

COMMENTS

A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?

In March 1980 the United Nations convened an international diplomatic conference of plenipotentiaries to adopt the final text of the Convention on Contracts for the International Sale of Goods.¹ This Convention represents the culmination of fifty years of scholarly effort to develop a uniform law applicable to nations involved in the international sale of goods.²

American participation in the drafting of a law on contracts for the international sale of goods is a relatively recent development.³ Never-

¹ Draft Convention on Contracts for the International Sale of Goods, Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session, 30 May - 16 June, 1978, 33 U.N. GAOR, Supp. (No. 16) 10, U.N. Doc. A/33/17 [hereinafter cited as 1978 Draft Convention]. The U.N. General Assembly resolution authorizing an international conference of pleni-potentiaries for five weeks in 1980 is G.A. Res. 33/93, 33 U.N. GAOR, Supp. (No. 45) 217, U.N. Doc. A/33/45 (1978). The date the conference is scheduled to begin is March 10, 1980. Telephone conversation with Mr. John Dietz, Legal Officer, United Nations International Trade Law Branch, Office of Legal Affairs (Feb. 14, 1980). At the time of writing, this conference had not yet taken place. Consequently, the events of the conference will not be discussed herein.

² See text accompanying notes 18-40, 108-30 *infra*.

³ See Nadelmann, *The United States Joins the Hague Conference on Private International Law: A "History" with Comments*, 30 LAW & CONTEMP. PROB. 291 (1965). Significant interest in a uniform law on the international sale of goods was manifested by the academic community and various private organizations beginning in 1951. The United States did send a delegation of observers to the Eighth and Ninth Sessions of the Hague Conference in 1956 and 1960. Action by the United States Government to secure membership in any of the international organizations undertaking the unification of law, however, did not occur until 1963. On December 30, 1963, President Johnson signed into law authorization for acceptance by the United States of member-

theless, United States ratification of the Convention on Contracts has become a distinct possibility.⁴ The prospects for adoption of a law governing commercial⁵ contracts for the international sale of goods should be of compelling interest to American merchants and their legal advisors.⁶

The text which was presented to the diplomatic conference in March was completed by the United Nations Commission on International Trade Law (UNCITRAL) in 1978.⁷ Its eighty-two articles embody the substantive revisions of a similar document that was rejected by the United States sixteen years ago⁸—the 1964 Hague Convention Relating to a Uniform Law for the International Sale of Goods.⁹

The first part of this comment will examine the process by which the United States joined the 1964 Hague Conference. It will then focus on the particular objections which the United States raised with regard to the product of that Conference, the 1964 Hague Convention. Finally, it will review the current status of that Convention.

The second part of this comment will consider the 1978 UNCI-

ship in (1) the Hague Conference on Private International Law and (2) the International (Rome) Institute for the Unification of Private Law. *Id.* at 306-07. The authorizing statute may be found at 22 U.S.C. § 269g (1976).

⁴ See Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 223 (1979); note 140 *infra*.

⁵ 1978 Draft Convention, *supra* note 1, art. 2(a), at 10. That provision reads in pertinent part that, "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. . . ." *Id.*

⁶ In 1977, domestic exports of merchandise from the United States totalled almost 118 billion dollars, while general imports into the United States totalled almost 147 billion dollars. BUREAU OF THE CENSUS, DEP'T OF LABOR, STATISTICAL ABSTRACT OF THE UNITED STATES 874 (Table No. 1511) (1978).

⁷ On June 16, 1978, UNCITRAL unanimously approved the text of the draft Convention on Contracts for the International Sale of Goods, including 11 provisions on formation of the contract. See Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session, 30 May - 16 June 1978, 33 U.N. GAOR Supp. (No. 17) 9, U.N. Doc. A/33/17. The articles on formation of the contract, 1978 Draft Convention, *supra* note 1, arts. 12-22, at 12-15, constitute a separate subject of inquiry and are not dealt with in this comment. For a discussion of the articles on formation, see Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311 (1979).

⁸ The American Delegation to the Hague Conference of 1964 advised the Secretary of State that the American Delegation had been unsuccessful in obtaining a uniform law on the international sale of goods acceptable to United States commercial interests. R. KEARNEY, REPORT OF THE DELEGATION OF THE UNITED STATES OF AMERICA TO THE DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS 16 (1964) [hereinafter cited as AMERICAN DELEGATION'S REPORT].

⁹ Convention Relating to a Uniform Law on the International Sale of Goods, done July 1, 1964, annex, Uniform Law on the International Sale of Goods, 834 U.N.T.S. 109,123 [hereinafter cited as ULIS].

TRAL Draft Convention, an effort to revise the 1964 Hague Convention so as to make it more acceptable to the international trading community. This section will utilize the United States' objections to the 1964 Hague Convention to determine whether the 1978 UNCITRAL Draft Convention satisfies the goals of American commercial interests. This comment will conclude that the 1978 UNCITRAL Draft Convention does satisfy these goals and recommend that serious consideration be given to ratification by the United States.

I. THE 1964 HAGUE CONVENTION ON A UNIFORM LAW FOR THE INTERNATIONAL SALE OF GOODS

As a general proposition, there is substantial uniformity in the law of international sales.¹⁰ While this was more true under the specialized commercial courts found in trading nations up until the mid-eighteenth century,¹¹ a large measure of that uniformity has been retained since the demise of those courts simply in order to facilitate international

¹⁰ Berman, *The Uniform Law on International Sale of Goods: a Constructive Critique*, 30 *LAW & CONTEMP. PROB.* 354, 354 (1965). Professor Berman has observed:

In no other branch of law is there more uniformity among the principal legal systems of the world than in the law of international sales. Contract law relating to documentary transactions, the law of carriage of goods by sea, rail, and air, the law of marine insurance, and the law of bank credits and acceptances, are basically the same in their general character—so far as international sales are concerned—in the so-called “common law” and “civil law” systems as well as in the legal systems of the centrally planned economies of the Soviet Union, Eastern Europe, and China.

Id.

¹¹ Note, *A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress*, 3 *BROOKLYN J. INT'L L.* 210, 211-16 (1977). In many nations prior to the mid-eighteenth century, disputes between parties involved in international trade were settled by specialized commercial courts. These courts utilized juries of merchants, having special familiarity with the law merchant and commercial practice. The result was prompt, fair and inexpensive resolution of disputes between merchants consonant with the shared understanding of the international trading community. As the function of commercial courts was absorbed into the business of courts of general jurisdiction, delay and expense increased while protectionism and provincialism began to encroach on the formerly universal *lex mercatoria*. *Id.*

For the last 150 years legal scholars and merchants have sought either a return to the old law merchant or the development of a modern substitute. As the former has grown less plausible over time, movement toward the latter has gained ever increasing momentum. *Id.* at 215-16. See also Schmitthoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in *INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 3-38 (C. Schmitthoff ed. 1964). Mr. Schmitthoff strongly recommended the development of a uniform law of international trade:

The evolution of an autonomous law of international trade, founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those of civil law and common law, and those of fully developed and developing economy, which would enable them to cooperate in the perfection of the legal mechanism in international trade.

Id. at 5.

commerce.¹²

Yet, differences in the specific applications of generally accepted principles lead to obstacles in both the negotiation of contracts and the resolution of disputes.¹³ Further, the doctrines of contractual obligation enunciated by the courts of different nations are oftentimes significantly at odds.¹⁴ These barriers impede the process of international trade and ultimately reduce the flow of goods to consumers.¹⁵

The lack of uniformity in the law of international sales provided an incentive to unify that law and led to several different avenues of scholarly inquiry.¹⁶ Of these, the most comprehensive means of unification appeared to be a uniform substantive law designed to transcend the doctrines of any one nation's legal system.¹⁷

Efforts to produce a uniform substantive law on the international sale of goods began in 1930 when the International Institute for the Unification of Private Law (UNIDROIT) undertook to draft such a law.¹⁸ UNIDROIT worked with the League of Nations in developing a satisfactory text until the project was suspended because of World War II.¹⁹

¹² Berman, note 10 *supra*; Schmitthoff, *supra* note 11, at 3 *passim*. The mechanisms for the preservation of uniformity have been succinctly stated by Professor Berman:

The reasons for this are not hard to find. On the one hand, the merchants, carriers, underwriters, and bankers of the world who engage in international sales transactions have had centuries of experience in establishing common practices and common norms. Moreover, they continually renew their common traditions through negotiation of contracts, through arbitration of disputes, and through the establishment of rules by trade associations. On the other hand, lawyers and lawmakers of many countries have also responded, over the centuries, to the need for uniformity in the law of international sales, and have helped to develop such universal legal institutions as the C.I.F. contract, the bill of lading, the marine policy and certificate, the bill of exchange and letter of credit.

Berman, *supra* note 10, at 354.

¹³ Berman, *supra* note 10, at 354.

¹⁴ *Id.*

¹⁵ *Id.* at 355; Walsh & Ryan, *Harmonisation and Standardisation of Legal Aspects of International Trade*, 51 AUSTRALIAN L.J. 608, 608 (1977).

¹⁶ See Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449 (1964). One of the avenues pursued has been an international convention on the conflict of laws, Convention on the Law Applicable to International Sales of Goods, done June 15, 1955, 510 U.N.T.S. 147. Another method of unification is via standard form contracts. See, e.g., UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, CONTRACTS FOR THE SALE OF CEREALS (1965). See generally Promotion of Wider Use of Existing General Conditions of Sale and Standard Contracts: Report of the Secretary-General, U.N. Doc. A/CN.9/18, 1 U.N. COMM'N INT'L TRADE L.Y.B. 207, U.N. Doc. A/CN.9/SER.A/1970. Efforts at unification in other areas have been undertaken by the United Nations Commission on International Trade Law (UNCITRAL). See note 119 *infra*.

¹⁷ Nadelmann, *supra* note 16, at 450.

¹⁸ Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROB. 326, 327 (1965); Nadelmann, *supra* note 16, at 453.

¹⁹ Honnold, *supra* note 18, at 327.

UNIDROIT resumed work on the draft uniform law in 1950.²⁰ One year later, an international diplomatic conference was held at the Hague to review the UNIDROIT draft of a uniform law on the international sale of goods.²¹ A Special Commission was appointed to revise the draft further and to solicit periodically the opinions of interested governments on the progress made.²² This process was completed in 1962, when a final text was produced by the Special Commission.²³ The government of the Netherlands then invited interested nations to attend a diplomatic conference for the final revision and adoption of a Uniform Law on the International Sale of Goods (ULIS).²⁴ The conference was held at the Hague in April of 1964.²⁵

The Hague Conference was scheduled to last only three weeks.²⁶ During that brief period it was hoped that all 101 articles of the Uniform Law on the International Sale of Goods (ULIS)²⁷ could be discussed, agreed upon, or revised to meet the demands of a significant number of delegates.²⁸ The factor which most seriously jeopardized the success of the Conference at its outset was that no consensus had been reached on many of the most important provisions of the ULIS.²⁹

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* See note 9 *supra*.

²⁵ Honnold, *supra* note 18, at 328.

²⁶ *Id.*

²⁷ ULIS, note 9 *supra*.

²⁸ Honnold, *supra* note 18, at 328, 331-32. In addition, the uniform law had to be drafted in both English and French. These tasks had to be repeated in regard to the Uniform Law on the Formation of Contracts. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, done July 1, 1964, annex I, Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169, 185. This Convention was a shorter but, nevertheless, significant document addressing the timing and manner of formation of international sales contracts. Finally, conventions implementing these uniform laws also had to be drafted in English and French. Honnold, *supra* note 18, at 328. Professor John Honnold, a United States delegate to the Hague Convention of 1964, characterized the difficulties as follows:

The frenzied labors of the large staff of translators, typists, and mimeograph operators brought these memoranda [governmental memoranda, proposing additional amendments] to the delegates in a constantly-swelling stream. In scenes reminiscent of the Sorcerer's Apprentice, staff members kept making the rounds during the sessions, depositing more and more memoranda on the thick stack of material that had been produced during the night. Each delegate responsible for discussion and voting needed a full time assistant just to sort the incoming documents and produce them at the crucial moment in the debate and voting. Only a few of the delegations had such help; certainly the United States delegation did not. If anyone imagines that there was time to read—let alone study—all of the relevant material, I have failed to communicate the volume of the material and the tempo of the proceedings.

Id. at 330.

²⁹ *Id.* at 328-29. See, e.g., Nadelmann, *supra* note 16, at 456-58. Austria and West Germany strongly objected to the overbroad scope of the ULIS prior to the 1964 Conference. Specifically, they were opposed to article 1 of the ULIS, which provided, in effect, that parties from different

In light of the degree of dissension which characterized the Conference, the prospect of securing substantial agreement was remote.

Some of the Western European nations which had been involved in the early drafting of the ULIS³⁰ exerted pressure to convert their previous efforts into a tangible product.³¹ They were unwilling to suffer an adjournment at this late stage to undertake a revision that might forestall the project for years.³² In their view, the need for some harmonization in international sales rendered even an imperfect contribution better than no contribution at all.³³ Some of those nations proposed undertaking a continental version of the ULIS if the Hague Convention did not attract sufficient international support.³⁴

The homogeneity of the various drafting nations also created certain problems. While UNIDROIT sought a diverse cross-section of nations at the Hague Conference, very few non-Western or third world nations participated.³⁵ Their absence resulted in the adoption of essentially Western notions of commercial practice in the provisions of the ULIS.³⁶ Consequently, many of those provisions were unclear and unfamiliar to the non-Western nations which had not been present at the Hague.³⁷

Almost every nation participating at the Hague Conference, including the United States, signed the Final Act of the Conference.³⁸

nations finding themselves in courts of a ULIS signatory nation would be subject to the provisions of the ULIS regardless of whether their own nations had adopted it. This was strongly objected to by the American Delegation to the Hague as well. See text accompanying notes 96-101 *infra*.

³⁰ The members of the committee which drafted the pre-conference draft of the ULIS were from France, West Germany, Italy, the Netherlands, Sweden, Switzerland, and the United Kingdom. See Nadelmann, *supra* note 16, at 453.

³¹ *Id.* at 455. See also AMERICAN DELEGATION'S REPORT, *supra* note 8, at 14.

³² Nadelmann, *supra* note 16, at 456. In view of the United States' late entry into the negotiations, the long-standing members of the International Institute for the Unification of Law (UNIDROIT) viewed American requests for adjournment and further delay with little enthusiasm. It has also been suggested that those Western European nations resisting attempts to delay final action on the ULIS may have felt that reluctant participants would fall into line once they realized substantial revision would not be permitted. *Id.*

³³ Honnold, *supra* note 18, at 351-52.

³⁴ Nadelmann, *supra* note 16, at 455.

³⁵ Honnold, *supra* note 4, at 225 (1979). Professor Honnold observed:

Of the 28 states at the 1964 Hague Conference, 19 were from Western Europe. From Eastern Europe—Bulgaria, Hungary and Yugoslavia (the absence of the U.S.S.R. proved to be significant); from Latin America—only Colombia (a representative from the local embassy); from Asia—only Japan (the absence of India and Pakistan is significant); from Africa—only the U.A.R.

Id. at 225 n.12.

³⁶ *Id.* at 225.

³⁷ *Id.*

³⁸ Honnold, *supra* note 18, at 331 n.18.

Such signature, however, did not constitute a commitment that each signatory State would ratify the Convention, making it part of that nation's binding domestic law.³⁹ In fact, the United States delegation made it quite clear that America would not adopt the ULIS.⁴⁰

A. The American Posture at the Hague Conference of 1964

The United States had shown little interest in the unification of international sales law while the ULIS was undergoing revision in Western Europe.⁴¹ Congress authorized the creation of an American Delegation to the Hague diplomatic conference just three months before the opening session in April 1964.⁴²

Because of the complex legal issues involved, it was impossible for the American Delegation adequately to review the text of the ULIS, let alone formulate the positions to be taken by the United States at the Conference, in the brief period allowed.⁴³ Nevertheless, two important determinations were made before the American Delegation departed for the Netherlands: (1) the Delegation would offer no more than a few of its own proposals in order to avoid incurring the animosity of the previously more active participants, and (2) it would remain non-committal about U.S. ratification even in the unlikely event that a satisfactory draft could be elicited from the Conference.⁴⁴ It is reasonable to conclude that the American Delegation had little faith that the Conference would produce a law on sales amicable to United States commercial interests.⁴⁵

³⁹ *Id.*

⁴⁰ See text accompanying notes 55, 75, 103-07 *supra*.

⁴¹ See note 3 *supra*.

