

Uniform Law for International Trade— Progress and Prospects

I. The American Bar Association and Unification of Law

A. THE STRENGTH OF THE ABA COMMITMENT

Article 1 of the original 1878 Constitution of the American Bar Association stated that the Association's "object shall be to . . . promote the . . . uniformity of legislation. . . ."¹ At this 1878 organizational meeting one of the first steps, other than getting organized, was to instruct the Committee on Commercial Law to start work on "action on the part of the Association looking toward further uniformity" in the law on "negotiable or commercial paper."² This was the fountainhead of the work that led in 1896 to the Negotiable Instruments Law—and on to Article 3 of the Uniform Commercial Code (UCC). This is only one of the Association's many steps to reduce legal disharmony among our fifty domestic jurisdictions.

Legal disharmony among the states is only part of the problem. Fantastic developments in international economic relationships have forced us to face the problem of disharmony between our domestic law and a multitude of foreign legal systems. Even large international corporations with specialized counsel find these problems intractable. Imagine the problems of middle-sized inland companies as they increasingly become involved in international trade!

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1. REPORTS OF THE AMERICAN BAR ASSOCIATION, 1878-1879, 30.

2. *Id.* at 27.

B. HELPING WITH ENACTMENT

For private law reform, both domestic and international, the ABA's leadership is crucial. Private law, and especially the unification of private law, is *lawyer's law*. Certainly the founders of the ABA had good reason to state in its Constitution one of its objects is to "*promote*" the uniformity of legislation. As we all know, this job is not only vital but tough. Legislative inertia is always a barrier and at the national level the weight of inertia is tremendous. In the international field there is always something that is more urgent and exciting than improving international private law; fighting brush fires takes precedence over planting trees.

With this weight of inertia almost any kind of an objection can slow things down, and finding objections is easy. Thousands of choices have to be made in developing a uniform law and getting general agreement. Some, who had been indifferent during the long process of drafting and international consultation leading to agreement, somehow find the time at the end of the road to rush forward with brilliant ideas about how the job should have been done. This was true of the UCC; there were sharp and plausible objections to each Article.³ The law was brought to life only when lawyers convinced the legislatures of the need to stop debating and take action.⁴

II. Unifying International Trade Law: International Sales Convention

In the field of international private law there are a number of current measures being considered by the United States.⁵ Among them—and certainly close to my heart—are those to unify substantive law for international trade—and particularly the uniform law for international sales embodied in the 1980 Convention approved, without dissent, by a diplomatic conference of 62 States.⁶

A. FIRST STEPS

Over a half-century of work culminated in the 1980 Vienna Sales Convention. The work took off in 1930, piloted by the International Institute for the Unification of Private Law (The Rome Institute or UNIDROIT), and reached its first landing-field at the Diplomatic Conference held at the

3. R. BRAUCHER & R. RIEGERT, *INTRODUCTION TO COMMERCIAL TRANSACTIONS*, 26 (1977); Beutel, *The Proposed UCC Should Not Be Adopted*, 61 *YALE L.J.* 334 (1952).

4. Braucher, *The Legislative History of the UCC*, 58 *COLUM. L. REV.* 798 (1958).

5. See Pfund, *United States Participation in International Unification of Private Law*, 19 *INT'L LAW.* 505 (1985).

6. Winship, *New Rules for International Sales*, 68 *ABAJ* 1231 (1982).

Hague in 1964. The United States just barely made it to the Conference; U.S. membership in UNIDROIT (and the Hague Conference on Private International Law) had cleared through Congress only weeks before.⁷ Ambassador Richard Kearney⁸ led the United States delegation; the late Soia Mentchikoff and I were hired (but unpaid) hands; the Bar was represented by the late Joe Barrett, a great internationalist from Pine Bluff, Arkansas, and the late Jim Dezendorf of Portland. This uniform law went into force in 1972, but adherents are primarily from Western Europe.⁹

This regional character gives us a significant message. In preparing this uniform law, there was negligible input from the common law world, and no significant participation from North or South America, Eastern Europe, Africa or Asia; the uniform law was a distinguished and sophisticated product of Western European legal science. However, the lack of participation by most of the world stood in the way of world-wide adherence. The problem was not merely psychological—a lack of feeling of paternity. The lack of world-wide participation also produced technical problems. You will have the general idea if you imagine a law for world-wide use that had been drafted only by common-law lawyers who used our standard legal idioms like “trust” and “equity,” and “consideration”—terms unknown and untranslatable for countries of civil law persuasion. In short, we of the 1964 United States delegation were inspired by the effort, but disappointed by the product; our report listed problems that needed attention, and called for review and revision.

