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UNIFORM LAW AND ITS APPLICATION BY JUDGES AND ARBITRATORS

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INTRODUCTION

The subject of this report is the application of uniform law. Application means to apply the law to actual disputes, to decide specific cases. Application in this sense is covered by a number of legal journals, most of which report not only cases where national law is applied but also cases involving uniform law. Some journals exclusively report uniform law cases.¹ Apart from the journals, there are collections of cases, some also dealing exclusively with uniform law.² Finally, there are commentaries on the various international conventions including references to decisions by courts and arbitration courts.³

It is not the task of the present report to deal with application as such. Application of uniform law becomes interesting and problematic when it is not uniform, that is to say when there are differences in its interpretation.

The problem of the application of uniform law is as old as uniform law itself. It is therefore not by chance that writers have time and again discussed many different aspects of the application of uniform law⁴ and also that international organisations have from time to time chosen as the subject of international congresses the application of uniform law. May I remind you of former

1. In particular, Unidroit's *Revue de droit uniforme - Uniform Law Review*.

2. See, for instance, P. Schlechtriem, U. Magnus, *Internationale Rechtsprechung zu EKG und EAG* (Baden-Baden 1987).

3. For ULIS see especially Dölle, *Kommentar zum einheitlichen Kaufrecht* (München 1976); for COTIF/CIM see K. Spera, *Die einheitlichen Rechtsvorschriften für den Vertrag über die internationale Eisenbahnbeförderung von Gütern (CIM)* (Wien 1986) with extensive references to case-law; for the Paris Convention see G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (Geneva 1968), where however references to case-law are scarce.

4. There exists an almost unlimited literature on the subject of the application and interpretation of law in general and of uniform law in particular. When I refer only to some authors and not to others it is out of no disregard for the latter.

Unidroit congresses, especially those held in 1956, 1959 and 1963.⁵ Most of what has been written and discussed in this connection is still valid.

The application of uniform law is of permanent interest to all the circles concerned: to judges and arbitrators, to businessmen, to legislators and not least to scholars. The problem has come to the forefront again in connection with the Vienna Sales Convention or more generally with the work of UNCITRAL.

Among the topics included at the Twelfth Congress of the International Academy of Comparative Law in Sydney/Melbourne, Australia in 1986 was that of *Methodology to Achieve Uniformity in Applying International Agreements, examined in the setting of the Uniform Law for International Sales under the 1980 U.N. Convention*.⁶ After our discussions here in Rome many more debates will take place, the topic thus remaining on the agenda.

It will not be possible in this report to touch on all aspects of the problem of application of uniform law by judges and arbitrators, nor will it be possible to repeat everything that has been said or written and what is in my opinion valid and wise. I shall try therefore to single out a few especially important aspects, to refer to solutions which have been suggested or to the experience of others, to comment on some views which I do not share and to support others which I consider most valuable.

Interpretation of uniform law has two aspects: practice and theory, interpretation as it is (which would involve very extensive research) and interpretation as it should be (which is not quite so extensive). My report will be concerned mainly with questions of theory, without however neglecting practice altogether.

I. RULES OF INTERPRETATION

1. Rules of interpretation in general

Several questions are frequently raised and discussed:⁷

5. See *Unification of Law, Yearbook*, 1956, vol. II, 1959 and 1963 with the reports by A. Malintoppi, J.G. Sauveplanne, T.J. Dorhout Mees and others.

6. General Report to the 12th International Congress of the International Academy of Comparative Law by John Honnold, *Methodology to Achieve Uniformity in Applying International Agreements, examined in the setting of the Uniform Law for International Sales under the 1980 U.N. Convention* (Not yet published). Insofar as I quote national reports for the XIIth Congress of the International Academy of Comparative Law, I shall always refer to them as "Report for Sydney 1986".

7. See, for the interpretation of the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (GC/CMEA), M. Kemper, L. Rüster, *Probleme der Auslegung internationaleinheitlicher Spezialnormen der RGW-Länder, Recht im Aussenhandel*, 11/12 (1965); M. Kemper, H. Strohbach, H. Wagner, *Die Allgemeinen Lieferbedingungen des RGW 1968, Kommentar* (Berlin 1975), p. 62.

(a) whether domestic rules of interpretation are suitable for uniform law or whether special rules of interpretation are needed;

(b) whether, because of the international origin of uniform law, the rules of interpretation of treaties (of public international law) should be applied;

(c) whether a combination of these different rules is needed.

What are domestic rules of interpretation? There are different views as to what is law and there are therefore also different views as to how law should be interpreted.⁸ The interpretation of Islamic law differs from the interpretation of French law. But even in France the interpretation of civil law differs from the interpretation of criminal law.⁹ For civil law the following methods have been developed: the grammatical (or verbal), the systematic (or logical), the historical, and the teleological interpretation.¹⁰ These classic methods have been confirmed many times.¹¹

There is a view that verbal interpretation is no interpretation at all, but simply a plain application; there is another view that teleological interpretation is in fact a systematic interpretation because the latter also strives to discover the aim of the law, but these are minor matters. Some authors discuss the question of the order in which the various methods should be applied, while others are of the opinion that each order has its own merits.¹² Obviously no firm order has been established.¹³

It has been stressed repeatedly that the rules of interpretation for domestic law are also suited to the interpretation of uniform law. This is evident as regards verbal interpretation. Any interpretation must start from the wording of a legal text. In this respect uniform law, if drafted in several languages as is nowadays usually the case, has advantages and disadvantages. I shall return to this point later.

8. It is however exaggerated to say that there are as many interpretations as there are countries, see L. Rézei, The Rules of the Convention Relating to its Field of Application and to its Interpretation, in: *Problems of Unification of International Sales Law, Working Papers Submitted to the Colloquium of the International Association of Legal Science. Potsdam August 1979* (London, Rome, New York 1980), p. 88.

9. See R. David, *Encyclopedia of Comparative Law*, vol. II: The legal systems of the world. Their comparison and unification, chapter 3: Sources of law (Tübingen, The Hague, Boston, London 1984), p. 82.

10. See J. Kropholler, *Internationales Einheitsrecht* (Tübingen 1975), p. 260.

11. See P. Schlechtriem, Unification of the Law for the International Sale of Goods. The Experience in the Federal Republic of Germany with ULIS and ULFIS and its Significance for the Interpretation and Application of the 1980 Vienna Convention on the International Sale of Goods, Report for Sydney 1986, p. 23.

