(xv) Time-limits
(xvi) Handing over of documents
(xvii) Trade Terms
(xviii) Price and Payment
(xix) Breach of contract
(xx) Avoidance of contract :
(a) Anticipatory fundamental breach,
(b) Stoppage of goods in transit, and
(c) Effects of avoidance of contract.
(xxi) Passing of risk
(xxii) Transfer of property

6. General Comments

1. Introduction

The project to unify the Law on the International Sale of Goods goes back to a recommendation made by Ernst Rabel in 1925 to the Council of the newly formed International Institute for the Unification of Private Law (UNIDROIT). Leading experts from Sweden, France, Germany and the United Kingdom representing the four principal legal systems were appointed to the original drafting committee.

The Uniform Law has been the outcome of research in the statutes, judicial decisions, legal and business literature and contract forms of practically all the countries. It was sought to use the best facilities of legal technique and to select the most adequate solutions. The Uniform Law is not the result of adoption of an eclectic procedure borrowed from the various systems of law, but a new uniform system. This has led to much criticism since the uniform rules so fashioned are without regard to whether international legal relations

to which they apply have elements which connect them to one of the signatory countries.

The object of the ULIS is merely to cover only the general aspects of the law of international sales, i. e. the contractual obligations of the buyer and seller arising out of a contract. It is not meant to be an exhaustive exposition of law covering all the rights, obligations, duties and other factors that may arise in an international transaction of sale. The Institute is in the process of preparing drafts of several uniform laws related to international sale of goods which are intended to be complementary for the progressive unification of law in all matters relating to the international sale of corporeal movables.

Among these satellite drafts, the drafts of the Uniform Law on the Formation of International Contracts on the Sale of Goods (Corporeal Movables) has been finalised. Uniform provisions in this field are not only useful but essential to the ULIS. The ULIS is further complemented by the draft Uniform Law on the Protection of the Bona-fide Purchaser of Goods, which deals with matters which, in the continental legal systems at least, belong without doubt to the law of personal property.[1] Other complementary drafts are Uniform Laws on Agency in Private Law Matters of an International Character, and the Contract of Commission on the International Sale or Purchase of Goods. The Institute has also prepared a preliminary draft of a Uniform Law governing the Substantive Validity of Contracts of International Sale of Goods. The unification of the law on international sales would be incomplete if the consequential relations were not also regulated by uniform laws.

The ULIS sets forth the basic obligations of the parties to sales contracts, delivery of the goods, their conformity with the contract payment of the price, excuse for non-

1. UNIDROIT, U.P.I. 1968 Paper : XIV, DOC. 37.

performance, remedies for breach, risk of loss etc. The ULIS was aimed at as an elaboration of a Uniform Law which will supersede all national laws.

The Uniform Law on Sale of Goods, comprising 101 Articles, demarcates its field of application under Articles 1 to 8 ; Articles 9 to 17 contain general provisions ; Articles 18-32 deal with the obligations of the seller as regards the date and place of delivery ; Articles 33-49 set out the obligations of the seller as regards conformity of the goods sold, and contain special provisions defining "lack of conformity", ascertainment and non-fixation of such lack and the remedies available for the buyer. Articles 50-55 provide for the remaining obligations of the seller. Articles 56-70 deal with the obligations of the buyer and Articles 71-95 set out provisions common to the obligations of the seller and the buyer, including rules concerning avoidance and damages. The remaining six articles relate to the passing of risk. The Convention of 15 Articles contains certain reservations which a contracting State may adopt.

Five ratifications are required to put the Convention into effect. Article X of the Convention sets no time limit for ratifications.

No radical change was introduced in the final text as adopted by the Hague Diplomatic Conference held in 1964 though the contents were simplified and made more flexible, the most significant change being in the sphere of application of the Uniform Law, the Conference accepting the reservation[2] whereby any Contracting State may declare that it will apply the Uniform Law only if each of the parties to the contract of sale has his place of business or his habitual residence in the territory of a different "Contracting" State and consequently may insert the word "contracting" before the word "State" in Article 1(1) of the Uniform Law. The

2. Article III of the Convention.

eventual use of this reservation is likely to limit to considerable extent the sphere of application of the Uniform Law.

