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## A UNIFORM LAW FOR INTERNATIONAL SALES \*

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*To cope with the uncertainties and complexities of conflicting national laws, international traders have been forced to devise various makeshifts to reach commercial understanding. The inadequacy of these expedients, the Author argues, demonstrates the need for reforming and unifying the underlying law. A project to draft a uniform law is now in being. In this Article, Mr. Honnold, an authority on United States sales law, weighs the constitutional objections, examines some of the substantive provisions of the drafts and the problems of multilingual drafting, and argues strongly for the participation of this country in the project.*

Determined work by several other nations during the past quarter-century has produced important progress towards the creation of a Uniform Law for the International Sale of Goods. Through ignorance rather than design our country has remained outside this project. The time has come to examine the need for such a uniform law and to decide whether we should share in this work.

The reasons which have led other nations to take up this work apply with full force to the United States. Our foreign trade, running at an annual rate of thirty billions of dollars, faces legal uncertainties which indeed are more serious than those which in this country forced the states to join in a wide range of uniform legislation, such as the Uniform Sales Act. That need arose even though nearly all of our states shared the same legal tradition of the common law so that

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lawyers in one state could come to grips with the ideas governing sales transactions in other parts of the country. The legal problems now involved in trade with Britain and with other countries with common-law traditions in some ways resemble the problems which confronted our states before the Uniform Sales Act. But the larger part of the world—the continent of Europe, the American republics to the south and much of Asia and Africa—confronts the American trader with legal systems which stem from different roots; even if he crosses the linguistic barriers and has access to the relevant codes, treatises and decisions he encounters concepts which are either meaningless or deceptive. And it is cold comfort to contemplate the feasibility either of finding an “expert” in the foreign law and making his explanations intelligible to an American court or of presenting American law to a foreign tribunal. All these complications would arise even if American and foreign law were well suited to overseas trade. But unhappily many of the foreign legal systems, like the Uniform Sales Act, were formulated before the development of modern practices in international trade and at important points ignore or contradict them.<sup>1</sup>

Alert foreign traders employ a variety of tools to cut their way through this thicket. Many businesses which specialize in foreign trade have developed detailed form contracts which seek to resolve the questions on which the law may be unsettled or in conflict. For some commodities trading can be carried on with dispatch by referring to

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1. The Uniform Commercial Code sets forth detailed rules designed to meet some of the practices and problems peculiar to overseas sales. UNIFORM COMMERCIAL CODE §§ 2-319 to 2-325 (hereinafter cited as UCC). Cf. UCC art. 5, *Letters of Credit*. See text accompanying note 64 *infra*. The code has been adopted in Pennsylvania, Massachusetts and Kentucky. PA. STAT. ANN. tit. 12A (1954) (follows 1953 version which was substantially revised by the 1957 draft); MASS. ANN. LAWS ch. 106 (1957); Ky. Acts 1958, ch. 77. Adoption of the code by additional states may be anticipated in coming years, but the process of adoption state by state is necessarily slow. The half-century which followed the promulgation in 1906 of the Uniform Sales Act (USA) produced only thirty-four adoptions, in spite of the fact that the Uniform Sales Act through its close adherence to existing law provided few points of controversy. The Uniform Commercial Code breaks much new ground; this increases not only its usefulness but also the areas of dispute concerning its wisdom.

Unhappily the Uniform Commercial Code can do nothing to resolve the often enormously complex problems concerning whether an American or foreign tribunal will apply American or foreign law to the international sales transaction. For a discussion of the nature of these difficulties, see RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY* (1950); LALIVE, *THE TRANSFER OF CHATTELS IN THE CONFLICT OF LAWS* (1955). Cf. *Draft Convention on the Law Applicable to International Sales of Goods*, 1 AM. J. COMP. L. 275 (1952) (English translation); Reese, *Some Observations on the Eighth Session of the Hague Conference on Private International Law*, 5 AM. J. COMP. L. 611 (1956) (discussion of draft convention on the law governing transfer of title in international sales of goods). The current version of the Uniform Commercial Code has retreated from earlier attempts to require the courts of states which adopt the code to apply the code if the transaction has any one of a series of stated contacts with the forum. Compare UCC § 1-105(1) with UCC § 1-105(2) (1953). Cf. Goodrich, *Conflicts, Niceties and Commercial Necessities*, 1952 Wis. L. REV. 199.

standard contracts drafted by trade associations; and under the auspices of the United Nations Economic Commission for Europe, detailed standard contracts have been prepared for international sales of lumber, citrus fruit, cereals and machinery.<sup>2</sup> In addition, foreign traders, through their organizations, have written out some of the complex connotations of the cryptic terms, such as "C.I.F." and "F.A.S.," which are important in international sales. Unhappily, two formulations of these trade terms compete on opposite sides of the Atlantic, but businessmen can reduce misunderstanding by specifically incorporating one of them into their contract.<sup>3</sup> Finally, machinery for arbitration is widely used in international sales; in this manner businessmen seek to escape from conflicting and antiquated national laws into a regime of commercial understanding.<sup>4</sup>

These various measures for legal self-help, although highly useful in skillful hands, do not remove the need for improving and unifying the underlying law. Private codes of obligations derived from a

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2. Copies of these standard contracts for international sales may be obtained from the United Nations. U.N. ECO. COMM'N EUROPE, CONTRACT FOR THE SALE OF CEREALS (U.N. Pub. Sales No. 1957. II. E/Mim. 21, pts. 1A, 1B, 2A, 2B, 3A, 3B, 4A, 4B); U.N. ECO. COMM'N EUROPE, GENERAL CONDITIONS FOR THE SUPPLY AND ERECTION OF PLANT AND MACHINERY FOR IMPORT AND EXPORT (ME/188 bis/53) (ME/574/55) (U.N. Pub. Sales No. 1957. II. E/Mim. 3); U.N. ECO. COMM'N EUROPE, GENERAL CONDITIONS FOR EXPORT AND IMPORT OF SAWN SOFTWOOD (ME/410/56) (1956); U.N. ECO. COMM'N EUROPE, GENERAL CONDITIONS FOR THE INTERNATIONAL SALE OF CITRUS FRUIT (U.N. Pub. Sales No. 1957. II. E/Mim. 12). Some of these alternative contract forms are designed for different types of quotations; one reflects terminology prepared for trade among Western countries, and invokes the rules of the International Chamber of Commerce on arbitration and on the meaning of trade definitions (hereinafter cited as INCOTERMS), whereas another which omits these references is appropriate for trade with Eastern countries. For a summary of the work of the Economic Commission for Europe in the preparation of standard contracts for international sales see Organisation des Nations Unies, Commission Economique pour l'Europe, *Note sur les Méthodes d'Unification du Droit Suivies par la Commission Economique pour l'Europe*, in 2 UNIFICATION OF LAW, YEARBOOK 1956, at 251, 258-67 (1957).

3. The two competing formulations are: (1) REVISED AMERICAN FOREIGN TRADE DEFINITIONS (1941), prepared by a joint committee representing the Chamber of Commerce of the United States, the National Council of American Importers, and the National Foreign Trade Council, and (2) INCOTERMS (1953), prepared by the International Chamber of Commerce.

4. A conference held at New York under the sponsorship of the United Nations led to the approval on June 10, 1958, of a Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See ICC News, July-Aug. 1958, No. 5. The initial impetus for this step to unify and strengthen the enforcement of such awards came from the International Chamber of Commerce; preparatory work for the conference was done by the United Nations. See U.N. ECO. COMM'N EUROPE, REC. 19th Sess., Annex Item 14 (E/2704) (1955) (draft of proposed treaty and report of committees); U.N. ECO. COMM'N EUROPE, REC. 21st Sess. 133 (E/2822) (1956) (comments on draft). For some of the underlying problems, see Domke, *On the Enforcement Abroad of American Arbitration Awards*, 17 LAW & CONTEMP. PROB. 545 (1952) and related articles in the symposium in the same issue; Nussbaum, *Treaties on Commercial Arbitration*, 56 HARV. L. REV. 219 (1942); Wahle, *International Aspects of Arbitration Reform*, 10 ARB. J.(n.s.) 140 (1955); Bruns & Motulsky, *Tendances et Perspectives de l'Arbitrage International*, 9 REV. INT. DE DR. COMP. 717 (1957).

contract are often unavailable because of hurried completion of the transaction by telephone or cable; and many concerns—especially small businesses—are not sufficiently established in foreign trade to have worked out complete contract formulations. Nor can the parties by agreement free themselves from local rules restricting the validity of agreements or imposing technical rules for their formation. Agreement to arbitrate disputes also fails to provide a complete answer: in the course of performance the parties need a guide for their obligations so that they can avoid misunderstandings by meeting the other party's expectations or, if a dispute must go to arbitration, so that an award can be based on a standard conforming to the parties' reasonable expectation.

Efforts by interested nations to meet these problems have carried a project for a Uniform Law for International Sales to an advanced stage. Initially sponsored by the International Institute for the Unification of Private Law, a distinguished commission drawn from various countries of Europe produced a preliminary draft in 1935.<sup>5</sup> The work was, unfortunately, interrupted by the war. But in 1951 an international conference, in which twenty nations participated,<sup>6</sup> was convened at the Hague to deal with the subject of a revised draft. This conference approved the project and suggested further improvement in the draft. The most recent draft reflecting the suggestions of the Hague

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5. The initial committee was composed of Judge A. Bagge (Sweden), Mr. H. Capitant (France), Mr. M. Fehr (Sweden), Prof. H. C. Gutteridge (Great Britain), Dean J. Hamel (France), Dr. E. Rabel (Germany), and Sir Cecil J. B. Hurst (Great Britain), President. Information in the drafting of this statute and of similar projects is collected in an invaluable series of volumes entitled UNIFICATION OF LAW published in Rome in 1948, 1954 and 1956 by the International Institute for the Unification of Private Law. The volumes of this series will be cited: UNIFICATION OF LAW (1948), UNIFICATION OF LAW (1954), etc. The early background of the project, and the 1939 draft, are discussed in UNIFICATION OF LAW 56, 102 (1948). The text and report appear in PROJET D'UNE LOI UNIFORME SUR LA VENTE INTERNATIONALE DES OBJETS MOBILIERS CORPORELS ET RAPPORT (1939) (U.D.P., Projet I (1)). The basic research for the work is reflected in RABEL, *DAS RECHT DES WARENKAUFS* (I: 1930, II: 1958). Cf. Cohn, *A Unified Law of Sale of Goods*, 21 J. COMP. LEG. & INT'L L. (3d ser.) 244, 246 (1939); Prudhomme, *D'un Projet de Loi Internationale sur la Vente*, 64 J. DU DR. INT. 5 (1937); Nadelmann, *Unification of Private Law*, 29 TUL. L. REV. 328 (1955); David, *The International Institute of Rome for the Unification of Private Law*, 8 TUL. L. REV. 406, 412 (1934). Nearly forty nations are members of the International Institute for the Unification of Private Law. Unhappily, the United States is not a member.

