Uniform Words and Uniform Application. - The 1980 Sales Convention and International Juridical Practice

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Uniform Words and Uniform Application.
The 1980 Sales Convention and International Juridical Practice[*]

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I. Introduction: The Task

[intro]

Our topic addresses general problems of methodology in applying the 1980 Vienna Convention establishing uniform law for the international sale of goods,[1] - an exploration that may be relevant to other measures to reach and maintain agreement across diverse legal and economic cultures.

A. The Setting

A half century of work to prepare a generally acceptable uniform law for the international sale of goods culminated in April 1980 when a diplomatic conference of sixty-two States approved, without dissent, the United Nations Convention on Contracts for the International Sale of Goods (CISG).

Ten adoptions ("ratification" by Signatories and "accession" by other States) are required to bring the Convention into force. On December 11, 1986, the deposit of instruments of ratification by China, Italy and the United States of America brought the number of adoptions to eleven; the convention will enter into force on January 1, 1988, for offers and contracts made on and after that date.[2] Ratification or accession procedures are pending in several additional States.

The 1980 Sales Convention and other measures to establish uniform international rules for private law are designed to minimize the uncertainties and misunderstandings that result from two basic problems: (1) uncertainty over which domestic law applies and (2) uncertainty in each country attempting to apply a wide range of foreign legal systems.

As we shall see, uniformity does not automatically result from agreeing on the same words for international rules; the objectives of the agreement can be undermined by different national approaches to interpreting and applying the uniform international rules. Our topic is concerned with this basic issue.

B. Wider Significance of the Topic

This report poses specific questions of methodology in terms of the 1980 Sales Convention.

[1] United Nations Convention on Contracts for the International Sale of Goods (CISG); Vienna, 11 April 1980 (A/CONF. 97/18, Annex I - the Final Act of the Conference; A/CONF. 97/19 - the Official Records of the Conference; these and similar citations in this report refer to United Nations documents.) The Convention was finalized in six languages - Arabic, Chinese, English, French, Russian and Spanish.

[2] CISG Art. 99. By April 1987 the U.N. Secretary General, as depository, had received formal notices of ratification from China, France, Hungary, Italy, Lesotho, United States of America and Yugoslavia, and of accession from Argentina, Egypt, Syria and Zambia.

However, the questions of methodology are also relevant to the wide range of work by the United Nations Commission on International Trade Law (UNCITRAL) and to similar international agreements developed by the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and regional international organizations. Some of the international agreements to which our studies are directly relevant are listed in a footnote.[3] In addition, comparing and analyzing differing national approaches to applying international agreements should be relevant more widely to efforts to reach and maintain international understanding.

[3]The measures towards uniform law developed by the United Nations Commission on International Trade Law (UNCITRAL) were examined in a symposium issue of the American Journal of Comparative Law: UNCITRAL's First Decade, 27 AM. J. COMP. L. 201-564 (1979).Uniform laws and rules prepared by UNCITRAL: (1) Convention on Contracts for the International Sale of Goods (1980) ("CISG" or "Sales Convention"). For bibliography see infra note 4. (2) Convention on the Limitation Period in the International Sale of Goods (1974). Text: V UNCITRAL Yearbook 209 (U.N. Pub. E. 75. V. 2; also available in other languages) and 23 AM. J. COMP.L. 356 (1975). Analysis: articles by Professor Smit in 23 AM. J. COMP. L. 337 (1975) and by Professor Sono in 35 LA. L. REV. 1127 (1975). (3) Convention on the Carriage of Goods by Sea (1978). Text: 27 AM. J. COMP. L. 421. Analysis: Id. 353-420. Bibliography: Id. 441. (4) The UNCITRAL Arbitration Rules (1976). Text: Id. 489. Analysis: Id. 489-488. Bibliography: Id. 505. (5) Model Law for International Commercial Arbitration (21 June 1985, U.N. Pub. A/40/17, Annex I). (6) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 330 U.N. Treaty Series 38, II Register of Texts (U.N. Pub. E. 73. V.3, also available in other languages) (1958 Convention was pre-UNCITRAL: closely related in function to above UNCITRAL conventions). (7) Nearing completion by UNCITRAL: Convention on International Bills of Exchange and Promissory Notes (A/40/17 (1985) paras. 334-338).The Hague Conference on Private International Law: Most closely related to international trade is the Final Act of October 30, 1985: Convention on the Law Applicable to Contracts for the International Sale of Goods. Cf. The 1980 Hague Convention on Civil Aspects of International Child Abduction, discussed in 16 N.Y.U.J. INT. L. POL. 415 (1984).The International Institute for the Unification of Private Law (the "Rome Institute" or "UNIDROIT"): Pioneering work in many fields, including the 1930 and 1931 Geneva Conventions on Bills of Exchange, Promissory Notes and Cheques, I Register of Texts, supra 13-39; Convention on Agency in the International Sale of Goods (Geneva 1983). For a review of current work see Pfund. 19 Int'l law. 505 (1985) and annual reports to UNCITRAL. See. E.g., U.N. Pub. A/CN.9/237/Add.2.

II. Organization of the Work: Background

A. Sources of Information on International Juridical Practice

To obtain information for a General Report to the Twelfth International Congress of Comparative Law, the present writer distributed a Study Outline to national reporters.

The following national reports were received:

Australia - Kenneth Sutton, Professor and Dean, Faculty of Law, University of Queensland.

Bulgaria - Luibmir Popov, Professor at the Institute of the Science of State and Law, Sofia.

Canada - Jacob S. Ziegel, Professor, University of Toronto.

Canada and Quebec - Claude Samson, Professor of Commercial Law, Laval University, Quebec.

Czechoslovakia - Antonin Kanda, Professor, Institute of State and Law, Czechoslovak Academy of Science, Prague.

Federal Republic of Germany - Peter Schlechtriem, Professor, Albert-Ludwigs University, Director, Institute for Foreign and International Private Law, Freiburg i.Br.

Finland - Leif Sevón, Director of Legislation, Ministry of Justice, Helsinki.

German Democratic Republic - Dietrich Maskow, Proessor, Academy for the Science of State and Law, Potsdam-Babelsberg.

Hungary - Gyula Eörsi, Professor, University of Budapest; Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences.

Italy - Michael J. Bonell, Professor, Universita Cattolica del Sacro Cuore, Milan.

Netherlands - Franz J.A. van der Velden, Senior Lecturer, Utrecht Law Faculty.

New Zealand - John H. Farrar, Professor of Law, University of Canterbury, Christchurch.

Poland - Jerzy Rajski, Professor, Faculty of Law, Warsaw University.

Singapore - Warren L.H. Khoo, Advocate & Solicitor, Supreme Court of Singapore.

United Kingdom - Malcolm Clarke, Lecturer, University of Cambridge.

Venezuela - Luis Covia Arria, Professor, Post-Graduate Program in Commercial Law, Faculty of Legal and Political Science, Central University of Venezuela.

These reports provide rich resources of national approaches and experience in handling national and international law on which this study relies.[4]

[4]The name reports on the Twelfth International Congress of Comparative law are cited to the name of the

reporter followed by an abbreviation of the country of origin. E.g., Maskow (G.D.R.). The 1980 Sales Convention has generated a voluminous international literature. The UNCITRAL Secretariat reports annually to the Commission on the bibliography relevant to this and other UNCITRAL conventions; these bibliographies are reproduced in the UNCITRAL Yearbooks. See e.g., Vol. XIII at 426. A valuable bibliography by Professor Winship appears in 21 Int'l lawyer 585-602 (1987). General treatises on the Sales Convention: P. Schlechtriem, Einheitliches UN-Kaufrecht (T?bingen: Mohr, 1981); J. Honnold, Uniform Law for International Sales Under the 1980 U.N. Convention (Deventer, Neth., 1982), herein cited: Honnold Commentary.

