

# THE UNIFORM LAW FOR THE INTERNATIONAL SALE OF GOODS: THE HAGUE CONVENTION OF 1964

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Three weeks of frenzied work in April 1964 at a diplomatic conference at The Hague brought the long-standing project to unify the rules of law for international sales transactions to a new and significant stage. The nations of the world are now invited to ratify two Conventions. One Convention would implement the Uniform Law on the International Sale of Goods (here often called "ULIS")—the older and larger project which will be the center of attention in this paper; the other would establish the Uniform Law on the Formation of Contracts for the International Sales of Goods (the "Formation" project).<sup>1</sup> At this April conference the United States for the first time participated in this work. The processes of lawmaking employed at this level need to be examined, and the work product requires evaluation.

## I

### THE 1964 DIPLOMATIC CONFERENCE

#### A. Background

International affairs move with lightning speed only in war. Peacetime progress tends to be glacial, and the weight of tradition controls the general direction and rate of further movement. This, at any rate, has been true of the development of the Uniform Law on the International Sale of Goods.

The history of ULIS needs to be traced to 1930, when the International Institute for the Unification of Private Law (the "Rome Institute") established a drafting committee of European scholars; the committee developed a draft uniform law

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<sup>1</sup> The texts of the Conventions and annexed Uniform Acts, in French and English, have been published under the auspices of the Ministry of Justice of the Netherlands. DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS, THE HAGUE 1964, TEXT OF THE FINAL ACT AND OF THE CONVENTIONS (1964). The English texts of the relevant documents are reproduced, following a brief introduction by the present writer, in 13 AM. J. COMP. L. 451 (1965) and also *infra*, pp. 425-59. The French and English texts have equal authenticity. CONVENTION RELATING TO A UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS [hereinafter cited as SALES CONVENTION] arts. I(2), XV; CONVENTION RELATING TO A UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS [hereinafter cited as CONVENTION ON FORMATION OF CONTRACTS] arts. I(2), XIII.

The Conventions and annexed uniform laws come into force if adopted (through ratification or accession) by five states. SALES CONVENTION art. X(1); CONVENTION ON FORMATION OF CONTRACTS art. VIII(1). As of February 1964, the Sales Convention had been signed by The Netherlands, Italy, San Marino, Vatican City, Greece (*ad referendum*) and the United Kingdom; the Formation Convention had been signed by the foregoing states with the exception of the United Kingdom. Signature, of course, is not necessarily followed by ratification. Ratification by the United Kingdom of the Sales Convention would presumably be subject to the reservation, sponsored by that delegation, under which the Uniform Law would apply only if the parties have "chosen that Law as the law of the contract." SALES CONVENTION art. V.

which in 1935 the League of Nations sent to governments for their comments.<sup>2</sup> A revised draft was completed in 1939—scarcely an auspicious year for European collaboration. After the war, devoted scholars picked up the project; and in 1951 a diplomatic conference at The Hague, attended by twenty-one nations, gave general approval to the objectives of the project and appointed a Special Commission to continue the work.<sup>3</sup> In 1956 this Commission released a revised draft which was sent to governments for their comments in preparation for a final diplomatic conference to complete the draft. Many governments arranged to have the draft studied, and prepared detailed comments and recommendations for revision.<sup>4</sup>

The Commission re-examined the 1956 draft in the light of these observations, and in 1963 released a detailed response including numerous amendments responding to suggestions the Committee deemed meritorious.<sup>5</sup> This 1963 revision of the draft was circulated to governments in preparation for the diplomatic conference at The Hague scheduled for April 1964.<sup>6</sup> In the meantime a draft of a Uniform Law on the Formation of Contracts for the International Sale of Goods had been prepared and circulated to governments for their comments.<sup>7</sup>

The United States took no part in this preparatory work. Ours was not one of the forty governments who were members of the Rome Institute, the sponsoring organization. This fact would have barred representation on the Committee that

<sup>2</sup> This committee was composed of two representatives from the United Kingdom—Sir Cecil Hurst (the Chairman) and Professor H. C. Gutteridge; two from Sweden—Judge Algot Bagge (the only member of this group who was able to come to the 1964 Conference) and Professor Martin Fehr; Professor Henri Capitant of France; and Professor Ernst Rabel of Germany. Until his death, the most influential member of the drafting groups was probably Professor Rabel, whose comparative study of the law of sales is still accepted as a primary authority. ERNEST RABEL, *DAS RECHT DES WARENKAUFS* (I: 1930; II: 1958). Further discussion of the background of the law and references to the original drafts and other source material may be found in Nadelmann, *The United States and Plans for a Uniform (World) Law on International Sales of Goods*, 112 U. PA. L. REV. 697 (1964); Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299 (1959).

<sup>3</sup> The Special Commission had the following members: M. Pilotti (President of The Hague Conference), V. Angeloni (Italy), A. Bagge (Sweden), F. de Castro y Bravo (Spain), L. Frédéricq (Belgium), M. Gutzwiller (Switzerland), J. Hamel and A. Tunc (France), Baron F. van der Feltz (Netherlands), T. Ascarelli (representing the Rome Institute), O. Riese (Federal Republic of Germany), B. A. Wortley (Great Britain), and P. Eijssen (Netherlands), Permanent Secretary.

<sup>4</sup> A year in advance of the diplomatic conference, thirteen governments and the International Chamber of Commerce had submitted observations totalling approximately one hundred printed pages. OBSERVATIONS OF GOVERNMENTS AND OF THE ICC ON THE DRAFT UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS (1963) (Doc./V/Prep./2) [hereinafter cited as OBSERVATIONS OF GOVERNMENTS]. The symbols in parentheses were part of a system for identifying conference documents; other similar references herein will relate to other documents presented at the conference. All such documents have been prepared and distributed by the Special Commission appointed by the Hague Conference on the Sale of Goods, Permanent Secretariat: Ministry of Justice, The Hague; the Permanent Secretary is Mr. H. E. Scheffer. This and other documents were published initially in French; English translations of some were available shortly before the opening of the conference.

<sup>5</sup> NOTE OF THE SPECIAL COMMISSION ON THE OBSERVATIONS PRESENTED BY VARIOUS GOVERNMENTS RELATING TO THE DRAFT OF A UNIFORM LAW ON INTERNATIONAL SALE OF GOODS (1963) (Doc./V/Prep. 3) [hereinafter cited as SPECIAL COMMISSION NOTE ON GOVERNMENTAL OBSERVATIONS].

<sup>6</sup> DRAFT OF A UNIFORM LAW ON INTERNATIONAL SALE OF GOODS (1963) [hereinafter cited as SALES DRAFT OF 1963].

<sup>7</sup> See Farnsworth, *Formation of International Sales Contracts: Three Attempts at Unification*, 110 U. PA. L. REV. 305, 306-307 (1962).

produced the various drafts but would not have precluded a response to the above-described request for observations on pending drafts. However, no response was made, nor was there any other sign of interest in the project.

Then, on the eve of The Hague Conference, a remarkable change occurred. In December 1963 (four months before the Conference) Congress enacted legislation authorizing United States membership in the Rome Institute.<sup>8</sup> The State Department hastily organized a delegation to represent the United States at the diplomatic conference, and requested the delegates to analyze the pending drafts.<sup>9</sup> A memorandum commenting on the proposed Sales draft was transmitted to the Conference as Observations and Amendments submitted by the United States of America. This memorandum was received at The Hague just in time to be translated into French and to be incorporated into the mass of working papers which awaited the delegates on their arrival.<sup>10</sup>

### B. The Conference

For this participant, impressions of the Conference are a mottled montage of exaltation, exhaustion and despair. An introduction to the procedures and problems of the Conference may be useful in evaluating the uniform laws that emerged, in preparing for future conferences, and in considering alternative routes towards unification.

The assignment facing the Conference was staggering. The Uniform Law on the International Sale of Goods, a long and complex law of over one hundred articles, needed to be revised and drafted finally in two languages. Similar work had to be done for the Uniform Law on the Formation of Contracts. International conventions to implement these laws had to be prepared. All this in three weeks!<sup>11</sup>

The available time would scarcely have been sufficient for final work on only one law on which the important substantive decisions had already been reached, so that the assignment would be confined to final polishing by a small professional group operating within a single legal tradition and speaking a common language.

None of these ingredients was present. In spite of the decades during which the Sales draft had been pending, the delegates did not work from the premise that

<sup>8</sup> 77 Stat. 775 (1963), 22 U.S.C. § 269 (1964). This law also authorized membership in The Hague Conference on Private International Law, a permanent organization at The Hague devoted to problems of conflict of laws.

<sup>9</sup> Members of the United States delegation were: Richard D. Kearney, Deputy Legal Adviser, Department of State; John N. Washburn, Attorney, Office of the Assistant Legal Adviser for Treaty Affairs; Joe C. Barrett of Jonesboro, Arkansas, and James C. Dezendorf of Portland, Oregon, Commissioners on Uniform State Laws; and Professors Soia Mentschikoff and John Honnold.

To help in planning the Government's new relationship with the Rome Institute and the Hague Conference on Private International Law, in February 1964 the Secretary of State established an Advisory Committee on Private International Law.

<sup>10</sup> Doc./V/Prep. 8 (1 Feb. 1964); Compilation of the Observations and Amendments, Submitted by the Governments and the International Chamber of Commerce (Conf./Gen./5).