6. The following sent representatives: Austria, Belgium, Denmark, Finland, France, Germany, Great Britain, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Vatican City. Observers were sent by the United States, Bolivia, Chile, Cuba, Yugoslavia, the UN Economic Commission for Europe and the International Chamber of Commerce. Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58 (1952); UNIFICATION OF LAW 31 (1954). The "observer" status of the United States was, in fact, nominal, consisting of the attendance of a staff member of the local embassy. The conference, sponsored by the Rome Institute, was held at the Hague in 1951 on the invitation of the Government of the Netherlands and followed immediately the seventh session of the Hague Conference on Private International Law.

conference was completed in 1956; this draft will be the subject of a further international conference after interested nations have submitted their comments.<sup>7</sup>

The fact that the United States has not yet taken an active part in this work is more reminiscent of older patterns of isolationism than of our current pretensions to strong participation in world affairs. There are, indeed, reasons for our interest which reach even beyond the question of adherence to the final draft. If other countries should adopt the Uniform Law for International Sales, it would comprise the law which their courts would apply to sales transactions with American concerns.<sup>8</sup> The project is important also as a laboratory for comparative research for the improvement of our domestic law, since it embodies a distillation from differing legal systems of those solutions to the problems of sales law which commend themselves to a distinguished international group of scholars. No reputable American scientist would do his work in ignorance of comparable research in other countries; it would be fortunate if the same could be said of the law.<sup>9</sup>

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7. The original text and accompanying report, both written in French, are distributed by the Permanent Secretariat to the Special Commission, Ministry of Justice, the Hague. PROJET D'UNE LOI UNIFORME SUR LA VENTE INTERNATIONALE DES OBJETS MOBILIERS CORPORELS, NOUVEAU TEXTE ÉLABORÉ PAR LA COMMISSION ET RAPPORT DE LA COMMISSION (1956) (hereinafter cited as REPORT OF THE DRAFTING COMMISSION). An English translation of the text of the law, also distributed by the Hague secretariat, is published under the title DRAFT OF A UNIFORM LAW ON INTERNATIONAL SALES OF GOODS (1957) and reproduced in 7 INT'L & COMP. L.Q. 3 (1958); quotations of the Uniform Law for International Sales (ULIS) herein will be taken from this version. The 1956 draft was prepared by a Special Commission, designated by the 1951 Hague conference, with 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.

8. If a sales transaction has the specified international character, a court of a country which has adhered to ULIS could apply ULIS even though the transaction ran between other countries which had not adhered to the law. Under article 2 (quoted note 12 *infra*), the international character depends on specified contacts with "different states" without requiring that these states have adhered to the law. This language was deliberately selected. REPORT OF THE DRAFTING COMMISSION 28. For the broad sweep of the rules on choice of law prescribed by the 1953 version of the Uniform Commercial Code see note 1 *supra*.

9. For discussion in American publications of the 1939 draft see Keyes, *Toward a Single Law Governing the International Sale of Goods—A Comparative Study*, 42 CALIF. L. REV. 653 (1954); Rabel, *The Hague Conference on Unification of Sales Law*, 1 AM. J. COMP. L. 58 (1952). For commentary on the current 1956 draft see Lagergren, *A Uniform Law of International Sales of Goods*, 1958 J. BUS. L. 131; Wortley, *A Uniform Law on International Sales of Goods*, 7 INT'L & COMP. L.Q. 1 (1958); Riese, *Der Entwurf zur internationalen Vereinheitlichung des Kaufrechts*, 1957 ZEITSCHRIFT FÜR AUSL. UND INT. PR. 16-116.

A draft of a Uniform Law on the International Sale of Personal Property, prepared by the Inter-American Juridical Committee, was presented at the 1953 meeting of the Inter-American Council of Jurists. See Kuhn, *Draft of an Inter-American Uniform Law on International Sales*, 48 AM. J. INT'L L. 126 (1954); cf. Schroeder,

It is now too early to attempt to answer the ultimate question of whether the United States should adopt the Uniform Law for International Sales. The preparation of a code which will be understandable and acceptable to countries of widely differing legal traditions is a formidable task; in spite of the painstaking work which has already been done, many problems remain. And since the United States has not yet participated in the project, the questions which naturally arise from an American point of view have not yet been presented to the draftsmen.

The issues which are ripe for consideration are these: Is it constitutionally possible for the United States to take part? Does the project embrace a significant and well-designed area? Does the current draft show sufficient promise to justify our interest? What are some of the questions and lines for further improvement suggested by the present draft? Are there lessons of a general nature to be learned from this experiment in the unification of legal rules governing international transactions?

### I. SCOPE OF THE UNIFORM LAW

Overtures to the United States inviting its participation in programs for the unification of law have often been rebuffed on the ground that constitutional power over the problem under consideration has been reserved to the several states and therefore lies beyond the competence of the national government.<sup>10</sup> It therefore is necessary to examine the scope of the Uniform Law for International Sales, both to ascertain the part it would play in our commerce and to provide a basis for assessing the competence of the national government to implement the law. First we shall sketch the rough outline of the scope of the Uniform Law only so far as is necessary to expose the constitutional question; we shall then consider some troublesome problems of interpretation of these provisions which should be considered as the drafting process continues.

Our domestic legislation for unification, such as the Uniform Sales Act, embraces the entire body of state law and thus extends to the purely domestic transactions within each state. On occasion, this pervasive approach to unification has been employed even on an inter-

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*An Inter-American Uniform Commercial Code*, 2 W. RES. L. REV. 42 (1950). The Council resolved, *inter alia*, that the drafting had not been preceded by the necessary study of comparative law, that the Juridical Committee should undertake this study and at the same time should circulate the provisional draft for comment. INTER-AMERICAN JURIDICAL YEARBOOK—1952-1954, at 209-15, 250 (1955). In view of the relatively mature state of the Rome-Hague project, it will be the focus for this discussion.

10. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts To Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954).

national scale, notably through the Geneva Convention of 1930 which has established rules for bills of exchange and promissory notes throughout much of Europe.<sup>11</sup> There is, however, no possibility for the general acceptance of a program to unify the law governing both domestic and international sales transactions. The only available choice is between an indefinite continuation of the present unhappy state of the law and the isolation of the international sale for separate treatment.

The Uniform Law for International Sales (ULIS) operates within a limited field in that it applies only to sales which have a double international aspect: both the *parties* and the sales *transaction* must have a specified international character. This double requirement can best be explained by two examples. *First*: A New York seller and a Boston buyer make a sales contract calling for the shipment of goods to France. In spite of the international shipment, ULIS does not apply since the parties lack the requisite international character. *Second*: A New York seller and a French buyer, through negotiations in the United States, make a contract for the sale of goods which will remain in the United States. Although in this case the parties have the requisite international character, ULIS is not applicable for lack of the second requirement: a specific international character of the transaction.<sup>12</sup>

At one point the draft does reach significantly into internal sales transactions. Under article 8 the parties are presumed to have agreed to the application of the Uniform Law when "the buyer has made known to the seller, before the conclusion of the contract, that the goods bought have been or will be resold under a contract governed by this

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11. See Hudson & Feller, *The International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333 (1931); UNIFICATION OF LAW 270-83 (1948). Numerous fields of law, including sales, have been unified among the Scandinavian countries. *Id.* at 321; *id.* at 487 (1954); *id.* at 277 (1956).

12. ULIS art. 2 reads: "This law shall apply to contracts of sale entered into by parties whose places of business, or in default thereof, whose habitual residences are in the territory of different States, in each of the following three cases:

"(a) when the contract implies that the goods sold shall be carried, or that when the contract was concluded they had been carried, from the territory of one State to the territory of another;

"(b) when the acts of the parties constituting the offer and acceptance have not all been carried out within the territory of the same State; as regards contracts by correspondence, the acts constituting the offer and acceptance are to be considered as having been carried out within the territory of the same State if the correspondence constituting the contract has been dispatched and received within the territory of that State;

"(c) when delivery of the goods has to be made within the territory of a State other than that within which the acts constituting offer and acceptance were carried out."

The first example posed in the text is governed by the opening paragraph of article 2 which states the necessary international character of the parties; the second example is controlled by paragraphs (a), (b) and (c) which enumerate the ways in which the transaction may assume an international character.

law."<sup>13</sup> At this point the draft may reach a transaction which, standing alone, does not involve the international movement of goods but which is included because of its close relationship with another transaction which does have the requisite international character.

### *The Constitutional Question*

As we have seen, the heart of the Uniform Law for International Sales is its application to the typical import or export transaction, involving a seller and buyer located in different countries and the shipment of goods in international commerce. Even without invoking the treaty power, there can be little question of the power of Congress to apply the law to these transactions under its power "To regulate Commerce with foreign Nations." The necessity to act as one nation in dealing with foreign trade was one of the important forces behind the adoption of our Constitution, and from the beginning the Supreme Court has given wide scope to national power over foreign commerce.<sup>14</sup>

The only constitutional question worthy of mention relates to the law's extension to domestic sales between parties who know that the goods have been or will be the subject of an international sale.<sup>15</sup> The draftsmen have concluded that this provision is needed to avoid the difficulty which could arise if, for example, an exporter finds that the obligations imposed upon him in a foreign sale are different from those obtained from his domestic supplier.<sup>16</sup> For reasons which will soon be

13. ULIS art. 8(a). Under article 8(b) a correlative presumption arises in a local sale if the seller has obtained the goods in a transaction which is subject to ULIS and "before the conclusion of the contract, has notified the buyer of the obligations of his own seller and that he has undertaken the same obligations towards his own buyer."

Since article 8 is written in terms of a presumed agreement for applicability of the law, it would appear to be subject to the rule of article 7 that agreements choosing the law are effective when the parties have "their places of business . . . within the territory of *different* states." (Emphasis added.) But the contrary view concerning the need for international parties is expressed by the draftsmen's report. REPORT OF THE DRAFTING COMMISSION 47.

14. U.S. CONST. art. I, § 8: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . ." See 1 FAR-RAND, THE RECORDS OF THE FEDERAL CONVENTION 19, 449-53 (1911); 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1057 (4th ed. Cooley 1873). In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824), Chief Justice Marshall observed: "The genius and character of the whole government seem to be, that its action is to be applied to all external concerns of the nation . . ." The breadth of national power over foreign commerce was generally recognized from the beginning of our constitutional development, and even by judges who then took a more narrow view of commerce among the several states. For collections of cases see 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES §§ 417, 576 (2d ed. 1929); THE CONSTITUTION OF THE UNITED STATES 123 (Corwin ed. 1953).