III. Problems of Methodology: An Introduction

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A. National Law and International Relationships

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Law for international trade is subject to tensions between two forces - the divisive impact of nationalism and our unwillingness to confine our activities within national borders. In recent decades added pressure for wider economic relationships has resulted from the depletion of local sources of raw materials and by burgeoning developments in technology that call for specialization and exchange. Law, entangled with complex political traditions and institutions, cannot move with the speed of science - but the pressures have become so great that we can see (as Galileo insisted of the earth) that the law “does move”.[5]

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B. Words and International Communication

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We are less fortunate than our colleagues in physical sciences who work with phenomena that are independent of cultural and national boundaries and can be expressed in numbers and formulas that have universal meaning. Laws for human affairs stem from diverse roots and present baffling problems of communication. Even if there are universal principles of right and justice, national laws responding to these principles have been expressed in words and concepts that have developed from diverse human experiences.

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In preparing international legislation it is possible to minimize these problems by using, wherever possible, words that refer to physical events that occur world wide rather than legal idioms that vary from culture to culture.[6] However, normative ideas cannot always be expressed in physical terms; words used in law often have overtones of values that reflect diverse interests and premises.

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An even more fundamental difficulty is that legislation is addressed to the future. Certainly in the diverse and developing field of international trade even the wisest legislators can not face and solve all of the problems that will arise. There is no escape from ambiguity at the growing edge of general statutory rules.

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Our mission is to explore ways to reduce these differences to workable limits.

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[5]For the historical setting see R. David. The International Unification of Private Law, International Encyclopedia of Comparative Law, Vol. 2, ch. 5, 123 et seq. (1971). See also: J. Sauveplanne Festschrift, Unification and Comparative Law in Theory and Practice (1984).

[6]See Honnold Commentary, op. cit. Supra note 4 ? 87; Samson (Can. &Quebec) at notes 26 et seq. For explanation of references to this and other national reports to the 1986 Congress see note 4, supra.

IV. Specific Problems of Methodology

A. Uniform Rules and Uniformity of Result: Regard for International Case-Law and Scholarly Writing

Introduction. No international tribunal has been established to deal with controversies that arise from commercial transactions; the uniform international rules must be applied by national courts or by arbitral bodies. For reasons just mentioned (IIIB) tribunals will not always reach the same result in applying the Convention. How can these problems be minimized?

(1) Interpretations by Tribunals in Other Countries

A tool for minimizing disharmony was provided in the 1980 Sales Convention. Article 7(1) lays down the following basic principle for applying the Convention:

> "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application ..."

This principle is expressed in other uniform legislation, international and national,[7] and even in the absence of statutory direction is implicit in legislation designed to achieve uniformity.

The first question posed by the Study Outline to the above-listed national reporters was this: Would tribunals in your country be receptive to the suggestion that they should give weight to interpretations in other countries? The issue was sharpened by the following question:

> In State A a question arises as to whether a provision of the Convention should be interpreted to mean "X" or "Y". Tribunals in States B and C have reached interpretations of "X". What, if any, weight should tribunals in State A give to the interpretation current in States B and C?

(a) The Tradition: Regard for Domestic Case Law

The national reports to the 1986 Congress squarely faced the tendency of national tribunals to apply law in accordance with ingrained national patterns. True, there has been some opportunity for national courts to develop a broader outlook when rules of private

[7] For provisions similar to Art. 7(1) see: United Nations Convention on the Limitation Period in the International Sale of Goods (1974), Art. 7, V UNCITRAL Yearbook 210; United Nations Convention on the Carriage of Goods by Sea (1978), Art. 3, IX UNCITRAL Yearbook 212.(Emphasis in quoting Article 7(1) and other statutory provisions has been supplied.)

international law ("conflict of laws") call for the application of the domestic law of another State. However, this experience has had little impact in the many jurisdictions in which domestic transactions predominate. In addition, discomfort with dealing with foreign law seems to produce a "homeward trend" in determining which legal system is applicable. Eörsi (Hung) VII. However, as we shall see, in some jurisdictions important experience has been developed in applying the early conventions designed to establish (e.g.) uniform rules for the carriage of goods by sea, air, rail and road. What does this experience imply for interpretation of the Sales Convention?

(b) Related Common-Law jurisdictions

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"Courts of the United Kingdom traditionally have given "relatively little weight ... to the interpretation given to uniform law by courts in other adhering states." Clarke (U.K.) IA(a). Until recently, this tradition has been followed even in applying international transport conventions - the *Hague Rules* and the *Warsaw Convention*. Cautiousness in confronting different legal traditions "reflects the barriers of language and tradition" and "is reinforced by those who write books, many of whom are busy practitioners." Id. at note 4. There has been a wider sharing of legal experience within the area influenced by the English common law. Reporters from Commonwealth countries note the persuasive authority of decisions of the House of Lords, the English Court of Appeals and Privy Council. Sutton (Aus.) I, 1.2. Ziegel (Can.) IA at pp 1-2; Farrar (N.Z.) IA; Khoo (Sing.) paras. 8-15. This is especially true "in relation to commercial matters having an international impact, where it has been recognized that uniformity is highly desirable." Sutton. id. at note 5. However, even within the Commonwealth the use of legal experience is somewhat selective. "New Zealand courts make extensive use of case-law from the United Kingdom and other parts of the Commonwealth," with major emphasis on "English, Australian and Canadian cases." Farrar, id. Similarly, Australian courts pay special attention to case-law in England, New Zealand and Canada. id. at note 6.

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Australian courts probably would seek to follow "a body of case-law" in civil law courts interpreting the Convention, but if decisions were in conflict the court would tend to follow the view prevailing in the common law English speaking jurisdiction. Sutton, id. at p. 4. But cf. Farrar (N.Z.) IA at note 10. On the other hand, Canadian courts were expected to be receptive to case law introduced to the civil law by contact with the law of Quebec. Samson (Can. & Quebec) at note 35 et seq. Moreover, the use of civil law experience in dealing with uniform international rules would be encouraged by a line of United Kingdom decisions culminating, in the House of Lords, in *Fothergill v. Monarch Airlines 1980* 2 All E. R. 696. Ziegel, IA. Canadian cases have relied on civil law interpretation of the international Hague rules on carriage of goods by sea; Owen, J. in the Eisen case, pointed to a series of cases that graphically illustrated "the importance attached among nations to consistency by their respective courts in the interpretation of the Hague Rules, with far-reaching results in the development of common law."1977 1Ll. Rep. 665 at 670. Similarly,

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"Singapore courts, faced with a problem of interpretation of CISG, will ... have regard to the Convention's international character and to the need to promote uniformity." This follows from two factors (1) the influence of English cases such as Fotherglil and (2) the obligation of Singapore courts "to give effect to Article 7(1)." Khoo, paras. 20-21.

(c) Civil Law Jurisdictions

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In Poland, "The utility of ... comparative law research in interpreting uniform laws has been widely accepted in Polish legal writing." Rajski, II at note 12 (citing authorities). A "generally accepted" approach to "foreign courts' decisions and doctrine" was illustrated by a 1975 decision of the Supreme Court interpreting the *Guadalajara protocol* to the *Warsaw Convention on Air Carriage*. Id, at notes 13 and 14. Similarly, Bulgarian courts and the Court of Arbitration for International Commerce at Sofia take account of the interpretation of international conventions in other Contracting States to clarify the provisions of the conventions and to achieve uniformity of interpretation. Popov (Bulg.) IA47.

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Prof. Bonell reports, however, that French and German courts found it impossible to reconcile conflicting interpretations of a provision of the 1930 *Geneva Convention on Bills of Exchange and Promissory notes*; in spite of heavy criticism, courts have followed whatever jurisdiction was indicated by private international law. Bonell (It), 1-1.4.4 at note 28 (citing criticism by R. David in II Int. Encl. Comp. L. 103). Prof. Bonell concluded that, so long as the differences remained unreconciled, applying the interpretation of the jurisdiction indicated by rules of private international law was preferable to "autonomous" law, since the "autonomous" application might vary with the choice of forum. Id. at note 19. Query: The 1930 *Geneva Convention* governs not only international but also domestic transactions. Are conflicting interpretations under such conventions more difficult to reconcile than problems under conventions (like the Sales Convention) that are confined to international transactions?