12. See H. Kelsen, *Reine Rechtslehre* (Wien 1960), p. 346.

13. See J. Kropholler, *op.cit.*, p. 261.

This is also true for logical and systematic interpretation. Every interpretation seeks a reasonable result. If two interpretations are possible one would not choose the silly one.¹⁴ Here again we face certain difficulties. Logical and systematic interpretation has two aspects. The first is to look at a provision in its context to find out its meaning within a given instrument such as the Sales Convention. The other aspect of systematic interpretation is to look at a certain provision within the context of a legal system as such. Here the difficulty consists in the absence of such a system at international level. Nevertheless, there are already some other uniform laws which could be compared. For a systematic interpretation of the Sales Convention one could look at the Limitation Convention as well as at the Agency Convention. The various transport conventions could also be used for systematic interpretation of any one of them.¹⁵

What then of teleological interpretation? Of course, also with an international convention one has to look at its purpose, its aim, at the intention of the legislator. In this respect we find a sharp difference between the civil law and the common law (maybe I should say the traditional common law) approach. Kahn-Freund¹⁶ refers to a statement by Lord Simonds "The general proposition that it is the duty of the court to find out the intention of the parliament ... cannot by any means be supported". Or, as has been quoted by Farnsworth,¹⁷ "If Parliament does not mean what it says, it must say so". In contrast, the starting point for continental courts in applying the law has been the intention of the legislator, supplemented by the aim of the law.¹⁸

To find out this intention of the legislator and the purpose of the law it is the historical method which is used. This method has two aspects,¹⁹ the one most often referred to being legislative history, the discovering of the legislator's intentions by looking into the *travaux préparatoires*, by examining all the

14. As has sometimes been done by M. Prager, *Verkäuferhaftung und ausländischgewerbliche Schutzrechte* (Pfaffenweiler 1987).

15. As has been done for instance by Dutch courts, see F.J.A. van der Velden, *Indications of the Interpretation by Dutch Courts of the United Nations Convention on Contracts for the International Sale of Goods 1980*, Report for Sydney 1986, p. 0017; see also D. Maskow, *On the Interpretation of the Uniform Rules of the 1980 UN Convention on Contracts for the International Sale of Goods*, Report for Sydney 1986, p. 9 *et seq.*

16. See O. Kahn-Freund, *Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation*, in: *New Perspectives for a Common Law of Europe*, edited by M. Cappelletti and M. Kohnstamm (Leyden, London, Boston, Brussels, Stuttgart, Florence 1978), p. 157; the statement is contained in *Magor and St. Mellors Rural District Council v. Newport Corporation (1952) A.C. 189*.

17. See E.A. Farnsworth, *Problems of the Unification of Sales Law from the Standpoint of the Common Law Countries*, in: *Problems of Unification of International Sales Law*, *op. cit.*, p. 5.

18. See Dölle/Wahl, *Einheitskaufrecht* Article 17 EKG, p. 138.

19. See F.J.A. van der Velden, *op. cit.*, p. 008.

materials connected with the preparation of the law. At national level these are parliamentary debates, minutes of meetings of commissions etc. At the international level this method has several shortcomings. Firstly, the preparatory materials are not very widely known. The records of diplomatic conferences are in some countries not available in any public or university library.²⁰ Secondly, there is a danger of taking the opinion of one delegate as the opinion of the conference. As Honnold puts it: "A statement by one delegate does not establish a prevailing viewpoint, and silence following a statement does not establish assent".²¹ And one could add that even the prevailing view implies opposition and does not constitute consensus. On the other hand, even if a proposal has been rejected this does not in all cases also mean that its content may not be used as a source of interpretation.²²

The other aspect is legal history. Interpretation by means of legal history seeks to clarify a statute by comparing it with the law as it was before the entry into force of the statute.²³ This method is especially valuable for uniform law which is regularly amended or revised, like the General Conditions of the CMEA (GC/CMEA). According to Szász "historical interpretation includes the analysis of the development of the system of norms, the metamorphosis and development of certain institutions of law in the various texts of the General Conditions (1951, 1958, 1968), and the establishment of the trend of the development".²⁴

It seems therefore, as has been stated before, that all the domestic rules of interpretation are useful for the interpretation of uniform laws as well. Why then, is it sometimes argued that domestic rules are not suitable? Bonell for instance writes: "To have regard to the 'international character' of the Convention means first of all to avoid relying on the rules and techniques traditionally followed in interpreting ordinary domestic legislation."²⁵ Maskow also speaks in favour of developing a specific method of interpretation for international trade law. "The international character of these rules should not be counteracted by using national methods of interpretation."²⁶

20. See J. Honnold, General Report for Sydney 1986, *op. cit.*, p. 31.

21. See J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Deventer, Antwerp, Boston, London, Frankfurt 1982), p. 119.

22. In this respect I differ from Maskow, *op. cit.*, p. 14. His view, however, is more clearly expressed in the German version of his report, p. 11.

23. See F.J.A. van der Velden, *op. cit.*

24. See I. Szász, *A Uniform Law on International Sales of Goods. The CMEA General Conditions* (Budapest 1976), p. 69.

25. See M.J. Bonell, Methodology in Applying Uniform Law for International Sales under the U.N. Convention (Wien 1980), in: *Italian National Reports to the XIIth International Congress of Comparative Law, Sydney 1986* (Milan 1986), p. 45.

26. See D. Maskow, *op. cit.*, p. 9; for the same view see H.J. Mertens, E. Rehbindler, *Internationales Kaufrecht, Kommentar zu den einheitlichen Kaufgesetzen* (Frankfurt 1975), p. 140.

It seems to me that Bonell has in mind not the above-mentioned traditional continental criteria for the interpretation of legal rules but the traditional English approach. He argues against "sticking to its literal and grammatical meaning ... of individual provisions" and declares that "Italian courts are accustomed to examining the rationale of the law and in so doing either expand or restrict the scope of a particular provision or even adapt the law to circumstances unforeseen at the time of its enactment".²⁷ Therefore one should not reject all the domestic rules of interpretation but distinguish between such rules as are suitable for uniform law and those which are not. As far as English law and its interpretation is concerned this is indeed different from the continental civil law approach. But it seems that even there new thinking is gaining ground. Bonell himself has on another occasion quoted Lord Denning in *Buchanan v. Babco Forwarding and Shipping* as saying, English courts should adopt the European method in interpreting an international convention.²⁸

Honnold draws our attention to the *Fothergill* case where the "slow process of development in English law took a large and decisive step".²⁹ In this case the House of Lords gave notions in the Warsaw Convention a wider meaning than is usual in the common law and concluded that in the interpretation of international conventions consideration should be given to the *travaux préparatoires* and also to foreign caselaw. If Jolowicz some years ago also referred to different attitudes to interpretation and in regard to the attitude of English courts warned that "old habits die hard",³⁰ it seems that with *Fothergill v. Monarch Airlines* there has been a real breakthrough.

With regard to the other point, it seems to me that there is sometimes a misunderstanding. Domestic rules of interpretation are something different from interpretation of domestic rules. The methods and rules of interpretation are the ones discussed above. But the interpretation of a specific provision, of a special notion itself, is a different matter. This actual interpretation cannot rely on the meaning of this notion in domestic law but has to proceed from the common understanding of the Contracting States.³¹

27. See M.J. Bonell, *op. cit.*, p. 45 *et seq.*

28. See M.J. Bonell, Some Critical Reflections on the New UNCITRAL Draft Convention on International Sale, *Revue de droit uniforme - Uniform Law Review*, (1978), II, p. 7.

29. See Honnold, *op. cit.*, p. 116; for the *Fothergill* decision see *Revue de droit uniforme - Uniform Law Review*, (1980), I, p. 246.

30. See J.A. Jolowicz, New Perspectives of a Common Law of Europe: Some Practical Aspects and the Case for Applied Comparative Law, in: *New Perspectives for a Common Law of Europe*, *op. cit.*, p. 263.