15. ULIS art. 8, discussed at note 13 *supra*. As was there noted, the law creates only a presumption of an agreement for its applicability, and probably only applies to international parties.

16. REPORT OF THE DRAFTING COMMISSION 47.



stated, this extension presents practical problems of administration which make its wisdom questionable.<sup>17</sup> But if this provision should receive final international approval and should be accepted by the Congress, there should be little question but that this ancillary control would fall within Congress' authority to take action necessary and proper for the effective regulation of foreign commerce.<sup>18</sup>

The Uniform Law, since it would emerge from international diplomatic negotiation, could also be supported by the national treaty power.<sup>19</sup> Although this part of the constitutional structure has recently been a target for criticism, a long and ancient line of decisions of the Supreme Court has made it clear—if indeed the point needs clarification—that the Constitution empowers the nation to deal with problems of international concern by a treaty which has the force of law.<sup>20</sup> Even the narrowest view of the legitimate area for international negotiation would certainly embrace the furtherance of our foreign trade and the removal of grounds for dispute between businesses located in different countries. Thus, whether enacted as legislation or ratified as a treaty,<sup>21</sup> there is no constitutional barrier to considering the proposed Uniform Law on the merits.

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17. See the discussion at note 24 *infra*.

18. The supporting decisions of the United States Supreme Court are legion—ranging from the Shreveport Rate Case, 234 U.S. 342 (1914) (national control of rate for local shipment), through *NLRB v. Fainblatt*, 306 U.S. 601 (1939) (labor relations in plant producing goods for sale in same state), to *United States v. Sullivan*, 332 U.S. 689 (1948) (retail sale of drugs bought from wholesaler in same state subsequent to interstate shipment). Cf. *United States v. Ferger*, 250 U.S. 199 (1919) (national control of issuance of fraudulent bill of lading although issuer did not plan interstate shipment); *Atchison T. & S.F. Ry. v. Harold*, 241 U.S. 371 (1916) (bill of lading covering final intrastate leg of interstate journey).

19. U.S. CONST. art. II, §2: The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . ." *Id.* art. VI: "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land . . . ."

20. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (treaty insured collectibility of alien's debts contrary to state law); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (right of aliens to hold land); *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (treaty overrode state law barring descent of land to alien). Cf. *Missouri v. Holland*, 252 U.S. 416 (1920) (hunting restriction for migratory game). See generally Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952); de Vries, *Universalisme et Unification du Droit aux États-Unis d'Amérique*, 7 REV. INT. DE DR. COMP. 542, 546 (1955).

Significant precedents have been set by American participation in international conventions to unify rules governing the liability of carriers by sea and air. See KNAUTH, *THE AMERICAN LAW OF OCEAN BILLS OF LADING* 118-31, especially 130 (4th ed. 1953); Mankiewicz, *Hague Protocol To Amend the Warsaw Convention*, 5 AM. J. COMP. L. 78 (1956).

21. The greater flexibility in some situations of the legislative approach to uniformity is discussed in Nadelmann & Reese, *The American Proposal at the Hague Conference on Private International Law To Use the Method of Uniform Laws*, 7 AM. J. COMP. L. 239 (1958). Cf. Nadelmann, *Uniform Legislation vs. International Conventions*, in *INTERNATIONAL TRADE ARBITRATION* 167 (Domke ed. 1958).

*Unresolved Problems Concerning the Scope of the Law*

In considering the constitutional power of the United States to share in this project, certain questions of interpretation of the Uniform Law were met but were not explored, for the area of doubt did not carry the law into constitutional difficulty. But, in assessing the advisability of our participation, careful attention must be given to the clarity with which the scope of the law is defined.

Often in the preparation of statutes it is unwise to try to anticipate the wide range of problems which may arise; instead, it may be the better part of statutory wisdom merely to point the way for development of law in the courts. But this restrained approach to drafting is hardly suitable in defining the scope of this law. As is shown by the legal chaos which now exists in foreign trade, uncertainty over which legal regime is applicable casts doubt on every judgment concerning the problem. No pains should be spared to minimize the area of doubt concerning the applicability of the Uniform Law.<sup>22</sup>

For the most part, the scope of the present draft of the law not only is narrow but also is defined with clarity. To be sure, ULIS does take a significant step beyond the narrowest test of an international transaction: a contract requirement that the seller ship the goods across an international boundary. Instead, it is enough if the contract "implies" that the goods "shall be" carried from one state to another; ULIS would thus include transactions in which a foreign buyer arranges for the hauling, as in a contract which contemplates that an American buyer would send his trucks to the factory of a seller in Mexico.<sup>23</sup> This broader reach seems appropriate in view of the importance of international transactions between countries with a common land frontier in which the buyer may readily take delivery at seller's place of business in the buyer's own trucks. Furthermore, only thin technicalities separate transactions in which seller arranges for international shipment at buyer's expense from those in which the buyer handles the transportation through transportation agencies which follow his instructions; the draftsmen in rejecting any such artificial distinction avoided a source of difficulty in the application of the Uniform Law. At first glance one might anticipate difficulty in deciding whether the contract "implies" international shipment when the agreement fails explicitly to state the destination of the goods. But in most cases these doubts will not arise since the necessity for securing clearance of goods through customs, for

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22. See GUTTERIDGE, *COMPARATIVE LAW* 159 (2d ed. 1949).

23. ULIS art. 2, quoted note 12 *supra*. By the same token, ULIS would seem to be applicable to many tourist purchases, such as an American tourist's purchase in Germany of a Volkswagen which he is expected to drive to another country.

which the seller must prepare supporting documentation such as a consular invoice, will clearly brand the international shipment.

Much more troublesome is the extension of ULIS to transactions in which the contract implies that the goods sold "had been carried" from one state to another, thereby embracing sales from stockpiles brought to the buyer's country prior to the making of the contract.<sup>24</sup> At first glance it appears that only the thinnest of technicalities could distinguish between shipments which precede the contract and those which follow, and that therefore both must be governed. However, this extension presents more serious problems of interpretation. Unlike the case of international shipment *after* sale, there is here no need for co-operation between seller and buyer to clear the goods through customs; it thus seems particularly difficult to find tangible evidence of whether a contract "implies" that the goods are of foreign origin. In addition, a foreign seller who sells from local stocks of goods in many cases will be sufficiently identified with buyer's country to become familiar with its laws and customs. Further work on ULIS should give careful consideration to the question whether any advantage from covering transactions in which international shipment precedes the contract is outweighed by the difficulties of administration.

#### *Presumed Agreements for Applicability*

There remains the problem of the workability of provisions, already briefly encountered in connection with the power of the United States to adhere to ULIS, which would extend its scope to certain local sales which precede or follow an international sale. From this point of view we must examine the language of article 8 under which the "parties shall be presumed to have agreed to the application of this law: (a) to sales in which the buyer has made known to the seller, before the conclusion of the contract, that the goods bought have been or will be resold under a contract governed by this law. . . ." As we have seen, this provision has the worthwhile objective of providing a single set of rules for closely-linked domestic and foreign transactions. But this extension of the law would be difficult to administer. One problem arises from the elusive nature of the evidence bearing on the basic question of whether one party has "made known" to the other the existence of the international contract. The Uniform Law, follow-

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24. ULIS art. 2(a), quoted note 12 *supra*. The language of ULIS at this point seems sufficiently broad to catch goods which "had been carried" across an international boundary by any prior owner, no matter how remote from the present transaction. This extreme sweep probably was unintended, and this discussion assumes that at least on this point the current draft will be corrected. It will, however, be remembered that holding that the transaction has the requisite international character meets only one of the two statutory requirements: under article 2 the parties also must have the specified international character.

ing continental commercial practice and recent legislative change in Britain, does not require that the sales agreement be evidenced by any formality such as a writing;<sup>25</sup> and even if there is a written sales agreement, article 8 makes operative communications between the parties "before the conclusion of the contract." Controversy over the existence of such a communication would render doubtful the basic question of the applicability of the Uniform Law; and indeed uncertainty could develop over whether an alleged communication about the related international transaction covered all of the essential facts from which the applicability of the Uniform Law could be deduced. At this point, the draftsmen have attempted to lay down the boundary line for the Uniform Law across a particularly difficult terrain; the benefits of extending the law to local transactions which are closely linked to international sales are almost certainly outweighed by uncertainty concerning the scope of the law.<sup>26</sup>

The fact that the definition of the scope of the law needs further attention is, of course, no reason for discouragement. The typical import and export transactions are clearly covered and foreign trade thereby is removed from the embarrassments resulting from the competing claims of national legal systems and from collision with a legal system which was not designed either to be intelligible to foreigners or to meet the peculiar needs of foreign trade. The unsolved problems seem susceptible of solution as the drafting process continues; the Uniform Law can provide a workable basis for separating from the mass of domestic sales the international transaction requiring special treatment.

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25. ULIS art. 19, quoted note 27 *infra*. Britain's repeal of the statute of frauds for sale of goods was effected by the Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, ch. 34, § 2. For some of the background for this step see Law Revision Committee, *Sixth Interim Report*, [1937] 2 Weekly N. 284, 285. Cf. *Second Report, Mercantile Law Commission*, 354 PARL. PAPERS 6 (1855); Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 433 (1950).

Although there seems little reason to question the strong trend towards removing formal requirements surrounding the making of sales contracts, for reasons which have already been suggested any area of doubt as to the choice of law should be avoided wherever possible. Compare the 1956 Draft Convention on the Jurisdiction of the Selected Forum in the Case of International Sales, which in article 2 requires written evidence of an agreement selecting the forum. See 5 AM. J. COMP. L. 653 (1956) (English text).

26. Article 9 sets the basic scope of the law. It applies to "sales of goods"; it does not apply, *inter alia*, to "stocks and shares, negotiable instruments or money" or to "registered ships, vessels used in inland navigation or aircraft." Under article 10, the fact that seller is to manufacture or produce the goods does not remove the transaction from the law "if the party undertaking delivery is required to supply the raw materials needed for such manufacture or production." But, as under the Uniform Sales Act, there can be doubt concerning contracts for the affixation of materials to realty, such as the erection of a plant and installation of machinery in a building, and also transactions in which the seller's services are predominant, such as repair of machinery and painting and repair of buildings. The Uniform Commercial Code has removed some but not all of these problems. See UCC §§ 2-105(1), -107.

