# Uniform Law on the International Sale of Goods with Special Reference to Warranty, Comparative Aspect*

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## I. Introduction

As far as the international contracts are concerned, the parties are free to agree the law to be applied to their contract of sale (principle of party autonomy)[1]. Even if this rule agrees with the principle of free bargaining in substantive law, it retains defects in many respects; first: differences of law create unnecesary barriers to the free flow of goods in international sales [2]. Practically the rapid expansion of world trade demands as a firm legal underpinning uniform law for international sales of goods.

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1) Restatement, Conflict of Laws, Second (Proposed Official Draft Part Ⅱ, 1968) § 187; Japanese Conflicts of Laws Art. 7, Sentence 1 reads: "The formation and validity of contracts shall be ruled by the law of country which was intended by the parties will to be applied."; The regulation in Soviet bloc is the same as above, see Ramzaitev, The Law of International Trade in the New Soviet Legislation, Journal of Business Law, 234 (1963).

2) Wortley, The need for more uniformity in the law relating to the international sale of goods in Europe, International and Comparative Law Quarterly Supplementary Publication No. 1 (1961), p. 45, further cf. case on p. 48.

Second: alert foreign businessmen seek to escape from national laws into a most profitable laws. Therefore in 1930 in order to take up the task of unification of international sales law was the International Institute for the Unification of Private Law at Rome (the "Rome Institute"), which was an Institute of the League of Nations, established a drafting committee of European scholars; and were produced a preliminary draft of the Uniform Law on the International Sale of Goods in 1935, revised draft (105 articles) in 1939, and after the war the Rome Institute has transformed into a permanent international institution, the 1956 revised draft (113 articles) by Special Commission appointed by the 7th Session of the diplomatic conference at the Hague (21 nations) in 1951 for further revisions. The Commission reexamined this 1956 draft according to the response of governments and produced 1963 revision of the draft, which was sent to governments in preparation for the diplomatic conference (28 states) at The Hague scheduled for April 2-25 1964[3]. "The Uniform Law for the International Sale of Goods" (101 articles—hereinafter will be refered to as "ULIS" or "Uniform Law") was produced through the debate of amendment proposals brought by the delegates. The United States took no part in the preparatory work or the drafting of ULIS, but in the 1964 Hague Conference[4].

Where much distinction would exist between the Uniform Law and the law of each country, the nation would hesitate to adopt the Uniform Law. Thus the Uniform Law are required to reflect much or less the laws of trading countries, and should be the product of comparative law. In British Sale of Goods Act of 1893, which is in force in most of the British Commonwealth, and the Sale of Goods Act, 1893 in America gave much influence in the formation of ULIS[5]. Later the Uniform Sales Act of 1906 has as its basis the British Sale of Goods Act of 1893. Also the Uniform Law incorporates civil law ideas. Namely a comparative study of the law of the law of sales[6] which Dr. Ernst Rabel who started the first preparations for

3) Most of countries of centrally planned economy did not participate this conference.
4) As to the 1964 Diplomatic Conference at the Hague, see Honnold, The Uniform Law for the International Sale of Goods: The Hague Convention of 1964, Law and Contemporary Problems, Vol. 30 (1965), No. 2, pp. 326.
5) A. Szakats, The Influence of Common Law Principles on the Uniform Law on the International Sale of Goods, (1966), 15 I.C.L.Q. 749.
6) Rabel, Das Recht des Warenkaufs, Vol. 1 (1936), Vol. 2 (1958)

drafting ULIS during the latter part of the 1920's and devoted much of his enormous capacity toward the task of unification had brought out in 1936 was the basic working tool on the subject matter[7]. However, until 1969 only British Parliament has ratified the two conventions adopted by the Hague Conference of 1964 unifying the law of international sales[8][9], but with the reservation allowed by Article 5 of convention. In virtue of this reservation Great Britain will apply the Uniform Law only to those contracts in which the parties have chosen the Law as the law of the contract[10]. The German scholar expresses his views that the ratification in those countries seems to be likely[11]. The Scandinavian scholar pointed out the similarity between the Scandinavian Sale of Goods Act and the Uniform Law due to a common influence, and in Denmark, Finland and Norway the organizations express their favourable attitude toward the prospect of unification in the law of international of sales[12].

