UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY

Proceedings of the Congress of the United Nations Commission on International Trade Law

New York, 18-22 May 1992

UNITED NATIONS
New York, 1995

Foreword

The secretariat of UNCITRAL is pleased to present the proceedings of the Congress of the United Nations Commission on International Trade Law which took place from 18 to 22 May 1992 at United Nations Headquarters, under the theme "uniform commercial law in the twenty-first century". The Congress was held during the twenty-fifth session of UNCITRAL, and formed part of the UNCITRAL contribution to the United Nations Decade of International Law, covering the years 1990 to 1999.

Almost 70 invited speakers addressed in the General Assembly Hall more than 600 participants from around the world. These included practising lawyers, corporate counsel, ministry officials, judges, arbitrators, teachers of law and other users of uniform legal texts.

The UNCITRAL Congress was designed to enable the participants to consider the accomplishments achieved in the progressive unification of international trade law during the past 25 years and, even more important, the needs that could be foreseen for the next 25 years. It provided participants with the following: up-to-date information and practical guidance concerning principal legal texts of universal relevance; an opportunity to express their opinion on the practical value of current laws and rules governing world commerce; a forum to voice their practical needs as a basis for possible future work by UNCITRAL and other agencies involved in formulating texts for international commerce.

The first day of the Congress was devoted to the process and value of the unification of commercial law. After the opening address by Secretary-General Boutros Boutros-Ghali, various speakers drew lessons from the experience of UNCITRAL and made useful suggestions for the future, and representatives of regional and other organizations involved in the unification of law addressed the important topic of coordination and cooperation.

The next three days were devoted to the following six areas of commercial law: sale of goods; supply of services; payments, credits and banking; electronic data interchange; transport; and dispute settlement. For each area two speeches were given by leading experts on particularly relevant universal legal texts. Representatives of selected bar associations from various regions, acting as "voices of international practice", assessed the practical value of uniform legal texts and suggested topics where unification of law appears to be needed, followed by comments and questions from the floor.

The last day was devoted to the future role of UNCITRAL, with emphasis on the needs and expectations of developing countries. In his closing remarks, Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs and Legal Counsel, expressed satisfaction with the success of the Congress and, in particular, the many useful proposals. Consistent with the concept of a free exchange of views and the long-term perspective of the Congress, neither the members of UNCITRAL nor the other participants were expected to form a common view, let alone adopt recommendations, on the proposals made during the Congress.

The presentations contained a treasure trove of suggestions and ideas that need to be evaluated and, if deemed promising, pursued in the years to come. Presumably, such steps will be taken not only by UNCITRAL as the host body - to mention another special feature of the Congress concept - but also by various other formulating agencies and similar bodies interested in the future laws of international commerce.

As far as UNCITRAL is concerned, we are able to report the first such steps. In a note prepared for the twenty-sixth session of UNCITRAL in 1993 (A/CN.9/378), the secretariat listed all proposals made at the Congress, most of which related to possible future work in a given area of commercial law. On a few such suggestions, additional notes explained briefly the main problems and other factors relevant to determining, at least provisionally, the feasibility of unification and law development efforts. On the basis of those notes, the Commission decided to prepare guidelines for preparatory conferences in arbitral proceedings and to undertake work, including further feasibility studies, in the area of assignment of claims in receivables financing and in that of cross-border insolvencies. The secretariat monitors developments in other areas (including the build-operate-transfer concept, securities, electronic bills of lading and international registries), and intends to present further explanatory notes at future sessions.

Some of the proposals made at the Congress related to matters other than preparation of new legal texts. Pursuant to one such proposal, the secretariat plans to monitor the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and other commercial law treaties. Pursuant to another proposal, the Willem C. Vis Arbitration Moot has recently been established by the Institute of International Commercial Law of the Pace University School of Law, New York, New York, and held at the Federal Economic Chamber at Vienna.

Many speakers emphasized the need for greater coordination of the activities of formulating agencies so as to avoid duplication of efforts and inconsistent texts. It was recalled that coordination of the activities of other organizations active in the field was among the primary tasks assigned to UNCITRAL at its establishment. While UNCITRAL had assumed that role and achieved a certain success, greater efforts should be made despite such impediments as institutional peculiarities and human weaknesses.

The need for coordination will further increase - and so will the difficulty of achieving it - with the proliferation of regional integration efforts towards free trade zones or common markets, until it is realized that it is ultimately in the best interest of the members of the regional grouping to have their business activities governed by universally prepared and acceptable uniform laws, except where there happens to be a special need or feature truly typical of the particular region. UNCITRAL, with its uniquely universal and balanced representation, with its superb mix of ministry officials, law professors and practitioners, with its traditional hallmarks of consensus, competence and professionalism, and with its six official languages, is well equipped to improve coordination and provide leadership into the twenty-first century.

Probably the strongest and most frequently made appeal during the Congress was for wider and more intensive dissemination of information on uniform legal texts. It was felt that in many countries there was insufficient information available on the laws governing international commerce, and that the relatively slow process of adherence to uniform legal texts was generally due to a lack of familiarity rather than any substantive objections. The secretariat has responded by further increasing its activities of organizing, or participating in, regional and national seminars and of providing legal technical assistance to Governments or parliaments engaged in law reform.

Unfortunately, because of the scarcity of human and, above all, financial resources (that is, voluntary contributions), the increase was fairly limited and indeed almost minimal if measured against the amount of requests received. Those requests indicate the great extent of current needs, which are most apparent in countries with economies in transition. Here one senses an increased and at times sudden awareness of the need for enacting adequate laws for business transactions as a necessary pillar of the infrastructure being developed. A similar awareness is found in other countries, in particular developing countries, that are about to enter, or to increase their participation in, the global market.

Those countries need laws of good quality and suitability for cross-border transactions, and they would benefit from enacting uniform laws which are also enacted in many other States, and which are thus familiar to foreign customers and commercial parties. Accordingly, legal texts prepared by UNCITRAL should be primary candidates for enactment, in view of their twin objectives of unification and improvement of commercial laws.

One may expect that in the years to come many more States will realize the value of adhering to uniform legal texts. After all, it can only be a matter of time until everyone realizes the paradoxical nature of having a global market-place with goods and services crossing borders as a matter of course, while those same borders, when legal issues become relevant, become suddenly noticeable or constitute barriers to such movements by virtue of the disparity and unfamiliarity of the laws of individual States. The conviction that such a realization has been furthered by the UNCITRAL Congress provides additional justification for our sincere gratitude to all those who delivered speeches or made statements.

For all those involved in the work of UNCITRAL, the Congress had the additional advantage of providing the opportunity for a "family reunion" on the occasion of UNCITRAL's silver anniversary. One could meet in the General Assembly Hall many long-time delegates, 11 of whom had participated in the very first session of UNCITRAL in 1968, and almost all of the former Secretaries of UNCITRAL were present, in particular Professors John O. Honnold, Willem C. Vis, Kazuaki Sono and Eric E. Bergsten.

Today we sadly know that the Congress was to be the last appearance of Willem C. Vis in an UNCITRAL context; he passed away on 5 December 1993. Willem C. Vis, who called John O. Honnold the great architect of much that has been achieved by UNCITRAL, was himself not simply an interior decorator, but had helped to shape UNCITRAL in its formative years, with his sharp analytical mind, his intimate knowledge of different legal systems, his rich experience in international organizations, his superb mastery of languages and excellent drafting skills. The secretariat will always remember his lasting contribution to the development of uniform commercial law.

