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Export-Import Sales Under the 1980 United Nations Sales Convention

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (Convention) was adopted in Vienna on April 11, 1980.[1] As of May 1985, there were seven parties to the Convention—Argentina, Egypt, France, Hungary, Lesotho, Syria, and Yugoslavia.[2] The Convention will come into force approximately one year after it is adopted by ten countries.[3] It is likely that the Convention will come into force in 1986. When the Convention does come into force it is possible that the United States will be one of the original parties. President Reagan submitted the Convention to the Senate in September 1983, with a recommendation that the Senate give its advice and consent to ratification.[4] The Senate Committee on Foreign Relations held hearings in April 1984, but has deferred final consideration.

This brief essay sketches the background of the Convention, and then summarizes its present status, scope, and general characteristics. A final section of the essay illustrates the Convention by examining the legal remedies it provides to an importer whose foreign seller fails to de-

* This essay is adapted from an outline of a talk delivered at the Fourth Annual Symposium on International Business and Taxation. The author gratefully acknowledges the extensive editing of the law review staff.

1. U.N. Doc. A/Conf.97/18, Annex I (1980), *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, Official Records at 178-90, U.N. Doc. A/Conf.97/19, U.N. Sales No. E.82.V.5 (1981) [hereinafter cited as CISG or Convention].

2. Note by the Secretariat, Status of Conventions, U.N. Doc. A/CN.9/271 at 4 (1985). Information about the current status of ratifications and accessions may be obtained from the Treaty Section of the Office of Legal Affairs at the United Nations Headquarters in New York. The Secretary General of the United Nations is the designated depository. CISG, *supra* note 1, art. 89.

3. CISG, *supra* note 1, art. 99(1) provides that the Convention will enter into force "on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession. . ."

4. S. Doc. No. 98-9, 98th Cong., 1st Sess. (1983).

liver as promised.[5]

II. BACKGROUND OF THE UNITED NATIONS SALES CONVENTION

The origin of the 1980 Convention can be traced to a project to draft an international sales convention which began in 1930 under the auspices of the International Institute for the Unification of Private Law (UNIDROIT). Participants in this project included representatives from the major legal systems of Western Europe, including a participant from the United Kingdom to represent common-law systems. There was, however, virtually no representation from Socialist or Third World countries and, except for the fleeting participation of Karl Llewellyn, the United States was not involved.[6]

The UNIDROIT initiative culminated in 1964 with the adoption of two sales conventions at a diplomatic conference at The Hague.[7] One convention covers the formation of international sales contracts while the other governs the rights and obligations of the contracting parties. Parties to these conventions agree to enact as national law the uniform law set out in the appendix to each convention. Although the conventions came into force in 1972, only Belgium, The Gambia, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom are parties. A major reason for this poor record of acceptance was the limited participation of non-European countries in the drafting of these conventions.

The Hague sales conventions were not enthusiastically received in the United States. The United States, which did not become a member of UNIDROIT until the end of 1963, decided only at the last moment to send a delegation to the 1964 conference at The Hague. Although the

5. Since the essay makes no attempt to do more than introduce the Convention, a reader interested in more detailed analysis should consult the growing number of studies of the Convention. For a bibliography of writings on the United Nations Convention, see Winship, *Bibliography: International Sale of Goods*, 18 INT'L LAW. 53 (1984). The indispensable introduction to the Convention is J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982).

6. For a more detailed discussion of the background of the Convention, see Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES § 1.01 (N. Galston & H. Smit eds. 1984).

7. The official French and English texts of the Hague sales conventions and the uniform laws appended to the conventions appear in 834 U.N.T.S. 107, 169 (1972). For a sympathetic early analysis of the uniform laws by a member of the United States delegation to the 1964 conference, see Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326 (1965). For a bibliography of studies of these Hague conventions, see 27 AM. J. COMP. L. 345-49 (1979).

United States' delegation participated actively at the conference, it expressed grave reservations about the adopted texts. The delegation's report to the Secretary of State concluded that the texts contain several serious weaknesses: (1) the focus is on trade between contiguous nations and does not pay sufficient attention to overseas shipments; (2) the convention does not provide balanced reciprocal rights and obligations for sellers and buyers; and (3) several key concepts are so complex that traders can not readily understand them. In its conclusion the delegation recommended that the United States not become a party to the Hague sales conventions.[8] The United States took no further formal action with respect to the conventions.

