

# SYMPOSIUM REFLECTIONS ON THE INTERNATIONAL UNIFICATION OF SALES LAW

## Introduction

*Richard E. Speidel\**

It was a bright morning in early January 1988. George, a commercial lawyer and partner in a leading Chicago law firm, was sipping coffee and paging through the newspaper. On page fifteen a small item caught his eye: "On January 1, 1988, the United Nations Convention on Contracts for the International Sale of Goods became effective in the United States. The Convention is now the supreme law of the land without the need for implementing legislation enacted by both houses of Congress. It governs offers made and contracts concluded after its effective date in the United States."<sup>1</sup>

It would be a mistake to say that George, in his excitement, spilled coffee on his suit. But he did take notice. His law firm represented clients in the United States and other countries, and those clients all bought and sold goods. What was this Sales Convention and would it affect his work? After all, he was just feeling comfortable with the Uniform Commercial Code ("U.C.C."). Would he, God forbid, have to master another Code?

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\* Beatrice Kuhn Professor of Law, Northwestern University School of Law.

<sup>1</sup> See Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707, 721-24 (1986)[hereinafter *Congress*].

Perhaps, George, perhaps. But before confronting this question, let us get the Convention chronology clearly in mind. In 1968, the United Nations Commission on International Trade Law ("UNCITRAL"), decided to review two international sales conventions dealing with formation and rights and obligations, which had been approved by a diplomatic conference at the Hague in 1964.<sup>2</sup> In 1980, the Sales Convention was unanimously approved in Vienna by a diplomatic conference of 62 states, including the United States. In August 1981 the United States signed the Sales Convention. The President submitted it to the Senate on September 21, 1983, with a recommendation that it be ratified, and on December 11, 1986, it was.<sup>3</sup> With the ratifications of the People's Republic of China and Italy on the same day, the requirements for the Convention's enactment were met.<sup>4</sup> Sixteen nations have now ratified it.<sup>5</sup>

## I. SCOPE: SOME NOTES ON CONVENTION AVOIDANCE.

### A. "Contracting Out"

When does George have to worry about the Convention? The answer is "never," if the parties have, by agreement, "contracted out" of the Sales Convention. Article 6 provides that the parties "may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions." Thus, it is possible (and quite likely) that the parties may agree to exclude the Convention and "contract into" the law of New York, or Illinois, or another state, and, therefore, the U.C.C.

There is a trap for the unwary here, however. The Sales Conven-

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<sup>2</sup> Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 (1972); Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 (1972). The 1964 Hague conventions were not widely adopted. The United States neither participated in the drafting nor approved the final product.

After ten years of effort, in which the United States actively participated, a consolidated draft sales convention was approved by UNCITRAL in 1978. This draft convention, although combining the subject matter of the two Hague conventions into a single document, accomplished a systematic and complete revision. The United Nations draft convention was approved unanimously in 1980 at the Vienna Conference, attended by 62 nations.

<sup>3</sup> For an enlightening (and disturbing) discussion of the ratification process, see Winship, *Congress, supra* note 1; see also Pfund & Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671 (1987).

<sup>4</sup> United Nations Department of Public Information, Press Release I/T/3849, Dec. 11, 1986. The Sales Convention was, under Article 99, to enter into force on the first day of the twelfth month after the tenth instrument of ratification was deposited. The People's Republic of China ("China"), Italy, and the United States constituted the ninth, tenth, and eleventh parties.

<sup>5</sup> Besides Italy, China, and the United States, the ratifying countries are, as of April, 15, 1988, Argentina, Australia, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia, Austria, Finland, Mexico, Sweden, and Zambia. George, there is a United Nations "hotline" for an update on recent ratifications: (212) 963-5047.

tion, as the supreme law of the land, is part of the law of Illinois and New York and, in cases of conflict, preempts the U.C.C. The law of Illinois and New York also includes its rules of conflicts of law. Thus, it will not be enough, simply to state that the transaction is governed by the law of Illinois. Care must be taken to provide that the parties' rights and obligations shall be governed by the local law (this should contract out of the conflicts rules), and domestic law (this should contract out of federal law) of the state, including its provisions of the U.C.C.

