Prospects for the Unification of Sales Law at the Regional or International Level: A Scandinavian View

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I. Regional Unification: Scandinavian Legislation on Sales.

Around 1890 it became evident that the Swedish law of sales, based mainly on the Swedish Code of 1734, was hopelessly outdated and a proposal for a sales act was drafted and published in 1894. In 1898 Professor Julius Lassen, a well-known Danish scholar, raised the issue of making this draft the basis for a uniform Scandinavian *Sale of Goods Act*. He pointed to the need for common Scandinavian legislation within this important field and, while criticizing a number of details, expressed the view that on the whole the draft would serve well as a basis for common legislation. Shortly afterwards commissions were appointed in Denmark, Norway and Sweden to continue the work on sales law. This work culminated in 1903 and 1904 with the commissions presenting new drafts which, with few unimportant changes, were enacted in the respective countries. The Swedish statute dates from 1905, the Danish one from 1906, and the Norwegian one from 1907. Discrepancies between the statutes are slight and are mostly due to differences between the languages or the drafting traditions of the countries concerned; there are very few substantial points where the statutes differ.

The time chosen for this legislative work was fortunate; the Scandinavian legislators could profit from the experience of the German Civil Code (*the Bürgerliches Gesetzbuch*) and the English *Sale of Goods Act*. In addition, Scandinavian legal science was at a peak at the time, and leading scholars — among whom, besides Julius Lassen, the Norwegian Fredrick Stang and the Swede Tore Almén may be mentioned — took part in the work.[1]

Altogether the Scandinavian *Sale of Goods Act* is generally considered to be a highly successful piece of legislation. One reason for

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[1] The general method of uniform legislation employed in Scandinavia is described in Hellner, *Unification of Law in Scandinavia*, (1968-69), 16 Am. J. Comp. L. 88.

its success was that it was soon made the subject of a Swedish commentary by Almén, which was studied in the other Scandinavian countries.[2] An indication of the unifying influence of this commentary can be found in the fact that Finland — which at the time of the enactment of the statutes was not an independent country and therefore could not participate in the drafting of the uniform legislation — has adopted the same principles as the other Scandinavian countries, and it is often said that Finnish courts follow Almén's commentary as closely as Swedish courts.

The role of the Scandinavian *Sale of Goods Act* is somewhat complex. None of the countries which have enacted it have any "code of obligations" in the Continental European sense, and legislation on leases of movable property, contracts for work, building contracts, and similar contracts, is also deficient. Nor has case law the same importance as in common law countries, and wherever possible the courts follow by analogy existing statutes or even the legislative history of such statutes.[3] Almén, Lassen, Stang and other writers generally treat the rules of the *Sale of Goods Act* as examples of general principles, or at least as important solutions of general problems. The influence of the *Act* is therefore felt in other branches of the law as well, and any change made in this statute might affect these branches, or at least make the position there more uncertain.

At the same time, the *Act* has the definite aim of providing law that is acceptable to merchants. At all stages of the preparatory work, the commissions cooperated with businessmen. The commentary of Almén abounds in references to commercial practice. Most of the rules apply both to commercial sales (where both parties are merchants who contract in the course of their business) and other sales; however, in commercial sales the duties of the parties are sometimes stricter than in other sales. Even so, it has often been said that the *Act* requires too much from parties that are not accustomed to business routine, for example as regards giving notice of defects in goods.

Formation of contracts is not dealt with in the *Sale of Goods Act*, but rules on this subject are found in another uniform statute, the *Contracts Act*, enacted between 1915-18,[4] which applies to contracts in general. Much of what can be said of the *Sale of Goods Act* is true also of the *Contracts Act*.

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[2] Om Köp och Byte av Lös Egendom, 4th ed., R. Eklund ed., (1960).

[3] See Hellner, "The Sanction for Breach of Contract, Including Anticipatory Breach, in Swedish Law" in *Swedish National Reports to the VIIth International Congress of Comparative Law, Upsala 1966*, (1966), p. 23.

[4] *The Contracts Act* was adopted by Finland in 1929.

The importance of the *Sale of Goods Act* at the present time is not easy to ascertain. In the first place, very few cases concerning sales now go to the courts. When seller and buyer disagree they will generally try to settle the dispute by negotiations. If the negotiations are unsuccessful the issue will probably be referred to arbitration. Private persons seldom can afford the present costs of litigation. Further, it is constantly said by businessmen that coming to a peaceful settlement with a customer, with whom one deals continuously, is much more important than winning a law suit. In the second place, the use of standard form contracts is exceedingly widespread, and to a large extent these contracts have replaced the rules of the *Sale of Goods Act.* It is not entirely clear what kinds of goods the legislators originally had in mind when they framed the rules, but it is easy to see that the examples of Almén generally refer either to commodities and other goods that are sold in large quantities, or to that old favourite, the horse. At present, contracts for the sale of machinery and engineering equipment are considered to require special attention with regard to legal regulation; for them great parts of the *Sale of Goods Act* are not suitable.[5]

On the other hand, the *Sale of Goods Act* retains its old position as an important source of influence in the general field of contract law, and it plays a major part in legal teaching in all the Scandinavian countries. If it is true that taught law is tough law, then the prospects of the Scandinavian *Sale of Goods Act* are excellent for a long time to come.