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The report for the Netherlands found no instance in which Dutch courts stated that they relied on foreign courts in interpreting uniform law, even in cases where it seemed that foreign decisions were applicable. Prof. Van der Velden concluded (p. 24 at note 53) that on this point Dutch courts could learn from recent English decisions like the *Fothergill case*. (The Dutch court arrived at the same interpretation of the Convention as the *Fothergill case* but without explicit reliance on decisions in other States.)

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(d) *Stare Decisis* and Predictions of Judicial Responses

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In some civil law jurisdictions, court decisions at least in theory have less binding effect than in common law countries. Covia Arria (Venez.) 2.1.4.1. This has led to the question: What, if any, international weight should be given to such civil law decisions? (Lord Diplock raised such a query in the *Fothergill case*, supra.) In concrete terms: Should a court in

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State A give little or no weight to decisions in State B because of the theory in State B that its decisions do not bind other courts in State B? To help in analyzing this issue, national reporters have provided useful information on the binding effect of court decisions in their country.

The United Kingdom "applies the notion of binding precedent."While trial courts are not bound by their own decisions they "are bound by those of the Court of Appeal and the House of Lords." The Court of Appeal in nearly all circumstances "is bound by its own decisions and by those of the House of Lords. The House of Lords is not bound by its own previous decisions but usually follows them; if the House disapproves of a previous decision of the House it is more likely to strive to distinguish it than to overrule it." Clarke (U.K.) IA(b) at pp. 1-2. 60

In Canada, the doctrine of *stare decisis* "has been part of Canadian common law from the beginning." Decisions of a superior court are binding on a lower court. Until recently, provincial courts of appeal considered themselves also bound by their own previous decisions "but this tradition seems to be breaking down." Ziegel (Can.) 4(b) at p. 3. And Comment, 63 Can. Bar Rev. 629, 634 (1985). On the authority of decisions in the U.K. for courts in Australia, see Sutton. I.1.2 at pp. 2-3, and in NewZealand see Farrar IA at pp. 3-4. 61

In Canada theoretical differences between the common law and civil law jurisdictions concerning the binding nature of precedent seem to have little practical significance. Quebec courts regard themselves free to depart from decisions below the Supreme Court (of Canada(level; however, these departures "are very rare." Ziegel, Q.4(b), quoting W. Friedmann, 31 Can. Bar Rev. 723 (1953). See also 63 Can. Bar Rev. 629, 634 (1985). In short, in Quebec the "doctrine and practice of precedent is remarkably close to that of the common law." Friedman, supra, at 746. 62

In the Netherlands the same is true. "De jure Dutch law denies binding authority" to court decisions. However, "de facto the courts accept binding authority of decisions of superior courts, especially of decisions of the Hoge Raad; there is no reason to expect a different attitude towards decisions of uniform law courts." van der Velden (Neth.) p. 22. Similarly, although the courts of Bulgaria lack authority to make law but may only interpret the law, the Supreme Court "has authority to resolve conflicts in judicial practice and to this end can set forth interpretations which courts are required to follow." Popov (Bulg.) I.A. 4.b. See also: Schlechtriem (F.R.G.) IV 2 at p. 32; Covia Arria (Venez.) 2.1.4.3 (result depends on authority of foreign decisions in country of origin; in view of Art. 7, such decisions would be analogous to interpretations of Venezuelan law). 63

(e) The Forum for Implementing the Convention - Ratification or Legislation 64

States may become parties to the Convention by ratification or accession (Art. 91); how- 65

ever, the manner in which domestic courts are directed to apply the Convention in lieu of domestic law depends on the legislative and constitutional procedures followed by each Contracting State. In some countries conventions may be given legal effect simply by ratification or comparable action; in others domestic legal effect is given by an Act of Parliament or other enactment that may resemble purely domestic legislation.

66 Bonell (It.) notes that the Convention's special "international character and the need to avoid domestic law intrusions are equally applicable regardless of whether the method of implementation is simply ratification" or by "national legislation embodying its rules." 1.1 at p. 2.

67 Professor Ziegel reports: "The English position seems to be that where the Convention is not annexed to the Act of Parliament" the Convention should only be referred to "where there is an ambiguity" in the Act (p. 6, citing cases). On the other hand. Prof. Velden reports a significant development in the Netherlands (P.9 at note 22). Formerly, when the rules of a convention where enacted in the Dutch language, courts considered only this Dutch text. However, in 1966 the Constitution recognized the supremacy of international conventions over domestic law. As a result, in 1982 and 1985 the Hoge Raad looked to the original text of the Convention and, in the later case, also considered the legislative history of the convention. Id. at p. 10, notes 23 and 24.

68 In Finland either mode of implementing a convention may be used. In some cases, the rules of the international convention may be extended to domestic transactions - a form of enactment that may obscure the international origin of the rules and the need for uniform international interpretation. Sevón (Fin.) pp. 3-4.

69 Query: even if the Sales Convention is given effect by enactment in the same form as a domestic law, should not this enactment include the text of Article 7, which provides that in interpreting the Convention "regard is to be had to its international character and to the need to promote uniformity in its application"? This approach to interpretation is surely one of the obligations of Contracting States. Does it not follow that this obligation calls for communicating the rule of Article 7 in an effective manner to tribunals of the Contracting State?

70 If the Convention is given domestic legal effect only by an act of parliament, the inclusion of Article 7 in the enactment suggests the following conclusions: (1) The principle of parliamentary sovereignty would require tribunals of the enacting State to give effect to the principles of interpretation stated in Article 7 even if different patterns applied to legislation of domestic origin. (2) If one parliamentary enactment applies to both international and domestic transactions, the obligations under Article 7 as to interpretation, of course, do not extend to domestic transactions. However, the tribunals of the enacting state may well conclude that parliament intended that the same interpretation should be given to the same statutory language in both international and domestic settings.

(2) Use of Foreign Scholarly Writing

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Some common law jurisdictions have traditionally given little effect to academic discussion of legal problems while many civil law jurisdictions give substantial weight to such writing or "doctrine." This difference in outlook suggests these questions: (1) In considering the interpretation expected in other countries, should not tribunals consider the influence of doctrinal writing in those countries? (2) Can doctrinal writing about the Convention have a special role in avoiding diversity that would result from viewing the Convention through the lenses of domestic law?

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(a) Domestic Practices

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A foundation for considering these questions is provided by these reports on the influence of domestic scholarly writing (doctrine).

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In the United Kingdom "the former practice against citation of living authors has been relaxed." However, English courts depend primarily "on statements by senior judges in previous cases." However, courts resort to writers "if there is no judicial statement on the point" or (a point significant for our topic) in considering "decisions of foreign courts in foreign tongue." In contrast, in Scotland "the writer appears to enjoy greater respect." Thus a statement by the writer of an "institutional" work "will be seen as the law of Scotland, unless it has been contradicted by the courts." Clarke (U.K.) IA(d) at note 5. Cf. Khoo (Sing.) para. 69: The English Court of Appeals in the Ulster-Sweift case relied on foreign commentary on the CMB Convention; there was similar reliance in the *Fothergill case*.

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The New Zealand courts in general "adopt the English approach to doctrine as it is presently practiced" except that scholarly writing probably is cited more frequently than in Engliand. Farrar IA at note 11. Practice in Australia seems similar to that in new Zealand. Sutton (Aus.) 1.6 at p. 8.

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The sharpest divergence from traditional U.K. practice is reported from Canada, whose courts long ago shed reluctance to use scholarly writings. Canadian courts "regularly cite textbooks, law review writings and other scholarly literature." This development "is explained by the wide geographical dispersal of Canadian courts, a less cohesive bar, less specialization among judges, and the greater influence exercised by Canadian law schools." Ziegel (can.) at 4(d), p. 4. See also Samson (Can. & Quebec) 4.1.2 (increased significance of doctrine even for statutory laws). In the United States academic writing is cited exhaustively in judicial opinions.