With a view to ensuring the widest possible success to its action towards unification, the Diplomatic Conference adopted two Recommendations, which have been annexed to the Final Act. Under Recommendation I each Contracing State is requested to assist UNIDROIT in compiling each year a list of the judicial and arbitral decisions of major importance made in such State, relating to the interpretation and application of the two Uniform Laws in the field of International Sale of Goods. Under Recommendation II, UNIDROIT is invited in the event of the Convention relating to Uniform Law on the International Sale of Goods coming into force by May 1, 1968, to establish a Committee composed of representatives of the Governments of the interested States to review the operation of the Uniform Law and to prepare recommendations for any Conference that may be subsequently convened for a revision of the said law. However, if the said Convention fails to come into force on the due date, the Committee should take up the task of considering what further action should be taken to promote the unification of law on the International Sale of Goods.

The Conference, which was attended by several States who had either ratified the Hague Convention of June 15, 1955 on the Law Applicable to International Sales of Goods or were about to do so, agreed that States which were parties to the Hague Convention may restrict application of the Uniform Law where the Hague Convention's choice of law rule points at that law (the Article IV reservation to the Convention).

The Conference also adopted a territorial limitation for the Uniform Law as a reservation in Article III. The Uniform Law should apply only if the buyer and seller are in a State which has ratified the convention, i.e., a

"Contracting State". And a provision was inserted into the body of the Uniform Law forbidding all recourse to rules of Conflict of Laws (Article 2) under Article V of the Convention. A State may ratify the Convention with the provision that the Uniform Law will be made applicable only if the parties to the contract have by "virtue of the Uniform Law" chosen that law as the law of the contract.

The generality and the lack of specificity of the ULIS will impose heavy burdens on drafters of international sales contracts as well as those tribunals that are called upon to interpret such contracts. The ULIS defines only a few of its basic concepts, and inadequately states the qualifications and exceptions to its general rules, fails to deal with trade terms (c.i.f., f.o.b. etc.) and the special problem of sales performed by delivery of transportation, insurance and banking documents, does not elaborate on the effect of various contractual allocations of risks upon the time and place of delivery and the buyer's obligation to pay the price by its failure to relate delivery to risk in a more meaningful way.

The ULIS is at best a basic foundation and design which needs to be filled out by a super-structure by the retention of national law applicable under the rules of private international law as subsidiary to it, filling in its gaps. The ULIS may be further elaborated to include a great many more rules, dealing with those specific problems of international sales law that are not dealt with uniformly by national laws or by usage.

2. Historical Background

On April 29, 1930 the Governing Council of the Institute for the Unification of Private International Law (UNIDROIT) passed a resolution to appoint a Committee[3] for the purpose of preparing a draft Uniform Law on the

3. J.B. Hinst as President, and A. Bagge, H. Capitant M. Fehr, H.C. Gutteridge, J. Hamel, and E. Rabel as Members.

International Sale of Goods (Corporeal Movables). The Committee so formed, comprising experts of different juridical systems, met eleven times from 1930 to 1943 for the task of preparing a first draft of a proposed draft and a preliminary draft of two annexes (a draft law on Sales with a reservation on property and a report on letters of trust). The Governing Council which unanimously adopted the draft in October 1934, forwarded it to the Council of the League of Nations together with a Report adopted by the Committee. The Governing Council also resolved in October 1934 to undertake a study with a view to unifying the norms relating to the conclusion of international contracts between absent parties. The Secretariat of the Institute, therefore, drew up a preliminary report followed by a questionnaire upon which a Working Committee based its work. By October 1936, the Committee established the final text of the preliminary Draft Uniform Law on International Contracts made by Correspondence, to be submitted to the Governing Council together with the Draft Uniform Law on Agency.

In accordance with a resolution of the Council of the League of Nations adopted on January 11, 1935, the draft on Sale of Goods was submitted to the Governments for their observations thereon. The Governing Council of the Institute set up in April 1937 a small Committee[4] and entrusted it with the task of revising the draft in accordance with the observations of the Governments. This Committee met in Paris in April 1938 for the elaboration of a new edition of the draft and the Report. The new revised edition submitted to the Governing Council was adopted on May 29, 1939.

When the Institute resumed its activity at the end of World War II, the Governing Council resolved in 1950 to forward the 1939 revised draft to the Government of the Netherlands, which convened a Diplomatic Conference in 1951. The 1951 Conference to which 20 governments had

4. A Bagge, H. C. Gutteridge, J. Hamel, and E. Rabel as Members.

sent delegates appointed a Special Commission with the task of revising the 1939 draft in the light of the remarks submitted by the governments and by the organisations concerned.

Following a resolution of the Governing Council adopted in 1952, the text of the Preliminary Draft on International Contracts made by Correspondence was also forwarded to the Special Commission appointed by the 1951 Conference for considering the draft Uniform Law governing International Sale of Goods. It was left to the Commission to decide whether the two uniform provisions should be referred together.