⁴² *Id.* The American Delegation consisted of Joe C. Barrett and James C. Dezendorf, Commissioners on Uniform State Laws; Professors John Honnold and Soia Mentschikoff; Richard D. Kearney, Deputy Legal Adviser of the Department of State; and John N. Washburn, Office of the Assistant Legal Adviser for Treaty Affairs. AMERICAN DELEGATION'S REPORT, *supra* note 8, at 2.

⁴³ AMERICAN DELEGATION'S REPORT, *supra* note 8, at 1.

⁴⁴ *Id.* at 3. These determinations were not actually made by the delegates themselves but, by the Advisory Committee on Private International Law, as established by Secretary of State Dean Rusk. A third determination made by the Advisory Committee before the American Delegation's departure noted that, "[O]ur Constitutional provision on foreign commerce was deemed to show conclusively that the subject matter of the April Conference was eminently qualified for Federal action and thereby to obviate the necessity for inclusion of any Federal clause in the draft conventions before the conference." *Id.*

⁴⁵ The tenor of the determinations made before the American Delegation's departure reflected a lack of any serious belief that American ratification was a possibility. Nevertheless, the delegates analyzed the pending draft to the extent that time permitted and submitted a memorandum to the Conference containing their comments on its provisions, in addition to several proposed amendments. Honnold, *supra* note 18, at 328. The comments indicated basic agreement with the Western European nations on the enduring need for unification of the law of international sales

The American Delegation to the Hague Conference had quite concrete notions of its desideratum for a law on international sales:

In essence, it was the lateness of the hour at which we decided to participate in the April 1964 Conference and the long period of years over which the other participants had been working on the draft Uniform Law for the International Sale of Goods which made it impossible for us to accomplish our first objective of bringing this uniform law into harmony with the sales article of the Uniform Commercial Code of the United States of America.⁴⁶

Yet, there was little likelihood that nations which had been involved in the drafting of the ULIS over the preceding thirty years could be induced to abandon those efforts in exchange for an international version of America's Uniform Commercial Code.⁴⁷

Despite its rather belated arrival upon the scene, the United States played a relatively significant role at the Hague Conference of 1964.⁴⁸ The American Delegation actively contributed to the elimination of certain problematic provisions.⁴⁹ For the most part, however, the

and expressed hope that a document equal to this task could be produced. 2 DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS, DOCUMENTS 235 (Doc/V/Prep/8) (1966) (Conference held at The Hague on April 2-25, 1964) [hereinafter cited as 2 DIPLOMATIC CONFERENCE DOCUMENTS]. The introductory language to the United States' comments reads:

The importance of unifying the basic rules of law relevant to international trade is becoming increasingly evident. The legal problems which arise in international trade are, in fact, akin to those which have led the States of the United States in the course of the past half century [sic] to develop and widely adopt a large number of uniform laws including the Uniform Sales Act and, recently, the Uniform Commercial Code.

The United States welcomes this related development on the international scene, and hopes that the forthcoming work on the draft Uniform Law for International Sales will make it suitable for widespread approval.

Id.

⁴⁶ AMERICAN DELEGATION'S REPORT, *supra* note 8, at 14.

⁴⁷ See text accompanying notes 30-34 *supra*. The wisdom of trying to implant a significant portion of the U.C.C. into an international law of sales has been seriously questioned by Professor John Honnold, a delegate to the Hague Conference:

No one who has thought very long about international unification of law would bring to this creative work a trading psychology like that used in a tariff negotiation: We'll take some of your "foreign" law if you'll buy a substantial shipment of our American products—and most especially a large order of our new, big shiny Uniform Commercial Code. The adoption of such an approach by all interested nations would probably lead to an impasse and, at best, would produce a Hydra-like monster of terrifying complexity.

Honnold, *supra* note 18, at 351.

⁴⁸ Professor Honnold was accorded the notable privilege of a chair on the select Drafting Committee: five scholars engaged in the preparation of a final English text of the ULIS and the Uniform Law on the Formation of Contracts. He surmised that this gesture was an effort to increase the degree of American support for the two Conventions. Honnold, *supra* note 18, at 330.

⁴⁹ *Id.* at 332 n.20. Negative comments sent to the Hague prior to the 1964 Conference by the United States were partially responsible for revisions withdrawing the applicability of the ULIS (1) to transactions where goods merely "had been carried" from one state to another and (2) to certain local transactions preceding or following an international sale. These were provisions that

American Delegation had been correct in its assumption that it could have little effect on a text that had been largely finalized before the United States began analysis of its provisions.⁵⁰

Having been frustrated in its efforts to amend the ULIS, the American Delegation adopted a course it believed would ultimately achieve the revisions it desired.⁵¹ First, it addressed the Conference on those defects that it felt remained in the text.⁵² The American Delegation then proposed two recommendations to be annexed to the ULIS to ensure ongoing efforts to improve it: one version if the ULIS came into effect⁵³ and one if it did not.⁵⁴

B. American Objections to the 1964 Convention Relating to a Uniform Law on the International Sale of Goods

On the last day of the Hague Conference the Chairman of the American Delegation, Richard Kearney, addressed the Conference as follows:

The Sales Law has been very much improved in the course of the Conference, and this is a matter for congratulation. But unfortunately, in our opinion there are several serious weaknesses which still remain. Among these are:

- 1) the draft points more to external trade between common boundary nations geographically near to each other;
- 2) insufficient attention has been given to international trade problems involving overseas shipments;
- 3) reciprocal rights and obligations as between seller and buyer viewed in light of the practical realities of trade practices, are not well balanced;
- 4) the law will not be understood by individuals in the commercial field.⁵⁵

had appeared in the 1956 draft of the ULIS, submitted to the participating delegations prior to the 1964 Conference.

⁵⁰ *Id.* Once the Conference began, however, no substantive amendments proposed by the American Delegation were incorporated into the text of the ULIS. This was blamed on "certain Western European delegations who controlled the Working Group for the Committee on Sales and opposed any new ideas that might hinder the timely completion of the text of the uniform law on sales and its adoption, by the conference." AMERICAN DELEGATION'S REPORT, *supra* note 8, at 14. The American Delegation had greater success in implementing changes in the Uniform Law on the Formation of Contracts. *Id.*

⁵¹ See 1 DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS, RECORDS 309-10 (1966) (remarks by Mr. Kearney, Chairman of the United States Delegation) (April 25, 1964) (Conference held at The Hague on April 2-25, 1964) [hereinafter cited as 1 DIPLOMATIC CONFERENCE RECORDS].

⁵² *Id.* at 309. See text accompanying note 55 *infra*.

⁵³ See text accompanying notes 103-06 *infra*.

⁵⁴ See text accompanying note 106 *infra*.

⁵⁵ 1 DIPLOMATIC CONFERENCE RECORDS, *supra* note 51, at 309.

The specific provisions of the ULIS to which these four objectives were addressed failed to emerge clearly until the United Nations Commission on International Trade Law (UNCITRAL) had completed its work on a revised version of the ULIS in 1978.⁵⁶ Nevertheless, the observations and remarks made by the American Delegation prior to and during the Hague Conference,⁵⁷ as well as the American Delegation's Report⁵⁸ which was submitted to the Secretary of State after the Conference, offer some clues as to which provisions of the ULIS were of particular concern.

1. *Inattention to Overseas Shipments*

The first weakness in the ULIS mentioned by the American Delegation was that the ULIS primarily addressed "common boundary nations geographically near to each other."⁵⁹ The second weakness noted was merely the converse proposition: that the ULIS gave insufficient attention to international trade problems involving overseas shipments.⁶⁰

The ULIS was vulnerable to the charge of insensitivity to the problems of overseas shipments in regard to its treatment of risk of loss. Passage of the risk of loss is an important issue in the sale of goods.⁶¹ When goods have been damaged en route without the fault of either party, *e.g.*, in the event of an accident, the time at which the risk of loss passed will determine whether the buyer pays the price as required by the contract.⁶²

Article 97 of the ULIS provided for passage of the risk of loss upon "delivery" (*délivrance*)⁶³ of the goods on the terms required by

⁵⁶ See text accompanying notes 162-351 *infra*.

⁵⁷ 2 DIPLOMATIC CONFERENCE DOCUMENTS, note 45 *supra*; 1 DIPLOMATIC CONFERENCE RECORDS, note 51 *supra*.

⁵⁸ AMERICAN DELEGATION'S REPORT, note 8 *supra*.

⁵⁹ See text accompanying note 55 *supra*.

⁶⁰ *Id.*

⁶¹ See Roth, *The Passing of Risk*, 27 AM. J. COMP. L. 291, 291 (1979).

⁶² *Id.* Mr. Roth explains the modern significance of risk of loss as follows:

While the goods in a modern sales transaction will often be insured, the rules of risk determine the practical obligations to take out insurance, to press a claim against the insurer or bear the burden of inadequate cover, and which party is concerned to salvage damaged goods. "Risk" as a legal concept refers to accidental injury to the goods. It therefore covers theft, seizure, destruction, damage and deterioration.

Id.

⁶³ "Delivery" was the English word chosen to approximate the concept which in the original French text was called "*délivrance*." The adequacy of this translation has been questioned. See Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 316-17; Roth, *supra* note 61, at 295. It is important to note at this juncture that *délivrance* is not the event upon which risk passes under French law. Instead, risk passes upon the transfer of property in the sold goods,

the contract and in accordance with the other provisions of the ULIS.⁶⁴ "Delivery," in turn, was defined in article 19 as "the handing over of goods which conform with the contract."⁶⁵ Under a destination contract⁶⁶ governed by these provisions, even if the seller had deposited the goods at the buyer's port, the buyer could prevent "delivery" from taking place in one of three ways: (1) by refusing to take possession of the goods, thereby precluding their being "handed over" to him;⁶⁷ (2) by avoiding the contract because of a nonconformity in the goods amounting to a fundamental breach;⁶⁸ or (3) by requiring the seller to deliver

which may occur at the time of the conclusion of the contract. Delivery of the goods is not an essential prerequisite to the transfer of property under French law. Schmitthoff, *supra* note 11, at 169 n.7. See G. BRULLIARD & D. LAROCHE, *PRECIS DE DROIT COMMERCIAL* 408 (6th ed. 1968).

⁶⁴ ULIS, *supra* note 9, art. 97, para. 1. Article 97 provides that:

1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law.
2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present law, where the buyer has neither declared the contract avoided nor required goods in replacement.

⁶⁵ ULIS, *supra* note 9, art. 19.

⁶⁶ Destination contracts are to be distinguished from shipment contracts. Under a destination contract it is incumbent upon the seller to provide for carriage of the goods to the buyer's port and bear the risk of loss during their shipment. Thus, risk of loss does not pass upon deposit of the goods with the carrier. An example of a destination contract is one containing the term "F.O.B. Hamburg" ("free on board" Hamburg), where seller is shipping from his port in New York to buyer's port in Hamburg. See, e.g., U.C.C. § 2-319; International Chamber of Commerce, Brochure No. 166, INCOTERMS 1953, FOB, para. A, reprinted in 1 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1 REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 103, 107 (1971) (U.N. Sales number E. 71. V. 3) [hereinafter cited as INCOTERMS-1953]. A shipment contract, on the other hand, may or may not require the seller to provide for carriage of the goods, but it will always place the risk of loss on the buyer during the voyage. In a documentary sale, the documents of title would be sent ahead to give buyer access to the goods on which he bears the risk. An example of a shipment contract is one containing the term "C. & F. Hamburg" (cost and freight Hamburg) where, again, seller is shipping from New York to buyer's port in Hamburg. See, e.g., U.C.C. § 2-320; INCOTERMS-1953, *supra*, C. & F., para. A. See generally E. FARNSWORTH & J. HONNOLD, *CASES AND MATERIALS ON COMMERCIAL LAW* 490-95 (3d ed. 1976); Honnold, *supra* note 18, at 338-39.

⁶⁷ See Roth, note 61 *supra*. The buyer, however, was obligated to take delivery of the goods under the ULIS, *supra* note 9, art. 56. Buyer's obligation to take delivery required "doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over." ULIS, *supra* note 9, art. 65. Finally, if the handing over of the goods was delayed due to buyer's breach of his obligation to take delivery, "the risk shall pass to the buyer as from the last date when, apart from such breach, the handing over would have been made in accordance with the contract." ULIS, *supra* note 9, art. 98, para. 1.

⁶⁸ ULIS, *supra* note 9, art. 78, para. 1. For the text of art. 78, para. 1, providing for the release of both parties from their obligations under the contract (including any shift of risk to the buyer), see note 282 *infra*. See also Roth, *supra* note 61, at 295, 300. The careful reader will note that, under art. 19 of the ULIS, "delivery" could not be accomplished unless the goods handed over "conform[ed] with the contract." See text accompanying note 65 *supra*. A simple nonconformity alone, however, would not prevent the risk of loss from passing to the buyer at the time the goods

goods in replacement of any goods not conforming to the contract.⁶⁹ Similarly, under a shipment contract,⁷⁰ while risk was tentatively passed to the buyer upon the seller's handing the goods over to the carrier,⁷¹ by avoiding the contract or demanding substitute goods the buyer could cast the risk of loss back on the seller.⁷²

The notion of tentative delivery adopted by the ULIS was at odds with the commercial practice of several nations, including that of the United States.⁷³ It threatened to be particularly burdensome in the context of overseas shipments, when a seller who had shipped goods to the buyer's distant port later learned that, because of some nonconformity or the buyer's refusal to receive the goods, "delivery" had not been accomplished.⁷⁴ In view of this analysis, the American Delegation was quite probably referring to risk of loss when it addressed the Hague Conference on the last day, saying that, "The United States did not consider that the Uniform Law on Sales as presented to the Conference met the requirements of the day-to-day activities of international commerce and, in particular, that it was not consistent with the usages

were handed over to him at his port. ULIS, *supra* note 9, art. 97, para. 2. The only instances in which a nonconformity would prevent passage of the risk were (1) where the breach was fundamental and buyer declared the contract avoided, or (2) where the goods were of the limited sort that allowed buyer to demand that seller deliver substitute goods. *Id.* Buyer could avoid the contract only if seller's breach were "fundamental." ULIS, *supra* note 9, art. 43. (For a definition of "fundamental breach" under the ULIS, see note 170 *infra*). A demand by buyer that seller deliver substitute goods could only be made if purchase from a third party were at odds with usage and not reasonably possible. ULIS, *supra* note 9, art. 42. Consequently, the presence of a non-conformity would not itself be enough to prevent the risk of loss from shifting to buyer upon seller's handing the goods over to buyer at his port.

⁶⁹ ULIS, *supra* note 9, art. 97, para. 2. See note 68 *supra*.

⁷⁰ Shipment contracts are described in note 66 *supra*.

⁷¹ ULIS, *supra* note 9, art. 19, para. 2.

⁷² ULIS, *supra* note 9, art. 97, para. 2. See Roth, *supra* note 61, at 295, 300-02. A number of other risk of loss problems were created by the ULIS whenever the complication of shipment overseas was introduced. See text accompanying notes 333-34, 338-39, 343-45 *infra*. See also Roth, *supra* note 61, at 261 *passim*.

⁷³ 2 DIPLOMATIC CONFERENCE DOCUMENTS, *supra* note 45, at 235-36. See Analysis of Replies and Comments by Governments on the Hague Convention of 1964: Report of the Secretary-General, U.N. Doc. A/CN.9/31 (1970), 1 U.N. COMM'N INT'L TRADE L.Y.B. 170-72, U.N. Doc. A/CN.9/SER.A/1970.

⁷⁴ Roth, *supra* note 61, at 296. The reasons for placing the risk of loss on buyer when the goods arrive in his port are described by Roth as follows:

An international sale frequently involves intermediate carriage by a third party. If loss or damage occurs during transit, it will be the buyer who discovers this when the goods reach their destination (unless the seller himself has an obligation to deliver there). The buyer—at least in a commercial transaction—will accordingly be in a better position to press a claim against the carrier or insurer and to salvage the goods by repair or sale. As a matter of policy therefore, the transit risk should ordinarily be on him. This will, in addition, prevent the buyer [from] using minor damage as a pretext for rejecting the goods when the market has declined and he is anxious to escape from a bad bargain.

Id.

and practises of sea-borne commerce."⁷⁵

2. Imbalance Between the Rights of Sellers and Buyers

It was never made clear to which articles of the ULIS the American Delegation was referring when it noted that the third weakness in the ULIS was an imbalance between the reciprocal rights and obligations of buyer and seller.⁷⁶ Nevertheless, commentators have argued that the ULIS, as the product of Western Europe, represented manufacturing (exporting sellers') interests at the expense of developing third world (importing buyers') interests.⁷⁷

Five areas in particular may be noted in which treatment of the buyer was sufficiently harsh to engender subsequent international attention:⁷⁸ (1) placement of the full burden of proof as to fundamental breach on the buyer;⁷⁹ (2) limitations on the buyer's cause of action for

⁷⁵ 1 DIPLOMATIC CONFERENCE RECORDS, *supra* note 51, at 309.

