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Marxism and International Private Law

THOMAS W. HOYA*

Has Marxism created anything new in international private law? What effect has the law applied among the communist countries had on the rest of the world? To answer these questions, a look at international trade can be useful. This trade is both the most common and the most important relationship between nongovernmental parties from different countries that is regulated by international private law. Further, Marxism and its central planning focus specifically on economics; and thus, what more fitting subject matter could there be for testing Marxism's contribution to international private law than the commerce between nations.

Effective regulation of international trade has been accorded a high value by communist countries, and also by Western countries and by the world as a whole. In roughly the last quarter century, organizations representing each of these three groups have prepared uniform laws for international sales, the core of international trade.

First, the communist organization Comecon (officially titled the Council for Mutual Economic Assistance), comprising chiefly the Soviet Union and Eastern Europe,¹ in 1958 adopted its General Conditions for the Delivery of Goods.² Second, Unidroit (officially titled the International Institute for the Unification of Private Law, and known also as the Rome Institute) prepared the drafts that formed the basis of two conventions adopted by a diplomatic conference in 1964. One convention contains the Uniform Law on the International Sale of Goods (ULIS),³ and the other convention contains the Uni-

* Hearing Commissioner, International Trade Administration, U.S. Department of Commerce. The views expressed in this article are the author's and do not necessarily reflect those of any government agency.

1. Comecon's 10 member countries today are: the Soviet Union; the six East European countries of Bulgaria, Czechoslovakia, the German Democratic Republic (the G.D.R., or East Germany), Hungary, Poland and Romania; and the three non-European countries of Cuba, Mongolia and Vietnam. Albania became a member of Comecon in 1949 after the organization had been founded earlier in that year, but it has not participated since 1961.

2. An English translation of the 1979 Comecon General Conditions, citations of English language translations of earlier versions of the General Conditions, and citations of Russian language publications of all these General Conditions may be found in T. HOYA, *EAST-WEST TRADE* 379-441 (1984).

3. Convention Relating to a Uniform Law on the International Sale of Goods, *opened for signature* July 1, 1964, annex, Uniform Law on the International Sale of Goods (hereinafter cited as ULIS), 834 U.N.T.S. 109, 123, *reprinted in* 1 United Nations, Commission on Interna-

form Law on the Formation of Contracts for the International Sale of Goods (ULF).⁴ The subject matters covered by ULIS and ULF together are essentially the same as those addressed by Comecon's General Conditions. ULIS and ULF are perceived as having been influenced especially by Western Europe. Third, Uncitral (officially titled the United Nations Commission on International Trade Law) revised both ULIS and ULF. Both revisions were incorporated in the United Nations Convention on Contracts for the International Sale of Goods,⁵ which was adopted by a diplomatic conference in 1980.

Comecon's General Conditions can be compared therefore with Unidroit's ULIS and ULF to see what, if any, East-West differences are represented by the Marxist law. Then any such differences can be checked to see whether they are explained by the communist system of central economic planning. Lastly, the U.N. Convention can be reviewed to see if any of the Comecon differences were adopted in this global law. These comparisons should show what is new about Comecon's international sales law, and what generally has been its influence worldwide.

All these comparisons, however, do not exhaust Marxism's possible contribution to international sales law. East-West trade has led the Western market economy countries to deal directly with the communist centrally planned economy countries, and this trading record can be checked for any effect on international private law. Finally, governments in the Western market economy countries are themselves participating more actively in their national economies. Consequently, the experience of the centrally planned Comecon countries can be reviewed to see whether it contains anything relevant for Western international sales law in the event Western governments continue to increase their economic roles.

tional Trade Law, REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 39 (1971) (hereinafter cited as REGISTER OF TEXTS); 30 LAW & CONTEMP. PROBS. 425, 429 (1965); 13 AM. J. COMP. L. 453, 456 (1964); 3 I.L.M. 855, 857 (1964).

4. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, *opened for signature* July 1, 1964, Annex I, Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), 834 U.N.T.S. 169, 185, *reprinted in* REGISTER OF TEXTS, *supra* note 3, at 64; 30 LAW & CONTEMP. PROBS. 451, 455 (1965); 13 AM. J. COMP. L. 472, 474 (1964); 3 I.L.M. 864-65 (1964).

5. Final Act of the United Nations Conference on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, Annex I, United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* 19 I.L.M. 668, 671 (1980); *see also* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982).

I. COMECON, UNIDROIT, U.N. LAWS

Before the comparison of these Comecon, Unidroit and U.N. laws, a brief account is in order for each of these laws and its origin. Comecon's law emerged from the events in Eastern Europe following World War II. The capture of power by communist regimes in these countries created for the first time an opportunity, and a need, for a Marxist international private law. For their trade relations, the Comecon countries initially used rules based on Soviet commercial experience with Western nations; and subsequently from 1951 to 1957, the Comecon countries developed their own bilateral arrangements. Then in 1958, all the Comecon countries adopted their multi-lateral General Conditions for the Delivery of Goods.

These General Conditions are a uniform sales law for all foreign trade among the Comecon countries. Since their adoption in 1958, the General Conditions have been further refined and expanded in 1964, 1968, 1975 and 1979. Jurists in Comecon countries claim, proudly and justifiably, that these General Conditions were in 1958 the first—and more than a quarter of a century later continue to be the only—broad unification of international sales law enforced in every country of a significant trading area.

Unidroit's work on the drafts that underlie ULIS and ULF began 35 years before the 1964 diplomatic conference that adopted the conventions incorporating them. Participation by the United States came only at the end of this long process. Of the 28 states attending the 1964 conference, 22 were West European countries, the United States and Israel. Of the eight states that have ratified or acceded to one or both the conventions, all are West European countries and Israel, save only for Gambia.

Uncitral was founded in 1966 partly in reaction to the leading role played by Western Europe in bodies like Unidroit. Uncitral was formally established at the initiative of Hungary, and its organization drew support from many developing countries. This Hungarian and developing country action stemmed in part from their desire to create a globally representative body to participate in formulating international trade law.

After its founding, Uncitral proceeded to revise Unidroit's ULIS and ULF, and in 1980 the U.N. Convention incorporating both revisions was adopted by a diplomatic conference and opened for ratification and accession. How widely applied around the world this U.N. Convention will become remains to be seen. In the United States, the President transmitted the Convention to the Senate in September 1983 with a recommendation that it give its advice and consent to

ratification;⁶ the Senate continues to have the Convention under consideration. At any rate, the U.N. Convention clearly constitutes a globally drafted international sales law.

II. GENERAL CONDITIONS—ULIS AND ULF

The first comparison is between Comecon's 1958 General Conditions and Unidroit's 1964 ULIS and ULF. These General Conditions are the culmination of a process in which the Comecon countries began with the Soviet trading experience with Western nations (mostly West European), and eventually drafted rules they thought more suited to their Marxist economic system. These rules were tried first in the 1951-57 bilateral arrangements, and then significantly revised and, as the major achievement, adopted as the 1958 multilateral General Conditions. Unidroit's 1964 ULIS and ULF, reflecting a strong West European influence, reached their final form only six years later. Therefore, a comparison of the 1958 General Conditions with ULIS and ULF should disclose those aspects of Western law prevalent at that time in Europe that Comecon found unsuited to its own centrally planned foreign trade.

How, then, do the 1958 General Conditions compare with ULIS and ULF? In fact, they approach the fundamental subjects of formation of a contract, obligations of the parties, and remedies and excuses for breach of contract in essentially similar fashion. But at least three differences emerge. First, the General Conditions restrict much more the contracting parties' right to exclude or depart from the unified law. Second, the General Conditions restrict much more a buyer's right to reject goods. Third, as the most important of numerous provisions that seek certainty rather than flexibility, the General Conditions provide a penalty, instead of damages, as the basic monetary remedy. The nature of, and possible connection to central planning of, each of these differences merit discussion below.

