

A UNIFORM COMMERCIAL CODE FOR INTERNATIONAL SALES? WE HAVE IT NOW

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By *Stewart F. Hancock, Jr.* [*]

Does anyone doubt that we are living in an era of international sales? Check the merchandise in any shopping plaza to see where it was made. Ask anyone in an assembling or fabricating business the sources of materials and component parts and the destinations of completed products.

With the steadily growing interdependence of the world economies and the accelerating increase in international trade, all of us appreciate the significance of such widely acclaimed achievements in international economic cooperation as GATT^[1] and NAFTA.^[2] But, ironically, many lawyers know little if anything of the United Nations Convention on Contracts for the International Sales of Goods (UN Sales Convention) -- the international accord which can be of the greatest benefit in facilitating the formation of international commercial contracts and avoiding or resolving the legal difficulties inherent in such agreements.

The UN Sales Convention is, as the title suggests, an international sales act.^[3] It provides the substantive law for international commercial sales transactions. It does not apply to consumer sales or to sales-related claims for death or personal injury but, in other respects, the scope of this international sales act is similar to Article 2 of the Uniform Commercial Code.

The Sales Convention has three important procedural counterparts -- the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the 1985 Model Law of International Commercial Arbitration, and the UNCITRAL Arbitration Rules.^[4] All four of these measures -- one substantive and three dealing with procedures pertaining to the conduct and enforcement of international commercial arbitration -- were created or promoted through the work of the same highly productive United Nations agency, UNCITRAL (the United Nations Commission on International Trade Law). The following account of UNCITRAL's remarkable achievement in international negotiations, lawyering and draftsmanship represented by the Sales Convention appears in the American Bar Association report recommending the Convention's ratification by the United States:

"To promote the development of international trade the UN General Assembly established the UN Commission on International Trade Law (UNCITRAL) in December 1966 with a limited but diversified membership. In 1970 UNCITRAL appointed a working group to revise ULIS (Uniform Law on the International Sale of Goods) and ULF (Uniform Law on the Formation of Contracts for the International Sales of Goods) so that they would become more widely acceptable. The working group met seven times to prepare a sales text and an additional two times to draft a formation text.

"On completion of the work by UNCITRAL the UN General Assembly convened a diplomatic conference to consider the UNCITRAL draft text at a meeting in Vienna in March-April 1980. Sixty-two states from all parts of the world were represented at the Vienna conference. The conference adopted without dissent the UNCITRAL text as revised by the conference and 53 states signed the Final Act of the conference on April 10, 1980.

"The United States participated actively in the preparation and adoption of the [UN Sales Convention] text. From its creation the United States has been a member state of UNCITRAL. When the commission

established a working group on the International Sales of Goods it appointed the United States as one of the working group's fourteen members. The United States delegation to the Vienna conference included Professor John Honnold and Professor Allan Farnsworth, both of whom had been active in the drafting of the UNCITRAL text. In its report to the U.S. Secretary of State, this delegation recommends that the United States sign and ratify the [UN Sales] Convention." [5]

The UN Sales Convention became effective on January 1, 1988 when it had been approved in only ten countries. In little more than five years, the Convention has been accepted by [forty-three] countries and is [page 20] now binding as law in the United States and most of our trading partners, comprising more than 60% of all world trade.[6]

An American lawyer with clients dealing in commerce with foreign countries must be aware of a critically important aspect of the Sales Convention. Unless the parties indicate that it does not apply, the Sales Convention will be the governing law pertaining to all commercial contracts for the sale of goods between parties having their places of business in different countries which have adopted the convention. Thus, for example, if the parties do not agree to the contrary, a commercial sales agreement between a business in New York and one in Mexico City (both United States and Mexico having adopted the Sales Convention) will automatically be subject to its provisions. Also, when the parties so agree, the Sales Convention can apply even though neither of their countries has ratified it. In addition, even when the Convention is not controlling, it "is increasingly being recognized (by courts and arbitral tribunals) as a law merchant (*lex mercatoria*) source of norms to be applied to international transactions." [7]