Secretariat of UNCITRAL

Explanatory notes

AAA	American Arbitration Association
ABCNY	Association of the Bar of the City of New York
AICC	Asociacion Iberoamericana de Cámaras de Comercio (Ibero-American Association of Chambers of Commerce)
BOT	build-operate-transfer
CCCP	Code of Civil and Commercial Procedures
CEC	Commission of the European Communities
CFR	cost and freight
CHIPS	Clearing-House Interbank Payment System
CICES	Centre international de commerce extérieur du Sénégal (International Centre for External Trade of Senegal)
CIF	cost, insurance and freight
CIP	carriage and insurance paid to
CMI	*Comité maritime international*
CMR	Convention relative au contrat de transport international de marchandises par route (Road Traffic Convention)
COMESA	Common Market for Eastern and Southern Africa
CPT	carriage paid to
EC	European Community
ECE	Economic Commission for Europe
ECU	European currency unit
EDI	electronic data interchange
EEC	European Economic Community
ESCAP	Economic and Social Commission for Asia and the Pacific
EXW	ex works
FCA	free carrier
FOB	free on board
FOR	free on rails
FOT	free on truck
GATT	General Agreement on Tariffs and Trade
IACAC	Inter-American Commercial Arbitration Commission
ICC	International Chamber of Commerce
ILSAC	International Legal Services Advisory Committee
IMF	International Monetary Fund
IMO	International Maritime Organization
Incoterms	International Rules for the Interpretation of Trade Terms
IUMI	International Union of Marine Insurers
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
PTA	Preferential Trade Area for Eastern and Southern African States
SDR	special drawing right
UCC	Uniform Commercial Code
UCP	Uniform Customs and Practice for Documentary Credits
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Uniform Law on the International Sale of Goods
UNCID	Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
WIPO	World Intellectual Property Organization

CONTENTS

I. Opening address

BOUTROS BOUTROS-GHALI
Secretary-General of the United Nations

Mr. Chairman, esteemed delegates, ladies and gentlemen,

This is a fine opportunity for me to pay homage to your illustrious assembly of specialists and experts in international trade law, known throughout the world as UNCITRAL. I welcome this opportunity with great pleasure. It is no ordinary occasion, for at least two reasons: first of all this meeting marks the "silver anniversary" of the United Nations Commission on International Trade Law, and I am happy to be with you today so that we can celebrate the event suitably together. Secondly, this Congress is the first one on such a vast scale to be held under the auspices of UNCITRAL; it is part of the United Nations Decade of International Law, proclaimed by the General Assembly in its resolution 44/23 of 17 November 1989, and it makes a valuable contribution to the Decade by virtue of its subject matter, namely "standardization of commercial law in the twenty-first century". This is a subject of great interest to me, firstly because of my functions as head of an organization for which standardization of law is a traditional objective, but also because I taught international law for a long time, as you know, and was for a number of years a member of the International Law Commission. You are meeting at an exceptional moment in history, at a time when profound changes have given rise to great hopes but also to serious concerns. On the one hand, we see that new perspectives are being opened up to us and that we can hope for substantial progress towards the establishment of peace and security throughout the world, progress towards a world in which cooperation and justice will reign. Democratization, respect for human rights, economic development and "sustainable development" - this new concept so rich in resonances, which is to be discussed at the United Nations Conference on Environment and Development in a few days' time at Rio de Janeiro: these are the pillars on which the new world order must rest. On the other hand, many regions of the world are passing through a period of dangerous instability marked by insidious conflicts which are a source of great concern, and by the resurgence of nationalism, or perhaps I should say micro-nationalisms, which run counter to our most steadfast efforts. To allay these tensions, many of our Member States are anxious to bring about a type of political and economic transition which will require a substantial revision of the law in many areas. This revision of the law is a necessary concomitant to the favourable trends, and at the same time may offer an opportunity to exorcise the disquieting trends which I mentioned a moment ago. That is our role, then, and it is a larger role than ever before.

The United Nations will be called upon to play an increasingly complex role in establishing peace, and one of the paths to which it intends to give high priority is economic development: in this sphere the standardization of international trade law promises to be one of the most important means of facilitating international exchanges and thereby fostering economic development. I have always been convinced that standardization of law is inseparably bound up with international cooperation in economic affairs and therefore with progress towards development. Differences in law can, as you well know, create an impenetrable thicket of norms in which only the most powerful can find their way - and all this to the detriment of those who are comparatively weak. Furthermore, suppleness in matters of law is inevitably a boon for cooperation: and as you well know - this has often been said, but we must never tire of repeating it - development, or more precisely a new mode of development, is going to be increasingly, in the course of the twenty-first century, a *sine qua non* for peace and for

the protection of our planet's basic equilibrium. More than ever before, clarity and uniformity are essential attributes of the law, the purpose of which, at least in our conception of it, is to protect and assist the weak.

No one can deny that UNCITRAL has, since its inception, made a vast contribution to the progressive standardization of international trade law, and this has won for it the esteem of the international community. This esteem, and one could say also this prestige, are well merited. Your accomplishments are indeed spectacular! The standardized legal instruments prepared by UNCITRAL bear eloquent testimony to the scope of your work. Let us mention, for example, the Convention on the Limitation Period in the International Sale of Goods, concluded at New York in 1974; the Convention on the Carriage of Goods by Sea, concluded at Hamburg in 1978; the Convention on Contracts for the International Sale of Goods, concluded at Vienna in 1980; and also the Model Law on International Commercial Arbitration, as well as a vast complex of rules regarding arbitration and conciliation. Obviously I cannot mention them all; but in a word, you have "covered", if you will allow me this expression, a large number of areas, and you have rationalized a great many human activities, thus enabling them to cross frontiers effortlessly. In these ways you have done good service to cooperation among peoples, and thereby to peace.

Yet, there is more to come; that list is not over. The present agenda of UNCITRAL contains a number of issues of great importance for all countries, but in particular for countries in transition, such as the just-adopted Model Law on International Credit Transfers, the *UNCITRAL Legal Guide on International Countertrade Transactions*, and the UNCITRAL Model Law on Procurement.

UNCITRAL is also preparing a uniform law on guarantees and stand-by letters of credit, and is examining possible legal instruments dealing with the use of electronic data interchange in trade. At the same time, UNCITRAL is always very active in cooperating with, as well as in coordinating and promoting the work of, other organizations that are involved in, and that have themselves made a valuable contribution to, the unification of international commercial law.

These achievements of UNCITRAL demonstrate that the spirit of good will, mutual accommodation, compromise and, most important of all, professionalism, which has always distinguished the work of UNCITRAL, can solve most difficulties and might indeed set an example for work on international public law issues as well.

I have no doubt that UNCITRAL will continue to make an outstanding contribution to the progressive unification of international commercial law working towards developing uniform legal texts. And I am sure that no effort will be spared in order to ensure that these uniform legal instruments not only address the needs of international trade, but also take into consideration the legitimate concerns of both developing and developed countries.

It should be clear to all that the success of such efforts will ensure that those uniform legal texts will find worldwide acceptance. However, it is for you to assess at this Congress the contribution of UNCITRAL and other organizations to the unification of international commercial law, past and current, and to suggest possible directions for the future, so that all trade law unification efforts remain practice-oriented and relevant to the needs of all countries in a time when far-reaching and rapid changes transform our global society in a way that affect the lives of people everywhere.

I wish to express my sincere thanks to the distinguished speakers and participants in this Congress, who with their active participation demonstrate their interest in UNCITRAL's work and their concern for the unification of international commercial law carried out by UNCITRAL and other organizations.

I would also like to assure you, Mr. Chairman and all distinguished delegates, that the Office of Legal Affairs, which provides Secretariat support to UNCITRAL, stands ready to be of every assistance in order to make this Congress productive.