<sup>11</sup> The Conference could hardly have been longer; the schedules for government officials and busy specialists (as well as the budgets of the governments—especially that of the host country) were subjected to heavy pressure by a conference of three weeks.

agreement had been reached on the major substantive provisions. The diplomatic conference of 1951 (which met on the Sales draft for ten days) did not come to grips with most of the important substantive provisions of the Sales draft: the main issues at that stage were the advisability of the project and a few questions as to general direction. Inevitably, the 1964 Conference did not regard these tentative decisions as binding. The circulation of the 1956 draft to governments and the consideration of their varied replies by the drafting committee could not produce a consensus. Consequently, the delegates arriving at the Conference were presented with massive governmental memoranda proposing large numbers of significant amendments;<sup>12</sup> as the deliberations proceeded, further amendments rolled off the mimeographing machines (in two languages) at an accelerating tempo.

Following the opening sessions, the large Conference divided, in effect, into separate conferences—on the Sales draft, the Formation draft, and the implementing Conventions. Of these, the largest group—with over fifty delegates in attendance—devoted itself to the Sales draft; this conference met for the larger part of nearly every day in the medieval grandeur of the Hall of Knights under vaulted arches and stained-glass windows in the presence of the throne from which the Queen of the Netherlands convenes the Parliament.<sup>13</sup>

The first step in the process was discussion of each of the 113 articles of the Sales draft. As each article was called up for discussion, representatives of different governments would offer their criticisms or observations, and call attention to the amendments they were proposing. Often the draftsmen would reply—usually through the brilliant and graceful eloquence of Professor Tunc of Paris who (as he put it) was cast in the role of Defender of the Faith.

At the end of the day's discussions one or more working groups of a dozen or so would be constituted to try to reconcile conflicting views and to prepare a written report either recommending that the original draft be approved, or proposing an amendment (or alternative amendments) for action by the conference. Sometimes the working group would come to a decision in an hour or two of discussion between the end of the afternoon session and a late dinner hour; two members of the group (one French-speaking, one English-speaking) would undertake the task of writing a report setting forth the group's recommendation on each section and the language of any proposed amendment.<sup>14</sup> These duties had to be performed in time stolen

<sup>12</sup> Extensive memoranda proposing a substantial number of amendments were submitted at the outset of the Conference, *inter alia*, by the Netherlands (Doc./V/Prep./14); the Federal Republic of Germany (Doc./V/Prep./15); Austria (Doc./V/Prep./11); Israel (Doc./V/Prep./17); Hungary (Doc./V/Prep./18). Numerous additional proposals for amendment were generated in the course of the Conference.

<sup>13</sup> Technically these separate groups were termed "committees" and final votes were reserved for the plenary "conference." The size and procedures of these divisions of the plenary session make it advisable to refer to them as the "Sales Conference" and "Formation Conference" to distinguish them from the numerous smaller committees.

<sup>14</sup> Some working groups labored for several days, and one notable group worked throughout most of the Conference on the vexing problems of the relationship between the rules on applicability of the Uniform Laws and established principles (and treaty obligations) on choice of law.

from the hours before and after the large sessions devoted to the on-going discussion of further sections of the law, and at the cost of time needed to prepare for the larger sessions by studying the proposed provisions and the ever-increasing volume of governmental memoranda, proposing additional amendments. Shortly, the daily pile of new documents began to include the reports of the various working parties; the conference then had to interrupt its forward motion to debate and vote on these reports concerning sections that had already been given preliminary discussion.

The frenzied labors of the large staff of translators, typists and mimeograph operators brought these memoranda to the delegates in a constantly-swelling stream. In scenes reminiscent of the Sorcerer's Apprentice, staff members kept making the rounds during the sessions, depositing more and more memoranda on the thick stack of material that had been produced during the night. Each delegate responsible for discussion and voting needed a full-time assistant just to sort the incoming documents and produce them at the crucial moment in the debates and voting. Only a few of the delegations had such help; certainly the United States delegation did not. If anyone imagines that there was time to read—let alone study—all of the relevant material, I have failed to communicate the volume of the material and the tempo of the proceedings.

Then, for some, a new and crushing demand arose: the Drafting Committee. The amendments brought in by the working parties had often been hastily written by delegates who were both hungry and tired; the most one could hope was that these drafts and accompanying memoranda would catch the sense of the proposal—certainly it was impossible for the working parties to prepare new sections that fit the style and structure of the draft. A larger problem was the need for a final draft in English. Shortly before the opening of the Conference, an English translation of the French text became available; it was a useful document, but it had been done hurriedly and required substantial reworking. In any event, it soon became obsolete.

This work was assigned to a Drafting Committee of five. Three had been members of the Special Committee that in the preceding years had prepared the Sales drafts: The Chairman, Mr. Van der Feltz of Holland, Professor Riese of Germany, and Professor Tunc of France. The United Kingdom contributed a highly skilled draftsman in Mr. Evans, Deputy Legal Adviser to the Foreign Ministry. The United States, in spite of its late arrival on the scene, was given a chair on the Drafting Committee—a generous expression of desire for our interest in the project which was not an unmixed blessing, for it depleted the manpower of a woefully understaffed delegation.<sup>15</sup>

During the final two weeks, the Drafting Committee worked almost every

<sup>15</sup> The present writer was named the fifth member of the Drafting Committee. The assignment of a delegate from the United States to this committee had the unfortunate effect of excluding representation from the Scandinavian countries; these countries had played an important part in the project from its very inception and sent delegates to the Conference of high quality and thorough preparation.

available hour when the large committees or plenary sessions were not in session, and late into the night. (One session until three in the morning is particularly memorable.) The quality of the final product was conditioned by several factors: the frenzied pace, calling for the spot-drafting of provisions in two languages, with no more than a half-hour or an hour for most sections;<sup>16</sup> accumulating fatigue, with its toll in precision and creativity; and scant opportunity for review, let alone reflection, on the product.<sup>17</sup> As the reader will soon see, the draft posed basic problems of approach and structure. But in view of the shortage of time and the large number of *ad hoc* amendments, it became evident that any basic re-examination of the draft would have barred completion of the project during the Conference; the most the draftsmen could hope was to work the amendments being produced by the Conference into the existing structure with a minimum of egregious error.<sup>18</sup> The effect produced by this hasty work was, I believe, disappointing to all. Many delegates used to meticulous legal work were dismayed; I shall not soon forget the look of friendly reproach by a particularly esteemed delegate as he looked up from reading one of our offerings.

Why, then, did the Conference deem the work finished and offer the product to the nations of the world for ratification? The line of argument that carried the day included these points: Over three decades had gone by since this project was started—the time had come to bring the work to fruition. Certainly the United States, after ignoring the work for three decades, was in no position to ask for more time—at least without giving solid assurance of favorable consideration of a revised draft; no one was in a position honestly to give such a commitment. Moreover, the government of The Netherlands, having borne the enormous burden and expense of arranging this Conference, could not be expected to repeat this heavy contribution, and another sponsor was not on the horizon. And could one be sure that more time and work and another diplomatic conference would produce a better product? Surely even those who were most disappointed in some of the provisions of these Uniform Laws must recognize that they would improve the sorry legal

<sup>16</sup> There even were problems of reconciling legal terminology and drafting style between the English and American languages—a fact that could not escape amused comment by our continental colleagues. For a “case study” of the Convention and further comments on some of the problems of drafting in parallel languages see Tunc, *Les Conventions de La Haye du 1er Juillet 1964*, [1964], *REVUE INTERNATIONALE DE DROIT COMPARÉ* 547.

<sup>17</sup> This one Drafting Committee also had to do the final work on the Uniform Law on the Formation of Contracts for the International Sale of Goods, and the two implementing conventions. But the brevity of these documents permitted the committees to turn out relatively finished products requiring much less attention by the overall Drafting Committee.

<sup>18</sup> The final working stage of the Conference was in the form of a report of the Drafting Committee; a plenary session moved rapidly through the Committee's offering of uniform laws on Sales and on Formation, and a Convention to implement each law. In some instances sections were recommitted to the Drafting Committee for further attention; midnight repairs having been made, a further version was returned to the Convention for its final approval. The last significant event before adjournment was the signing of the Final Act of the Diplomatic Conference. The United States and nearly all of the other governments in attendance at the Conference signed this Final Act, which comprised a detailed recital of the events of the Conference; this signature, of course, does not involve any obligation to ratify the conventions prepared at the Conference.

situation confronting trade, which must cope with national laws antique and unsuited to international transactions, unintelligible to traders from different legal and linguistic backgrounds, and subject to the vagaries of the conflict of laws.

Thus we face the age-old choice between keeping the bird in the hand (taken after a generation of effort) or taking to the bush in hope of better game. This calls for inspection of the bird we have.

## II

### THE UNIFORM LAW

#### A. The Law's Reach

1. *The international sale.* ULIS takes a more restrained approach than the Uniform Sales Act, the Uniform Commercial Code, and the Geneva conventions on bills of exchange and promissory notes—all of which seek unification by governing the total body of law of the enacting jurisdictions.<sup>19</sup> The nations of the world could not be expected to attach their domestic sales law as a tail to the international kite; it was therefore necessary to sort out the international sale for separate treatment.

The Uniform Law's definition of the international sale, as embodied in the 1956 draft, has been examined elsewhere and need not be given extended treatment here; the final version closely follows the 1956 draft except for the deletion of those parts which the earlier discussion found to be ambiguous and unnecessary.<sup>20</sup> It should be enough to mention that ULIS applies only to transactions that have a double international aspect—with respect to both the parties and the sales transaction. Thus, a sale by an American seller to an American buyer for the shipment of goods to

<sup>19</sup> See Hudson & Feller, *The International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333 (1931). Similarly pervasive unification in many fields, including the law of sales, has been established among the Scandinavian countries. See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, 1948 UNIFICATION OF LAW, 270-83, 321. Similar unification of the law of sales within the continent of Europe has not been seriously urged—probably because it is so closely related to the structure of the law of obligations which is subject to significant differences, particularly between those legal systems influenced by the French code and those influenced by the German code.