The UN Sales Convention has been hailed as "the centerpiece of international trade law", [8] as "the first truly international sales law to be accepted by broad segments of the international community of nations"; [9] as "the most significant piece of substantive contract legislation in effect at the international level"; [10] and as "the biggest success so far achieved by intergovernmental attempts at unification of commercial laws." [11] Despite this enthusiastic reception and the fact that -- in view of its wide acceptance among our trading partners -- it will govern a large majority of our commercial international sales contracts, [12] the Sales Convention remains largely unknown even to many lawyers whose clients customarily deal in international trade.

As summarized by Albert Kritzer of Pace University Law School, one of this country's leaders in the movement to alert lawyers and judges to the urgency of learning about the Sales Convention:

"The scope of the UN Sales Convention is quite significant. In the United States, for example, for transactions it covers it replaces the greater part of Article 2 of the Uniform Commercial Code. Moreover, because the Convention contains a Book-of-the-Month Club feature (it is automatically applicable unless one elects otherwise), it can apply without a conscious election on the part of contracting parties. Nevertheless, few practitioners are even aware of the existence of this Convention or the revolution in legal thinking it mandates. Nor do they have experience in the techniques of interpreting and applying it in the international setting for which it is designed. One consequence is that lawyers dealing with problems of international commercial law too often are not prepared to furnish proper counseling to their clients." [13]

While the UN Sales Convention is in many respect similar to Article 2 of the UCC, there are some significant differences since it is a blend of common law and civil law. [14] Moreover, it reflects aspects of two older international sales conventions which have been part of the legal culture of many European countries -- the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). [15] The scholarly comment on ULIS and ULF in this country is sparse, and many, if not most, members of our [page 21] profession are not even aware of the existence of these uniform laws, much less the need to use them occasionally as precedents in interpreting the UN Sales Convention. Thus, American lawyers have some catching up to do.

Various explanations have been suggested for the failure of the legal profession (including the judiciary and many law schools) to appreciate the significance of the UN Sales Convention and that an important body of substantive commercial law -- which must be studied and understood -- has come into being. One is most often cited. The Sales

Convention was enacted in this country as a treaty. Thus, it became binding on each of our fifty states by action of the President with the concurrence of the Senate, [16] without the need for attention or action by the legislatures of the states. The concurrence of the United States Senate was preceded by committee hearings. [17] And the Senate had the benefit of studies and reports recommending approval of the Sales Convention from, among others, a committee of the American Bar Association. [18] However, because no state approval was required, an important code of international substantive law governing commercial transactions of the sort covered in domestic commerce by Article 2 of the UCC became binding New York law without the analysis by the New York Law Revision Commission, legislative committees, professional groups, academics and bar associations which had preceded the adoption of the UCC in New York. [19]

The significant Sales Convention questions now, of course, relate to what can and should be done to obviate the profession's lack of familiarity with the Convention, not what has caused it. Two law professors, Albert H. Kritzer, mentioned before, and Eric E. Bergsten, both at Pace Law School, are providing answers and, through the Institute of International Commercial Law at Pace and their imaginative and energetic leadership, showing the way.

Eric Bergsten, Deputy Director of the Institute, helped create the Convention. He headed the team responsible for the Secretariat Commentary on it that was prepared pursuant to Resolution 33/93 of the United Nations General Assembly, [20] and was thereafter Secretary of UNCITRAL from 1985 until 1991. Albert Kritzer, the Institute's Executive Secretary, was, until his retirement, International Sales Counsel for the General Electric Company. He had been deeply involved in the practical aspects of international commercial sales at General Electric and became concerned by what he saw as a lack of sufficient communication to practitioners and law faculties on the Sales Convention. Together with Professor Willem C. Vis [21] -- a renowned authority on international commercial transactions -- he founded the Institute of International Commercial Law at the Pace University School of Law. [22]