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Reporters from civil law jurisdictions stress the weight given to scholarly writing in applying both domestic and foreign law: Popov (Bulg.) IA4d: Art. 7 would further encourage this practice; Sevón (Fin.) p. 9: Writers also bring to bear decisions of foreign courts on uniform legislation, and of other Scandinavian courts on uniform Nordic laws; van der Velden

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(Neth.): One exception is Hoge Raad, but this court is fully informed by an advisory opinion by the Procurer-General, whose reports carrry great weight. See also Rajski (Pol.) 5, p.8.

(b) Doctrinal Writing and the Sales Convention

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The national reports show that in many jurisdictions doctrinal writing plays a significant role in adjudication. (Let us refer to these as “D” jurisdictions.) It seems to follow that a jurisdiction that relies primarily on earlier court decisions (a “C” jurisdiction) would be in error if it concluded that, in the absence of court decisions in a “D” jurisdiction, there was no basis for predicting the approach of its tribunals. 80

To be specific, let us assume that a tribunal in a “C” jurisdiction in construing the Sales Convention faces alternative constructions “X” and “Y”. This court concludes that, pursuant to Art. 7 of the Convention, the court should give regard to the interpretation that would be more consistent with the Convention’s “international character and the need to promote uniformity in its application.” Let us assume further that doctrinal writing, highly regarded in several “D” states, supports interpretation “X” and rejects interpretation “Y”, and there is no court decisions or writings supporting interpretation “X”. It may be suggested that the objective of “uniformity of application” laid down in Art. 7 calls for substantial regard for interpretation “X”. See also: Covia Arria (Venez.) 2.1.4.4. (influence of Art. 7 in encouraging regard for foreign doctrine). 81

Let us reverse the field, and suppose that doctrinal writing in “C” jurisdictions favors interpretation “Y”, but that such writing has little influence in those jurisdictions. It may be suggested that tribunals in other jurisdictions need not give weight to this doctrinal writing to carry out the Article 7 objective of “uniformity” but only for the persuasive value (if any) of the authors’ reasoning. 82

Later we shall consider the danger of hasty conclusions by judges and lawyers that the Convention is simply codifying the legal traditions of their own domestic law. Would it not be appropriate for tribunals even in “C” jurisdictions to consult international scholarly writing simply to avoid the over-hasty recourse to the familiar concepts of domestic law? 83

(3) General Access to Case-Law and Bibliographic Material

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The development of a homogenous body of law under the Convention depends on channels for the collection and sharing of judicial decisions and bibliographic material so that experience in each country can be evaluated and followed or rejected in other jurisdictions. 85

(a) An International Clearing-House

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There is general agreement on the need for an international clearing-house to collect and disseminate experience under the Convention. The International Institute for the Unification of Private Law (UNIDROIT) performs a very useful service by reports in its Uniform Law Review of case-law and bibliographic material under several uniform laws. UNCITRAL is in the course of considering whether it should perform a similar service for UNCITRAL Conventions. (See the Secretariat report on this topic: A/CN.9/262.) Such a step is supported by several reporters.

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(i) Channels for Reporting

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Gathering needed material calls for assistance from national sources. UNCITRAL and its Secretariat can not be charged with selecting the appropriate domestic channel; we may expect that UNCITRAL would request the Secretary-General to request this assistance from States that ratify UNCITRAL conventions. Reports to this Congress provide useful information on channels for gathering the necessary material.

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In the German Democratic Republik no difficulty is expected in collecting decisions under the Convention since all cases would come from a single tribunal. In addition, arbitration awards that include significant legal questions are being published in anonymized form; the awards could be transmitted through the Chamber of Foreign Trade or the Ministry of Foreign Trade. Maskow, 2.2, p.13 at note 17 (citing publications of arbitral awards by the GDR Chamber of Foreign Trade).

90

For Australia decisions could be gathered and disseminated through the International Business Law branch of the Federal Attorney-General's Department, since the Department has shown "keen interest in promoting the Convention and international trade law in general." A second and possibly preferable alternative would be to charge the law school in one of the universities with this task. Sutton 3.2.

91

In Venezuela a central role would be played by the Consultoria Juridica of the Ministry of Foreign Relations, in collaboration with faculties of law and private foundations. Covia Arria 2.1.4.5.

92

For New Zealand the channel for communication would be the Ministry of Foreign Affairs, in collaboration with the four law schools. Farrar I.A. at note 13.

93

For Bulgaria the appropriate channels would be the Ministry of Foreign Affairs or of Foreign Commerce. Popov I.A.4.3.

94

In the United Kingdom assistance might be obtained from the U.K. Committee on Comparative Law, or by requesting one or more individuals to become rapporteur for new developments. Clarke I.A.e. at p.2.

95

In Finland the Ministry of Justice could (as in the past) request the courts to transmit decisions on specified subjects to the Ministry. Sevón p.10.

96

The report for the Federal Republic of Germany also sets forth useful information for the development of scholarly materials and for "Judges, Academics," which have repeatedly held discussions on the uniform sales law. Schlechtriem IV(2)(a)-(c) at pp. 32-34. 97

(ii) Methods for Dissemination 98

We may assume that material prepared under UNCITRAL auspices would be disseminated through the world-wide U.N. documentary services and would be available through U.N. Depositary Libraries. See Samson (Can. & Quebec) 4.1.3. 99

Will these channels be adequate? Warren Khoo (Sing.; paras. 46-47) stresses the vital importance of collecting and disseminating case-materials on UNCITRAL conventions, but cautions that it would be inappropriate for UNCITRAL to distribute this material only to States that are members of the Commission. In addition, distribution to States may not reach counsel and other users that need the materials. Khoo points out that "at least for countries like Singapore, dissemination through professional publications would offer a greater chance of the material reaching the end-user." 100

Queries: (1) Is there incompatibility between collection and publication by UNCITRAL and the further dissemination of these materials by commercial publications? (There have been expressions of interest by commercial publishers in disseminating case-material that UNCITRAL gathers.) (2) Can one rely exclusively on commercial publishers to gather world-wide case-law? Would the price of commercial publications be within the reach of all who need the material, particularly in developing countries? 101

B. Legislative History 102

(1) The Problem: Domestic v. International Setting 103

What resources, in addition to interpretations in other Contracting States, are available to counteract the tendency to construe uniform international rules in the light of domestic rules and patterns of thought? As we have seen, the Convention instructs courts to interpret its provisions with regard "to its international character and to the need to promote uniformity in application." Pending the development of international case-law and scholarly writing, a useful corrective for domestic preconceptions may be provided by the genetic history of the international rules, provided by legislative history. Samson (Can. & Quebec) 4.2. 104

(a) Records of the Convention's Development 105

The Convention's history is rich and revealing. In preparing the Convention UNCITRAL built on the work, spanning three decades, that produced the Hague Conventions of 1964 (ULIS and ULF). Deliberations in UNCITRAL would commence with an analysis of the handling of the problem in the 1964 Conventions. In many instances the Hague solution was 106

retained; the discussions shed light on the common understanding of the Hague solution and the reasons for its retention. When the Hague approach was modified or rejected, the reasons for the change shed a revealing sidelight on the new provision. As the UNCITRAL draft developed, proposals to delete or amend were made and decided; the views that prevailed in making these decisions add depth to the international understandings that underlie the Convention's words.