A. *Exclusion of or Departure from the Unified Law*

The difference in permitted exclusion of or departure from the unified law is substantial. In Comecon, contracting parties may not exclude the whole General Conditions.⁷ Moreover, their right to depart from most of the individual provisions is sharply limited. Pursu-

6. *Message from the President of the United States Transmitting the United Nations Convention on Contracts for the International Sale of Goods*, Senate Treaty Doc. 98-9, 98th Cong., 1st Sess., Sept. 21, 1983.

7. This prohibition has been derived from interpretation of the General Conditions preamble.

ant to the preamble of the General Conditions, the parties may depart from most of the individual provisions only by justifying their action on the basis of "the specific nature of the goods and/or special characteristics of their delivery." A minority of the provisions in the General Conditions states expressly that they apply only in the absence of contrary terms in the parties' contract.

The contrast with ULIS could hardly be greater. ULIS states that the parties "shall be free to exclude the application . . . of the present Law either entirely or partially," and "[s]uch exclusion may be express or implied."⁸ Thus, contracting parties are given complete freedom either to exclude the whole law or to vary any of its individual provisions, without any formality required even for a total exclusion.

On the question of whether the mandatory character of much of the General Conditions represents a new concept in the history of law, the answer is negative. Various legal codes around the world before 1917 contained provisions of an equally mandatory force, as do many noncommunist codes in effect today. What is new about the General Conditions is their utilization of mandatory provisions in the field of international sales law, especially their extensive utilization of this compulsory approach. This mandatory approach is all the more significant because the General Conditions are slightly longer than ULIS and ULF together, covering some subjects in a much more detailed fashion (especially payments), and covering some subjects not addressed at all by ULIS and ULF (e.g., packing and marking of goods). This broader and more detailed coverage of the General Conditions, when combined with their more mandatory approach, means that they prescribe for contracting parties many terms of the contract, in sharp contrast to the complete freedom afforded the parties by ULIS.

Is it the Comecon countries' central planning, or something else, that accounts for the 1958 General Conditions' much greater restriction of exclusion or departure? The basic answer is the central planning, with some reason as well supplied by the economic situation of these countries in the 1950's when these General Conditions were drafted. It is the nature of central planning to place a high value on decisions made by central authorities. The 1958 General Conditions reflect this philosophy. The Comecon national governments believed that the terms of this unified law, prepared by an assembled group of experts, were sounder than terms that the numerous contracting par-

8. ULIS, *supra* note 3, art. 3.

ties might draft on their own. Therefore, it made sense to mandate use of many of the General Conditions terms.

This mandating had a further advantage for the Comecon governments that is unique to central planning. These governments depend, for fulfillment of their centrally planned foreign trade, on the conclusion by state foreign trade organizations (FTOs) of the multiple contracts that are required to carry out each year's trade plan. The more of each contract's provisions that are prescribed by the General Conditions, and the fewer that are left to the discretion of the FTOs, the greater will be the speed at which these contracts are concluded. In the same way, the less will be the risk that some contracts may fail to be signed at all because the negotiating FTOs are unable to agree on the terms. Consequently, this mandating of many General Conditions provisions enables the Comecon governments to rely more securely on prompt conclusion by the FTOs of the contracts needed to implement the planned trade.

The economic situation in the Soviet Union and Eastern Europe in the 1950's was also a pertinent factor. These countries were still recovering from World War II, with many goods in short supply. Under these circumstances, the central planners thought it all the more important that they themselves, rather than the FTOs, control more decisions, so that the broad national perspective available only to the central planners could allocate more directly the scarce resources. This reasoning naturally encouraged extending the influence of the central authorities even to such matters as prescribing contract terms in foreign trade.

