

# Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods

HENRY LANDAU\*

## I. 1964 Hague Conference and Its Effects

The United States did not become involved in the formulation of an international sales law until 1964, the year of the adoption by a conference at The Hague of the Uniform Law on the International Sale of Goods (ULIS) and of the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). The 1964 conference was called to consider the 1956 draft, a copy of which was sent to the United States Department of State, accompanied by a request for comments. The United States took no part in the preparation of that, or any prior, draft and did not submit any comments with respect to the 1956 draft, prior to the 1964 Hague conference.

The United States was invited and sent a delegation to the 1964 Hague Diplomatic Conference. The delegation was chaired by Richard Kearney, Deputy Legal Advisor, and its members included two commissioners on Uniform State Laws, Professor John Honnold, who was given a seat on the ULIS drafting committee, and Dean, then Professor Soia Mentschikoff, who was on the ULF drafting committee. The United States' delegation offered amendments to bring ULIS closer to the Uniform Commercial Code and to make the 1956 draft more acceptable to common law countries. While a few United States' proposals were accepted, most were not. The United States' delegation had little impact since consideration of its views would have required major revisions proposed by johnnies-come-lately. However, the 1964 conference gave birth to the Secretary of State's Advisory Committee on Private International Law (the "Advisory Committee"), a body created to help the State Department to cope with problems of unification of private international law. The Advisory Committee is comprised of representatives of major legal organizations, namely The National Conference of Commissioners on Uniform State Laws, the Association of American Law Schools, the Judicial Conference of the United States, the American Branch of the International Law Association, the American Law

---

\*Mr. Landau is a member of the New York Bar and practices law with Simpson, Thacher & Bartlett in New York City.

Institute, the Conference of Chief Justices and the American Bar Association.

## **II. International Sale of Goods Convention**

### *A. Participants*

The United States played a different role in the formulation of the Convention on the International Sale of Goods. Permit me to introduce the cast. First, there was Professor Allen Farnsworth. He was a member of the working group, i.e., drafting group, from the very outset, and represented the United States at all the sessions of UNCITRAL but one, at which Professor Richard Speidal took his place. Then came Professor John Honnold, who for part of the time was with the United Nations' Legal Secretariat but, as I shall describe later, played an important role in the formulation of the Convention. Professors Farnsworth and Honnold were also our principal delegates at the 1980 Vienna conference. Then came the group of experts, or the study group, which initially was comprised of members of academia: Professors Hogan of Cornell, Kaplan of Harvard, MacNeil and Speidel of Virginia, Reece and Smit of Columbia, and Mentschikoff of Chicago. Later the committee was enlarged to include lawyers associated with corporations, trade associations and law firms engaged in or connected with international trade, namely General Electric, General Motors, Sterling Drug Company, the Newmont Mining Company, the National Foreign Trade Council and the National Association of Importers. The function of the study group was to analyze any submitted studies, reports, suggestions and proposals, to make suggestions, to submit proposals before and at meetings with our representatives prior to their departure to attend meetings of the UNCITRAL Working Group on Sales, to assist in reaching agreements on the positions to be taken at the meeting of the working group and of UNCITRAL, to suggest reasons to support proposed positions and to devise strategies to obtain their acceptance.

The UNCITRAL Working Group on Sales held nine sessions, seven of which were devoted to rewriting ULIS, after a review of the ULIS articles, by either adopting, modifying, rewriting, consolidating or deleting some or all of the articles or by adding additional provisions. The remaining two sessions were devoted to ULF.

While ULIS was the product of civil law oriented West European countries, the preparation of the Sales Convention was more common law oriented, and this necessitated more compromises. As a result, it was necessary, now and then, to devote substantial time to assure the preservation of previously agreed upon compromises.

I shall now take you behind the scenes to give you some idea of how the Convention was formulated.

*B. Behind the Scenes: The Evolution of the Convention*

At the fourth session of the UNCITRAL Working Group on Sales held in 1973, it was decided that, at its fifth session, the working group would consider ULIS arts. 60-90 for the first time. Several articles were assigned to each of five groups of states for examination and submission to the UNCITRAL Secretariat for comments and proposals with respect thereto, which were to be circulated to members of the working group before the fifth session. Articles 75-77 were allotted to a group chaired by the United States which, in addition to the United States, consisted of France, Hungary, Iran and Japan.

