DEVELOPING INTERNATIONAL TRADE LAW

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If one's goals are modest and patience great, then with a little bit of luck, something on a multilateral level in the area of private international law can be accomplished. What I want to talk about today is what has thus far been a successful attempt to produce by multilateral negotiations a uniform law on the international sale of goods, which is roughly comparable on an international scale to Article 2 of the Uniform Commercial Code. And in so doing I want to address four main areas of interest. First, I want to tell you something about the history of the attempt to conclude an agreement in this area. Second, I want to address drafting and the negotiation process, because I understand that is the subject you are most interested in at this Workshop. Third, I shall talk about the substance of the proposed draft. And finally, I shall conclude with a few comments about the future.

Let us go first to the history so that my comments can be put in the proper time frame. Heinrich Heine, the German poet, once said, "If the world comes to an end I shall go to Holland because there everything happens fifty years later." That is pretty much the way it is with the sales draft. The history covers the fifty years from 1930 to 1980. This period can be conveniently grouped into two stages.

The first stage was the creation of what is known to those in the business as the Uniform Law on International Sales (ULIS). In 1930, the International Institute for the Unification of Private Law — which is located in Rome — set up a drafting committee of European scholars, including those from the United Kingdom. I suppose Ernst Rabel was the most influential of them. Their efforts resulted in a draft on international sales which the League of Nations then sent to governments for their comments. In 1939, the committee completed a revised draft that reflected comments re-

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ceived from governments. After nearly a decade of work on this project, it was interrupted by World War II. The next event of importance in the law of sales took place in 1951 when twenty-one nations attended a conference held at the Hague. The conferees gave general approval to the revised draft and appointed a special commission to continue the work on sales law. Once again, the special commission was composed entirely of Europeans. André Tunc of the University of Paris was to become the most influential of that group. In 1956, the special commission released a revised draft that was once again sent to governments for comments. In 1963, the commission completed a further revision that responded to these comments. This draft was again circulated to governments and a diplomatic conference was scheduled.

I have covered a period of thirty-three years rather rapidly, because the United States had almost no input during this time, at least not officially. In December of 1963, at what certainly could be called the eleventh hour, Congress authorized the United States to join the forty-nation group that composed the Rome Institute. Shortly thereafter, in April of 1964, the diplomatic conference on the sales draft was held at the Hague. In three short weeks the conference reduced the number of articles — which we would call sections — from 113 to 101. In addition, they produced a separate draft on the formation of international sales contracts. I have spared you the history of that, but it is very similar to that of the sales draft itself. This conference was the first time that the United States had any input into this process. We sent a team of six experts, including Professor John Honnold of the University of Pennsylvania, who was later to play a role in a subsequent aspect of the sales work; Professor Soia Mentschikoff of the University of Chicago and now Dean of the University of Miami; and Richard Kearney, who was then deputy legal advisor of the Department of State and later Ambassador. Much of the work at the conference was done in drafting committees. There were five members on the drafting committee on sales, including André Tunc, who had been part of the earlier drafting process — in a role that he himself characterized as "defender of the faith." This committee also included John Honnold, who directed the United States contribution to sales, and Soia Mentschikoff, who worked on the formation draft in a similar capacity. If you are interested in a scholarly way in what happened at this conference, you should consult the two massive volumes in double columned style published by the Ministry of

Justice at the Hague in 1966. These volumes include a summary of the proceedings, all of the various drafts, and a valuable commentary on sales law by Professor Tunc.

This is where we were after a little more than thirty-five years. The ULIS was subsequently adopted by eight countries. The United Kingdom was the first to sign, for which an explanation is in order. The United Kingdom, which at the time was very interested in entering the Common Market, had engineered a reservation, which it then proceeded to use when it adopted the law. This reservation provided that the law would only apply if the parties chose the law as a part of their contract. Englishmen could explain to you how this did have some effect, but I will not attempt to do so. In any event, the United Kingdom counts it as one of the required ratifications. Other countries adopting the ULIS were San Marino, Belgium, Israel, the Netherlands, Italy, the Federal Republic of Germany, and Gambia.