The aim of the Pace Institute of International Commercial Law is to promote friendly and constructive international trade relations through various programs designed to interest and inform law students, law faculties and the legal profession. For example, it is now in the process of creating an electronic access program to facilitate research on the Sales Convention. [23] To date, however, its most ambitious and productive undertaking has been the creation and management of an international commercial arbitration moot program in which teams of students from various common law and civil law countries come together and [page 22] compete with one another in conducting simulated arbitrations in an actual arbitral forum before experienced arbitrators and jurists. The competition, which is now known as the Willem C. Vis International Commercial Arbitration Moot, follows a format that was conceived by Professor Vis and refined at the Institute in consultation with a task force appointed for this purpose by the Association of the Bar of the City of New York. [24]

The Institute's initial moot was held at the International Arbitral Centre of the Austrian Federal Economic Chamber on March 18-20, 1994. Participating teams traveled to Vienna representing eleven law schools from nine countries (Australia, Belgium, Canada, Finland, Germany, Hungary, Mexico, Netherlands, and the United States). [25] Arbitrators for the first two rounds of oral hearings were drawn from members of the UNCITRAL Secretariat, lawyers in Vienna who practice in international commercial arbitration and international law professors who accompanied the teams. [26] The three-member panel of arbitrators for the final round consisted of the panel chairman Dr. Gerold Herrmann of Germany, currently Secretary General of UNCITRAL, and Professor M. Joachim Bonell of Italy, Director of the Comparative Law Institute at the University of Rome (La Sapienza). I served as the third panelist. Because Dr. Herrmann and Professor Bonell were from civil law countries, there was a need for someone with a common law background on the panel and, as a recently retired Judge of the New York Court of Appeals, I was privileged to fill this role. [27]

The first Willem C. Vis International Commercial Arbitration Moot was an emphatic success. I know this to be so from judging the students in the final round of arbitration, from observing several of the preliminary rounds, and from my conversations with the arbitrators and with most of the participants and their coaches. The critiques and assessments conducted afterwards overwhelmingly confirmed this view. The oral presentations and the written

submissions addressing the challenging UN Sales Convention problem devised by Eric Bergsten were all of high quality and some -- particularly those of Columbia and Université Laval of Quebec in the final round -- would be considered outstanding in any forum. Although the arbitrations were conducted in English, the teams from Belgium, Finland, Germany, Hungary, Mexico, Netherlands and Quebec had no difficulty in presenting their views clearly and forcefully.

A most rewarding aspect of the moot was the rapport and spirit of joviality which developed almost instantaneously among the students of diverse backgrounds and nationalities and prevailed throughout the three days in Vienna. While a common law team (Columbia University, represented by Ariadne Montare and William Spiegelberger) ultimately was declared the winner in a close contest for the Frédéric Eisemann Award for best team oral presentation, several of the other awards (including best brief [28] and best individual oral advocate) went to teams of students from civil law jurisdictions (Germany, Hungary and Quebec).

Not surprisingly, the Institute of International Commercial Law, encouraged by the enthusiastic reviews of the first moot and the increased awareness of the UN Sales Convention which it has produced, is completing plans for future moots. The American Arbitration Association and [page 23] the International Chamber of Commerce [and the United Nations Commission on International Trade Law (UNCITRAL)] are co-sponsoring the second International Commercial Arbitration Moot to be held in Vienna from March 22 to 26, 1995. All schools that enrolled in the inaugural moot are returning. The roster of participants has increased to [twenty-three] teams from fifteen countries, with teams now coming from Denmark, England, Norway, Slovenia, Switzerland, and Turkey. Australia, Germany, and Mexico will each be represented by an additional team from a second law school and [three] more American law schools are enrolled, making a total of [six] entries from the United States -- . . . Columbia University, Cornell University, McGeorge School of Law, Pace University, Southern Methodist University and Syracuse University School of Law.