<sup>20</sup> Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 304-310 (1959). As approved in 1964, the crucial provision on the scope of ULIS is the following language of article 1, paragraph 1:

"1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

- "a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;
- "b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;
- "c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected. . . ."

In the 1956 draft, the provision corresponding to paragraph 1(a), above, included as international transactions contracts which implied that the goods "had been carried" from one state to another. For difficulties posed by this language, see the above-cited article at 309. The 1956 draft in article 8 also provided for the coverage of certain local transactions preceding or following an international sale. Difficulties of administration latent in this provision were discussed in the same article at 309-310. Both provisions were deleted from the final draft in response to objections made by the United States and other delegations to the diplomatic conference.

Germany would not be covered, since the parties are not international. Conversely, a sale negotiated by an American seller to a French buyer, in spite of the international character of the parties, would not be governed by ULIS if the transaction arose from negotiations in the United States and the goods were to remain here. In short, ULIS, as revised, prescribes a definition of the international sale of modest scope and acceptable clarity. Difficult borderline problems, of course, can arise, but the typical international sale is clearly covered, and the area of doubt at the fringes is small in comparison with that involved in the operation of rules of choice of law. Moreover, if a transaction falls within a twilight zone, the parties can agree to exclude or to apply the Uniform Law.<sup>21</sup>

2. *Rejection of conflicts rules for law of forum.* The Uniform Law, however, has a less modest aspect. Let us suppose that a seller in the United States and a buyer in Canada are parties to an international sales transaction; neither Canada nor the United States has adopted the Uniform Law but Germany has. For this situation, ULIS prescribes the following remarkable result: If one of the parties can get jurisdiction over the other in Germany, the German court is directed to apply the Uniform Law, although the transaction had no relationship to Germany or any other adopting state. This example, although extreme, is far from impossible, since concerns engaged in international trade may have assets in an adopting state (Germany in the above example) and thus be subject to the jurisdiction of a court governed by the Uniform Law's broad rules for self-application. These same rules can be expected to have frequent application in trade between adopting and non-adopting states. Thus, assuming that Germany has adopted ULIS but we have not, in all sales from the United States to Germany or from Germany to the United States, a German court would be directed to apply ULIS, without regard to general principles of choice of law.

This wide reach for jurisdiction results from the combined effect of two provisions. Article 1 states that the parties and the transaction have the necessary international ingredients if they involve "*different States*" (without regard to whether either State has adopted the Uniform Law). And Article 2 provides: "Rules of private international law shall be excluded for the purposes of the application of the present Law. . . ." This approach was deliberately chosen at an early stage of the drafting process and was defended stoutly at the diplomatic conference as a means to extend the benefits of ULIS and escape the chaos of conflicts rules. A move to narrow the reach of the Uniform Law, led by the United Kingdom, the Scandinavian countries and the United States, failed by an equally divided vote.<sup>22</sup>

<sup>21</sup> ULIS art. 3: "The parties to a contract of sale shall be free to exclude the application thereto of the present law either entirely or partially. Such exclusion may be express or implied." Under the 1956 draft (article 6) a much heavier degree of explicitness was required for displacing the provisions of the Uniform Law.

ULIS art. 4 provides that the Uniform Law may be "chosen as the law of the contract by the parties" without regard to their international character.

<sup>22</sup> See Report of the Commission accompanying the 1956 Draft (Doc./V/Prep. 1) 21. The working



These provisions have already produced astringent comment from specialists in conflicts of law who are not convinced that the values of a "modern" and "good" law understood by the *forum* outweigh the evils of jockeying for a *forum* with a favorable rule;<sup>23</sup> the debate echoes the controversies that exploded on the appearance of similar (but less greedy) provisions in the 1952 draft of the Uniform Commercial Code.<sup>24</sup>

A full evaluation of the argument needs to be put in a larger setting of a philosophy about choice of law, and cannot be attempted here. There is room for only brief comments of a practical sort. First: A nation with enthusiasm for the Uniform Law is not readily deterred from adoption even by strong arguments that the Law's reach is excessive, for these difficulties will be deposited on the doorsteps of nonadopting states.<sup>25</sup> Second: If the ULIS once goes into effect through adoption by five states, the rest of the world cannot forget about this Law—a consideration that surely was not overlooked by the sponsors. One now feels the force of this second consideration, for the possibility that the Uniform Law will be applied willy-nilly to our international sales makes it important to become acquainted with the Uniform Law.

But first we must face this question: What should such a uniform law try to do?

### B. Function of a Uniform Law for Sales

There is something peculiar and elusive about sales as subject for statutory rules. This special elusive quality comes from the fact that nearly every "rule" of sales law yields to the parties' intent. The power of the parties over the law of their transaction is complete within the area covered by the Uniform Law for International Sales, for ULIS does not touch the rights of third parties—whether they be creditors,

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party on the problem of scope worked throughout most of the Conference, and made its report to the assembly in an eloquent forty-minute *exposé* by M. Bellet—a performance rewarded by spontaneous applause and the successful vote described in the text.

<sup>23</sup> Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449 (1965); de Winter, *Loi Uniforme sur la Vente Internationale des Objets Mobiliers Corporels et le Droit Internationale Privé*, 11 NETH. INT. L. REV. 271 (1964).

<sup>24</sup> Burton, *The Uniform Commercial Code and Conflict of Laws*, 9 AM. J. COMP. L. 458 (1960); Goodrich, *Conflicts, Niceties and Commercial Necessities*, [1952] WIS. L. REV. 199.

<sup>25</sup> The direction on choice of law that ULIS gave to the courts of adopting states is inconsistent with the rules of the Convention on the Law Applicable to the International Sale of Goods, which has been ratified by Italy, Belgium, France, Denmark, Norway and Sweden—more than the five ratifications needed; it went into effect on September 1, 1964. See de Winter, *supra* note 23, at 276; Nadelmann, *supra* note 23, at 452. To meet this problem, article IV of the Sales Convention provides: "1. Any State which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law in cases governed by one of those previous Conventions only if that Convention itself requires the application of the Uniform Law. . . ." A similar opportunity for a reservation is made in article IV of the Convention on Formation of Contracts.

These Conventions only allow for such reservations by States that have "previously" ratified such a convention on conflict of laws; States that first ratify one of the Conventions on Uniform Law may be unable subsequently to ratify the conventions on choice of law.

security-holders, or prior owners.<sup>26</sup> Nor is there any attempt to make rules to aid the weak or ignorant or inattentive, like the rules of the Sales Article of the Uniform Commercial Code invalidating "unconscionable contracts" and outlawing certain forms of words for the disclaimer of warranties.<sup>27</sup> These problems, for the most part, remain subject to national law.<sup>28</sup>

A second difficulty for the draftsman is the almost infinite variety of sales transactions. If transactions in goods were as stereotyped as transactions in checks, legal rules could be stated with considerable definiteness. But sales of goods come in endless shades and patterns. Important consequences turn on the nature of the goods (prices fixed or fluctuating, purchased for resale or for use, etc.), the distance and type of transport, and the relationship between the parties—to mention only a few of the factors that make this a difficult and fascinating subject.

Within this complex universe of trade, as we have seen, the parties can have the transaction as they want it. Many of their expectations will have been expressed; others can be implied from the course of their prior dealing or from the usage of the trade. Where no such expectation has been expressed, what is the function of a statute? In some aspects statutory provisions bear an uncomfortable relationship to rules of statutory construction. In both, the ideal is to divine the intent of others. In both, an attempt at precise rules of construction interferes with a sensitive response to the precise problem at hand.

The discussion that follows may be useful to test a series of hypotheses: (1) There are a few important issues on which a unifying statute needs to declare a general policy or approach. (2) On most problems of sales law, complex and detailed statutory provisions are unnecessary and may be dangerous. (3) If the uniform statute avoids harsh technicalities, the Law's greater contribution will not be what it says but what it becomes—a common language and referant for a developing jurisprudence that one day could constitute an international law merchant.

Since it would be cumbersome (and dull) to survey the entire Uniform Law, its provisions will be sampled and those hypotheses examined in connection with its rules on quality of the goods, risk of loss, and remedies for breach.

<sup>26</sup> ULIS art. 8: "The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage."

ULIS art. 52 sets forth the seller's obligation where "the goods are subject to a right or claim of a third person . . ." but the validity of the claims of third persons is left to local law. The Uniform Sales Act § 26 similarly accepted preexisting non-uniform law on whether seller's retention of possession is in fraud of his creditors; *cf.* UCC § 2-402(2).

<sup>27</sup> UCC §§ 2-302, 2-316; Contrast ULIS art. 8, quoted in note 26 *supra*.

<sup>28</sup> In view of ULIS art. 8, a party could have recourse to applicable national law invalidating the agreement because of fraud. On the other hand, the Uniform Law after stating seller's obligations as to conformity of the goods (art. 33) adds that these rights "exclude all other remedies based on lack of conformity of the goods." ULIS art. 34. The important rules of UCC 2-316 on disclaimer of warranties appear to be guides for the interpretation of the contract, and thus (unlike the Code's rules on "unconscionability") would be displaced by ULIS. *Cf.* ULIS arts. 3, 17.

## C. A Sampling of the Law's Provisions

1. *Quality of the goods.* What should the Uniform Law say about the quality of goods the seller must supply under the contract? Some general comments of an obvious sort may help to lay a foundation for later examination of the variations in draftsmanship demanded by different aspects of the law of sales.