1. EXAMPLE: AVOIDANCE PROVISIONS

Professor Farnsworth prepared a report of the fourth session's proceedings as well as an analysis and proposals with respect to ULIS arts. 75-77 which deal with avoidance of installment contracts. Article 75(1) of ULIS provides that if under a contract for delivery of goods in installments either party's failure to perform as to one installment gives the other "good reason" to fear failure of performance in respect to future installments, he may avoid the contract for the future. Professor Farnsworth proposed to bring this article into conformity with the provision on fundamental breach by permitting avoidance if either party had good reason to fear a fundamental breach in respect to future installments, provided he would declare the contract avoided within a reasonable time.

Subdivision 2 of ULIS art. 75 provides for the buyer's avoidance as to installments already delivered if, by reason of their interdependence with future deliveries, such deliveries would be worthless to him. Professor Farnsworth proposed a less harsh provision by substituting "if their value would be substantially impaired" for "worthless."

ULIS art. 76 allows avoidance when prior to the "date fixed" for performance, "it is clear that one of the parties will commit a fundamental breach of the contract." Professor Farnsworth proposed the elimination of the word "fixed" so as to be certain that the application of the article would not be limited to contracts in which a date is expressly stated. He further suggested that it would be desirable to provide for avoidance when the other party deliberately disclosed that he would not carry out the contract. He also proposed the elimination of article 77, which provides for recovery of damages upon avoidance, as unnecessary in view of the provision for damages in article 78.

These proposals were circulated to France, Hungary, Iran and Japan for comments. France's representative approved in part the proposal with respect to article 75(1). He agreed that it would be difficult to determine whether the deliveries would be worthless to the buyer because such determination would require a subjective judgment, but he preferred not to

change the paragraph "which already favors the buyer." The lack of balance between the obligations of the buyer and those of the seller was one of the objections to ULIS. He also approved the deletion of "fixed" from article 76 but disagreed with the proposal to permit avoidance when a party declared his intention not to perform.

The representative from Hungary made no comment with respect to article 75. He suggested deletion of articles 76 and 48 which deal with avoidance if it is clear before the delivery date that the goods will be non-conforming and suggested that if, prior to the date fixed for performance of the contract, it is clear that one of the parties will commit a breach, the other party may "from this time on" exercise the rights provided for that particular breach. Iran and Japan did not submit any comments.

Prior to the meeting of the U.S. Study Group scheduled for December 7, 1973, I received a copy of Professor Farnsworth's report and copies of the analysis, comments and proposals of UNCITRAL's Secretariat. Since Professor Farnsworth was unable to attend the fifth session of the working group, Professor Richard Speidel was designated to take his place. Professors Farnsworth and Speidel, Robert S. Dalton, executive secretary of the advisory committee, I and five other members of the study group attended the December 7 meeting. We then agreed that Professor Farnsworth's redraft was an improvement and went on to discuss the other ULIS articles to be considered at the forthcoming session of the working group.

At that session of the UNCITRAL Working Group, a number of different and conflicting opinions were presented regarding article 75 and different draft proposals were submitted. A drafting committee composed of representatives of France, Ghana, India, Japan and the United States and the observer of the International Chamber of Commerce was established to prepare a revised draft. Ultimately, the working group decided to adopt the article 75 revision proposed by Professor Farnsworth and that is the way it was presented in the Draft Convention submitted to the Vienna conference as article 71(1).

With slight language changes, Professor Farnsworth's proposals concerning ULIS art. 75 appear as articles 73(2) and 73(3), and his proposed draft that would allow a party to avoid a contract when it is clear the other party will commit a fundamental breach appears as article 72(1) of the convention text set out in the Final Act. The Vienna conference also accepted the proposal that the party intending to declare the contract avoided must give reasonable notice thereof to the other party to permit that party to give adequate assurance of his performance, but only if time allows, and that this requirement will not apply if the other party has declared that he will not perform his obligation.

I selected the revision of ULIS arts. 75-77 for presentation to illustrate that the evolution of the Sales Convention was a time-consuming and sometimes irritating task.

## 2. SUBSEQUENT SESSIONS

At subsequent sessions, as at the fifth session, proposals of the United States' representatives were accepted resulting in a draft International Sales Convention which, to a great extent, harmonized common and civil law concepts. The text of the draft International Sales Convention as either adopted or deferred at the fifth session of the working group was circulated among representatives of the member states of the working group and the observers who attended that session, accompanied by a request that they submit comments and texts of proposals, if any, to the UNCITRAL Secretariat. The Secretariat was requested to submit to the working group a study of unresolved problems and to suggest possible solutions thereof before the working group's sixth session. The Secretariat's report was circulated among members of the U.S. Study Group and discussed in preparation for the following sessions.