The Special Commission appointed a Sub-Committee entrusted with the task of examining these uniform provisions and in 1954, resolved that the formation of contracts should form the object of a separate study, apart from the draft Uniform Law on the Sale of Goods. On the basis of this resolution, the Governing Council of the UNIDROIT decided that the above-mentioned uniform provisions should be revised in order to form the object of an independent international instrument. At the same time, the Council decided to widen the scope of such unification in order to include therein other legal principles relating to the formation of contracts, beyond the special case of the contracts made by correspondence.

The Working Committee set up by the Council, considering the obstacles in the way of unification of the rules on the formation of contracts in general, deemed it opportune to limit at present the scope of the efforts at unification to the formation of special contracts which mainly interest international trade, in the first place to the formation of contracts governed by the draft Uniform Law on the International Sale of Goods (Corporeal Movables) which had been submitted to the Diplomatic Conference in 1951. In 1958, the Governing Council of UNIDROIT examined and approved the new draft which was subsequently forwarded to the Government of the

Netherlands, which sent it to the Governments concerned for their remarks thereon.

The text of the revised draft of 1956 on the Sale of Goods, along with a report was also transmitted to the Government of Netherlands and forwarded to various Governments and organisations for their observations thereon.

In 1962 the Special Commission amended the revised draft on Sale of Goods in the light of the observations received. The Government of the Netherlands convened a Diplomatic Conference at the Hague in April 1964 in order to examine the study and adopt the draft Convention relating to a Uniform Law on International Sale of Goods based on the draft of the UNIDROIT as revised by the said Special Commission, as well as the draft Convention relating to a Uniform Law on the Formation of Contracts for the International Sales of Goods (Corporeal Movables) prepared by a Working Committee of UNIDROIT. A note analysing the remarks made by the Governments on the second draft Uniform Law was also prepared for the benefit of the Conference.

The Conference, in which governments of 28 States[5] were represented and governments of four States[6] and six International Organisations[7] sent Observers, opened on April 2, 1964 and completed its work on April 25, with the Final Act signed by 27 delegates. Various Committees were set up

5. Austria, Belgium, Bulgaria, Colombia, Denmark, Federal Republic of Germany, Finland, France, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Vatican City, Yugoslavia.
6. Argentina, Mexico, South Africa, Venezuela.
7. Council of Europe, European Economic Community, the Hague Conference on Private International Law, International Chamber of Commerce, International Institute for the Unification of Private Law, and Organisation for Economic Cooperation and Development.

by the Conference to study the two draft Uniform Laws and the draft Conventions.

On December 31,1964 the Convention on Sales was signed by Greece, the Netherlands, San Marino and the United Kingdom, whereas the Convention on the Formation of Contracts of Sale was signed by Greece, the Netherlands and San Marino.

3. Ratification of or Accession to, the Hague Conventions of 1964

As of March 1969 the Convention on Sale, of Goods 1964 had been ratified by Belgium,[8] the United Kingdom and

8. In depositing, on 12 December 1968, its instrument of ratification, Belgium made the following declaration : In accordance with the provisions of Article V of the Convention, the Kingdom of Belgium will apply the Uniform Law only to contracts in which the parties thereof have, by virtue of Article 4 of the Uniform Law chosen that Law as the law of the contract. In accordance with Article IV of the Convention, the Kingdom of Belgium will apply the Uniform Law only if the Hague Convention of 15 June 1955 on the Law Applicable to the International Sale of Goods leads to the application of the Uniform Law. The latter notification shall become operative when the Kingdom of Belgium withdraws the declaration made in in accordance with Article V of the Convention.

9. In depositing, on 31 August 1967, its instrument of ratification, the United Kingdom made the following declaration :
   (a) In accordance with the provisions of Article III of the Convention, the United Kingdom will apply the Uniform Law only if each of the parties to the contract of sale has his place of business, or, if he has no place of business, his habitual residence in the territory of a different contracting State, the United Kingdom will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of Article 1 of the Uniform Law.
   (b) In accordance with the provisions of Article V of the Convention, the United Kingdom will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of Article IV of the Uniform Law, chosen that Law as the law of the contract.

San Marino[10], and the Convention on Formation of Contracts by the United Kingdom and San Marino.[11]

The position of the other States is as follows :

(a) States which have expressed the intention to ratify, or accede to, both the Conventions :

Australia, Colombia, Federal Republic of Germany, France, Italy, Luxembourg, Mexico and Netherlands.