To the contrary the writers in the United States are as a whole critical to the Uniform Law[13], and while the attitude of the United States is considered by all to be of the greatest importance, the United States did not adopt the Uniform Law yet. Americans consider that the Uniform Commercial Code is in many way more modern and better adapted to the demands of international trade than the Uniform Law. The

7) Nadelmann, The United States and plans for a Uniform (World) Law on International Sales of Goods, University of Pennsylvania Law Review, Vol. 112 (1964) No. 5, p. 698

8) The two conventions relating to Uniform Law on the International Sale of Goods (101 articles) and Uniform Law on the Formation of Contracts for the International Sale of Goods (13 articles), have been signed by several states; Belgium, France, West Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, The San Marino, the United Kingdom and the Vatican City, but have been ratified only by the United Kingdom and by the Republic of San Marino (at the time, Dec. 1969).

9) The Rome draft coming before the Diplomatic Conference of 1951 had many features of the English sales law. Nadelmann, supra p. 702

10) Hellner, Prospects for the Unification of Sales Law at the regional or international level: A Scandinavian view, McGill Law Journal, Vol. 15, No. 1 (1969) p. 89

11) Dölle, Die Vereinheitlichung des internationalen Kaufrechts, Juristen-Jahrbuch 9. Band, 1968/69, p. 51

12) Hellner, supra p. 87, 88

13) Honnold, supra, particularly pp. 349; also the statement of American representative at the Plenary Sesssion, April 25, 1964 in Hague Conference; Nadelmann, the Unification on the International Sale of Goods: A Conflict of laws Imbriglio, 74 Yale Law Journal, 449, at 452, n. 37 (1965); Nadelmann, The Conflicts Problems of the Uniform Law on the International Sale of Goods, The American Journal of Comparative Law, Vol. 14 (1965) p. 240 sees unsatisfactory because of the conflicts problem; Daw, Some comments from the practitioner's point of views, The American Journal of Comparative Law, Vol. 14, p. 243

practical problem for wider unification will be to reconcile the principles laid down in the Uniform Commercial Code with those of European Continental origin found in the Uniform Law[14].

On the other hand there has been insisted the need for an international agency of the highest order, on the level of the United Nations, which undertakes the task of promotion of the harmonization and unification of the law of international trade. According to the General Assembly resolution 2205 (XXI) of December 17, 1966 United Nations Commission on International Trade Law (UNCITRAL) was established[15]. As the result of efforts for three years the new draft code for the International Sale of Goods are drafted by UNCITRAL at the end of 1970.

The present article intends to compare the Uniform Law on the International Sale of Goods with Uniform Commercial Code, concentrating on the warranty, for it is not feasible to survey the entire draft of the Uniform Law for International Sales.

## II. Warranty under the Uniform Law

The provisions on warranty in the Uniform Law 1964 are not much revised in new draft of UNCITRAL.

### 1. Basis of Warranty Liability

If the product turns out defective, why is a seller held liable? On this question, the predominent opinion in Germany construed that the seller's liability is not to be found in the contract of parties, but is created and imposed by law. However, new theory which arose after World War II, establishes the liability of sellers for defective goods based upon the parties contract.

Under the British Sale of Goods Act 1893, if the goods do not conform, the seller is held liable due to breach of warranty, which is a liability that exists besides the contract. But breach of warranty has been progressively sliding towards the breach of contract in England.

14) Hellner, supra p. 99.

15) In accordance with this resolution, UNCITRAL became operative on January 1, 1968; Also as to the birth of UNCITRAL, see Carey, UNCITRAL: Its origin and prospects, The American Journal of Compartive Law, Vol.15 (1967), pp. 626.

Pursuant to UCC, non-conformity of goods is considered not as "breach of warranty", but "breach of contract" itself.

The Uniform Law provides same as UCC.

As a result, this theoretical differences as to warranty liability basis cause variation with respect to remedies.

### 2. **Requisite for Lack of Comformity** (ULIS article 33)

The provisions of the Uniform Law dealing with conformity of the goods are based on same ideas of British Sale of Goods Act 1894 and Uniform Commercial Code. And there is no difference between the Uniform Law of 1964 and new draft of UNCITRAL as to article 33.

The warranty in England was developed originally from express warranties. Thus in England a jeweler sold somebody stone for 100 Pound, affirming that is bezar stone, which is used to be found in the stomach of animals and cures a sort of sickness. But, where it was proved actually not to be bezar stone and buyer claimed damages, the court held that the plaintiff can not claim the damages, because the seller affirmed only about the fact, therefore there is no cause of action, unless the seller said that he warrants it is bezar stone[16]. However, implied warranty was recognized from 1815[17]. Nowadays, Uniform Commercial Code article 2-313 provides that "any affirmation of fact creates an express warranty."

The warranty under Anglo-American law consists of an express and implied warranty. Where the seller actually makes the promise or representation, it is an express warranty. One which is created by law because of the circumstances is an implied warranty. It is created by law, but still implied warranty can be assumed as contract, because implied contract is recognized in the Anglo-American law.