The unification of sales law in Scandinavia thus works successfully, reflecting both the close economic cooperation between the Scandinavian countries and their common legal tradition. The attitude of these countries towards a proposal of giving up their regional unification for a wider system of unification would therefore be as hesitant as their attitude towards a proposal to exchange their basic principles of contract law for a body of international rules.

The success of the common Scandinavian legislation on sales does not raise any obstacle towards plans for a reformation of this legislation, to be undertaken jointly and with the aim of maintaining the unity already gained. As mentioned before, Finland has not adopted the uniform Scandinavian *Act,* but it has need for the codification

[5] General conditions for the sale of engineering goods, which are mainly based on the *Commentary of the General Conditions for the Supply of Plant and Machinery for Export Prepared under the Auspices of the United Nations Economic Commission for Europe,* (1956), U.N. Doc. E/ECE/220 (E/ECE/1M/WP. 5/16).

of its sales law. Finland, naturally, is not willing to enact a statute which contains word for word a text that was produced at the beginning of this century. National commissions, cooperating with each other, have therefore been set up in Denmark, Finland, Norway and Sweden for the purpose of preparing a revision of the Scandinavian *Sale of Goods Acts*.[6] The aim of the revision is limited. The basic principles and concepts are to remain unchanged; only on special points, where the present law appears unsatisfactory, are reforms to be undertaken. Two special aims have been set for the reform: to provide better protection for the consumer; and, to bring the law closer to the *Uniform Law on the International Sale of Goods*. The latter aim can be justified by several arguments. If the Scandinavian countries are to adopt the *Uniform Law*, it is obviously desirable that the law for domestic sales and the law for international sales agree as far as possible. But even if they do not, the Scandinavian countries should profit from the experience gained in the *Uniform Law* and, where suitable, make use of the solutions found there.[7]

It is uncertain when any result can be expected from the work on the revision of the Scandinavian *Sale of Goods Act*, but the earliest time by which any final draft can be produced is towards the end of 1969.

II. International Unification of Sales Law.

The work on the *Uniform Law on the International Sale of Goods* began during the latter part of the 1920's when Ernst Rabel made the first preparations.[8] An international commission was appointed in 1930 which delivered its first draft in 1935. The work continued, with interruption only for the Second World War, in drafts published in 1939, 1956 and 1963. Each draft was submitted to the Governments interested or, in the case of the 1939 draft, to an international conference. Finally, in 1964 the Convention relating to a *Uniform Law on the International Sale of Goods* was produced by a Diplomatic Conference working at the Hague.

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[6] The writer is one of those charged with the task of preparing the revision in Sweden.

[7] For a German discussion in the same vein, see Weitnauer, H., "Vertragsaufhebung und Schadensersatz nach dem Einheitlichen Kaufgesetz und nach Geltendem Deutschem Recht" in *Rechtsvergleichung und Rechtsvereinheitlichung*, (1967), p. 71.

[8] See *Rapport sur le droit comparé en matière de vente par l'Institut für Ausländisches und Internationales Privatrecht*, (Rome, 1929), reprinted in Rabel, *Gesammelte Aufsätze*, vol. 3, (1967), p. 381.

For a long time, the real leader of the work was Rabel, who devoted much of his enormous capacity towards this important task of unification.[9] Among those who took continuous part in the work was a Swede, Judge Algot Bagge (who is probably the only person to have participated during the whole period from 1930 to 1964). Other Scandinavians also cooperated during shorter periods.

Rabel was familiar with the Scandinavian *Sale of Goods Acts*, and in his great comparative work there are numerous references to Almén's commentary in a German translation.[10] On some points Scandinavian law has provided the model for the *Uniform Law*, as can be seen from the reports accompanying the various drafts. On other points there is similarity between the Scandinavian *Act* and the *Uniform Law* due to a common influence. Altogether, the structure and main principles of the *Uniform Law* make it particularly easy for Scandinavians to understand the *Law*. The concept of "delivery of the goods", which occupies a central position in the rules regarding the seller's obligations, corresponds on the whole to a similar concept in Scandinavian law, although there are some differences.[11] The remedy which, in the English text, is styled "avoidance", like the corresponding remedy in Scandinavian law, is independent of any right to claim damages. The right to have a contract avoided immediately upon the breach of the other party (*i.e.* without first having set a *Nachfrist*) presupposes that the breach is "fundamental", and on this point too there is essential similarity to Scandinavian law. Another instance where the Scandinavians find the system of the *Uniform Law* similar to their own law is that the passing of the risk is governed without any reference to the passing of property in the goods.

The Scandinavians have thus had special reason to regard the various drafts of the *Uniform Law* in a favourable light, and on numerous occasions they have expressed their desire that such a law should come into force. It has always been presupposed that two conditions would then apply: that the law should be limited to international sales and have no application to domestic sales; and, that efforts at regional unification, such as the one existing between the Scandinavian states, should be respected. These conditions are

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[9] See in particular: Rabel, *Das Recht des Warenskaufs*, vol. 1, (1936, repr. 1957), vol. 2, (1958) and numerous essays reprinted Rabel, *op. cit., supra*, n. 8.

[10] Almén, *Das Skandinavische Kaufrecht*, vols. 1 & 2, tr. Neubecker, (Heidelberg, 1922).

