The New Uniform Law for International Sales and the UCC: A Comparison

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I. The Early Days of the UCC: Targets for Concern

For some of us, this meeting may bring back memories that are thirty or even forty years old, when the Uniform Commercial Code was looming on the horizon and meetings were held to discuss impending changes in the law of sales. However, the old-timers may recall one interesting difference. In the 1940s, when the sales rules were being hammered into shape, few would turn out for meetings. Those who had been working so hard on the draft had the feeling that few practicing lawyers were interested in article 2 on sales, while lawyers for banks, finance companies, warehouses, corporate transfer agents, etc., etc., turned out in droves, with knives sharpened, to make sure articles 3 through 9 were just right.

This discrimination against sales law made some of us feel rejected—until we realized that those few lawyers, who could afford to spend time on legal developments, felt that the sales problems *they knew about* could be fixed up in their *sales contracts*. The keenest interest centered on article 2 provisions that restricted freedom of contract—the invalidation of "unconscionable"contracts (UCC 2-302), and restrictions on warranty disclaimers (UCC 2-316, 2-719). This suggests that you may be interested in whether the sales convention is built on an old-fashioned idea—freedom of contract (CISG article 6) a point to which I shall return.

II. Dialogue about the Sales Convention in England

This meeting brings back to me memories that are much more fresh—of this past year when I had the task of introducing the Sales Convention in Britain and on the continent. The most exciting encounters were with audiences of judges and barristers in England, where any inroad on the rule of English law, especially in international commerce, touches sensitive nerves. You may be interested in a brief review of how the dialogue developed—and then consider how this discussion is applicable here.

These sensitive feelings about English law made it prudent at the outset to offer this modest concession: "Let us assume that English sales law—codified in 1893—is the most modern, the clearest and the most favorable to English merchants of any system of law in the world." This cheerful

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assumption forced the discussion into this framework: "With such a marvelous system of domestic sales law, can there be *any* conceivable value to England of international uniform rules?" The dialogue, with further concessions, continued.

1) If your bargaining power in international commerce is still strong enough to get contract clauses invoking English domestic law, you will, of course, put such clauses in your contracts. This choice by the parties will be effective[1] and the convention will not apply. Hence, for these contracts you will continue to enjoy your present position: (a) the clearest and best sales law in the world; (b) and, of even greater importance, you will deal with law that you will know, and your opponent will not know—unless, of course, he engages one of you as counsel.
2) Perhaps all this means that the Sales Convention is not only un-English, but irrelevant.

Thus, if you can get a contract clause invoking English law you have *absolutely nothing to worry about*. On the other hand, counsel for the foreign party may be so narrow-minded or obtuse as to fail to appreciate the advantages of English law. Possibly the sales department of your client will suggest that it would be more sensible to close a contract than to haggle further over which law will apply. When this happens, there are still only two things to worry about: (a) either you give in to the foreign party and designate foreign law; or (b) you leave the problems to the nice clear rules of private international law (conflicts).

You then face either the certainty or the possibility of foreign law—law that we have agreed is, of course, inferior. At any rate, apart from its merits, the foreign law may be inscrutable, with statutes and case-law and treatises written in an alien tongue—and perhaps not even written in a Western alphabet. Under these circumstances one faces the unhappy possibility that the legal work will have to be shared, perhaps even dominated, by foreign legal counsel.

III. The Ultimate Issue: Foreign Law Versus Uniform International Sales Law

Could it be that this dialogue with English judges and barristers is relevant here? Won't you too have domestic law clauses in your contract—if the other party will agree? If so, doesn't this mean that the relevant issue is whether the international sales law is better or worse than the foreign legal systems one might encounter when you can't get a domestic law clause?

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[1]CISG art. 6.

I don't know how to address this issue squarely, for it would overtax my scholarship, and also your patience, to compare the international sales law with a full gamut of the foreign rules your clients might encounter. So I am forced to a roundabout approach. Perhaps the only way to approach an unfamiliar new law is to compare it with something that is familiar—article 2 of the UCC. Then I shall have to leave to your imagination whether the new rules are better than the various foreign legal systems you might meet.