The most vital parts of the history of the 1964 Hague Conventions appear in the two-volume records of the Conference.[8] These records include detailed reports explaining he drafts that were laid before the 1964 Conference, and the discussions and decisions on these proposals. 107

The UNCITRAL work that led to the 1980 Convention is fully documented. This material is reproduced in the UNCITRAL Yearbooks, Volumes I-X (1968-1979).[9] These volumes include Secretariat studies, reports of the Working Group on the International Sales of Goods, and reports of discussion and action by the Commission in its plenary review of the Working Group Drafts. The Records of he 1980 Vienna Conference that finalized the Convention provide a complete record of the action on each article of the UNCITRAL draft, and a record of the discussions and decisions.[10] 108

Access to the necessary documents and finding the relevant legislative history present practical problems. The present writer has prepared a one-volume Documentary History of the 1980 Sales Convention that reproduces the relevant documents and, by marginal notes, keys the legislative material to the final provisions of the Convention. (Publication of this volume is expected in 1988). 109

(2) Receptiveness to Legislative History 110

(a) Related Common-Law Jurisdictions 111

(i) Interpretation of Domestic Legislation 112

In the recent past much of the common law world adhered to the doctrine of English courts that statutes must be given a literalistic reading, with little room for consideration of parliamentary intent as evidenced by legislative debates. This approach seems to be weakening 113

[8]Diplomatic Conference on the Unification of Law Governing the International Sale of Goods. The Hague, 2-25 April 1964, Records and Documents of the Conference (The Hague: Ministry of Justice o the Netherlands, 1966). Unfortunately, only well-stocked libraries have these volumes.

[9]These Yearbooks are published in four languages, English, French, Spanish and Russian. The U.N. Document Number for Volume I (1968 - 1970) for the English version is (1971: A/CN.9/Ser. A/1971; E.71.V.1). Succeeding volumes have similar documentation. Other languages versions substitute F, S, or R for "E" in the above designation.

[10]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March - 11 April, 1980, Official Records (A/CONF.97/19; United Nations, Vienna, 1981, Sales No. (for the English version) E.81.IV.3. Other language versions bear an appropriate initial in place of "E".

in England even in domestic cases: “The rule against citation of pre-Parliamentary reports has been abrogated” although “the rule against citation of Parliamentary debates remains.” Clarke (U.K.) IB at p.2 (Hansard’s reports of the debates may be “placed before the court for use by the judges, should they wish to consult it.”) In Canada the English approach is followed in domestic cases. Ziegel IBI (citing criticism of this approach in Ontario Law Reform Comm., Report on Sale of Goods, Vol. 1, pp. 29-30 and in scholarly writing.) But cf. Samson (Can. & Quebec) 4.2.2.1.

114 Australia in theory follows “the English model” but in practice is “a little more liberal.” A 1981 decision of the High Court “looked at legislative history” and seemed to depart from literal meaning to give effect to the purpose and object underlying the statute.“ Sutton I.1.5 at notes 15, 19, including references to cases, including Cooper Brokes. 147 C.L.R. 297 (H.C. 1981). Professor Sutton also reports that wider use of legislative materials may result from the 1984 addition of a provision (? 15AB) to Australia’s Acts Interpretation Act; this 1984 provision provides, under specified circumstances, that consideration ”may“ be given material, not forming part of a legislative Act, that is capable of assisting in ascertaining the meaning of a provision of the Act. This new section mentions various materials that may be used - e.g., relevant reports of a Royal Commission, Law Reform Commission or committee of inquiry; explanatory memoranda relating to the Bill laid before Parliament before enactment; relevant Parliamentary debates. (The Act is detailed and cannot be fully reported here; reference should be made to the full text of Sutton’s report at 1.7). ”New Zealand courts seem at present to be quite liberal in allowing citation of *travaux préparatoires*.” Farrrar IB at note 15 (citing 1981 and 1984 decisions that referred to committee reports and even Parliamentary debates.) In the United States courts routinely make heavy use of legislative history, prompting the witticism that reference is made to the statute only when the legislative history is unclear.

(ii) Interpretation of International Conventions

115

116 The House of Lords in 1980 made a significant and influential departure from the strict English approach with respect to treaty interpretation: *Fothergill v. Monarch Airlines*, supra, interpreting the Warsaw Convention on air carriers. Clarke reports: “In the interest of uniformity the judges must employ the same aids to interpretation as the judges of other adhering States. The Courts will follow the broad guidelines of the 1969 Vienna Convention on the Law of Treaties. (See Arts. 31 and 32.(In particular, the courts will look at *travaux préparatoires* if (1) examination of the text of the treaty does not resolve the issue; (2) the *travaux* are public and accessible; and (3) the *travaux* ‘clearly and indisputably point to a definitive legislative intention.’ IB at notes 7-9, citing opinions in *Fothergill* and two 1983 decisions of the Court of Appeals. Reporters from the Commonwealth conclude that the *Fothergill* decision will have strong (and perhaps decisive) influence in their courts. Sutton (Aust.) I.1.6 at notes 20-22; Ziegel (Can.) at 4(3) (sees ”no difficulty“ and Art. 7 of the Convention will ”strengthen Canadian courts hands”). Farrar (B.Z.) I.A, reports that a flexible approach is further encouraged by the Acts Interpretation Act of 1924 and references

in a 1979 decision (2 N.Z.L.R. 540(referring to U.N. Resolutions and Reports.

(b) Other Jurisdictions

117

Reporters from jurisdictions primarily of civil law background report free use of *travaux préparatoires* even in construing domestic legislation - a practice that can only be reinforced by the Convention's directions in Art. 7 for regard to its "international character" and the need to "promote uniformity." 118

In the Netherlands some 20% of the decisions of the Hoge Raad used legislative history, van der Velden pp. 13-15 at notes 30-33, citing decisions and research into judicial practice. In the Federal Republic of Germany courts "look at *travaux préparatoires*, at least to the extent that they are easily accessible, such as when they are brought forward by attorneys or made accessible by scholarly literature, which German courts generally heed very carefully." Schlechtriem. III.1.(b) at ppp.25-26, notes 38-41. The use of legislative materials also seems to be linked to the emphasis on effectuating the purpose of the legislation (the teleological approach). Schlechtriem at pp. 26-27 note 42 and van der Velden at pp. 16-18, notes 35-41. See also: Covia Arria (Venez.) 2.2 (legislative history has greatest value in earlier years after enactment). See also Samson (Can. & Quebec) 4.2.2.2. 119

In Finland, legislative history "is considered to be a necessary part" of legal reasoning in construing legislation. Emphasis is given to certain aspects of legislative history. "The Government's Bills contain explanations of the reasons for the proposed legislation as well as the intended interpretations of the provisions." Similar materials may be included in an "explanatory memorandum" when "legislation enabling Finland to ratify a Convention is presented to the Parliament." More particularly, a "reference to the Official Records of the Vienna Conference is to be included in the Bill introducing the legislation necessary for ratification of the Convention." Sevón, B at pp. 11-13 (Sevón also cautions against reliance on statements of "one or a few delegates" as contrasted with votes at the Diplomatic Conference). 120

Other national reports also note the use of legislative history. See Bonell (It.) at 1.4.3. and notes 13-15: A "useful guide" but the value "should not be over-estimated"; Italy and most continental legal systems have departed from the 19th Century emphasis "on the subjective intent of the draftsmen." Maskow (G.D.R.) 2.3, notes 18-21: Legislative history is merely an "auxiliary" means of interpretation but the Official Records can be a "valuable help" in interpreting the Convention. See also Rajski (Pol.) p.7 (Use accepted in legal writing but practical importance has been weak; records of 1980 Vienna Conference "not available in any public or university library"). Cf. Popov (Bulg.) at pp. 3-4. 121

(3) Legislative History when the Statute is "Clear"

122

Some of the reports have noted that legislative history may be used only when the statute is 123

"ambiguous." In one sense this is a truism: domestic legislation and international conventions are not subject to judicial amendment. However, this truism may divert thought from more relevant questions: What materials are useful in deciding whether the law-maker deciding the question posed by the problem at hand? Can the words alone tell the interpreter whether their meaning is "clear"?