That is where the story of ULIS ends for the moment, but the work was picked up in another guise — the Convention on the International Sale of Goods (CISG). Its history begins in 1968 when the United Nations Commission on International Trade Law (UNCITRAL) held its fifth session. UNCITRAL put the topic of international sales on its priority list. The creation of such a group had been proposed a few years earlier by the Hungarians in the United Nations. UNCITRAL originally had twenty-nine members but was later expanded to thirty-six. UNCITRAL operates, and this is not unusual in the United Nations, in blocks. That is, there are groups of countries from Africa, Asia, Latin America, Eastern Europe, and Western Europe — which includes the United States and Australia — which work together as blocks.

At its second session in 1969, UNCITRAL appointed a fourteen-member working group to consider what changes in the ULIS, as proposed at the diplomatic conference, would make the proposed draft more acceptable to countries of varied legal, social, and economic systems. This, of course, was what the Hungarians had in mind when they proposed the creation of such a commission. It is important to realize that at the time this proposal to revise ULIS was made, ULIS had only two of five ratifications necessary to bring it into force. The working group in UNCITRAL took long enough that there were six additional ratifications while the group was at work.

The working group met for seven sessions of two weeks each,

alternating between New York and Geneva between 1970 and 1977. That was the time at which I became involved in the work of UNCITRAL and of the working group. At the working group's seventh session in 1976, work was completed on the redraft of the ULIS text produced at the earlier diplomatic conference. The draft at this point was reduced to sixty-seven articles. A common process of compromise in this group is to leave an article out if agreement cannot be achieved, and that is obviously what happened with this draft. We were then down to sixty-seven articles with some unresolved questions signified by brackets. The text also had a commentary by the Secretariat of UNCITRAL, which is the International Trade Branch in the legal office of the United Nations. During this difficult time when we worked on sales law, the man in charge of this office was John Honnold, who had temporarily left the University of Pennsylvania Law School to do this work. He had been at the diplomatic conference in the Hague, and it was extraordinarily good luck for the project that he was persuaded to participate. It is hard to imagine that it could have been as successful with anyone else. Fortunately, when Professor Honnold left, he was succeeded by Willem Vis, a Dutchman. Perhaps more important for us was the deputy who then came into the Branch, a man named Eric Bergsten, who had been a professor at the University of Iowa. There has therefore been an important United States influence in the work of UNCITRAL.

In 1977, UNCITRAL held its tenth session in Vienna and revised and approved the sales draft that is now known as the Convention on the International Sale of Goods. From 1976 to 1977, the working group that had finished sales spent two more meetings on formation and validity. Formation was the subject of a parallel but much smaller convention than had gone through the diplomatic conference at the Hague. Validity was the subject of a draft dealing with some problems of mistake and interpretation that had come out of the Rome Institute. The working group refined the formation draft, threw out the provisions on mistake as impracticable in this forum, and kept the provisions on interpretation. In 1978, at UNCITRAL's eleventh session, this was integrated into the Convention on the International Sale of Goods. Just as the Uniform Commercial Code took the subject matter of the old Uniform Sales Act and added some rules on formation, UNCITRAL produced a draft that is mostly devoted to sales but that has something on formation and interpretation, all limited of course to the international

sale of goods. The next step, prior to actual ratification, is a diplomatic conference that is expected to be held in 1980. So much for the history.

I shall now tell you a little about drafting and the negotiating process. A variety of views is represented; at the risk of oversimplification, let me suggest some of the groups that hold these views. First, there are the Western developed nations which are divided into two camps intellectually because of the existence of common law countries — for example, the United States, the United Kingdom, and Australia — and civil law countries such as France, West Germany, and Austria. In this context Japan also falls into the "Western" developed nation category. Now, many of these countries are not only civil law countries, but they are closely identified with the drafting of the first ULIS. The United States and Australia, for example, do not share this background. Then there are the Eastern European nations of which the Soviet Union and Hungary have been particularly active and very diligent. Finally, there are the developing nations which are very numerous and not always as well-represented, because it is quite a drain on such countries to man all of the specialized agencies of the United Nations. Although not all of them are able to send technical experts to this commission, some have found it possible to participate very actively. Ghana, for example, has been quite active. The working group's chairman has been Mexican and hence Mexico is active. And while there are differences between the common law and civil law countries among the developed nations, it has been somewhat surprising to me that the developing nations are primarily "developing" and only very secondarily by tradition divided into common law or civil law.