⁷⁶ Examination of the pre-conference observations by the Government of the United States, 2 DIPLOMATIC CONFERENCE DOCUMENTS, note 45 *supra*, the remarks made by the American Delegation at the conference, 1 DIPLOMATIC CONFERENCE RECORDS, note 51 *supra*, and the *American Delegation's Report*, note 8 *supra*, revealed only two specific articles that were referred to as creating particular difficulties for the buyer: arts. 38 and 39 on notifying seller of breach [arts. 47 and 48 in the pre-Conference draft]. 1 DIPLOMATIC CONFERENCE RECORDS, *supra* note 45, at 306. The complaint that the article on notification of latent defects [art. 48 of the pre-Conference draft] gave buyer too little time to discover the defects was obviated at the Hague Conference by ULIS, *supra* note 9, art. 39, para. 1, which allowed the buyer to rely on a defect that could not have been revealed in an examination promptly after delivery, so long as he gave the seller notice promptly upon his discovery of the defect. The other complaint was simply that, under art. 38 of the ULIS, *supra* note 9 [art. 47 in the pre-Conference draft], the buyer was obligated to inspect the goods for breach even if they were to be redispached without unloading, unless the seller knew or should have known of the buyer's intent to redispach. This provision, although expressly mentioned by the American Delegation to the Hague, did not amount to a major imposition on the buyer when compared with the provisions discussed at notes 166-92, *supra*, and so is not discussed further. The 1978 Draft Convention does alter that provision, however, to relieve the buyer of any obligation to inspect before the goods are redispached if he has no reasonable opportunity to do so. See 1978 Draft Convention, *supra* note 1, art. 30, at 18.

Despite the paucity of references to specific articles in the ULIS detrimental to the buyer, the charge that buyers were treated more poorly than sellers was, nevertheless, repeated in the American Delegation's Report:

Although the delegations at the April Conference tended to preserve in favor of the seller the imbalance between the rights and obligations of the seller on the one hand and of the buyer on the other, in the final days the plight of the buyer received consideration, some of it hastily conceived.

AMERICAN DELEGATION'S REPORT, *supra* note 8, at 10.

⁷⁷ Walsh & Ryan, *supra* note 15, at 613.

⁷⁸ The areas enumerated as being the object of subsequent international attention in regard to the plight of the buyer are the most significant instances of change in the rights of the buyer accomplished by the 1978 Draft Convention. See text accompanying notes 158-200 *infra*.

⁷⁹ See text accompanying notes 166-74 *infra*.

breach after passage of the risk of loss;⁸⁰ (3) limitations on the buyer's right to exact specific performance from a breaching seller;⁸¹ (4) provision of an overly extensive right of avoidance to seller;⁸² and (5) immunity of seller from liability for breach due to causes which seller could not foresee, but which his subcontractors could foresee.⁸³

3. *Insensitivity to Commercial Practice*

The fourth and final weakness in the ULIS cited by the American Delegation was that it would not be understood by individuals in the commercial field.⁸⁴ The American Delegation's Report on the ULIS⁸⁵ and the American Government's pre-Conference comments⁸⁶ contained several references to aspects of the ULIS which were either incomprehensible to merchants or simply at odds with commercial practice.

A provision which the American Delegation stressed would be particularly confusing to merchants was the residuary clause guiding the interpretation of the ULIS.⁸⁷ Article 17 of the ULIS provided that matters not expressly settled by any provision of the ULIS were to be settled by the "general principles" on which the ULIS was based.⁸⁸ The American Government's pre-Conference comments suggested that these "general principles" were nowhere spelled out in the ULIS and, thus, retaining that language would be a source of confusion to parties in the commercial field.⁸⁹ Rather, the pre-Conference comments advised that article 17 be amended to provide that matters not expressly settled by the ULIS "be settled according to the law's *general objective to unify the law in the light of international commercial practice.*"⁹⁰ The touchstone desired by the American Government for the interpretation of the ULIS, then, was the understanding of merchants and their legal advisors.

The risk of loss provisions in the ULIS, a source of United States concern in the context of overseas shipments,⁹¹ was also criticized by

⁸⁰ See text accompanying notes 175-77 *infra*.

⁸¹ See text accompanying notes 178-82 *infra*.

⁸² See text accompanying notes 183-85 *infra*.

⁸³ See text accompanying notes 186-92 *infra*.

⁸⁴ See text accompanying note 55 *supra*.

⁸⁵ AMERICAN DELEGATION'S REPORT, note 8 *supra*.

⁸⁶ 2 DIPLOMATIC CONFERENCE DOCUMENTS, note 45 *supra*.

⁸⁷ *Id.* at 241.

⁸⁸ ULIS, *supra* note 9, art. 17.

⁸⁹ 2 DIPLOMATIC CONFERENCE DOCUMENTS, *supra* note 45, at 241.

⁹⁰ *Id.* (emphasis supplied).

⁹¹ See text accompanying notes 61-75 *supra*.

the American Delegation for its failure to comport with commercial understanding.⁹² The passage of risk of loss upon “delivery,” the “handing over of goods which conform with the contract,”⁹³ had the shortcoming of not being a commercially observable event.⁹⁴ Consequently, merchants never could be assured that any physical act, *e.g.*, placement in the hands of a carrier or deposit at the buyer’s port, successfully accomplished the passage of risk of loss.⁹⁵ In this respect, then, the ULIS was incomprehensible to individuals in the commercial field.

4. *The Scope of the ULIS—A Fifth Objection*

Besides the four flaws in the ULIS noted by the American Delegation in its address to the Hague Conference, a fifth significant defect which the American Delegation had noted at other times during the Conference was the ULIS’s overly broad scope.⁹⁶ Article 1 of the ULIS had the effect of requiring the courts of any nation adopting the ULIS to apply its provisions in any dispute where the parties’ places of business were in different countries, *regardless of whether those countries had adopted the ULIS*.⁹⁷ The spectre raised by this provision was that once the ULIS went into effect through adoption by five nations,⁹⁸ forum shopping would ensue since a signatory forum would be compelled to apply the ULIS to merchants from non-signatory nations.⁹⁹ To preclude forum shopping and the imposition of the ULIS on non-signa-

⁹² 2 DIPLOMATIC CONFERENCE DOCUMENTS, *supra* note 45, at 235-36. The specific observation made by the Government of the United States was that “*délivrance* under the draft is not the commercial event of relinquishing possession [sic] which would be a merchant’s understanding of ‘delivery’, but is an artificial concept. . . . Since it is a creature of the draft rather than of international commercial life, it has proved difficult to translate into various languages.” *Id.*

⁹³ ULIS, *supra* note 9, art. 19.

⁹⁴ See text accompanying notes 63-72 *supra*; Roth, *supra* note 61, at 295.

⁹⁵ *Id.*

⁹⁶ AMERICAN DELEGATION’S REPORT, *supra* note 8, at 5-6.

⁹⁷ ULIS, *supra* note 9, art. 1, para. 1.

⁹⁸ Convention Relating to a Uniform Law on the International Sale of Goods, *done* July 1, 1964, art. X, 834 U.N.T.S. 107, 115.

⁹⁹ Nadelmann, *supra* note 16, at 457. The following hypothetical was provided by Professor Nadelmann:

Thus, if a person in Canada sells goods to a person in the United States which goods must be shipped to the United States, in any subsequent disputes between the parties respecting the transaction either party can—notwithstanding the fact that neither the United States nor Canada has adopted the Uniform Law—take advantage of the law if its relevant provisions are more favorable to that party than the otherwise applicable law. The party merely bring suit in a “contracting” state which will automatically apply the Uniform Law. This result may be accomplished as long as the other party happens to have assets in a “contracting” state and presence of assets is a basis there for assumption of jurisdiction.

Id.

tory nations, the American Delegation to the Hague proposed an amendment "limiting the application of the uniform law to contracts by parties in 'different *contracting* States'. . . ." ¹⁰⁰ The proposed amendment was narrowly defeated. ¹⁰¹

Because concerns raised by the American Delegation were often shared by other delegations in attendance, ¹⁰² it is not surprising that the United States went beyond merely enumerating the ULIS's four major weaknesses. In the course of the same address in which these weaknesses were noted, the American Delegation proposed that a two-pronged recommendation be annexed to the Final Act of the Conference. ¹⁰³ First, if the ULIS received enough signatures to come into effect, ¹⁰⁴ a committee composed of representatives from interested states would be formed to review its operation and prepare recommendations for possible improvements. ¹⁰⁵ If the ULIS did not come into effect, a committee similarly constituted would determine what further efforts would be required to obtain a uniform law on the international sale of goods. ¹⁰⁶ Thus, the possibility of the ULIS's failure and the need to carry the project forward received formal recognition by the 1964 Conference.

¹⁰⁰ AMERICAN DELEGATION'S REPORT, *supra* note 8, at 5 (emphasis in original).

¹⁰¹ *Id.* at 6-7. The vote was 11 delegations for the amendment, 11 opposed, and 2 delegations abstaining. *Id.* Nevertheless, under art. III of the ULIS Convention, Convention Relating to a Uniform Law for the International Sale of Goods, note 98 *supra*, a nation may derogate from art. 1 of ULIS and limit its application to parties whose places of business are in different "contracting" states. See Nadelmann, *supra* note 16, at 454.

¹⁰² AMERICAN DELEGATION'S REPORT, *supra* note 8, at 6.

¹⁰³ 2 DIPLOMATIC CONFERENCE DOCUMENTS, *supra* note 45, at 567.

¹⁰⁴ Under art. X of the Convention Relating to a Uniform Law on the International Sale of Goods, note 98 *supra*, the Convention was to come into force six months after ratification or accession by five nations. For the current status of the Convention and the Uniform Law on the International Sale of Goods, see text accompanying notes 108-116 *infra*.

¹⁰⁵ This recommendation was adopted by the Conference in a slightly altered form, the only noteworthy revision being a delay of two years in the deadline for implementation. It appears in an annex to the Final Act of the Conference. 1 DIPLOMATIC CONFERENCE RECORDS, *supra* note 51, at 330 (Final Act of the Conference Annex to the Final Act, Recommendation II). The recommendation reads:

(1) The Conference recommends, in the event the Convention relating to a Uniform Law on the International Sale of Goods comes into force by May 1, 1968, that the International Institute for the Unification of Private Law establish a committee composed of representatives of the Governments of the interested States, to review the operation of the Law and to prepare recommendations for any Conference convened pursuant to Article XIV of the Convention.

(2) The Conference recommends, in the event the Convention relating to a Uniform Law on the International Sale of Goods has not come into force by May, 1968, that the International Institute for the Unification of Private Law establish a committee composed of representatives of the Governments of the interested States, which shall consider what further actions should be taken to promote the unification of law on the international sale of goods.

Id.

¹⁰⁶ See note 105 *supra*.

In its report to the Secretary of State, the American Delegation rejected the ULIS as a viable instrument for application to international sales undertaken by American merchants.¹⁰⁷

C. Current Status of the Hague Convention on the Uniform Law on International Sales

The ULIS entered into effect in 1972 upon ratification by five nations.¹⁰⁸ To date it has been ratified or acceded to by only eight nations,¹⁰⁹ and even in these it is almost never applied.¹¹⁰ For example, in the United Kingdom the ULIS was ratified so as to apply only when expressly chosen as the governing law by the contracting parties.¹¹¹ Most merchants in the United Kingdom are either unaware of its existence¹¹² or reluctant to submit to an untried body of law.¹¹³ Thus, they do not incorporate it into their contracts.¹¹⁴ In those nations which have unconditionally ratified the ULIS, it simply is not enforced by the

¹⁰⁷ AMERICAN DELEGATION'S REPORT, *supra* note 8, at 10. The sentiment conveyed was unmistakable:

All things considered, it would appear unlikely that the Uniform Act will prove acceptable to America's governmental, commercial and legal organizations because its many unclear and unworkable provisions do not meet the current needs of commerce and because it varies so markedly in its approach and content from our Uniform Commercial Code.

Id.

¹⁰⁸ Convention Relating to a Uniform Law on the International Sale of Goods, *supra* note 98.

¹⁰⁹ Nations which have ratified or acceded to the ULIS are Belgium, Federal Republic of Germany, United Kingdom, Gambia, Israel, Italy, Netherlands, and San Marino. Honnold, *supra* note 35, at 224 n.7.

¹¹⁰ Summary Record of the 183d Meeting, United Nations Commission on International Trade Law 8-9, U.N. Doc. A/CN.9/SR.183 (June 24, 1977) (remarks of Mr. Plantard, representative of France).

¹¹¹ Any state is permitted to ratify or accede to the ULIS provisionally, *i.e.*, to apply its provisions only when the parties to a contract have chosen the ULIS to govern. Convention Relating to a Uniform Law on the International Sale of Goods, *supra* note 98, art. V. This option was elected by the United Kingdom. *Analysis of Replies and Comments by Governments on the Hague Conventions of 1964: Report of the Secretary-General*, *supra* note 74, at 161 n.7. See also R. GRAVESON, E. COHN & D. GRAVESON, THE UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967, at 26-29 (1968).

¹¹² See Summary Records of the 183d Meeting, United Nations Commission on International Trade Law, note 110 *supra*.

¹¹³ R. GRAVESON, E. COHN & D. GRAVESON, *supra* note 110, at 27-28. The reasons enumerated by these authors for caution in choosing to apply the ULIS were: (1) "innumerable points of detail" have of necessity been left to the interpretation of courts and commentators, resulting in great uncertainty in interpretation; (2) the ULIS requires numerous kinds of notice or demand by the parties to safeguard their interests, and (3) the ULIS renders the Uniform Law on Formation of Contracts (ULF) applicable, which is at odds with English law on the formation of contracts.

Id.

¹¹⁴ Summary Records of the 183d Meeting, United Nations Commission on International Trade Law, note 110 *supra*.

courts.¹¹⁵ Few nations have expressed any intent to adhere to the Hague Convention Relating to a Uniform Law on the International Sale of Goods.¹¹⁶

II. THE 1978 UNCITRAL DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The unhappy fate of the 1964 Hague Convention Relating to a Uniform Law on the International Sale of Goods did not signal the end of efforts to produce such a uniform law. The needs of international commerce for unification persisted and, if anything, increased.¹¹⁷ In response to the call for a general unification of international law, the United Nations resolved in 1966 to establish the United Nations Commission on International Trade Law (UNCITRAL).¹¹⁸ The General Assembly resolution calling for the creation of UNCITRAL provided it with a mandate for "the promotion of the progressive harmonization and unification of the law of international trade."¹¹⁹ It further required

¹¹⁵ *Id.*

¹¹⁶ Besides the countries which did ultimately ratify or accede to the ULIS, *see* note 109 *supra*, upon inquiry by the United Nations Commission on International Trade Law in 1968, *see* Report of the United Nations Commission on International Trade Law on the Work of its First Session, 29 January - 26 February 1968, 23 U.N. GAOR, Supp. (No. 16) 18-19, U.N. Doc. A/7216 (1968), *reprinted in* 1 U.N. COMM'N INT'L TRADE L.Y.B. 79, U.N. Doc. A/CN.9/SER.A.1970, six other nations indicated a serious intent to ratify or accede. They are Australia, Colombia, France, Greece, Luxembourg and Mexico. Analysis of Replies and Comments on the Hague Conventions of 1964: Report of the Secretary-General, *supra* note 73, at 161. When work on a revised version of the ULIS began under the auspices of the United Nations Commission on International Trade Law, *see* text accompanying notes 121-24 *infra*, these nations held any further action on the ULIS in abeyance, pending their evaluation of the UNCITRAL revision. Sutton, *The Hague Conventions of 1964 and the Unification of the Law of International Sale of Goods*, 7 U. QUEENSL. L.J. 146, 147 (1971).

¹¹⁷ *See* text accompanying notes 132-35 *infra*.

¹¹⁸ The resolution creating UNCITRAL, G.A. Res. 2205, 21 U.N. GAOR, Supp. (No. 16) 99, U.N. Doc. A/6316 (1966), provides in pertinent part that the General Assembly, "Decides to establish a United Nations Commission on International Trade Law (hereinafter referred to as the Commission), which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade. . . ." *Id.* *See generally* 1 U.N. COMM'N INT'L TRADE L. Y.B., U.N. Doc. A/CN.9/SER.A/1970.