Soon after the 1964 conference, the United Nations General Assembly established a Commission on International Trade Law (UNCITRAL or the Commission) to study how to eliminate legal obstacles to international trade. At its first session in 1968, the Commission resolved to give priority to a review of the Hague sales conventions and in 1969 the Commission appointed a Working Group on Sales to carry out this review. This Group worked for almost a decade to redraft the 1964 convention before presenting a consolidated draft convention to the Commission. After reviewing the resulting text, the Commission approved the UNCITRAL draft in 1978 and then circulated it to governments and interested international organizations. On the Commission's recommendation, the United Nations General Assembly convened a diplomatic conference in Vienna in March 1980 to consider the UNCITRAL draft.[9] Sixty-two nations sent delegations to the Vienna conference. After five weeks of intense debate, a roll call vote was taken on a final text: forty-two nations voted in favor, none against, and nine countries abstained. The official text closely resembles the 1978 UNCITRAL draft text.[10]

Delegates from the United States participated actively in UNCITRAL and its Working Group during the lengthy deliberations on the

8. Report of the Delegation to the 1964 Conference at The Hague, *reprinted in* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 237 (1964).

9. For a useful summary of the background to the 1978 UNCITRAL draft convention, see Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979) (Professor Honnold's essay introduces a collection of articles which analyze the 1978 text).

10. Apparently the delegations that abstained on the final vote did not have authority to vote on a final text. The official documents, including summary records of plenary and committee meetings, are published in the conference's Official Records, *supra* note 1. For brief summaries of the conference debates, see J. HONNOLD, *supra* note 5, at 54-56; Perrott, *The Vienna Convention 1980 on Contracts for the International Sale of Goods*, 1980 INT'L CONT. L. & FIN. REV. 577.

draft text. These delegates were briefed by the Secretary of State's Advisory Committee on Private International Law, composed of representatives of major legal organizations such as the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The State Department also appointed a special study group with members knowledgeable in the legal and business problems of international trade. The United States delegates to the Vienna conference, John O. Honnold, E. Allan Farnsworth, and Peter H. Pfund, voted in favor of the final text at the conference, and subsequently recommended to the Secretary of State that the United States become a party to the Convention.[11]

III. PRESENT STATUS OF THE UNITED NATIONS SALES CONVENTION

Article 91 of the Convention provided that the Convention was to remain open for signature until September 30, 1981. Twenty-one countries signed by this deadline, including Austria, Chile, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, France, the German Democratic Republic, Ghana, Hungary, Italy, Lesotho, the Netherlands, Norway, People's Republic of China, Poland, Singapore, Sweden, the United States, Venezuela, and Yugoslavia.[12] By signing the Convention, these countries undertook an implicit obligation to seek ratification in accordance with their domestic constitutional procedures. Countries which did not sign by the September 30, 1981, deadline may accede to the Convention at any time.[13]

Article 99(1) provides that the Convention will enter into force "on the first day of the month after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession." As of May 1985, Argentina, Egypt, France, Hungary, Lesotho, Syria, and Yugoslavia had ratified or acceded.[14] Other countries, as noted below, are presently con-

11. J. HONNOLD, REPORT OF THE UNITED STATES DELEGATION TO THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1981). For discussion of the role of the special advisory committee to the State Department, see Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW. 29 (1984); Speidel, Book Review, 5 N.W. J. INT'L L. & BUS. 432 (1983). For a history of the Secretary of State's Advisory Committee on Private International Law, see Pfund, *U.S. Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985).

12. Note by the Secretariat, *supra* note 2, at 4.

13. CISG, *supra* note 1, art. 91(3).

14. Note by the Secretariat, *supra* note 2, at 4.

sidering ratification or accession and informed sources now suggest the Convention will come into force in 1986.