Last year, it seemed necessary to single out provisions of the new international sales law that might seem strangest to English lawyers. I was surprised to find that most of my examples were on points where the convention had adopted the modern sales law of article 2 of the UCC.

What are some of the most significant points of comparison between the convention and the UCC? A thorough comparison would require a book.[2] Consistent with commercial practice, we must rely on samples.

A. *Freedom of Contract*

How does the 1980 Convention compare with article 2 of the UCC?

(1) The Sales Article of the UCC in general gives effect to the contract made by the parties. However, as was mentioned, there are a few notable exceptions: The outlawing of "unconscionable" contracts (UCC 2-302) and restrictions on disclaimers of warranties (UCC 2-316, 2-719 (remedies)).

(2) In contrast, the international sales law imposes *no* restrictions on freedom of contract. Under article 6, the parties by agreement may exclude all of the convention, and the terms of the contract displace any inconsistent provision of the convention.

(3) I must quickly mention two further features of the convention that make it possible to strongly support freedom of contract. *First*, sales to consumers are, in substance, excluded. (If you look at article 2(a), you will note a close resemblance between the wording of this provision and section 9-109 of the UCC). There is a second exclusion to make it possible to base the Convention on freedom of contract: the Convention does not apply to actions for "death or personal injury."[3] Thus, the convention does not affect the typical action based on what we call "product liability." However, in my opinion, the convention would displace our rules on "product liability" to the extent that they regulate the *economic* relations between the seller and buyer resulting from the sales contract.[4]

Second, the convention in article 4(a) leaves questions of validity to domestic law. This, of course, was required by the wide range of domestic

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[2]The author is forced to admit that he has written such a book: J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 U.N. CONVENTION (Kluwer, 1982) [hereinafter cited as JH].

[3]CISG, art. 5.

[4]JH § 73.

policies as to what is illicit. Consequently U.S. rules prohibiting the export or import of certain items, and the UCC rules outlawing "unconscionable" contracts, could be applicable—but only if "conflicts" rules point to our domestic law. Interesting questions can also arise as to whether certain domestic rules are rules on "validity"—and therefore govern international contracts that are subject to the convention. With some hesitation, I have come to the conclusion that the UCC rules on contract disclaimers are rules of interpretation rather than of validity, and consequently would *not* apply to international sales under the convention.[5]

B. *Similar Substance*

A glance through the chapter headings of the new international sales law shows that it covers substantially the same ground as article 2 of the UCC, and also resembles the scope of other national sales laws such as, *e.g.*, the U.K. Sale of Goods Act and the Scandinavian Uniform Sales Laws. (In many continental codes, most sales questions must be solved under the general provisions on "obligations" embracing contract and torts; continental jurists can perform amazing feats of pulling answers to sales problems out of these brief general provisions.)

C. *International Sales Law Is Shorter*

The international sales law is shorter than article 2 of the UCC. As to length, the convention falls between the UCC, which foreign lawyers tend to regard as excessively detailed, and the shorter statutes of the U.K. and Scandinavia. There are several reasons for this.

1. THIRD-PARTY PROBLEMS

Third-party problems are left to domestic law in the convention. There are no rules on *bona fide* purchase or the rights of creditors.[6] In short, the convention governs only rights between the parties to the international sale.[7] If the international sales law had taken on the sensitive problems of third-party rights, so entangled with domestic rules on property and creditors' rights, that drafting work might still be under way—with little hope of success. These problems had to be left to the new generation.

2. DISCLAIMER CLAUSES

In its general acceptance of freedom of contract, the convention does not seek to regulate disclaimer clauses. This was a decision of general policy. In addition, I think that you might agree that this aspect of the UCC would

[5]JH §§ 231-34.
[6]*Cf.* U.C.C. 2-402, 2-403.
[7]CISG, art. 4.

have presented drafting problems. Take, for example, section 2-316(3)(a): All implied warranties are excluded by expressions like "as is." The linguists amongst us might consider how to translate "as is" into Japanese or even into French.