¹¹⁹ *See* note 118 *supra*. In addition to work on a uniform law for the international sale of goods, UNCITRAL has effected the unification of other troublesome areas of international law. In 1974 an international diplomatic conference adopted UNCITRAL's Convention on the Limitation Period in the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods, U.N. Doc. A/CONF. 63/15 (1974), *reprinted in* 5 U.N. COMM'N INT'L TRADE L.Y.B. 210-15, U.N. Doc. A/CN.9/SER. A/1974. *See generally* Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201, 203-04 (1979). The UNCITRAL Arbitration Rules were recommended by the U.N. General Assembly for use by commercial parties in 1976. G.A. Res. 31/98, 31 U.N. GAOR, Supp. (No. 39) 182, U.N. Doc. A/31/39 (1976). The Arbitration Rules have received a positive reception in the business world. Summary Records of the 180th Meeting, United Nations Commission on Interna-

that each geographical, legal and economic region of the world be represented in the membership of UNCITRAL.¹²⁰

At its first session in 1968, UNCITRAL raised the fate of the ULIS as a pressing issue.¹²¹ Two basic alternatives were considered: either UNCITRAL could promote the wider adoption of the ULIS as it stood or it could undertake a revision of the ULIS that would draw greater international support.¹²² While some nations had indicated an interest in ratifying or acceding to the ULIS, there was fairly widespread dissat-

tional Trade Law 2, U.N. Doc. A/CN.9/SR.180 (May 24, 1977) (remarks of Mr. Suy, Acting Chairman, Under Secretary-General, Legal Counsel). In March 1978 a diplomatic conference in Hamburg approved UNCITRAL's Convention on the Carriage of Goods by Sea. Draft Convention on the Carriage of Goods by Sea, Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session, 12 April - 7 May 1976, 31 U.N. GAOR Supp. (No. 17) 17, U.N. Doc. A/31/17, reprinted in 7 U.N. COMM'N INT'L TRADE L.Y.B. 194, U.N. Doc. A/CN.9/SER.A/1976. See generally Honnold, *supra*, at 204-05. UNCITRAL is currently engaged in the unification of other areas of international law as well. See *id.* at 204 *passim*.

¹²⁰ *Id.* UNCITRAL's work is done by working groups composed of representatives from nations with a wide array of geographical, legal and economic interests. It has been noted that "UNCITRAL's work is inherently more likely to obtain acceptance from third world countries than that of other bodies in which the developing countries feel their interests are not sufficiently recognized." Walsh & Ryan, *supra* note 15, at 610. The member nations of UNCITRAL are: Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Burundi, Chile, Colombia, Cyprus, Czechoslovakia, Egypt, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, India, Indonesia, Japan, Kenya, Mexico, Nigeria, Philippines, Sierra Leone, Singapore, Syrian Arab Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, and Zaire. Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session, *supra* note 7, at 3.

¹²¹ See Report of the United Nations Commission on International Trade Law on the Work of its First Session, note 118 *supra*. See generally 9 CALIF. W. INT'L L.J. 157, 166-68 (1979).

¹²² Report of the United Nations Commission on International Trade Law on the Work of its Second Session, 3 - 31 March 1969, 24 U.N. GAOR Supp. (No. 18)8, U.N. Doc. A/7618, reprinted in 1 U.N. COMM'N INT'L TRADE L.Y.B. 97-98, U.N. Doc. A/CN.9/SER.A/1970. The staunchest advocate of securing the ratification of the ULIS was Mr. Matteucci, the observer from the International Institute for the Unification of Private Law (UNIDROIT). As the moving force behind the Hague Conference of 1964, UNIDROIT sought UNCITRAL's endorsement of that effort. Summary Record of the Eighth Meeting, United Nations Commission on International Trade Law 77-78, U.N. Doc. A/CN.9/SR.8 (Feb. 7, 1968) (remarks of Mr. Matteucci, observer from UNIDROIT). It was clear, however, that while some nations were interested in ratifying the ULIS, most were not. It was often noted that the United States' recommendation to provide for the revision of the ULIS if it failed to come into force by May 1, 1968, see note 105 *supra*, was an available alternative. See, e.g., Summary Records of the Tenth Meeting, United Nations Commission on International Trade Law 99-100, U.N. Doc. A/CN.9/SR.10. (Feb. 9, 1968) (remarks of Mr. Jenard, representative of Belgium). The decision arrived at was to transmit a questionnaire with the text of the ULIS and a commentary by Professor André Tunc, 1 DIPLOMATIC CONFERENCE RECORDS, *supra* note 51, at 355 (Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sales), to member nations of the United Nations and member nations of the U.N.'s specialized agencies in order to assess the international attitude toward the ULIS. Report of the United Nations Commission on International Trade Law on the Work of its First Session, note 116 *supra*.

isfaction with the text as it stood.¹²³ As a result, UNCITRAL resolved to revise the ULIS so as to create an international law of sales more likely to be embraced by the international trading community.¹²⁴

The United States' position on the ULIS remained consistent with the position it had adopted at the Hague Conference of 1964.¹²⁵ At the second session of UNCITRAL, held in 1969, the American representative stated that the objections to the ULIS registered by the American Delegation five years before continued to be subjects of American concern and urged that revision of the ULIS be undertaken pursuant to the American recommendations at the Hague Conference.¹²⁶

On June 16, 1978, UNCITRAL unanimously approved the Draft Convention on Contracts for the International Sale of Goods,¹²⁷ a uniform substantive law of sales which transcends the legal doctrines of any one nation.¹²⁸ UNCITRAL has given special attention in drafting the provisions of this law to the objections raised by the American Delegation to the Hague Conference in 1964.¹²⁹ Following approval of the

¹²³ Report of the United Nations Commission on International Trade Law on the Work of its Second Session, note 122 *supra*.

¹²⁴ The essence of the UNCITRAL decision was:

3. To establish a Working Group—composed of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America—which shall:

(a) Consider the comments and suggestions by States . . . in order to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods. . . .

Id.

¹²⁵ See note 126 *infra*.

¹²⁶ Summary Record of the 30th Meeting, United Nations Commission on International Trade Law 51, U.N. Doc. A/CN.9/SR.30 (March 5, 1969) (remarks of Mr. Rubin, representative of the United States of America). The American recommendation at the Hague appears at note 105 *supra*. In addition, ongoing American dissatisfaction with the overbroad scope of the ULIS, see text accompanying notes 96-101 *supra*, and with the uncertainties of the "delivery" (*délivrance*) term in the ULIS, see text accompanying notes 61-75 and 92-95 *supra*, were noted by the American representative to UNCITRAL. Summary Record of the 31st Meeting of the United Nations Commission on International Trade Law 63-64, U.N. Doc. A/CN.9/SR. 31 (March 6, 1969) (remarks of Mr. Rubin, representative from the United States of America).

¹²⁷ See note 7 *supra*. Incorporated into the 1978 Draft Convention are a set of rules on the formation of international sales contracts. See *id.* The bulk of the 1978 Draft Convention, however, consists of the text on the international sale of goods, as approved by UNCITRAL's Working Group on Sales. Report of the Working Group on the International Sale of Goods on the Work of its Seventh Session (Geneva, 5-16 January 1979), U.N. Doc. A/CN.9/116, reprinted in 7 U.N. COMM'N INT'L TRADE L.Y.B. 88, para. 10, U.N. Doc. A/CN.9/SER.A/1976.

¹²⁸ See Bergsten & Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 255, 255 (1979).

¹²⁹ A full discussion of these objections and how they were met is given in the text beginning at note 141 *infra*.

text of the 1978 Draft Convention by the diplomatic conference convened in March, it may be submitted to the treaty ratification process of the United States: signature by the President with the advice and consent of two-thirds of the Senate.¹³⁰ In light of the remarkable recasting of the ULIS accomplished by the 1978 Draft Convention and the current opportunity for adoption of this law as a treaty of the United States, examination of the degree to which American concerns have been remedied¹³¹ is appropriate.

A. United States Concerns and the 1978 Draft Convention on Contracts for the International Sale of Goods

Along with other Western industrial countries, the United States has dramatically increased the volume of trade it carries on with both third world nations and countries with centrally planned economies.¹³² In turn, there has been ever-increasing pressure from third world countries to expand their own export trade.¹³³ A concomitant of this demand has been a parallel effort to change the pro-Western bent of the rules under which international trade is conducted.¹³⁴ These factors have created a climate of "overwhelming international support" for the 1978 Draft Convention on Contracts for the International Sale of Goods and wide adoption is being predicted.¹³⁵ American interest in ratification will likely be enhanced by the current level of international support for this project.¹³⁶

Perhaps the factor most clearly favoring United States adoption of the 1978 Draft Convention is the long-term instrumental participation of the United States in UNCITRAL's Working Group on Sales.¹³⁷

¹³⁰ U.S. CONST. art. 2, § 2, cl. 1; Farnsworth, *Developing International Trade Laws*, 9 CALIF. W. INT'L L.J. 461, 465, 470 (1979) (suggests a favorable outcome).

¹³¹ See note 129 *supra*.

¹³² Walsh & Ryan, *supra* note 15, at 609.

¹³³ *Id.* at 610.

¹³⁴ The primary forum for these demands has been the United Nations Conference on Trade and Development (UNCTAD). *Id.* See also Wolf, *The U.S. Mandate for Trade Negotiations*, 16 VA. J. INT'L L. 505, 507 n.11, 547, 547-48 n.178 (1976) (suggesting other forums). A significant number of preferential tariff arrangements between developed and developing nations were concluded under the GATT during the Kennedy Round in 1964-67. Since that time the United States has replaced such arrangements through its participation in the Generalized System of Preferences (GSP), allowing the extension of duty-free treatment for products of developing countries. Trade Act of 1974, 19 U.S.C. §§ 2461-65 (1976).

¹³⁵ Honnold, *supra* note 4, at 223; Walsh & Ryan, *supra* note 15, at 613.

¹³⁶ See text accompanying notes 156-200 *infra*. The enduring American concern for the plight of the buyer under the ULIS supports the contention that widespread adoption of the 1978 Draft Convention by third world and underdeveloped countries should encourage American adoption as well.

¹³⁷ See Honnold, *supra* note 18, at 352; Nadelmann, *supra* note 16, at 456.

America's disinterest in the provisions of the ULIS until so late a date as to render meaningful input impossible was a major reason for the failure of the ULIS to reflect American commercial interests.¹³⁸ As John Honnold, one of the American delegates to the Hague, observed:

Surely we cannot afford again to rouse ourselves on the eve of a decisive diplomatic conference. Effectiveness requires informed consistent work during the years (or decades) while a project is in gestation—not only to help insure that the finished product will meet our needs but also to develop that degree of understanding and feeling of participation necessary for a fair decision about adoption.¹³⁹

The active role played by the United States in drafting the 1978 Draft Convention has permitted the emergence of a uniform substantive law of sales which meets the particular American concerns voiced at the Hague in 1964 and reiterated thereafter at UNCITRAL.¹⁴⁰ Analysis of the advances made in those areas provides the benchmark for acceptability of the 1978 Draft Convention to American commercial interests.

1. *Scope of Application*

The scope of application of the ULIS was a source of concern to the United States at the Hague Conference in 1964¹⁴¹ and continued to be such at UNCITRAL.¹⁴² This issue may be analyzed in two distinct parts: (1) application where the parties' places of business have not adopted the international law;¹⁴³ and (2) application to consumer sales.¹⁴⁴

As will be recalled, signatories to the ULIS were required to apply its provisions regardless of whether the parties' places of business were in nations that had ratified the ULIS.¹⁴⁵ That was considered to be a major flaw by the American Delegation.¹⁴⁶

¹³⁸ See text accompanying notes 41-50 *supra*.

¹³⁹ Honnold, *supra* note 18, at 352.

¹⁴⁰ See Farnsworth, *supra* note 130, at 470. Professor Farnsworth, a representative to UNCITRAL for the United States, has commented that "[m]ost of the sales law is now satisfactory to us" and barring any detrimental revisions accomplished at the international diplomatic conference by nations not currently represented at UNCITRAL "will merit serious consideration for adoption by the United States." *Id.* But see Walsh & Ryan, *supra* note 15, at 613 (suggesting that, because the UNCITRAL draft redresses buyers' rights at the expense of sellers, the United States, as a sellers' nation, will likely not ratify). This observation could not have been made with a full appreciation of the United States' position at the Hague Conference in regard to the relative rights of buyer and seller. See text accompanying notes 55, 76-83 *supra*.

¹⁴¹ See text accompanying notes 96-101 *supra*.

¹⁴² See note 126 *supra*.

¹⁴³ See text accompanying notes 145-51 *infra*.

¹⁴⁴ See text accompanying notes 152-55 *infra*.

¹⁴⁵ See text accompanying notes 96-101 *supra*.

¹⁴⁶ *Id.*

Under the 1978 Draft Convention the possibility of application where the parties are not from contracting nations has been substantially reduced. Article 1 of the 1978 Draft Convention reads:

- (1) This 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; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.¹⁴⁷

This provision permits application of the 1978 Draft Convention to parties whose places of business are not in contracting states only if the forum in which the case is brought determines, upon application of its own conflicts principles, *e.g.*, place of the making of the contract, that the substantive law of a contracting state applies.¹⁴⁸ Then, because the parties are from different countries, the relevant substantive law of the contracting state would be its international sales law, *i.e.*, the 1978 Draft Convention.¹⁴⁹

The other side of the coin, of course, is that where the parties have places of business in different contracting states, they can rarely avoid application of the 1978 Draft Convention. Such avoidance could only occur in one of two ways: (1) if the parties insert a term in their contract expressly excluding its application;¹⁵⁰ or (2) if a third non-contracting state will take jurisdiction of the case and, upon application of its conflicts principles, determine that its substantive law or the substantive law of another non-contracting state applies.¹⁵¹

A second objection to the scope of the ULIS was raised by America only after the decision to revise the ULIS had been made: the

¹⁴⁷ 1978 Draft Convention, *supra* note 1, art. 1, at 10. This revision is clearly in line with American wishes, as expressed at the Hague in 1964. It will be recalled that America proposed an amendment to the ULIS "limiting the application of the uniform law to contracts by parties in 'different contracting States'. . ." (emphasis in original). See text accompanying note 100 *supra*.

¹⁴⁸ Commentary on the Draft Convention on the International Sale of Goods U.N. Doc. A/CN.9/116, annex II, reprinted in 7 U.N. COMM'N INT'L TRADE L.Y.B. 96, 97, col. 1, para. 7, U.N. Doc. A/CN.9/SER.A/1976 [hereinafter cited as Secretariat's Commentary]. This commentary was prepared by the Secretariat at the request of the Working Group on the International Sale of Goods. It was approved by the Working Group at its seventh session in 1976 because "it would make the preparatory work and the policy underlying the formulations in the draft convention more readily available." Report of the Working Group on the International Sale of Goods on the Work of its Seventh Session (Geneva, 5-16 January 1976), *supra* note 127, at para. 9. This commentary is similar in function to the commentary on ULIS prepared by Professor André Tunc. See note 122 *supra*.

¹⁴⁹ Secretariat's Commentary, *supra* note 148, at 97, col. 1, para. 7.

¹⁵⁰ 1978 Draft Convention, *supra* note 1, art. 5, at 11. That article provides: "The parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions." *Id.*

¹⁵¹ Secretariat's Commentary, *supra* note 148, at 97, col. 1, para. 6.

impropriety of its application to goods bought for immediate consumer use.¹⁵² In 1971, Professor Farnsworth, a United States representative to UNCITRAL, stated that it was the position of the United States to exclude sales of goods for consumer use from the 1978 Draft Convention.¹⁵³ This position already enjoyed great support at UNCITRAL¹⁵⁴ and resulted in the exclusion of consumer sales from the reach of the 1978 Draft Convention except where the seller could not have foreseen that the goods were intended for direct consumer use.¹⁵⁵

2. *Rights and Obligations of Buyer and Seller*

One of the four weaknesses of the ULIS delineated by the United States at the Hague Conference of 1964 was an unfavorable treatment of buyers as compared with sellers.¹⁵⁶ The most plausible explanation for this objection was a desire by the United States to facilitate trade with developing countries.¹⁵⁷ Third world countries, as importers of manufactured goods (buyers), were forced to defer to terms imposed by exporting industrialized nations (sellers), either because they had no adequately developed trade law of their own¹⁵⁸ or because the industrialized nations had sufficient bargaining power to dictate terms.¹⁵⁹ Their dissatisfaction with the balance of rights between buyer and

¹⁵² No objection to applying the ULIS to consumer purchases appears in the American Delegation's Report on the 1964 Hage Conference. AMERICAN DELEGATION'S REPORT, note 8 *supra*. Similarly, no objection appears in the comments submitted by the United States prior to the 1964 Hague Conference, 2 DIPLOMATIC CONFERENCE DOCUMENTS, note 45 *supra*, or in the remarks made by the American Delegation during the Conference, 1 DIPLOMATIC CONFERENCE RECORDS, note 51 *supra*.