At the awards luncheon following the final oral presentation, Dr. Werner Melis, Director of the Austrian Arbitration Institute which hosted the 1994 event, had this to say:

"Unfortunately, and this is especially true in my country, international arbitration is practically not taught at universities. This means that many lawyers leave law school with not the slightest idea about the necessity for international arbitration and what it is about. And this in a situation, where, as we know, practically 100% of all international commercial disputes are settled only by arbitration and not before state courts. . . . I hope that this deficit -- this international deficit of knowledge on international arbitration -- will be overcome by moots like this. I look forward to continuing international arbitration moots. Perhaps there will be . . . an international world cup for this event."

To be sure, Dr. Melis was being a bit expansive in forecasting "a world cup for this event." Even Albert Kritzer would have to concede, although grudgingly perhaps, that international arbitration lacks some of the excitement of world-wide soccer. But, having observed the outstanding success of the 1994 moot, and noting that Professors Bergsten and Kritzer have more than doubled the number of participants for the second Willem C. Vis International Commercial Arbitration Moot planned for 1995, I'm not so sure that I would bet against it. [page 36]

FOOTNOTES

** The author retired on December 31, 1993 as Associate Judge of the New York State Court of Appeals. He has returned as Counsel to the firm of Hancock & Estabrook in Syracuse, New York where he is active, among other things, in appellate advocacy and as arbitrator on domestic and international panels and in the American Arbitration Association's Large Complex Dispute Program. He also serves on the faculty of Syracuse University College of Law as Distinguished Visiting Professor of Law and Jurist in Residence.*

1. General Agreement on Tariffs and Trade.

2. North American Free Trade Agreement.

3. The text of the UN Sales Convention is available in a pamphlet entitled "UNCITRAL" (United Nations Publication Sales No. E.86.V.8 ISBN 92-1-13328-4-2, 01500 P) which may be obtained at the UNCITRAL office of the United Nations in New York City. The Sales Convention was adopted by representatives of the countries attending the United Nations Conference on Contracts for the International Sales of Goods at Vienna on April 10, 1980.

4. The texts of the Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules are both set forth in the pamphlet entitled "UNCITRAL" (see n 3. *supra*). The text of the New York Convention is published in the *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, Volume II (United Nations Publication: New York, 1973).

5. "American Bar Association Report to the House Delegates" by Section of International Law and Practice, *International Lawyer*, Vol. 18, No. 1, Winter, 1984.

6. The UN Sales Convention is in effect in the following countries: Argentina, Australia, Austria, Belarus, Bosnia-Herzegovina, Bulgaria, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Mexico, Netherlands, Norway, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Yugoslavia, and Zambia. In 1995 the Convention will also become effective in Cuba, former USSR states Georgia and Moldova, and in New Zealand. The UN Sales Convention has been binding law in each of our fifty states since January 1, 1988, when it became effective after acceptance by the United States, the tenth country to adopt it.

7. Del Duca, Guttman & Squillante, *Sales Under the Uniform Commercial Code and the Convention on International Sales of Goods* (Anderson: 1993), p. xxi.

8. Clive Schmitthoff, *Export Trade: The Law and Practice of International Trade*, 9th ed. (Stevens & Sons, London: 1990), p. 252.

9. Joseph Lookofsky, *International Encyclopedia of Laws*, Blanpain, gen. ed. (Kluwer: 1993), p. 17.

10. *Id* at 18.

11. *Financial Times* (London: September 21, 1993).

12. Professor Allan Farnsworth, one of the delegates of the 1980 Vienna Conference (see n 5 *supra*) predicts that "In all likelihood, the [Convention] will soon be in the governing law for most of our exports and imports of goods," 21 *Cornell L.J.* 439-440 (1988). And European authority Lief Sevón states, "it is beyond doubt that the UN Sales Convention will be the predominant instrument governing the rights and obligations of sellers and buyers in the international sale of goods," 106 *Juridisk Tidskrift Suomen Lainopillinen Yhdistys* 327 (1990).