For the West European countries that were influential in the drafting of ULIS and ULF, their market economy systems supplied a different vantage point. A market economy suggests that optimum efficiency is more readily obtained through decentralizing most decisions to the contracting parties, who are closest to the transactions at issue. These parties are thought able to make the wisest choice of contract terms, drawing on the unified law where appropriate and drafting their own terms where they can do better. Hence, ULIS and ULF give them complete flexibility here. Further, Western countries with a tradition of limited government see a value simply in affording private parties maximum freedom whenever possible.

B. Rejection of Goods

A second difference between the 1958 General Conditions and ULIS and ULF is that the General Conditions restrict much more the rejection of goods as a remedy available to the buyer. Under ULIS

(ULF deals only with formation of contracts), rejection is one of the basic remedies given to a buyer who has received nonconforming goods. Under the General Conditions, such rejection is severely limited. As with the General Conditions' restriction of exclusion or departure, the limiting of rejection constitutes of itself no novel legal concept. What is new is the application of this approach in such a high degree to international sales law.

Again this difference between the General Conditions and ULIS is accounted for chiefly by the difference between centrally planned and market economies, with the economic circumstances of Comecon in the 1950's a supporting factor as before. Allowing a buyer in Comecon foreign trade to reject nonconforming goods presents two problems: the loss to central planning of the values represented by the originally scheduled delivery, and the practical difficulties for the rejecting buyer in obtaining replacement goods. As to the values of central planning, every delivery is scheduled originally because it represents the most effective utilization of resources in the buyer's and seller's countries, sometimes including political and social resources. Preserving a delivery as initially scheduled, even when the goods prove imperfect, sustains the values involved in its scheduling. Allowing a rejection by the buyer, on the other hand, derogates from them. Hence, the philosophy of central planning can be read as requiring that rejection be limited.

As to the rejecting buyer's practical situation, it often would be unable to obtain replacement goods during the pending plan period, because the planning is usually so taut that all the goods to be produced then would have been already allocated. Thus, a rejecting buyer commonly would either have to forego the goods until the next plan period, or else spend scarce hard currency to buy the goods outside Comecon. Given these undesirable alternatives, requiring the buyer to accept the nonconforming goods and make do seemed a realistic approach for the General Conditions.

Both the values of central planning and a rejecting buyer's practical difficulties were accentuated by the Soviet and East European economic hardships of the 1950's. For central planning, the resource costs would have seemed unacceptably high in locating a new buyer for the rejected goods, adjusting them to meet the needs of that buyer, and transporting the goods to it. For a rejecting buyer, replacement goods could rarely have been obtained soon.

To the market economies at which Unidroit's 1964 ULIS and ULF were mainly directed, the remedy of rejection appeared in a quite different light. The market economy system places no special

value on preserving a delivery as originally contracted. Moreover, a rejecting buyer can often obtain replacement goods with reasonable ease. Thus, ULIS authorizes rejection fairly broadly to protect the interest of buyers in ultimately obtaining the exact goods that they originally ordered.

C. Penalties or Damages

The third difference between the 1958 General Conditions and ULIS and ULF concerns the form of the monetary remedy for breach of contract. Under the 1958 General Conditions, a penalty is the primary monetary remedy, with damages secondary; under ULIS, damages are the basic monetary remedy (ULF regulates only formation of contracts). Once again, the element in the General Conditions that is different—here a penalty as the primary monetary remedy—represents no innovative legal concept. As before, what is new is the extensive use of this concept in international sales law.

Unlike the 1958 General Conditions' restriction of exclusion or departure and of rejection, their approach to penalties does not stem mainly from central planning. Rather, the origin is basically the economic situation of Comecon in the 1950's. In that time of relative scarcity, the Comecon national governments wanted to focus maximum attention on completing scheduled physical deliveries and, when necessary, on enabling the buyer to adjust to nonconforming deliveries. Damages thus appeared a disadvantageous remedy, because resolving their complex and time-consuming proof problems diverts resources from that deemed all-important task of consummating physical deliveries. Penalties seemed to serve this task better, because they are quickly and easily ascertained.