In conclusion, Mr. Chairman, may I wish you and all distinguished delegates every success in your deliberations.

II. Process and value of the unification of commercial law: lessons for the future drawn from the past 25 years

A. Birth and goals of UNCITRAL

1. Background to the establishment of UNCITRAL

PROFESSOR LÁSZLÓ RÉCZEI
Budapest

The aim of this Congress is to consider the accomplishments in the progressive unification and harmonization of international trade law during the past 25 years and the needs that can be foreseen for the next 25 years. Permit me not to follow this programme but - as a witness of the very beginning -to contribute to the history of UNCITRAL and to say a few words on the events preceding its establishment.

In April 1964 the Government of the Netherlands convened at The Hague a diplomatic conference on the unification of the law governing the international sale of goods. There was at that time a slight easing of the cold war. Due to the political situation delegations of two developing and three socialist countries attended the conference among 30 or so delegations from developed countries. The developing countries having shed colonialism, had just started their sovereign life and activities, among others, that of foreign trade. The situation in the socialist countries was not much better. Everybody who was an expert in foreign trade was suspect and kept away from international transactions, and exposed to being trailed by secret police. Foreign trade was rather in the hands of reliable Party members than in those of experts. The resulting ignorance has caused enormous damage. For these States there was a real need for a set of rules on the sale of goods, acceptable by as many States as possible, and taking into consideration the fact that the participants in international trade were at different levels of development. This set of rules should therefore avoid applying strange rules and unknown sanctions and solutions, and - being uniform - should eliminate the problem of conflict of laws, which was an unknown problem for tradesmen in those States.

The draft submitted to the Hague conference was only based upon the laws of the highly developed countries. Its basic principle was not only the *pacta sunt servanda* but *pacta sunt rigide servanda*, applying sanctions in cases of breach of contract that cannot and must not be assumed by tradesmen who were not at the highest level of expertise. I have no intention of enumerating and analysing examples, I only draw your attention to sections 24, 32, 41 and 43 of the Hague Convention relating to a Uniform Law on the International Sale of Goods, providing for, in case of breach of contract, the avoidance of the sale contract by notification, and sections 25, 26 and 30, according to which the contract is *ipso facto* null and void in case of breach. The arguments for mitigating this strictness were of no avail. The majority of the delegations were not prepared to compromise; they were satisfied seeing their domestic legislations raised to the international level.

A similar trap could have been section 9 of the Convention providing that the contracting parties shall be bound by usages which they have impliedly made applicable to their contract, and by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In addition, the usages shall prevail and not the Convention. Who in the socialist countries

had any knowledge about the usages applied or developed on the world market, what was their content and what kind of surprises were hidden in them? The Convention related more than once to the usages, for example in sections 20, 21 and 26.

As I have mentioned, there was no possibility at the conference to take into consideration that the mechanics of foreign trade of the majority of the States was lagging behind those of the developed countries. The delegations of the developed countries insisted upon maintaining the usages, customs and practices established by the long experience of their tradesmen, and disregarded the fact that neither the developing nor the socialist States were at the level necessary for them to adhere to the Convention. This explains the result that hardly a dozen States have ratified the Convention, less than one third of the participants in the conference.

The uniform and universal regulation of the law of international sale was, nevertheless, a real need of world trade. As more colonial countries became sovereign and became parties to trade contracts, the more clear and urgent it became that unification must be commenced, regardless of how many generations it would take to accomplish it.

After the Hague conference it became clear too that the law of international trade is of larger importance than it was supposed when the unification of sales law was initiated by UNIDROIT. In the 1920s there were about 50 sovereign States, in 1964 three times as many. The step-by-step creation of a kind of commercial law would facilitate international trade and influence the development of peoples. Consequently, the elaboration of its respective rules cannot and must not be left to a restricted number of States. This was the way leading to the United Nations. This did not mean, however, that international organizations established many years before for the same purpose become unnecessary. The past 25 years have convincingly proved that the activity of these organizations and that of the United Nations have become more efficient.

The establishment of UNCITRAL was due to the fact that the Hague conference was not flexible enough to take into consideration the interests of the less developed States, and was not striving for compromises but relied upon the majority of votes. It is my firm conviction that the successful 25 years of UNCITRAL is due to its main working principle introduced practically from the very first day of its activity, namely that the primary factor in coming to a decision is compromise. And compromise is possible only if every member of a community understands the situation and the needs of others.

This Congress was convened in part to discuss the needs of UNCITRAL for the next 25 years. I must say it is not my job, it is yours. I belong to the past, and I do not draw up plans for the next 25 years. Nevertheless, I want to make one remark for the times to come.

If UNCITRAL manages to become accepted by the whole world in any domain of the law or a set of rules, one believes that the problem of conflict of laws will be eliminated in this field. But this is not the case. A counter-effect enters into the picture. The uniform law from the very moment of its coming into operation starts to differ from itself. Every judge in every country is a sovereign interpreter of the text, and the judge became a judge by learning the system of law of his own country. And as the speediest bird is unable to fly out of itself, so the judge is unable to forget the law he has learned. Divergent or contradictory interpretations, like the application of rules of different countries, lead to different judgements.

The more successful the activities of UNCITRAL, the more it extends its activities in the field of international trade relations, the more necessary the uniform interpretation of the uniform rules will be. It would be very simple to set up a kind of international civil jurisdiction, but I am afraid it will

take some time for the realization of the understanding that international jurisdiction is not detrimental to national sovereignty. In the meantime, it might be useful to issue a periodical, the task of which would be to publish the differing interpretations and contradictory judgements, and to discuss them on an international level. In other words, we should strive to achieve uniform interpretation not by power and authority of the court, but by scientific arguments. A monitoring programme makes possible the collection of judgements and awards, but they are not confronted with each other.

An example might be the yearbooks of UNIDROIT, which always contain judgements based upon uniform rules. This would be more useful if such publications were issued more than once a year, and if interested lawyers were given the opportunity to discuss - or agree upon - the interpretation.

I have full confidence in the convincing power of jurisprudence, if its arguments are not inspired by the protection of particular interests.

2. Birth of UNCITRAL

ARON BROCHES
Former Vice-President and General Counsel, World Bank, Washington, D.C.

I have been asked to make a few remarks about the birth of UNCITRAL to serve as a backdrop for the discussion of its present and future role which will occupy the Congress during its proceedings.

I attended the first session of the Commission as an observer representing the World Bank. As a development institution the World Bank welcomed the establishment of a United Nations body with the mandate of promoting the progressive harmonization and unification of the law of international trade by action on a broad international basis, including in particular, the full participation of developing countries.

The accomplishments of UNCITRAL over the past quarter century have become a source of justified pride of the United Nations system. With hindsight one may wonder what took Governments so long, some 20 years since the creation of the United Nations, to consider the question of a possible United Nations role in this field.

In the early 1960s two important developments produced a change.

In 1962 the International Association of Legal Science convened in London a Colloquium on the Sources of Law of International Trade. The late Professor Clive Schmitthoff, the great authority on international trade law, was one of the rapporteurs. The review by the Colloquium of the activity of public and private international agencies in the area of harmonization and unification had shown, in his words, a lack of purposeful cooperation between the formulating agencies. Progressive liaison and cooperation between them should be the next step in the development of an autonomous law of international trade, which by its nature was universal. In an article written subsequently, Schmitthoff suggested that an international agency of the highest order, possibly at the level of the United Nations, should be charged with the task of coordination.

The second development took place on the political level. In 1964 Hungary took what turned out to be a decisive initiative when it proposed the inclusion in the provisional agenda of the General Assembly that year of an item calling for consideration of steps to be taken for progressive development of the law of international trade.