Tribunals often have reason to be impatient with desperate efforts to salvage a sinking case by appeals to doubtful legislative history. Legislative history invoked by advocates often will shed only a dim light on the meaning of the statutory text. On the other hand, it may be hasty to conclude that the words clearly decide the problem at hand before appropriate attention is given to those words in their setting in the legislative process. 124

Should the interpreter decide on the meaning of a statutory provision before giving appropriate consideration (which, indeed, may well be short shrift) to legislative history? Caution about haste in reading statutory words may be especially appropriate in dealing with an international convention since, at first glance, the words may seem to express a familiar domestic rule. This may well be true; the Convention was built with regard to the rules of domestic law. But it would be hasty to leap to this conclusion without checking on available materials that reveal the origin and purpose of the provision at hand. Even in jurisdictions that are habituated to the "clear meaning" rule, a more nuanced approach may be justified by the directive in Article 7 for interpretation of the Convention with regard "to its international character." 125

C. Principles of Growth: "General Principles" 126

(1) Introduction 127

(a) Evolution of Article 7(2) of the Convention 128

Paragraph (2) of Article 7 addresses the following problem: A matter that is "governed by" the Convention presents a question that is not "expressly settled in it." How should such questions be decided? 129

Paragraph (2) was added at a late stage as a compromise between divergent views. The view that prevailed at the 1964 Sales Convention was stated as follows in Article 17 of ULIS: 130

Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based. 131

Professor André Tunc concluded that this rule was indispensable; otherwise a party could contend that the Law "was not absolutely clear or did not precisely cover the case in hand" 132

so that he would be entitled to a rule of domestic law that was “more advantageous to him.”

In the UNCITRAL Working Group objections to ULIS 17 that had been voiced at the Hague Conference were pressed with added vigor: The “general principles” on which the law was based had never been articulated; ULIS 17 led to uncertainty. Supporters of ULIS 17 replied that filling “gaps” by turning to domestic law would involve even greater uncertainty. The rules of private international law were neither clear nor uniform; there would be doubt over which law was applicable. In addition, the domestic law would be foreign to one of the parties and would be unsuited to the problems of international trade. Finally, referring gap-filling to domestic law would never lead to a uniform solution, whereas recourse to the general principles of the Convention would develop common international case-law (IV. A, supra). 133

UNCITRAL concluded that adding Article 7(1), supra, calling for uniformity in application, met the problem. The 1980 Conference disagreed and added paragraph (2) of Article 7. In response to those who feared that courts might turn too quickly to national law, the first part of paragraph (2) reproduced the “general principles” rule of ULIS 17. On the other hand, in response to those who doubted that general principles of the Convention could always be found, paragraph (2) added that “in the absence of such principles” open questions are to be settled “in conformity with the law applicable by virtue of the rules of private international law.” 134

(b) Matters “Governed by” the Convention 135

Article 7(2) provides for the use of general principles of the Convention only to solve questions “concerning matters governed by this Convention.” The Convention governs only some of the issues that may arise in an international sale. Thus, the Convention specifically excludes issues concerning the validity of the contract (Art. 4(a)) and the effect of the contract on the property in the goods (Art. 4(b)). Nor does the Convention govern rights based on fraud or the capacity of an agent to bind the principal - vital but complex bodies of law which this Convention could neither supplant nor restate; unification in these areas must await the completion of separate conventions. Since these areas are not “governed” by the Convention, they are beyond the reach of “gap-filling” under Article 7(2).[11] (11) See also Bonell (It.) 2.2., p. 14, Schlecthtreim (F.R.G.) II.3(1)(a), p.11. 136

(2) Approaches to “Gaps” in Domestic Legislation 137

Following our customary approach we shall first examine the way domestic practice deals with problems not expressly solved in statutes or codes. Then we shall consider whether 138

[11]The foregoing paragraphs are based on Honnold Commentary, op. cit. Supra. N.4, pp. 125-128.

domestic practice is applicable to international legislation such as the Sales Convention.

At this point we confront particularly significant differences between common law and civil law approaches. 139

(a) Common Law 140

Common law countries have not attempted to place their legal system within a systematic legislative framework or “code.” To be sure, the body of legislation on specific topics continues to grow and some of these statutes presume (inaccurately from a civil law perspective) to call themselves “Codes” - e.g. the (U.S.A.) Uniform Commercial “Code”. Nevertheless, all of these statutes depend on a vast body of general principles that have developed in the course of deciding innumerable cases. (“Principles” is used advisedly, for the link between past cases and current law is the body of principles that have been developed by the extension of the results of specific cases to different but analogous situations.) 141

Even statutes of wide scope rely on general common-law principles. For example, one of the basic general provisions of the Uniform Commercial “Code” (UCC ?1-103) states: “Unless displaced by the particular provisions of this Act, the principles of law and equity including ... (eleven examples(shall supplement its provisions.” The above provision was included for the sake of emphasis; in the absence of such provision the availability of the body of common law principles would be taken for granted as indispensable. The fact that statutes are drafted on this assumption helps to explain the view in some common law jurisdictions that extension of statutes by analogy is unnecessary and even inappropriate. 142

This tradition of strictness in applying statutes is mentioned in reports from the United Kingdom, Canada, Singapore, Australia and New Zealand: Clarke IIA, p.3; Ziegel IIA. P. 7; Khoo, para. 74; Sutton, IIA, 2.1; Farrar IIA at note 17. However, significant departures from this tradition are reported. Clarke (U.K.) draws attention to the “tradition of the common law, in which the law was developed, its gaps filled, by resort to more general underlying principles.” On occasion, courts have “remedied obvious lacunae in statutes”; however the practice is uneven, depending on the judge’s “training and temperament.” IIA(I) at notes 11 and 12. Sutton describes the filling of statutory gaps by the High Court of Australia. IIA at note 23. Farrar recalls that in New Zealand “resort to general principles in the broadest sense is an integral part of common law reasoning with cases.” In addition, New Zealand decisions have used statutory provisions “as sources of influence or policy,” and have used “general principles of a statute under the more conventional concepts of the purpose of scheme of an Act.” IIA at notes 18-24. Farrar concludes: “A purposive approach is now arguably the dominant approach to the interpretation of all statutes and seems predicated by Section 5(j) of the Acts Interpretation Act 1924” (citing Burrows in (1984(11 N.Z.U.L.R. 3-4). 143

Interpretation of International Uniform Laws. As we have seen, in 1980 the House of Lords in the /Fothergill/ decision broke new ground for the interpretation of unifying international laws. However, in the Buchanan case the House of Lords had criticized an opinion by Lord Denning that filled a gap in an international convention. Ziegel, II.A.Q4(a), p.8 (1978(A.C. 141, 153, 156, 157, 160-161. (The international convention in question did not contain a rule on interpretation like Article 7(2) which provides that matters "not expressly settled" in the Convention "are to be settled in conformity with the general principles on which it is based.") 144

Khoo, after discussing the above rebuke to Denning by the House of Lords and the reliance by Singapore courts on English law, adds (para. 85): "What is absolutely clear is that in the face of these words in Article 7(2), a Singapore court would have to take leave of the traditional constructionist approach so much favored by those in the mainstream of English jurisprudence." Similarly, Sutton reports that in view of recent trends in Australian courts and the express provision in Article 7(2), "in the interpretation of the Convention, Australian courts will be able to mould the Convention to meet new situations not expressly covered in its provisions." II.A.2.1. 145

(b) Other jurisdictions 146

Professors Schlechtriem (F.R.G.) and van der Velden (Neth.) examine the problem of "gaps" as part of an intensive analysis of general principles of interpretation. Unfortunately, it is impossible to give an adequate summary of this valuable material. Schlechtriem pp. 7-27; van der Velden pp. 6-21. 147

Both reports illuminate their analysis by copious references to judicial decisions; the Schlechtriem report also includes an analysis of a large number of decisions by German courts interpreting the uniform laws for international sales established by the 1964 Hague Conventions (ULF and ULIS). 148

(i) Purposive or "Teleological" Interpretation as a Barrier to Domestic Law 149

Both the Schlechtriem and van der Velden reports stress the importance , in modern jurisprudence and scholarly writing, of a "purposive" or "teleological" interpretation of legislation, and add that this approach has special importance for legislation designed to achieve international uniformity. Both reports point out that the Sales Convention lacks a surrounding body of uniform international law, so that failure to make full use of the reference in Art. 7(2) to the "general principles" on which the Convention is based would undermine the Convention's provision (Art. 7(1)) calling for "uniformity in ... application." Schlechtriem pp. 26-28 at note 42; van der Velden pp. 16-18 at notes 35-40. 150

(ii) General Principles and Civil Law Codes 151

Prof. Bonell reports that "referring to general principles of law is a well-known technique in civil law systems" and refers to express provisions to this effect in the civil codes of Italy, 152

Austria, Spain, Egypt and Switzerland. In France and Germany the codes do not expressly call for recourse to general principles; nevertheless this approach is taken for granted. 2.3 at pp. 15-16. See also Sevón at pp. 13-14; Samson (Can. & Quebec) 4.3.2; Covia Arria 3.1.2.: provision in Civil Code of Venezuela, Art. 4, for analogy from specific provisions and recourse to general principles of law.