### *Aspects of Sales Law Covered*

Several important problems which may arise in sales transactions have not been dealt with by the Uniform Law for International Sales because of the peculiar difficulties anticipated in reaching international agreement. There are in fact ample reasons for legislators to undertake to unify divergent national rules on the formation of international contracts, such as the conflicting rules on the revocability of offers. Indeed, some of these problems which lie at the root of the very existence of a contract need greater help from positive rules of law than many questions arising in the administration of the sales contract, since these latter questions, when anticipated by alert counsel, can be avoided by careful drafting of the agreement. Nevertheless, most of the problems concerning the making of the contract have been excluded from the present draft.<sup>27</sup> The same self-restraint was practiced by the older Anglo-American codifications, the Sale of Goods Act<sup>27a</sup> and the Uniform Sales Act. Although the sales article of the Uniform Commercial Code has dealt with several of these troublesome questions,<sup>28</sup> one cannot criticize the draftsmen of the Uniform Law for International Sales for declining to take this bolder course. If further collaboration in the unification of law produces a climate favorable to wider agreement, attention can then turn to the project, which is still in an early stage, for a convention on the making of international contracts by correspondence.<sup>29</sup>

The scope of the Uniform Law for International Sales was further restricted by the decision to focus on the mutual obligations of the seller

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27. ULIS art. 12. The question of the legality of the contract is also remitted to domestic law. *Ibid.* These general provisions are, however, qualified by article 19 which provides: "No particular form is required for a contract of sale. It may be proved by means of witnesses." This article would permit the enforcement of oral agreements which, in most of the states, are subject to a statute of frauds. Cf. USA § 4; UCC § 2-201. ULIS also seems to lay down a rule concerning the validity of contracts in article 67: "The parties may not plead any rule of municipal law which renders invalid a contract which does not stipulate a price."

27a. 1893, 56 & 57 Vict. ch. 71, §§ 16-20.

28. *E.g.*, UCC §§ 2-202 (parol evidence), 2-204 (formation; definiteness), 2-205 (nonrevocability of certain offers), 2-206 (offer and acceptance; acceptance by different medium than offer), 2-207 (additional terms in acceptance or confirmation), 2-302 ("unconscionable" contracts outlawed). Some of these sections, especially 2-207 and 2-302, have proved to be among the most controversial of the code.

29. A preliminary draft of a Uniform Law on International Contracts Made by Correspondence (1936) was prepared in conjunction with early drafts of the Uniform Law for International Sales. UNIFICATION OF LAW 25-27, 71-83, 160-67 (1948) (text of draft). After the decision of the Special Commission on Sales not to include this material in ULIS, the Rome Institute set up a special committee to carry this work forward. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, REPORT OF ACTIVITY 9 (1956). This committee's draft of April 1958 proposed a uniform law limited to the making of contracts for the international sale of goods. Article 2 states that this law would apply to contracts which are governed by the Uniform Law for the International Sale of Goods (ULIS). U.D.P. 1958—Études XVI/A, Formation des Contrats—Doc. 10. These two projects are thus intimately linked, and could at a later stage readily be merged.

and buyer, and to exclude problems of the claims against the goods by third parties such as creditors.<sup>30</sup> This decision also is consistent with our own experience with unification. The Uniform Sales Law, while incorporating by a rather vague reference the confusing common-law doctrines on bona fide purchase,<sup>31</sup> expressly left the question of the rights of sellers' creditors to the conflicting rules of the various states.<sup>32</sup> It is certainly too early in the international field to hope for successful unification of the rules affecting the rights of third parties, although, as in the case of the making of international contracts, this problem is receiving attention.<sup>33</sup>

In general, the Uniform Law for International Sales deals with those problems of sales law which are covered by the Uniform Sales Act: seller's obligations with respect to delivery and quality of the goods; the circumstances governing buyer's obligations to pay the price; transfer of risk of loss; responsibility to take care of rejected goods; remedies for breach. Its style is not alien to an American lawyer. More fully articulated than highly generalized formulations like the French Civil Code, in length and approach it is not unlike the Uniform Sales Act. There is, however, a significant difference in style at some points where the necessity to hammer out a draft which would be clear to the various members of an international drafting group has rubbed away the metaphysics which in the course of time have developed around local formulations. In Rabel's vigorous language, the draft abandons "awesome relics from the dead past that populate in amazing multitude the older codifications of sales law."<sup>34</sup> Although we shall encounter a

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30. ULIS art. 12: "This law shall govern only the duties of the seller and the buyer arising from a contract of sale; in particular, it shall not be concerned . . . with the effect the contract may have on the ownership of the goods sold . . . ." ULIS does deal with other problems, such as risk of loss, which Anglo-Americans are accustomed to relate to the "property" concept. ULIS arts. 109, 110 (risk of loss). See text accompanying note 54 *infra*. Cf. arts. 62, 63 (seller's obligation to the buyer that the title be good). For the decision in Scandinavian and German Law formulations to focus on the obligations of the immediate parties to the sales contract see LAGERGREN, DELIVERY OF GOODS AND TRANSFER OF PROPERTY AND RISK IN THE LAW OF SALE (1954); Cohen, *A Unified Law of Sale of Goods*, 21 J. COMP. LEG. & INT'L LAW (3d ser.) 244 (1939); Lawson, *The Passing of Property and Risk, A Comparative Study*, 65 L.Q. REV. 352, 358, 362 (1949).

31. The preservation in § 24 of the Uniform Sales Act of the question-begging distinction between void and voidable titles hardly served to unify the law of bona fide purchase. See 2 WILLISTON, SALES §§ 346-48 (rev. ed. 1948).

32. USA § 26. Cf. UCC § 2-402.

33. An attempt to unify the rules on choice of law is reflected in the draft convention on the Law Governing Transfer of Title in International Sales of Goods, approved at the 1956 Hague Conference on Private International Law. For the text see 5 AM. J. COMP. L. 650 (1956), discussed by Reese, *supra* note 1.

34. Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 61 (1952). See also Ekeberg, *The Scandinavian Cooperation in the Field of Legislation, in UNIFICATION OF LAW* 321, 337 (1948) (clarity resulting from international cooperation in drafting).

few more relics which could well be abandoned, the drafting has already brought clarity to several problems which are surrounded by fog in local formulations. The result may be of value in clarifying our law even for domestic purposes; it certainly is an advantage for transactions in which understanding must reach across diverse legal systems.

## II. A SAMPLING OF THE SUBSTANTIVE RULES OF THE UNIFORM LAW

It is not, of course, feasible to survey here the entire draft of the Uniform Law for International Sales. But some appreciation of its approach and method can be gained by examining its handling of two significant problems: seller's obligation with respect to the quality of the goods and risk of loss.

### *The Quality of the Goods*

Although the provisions of ULIS on the problems which we relate to the concept of "warranty" are not its most striking or controversial features, we must consider them briefly for they underlie the basic rights and remedies of the parties and thus are of concern to traders whose transactions would be governed by the law.

Unfortunately, no statute can provide ready-made or easy answers to the basic question concerning the quality of goods required under sales contracts. The most that any statute can do is to remove barriers which would interfere with a mature and flexible interpretation of each contract in the light of mercantile understanding. Strangely enough, prevailing sales law needs help even to reach this goal. It is perhaps ironic that English case-law at one point came close to reaching the simplicity and the flexibility needed for handling sales contracts when in 1877 Judge Brett wrote that there is one rule which "comprises all the others": the goods must answer "the real mercantile or business description" which is "contained in words in the contract, or which would be so contained if the contract were accurately drawn out."<sup>35</sup> But the law became complicated as judges, in the course of distinguishing unwanted precedents, created separate types of implied warranty surrounded by technical and artificial rules. Codifiers conscientiously trying to preserve rather than to reform perpetuated these technicalities.<sup>36</sup> Thus, dealers are subjected to a warranty of "merchantable quality" the scope of which can only be dimly appreciated by going

35. *Randall v. Newson*, 2 Q.B.D. 102 (1877).

36. Chalmers, in drafting the British Sale of Goods Act, 1893, followed instructions to "reproduce as exactly as possible the existing law." CHALMERS, *SALE OF GOODS ACT* at viii (12th ed. 1945) (introduction to 1st ed.).

through a mass of case-law. And under the Uniform Sales Act this important warranty arises only when the sale is "by description," a requirement on which even the case-law sheds only darkness. A separate warranty of fitness for purpose depends on a showing of specified communications between buyer and seller and buyer's reliance on the seller's skill and judgment; but this warranty is subject to a limitation in the case of sales under a patent or other trade name which is so inconsistent with the rest of the statute that the limitation has been read out of the statute by most of the decisions.<sup>37</sup> Although students of sales law in this country can be trained to cope with these mysteries the dismay of a foreign lawyer who must wrestle with these problems has to be seen to be appreciated. Through an interesting parallel development, continental sales law has been similarly embarrassed by technicalities surrounding the notion that an obligation as to quality is a collateral guaranty separate from the sales contract; students of the common law who try to make their way through the resulting confusion will not emerge soon or with substantial enlightenment.<sup>38</sup>

The Uniform Law for International Sales fortunately escapes much of this difficulty; its basic rules are simple, and would perhaps appear insignificant to one who has not struggled through the technicalities of the present law. Under the Uniform Law the seller is obliged to deliver goods which "possess the qualities and characteristics expressly or impliedly contemplated by the contract."<sup>39</sup> These few words provide a

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37. The warranty of "merchantable quality" and the "by description" mystery are embodied in USA §15(2). On the problems of the latter see 1 WILLISTON, SALES §§ 224-25 (rev. ed. 1948); cf. HONNOLD, SALES AND SALES FINANCING 60-62 (1954). On the "trade name" problem under USA §§ 15(1) and (4) see 1 WILLISTON, SALES § 236(a) (rev. ed. 1948). The Uniform Commercial Code cuts through most of this thicket. See UCC §§ 2-312 through -315. See State of New York, Law Revision Commission, *Study of Uniform Commercial Code, Article 2—Sales*, LEG. DOC. NO. 65(C) at 52-69 (1955).

38. Under the Civil Code of France and of those countries which follow its formulations, it is necessary to distinguish between: (a) an action for failure to perform an *obligation* (art. 1134) (compare our action based on "express warranty"); (b) actions based on existence of a hidden defect (*vice caché*; art. 1643) (compare our "implied warranties"); and (c) disappointment of buyer's expectations which give rise to an action for *erreur* (arts. 1109-10, 1117). These various actions are based on different showings, and are governed by distinct rules governing the speed within which the buyer must act and the amount of recovery. See HAMEL, 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS §126 (2d ed. 1956); MORROW, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327, 329 (1940); RABEL, *The Nature of the Warranty of Quality*, 24 TUL. L. REV. 273 (1950). See REPORT OF THE DRAFTING COMMISSION 31.

