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## A DRAFT OF AN INTERNATIONAL LAW OF SALES

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THE purpose of this article is to introduce to the American legal world the Draft of an International Sales of Goods Act elaborately prepared by a special committee of the International Institute at Rome for the Unification of Private Law.<sup>1</sup> In 1935 it was sent by the Institute to the Secretariat of the League of Nations which distributed it to the governments of all member states and also to those not members of the League. Many governments having replied, the revision of the draft is now nearly completed, and the amended text will be subjected to a new and decisive trial in the near future. This, therefore, seems to be the right moment to draw the attention of a larger public to the tentative work of the Institute,<sup>2</sup> which may be viewed as both prudent and bold. In the United States until now, this work seems to be hardly known, although the committee on one occasion had the privilege of the presence of Professor Karl N. Llewellyn and the United States Department of Commerce had the courtesy to send the draft to numerous American firms and associations.<sup>3</sup>

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<sup>1</sup> The first draft was published by the League of Nations. "1935 U.D. P. Proj. I." A German free translation with comment by the writer was published in 9 *Zeitschrift für ausländisches und internationales Privatrecht* (1935). See also Gutteridge, *An International Code of the Law of Sales*, *British Year Book of International Law* 88 (1935); Rabel, *Das Recht des Warenkaufs*, vol. I (1936).

<sup>2</sup> President of the Institute was the late Vittorio Scialoja who was succeeded by Mariano D'Amelio. Members of the committee were Algot Bagge, Henri Capitant, Martin Fehr, H. C. Gutteridge, Joseph Hamel, Sir Cecil Hurst and the writer.

<sup>3</sup> The only answer I know of came from a big importing firm whose spokesman expressed the feeling that, "Anything tending to simplify the processes of international trade and helping to smooth the path of the importer is a step forward. The proposed law appears to me to be

Perhaps a lack of interest may be foreseen because of the general apprehension that no such law would ever be approved by Great Britain or the United States, no matter how great its merit might be, nor how much it might be based on common law thinking, nor what influence it might exercise in promoting international cooperation. Such indeed is the bitter impression of many European observers looking on the fate of the Uniform Law of Bills of Exchange and Cheques (Geneva 1931)<sup>4</sup> and of the "Incoterms 1936," both excellent products, the one of an international Convention, the other of the International Law Association, both drawn up under the active participation of English and American lawyers and business representatives and recommended by them. This is also an obvious danger in our case. Still, there should be no objection to the draft on the ground that it would destroy or disturb the already existing great unification brought about by the extension of the British Sales of Goods Act of 1893 to almost the whole British Empire and the adoption of the similar Uniform Sales Act by all but a few states of the United States. The draft has no intention of interfering with the domain of these laws. It limits itself to "international sales" and (in the second draft) defines these as contracts of sale concluded between persons residing or doing business in different jurisdictions not governed by the same legislation. The international statute would only apply to those cases where one of the parties has his business within the territory covered by the British or American sales law while the other party has his business or residence in a territory where a different law is in force. At present, in such a situation the conflict of law rules of the country or state whose courts are dealing with the case might result in the application of any foreign law.

Therefore, the proposed international law is not meant as a substitute for the actual domestic law. The overwhelming majority of sales contracts remain under the same rules as they are at present. It intends to do no more than to take the place of the rules of the conflict of laws concerning sales and the legal norms called for by the conflict rules. The law thus to be applied now might be that of any foreign country, different in different cases, and difficult to apply. The proposed international law, on the other hand, would be uniform, kindred to the Sales Act, and at least intelligible. Whether it has other merits, we shall soon see.

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the result of careful research and well considered. It would seem to cover all points the average importer is interested in and should facilitate international trade if and when it is put into effect."

<sup>4</sup> Feller, *The International Unification of Laws Concerning Checks*, 45 *Harv. L. Rev.* 668 (1932); Feller and Hudson, *The International Unification Concerning Bills of Exchange*, 44 *Harv. L. Rev.* 333 (1931).

In the United States the domain of interstate law is broader than anywhere else, since it embraces the relations between the states of the Union themselves. Very recently an important step was taken to cover this subject by a special federal enactment rather than by interstate and international conflict of laws. On July 12, 1937, Mr. Chandler introduced in the House of Representatives a Bill Relative to Sales of Goods and Contracts to Sell Goods in Interstate and Foreign Commerce.<sup>5</sup> It embodies a new version of the Uniform Sales Act with interesting though slight amendments. For interstate commerce and perhaps for the relations with British countries this attempt to deal with the problem is notable, and the international draft, as we said, does not touch this matter. However, international commerce with civil law countries can hardly be ruled by any type of unilateral American law except in the case where according to the rules of conflict of laws American law governs the transaction. I assume that Mr. Chandler's object is to provide a uniform federal act precisely for these situations and that certainly would be a good service. At the same time, however, this proposition of a well known expert points distinctly to the existing lack of reliable legal sources.

Our draft, on the contrary, is designed to spare the conflict of laws its own astonishing *quodlibets* and to eliminate the often tiresome and futile statements of foreign law. I could tell a tale about these pleasures and their queer results from practical experience. The doctrines of the American conflict of laws concerning sales are not so bad as certain others, yet they inflict enough racking on the unwary who comes to consult their oracles. Actually there seems to be no certitude in many American states as to what questions (besides the validity) are governed by the law of the place of contracting (*lex loci contractus*) and what questions (besides the modalities of the performance) are governed by the law of the place of performance (*lex loci solutionis*), although the influence of Mr. Beale<sup>6</sup> now greatly favors the extension of the latter. Nor is it easy to state what is the place of contracting, for instance in the case of an executed sale and in the case of a contract concluded by correspondence. Additional diffi-

<sup>5</sup> 75th Congress, H.R. 7824. This bill adopts as criterion of interstate and foreign commerce an agreement that the goods sold shall be transported from any foreign country into the United States, or from within any State of the United States into or through another State or any foreign country. This criterion was eliminated in our second draft as too difficult to apply. It appears from the introduction of the bill into the House of Representatives that Mr. Chandler has little doubt about its constitutionality.