(b) States in which the question of whether to ratify or accede is under consideration :

Denmark, Ireland, Korea, Norway, Rumania, Sweden, and Switzerland.

(c) States which do not intend to ratify or accede :

Austria, Jordan, Laos, Maldive Islands, South Africa, and United States of America.

10. In depositing, on 24 May 1968, its instrument of ratification, San Marino made the following declaration : In accordance with the provisions of Article III of the Convention relating to a Uniform Law on the International Sale of Goods, the Republic of San Marino will apply the Uniform Law only if the parties to the contract of sale have their place of business or, if they have no place of business, their habitual residence, in the territory of different contracting States. The Republic of San Marino will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of Article 1 of the Uniform Law.

11. In depositing, on 24 May 1968, its instrument of ratification, San Marino made the following declaration : In accordance with the provisions of Article III of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, the Republic of San Marino will apply the Uniform Law only if the parties to the contract of sale have their place of business or, if they have no place of business, their habitual residence, in the territory of different contracting States. The Republic of San Marino will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of Article 1 of the Uniform Law.

Israel intends to ratify the Convention on Sales, but is still considering the question of ratification of the Convention on Formation.

Spain, Czechoslovakia and the Union of Soviet Socialist Republics have not expressly indicated whether or not they intend to ratify or accede to the 1964 Conventions.

4. Consideration by the United Nations Commission on International Trade Law

The Commission considered the general aspects of the Hague Conventions of 1964 as well as the text of those Conventions and the Uniform Laws forming annexes to those Conventions. Committee I of the UNCITRAL also considered what course of action should be recommended to the Commission in respect of the Hague Conventions of 1964 and in general, for the purpose of promoting the progresssive harmonization and unification of the law relating to the international sale of goods.

In the course of the discussions two main trends of opinion emerged regarding the Hague Coventions of 1964. In the view of some representatives, the Conventions were suitable and practicable instruments and a significant contribution towards the unification of law. Therefore, they should not be revised before they had been put to the test in actual practice and before it was reasonably certain that a better instrument could be drawn up. The view was also expressed that any action by the Commission, other than recommending to States that they accede, would slow down the present trend towards ratification or accession. The Observer of UNIDROIT expressed the opinion that, in general, the objections to the provisions of the Conventions had already been considered at the 1964 Diplomatic Conference and rejected.

In the view of other representatives, the Hague Conventions of 1964 did not correspond to present needs and realities and, in the interest of unification, it would be desirable to review the Conventions at an early date. Represent-

atives sharing this view pointed out that the 1964 Hague Conference, at which the Conventions were adopted, had been attended by only twenty-eight States and that none of the developing countries had been represented.

Representatives of the developing countries were of the opinion that the Hague Conventions of 1964 had not taken their interests into account. Other repesentatives also considered that it was essential that the legal systems and the interests of countries not represented at the Hague Conference of 1964 should from now on be taken into account.

Some representatives expressed the view that the Conventions embodied certain legal concepts of an artificial character which it would be difficult for some States to accept. Moreover, many provisions were aimed at facilitating trade between countries within the same region rather than between countries in different continents. Therefore, it would hardly serve a useful purpose for the Commission to recommend to States that they accede to the Conventions.

The Observer of UNIDROIT stated that, in his view, the legal position with regard to revision of the Hague Conventions of 1964 was that such revision could be undertaken only by the States which had drawn up these Conventions and that while States which had not signed the Conventions could conclude a separate agreement, they had no power to amend the Conventions. In his opinion, UNIDROIT could take action only if the Conventions themselves authorized it to do so.

Mr. H. Scheffer, who was Secretary-General of the 1964 Hague Diplomatic Conference on the Unification of Law governing the International Sale of Goods, in a statement on behalf of the Netherlands Government, made at the invitation of Committee I, stated that the Netherlands Government being responsible for the 1964 Conference and bound by certain obligations laid down in the final clauses of the Hague Conventions of 1964, would always be ready to lend its

further assistance in this field if requested by the United Nations or other organizations.

Some representatives referred to paragraph 2 of Recommendation II annexed to the Final Act of the Hague Diplomatic Conference on the Unification of Law governing the International Sale of Goods, in which the Conference recommended that UNIDROIT should establish a committee composed of representatives of the governments of the interested States which should consider what further action should be taken to promote the unification of law on the international sale of goods. One representative also drew attention to Article XIV of the Hague Convention of 1964 relating to a Uniform Law on the International Sale of Goods which provided that after the Convention had been in force for three years, any Contracting State might request the convening of a conference for the purpose of revision; that States invited to the conference, other than contracting States, should have the status of observers unless the contracting States decided otherwise by a majority vote, and that observers should have all rights of participation except voting rights.

