Published in *International Uniform Law in Practice* [ISBN 0-379-20972-1], Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (UNIDROIT), Rome, 7-10 September 1987 at pages 547-552. Reproduced with the permission of Oxford University Press, Inc.

UNIFORM LAW AND ITS IMPACT ON BUSINESS CIRCLES

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As I listened to the discussions on uniform law and its impact on business circles, I formed an increasingly imperialistic view of the subject. Each of the speakers encouraged me to think that the scope of our subject was broader and broader.

I learned that not only should I think about the impact of uniform law on business circles, but I should think about the opposite — the impact of business circles on uniform law. This made the subject twice as large, something that would make any imperialist rejoice. Then I was told that I should include economic operators and members of the legal profession in business circles.

I was especially glad to learn that I was to include members of the legal profession because in my country, as you know, lawyers are very numerous. We tell the story about the toxicologist who announced that he had stopped experimenting on mice and was beginning to experiment on lawyers instead. He gave two reasons: the first was that there were more lawyers than mice in the United States and the second was that one gets fond of mice. It is worth noting, in a more serious vein, that our largest organisation of lawyers, the American Bar Association, was very influential in my country in encouraging our Senate to ratify the Vienna Convention on Sales.

As I look at the results of yesterday's discussions I find a range from optimism to pessimism. Wang Zhenpu, I think, expressed the most optimism. I have the feeling that if I had a favourite uniform law and took it to the People's Republic of China, it would have a very warm reception. I have the impression from listening to Philippe Khan that if I took my uniform law to France, or to the Europe that he described, then no one would know about it and no one would care. Even worse, I gathered from Jeremy Carver that if I took it to the lawyers he was speaking about, they would know about it but would try to contract out of it as quickly as possible. And perhaps worst of all, Kurt Grönfors led me to believe that the people he was talking about in the transport field, particularly the CMI, would oppose its ratification in the first place so that it would never enter into force at all. It is my function to reconcile all of these views.

Is the proper attitude one of optimism or pessimism? My own answer is the rather cautious, indeed cowardly, answer that "it depends". I will give you

five factors on which it seems to me, after listening to the discussion, that it does depend.

The first factor is the extent to which business circles are organised. Assuming, for purposes of simplification, that there are two sides to a transaction, sometimes both sides are organised, sometimes only one is organised, and sometimes neither is organised.

In the transport area, ocean carriers are certainly organised. Shippers are perhaps less organised but their insurers are well organised. So both interests are represented by well organised parties.

Sometimes only one side is organised. Bankers tend to be well organised; their customers are less well organised. As to letters of credit, issuers tend to be organised, beneficiaries less so. Unidroit has attempted an initiative, which is at the moment laid aside, to achieve some degree of unification in the area of hotelkeeper's or innkeeper's contracts. As a guest in a hotel it is my impression that I am less organised than the hotel is.

Sometimes neither side is particularly well organised. In the area of sales, for example, Philippe Kahn years ago made a distinction between sales of commodities at one extreme and sales of specially manufactured machinery at the other extreme. Sellers and buyers of commodities often tend to be better organised. But as you move to specially manufactured goods, sellers and buyers are less organised, and one of the features of the sales field is that it is not generally well organised. There is a banking bar, there is a transport or maritime bar — groups of lawyers who specialise in these fields. If you want to reach banking or maritime lawyers, you can do so through their oganisations, so that the process of educating them about uniform laws is relatively simple. It is somewhat harder to get the attention of people who are or become involved in sales transactions. There is, at least in the United States, no sales bar — no group of lawyers who regard themselves as specialists in the law of sales. We have, however, found that house counsel, that is to say salaried lawyers in the employ of corporations, tend to be more interested in the Vienna Convention than lawyers who practise in private law firms. My first factor then is the extent to which business circles are organised.

My second factor is the extent to which business circles perceive unification of law to be significant. As several speakers have already suggested, before you ask about this you have to ask a preliminary question: Do business circles care about law at all?

Aubrey Diamond made the point that with respect to the sale of goods one has the sense that not only do merchants not care about uniform law, they do not care much about law at all. As he mentioned, we have studies in the United States that show, for example, that while lawyers may care whether the offer and the acceptance match each other, the people who send these forms regularly

give no thought to the differences at all — at least until it is too late. Or, to take another example, although we have a rule that many sales transactions must be evidenced by writing in order to be enforceable, a rule that would be changed by the Vienna Convention, merchants regularly disregard the enforceability of contracts and the requirement of a writing. So the first question is: "Do they care about law at all"? And with respect to sales law, the answer is that often they do not.

Perhaps the answer is different in developing countries. When Wang Zhenpu looks at the People's Republic of China and sees that it welcomes uniform laws, it is in part not the *uniformity* but the *law* that is welcomed. Other speakers from developing countries have also suggested that this is so for their countries as well.

If business circles have an interest in law, then you must ask, are they interested in uniformity of law? There are some things, often little things, that business circles think should be uniform. Business circles like uniform definitions, and so INCOTERMS have been a considerable success. Business circles like uniform usages because it is irritating to have to keep asking what usages affect routine transactions. It is much easier if you can find the applicable usages in a little book called "Uniform customs and practices". Also when you have standard transactions — maybe the sale of commodities and certainly the sale of transport services — on which people compete in the international sphere business circles often think it desirable to have unification.

I suppose that one of the things that works against unification is unification itself. I think of a recent meeting in Vienna where UNCITRAL took up the problem of a uniform regime for negotiable instruments. Certainly one of the difficulties of working out any unification in that field is that there is in existence a unification, the Geneva Convention, that tends to make a new initiative for unification more difficult. So my second factor is the extent to which a need for unification is perceived in business circles.