13. Statement of Albert H. Kritzer, Executive Secretary of the Institute of International Commercial Law in a proposal for an "Electronic Access Program of the Institute of International Commercial Law at the Pace University School of Law" dated March 31, 1994.

14. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, (Kluwer 1993), Front Matter, p. 3.2

15. See n 5 *supra* ABA Report to House of Delegates, quoted at pp. 1-2 *supra*.

16. U.S. Const. art. 11 § 2 ("[The President] shall have Power by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur").

17. International Sale of Goods: Hearing on Treaty Doc. No. 98-9 Before the Senate Committee on Foreign

Relations, 98th Cong., 2d Sess. 39 (1984).

18. See, "American Bar Association Report to the House of Delegates by Section of International Law and Practice," *International Lawyer*, Vol. 18, No. 1, Winter 1984.

19. See, e.g. New York State Law Revision Commission, Report and Appendices to The Legislature Relating to the Uniform Commercial Code, Legislative Doc. (1956) No. 65(A); NY Uniform Commercial Code § 2.101, Law Review commentaries (McKinney's 1993).

20. The UCC is accompanied by an Official Commentary. The UN Sales Convention is not. The Secretariat Commentary is the closest counterpart to an Official Commentary on the UN Sales Convention.

21. Professor Vis headed UNCITRAL when the UN Sales Convention came into being and served as Executive Secretary of the Vienna Diplomatic Conference that created it. Willem Vis was Director of the Institute until his unexpected death in December of 1993.

22. Albert Kritzer is also the author of *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer 1989). This is a paperback text. It has since been expanded to a two-volume looseleaf edition. The 10th supplement to this edition was issued in July 1994.

23. The Institute has also conducted an international essay contest on the Sales Convention evoking interest by law students from Argentina, Australia, Belgium, Brazil, Canada, Czech Republic, Denmark, Egypt, France, Germany, Ghana, Greece, Guyana, Hungary, India, Indonesia, Jordan, Mexico, Nicaragua, Nigeria, Pakistan, Singapore, South Africa, Sweden, Turkey, United Arab Emirates, United Kingdom, United States, Zambia and Zimbabwe.

24. The concept of a moot on the UN Sales Convention was broached at a meeting of UNCITRAL in New York in the Spring of 1992. Michael Sher, Esq., representing the Association of the Bar of the City of New York at the UNCITRAL meeting, but speaking as an individual, first mentioned the idea.

25. The following law schools sent teams: Deakin University, Australia; Kotholieke Universiteit Leuven, Belgium; Université Laval, Quebec, Canada; University of Lapland, Finland; Albert-Ludwigs-Universität Freiburg, Germany; Eötvös Loránd University, Hungary; Universidad Panamericana, Mexico; Erasmus Universiteit Rotterdam, Netherlands; Columbia University, Cornell University, Pace University, United States.

26. Also participating in these rounds were Dr. Roland Löewe, who chaired the committee that did most of the substantive work on the UN Sales Convention at the 1980 Vienna Diplomatic Conference on the Convention; and Andre Friedman, Esq., former chair of the committee on International Trade and Practice of the New York State Bar Association.

27. Like many good things that have happened to me, my receipt of an invitation to serve as a final panelist was due to luck -- being in the right place at the right time. By chance I happened to talk to Albert Kritzer at a Cornell Law School luncheon at the Waldorf last January at the precise time that he was trying to find a common law jurist to fill out the panel. Fortunately, a retired Judge of the New York Court of Appeals seemed to meet his requirements.

28. To preserve the common law/civil law balance of the moot, the briefs were judged by Professor Barry Nicholas of Brasenose College, Oxford, who represented the United Kingdom at the Vienna Diplomatic Conference and by Dr. Fritz Enderlein of Germany, also a participant at the Vienna Diplomatic Conference. Both have written extensively on various aspects of international sales, including the UN Sales Convention.

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