This aspect of civil law systems resembles the Sales Convention, since both (unlike the common law) lack a related body of supplementary legal principles. 153

On the other hand, Prof. Maskow (G.D.R.) reports a "conservative tendency in interpreting international agreements ... A wide interpretation, as a rule, is not admissible, either in the form of an extended application or legal analogy, because (the resulting application was not derived from(the parties' mutual consent ... In the case of international agreements a dynamic interpretation would be more difficult (since(more parties are involved and would have to agree on extended interpretation ... The required flexibility can be secured," through other "dynamic means of legal development, such as usages of trade (Art. 9 CISG)." 2.1 at notes 8-9. At a later point, however, Prof. Maskow reports on the use of general principles in interpreting the CMEA rules for export delivery contracts ("ALB"), but preference is given "to the extensive and analogous application of concrete provisions over the deduction of concrete solutions from general principles." Id. 3.1 at note 23. In this regard, Maskow sets forth several important principles that can be derived by analogy from specific provisions of the Sales Convention. Id. at p. 16. See infra at (3). 154

The Czechoslovak International Trade Code, drafted under the influence of the 1964 Hague Convention, calls for use of the "principles governing" the Trade Code in dealing with gaps. Kanda (Cz.) p. 18. The reporter regrets the possibility that, under Art. 7(2) of the Convention, gaps might be filled by reference to domestic law selected by the rules of private international law; "an internationally unified legal norm" such as the Convention has even greater need for recourse to its general principles than a domestic law such as the Czechoslovak Trade Code. P.18. See also Eörsi (Hung.) p. 16.; Rajski (Pol.) III para 6 at p. 10; Popov (Bulg.) II.A." p.4. 155

In this writer's opinion, public law conventions restricting the sovereign power of States call for stricter construction than conventions articulating the obligations of parties to the commercial contract. See Honnold Commentary, op. cit. Supra note 4 at ? 103. 156

(3) Examples of "General Principles" of the Convention 157

Some of the reporters have illustrated the possibility of developing general principles of the Convention by listing examples. These lists, of course, differ but the extent of similarity is significant. It is not feasible to set forth the grounds for establishing these general principles; brief listing must suffice. 158

(a) Loyalty to the other party to the contract. Sevón, A at p. 14. 159

(b) The duty to cooperate with the other party. Maskow p. 16; Samson (Can. & Quebec.) 4.3.3.1(1); Honnold, Commentary ?? 323 & 342 (n.2), op. cit. Supra note 4; Bonell, 2.3.2 p. 19. Compare the obligation not to interfere with performance by the other party. Honnold Commentary ? 436 (cf. CISG Art. 80). 160

(c) The duty to mitigate damages. Sevón p. 14; Honnold, Commentary ? 101; Bonell 2.3.2. p. 19; Samson at notes 142, 144. 161

(d) To act in accordance with standards of a reasonable or businesslike person. Bonell 2.3.2. p. 19; Maskow p. 16 standards Cf. Samson at note 146 (priority for usage). 162

(e) The obligation not to contradict a representation on which the other party relied. Bonell 2.3.2. p. 19. 163

(f) More generally, the protection of reliance. (Ziegel Q.4). 164

(g) Foreseeability of legal consequences of breach of contract. Maskow p. 16. 165

(h) Legal effect for the obligations of promises. Ziegel Q.4 at p.10. 166

(i) Preservation of the contract, Samson at notes 139-141. 167

The above examples were deduced from the use of similar principles in different articles of the Convention. Professors Ziegel (Q. 4 at p. 10) and Bonell (2.3.2) agree with this method but conclude that this approach alone is not sufficient. Professor Ziegel offers the challenging observation that it would be damaging to the Convention "if it did not answer most sales questions"; this approach was needed to give effect to the Convention's call for interpretation that would achieve the Convention's objective to unify the law. 168

(a) Recourse to "General Principles" under Article 7(2) and Development of International Case-Law 169

We have noted that Article 7(2), in calling for gap-filling through use of the convention's "general principles," avoids the intrusion of diverse rules of domestic law. A corollary is the fact that only development under the aegis of the Convention contributes to the body of international jurisprudence and doctrine. (See IV.A, supra.) 170

For example, let us assume that a question "governed by" the Convention but not specifically solved by its provisions is answered by recourse to private international law and the domestic law of State A. This solution will not be available when the question arises again and rules of private international law point to the domestic law of States B, C, or D ... on the other hand, recourse to "general principles" of the Convention will contribute to international body of case-law that will support the Convention's objective to unify the law. 171

D. Interpretation to Promote Good Faith in International Trade 172

Paragraph (1) of Article 7 concludes with the statement that in interpreting the Convention there shall be regard for promoting "the observance of good faith in international trade." This language was adopted as a compromise between two divergent views: (a) some delegates supported a general rule that, at least in the formation of the contract, the parties must observe principles of "fair dealing" and must act in "good faith". (b) Others resisted this step on the ground that "fair dealing" and "good faith" had no fixed international meaning and would lead to uncertainty. The commission decided that an obligation of "good faith" should not be imposed loosely and at large, but should be restricted to a principle for interpreting the provisions of the Convention. This compromise was generally accepted, and was embodied in the concluding words of Article 7(1). 173

What content should be given to "good faith" as an aid to interpretation? The national reporters were asked whether their jurisdictions imposed an obligation of "good faith." and were invited to make suggestions concerning the proper application of the Convention's "good faith" requirements. 174

(1) "Good Faith" in Domestic Law 175

Again we face a significant difference in approach (if not in result) between jurisdictions related to English common law and those related to civil law. 176

(a) Common Law Approaches 177

Reporters from jurisdictions closely linked with English common law agree that "good faith" is not an accepted premise for imposing legal obligations. Clarke (U.K.) IIB at pp. 3-5; Sutton (Aus.) IIB at 2.2; Farrar (B.Z.) IIB at pp. 7-8; Ziegel (Can.) IIB at pp. 11-12. However, a number of rules reach results that, in civil law areas, might be described as imposing an obligation of "good faith." 178

Clarke reports that such obligations have been imposed under labels such as: restitution (for the costs of preparatory surveys); a duty of disclosure (by the assured in an insurance contract); equitable estoppel; undue influence; control of contract terms; remedies for misrepresentation. Clarke suggests that "good faith" as a general principle emerged in German law when specific provisions of the civil code were drawn together, but that such attempts at generalization have not met with success in England. "English judges tend to be suspicious of general principles, which they regard as too vague to be useful." 179

Ziegel notes that the Ontario Law Reform Commission's Report on Sale of Goods (3 Vols. 1979; an important study for which Ziegel was Reporter), in its proposed revision of the Sale of Goods Act, proposes (3.2) an obligation o f good faith in the performance of a 180

right or duty created by the Act. (Compare the (U.S.A.) Uniform Commercial Code, ?1-203, quoted infra.) The Ontario proposal has generated controversy (see Bridge, (1984) 9 Can. Bus. L.J. 385) but Ziegel concludes that the dispute is largely academic: “Even the strongest critics of good faith concepts concede that the common law has long promoted a policy of reasonableness in the interpretation of contractual rights and duties and in filling gaps in the parties agreement. It is also a principle of statutory construction that where a provision is capable of alternative interpretations the court will chose the one that will lead to the more reasonable result.” The court is the anthropomorphic figure of justice in the guise of the reasonable man” (citing Davis Contractors v. Fareham, (1956(A.C. 696. 728-29).