Under the Uniform Law article 33 paragraph 1 (f) the seller is obliged to deliver goods which "posess the qualities and characteristics expressly or impliedly contemplated by the contract." This article is contrued that it provides the express and implied warranty. But the most important part of this rule is the implied contemplations of the parties. The Uniform Law, article 33 paragraph 1 (f) corresponds with UCC

16) Chandelor v. Lopus, Crohe, James 1, 4 (Exchequer Chamber 1625).
17) Gardiner v. Gray, 4 Camp. 144; 17 E.R. 46.

§ 2—313, which provides an express warranties by affirmation, promise and description.

More specifically, the goods must:

First, "posess the qualities necessary for their ordinary or commercial use"—this corresponds with implied warranty of merchantablity under UCC § 2—314, "merchantable quality" under British Sale of Goods Act 14 (2);

Second, "posess the qualities for some particular purpose expressly or impliedly contemplated by the contract" (it corresponds with the implied warranty of fitness for particular purpose under UCC § 2—315 and Sale of Goods Acs (1)); and

Third, have "the qualities of a sample or model (this corresponds with the express warranty by sample or model under UCC § 2—313(1)(c)). This provision was added in the 1964 Hague Conference. And all other paragraphs remain the same as 1956 draft.

The provisions provides a strong basis for protecting the interest of buyer. However, for the protection of seller, the Uniform Law adds the important rule that no defect "shall be taken into consideration where it is not material." Therefore the seller can be protected against the claim due to minor defects. This rule is called "minima non curat praeter". It is not articulated in Amercian law. In interpretation of "not material" the usage under article 9 will operate, and should be consistent with the good faith.

In the second session of UNCITRAL in March 3—31, 1969 the representative of Japan, Prof. Michida said that the doubts can arise as to what should be regarded as "not material". But all the writers support this provision and consider it is fair solution.

The wording of article 9 under the Uniform Law 1964 was unsatisfactory in two respects; first was the lack of a definition of the circumstances in which the parties would be considered as having impliedly made usages applicable to their contract. The second was the "reasonable persons" in paragraph 2. "Reasonable persons" from different parts of the world might consider different usages as applicable to the contract. This provision could give rise to doubts and uncertainty.

Thus paragraph of new draft introduces no change. Paragraph 2 is ancillary to para. 1 and is designed to define usages. These are of two types: (a) usages of which the parties are actually aware and, (b) usages of which the parties should

have been aware. Two tests——one subjective and the other objective——are therefore employed. Paragraph 3 of the recommended text introduces no change in the original article. It gives expression to the principle of the autonomy of the parties which is given effect in article 3 and other provisions of ULIS. Paragraph 4 of the recommended text is designed to introduce a rule of interpretation relating to expressions, provisions or forms of contract commonly used in commercial practice.

### 3. Remedies

In dealing with the requisite for warranty, there was not much deviation from that of the Uniform Commercial Code, and the scholars in the United States express largely their favourable attitude. On the contrary, the rule on remedies provided in the Uniform Law is considered as very different from the Anglo-American law, as complicated and consequently are very critical. Therefore the provisions of the Uniform Law 1964 concerning remedies were much revised in new draft of UNCITRAL.

If the breach of contract can be established, buyer can, under Article 46 of the Uniform Law, keep the goods and "reduce the price in the same proportion as the value of the goods." Is the buyer justified in rejecting the goods and refusing to pay anything? UCC § 2—601 provides that the buyer may reject the goods "if the goods··· fail in any respect to conform to the contract, the buyer may reject the whole." This rule is called as "rule of strict performance". But there has been dissatisfaction with this rule, because it may operate as an excuse for the buyer to escape his contract where the real reason for his rejection is that the market price has fallen. Nevertheless, if the UCC was to be applied, the rule of strict performance under UCC§ 2—601 would justify buyer's rejection.

(1) Fundamental Breach

The Uniform Law, however, provides entirely different from this rule of strict performance, and takes different situation from English and American sales law. According to Korean Civil Code, article 575 para. 1 and Japanese Civil Code. art. 566, paragraph 1, the buyer may rescind the contract only if the objective of the contract is not attainable due to the defect. Under Article 43 of Uniform Law the buyer has the right to "declare the contract avoided" and force the goods back on the seller

only if a "fundamental" breach of contract is involved. Therefore the Uniform Law refers to two kinds of breach. First: breaches where the contract may de avoided, and Second: breaches where only damages can be claimed. Also "avoided" means rejected. Avoidance of contract ordinarily requires a "declaration" by buyer; but sometimes happens automatically and is then called "ipso facto avoidance of the contract".