Central planning also plays a role. It too can foster a concentration on physical deliveries such that efforts to be expended on all apparently unrelated matters are to be minimized. Similarly, central planning operates more readily with values that may be quantified rapidly, wholly aside from the amount of effort required. Accordingly, central planning reinforced the preference in the 1958 General Conditions for penalties, which are easily and quickly ascertainable, as against damages.

Actually the emphasis on penalties rather than damages in the 1958 General Conditions is the most important of numerous provisions that seek ease and speed of application together with certainty. These General Conditions regularly stipulate, for instance, an exact number of days or months where ULIS and ULF employ flexible terms such as "promptly" or "a reasonable time." For filling gaps in

the unified law, these General Conditions specify the seller's law, whereas ULIS refers such questions to its "general principles." Still another example of the 1958 General Conditions' pursuit of certainty concerns formation of a contract. Unlike ULF, they require a writing; and, again unlike ULF, they permit no deviation of the terms of the acceptance from those of the offer.

ULIS and ULF, of course, lack central planning's purpose of promoting fulfillment of planned trade. For a monetary remedy, ULIS provides basically compensatory damages, on the market economy theory that the contracting parties will thereby be enabled to allocate the affected resources to their most productive uses. For the other provisions where ULIS and ULF employ terms that are flexible when the General Conditions are specific, ULIS and ULF again try to supply rules that can be shaped to the individual aspects of each transaction. In part also, naturally ULIS and ULF often cannot be as precise as the General Conditions because ULIS and ULF are directed at a much more heterogeneous collection of countries than are represented by the politico-economically similar Comecon countries.

D. General Conditions, 1958-79

The history of the General Conditions differs from the history of ULIS and ULF in a significant respect: the General Conditions have undergone progressive revision since their inception in 1958. Comecon has adopted either amended or new versions in 1964, 1968, 1975 and 1979. In addition, the national arbitration tribunals in the Comecon countries have been continually interpreting the General Conditions since 1958. What effect, then, has this two-and-a-half decades of development had on the differences that existed between the 1958 General Conditions and the 1964 ULIS and ULF?

As to the strict restrictions imposed by the 1958 General Conditions on exclusion or departure, some slight softening has occurred. Exclusion of the whole General Conditions is still barred, but most individual provisions now may be departed from more easily than before. This easier departure has been made possible in an effort to obtain more efficiency in foreign trade. Central planners now increasingly seek such efficiency by delegating more authority to the FTOs. In part, the central planners believe that the FTOs can structure many terms of the contract better than the pertinent General Conditions clauses, because the FTOs are closer to the transaction at issue. Also in part, the experience gained by the FTOs since 1958 has made them more responsible in discharging authority, and accordingly has led to the central planners' entrusting them with more authority.

Despite some easing of the restrictions on departure from the General Conditions, however, the original limitations do remain, albeit in much more flexible form. Thus, the General Conditions retain a mandatory character that, when coupled with their broad and detailed coverage, still prescribes for contracting parties many terms of each transaction. Consequently, there continues the sharp contrast with ULIS, which affords complete freedom of departure or exclusion.

As to the 1958 General Conditions' strict limitation on rejection, again some slight softening has taken place, though less than for exclusion or departure. Once again, the reason is the central planners' search for increased efficiency. Authorizing rejection more often promotes efficiency by stimulating sellers to better quality production. The improved economic situation of the Comecon countries, which assures a minimum supply of essential goods, has made possible this focus on quality as well as on quantity of production.