31. See decision of the Corte di Cassazione (24 June 1968) cited by Bonell, Report for Sydney 1986, *op. cit.*, p. 48.

Methods of interpretation have also been discussed in a different setting in connection with the General Conditions for Delivery among the CMEA member countries. Szász obviously took the view that different countries have different rules of interpretation when he affirms that the conflict of laws rule contained in § 110 of the GC is relevant not only for the filling of gaps, but also for determining which of the different national interpretations should prevail.³²

I should not say that traditional rules of interpretation of national law are sufficient for the interpretation of uniform law. I quite agree that there are peculiarities and also that certain amendments should be made to the rules. Most important is the comparative interpretation³³ to which I shall return in the next section.

Let me turn now to the rules of interpretation of treaty law. Razumov in his report speaks of the twofold legal nature of uniform law. Because uniform law has an international character, rules of interpretation of treaty law should be applied.³⁴ This leads us to Articles 31 to 33 of the Vienna Convention on the Law of Treaties. Some of these rules do not differ in substance from the rules of interpretation of national law, so that Article 31 requires a treaty to be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, and Article 32 permits recourse to supplementary means of interpretation including preparatory work “in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”³⁵

Honnold quite rightly distinguishes between different types of conventions and even between different parts of the same convention. Whereas the final provisions of the Sales Convention deal with obligations of States, most of its other provisions deal with a very different matter — the obligations not of States but of the parties to a contract of sale. “With respect to these provisions the Sales Convention states its own rules of interpretation ... Not surprisingly, these rules

32. See I. Szász, *op. cit.*, p. 73.

33. See J. Kropholler, *op. cit.*, p. 261.

34. See Special Report by Razumov, Les actes normatifs réglémentant la coopération économique, scientifique et technique entre les organismes des pays membres du CAEM et leur interprétation dans la pratique arbitrale de ces pays, in: *International Uniform Law in Practice - Le droit uniforme international dans la pratique*. International Congress, Rome, 7-10 September 1987.

35. See *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March - 24 May 1968 and 9 April - 22 May 1969, Official Records, Documents of the Conference* (New York 1971), p. 293.

call for a more flexible approach than would be acceptable for rules defining the obligations of States.”³⁶

May I conclude by saying that insofar as the rules of interpretation of treaties are substantially the same as the rules of interpretation of national law they are not needed and, in so far as they differ, they are not suited for application to uniform law.³⁷

2. Special rules in international conventions: uniformity

Experience shows that uniform law is not automatically applied uniformly.³⁸ Some authors even think that uniformity is scarcely possible.³⁹ So far I have dealt with rules of interpretation in general and shall now discuss special rules of interpretation which are included in international conventions.

Some conventions of more recent origin include special rules of interpretation, while others contain provisions which I may call gap-filling rules and to which I shall return in chapter II.

Article 7 paragraph 1 of the Sales Convention provides: “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 and the observance of good faith in international trade.”

Similar language has been included in Article 6 of the Agency Convention,⁴⁰ in Article 15 of the draft OTT Convention⁴¹ and in Article 15 of the draft Leasing Convention.⁴² The keywords in this formula are “international

36. See Honnold, *op. cit.*, p. 134.

37. M. Kemper, H. Strohbach, H. Wagner, *op. cit.*, p. 63 already doubted the advisability of applying interpretation rules of public international law to uniform law.

38. See M. Cappelletti, Introduction, in: *New Perspectives for a Common Law of Europe*, *op. cit.*, p. 13; on the relation between scope of application and harmonisation of interpretation see J. Warmbold, *Grundzüge eines einheitlichen Privatrechts für den Ost-West-Handel: Die allgemeinen Bedingungen für die Warenlieferungen zwischen den Organisationen der Mitgliedsländer des Rates für Gegenseitige Wirtschaftshilfe ALB/RGW 1968/1975 und das Einheitliche Gesetz über den internationalen Warenkauf* (Tübingen 1980), p. 69, 86.

39. See A.L. Diamond, Conventions and their Revision, in: *Unification and Comparative Law in Theory and Practice, Contributions in honour of Jean Georges Sauveplanne* (Deventer, Antwerp, Boston, London, Frankfurt 1984), p. 46.

40. See Diplomatic Conference for the Adoption of the Unidroit Draft Convention on Agency in the International Sale of Goods, *Revue de droit uniforme - Uniform Law Review*, (1983), I-II, p. 161.

41. Preliminary Draft Convention on Operators of Transport Terminals (OTTs), *Revue de droit uniforme - Uniform Law Review*, (1984), I, p. 161.

42. Preliminary Draft Uniform Rules on International Financial Leasing, *Revue de droit uniforme - Uniform Law Review*, (1984), II, p. 65.

character” and “uniformity”. (I shall refer to good faith in section 3). These keywords are contained in other conventions. Article 7 of the Limitation Convention provides: “In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity”.⁴³

This wording was repeated in Article 3 of the Hamburg Rules.⁴⁴ (Strangely enough, the United Nations Convention on International Multimodal Transport of Goods⁴⁵ contains no similar language in spite of the fact that many provisions of the Hamburg Rules have been copied.) According to Eörsi the elements of international character and uniformity have been well chosen.⁴⁶

What if a convention does not contain such language? Nevertheless, the same elements have to be observed. Regard to the international character of a uniform law and the need to promote uniformity is something which is implied in any unification of law.⁴⁷ Such a maxim has been stated in many court decisions.⁴⁸

There are however several obstacles and problems, to some of which only I shall refer.

There is first of all the language problem. Modern conventions are drafted and agreed on in several languages, at present six within the system of the United Nations: Arabic, Chinese, English, French, Russian and Spanish. To a certain extent this fact makes interpretation easier, because it is possible for the court to apply the method of comparative interpretation and find the exact meaning and content of a provision by comparison. As Schlechtriem observes: “Numerous volumes could be filled with similar decisions on uniform law created by international-conventions: all of these decisions attempt to find a solution by analysing the wording with regard to the several original languages ...”.⁴⁹ Van der Velden in this context rejects “any selection between authenticated

43. *United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974, Official Records* (New York 1975), p. 101.

44. United Nations Convention on the Carriage of Goods by Sea, 1978, A/CONF. 89/13.

45. United Nations Convention on International Multimodal Transport of Goods, 1980, TD/MT/CONF/16.

46. See G. Eörsi, General Provisions, in: *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, edited by N. Galston and H. Smit (New York 1984), pp. 2-5.

47. See I. Szász *op. cit.*, p. 69.

48. To give only two examples: decision of the German BGH referred to in *Neue Juristische Wochenschrift*, (1976), Heft 35, p. 1583 with notes by J. Kropholler and decision of the OLG Düsseldorf, see *Revue de droit uniforme - Uniform Law Review*, (1981), I, p. 257.