When resubmitted the following year, the item was assigned to the Sixth Committee, where Endre Ustor was the vigorous champion of a United Nations role. The proposal was welcomed by the developing countries, but nevertheless received at first a rather cool and cautious reception, motivated in part by doubts whether the unification of substantive law was attainable on a worldwide scale, and by a wish not to duplicate work undertaken by others. The result of the deliberations of the Sixth Committee was, however, a unanimous recommendation that the General Assembly adopt a resolution requesting the Secretary-General to submit a comprehensive report to the General Assembly at its twenty-first session, held in 1966, that would review the work in the field of harmonization or unification of the law of international trade, analyse suitable methods and approaches, and consider the future role of the United Nations and of other agencies in the field.

The Secretary-General thereupon retained the services of Professor Schmitthoff, who prepared a preliminary study that became the foundation for the report of the Secretary-General and the General Assembly resolution which established UNCITRAL.

The report noted that thanks to the efforts of a number of formulating agencies there had been a degree of harmonization and unification on such subjects as the international sale of goods, bills of exchange, international maritime trade and commercial arbitration. An objective evaluation of these efforts revealed, however, a number of shortcomings.

None of the agencies commanded worldwide acceptance. None had a balanced representation of countries with market economies, countries with planned economies, and developed and developing countries. As a result, the completion of the technical work of preparing draft conventions, model laws or uniform laws often failed to culminate in an international convention or the adoption of legislation, and in adequate participation in conventions which had been adopted. The newly independent countries had been able to participate only to a minor degree in the activities of the formulating agencies, and in many of them their pre-independence legislation was not suited to their stage of economic development. Finally, insufficient coordination and cooperation had resulted in a considerable amount of duplication.

This analysis pointed the way to a suggested remedy, namely, involvement in the process of harmonization and unification of the United Nations, with its almost universal membership representing the various legal, economic and social systems, as well as all stages of economic development. Furthermore, since there was no existing United Nations organ which was both technically competent in this field and able to devote sufficient time to what promised to be a complex and long-term endeavour, a new organ, a commission for international trade law, needed to be created. Membership in the commission was to ensure equitable representation of all regions, and the representatives should be persons of eminence in the field of the law of international trade. There was also need for the establishment of a new secretariat in the Office of Legal Affairs, which became the International Trade Law Branch, whose chief is the Secretary of UNCITRAL.

In discussing the functions of the new organ, the report stated that while coordination should be its primary function, it would be desirable not to confine it to that role, but to authorize it to perform formulating functions as well. This was made explicit in General Assembly resolution 2205 (XXI) of 17 December 1966, which authorizes the Commission to prepare or promote the adoption of conventions, model laws and uniform laws. Both functions raise the question of the relation between the Commission and the many other formulating agencies, starting with the long-established Rome Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law and, in the private sphere, the International Chamber of Commerce.

The resolution does not provide an explicit answer to the question. It does, however, state that when it exercises a formulating function UNCITRAL shall do so, where appropriate, in collaboration with other organizations in the field. The UNCITRAL practice of extensive Secretariat consultations and inviting interested organizations not only to attend Commission sessions but also to take part in working groups is calculated to avoid problems on this score. It is true, however, that the principal activity of UNCITRAL has been that of a formulating rather than a coordinating body. UNCITRAL might therefore wish to consider how it could increase its activities of coordination in line with its original mandate.

It was understood from the start that the objectives of UNCITRAL required a great deal of flexibility in the choice of means to achieve it. This is as true of the type of instrument, convention, uniform law, model law, legal guide or standard rules adopted, as of the technique used to arrive at their formulation, including varying degrees of involvement of the Secretariat, consultants, working groups and contributions of other organizations. For example, in the successful work of UNCITRAL on the Model Law on International Commercial Arbitration, a working group of the whole deliberated on the basis of successive drafts developed by the Secretariat.

At its first session the Commission decided that its work should be based on consensus. This wise decision enabled the Commission to establish a tradition of non-ideological, constructive discussions aimed at finding technically sound and widely acceptable solutions. Representatives of originally 29 and now 36 Member States, as well as observers from other States and of international organizations, bring together a wealth of expertise and experience. Using its unique assets of universal participation and capability of producing texts in six important languages, UNCITRAL should continue its harmonization and unification work on high-priority, feasible projects. The participants in the Congress may be able to assist the Commission in identifying suitable topics based on the needs of international practice.

Permit me to conclude these remarks by paying tribute to the contributions of the late Clive Schmitthoff to the theoretical foundations and the practical development of the law of international trade and to the birth of UNCITRAL. With the permission of the Chairman, may I therefore invite everyone to stand up for a minute of silence.

AMBASSADOR ANDRÉ ERDÖS
Permanent Representative of Hungary to the United Nations

Since the agenda of the Congress contains an item entitled "The birth of the United Nations Commission on International Trade Law", I shall take the liberty of making a few remarks in my capacity as permanent representative of the Republic of Hungary to the United Nations. In doing so, with your permission, I shall make a small historical digression to cast our minds 30 years back.

But, above all, it seems to me important to point out that the Government of the Republic of Hungary did not leave to chance the choice of the persons who would represent it at this Congress. One of them is László Réczei, an eminent personality in the field of international trade law, who scarcely needs any introduction here. He is a former Chairman of UNCITRAL, and represented Hungary at more than a dozen of its sessions. The other Hungarian representative is Endre Ustor, whose name is closely connected with the birth of UNCITRAL. Endre Ustor is a former Chairman of the International Trade Commission and a former President of the United Nations Administrative Tribunal, and has represented Hungary on the Sixth Committee.

It is a matter of history to recall that it was the Hungarian Government that proposed the introduction in the provisional agenda of the General Assembly at its nineteenth session of a new item with a rather long title, "Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade". An attached explanatory memorandum makes it clear that "what is meant by 'the development of private international law' is not so much an international agreement on the rules of the conflicts of laws as applied by national courts and arbitral tribunals as rather the unification of private law mainly in the field of international trade". That proposal was not considered by the General Assembly at its nineteenth session. But in the following year, 1965, it was submitted again, accompanied by an explanatory memorandum identical to the one of the preceding year, for inclusion in the agenda of the twentieth session. Having accepted that request, the General Assembly decided in turn to refer the question to the Sixth Committee.

The birth of UNCITRAL took place within the Sixth Committee. During the twentieth session, still in 1965, the delegation of Hungary presented a voluminous document on the question, and the Secretariat also prepared a preliminary report on the subject. At the twenty-first session of the General Assembly, in 1966, the Committee had before it the excellent report of the Secretariat, which had been prepared on the basis of a study by Professor Clive Schmitthoff. A concise account of the debate in the Sixth Committee by its Rapporteur, Professor Arangio-Ruiz of Italy, is reproduced in the documents of the twenty-first session.

The debates in the Sixth Committee were accompanied by a long series of informal negotiations in search of compromise. These efforts finally produced unanimous agreement on a resolution - resolution 2205 (XXI) - which led to the establishment of UNCITRAL.

Referring to these discussions, Robert Rosenstock, in an article entitled "UNCITRAL - A sound beginning" published in *The American Journal of International Law* in 1968, stated: "No one present when the final arrangements were agreed upon in an informal negotiating session will soon forget the broad grin of deserved paternal pride that broke out on the face of Dr. Endre Ustor, the distinguished delegate of Hungary, when agreement was finally reached".

The representatives of Hungary who are present in this hall observed in thoughtful meditation the minute of silence in memory of Clive Schmitthoff, and pay a tribute to his outstanding contribution to the creation of UNCITRAL. They also remember the many other colleagues who are no longer with us, and who also participated in this common enterprise. Among them are consultants who played an active part in the preparation of the study by Professor Schmitthoff in 1965, Constantin Stavropoulos, the United Nations Legal Counsel, Paolo Contini of the Secretariat, Richard Kearney of the United States delegation, and many others.