But significant obstacles remain to any wide authorization of rejection in the General Conditions. Central planning, though more open-minded to occasional rejections as a spur to better quality production by sellers, continues to place high values on the completion of most deliveries as originally scheduled. In addition, a rejecting buyer seeking replacement goods, though better off than in the 1950's, still encounters substantial practical difficulties. Therefore, the restrictions on a buyer's right to reject goods, while less in some subsequent versions of the General Conditions than in the 1958 version, are still mostly in place. Thus, this difference from ULIS, which broadly authorizes rejection, endures, albeit in slightly reduced magnitude.

With respect to damages, on the other hand, the change in the General Conditions since 1958 has been significant, and has markedly reduced the difference from ULIS. Penalties remain the primary monetary remedy in the General Conditions, but damages have been elevated to an important role. Behind this change is again the central planners' enhanced focus on better quality production and, as a concomitant, on more efficient operation by economic units. Damages, as a more accurate measure of injury sustained than penalties, support this new focus by providing a more rational accountability for economic units and the quality of their production.

The central planners increasingly see the additional time and effort required to ascertain damages, as compared with a penalty, as more than offset by this superior long-run accountability. Further, the additional use of damages creates neither inconsistencies with the values of central planning nor practical difficulties for plaintiffs.

Hence, the authorization of damages under the General Conditions has grown steadily since 1958; and this growth should continue, with each step diminishing the difference from ULIS.

The mechanical and precise nature of other provisions in the 1958 General Conditions, such as time periods, that provide quick and easy certainty still remain, however, essentially unchanged from 1958. For formation of a contract, nonetheless, some suggestions are heard for relaxing the strict requirements for a writing and for an acceptance that consents to every term of the offer. The slight softening of the restrictions on departure, of course, enables contracting parties somewhat more readily to replace a General Conditions specification with an individually drafted term of their own. But, aside from this greater possibility of departure, the mechanically precise approach of General Conditions provisions, although lessened for those involving penalties and damages, retains its contrast with the flexible approach of ULIS and ULF.

III. U.N. CONVENTION

In 1980, a diplomatic conference adopted the United Nations Convention on Contracts for the International Sale of Goods,⁹ which represents a revision, prepared by Uncitral, of Unidroit's ULIS and ULF. The establishment of Uncitral had been formally proposed by Hungary, and the Comecon countries played an active role in drafting this U.N. Convention. How, then, did the U.N. Convention turn out with respect to the differences observed above between Comecon's General Conditions and Unidroit's ULIS and ULF?

The U.N. Convention in fact follows the ULIS and ULF approach as to all these differences. That outcome is hardly surprising. Whereas the General Conditions are designed for Comecon's similar centrally planned economies, the U.N. Convention is aimed at all the countries of the world with their widely varying economic systems, and accordingly cannot pursue an approach keyed to any one particular system. Thus, it is Comecon's central planning that explains much of the General Conditions' restriction of departure and of rejection. For the General Conditions' approach to penalties and damages, the connection with central planning is less clear; but here the difference between the General Conditions and both ULIS and the U.N. Convention has narrowed since 1958.

As to exclusion or departure, the drafters of the General Conditions could reasonably believe that their centrally prepared terms

9. See *supra* note 5.

would appropriately anticipate and equitably resolve, for the member countries' centrally planned trade, the various problems of all possible transactions. Hence, the drafters could conclude that mandating the use of most of these terms would supply a sound regulation. For the U.N. Convention, on the other hand, the range of possible parties and transactions to which it might apply are enormous. The only realistic approach is to afford contracting parties a large leeway to adjust the Convention's terms to their individual circumstances. In addition, the U.N. Convention's constituency, unlike that of the General Conditions, contains many countries philosophically unsympathetic to any central mandating of terms for contracting parties. Consequently, the U.N. Convention, essentially like ULIS, allows the parties freely to exclude it entirely or to vary almost all of its individual provisions.

As for rejection, Comecon's restrictions come from values important to central planning and from difficulties encountered there by rejecting buyers. Both of these problems are absent for the U.N. Convention. Therefore the U.N. Convention, like ULIS, authorizes rejection fairly widely to enable a buyer eventually to obtain exactly what it ordered.