A. Prospects for Ratification or Accession Outside the United States

Although reliable information is difficult to obtain, several sources report that the following countries are presently considering ratification or accession to the Vienna Convention: Austria, Bulgaria, Czechoslovakia, People's Republic of China, Sierra Leone, Switzerland, and Venezuela. The Nordic countries, which already share a uniform sales law, have agreed to become parties to the Convention at the same time.[15]

In addition, a number of important governmental and international business organizations have recommended that the Convention come into force. For example, at a meeting in Moscow in March 1983, the Council of Mutual Economic Assistance gave general approval to the Convention. In September 1983, the Law Association for Asia and the Western Pacific adopted a resolution urging governments in the Asian-Pacific region to accede to the Convention. The Asian-African Consultative Committee has also recommended that its member countries become parties. Among business groups, the Commission on International Contract Practices of the International Chamber of Commerce (ICC) has urged the national committees of the ICC to encourage their respective governments to adhere to the Convention. In addition, several recent conferences have publicized the Convention's provisions.[16]

Despite interest in the Convention, ratifications and accessions have been slow. An examination of the reasons why several countries have hesitated explains the delay.[17]

1. The United Kingdom

The Law Society in Britain has recommended that the United Kingdom not adhere to the 1980 Sales Convention, at least not until its major trading partners decide to do so. This recommendation does not, however, reflect opposition in principle to uniform sales rules. The United Kingdom is a party to the 1964 Hague sales conventions, albeit with the

15. *See generally* Sono, *The Role of UNCITRAL*, in INTERNATIONAL SALES, *supra* note 6, §4.06; U.S. Mission at the United Nations (unclassified telegram), 17th Plenary Session of UNCITRAL (October 15, 1984).

16. *See generally* Sono, *supra* note 15. For the International Chamber of Commerce position, see ICC Commission on International Commercial Practice, U.N. Convention on International Sale of Goods Working Party, Revised Draft Commentary, Doc. 460/291 (1983).

17. For further elaboration on the status of the Convention in the United Kingdom, the Federal Republic of Germany, and Canada, see Winship, *The Present Status of the 1980 U.N. Sales Convention*, in WORLD TRADE AND TRADE FINANCE ch. 10 (J. Norton ed. 1985).

reservation that contracting parties must affirmatively choose to have the uniform laws apply. If the United Kingdom were to adopt the Convention, it would have to denounce the Hague conventions. Moreover, parties who agree to resolve disputes by arbitration in England might select the Convention rather than English law as the governing law. The Law Society Report frankly states the legal community's concern about losing business and gives this concern as a reason for not supporting the Convention.[18]

2. The Federal Republic of Germany

The Federal Republic of Germany, like the United Kingdom, has ratified the Hague conventions and its experience with the uniform laws may explain its absence from the vanguard of support for the 1980 Convention. The Federal Republic was one of the first countries to ratify the 1964 conventions and it expected other countries to follow its example. The uniform laws were not widely adopted, however, and the Federal Republic now wants to avoid a repeat of that experience. At the same time, the uniform sales laws do provide uniform rules for transactions with some of the Federal Republic of Germany's major trading partners, such as Italy and the Benelux countries. The Federal Republic, therefore, does not want to risk denouncing the earlier conventions until it knows whether its trading partners will adopt the 1980 Convention.[19]

3. Canada

Although the Canadian federal government has given serious consideration to the Convention, Canada is unlikely to accede to the Convention in the near future. The principal problem is constitutional: the federal government has limited treaty power with respect to private international law conventions. Each province must accept the Convention before it takes effect in that province. Furthermore, there is concern about the potential disruption to United States-Canada trade, which represents a major part of Canada's foreign commerce.[20]

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18. *See* Law Society Council, Law Reform Committee, *1980 Convention on Contracts for the International Sale of Goods*, LAW SOCIETY GAZETTE 653 (1981). For the Law Reform Committee's full statement, see *International Sale of Goods: Hearing on Treaty Doc. 98-9 Before the Senate Committee on Foreign Relations*, 98th Cong., 2d Sess. (1984) (statement of Frank Orban) [hereinafter cited as *Hearing*].

19. Schlechtriem, *Recent Developments in International Sales Law*, 18 ISRAEL L. REV. 309 (1983); *see also* Magnus, *European Experience with the Hague Sales Law*, 3 COMP. L. Y.B. 105 (1979).

20. Ziegel, *Should Canada Adopt the International Sales Convention?*, in NEW DEVELOPMENTS IN THE LAW OF EXPORT SALES 67, 81 (1983).