¹⁵³ Summary Record of the 74th Meeting, United Nations Commission on International Trade Law 137, U.N. Doc. A/CN.9/SR.74/1971 (April 5, 1971) (remarks of Mr. Farnsworth, representative of the United States of America).

¹⁵⁴ *Id.* at 131-32 (remarks of Mr. Ogundere, representative of Nigeria). Apparently the Commission (UNCITRAL) was almost unanimously in favor of excluding sales of goods to consumers.

¹⁵⁵ 1978 Draft Convention, *supra* note 8, art. 2, at 10. That provision reads in pertinent part: "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." *Id.*

¹⁵⁶ See text accompanying notes 55 and 76-83 *supra*.

¹⁵⁷ See text accompanying notes 132-136 *supra*.

¹⁵⁸ Walsh & Ryan, *supra* note 15, at 609.

¹⁵⁹ *Id.* The sentiment that buyers' rights were subjugated in the ULIS to the interests of seller-nations was expressed at UNCITRAL by representatives of third world and underdeveloped nations. See, e.g., Summary Record of the 29th Meeting, United Nations Commission on International Trade Law 32-33, U.N. Doc. A/CN.9/SR.29/1969 (March 5, 1969) (remarks of Mr. Shafik, representative of the United Arab Republic). But see Summary Record of the 29th Meeting of the United Nations Commission on International Trade Law, *supra*, at 33 (remarks of Mr. Guest, representative of the United Kingdom) (reasoning that nations which are buyers one day are sellers the next and, thus, no special advantage had been conferred on any particular group of nations under the ULIS).

seller under then-prevailing international law created a demand to restructure those laws.¹⁶⁰ As the American objection pointed out, the ULIS accomplished no such restructuring.

By the time the UNCITRAL Working Group on Sales had begun its work, the disparities in the ULIS treatment of the buyer and seller had been recognized.¹⁶¹ The mandate given to the Working Group on Sales was to consider what modifications of the ULIS would render it "capable of wider acceptance by countries of different legal, social and economic systems."¹⁶² It is clear from an examination of specific provisions in the 1978 Draft Convention that the rights of buyers have received greater protection than afforded under the ULIS. Five areas which were noted as causing particular problems for buyers under the ULIS¹⁶³ appear to have been remedied in the 1978 Draft Convention.¹⁶⁴ In certain instances the United States representatives to UNCITRAL were instrumental in securing those changes.¹⁶⁵

a. Fundamental Breach—The Burden of Proof

Under the 1964 Hague Convention, if a party's failure to perform any of his obligations under the contract amounted to a "fundamental breach," the aggrieved party could avoid or cancel all of his obligations under the contract¹⁶⁶ without losing any of his rights to damages.¹⁶⁷ A similar result obtains under the 1978 Draft Convention.¹⁶⁸ Of course, precisely what the aggrieved party must prove to sustain a finding of "fundamental breach" becomes an important issue. Because the usual case involves a buyer avoiding the contract due to a nonconformity in the goods or in the delivery, this provision was of special concern to buyers.¹⁶⁹

¹⁶⁰ Walsh & Ryan, *supra* note 15, at 613.

¹⁶¹ See note 124 *supra*.

¹⁶² *Id.*

¹⁶³ See text accompanying notes 78-83 *supra*.

¹⁶⁴ See text accompanying notes 172-74 *infra*.

¹⁶⁵ *Id.*

¹⁶⁶ ULIS, *supra* note 9, arts. 24, 30, 62, 66. See, e.g., ULIS art. 26, para. 1, which provides:

1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.

¹⁶⁷ ULIS, *supra* note 9, art. 78. The effect of avoidance under art. 78, para. 1, is as follows: "1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due."

¹⁶⁸ 1978 Draft Convention, *supra* note 1, art. 45, at 20, and art. 60, at 24.

¹⁶⁹ See Michida, *Cancellation of Contract*, 27 AM. J. COMP. L. 279 *passim* (1979). Most of the hypothetical cases posed by Mr. Michida in his article regarding avoidance or cancellation of the

The ULIS required a buyer claiming a fundamental breach to prove: (1) that a reasonable person would not have entered the contract had he foreseen the breach and its effects; and (2) *that the breaching party knew or ought to have known* that a reasonable person would not have entered the contract had he foreseen the breach and its effects.¹⁷⁰ Of course, imposing upon the buyer the burden of proving this second question of fact was a significant hardship.¹⁷¹

Under the 1978 Draft Convention an aggrieved party's burden of proof as to fundamental breach has been lessened. In a joint effort, the Philippines and the United States successfully shifted the burden of proving what the breaching party could or could not have foreseen to the breaching party,¹⁷² *i.e.*, the seller in the usual case.¹⁷³ The definition of fundamental breach under the 1978 Draft Convention reads, "A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party *unless the party in breach did not foresee and had no reason to foresee such a result.*"¹⁷⁴ Thus, greater benefit to the buyer in this area was secured.

b. Seller's Liability After the Passage of Risk of Loss

As early as 1973 UNCITRAL's Working Group on Sales had decided to expand the liability of a seller for nonconformities arising after the risk of loss had passed to the buyer.¹⁷⁵ Under the ULIS, the only nonconformities for which a seller could be held accountable after the risk of loss had passed were those "due to an act of the seller or of a

contract support the proposition that it is the buyer who usually will seek to escape his obligations under the contract in this fashion.

¹⁷⁰ ULIS, *supra* note 9, art. 10. That provision reads:

For the purpose of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.

See Michida, *supra* note 169, at 282-84. Michida's analysis actually pertains to the fundamental breach provision of the Working Group on Sale's 1976 draft of the Convention on Contracts for the International Sale of Goods, Draft Convention on the International Sale of Goods, U.N. Doc. A/CN.9/116, annex I, art. 9 (1976), *reprinted in* 7 U.N. COMM'N INT'L TRADE L.Y.B. 89, 90, U.N. Doc. A/CN.9/SER.A/1976 [hereinafter cited as 1976 Draft Convention]. The definition of fundamental breach under the 1976 draft, however, was similar to that under the ULIS art. 10, note 9, *supra*, and would similarly impose on the buyer the burden of proof as to what the seller could reasonably foresee.

¹⁷¹ Michida, *supra* note 169, at 283-84.

¹⁷² *Id.* at 284-85.

¹⁷³ *See* note 169 and accompanying text *supra*.

¹⁷⁴ 1978 Draft Convention, *supra* note 1, art. 23, at 15 (emphasis supplied).

¹⁷⁵ Summary Record of the 127th Meeting, United Nations Commission on International Trade Law 14, U.N. Doc. A/CN.9/SR.127/1973 (April 3, 1973) (remarks of Mr. Loewe, representative from Austria and Rapporteur of the Working Group on Sales).

person for whose conduct he is responsible.”¹⁷⁶

Under the 1978 Draft Convention the seller's liability has been substantially expanded. After risk of loss has passed, the seller may be held liable for any nonconformity “due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.”¹⁷⁷ While under the ULIS the buyer was placed in the difficult position of pointing to a particular act by the seller or his servants which caused the post-passage defect, the UNCITRAL Convention allows the buyer to show merely that some quality of the goods that was promised did not endure after the passage of risk. Isolation of a particular act would no longer be necessary.

c. Buyer's Right to Specific Performance

Under the ULIS, a buyer could not require a seller to perform his obligations under the contract if the usage of the trade was to purchase conforming goods in the buyer's own market and it was reasonably possible for buyers to do so.¹⁷⁸ The 1978 Draft Convention provides, however, that the buyer may require the seller to perform any of his obligations unless the buyer has resorted to an inconsistent remedy, *e.g.*, avoidance of the contract.¹⁷⁹ Under this provision a seller is not permitted to weigh the costs of performance against the damages the buyer would claim upon the seller's refusal to perform.¹⁸⁰ This is a significant shift in the buyer's favor.

While the increase in the buyer's right to specific performance would be consistent with the American desire for the general enhancement of the buyer's rights, it does run counter to the common law's reluctance to require specific performance as to non-unique goods.¹⁸¹ This concern is somewhat diminished by article 26 of the 1978 Draft Convention:

¹⁷⁶ ULIS, *supra* note 9, art. 35.

¹⁷⁷ 1978 Draft Convention, *supra* note 1, art. 34, para. 2, at 17.

¹⁷⁸ ULIS, *supra* note 9, art. 25. That provision reads in pertinent part: “The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. . . .” *Id.*

¹⁷⁹ 1978 Draft Convention, *supra* note 1, art. 42(1), at 20. The only situation in which the buyer is entitled to require the seller to procure substitute goods, however, is if the lack of conformity giving rise to such a request amounts to a fundamental breach of the contract. *Id.* at art. 42(2).

¹⁸⁰ Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 250-51 (1979).

¹⁸¹ *Id.* at 247.

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligations by the other party, a court is not bound to enter a judgment for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.¹⁸²

Nevertheless, in non-common law countries the buyer would have a broad right to require specific performance by the seller to remedy any non-conformities.

d. Limitations on Seller's Right to Avoid

Under the ULIS a seller was entitled to declare the contract avoided if the buyer's failure to pay the price or take delivery of the goods by the date fixed in the contract amounted to a fundamental breach.¹⁸³ Under the 1978 Draft Convention, however, *once a buyer has paid the price* the seller cannot avoid the contract for the buyer's late performance unless he does so before he becomes aware that performance has been rendered.¹⁸⁴ Thus, if a buyer pays after the due date but before the seller has declared the contract avoided, the buyer will be protected despite his own late performance. There is no similar tool in the seller's arsenal by which he may preclude the buyer from avoiding the contract in the case of any fundamental breach.¹⁸⁵

e. Increase in Seller's Liability for the Breaches of Subcontractors

The availability of the defense of *force majeure*¹⁸⁶ to sellers whose subcontractors have failed to perform has been substantially curtailed

¹⁸² 1978 Draft Convention, *supra* note 1, art. 26, at 15. *But see* Farnsworth, note 181 *supra*. Professor Farnsworth observes that under the ULIS the availability of specific performance was much more limited than under the 1978 Draft Convention. In situations where common law courts *could* exact specific performance, they must do so under the 1978 Draft Convention. Under the ULIS, however, they were not required to exact specific performance unless they *would* have done so in its absence. *Id.*

¹⁸³ ULIS, *supra* note 9, arts. 62, 66.

¹⁸⁴ 1978 Draft Convention, *supra* note 1, art. 60(2), at 24.

¹⁸⁵ Under the 1978 Draft Convention the only provision which sets a time limit on the buyer's right to avoid the contract allows the buyer "a reasonable time" to avoid after he knew or ought to have known of the fundamental breach. 1978 Draft Convention, *supra* note 1, art. 45(2), at 21. Thus, the seller's performance before the buyer has declared the contract avoided will not preclude the buyer from avoiding the contract.

¹⁸⁶ The civil law principle of *force majeure* exempts a party to the contract from liability for non-performance of one or more of his obligations in the event that circumstances arise to prevent his performance which were both unforeseeable and insurmountable. This must be distinguished from the common law doctrine of frustration, by which the entire contract is terminated. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1413 n.2 (1963). *See also* Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231, 233-34 (1979).

under the 1978 Draft Convention. The ULIS provided an exemption from liability for any non-performance if the breaching party, in most cases the seller,¹⁸⁷ could "prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome. . . ."¹⁸⁸ Where the item sold comprised components manufactured by sub-contractors, the seller could make a very strong case that he was not bound to take into account, avoid, or overcome all contingencies that his subcontractors might have been able to anticipate.¹⁸⁹

Under the 1978 Draft Convention the seller may no longer argue that he was unable to foresee a possible impediment to performance which his subcontractors were able to foresee. No exemption will be afforded to a party whose subcontractors could reasonably have been expected to take the impediment into account at the time of the conclusion of the contract or could have avoided or overcome its consequences.¹⁹⁰ While this provision applies equally to buyers and sellers, it is clear that manufacturing seller nations would be more seriously affected by rules increasing the liability for the breaches of subcontractors.

It is true that, as a manufacturing seller nation, the United States would be interested in a provision immunizing sellers who could not foresee impediments to performance which their subcontractors could foresee. Such a principle, however, would be at odds with American commercial law,¹⁹¹ the general tendency of which is to construe the

¹⁸⁷ See Nicholas, *supra* note 186, at 235.

¹⁸⁸ ULIS, *supra* note 9, art. 74, para. 1.

¹⁸⁹ Secretariat's Commentary, *supra* note 148, at 131, col. 1, para. 9.

¹⁹⁰ 1978 Draft Convention, *supra* note 1, art. 65, at 26. That provision reads in pertinent part:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

Id.

¹⁹¹ A basic principle of American commercial law is that general contractors will not be excused from performance simply because their subcontractors have failed to perform. *J.J. Brown Co. v. J.L. Simmons Co.*, 2 Ill. App. 2d 132, 140, 118 N.E.2d 781, 785 (1954); *City of New York v. New York Jets Football Club, Inc.*, 90 Misc. 2d 311, 318, 394 N.Y.S.2d 799, 805 (Sup. Ct. 1977); 6 A. CORBIN, CONTRACTS § 1340 (1962). The general contractor may be excused only if a subcontractor specifically contemplated by the contract either no longer exists or, in turn, can meet the rigorous standards of an impossibility defense. *Id.* § 1321.

excuse of impossibility narrowly.¹⁹²

f. Some Benefits to the Seller Under the 1978 Draft Convention

It would be misleading to suggest that the 1978 Draft Convention has uniformly enhanced buyers' rights at the expense of sellers' rights. In some instances, sellers' rights also have been increased. For example, the right of sellers to require that buyers specifically perform their obligations under the contract has been increased along with the right of buyers to exact specific performance from sellers.¹⁹³

Under the ULIS, if a buyer refused to pay for conforming goods which a seller had properly delivered, the seller could not require that the buyer pay the price if it were "in conformity with usage and reasonably possible" for the seller to sell the goods to a third party.¹⁹⁴ If resale was both customary and possible, the contract between the buyer and seller became *ipso facto* avoided,¹⁹⁵ allowing the seller to claim

¹⁹² See, e.g., *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315-16 (D.C. Cir. 1966); Berman, *supra* note 186, at 1413 *passim*. See also Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods, U.N. Doc. A/CN.9/125 and A/CN.9/125/Add. 1 to 3, reprinted in 8 U.N. COMM'N INT'L TRADE L.Y.B. 109, 133, para. 17, U.N. Doc. A/CN.9/SER.A/1977 [hereinafter cited as Comments]. The United States in 1977 expressed dissatisfaction with the 1976 Draft Convention, note 1 *supra*, with regard to the ease with which the excuse of impossibility was granted. Comments, *supra*. Only part of that complaint has been remedied in the 1978 Draft Convention. The United States proposed language which was ultimately adopted as part of the 1978 Draft Convention, *supra* note 1, art. 65(1), at 26, imposing a responsibility on parties to make reasonable efforts to avoid or overcome an impediment to performance *after* such impediment had occurred. Comments, *supra*. However, an American proposal that the impossibility excuse be denied unless the nonoccurrence of the impediment "*was an implied condition of the contract*" did not win adequate support for inclusion in article 65. *Id.* (emphasis in original).

In a more general vein, a British commentator has criticized the provisions on impossibility of performance under the 1978 Draft Convention for (1) imprecision as to what constitutes impossibility, Nicholas, *supra* note 186, at 240, and (2) a failure to deal with the possibility of an impediment which, when withdrawn, leaves performance so radically changed as to justify avoidance of the contract. *Id.* at 241; see Comments, *supra* at 135, para. 25. The United States, in its 1977 comments to art. 50 of the 1976 Draft Convention, *supra* note 170, art. 50(3), at 94, col. 2 (carried forward verbatim to art. 65(3) of the 1978 Draft Convention) placed its support behind a British proposal to modify further the provisions on impossibility. That revision would have had the effect of entirely excusing performance "*if, when the impediment is removed, the performance has so changed that the contract has become materially more burdensome than had the impediment not occurred.*" Comments, *supra*, at 135, para. 24 (emphasis in original). That proposal has not been adopted, and consequently, reveals the continued existence of some problems in the 1978 Draft Convention from the American point of view.

¹⁹³ For a discussion of the increased rights of buyers to specific performance, see text accompanying notes 178-82 *supra*.

¹⁹⁴ ULIS, *supra* note 9, art. 61, para. 2.