<sup>6</sup> Beale, Conflict of Laws § 346, *cf.* p. 1260 (1935). Rest. of Conflict of Laws, §§ 371, 372, 418, 423. The actual decisions carry an enormous uncertainty, and the authors quoting them remark almost always that they generally do not treat place of contracting and place of performance as different. The most recent writer, Stumberg, Conflict of Laws, 367-370 (1937), is no more successful in his explanation of the authorities.

culties are caused by the fact that the place where one party to a sale has to perform his contractual obligations is frequently different from the place where the other party has to make his performance. The German and Swiss courts consider it logical that every obligation of the seller should be governed by the law of the place where he is to perform his duties and that the law for the buyer's obligations is to be determined separately. This system of "splitting" has proved not only highly artificial but in part absolutely impracticable.<sup>7</sup> It is, for instance, an unanswerable question whether the risk of loss belongs to the law of the seller or to that of the buyer. Even if the problems of conflict of laws were cleared up, the problem of the codes, statutes, doctrines and judicial decisions called upon to govern the contract would remain.

To avoid these complications and to substitute a reasonably concise body of clear and simple written rules could not be a loss, and still less would it be a loss to have to consult only one law commented on by the courts and scholars of the world instead of innumerable different foreign legislations. These advantages ought to overbalance the complaint that in the future sales transactions would be governed by two different laws, one applicable to national sales, and another one cast in another mould applicable to international sales. Nor should the fact alone that an enacted law diffuses a somewhat new fragrance disturb an American mind. Certainly, an internationally grown "code" cannot, and will not avoid foreign influences, as well as a few technical and substantial novelties. This "code" is, however, based on usages and instances which already prevail in international commerce. To give the reader an impression of what the contents of the draft are, I shall discuss a number of the more important features of the present draft. The subject-matter is so well known to every lawyer that I hope that these points will be intelligible in the short outlines necessitated by the vastness of the subject.

## I

Am I to criticize, for the purpose of comparison, the Uniform Sales Act? I cannot avoid it entirely, but I do not feel it my privilege to do so thoroughly. I am convinced of its merits and powerful effects. On the other hand, what Professor Gutteridge himself says about the English Sales Act should be noted. After having emphasized its importance he says: "It would, however, be a gross example of legal ultramontanism if the attitude is adopted that the rules of the Sale of Goods Act represent the

<sup>7</sup> See Neuner, 2 *Zeitschrift für ausländisches und internationales Privatrecht* 108 (1928); Nussbaum, *Internationales Privatrecht*, 218.

acme of perfection.”<sup>8</sup> The American Sales Act, though in several points improved, has been given a more severe censure by Professor Isaacs of the Harvard Business School,<sup>9</sup> who feels that the economic background of the act was that of three generations ago, an idyllic world where sellers and buyers met without middlemen, where the price was paid in cash, where the buyer had to fetch the goods, and where he firmly relied on the skill of the seller. He enumerates a whole series of difficulties raised by antiquated rules of the act. A historian might add an archaic remnant of fundamental concepts evidently too familiar to common law lawyers and business men to be still a cause for wonder; the age-old distinction of sale and agreement to sell, for instance, is nothing but a relic of the time when the sale necessarily was a cash and carry contract, consent alone not being binding in any archaic law. It is easy to understand that no modern code can adopt this distinction with its consequence concerning requirements of form and the exaggerated effects it attributes to the passing of title and the paying of the price.

However, I feel that I cannot avail myself of all of the severe criticisms of the American author mentioned above. I am not sure whether he will quite approve of the international draft, which could not fail to borrow from the actual modern codes of civil law countries. Otherwise the draft would have been the more criticized as strange and unwholesome. Certainly these codes were not to be imitated in so far as they have preserved rules which originated in periods of antiquated economic organization. On the other hand, these codes contain numerous rules which might *prima facie* appear to be antiquated, which nevertheless serve, however, a useful purpose. To be more specific, I mean those rules which apply only where the parties have failed to agree on a necessary element of the transaction. Of such a “subsidiary” character are, for instance, the rules that delivery and payment are concurrent conditions, or that the place of delivery is at the residence of the seller. Why should old elementary rules not be preserved in this subsidiary function? These rules are well established from a practical point of view, precisely because they do not have to provide for a statistical majority of cases but only to give a systematic starting point. It is the very task of a code to establish subsidiary rules. A rule determining in a practical way, for instance, where delivery is to be made in the absence of all reference to other places could hardly point either to the place of despatch or to the place of destination and still less to any other. These codes are not wrong

<sup>8</sup> Gutteridge, *op. cit. supra* note 1.

<sup>9</sup> Isaacs, *The Industrial Purchaser and the Sales Act*, 34 Col. L. Rev. 262 (1934).

because entire trade branches are not satisfied with the seller's place for performance or with delivery and payment as concurrent conditions or with the seller's place for performance. Again, it is not always a token of inferiority of a law that one or another branch of trade formulates clauses with different rules. Industrial manufacturers' forms, for instance, frequently contain clauses limiting the buyer's right to reject the goods and to rescind the contract, allowing such right only for gravest defects. They do so from a unilateral standpoint, and they are able to deal with a specialized production from an expert standpoint. Thus, they may specify as a sufficiently grave defect a deficiency of 85 or more per cent of a certain element or a certain minimum percentage of breakage. The law itself can hardly individualize its rules in such a manner, for the sake of an industrial buyer. There are certain sales laws allowing rescission only for grave defects generally speaking and charging the judge with the task of appreciating the gravity of a breach of warranty.<sup>10</sup> In the larger countries, however, the free option of the buyer has succeeded better in avoiding wanton litigation.