[11] To Americans, on the contrary, the *Uniform Law's* concept of "delivery" gives particular trouble; see Honnold, *A Uniform Law for International Sales*, (1958-59), 107 U. Pa. L. R., 299, at pp. 317, 324.

fulfilled by the provisions of the *Uniform Law* and the International Convention.[12]

After the completion of the *Uniform Law* at the Hague Conference, it was submitted to various business organizations in the Scandinavian countries, these organizations being invited to express their opinion on the desirability of adopting the *Law*. In Denmark, Finland and Norway the organizations mainly confined themselves to expressing their favourable attitude towards the prospect of reaching unification in the law of international sales. These countries suggested that the adoption of the *Law* should depend mainly on the reaction of the countries which constitute the main business partners of Scandinavia. In Sweden, on the other hand, the business organizations appointed a special committee, which scrutinized the *Law* in detail and returned an unfavourable verdict.[13] In the opinion of the committee, Sweden should not adopt the *Law* under present circumstances. If the situation were to change — if other countries with which Sweden has important business relations were to enact it — the question of adoption should be taken up again for further consideration. The criticism of the Swedish committee is based on a number of interrelated reasons. One is that the *Uniform Law* contains some unfortunate rules, the consequences of which cannot be avoided through suitable contract clauses without great difficulties. Another is that too many important problems remain virtually unsolved and that the influence of the *Law* cannot be predicted when such problems arise in practice.

Recently the question of unification of sales law by legislation has been brought up before another forum. The United Nations has set up the United Nations Commission on International Trade Law (UNCITRAL), which is specially concerned with the problems of the underdeveloped countries. One of the two priority subjects chosen by the Commission is the international sale of goods.[14] It is far too early to form any opinion on what the Commission can do in this field, but of course its work deserves close attention. On the initiative of the Commission, a questionnaire has been distributed

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[12] See also the definition of an international sale in Art. 1 of the *Law* and the reservation permitted by Art. 2 of the Convention.

[13] The opinion of the committee is expressed in a memorandum dated March 7, 1967 (mimeo.). The basis for the work of the committee was a memorandum on the *Law* written for the Swedish Ministry of Justice by the present writer: P.M. angaende ett vid 1964 ars köplagskonferens i Haag upprättat förslag till enhetlig lag om internationella köp av lösa saker, (mimeo. 1966).

[14] See U.N. Comm. on Int. Trade Law, *Methods of Work for Priority Topics*, (1968), U.N. Doc. A/CN.9/9.

among the member states and specialised agencies of the United Nations. States are invited to indicate whether or not they intend to adhere to the 1964 Hague Conventions and state the reason for their position. The answers to the questionnaire are not yet known.

III. Attitudes Toward International Legislation.

From the Scandinavian point of view [15] the question of adopting the *Uniform Law on the International Sale of Goods,* or any other similar statute, raises several problems which must be considered separately.[16]

The first question is whether unification on an international scale brings any advantages which are worth seeking. To this question the answer is undoubtedly in the affirmative. No hesitation on this point has been expressed in Scandinavia.

When we ask how widespread international unification must be to be worthwhile, we face greater difficulties. The regional unification achieved by the present *Sale of Goods Acts* will, because of the importance of the trade within Scandinavia, make international unification somewhat less important. Practically speaking, unless the Common Market countries adopt the *Uniform Law on the International Sale of Goods,* it is unlikely that many Scandinavians will think it worthwhile to adopt this law. But is this enough? What about Great Britain and the United States? What about other countries? Great Britain has ratified the Hague Convention of 1964 but with the very important reservation allowed by Article V of the Convention. A state which has made this reservation will apply the *Uniform Law* only to those contracts in which the parties have chosen the *Law* as the law governing the contract. From the practical point of view, ratification with this reservation will not at present be considered an important step toward ensuring that the *Law* will apply to business relations between Great Britain and other countries. But of course the situation may change. The position of the Commonwealth countries is not known. They were not represented at the Hague Conference and therefore have had less reason than others to consider the adoption of the *Uniform Law.*

The United States is the great question-mark. The Swedish Export Association, when giving its opinion on the desirability of

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[15] The Scandinavian point of view is taken here as the only one familiar to the writer but which is probably in many regards that of other countries.

[16] The opinions expressed here are of course entirely the writer's own and represent neither the official Swedish attitude nor that of the Swedish business organizations.

adopting the *Uniform Law*, stated expressly that any uniform law that is to be of sufficient value to Swedish exporters must be acceptable to the United States.[17] It is not clear whether others will go so far, but certainly the attitude of the United States is considered by all to be of the greatest importance. But what will the United States do? Thus far, there have been few signs that the United States will adopt the *Uniform Law*.[18]

Another important question is how far a uniform law must agree with the domestic law in order to be acceptable. For reasons already stated, no great problems arise in this respect in Scandinavia regarding the statute under discussion. On some key points there is close agreement between the two Acts, and work on revising the Scandinavian Sales Acts with the aim of profiting from the experience laid down in the *Uniform Law* is already in progress. The importance of this kind of agreement should, on the other hand, not be exaggerated. It is not likely that any uniform statute that is acceptable from other points of view would fail in this respect. Anyone taking part in international trade must submit to the principles governing such trade. On most important points either the individual contract, a standard contract, or the customs of the trade, will decide the issues, and the role of a statute is therefore limited. Generally speaking a uniform law is much closer to the domestic law of the adopting country than are the laws of those countries which, according to the principles of private international law, might apply to a particular contract.