Other representatives took the view that a new convention acceptable to all States, or at least to a majority of them, should be drawn up and be opened for accession by all States which participated in international trade. These representatives were of the opinion that, to this end, the Commission should set up a body to prepare a new world-wide convention which took account of the interests of all countries, and that the United Nations should subsequently convene an international conference for the purpose of adopting such a convention.

In proposing that the unification of the law of the international sale of goods could only be achieved by a new convention, one representative suggested that the new convention should use, as preparatory documents, the records of the discussions in United Nations bodies on

the normalization of trade relations and the elimination of colonialism as well as the principles of the Hague Conventions of 1964, the Standard Contracts of the Economic Commission for Europe and the General Conditions drawn up by the Council for Mutual Economic Assistance.[12]

5. The Hague Convention on Uniform Law on International Sale of Goods, 1964 (ULIS)

(i) Incorporation into national municipal legislation

The Convention on ULIS provides under Article I thereof that Contracting Parties should incorporate the Uniform Law into its own Legislation either in one of the authentic texts or in a translation into its own language or languages. The ULIS would accordingly acquire the character of domestic law in the country of incorporation. The U.K. has already enacted the ULIS in its legislation.[13] This has the merit of ensuring that an identical text would be found in the legislation of all the Contracting States. However, it was rigid and might complicate matters as it did not allow for the flexibility of a model law as to adaptations of a drafting of systematic character, and did not take into consideration the traditions of drafting legal texts in a country. For instance, the Czechoslovakian International Code, which was based on the ULIS, would be made ineffective.

Article XI of the Convention provides that "Each State shall apply the provisions incorporated into its legislation in pursuance of the Convention to contracts of sale to which the ULIS applies and which are concluded on or after the date of entry into force of the Convention in respect of that State".

(ii) Application with reservations

To facilitate the acceptance of ULIS by the States,

12. UNCITRAL U. N. DOC. A/CN. 9/I. 16, pp. 8-10.
13. The Uniform Law on International Sale of Goods Act, 1967.

certain limitations and reservations were added to the Convention which a State could adopt at the time of ratifying the Convention, thus limiting the application of ULIS in accordance with the reservation. One of the most severely criticised parts of the ULIS is the scope of their application. Article 1 of the ULIS defines the international character of the transaction that attracts the law. A controversial feature of these laws is that they are declared to be applicable to transactions involving different States-thus enlarging the ambit of the application even to cases where different countries are involved though they may not have adhered to the ULIS Convention. Efforts to limit the scope of these laws to transactions between "different contracting States" failed at the Conference.[14] The derogations are provided for in Articles II, III and IV and V of the Convention on ULIS, whereunder the States adhering may derogate from the ULIS. Article II of the Convention provides that two States, for the purpose of application of the ULIS, may not be considered as different States because such States apply to sales legal rules which are the same as or closely related to those of each other, whether or not one of them had adopted the Convention. Article III of the ULIS provides that a Contracting State may derogate from the Articles of the ULIS by declaring that it will apply the ULIS only if each of the parties to a contract has his place of business or habitual residence in the territory of a different Contracting State and may therefore, read 'states' in Article 1 of the ULIS as Contracting "States".[15] Under Article IV of the Convention if a State has previously adhered to a convention on conflict of laws in the same of field, such State may declare that ULIS will apply only if the convention on conflict of laws "itself requires the application of the Uniform Law". Article V of the Convention introduces an optional clause which enables a State

14. XIII, *A.J.C.L.* (1964) 451, Documents, John Honnold.
15. Reservation under Article III was inserted on the German motion for territorial limitation for the application of ULIS.

adopting ULIS to declare that it will apply the Uniform Law only where the parties to a contract have thereunder chosen the Uniform Law as the law of the contract. Article VIII is designed to take care of the differing practices of States in regard to specific performance and is not to enforce on any State any remedy inconsistent with its normal practice.

(a) **Article II**

Article II of the Convention appears to be for the benefit of countries whose legal systems are founded on a common school of legal jurisprudence so that even if some countries adhered to ULIS and others did not, the existing uniformity of laws between such countries would not be disturbed. It was an important contribution towards regional harmonization and unification of law within the framework of world-wide unification.