49. See P. Schlechtriem, *op. cit.*, footnote 34. It is different with the Paris Convention, where there are official versions also in English, German, Italian, Portuguese, Russian, and Spanish, but in case of doubt the French version prevails according to Article 29.

texts".⁵⁰ This, however, is not realistic. It is too much to ask of every court to compare all language versions. At least in my country no lawyer has such vast knowledge of foreign languages. Even when United Nations conventions are translated into German by special translation conferences of the four German speaking countries (Austria, German Democratic Republic, Federal Republic of Germany and Switzerland), the Arabic and Chinese versions are neglected altogether, the Russian and Spanish versions being consulted only infrequently.

It is however incorrect to say that only the English and French texts were adopted by the Vienna Conference and that the other texts had to be prepared afterwards.⁵¹ All the texts were drafted simultaneously by a drafting committee during the conference.⁵²

Problems arise when the texts of several authentic versions do not precisely match,⁵³ as is sometimes the case.⁵⁴ According to Hobbes: "All words are subject to ambiguity, and therefore multiplication of words in the body of law is multiplication of ambiguity ...".⁵⁵ The same experience is stressed by Eörsi, when he discusses "the evil of definition".⁵⁶ The question of definitions, like so many other questions, is a source of controversy. This is caused *inter alia* by different legal traditions, lawyers from the common law systems usually being in favour of more numerous and longer definitions.⁵⁷

Major difficulties in the interpretation of uniform law and in arriving at uniformity arise because there is no common heritage of judicial techniques and substantive law among the Contracting States.⁵⁸ For this reason some authors even doubt the possibility of arriving at uniform application and interpretation

50. Van der Velden *op. cit.*, p. 006.

51. See J. Rajski, Method of Unification of Law for the International Sale of Goods, Rapports Polonais 1986. Report for Sydney 1986, p. 49.

52. Compare the report of the Drafting Committee, Official Records, p. 154.

53. See Diamond, *op. cit.*, p. 49.

54. See also Kropholler, *op. cit.*, p. 266. Sometimes a simple misprint can create confusion, as happened with the Limitation Convention, the English text of which says "ten" while the French text says "six" instead of "dix".

55. Quoted by W. Guldemann, International Air Law in the Making, *Current Legal Problems*, (1974), p. 240.

56. See G. Eörsi, A. Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods, *American Journal of Comparison Law*, 31 (1983), p. 336.

57. See for instance the criticism by A. Rosett, Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods, *Ohio State Law Journal*, 45 (1984), p. 280.

58. See Special Report by J. Honnold, The United States Uniform Commercial Code: Interpretation by the Courts of the States of the Union, in: *International Uniform Law in Practice - Le droit uniforme international dans la pratique*. International Congress, Rome, 7-10 September 1987, p. 181.

of uniform law at all.⁵⁹ Of course, the fact cannot be overlooked that the lack of common ground creates difficulties and complications.⁶⁰

May I refer to a recent example when UNCITRAL was discussing the draft convention on the international bill of exchange. Because the term "guarantee" has very different connotations under the Geneva system and under Anglo-american law it was rather difficult to reach a compromise.⁶¹ Numerous examples could be found in regard to all uniform law.⁶²

To promote uniformity in this respect means, when interpreting uniform law provisions, not to rely on national caselaw or the domestic legislation of a Contracting Party.⁶³ Exceptionally, courts have found it impossible not to refer to concepts and principles of domestic law.⁶⁴

If notions in uniform laws are taken from national law there is always a danger of interpreting them in accordance with the law of their origin, instead of interpreting them autonomously, "i.e. in the context of the Convention itself and not by referring to the meaning which might traditionally be attached to them within a particular domestic law."⁶⁵

In this context, I may quote an interesting observation of Sevón: "Most authors (in the literature on the Sales Convention) seem to stress that the Convention closely resembles the national law on sales of the author's country. ... There is thus a considerable risk that concepts used in the Convention will be believed to correspond to identical or even to similar concepts in national law."⁶⁶

Drafters of uniform law often strive to employ neutral terms to avoid such

59. For such a rather pessimistic view see also Jolowicz *op. cit.*, p. 244: "It is not to be expected that the insertion into different legal systems of a single text will produce identical or even similar results in all those systems any more than it is to be expected that the addition of a little green paint to four litres of yellow will give us the same colour as the addition of the same quantity of the same paint to four litres of red".

60. See Kropholler, *op. cit.*, p. 306; H. Kötz, *Gemeineuropäisches Zivilrecht*, in: *Festschrift für Konrad Zweigert* (Tübingen 1981), p. 484.

61. Draft article 43, A/CN.9/XX/CRP.11. Even under the Geneva system there are already famous differences in interpretation between France and the Federal Republic of Germany.

62. See P. Risch, *Divergenzen in der Rechtsprechung zum Warschauer Abkommen und die Mittel zur Sicherung der einheitlichen Auslegung des vereinheitlichten Luftprivatrechts* (München 1973).

63. See relevant decisions in *Revue de droit uniforme - Uniform Law Review*, (1981), II, pp. 195 and 199.

64. *Ibid.* (1980), I, p. 300.

65. See Bonell, Report for Sydney 1986, *op. cit.*, p. 46.

66. See L. Sevón, Method of Unification of Law for the International Sale of Goods, National Report of Finland for Sydney, p. 16.

risks. This has been applauded,⁶⁷ warned against⁶⁸ and rejected.⁶⁹ That neutral terms also may present difficulties in their interpretation is shown by the different interpretations of such simple words as "can".⁷⁰

In connection with systematic interpretation I have already referred to other uniform laws in the same field. In regard to the Sales Convention I have not yet mentioned the General Conditions for Delivery of the CMEA. I regard these Conditions as one of the sources of the Sales Convention⁷¹ and therefore also as a piece of legislation available for comparison. There is no doubt that delegates from socialist countries during the debates in UNCITRAL and at the Vienna Sales Conference had in their minds not only their national laws, but also the GC/CMEA.

In interpreting uniform laws courts should consider not only similar laws but also commercial customs and usages. This would also promote uniformity.⁷²

It is open to question not only whether uniformity is in all cases possible but also whether uniformity is in all cases necessary and maybe even dangerous. According to Van der Velden "the evolution of CISG will almost be halted if courts try to serve uniformity by an interpretation acceptable to all Contracting States".⁷³ It should also be borne in mind that there is more than one possible interpretation and that several different interpretations may be completely legitimate.⁷⁴

Finally let me touch on another question. In connection with divergent interpretations of uniform law by the courts of different countries authors sometimes refer to the possibility of forum shopping by prospective litigants.⁷⁵ In my opinion such a danger is not real. Parties to international sales contracts and

67. See F. Enderlein, D. Maskow, M. Stargardt, *Kommentar. Konvention der Vereinten Nationen über Verträge über den internationalen Warenkauf. Konvention über die Verjährung beim internationalen Warenkauf. Protokoll zur Änderung der Konvention über die Verjährung beim internationalen Warenkauf* (Berlin 1985), p. 25.

68. See Jolowicz, *op. cit.*, p. 249.

69. See Rosett, *op. cit.*, p. 270.

70. Examples are given by M. Kemper, H. Strohbach, H. Wagner, *op. cit.*, p. 64.

71. This aspect was stressed in F. Enderlein, *Das Wiener UN-Kaufrechtsübereinkommen 1980 und die ALB/RGW, Vienna seminar May 1987*. See also UNCITRAL, *Yearbook*, vol. I: 1968-1970 (New York 1971), p. 98.