The development of specific common law rules into wider generalizations, foreshadowed by the above reports, is dramatically illustrated by the (U.S.A.) Uniform Commercial Code (UCC) which in ? 1-203 lays down the following general rule: “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” The UCC drafters did not provide a definition of “good faith” to implement this provision; some guidance is provided by the statement (directly applicable only to Article 2 on Sale of Goods) that “good faith” in the case of a “merchant” means not only “honesty in fact” but also “the observance of reasonable standards of fair dealing in the trade.” UCC ? 2-103(1)(b). The vagueness of the concept has delayed its development; some of the recent literature is cited in a footnote.[12] 181

(b) Other Jurisdictions 182

In the German Democratic Republic the law governing international commercial contracts (GIWI)[13] contains rules which “correspond to the principles of good faith.” Maskow 3.2. at p. 17. These include requirements that the parties “cooperate in an effective manner”; perform their contractual duties in a manner “to attain the purpose of the contract in the best possible way ... and to enable the other party to perform his duties”; “use their best endeavors to prevent damage to the other party and to mitigate such damage as has occurred.” 183

Prof. Bonell (It.) 3.3., p.24 notes that, under the civil codes that require the parties to act in good faith, “the specific application of good faith may differ considerably in practice.” The German requirement (“Treu und Glauben,” BGB ? 242) has been developed by case law to include such important issues as wrongful conduct in negotiation (culpa in contrahendo), abuse of rights, hardship and unconscionable terms, but comparable provision in some other codes has played a modest role in judicial practice. In Italian practice this can be 184

[12] Summers, “Good Faith.” 54 Va. L. Rev. 195 (1968) and 67 Cornell L. Rev. 810 (1982); Burton. Breach of Contract and Good Faith, 94 Harb. L. Rev. 369 (1980); Note, Good Faith Performance, 67 Iowa L. Rev. 1 (1981); Restatement, Second, of Contracts ? 205.

[13] Gesetz ?ber inernationale Wirtschaftsvertr?ge (GIW).

explained by the fact that some of the results obtained elsewhere by a “good faith” requirement flow from specific provisions of the Italian civil code; a duty to disclose a ground for invalidity of a contract (Art. 1467). For interpretation with regard to good faith in Venezuela, see, Covia Arria 3.2.2. (Codigo de Procedimiento Civil, Art. 10). For general requirements in Bulgarian law of “bonne foi” in making and performance of contracts, see Popov at IIB2, p.5. See also Samson at notes 151-152.

(2) “Good Faith” Under the Convention

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Professor Schlechtriem, in his thorough review of case-law under the 1964 Sales Convention (ULIS), reports that although “good faith” was not mentioned in that Convention, an obligation of “good faith” was given effect under ULIS 17 as one of the “general principles on which (the Convention(is based..” (As was noted under IVC, Article 7(2) of the 1980 Convention contains the same language.) In refusing to give effect to an agreement to settle a controversy because one party was unaware of a basic fact known only by the other party, the German court stated: “The principles of good faith also govern those transactions subject to the (1964 Sales Convention(for they are an essential element of all modern sales laws ...” Schlechtriem, III2(b) pp. 30-31.

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Prof. Maskow suggests that ascertaining the “general principles” on which the 1980 Convention is based can be made more objective in the light of standards for “good faith.” Thus, Maskow suggests that “good faith” calls for “conduct that is normal among tradesmen.” Although this obligation could not be used to set aside undertakings clearly agreed upon, “unjust clauses requiring interpretation” could be construed “in favor of the prejudiced party.” Additional standards would be provided by “usages of trade” and by “contractual practice” (including codifications of practice such as Incoterms and similar compilations) and from conventions related to the Sales Convention. Maskow 3.1 & 3.2, pp. 17-18. See also Samson, 4.4.2; Honnold “the observance of good faith in international trade” may call for comparative research on what is “commonly accepted” for comparable transactions - or at least shaped “in the light of the special conditions and requirements of international trade.”

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The writer of the present report can not help being impressed by two points: First, a general obligation of “good faith,” although carrying semantic overtones as appealing as “justice,” lacks predictable content - at least in most common-law jurisdictions. In fact, this concept has developed different contours in various civil law jurisdictions. Second, the reference to “good faith” in Article 7(1) embodied a deliberate and carefully-negotiated compromise: The proposal to establish a general “good faith” obligation was rejected: what was accepted was the provision of Article 7(1) that “good faith in international trade” was to be used as a principle “in the interpretation of this Convention.”[14] (See IVB, supra, on the role

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[14]This background is set forth in Honnold Commentary, op. cit. Supra note 4, ? 94, p. 123, summarized supra at IVD (1).

of legislative history in interpretation.)

Under this understanding, the reference to “good faith” can play a useful role as a barrier to abuse of the Convention. For instance, the Convention does not specifically state that a buyer’s right to specific performance (Art. 46) may not be exercises when the buyer delays action to see whether the price will rise or fall - thereby speculating at the other party’s expense. Such abus de droit would be blocked under the rule of Article 7(1) that the Convention shall be interpreted “to promote the observance of good faith in international trade.” Other examples could be mentioned.[15] The significant feature of this approach is that, the place of a rule that is undefined and susceptible of radically different interpretations, the analysis of problems of “good faith” proceeds within the guiding framework of the provisions and structure of the convention. 189

Fortunately, the Convention provides additional tools for flexibility and adaptation: One tool is the direction (Art. 7(2)) to employ the “general principles” on which the Convention is based to deal with unanticipated problems. A second (Art. 9) is the legal effect given to usages of trade and practices established by the parties. 190

[15]See Honnold Commentary, op. cit. Supra note 4, ??95, 100, 291, 285. This approach, of course, affects the rights and obligations of the parties, contrary to the suggestion that this view is concerned only with the Convention and not with the obligations of the parties. No such distinction is, of course, possible in a statute that is focused on the rights of the parties.

V. General Issues

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A. The Need for Comparative Research

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As we have seen, troublesome problems arise from concepts that are given diverse application in different legal systems. To respond to this problem, Professor Schlechtriem suggests: “It might be helpful to compile, on a comparative basis, the points on which the world’s most influential legal systems ... agree or are at least so similar as to allow the derivation of common principles.” III2, 29. See also van der Velden p. 19. The present writer has made a similar suggestion to counteract the threat to uniform application resulting from diverse domestic rules; no such threat of diversity is posed by principles that reflect a consensus - a “common core” of meaning.[16] See also Samson (Can. & Quebec) 5.1.

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There also is value in research to find contract patterns established (e.g.) by trade associations representing both sellers and buyers. Under these circumstances, contract patterns are more likely to reflect principles of efficiency and fairness rather than bargaining power.[17]

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Domestic tribunals and parties would seldom be equipped to conduct such research. The task calls for organized, long-term effort. In view of the dimensions (and value) of the task, international organization and division of labor may be required.

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B. A Center for Documentation and Research

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Prof. Rajski (Pol.) stressed the need for a center for research and documentation “in all branches of internationally uniform law,” or, if this is considered too ambitious, the research center could be confined to UNCITRAL activities. See also Samson (Can. & Quebec) 5.2. Under Rajski’s proposal the Center’s activities would include documentation, research, legal training and expert advice. The writer of the present report endorses the importance of such comparative research. Surely the general entry into force of the Sales Convention should and will stimulate these developments.

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The 1980 Convention was prepared to meet an immediate practical need - to provide a uniform legal framework for international trade. The Convention already is beginning to serve an even wider need in laying foundations for a cosmopolitan approach to legal methodology as a tool for strengthening structures for international legal order.

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[16] Honnold Commentary, op. cit. Supra note 4, ? 94, p. 124.
[17] Id. ?? 430-432 pp. 434-438. Cf. Art. 79 of the Convention.

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