Thus the draft is fully cognizant of the numberless varieties of goods, lines of trade and production. In fact owing to these differences the types of sales are inexhaustible. It was one of my first experiences in research to learn that almonds must have special conditions of delivery for the reason that they can easily be stolen. Yet, codes can only exist in abstractions and can very well leave it to coal merchants or manufacturers of washing machines to formulate standard forms taking care of their peculiar needs. This is not to say, however, that in formulating rules of general sales law one must not consider typical exceptions. Thus, for instance, the general rule is that the seller must be notified of a defect without undue delay after inspection. Yet the law has to provide for the exceptional case where a defect cannot be discovered at inspection but only after the goods have been put in use. The draftsmen, in general, thought it wise not to interfere with the special mercantile types of forms and clauses. The history of the "Wassaw-Oxford Rules" for c.i.f. contracts (1932), both during their laborious preparation by the International Law Association and after their adoption, proves how extremely difficult it is to formulate rules serving all lines of business. Moreover, trade clauses must be fluid. It would do no good to petrify them in a statute, and least of all in an internationally bound law. An opportune exception has been made, however, for one special problem: the law expressly determines where delivery of the goods should be made if a contract containing

<sup>10</sup> Swiss Code of Obligations, Scandinavian Sales Law.

a f.o.b., f.b., or c.i.f. clause is silent on the point. Thus, the draft leaves the autonomous reign of standard forms untouched in its full independence and only intends to give a much needed supplement to fill the gaps which the forms so often leave open.

If the draftsmen thus restrained their field to the structure of the ordinary categories of sale contracts—there is certainly not one kind of sale which alone is the normal one—they did so not in disrespect of, but because of their very respect for mercantile usages. They were anxious to find a line of abstractions and a system which would not only conciliate actual legal methods between themselves, but also with the language and the ways of thought of business circles. That tendency is different from the technique of continental laws where Roman influence has efficiently formed conceptions and terminology of jurists and law givers, and has therefore been much less affected by commercial contracts. But even the Commercial Law and the Sale of Goods Acts, notoriously nearer to mercantile feeling, make it frequently difficult for courts and laymen to give effect, directly and without artificial construction, to the true intention of the parties or, as has been said, to “translate it into proper legal terms.”<sup>21</sup> The best *point d'appui* for the draft was to be found in the Scandinavian Sales Act, an excellent product of harmonization of not only civil and common Law legal art but also of commercial experience.

To illustrate the endeavor made to come as close as possible to the conceptions of real life, and develop at the same time accurate international formulations, I should like to emphasize the method used to attain convenient basic notions and to explain it by one or two illustrations. The draft seeks to draw its fundamental elements not from any legally moulded concepts but directly from the actual facts appearing in the course of the execution of sales. Its fundamental notions are not legalistic but “natural.” They are based on typical “facts.”

An outstanding example of these efforts is the notion of *delivery* as used in the draft. Every lawyer knows how many different meanings are covered by this term as it appears in common law terminology and in particular in the Sales Acts. Delivery is defined as the physical transfer of goods, the transfer of constructive possession, the transfer of title, and a good many other things. However, in the true meaning of some provisions, such as Section 43 of the Uniform Sales Act, speaking of place, time and manner of delivery, there seems to be hidden a specific idea well matched for our purpose. In commercial practice the world over, the

<sup>21</sup> Expression of Professor Williston, 34 Harv. L. Rev. 750, 755 (1921), with respect to the lack of complete understanding of mercantile usage regarding the use of bills of lading.

same meaning is connected with the word, though considerably obscured by its nebulous wavering—a usual phenomenon in the terminology of laymen. What is the very essence of this matter is shown by comparative theoretical research and seems already well abstracted by the Scandinavian Sales Law. Thus, according to the definition in Article 17 of the draft, the seller has made delivery when he has “done any act he is required to do in order to make it possible for the goods to come into the hands of the buyer or some person on his behalf.” It is the often emphasized situation where “the seller has performed, as regards the goods, the last act required by the contract.”<sup>22</sup> Article seventeen says:

“It depends on the nature of the contract, which acts are necessary for this purpose. In the most frequent case of an international sale, the seller has to dispatch the goods and to do nothing more; then delivery is effected where he has consigned the goods to the first carrier or forwarding agent, or if the first part of the journey is by sea, by placing them on board ship; where under the contract or by usage of the trade, the seller is entitled to present a receipt for shipment bill of lading to the buyer, it shall be sufficient to deliver the goods to the shipowner.”<sup>23</sup>

Parties may agree, of course, that delivery is to be made at the place (station, quay, warehouse, etc.) of the buyer. Frequently parties say no more in their agreement than that the seller ought to ship the goods to the buyer. In such a case a controversy may arise as to whether the seller has delivered with the arrival of the goods at the buyer's place or whether delivery is completed when the seller has dispatched the goods to the address of the buyer. The draft, following the American model but contrary to continental law, decides expressly that in such a case no more than a duty to dispatch properly is to be presumed.

A third type of situation is where the buyer is to come and take the goods at the seller's place. This situation is not rare at all in contracts where the seller is a manufacturer. For this case the draft prescribes that delivery implies a definite duty of the seller of unascertained goods: he must clearly appropriate the individual goods to the contract, put them actually aside on behalf of the buyer, as well as it can be done, and notify the latter accordingly.

Such a concept of delivery constituting an abstraction of all acts required in respect to the goods and drawn from the actual facts of business rather than from legal preconceptions, has great advantages. Its primary advantage is that it points in a general and direct way to the main obligation of the seller without encroaching upon the substantive

<sup>22</sup> Note in 22 Col. L. Rev. 462, 465 (1922).

<sup>23</sup> Art. 17 al. 3.



rule or the terminology on transfer of title or of possession. In practical effect, the problem of determining at what moment the seller has performed his principal duty under the contract has been separated from all questions concerning transfer of title and even transfer of possession. This separation of issues, which was forced upon the draftsmen by the necessity of abstaining from all attempts at internationally unifying the problems of the law of property (especially the problem of transfer of title) represents a considerable progress in legal technique, resulting in the removal of a source of many difficulties. Not only in Common Law jurisdictions but also in countries following the system of the French Code, endless difficulties are caused by a confusion of three different problems, *i.e.*, the problems of determining (1) what the seller is bound to do under the contract; (2) at what moment title to the goods passes from the seller to the buyer; and (3) at what moment the risk of loss or deterioration passes from the seller to the buyer.