Let me give you a few brief examples of how this works. Take usages, for example. If you have ever taught contracts or commercial transactions, I do not suppose that you thought usages had any enormous political content. Viewed in the context of the United Nations, however, they become political. Generally, developed nations like usages. Most usages seem to be made in London, whether in the grain or cocoa trade, for example. Developing countries, on the other hand, tend to regard usages as neo-colonialist. They cannot understand why the usages of, let us say, the cocoa trade should be made in London. And usages are looked on with perhaps even more suspicion by the Eastern European countries, because the Eastern Europeans, being even more bureaucratic in

their outlook than our multinationals, like to have everything in their files. There is nothing more distressing to a bureaucrat than the thought that some Englishman or Ghanian is going to appear and claim that there is a usage that he does not have in his files. So drafting provisions governing usage is much more complicated than I would have expected when I became involved.

Another example of this is the requirement of a writing. If there is anything that is less exciting than usages in teaching commercial law or contracts, I suppose it is the Statute of Frauds. In the context of the United Nations, however, one can generate a fair amount of heat. ULIS provides that no writing is required. Should this position be maintained? The Western developed nations thought it was a good rule. Most European countries, in their commercial codes, do not require a writing between merchants. Perhaps our own advisors from large corporations doing business abroad would be more likely to think that a writing is a good thing. Nevertheless, the Western developed nations' position generally supported the provision of ULIS that dispensed with this requirement. On the other hand, the Eastern European nations, in particular the Soviet Union, will not admit the validity of an agreement without a writing. They take, I suppose, the line from Sam Goldwyn that "an oral contract is not worth the paper it is written on." Soviet law requires both a writing and a signature of two authorized individuals. A very important part of the tenth session at Vienna, when the sales material was put into its present form, was the negotiation with the Soviets of an exception that would permit them to maintain their requirement of a writing in spite of the general rule that would still apply to contracts between participants from other countires.

Two more brief examples are worthy of mention. What about specific relief? Can the seller, when the buyer does not want to take the goods, compel the buyer to take the goods and pay the price? Conversely, can the buyer, if the seller does not want to give him the goods, compel the seller to transfer the goods to him? In the civil law countries of Europe it is recognized, at least in theory, that specific relief is widely available. Therefore, those countries favor specific relief. This is particularly so for the civil law countries of Eastern Europe that have planned economies, with no markets on which buyers can buy substitutes if sellers do not deliver. One of the problems that the small minority of developed common law countries had was to restrain somehow the enthusiasm of al-

most all the rest of the world for a statement that specific relief is generally available. The result was an uneasy compromise.

One last item to indicate how almost anything can become political: how soon does the buyer have to notify the seller of a defect in the goods? It is hard to imagine anything that is more antiseptic than that question. The Western developed countries or the Eastern European countries tend to think of themselves as manufacturers of goods and purchasers of raw materials. A short notification period for the buyer to complain obviously favors manufacturers of goods and purchasers of raw materials. One can quickly determine that raw materials are defective, while it may take a longer period of time to ascertain whether an exported machine is defective. The developing countries took the opposite point of view. Consider the person who sells coffee beans and buys coffee grinders. He will want a long period during which the buyer can complain.