B. Prospects in the United States

The United States has taken significant formal steps to ratify the Convention.[21] The United States signed the Convention on August 31, 1981, and President Reagan sent it to the Senate on September 21, 1983, with the request that the Senate give its consent to ratification. The Convention was forwarded to the Senate Committee on Foreign Relations, which held hearings on April 4, 1984. Although the committee planned to take up the Convention in September 1984, the leadership decided to defer consideration until the new Congress convened in 1985. At least one reason for this decision was a letter from Senator Richard Lugar (R-Ind.), a member of the Foreign Relations Committee, to Secretary of State George Shultz. The letter asked Shultz to respond to the following questions: (1) Is there evidence of specific cases of difficulties caused by the absence of the Vienna Convention? (2) Why should parties be required to "opt out" rather than to "opt in" to the Convention's provisions? and (3) What are the specific differences between United States commercial law and the Convention?[22] Secretary Shultz responded promptly through a delegate, but the questions had raised doubts and support for ratification could not be mustered, particularly with the 1984 elections looming. Proponents of the Convention are now gathering evidence of the difficulties caused by the absence of the Convention to submit to Senator Lugar, who has become chairman of the Senate Foreign Relations Committee in the new Congress.[23]

Outside the political arena, the Convention has had a favorable reception. A number of business and legal organizations have publicly supported ratification by the United States. These organizations include the four leading associations representing businesses involved in international trade: the National Foreign Trade Council, the American Association of Exporters and Importers, Business International, and the United States Council for International Business. Other organizations endorsing the Convention include the American Bar Association, the American Arbitration Association, and the Lawyers' Committee for the Conven-

21. For a detailed description of the steps taken in the United States, see Winship, *supra* note 17, § 10.05.

22. Letter from Senator Richard Lugar to Secretary of State George Shultz (Aug. 10, 1984), available in the files of Hastings International and Comparative Law Review.

23. Winship, *supra* note 17, § 10.05. Senator Lugar's letter states in part that "I have asked that consideration be deferred until I am assured that the U.S. business community which will be affected by this proposed Convention is thoroughly familiar with it and has indicated its views of the Convention." *Supra* note 22. The status of the Convention in the Senate Committee on Foreign Relations is summarized by a Memorandum from Peter H. Pfund to Members of the Secretary of State's Advisory Committee (Sept. 21, 1984).

tion on Contracts for the International Sale of Goods. On the other hand, several business organizations, such as the National Association of Manufacturers and the United States Chamber of Commerce, whose members are not primarily engaged in international trade, have given lukewarm support to the Convention. The only organizations which, after studying the Convention, have withheld their endorsement are the American Corporate Counsel Association and the Heritage Foundation. The principal objection of these organizations is that ratification without further study would be premature.[24]

IV. SCOPE AND GENERAL CHARACTERISTICS OF THE CONVENTION

The scope of the United Nations Sales Convention is summarized by the following outline of the table of contents.

1. Part I (Arts. 1-13): The two chapters of this part define the Convention's sphere of application and set out general rules of interpretation.

2. Part II (Arts. 14-24): These articles codify the rules governing the formation of the international sales contracts.

3. Part III (Arts. 25-88): The five chapters in this part regulate the rights, obligations, and remedies of the parties to international sales contracts.

4. Part IV (Arts. 89-101): This final part defines the relation of the Convention to other international agreements, sets out the reservations countries are authorized to make when they ratify or accede to the Convention, and provides rules for implementation of the Convention.

Much of the two 1964 uniform sales laws has been incorporated into Parts II and III of the Convention. As a concession to countries concerned about this consolidation, Article 92 provides that a country may choose not to adopt one or the other of these two parts when it ratifies or accedes to the Convention.[25]

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24. *See generally* Winship, *supra* note 17. For the position of the Heritage Foundation, see BROOKS, WHY CONGRESS SHOULD BE WARY OF THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (1984). The American Corporate Counsel Association adopted the following statement: "The Association Board takes no position on the question of the ratification of the convention. The board is concerned that the existence of the convention and its effect on international sales is not yet widely known throughout the business community or by corporate counsel representing medium and small firms." *Reprinted in Hearing, supra* note 18, at 37.