After having sketched this historical outline, may I in conclusion express our wishes for the success of your Congress, which commemorates the twenty-fifth anniversary of the establishment of UNCITRAL. The Congress is at the same time a major event in the United Nations Decade of International Law. We are gratified to see in this hall so many official delegates, scholars and experts who continue to make valuable contributions to putting the achievements of UNCITRAL into effect in the practice of international trade law.

3. Goals of unification

PROFESSOR JOHN O. HONNOLD
University of Pennsylvania, Philadelphia, Pennsylvania, United States of America;
Secretary of UNCITRAL, 1969-1974

My task is to help us consider this question: What are the goals - the ultimate values - that should inspire the work of UNCITRAL during the coming years? This question is addressed to all of us, since success depends on the thought and effort of the extended UNCITRAL family that is represented here today.

What goals for the work of UNCITRAL call for special emphasis? Let us consider these four: (i) clarity; (ii) flexibility; (iii) modernization; and (iv) fairness.

These, from the very beginning, have been the goals of UNCITRAL. How can we preserve and intensify these values in the work that lies ahead?

Clarity or, in other words, predictability

Perfect clarity and predictability in law, as most of you know all too well, is not for this world - at least so long as law has to be expressed in mere words and must cope with the conduct of mere humans, restless and innovative creatures with a proclivity for doing unexpected and sometimes outrageous things. Nevertheless, within a single domestic system it usually has been possible to keep uncertainty within tolerable limits so that nearly everyone prefers law to anarchy.

International trade, crossing scores of different legal systems whose rules are expressed in a multitude of languages, has had to cope with formidable legal uncertainty. In response, those engaged in international commerce have developed useful tools for self-help, such as standard contracts for some well-organized areas of international trade, the International Chamber of Commerce (ICC) International Rules for the Interpretation of Trade Terms (Incoterms) and arbitration rules. As we shall see in more detail later in these proceedings, UNCITRAL has vigorously developed these and other self-help measures to make them more widely available. These self-help tools, however, cannot reach large areas of legal uncertainty that call for uniform international rules of law.

Can clear, predictable international law be made from the divergent rules of dozens of domestic legal systems, rules built with local legal idioms for which there are no equivalent terms in other languages? The answer, unhappily, is no, but that is not the end of the story.

As you might suppose, delegates nurtured in their domestic legal systems would come to UNCITRAL with a mission to get as much as possible of their cherished domestic legal culture into the uniform international text. The good news is that this public-spirited international group quickly saw that this approach would not work, and all were deeply committed to success.

The delegates found that the best approach to seemingly intractable problems was to focus on concrete factual examples at the crossroads of crucial choices (there seem to be words in most languages for "facts", as contrasted with disembodied legal concepts). Addressing these concrete facts, the group could usually agree on what result was best for international trade. Then, with agreed results as the target, it was usually possible (although not easy) to reflect the agreed results in earthy language cleansed of untranslatable local legal idioms.

Let me confess to distress when people say that we "negotiated" a legal text. Of course the delegates worked long and hard to get agreement, and UNCITRAL has held proudly to its record of reaching decisions without a formal vote. However, agreement was not reached by bargaining with legal ideas as in tariff "negotiations" ("we'll reduce tariffs on your chickens if you'll do the same for our corn"). I treasure vivid memories of delegates who, even in the early UNCITRAL sessions, would say: "This isn't what I am used to, and not what I wanted, but this seems clear and fair; I can go along".

I need not dwell further on techniques for making international trade law clear and predictable, for the very next topic will deal with this. Later this afternoon we shall consider ways to promote uniformity in the interpretation of uniform legal texts.

Flexibility and adaptability to differing situations

Is it possible to prepare worldwide international law that is sufficiently flexible to handle varied and changing circumstances? Fortunately, I can shorten my remarks by noting points in the programme of the Congress where measures to promote flexibility will be illustrated.

The most basic example of flexibility is in the choice among different unification techniques, as follows:

(a) Where maximum uniformity is important UNCITRAL employs the international treaty or convention. A notable example of this is the 1980 United Nations Convention on Contracts for the International Sale of Goods. This Convention has already been ratified by 33 countries, including States on each continent. The Convention provides for flexibility in many ways. One is by avoiding unnecessary detail. Another is the provision that the parties may exclude the Convention, and that the contract between the parties prevails over inconsistent provisions of the Convention. In addition, the Convention gives full effect to the practices established between the parties and to applicable trade usages. The Convention will be discussed in greater detail in the course of the proceedings, as well as other UNCITRAL conventions;

(b) Where there is need for greater adjustment to local conditions, instead of a convention UNCITRAL prepares a model law, for example the 1985 Model Law on International Commercial Arbitration, which the Congress will discuss during its proceedings;

(c) When even greater flexibility is needed, UNCITRAL prepares standard rules or provisions that the parties can make effective by contract - for example, the very successful UNCITRAL Arbitration Rules which become effective by a stroke of the pen of the parties concerned.

Have these various approaches provided adequate, or too much, flexibility? At various points in the programme of the Congress the views and experience of delegates will be invited and welcome.

Modernization

Is unification based on existing legal systems enough? Should we be satisfied with uniformity based on melting together in one international pot the present systems of domestic law? Such a "melting-pot" approach has fatal weaknesses. Some of the widely prevailing domestic codes are nearing the close of their second century and many are almost a century old. Worse, many were designed for domestic transactions that have no resemblance to today's international commerce.

Fortunately, substantial modernization is inescapable. Even if delegates were confined to choosing among existing domestic rules they would face this question: Which rule is best for international trade and today's conditions? Modernization is even more important in the approach, mentioned above, which focuses on this question: Which result should follow in these concrete situations?

Modern law for international trade must be based on current international experience. We trust that the delegates will give UNCITRAL the benefit of their experience.

Fairness

There is, I think, a consensus that commercial arrangements are developed most effectively in a competitive market by negotiation between experienced parties. However, in some situations the parties need help.

Parties often want to close contracts quickly, rather than hold up the transaction to negotiate solutions for every problem that might arise.

Uniform laws, like the United Nations Sales Convention, provide general rules that are designed fairly to fill these gaps in the contract. A widely representative body like UNCITRAL is well designed to develop rules that are fair to both parties; only rarely have delegates objected that draft rules favoured one side; when this has happened, the delegates' concern for widespread acceptance has led to satisfactory compromises.

For fair negotiations, both parties need to be well-informed. During the proceedings delegates will be able to consider the very successful *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*, which, at the request of developing countries, was prepared to help in negotiating contracts for the construction of industrial works. They will also hear of similar projects that are under way, and can suggest areas where additional work is needed.

Finally, we come to a sensitive area where effective negotiation may not be feasible. I wonder how many of us who came by air, sea, bus or rail proposed to read and rewrite the contracts that governed the carrier's responsibility for the traveller and his or her luggage. Suppose that a seller, on bringing goods to a ship says, "Let's sit down and rewrite the standard ocean bill of lading that you and other ocean carriers have prepared". How far would he get?

Until recently, shaping the international rules on the responsibility of ocean carriers for cargo has been dominated by the ocean carriers. The United Nations Convention on the Carriage of Goods by Sea, prepared by UNCITRAL to achieve a fairer balance between the interests of cargo and ocean carrier was finalized in 1978 by a diplomatic conference at Hamburg; in November 1992 the Convention will go into force among 20 countries. The Convention, and the ground it laid for uniform law for modern combined or multimodal transport (e.g., by truck, rail and sea) is on the Congress agenda under the item entitled "From Hague to Hamburg".