The first observation is that expectations of the parties about the quality of the goods are real and central to the transaction. We shall shortly have to ask whether the same is true of risk and remedies. But as to the quality of the goods there can be little doubt: one becomes dizzy trying to imagine a sales transaction without a real and specific expectation about the quality of the goods, although many of those expectations (steel beams without cracks; a lathe that turns) may be so obvious that they "go without saying."

In view of this, one might ask why it is necessary to have "rules" on how to construe this aspect of sales contracts when the meaning of other transactions must be found without such guides. The question (at least for me) is both intriguing and difficult. Perhaps in the law of "warranty" we have a permanent legacy of artificial tools devised to cope with an instance of cultural lag. Early courts, conditioned by the traditions of a static land economy where changes in relationships were rare and to be taken with caution, perhaps needed a nudge to realize that most sales transactions were made rapidly without the articulation of some of the most important expectations of the parties.

Whatever the cause, British codification seized on technical distinctions in the developing case law to erect separate "types" of warranties—"fitness for purpose" and "merchantable quality."<sup>29</sup> The Uniform Law followed the same structure—smoothing away some technicalities and adding others;<sup>30</sup> and the Uniform Commercial Code has preserved the same structure, with its own refinements and complications.<sup>31</sup>

The Uniform Law on International Sales defines the seller's basic obligation as to quality in a manner that is similar to our customary "warranty" law—with perhaps some gain in unity and coherence. The most attractive feature of this part of ULIS is the simple, but powerful, general rule that the goods must "possess the qualities and characteristics expressly or impliedly contemplated by the contract."<sup>32</sup> This language seems just right to direct attention toward the crucial issue—the construc-

<sup>29</sup> British Sale of Goods Act §§ 14(1) (fitness for purpose); 14(2) (merchantable quality). On the other hand, a more unified approach could have been derived from Judge Brett's opinion in *Randall v. Newson*, 2 Q.B.D. 102 (C.A. 1877).

<sup>30</sup> USA §§ 15(1) (fitness for purpose), 15(2) (merchantable quality).

<sup>31</sup> UCC §§ 2-314 (merchantable quality), 2-315 (fitness for purpose). The Code, happily, sloughed off the "by description" technicality attached to the warranty of merchantable quality, and the "patent or other trade name" qualification attached to the warranty of fitness for purpose. On the other hand, the Code created difficulties by its complex definition of "merchantable" quality in UCC § 2-314(2). See JOHN HONNOLD, *SALES AND SALES FINANCING* 74-75 (2d ed. 1962).

<sup>32</sup> ULIS art. 33(1)(f).

tion of the contract—and to help tribunals move beyond the incomplete articulation of complex expectations to the rich overtones of the transaction in its commercial setting.

These few words might have sufficed. However, such a laconic disposition of a large subject would have left many Anglo-American lawyers breathless and unsatisfied. Consequently, it is perhaps wise that ULIS adds further words to elaborate the theme, in providing that goods must possess the qualities “necessary for their ordinary or commercial use,” and also “the qualities for some particular purpose expressly or impliedly contemplated by the contract”—obligations expressing the essence of our implied warranties of merchantable quality and fitness for purpose.<sup>33</sup>

In defining the seller's obligation as to conformity of the goods the Uniform Law adds one important qualification not articulated in our law. Article 33(2) provides: “No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material.” To avoid confusion in analysis (at some risk of confusion in presentation) it must be understood that this is not a rule remitting buyers to damage-recovery rather than rejection; the Uniform Law has separate provisions on rejection of the goods. We shall examine these provisions later, and find that the buyer is given broad power to reject goods that fail to conform.<sup>34</sup> The scope of the above-quoted provision of Article 33 is controlled by the fact that this is a rule on whether the seller has “fulfilled” his obligation to deliver conforming goods. Hence, any deviation as to quality or quantity could hardly be dismissed as “not material” if it would call for compensation in damages. Thus, defects in a very few items in a large shipment could be “material” if the buyer has paid for the larger quantity, or if the seller demands full payment for the defective goods. On the other hand, if the market has not risen, such a deviation may not be “material” if the seller bills only for the quantity of conforming goods.<sup>35</sup> Other interesting applications of the principle could arise, but the leeway allowed the seller is necessarily small.<sup>36</sup>

In conclusion, the provisions of the Uniform Law dealing with conformity of the goods are far from startling, are consistent with ideas on which our law is based, and are reasonably clear. Certainly they could provide a workable structure for the development of international mercantile law much less beset by uncertainty than the chaos resulting from doubt over which system of law is available and the difficulty

<sup>33</sup> ULIS art. 33(1)(c) and (d). This provision also (perhaps with unnecessary but harmless detail) articulates the obligation to deliver the quantity of goods specified in the contract and the obligation that the goods conform to a sample or model (paragraphs 1(a) and (c)).

<sup>34</sup> See *infra* at notes 63-65. As we shall see, buyer's rights to reject for non-conformity of the goods (ULIS arts. 41, 43-44) is much stronger than for deviations from contractual obligations as to time and place for delivery (ULIS arts. 26-27, 30-32).

<sup>35</sup> Even if a shortage (or excess) of quantity or quality is “material” buyer's right to reject will probably be limited to those goods that are defective, or to the excess in quantity. ULIS arts. 45, 47.

<sup>36</sup> The limited leeway provided by ULIS art. 33(2) may be comparable to decisions under § 12 of the Uniform Sales Act that some statements in a contract may not be express warranties if the buyer did not “purchase . . . the goods relying thereon.” See Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457, 469-470 (1949).

of understanding the local legal idioms and traditions with which most national legal systems have become encrusted.

2. *Risk*. Do statutory rules on risk of loss perform the same function as rules on conformity of the goods? Comparing the rules in these two fields may provide an approach that will be useful for evaluating the Uniform Law.

Analytically, risk of loss is closely related to the seller's obligation concerning the quality of the goods. ULIS brings this point out clearly: "Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes."<sup>37</sup> Moreover, the contract may specify the point at which risk passes, or may use a trade term which embodies understandings as to the passage of risk.

On the other hand, the passage of risk is not so central to a real intent or expectation by the parties as is the quality of the goods. Although it is difficult to conceive of a sales contract without a real expectation concerning the kind and quality of the goods, the same is not true of risk. Casualty to goods is infrequent, and even then the loss will often be borne by the carrier (especially in maritime shipments) or by an insurer under a policy carried by one or both of the parties. This protection may result from routine business practice rather than from a bargain over who would have the burden of securing the policy and pressing a claim. Such problems that are not central to the bargain and that seldom cause trouble may be ignored in the hasty exchange of cables in a fast-moving international transaction; there is need for a case-decider. The rule may be as arbitrary as a rule of the road—so that each party can readily know whether he has the burden to salvage damaged goods and press a claim against carrier or insurer. If, in addition, the statutory rule can minimize waste and encourage efficiency in distribution, so much the better.

At this point we are entering difficult and contested terrain. Does the Uniform Law deal adequately with the problem of risk by giving a short answer to this general question: When the contract is silent, do transit risks fall on the seller or on the buyer?

This is about all that the British Sale of Goods Act tells us. In the absence of an agreement to the contrary, risk passes when "in pursuance of the contract, the seller delivers the goods to the buyer *or to a carrier . . .* for the purposes of transmission to the buyer. . . ."<sup>38</sup> The Uniform Sales Act adopted this general rule that buyer bears transit risks, but the draftsman added an ill-fated refinement: seller retains the risk of loss whenever "the contract to sell requires the seller to deliver the goods to the

<sup>37</sup> ULIS art. 35(1). This starting point, students soon learn, is implicit in American sales law, and perhaps in any system of risk-allocation. ULIS gains a bit of clarity by articulating the basic premise.

<sup>38</sup> British Sale of Goods Act § 18, Rule 5(2). The quoted language is framed in terms of "appropriation" of goods to the contract; this leads on to passage of "property" which in turn transfers risk. (The international sale usually need not be concerned with the complications that arise when the contract relates to "specific" goods.) The quoted language is subject to a further qualification—that the seller "does not reserve the right of disposal." This refinement has proved troublesome, and was rejected by the Uniform Sales Act. Uniform Sales Act §§ 19 Rule 4(2), 20(2), 22(a).

buyer . . . or to pay the freight or cost of transportation to the buyer. . . ."<sup>39</sup> This refinement proved to be particularly unfortunate as applied to foreign trade, for the most common forms of price quotation, "C. & F." and "C.I.F.," while allocating transit costs to seller, nonetheless were understood as not interfering with the passage of transit risk to the buyer.

There were practical reasons for this mercantile custom of shifting transit risks to buyers. Damage in transit normally is disclosed only when the goods have arrived at their destination, when they are near the buyer and very far from the seller. The buyer thus is in a better position than seller to ascertain the scope of the damage, present proof of loss to the insurer, and redispense of the damaged goods. In some instances, the buyer will have paid for the goods before arrival; the documents he obtained on payment would normally include a policy of marine insurance "for account of whom it may concern" and this protects the buyer against loss. American cases gave effect to this mercantile understanding in spite of the above-quoted qualification added to the Uniform Sales Act.<sup>40</sup> We would, of course, have done better with the simpler general rule of the British Act.

The approach of the Uniform Law on International Sales closely resembles that of the British Act. ULIS Article 97-1 provides this general rule: "The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law."

Since risk passes on "delivery," the crucial question is the definition of that term. Article 19 provides:

1. Delivery consists in the handing over of goods which conform with the contract.
2. Where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer. . . .