Those are just a few of the exciting political issues that we have faced over the last decade. How are they presented in the context of UNCITRAL? Fortunately, we started with a text; we did not have to begin by writing a draft. We started with the draft that came out of the diplomatic conference at the Hague. A wise man once said that "no passion on earth, no love or hate is equal to the passion to alter someone else's draft." I think this is true of our group. Of the thirty-six countries now on the Commission, there is a somewhat smaller number of effectively represented countries whose delegates actually participated in the drafting. The tradition is the United Nations tradition of unanimity. In view of all the political differences I have alluded to, you may wonder how unanimity is possible. Well, you do not quite get unanimity. The chairman will face a few people down. If nobody agrees with the speaker, certain reservations are entered in the nature of footnotes and the Commission gets along with its business. Failing that, progress is made by talking each other to death and by being extremely persistent from one session to another until, by a process of attrition, someone gives in.

Fortunately, it is a very interesting group, a group of many distinguished people — academics, government officials, and others. One of the important things that favors the American and other common law countries is the work was done in English. French has been very much a declining language over the last ten years in this group. Americans are quite diligent and reasonably skilled at drafting, which helps to get our point across. The Soviets

and the Japanese are likewise extremely diligent. In a group like this, it is misleading to count the members. You really must count the number of people who effectively express their views in the form of a text.

There is also a system of observers, which tends to be both good and bad. It helps in the sense that a country that happens to have someone who is skilled and interested in participating can send that person and he will be accepted as an observer and be permitted to participate. Since formal votes are not taken, at least in principle, there is not a lot of difference between being an effective observer and an effective delegate. On the other hand, there has been a considerable amount of dilution by the increased numbers of observers, and when delegates are trying to talk each other to death additional talking does not help.

UNCITRAL is, by United Nations standards — and I have not had a lot of experience in other groups — a highly professional and apolitical group. If one talks to the interpreters and the *précis* writers after an absolutely dreadful session and asks how they can stand it, they will reply, "This is so much better than the Commission I worked in last week."

It should also be mentioned that an extremely important role is played by the Secretariat — originally John Honnold and now, in part, Eric Bergsten — because it is their function to prepare the working documents. While all of us who sit as representatives believe that we are the "makers" of this law, they are the ones who put before us the various possible drafts. This usually is done with a tactful note suggesting that you would have to be out of your mind to adopt draft *A*, that draft *B* is really not very good, and that you should adopt draft *C*. This is an art in which they have become very proficient.

United States views are developed under the Department of State, first under Dick Kearney and now under Steve Schwebel, the deputy legal adviser. In theory, they make the policy and we implement it, but the division of authority is somewhat less clear than that suggests. There is also an advisory council to the Secretary of State on which representatives from such organizations as the ABA and AALS sit. Furthermore, the work on sales has had the benefit of more or less regular annual meetings of technical advisers in the New York area. These advisers are drawn from business and the practice of law along with an occasional law professor, all of whom have given useful guidance and have served as a sounding board.

It is sometimes useful to be able to say in the Commission, "I have talked with the practical people in my country, and they are of the view that such and such is a better rule." On the basis of all of this, we write our own instructions and forward them to the State Department and hope that the Department doesn't change them very much. A couple of years ago the instructions came back without any changes at all, except at the end of the telex was the name Kissinger. Needless to say, I did exactly what he told me to do.

I would now like to address some substantive questions relating to the draft. To what does it apply? Instead of adopting the approach of the Uniform Commercial Code, which applies to sales generally, it is more like the Pomerine or Federal Bills of Lading Act which applies to interstate, but not domestic, transactions. The Convention on the international law of sales would not apply to New York-California transactions. It would apply, in certain circumstances, to a transaction between the United States and France. Those of you who teach in the field of conflict of laws may want to look more carefully into the provisions of Article 1, but basically it applies to transactions in which both parties are from countries that have adopted the law and, in the alternative, to transactions in which the choice of law rules lead to the law of a country that had adopted the law. In this latter situation, the court does not look to the domestic law of that country; it looks to the international sales law of that country. Consumer sales have been excluded. One of the interesting things you find when you get into a group like this is that there is an exportable part of our law. The Uniform Commercial Code happens to say a lot of things in a very sensible way as far as other people in the rest of the world are concerned. And so when you look at this draft and find that "consumer sales" are defined as sales in which goods are bought for personal, family, or household use, it sounds familiar because it is lifted from Article 9 of the Uniform Commercial Code.