39. ULIS art. 40(5). Local complications are further reduced under article 41, which excludes remedies available under local law (such as mistake) from the circumstances covered by article 40. See note 38 *supra*. It is, however, somewhat surprising that under the language of article 41 this unifying principle applies to "the circumstances to which the foregoing Article relates," and thus might not apply to the following articles 42-44 on sales by sample or model. Perhaps in view of article 43 the "undertaking" that goods conform to a sample may be deemed one of the constructed obligations covered by article 40. Cf. UCC § 2-312(1)(c) (1952).



basis for a unified, powerful and realistic approach to a solution to the most pervasive problem of sales law. The most important part of this rule, of course, is the enforcement of implied contemplations of the parties. Especially in hurried mercantile transactions, often effected by cable, it is not practicable to articulate all of the reasonable expectations of the parties. In fact, some of the most important understandings are not expressed simply because they are so basic that they are taken for granted: for this reason an order for a piece of machinery may not specify that it will perform in a manner customary for that kind of machinery or that steel beams will be free of flaws which impair the strength of material of this type. Further, the general principle incorporated in ULIS seems to be the only line of thought capable of rationalizing case law under the Uniform Sales Act which holds goods of very low quality to be "merchantable" under one contract while holding goods of reasonably good quality "unmerchantable" in light of the stronger expectations reasonable in another contractual setting.<sup>40</sup>

These few words giving legal effect to the express and implied expectations of the parties under the contract, if fully understood, would probably be sufficient. But to avoid misunderstanding by those accustomed to more detailed formulations, ULIS adds, in a manner reminiscent of the implied warranties of the Uniform Sales Act, that compliance with the contract includes the obligation that the goods possess the qualities "necessary for their ordinary or commercial usage," or for "some particular purpose expressly or impliedly contemplated by the contract."<sup>41</sup> But the ULIS emphasizes, more helpfully than existing formulations, that in a society in which an almost infinite variety of goods must compete there is no place for abstract or doctrinaire standards for quality: the only satisfactory point of reference is the contract in question, construed in the light of those expectations which are reasonable in the particular contractual setting.

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40. This basic test of ULIS also seems consistent with the distinctions which have been developed to determine whether goods are subject to a "defect" (*vice*) under formulations like the Civil Code of France. See CODE CIVIL arts. 1625, 1641-43 (Fr. 53d ed. Dalloz 1954). HAMEL, *op. cit. supra* note 38, § 128.

41. ULIS art. 40(3), (4). At this point, ULIS makes one rather surprising retreat from its policy to frame only general rules. All of the law's rules implementing implied understandings, as set forth in article 40(3)-(5), are by article 13 made inapplicable "to sales of living animals." The draftsmen state that the degree of national legislation makes unification impracticable. REPORT OF THE DRAFTING COMMISSION 48-49. Cf. HAMEL, *op. cit. supra* note 38, §§ 125, 362-81 (special rules in France concerning sales of domesticated animals). The present draft, in enforcing certain express obligations and excluding implied obligations could be interpreted as establishing an international rule of *caveat emptor*, at least where no national legislation applies. The 1939 Rome Draft (art. 3) avoided this problem by excluding the entire domain of quality obligations concerning living animals from the scope of the Uniform Law. The present draft requires further attention at this point.

This general endorsement of seller's duty to comply with the implied obligations contemplated under the contract provides a strong basis for protecting the interests of buyers. But lest buyers be given a basis for imposing immaterial or trivial objections to seller's performance, ULIS adds the important rule that no deviation of quality or quantity "shall be taken into consideration where it is not material to the interests of the buyer or where it is permitted by usage."<sup>42</sup> An examination some years ago of trade practice in this country disclosed that the problem of rejection for immaterial deviations from the contract, on which buyers tend to seize in a falling market, had led to the adoption of trade rules and contracts specifying permissible leeway.<sup>43</sup> ULIS thus, in addition to a strong provision giving binding effect to usages of the trade,<sup>44</sup> strikes a balance between the substantial interests of sellers and buyers which is in accord with business practice and the basic expectations of the parties. Although, as we have seen, precise rules are impossible, the Uniform Law removes technical difficulties with which the prevailing law has become encrusted. ULIS certainly would provide a more helpful route to a solution of these problems than is presently open in view of the confusion which arises both in deciding which national law governs and in applying an unfamiliar foreign legal system.

### *Risk of Loss*

Risk of loss presents the draftsmen of the Uniform Law with their most significant and challenging opportunity for improvement. The importance of the solution lies in the fact that, in spite of the widespread practice of carrying insurance, there remain the highly practical prob-

42. ULIS art. 40, para. 2.

43. Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457, 464-66 (1949). This same trade policy is reflected in the standard contracts recently prepared under the auspices of the Economic Commission for Europe. See note 2 *supra*.

ULIS also has rather elaborate provisions which restrict buyer's power to reject where seller's breach is not "fundamental." In these cases ULIS, borrowing the German idea of *Nachfrist*, empowers the buyer to set a new reasonable time for performance after which time the buyer may refuse to accept the goods. See ULIS arts. 15 (definition of "fundamental" breach), 30 (non-fundamental breach as to time), 35 (place), 53 (opportunity to replace or repair defective goods). Unlike the Uniform Sales Act, the Uniform Commercial Code contains provisions designed, in a few situations, to limit rejection for minor deviations. UCC §§ 2-608 (revocation of acceptance); 2-612 (installment contracts); 2-508 (cure of improper tender or delivery). On the rather awkward French rules, which may call for court intervention in situations in which under American law and under ULIS a simple notice by buyer may suffice, see HAMEL, *op. cit. supra* note 38, §§ 79-82, 134.

44. ULIS art. 14(a). On some of the problems of giving effect to custom under existing law see Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192 (1955); Honnold, *Letters of Credit, Custom, Missing Documents and the Dixon Case*, 53 COLUM. L. REV. 504 (1953).

lems of identifying the obligation to take out insurance, to press a claim against the insurer, and to salvage damaged goods.

Traditional formulations of the law are not wholly satisfactory for domestic commerce and are glaringly deficient for ocean shipments. For historical reasons, the Uniform Sales Act approaches this and other problems through the concept of "property"; subject to various exceptions, one starts from the proposition that the party who has "property" in the goods bears the risk.<sup>45</sup> Since businessmen do not often draft their hurried sales contracts in the light of this abstract concept, the act sets forth a set of "presumptions" concerning their "intent" as to the location of property, but the rules are complex and often call for speculation concerning elusive or nonexistent states of mind, such as the "implied assent" by one party to "appropriation" by the other.<sup>46</sup> The difficulty of applying these various rules to concrete situations is aggravated by the failure of the rules to express or to reflect practical reasons for allocating risk to one party rather than the other.

The Uniform Commercial Code sweeps the property theory aside, and lays down rules specifically devoted to allocating risk in terms of the physical acts done in the performance of sales contracts.<sup>47</sup> In most cases the results are not different from those which may be reached under the Uniform Sales Act. But a striking gain in clarity and predictability flows from dealing with risk as a separate problem; and in formulating policy the attention to only one problem at a time produces results which are better adapted to the problem at hand.

The Uniform Law for International Sales employs an approach which falls between that of the Uniform Sales Act and the Uniform Commercial Code. The new law does not employ the general concept of "property," nor does it deal separately with the problem of risk. Instead, to provide a fulcrum for allocating risk and for approaching certain other problems of performance, the law creates a concept which, in the original French text, is called "délivrance" and which the English translation renders as "delivery." But it is hazardous to use this rather simple English word, which suggests merely a transfer of possession, to encompass the complex mixture of fact and law which is

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45. USA § 22. Exceptions are stated in §§ 22(a) and 20(2) (reservation of title for security does not hold risk on seller) and § 22(b) (party who delays delivery has risk with respect to loss which might not otherwise have occurred). Cf. Sale of Goods Act, 1893, 56 & 57 Vict. ch. 71, §§ 16-20.

46. USA § 19, rules 4(1) and (2).

47. The Uniform Commercial Code devotes two sections (2-509 and 2-510) to the problem of risk. The events which are determinative are receipt of the goods, tender of delivery (by a non-merchant), shipment of the goods, and breach of contract. For a comparison of the approach of the Uniform Sales Act and of the code see Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROB. 3 (1951).

implicit in the Uniform Law's concept of "délivrance." The basic definition of "délivrance" is the "handing over of goods which conform with the contract. . . ." <sup>48</sup> This reference to the "handing over" of the goods suggests that there must be actual physical delivery to a buyer who accepts possession.<sup>49</sup> But under this language physical delivery even into the buyer's hands does not achieve "délivrance" in any case in which the goods fail to "conform with the contract"; at this point one is tempted to think of "délivrance" as the same as seller's "performance" of his contractual duties. But this rendering also is inaccurate, since seller may fully perform his contractual duties by tendering the goods to an unwilling buyer; this, however, is not "délivrance" since there has been no "handing over" of the goods. Unhappily, the definition must be further elaborated for the usual case which calls for shipment of the goods. In this event, subject to several exceptions, "délivrance" occurs when the goods are "handed over to the carrier."<sup>50</sup> In this situation also, the English term "delivery" can be misleading since the goods have certainly not reached the buyer, and in maritime shipments often they will be in the exclusive control of the seller through his retention of a negotiable bill of lading.

The difficulty does not lie in the translation. No adequate English word appears to be available and, indeed, the translation of the Uniform Law into other languages encountered difficulty at this point.<sup>51</sup> To avoid confusion we are forced to the rather uncouth expedient of adhering to the original term *délivrance* in discussing this basic concept of the Uniform Law.

The law's use of *délivrance* and its allocation of the risk of loss can be introduced by an example drawn from the venerable case of *Tarling v. Baxter*.<sup>52</sup> As generations of students have learned, the case concerned a stack of hay which, under the agreement of sale, the buyer could take away only after payment which was due over a month later. During

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48. ULIS art. 20. For the effect of *délivrance* on risk, see arts. 110, 111 discussed at p. 319 *infra*.

49. Under article 19 of the 1939 Rome draft, "délivrance" apparently did not require delivery of the goods out of the seller's possession when the seller performed all of the acts required of him. The new language of article 20 of the 1956 draft, in requiring *la remise* ("handing over") of the goods reflects a deliberate change in approach. See REPORT OF THE DRAFTING COMMISSION 32; Graue, Book Review, 5 AM. J. COMP. L. 141, 143 (1956).

50. ULIS art. 21, para. 1.

51. Institut International L'Unification du Droit Privé, Coordination des Traductions du Project 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.).