*Warning:* Ignoring this advice can be hazardous to your economic health. Taking this advice without further study and thought is equally dangerous.

## B. Choice of Law Provisions

The answer to when George has to worry about the Sales Convention is more complicated if there is no choice of law clause in one of his client's contracts. I do not wish to anticipate the exchange between Professors Gabor and Reese, but for George's sake at least, let us identify the sources of the difficulty.

### 1. *The Place of Business Test*

Article 1(1) provides that "[t]his Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) When the States are Contracting States . . . ." George, there is no need to worry about the Sales Convention if your client's place of business is in the United States and the other party's place of business is in Great Britain. Why? Unless the United Nations "hotline" reveals otherwise, Great Britain is not now a contracting party.<sup>6</sup> The Sales Convention does not apply.

Suppose, however, that the other party's place of business is in France, which is a contracting party. Suppose, further, that this party—a seller—had imported and stored a large quantity of wine in a warehouse in Chicago. If the seller, whose place of business is in France, now sells the wine to your client, whose place of business is in the United States, the Convention applies even though the wine never leaves the warehouse. The test is based upon "place of business," not location of the goods or where the contract was made or was to be performed. On the other hand, if both parties' places of business are in the United States and the seller is obligated to obtain the wine in France and ship it directly to your client's subpurchaser in Canada, the Sales Convention does

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<sup>6</sup> Dial (212) 963-5047.

not apply.<sup>7</sup>

## 2. *Residual Choice Rules: The United States Reservation*

Suppose the parties have places of business in different nations but neither is a "Contracting State." What choice of law rules apply if the parties have not provided for them in the contract? Article 1(1)(b) provides that the Sales Convention applies "when the rules of private international law lead to the application of the law of a contracting state." Translated, this seems to say that if the international rules of choice of law point to United States law or the law of some other signatory, the Sales Convention applies.

But what are these rules of private international choice of law? Not to worry, George. Congress, in its wisdom, exercised a reservation under Article 95 and deleted Article 1(1)(b) from the Convention before ratification. Why? According to Professor Francis Gabor, whose Article appears in this Symposium, it was the "unsettled and unpredictable status of private international law which prompted this limitation."<sup>8</sup> Under the reservation the Sales Convention will not apply unless the parties have agreed to its application or both of the contracting parties' places of business are in a state which has ratified the Convention.

## 3. *The Symposium: The Gabor-Reese Exchange*

Against this background (and with a concern that a substantial number of nations will not ratify the Sales Convention within the next decade), Professor Francis Gabor explores the 1985 Hague Draft Convention on the Law Applicable to Contracts for the International Sale of Goods. This is, in essence, a separate convention on international choice of law. Professor Gabor likes what he sees and, among other things, recommends that either Congress or the Permanent Editorial Board of the U.C.C. consider the Hague Draft Convention as a model for the enactment in the United States of uniform rules for the international choice of law.

Professor Reese, in his response to Professor Gabor, agrees that uniform rules would be desirable. He concludes, however, that "it would be difficult . . . to reach agreement on such rules, and there is always the

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<sup>7</sup> Confusing, right? Professor Arthur Rosett, a persistent and effective critic of the Sales Convention, thinks it is ridiculous. Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW. 445 (1984). In fact, Professor Rosett does not like the Convention at all. Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984).

<sup>8</sup> Gabor, *Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective*, 8 NW. J. INT'L L. & BUS. 538, 539.

strong possibility that these rules will be interpreted differently in different states.”<sup>9</sup>

Until these improbable events occur, George, you are well advised to review and revise the array of international choice of law clauses, now stored in the law firm computer, and to call regularly the United Nations “hot line” to ascertain whether a new nation has ratified the Sales Convention. Who knows? In time your clients may desire to “contract into” the Convention.