The basic provisions of the Uniform Law on risk in transit boil down to these very few words: risk passes on seller's "handing over the goods to the carrier for transmission to the buyer"—an approach, as we have seen, which is similar to both the British Sale of Goods Act and the Uniform Sales Act.<sup>41</sup>

How does ULIS compare with the Uniform Commercial Code? Putting aside for the moment questions of style, significant similarities are revealed. Both reject the "property" concept for approaching risk and other legal problems. Both tend strongly to allocate risk to the seller so long as he is in possession of the goods—a choice strongly supported by the fact that one in possession is in the better position

<sup>39</sup> Uniform Sales Act § 19 Rule 4(2) and Rule 5.

<sup>40</sup> *E.g.*, *Smith Co. v. Marano*, 267 Pa. 107, 110 Atl. 94 (1920).

<sup>41</sup> For special provisions dealing with the appropriation of goods to the contract, see ULIS arts. 19(3), 98(2), 100. By avoidance of the concept of "property" ULIS is considerably more terse and classic than even the British Act or the Uniform Sales Act. On the other hand, its use of the artificial concept of *délivrance* created new difficulties. See *infra* at note 78.

to guard against loss and provide insurance.<sup>42</sup> Both ULIS and UCC have strong provisions throwing the risk on a party in breach of contract.<sup>43</sup> Finally, and most important, the Code also works from the basic presumption that risk in transit falls on the buyer: unless the contract provides otherwise, "the risk of loss passes to the buyer when the goods are duly delivered to the carrier."<sup>44</sup> These points comprise the major issues of substance; and on them, the UCC and ULIS take the same or a similar stand.

There is, however, an enormous difference in style. The UCC is not content to stop with a short presumption about risk in transit, and provides several pages of statutory text (elaborated by several more pages of Official Comment) on the implications of using specified trade terms including "F.O.B.," "F.A.S.," "C.I.F.," "C. & F.," "Net Landed Weights," "Payment on Arrival," and "Ex-Ship."<sup>45</sup>

For example, if the parties use the term "C.I.F.," the Code states that they mean, *inter alia*, that the seller, at his risk, shall "put the goods into the possession of a carrier at the port for shipment" and "obtain a negotiable bill or bills of lading covering the entire transportation to the named destination," and "load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for"; the seller shall also

obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance. . . .

In addition, the seller shall "prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract," and "forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights."<sup>46</sup>

In this last paragraph the writer was not carried away by a delusion that readers would be fascinated by the quoted statutory language; the tedious recital was designed to contrast the approach of the UCC with that of ULIS, which is silent on all the

<sup>42</sup> ULIS implements this policy more forcibly than does the UCC by rejecting any qualifications based on whether the seller is a "merchant." See UCC § 2-509(3).

<sup>43</sup> UCC § 2-510; ULIS arts. 19(1), 97(2).

<sup>44</sup> UCC § 2-509(1)(a). However, this provision is subject to exception if the contract requires the seller "to deliver" the goods at a particular destination. See also UCC 2-509(1)(b). The quoted language unhappily opened up the possibility that an obligation to bear freight expense would be construed as an obligation "to deliver." An official comment, appended for no discernible reason to another section (Comment 5 to UCC 2-503), said that the draftsmen had "the specific intention of negating" the older rule "that a term requiring the seller to pay the freight or cost of transportation to the buyer is equivalent to an agreement by the seller to deliver to the buyer. . . ."

<sup>45</sup> UCC §§ 2-319-2-324.

<sup>46</sup> UCC § 2-320. Further detailed provisions on the form of bill of lading in C.I.F. contracts are set forth in § 2-313. *E.g.*, contrary to the rule where the quotation is "F.O.B.," a "received for shipment" bill of lading will do; detailed rules are also provided on the consequences when bills of lading are issued in sets and one part is missing.

matters discussed in the last paragraph. Should the ULIS have attempted to set forth the course of performance contemplated by various types of trade terms? The question is difficult, but I incline to the view that ULIS chose the wiser course.

One crucial question is the extent to which the details of performance expected under various forms of price quotation are now standardized, or can become standardized under the influence of international enactment. It is doubtful that studies have been made to provide an answer to this question. This alone may decide the question, for one cannot responsibly launch detailed statutory provisions on the international scene in ignorance of their impact on practices applicable to a myriad of commodities in countless remote trading and shipping centers. The study by the International Chamber of Commerce that preceded promulgation of Incoterms<sup>47</sup> showed significant deviations; the extent to which these have been ironed out by traders' use of Incoterms is unclear. The initial formulation of Incoterms of 1936 was revised in 1953, and investigation shows that further refinements may be needed. The Standard Conditions of Sale (*i.e.*, form contracts), drafted under the auspices of the United Nations' Economic Commission for Europe, have disclosed that different understandings are current in trading in different commodities even within Europe.<sup>48</sup> And it must be remembered that both Incoterms and the ECE Standard Contracts are prepared for voluntary acceptance; a much higher degree of restraint is needed for the promulgation of a statutory norm from which traders can escape only by express contractual provision or by proof of an overriding course of dealing or trade custom.

The above conclusions are tentative, based on doubt and surmise. But there is one final consideration, on which the writer has little doubt. The drafting of a detailed definition of trade terms and trade practices should not be committed to a diplomatic conference convened to prepare an international convention. Added detail, particularly of a technical nature, multiplies the danger of mishap in votes of governmental representatives. The diplomatic conference of 1964 was steering uncomfortably close to chaos; multiplying the detail would surely have carried the conference over the verge. True, there is need for greater help to unify the rules for the more specific steps in contract performance. Happily, there are ways to this end that need not involve the cumbersome machinery of a diplomatic conference and an international convention.<sup>49</sup>

3. *Remedies.* What should be the objective and design of statutory rules on remedies for breach of the sales contract? What is the relationship of rules on remedies to those on warranty and risk?

From one point of view, rules on remedies—like the rest of sales law—are merely

<sup>47</sup> INTERNATIONAL CHAMBER OF COMMERCE, *TRADE TERMS* (1953).

<sup>48</sup> Cf. Michida, *Possible Avenues to Preparation of Standard Contracts for International Trade on a Global Level*—a paper presented at the September 1964 Colloquium of the International Association of Legal Science, to be published in HONNOLD (ED.), *UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS* (Paris, 1965).

<sup>49</sup> See *infra* at note 83.



designed to implement the transaction created by the parties. Under our domestic law the parties, within wide limits, can by agreement control the remedies available on breach;<sup>50</sup> under the Uniform Law on International Sale that choice is wide indeed.<sup>51</sup> However, statutory provisions on remedies play a different and larger role than do provisions on warranty, or even rules on risk of loss. Merchants making a sales transactions normally think even less of remedies for breach than of risk of loss; except for trades with highly developed form contracts the agreement will probably be silent. Nor do the standard definitions of trade terms—Incoterms or the Revised American Foreign Trade Definitions—deal with the important questions of remedies. Even course of dealing and usage of trade are relatively unhelpful. To be sure, on occasion it has been possible to develop proof of trade usage concerning the adjustment of grievances.<sup>52</sup> However, it is much more difficult to find a set pattern on adjustment of grievances than to find the pattern of expected normal performance. Rules of law on risk thus play a relatively important role, and several important issues call for statutory resolution.

(a) *Style and approach of remedy provisions.* In dealing with warranty and risk, as we have seen, ULIS employs an approach that is simple and restrained—even classic; its rules on remedies are Byzantine in their complexity. This is justified only in part by the difficulty of the underlying problems; complexity was enhanced by a scheme of organization which was designed for clarity but was productive primarily of bulk.

The scheme needs to be grasped by anyone who works with ULIS. It is this: various aspects of the parties' performance are set apart for separate treatment, and

<sup>50</sup> UCC § 2-718(1): "Damages for breach may be liquidated in the agreement but only at an amount which is reasonable in the light of . . ." several specified considerations. UCC § 2-719(1)(a): "the agreement may provide for remedies in addition to or in substitution for those provided in this article . . .," subject to limits prescribed in subsections (2) and (3) where circumstances cause an exclusive or limited remedy "to fail of its essential purpose" or where the limitation of consequential damages is "unconscionable."

<sup>51</sup> ULIS art. 3 (quoted *supra* note 21) gives the parties complete freedom "to exclude" the application of the Uniform Law "either entirely or partially." Thus the contract may withdraw (and presumably may limit) the specified remedies. Whether the parties may *extend* the remedies prescribed in ULIS is less clear. The Uniform Law gives the parties full freedom by contract to override the provisions of ULIS with respect to the various aspects of performance of the contract. ULIS arts. 18, 19(1), 33, 38(4), 56, 69. None of these authorizations explicitly extends to remedies. However, ULIS art. 9(1) (as part of chapter II entitled General Provisions) states: "The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves." Since usage and course of dealing may bind the parties in any respect (including rules on remedies) and since the explicit basis for this result is an express or implied agreement of the parties, it would be grotesque to conclude that ULIS intends to interfere with the freedom of the parties in any respect. *Cf.*: ULIS art. 16; SALES CONVENTION art. VII(1) (limitation on obligation of court to decree specific performance).

The Uniform Law's acceptance of contractual freedom is further emphasized by article 8 (quoted *supra* note 26) which provides that the Uniform Law is not concerned "with the validity of the contract or of any of its provisions. . . ." By the same token, national rules on the invalidity of agreements concerning remedies, as well as other matters, may still be applicable to international transactions subject to ULIS. *Cf.* Articles 15 and 17.