25. *See* Winship, *supra* note 6, §§ 1.02-.03.

The general rule defining the Convention's sphere of application, Article 1(1), states:

> 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 [i.e., countries that have ratified or acceded to the convention]; or (b) when the rules of private international law [i.e., choice-of-law rules] lead to the application of the law of a Contracting State.[26]

This general rule is supplemented by several other provisions. Article 1(2) requires that both parties have notice that their businesses are in different countries, while Article 10 provides guidelines for identifying the relevant place of business when a party has more than one.

A potential limitation on the sphere of application of the Convention is set forth in Article 95, which authorizes a country to declare, at the time of ratification or accession, that it will not be bound by Article 1(1)(b). Thus, a court sitting in a country which has made this declaration would apply the Convention only if the parties before the court have their places of business in contracting states.[27]

Other important limitations on the Convention's application are found in Articles 2-5, which exclude certain transactions and issues from the Convention's coverage. The most important of these exclusions are:

(a) sales to consumers (Art. 2(a));

(b) issues of validity, such as mistake, fraud, duress, unconscionability, and illegality (Art. 4(a));

(c) issues relating to property interests in the goods sold (Art. 4(b)); and

(d) claims for death or personal injury caused by defects in the goods sold (Art. 5). In general, only disputes between a seller and a merchant buyer are governed by the Convention.

Even if a sales transaction falls within the scope of the Convention, the parties are free to vary the effect of its provisions or even to exclude it altogether. Article 6 provides that "[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."[28] Trade usage and course of dealing may also vary the effect of the Convention's provisions.[29] Whether the

26. CISG, *supra* note 1, art. 1(1).

27. *See* Winship, *supra* note 6, §§ 1.02-.03. The United States plans to make the reservation permitted by Article 95.

28. CISG, *supra* note 1, art. 6.

29. *Id.* art. 9 provides:

language of Article 6 permits exclusion by implication, however, is unclear, although the better interpretation of the Convention's history and policy indicates implied exclusions are permitted.

Articles 7 and 8 contain guidelines for interpreting the Convention. Article 7(1) states that when interpreting the Convention "regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in international trade."[30] Recognizing that situations not contemplated by the Convention's rules will arise, Article 7(2) states that "gaps" are to be filled by application of the Convention's general principles or, if there are no relevant general principles, the domestic sales law to which the forum's choice-of-law rules lead. Other than the statement in Article 7(1), however, the Convention does not expressly define its general principles. It has been suggested that the following three principles are implicit in the text of the Convention: (1) a duty to compensate a party for expenses incurred in reliance on the representations of another party; (2) a duty to communicate information needed by the other party; and (3) a duty of a nonbreaching party to mitigate the loss resulting from a breach of contract.[31] The rules for the interpretation of the parties' agreement are generally less complicated, although Article 8 asks the reader to consider both the subjective intent of the parties and the objective meaning of their conduct.[32]

Despite differences of general approach and style between the Convention and the Uniform Commercial Code, most commentators conclude that the common-law lawyer should have little difficulty working with the Convention.[33]

Two statements supporting ratification of the Convention by the United States summarize the characteristics of the Convention which make it attractive to export-import traders and their legal advisers.

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(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a use of which the parties knew or ought to have known and which in international trade is likely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

30. *Id.* art. 7(1).

31. J. HONNOLD, *supra* note 5, § 99.

32. See Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 286-88 (1984), for an analysis criticizing Article 8.

33. See, e.g., the assessment of the formation provisions in Winship, *Formation of International Sales Contracts Under the 1980 Vienna Convention*, 17 INT'L LAW. 1 (1983).