3. Trade Terms

The convention was also shortened by the decision not to provide statutory definitions of trade terms that might be used in contracts. Several definitions of this type appear in the UCC: seven long sections, 2-319 to 2-325. Let me emphasize that these are *not* definitions of *words used in the statute* but of words and expressions that *merchants use in their contracts*.

Leaving out definitions of trade terms used in contracts was not an oversight. In view of the almost infinite variety of settings in which these words may be used, general statutory definitions of merchant's words can be misleading and unsuited to the practices and transaction at hand. Moreover, the definitions of trade terms need to change to take account of changes in commercial practice, such as the container revolution. The ICC's valuable definitions in INCOTERMS have had repeated revisions—the most recent by the thorough overhaul of 1980.

Under the Convention, as under present practice, I don't believe that you would consciously choose to rely on a statute for detailed arrangements concerning transport and risk. If you have not yet had the chance to examine INCOTERMs new trade terms that were designed to respond to the container revolution, I suggest that you will find them helpful, and you may wish specifically to incorporate certain of these terms as a useful tool towards rapid closing of the contract, regardless of whether the convention or some system of domestic law is applicable.

D. *Formation of Contract*[8]

1. *Offer*. This part of the Convention includes a provision (art. 16) that I had to introduce in England as an iconoclastic inroad on the Sale of Goods Act and the common law. For example, an offer states that it will be "firm" or "irrevocable" for a week, but within the week the offeror says he withdraws the offer. The convention (art. 16) provides the same result as the UCC 2-205—there is no need for an international peppercorn to provide consideration for the promise to hold the offer open. In some situations the convention may carry the firm offer rule somewhat farther than UCC 2-205—but the result is much closer to the UCC than to traditional common-law doctrines.

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[8]The comparison here is with part 2 of article 2 of the UCC (sections 2-201 to 2-210) and part II of the Convention CISG arts. 14-24.

2. *Acceptance*. The convention (art. 19) like the UCC, addresses the problem of the "battle of the forms": for example, a reply says it "accepts" an offer but deviates from it in some immaterial respect. The convention does not go as far as the UCC in closing a contract. Under article 19 of the Convention, if the offeror, without undue delay, objects to even an "immaterial" deviation in the purported "acceptance," there is no contract; the parties have to iron out the problem. UCC 2-207 tried to go farther and, in effect, force through a marriage when the couple is quarreling at the altar. Personally, I think the Convention's restraint is preferable.

3. *Statute of Frauds*. A more significant deviation between the UCC and the Convention involves the Statute of Frauds. Formal requirements have been beating a general retreat. On the continent, commercial codes usually remove the formal requirements imposed by the general civil codes. In addition, in 1954, the U.K. repealed the provision, dating from 1677, which was the inspiration for the Statute of Frauds in UCC article 2 (2-201).[9] There was an overwhelming preponderance of opinion that international sales should not be subject to formal requirements. Article 11 so provides, displacing domestic rules to the contrary.

There was one outstanding opponent to this provision—the U.S.S.R. The U.S.S.R. delegates gave us to understand that they could not accept a convention that would displace their elaborate formal requirements for concluding foreign trade agreements. To avoid an impasse, articles 12 and 96 authorize ratification with a reservation excluding article 11. As a result, if the U.S.S.R. ratifies subject to this reservation, formal requirements of that state, or of the other party to the international sale, would apply—pursuant to applicable "conflicts" rules.

As you know, the UCC 2-201 has a modified version of the English statute of frauds. Some may think that the U.S. should ratify subject to a reservation excluding article 11. The considerations are complex and conflicting. I can only mention a few, for your consideration:

i) Can parties who feel the need of a Statute of Frauds mitigate the problem by form clauses making clear that any proposal or offer is subject to the conclusion of a written contract—perhaps with the written approval of the head office?

ii) In an international sale, can one safely rely on our domestic Statute of Frauds, in view of the confusion in "conflicts" rules on this point?

iii) A reservation excluding article 11 is a two-way street. Might U.S. parties be disadvantaged if foreign trading parties claim that the contract is nullified by some surprising formal requirement under their law?