<sup>52</sup> *Cf.* *Schipper v. Milton*, 51 App. Div. 522, 64 N.Y.S. 935 (1st Dep't 1900), *affirmed sub nom.*, *Smith v. Milton*, 169 N.Y. 583, 62 N.E. 1100 (1901); *Burton v. Jennings*, 185 F. 382 (2d Cir. 1911).

remedies are *separately stated for each type of performance*. Thus, ULIS, in four articles (20-23), lays down rules on the time and place for delivery of the goods. These provisions on the seller's substantive obligations are followed by fourteen articles dealing with remedies arising out of failure to perform these obligations: two articles (24-25) dealing jointly with date and place; four long articles (26-29) dealing specifically with remedies for default as to date of delivery, and three long articles (30-32) dealing specifically with remedies for default as to place.

A sharp knife was needed for this fine slicing of the seller's obligations as to time for delivery from his obligations concerning place of delivery. If the goods arrive late, one could either say that at the right time they were at the wrong place (*en route*); or that they got to the right place, but too late. Indeed for most situations it is difficult to think of breach arising simply from the presence of goods at the wrong place, unless the time for their delivery has also expired.<sup>53</sup> Certainly it is not surprising that separate development of remedies for these two aspects of performance led to duplication and unnecessary bulk.<sup>54</sup> It is this approach that accounts for the fact that a uniform law laying down only a handful of important policy choices nevertheless runs on to 101 articles of statutory text. It is just possible that admirers of Descartes overlooked the fact that breaking a problem into small pieces for close scrutiny was only one step in the Method, which includes also a synthesis of the separate parts.

(b) *Rejection*. Much of the bulk of the Uniform Law—and considerable expenditure of time at the diplomatic conference—resulted from the attempt to deal in detail with the scope of the buyer's remedy of rejection. This problem is of special importance in international transactions, for time and space separating sellers and buyers render it wasteful for sellers to redispense of goods rejected at the point of destination.

The problem is a stubborn one. Varying degrees of non-conformity in an almost infinite variety of situations have made the sweeping pro-rejection rules of the Uniform Sales Act seem harsh, while the complex distinctions of the Uniform Commercial Code appear casuistic.<sup>55</sup>

What is the policy of ULIS on the remedy of rejection? In brief, the Uniform

<sup>53</sup> The reciprocating relationship of place and time was exposed in the following complex language of ULIS art. 30-1: "Where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided. . . ."

To be sure, the concept that the goods may be "delivered" to the buyer on shipment may make the wrong place for this type of "delivery" relatively insignificant if normal shipment brings the goods to the buyer's place of business at the expected time. But this is a conceptual problem of the act's own creation that, as we shall see, leads to other difficulties.

<sup>54</sup> Further duplication resulted from the separate statement of buyer's remedies for seller's failure to deliver conforming goods. ULIS arts. 41-49. Various types of breach by the buyer are also given separate treatment: non-payment (arts. 61-64); failure to take delivery (arts. 66-68); miscellaneous unclassified breaches (art. 70).

<sup>55</sup> Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457, 460-61, 472-79 (1949).

Law substantially restricts buyer's right to reject because of seller's breach relative to time (or place) of delivery while preserving a broad right to reject goods which do not conform to the contract.

Discussion of the provisions of ULIS requires first a brief introduction to its terminology. The remedy we call rejection is termed "avoidance of the contract"; avoidance ordinarily requires a "declaration" by buyer; but sometimes happens automatically and is then called "*ipso facto* avoidance of the contract."<sup>56</sup>

*Delay.* Equipped with the Law's terminology, we can work with this problem: In an international sales transaction, seller is late in tendering the goods. May the buyer reject? Sometimes, but not always. Under the Uniform Law buyer may "declare the contract avoided" when "the failure to deliver the goods at the date fixed amounts to a *fundamental breach of the contract*."<sup>57</sup> Obviously, the key question is: What is a "fundamental" breach? ULIS answers this basic question by stating that

a breach of contract shall be regarded as fundamental whenever the party in breach knew, or ought to have known, at the time of conclusion of the contract, that a reasonable person in the same situation as the other party *would not have entered into the contract* if he had foreseen the breach and its effects.<sup>58</sup>

Anyone who had the patience to read the foregoing definition carefully will have noted that it is a stew with many ingredients. Let us sort them out. A breach is "fundamental" if (1) a hypothetical "reasonable person" in the situation of the aggrieved party; (2) foreseeing the breach and its effects; (3) would not have entered into the contract; and (4) this decision on behalf of the innocent party was foreseen or foreseeable by the other party at the time of the making of the contract. Projecting these reciprocating states of mind by hypothetical parties calls for a lively imagination. Even more imagination is needed to suppose that these various ingredients will be useful in deciding cases, for the realistic considerations are very different, and surely include factors such as these: Will monetary compensation for any breach fully compensate the wronged party? Is the amount of compensation subject to dispute? Is the payment of such compensation assured?<sup>59</sup> The most that can be said for the Uniform Law is that the statutory test is sufficiently airy to permit consideration of the relevant factors, to which an arbitrator would probably turn instinctively once he feels that the rule of law permits a flexible approach to the problem.

In one setting, ULIS withdraws its flexible approach. Default as to time under article 38 is always "fundamental" when "a price for such goods is quoted on a market where the buyer can obtain them." This provision was prompted by the

<sup>56</sup> Problems presented by this terminology will be discussed at notes 70-73 *infra*.

<sup>57</sup> ULIS art. 26(1). Emphasis has been added throughout.

<sup>58</sup> ULIS art. 10.

<sup>59</sup> *Op. cit. supra* note 55 at 468-472 (1949).

view that raw commodities—which often are traded on an exchange—are subject to price fluctuations which may make delay particularly important.<sup>60</sup> Unhappily, this attempt to be specific may engender more doubt than it removes. The term “market” is undefined and difficult to apply;<sup>61</sup> nor does the availability of substitute goods relate to the substantiality of seller’s breach.<sup>62</sup>

A second, and much more important device is used to bring precision to this difficult area: the famous German institution of *Nachfrist*—the establishment of a deadline through a notice by the waiting party. Here, ULIS is simple, intelligible and powerful. Even though seller’s delay is not a fundamental breach, under article 27(2) “The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period shall amount to a fundamental breach of the contract.” The attractions of the rule are these: (1) The seller is given advance warning that dire consequences will follow his default beyond the stated day; (2) The discretion given to the buyer to fix the deadline—subject only to the requirement that it be “reasonable”—brings some precision to an otherwise foggy field.

*Non-conformity of the goods.* As was noted before, the limited rejection permitted for seller’s default as to time (and place) must be contrasted with much stronger remedies where the goods do not conform. Unhappily, the Uniform Law’s rules are here cast in particularly complex form; the curious reader will find them in the footnote.<sup>63</sup> But the sections seem to boil down to two fairly workable ideas. *First:* Regardless of the seriousness of the defect in quality, seller may cure his tender by providing conforming goods so long as any delay does not constitute a funda-

<sup>60</sup> Special Commission appointed by The Hague Conference on the Sale of Goods, Report of the Commission (on the 1956 Draft) (The Hague, 1963, Doc./V/Prep. 1) 41.

<sup>61</sup> To reduce the elusive nature of the concept of a “market,” the reference to prices “quoted on a market” may be taken as referring to an exchange—an expedient that is subject to embarrassment in the legislative history. ULIS (1956 Draft) art. 31 referred in paragraph 1 to a “market,” whereas paragraph 2, later deleted, referred to an “exchange”—thus providing grounds for contending that the two terms are not identical.

<sup>62</sup> Injecting the qualification concerning the availability of goods to the buyer may have resulted from the fact that “avoidance” of the contract not only cuts off the power of the party in breach to make an effective tender, but also terminates the right of the innocent party to obtain specific performance. See text at note 73 *infra*.

<sup>63</sup> ULIS art. 43 provides: “The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in the case to which paragraph 2 of article 42 applies, after the expiration of the period referred to in that paragraph.”

ULIS art. 44 provides: “1. In cases not provided for in article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

2. The buyer may however fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with article 46 or, provided that he does so promptly, declare the contract avoided.”

mental breach, under the rules on lateness just discussed. *Second*: If the goods fail to conform in a minor ("non-fundamental") respect, must the buyer accept or retain them and be satisfied with price adjustment or damages?<sup>64</sup> The answer is No. Again the *Nachfrist* (or deadline) device is provided. Under article 44(2), the buyer may "fix an additional period of time of reasonable length"; if the seller fails within that period to provide conforming goods the buyer may "declare the contract avoided."<sup>65</sup>

*Evaluation of rejection provisions of ULIS.* Some words of praise and criticism slipped out in the course of describing the provisions. In attempting an overall evaluation of this part of the Uniform Law, let us consider first substance and then form.

In view of the fact that in enterprise so widely shared no one can have his heart's desire, the Uniform Law's rules on rejection seem to respond fairly to the essential interests at stake. A difficult choice has to be made in deciding whether to limit the remedy of rejection; I have elsewhere given reasons for concluding that authorizing rejection for any deviation from the contract is inconsistent with commercial practice and leads to illusory results in adjudication.<sup>66</sup> The Uniform Law seems to have moved in the right direction—particularly in view of the opportunity to use the *Nachfrist* notice to close out the transaction.

On the other hand, the style of this part of the Uniform Law is regrettable. The structure is needlessly complex and confusing. In addition, for reasons that will be developed more fully in the pages that follow,<sup>67</sup> the basic concept of "avoidance of the contract" is an awkward and dangerous tool for this difficult and intensely practical problem of rejection.

(c) *Notice of damage claim and of rejection of the goods.* One of the least attractive features of the Uniform Law for International Sales is its handling of these two problems: (1) Goods in the buyer's possession prove to be defective. The buyer proposes to keep the goods and claim damages from the seller. How fast must the buyer notify the seller to prevent loss of his claim? (2) Instead of keeping the defective goods, the buyer proposes to reject them. What notification must be given seller to transfer to the seller the burden of handling the goods?