Turning next to the question whether the *Uniform Law* deals with the subjects that are most important for international trade, we must look at the substance of the provisions of the *Law*.[19] Undoubtedly,

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[17] Letter from the Swedish Export Association to the Swedish Government, dated March 21, 1967.

[18] See in particular, Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, (1965), 30 Law & Contemp. Prob. 326; Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique, ibid.*, 354; Farnsworth, *Some Basic Diffcrences Between the American Law of Sales and the Draft Uniform Law on the International Sale of Goods*, (1965-66), 14 Am. J. Comp. L. 227; Farnsworth, *Book Review*, (1968), 66 Mich. L.R. 583; Nadelmann, "A plea for Coordination of Movements for the Unification of Law" in *Akrothinia Petros G. Vallindas*, (1966), p. 157. A slightly more favourable view is taken by Daw, *Some Comments from the Practitioner's Point of View*, (1965-66), 14 Am. J. Comp. L. 242.

[19] An earlier draft (which in this respect did not differ from the final *Law*) was criticized by Kahn, *La vente commerciale internationale*, (1961), at p. 31, who found that the text was not modern enough and had «beaucoup souffert de son origine gouvernementale». The final product is reviewed more favourably by Kahn, *La convention de La Haye du 1cr juillet 1964 portant Loi uniforme sur la vente internationale des objcts mobilicrs corporels*, [1964] Rev. trim. dr. comm. 689.

the *Uniform Law* deals with most of the subjects that are treated in earlier national statutes on sales, such as the English *Sale of Goods Act*, the American *Uniform Sales Act*, and the Scandinavian *Sale of Goods Acts*, and in books on sales forming part of more comprehensive codifications, such as the French *Code civil*, or the German *Bürgerliches Gesetzbuch* and *Handelsgesetzbuch*. But in each legal system general principles of the law of contracts or the law of obligations can also be applied to sales, and it is often uncertain how far the provisions of the *Uniform Law* can, and should, replace these principles. The *Uniform Law* contains some articles that are clearly meant to prevent the substitution of national rules in the guise of general principles [20] for the rules laid down in the *Uniform Law* itself. On the other hand, the *Uniform Law* must be supplemented by national principles in some respect, particularly since Article 8 restricts the *Uniform Law* to "the obligations of the seller and the buyer arising from a contract of sale."

It is not possible to discuss these questions in detail, but it must be admitted that here we face here some of the most difficult problems regarding the *Uniform Law*. It may happen that disputes between parties which cannot be settled with reference to the contract will often concern matters on which it is doubtful whether the *Uniform Law* takes any position. One example will suffice: has the *Uniform Law* any influence on problems concerning "products liability" and, if not, how does it draw the line between liability governed by its rules and liability governed by the principles of domestic law relating to products liability? [21]

The question, whether the *Uniform Law* deals with the most important aspects of international sales has other facets than the

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[20] Art. 34 (remedies for lack of conformity other than those provided by the *Law*), Art. 53 (remedies for the seller's failure to transfer property in the goods), Art. 24(3), and Art. 64 (denying a party the right to appeal to a court or arbitral tribunal for a "period of grace"). A general provision with the same purpose is Art. 17, which prescribes that questions concerning matters governed by the *Law* which are not expressly settled therein shall be settled in conformity with the general principles on which the *Law* is based. This rule in itself gives rise to problems of interpretation: see Dölle, "Bemerkungen zu Art. 17 des Einheitsgesetzes über den Internationalen Kauf Beweglicher Körperlicher Gegenstände" in *Festschrift für H. G. Ficker*, (1967), 138.

[21] The writer took the position that the *Law* does not apply to questions of products liability in his memorandum on the *Law*, *op. cit.*, *supra*, n. 13, at p. 105, but the committee appointed by the Swedish business organizations expressed doubts as to the correctness of this assumption in their memorandum, *ibid.*, at p. 52. See Szakats, *The influence of Common Law Principles on the Uniform Law on the International Sale of Goods*, (1965-66), 15 Int. & Comp. L.Q. 749, at p. 771.

one just mentioned. This is exemplified by the intervention of the State in matters which affect seller and buyer, by requirements of export and import licences and certificates of origin, by customs provisions and currency regulations, and so forth. In most countries there are also numerous restrictions on the importation of food because of considerations of public health. Similar requirements on imports may occur for other kinds of goods. It is easy to understand why national legislation, which may date from the beginning of this century, frequently does not deal with such matters, but it is another question whether modern legislation specially designed to govern international sales should not deal with them.[22] However, in the writer's opinion, even if we think it desirable that modern legislation on sales should give guidance on such questions — which is not beyond dispute — we cannot very well refrain from adopting a statute because it does not deal with all the subjects which we should like to find regulated in it.