In consequence of this confusion, the treatment of each one of these problems has become confused itself. To make the passing of property and risk coincide is surprisingly primitive, the Sales Act<sup>14</sup> having long ago acknowledged that the parties may "otherwise agree," and there being so many, much used, commercial clauses to the effect that the risk shall pass without any regard to the title. Thus, with a c.i.f. clause the risk passes when the goods reach the ship, no matter whether property is acquired by the buyer at an earlier or later time. Plain clauses have been misunderstood, or have at least created difficulties for construction by the courts, because the very rule that the passing of the risk depends upon the passing of the property is misleading. That is true in a double sense. The risk question in the trader's mind is not dependent on the property question, but is "infinitely more important."<sup>15</sup> Moreover, in the comparatively rare cases where the parties think of the passing of the title at all, they fix that moment by considerations entirely different from those by which they determine the moment the risk shall pass from the seller to the buyer. Property remaining with the seller after dispatch or receipt means security for the price. Risk is customarily and reasonably attributed to the buyer as soon as the seller is no longer active in dispatching the goods, and that is the moment the draft calls delivery. Thus the often vexing problem of risk transfer is extremely simplified, thanks to the purified concept of delivery: Risk does not pass with the title nor with the possession. It passes with the "delivery" (art. 103), and of course with a delay of the buyer's taking delivery.

<sup>14</sup> Uniform Sales Act § 22.

<sup>15</sup> Gutteridge, *op. cit. supra* note 1.

The category of taking delivery has been built up by an analogous approach. It has nothing to do with approving the quality of the goods or with acceptance of title. In a stricter sense it is the act of occupation of the goods tendered. In a wider sense<sup>16</sup> it also contains an act of the buyer required by the individual contract to cooperate with the seller's acts of delivery, such as sending a ship, or sacks, or shipping instructions.

## II

Substantially, if not as to their form, most rules of the draft correspond with the principles of Anglo-American law.

1. Under the system of the French code, where one party has a cause of action for a breach of contract, the other party cannot simply regard the contract as dissolved but has to resort to the cumbersome remedy of applying to a court in an "action for rescission."

Although the promisor may have committed a serious breach of contract, the promisee is bound by the contract to fulfill his promise, at least as a general rule, until a court has expressly dissolved the contract by a decree. The Draft, following the laws of Germany, Switzerland, the Scandinavian and the Anglo-American countries, grants the promisee the power to rescind, in case of a serious breach of contract by the promisor by his simple declaration. Likewise, no judicial authorization is required to resort to formal judicial proceedings when he wishes to have a defect of the goods authoritatively ascertained.

2. The principles of the effects of non-performance are patterned after the English system. That is to say, the rules start from the point of view that a promisor must perform or respond for breach of contract. It is an exception to be proved by him that he might be discharged in consequence of some event legally accepted as liberatory, although by no means bound to be an "impossibility." This conception contrasts markedly with a mass of German theory necessitated by the view of the latest pandectistic doctrine which founded the liability of a promisor upon his fault and considered but two categories where fault generated responsibility: impossibility and delay. This attitude adopted by the B.G.B. forced the courts more and more to fill the gap which exists, if the concepts of impossibility and delay are not in an unreasonable manner extended. A new law simplifying the theoretical approach to the acknowledged general doctrine of liability will not be unwelcome in Germany today. At the same time, as liability is the rule and discharge the strictly defined exception, the draft can perhaps avoid the romanistic theory of "fault" as a constituent of responsibility. Not that I think the Anglo-American

<sup>16</sup> Cf. Swiss Obl. R. art. 91.

law can indefinitely ignore the role which the concept of negligence would play in contractual matters. There are already plenty of signs to the contrary. Still, the draft was able to manage without that idea in so far as the sales acts do<sup>17</sup> and did it in order to remain within the English lines of thought.

3. Where no time is fixed by the contract or the trade usages for the delivery of the goods or for the payment of the price, a "reasonable time" is allowed. This rule, with all its elasticity to measure time according to circumstances has evidently proven fit for the enormous variety of conditions prevailing in the vast territories of the British Empire and the United States. The draft has adopted this rule for this very reason although it is new to many countries and has already been criticized as too uncertain in one of them. New rules are always found either too rigorous or too indefinite! Likewise, a reasonable time is granted for the examination of the goods and for giving notice of a defect. Where the seller has a right or a duty to repair a defect, he has to do it within a reasonable time. Such a right and duty has not been established by the draft as a general rule, as it now is under French law, but only for the case of the goods being manufactured according to special orders of the buyer.

4. Damages are considered in essentially the same manner as in the American sales act. Where there exists a current price for the goods sold, damages are in the first instance measured by the difference between the contract price and the current price, together with the expenses one would incur repurchasing or reselling the property on the market. This assessment on an abstract footing (general damages) presents also, as is the true rule (sometimes misunderstood) of Anglo-American law, the minimum amount of the damages. It is no defense that the actual harm was smaller, owing to the special circumstances of the promisee or to the fact that the promisee—aside from the case of an anticipatory breach—should have done something to mitigate the damage. As the draft adopts the fundamental structure of this "abstract" method, it follows that many, although not all, details in the method of computing the current price, such as the definitions of time, place, and market, are identical in the draft and in present American law. All this would be no absolute innovation for the other countries, too, at least not in the actual practice of their commercial courts. For the countries of the system of the French Code and for certain other jurisdictions, it would be new, however, to find the rules for computing damages clearly defined by the law. So far, they were not only not defined by statute but were even left by

<sup>17</sup> Cf. Uniform Sales Act § 81.

the supreme courts to the discretion of the trial courts, with resultant grave uncertainties.

While general damages computed in what the draft calls the "abstract" method constitute the regular minimum the promisee is entitled to, the draft does not exclude the possibility of special damages of a greater amount. By analogy to the rule in *Hadley v. Baxendale*,<sup>17a</sup> they may be awarded, but only when special harm was foreseeable. The draft could not limit itself, like the sales acts, to a reference to the common law and was forced to insert a definition. So it provides as a condition for awarding special damages that the promisee prove that at the conclusion of the contract the now promisor was in a position to foresee the events to which such special harm is due. The promisee is bound, of course, to minimize the harm; a buyer in particular is bound "to make a repurchase without delay in any case in which repurchase is in accordance with the usage of the trade or can be effected without inconvenience or appreciable cost."