As to penalties and damages, Comecon's central planning seems to be consistent with the extensive use of damages that is authorized by both ULIS and the U.N. Convention. That it was chiefly Comecon's postwar economic difficulties that prompted the emphasis in the 1958 General Conditions on penalties instead is suggested by the increasing authorization of damages (though penalties remain more important) in successive versions of the General Conditions as the member countries' economies have improved. Whether the advance of damages within the General Conditions will ultimately approximate their widespread authorization in ULIS and in the U.N. Convention—or whether Comecon's central planning actually contains some limit on their use—is a question that only the future can answer. To the years ahead must also be left a determination of whether Comecon's centrally planned system will follow ULF and the U.N. Convention in relaxing, for formation of a contract, the General Conditions' present requirements of a writing and of an acceptance that alters nothing in the offer. But other General Conditions provisions, such as time periods, will for the foreseeable future retain a mechanical certainty that contrasts with the flexibility of ULIS, ULF and the U.N. Convention.

In sum, this comparison of the U.N. Convention with the differences separating the General Conditions from ULIS and ULF shows

the U.N. Convention to have adopted the course taken by ULIS and ULF. What mainly caused the General Conditions to diverge from ULIS and ULF is the centrally planned economic system used by the Comecon member countries; and this central planning also mainly accounts for these same differences existing between the General Conditions and the U.N. Convention.

IV. CONCLUSION

Those respects in which Comecon's General Conditions differ from Unidroit's ULIS and ULF, and from the U.N. Convention, represent no new legal concepts, but rather an extensive application to international sales of previously known concepts. Further, the General Conditions appear to have had no major impact on the U.N. Convention. For this area of international private law, then, the newness of the Marxist contribution, as well as its effect on law worldwide, seems to be modest.

But all the final returns may not be in. Behind those differences that distinguish the General Conditions from ULIS and ULF, and from the U.N. Convention, lies chiefly the Comecon countries' central planning. For foreign trade, this central planning has meant state trading. State trading did not arrive with the Bolshevik Revolution; it is said to have been born in the early Middle Ages.¹⁰ In the twentieth century, moreover, even market economy governments have sometimes indulged in state trading. The two World Wars, the depression of the 1930's, various post-World War II economic crises—and occasionally self-defense when dealing with communist state trading countries—have each led Western industrialized countries to adopt some state trading. Nonetheless, it is really the communist countries that have given state trading its meaning in the modern world.

The thrust of all this global state trading, of course, goes to international public, not private, law. In the public sphere, however, even the bastion of the market economy system, the United States, sometimes has chosen to meet the communist superpowers at least partly on their own state trading terms. Prominent examples are such arrangements as the U.S.-U.S.S.R. and U.S.-P.R.C. Grain and Maritime Agreements.¹¹ Further, and more to the point of this article, a

10. Hazard, *State Trading in History and Theory*, 24 *LAW & CONTEMP. PROBS.* 243 (1959).

11. Grain Agreement, Oct. 20, 1975, United States-U.S.S.R., 26 *U.S.T.* 2971, *T.I.A.S.* No. 8206, extended, Aug. 5, 1981, *T.I.A.S.* No. 10237, and extended again, Aug. 4 & 20, 1982, *T.I.A.S.* No. 10451. Grain Agreement, Aug. 25, 1983, United States-U.S.S.R., *N.Y. Times*, July 29, 1983, at A1, col. 4 & at D9, cols. 2-5; Aug. 2, 1983, at D1, cols. 4-5 & at D13, cols. 1-2; *Wall St. J.*, July 29, 1983, at 3, col. 1; *Wash. Post*, July 29, 1983, at A1, col. 1 & at A5, col.

spillover has occurred into international private law. In U.S. Trade Agreements with the governments of the Soviet Union, China, Hungary and Romania, the U.S. government has bargained for, and obtained, a provision encouraging third-country arbitration clauses in private commercial contracts.¹²

The origin of this intergovernmental provision is a common situation confronting U.S. companies in East-West trade. Frequently, several of them compete among themselves to conclude a contract with a single FTO that represents the whole communist country. U.S. officials were concerned that the U.S. companies, especially small- and medium-sized ones, often lack the bargaining strength to resist arbitration clauses specifying the communist country's tribunal. To rectify this perceived imbalance in bargaining strength, the U.S. government negotiated with these four communist governments an intergovernmental encouragement of third-country arbitration.