¹⁹⁵ *Id.* For a discussion of the concept of *ipso facto* avoidance under the ULIS, see text accompanying notes 263-86 *infra*.

damages,¹⁹⁶ but precluding him from demanding specific performance, *i.e.*, payment of the price by the buyer.¹⁹⁷

The seller's right to require specific performance has been enlarged fairly dramatically under the 1978 Draft Convention. The seller is permitted to elicit specific performance of all aspects of the contract from the buyer, including payment of the price.¹⁹⁸ As a result, the seller is relieved of the obligation imposed by the ULIS to pursue resale. It should be recalled that sellers may obtain specific performance under the 1978 Draft Convention only if the courts of the nation in which suit is brought could exercise such equitable power.¹⁹⁹

It must be realized, then, that the 1978 Draft Convention does not consistently provide buyers with advantages at the expense of sellers. Rather, it rectifies the prior imbalance evident in the ULIS in order to ensure that buyers and sellers will be treated more evenhandedly.²⁰⁰

3. Movement Toward Commercial Practice and Reality

Perhaps the most serious criticism leveled by the American Delegation to the Hague Conference against the ULIS was its disregard for commercial practice and its incomprehensibility to merchants.²⁰¹ While this may seem a telling criticism of a document meant to harmonize the commercial practices of different nations, an accommodation reached on any one provision will often be at odds with the commercial practices of particular nations precisely because of the process of compromise.²⁰²

Nevertheless, the drafters of the ULIS often did sacrifice the

¹⁹⁶ ULIS, *supra* note 9, art. 63, para. 1.

¹⁹⁷ *Id.* art. 61, para. 2. It is arguable whether obtaining payment of the price from the buyer, rather than resale and damages, actually constitutes specific performance. See Farnsworth, *supra* note 180, at 249-50.

¹⁹⁸ 1978 Draft Convention, *supra* note 1, art. 68, at 23; see text accompanying note 182 *supra*.

¹⁹⁹ See text accompanying notes 181-82 *supra*. This exception, however, has not fully satisfied the United States representatives to UNCITRAL. They recently noted that this specific performance provision would allow a seller to violate principles of both American law and commercial practice:

This appears to allow the seller to recover the price in a suit against the buyer, even though buyer has repudiated when the goods are still in the hands of a seller who has an available market on which he can sell them. It would appear that a seller who had not yet begun to manufacture goods could take advantage of this provision.

Comments, *supra* note 192, at 132, para. 12.

²⁰⁰ But see Walsh & Ryan, *supra* note 15, at 613. One is led to believe by Messrs. Walsh and Ryan that the balancing has gone too far in the direction of buyers and, as a result, developed Western nations such as the United States will be reluctant to ratify the 1978 Draft Convention. This view of American interests is not well supported. See note 140 *supra*.

²⁰¹ See text accompanying notes 55 and 84-95 *supra*.

²⁰² See Bergsten & Miller, *supra* note 128, at 255.

norms of commercial practice in order to implement provisions which they considered superior.²⁰³ In addition, many of the innovations that were intended to supplant commercial practice were insensitive to the practical problems of international commercial trade.²⁰⁴ To this extent, then, the ULIS's solutions to problems in the international sale of goods were at odds with commercial reality.

a. Commercial Practice as a Guide to Interpretation

Issues not expressly addressed by any provision of the ULIS were to be resolved under article 17: "Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."²⁰⁵ This residuary clause was criticized by the United States at the Hague because nowhere in the ULIS were the "general principles" on which it was based ever enumerated.²⁰⁶ As a result the merchant and his lawyer would discover at their peril what "general principles" might be applied to them.²⁰⁷ This provision was a notable example of the American Delegation's objection at the Hague that the ULIS would be incomprehensible to merchants.²⁰⁸

The United States also had felt that judicial inconsistency would result from the ULIS's reference to "general principles."²⁰⁹ The courts of one nation might discover general principles in the ULIS that differed from those discovered by the courts of another nation.²¹⁰ Uncertainty and disuniformity would be the consequence of this interpretative guide.

These difficulties had not been forgotten by the American representatives to UNCITRAL. At the third annual session of UNCITRAL in 1971, Professor Farnsworth, the American member of the Working Group on Sales, criticized the reference in the ULIS to its "general principles."²¹¹ He went on to suggest that circumstances not expressly

²⁰³ Nadelmann, *supra* note 16, at 458-59.

²⁰⁴ See text accompanying notes 216-38, 250-70, 281-89 *infra*.

²⁰⁵ ULIS, *supra* note 9, art. 17.

²⁰⁶ See text accompanying notes 87-90 *supra*.

²⁰⁷ *Id.*

²⁰⁸ See text accompanying note 55 *supra*.

²⁰⁹ See 2 DIPLOMATIC CONFERENCE DOCUMENTS, *supra* note 45, at 241.

²¹⁰ *Id.*

²¹¹ Summary Records of the 77th Meeting, United Nations Commission on International Trade Law 180-81, U.N. Doc. A/CN.9/SR.77/1971 (April 7, 1971) (remarks of Mr. Farnsworth, representative of the United States). It should be noted, however, that the sentiment expressed by Professor Farnsworth and others, *id.* at 79 (remarks of Mr. Chafik, representative of the United Arab Republic), that the reference in the ULIS to "general principles" was inadequate was not

provided for in the ULIS would best be resolved by reference to the goal of uniformity in international commercial practice.²¹²

By 1976 UNCITRAL's Working Group on Sales had approved a draft convention on the international sale of goods.²¹³ That draft reflected American wishes that commercial practice be the touchstone for interpreting a uniform law on the international sale of goods.²¹⁴ Besides the addition of a general good faith requirement, the 1976 formulation was perpetuated verbatim in article 6 of the 1978 UNCITRAL draft, as follows: "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade."²¹⁵ The 1978 Draft Convention's emphasis on "uniformity" and "its international character" incorporate international commercial practice as the reference point for the interpretation of its provisions.

b. Risk of Loss

The American Delegation to the Hague criticized the ULIS in 1964 because its approach to issues of risk of loss in the shipment of goods overseas was drafted without regard to international commercial practice.²¹⁶ America's particular complaint was that risk did not pass by way of a commercially observable event.²¹⁷ Article 97 of the ULIS simply read: "1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and

shared by representatives from civil law countries; they could, apparently, discern the presence of such general principles in the ULIS, "the most important one being that of good faith." Summary Records of the 78th Meeting, United Nations Commission on International Trade Law 186, U.N. Doc. A/CN.9/SR.78/1971 (April 8, 1971) (remarks of Mr. David, representative of France).

²¹² Summary Records of the 77th Meeting, *supra* note 211, at 181.

²¹³ Report of the Working Group on the International Sale of Goods on the Work of its Seventh Session, note 127 *supra*.

²¹⁴ 1976 Draft Convention, note 170 *supra*. The 1976 interpretative provision, art. 13, read: "In the interpretation and application of the provisions of the Convention, regard is to be had to its international character and to the need to promote uniformity." *Id.* at 103.

²¹⁵ 1978 Draft Convention, *supra* note 1, art. 6, at 11. The validity of the American concern regarding inconsistent judicial interpretation was reflected in the Secretariat's commentary to the 1976 draft:

National rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end, article 13 emphasizes the importance, in the interpretation and application of the provisions of the convention, of having due regard for the international character of the convention and for the need to promote uniformity.

Secretariat's Commentary, *supra* note 148, at 103, col. 1.

²¹⁶ See text accompanying notes 61-75 *supra*.

²¹⁷ See text accompanying notes 91-95.

the present Law."²¹⁸ This provision was incomprehensible to merchants because the physical act of delivering the goods to the buyer was insufficient to accomplish "delivery" as defined by the ULIS.²¹⁹

The only guidance in this matter came from article 19: "1. Delivery consists in the handing over of goods which conform with the contract."²²⁰ Consequently, delivery was not a commercially observable event; it was subject to the buyer's willingness physically to take over the goods and to his decision to avoid the contract or demand substitute goods.²²¹

The American Delegation's position on risk of loss at the Hague was echoed by other nations through their representatives to UNCTRAL.²²² As a result, the 1978 Draft Convention provides for the passage of risk upon commercially observable events.²²³

Articles 78 through 82 of the 1978 Draft Convention address the risk of loss in international contracts for the sale of goods.²²⁴ All reference to the troublesome concept of "delivery" has been eliminated.²²⁵ A buyer's refusal to take possession of goods placed at his disposal will not preclude the shift of risk of loss to him at the time he is obligated to take delivery under the contract.²²⁶ The apparent scheme of the 1978

²¹⁸ ULIS, *supra* note 9, art. 97.

²¹⁹ See text accompanying notes 61-75 *supra*.

²²⁰ ULIS, *supra* note 9, art. 19, para. 1.

²²¹ See text accompanying notes 61-75 *supra*.

²²² See, e.g., Summary Records of the 113th Meeting of the United Nations Commission on International Trade Law 72, U.N. Doc. A/CN.9/SR.113/1972 (April 26, 1972) (remarks of Mr. Burguchev, representative of the Union of Soviet Socialist Republics); Analysis of Replies and Comments on the Hague Conventions of 1964: Report of the Secretary-General, note 73 *supra*.

²²³ See text accompanying notes 231-32, 237-38, 255-57, 261-70 *infra*.

²²⁴ 1978 Draft Convention, *supra* note 1, arts. 78-82, 29-30.

²²⁵ *Id.*

²²⁶ 1978 Draft Convention, *supra* note 1, art. 81(1), (2), at 30. See text accompanying notes 255-57 *infra*. The 1978 Draft Convention has *not* altered which party will ultimately bear the risk of loss. In the case of a refusal by the buyer to take possession of the goods, ULIS also provided that risk of loss would pass to the buyer at the moment he was obliged to take delivery from the seller. See note 67 *supra*. What the 1978 Draft Convention does accomplish, however, is elimination of the cumbersome inquiry into whether or not "delivery" has taken place. The elaborate theoretical construct of ULIS provided that, as a general rule, risk of loss passed upon "delivery" of the goods. Where buyer refused to take possession of the goods, however, the absence of a delivery would not prevent the risk from passing to him. Similarly, where the buyer avoided the contract, the occurrence of delivery would not hinder him from casting the risk back on the seller. See text accompanying notes 61-75 *supra*. This approach to risk of loss could serve only to confuse merchants—and their lawyers.

Under the 1978 Draft Convention, the simplified rule for risk of loss in destination contracts is that the buyer bears the risk of loss once the date for delivery arrives and the buyer is made aware that the goods have been placed at his disposal. Draft Convention, *supra* note 1, art. 81(2), at 30. See Roth, *supra* note 61, at 295-96. The only exception to this general rule is in the case of fundamental breach. See text accompanying notes 166-69 and 172-74 *supra*.

Draft Convention is to designate commercially observable moments, at which the risk of loss will pass, for each of the primary types of international sales contracts.²²⁷

Shipment Contracts. The issue of when risk of loss passes in shipment contracts²²⁸ is complex in shipments overseas since several carriers may be involved in routing goods from the seller's factory to the buyer's port.²²⁹ The ULIS apparently did not recognize this possibility, stating simply that "delivery [the event upon which risk passes] shall be effected by handing over the goods to the carrier for transmission to the buyer."²³⁰

The 1978 Draft Convention takes cognizance of the practical commercial problems which arise in regard to shipment contracts involving shipments overseas. Article 79 of the UNCITRAL draft provides that under a shipment contract risk passes when the goods are handed over to the *first* carrier for transmission to the buyer.²³¹ Thus, if the goods are first to be shipped from an inland location by rail or truck, risk would pass when the goods are handed over to the inland carrier.²³²

The ULIS left further confusion about risk of loss under shipment contracts by its failure to resolve whether "delivery" was accomplished by physically handing the goods over to the carrier or, instead, delayed until the time the documents of title were actually transferred to the buyer.²³³ Such a delay would run counter to the customary treatment of risk of loss under shipment contracts.²³⁴ The buyer would be able to argue that the risk did not pass to him upon deposit with the carrier, as

²²⁷ See text accompanying notes 231-32, 237-38, 255-57, 261-70 *infra*. The 1978 Draft Convention generally provides for the passage of risk upon a commercially observable event. The buyer, however, may still declare the contract avoided or demand substitute goods and, thus, cast the risk of loss back on the seller. 1978 Draft Convention, *supra* note 1, art. 82, at 30. That provision reads: "If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80, and 81 [on the passage of risk of loss] do not impair the remedies available to the buyer on account of such breach." The remedies for fundamental breach are either avoidance (which would include termination of any burden as to risk of loss, see text accompanying notes 281-82 *infra*), *id.* art. 45, at 20-21, or requiring the delivery of substitute goods by seller. *Id.* art. 42(2), at 20. See Secretariat's Commentary, *supra* note 148, at 141, col. 2, para. 2.

²²⁸ See note 66 *supra* (definition of a shipment contract).

²²⁹ See Secretariat's Commentary, *supra* note 148, at 140, col. 2, para. 4.

²³⁰ ULIS, *supra* note 9, art. 19, para. 2.

²³¹ 1978 Draft Convention, *supra* note 1, art. 79(1), at 29.

²³² Secretariat's Commentary, *supra* note 148, at 140, col. 2, para. 4.

²³³ See 2 DIPLOMATIC CONFERENCE DOCUMENTS, note 45 *supra*; Roth, *supra* note 61, at 296. The issue of delay in the passage of risk as a result of delay in the transfer of documents does not arise in relation to destination contracts because under a destination contract the risk of loss does not pass until the goods are deposited at the buyer's port. See note 66 *supra*.

²³⁴ See note 66 *supra*.

is the usual case under a shipment contract.²³⁵ Instead, he would assert that passage of the risk was delayed until the time he actually received the documents of title; any casualty to the goods during the interim thus created would be borne by the seller.²³⁶

Article 79 of the 1978 Draft Convention considers whether legal title must pass before risk of loss passes in the context of shipment contracts: "The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk."²³⁷ It is clear from this language that risk of loss passes upon the physical transfer of the goods and not upon the passage of legal title.²³⁸ UNCITRAL's formulation, then, ensures that risk of loss under shipment contracts passes upon a commercially observable event: the physical act of handing the goods over to the first carrier for transmission to the buyer. This revision is more understandable to merchants and more harmonious with commercial practice than the ULIS provision it replaced.

Some ambiguity remains in the 1978 Draft Convention's treatment of risk of loss under certain types of shipment contracts. It will be recalled that for most shipment contracts under the 1978 Draft Convention the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.²³⁹ This provision will not apply, however, unless "the contract of sale involves carriage of the goods *and the seller is not required to hand them over at a particular destination.*"²⁴⁰ The United States recently criticized this language²⁴¹ because it excludes two types of shipment contracts: C.I.F. contracts²⁴² and C. & F. contracts.²⁴³ Because these contracts involve carriage of the goods and require the seller to hand the goods over at a particular destination, under the 1978 Draft Convention they would be treated as

²³⁵ See 2 DIPLOMATIC CONFERENCE DOCUMENTS, note 45 *supra*; Roth, *supra* note 61, at 296.

²³⁶ See Roth, *supra* note 61, at 296.

²³⁷ 1978 Draft Convention, *supra* note 1, art. 79(1), at 29.

²³⁸ See also Secretariat's Commentary, *supra* note 148, at 140, para. 2, col. 1.

²³⁹ 1978 Draft Convention, *supra* note 1, art. 79(1), at 29.

²⁴⁰ *Id.* (emphasis supplied).

²⁴¹ Comments, *supra* note 192, at 133, para. G.

²⁴² INCOTERMS-1953, *supra* note 66, C.I.F., at 110-12. A sale of goods under the C.I.F. term means that the price includes the cost of the goods, insurance on the goods for the benefit of the buyer, and freight charges to the buyer's port. Even though the seller pays the price of the freight, however, the buyer must, "Bear all risks of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment." *Id.* at 111, para. B. See U.C.C. § 2-320(1)-(2).

²⁴³ INCOTERMS-1953, *supra* note 66, C. & F., at 108-09. Under that trade term definition, the price includes the cost of the goods and the freight charges to the named destination. However, the buyer must, "Bear all risks of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment." *Id.* at 109, para. B. See U.C.C. § 2-320(1), (2), (3).

destination contracts.²⁴⁴ The result would be a delay in the passage of risk until the goods arrive at their destination,²⁴⁵ a result wholly at odds with commercial practice.²⁴⁶

There is little likelihood that arbitrators and judges will exclude C.I.F. or C. & F. contracts from treatment as shipment contracts under the 1978 Draft Convention. The drafters have indicated that use in the contract of a standard trade term, such as C.I.F. or C. & F., should instruct the judge or arbitrator to depart from the risk provisions of the Convention and resort to an accepted set of trade definitions,²⁴⁷ *e.g.*, the International Chamber of Commerce Incoterms-1953.²⁴⁸ Under the Incoterms-1953, the C.I.F. or C. & F. term dictates that risk will pass upon deposit of the goods with the carrier.²⁴⁹ Thus, it is doubtful that the 1978 Draft Convention will interfere with commercial expectations regarding risk of loss under C.I.F. or C. & F. contracts.