The underlying problems posed by these two situations are only superficially similar. In the first, the requirement of notice responds to the seller's need to gather evidence of the condition of the goods in order fairly to meet the buyer's claim. In the second case, the seller needs notice of rejection so that he can take

<sup>64</sup> We are here assuming that the deviation, although minor, is a real non-conformity: that is, under the rule of ULIS art. 33(2) (quoted *supra* in the text preceding note 34), the deviation is not too immaterial to be "taken into consideration."

<sup>65</sup> The rigors of rejection even with respect to non-conforming goods are relaxed by article 45 which permits rejection only of the non-conforming goods. Cf. ULIS art. 47 (if seller tenders too much, buyer may reject "the excess quantity").

<sup>66</sup> *Supra* note 55.

<sup>67</sup> See text at notes 70-73, *infra*.

immediate steps to reshipe or resell the goods and thereby avoid deterioration, storage costs and other unnecessary costs and risks. The issues seem prosaic but they are important; the failure to give notice required by law can be disastrous. Unhappily, the Uniform Law's provisions can lead to technical objections to just claims.

We start with the basic and seemingly flexible rule of ULIS that the buyer "shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it."<sup>68</sup> Difficulty arises only because of a chain of technical rules governing the time within which a buyer "ought" to discover defects. Article 38-2 states: "In case of carriage of the goods the buyer shall examine them at the place of destination." But in many situations—and especially in dealing with goods which are sealed in cans or tightly crated—it may be more efficient to delay any inspection until after the goods have been reshipped by the buyer to a point of consumption or to a sub-purchaser. The Uniform Law does not overlook the problem, but the tolerance allowed is very narrow. Article 38(3) permits delay in inspection until arrival at the new destination only if "the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispach. . . ." Such strict limits might be appropriate to restrict rejection at an unexpectedly remote spot, but they can hardly be justified in barring a claim for monetary adjustment for defective goods. At this point ULIS makes the common error of laying down detailed rules that fail to fit the complex facts of commercial life.<sup>69</sup>

In dealing with rejection—when the other party needs to take prompt action—ULIS unfortunately drifts off into language of metaphysical obscurity growing out of the concept of "avoidance of the contract." "Avoidance" is not at all what one would expect: it is a remedy given for breach and does not bar the recovery of damages.<sup>70</sup> Unhappily, the term covers various legal consequences, two of which

<sup>68</sup> ULIS art. 39(1). ULIS uses two general terms to specify time for action: "promptly" (*dans un bref délai*), and "within a reasonable time" (*dans un délai raisonnable*). "Promptly" was used when maximum speed was required. Article 11 defines "promptly" as calling for action "within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed." Cf. USA § 49; UCC § 2-607(3)(a) ("the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy").

Delegates to the 1964 convention will not soon forget the battles over the terms; a humorous and brilliant poem that was part of the heritage from the diplomatic conference of 1951 reveals that this problem was troublesome even then. Unhappily, the smoke from the battle over the definition of the terms may have obscured more important issues.

<sup>69</sup> The UCC—which sometimes is designed with excessive detail where ULIS is built on classic lines—here provides the more wholesome example. UCC § 2-602(1): "Rejection of goods must be within a reasonable time after delivery or tender. It is ineffectual unless the buyer seasonably notifies the seller." The greater speed called for in some rejection situations is provided by the all-embracing test of UCC § 1-204(2): "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."

<sup>70</sup> ULIS art. 78-1: "Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due." Relief from damage because of some excuse (in traditional terms, impossibility or *force majeure*) is termed an "exemption" (in the French text, *exonération*) and is dealt with in article 74.

are predominant. On "avoidance" the injured party (i) loses the remedy of specific performance, and (ii) is relieved of the duty of accepting the goods.<sup>71</sup>

Further complication results from the fact that there are *two* types of "avoidance": (1) a *declaration* of avoidance (which gives notice to the other party) and (2) an automatic (non-notification) type of "avoidance." The latter, in the French text, is expressed in the legal idiom "*résolution de plein droit*" which, in desperation, the "English" text renders into Latin as "*ipso facto* avoidance."

This latter automatic, non-notification "*ipso facto* avoidance" may in some situations deny the other party information needed for important action. The varieties and consequences of this type of avoidance are complex, and are buried in a footnote.<sup>72</sup> However, enough has perhaps been said to explain the writer's unhappiness with the structure and style of this part of the Uniform Law. The Observations of the United States, presented shortly before the opening of the Conference, expressed disappointment over this and similar concepts which were complex legal constructs rather than references to the events of commercial life.<sup>73</sup> One of the great opportunities of a uniform law for international use is to provide a clear, common language of discourse for the development of an international law merchant. A new international language would miss a great opportunity if it employed irregular verbs and English non-phonetic spelling. Unhappily, as we have seen, the drive to bring the Convention and Uniform Law to completion in three weeks barred any attention to the workability of the draft's basic concepts.

(d) *Other significant provisions.* Reference can only briefly be made to a few other significant aspects of the Uniform Law: a duty even by the innocent party to take feasible steps to preserve the goods;<sup>74</sup> a power to suspend performance when the economic situations of the other party appears to have become so difficult that

<sup>71</sup>In jurisdictions where specific performance is theoretically generally available, it has been thought important to end the injured party's right to specific recovery when the party in breach loses his power to tender the goods, so that neither can speculate at the other's expense. In view of the rarity of recourse to specific performance, this concern is of greater theoretical (or aesthetic) than practical value. In Anglo-American jurisdictions the problem is avoided by the discretionary nature of the remedy: a buyer who elected specific performance late after a rise in the market would probably be barred, *inter alia*, by the doctrine of laches.

<sup>72</sup>*Ipso facto* avoidance arises in various situations: Under ULIS art. 25, when seller fails to deliver, the "buyer shall not be entitled to require specific performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates." In this case, "the contract shall be *ipso facto* avoided as from the time when such purchase should be affected." Under ULIS art. 26(1), if the buyer fails to notify seller of his election between specific performance and avoidance of the contract "within a reasonable time," the "contract shall be *ipso facto* avoided." In this latter situation reasonable notice may be assured in some cases under ULIS 26(3): if the seller has "effected delivery" (which may include delivery to a carrier) "before the buyer has made known his decision" and "the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided." There are parallel provisions on place for delivery in Article 30. *But cf.* ULIS arts. 61, 62.

<sup>73</sup>*Observations and Amendments Submitted by the Government of the United States of America* (Doc./V/Prep./8, Feb. 1, 1964) 2-3. *Cf. Compilation of the Observations and Amendments Submitted by the Governments and the International Chamber of Commerce* (Conf./Gen./5) 47a, 80-81a.

<sup>74</sup>ULIS arts. 91 and 92. *Cf.* UCC § 2-603. *Merchant Buyers Duties as to Rightfully Rejected Goods.*

there is reason to fear non-performance;<sup>75</sup> the overruling of statutes of frauds and comparable formal requirements.<sup>76</sup> There are, of course, many other interesting provisions among the 101 articles of the Uniform Law; the most that one can hope (in line with commercial practice in examining goods) is that we have taken a fair sample as a basis for evaluation.

### III

#### CONCLUSIONS AND UNANSWERED QUESTIONS

##### A. ULIS: An Evaluation

An evaluation of the Uniform Law calls for a judgment combining many elusive factors. The successful parts of the Draft need to be balanced against those defects which exist in any human creation—and especially appear in any human's evaluation of another's creation. A fair evaluation of the Law's strengths and weaknesses is hard enough, but that is only the beginning of the problem. Is this Law—however flawed—less imperfect than the present chaos? What are the chances that further effort would produce a better result? Would the adoption of the present Uniform Law inhibit significant improvement of the structure?

A confident answer to a problem with so many variable and unknown elements would establish only the writer's dogmatism. For better or worse, however, choices must be made. Here are two hypotheses: (1) Although the Uniform Law in International Sales is a disappointing effort, in time it could produce a modest improvement in the present unsatisfactory state of the law—primarily through the development of an international *jurisprudence* with a common idiom and frame of reference. (2) In view of the quickening interest in the project and deepening understanding of its problems, further work on the Uniform Law should lead to sig-

<sup>75</sup> ULIS art. 73. See also art. 76 giving a right to declare the contract avoided when, prior to the date for performance, "it is clear that one of the parties will commit a fundamental breach of the contract." Cf. UCC 2-609. *Right to Adequate Assurance of Performance*; UCC 2-610. *Anticipatory Repudiation*.

<sup>76</sup> ULIS art. 15: "A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses." Contrast USA § 4; UCC § 2-201. *Formal Requirements; Statute of Frauds*. Following recommendations of the Law Revision Commission, Parliament repealed the statute of frauds provisions of the British Sale of Goods Act. Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, ch. 34, 34 Halsbury's Stat. (2d ed.) 97.

Also worthy of mention is the provision that on the expiration of a year following notice of lack of conformity of the goods, the buyer shall "lose his right to rely" thereon. ULIS art. 49(1). The quoted language was deliberately chosen to extinguish the buyer's substantive right, with the expectation that a forum in a nation that had not adopted ULIS but referred to the substantive law of an adopting nation would apply this one-year period rather than the forum's statute of limitations. Curiously, the Uniform Law specifies no time limit for the seller's right to recover damages from a buyer—as for wrongful rejection in a falling market. At the September 1964 colloquium of the International Association of Legal Science, Professor Trammer of Poland presented a draft convention to unify rules on lapse of time in international sales of goods. Trammer, *Time Limits for Claims and Actions in International Trade*. See also Harris, *Time Limits for Claims and Actions*. These papers will be published as part of the proceedings in HONNOLD (ED.), *UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS* (1965). The Colloquium agreed that the problem deserved attention and referred the matter to the Rome Institute.



nificant improvement. It seems wise to make an added effort to improve the law before putting it into force.