From a business perspective, the American Association of Exporters and Importers (AAEI) gives the following reasons for endorsing ratification:

> The main advantage of the Convention is that it will provide an agreed set of rules for the many international sales transactions in which it would otherwise be unclear what law governs. The rules laid down are generally reasonable and not too far from our domestic sales law as embodied in the Uniform Commercial Code. These international rules (and in due course also a body of interpretive materials) will be readily available in English. As a result, there will be greater certainty as to the applicable legal rules in a variety of disputed situations and less chance that an American exporter or importer will find himself subject to a rule of law far from his normal expectations.[34]

The AAEI reiterated its support for prompt ratification even after the Senate Committee on Foreign Relations decided to defer consideration.[35]

From a legal perspective, the American Bar Association also favors prompt ratification by the United States. Its report states in part:

> The United States would benefit in the following ways if it were to sign and ratify the convention. For U.S. business interests the CISG will:
>
> —avoid the difficulties of reaching agreement with foreign buyers and sellers on choice of forum or applicable law clauses because the CISG text will be a readily available compromise;
>
> —permit the parties to shape their rights and obligations to arrive at results similar to those that could be reached under the Uniform Commercial Code without fear of foreign "mandatory" rules;
>
> —decrease legal costs which might otherwise be incurred in the research of many different foreign laws because it will be easier to research the CISG text and legislative history, which is available in an official English text and will no doubt be extensively annotated; and
>
> —reduce problems of proof of foreign law in domestic or foreign courts.
>
> In addition, the United States will gain political goodwill by its endorsement of the product of UNCITRAL, a broad-based and apolitical arm of the United Nations.[36]

Despite the delay in Senate consideration of the Convention, the Ameri-

34. *Hearing, supra* note 18, at 78-79. The AAEI makes its recommendation even though it admits that exporters and importers could live with the present patchwork of national laws. *Id.* at 78.

35. Letter from Eugene J. Milosh, president of the A.A.E.I., to Senator Charles Percy (Nov. 30, 1984).

36. *A.B.A. 1981 Report to the House of Delegates, reprinted in* 18 INT'L LAW. 39-40 (1984).

can Bar Association continues to work for prompt ratification by the United States.[37]

V. ILLUSTRATION: BUYERS' REMEDIES

Analysis of the following simple hypothetical case illustrates how the Convention might operate in practice: Export Company in Singapore agrees to sell to Importer in San Francisco 20,000 electronic widgets, shipment to be made by air freight from Singapore before December 31. Export Company does not ship the widgets by the agreed date. What remedies does Importer have under the Convention?[38]

An attorney researching this problem will find that Importer has remedies under two principle clusters of articles of the Convention: Articles 45-52 (remedies available only to the buyer) and Articles 71-88 (remedies available to both buyers and sellers). In addition, the introductory articles of Part III set out several relevant provisions, including a definition of "fundamental breach."[39]

In theory, Importer will first consider bringing an action of specific performance when Export Company fails to deliver. Article 46(1) provides: "The buyer may require performance by the seller of this obligation unless the buyer has resorted to a remedy which is inconsistent with this requirement."[40]

Importer's claim to specific performance is significantly limited, however, by an earlier general provision of the Convention. Article 28 provides:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.[41]

Given the common-law traditions of both the United States and Singa-

37. The A.B.A. Section of International Law and Practice has established an ad hoc committee, chaired by David N. Goldsweig, to promote the Convention. The ad hoc committee plans to sponsor several symposia around the country to bring the Convention to the attention of United States lawyers. The Section's Comparative Law Division has a Private International Law Committee which is also mobilizing support for the Convention under the direction of Reed R. Kathrein and Grant R. Ackerman.

38. Assume that the Convention is in force, that both Singapore and the United States are parties to the Convention, and that the contract does not include a choice-of-law clause excluding application of the Convention.

39. CISG, *supra* note 1, art. 25.

40. *Id.* art. 46(1).

41. *Id.* art. 28.

pore, Importer probably could not obtain specific performance under the Convention. In any event, Importer is unlikely to demand specific performance because enforcement would be costly and difficult and Importer can probably purchase similar widgets on the widget market. Moreover, Importer would be less than confident about obtaining adequate performance from Export Company after the breach.[42]

Rather than specific performance, Importer is more likely to demand cancellation, or, as the Convention would say, "avoidance" of the contract. If certain conditions are met, Importer may avoid the contract and thereby release both parties from their contract obligations, subject to the recovery of damages.[43] In general, the Convention will not permit Importer to avoid the contract for minor defaults. Even in the case of non-delivery, Importer does not automatically have a right to cancel: either the non-delivery must be a "fundamental breach" or Export Company must fail to deliver within an additional period of time granted by the Importer.[44] Article 25 defines a fundamental breach as follows:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.[45]

In this example, a fundamental breach occurs if Export Company never ships the widgets. If, however, Export Company makes or proposes to make a late shipment, the breach may not be fundamental.[46] After learning that the widgets will not be shipped within the contract time, Importer may grant Export Company a reasonable extension of time within which to perform.[47] During this period Importer may not avoid the

42. For a discussion of the Convention's specific performance provisions, see Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 249-51 (1979); *see also* Comment, *Remedies Under the U.N. Convention for the International Sale of Goods*, 2 INT'L TAX & BUS. L. 79, 96-99 (1984).