In this and similar situations you will have the opportunity to consider and comment on the effect of international representative government on the fairness of law for international commerce.

In the hours and days ahead, the Congress will thus have many opportunities to consider and contribute to the work of UNCITRAL towards international rules that are clear, flexible, modern and fair.

4. Process of preparing universally acceptable uniform legal rules

PROFESSOR WILLEM VIS
Pace University, White Plains, New York, United States of America;
Secretary of UNCITRAL, 1974-1980

There is, I think, no need, to stress before this audience the seemingly insuperable difficulties and complexities that are inherent in the process of preparing acceptable uniform legal rules on a world-wide level.

First, domestic legal systems do of course provide us with rules that are divergent in substance, or there would be no need for uniformity. Where rules are divergent, a choice between them must be made or a new rule that bridges the differences may be formulated. The important question then is on what grounds one rule is found to be more desirable than another.

Secondly, legal systems not infrequently employ a different legal terminology, or an identical terminology shelters different meanings. The concern here is whether, in formulating uniform rules, technical terms can be borrowed from domestic legal systems without causing problems of interpretation in other jurisdictions.

Thirdly, the language in which uniform legal texts are drafted is almost invariably English, at least in the important preparatory stages of the work. The question to what extent the preponderant use of English has an impact upon the conceptual formulation of rules is an intriguing one and would perhaps take a Wittgenstein to analyse and answer. It is at least arguable that participants in the process whose tongue is not English and who have not mastered legal English are handicapped in legal discussions. Allow me to express here my admiration for the great skill with which United Nations interpreters have ensured the existence of acceptable levels of communication and understanding between participants from diverse legal and linguistic backgrounds.

On the other hand, there are several factors which somewhat ease the difficulties referred to.

First, UNCITRAL texts generally apply to specific international transactions, and are not intended to replace or modify domestic law for domestic transactions.

Secondly, UNCITRAL texts, whenever appropriate, recognize the autonomy of parties to tailor their transactions as they see fit.

Thirdly, real efforts have been made, though not in every instance successfully, to employ "neutral legal terminology". Significantly, at least from my own experience in UNCITRAL as both a member of its Secretariat and a governmental representative, I have not found that the different approaches in the civil law and the common law to drafting legal texts have been a problem. Nor, for that matter, have doctrinal theories, so prevalent in, for instance, negotiable instruments law, ever been a deciding factor in choosing one approach over another.

Also, the flexibility in the methods employed in formulating legal rules is a major factor determining acceptability. This is an aspect of the work of UNCITRAL which will be dealt with by others, and I shall, therefore, not dwell on it.

As to the process of preparing uniform rules, there is no standard scheme that fits each and every topic that has been or still is on the work programme of UNCITRAL. In general terms, the full

Commission will make a decision whether or not work should proceed on a given topic on the basis of observations by Governments and interested circles and preparatory studies by its Secretariat. If the green light is given, the first phase of the process consists in moving the work forward to a point where it can profitably be taken in hand by a working group. In most instances, this will require a draft text of legal rules, either an existing multilateral convention or, where there is none, a draft text prepared by the Secretariat.

For example, the work in respect of the international sale of goods was based on the 1964 Hague Conventions, and the work on the carriage of goods by sea was based on the 1924 Brussels Convention on Bills of Lading. In respect of the limitation period in the international sale of goods, the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules and bills of exchange and promissory notes, draft uniform rules were formulated by the secretariat itself in consultation with outside experts and practitioners. This approach of building on what already exists or formulating uniform rules *de novo* has been followed on all other topics that UNCITRAL has been dealing with: industrial contracts, liquidated damages and penalty clauses, the universal unit of account for international conventions, electronic data interchange, letters of credit and guaranties etc. Once a working group completes work on a draft text, the full Commission takes over, and final texts are adopted by the Commission itself and subsequently approved by the General Assembly or by a diplomatic conference.

What lessons may be drawn from this sometimes overly lengthy process?

The principal drawback, in my view, is the consideration of draft texts by larger groupings at successive stages of the process. It is a problem that does not solely arise within UNCITRAL. Most, if not all, representatives to the Commission and observers participating in UNCITRAL meetings are lawyers. Any lawyer worth his salt will be of the view that a legal text is capable of improvement. Since there are many ways in which a legal text may be drafted, one sees, in the final stages of the process, a fair number of proposals for amendments. Amendments tend to lead to compromises. Compromises may be in the interest of acceptability of legal rules, but they do not always make good law.

There is a fundamental difference between the measured, thoughtful work of a working group, from meeting to meeting over a period of years, and the abruptness of almost instant decisions that often must be taken on a great many matters in the larger groupings of committees of the whole, the full Commission or in a diplomatic conference. The process of drafting legal rules in the smaller working groups whose membership tends to remain stable over the years, with ample time for studying proposals, for redrafting and reconsideration, cannot be duplicated in the larger forums where quite a number of participants come to the subject for the first time, and where legal texts must often be redrafted on the spot.

There now appears to be a trend in UNCITRAL to carry out the first stages of preparatory work in larger working groups, open to all interested parties. It may well be the answer to the need for greater acceptability of texts, though some may ask the question whether it is feasible to formulate the best possible legal texts in large groupings. I think it was Professor René David who once stated that the quality of draft legal texts increases in the proportion in which the number of draughtsmen decreases. But I am confident that UNCITRAL will find the correct equilibrium. It is a fact that processes, procedures and methods have changed over the years and will further change.

The work of UNCITRAL is unique in that its client is the world. Its work is not politically driven, nor is it driven by economic interests, in the sense that the legal activities of, for instance, the EEC are so driven. The legitimacy of its work requires the existence of a universally perceived need

for rules that facilitate the conduct of international trade. The only weapon of UNCITRAL is one of persuasion. This in turn requires acceptable legal texts of high quality.

Universal acceptability of uniform legal rules cannot be achieved unless the rules are user-friendly. Traders, merchants, bankers and lawyers will accept UNCITRAL texts only if they conclude that it is their advantage to have their international transactions governed by such rules.

UNCITRAL, in its working methods, has I believe made room for the participation of practitioners. It has had, for instance, since the early days a standing Study Group on International Payments composed of bankers and representatives of interested organizations whose contribution to the work of UNCITRAL has been substantial.

The contribution to the work of UNCITRAL by practitioners should be increased at all stages of the work. UNCITRAL could achieve this by urging Governments to consult with national bar associations and appropriate trade organizations, and by encouraging such associations and organizations to submit to its Secretariat comments on draft texts. Such comments would be particularly valuable at the early stages of preparing uniform rules.

I would not wish to close without paying tribute to a former colleague in the UNCITRAL Secretariat who was my predecessor as Secretary of UNCITRAL: John Honnold. Those who have worked with him in the Secretariat and the Commission know him as the great architect of much that has been achieved by UNCITRAL.

B. Methods of improved coordination between formulating agencies

1. Overview

PROFESSOR ERIC E. BERGSTEN
Pace University, White Plains, New York, United States of America;
Secretary of UNCITRAL, 1985-1991

The preparatory work leading to the creation of UNCITRAL emphasized the contribution that the United Nations could make to the effective development of international trade law by coordinating the efforts of the existing formulating agencies. "Rather than reducing the usefulness of existing formulating agencies, an active United Nations interest and participation in this work would tend to broaden their scope and enhance their activities."[1] The question to be asked was "Should the functions of the United Nations be confined to coordination or should they also encompass formulation?".[2]

The answer given by the General Assembly in resolution 2205 (XXI), by which UNCITRAL was created, was that it should do both. However, "coordinating the work of organizations active in this field and encouraging cooperation among them" were listed as the first, and presumably the most important, of the tasks given to the new Commission. The General Assembly has repeatedly emphasized the importance it attaches to the coordination function of UNCITRAL, most notably in its resolution 34/142 of 17 December 1979, and in its now standard reaffirmation of the mandate of the Commission, as the core legal body in the United Nations system in the field of international trade law, to coordinate the legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law.