Destination contracts. The ULIS provided that under both shipment and destination contracts, the seller was subject to reimposition of the risk of loss if the buyer decided to avoid the contract for a fundamental breach²⁵⁰ or to demand substitute goods.²⁵¹ However, a destination contract governed by the ULIS also offered the buyer an opportunity to prevent delivery from taking place by refusing to take possession of the goods.²⁵² While it could be shown that the risk of loss passed, notwithstanding the buyer's refusal, due to the breach of his duty to take delivery,²⁵³ the confusion which the ULIS infused into this

²⁴⁴ 1978 Draft Convention, *supra* note 1, art. 81(2), at 30.

²⁴⁵ *Id.*

²⁴⁶ See notes 242-43 *supra*.

²⁴⁷ The suggestion that use of a standard trade term in the contract would result in a judge or arbitrator resorting to an accepted set of trade term definitions was made in a commentary to the 1976 Draft Convention, *supra* note 170, art. 8 (commentary), and approved by the Working Group on Sales in 1976. Secretariat's Commentary, *supra* note 148, at 139, col. 2, para. 3, to 140, col. 1, para. 3. As the pertinent language on risk of loss under shipment contracts is identical in the two drafts, the 1976 Secretariat's Commentary should be of equal weight in regard to the 1978 Draft Convention. (It should be noted, however, that UNCITRAL has requested the Secretary-General to draft a new commentary on the provisions of the 1978 Draft Convention.) See Roth, *supra* note 61, at 309; 1978 Draft Convention, *supra* note 1, at 9; such a variation from the provisions of the 1978 Draft Convention is permissible. *Id.* art. 5, at 11. That provision reads: "The parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions."

²⁴⁸ INCOTERMS-1953, *supra* note 66, at 103. See generally E. FARNSWORTH & J. HONNOLD, *supra* note 66, at 495.

²⁴⁹ See notes 242-43 *supra*.

²⁵⁰ See text accompanying notes 66-72 *supra*.

²⁵¹ See text accompanying notes 66-72 *supra*.

²⁵² See text accompanying note 67 *supra*.

²⁵³ See note 67 *supra*.

area drew the criticism of the American Delegation in 1964.²⁵⁴

The 1978 Draft Convention ensures that the moment at which risk of loss passes to the buyer in destination contracts is independent of the buyer's willingness to take possession of the goods.²⁵⁵ As destination contracts involve carriage of the goods and require the seller to hand the goods over at a particular destination, they are governed by article 81 of the 1978 Draft Convention.²⁵⁶ That article provides in pertinent part that, "If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place." Consequently, a buyer's unwillingness to take possession of the goods will not prevent the risk from shifting to him.²⁵⁷

Goods sold in transit. The risk of loss problem is especially perplexing when the goods are purchased while still in transit. This is because of the difficulties in proving when in the course of carriage the damage actually took place.²⁵⁸ The ULIS provided an inadequate answer to this problem by simply stating that risk passed upon handing the goods over to the carrier.²⁵⁹ Thus, it suffered from the same omission noted in the area of shipment contracts: a failure to confront the problem of multiple carriers.²⁶⁰

The 1978 Draft Convention provides a somewhat technical solution to the risk of loss problem when goods are sold in transit. "The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition."²⁶¹ This provision is best understood in the context of common carriage under ocean bills of lading.²⁶²

Upon receipt of goods from a shipper, an ocean carrier must, at the shipper's request, issue a bill of lading which shows, *inter alia*, "[t]he apparent order and condition of the goods."²⁶³ The bill of lading

²⁵⁴ See text accompanying notes 73-75 *supra*.

²⁵⁵ See text accompanying notes 256-57 *infra*.

²⁵⁶ 1978 Draft Convention, *supra* note 1, art. 79(1), at 29, and art. 81(2), at 30. See Secretariat's Commentary, *supra* note 148, at 140, col. 1-2, para. 3; Roth, *supra* note 61, at 299-300.

²⁵⁷ Roth, *supra* note 61, at 300.

²⁵⁸ Secretariat's Commentary, *supra* note 148, at 140, col. 2, para. 6.

²⁵⁹ ULIS, *supra* note 9, art. 99, para. 1, at 165.

²⁶⁰ See text accompanying notes 228-30 *supra*.

²⁶¹ 1978 Draft Convention, *supra* note 1, art. 80, at 29.

²⁶² See generally A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING (4th ed. 1953).

²⁶³ Carriage of Goods by Sea Act of 1936, 46 U.S.C. § 1303 (3)(c) (1976) [hereinafter cited as

controls the disposition of the goods and becomes prima facie evidence of receipt by the carrier of the goods as therein described.²⁶⁴ The courts have held that issuance by the carrier of a "clean" bill of lading,²⁶⁵ *i.e.*, one on which no defect in the goods received is noted, will give rise to the presumption that the carrier has had an opportunity to inspect the goods and record any apparent defects.²⁶⁶ Absent rebuttal of this prima facie evidence of receipt of the goods in good condition,²⁶⁷ the carrier may become liable for any damage to the goods up to \$500 per package or other customary freight unit.²⁶⁸ Thus, at the time the goods are loaded on board their apparent condition is usually known.

As noted above, the 1978 Draft Convention provides that the buyer bears the risk of loss for goods sold in transit from the time the goods are handed over to the carrier who issued the bill of lading or other document controlling their disposition.²⁶⁹ This provision obviates the difficult problem of proving when the damages occurred by deeming risk to have passed at a time when the apparent condition of the goods was known.²⁷⁰

COGSA]. The United States legislation implements the provisions of an international convention concluded in 1924. Convention Relating to Bills of Lading for the Carriage of Goods by Sea, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 (1931-32) [hereinafter cited as Brussels Convention]. See A. KNAUTH, *supra* note 262, at 127-31. The provisions of COGSA vary only in minor details from those of the Brussels Convention. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 143-44 (2d ed. 1975). In March 1978 a diplomatic conference at Hamburg approved another product of UNCITRAL, the U.N. Convention on the Carriage of Goods by Sea. See note 119 *supra*. The "Hamburg Rules" expand the liability of carriers for negligence during the course of the voyage beyond their current limited exposure under the Brussels Convention (and COGSA, which implements that Convention in the United States). See Hellawell, *Allocation of Risk Between Cargo Owner and Carrier*, 27 AM. J. COMP. L. 357, 359-61 (1979). Ratification of the Hamburg Rules is not assured due to the intensive campaign against ratification being mounted by ocean carriers. See Honnold, *supra* note 119, at 205.

²⁶⁴ COGSA, 46 U.S.C. § 1303(4) (1976); A. KNAUTH, *supra* note 262, at 134-37.

²⁶⁵ To be considered "clean," an ocean bill of lading must bear no notations which indicate that the goods or the containers in which they were packed were defective in any manner at the time of deposit with the carrier. A bill bearing any notation of defects is termed "foul." G. GILMORE & C. BLACK, *supra* note 263, at 122. A clean bill of lading will usually bear the notation: "received in apparent good order and condition." See, *e.g.*, *States Marine Corp. v. Producers Cooperative Packing*, 310 F.2d 206, 211 (9th Cir. 1962); *Kupfermann v. United States*, 227 F.2d 348, 349-50 (2d Cir. 1955).

²⁶⁶ See *Kupfermann v. United States*, 227 F.2d at 349-50; *C. Itoh & Co. v. Hellenic Lines, Ltd.*, 470 F. Supp. 596, 596-97 (S.D.N.Y. 1979). At that point the burden shifts to the carrier to prove either (1) that the harm resulted from one of the statutorily excepted causes, which include latent defects, COGSA, 46 U.S.C. § 1304(2) (1976), or (2) that the carrier exercised due diligence to make the ship seaworthy, but to no avail. *Id.* § 1304(1). See, *e.g.*, *C. Itoh & Co. v. Hellenic Lines*, 470 F. Supp. 596 (S.D.N.Y. 1979).

²⁶⁷ See note 266 *supra*.

²⁶⁸ COGSA, 46 U.S.C. § 1304(5) (1976).

²⁶⁹ 1978 Draft Convention, *supra* note 1, art. 80, at 29.

²⁷⁰ See Secretariat's Commentary, *supra* note 148, at 140, col. 2, para. 6.

Deterioration after the passage of risk. The ULIS did not adequately address the commercial problems stemming from deterioration of the goods after the risk of loss had passed to the buyer, where that deterioration was due to a breach by the seller prior to the passage of risk.²⁷¹ The ULIS simply stated that the buyer could avoid payment of the price only if the loss or deterioration was a result of some act of the seller or his servants.²⁷² The unavoidable inference was that the buyer would have no remedy unless the breach was fundamental, permitting avoidance of the contract; the availability of less extreme remedies for defects arising after the risk had passed was mentioned nowhere in the ULIS.²⁷³ This omission was fairly serious and revealed the ULIS's insensitivity to a common problem in commercial practice.²⁷⁴

Examination of America's Uniform Commercial Code reveals that the buyer's array of remedies for a breach by seller is not impaired by the passage of risk to him.²⁷⁵ A similar provision may be found in the 1978 Draft Convention. Article 34 reads in pertinent part that:

The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) [the time when the risk passes to the buyer] of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.²⁷⁶

The establishment of the seller's liability "for any lack of conformity . . . due to a breach of any of his obligations" after the risk has passed appears to reserve to the buyer all of his rights and remedies.²⁷⁷ The buyer would not be constrained by the need to justify an avoidance of the entire contract merely to obtain compensation for losses sustained due to defects arising after the risk of loss has passed.²⁷⁸ This provision

²⁷¹ See Roth, *supra* note 61, at 301-02.

²⁷² ULIS, *supra* note 9, art. 96. That provision reads: "Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible." See *also id.* art. 35, para. 2.

²⁷³ See Roth, *supra* note 61, at 301. For the effects of avoidance of the contract, see text accompanying note 282 *infra*.

²⁷⁴ See Roth, *supra* note 61, at 302.

²⁷⁵ Under U.C.C. § 2-607(2), the buyer's acceptance of the goods does not impair any of his remedies for nonconformities in the goods besides rejection of them. This is true regardless of the fact that risk of loss will pass to the buyer at the time of his acceptance of defective goods. U.C.C. § 2-510(1). Thus, the passage of risk of loss to the buyer does not impair any of his remedies besides rejection.

²⁷⁶ 1978 Draft Convention, *supra* note 1, art. 34(2), at 17.

²⁷⁷ Roth, *supra* note 61, at 302.

²⁷⁸ *Id.*

is more in touch with commercial practice than was its counterpart under the ULIS.²⁷⁹

While some problems continue to exist in the 1978 Draft Convention's provisions on risk of loss,²⁸⁰ the most serious difficulties have been resolved. The passage of risk upon commercially observable events brings the 1978 Draft Convention into line with commercial practice and renders it comprehensible to merchants.

c. Avoidance

Avoidance of an international sales contract is a remedy reserved for serious breaches by one of the parties.²⁸¹ The effect of avoidance under both the ULIS and the 1978 Draft Convention is to release both parties from their obligations under the contract while preserving to the aggrieved party any right to damages he would otherwise have.²⁸²

²⁷⁹ *Id.*

²⁸⁰ *See id.* at 297-309. Two of Mr. Roth's criticisms are summarized here. Article 79(2) of the 1978 Draft Convention, *supra* note 1, at 29, delays passage of risk to the buyer in shipment contracts where the goods are not marked or otherwise identified to the contract, "until the seller sends the buyer a notice of the consignment which specifies the goods." The result is, of course, that the proof problems eliminated in regard to the risk of loss for goods sold in transit, *see* text accompanying notes 263-70 *supra*, are retained for unmarked or unidentified goods sold under a shipment contract. Before that provision was adopted, however, the United States registered support for a Norwegian proposal having much the same effect. *See* Comments, *supra* note 192, at 135. Thus, it is doubtful that this provision for delay in the passage of risk poses any great obstacle to United States adoption of the Convention on Contracts for the International Sale of Goods. A second criticism offered by Mr. Roth is that under art. 81(2) of the 1978 Draft Convention, *supra* note 1, at 30, covering destination contracts, the buyer apparently may keep the risk of loss on the seller if the seller should deliver the goods before they are due. Roth, *supra* note 67, at 306. The anomalous result would be that even if the buyer took possession of the goods before the due date under the contract, any casualty sustained would be borne by the seller. *Id.* This result was probably not intended by the draftsmen. *Id.* As the Convention is not yet in final form, this deficiency may yet be remedied. *Id.* at 309.

²⁸¹ The instances in which buyers avoidance may occur under the ULIS are provided in ULIS, *supra* note 9, at arts. 25-26, 30-32, 41, 43, 52, 55. The instances in which seller's avoidance may occur appear in the ULIS, *supra* note 9, at arts. 61-62, 66-67, 70. Avoidance under the 1978 Draft Convention is provided at 1978 Draft Convention, *supra* note 1, arts. 45, 60. Article 45, relating to avoidance by the buyer, reads in pertinent part:

- (1) The buyer may declare the contract avoided:
 - (a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or
 - (b) if the seller has not delivered the goods within the additional period of time fixed by the buyer . . . or has declared that he will not deliver within the period so fixed.

²⁸² The consequences of avoidance under the ULIS may be found at ULIS, *supra* note 9, art. 78, para. 1. That provision reads: "Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due." The consequences of avoidance under the 1978 Draft Convention may be found at 1978 Draft Convention, *supra* note 1, art. 66(1), at 26. That provision reads:

Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract

In the case of a fundamental breach by a party under the ULIS, the aggrieved party's silence on whether or not he would avoid the contract resulted, after a "reasonable time," in automatic or "ipso facto" avoidance.²⁸³ This device was impractical and out of touch with commercial practice.²⁸⁴ It kept merchants who knew that they had in some respect breached a contract in suspense as to whether the contract was still in force—thus allowing them a chance to cure the defect²⁸⁵—or had at some point become ipso facto avoided.²⁸⁶

The uncertainties created by the ULIS in regard to ipso facto avoidance have been eliminated from the 1978 Draft Convention. There is no provision for ipso facto avoidance; avoidance occurs only when the aggrieved party, "declare[s] the contract avoided."²⁸⁷ In addition, a "declaration of avoidance of the contract is effective only if made by notice to the other party."²⁸⁸ A breaching seller, for example, is entitled to undertake reasonable efforts to cure the breach unless the buyer has expressly declared the contract avoided.²⁸⁹

Under the ULIS, avoidance had the effect of releasing the parties from their obligations under the contract, with the proviso that a right to seek damages was retained.²⁹⁰ Such a proviso was necessary because some legal systems view avoidance as terminating all obligations under the contract, including the right to seek damages.²⁹¹ The proviso, however, preserved only the right to seek damages and, thus, fell short in an

for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

Avoidance under the ULIS and the 1978 Draft Convention is the functional equivalent of "cancellation" under the U.C.C. § 2-106(4).

²⁸³ ULIS, *supra* note 9, at arts. 26, 30, 61-62.

²⁸⁴ Secretariat's Commentary, *supra* note 1, at 115, col. 1, para. 2. The Commentary declared in pertinent part: "Automatic or *ipso facto* avoidance was deleted from the remedial system in the present convention because it led to great uncertainty [as to] whether the contract was still in force or whether it had been *ipso facto* avoided."

²⁸⁵ See, e.g., ULIS, *supra* note 9, art. 27, para. 1. That provision reads: "Where failure to deliver the goods at the date fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller." *Id.*

²⁸⁶ See Honnold, *supra* note 35, at 228-29.

²⁸⁷ 1978 Draft Convention, *supra* note 1, art. 45(1), at 20-21, and art. 60(1), at 24. See Honnold, *supra* note 35, at 228-29.

²⁸⁸ 1978 Draft Convention, *supra* note 1, art. 24, at 15. See Honnold, *supra* note 4, at 229.

²⁸⁹ 1978 Draft Convention, *supra* note 1, art. 44(1), at 20. To ensure that the buyer will not declare the contract avoided in the midst of the seller's efforts to cure, under article 44(2) of the 1978 Draft Convention, *supra* note 1, at 20, the seller may require the buyer to declare whether or not he will accept performance. If the buyer does not answer within a reasonable time, the seller is entitled to cure, so long as he can do so within the period he has indicated in his request.