52. 6 B. & C. 360, 108 Eng. Rep. 484 (K.B. 1827). The discussion in the text simplifies the facts which, in the actual case, are complicated by buyer's delivery to seller of a bill of exchange which the seller had negotiated to a third party.

this period, the hay burned. Many will recall the decision that "property" passed to the buyer on the making of the contract, and that the buyer consequently was obliged to pay the price although he received no hay. A rule of law based on the case was codified in the Sale of Goods Act and in turn was carried into the Uniform Sales Act.<sup>53</sup>

Under the Uniform Law for International Sales the result is different. Our starting point is the general rule that risk passes to the buyer on *délivrance*.<sup>54</sup> As we have seen, in this situation *délivrance* requires the "handing over" of the goods to the buyer; while the goods remain with the seller before the date on which buyer is obliged to take the goods, the seller retains the risk of loss. This result, which is also that of the Uniform Commercial Code,<sup>55</sup> seems distinctly preferable to that of the older Anglo-American law. The question is, of course, simply one of allocating risk; in the absence of an agreement or other controlling circumstance to the contrary, the risk should be borne by the party who can best guard against it. Usually, the one in possession and control of goods is in the best position to guard against their loss and also to insure the goods under standard policies covering buildings and their contents.<sup>56</sup>

The scene changes radically if either party fails to perform his contract. Even in the absence of *délivrance*, risk will pass to the buyer "as from the date in which *he is in delay* in accepting delivery of goods."<sup>57</sup> Conversely, as we have already seen, the seller makes *délivrance* only by handing over goods "which conform with the contract"; thus, the fact that goods are defective when delivered to a carrier prevents the risk of loss in transit from shifting to the buyer. This rule is consistent with results which are possible under the Uniform Sales Act and with explicit provisions of the Uniform Commercial Code.<sup>58</sup> Indeed, any other result would impose on buyers the respon-

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53. Sale of Goods Act, 1893, 56 & 57 Vict. ch. 71, § 18, rule 1; USA § 19, rule 1.

54. ULIS art. 109.

55. UCC § 2-509(3). If seller is a merchant, risk passes only on "receipt" of goods by the buyer, and otherwise on tender of delivery.

56. Insurers can cover risks more safely and thus more cheaply if they know the type of building (concrete versus wood or thatch) and the type of goods customarily stored there (iron versus gasoline). Only the possessor can insure on the basis of known risks.

57. ULIS art. 110. (Emphasis added.) Cf. USA § 22(b); INCOTERMS (1953): "F.O.R.—F.O.B.," ¶ B5 (when buyer's failure to give necessary shipping instructions delays shipment he shall bear "all risks of the goods from the expiration of the period fixed" for his action); "F.A.S.," ¶ B4; "F.O.B.," ¶ B4; "C.I.F.," ¶ B4.

58. USA § 19, rule 4(1) (appropriation of the contract "description and in a deliverable state"). UCC § 2-510(1) provides more explicitly: "Where a tender or delivery of goods *so fails* to conform to the contract *as to give a right of rejection* the risk of their loss remains on the seller until cure or acceptance." (Emphasis added.) This language, which modified earlier versions of the code so as to relieve sellers from the excessive sanction of rejection for immaterial deviation from

sibility for goods which are both damaged and defective, whereas if there were no damage in transit the buyer could reject the goods for non-conformity with the contract.

Although there are points in the present draft at which one might be tempted to work for improvement, it is evident that these basic rules achieve a workable and fair allocation of the problem of risk and certainly are more understandable to merchants from differing legal systems than the antique and conflicting doctrines which now prevail.<sup>59</sup>

### *Maritime Shipments and International Trade Terms*

The problem of risk of loss in maritime shipments is particularly stubborn. The Uniform Sales Act, operating through the property concept, lays down presumptions under which risk passes to the buyer when the goods are shipped, unless the contract requires the seller to deliver the goods to the buyer or to pay the freight.<sup>60</sup> Even in land commerce this rule encounters difficulty since freight expense may be shared or absorbed by the seller without reasonable expectation of assuming transit risks.<sup>61</sup> And in ocean shipments a number of practical considerations—the widespread use of insurance, the frequent payment against documents (including an insurance policy) prior to the arrival of the goods, the difficulty of inspection prior to unloading—have led to the firm custom that under the widely-used C.I.F. and C. & F. quotations, risk during shipment falls on the buyer even though the price covers the cost of ocean freight. This understanding, flatly contrary to the presumptions of the Uniform Sales Act, has been given effect by judicial decisions and is clearly articulated in the standard definitions developed by foreign traders.<sup>62</sup>

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the contract, might well be considered in connection with continued work on the Uniform Law for International Sales. See the comments of this writer in State of New York, Law Revision Commission, *Study of Uniform Commercial Code, Article 2—Sales*, LEG. DOC. No. 65(C) at 494-95 (1955).

59. On possibilities for improvement see note 58 *supra*, and the discussion of the concept of *délivrance infra* at pp. 324-26. ULIS is, in fact, even simpler than the UCC since it avoids several nice but troublesome distinctions which must be drawn in solving problems of risk under the Code, *e.g.*: (a) The distinction between merchants and non-merchants under UCC § 2-509(3) which brings into play the loose definition of "merchant" in § 2-104(1); (b) The transfer of risk to buyer for a commercially reasonable time under UCC § 2-510(3) even prior to the stated date for delivery or transfer of risk if buyer "repudiates or is otherwise in breach."

60. USA § 19, rules 4(2), (5).

61. NATIONAL FOREIGN TRADE COUNCIL, INC., REVISED AMERICAN FOREIGN TRADE DEFINITIONS—1941, II-C: "F.O.B. Freight Allowed" (the stating of a F.O.B. point expresses intent for the passage of risk at this point, in spite of the seller's absorption of freight expense); *Cf. Id.* II-F: "F.O.B. (named inland point in country of importation)"; INCOTERMS (1953): "Freight or Carriage Paid to . . ." (transit risk on seller in spite of his assumption of freight expense, even in absence of specific term such as F.O.B. shipping point).

62. *Seaver v. Lindsay Light Co.*, 233 N.Y. 273, 135 N.E. 329 (1922); *Smith Co. v. Marano*, 267 Pa. 107, 110 Atl. 94 (1920); NATIONAL FOREIGN TRADE COUNCIL, INC.,

The unsuitability of the Uniform Sales Act for foreign trade has long been recognized. Over twenty years ago, dissatisfaction with the act in this area led to a project for a federal sales act which, after various vicissitudes, finally grew into the Uniform Commercial Code.<sup>63</sup> Consistent with this background, the code has many provisions which deal with the practices peculiar to foreign trade, including detailed definitions of the implications and legal consequences of several of the trade terms such as "C.I.F." which are common to foreign commerce.<sup>64</sup>

At this point, the draftsmen of the Uniform Law for International Sales have faced a troublesome question: How much detail concerning the implications of the various foreign trade terms should be incorporated into the law? The amount of detail which might be employed is suggested by the fact that the Uniform Commercial Code devotes five pages to the implications of foreign trade terms; both *Incoterms* and *Revised American Foreign Trade Definitions* require substantial booklets. The difficulty of the problem of statutory drafting is indicated by the fact that the 1939 Rome draft contained brief provisions dealing specifically with F.O.B., C. & F. and C.I.F. terms, but the 1951 Hague Conference properly concluded that this abbreviated handling was inadequate. The draftsmen then decided that it would be unwise to attempt to incorporate into the law a complete statement of the complex connotations of the various forms of price quotations and that no special reference to them should be made.<sup>65</sup> Instead, they have attempted to solve the basic problems through brief and general rules.

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REVISED AMERICAN FOREIGN TRADE DEFINITIONS—1941, IV: "C. & F."; *id.* V: "C.I.F."; INCOTERMS (1953): "C. & F.," ¶B-3; "C.I.F.," ¶B-3. Risk remains on the seller during ocean transit under the quotation "Ex ship . . . (named port of destination)." *Id.*: "Ex Ship."

63. In 1936 a committee of The Merchants' Association of New York prepared a draft of a federal sales act; this project was later suspended in favor of a revision of the Uniform Sales Act, around which the Uniform Commercial Code grew. See Thomas, *The Federal Sales Bill as Viewed by Merchant and Practitioner*, 26 VA. L. REV. 537 (1940); Lewis, *The Proposed New Commercial Code*, 20 PA. B.A.Q. 131, 134 (1949). Much earlier Professor Williston had drafted a federal sales act which included provisions designed to meet the problems of international trade; in 1922 this bill was approved by the American Bar Association. 47 A.B.A. REP. 52, 288 (1922).

64. UCC §§ 2-319 to -325. Cf. Ward & Rosenthal, *The Need for the Uniform Commercial Code in Foreign Trade*, 63 HARV. L. REV. 589 (1950). The problems of letters of credit, which play a central part in international sales, are the subject of article 5 of the code; article 7 contains numerous detailed provisions on bills of lading which are important to foreign trade.

65. HAGUE CONFERENCE—1951, ACTE FINAL pt. X, at 277 (1952); REPORT OF THE DRAFTING COMMISSION 43. Part of the problem may lie in the fact that merchants on the two sides of the Atlantic have yet to reconcile the differences between Revised American Foreign Trade Definitions and Incoterms. See Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 62 (1952) (barriers towards more complete unification may be removed with the increasing use of Incoterms).

There are reasons which support this choice. The attempt to lay down statutory definitions for terms used in contracts suffers from an inherent difficulty: In a contract, as elsewhere, the meanings of words reflect the settings in which they are used and the practices out of which they grow. A statutory formulation may be too rigid for the variegated and changing practices of commerce.<sup>66</sup>

Against this difficulty, however, must be balanced the danger that it may not be possible to lay down brief general rules on risk in international shipments which will have sufficient content to be helpful. The problem is sufficiently important and suggestive of wider problems of statutory draftsmanship to warrant further examination.

As we have seen, under the ULIS risk passes when the seller accomplishes *délivrance*, and if the contract calls for shipment, *délivrance* occurs "when the goods are handed over to the carrier."<sup>67</sup> This test provides a clear and realistic starting point for the solution of problems of risk in the vast majority of international transactions which call for shipment of goods to the buyer. The "handing over" of the goods to a carrier is a clearly defined physical event which is usually sharply identifiable and lends itself to clear translation in a multilingual international statute.<sup>68</sup> In addition, there is a body of mercantile practice

66. The Uniform Commercial Code has gone quite far in providing statutory definitions for contract terms. Several relate to quotations often employed in foreign trade. UCC §§ 2-319 ("F.O.B." and "F.A.S."), 2-320 ("C.I.F." and "C. & F."), 2-322 (delivery "Ex-ship"), 2-324 ("No Arrival, No Sale"), 2-325 ("Letter of Credit," "Confirmed Credit"). In addition, the code sets forth certain phrases which when used in contracts will negate implied warranties. UCC § 2-316(2), (3)(a). Unless these statutory definitions of terms, which will appear in a wide variety of contractual settings, are handled with restraint they can lead to interpretations quite out of harmony with the understandings of the parties who employ them. See the comments of this writer in State of New York, Law Revision Commission, *Study of Uniform Commercial Code, Article 2—Sales*, LEG. DOC. NO. 65(C) at 408-09, 431-32 (1955). Cf. Gower, *F.O.B. Contracts*, 19 MODERN L. REV. 417, 418 (1956).