My third factor, which a number of speakers have already alluded to, is the extent to which business circles have an impact on the law absent the particular initiative for unification. How much success have business circles had in shaping existing law? Again I think of hotelkeepers. Although I am lodged in a very fine hotel, I am sure that if we got into dispute, they would apply the rule all hotelkeepers apply if they can, the golden rule. My hotel asked me for a deposit in advance and the golden rule of course is that the one who holds the gold makes the rules. It is natural that hotelkeepers would regard any attempt to change that situation by writing different rules as interference by outsiders. Hotelkeepers could be expected to look with hostility and suspicion on any different rules, which would surely be worse from their point of view. Another example given in very interesting detail by Kurt Grönfors yesterday is the CMI

when it came into the orbit of the United Nations and UNCITRAL. The existing unification, which had largely been the product of business circles, was regarded as more desirable than any unification that could have have come out of the Hamburg Conference.

In the United States we have an interesting example, which I mention, partly because I know more about the law of the United States and partly because it relates to something that Jeremy Carver has alluded to. I think he somewhat exaggerated the "model" — as opposed to the "uniform" — nature of our Code, but it is true that our States can and do make their own legislative variations. One of the most significant and interesting of these is the variation in New York with respect to letters of credit. Our Code has a whole article — a chapter as it were — on letters of credit. This attention to letters of credit in a statute was something new for us and of course it ran up against the opposition of bankers, who already had their uniform customs. They reacted in the same way that the CMI would be expected to react to the Hamburg Rules. Bankers in New York were particularly significant in the battle with the legislature over the Code and of course letters of credit are important to New York banks. Therefore New York has a strange amendment. If you have a letter of credit governed by the law of a typical State, such as Massachusetts or Pennsylvania, and if you incorporate the uniform customs and practices of the ICC, your letter of credit is governed by our Code on letters of credit supplemented by those customs and practices. In New York, however, if you incorporate the customs and practices, the non-uniform amendment provides that you do not get the Code. Since virtually every bank does incoporate the customs and practices, the Code governs virtually no letters of credit in New York. That result can be explained only by history — the banks already had their own system and they did not want a different one. They could not oppose the Code as a whole, but they worked out a strange compromise. My third factor then is the impact of business circles absent unification.

My fourth factor is the extent to which business circles have been involved in unification. It is human nature for us to tend to support proposals when we have been asked about them during their formulation. One reason for the greater acceptance of the Vienna Sales Convention as opposed to the earlier ULIS is that more countries were involved in its preparation. That is clear for my country which became involved in ULIS only at the very last moment. Certainly it is also true of developing countries that had very little or no involvement in ULIS and a considerably greater involvement in the Vienna Convention. So too is it true for business circles. Anything that the ICC does has the advantage that business circles are involved in the ICC. The INCOTERMS and the uniform customs and practices therefore start out with that advantage.

Arbitration is an interesting field in this respect because arbitration is vir-

tually an industry itself, and arbitration is well organised. Everyone who wants to hold a conference of people involved in arbitration knows how to get in touch with them throughout the world. UNCITRAL's arbitration rules and the model law and the ICC's work on arbitration have had the great advantage of being able to involve businessmen or arbitrators from the beginning. The CMI's work as described by Kurt Grönfors had the same advantage. Business circles liked these texts because they wrote them.

In the United States, to come back again to my country, one can say that our ratification of the sales convention was facilitated by the fact that we had had some success in involving business, and particularly legal, circles. And where there were nevertheless people who thought that they had been left out of the consultative process during the decade or more of development of the Vienna Convention, we had trouble in marshalling their support for ratification. The fourth factor then is the involvement of business circles in the unification process.

My last factor is one that was mentioned by a number of speakers, but was highlighted by Jeremy Carver. It is the extent to which business circles can avoid the application of uniform laws in particular cases — the extent to which they can opt out. Texts like INCOTERMS, the uniform customs and practices, arbitration rules and the version of the ULIS in the United Kingdom, are wonderful in this regard. You do not even have to opt out; these texts do not apply unless you opt in. Other texts, like the Vienna Convention and ULIS, are not quite as good, because they apply unless you opt out. They are therefore a little more threatening, but you can get rid of them if you know how to do it. Getting rid of such a text is not always a simple matter, however. You cannot get rid of the Vienna Convention by saying "we want the law of", for example "France", because France has the Vienna Convention and you will still get the Convention. But if you know how to get rid of the Convention, you can get rid of it. Of course the worst texts in this sense are those, like the Hamburg Rules, that contain mandatory rules. Once they are ratified business circles cannot opt out of them.

It is somewhat paradoxical that if you could imagine a scheme of unification that would never bind anyone, you would expect it to have universal acceptance. If that sounds absurd, there are such enterprises. Ole Lando is doing a kind of restatement with a group, and Joachim Bonell is doing a kind of restatement with another group. As an author of one of the American restatements, I can assure you that if you start out by saying to everyone that your text is not going to bind anybody it becomes much easier to write it than to write a statute. Even this does not eliminate all of the problems however.

In summary, I have picked out five factors from the discussion on the impact of uniform law on business circles. First, the impact depends on the extent to which business circles are organised. Second, it depends on the extent to which

they perceive uniformity or uniform law as significant. Third, it depends on the extent to which they have had in the past an impact on law. Fourth, it depends on the extent to which they are involved, or have been involved, in the unification process. And, finally, it depends on the extent to which, if everything goes badly, they can get out of the whole thing or do not have to contract into it.