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[9]JH § 126.

In my view, the answer to this problem is difficult but not terribly important. On balance, my own view is that a reservation preserving statutes of fraud (articles 12 and 96) would cause more trouble for our traders than it would avoid. However, this is surely a question on which reasonable people can and will differ.

E. *Risk of Loss*[10]

The Convention's rules on risk of loss are closely patterned on the modern rules of the UCC. The approach is the same: the elusive concept of property (with which the U.K. is still saddled) is not employed. Instead, the Convention's rules are drafted in terms of concrete commercial events—handing over goods to the carrier[11] and the buyer's "taking over" physical possession from the seller.[12] The gains are enormous—in clarity, translatability and practicability. In this, as in other areas, what American lawyers learned from the UCC made a profound contribution to the international sales law.

If you are drafting a contract for the purchase of goods that are already afloat at the time of the contract, one would want a clear provision on whether the buyer bears the risk for damage (such as seeping sea-water) that occurs throughout the voyage. The Convention's rules on this awkward problem[13] are probably no better than you find in domestic law.[14]

F. *Avoidance (Cancellation) for Minor Breach*

We come now to a perennially thorny problem: May a seller or buyer avoid, cancel, or otherwise terminate the contract when the other party has committed a minor breach? The UCC 2-601 starts with a "perfect tender" rule, but 2-608 provides that acceptance of goods may be revoked only if "the non-conformity *substantially* impairs" the value of the goods. Section 2-612(2) further restricts the perfect tender rule when goods are to be delivered in separate lots or installments. In addition, under UCC 2-508, a seller is given significant rights to cure defective deliveries.

The Convention closely follows the UCC as to "cure."[15] But, in general, the Convention goes farther than the UCC in restricting the right to "avoid" the contract for minor breach.[16] However, in cases where a party is *delaying* performance, the convention provides an interesting and powerful

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[10]CISG, arts. 66-70.
[11]CISG, art. 67(1).
[12]CISG, art. 69(1).
[13]CISG, art. 68.
[14]*Compare* U.C.C. 2-509(1) with 2-509(3).
[15]CISG, arts. 37 and 48.
[16]CISG, arts. 25, 49 and 64.

weapon—the so-called "Nachfrist" notice, adapted from German law.[17] In short, the aggrieved "waiting" party may notify the other party that he must perform within a further specified reasonable period. If the delaying party does not comply with this *Nachfrist* ("or else") notice, the notifying party may avoid the contract without regard to the materiality of the breach. This provision has been well-received by delegates from the various regions of the world, and makes a useful contribution to a problem that has proved troublesome under the domestic law of many countries.[18]

IV. Conclusion

Comparing rules of law prepared for international sales with rules prepared for domestic sales is like comparing horses with camels. Who can say which is better? The two creatures were developed for different purposes. Certainly the relevant question is not whether the 1980 Convention is better or worse than article 2 of the UCC. I assume that, at least for many years, if we *can* get a clause invoking U.S. domestic law we will do so, since this gives us law with which we are familiar—and the other party is not.

The one relevant question is whether the 1980 Convention, drafted with the active participation of U.S. and other common law representatives, and available in English, will be better for us than the wide variety of foreign laws that may be our lot under the elusive rules of private international law.

In the light of this issue, I must conclude with this sobering thought of a personal nature. When I reach the day of Judgment, I wish that I could hope for a standard as easy to satisfy as the one we face here: the Convention or a wide variety of foreign laws. Sadly for my own fate, under the applicable standards, on the day of Judgment the 1980 Vienna Convention will have an infinitely better chance of Salvation.

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[17]CISG, arts. 47(1), 49(1)(b), 63(1) and 64(1)(b).
[18]JH §§ 287-90, 302-08, 350-56.