67. ULIS art. 21 provides: "Where the contract of sale implies the carriage of the goods, unless it is provided that delivery is to be effected at the place of destination, delivery shall be deemed to take place when the goods are handed over to the carrier. When some part of the carriage has to be effected by the seller in his own transport or in transport hired by him on his own account, delivery shall take place when the goods are handed over to the carrier with whom a contract of carriage has been made on the buyer's account. Should the carriage of the goods have to be effected by several carriers acting successively, and the contract of sale thereby require the seller to make one or more contracts to cover the whole of the carriage, delivery shall be accomplished by handing over the goods to the first carrier. . . ."

"Where the carrier to whom, in accordance with the provisions of the first paragraph, the goods have to be handed over is a carrier by water, delivery shall be effected either by placing the goods on board ship or by placing them alongside, whichever the terms of the contract provide, unless the seller shall be entitled, according to the terms of the contract or usage, to present to the buyer a received for shipment bill of lading or other similar document."

68. ULIS art. 21, quoted note 67 *supra*. ULIS deals separately (arts. 59-61) with the obligations of the parties concerning the transfer of documents relating to the goods. ULIS thereby happily avoids the problem, encountered in Anglo-American formulations, as to whether the documents embody the "property" in the goods and



which suggests that the allocation of transit risks to buyers reflects significant practical considerations.<sup>69</sup> The buyer, who is in the presence of the goods and the carrier when the damage is discovered, is usually in a better position to negotiate the settlement of a claim against a carrier or insurer than is a distant seller. If, as is often the case, the damage during transit is minor or relates to only part of the goods, the buyer can more conveniently salvage the goods; this result also tends to reduce the grounds for rejection of goods by buyers who find that the transaction has become unprofitable during the period required for shipment and who could by rejection force the seller into the awkward position of choosing between redisposing of the goods in a distant market and negotiating with the buyer for their redistribution at a disadvantageous price.

The complexities of mercantile practice, unhappily, have not permitted the draftsmen of the Uniform Law for International Sales to stop with the simple and clear rule which we have just examined. One troublesome problem arises with respect to initial movement of the goods preliminary to their delivery to a carrier, such as hauling the goods to the railroad in seller's trucks or through the instrumentality of a freight forwarder. In an apparent attempt to deal with such problems, the ULIS states: "When some part of the carriage has to be effected by the seller in his own transport or in transport hired by him *on his own account*, delivery shall take place when the goods are handed over to the carrier with whom a contract of carriage has been made *on the buyer's account*."<sup>70</sup> This language, in actual application, could be troublesome, for the distinction between shipment on the seller's "account" and shipment on the buyer's "account" carries legal overtones which come close to begging the question of responsibility, and which, like all terms with doctrinal implications, presents special difficulties for a multilingual international statute which must be understandable in the light of

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thereby affect risk of loss and other legal attributes associated with the "property" idea. See notes 45, 47 *supra*; 2 WILLISTON, SALES § 305 n.16 (rev. ed. 1948).

This language of ULIS § 21, para. 1, suggests that "handing over" to an inland carrier shifts the risk prior to loading, unless the contract imposes this added obligation of loading. On the other hand, ULIS § 21, para. 3, states that in water shipment seller must place the goods "on board ship" unless the seller is entitled, "according to the terms of the contract or usage," to present a "received for shipment bill of lading or other similar document." On the conflict over the acceptability of "received for shipment" bills of lading see INCOTERMS (1953): "C.I.F.," ¶ A7; UCC § 2-323(1); INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICE FOR COMMERCIAL DOCUMENTARY CREDITS art. 19 (1951).

69. See the definitions of trade terms cited note 61 *supra*. The balance of convenience tips towards retention of transit risk by sellers in the unusual cases where it would be difficult to determine whether damage occurred in transit or existed at shipment, and where any repair of the goods requires the personal intervention of seller.

70. ULIS art. 21, para. 1, quoted in context note 67 *supra*. (Emphasis added.)

differing legal backgrounds.<sup>71</sup> The problem of draftsmanship is exceedingly thorny in view of the delicate gradations by which preliminary shipment under seller's control shades into transport by an independent carrier, but there is reason to hope that the draftsmen can materially improve upon the present formulation.<sup>72</sup>

For the bulk of our foreign commerce which moves by water, ULIS as it now stands provides the clean-cut rule that risk passes when the goods are placed "on board ship."<sup>73</sup> Through this and through other useful provisions dealing with the mechanism of documentary transfers,<sup>74</sup> ULIS probably achieves as helpful a degree of precision as is feasible in light of the varying patterns of trade practices and understandings current in different parts of the world. Until the more detailed implications of trade terms achieve a degree of standardization which would justify their incorporation into an international code, ULIS can serve the useful function of freeing foreign commerce from the embarrassment of a statutory formulation in the Uniform Sales Act which contradicts mercantile understanding for the bulk of our overseas trade, while removing the uncertainty over whether the basic legal rule stems from American law or some foreign system, the implications of which are beyond the reach of our merchants and their lawyers.

### III. LEGAL CONCEPTS AND INTERNATIONAL DRAFTING: DÉLIVRANCE

The Uniform Law's key concept, *délivrance*, as we have seen, does not describe an observable physical event but is rather a concept created

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71. This "account" language of article 21 might even be read as inviting return to the general rule of the Uniform Sales Act that the party who bears the shipping expense bears the risk, but the report of the draftsmen indicates that the provision deals only with the narrow problem of preliminary transport. REPORT OF THE DRAFTING COMMISSION 52. This narrow reading receives support from the fact that the language refers to situations where "some part" of the carriage is to be effected in the described manner. In addition, article 112 of the Uniform Law reads: "The fact that the parties have inserted terms in the contract concerning expenses, and in particular the fact that they have agreed that such expenses shall be borne by the seller, shall not of itself suffice to pass the risk." Concerning the continental practice of reliance on the draftsmen's report to deal with ambiguities in the text, and the difficulties of this approach under English law, see GUTTERIDGE, COMPARATIVE LAW 172 (1949).

72. Consideration should be given to the workability of a rule expressed in terms of delivery to an independent carrier which does not perform its duties under the seller's control. In a transaction calling for delivery in seller's own trucks or ships, in the absence of agreement, risk of loss would remain on seller during transit since the contract would not call for delivery of the goods to an independent carrier. In all such cases in which seller is in possession of the goods during transit, the same practical considerations apply as those which call for holding risk on seller while the goods remain on his premises. See text accompanying note 56 *supra*. These general rules of ULIS are, of course, subject to agreements to the contrary, including the use of a trade term such as "Ex ship (port of destination)" which is understood to postpone the transfer of risk until the goods reach the specified point. See INCOTERMS 60 (1953).

73. ULIS art. 21, para. 3, quoted note 67 *supra*. If the contract calls for placing the goods alongside a ship, risk passes at that point. With respect to the "on board" versus "received for shipment" problem, see note 68 *supra*.

74. See ULIS arts. 59-61.

by the law with features so unique that it cannot successfully be translated. Perhaps the reader should again be reminded that *délivrance* is quite different from physical "delivery," for *délivrance* can occur while seller keeps control of the goods through a negotiable bill of lading. Nor is *délivrance* merely another name for the passing of the risk of loss, since risk can pass before *délivrance* when buyer is late in taking the goods.<sup>75</sup> We therefore must ask whether it is wise to give this concept a central place in the Uniform Law, the chief virtues of which should be its clarity to businessmen and lawyers coming from widely different linguistic and legal backgrounds.

Is a single unifying concept like *délivrance* needed to aid in the solution of various problems of the law of sales? The Uniform Law uses this concept not only in connection with risk of loss but also as a tool for determining the point at which the buyer is obliged to pay for the goods;<sup>76</sup> but there too *délivrance* proves to be unwieldy. In most sales contracts, *délivrance* occurs when seller ships the goods, but the buyer is rarely obliged to pay the price at that point. In some contracts, the crucial obligation is the establishment of an irrevocable letter of credit in advance of shipment and sometimes even in advance of manufacturing the goods; in others, buyer must pay only in exchange for shipping documents which may be tendered while the goods are in the course of shipment or after arrival. In none of these cases is payment due on *délivrance*. The attempt to use the concept of *délivrance* in defining the time for payment therefore drives the draftsmen into making complex exceptions which, it must be said, never quite solve the problem.<sup>77</sup> And the difficulties resulting from the use of this complex concept are quite unnecessary, for the point at which buyer must pay the price can be defined more simply and clearly in terms of the important physical steps in the performance of the contract, and notably

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75. ULIS art. 110. See text accompanying note 57 *supra*.

76. ULIS art. 80: "Unless otherwise provided by the contract or by usage, delivery (*délivrance*, in the French text) of the goods and payment of the price are concurrent conditions . . . ." Article 81 adds a number of exceptions to this general rule. See note 77 *infra*.

77. ULIS art. 81: "Where the contract of sale implies the carriage of the goods, and where it is not stipulated that delivery [*délivrance*] shall be made at the place of destination and where, according to the terms of the contract or usage, payment of the price is not fixed for a date subsequent to that of delivery, the seller may postpone despatch of the goods, because the price has not been paid, whenever the contract of carriage does not give the seller a right of disposal over the goods during transit. Where the seller has despatched the goods because he possessed the right of disposal thereof during transit, he may, so long as the price remains unpaid, object to the goods being handed to the buyer at the destination." It is evident that these various exceptions leave far behind the general rule that payment is due on *délivrance*. The language of article 81 also seems unfortunately to focus on the type of control under the contract of carriage which the seller *obtains*, rather than on the shipping arrangements which the contract permits or which is *legally permissible* in the absence of contract stipulation.

by reference to the surrender of control over the goods.<sup>78</sup> ULIS would be improved if both the problems of risk of loss and the point for payment of the price were solved on their own merits in terms of the physical events in the performance of the sales contract which are appropriate to each.

From these specific instances there emerges a principle of general applicability. Draftsmen of any international document must be especially wary of complicated legal concepts which are either meaningless or deceptive to people of a different legal tradition and language. Consequently, the art of drafting for international use, even more than most difficult tasks of legal writing, requires that the problem be stripped down to concrete events for which practical consequences can be described.<sup>79</sup> Adherence to this principle in the final work of polishing the current draft of the Uniform Law for International Sales would materially improve its value and acceptability for general adoption.<sup>80</sup>

Only the most unrelenting specialist would be willing to pursue much further the handling of the body of sales law in ULIS. But there are two additional features of the new Uniform Law which deserve attention.

### *Salvage*

The great distances which often intervene between seller and buyer in international transactions aggravate the problems which arise where buyers, either rightfully or wrongfully, refuse to accept the goods. In addition to the measures which we have seen to reduce the grounds for unwarranted rejection, ULIS creates important principles tending

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78. Cf. UCC §2-310 (specific rules on the point in the sales transaction at which payment is due).