²⁹⁰ See note 282 *supra*.

²⁹¹ Secretariat's Commentary, *supra* note 148, at 132, col. 1, para. 4.

important respect: it failed to preserve any of the contract's provisions regarding the settlement of disputes.²⁹² These would include provisions for arbitration, choice of law, choice of forum, and clauses excluding or providing for liquidated damages.²⁹³

The 1978 UNCITRAL Draft Convention ensures that provisions regarding the settlement of disputes are preserved. Article 66(1) reads in pertinent part: "Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract."²⁹⁴ This article preserves terms that are a frequent feature in international commercial practice.²⁹⁵

d. The Reduction of Price Remedy

A remedy for breach of contract appearing in the 1978 Draft Convention, which is generally unfamiliar to American merchants and their legal advisors, is reduction in the price.²⁹⁶ It is understood by common law lawyers as roughly analogous to the right of set off,²⁹⁷ but it is one of the predominant remedies for breach of contract in civil law countries.²⁹⁸ In fact, under civil law systems the remedy of damages is available only when the breaching party is found to have evidenced some element of fault.²⁹⁹

While damages are measured as of the time of delivery, reduction in price is measured as of the time of conclusion of the contract.³⁰⁰ *Only if there has been a change in the market price of the goods since the time of conclusion of the contract* will the remedy of reduction in price yield to the aggrieved party a different amount than would be available under the damages provision of the 1978 Draft Convention.³⁰¹

Under the traditional damages remedy, if the market price of the goods has gone down since the conclusion of the contract, a buyer's

²⁹² *Id.* at para. 5.

²⁹³ *Id.*

²⁹⁴ 1978 Draft Convention, *supra* note 1, art. 66(1), at 26.

²⁹⁵ See, e.g., UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, *supra* note 16, No. 1A, cl. 22.1, at 10-11.

²⁹⁶ 1978 Draft Convention, *supra* note 1, art. 46, at 21. See Bergsten & Miller, *supra* note 128, at 255.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 257.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 259.

³⁰¹ *Id.* at 260. This, however, would not be true if consequential damages such as plant shut-down due to the seller's delay were included by the buyer in his suit for damages. *Id.*

damages will be decreased due to the lower price for the goods in the buyer's market.³⁰² Under the reduction in price remedy, however, the buyer is unaffected by such price changes.³⁰³ He may reduce the price by the full proportion that the defective goods actually delivered bear to goods that would have conformed to the contract, as measured in the market at the time of contracting.³⁰⁴

It is true that affording the buyer such an escape device from the effects of bad bargains is at odds with American law and commercial practice.³⁰⁵ In addition, this remedy is available even when the seller's breach would be exempt from damages under the 1978 Draft Convention's provision on impossibility of performance.³⁰⁶ This, too, is at odds with American commercial and legal concepts.³⁰⁷

Despite an unfamiliarity with this remedy in America and other common law countries, pressure to remove it from the 1978 Draft Convention would likely prove fruitless. As pointed out by the former Secretary of the UNCITRAL Working Group on Sales, "Such an alternative is not open. Reduction of price is too well known to Civil law jurists as the ordinary form of monetary relief available to a buyer who has received nonconforming goods for there to be any question of deleting it from the Draft Convention."³⁰⁸ Thus, the reduction in price remedy undoubtedly is one permanent feature of the 1978 Draft Convention which appears to be foreign to American notions of commercial practice.

Inclusion of the reduction in price remedy should not create a significant deterrent to American adoption of the 1978 Draft Convention on Contracts for the International Sale of Goods. First, the remedy will not be invoked often because it is of benefit only to buyers when the market price has fallen since the time of the contract.³⁰⁹ Further, a noteworthy justification for retaining this remedy may be offered. Reduction in price is sufficiently beneficial to buyers to discourage them

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ 1978 Draft Convention, *supra* note 1, art. 46, at 21.

³⁰⁵ See Bergsten & Miller, *supra* note 128, at 271, 274.

³⁰⁶ *Id.* at 265, 266-67. Under the 1978 Draft Convention no damages may be obtained where performance has been rendered impossible without the fault of either party. 1978 Draft Convention, *supra* note 1, art. 65(1), at 26. See note 190 *supra* (text of article 65(1)). This exemption applies only to damages and not to reduction in price, as art. 65(5) provides, "[N]othing in this article prevents either party from exercising any right other than to claim damages under this Convention." 1978 Draft Convention, *supra* note 1, art. 65(5), at 26.

³⁰⁷ See Bergsten & Miller, *supra* note 128, at 263-66.

³⁰⁸ *Id.* at 272.

³⁰⁹ *Id.* at 274.

from pursuing, in more controversial cases, a remedy far more costly to sellers: avoidance of the contract.³¹⁰

e. Damages—In General

A detailed analysis of whether the damage provisions of the 1978 Draft Convention are in harmony with American contract law has been undertaken by Professor Farnsworth.³¹¹ He has concluded that they are, with one notable exception. The American tenet “that relief should be substitutional rather than specific, runs into heavy weather in the Draft Convention.”³¹² Both the buyer and seller may demand specific performance of most of the other’s obligations under the contract.³¹³

While the scope of the right to specific performance under the 1978 Draft Convention is overbroad by common law standards, it should not constitute a source of any serious concern. It will be recalled that an “escape clause” is provided which makes this feature less objectionable.³¹⁴ Under article 26 a court is excused from imposing specific performance in those circumstances where, under its own domestic law, it could not similarly impose specific performance.³¹⁵

f. Absence of Trade Term Definitions

Because of the importance of standard trade terms to the understanding of merchants and lawyers in any trading context, the omission of such terms from both the ULIS and the 1978 Draft Convention warrants some attention.³¹⁶ Trade term definitions are an integral component of the sale of goods scheme in the United States under Article

³¹⁰ *Id.* at 275. See text accompanying notes 281-82 *supra*.

³¹¹ Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247 (1979).

³¹² *Id.* at 249. Professor Farnsworth notes that his analysis excludes any consideration of whether the reduction of price remedy comports with Common law notions of damages. For a discussion of this question, see text accompanying notes 296-310 *supra*.

³¹³ 1978 Draft Convention, *supra* note 1, art. 42, at 20 and art. 58, at 23.

³¹⁴ See text accompanying notes 181-82 *supra*.

³¹⁵ 1978 Draft Convention, *supra* note 1, art. 26, at 15. For the text of this article, see the text accompanying note 182 *supra*. *But cf.* Farnsworth, *supra* note 311, at 249-50. While art. 26 of the 1978 Draft Convention excuses a court from entering judgment for specific performance unless it *could* do so under its own law, the ULIS excused a court from entering judgment for specific performance unless it *would* do so under its own law. Convention Relating to a Uniform Law on the International Sale of Goods, *supra* note 98, art. VII. Thus, the 1978 Draft Convention has increased the obligation of common law courts such that entry of judgment for specific performance is compulsory whenever to do so would be within the court’s discretion. The ULIS imposed an obligation to enter judgment for specific performance only when that remedy would have been selected by the court in the usual exercise of its discretionary powers.

³¹⁶ See E. FARNSWORTH & J. HONNOLD, *supra* note 66, at 495. For a criticism of this omission in the ULIS, see Berman, *supra* note 10, at 366.

Two of the Uniform Commercial Code.³¹⁷ Numerous court decisions have turned on the precise definitions of trade terms under the Uniform Commercial Code.³¹⁸ Yet, what is undoubtedly beneficial in the domestic sale of goods need not necessarily be so in the international context.

The 1978 Draft Convention accommodates the utilization of trade term definitions from other sources. Article 8 provides that:

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.³¹⁹

In fact, the drafters of the 1978 Draft Convention have suggested that the use of such terms would serve to override contradictory provisions in the Convention.³²⁰ Presumably, the source for these definitions would be either the International Chamber of Commerce's Incoterms-1953³²¹ or the Revised American Foreign Trade Definitions-1941.³²² These two formulations, however, do not agree in certain respects.³²³ This disagreement leaves open the question of what a court would do in the absence of specification in the contract of one set of definitions.³²⁴

There are several reasons why the absence of trade term definitions from the 1978 Draft Convention should not be considered a significant defect. First, of the many nations responding to UNCITRAL's inquiries about the ULIS, only Sweden noted the omission of trade term definitions as a source of any concern.³²⁵ Further, it has recently been suggested that the discrepancies between the Incoterms-1953 and the Revised American Foreign Trade Definitions-1941 indicate a lack of consensus as to precisely what obligations certain trade terms actu-

³¹⁷ See U.C.C. §§ 2-319 to 2-327.

³¹⁸ See, e.g., *National Heater Co. v. Corrigan Co. Mechanical Contractors*, 482 F.2d 87, 90 (8th Cir. 1973); *Consolidated Bottling Co. v. Jaco Equip. Corp.*, 442 F.2d 660, 662 (2d Cir. 1971); *Continental Ore Corp. v. United States*, 423 F.2d 1248, 1251-53 (Ct. Cl. 1970).

³¹⁹ 1978 Draft Convention, *supra* note 1, art. 8(2), at 12. See also *id.* art. 5, at 11. The text of that article appears at note 247 *supra*.

³²⁰ See text accompanying note 247 *supra*.

³²¹ INCOTERMS-1953, note 66 *supra*.

³²² Revised American Foreign Trade Definitions (1941), *reprinted in* P. MACDONALD, *PRACTICAL EXPORTING AND IMPORTING* 503 (1959).

³²³ E. FARNSWORTH & J. HONNOLD, *supra* note 66, at 495.

³²⁴ *Id.*

³²⁵ Analysis of Replies and Comments by Governments on the Hague Conventions of 1964: Report of the Secretary-General, *supra* note 73, at 163, col. 1, para. 19.

ally exact from the parties;³²⁶ selection of an exclusive definition for each trade term would detract from the judicial flexibility necessary to interpret the terms as used by merchants.³²⁷ To these considerations should be added the substantial difficulties encountered in gathering the signatories to a Convention whenever a particular definition should fall into disfavor.³²⁸ The absence of trade term definitions has not, for these reasons, been viewed as a serious obstacle to American ratification of the UNCITRAL Convention on Contracts for the International Sale of Goods.³²⁹

4. *Carriage of Goods Overseas*

Among the four criticisms of the ULIS by the American Delegation to the Hague Convention was that the ULIS gave insufficient attention to international trade problems involving shipments overseas.³³⁰ No specific provisions, however, were referred to as examples of this deficiency.³³¹ Nevertheless, it appeared to be the insensitivity of the ULIS to risk of loss problems in overseas shipments that caused the greatest amount of concern to the American Delegation.³³² When the 1978 Draft Convention brought its risk of loss provisions into line with commercial practice and rendered them more comprehensible to merchants, the problem of insensitivity to the needs of overseas shipments was largely eliminated.³³³

Under the ULIS, the passage of risk of loss was not a commercially observable event; merchants could not be sure when "delivery" had been accomplished or when risk had passed.³³⁴ The 1978 Draft Convention has eliminated the concept of tentative "delivery" found in the ULIS.³³⁵ As a result, sellers may be confident that (1) under shipment contracts risk of loss will pass when conforming goods are placed in the hands of the first carrier for transmission to the buyer,³³⁶ and (2) under destination contracts risk of loss will pass when conforming goods are timely deposited at the buyer's port and their arrival made

³²⁶ Roth, *supra* note 61, at 310.

³²⁷ *Id.* at 310 n.92.

³²⁸ *Id.* at 309-10.

³²⁹ *Id.* at 310. See also Farnsworth, note 130 *supra*; Honnold, *supra* note 35, at 223.

³³⁰ See text accompanying note 55 *supra*.

³³¹ See text accompanying notes 56-58 *supra*.

³³² See text accompanying notes 61-75 *supra*.

³³³ See text accompanying notes 334-47 *infra*.

³³⁴ See text accompanying notes 61-75 *supra*.

³³⁵ See text accompanying notes 224-27, 231-32, 237-38, 255-57, 261-70 *supra*.

³³⁶ See text accompanying notes 231-32 *supra*.

known to him.³³⁷ Both are commercially observable events.

The ULIS failed to make adequate provision for the passage of risk of loss when goods are sold while in transit.³³⁸ Again, the problem of proving when damage may have taken place is particularly difficult when goods are sold in transit.³³⁹ The 1978 Draft Convention meets this concern by fixing the passage of risk of loss at "the time the goods were handed over to the carrier who issued the documents controlling their disposition."³⁴⁰ Because the status of the goods is usually checked at the time a bill of lading is issued, this formulation ensures that risk of loss shifts to the buyer only after it is clear that the goods were conforming at the time risk passed.³⁴¹ Consequently, a buyer purchases the goods knowing that, if the goods delivered do not conform to the description on the bill of lading, his cause of action should be initiated against the carrier.³⁴²

Another area in which the ULIS gave insufficient attention to the shipment of goods overseas was in regard to the avoidance of the contract. The concept of ipso facto avoidance was criticized as being out of touch with commercial practice.³⁴³ It subjected merchants to uncertainty about whether efforts to cure nonconformities would be rendered wasteful by a subsequent determination that the contract had been ipso facto avoided.³⁴⁴ Of course, in the case of a sale of goods involving overseas shipment, the considerable expense of an effort to cure would mean even greater loss if it were determined that the contract had been avoided by operation of law.³⁴⁵ The 1978 Draft Convention eliminates the concept of ipso facto avoidance by confining avoidance to instances where the avoiding party declares the contract avoided³⁴⁶ and notifies the breaching party of his decision.³⁴⁷ As a result, merchants are spared the uncertainty and expense of unnecessary shipments overseas.

CONCLUSION

Analysis of American concerns regarding the international sale of goods strongly indicates that the 1978 Draft Convention on Contracts

³³⁷ See text accompanying notes 255-57 *supra*.

³³⁸ See text accompanying notes 258-60 *supra*.

³³⁹ See Secretariat's Commentary, *supra* note 148, at 140, col. 2, para. 6.

³⁴⁰ 1978 Draft Convention, *supra* note 1, art. 80, at 29.

³⁴¹ See text accompanying notes 261-70 *supra*.

³⁴² See text accompanying note 268 *supra*.

³⁴³ See text accompanying notes 284-86 *supra*.

³⁴⁴ *Id.*

³⁴⁵ Michida, *supra* note 169, at 281 (1979).

³⁴⁶ 1978 Draft Convention, *supra* note 1, art. 45, at 20-21 and art. 60, at 24.

³⁴⁷ *Id.* art. 24, at 15.

for the International Sale of Goods should be much better received by commercial interests in the United States than its predecessor, the Uniform Law on the International Sale of Goods (ULIS). The defects in the ULIS articulated by the American Delegation to the Hague Conference of 1964 continued to be subjects of United States concern as UNCITRAL undertook the revision of the ULIS in the 1970's. Numerous provisions redrafted by UNCITRAL reflect the substantial American contribution to that instrument.

The overbroad scope of the ULIS has been narrowed by the 1978 Draft Convention so that consumer sales and noncontracting parties are excluded from its reach. American objections to the imbalance in the ULIS between the rights of sellers and buyers have been remedied in several provisions of the new law.

The 1978 Draft Convention has been drafted with much greater regard for international commercial practice than was the ULIS. The Draft Convention designates uniformity in commercial practice as the touchstone for interpretation. In addition, the treatment of risk of loss and avoidance under the new law is much more responsive to the special problems of commercial practice. Risk of loss passes upon a commercially observable event,³⁴⁸ and avoidance of the contract may occur only upon an express declaration by the avoiding party to the breaching party.

Certain aspects of the 1978 Draft Convention are still at odds with American commercial practice, *e.g.*, the remedy of reduction of the price and the overbroad provisions on specific performance. Nevertheless, a number of considerations with regard to both the reduction in price remedy and the overbroad availability of specific performance mitigate some of the concerns these provisions might otherwise incur.

By bringing the risk of loss and avoidance provisions of the ULIS more into line with commercial practice, the 1978 Draft Convention also succeeded in meeting the needs of merchants involved in overseas shipments. Because risk of loss passes only upon a commercially observable event and avoidance may occur only when it is declared to the breaching party, merchants may be assured that the overseas shipment of goods will not be subjected to any novel perils under the 1978 Draft Convention.

A Convention on Contracts for the International Sale of Goods will shortly be before the American commercial and legal communities. It provides solutions to many of the concerns that merchants and law-

³⁴⁸ See text accompanying notes 231-32, 237-38, 255-57, 261-70 *supra*.

yers feel pervade the international sale of goods. A unique opportunity to unify an area of law which continues to present obstacles to international commerce is at hand. In light of the substantial advantages provided by this Convention, United States ratification should be given the most serious consideration.

Martin L. Ziontz