72. See F. Enderlein, D. Maskow, M. Stargardt, *op. cit.*, p. 46.

73. See van der Velden, *Uniform International Sales Law and the Battle of Forms*, in: *Unification and Comparative Law in Theory and Practice*, *op. cit.*, p. 247 *et seq.*

74. See H. Kelsen, *op. cit.*, p. 348.

75. See J. Honnold, *Uniform Law for International Sales ...*, *op. cit.*, p. 120; see also P. Schlechtriem, *op. cit.*, p. 31.

even their lawyers are not usually aware of differing decisions by courts of different countries. And even if such knowledge were available (as we hope it will be in the future, see chapter III), parties cannot when concluding their contract foresee the questions regarding which there may be a subsequent dispute, whether as to the quality of the goods (where for instance the court of country A would be preferable) or as to the obligation of taking delivery by the buyer (in respect of which the court of country B should be chosen). The lack of uniformity in the interpretation of uniform laws therefore has no influence on the choice of the forum. Even so, uniformity should be sought to the widest possible and reasonable extent.

3. Special rules continued: good faith

As mentioned above, Article 7, paragraph 1 of CISG goes on to require in the interpretation of the convention "the observance of good faith in international trade". Such a provision certainly will surprise many a reader of the convention. Bonell calls this a "rather peculiar provision".⁷⁶ Why it could happen that such a rule, which is usually no rule of interpretation of the law at all,⁷⁷ was included in Article 7 is described in detail by Eörsi⁷⁸ and Honnold.⁷⁹ I shall not repeat what has rightly been said. May I rather return to good faith in connection with the general principles (chapter II, section 2). Here I would like to touch on only two aspects of the matter, the interpretation of uniform laws in the interest of the weaker party and the interpretation of uniform laws faithfully towards the legislator.

Bonell⁸⁰ compares the relation between an exporter from a highly industrialised country and an importer from a developing country with that normally to be found in a consumer transaction stipulated at national level. This implies that the interpretation of the convention could be used to protect the weaker party. It seems that Eörsi has the same chain of thought.⁸¹ In another context Lando strives for the protection of the weaker party in a European Commercial Code.⁸²

76. See Bonell, Report for Sydney 1986, *op. cit.*, p. 62.

77. See Sevón, *op. cit.*, p. 15.

78. See Eörsi, A Propos ..., *op. cit.*, p. 333 *et seq.*

79. See Honnold, General Report for Sydney 1986, *op. cit.*, p. 44 *et seq.*

80. See Bonell, Report for Sydney 1986 *op. cit.*, p. 66.

81. See G. Eörsi, The Method of Unifying the Law on the International Sale of Goods, Hungarian reports Sydney 1986, p. 35; see also G. Eörsi, Contracts of Adhesion and the Protection of the Weaker Party in International Trade Relations, in: *New Directions in International Trade Law*, vol. I: Reports (Dobbs Ferry, N.Y. 1977), p. 155.

82. See O. Lando, Unfair Contract Clauses and a European Uniform Commercial Code, in: *New Perspectives for a Common Law of Europe*, *op. cit.*, p. 267 *et seq.*

For me it is doubtful whether this would work at international level. Also in relations between industrialised and developing countries it is not always the party from the "south" who is the weaker party. Much depends on the kind of goods to be sold or purchased, on offer and demand etc. I quite agree with Maskow, who has stated: "Observance of good faith means to observe such a conduct as is normal among tradesmen. As international trade is dominated by intense competition, exaggerated requirements cannot be deduced therefrom. Thus, this principle by no means implies the establishment of material justice between the parties."⁸³

Another aspect which has not been mentioned so far in the discussion is the observance of good faith towards the legislator, i.e. the Contracting States, when interpreting the uniform law. In my view this is connected with the task of arriving at a sound and reasonable result in interpreting the uniform law and not of twisting the intentions of the legislator to the contrary. I have found examples of such twisting not in court practice, but in literature.⁸⁴

Does the observance of good faith in interpreting uniform law require courts and arbitrators to use all the methods of interpretation described in section 1? To look at all language versions? To research all decisions by courts of other countries? Van der Velden tells us, and I believe he is right, that "The workload of the courts creates such time-pressure, that it makes an ample research of all existing sources of a statute's interpretation practically impossible."⁸⁵

II. RULES OF GAP-FILLING

1. Gap-filling in general

Gaps are unavoidable in any legislation and the more so in uniform laws.⁸⁶ No legislator is able to address and solve all the circumstances and problems that will arise. Therefore, some uniform laws contain not only rules on interpretation but also rules on gap-filling. There are three methods:

(a) Gaps are to be filled in conformity with the general principles of the

83. See Maskow, *op. cit.*, p. 18. According to P. Winship, International Sales Contracts Under the 1980 Vienna Convention, *Uniform Commercial Code Law Journal*, 17 (1984), p. 67, there is no obligation to perform contracts in good faith.

84. See Prager, *op. cit.*, p. 205, 235.

85. See van der Velden, Report for Sydney 1986, *op. cit.*, p. 0021.

86. See Honnold, *Uniform Law for International Sales ...*, *op. cit.*, p. 127; Honnold, General Report for Sydney 1986, *op. cit.*, p. 8.

uniform law, there being no recourse to national law. This is the solution of Article 17 of ULIS.

(b) Gaps are to be filled in conformity with the general principles of the uniform law and only if this is not possible is recourse open to national law. This is the solution of Article 7, paragraph 2 of CISG.

(c) Gaps are to be filled by national law. This is the solution of § 110 of the GC/CMEA,⁸⁷ and also of Article 10, paragraph 1 of CIM and Article 8, paragraph 1 of CIV.⁸⁸

Also in national law rules of gap-filling are not everywhere the same.⁸⁹

Before gaps can be or have to be filled the question arises of what constitutes a gap. A distinction is drawn between external and internal gaps. External gaps are all matters outside the scope of the uniform law, such as, for instance, according to Article 4 of CISG, all matters concerning the validity of the contract. Internal gaps on the other hand are matters which are within the scope of the uniform law but are not expressly settled. The borderline is sometimes hard to draw. Schlechtriem points to the problem of the validity of a contract in connection with the initial impossibility of performance.⁹⁰

Also in respect of international gaps there are very doubtful cases. If within the scope of the uniform law there is no provision for a specific matter does this mean that there is a gap or that there is a negative regulation? Such questions have arisen several times in connection with the application of the GC/CMEA. For certain cases of breach of contract a penalty was provided. Do other cases of breach fall under national law (gap) or is there no remedy (no gap). Thus it is difficult also to draw a borderline between interpretation and gap-filling.⁹¹

Whether a gap appears or not depends on the scope of the interpretation of the uniform law; whether the uniform law is interpreted strictly according to its wording or, as the case may be, also restrictively and extensively.

87. For the text of the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance see *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. I (New York, United Nations, 1971). Meanwhile the GC have been further developed and are in force now as "GC/CMEA 1968/1975 version of 1979".