Under Article 10 a breach is "fundamental" when "the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects". No reasonable person would enter into a contract expecting non-performance. In such a case the breach is fundamental.

With respect to the concept of the fundamental breach, Prof. Honnold considers it is in right direction. But, in the Working Group meeting of UNCITRAL, considerable number of respresentative submitted proposals to replace the term "reasonable person" by a more precise expression such as "a merchant engaged in international commerce". However, the Working Group came to conclusion that it was premature to discuss the definition of fundamental breach before the Working Group considered the substantive provisions of the Law in which that term was used. And the Working Group decided to defer to a later session.

Nachfrist: After a breach that is not fundamental, under article 44 (2), the seller retains, even after the delivery date has passed, "the right... to deliver other goods which are in conformity with the contract···provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense." The buyer may "fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect"; and if the seller has not performed within this period the buyer may "declare the contract avoided". This procedure is called Nachfrist based on the German concept. Such expressions, "unreasonable inconvenience", "unreasonable expense" and "reasonable length" provided for a flexible standard are more advantageous to the seller, and are justified in international sales on the ground that rejection of the goods is harsher on the seller where it leaves his goods in a distant foreign country, but the uncertainty that results will put a heavy burden for the interpretation.

In such case, article 17 provides "the general principle on which the Uniform Law is based" as a standard of interpretation. But, because this provision was criticized by the representative of UNCITRAL on the ground that it was vague and illusory, since the Uniform Law did not specify the general principles on which it was based; therefore the Working Group recommended that instead of present article 17 the following provision be adopted:

Article 17

In interpreting and applying the provisions of this law, regard shall be had to its international character and to the need to promote uniformity.

(2) Specific Performance

In German law there are no limits to the buyer's action for a decree of specific performance; According to section 241 of the German Civil Code the duty to perform specifically is indeed considered to be the very essence of the contractual relationship. In German law specific performance is the primary remedy, whereas, in theory, an action for damages is merely regarded as a sort of secondary remedy. Under the Uniform Law the buyer's principal remedies are also requiring performance of the contract (Art. 41). The underlying intent of the Uniform Law is to save the contract and assist its completion.

On the contrary, in English law specific performance is merely equitable discretionary relief. The main prerequisite of the granting of specific performance is that the goods must be specific or ascertained. But even in such a case the court may refuse it.

However, under the German system there are actually only rare instances where actual delivery of the goods to the buyer is ordered by the courts. The differences between the continental and Anglo-American systems is less significant.

(3) Claim of Damages

At first, comparing English and German law of sale, German law is based on the Roman principle of culpa——that the parties to a contract are liable to each other for damages only in the case of fault of one of the parties. Consequently, if the seller has committed a breach of warranty the buyer, according to section 459 of the German Civil Code, has only a right of election between rescision and reduction of the price. The buyer cannot sue for damages without proving fault on the part of

the seller. The Roman tradition, as in Germany, regards the breach of a warranty as a ground for admitting liability without fault but just for this reason the seller's responsibility is limited to rescission or the reduction in price. The seller is, in principle, not exposed to an action for damages.

On the contrary, in the common law the buyer can bring an action for damages in every case where the seller's liability for defect is recognised; no proof of fault on the seller's part is required. Only exceptionally according to section 463 of the German Civil Code the buyer can bring an action for damages against the seller in the case of a breach of an express warranty (zugesicherte Eigenschaft). In this respect there is similarity between the provision and the British Sale of Goods Act section 14 (1).

The draft Uniform Law of 1956 follows the common law rule according to which the buyer is in principle granted a claim for damages in case of a breach of warranty. Korean and Japanese Civil Codes follow parallel line, which is the same as to damage claim. This solution affording damage claim will work for the protection of buyers.

If the failure of the goods to conform to the contract amounts to a fundamental breach, the buyer may declare the contract avoided, and in addition damages may be claimed (Art. 77). If the breach of contract does not amount to a fundamental one, the buyer can claim damages only, and may not rescind the contract (Art. 82).

To sum up:

1. With respect to the Uniform Law article 33 providing prerequisite for lack of conformity there has been no objection.

2. Even if the Uniform Law provisions on remedies are unsatisfactory, it can be superseded by the feasible provision, because the revision are progressed presently by UNCITRAL.

3. The warranty provisions of the Uniform Law are trying balancing the interests of buyer and seller. But they are provided to be more advantageous for the seller than in the provision of national law of sale in the world countries.

In conclusion, because the provision of mandatory application of the Uniform Law. such as article 2 was eliminated and all the countries participate its revision in the highest international level, the new draft can be feasible and workable Uniform Law on the International Sale of Goods.