Continuing in the same vein, we find that the *Uniform Law* lacks provisions dealing with well-known clauses occurring in almost every international contract of trade, such as f.o.b. and c.i.f. clauses. Earlier drafts contained short rules of a few clauses, but these were omitted in later drafts and in the final statute. This is perhaps not a serious defect because, as has been pointed out, the International Chamber of Commerce is better equipped to deal with the content of these clauses.[23] The continuing development of transportation techniques and the consequent need for repeated adjustments of the clauses to contemporary practice make it undesirable to fix the contents of the clause in an international convention. But it may be objected that it is often doubtful to what extent the rules of the *Uniform Law* can influence the application of such clauses. For instance, can Article 19 of the *Uniform Law* be applied to an f.o.b. or a c.i.f. contract which contains no explicit reference to the "incoterms" or any similar body of rules?[24] Perhaps more important

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[22] See Kahn, *La vente commerciale internationale*, at p. 307; Berman, *loc. cit.*, at p. 357.

[23] At the 1951 Hague Conference, where an earlier draft of the *Law* was discussed, opinions were divided on the question whether the *Law* should contain any provisions on the clauses; see *Actes de la Conférence convoquée par le Gouvernement Royal des Pays-Bas sur un projet de convention relatif à une loi uniforme sur la vente d'objets mobiliers corporels*, (Rome, 1952), at pp. 240, 262.

[24] A reference to the "Incoterms", which have been adopted by the International Chamber of Commerce, would probably be considered to exclude the application of the *Uniform Law* entirely. See Honnold, (1965), 30 Law & Contemp. Prob., 326, at p. 340; Schmitthoff, "The Risk of Loss in Transit in International

is the question, whether the rules of the *Uniform Law* can be applied in conjunction with the "Incoterms"? As the "Incoterms" only prescribe how the parties should act, and do not deal with the consequences of a breach, — a matter which is referred to the national law applicable — the lack of attention to this problem may have unforeseen consequences.

Related to this question is whether the *Uniform Law* can operate in conjunction with the standard contracts commonly in use in international trade. Much of course depends on the standard form contracts themselves. A possible view is that such contracts should be rewritten in order to be adjusted to the *Uniform Law*. However, this latter view would impair the utility of the *Uniform Law* considerably, at least until the *Uniform Law* has been universally accepted, not only by States, but also by the business world, which in the absence of mandatory rules will decide for itself what principles it will accept.

It might be suggested that there is no need to fear that the position will be more difficult under the *Uniform Law* than under existing national laws. But this is not certain. The *Uniform Law*, Articles 55 and 70, states in general terms the consequences of breaches of contract not specifically regulated by the *Law*. If a standard form contract imposes an obligation without stating the sanction for its breach, the *Uniform Law* can be applied without regard to the fact that its system of sanctions may differ entirely from that provided by the contract itself for cases explicitly regulated by it. We face here a problem similar to that just mentioned with regard to the transportation clauses.

A related problem arises from the fact that the *Uniform Law* aims to apply to all kinds of goods and to all kinds of business relations. It can be maintained that commerce is at present so diversified that no single statute can be applied to all types of sales.[25] Such a view would be too pessimistic. The aim of the uniform legislation must be fairly modest, and, as mentioned before, for all really important questions individual contract clauses, standard contracts, and customs of the trade will provide the answer. International standard contracts generally presuppose that they can be applied in conjunction with national legislation which is not limited to any particular trade. The *Uniform Law* should be able to fulfil the same function as those national laws.

Sales" in *Unification of the Law Governing International Sales of Goods*, John Honnold ed., (Paris, 1966), 169, at p. 183.

[25] See Kahn, *La vente commerciale internationale, supra*, n. 19.

The final word on the desirability of adopting the *Uniform Law* will depend, of course, on one's opinion about the suitability of its rules when regarded as practical solutions to the problems of international trade. The *Uniform Law*, in this respect, should be compared with the different systems of national law which it is intented to replace. Many lawyers, and perhaps even many businessmen, will always consider their own national law to be the best system, simply because they are trained in it and are used to working with it. But since in an international contract there are by definition two parties, each having his own law, it is impossible for both of them to have their law applied on matters on which the two systems disagree. Thus the primary test of the *Law* should be whether, on the average, a party will accept it as preferable to the other party's law. Judged from this view-point, the *Uniform Law* exhibits many qualities. The absence of any references to the "doctrine of impossibility", which has exercised so strong an influence on German, and even Scandinavian, law is in the writer's opinion a great boon. Similarly, it is a distinct advantage that the rules on non-conformity of goods, in Articles 33-37, have been constructed without relying on any concept of a "guarantee" for the goods, with the additional result that the differences between a performance of an *aliud* and of a *peius* have disappeared. It may be assumed that those previously unfamiliar with such historical residues will be happy not to encounter them when, in an international contract, the other party's law is to be applied.

It is of course possible to raise the requirements of a uniform law even higher, and to demand that it should contain not only relatively, but also absolutely speaking, good rules. In many respects the *Uniform Law* fulfils the latter requirements. The diversity of opinions concerning what is the best rule will, however, prevent any general agreement on the absolute quality of the solutions offered by the *Uniform Law*.

Unfortunately, when the quality of the practical solutions are judged, defects may count more than merits. Few parties will be willing to use a law which will work well in many respects, but which may in some contingencies lead to unacceptable consequences, or whose consequences cannot be predicted with sufficient certainty. It is not possible here to analyse the *Uniform Law* in detail to see whether any such objections can be raised against it, and it may be recalled that the main criticism of the Swedish business organizations was based on this ground.[26] In the writer's opinion, the part

[26] See *supra*, n. 13.

concerning "remedies for lack of conformity", Articles 41-49, is so exceedingly complex that it is hard to see how it can work in practice.[27] An the articles on "remedies for non-payment", Articles 61-64, contain rules which often do not make sense if one tries them on the various possible situations of non-payment or late payment — before, at the same time as, and after delivery of the goods to the buyer.