88. For the text of CIV and CIM see *Revue de droit uniforme - Uniform Law Review*, (1982), I, pp. 63 and 117.

89. See Dölle/Wahl, *op. cit.*, p. 128. There are opposing views as well. According to the Aramco award p. 66: "Problems of interpretation are solved mainly by using methods ... which are the same in all the legal systems of the world."

90. See Schlechtriem, *op. cit.*, footnote 11.

91. See I. Szász, *op. cit.*, p. 73; also M. Kemper, H. Strohbach, H. Wagner, *op. cit.*, p. 71.

The method for such restrictive or extensive interpretation is the *analogia legis* and the *analogia juris*. In regard to the GC/CMEA the prevailing view is that analogy is permitted, but there is disagreement as to the extent of the analogy. In the court of arbitration of the German Democratic Republic the following principles have been developed:

Analogy is possible under three preconditions:⁹²

(a) the matter is not expressly governed by the provisions of the GC/CMEA (there is a gap).

(b) there is a provision in the GC for a similar matter.

(c) the analogy is without doubt within the contemplation of the member countries of the CMEA.

The admissibility of analogy is also supported by authors from other socialist countries, such as Lunz.⁹³ There are however views to the contrary. (The relation between the GC/CMEA and the subsidiary law is a permanent topic at the conferences of the Presidents of the courts of arbitration attached to the chambers of commerce in the CMEA member countries.)⁹⁴

In regard to CISG, Schlechtriem is of the view that "it is imperative that scholarly analysis should try to uncover and discuss as many gaps as possible, and to reach, to the greatest possible extent, consensus on the principles that govern the filling of these gaps."⁹⁵ The contrary was true for the GC/CMEA. Since here a gap was considered by some authors as automatically calling for the application of subsidiary national law, GDR authors preferred to detect as few gaps as possible.⁹⁶

2. Gap-filling by general principles

As has been shown, ULIS and CISG refer expressly to general principles. It is a task for courts and arbitrators to detect those general principles, but it

92. See award 180/69 GDR court of arbitration, referred to in: *Internationales Wirtschaftsrecht. Rechtliche Regelung der sozialistischen ökonomischen Integration*, edited by M. Kemper and L. Rüster (Berlin 1983), p. 106, and more extensively by M. Kemper, H. Strohbach, H. Wagner, *op. cit.*, p. 74.

93. See L.A. Lunz, *Wneschnetorgowaja kuplja-prodasha* (Moscow 1972), p. 74 (in Russian).

94. See for instance G. Weidlich, P. Schindel, Die XII. Konferenz der Schiedsgerichte bei den Handelskammern der Mitgliedsländer des RGW und der SFRJ, *AW Recht im Aussenhandel*, (1984), Nr. 72, p. IX, where the content of award 180/69 was reaffirmed.

95. See Schlechtriem, *op. cit.*, p. 29.

96. This was true especially before the enactment of the International Commercial Contracts Act of 1976 (for the English text see *Commercial, Business and Trade Laws of the World, German Democratic Republic*, edited by F. Enderlein (Dobbs Ferry, N.Y. looseleaf), because the old German BGB (Civil Code) was not considered suitable to govern intra-socialist relations.

is also a task for scholarly research. Honnold's General Report for Sydney⁹⁷ contains the following list of general principles found in the Sales Convention:

- (a) Loyalty to the other party to the contract
- (b) The duty to cooperate with the other party
- (c) The duty to mitigate damages
- (d) To act in accordance with a reasonable or businesslike person
- (e) The obligation not to contradict a representation on which the other party relied
- (f) The protection of reliance
- (g) Foreseeability of legal consequences of breach of contract
- (h) Legal effect for the obligations of promises.

These are principles which we find also in commentaries on the Sales Convention.⁹⁸

Already in regard to Article 17 of ULIS, important general principles have been stated, among them good faith (*Treu und Glauben*), freedom of contract, reasonable person etc.⁹⁹ The remarkable collection of ULIS cases by Schlechtriem and Magnus contains fourteen decisions concerning Article 17.¹⁰⁰

Sometimes it is felt that common law lawyers are not very fond of general principles¹⁰¹ or that common law judges do not refer to general principles when interpreting statutes. That does not mean however that there are no general principles in the common law. Honnold refers to Sec. 1-103 of the Uniform Commercial Code, which lists nearly a dozen general principles, i.e. the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes. (For a non-common law lawyer however these are not principles but legal institutes for each of which there are numerous provisions in the civil codes.)

English law, as is convincingly shown by Brown, is rich in general principles, among them the so-called maxims of equity such as:

- (1) Equity will not suffer a wrong to be without a remedy
- (2) He who seeks equity must do equity

97. See Honnold, General Report for Sydney 1986, *op. cit.*, p. 42.

98. See F. Enderlein, D. Maskow, M. Stargardt, *op. cit.*, p. 48 *et seq.*

99. See Dölle/Wahl, *op. cit.*, p. 134 *et seq.*

100. See P. Schlechtriem, U. Magnus, *op. cit.*, p. 183.

101. According to N. Brown, General Principles of Law and the English Legal System, in: *New Perspectives for a Common Law of Europe*, *op. cit.*, p. 174: "The term (general principles) sounds alien to English lawyers".

- (3) He who comes to equity must come with clean hands
- (4) Equity looks to the intent rather than to the form
- (5) Equity looks on that as done which ought to be done
- (6) Equality is equity
- (7) Delay defeats equities.¹⁰²

Some of those principles sound quite familiar also to lawyers from civil law countries. Others sound less so.

In connection with Article 7, paragraph 2 of CISG there is a certain danger that general principles of law will be "discovered" and "fabricated" in order to arrive at a solution in harmony with domestic law.¹⁰³

In cases of doubt in regard to a general principle Honnold gives the advice that a proposed application of a general principle may be tested against applicable trade usages (Article 9 of CISG).¹⁰⁴ I have a feeling that such a test might be superfluous. If a trade usage in accordance with Article 9 is applicable, no interpretation of the Sales Convention and no general principle may be needed.

So far I have spoken about uniform law with reference to general principles. But even if there is no such reference, each and every uniform law should be interpreted and applied taking into consideration its international character¹⁰⁵ and in conformity with the general principles inherent in it. This follows from the method of systematic interpretation. Although in general the court of arbitration of the GDR adheres to this principle, not all awards are rendered in accordance with it.¹⁰⁶

3. Gap-filling by national law

There was under Article 17 of ULIS no gap-filling by national law. This exclusion has been severely criticised but also defended.¹⁰⁷ Paragraph 2 of Article 7 was included in CISG as a compromise, the provision leading to national law only if no general principles can be found. One danger, that of finding the principles of one's own national law to be the general principles of the convention, has already been mentioned. The other danger, of course, is not to find

102. *Ibid.*, p. 176.

103. This is Schlechtriem's warning, *op. cit.*, p. 28.

104. See J. Honnold, *Uniform Law for International Sales ...*, *op. cit.*, p. 133.

105. With regard to the GC/CMEA see I. Szász, *op. cit.*, p. 70.

106. For this reason I criticized award 163/83, see F. Enderlein, *Zu den Rechtsfolgen bei Fehlleitung von Waggonsendungen - Anmerkung zum Schiedsspruch SG 163/83 vom 18.12.1984, AW Recht im Aussennhandel*, (1986) Nr. 87, p. X.