The law applies only to the rights of the buyer and seller arising out of the contract of sale. It does not govern the rights of third parties or the problems of duress, including economic duress, which tend to be too sensitive for an organization like UNCITRAL to handle. I will just list the substantive chapter headings for you, because they convey something about the content of the laws: formation; seller's obligations, including delivery of the goods; handing over documents; conforming goods; remedies for breach by the seller; the buyer's obligations, including payment of the price and

taking delivery; remedies for breach by the buyer; and provisions common to seller and buyer. The latter include a provision on anticipatory breach — an interesting provision, for it is said that at least some civil law countries do not recognize anticipatory breach. There is also a section on impracticability of performance, sections on damages, and sections on passage of risk. All of these rules are suppletive in that you can provide otherwise by contrary agreement; they are not mandatory. The draft also includes both familiar and unfamiliar concepts. Without going into detail, it can be said that one of the achievements as far as the United States is concerned is that over the last decade we have succeeded in excluding most of the very strange notions. So, when you study the draft you will find, with few exceptions, that the concepts you encounter are not vastly different from the familiar concepts in United States law.

I would like now to turn to the future, both with respect to the sales law and to UNCITRAL's work. Some of what I have to say is optimistic and some is pessimistic. Most of the sales law is now satisfactory to us, and we hope that it can be preserved in its present form at the diplomatic conference. There will be some problems. There will be some countries that have come to UNCITRAL only as observers and that will send delegates to the diplomatic conference, notably the developing countries which have not been effectively represented in the prior stage and which will then, for the first time, send someone who is both competent and interested. But if we hold the line, I think we will have a product of quality that will merit serious consideration for adoption by the United States. I hope this will happen within the decade.

With respect to UNCITRAL's future agenda, a little pessimism is appropriate. It might be a good idea if such organizations were created for a fixed term, perhaps ten years. UNCITRAL began with a marvelous agenda. But sales is almost finished, commercial paper will be finished within a year or so, bills of lading is completed, and we have done a lot on arbitration. Hence, we are now looking for something further to do, and one sometimes gets into trouble when looking for something to do. One of the items now being worked on is a study on international contract practices and form contracts. Another area is conciliation, as distinguished from arbitration. There is even talk of doing something in the area of secured transactions, a difficult task indeed. In the background there is the issue of the "new economic order." This will be a part of our agenda in the forthcoming twelfth session in Vienna this

coming year, where we shall talk about what the new economic order has to do with us. Certainly it will not be possible to end up without putting an item relating to that on our agenda of work.

A further ground for pessimism is that the International Trade Law Branch, which has been in New York at the United Nations building for all of its life, will be moving to Vienna, presumably in 1979, to help fill the enormous buildings in the new United Nations complex in that city. That seems to be a bad idea to everyone in the United States who has considered it. Vienna is a much more parochial city than New York. From a selfish point of view, we will have less influence. It will not only be harder for the branch to keep in touch with international commerce, but it will, I am afraid, be harder to get good people to go to Vienna. In New York they have the library facilities of several universities to supplement the very limited facilities of the United Nations itself. In Vienna there will be nothing comparable and it is questionable what either the United Nations or the Austrian government is going to contribute for library facilities. We are also faced with the retirement of Ambassador Richard Kearney who has kept a watchful eye over all of these efforts and has participated very actively in some. Along with his many other responsibilities, Steve Schwebel, the deputy legal adviser, is doing a heroic job in keeping watch over the work in this area. But it is very important that those of you who have an interest both in private law activities and international law encourage the continuance of the efforts that have been made.

Finally, if there is a moral to this it would be the following: if you have any time to write and you are minded to give a look at the draft, this would be a very interesting subject to consider writing on. Whatever you write would certainly be of great interest at the diplomatic conference. And if you have any influence with the Department of State, keep reminding them that their work on private international law is very important and ought to be encouraged.

Thank you very much.