If one finds what appears to be an unfortunate rule, it may sometimes be possible to avoid its undesirable consequences by construing the rule in accordance with the requirements of common sense, if necessary, against the apparent literal meaning of the text. How far this is necessary and possible with regard to the *Uniform Law* is hard to judge at present, as the *Law* has not yet been the subject of any thorough analysis of this kind which is accessible in print to the general public.[28]

Another aspect of the same problem is whether the system of obligations and remedies of the *Uniform Law* is satisfactory. Here the difference between legal systems will be of particular importance. For a long time, the right to require specific performance was a stumbling-block to the attempt to find rules acceptable to both common law and civil law systems. A workable solution has been found, and this problem need not trouble us any more.[29] A similar question has been to reconcile the German notion of fidelity to the negligence rule with the Anglo-American and French tradition of upholding strict liability for damages in sales law. At all stages, including the final version of the *Uniform Law*, the principle of strict liability has been victorious, with one reservation — it is possible that the text of Article 74, as adopted at the Hague Con-

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[27] The confusion regarding these rules prevailing even during the last hours of the Conference can be studied in the records of the Conference, *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods*, vol. 1, (1966), at p. 317. After the text of Art. 52 (the present Art. 43), which bad been adopted at an earlier session, had been discussed once more in a plenary session and the text of the Article earlier agreed upon had been re-established, the chairman of the drafting committee once more took up the question of what this article should contain. No one even commented on his proposal, and the session closed a few minutes later.

[28] Probably the most thorough analysis of the *Law* is to be found in official memorandums which are not in print and are not accessible to the public. But this is guesswork.

[29] The matter has been reduced by Art. 16 to a question whether a Court is bound to enter or enforce a judgment providing for specific performance, and there is a rule, Art. 8, under which the Court's duties in this respect are limited to what it would do in respect of similar contracts of sale not governed by the *Uniform Law*.

ference in 1964, contains a concession to the concept of negligence.[30] Since apparently the present law is acceptable to all parties concerned, no great problem seems to arise.

A matter relating not so much to the difference between legal systems as to the difference between statutory rules and standard contracts, is the use of the remedy of "avoidance" in the *Uniform Law*. Although the *Uniform Law* restricts the cases where an aggrieved party may avoid a contract because of the breach by the other party to cases where the breach is "fundamental", or where the defaulting party has not fulfilled its obligation within a supplementary period known as a *Nachfrist,* there is still a considerable difference between this system and that found in several standard form contracts in common use in Europe, notably the ECE contracts. According to these contracts, it is only in exceptional cases that a party may avoid the contract because of a breach by the other party.[31] Whatever opinion one may hold personally on the justification of the rules of the *Uniform Law,* one should not be surprised that sellers are unwilling to submit to the more rigorous rules of the *Uniform Law.*

In the writer's opinion, the problem is caused by the fact that we actually have two different types of sale contracts. The system of the *Uniform Law* is based on the idea that the aggrieved party can use the right to avoid the contract, if a breach is pending or has been committed, as a means for forcing the other party to perform, or, if he does not succeed in this aim, as a way of liberating himself from his obligation. He will employ the right to claim damages as a means of getting compensation for the loss. The standard form contracts largely use the remedy of a penalty for both the primary purpose of forcing the other party to perform, and for the secondary purpose of ensuring compensation (which may be more or less full) if the other party does not fulfil his obligations.

The system of the *Uniform Law,* which is essentially the same as that of most other statutes on sales, is cruder. It is intended to be applicable to all kinds of goods, and is based on the idea that the parties, should rely entirely on the statutory remedies for breach of their contractual obligation. The system of standard form

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[30] See Riese, *Die Haager Konferenz über die Internationale Vereinheitlichung des Kaufrechts vom 2. bis 25. April 1964,* (1965), 29 Rabels Zeitschrift 1, at p. 18.

[31] See Godenhielm, *Some Views on the System of Remedies in the Uniform Law on International Sales,* [1966] Scandinavian Studies in Law 9, at p. 19.

contracts is better adapted to certain kinds of goods and more lenient to a defaulting seller than that of the *Uniform Law*, but it requires that the parties agree in advance on the amount of the penalties, and it presupposes a certain amount of mutual confidence. Whether it is possible to base a statutory system, which must apply to many different kinds of goods and contracts, mainly on the use of penalties seems doubtful. On the other hand, a system which does not use penalties, but yet restricts the right to avoid the contract and to claim damages as much as the standard form contracts do, seems to be of doubtful value.

In some cases a contract may be avoided *ipso facto* according to the *Uniform Law*. This generally occurs where one party has failed to give the other party notice of his decision when that party is in breach.[32] In Sweden, the objections to these provisions have been particularly strong, but apparently they have been based on some kind of misconception of the meaning of this unfortunate expression. That the contract is avoided means only, contrary to what one might expect, that neither party can require performance from the other party; performance already received must be returned unless it can be set-off against some other claim.[33] The point really open to dispute seems to be whether one should force a party to give notice on so many occasions, with the sanction of losing the right to claim performance from the other party if the notice is omitted. In other situations, notably those where the contract has been performed, a similar question arises, that is, whether a party who fails to give notice should lose his right of rejecting the goods. These are questions on which opinions may differ.[34]

Altogether the *Uniform Law on the International Sale of Goods* has many debatable features, and not all of them can be explained by the impossibility of finding solutions which will be entirely satisfactory to everyone concerned. The future of the *Uniform Law* in Europe is currently uncertain, but it may well become clearer within a short period.