B. WORLD-WIDE PARTICIPATION—UNCITRAL

This review and revision was accomplished by a legislative body that, within its strictly limited membership of 36 States, for the first time provided world-wide representation. This was the United Nations Commission on International Trade Law (UNCITRAL).¹⁰ In 1968 UNCITRAL working groups promptly got to work on uniform rules for sales, arbitration and negotiable instruments. Later the work expanded to carriage of goods by sea, and international contracts for industrial works.¹¹ By 1978, without a single formal vote, unanimous agreement was reached on a draft Conven-

7. Honnold, *Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326 (1965).

8. Ambassador Kearney was the recipient of the 1984 Theberge Private International Law Award. See 18 INT'L LAW. 609 (1984).

9. Honnold, *The Draft Convention on Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 223, 224 (1979).

10. Honnold, *UNCITRAL: Mission and Methods*, 27 AM. J. COMP. L. 201, 207 (1979).

11. *Id.* at 202-207.

tion on International Sales, and, I have mentioned, this Convention was finalized, again without dissent, by the 1980 Vienna Conference of 62 States.

This was possible because this was a field where there was a general consensus that something useful *needed* to be done, and *could* be done. Those who have seen the problems of international legislation in more contentious fields can have little idea of the pragmatic, constructive, hard-working atmosphere in UNCITRAL—a feeling that developed into an *esprit* like that of an old regiment.

C. CURRENT STATUS

Twenty-one States, with representatives from each continent, became “Charter Member” Signatories¹² during an initial 18-month period, thereby committing themselves to submit the Convention for ratification under their constitutional procedure. (The United States is one of these “Charter Member” States.) Final adoption by 10 States brings the Convention into force. (These adoptions, of course, include not only “ratification” by “Charter Member” States but also “accession” by other States.) Constitutional procedures for ratification or accession are always slow. But seven States (in three continents) have completed this process,¹³ and several more report that they are nearing the end of the road. It is rare that international legislation of such scope receives such prompt and widespread approval.

D. THE UNITED STATES AND THE SALES CONVENTION

What part did the United States play? From the beginning the United States has been an active member of UNCITRAL. In the early years, Ambassador Kearney and thereafter Peter Pfund (Assistant Legal Adviser for Private International Law), by gentle persuasion, secured advice from industry and free, hard work from legal experts in the various fields of UNCITRAL’s activity.¹⁴ Early in the game, when I found myself an international civil servant in charge of legal work for UNCITRAL, United States representation on sales was placed in the strong hands of Allan Farnsworth who, among many qualifications, was Reporter for Restatement Second of Contracts. The Sales Article of the UCC, as the most modern and highly articulated sales law, was a valuable resource for testing and shaping the

12. Austria, Chile, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, German Democratic Republic, Ghana, Hungary, Italy, Lesotho, Norway, People’s Republic of China, Poland, Singapore, Sweden, The Netherlands, United States of America, Venezuela, Yugoslavia.

13. Argentina, Egypt, France, Hungary, Lesotho, Syrian Arab Republic, Yugoslavia.

14. See Pfund, *supra* note 5.

1980 Sales Convention. Of course, not everything in our sales law could be used, but it is true that the 1980 Sales Convention bears a much closer resemblance to the UCC than to any other legal system.¹⁵

What about review and action in the United States? This brings us home, to our ABA Section on International Law and Practice. A special subcommittee, headed by Peter Winship, prepared a thorough report on the Convention and, on the recommendation of this Section, the Association's House of Delegates recommended that the United States sign and ratify.¹⁶

This action by the ABA was vital and effective. In September 1983, the President sent the Sales Convention to the Senate, with his recommendation that the Senate "promptly give its advice and consent" to ratification.¹⁷ In April 1984 the Senate Committee on Foreign Relations held hearings; the senators in attendance and the witnesses for the ABA and other organizations concerned with law and international trade warmly supported favorable action.¹⁸ Thereupon we faced a race between action in the Senate and the oncoming November election. Of course, the election won.

IV. Conclusion

This carries us full circle, to the historic role of the American Bar Association in "promoting" uniform legislation. The word the Founding Fathers used was *not* "studying" or "making speeches," but "promoting"—the action that is necessary to breathe life into law. Encouragement from all quarters is needed to pry loose the Sales Convention, and other Private International Law matters.¹⁹

It is difficult to conclude when the end of my story lies in the future. All I can say is: the ABA's and, in particular, this Section's devoted work towards an effective structure for private international law has been a major factor in strengthening the international legal order; their continuing support is essential and greatly appreciated.

15. Lansing & Hauserman, *A Comparison of the UCC to UNCITRAL's CISG*, 6 N. CAR. J. INT'L L. & COMP. REG. 63-80 (1980).

16. For the Section's Report and Recommendation, see 18 INT'L LAW. 39-51 (1984).

17. Treaty Doc. No. 98-9

18. S. Hrg. 98-837.

19. *E.g.*, see the pending Hague Convention on Civil Aspects of International Child Abduction, Treaty Doc. 99-11, Nov. 5, 1985.