107. See UNCITRAL *Yearbook*, vol. I, pp. 136, 170, 181 - 183; vol. II, pp. 21-22, 49, 62; vol. III, p. 76. See also M.J. Bonell, *Some Critical Reflections ...*, *op. cit.*, p. 7.

any general principles and to go straight to the applicable national law (preferably the law of the forum).¹⁰⁸ But also if a court, as the *ultima ratio*, has to apply national law the decision must not be in conflict with the spirit and purpose of the uniform law.

The national law supplementing the uniform law which has to be applied is decided by virtue of the rules of private international law of the forum.

In regard to the GC/CMEA the applicable subsidiary law is already determined in the GC themselves. § 110 refers to the substantive law of the seller's country. In socialist countries there are however usually several different laws for sales relations, whether or not socialist enterprises are involved. Paragraph 2 of § 110 therefore makes it clear that: "by the substantive law of the seller's country are meant the general provisions of civil law, and not the special provisions laid down to govern relationships among socialist organisations and enterprises of the seller's country."

In the case of the German Democratic Republic and of the Czechoslovak Socialist Republic the subsidiary applicable substantive laws are not the civil codes but the special codes for international trade, the International Commercial Contracts Act (GDR) and Act 101/1963 on legal relations in international trade (Czechoslovakia).

§ 110 of GC/CMEA has lost much of its importance in connection with the development of the General Conditions themselves. With each revision or amendment (1968, 1975, 1979) more matters have been included within their scope.¹⁰⁹ To reduce the necessity of further applying national law a proposal has been made to elaborate a general contract law for economic relations between the member countries of the CMEA.¹¹⁰ Even now there should be no recourse to national law in spite of a gap if the national law itself has no specific provision for the matter in hand, i.e. if the same gap exists in the national law.

A specific question will arise after CMEA countries have ratified the United Nations Sales Convention. Will the Sales Convention, after its incorporation

108. This is what Sevón is afraid of, *op. cit.*, p. 14.

109. For instance in 1968 the chapter on limitation was added and in 1975 and 1979 so also were additional provisions *inter alia* in regard to damages. Furthermore, gaps in the law do not matter, as long as there is a relevant provision in the contract. This was Hungary's position in regard to Article 17 of ULIS which was considered to be superfluous, see UNCITRAL *Yearbook*, vol. III, p. 76. § 110 GC/CMEA expressly points to the law of the seller's country only if the question is not regulated by the contract.

110. See *Internationale wissenschaftliche Konferenz. Grundzüge einer wissenschaftlichen Konzeption des allgemeinen Teils der rechtlichen Regelung internationaler Wirtschaftsverträge zwischen den Organisationen der Mitgliedsländer des RGW. Potsdam-Babelsberg 1985 (Aktuelle Beiträge der Staats- und Rechtswissenschaft, Heft 331)*. (Potsdam-Babelsberg 1986).

into national law, belong to the general provisions of civil law in the sense of paragraph 2 of § 110? Will CISG be the subsidiary law for the GC/CMEA? I am in favour of such a solution, especially because it would bring about more conformity than recourse to different national laws, and it would speed up the further development of the GC themselves.¹¹¹ There has however also been opposition to this solution.¹¹²

III. MEASURES FOR UNIFORM INTERPRETATION

I. Regard for precedent

The XIIth Congress of the International Academy of Comparative Law considered also the question of how far regard is to be had to international caselaw in the promotion of uniformity in the application of uniform law.¹¹³ It turned out that there were different traditions not only in regard to the consideration of foreign decisions but also in regard to the necessity of reasoning in the decisions. Sometimes a court arrives at an identical decision without mentioning a similar decision in another country (maybe sometimes also without knowing of the other decision!). In general (if we leave aside certain common law countries and their relations with the Privy Council in London) decisions of foreign courts have no binding force on the courts of other countries. Also in the future this will not be the case. The only force foreign decisions have is their persuasive effect. The more convincing the reasoning of a decision the more likely it will be that other courts will follow it.

The wisest decision however cannot be followed if it is not known abroad. Not only the readiness to, but also the technical possibility of, taking opinions of foreign courts into consideration differ from one country to another.¹¹⁴ What has to be solved is the problem of information. What has so far been done in this respect does not seem to be sufficient.

Of course, Unidroit has already for two decades published decisions, but I do not know whether the *Revue de droit uniforme - Uniform Law Review* has a sufficiently wide distribution to reach all the courts concerned.

111. See F. Enderlein, M. Stargardt, Zur Anwendung des UN-Kaufrechts auf Aussenhandelskauf- und -lieferverträge und sein Verhältnis zum GIW, *AW Recht im Aussenhandel*, (1985), Nr. 75, p. VII.

112. See D. Maskow, *op. cit.*, p. 6.

113. See Honnold, General Report for Sydney 1986, *op. cit.*, p. 9 *et seq.*

114. See Schlechtriem, *op. cit.*, p. 33.

UNCITRAL will certainly have to think about its possibilities. Some years ago the Secretariat began to consider means of collecting and disseminating decisions on the legal texts which have been prepared by UNCITRAL.¹¹⁵

Other international organisations also play an active role. To give only one example I should like to mention the Journal of the Central Office for International Rail Transport which regularly publishes decisions concerning CIM and CIV.

As far as the GC/CMEA are concerned there are no court decisions at all. According to the "Convention on the Settlement by Arbitration of Civil-Law Disputes Arising out of Relations of Economic, Scientific and Technological Co-operation" of 1972 all such disputes are subject to arbitration.¹¹⁶ Awards by one court of arbitration are not binding on others, not even on another arbitration committee of the same court of arbitration.¹¹⁷

This does not mean however that decisions of other arbitration courts are totally disregarded. Decisions of other arbitration committees are taken into consideration, are referred to and — if persuasive — are followed. In other cases those awards are not followed and reasons are given for a differing decision. The reason could be a difference in the circumstances of the case but also a different interpretation of the uniform law.

The extent to which foreign arbitral awards are taken into account is not yet satisfactory. The main reason again is lack of information. Awards are regularly published,¹¹⁸ but in ten different languages. The problem of a general translation has yet to be solved.

2. Advisory board

To improve the situation within the CMEA the idea of a joint journal has repeatedly been discussed. Such a journal could be published by one, several or all chambers of commerce or maybe even better by the CMEA Secretariat.

A chance to become better acquainted with the views and practice of other

115. A/CN.9/267, Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of such Texts.

116. For the text of the Convention see: The Multilateral Economic Co-operation of Socialist States, A Collection of Documents (Moscow 1977). However, the SMGS (i.e. the socialist equivalent of CIM) is applied by courts.