During the first several years of UNCITRAL's existence the mandate to coordinate the activities of other organizations in the field of international trade law underlay every activity it undertook. UNCITRAL requested and received reports from the International Chamber of Commerce (ICC) and from the International Institute for the Unification of Private Law (UNIDROIT) on work that might be undertaken either by those organizations or by UNCITRAL itself. It brought to the attention of a worldwide audience the work in the field of international trade law of several regional organizations, and especially of the United Nations Economic Commission for Europe, the Council of Europe and the now defunct Council for Mutual Economic Assistance.

The relationship with certain organizations has remained close during the entire 25 years. For example, the work of ICC in the field of guarantees was originally undertaken on the invitation of UNCITRAL in 1969, and through 1974 there were annual reports to the Commission on the progress it was making in the development of rules on that subject. The current work of the Commission in the field of guarantees, the preparation of a convention covering international demand guarantees and stand-by letters of credit, began with a session of the working group in 1988 largely devoted to a review of the then current draft of the ICC Uniform Rules for Demand Guarantees (ICC publication No. 458). In other subjects, ICC has requested, and received, an endorsement by UNCITRAL of the 1974 and the 1983 versions of the Uniform Customs and Practice for Documentary Credits (UCP) (ICC publication No. 400) and, just recently, of Incoterms 1990 (ICC publication No. 460).

On several occasions UNIDROIT has transmitted draft texts for consideration and completion by UNCITRAL. The most recent resulted in a diplomatic conference in April 1991, at which the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade was adopted. Perhaps most striking is that the work that led to the preparation of the United Nations Convention on Contracts for the International Sale of Goods, the convention that is perhaps the best-known product of UNCITRAL, began as a study of the two 1964 Hague Conventions on the international sale of goods, which had been prepared by UNIDROIT. The two conventions and the uniform laws that were annexed to them contained certain features that made them unacceptable to a number of States, thereby precluding their universal acceptance. The UNCITRAL study was intended to "ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems".[3] As it turned out, the proposed modifications became so extensive that the study turned into the preparation of a new convention based upon the 1964 texts. The final result is an achievement that UNIDROIT as an organization can take pride in as much as can UNCITRAL.

A close relationship has also been maintained with the Hague Conference on Private International Law and with numerous other intergovernmental and non-governmental organizations, both regional and worldwide, that are interested in whole or in part in international trade law.

These examples of the relationship between UNCITRAL and other organizations active in the field of international trade law are illustrative of the general improvement in the cooperation between the various organizations that has taken place in the past 25 years. Documentation is exchanged and members of the secretariats or other representatives of various organizations often attend meetings of the other organizations. Regional organizations, in particular, are more likely than in the past to promote the adoption of a convention already existing at the universal level rather than to prepare a convention of their own for regional use, thereby promoting intraregional unification of law without isolating the region from the rest of the world. Finally, it is now common - several examples could be given - for one organization to use a text prepared by another organization as the basis for its own work in a separate but related project.

Nevertheless, the problem remains much as it was 25 years ago. There is a multiplicity of intergovernmental and non-governmental organizations active in the field of international trade law. A report of the UNCITRAL Secretariat in 1988 listed 40 such intergovernmental and non-governmental organizations, and undoubtedly many were not mentioned. The significant increase in their activities means that the need for conscious coordination is as imperative today as it was when the General Assembly created UNCITRAL 25 years ago.

Unfortunately, the General Assembly did not give the Commission institutional resources to carry out the coordination role it had been assigned. Most of the organizations engaged in the development of international trade law lie outside the United Nations system. Those inside the United Nations system, or even within the United Nations itself, are under no obligation to accede to the views of the Commission. It was self-evident from the beginning that the effective leadership of UNCITRAL in the field did not arise out of any perception of hierarchical authority, a hierarchical authority that did not exist. The deference given to the requests and suggestions of UNCITRAL in the early years arose out of the perception that only UNCITRAL could give the leadership that was generally perceived to be needed.

In spite of the honours being bestowed on UNCITRAL during this week of the Congress, it can be argued that the Commission is less well positioned today to carry out its task of coordination than it was 25 years ago. For one thing the Commission has lost sight of the importance of that role. The Commission no longer asks other organizations to report to it on their activities in regard to a specific topic, as it once did. The annual report of the Secretariat on the work of other organizations is duly received, and usually without substantive comment. The Commission may think of itself as the core legal body in the field of international trade law, but if it does, it does so in respect of its formulating role and not in respect of its coordination role, which is the context in which the General Assembly uses the term.

The very success that UNCITRAL has enjoyed as a formulating agency interferes with its coordination role. In 1968 the Commission entered a field that was only then coming to the general attention of the international community. The decision to create the Commission was the result of the academic interest in the subject during the 1960s. The creation of the Commission and its subsequent success contributed immensely to the increased interest of practitioners and Governments in the subject. As is demonstrated by the success of the present Congress, international trade law is currently acknowledged to be one of the important subjects to be considered in the United Nations Decade of International Law. That would not have been true if the Decade had been celebrated in the 1970s or the 1980s.

When the Commission began its work in 1968, it had no agenda. It was only natural that its first task would be to survey the existing situation and to determine what further work was called for. Deference by other organizations to the coordination role of UNCITRAL was non-threatening. However, the success of UNCITRAL as a formulating agency during the last 25 years raises concerns on the part of some, but not all, other organizations, both those that have traditionally worked in the field of international trade law and those that have new-found pretensions to do so. Organizations that have such concerns are obviously less willing to accept the coordination role of the Commission than they were in the early years.

Examples are difficult to document, and it might not be wise to attempt to do so. Most of the relevant events are subject to interpretation. Therefore, only two cases involving regional economic commissions of the United Nations itself will be mentioned. In one case, a committee of one of the regional economic commissions was able to thwart a proposal that the Commission should undertake a particular project that would have overlapped with one of their own. In another, a different regional

economic commission has actively encouraged the States in its region not to adopt two of the conventions prepared by the Commission. It is to be hoped that these two examples of the disregard shown for the work of the Commission, and the others that are more difficult to document, are momentary aberrations.

A somewhat different problem of coordination has arisen in the field of the international sale of goods, a problem that could easily arise in other fields. At the present time there are three conventions that are subsidiary to the United Nations Sales Convention prepared by UNCITRAL. They are the Convention on the Limitation Period in the International Sale of Goods, also prepared by UNCITRAL, the Convention on Agency in the International Sale of Goods, prepared by UNIDROIT, and the Convention on the Choice of Law in the International Sale of Goods, prepared by the Hague Conference. Of the three, only the Convention on the Limitation Period is in force. There are undoubtedly a number of reasons for that. One of them may be that the Convention on the Limitation Period is by far the oldest of the three, having been adopted by diplomatic conference in 1974, whereas the Convention on Agency was adopted by diplomatic conference in 1983 and the Convention on Choice of Law was adopted in 1986. I suggest, however, that the primary reason is that neither UNIDROIT nor the Hague Conference has been in a position to promote effectively the ratification of its convention when the convention had to be considered in isolation from the Sales Convention, to which it is subsidiary. States that consider ratifying the Sales Convention are apt to consider ratifying the Convention on the Limitation Period at the same time, but are less likely to consider ratifying the two conventions not prepared by UNCITRAL. Both the Convention on Agency and the Convention on Choice of Law are effectively orphans.