I should like to express my conviction that this influence, not to say final triumph, of Anglo-American methods, is not limited to the measure of damages and is by no means casual. Many important problems of the law of contracts were seen by the courts of these countries with an admirable instinct. I think that the English and American courts remained truer to the ancient approach to contract law than continental judges and authors in so far as they never ceased to ask what the intention of the party was, and, where no intention could be found what the parties would have intended had they foreseen this contingency. The same method was once extremely popular on the continent of Europe and has its consequences even today. Yet, the majority have rather condemned it, and in fact, the test of intention, as it is well known, is defective and often fictitious. The truth was seen by Chalmers, the draftsman of the Sales of Goods Act.<sup>18</sup> When dealing in his book with the theory that damages for breach of contract should be fixed in accordance with the contemplation of the parties, he discusses the objection that it was difficult if not impossible to apply this criterion in a case where the parties did not even think of a possible breach. Chalmers saw that the criterion was "necessarily an objective one." He states: "The question is what a reasonable man with their (*viz.* the parties') common knowledge would contemplate as a probable consequence of the breach, if he applied his mind to it." Put in this way, the idea is sound. It is not merely subjective and therefore not

<sup>17a</sup> 9 Exch. 341 (1854).

<sup>18</sup> Sales of Goods Act, 11th ed., p. 144; *cf.* Rabel, *op. cit. supra* note 1, at 484.

fictitious. On the other hand, it is not *too* objective! For example, the German Civil Code thought it logical to refrain from any restriction of damages because of remoteness. Under its system a promisor appears to be liable for all harmful consequences however remote for which his breach of contract was the *conditio sine qua non*. Feeling that this was an exaggeration, a voluminous and most subtle theory was developed to cut the objective causation by another objective criterion: only an "adequate causation" was said to be sufficient. The rule in *Hadley v. Baxendale* has a much better foundation, though its formulation might be open to criticism. Ideas expressed by American courts and writers<sup>19</sup> make me feel the best theory to be the following one: that it depends on the *sense* and *scope* of the contract, what *interests* of the creditor should be warranted by the promise, and that these interests and no others, in case of a breach of contract, ought to be protected by "concrete" (*i.e.* special) damages. (Illustration: A highly emotional lady, being fond of a dog buys it. If it is not delivered and she falls ill from disappointment, she should certainly not recover damages for personal injury on the basis of the contract.) The most important problem is that of harm by frustrated resale. Where the buyer has resold the goods at a price higher than the market price at the time of the seller's breach, English courts are reluctant to award him the difference unless he proves that the seller had contemplated at the time of contracting the "probability" of such resale; moreover, what is sufficient evidence of such contemplation and probability is very closely examined. I think that American courts are not quite so unfavorable to a larger award even in the case where the seller was not told, but might reasonably have considered a *possible* resale. Professor Williston observes that it is generally to be presumed between merchants that a resale is contemplated by the buyer. The Restatement of the Law of Contracts<sup>20</sup> is evidently to be understood in the same sense. The draft allows the same result to be reached by any court declaring a resale to be normally foreseeable, but it does not force English judges to do so.

5. This very theory, that sense and scope of the contract are to be consulted in order to determine its effect on the obligations of the parties—it could be called, using the English catch-word, the "contemplation theory"—has particular importance also for the distribution of the risks between the parties and thus for the rules of exoneration. However, this very difficult problem of unification has not been solved in the first

<sup>19</sup> Cf. Rabel, *op. cit.* *supra* note 1, at § 61, 6-8.

<sup>20</sup> Rest., Contracts § 320, comment c (1932).

draft. It might be interesting to report in a separate article on the efforts to liquidate it in the second draft.

6. In another matter the draft has adopted a consequence of the same basic idea, curiously enough freeing English principles from their historical vestment. The idea of distinguishing between the *material elements* of a contract and its *immaterial* ones is characteristically Anglo-American, without being quite alien to any other system. The British Sales Act still distinguishes between "conditions" and "warranties." "Condition," however, is in no sense what the word seems to say, since it is not true (as some misled writers still think) that failure of condition would avoid the contract as if it had never been concluded. The other term, "warranty," has five or six different meanings. The American commissioners who drafted the Uniform Sales Act knew how confusing this distinction was.<sup>21</sup> They speak directly of "performance" of a condition (section 11) and eliminate the impracticable rule allowing rescission only as a remedy for breach of a condition, section 69 (1) (d). The Uniform Act helps to purify the doctrine by recognizing the dogmatic value of the distinctions. Unfortunately, however, the Act itself still remains in the dark, retaining the wrong terms (sections 11-16) and falling from the English extreme into the opposite when it allows rescission not only because of all defects but also, apparently, because of a breach of any collateral promise. The true theory must be that obligations other than the few main ones must be distinguished according to the importance ascribed to them by the intention of the parties as interpreted individually or typically. The draft defines an essential contractual duty as a duty arising from a term of the contract without which the promisee would not have concluded the contract. If such a duty is broken, he can "rescind" the contract, otherwise only damages may be claimed.

Furthermore, in the event of partial default in delivery, or of delay in delivery of part of the goods, or where only part of the goods are defective, the contract cannot be rescinded as a whole unless the breach goes to the root of the contract. This rule seems preferable to the free option accorded by the Uniform Sales Act, section 44 (3).<sup>22</sup>

The same criterion, this time strictly following the Anglo-American terms, is utilized in determining the consequences of a failure to deliver the goods or to pay the price at the time definitely fixed for this purpose in the contract. Delay, when time is "of the essence of the contract," is

<sup>21</sup> 3 Williston, Contract § 673 (rev. ed. 1936); Gutteridge, *op. cit. supra* note 1.

<sup>22</sup> Another interesting suggestion in regard to § 44 (3) is made in 35 Col. L. Rev. 726-739 (1935).

sufficient for immediate rescission.<sup>23</sup> The commercial practice terms relating to the date of delivery are deemed to be essential not simply in every mercantile sale but only in sales of bulk goods and of other goods having an international market. The draft attempts to include these groups of sales by requiring that prices are quoted for the goods sold on a market available to the buyer.