By the end of the seventh session, the final draft of the International Sale of Goods Convention was ready for submission to UNCITRAL. At the eighth and ninth sessions the ULF articles were reviewed and an accord was reached on the draft of the Formation of Contracts Convention. Both conventions shortened ULIS and ULF, rearranged and consolidated articles, improved their language and adapted them to the realities of worldwide business practices.

At the tenth session of UNCITRAL in 1977, the draft International Sale of Goods convention was adopted and at its eleventh session in 1978, the draft of the Formation of Contracts convention, proposed by the working group, was adopted. At its eleventh session, UNCITRAL also agreed to combine the two drafts into one Draft Convention. The commission also asked the Secretary-General to prepare a Draft Protocol amending the Convention with respect to the limitations period in the International Sale of Goods.

Some of the troublesome problems encountered along the way were: the scope of application of the convention; the formulation of a definition of fundamental breach; the formulation of provisions relating to specific performance which would satisfy civil and common law states; the application of usages; provisions requiring written modification of contracts in writing; and whether there should be a model uniform law which could be adapted and incorporated in the national laws or a convention.

### 3. DRAFT CONVENTION AND STATE DEPARTMENT'S ADVISORY COMMITTEE

The Draft Convention and Draft Protocol were circulated among governments for comments. The Secretariat of the United Nations was requested to prepare a report setting forth its comments on the Draft Convention and the Draft Protocol as well as on the comments it received from governments. On December 16, 1978, by resolution 33/93, the General Assembly of the United Nations convened the Vienna Diplomatic Conference to consider the Draft Convention, the Draft Protocol and the report of the U.N. Secretariat, as a basis for an international sales convention.

The Secretary of State's Advisory Committee scheduled a meeting for November 16, 1979 to agree on the United States government's comments on the Draft Convention and the Draft Protocol for publication by the U.N. Secretariat in advance of the conference. Drafts of such comments were being prepared by Professors Farnsworth and Honnold. Prior to the meeting of the advisory committee, Judge Schwebel, then Deputy Legal Advisor and Vice-Chairman of the Advisory Committee, sent to me for comment copies of: (1) the U.N. Secretariat's commentary on the provisions of the draft convention prepared at the request of UNCITRAL, but under its own authority; (2) Professor Honnold's 171 page analysis of the provisions of the Draft Convention, (3) Professor Farnsworth's 75 page analysis of contract formation provisions and of the Draft Prescription Protocol; and (4) their recommendations for the United States government's positions, for consideration by the Advisory Committee. Professors Honnold and Farnsworth recommended some amendments for purposes of clarification, some additions of new subsections and some alternative formulations of some of the articles. They suggested strong support for some articles without change, particularly those achieved by compromise to avoid proposals for change from other governments which would produce less acceptable versions. Article 28, which deals with specific performance, is a good example of such a compromise. It provides that a court is not bound to enter judgment for specific performance unless it would do so under its own law with respect to contracts not governed by the Convention.

I transmitted my comments expressing agreement with practically all of the suggestions, but disagreeing with a few, and setting forth the reasons for my views. As the United States member of the International Chamber of Commerce Commission on International Commercial Practice, I learned of, and was able to point out, some attacks that might be made on some provisions. With Professor Farnsworth, I favored captions and explanatory comments to accompany the final text. The Vienna conference rejected the inclusion of comments as part of the Final Act.

At the Vienna conference, the United States was represented on the Drafting Committee as were Brazil, China, Czechoslovakia, Ecuador,

Egypt, Finland, France, Libya, the Republic of Korea, Singapore, the United Soviet Socialist Republic, the United Kingdom and Zaire.

In a letter which I received from Richard Kearney, then Chairman of the Advisory Committee, he summarized the United States' contribution to the Vienna convention as follows:

The adoption of the texts of the Convention on International Sales Transactions and the Formation of International Sales Contracts by the United Nations Commission on International Trade Law resulted in no small part from the solutions proposed by the United States to deal with the complicated legal issues dealt with in those Conventions.

The Work of our Study Group on International Sale of Goods was the basis for the U.S. contributions to the development of these Conventions. The meetings of the group were essential to reaching agreement on the positions to be put forward by the American representatives at UNCITRAL meetings on the basis of excellent studies prepared by Allan Farnsworth. Your advice and suggestions were essential to this process by developing sound solutions through the process of study and comments.