What has now been said applies only to the *Uniform Law on the International Sale of Goods*, not to the *Uniform Law on the Formation of Contracts for the International Sale of Goods*, which was also established at the Hague Conference in 1964. The *Formation*

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[32] See *e.g.* Art. 26 (1) & (2).

[33] The wording of Art. 78 (1), which concerns the "effects of avoidance", is very wide and must be construed with regard to what is stated in para. (2). See Honnold, *supra*, n. 18, at p. 347.

[34] See Honnold, *supra*, n. 18, at p. 346.

Law is less complex, and the similarities between legal systems are greater in this field than in that governed by the *Sales Law*. The main issue when the *Formation Law* was drafted was whether offers should be revocable or not. The outcome was a compromise under which the main principle is that offers can be revoked until they are accepted.[35] For common law countries this feature should make the *Law* easy to approve. For countries that have adopted the principle that offers are irrevocable when nothing else is indicated, the outcome is perhaps less satisfactory. But as standard contracts often contain clauses that offers are revocable until accepted, merchants too are used to this system.[36] However, there are some important cases where offers are irrevocable. In view of the present state of Anglo-American and French law it seems particularly valuable that according to Article 5(3) of the *Formation Law* any offer that states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable, cannot be revoked.

Should we consider the possibility of enacting the *Formation Law* and not the *Sales Law?* The general opinion seems to be that the two *Laws* are so intimately connected that one should have both or none. All the countries that have signed the one convention have signed the other.[37] In the writer's opinion, there are certain reasons for adopting the *Formation Law* even if one does not take the *Sales Law*. It is particularly important to have a uniform law governing the steps of entering into a contract. When the parties make a contract they can introduce into it what provisions they like, but before it is concluded they must know what effect an offer or an acceptance will have. The game of entering into a contract requires rules deciding what moves are allowed and what consequences they will have. Here the practical advantages of uniformity, and of the certainty due to codification, are obvious. In addition the rules on "firm offers", as already indicated, are of particular value.

However, the *Formation Law* will probably share the fate of the *Sales Law*, which is considered to be more important. The system of reservations allowed under the two Conventions (although not the same in both cases) is so complicated that it might cause great inconvenience to have the *Formation Law* alone applying in

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[35] See Schmidt, *The International Contract Law in the Context of Some of its Sources*, (1965-66), 14 Am. J. Comp. L. 1, at p. 14.

[36] No objections were raised against this rule when it was submitted to the Swedish business organisations.

[37] The United Kingdom first did not sign the Formation Convention but later ratified both Conventions.

some international relations and both the *Sales* and the *Formation Laws* in other relations.

IV. Prospects for Wider Unification.

In view of what has just been said, it may be thought an oversimplification to maintain that the unification of sales law within Europe is chiefly a technical problem which, if it has not been solved already by the *Uniform Law on the International Sale of Goods*, can be solved fairly easily by a revision of that *Law*. Nonetheless, this contention seems justified. The general willingness in Europe to accept the present *Law* has been abundantly proved, and if, for one reason or another, it will not be adopted in its present state, the objectionable features can undoubtedly be remedied. The general principles on which the *Law* is based have in fact already received the consent of most European states.

A much greater problem is presented by the wish to create a statute that will be acceptable in a wider sphere which also includes the United States. The Americans rightly claim that they have a codification of sales law — Article 2 of the *Uniform Commercial Code* — which is in many ways more modern and better adapted to the demands of international trade than the *Uniform Law on the International Sale of Goods*. As previously mentioned, it seems doubtful whether the United States will accept the *Uniform Law*. The same might be the case with a revised version if it should retain the essential features of the present *Law*. The practical problem for further harmonization will therefore be to reconcile the principles laid down in the *Uniform Commercial Code* with those of European Continental origin found in the *Uniform Law*. If this reconciliation is possible, it might also facilitate the adoption of harmonized legislation by other countries, which at present are not inclined to accept the *Uniform Law*.

If the *Uniform Law* is fairly universally accepted in Europe in the near future, as is possible, the problem now mentioned must be considered to be a long-range one, unless the initiative of the UNCITRAL leads to any immediate results. On the other hand, if the *Uniform Law* fails to get sufficient support in Europe, the problem may present itself soon enough.

The present occasion gives an excuse for offering some remarks on the vast subject of reconciling the two important bodies of law concerned, something in which the writer under ordinary circumstances would not venture to attempt. These remarks are of a very preliminary character and only represent the limited outlook of a representative of one small European legal community.

Article 2 of the *Uniform Commercial Code* has for a long time attracted considerable attention in Europe, and it is certainly esteemed very highly.[38] It is likely that it will have a strong influence on future legislative work on sale, regardless of the outcome of any work on unification. The principal reason lies in the realistic attitude that is found in so many of its rules. The aim of the *Code,* to conform to commercial practice and provide workable rules, makes it a touchstone for any attempt to arrive at practical modern legislation on sales.