7. As a matter of course, the other improvements achieved on the English Act by the Uniform Sales Act are also maintained. For instance, the rule in *Chandler v. Webster*<sup>23a</sup> ("loss lies where it falls"), which seems queer to any continental lawyer, is rejected in America<sup>24</sup> as well as in Scotland<sup>25</sup> and also in the draft. Where one party is discharged from his obligation by *vis major*, the other is free from his duty, no matter at what date he had to fulfil it. Furthermore, implied warranty of fitness for a particular purpose does not depend on the requirement that the goods be of a description which it is in the course of the seller's business to supply (*cf.* U.S.A. section 15 (1) as against Sale of Goods Act, section 14 (1)). Recoupment in diminution or extinction of the price cannot be coupled with damages for the same breach of warranty (*cf.* U.S.A. Sec. 69 (2) as against Sale of Goods Act, Sec. 53 (4)). The obscure<sup>26</sup> English section 33 has not been followed.

The American Sales Act, Sect. 49, has also, modifying the common law practice in New York and almost every State, brought its rule nearer to the civil law, while it leaves surviving an implied warranty after acceptance of the goods (*cf.* German Civil Code § 363). The draft had to follow this lead.

### III

With all these and many other analogies between the draft and the American law, I am, however, not prepared to contend that their rules are identical throughout.

There is, first of all, a difference in style. The draft is conceived in a more systematic method, availing itself of the legislative experiences of the civil law countries. Besides, it is written in French, a language with

<sup>23</sup> On the details of this very delicate and interesting matter see Rabel, *op. cit. supra* note 1, at §§ 50-52.

<sup>23a</sup> [1904] 1 K.B. 493.

<sup>24</sup> *Tulsa Opera House v. Mitchell*, 24 P. (2d) 997, 1001 (Okla. 1933); *Rest., Contracts* § 468 (Okla. Ann. 1932); 44 *Harv. L. Rev.* 623, 628 (1930).

<sup>25</sup> *Cantiare San Rocco v. Clyde Ship Building Co.* [1924] A. C. 226; *Watson v. Shankland* 10 M. 142 (1871); *Gloag, Contracts* 353 (2d ed.); *Gloag and Henderson, Introduction to Scotch Law* 97, 332 (2d ed.).

<sup>26</sup> *Cf.* 4 *Williston, Contracts* § 996 B (rev. ed. 1936).

peculiar requirements. Hence the proposed code will undoubtedly appear somewhat foreign in America, and not much less so in any other country. To overcome this impression, it would perhaps be sufficient to have an English version not translating the text verbally, but freely rendering its meaning.

Furthermore, the rules do not follow strictly any actual legislation. The American reader will run across many more or less unfamiliar provisions. For instance, the rules concerning anticipatory breach of contract, contracts for delivery by instalment, privilege of the seller to deliver a second time after one incorrect delivery, all regulated with special regard to English and American law, have yet some peculiarities of their own. Bringing up here what seems to me the greatest divergences from American law I think it will be quite easy to see that in these points the sales acts cannot be maintained forever.

1. As a residue from the year 1677, the Statute of Frauds still lives and has even given life to section 4 of both sales acts. Its principles are widely riddled with exceptions and it is generally not invoked except by dishonest men, or as a make-weight for some more substantial defence. This survival is essentially inferior to the old French rule which, restricting parol evidence, requires a writing for any contract over 150 francs. The opinion that oral evidence should be restricted still finds support today. Yet, no rational justification has ever been afforded for the mottled variety of evidence provisions in the different civil and commercial codes of the countries of the French system nor for the different amounts the various American states thought fit to fix as the maximum for oral contracts. The impression of pure arbitrariness is strengthened by the incredible labyrinth of interpretation of these rules and by their paradoxical effects. How is it to be explained that someone who has bound himself by telephonic arrangement and omits to confirm the contract by letter, can take advantage of a statute which purports to combat fraud? In an American guide to sales contracts and order forms I find the bewildering statement that "printed agreements are sometimes used with full knowledge that they would have no standing in courts; as, for example, cases where no method exists of arriving at a definite price for goods to be manufactured."<sup>27</sup> What an experience after years of research in preclassical Roman *ius civile!* Yet this is but one illustration. Chief Justice Campbell once said that he would have "rejoiced, when this statute goes. It does more harm than good; it promotes fraud rather than prevents it, and is not productive in justice." Willis, J., quoting this

<sup>27</sup> Sales Contracts and Forms, New York, Prentice-Hall Inc. (1928).



sentence in 1901,<sup>28</sup> added his deep regret that "principles so distasteful to justice and so hurtful to the whole community" were re-enacted in the Sales Act.

Therefore I hope the draft will not be criticized for having done away with all restrictions of parol contracts, as do all other recent codes, especially when it is considered that parties to an international sales transaction can be supposed to know what they are doing.

2. Another comprehensive chapter of anomalies, from a comparative point of view, is formed by the relics of the ancient cash and carry system. In many respects different rules are established by the present sales laws, especially the Sale of Goods Act, for cases where title to the goods has passed and cases where title has not passed. In other respects, different rules are established for cases where the price has been paid and where it has not been paid. It is submitted that all these distinctions, no matter what reasons are alleged for them today, have their origin in the ancient system of immediate cash sale which is still called shortly "sale" in the sales acts.<sup>29</sup> Under the present state of commerce and law these rules would have never been arrived at.

The most impressive phenomenon in this connection remains untouched by the international draft, *viz.*, the rule that the action for the price can not be brought unless the title has passed to the buyer. It is very curious that the seller's right to obtain the price should depend on any thing other than his own choice, and moreover on an event so difficult to ascertain and so often casual. Where the transfer of the title has been postponed by mutual agreement, one should think that it is left with the seller as a security for the price. Yet, in that system it is declared to be impossible for the seller, at least as a general rule, to have both property in the goods and a right of action for the price. However, the draft had nothing to reform in this matter. It had but one course to follow in face of the abyss between the Anglo-American and the continental concepts of specific performance. The basic ideas are too far away from each other for a thorough unification. In this one point the only sound solution was to leave the existing differences untouched. The draft provides that in the matter of specific performance the courts of each country are allowed to follow their own traditional course. Thus, English and American courts will not be troubled with new principles. All other courts

<sup>28</sup> Willis, *Contract of Sale of Goods* 110 (3d ed. 1929).