(b) **Article III**

Article III restricts the application of the ULIS only to contracting States. However, this rule should be made for general application, and not as a reservation, only for if it was permissible to apply the ULIS to non-contracting States, a situation might arise where it was applied to nationals of a country which did not wish to adhere to the Convention.

Article III would be effective in restricting the application of the ULIS to contracting States only if it is adopted by the State of the forum. If the forum is in a State which has not adopted this reservation, then inspite of the reservation having been adopted by the other State, the ULIS would apply to the suit of the party of the latter State.

(c) **Article IV**

Article IV of the Convention was necessitated by the fact that several of the participating States : Belgium, France, and the Scandinavian countries, had ratified the 1955 Hague Convention on the Law Applicable to International Sale of Goods (ULIS). From the wording of the Article, it

seems to follow that States which subsequently ratified the ULIS cannot take advantage of the reservation thereunder.

This reservation, however, even if operative, would not prevent courts in countries where the Convention on ULIS was ratified without any of the reservations (this is a possibility which must be kept in view) from applying the ULIS to international sales, including sales with a party in a country which had subscribed to the reservation under Article V of the Convention. (It appears that in this sphere a more realistic approach combined with knowledge about rules on assumption of jurisdiction is required).[15a]

The reservation under Article IV may give rise to problems and if it is adopted, complicated and dubious questions of conflict of laws would arise.[16] Should both reservations under Articles III and IV be exercised, the effects of ULIS Convention would be entirely different in one or another Contracting State.[17] The implementation and effectiveness of the ULIS would depend solely on the will of the Contracting States.

(d) **Article V**

Article V of the Convention which was not included in the draft submitted to the Diplomatic Conference of 1964 at the Hague, ensures that the parties to a contract will enjoy the same freedom of contract as they would have if the ULIS did not exist. This appears to be inconsistent with the very purpose of the Convention which sought to establish rules governing international sale of goods. It has been pointed out[18] that this Article reduces significantly the advantages that might be gained from the

15A. K.H. Nadelmann : "The Conflicts Problems in the Uniform Law on the International Sale of Goods", in *AJCL*—Vol. XIV (1965) p. 236.

16. Norway, UNCITRAL, U.N. Doc. A/CN. 9/11.

17. Austria, UNCITRAL, U.N. Doc. A/CN. 9/11.

18. Spain, UNCITRAL, U.N. DOC. A/CN. 9/11. Add 1.

entry of the Convention into force, as well as it unduly complicates the application of the Convention. Moreover, the exercise of this reservation could seriously affect attempts to solve problems arising in connection with the international sale of goods. It could be detrimental to the nationals of other countries who may enter into a contract without knowing the existence of such a reservation. Where a country exercises the reservation, it appears possible that there may be divergencies in the settlement of disputes related to the application of the Convention and involving nationals of other countries who have not made the reservation, depending in which country the forum is situate. For instance, if contracting parties have not expressly referred to ULIS in their contract belonging to countries A and B, and country A, but not country B, has adopted this reservation, the ULIS will apply to their contract if the dispute is brought before a Court in country B, but not if the court is situated in country A. The Article seems to reflect a desire to adhere to the Convention but at the same time to exclude the application of the provisions of the entire Convention, a principle neither logical nor reasonable.

Article V reduces considerably the value of the ULIS since the reservation makes it possible for any State to become a party to the Convention without having to make even slightest change in its own law, as required by Article I of the Convention.[19] It, in effect, renders the ULIS similar to general conditions of sale and deprives it of the character of substantive law. If all the contracting States were to adopt this reservation, the practical utility of ULIS will be completely destroyed, as it would apply only as general conditions of sale if contracted to by the parties.

Further,[20] the Article appears to be contradictory to

19. Austria, UNCITRAL U.N. Doc. A/CN. 9/11, p. 5.

20. Ghana, Summary of Comments, UNCITRAL U.N. Doc. A/CN. 9/L. 16/Add. 5. p. 6.

Article XI of the Convention which provides that the contracting States shall apply the provisions of ULIS to contracts of sale. It is not clear that if the reservation under Article V is adopted, the provisions of Article V or Article XI would prevail.[21]

The inclusion of the reservation under Article V of the Convention, though legally absurd, seems to have been made with a view to get as many ratifications to the Convention as was possible and for reasons of a political and economic nature. The practical consideration[22] which motivated its inclusion was to permit a cautious and progressive unification of the law on international sale of goods. A mercantile country which adopted the ULIS might not necessarily be able to impose it on its business community overnight. Further, a transitional period was particularly desirable because the ULIS incorporated certain legal concepts with which either the civil law countries or the common law countries might not be familiar.