However, there are many features of the *Uniform Commercial Code* that are unlikely to appeal to Europeans. The structure of Article 2 is unfamiliar to Europeans and it is often not possible to find the relevant provisions without resorting to the index. The stranger to the *Code* will sometimes find it unsystematized and sometimes oversystematized. The wealth of details and the length of the blackletter text make it difficult to discover the main principles. The relationship between blackletter text and commentary may also puzzle the reader who is not familiar with the *Code.*[39] Moreover, the Official Commentary is often not sufficient to explain the *Code* to those who are unfamiliar with its background; and the relationship of the *Code* to the general law of contracts is at present not easy to grasp.

The *Uniform Commercial Code* will thus, for reasons of legislative technique, cause considerable difficulties if its principles are to influence a uniform statute. However, with the help of the Americans themselves it will undoubtedly be possible to overcome these difficulties. Likewise, it should be possible to adjust the

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[38] Regarding the relation between the *Uniform Law* and the *Uniform Commercial Code,* see in particular Rabel, «Rapport à M. le Président de l'Institut sur les codes entrés en vigueur depuis le projet d'une loi uniforme sur la vente internationale, et en particulier, les formulations italienne et américaine», in *Gesammelte Aufsätze,* vol. 3, (1967), at p. 662.

[39] An example may be given. If one asks the question whether a seller can commit a breach of contract by failing to deliver within a reasonable time when no time for delivery has been agreed upon and he has not received a demand from the buyer, one finds that the black letter text, *Uniform Commercial Code* § 2-309 (1), states simply that the time for delivery shall be a reasonable time. This seems to imply that no demand by the buyer is necessary. However, the official Commentary to § 2-309 of the *Uniform Commercial Code* states, at p. 5, that the obligation of good faith requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery has expired. A foreigu reader will ask why this important qualification to the main rule is only stated in the Commentary, and what is the binding force of such a statement which is based on the general requirement of good faith.

conceptual scheme of the *Uniform Law* so as to make it more easily understandable to Americans, and to many Europeans. The great task will be to find rules acceptable to both parties on points where the factual differences are great.

It has already been mentioned that objections have been raised against the *Uniform Law on the International Sale of Goods,* because of the extent to which it permits an aggrieved party to "avoid" a contract because of the breach of the other party. The rule that "avoidance" presupposes a fundamental breach is considered to contain only the minimum requirement in this respect. The *Uniform Commercial Code,* on the other hand, has no such principle; rejection of goods because of improper delivery is allowed even if the breach is not fundamental.[40] If there has been criticism of the *Uniform Law* even as it stands, what will then be the reaction towards a statute that would contain a concession to the *Uniform Commercial Code* in this respect? This seems to be a point on which it will be difficult to arrive at a solution acceptable to both parties.

As mentioned before, specific performance has proved to be an obstacle to general agreement, and in fact it has had to be by-passed and different solutions permitted. A similar obstacle remains in the rules concerning an action for the price. For civil lawyers it seems an obvious rule that the seller be allowed to sue the buyer for the price whenever it is convenient for him. The *Uniform Commercial Code,* on the other hand, will in ordinary circumstances force the seller to re-sell the goods rather than sue for the price, and it is only when resale is impracticable that the action for the price is permitted.[41] Here is a point where the reasons for the American rule are obscure to the European: how far is this remedy embedded in historical tradition or in business practices? In general, the *Uniform Commercial Code* seems to impose stricter duties both on the defaulting, and the aggrieved, parties than are customary in European law.

The *Uniform Commercial Code* has undoubtedly reached a higher level of commercial sophistication than has the *Uniform Law,* and it might be difficult to make Americans accept the lack of regulation on important subjects which is characteristic of the *Uniform Law.* But as mentioned before, we should not reject a statute, which can be as useful as the *Uniform Law,* because it leaves a number of important problems unsolved.

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[40] *Uniform Commercial Code,* § 2-601; Honnold, *supra,* n. 18, at p. 343.
[41] *Uniform Commercial Code,* § 2-709.

If uniformity on some important matters can be reached within the foreseeable future, it should be possible to continue the work later by taking up new problems. But it is possible that on many points we should let unification develop by other means. Attempting uniform legislation on subjects which in Europe are left to private internationally drafted agreements under the auspices of the International Chamber of Commerce and similar bodies would be considered over-ambitious and would probably meet with the resistance of the business community itself.

V. Conclusions.

The prospects for reaching unification in the law of sales in a wider sphere than Europe do not seem very bright at present, but the situation can change rapidly for the better. Much of the work needed lies in the sphere of persuading all parties concerned that they must make important concessions to one another in order to achieve harmonization, and that they should not be content to trust the skill and influence of their representatives to carry their aims through at an international conference. But much work is also necessary on the intellectual plane. In spite of what has already been done in the comparative analysis of the law of sales, innumerable difficulties arise from the simple fact that we do not understand one another's laws sufficiently and, therefore, do not understand what is important to others. Much work is also needed in every country in order to facilitate the adjustment of the law of international sales to the law of domestic sales, and the law of contract in general. No country with well-developed domestic and international trade can afford to have entirely different principles apply in the two fields. Lack of sufficient preparations is as likely to defeat future work as lack of good will.