<sup>29</sup> Llewellyn seems to have similar impressions when he says, *Cases* p. 14: "The courts have spent a century struggling through to recognition of issue after issue as severable from title," and p. 110, that the requirement of the action for the price that title has passed has historical reasons.

would grant judgments for specific performance as they do now. However, the draft has made a step toward the Anglo-American system, by providing that even in the continental countries the buyer shall not be entitled to specific performance where it is in accordance with the usage of the trade to repurchase the goods or where he can repurchase them without inconvenience and appreciable expense. Likewise the seller cannot claim payment of the price where a resale is trade usage. These are acknowledgments of a practical advantage of the Anglo-American system. But even this concession has caused misgivings by learned lawyers of a certain European country.

American law, although giving an aggrieved party the power to rescind the contract on a broader scale than English law, still distinguishes in section 69 (1) (c) between the cases where property has passed to the buyer and where it has not passed. If property has not passed, the buyer, in case of a breach of warranty, is allowed to reject the goods and, in addition, to sue the seller for damages. If property has passed, however, he must either reject the goods or sue the seller for damages, but he cannot do both. There is no reason whatever for such a distinction. I know the progress it represents over previous phases, but that distinction has not passed to the draft.<sup>30</sup>

Another concept of Anglo-American law which was rejected by the draftsmen is that of "acceptance." Today acceptance is used with five different meanings in the law of sales and "none of them is inextricably interwoven with the moment of passing title."<sup>31</sup>

3. Rescission and damages for nonperformance mutually exclude each other according to a rule common to Anglo-American and German view. Why? "Rescission" and "*Rücktritt*" "avoid" retroactively the contract, but the basis of damages is the contract which must therefore be still alive. Nobody can "both affirm and rescind the contract." Logic? It is pure doctrinairism, and the supposed destructive character of rescission a *petitio principii*. It follows from this pseudo-axiom that the aggrieved party is confronted with an election of remedies, the practical bearing of which he often does not know. In America the binding effect of such an option is aggravated by procedural hardships. The draft prefers the French and Latin-American system, which has also been adopted by the Scandinavian and some other countries. Where rescission is allowed—

<sup>30</sup> As I see with satisfaction there is now a suggestion to the same effect, 35 Col. L. Rev., 739, n. 67 (1935).

<sup>31</sup> Isaacs, *op. cit. supra* note 9 at 270; Williston, 34 Harv. L. Rev. 763 (1921) does not want to let pass any occasion to emphasize the several uses of the word in the law of sales.

because of non-performance of delivery, of payment, or of any other "material" obligation—and the promisor is not discharged by *vis major*—the promisee may "rescind" the contract and claim compensation for the harm caused to him by the very rescission. In other words, in those cases where a promisee is allowed to rescind the contract because of a failure of performance not due to the fault of the promisor, both parties must simply restore to each other what they have obtained in execution of the contract; but in case of a rescission because of the promisor's fault, he must moreover pay the damages resulting from the breach. The term "rescind" is actually used also where a contract is repudiated by one party and the other "accepts" the repudiation ("brings the contract to an end"), but nevertheless may claim damages for the breach. Perhaps a better word could be found for this kind of cancelling not so much the contract, as the promisee's right to specific performance, which leaves the contract in existence and only transforms the contents of the obligations. That notion is not altogether alien either to the decisions or to the American uniform act, as section 61, contrary to English law allows the unpaid seller to rescind the transfer of title under certain conditions and to recover damages for the loss occasioned by the breach. In a corresponding way, Mr. Chandler adds to section 69 (1) (d) (his s. 60 (1) (d) dealing with rescission on the ground of a breach of warranty) a claim for "damages for any loss for which the recovery of the price or the part thereof which has been paid will not be adequate compensation." This addition indicates a characteristic discontent with the present state of the law, although it expresses an idea somewhat different from that expressed here.<sup>32</sup>

4. Finally, but without exhausting the matter, I should like to call attention to the task the draftsmen had in defining the concept of "defects of quality" for which the seller has to respond. Historical developments have once more led English law to a very complicated accumulation of grounds for liability where some defects are covered by two or more warranty rules and others by none. In America, at least condition and warranty are melted together and the concept of implied warranty for special purpose has been made broader. As a result, no, or only a few, gaps are left in the subject-matter of warranty. However, there remains the ill defined line between express and implied warranties and the confusion of "description" overlapping both of them.<sup>33</sup> All the

<sup>32</sup> It seems to be the "reliance interest" as used by Fuller and Perdue. See 46 Yale L. J. at pp. 89 and 383 (1936, 1937).

<sup>33</sup> See Isaacs, *op. cit. supra* note 9, at 266.

difficulties arising out of this system are absolutely superfluous. The draft establishes a comprehensive concept of defect covering all the various situations and treating them all alike.

As a matter of course, the antiquated<sup>34</sup> rule of section 15 (4) of the Uniform Sales Act concerning the sale of a specific article under its patent or other trade name has been omitted.

Most rules of the draft have emerged, after long preparation and discussion, from the common strong conviction of the draftsmen that they represent what can fairly be stated to be the living law of the present time. Other principles, among which a few are very important, were subject to doubt either because it was questionable how far the domain of a certain principle should extend or because their formulation was difficult. In the first regard, for instance, the question had to be solved, to what groups of sales the presumption that a fixed date of delivery is of the essence of the contract should be applied, or what circumstances should be required for releasing a party from his contractual duties. In the second regard it is, for example, not easy to define what commercial usages shall be binding for the parties to an international sales transaction. This task is difficult not so much because the national legislations differ in deciding concrete cases, but because they start from different general conceptions about the relation between usage and law. The needs of life are so varied that even after an exhaustive research in comparative law, after a careful juristic analysis, and a consideration of the economic issues involved, the choice of rules cannot always seem smooth. It is however to be emphasized that the committee did never reach a decision by mere majority rule. Their ultimate propositions, though they do not all correspond to every member's wishes, result from their unanimous opinion about the best unification actually obtainable. Besides it is to be understood that apart from some very welcome suggestions made by governmental notes, all utterances of the committee members were strictly personal.

Quite naturally there may be future opposition to some specific points, but I hope that whoever thinks that a rule may be still better formulated will take the trouble of initiating a further discussion.