The reservation in Article V of the Convention (which provided for application of the ULIS only if the contracting parties chose ULIS as the law of their contract) read with Articles 1, 3 and 4 of the ULIS appeared to be contradictory. Articles 1 and 4 of the ULIS enumerate the cases where the ULIS "shall apply" and Article 3 of the ULIS permitted the parties to exclude the application of ULIS either entirely or partially. Therefore, unless the parties availed themselves of the right given to them under Article 3 of the ULIS, the ULIS "shall apply" as between the parties to a contract.[23]

(iii) Application to "International Sale of Goods"

The ULIS is essentially applicable to international sales

21. Norway and U.K. are of the opinion that Article V would prevail. See UNCITRAL U.N. Doc. A/CN. 9/L. 16/Add. 6. p. 6.
22. U.K. "Summary of Comments" UNCITRAL U.N. Doc. A/CN. 9/L. 16/Add. 5. p. 8.
23. Ghana, UNCITRAL U.N. Doc. A/CN. 9/L. 16/Add. 5, p. 6.

having an unusual limitation ; it applies only to international and not to domestic transactions. Under Article 1 of the ULIS, two elements are essential. First, the parties must be international in character, like having their place of business or place of habitual residence in different countries, and second, the transaction must also be international in character, i.e. either (1) if the goods are to be carried from one country to another or (2) if the acts constituting offer and acceptance take place in more than one country ; or (3) if the goods are to be delivered in a country other than the one where the acts constituting the offer and acceptance take place.

The application of the law does not depend on the nationality of the parties,[24] but on the international character of the transaction. The concept of nationality, which prior to the First World War seemed to dominate most international relations, gave way to the concept of domicile which has in turn been replaced by other concepts such as those of residence and place of business (*Gutzwiller*). However, there may be transactions which, though not satisfying the conditions laid down in Article 1 of the ULIS, should come within the purview of the ULIS. It is not clear[25] whether it was necessary to expressly state in a contract of sale that the goods are to be sent to another country or whether it was sufficient that the seller understood that the goods were to be sent out of the country. The ULIS does not clarify whether it is necessary for both parties to a contract to know that the goods are to be carried from one country to another. If prior knowledge was necessary, a burden would be imposed on the buyer. If it was not necessary, the seller might lose the protection of his own municipal law merely by believing the transaction to be a domestic instead of an international sale

24. Vide Article 1(3) of the ULIS.
25. Japan, UNCITRAL U.N. Doc. A/CN. 9/I. 16/Add. 5. p. 11 ; Norway, UNCITRAL U.N. Doc. A/CN. 9/11. p. 23.

of goods. Several trading companies follow the practice of buying goods on "f.o.b." basis and selling them on "c.i.f." basis at the same place to their buyers abroad.

In addition to the above difficulties of interpretation, the ULIS does not take into consideration the fact that the buyer's obligation, i.e. the payment of the sale price is realised on an international level, and that legal problems, different from internal relations, are connected with it.

The definition of "international sale of goods" needs to be re-examined in order to provide maximum legal certainty in the field of international trade. A comprehensive and a more exhaustive definition would contribute greatly to easily determining the true "international" character of sale transactions possessing the objective criterion (nationality of the parties) and the objective criterion (domicile or residence).

The expression "place of business" has different connotations in different countries. The ULIS does not define this term in detail but apparently presumes enterprising activity of the party. Nor does ULIS elucidate the term "habitual residence" which appears to be a modern replacement for "domicile". There is no definition of either "goods" or "sales", probably intentionally, though the expression "goods" is stated in Article 5(1) not to apply to sales (a) of stocks and shares (b) of ships (c) of electricity, (d) by authority of the law or on execution or distress, and appears to be narrower than "goods" defined in the English Sale of Goods Act, 1893 or the Indian Sale of Goods Act, 1930. The exact position of implements, industrial growing crops and things attached to land to be removed before or under a contract of sale seems left in doubt.[26] The ULIS applies subject to mandatory rules governing sale by instalments in

26. L.A. Ellwood: "The Hague Uniform Laws Governing the International Sale of Goods" in *Some Comparative Aspects of the Law Relating to Sale of Goods* (*ICLQ* Supplementary Pub. 9, 1964).

the domestic law.[27] It is not clear whether the mandatory rules of '*lex fori*' or of the law of the country of a contracting party is referred to.