It is not the presence of questionable decisions of policy in the Uniform Law that pushes this writer regretfully over the brink into counselling further work and delay. And certainly it is not the silence of ULIS on many problems that arise in international practice. As the reader will have perceived, my most serious reservations relate to matters that some might dismiss as mere style or art: complexity and technicality of some parts of the Uniform Law, and the use, at critical spots, of conclusory terms related to local legal idioms rather than standard events of commercial life.

One symptom of this problem has been the difficulty of translating some of the Law's crucial terms. We have already met the desperate rendition of *résolution de plein droit* into "*ipso facto* avoidance," and have glimpsed some of the difficulties of working with this concept.<sup>77</sup> Difficulty with the Law's key concept of *délivrance*—so plausibly (and deceptively) rendered as "delivery" has been discussed elsewhere; the difficulty reappeared in attempting to translate the concept into languages other than English.<sup>78</sup> I need only add that the term plagued the final drafting process, so that even those who had struggled with the draft for years had trouble differentiating the conceptualized *délivrance* (translated "delivery") and the commercial event which in the French text is called *remise* and in the English text is described, in pictorial language, as "handing over." It is possible to acquire a refined taste for the elegance of some of these nuances, as for esoteric forms of the French subjunctive, but one would not commend this style for effective translation and comprehension in the varied legal (and linguistic) settings of the world.

The use of the complex, conclusionary legal idiom of "property" led to confusion in Anglo-American sales law; a comparable difficulty infects parts of the Uniform Law. For comprehensibility in various languages and local legal settings, the concepts need to be kept simple and closely tied to commercial life, so that words for the ideas exist in various languages because the underlying practice exists, and must be described wherever commerce is discussed. In many parts, the Uniform Law meets this painfully exacting standard; at crucial spots it needs reexamination.

Can improvement of this nature be made after the Uniform Law is put into force? In spite of the awkwardness of recourse to the machinery of diplomatic conference and treaty revision, it may be possible to correct egregious errors of limited scope.<sup>79</sup>

<sup>77</sup> See text accompanying notes 70-73 *supra*.

<sup>78</sup> Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 317-320, 324-326 (1959). The difficulty encountered in translating *délivrance* into languages other than English appears from *Coordination des Traductions du Projet de Loi Uniforme Sur la Vente Internationale des Objets Mobiliers Corporels* 2, 3 (U.D.P. 1957—Etudes IV, Vente—Doc. 101) (May 1957) (mimeo).

<sup>79</sup> If ULIS goes into force, three years thereafter a conference to revise the Convention or the Uniform Law may be convened on request by one quarter of the contracting states. SALES CONVENTION art. XIV; CONVENTION ON FORMATION art. XII; Cf. *Final Act of the Diplomatic Conference*, Recommendation II(2): If the Sales Convention has not come into force by May 1, 1968, the Rome Institute should establish a committee composed of representatives of the Governments of interested states to "consider what further actions should be taken. . . ."

But matters concerning key concepts will be much more difficult—probably impossible—to modify once the system is under way.

The care and approach in the preparation of the project should reflect one's hopes concerning the scope of possible utilization. The Uniform Law (through default) has been of European design, but it moves towards meeting a need of world-wide dimensions. True, one might conceive of a series of regional approaches to unification: a European draft, the implementation of a pending Inter-American draft,<sup>80</sup> the preparation of still further drafts for Asia and Africa. Regional approaches may indeed be necessary for intimate social or economic integration, but a uniform law for international sales does not disturb such delicate national interests. The prime functions of this uniform law are to provide firm legal underpinning for engagements voluntarily made, and to dispose of unresolved issues clearly and in conformity with the customs of international trade—factors not closely related to the traditions and idioms of domestic legal systems. Indeed, the wider the gap between the legal systems of the traders, the greater the need for a uniform law.

The need is for nothing less than a uniform law suitable for world-wide use—a breath-taking opportunity that creates peculiar and exacting problems of design and draftsmanship. In this rapidly shrinking world, we need not fear that the project will languish and die if it is not immediately put into force. The project needs further work, and the importance and difficulty of the problems justify the extra effort.

Any American suggestion for delay, after almost four decades of indifference, is likely to be misconstrued. I do trust that no one would harbor a suspicion of Fabian warfare against the uniform law by those of us who have keenly supported the project over the years. Nor would it be plausible to suppose that the United States or any other trading nation has any interest other than the preparation of the best possible uniform law.<sup>81</sup> The more plausible suspicion is that we might like to keep the project open so we can get more of "our law" into the draft.

No one who has thought very long about international unification of law would bring to this creative work a trading psychology like that used in a tariff negotiation: We'll take some of your "foreign" law if you'll buy a substantial shipment of our American products—and most especially a large order of our new, big, shiny Uniform Commercial Code. The adoption of such an approach by all interested nations would probably lead to an impasse and, at best, would produce a Hydra-like monster of terrifying complexity.

<sup>80</sup> For discussion of early phases of the project prepared by the Inter-American Judicial Committee see Kuhn, *Draft of an Inter-American Uniform Law on International Sales*, 48 AM. J. INT'L L. 126 (1954); cf. Schroeder, *An Inter-American Uniform Commercial Code*, 2 W. RES. L. REV. 42 (1950). For a later draft and accompanying report, see INTER-AMERICAN JURIDICAL COMMITTEE, DRAFT CONVENTION ON A UNIFORM LAW ON THE INTERNATIONAL SALE OF TANGIBLE PERSONAL PROPERTY (Organization of American States, 1960).

<sup>81</sup> See *Report of the Delegation of the United States of America on the Unification of Law Governing the International Sale of Goods, The Hague*, in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, [1964] HANDBOOK AND PROCEEDINGS 237 *et seq.*

### B. Structural Problems

Experience with ULIS illustrates basic organizational problems concerning further work on international unification of law. A solution cannot be attempted here, but the problems need to be faced without further delay.

What is the most effective channel for United States participation in the many pending projects for unification of law? Surely we cannot afford again to rouse ourselves only on the eve of a decisive diplomatic conference. Effectiveness requires informed, consistent work during the years (or decades) while a project is in gestation—not only to help insure that the finished product will meet our needs but also to develop that degree of understanding and feeling of participation necessary for a fair decision about adoption.

Communications from other governments and requests for comments about pending drafts come to the State Department; that Department necessarily controls the representation of this country at diplomatic conferences. The State Department should have the responsibility to organize the work that needs to be done. The nature of the work, however, is different from that customarily handled by the State Department. It is long-range, scholarly and, for the most part, non-political; an organizational unit needs to be established that is qualified and oriented for this work. In view of the ebb and flow of changing subjects of international legal collaboration, the Department will need to rely in large part on outside specialists; but the Department needs adequate full-time personnel with the time and background necessary to follow the work, to convene qualified working parties, and to share in recommendations about United States adherence to the final product. New administrative (and budgetary) arrangements are needed as we emerge from our past lethargy and ignorance with respect to long-range, non-political legal developments on the international scene.<sup>82</sup>

There are also problems of organization and coordination at the international level that need to be mentioned briefly to put the current project into perspective. Uniform legislation is only one of two complementary techniques to smooth the legal paths of international trade. A second is the development of standard contracts that, when well prepared, constitute specialized codes for the type of commodity at hand. The United Nations Economic Commission for Europe has done pioneer work in the preparation of standard contracts for the sale of specific commodities; the success of these contracts for European trade has demonstrated the desirability of expanding this work. As in the preparation of the Uniform Law on International Sale, Europe has led the way; but the need for standard contracts, like the need for uniform legislation, is not confined to a single region. Last September's colloquium of the International Association of Legal Science explored

<sup>82</sup> The problems of staffing a delegation adequate to deal with the exacting demands of a diplomatic conference were suggested in the text at notes 11-17 *supra*.

the wider opportunities of such contracts as an aid to unification;<sup>83</sup> there remains the development of an appropriate institutional vehicle for carrying this work forward—possibly within the U.N. Secretariat or within the Conference of Trade and Development.

This work on standard contracts has significance which brings us back to our primary theme, the development of uniform law. The further crystallization of international commercial practice in the preparation of standard contracts should enlighten any further work in improving the Uniform Law for International Sales, and should aid tribunals, under ULIS or any other legal regime, when they are called upon to give effect to international commercial custom.

These wider vistas should help us see that further work is worthwhile, but should not distract us from our most immediate problem: the creation of organizational structures for effective United States participation in the developing work (by law or contract) to reduce the legal difficulties facing international trade. Perhaps the most effective catalyst for his work is the Advisory Committee on Private International Law established in 1964 by the Secretary of State.<sup>84</sup> This Committee should authorize studies directed to these basic problems of organization, and lend the weight to its judgment to concrete steps towards a solution. It would be depressing to consider the impoverished state of our domestic law without the organizational planning that produced the National Conference of Commissioners on Uniform State Laws and the American Law Institute. There is comparable need to construct institutions for effective work dealing with international legal unification.

<sup>83</sup> See note 48 *supra*.

<sup>84</sup> The Advisory Committee on Private International Law, under the chairmanship of the Legal Adviser to the Department of State, includes representatives of nine of the nation's leading professional organizations and the Department of Justice. See *Report of the Delegation, supra* note 81.