117. See Razumov, *op. cit.*, p. 172.

118. Collections of arbitral awards are published in the GDR as "Aus der Spruchpraxis des Schiedsgerichts bei der KfA der DDR". Four booklets containing 130 awards have been published so far. In Romania, the USSR and Czechoslovakia such collections have been published in English. For more information on relevant publications see H. Strohbach, Publikationen zur Schiedsgerichtsbarkeit, *AW Recht im Aussenhandel*, (1985), Nr. 78, p. XIII.

member countries is provided by the regular holding of symposia and conferences. The Bulgarian Chamber of Commerce and Industry has been especially active in this field.¹¹⁹

Another permanent body for discussion is the Working Group within the Legal Consultative Committee of the CMEA to which the task has been assigned of improving and developing the General Conditions. This Working Group "is an organization in being which for the interpretation of certain provisions may offer valuable information at least as regards the considerations, ideas, purpose which are underlying the one provision or the other."¹²⁰ In the GDR the members of this Working Group regularly report to meetings of arbitrators.

So far the most efficient way of promoting uniformity in the interpretation of the GC/CMEA (however not yet satisfying all needs) are the regular conferences of the Presidents of the courts of arbitration. These conferences take place every two years and are held on a rotation basis in all CMEA countries.¹²¹ On these occasions the Presidents exchange views and information on questions concerning the application of the GC/CMEA as well as of their national subsidiary laws.

From time to time there are proposals that the CMEA or relevant committees should give advice on questions of interpretation. Such advice would of course carry the highest authority or could even be binding on the courts of arbitration but so far there has been only one instance of such official interpretation.¹²²

Many suggestions have also been made at universal level for improving the situation in regard to information and exchange of views. It is obvious that commenting on uniform laws and comparing such comments furthers the uniformity of application and interpretation. The role of scholarly research cannot be underestimated in this respect.¹²³ Mention should be made especially of the col-

119. In 1983 the Bulgarian Chamber of Commerce and Industry organised in Varna an international symposium on problems of CMEA law which, together with the second symposium in 1986, furthered uniform application of the GC/CMEA. See R. Richer, II. Internationales Symposium zu Problemen des RGW-Rechts, *AW Recht im Aussenhandel*, (1986), Nr. 88, p. V.

120. See I. Szász, *op. cit.*, p. 721.

121. Conferences so far: Prague 1960, Moscow 1963, Berlin 1965, Warsaw 1967, Varna 1969, Bucharest 1971, Budapest 1973, Ulan Bator 1975, Havana 1977, Bratislava 1979, Tashkent 1981, Berlin 1983, Gydnia 1985, Varna 1987. Reports are published regularly in *Recht im Aussenhandel*.

122. The 22nd meeting of the Permanent Commission of the CMEA for Foreign Trade has given an authentic interpretation to §§ 5 and 6 of the GC/CMEA.

123. See J. Kropholler, *Die Wissenschaft als Quelle der Internationalen Rechtsvereinheitlichung*, *Zeitschrift für Vergleichende Rechtswissenschaft*, 85 (1986), p. 148.

lection and publication of cases. The idea has also been launched of establishing with the supreme courts a documentation service on foreign decisions relating to uniform law.¹²⁴

Réczei has on an earlier occasion suggested setting up a periodical "with the task to collect judgements passed on the ground of the (sales) convention from all parts of the world, publish and mainly discuss them."¹²⁵ In the view of Rajski "it would be ... desirable that UNCITRAL is charged with the task of collecting and disseminating arbitral and judicial decisions concerning interpretations" of UNCITRAL conventions.¹²⁶ I myself believe that UNCITRAL would best be suited for such a task, first of all because of its worldwide membership, secondly because the General Assembly of the United Nations could call on all States to submit court decisions, and thirdly because the collection of relevant decisions would enable the Secretariat to give recommendations to the Commission in regard to possible or necessary revisions or amendments of the uniform laws.

An exchange of views is especially important in regard to the various different social, economic and legal systems in the world, that is in north-south and in east-west relations.¹²⁷

In his General Report for Sydney, Honnold reported that there was general agreement on the need for an international clearing-house to collect and disseminate experience under the Sales Convention.¹²⁸ The most specific suggestion is contained in Bonell's report. He advocates the rendering of advisory opinions concerning the proper interpretation to be given to the Sales Convention by a particularly qualified international organ entrusted with this task. He is not sure whether such an important and politically controversial function could be given to a permanent committee of UNCITRAL, that is, a body composed of representatives of States.¹²⁹ The alternative would be to entrust this task to a panel of internationally known and recognised experts. A similar proposal was submitted long ago. In 1972 France (supported by Belgium and Poland) recommended that in order to promote uniformity in interpretation, UNCITRAL should set up a standing working group with the task of publishing commentaries every five years, setting out and criticising judgments involving the inter-

124. Referred to by J. Kropholler, *Internationales Einheitsrecht*, *op. cit.*, p. 284.

125. See L. Réczei, *op. cit.*, p. 93.

126. See J. Rajski, *op. cit.*, p. 51.

127. See H.-J. Bartels, *Rechtsvereinheitlichung zwischen Ost und West*, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 45 (1981), p. 111.

128. See J. Honnold, *General Report for Sydney 1986*, *op. cit.*, p. 22.

129. See M.J. Bonell, *Report for Sydney 1986*, *op. cit.*, p. 49 *et seq.*

pretation of the uniform law.¹³⁰

As CISG will come into force on 1 January 1988 it is quite understandable that attention should at this time be focused on this convention. It will still take some time for decisions to be collected and compared and we should not forget therefore the other conventions which are already in force and in respect of which many decisions are available for research. I have in mind the great number of conventions in the field of transport law. Might it not be a task for Unidroit to collect and compare those decisions, to evaluate differences in interpretation and to give expert advice on the proper application of the conventions, especially since Unidroit has in many cases been responsible for the preliminary work on those conventions? In a letter to Unidroit Richter-Hannes went even further and suggested the elaboration of a kind of *Restatement* of international transport law.

3. Supreme court

There exists a general opinion that uniformity in the interpretation of uniform laws can be achieved only with the help of a supreme court. Without a common forum the uniform law would, as soon as it comes into operation, begin to differ from itself: "it would not be the uniform law which would be applied as such, but the uniform law as interpreted in the one or the other contracting country."¹³¹

The most radical remedy against differing interpretations would indeed be an international tribunal, but at the same time this best solution is at present entirely unrealistic.¹³²

The situation is different at regional level. In Western Europe the European Court of Justice has played an important if not decisive role in interpreting community law. Kropholler is correct when he observes that so far the interpretation of (Western) European Community Law has been more dynamic than the interpretation with the CMEA.¹³³

Within the CMEA the creation of a supreme arbitration court has been repeatedly discussed. Research has been carried out with regard to the competence of such a court, the cases which should be decided by it, its composition, whether the court should decide itself or just refer back to the arbitration court of first instance, how to avoid almost every dispute going up to the second instance,

130. See UNCITRAL *Yearbook*, vol. III (1972), p. 77.

131. See L. Rézei, *op. cit.*, p. 92.

132. See M.J. Bonell, Report for Sydney 1986, *op. cit.*, p. 48 *et seq.*

133. See J. Kropholler, *op. cit.*, p. 263.

the fees of such a court and many other questions. It is difficult at the moment to forecast whether and when such a supreme arbitration court will come into being. In the long run, however, there will be no uniform interpretation of the CMEA uniform law without it.