A limited meaning has been given to 'sales' under Article 6 as to include goods to be manufactured or produced unless the party who orders the goods undertakes to supply "an essential and substantial part of the materials"—a phrase not defined—necessary for such manufacture or production. In addition to the difficulty of determining the borderline between the essential and non-essential part of the necessary materials, the violation by the buyer of his obligation with regard to hoarding the materials would affect the position of parties concerning deficiencies in the goods produced.[28] It could be limited to cases in which all the materials necessary for the production of goods were to be supplied by the seller.

The ULIS applies regardless of the commercial or the civil character of the parties or of the contracts.[29] This distinction is unknown in the common law countries and has been superseded in other countries whose law is of the Roman tradition (Switzerland, Italy) but prevails in all the legal systems based on the Napoleonic Code.

International sales of a civil character are more rare in comparison with international commercial transactions. These terms have not been defined in the body of the ULIS, and it is wondered whether the ULIS is meant to be applied to all international sales, e.g. in the case of a trader purchasing abroad merchandise for his own use to be transported to his country. In practice,[30] if not in theory, the sale is considered as commercial when it is made by a man engaged

27. Article 5(2), ULIS.
28. Czechoslovakia. UNCITRAL U.N. Doc. A/CN. 9/L. 16/Add. 5, p. 16.
29. Article 7, ULIS.
30. French law.

other hand, it was not possible to exclude the application of conflict rules entirely as there were matters (e.g. prescription) which were not dealt with in the ULIS and which it was not possible to settle in conformity with the general principles of the ULIS. In such cases recourse would have to be had to conflict rules.[38]

The practical advantage of the exclusion of conflict rules is that the courts of a country where the 1964 Convention on ULIS is in force need only know the law applicable to sales for two types of cases, leaving aside exceptional law applying to non-international sales and the law established by the ULIS.[39] This is a step in the direction of reconstruction of *jus commune* as a reaction to excessive nationalization. This principle, however, stipulates the absolute application of *lex fori*, regardless of the character or the legal situation which is to be the subject of regulation. It makes the scope of the ULIS too extensive and broad, which is not suitable for the regulation of international trade relations.

The rules for the application of the ULIS have a wide reach and may apply to cases even where the State may not have adopted the ULIS. The principle embodied in Article 2 of the ULIS would, in certain cases, have the unfortunate effect of the ULIS being applied to cover cases which have little or no connexion with the State of the forum, or of being applied in certain cases to a transaction involving two countries even though the ULIS had not been adopted by either country.[39a] If one of the contracting parties was able to obtain jurisdiction over the other party because of presence

38. Observer of UNIDROIT, UNCITRAL UN. Doc. A/CN. 9/L. 16/ Add. 5. p. 13.

39. R. David : "The Methods of Unification" in (1968) *A.J.C.L.* XVI 13,21.

39a. Article III of the Convention Might allow modifications to the principle contained in Article 2 of the ULIS.

of assets[40] or for other reasons[41] and file a case before a court of a country which had adopted the ULIS, which had no material connection with the contract, the courts in a country which ratifies the Convention relating to the ULIS must apply the provisions of Uniform Law to all international sales as defined in the ULIS. This would be the case even when no clash exists between the law of the buyer and that of the seller or when the conflict rules on both sides refer to the same law. Such application of the ULIS in such situation might be contrary to the intention of the parties and defeat their expectations. It may be noted that the 1951 draft of the ULIS had no provision forbidding recourse to conflict rules,[42] but the provision was included in the 1956 draft[43] and the 1964 draft.

This is the result from the combined effect of Article I which states that parties and the transactions have the necessary international ingredient if they involve "different States" (without regard to whether either State had adopted the ULIS) and Article 2, which excludes the application of the rules of private international law for the purposes of the application of the Uniform Law unless the contract provides otherwise.

Even in the event of the ULIS being adopted by every country in the world, the need for conflict rules would not be excluded. The reason for this is two-fold : first, the ULIS does not regulate all questions in the sales-law field, and second, the possibility of national courts giving different

40. Presence of assets is a basis for *in personae* judgment over non-residents. e. g. in Germany, Austria, Sweden and Denmark. *Forum arresti* jurisdiction is available in Belgium, Scotland and many other countries.

41. Under Article 14 of French Civil Code, a Frenchman even though not residing in France, may always sue foreigners, resident or non-resident.

42. Text in *UNIDROIT Year book* 1948, P. 102.

43. Text in *ICLQ* Vol. VII (1958), P. 3.