43. *See* CISG, *supra* note 1, arts. 49, 81; *see also id.* art. 26, stating: "A declaration of avoidance of the contract is effective only if made by notice to the other party." For discussions of the avoidance provisions, see Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, *in* INTERNATIONAL SALES, supra note 6, § 9.03[2]; Michida, *Cancellation of Contract*, 27 AM. J. COMP. L. 279 (1979).

44. CISG, *supra* note 1, art. 49(1).

45. *Id.* art. 25.

46. For criticism of the fundamental breach provisions, see Ziegel, *supra* note 43, § 9.03[2][b].

47. This provision is frequently called *Nachfrist* after a similar German institution from which the Convention provision is borrowed.

Convention. If Export Company, however, fails to deliver within this additional time, Importer may avoid the contract regardless of whether the non-delivery is a fundamental breach. By taking advantage of this notice provision, the Importer avoids the difficult determination of whether the original non-delivery is a fundamental breach.[48]

If Importer has not avoided the contract, Export Company has a right to force Importer to declare his intentions. Knowing that it cannot make timely delivery, Export Company may notify Importer that it proposes to ship the widgets late. This notice, if received by Importer, operates as a request that Importer inform Export Company whether late delivery will be accepted. Importer is free to accept or deny this request, but if Importer accepts or does not respond, Export Company may make delivery within the time specified and Importer may not avoid the contract during this period.[49]

Even if Importer may not avoid the contract or if he chooses not to do so, Importer may be entitled to recover damages. The general damage formula provides for recovery of "a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."[50] This formula would seem to encompass incidental and consequential damages, subject, however, to two significant limitations: (a) damages may not exceed those damages foreseeable at the time of contracting; and (b) damages will be reduced by the amount which the non-breaching party failed to mitigate.[51] If Importer avoids the contract following non-delivery, the general formula is supplemented by the more specific damage formulas of Articles 75 and 76, which allow Importer to recover the cover-contract price differential or market-contract price differential.[52]

VI. CONCLUSION

The Convention should be judged by whether it improves the present situation. Applying this test, most commentators conclude that the Convention is an improvement. This single text of the Convention will displace the numerous different sales laws which domestic courts would otherwise have to apply when choice-of-law rules require application of

48. CISG, *supra* note 1, art. 47.

49. *Id.* art. 48(2)-(4).

50. *Id.* art. 74.

51. *Id.* arts. 74, 77. *See also id.* art. 82 (a party may not rely on the other party's failure to perform when the first party caused the failure); *cf.* U.C.C. § 2-715.

52. *Id.* arts. 75, 76; *cf.* U.C.C. §§ 2-712, 2-713.

foreign law.[53] The Convention will also provide a readily available text for parties who cannot agree on the national law to govern their contract. Moreover, the Convention's provisions will be a repository of model clauses which international traders may incorporate into their contracts. The importance of the Convention should not be exaggerated. As the American Association of Exporters and Importers has stated,[54] most international traders can live with the present patchwork of national sales laws. But even if its contribution is modest, the Convention will satisfy the laudable UNCITRAL objective of eliminating unnecessary legal barriers to the free flow of international trade.

53. This is not to say that choice-of-law rules will be altogether irrelevant once the Convention comes into effect. As noted earlier, choice-of-law rules remain important in two different contexts. When a forum's choice-of-law rules lead to the law of a Contracting State, the Convention will be applicable by virtue of Article 1(1)(b). More importantly, gaps in the Convention text which cannot be filled by the Convention's general principles are to be filled by reference to the national law which would be applicable by virtue of the forum's choice-of-law rules. CISG, *supra* note 1, art. 7(2).

54. *See Hearing, supra* note 18.