79. Experience has adequately shown the problem of the use of legal terms, which inevitably have local connotations, in international drafting. See Wolfson, *The English and French Carriage of Goods by Sea Enactments*, 4 INT'L & COMP. L.Q. 508, 525, 532 (1955) ("excepted perils"); Matteucci, *The Methods of the Unification of Law*, in 2 UNIFICATION OF LAW, YEARBOOK 1956, at 3, 62-65 (1957). Cf. GUTTERIDGE, *COMPARATIVE LAW* 155 (2d ed. 1949) (separate handling of risk).

80. The Uniform Law uses certain other concepts which, although less troublesome than that of *délivrance*, seem to fall somewhat short of the ideal for international drafting. Following are two examples from article 27, followed by the rendering of these concepts in the English translation: "résolution de plein droit" ("*ipso facto* avoided"); "résoudre le contrat" ("avoid the contract"). Although it is possible to work out the meaning of these concepts from other sections of the Uniform Law, it is evident that references to "avoidance" of the contract is a figure of speech understandable only in the light of local understandings. The entire contract is not "avoided," for ULIS clearly states the useful rule that the injured party retains the right to recover damages for its breach. ULIS art. 88. The essential question is sometimes whether the buyer may reject goods which the seller tenders, and sometimes whether he has the power to notify seller that he will not accept future tenders of goods. The ideal for international drafting would call for stating the rule in such concrete terms.

towards the efficient redistribution of goods which may have been rejected rightfully.

The Uniform Law treatment of this matter is noteworthy not only for the substance of the provisions but also for the admirable handling of the problems of draftsmanship. Some of the language of ULIS consequently deserves examination. For example, a buyer who has received goods which he rejects "shall be bound to preserve them on behalf of the seller"; even though the goods are not in the buyer's possession, if they are "placed at his disposal at their destination," he shall be "bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without appreciable inconvenience or expense."<sup>81</sup> One who thus is under a duty to preserve goods for another may store or sell the goods; he must sell the goods if they are "subject to loss or rapid deterioration."<sup>82</sup> These rules of the Uniform Law, somewhat stronger than the salvage provisions of the Uniform Commercial Code, are useful to reduce the waste resulting from spoilage and unnecessary storage costs, to keep goods moving in the channels of commerce, and thus to reduce the amount in controversy.<sup>83</sup>

#### *Buyer's Right To Force Delivery*

Perhaps of greater psychological than practical interest is the difficulty which the draftsmen encountered in dealing with buyer's right to force delivery from a seller who wrongfully withholds the goods. Although on the Continent this right is widely established, it was thought that uniform rules governing the problem would cut too deeply into Anglo-Saxon traditions for a limited remedy of "specific performance."<sup>84</sup> Consequently, the Uniform Law, after providing for specific

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81. ULIS art. 104. Recognizing that there is no reason to require buyer so to act when the seller is in a position to help himself, article 104 concludes: "This provision shall not apply where the seller or a person authorized to take charge of the goods on his behalf is present at such destination." Cf. ULIS art. 103.

82. ULIS arts. 105, 106, 107. To protect a seller who incurs costs in connection with the goods ULIS creates a power which we are accustomed to calling a "lien," but which ULIS expresses as seller's "right to retain [the goods] until he has received from the buyer the cost of preserving them." ULIS art. 103. At this point and throughout the Uniform Law's sections on preservation of the goods the language deals in concrete terms with specific practical problems. As a result, the drafting is admirably clear; the contrast with legal formulations cast in more doctrinal terms is inescapable.

83. The Uniform Commercial Code specifically deals only with a duty of salvage by merchant buyers. UCC §2-603. But in an indirect manner a duty of salvage is imposed on sellers by restricting their right to recover the full price even against a buyer who wrongfully refuses to accept the goods. UCC §2-709. For a helpful analysis of problems of salvage at the various steps in performance see LAGERGREN, *DELIVERY OF GOODS AND TRANSFER OF PROPERTY AND RISK IN THE LAW OF SALE* 18 (1954).

84. REPORT OF THE DRAFTING COMMISSION 32-33; Rabel, *The Draft of a Uniform Law Concerning International Sales of Goods*, in *UNIFICATION OF LAW* 57, 63 (1948).

recovery of goods under fairly limited circumstances, provides that even this limited remedy only applies "should this be possible and permitted by the municipal law of the Court in which the action is brought."<sup>85</sup>

The lack of uniformity which results from this bow to the supposed intransigence of Anglo-Saxon tradition is probably not serious. But there is a bit of irony in the fact that as early as 1855 the British Mercantile Law Commission, after an extensive survey of opinion in commercial and legal circles in England and Scotland, recommended that the rules of England on this point be assimilated to the broad civil law right of recovery in force in Scotland, and that legislation was enacted to enforce this recommendation.<sup>86</sup> Legal diversity is indeed a stubborn foe.

#### IV. CONCLUSIONS

The world market for goods needs the support of a unified legal framework. The project for a Uniform Law for International Sales represents an important step towards that goal; it deserves the support of countries with a stake in international commerce. Certainly the United States cannot maintain its pretensions to leadership in world trade and in the international community and at the same time rest in ignorance and lethargy with respect to such constructive work.<sup>87</sup>

In spite of the important work which has been done, much remains. Significant decisions therefore must be taken with respect to the channels through which the law can best be brought to completion. The International Institute for the Unification of Private Law, which over the years has carried the law to its present advanced stage, has strong representation among the nations of Europe, but only scattered member-

85. ULIS art. 27. See also ULIS arts. 51, 60. Cf. art. 72 (similar exception with respect to local rules on price recovery).

86. *Second Report, Mercantile Law Commission*, 354 PARL. PAPERS 10 (1855). This recommendation resulted in the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. ch. 97, § 2. For discussion of the manner in which this provision was carried forward into the Sale of Goods Act and ultimately into the Uniform Sales Act, see HONNOLD, SALES AND SALES FINANCING 208-09 (1954).

87. The government of the Netherlands, which convened the 1951 Hague Conference, has transmitted the 1956 draft of ULIS to the United States Department of State inviting comments on the draft for consideration at the forthcoming diplomatic conference. A modest first step would be a thoughtful response to this invitation.

There are now distinct signs of increasing interest in the international unification of law. The United States sent a strong delegation of observers to the 1956 Hague Conference on Private International Law. And in August 1957 the House of Delegates of the American Bar Association created a special committee, under the chairmanship of Joe C. Barrett, Esq., on the International Unification of Private Law. See 1957 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 152, 299 (1958); 82 A.B.A. Rep. 42, 176 (1957); 43 A.B.A.J. 1056 (1957). Cf. Yntema, *Unification of Law in the United States*, in UNIFICATION OF LAW 301, 317 (1948) (reasons for past lethargy); Wortley, *Great Britain and the Movement for the Unification of Private Law Since 1948*, 32 TUL. L. REV. 541 (1958).

ship in other parts of the world. The problem which the Uniform Law faces is truly world-wide and requires concerted effort and support on the widest possible basis.<sup>88</sup>

The final stage of preparation and promulgation seems to call for technical work and international collaboration under the sponsorship of the United Nations. This sponsorship would augment the substantial work of the UN at nonpolitical levels which over the years has strengthened the international community through its collaboration in constructive work outside the arena of ideological conflict.<sup>89</sup>

The approach and method employed in the final work on the law also will be important in determining the final success of the project. The sale of goods is a highly practical affair; legal solutions to its problems can be successful only in the degree to which they are based on an intimate knowledge of commercial practices and needs. A helpful example is provided by the International Chamber of Commerce which in the course of formulating *Incoterms*, its highly useful definition of the implications of international trade terms, gathered and published detailed information on world-wide understandings and practices.<sup>90</sup> A further source, not only of commercial practice but also of enlightened judgment on commercial need, is emerging from the standard contracts for the international sale of specific commodities which are being developed by the Economic Commission for Europe.<sup>91</sup> The careful study of sources such as these can help to illumine the final decisions concerning the areas of international commercial practice which are sufficiently standardized for embodiment in a legal rule. Indeed, even in advance of the international adoption of a uniform law, valuable material would become available to merchants and their lawyers drafting

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88. There is every reason to avoid regional approaches to the problem. The project for a Uniform Law for International Sales commenced by the Inter-American Juridical Committee (see note 9 *supra*) faces the same problem of bridging understanding between civil-law and common-law traditions which confronts ULIS. There is no reason to complicate the problems of concerns engaged in foreign commerce with one "uniform" law for inter-American trades and another for inter-European transactions, which would leave the problems involved in trans-Atlantic and trans-Pacific trade unresolved. ULIS art. 3 contains significant provisions whereby two or more signatory states may exclude trade among themselves from the Uniform Law. By this route countries with common-law traditions could retain their current legal scheme. But before taking such a step the countries involved should seriously consider the extent to which their rules on international commerce are actually uniform and in keeping with current business practices. See note 1 *supra*. On the more complete unification which has been achieved among the Scandinavian countries, see materials cited note 11 *supra*.

89. See GUTTERIDGE, *COMPARATIVE LAW* 183-84 (1949); Bagge, *International Unification of Commercial Law*, in *UNIFICATION OF LAW* 253, 267-69 (1948). For a summary of the work which the United Nations has already done in the field of the unification of law, see *UNIFICATION OF LAW, YEARBOOK 1956* (1957).

90. *INCOTERMS* (1953).

91. See note 2 *supra*.

sales contracts, to courts and arbitrators facing controversies over international practice, and to any State concerned with the revision of its commercial law.<sup>92</sup>

### *Unification in Its Wider Context*

Nothing could be more false than to suppose that a movement for the unification of commercial law is a novel notion for which the time is not quite ripe. We should not forget that the current isolation of commercial law into small, separate and conflicting national systems is but one of the consequences of the narrow nationalism of recent centuries which fragmented wider units of cooperation developed under the Roman Empire and under regimes of autonomous international commercial practice.<sup>93</sup> The most striking part of the story is the slowness of our progress in piecing these fragments together.

One thing, at least, is clear: in a world shrinking so rapidly, successful isolation is the least likely of prospects. Perhaps it is not too much to hope that nations, by joining together to meet the day-to-day needs of their mutual trade, may at the same time help weave the fabric of cooperation necessary for the development of an international legal order.

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92. At a later date consideration should be given to the role comparable to that performed on a national basis by the Commissioners on Uniform State Laws. Very possibly the UN could assume this function by making generally available the decisions applying and interpreting the Uniform Law; such tools could assist in the rebirth of a common law for international trade. See ULIS art. 1: Questions not expressly settled by ULIS but within its scope "shall be settled according to the general principles on which this law is based."

93. See Kennedy, *The Unification of Law*, 10 J. Soc'y COMP. LEG. (n.s.) 212, 217 (1910) (this article deserves reading in its entirety for its perceptive as well as eloquent analysis of the problem of unification); Hamel, *The Geneva Conventions on Negotiable Instruments and Methods of Unifying Private Law*, in UNIFICATION OF LAW 270-72 (1948).