If a diplomatic conference should be held upon the sales law, all criticisms and suggestions could be reexamined there.

Although we look forward with pleasure to a discussion of the spirit

<sup>34</sup> See *id.* at p. 265; the rationale of the rule is explained by Töpken, in 10 *Zeitschrift für ausländisches und internationales Privatrecht*, 67 (1936).

and substance of the International Sales Act, it is to be expected that certain general objections will be made which are frequently advanced against any such proposed unification. A uniform sales law will appear impossible to some in spite of the draft which claims to prove the contrary, and it will seem useless to others. It will be contended by the lawyers of one country that the draft deviates too much from their own law, and by their colleagues from another country that the changes in existing law which the act would introduce would be too slight to justify the inconveniences involved in its adoption. As a matter of fact, there has already been a protest against the unification of sales law in one country, because the matter had recently been dealt with in a new code, and in another, because the matter was going to be regulated soon in a new code and was difficult enough without considering the draft.

In my mind, though the coincidence of such objections suggests some irony, I have no doubt that in each of them there is some truth and that they have some weight. Moreover, all of them arise from a tendency to preserve tradition which I should be the last person to underrate. I have always considered legal continuity as admirable and at least as a general tendency wholesome. The slow and steady evolution of Roman, English and American law has taught a great lesson to universal jurisprudence. Really, it is simply a question of expediency whether and in what measure the legitimate inertia ought to be broken in favor of unification.

As to this measure, it has been shown above how modestly the International Sales Law would intrude into the traditions of the various countries concerned. The act will not substitute itself into the existing national order in domestic sales contracts but in the national and international disorder in international sales.

The importance of such a law depends on its function in the universal development of law. To appreciate this problem in the face of requirements contradictory to each other, we may remember the dilemma in which the Commissioners of Uniform State Laws found and often still find themselves, and, in a certain sense, also the work of the American Law Institute. Of course, the Restatements of the American Law Institute are not intended to be enacted as state or federal law. Their authors are unwilling to change the actual law. However, precisely for this reason, they were accused of modifying effectively the present rules in many respects. Their work has been blamed both for showing too many progressive tendencies, and for being too conservative. Since our situation is somewhat analogous, I venture a few words about that subject, es-

pecially in view of some recent valuable and spirited reviews<sup>35</sup> of the Restatement of the Law of Property. Reducing legal rules to writing has its age-old experiences. Whoever has had to reduce customs to writing or to clear up old rules by consolidating or codifying must have felt as if he were between Scylla and Charybdis. Even "to make explicit existing principles which have been implicit in widely scattered groups of cases," as is the avowed purpose of the Restatements, corresponds exactly with the object of any writer on case law. No legal system can be either established or reported in a scientific way without a subjective element being mixed into it, especially if the law of forty-eight states is to be stated simultaneously. For it was impossible to limit the Restatement to an enumeration of what has been held in the majority of states on the various questions. The attempt would have recalled Emperor Theodosius II. and his Law of Citations estimating conflicting opinions of Roman jurists by number instead of weight. To weigh doctrines, however, it is necessary not only to evaluate their reasonableness but also their history, since the process of evolution moves at different speeds in different territories, giving here the results of an earlier, and there of a later period. In this situation, the restater is compelled to judge for himself what rules, though formally unrepealed, are obsolete or obsolescent, and what rules, however ancient, may still have life in them.

If I understand the restaters correctly, they have consciously assumed this entire burden. Though they do not intend to legislate, they did by no means wish to limit themselves to a photographic picture of a momentary stage of the law. The burden was, of course, greatly increased by their determination to formulate a single answer for every question, an answer that should represent "the American law" on the subject. I can imagine a discussion on this requirement. Yet why not trust such a profoundly considered plan? Perhaps what the Restatements ought to be first of all, is not so much the principal guide for courts and the leading textbook for students—both of which most Restatements, accompanied by preparatory work and annotations, will surely be in fact. Their greatest mission is to lead the American law out of its so often lamented actual position and to prepare a uniform and modernized law. For that scope the way chosen is probably the only suitable one. Each Restatement means a great step forward on a hard path.

The same claim may be allowed to the draft of International Sales

<sup>35</sup> Raymond, 23 Iowa L. Rev. 141 (1937); Vance, 86 U. of Pa. L. Rev. 137 (1937); Bordwell, 51 Harv. L. Rev. 565 (1938). I hope to have another opportunity to say something about the Restatement of the Law of Property from the point of view of comparative law.

Law. Here, too, there is no intention to innovate *ad libitum*. The draft does not contain a single arbitrarily invented provision nor any newly invented terms but only more precise reformulations of existing terms. All are proved in practice. On the other hand, of course, the purpose was avowedly not the simple one of harmonizing the actual legislations and standard forms, but to seek the rules best in themselves and best suited to each other.

Will it be objected that the job is but half done if the law of sales only is codified and the rest of the law of contracts and obligations left as it is? Well, it leaves open the way to greater ambitions. That there is no harm in such separate treatment was proved by the British and American sales laws, the old German Commercial Code and the Scandinavian Sales Act. The latter illustrations are even more effective because the general laws of the various jurisdictions concerned were much more different from each other than the various laws within the Commonwealth of British Nations and the United States. The law of sales is almost a whole. The contract of sale is easily distinguished from other contracts. The oldest commercial contract in history is still the most used of all. Its main structure has remained the same ever since its departure from the rigid ancient system of "real" sale. To codify this contract is quite natural. May we not anxiously ask whether the new code is too alien or too related to existing codes, whether commerce could survive without it and how much the need for this codification is diminished by all sorts of obstacles to world trade?

We are pleased to imagine what it would mean, if over great stretches of the earth for the first time a central chapter of the law of obligations would be governed by uniform legislation. What a field for judges like Holmes and authors like Williston, what interchange of solutions, methods, systems! It is not true that unification is practically useless without a common court of appeals. Good decisions have a persuasive power. Common legal science is a greater benefit than is generally imagined. Within each country the international sales law would rival the domestic law by intrinsic strength, as did in Rome the *ius gentium* with the *ius civile*. Looked at in this way, it is well worth while to help the international law of sales to come into existence.