In the future, this same common situation of U.S. companies in East-West trade (and possibly in commerce with other state trading entities, such as OPEC) may well produce U.S. intergovernmental agreements that encourage the use of other clauses in private commercial contracts. Such encouragement—as in the case of third-country arbitration—falls short of the direct mandating of terms done within Comecon by the General Conditions. Nevertheless, it still represents an intrusion of the U.S. government into international private law that is unusual in the U.S. experience and that has clearly been caused by communist state trading.

But the possible future global relevance of the General Conditions and state trading does not end with East-West trade. As noted above, Western industrialized countries in this century have on occasion adopted state trading, not just to deal with communist countries, but also to deal with home grown economic problems. Governments of developing countries as well often exercise significant responsibility for the domestic and foreign operations of their national economies.

3; Aug. 2, 1983, at A4, cols. 1-4; Aug. 6, 1983, at G8, col. 3. Maritime Agreement, Oct. 14, 1972, United States-U.S.S.R., 23 U.S.T. 3573, T.I.A.S. No. 7513. Maritime Agreement, Dec. 19, 1975, United States-U.S.S.R., 26 U.S.T. 2767, T.I.A.S. No. 8195. Grain Agreement, Oct. 22, 1980, United States-China, T.I.A.S. No. 9930. Maritime Agreement, Sept. 17, 1980, United States-China, T.I.A.S. No. 10244.

12. Trade Agreement, Oct. 18, 1972, United States-U.S.S.R., art. 7(1); this Agreement, which never entered into effect, appears in: 67 DEP'T. ST. BULL. 595 (1972); Bureau of East-West Trade, U.S. Department of Commerce, U.S./SOVIET COMMERCIAL AGREEMENTS 1972, at 88 (1973); and 11 I.L.M. 1321 (1972). Trade Agreement, July 7, 1979, United States-China, art. VIII(2), 31 U.S.T. 4651, T.I.A.S. No. 9630. Trade Agreement, Mar. 17, 1978, United States-Hungary, art. VIII(2), 29 U.S.T. 2711, T.I.A.S. No. 8967. Trade Agreement, Apr. 2, 1975, United States-Romania, art. VIII(2), 26 U.S.T. 2305, T.I.A.S. No. 8159.

In the United States, debate is currently joined over the wisdom of an industrial policy, that is, over whether the national government should assume more responsibility in domestic and foreign economic matters. Western market economy countries indeed may progressively increase the economic authority of their national governments.

These Western governments may, for instance, come to participate more actively in foreign trade, if not through direct planning, then through owning state domestic corporations that engage in foreign trade. These governments may then consider mandating more terms for international sales contracts, just as the General Conditions do now by restricting exclusion or departure. These governments may then also become more interested in the completion of contracted deliveries (because, for example, they provide domestic employment for the exporter); and accordingly, these governments may contemplate an international sales law that, like the General Conditions, limits rejection.

To be sure, such possible adoptions by the industrialized West of approaches employed by Comecon's General Conditions are merely speculative possibilities. U.S. intergovernmental encouragement in East-West trade of a particular type of arbitration clause in private commercial contracts is, on the other hand, already a reality. It remains true that Marxism's impact on international sales law is, to date, modest. But the reality of some present impact and the possibility, however speculative, of an important future impact both suggest that Marxism's approach to these matters bears continued watching.