## II. CONTENT: TOWARD THE GOOD, THE TRUE, AND THE BEAUTIFUL IN INTERNATIONAL SALES LAW

### A. Substance of the Convention

Sales Convention avoidance is one thing, understanding the Convention is another. Two questions that should interest the Georges of the world include: 1) would incorporation of the Sales Convention as the law of the transaction actually facilitate the international sale of goods;<sup>10</sup> and, 2) how does its content compare with and improve upon the U.C.C.? These important questions are not directly considered in this Symposium and their answers must be found in other sources.<sup>11</sup> What is considered are the deeper questions of aspirations and potential for the Sales Convention.

### B. The Symposium: The Kastely-Winship Exchange

Professor Amy Kastely, in her “Rhetorical Analysis” of the Sales Convention, deals primarily with the broader objectives fostered and opportunities provided by the Convention. She argues that one objective of the Convention was to promote international commercial harmony by creating “a rhetorical community in which its readers first assent to the

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<sup>9</sup> Reese, *Commentary on Professor Gabor's Stepchild of the New Lex Mercatoria*, 8 NW. J. INT'L L. & BUS. 570, 572-73.

<sup>10</sup> In an earlier volume of the JOURNAL, I suggested that the Sales Convention was produced more from a “compromise among competing legal traditions” than an assessment of the “needs and practices of international trade.” Speidel, Book Review, 5 NW. J. INT'L L. & BUS. 432, 438 (1983)(reviewing J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982)).

<sup>11</sup> For the leading text, see J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982). In addition to this book, a mini-library on the Convention should include: 1) UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS (1981)(final text of the Sales Convention and the 1980 Conference proceedings); 2) THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS (R. Kathrein & D. Magraw eds. 1987)(collection of primary materials, including all six official language versions of the Convention); and 3) Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW. 585 (1987).

language and values of the text itself, and then use the language and values to inform their relations with one another."<sup>12</sup> She then applies what is called "rhetorical analysis" to examine the nature of the community formed by the text of the Sales Convention, its points of coherence, and its potential vulnerabilities. She concludes that "the success of the Convention will depend in large part on the coherence and complexity of the common language it generates and on the vigor of the discourse it inspires."<sup>13</sup> She also suggests that the community created is precarious. Vigorous discourse requires that a sufficient number of states ratify the Convention so that a wider range of interested parties are able to "discuss and deliberate." She concedes the possibility that these events and discussions may not occur.

Professor Peter Winship provides commentary upon Professor Kastely's rhetorical analysis that is both theoretical and practical. He first suggests that the analysis might be enriched if the Sales Convention were compared more fully to earlier, similar texts on the international sale of goods.<sup>14</sup> In this discussion, Professor Winship provides helpful insights into the legislative history of the Convention.

Professor Winship next argues that the analysis would be sharpened if Professor Kastely differentiated more sharply between the two main audiences (contracting states and trading partners) to whom particular provisions of the Convention are addressed.<sup>15</sup> According to Winship, the interests of these audiences are not always in common. Furthermore, the interests of trading partners, when fully elaborated, help to illuminate the scope and content of the Convention.

Finally, Professor Winship takes issue with Professor Kastely's reading of Article 7 and the relevance of good faith in international trade. In the balance of his Article, Professor Winship develops the limited role of good faith, which he illustrates with a series of cases under the relevant articles of the Convention, and explores the potentially damaging gaps in the Sales Convention.<sup>16</sup> The complexities and nuances of this analysis reveal both some important limitations in the Sales Convention and provide an opportunity to compare the treatment of the duty of good faith under Article 2 of the U.C.C.

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<sup>12</sup> Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 577.

<sup>13</sup> Kastely, *supra* note 12, at 621.

<sup>14</sup> Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 624-27 (1988).

<sup>15</sup> *Id.* at 628-30.

<sup>16</sup> *Id.* at 630-39.

### III. THE FUTURE OF INTERNATIONAL SALES LAW

Well, George, there it is: the *Journal* has provided some thoughtful views of scope and content of the new Sales Convention, with emphasis on problems and aspirations for its future. But, the majority of the work is left to you and your colleagues, George. And given the huge number of international sales today, you had better get started.