I would make two suggestions on this particular problem. The first relates to the preparatory stage of a new convention. Prior to a diplomatic conference the organization concerned might involve UNCITRAL in the preparation of the convention. The approach that is most likely to lead to effective results would be for the draft convention to be submitted to UNCITRAL for its completion so that the diplomatic conference would be held under the auspices of the United Nations. That is neither a new nor a radical suggestion. The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade that was adopted by a diplomatic conference in April 1991 was based on a draft convention prepared by UNIDROIT that it submitted to UNCITRAL for completion and adoption. Since this convention is linked in philosophy, though not legally, to the Hamburg Rules and to the United Nations Convention on International Multimodal Transport of Goods, it was, in my view, a wise recognition on the part of UNIDROIT that the convention would have a more promising future if UNCITRAL were to complete its preparation and undertake its promotion as part of a transportation package.

A second suggestion relates to texts of international trade law that are prepared by other organizations, whether they are structured in the form of a convention or not. The Commission should invite organizations to submit to it for its endorsement texts of international trade law that they have prepared. That is an action which ICC has done several times in respect of the Uniform Customs and Practice for Documentary Credits, and which it did in 1991 in regard to the 1990 revision of Incoterms.

This is not the first time this suggestion has been made. In 1981 the Secretariat noted that the Commission had not recently sought out for endorsement texts adopted by other formulating agencies. The Secretariat report went on to say: "Now that the mandate of the Commission in the coordination of legal activities in the field of international trade law has been reaffirmed by the General Assembly, the Commission may wish to consider actively soliciting additional texts for endorsement." The Commission did not take up that Secretariat suggestion either in 1981 or later. Perhaps it did not because the solicitation of texts for endorsement, or their submission to UNCITRAL by the

formulating agency, carries with it the risk that the Commission might not wish to endorse the text. That the risk is real was demonstrated in 1991 when the Commission put off for a year its decision as to whether to endorse Incoterms 1990, though the reason for the delay did not arise out of doubts as to the quality of the new version of Incoterms. However, the risk of rejection by the Commission would in itself act as a means to determine whether the text in question advances the cause of international trade law, or whether it is just one more legal text cluttering the books, thereby reducing the effective unification and harmonization of international trade law.

While promotion of texts of international trade law in a State that is active in the Commission is primarily the work of the delegates to the Commission, the ministries concerned and the academics and interested circles from that State, that only covers at most one quarter of the member States of the United Nations. Promotion of the adoption of texts in the remaining three quarters of the member States requires active efforts. Once the Commission has endorsed a text of international trade law prepared by another organization, the Secretariat is free to help promote its adoption and use. It is not free to promote texts of international trade law that have not been prepared or endorsed by the Commission. UNCITRAL is well positioned to promote the adoption of the legal texts it has produced or endorsed by activities in individual States. Although any organization can organize a seminar wherever UNCITRAL can do so, intergovernmental organizations outside the United Nations system do not have the support mechanisms in place that are furnished by the country offices of the United Nations Development Programme.

UNCITRAL is a unique organization. It should not be considered to be just one more of the formulating agencies in the field of international trade law. It is the only organization in the world that is competent in the entire field and that, through being a part of the United Nations reporting to the General Assembly, draws its participation from all countries. Those attributes are part of its strength as a formulating agency. However, the intellectual satisfaction that can come through the preparation of legal texts that are appropriate for adoption in States with all forms of legal and economic systems and at all levels of economic development should not obscure the fact that the primary task the General Assembly expected UNCITRAL to undertake was the coordination of work of other organizations inside and outside the United Nations in the field of international trade law.

2. International Institute for the Unification of Private Law

MALCOLM EVANS
Secretary-General, International Institute for the Unification of Private Law, Rome

May I first convey to the Commission the warmest congratulations of UNIDROIT on the occasion of these celebrations to mark the holding of the twenty-fifth annual session of UNCITRAL, and at the same time express my appreciation as Secretary-General of UNIDROIT for the opportunity which has been offered to me to share with the Congress participants some reflections on the important subject of coordination among formulating agencies.

These reflections will bear briefly on four aspects of coordination, namely the selection of areas deemed to be amenable to harmonization, the process of elaboration of texts, that of their promotion and, finally, the subject of training and assistance. Moreover, I trust that I may be forgiven if I rely essentially on illustrations drawn from the experience of UNIDROIT. Its 65 years of endeavour, coupled with a broad mandate which extends well beyond the field of international commercial law, and with what has often been described as a markedly scientific approach, have brought it into direct contact with almost all organizations active in the process of harmonization and unification, whether

their character be intergovernmental or non-governmental, universal or regional, and with many associations representing various professional categories.

Of the four points which I identified, I would submit that the first, the selection by formulating agencies of topics for study and possible action, is that in which the greatest progress has been made in terms of coordination, and in this connection I would recall that for almost 15 years now the Secretariats of the Hague Conference on Private International Law, UNCITRAL and UNIDROIT have taken advantage of all possible occasions to exchange ideas and information with a view, *inter alia*, to avoiding the danger of duplication of work. These meetings have proved invaluable, and for my own part I cannot recall a single occasion during that time when there has been any friction between UNIDROIT, on the one side, and UNCITRAL or the Hague Conference, on the other, in the allocation of work.

One might suggest that success in avoiding time-wasting and expensive duplication of work is so evident a concern as not to be a source of self congratulation for the formulating agencies, given the ever increasing insistence of Governments that the resources available for international cooperation in the harmonization and unification of private law are most definitely finite. Although a marked slowing-down in the proliferation of intergovernmental agencies which characterized the first two decades following the Second World War might indicate a reduction in the scope for potential competition between organizations, two factors may nevertheless pull in the opposite direction. The first of these is the perception of certain States or groups of States that one agency may constitute a more favourable forum than another for the promotion of their interests, while the second is the tendency for organizations of a regional, and predominantly economic and integrative character, increasingly to legislate in the field of commercial law, thereby rendering it more difficult for the member States of such groupings to contemplate steps towards universal harmonization which could result in solutions at variance with those adopted at regional level. This latter is, I would suggest, an area deserving attention.

Turning to the question of coordination at the stage of the elaboration of uniform law texts, the experience of UNIDROIT may be considered from two different perspectives. UNIDROIT is, indeed, a formulating agency, in the sense of its being an intergovernmental organization, with a membership of over 50 States drawn from all continents of the world, a number of which have hosted ad hoc diplomatic conferences for the adoption of UNIDROIT conventions.

At the same time, however, UNIDROIT is a research institute with a wide network of eminent correspondents from academic and professional circles to whom recourse is regularly had for assistance in connection with the comparative law and feasibility studies decided upon by the Governing Council, and who frequently join Council members in manning the study groups initially responsible for the preparation of uniform law texts, whether the finalization of those texts be undertaken by UNIDROIT itself or by another agency.

Illustrative of this double function of UNIDROIT is the fact that in addition to the two most recent UNIDROIT conventions adopted at Ottawa in 1988, the Convention on International Financial Leasing and the Convention on International Factoring, the Institute also provided the basic research and drafts for two other recently concluded conventions, namely the United Nations Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Geneva, 1989) and, still closer to home today, the 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, which represented the fruit of over a decade's work first in UNIDROIT and then in UNCITRAL.

While there is always room for improvement, I would suggest that, at least in the light of the experience of UNIDROIT, a largely satisfactory picture emerges in regard to coordination with other formulating agencies in the first two stages of the harmonization process to which I have referred.

Much more, I would submit, however, remains to be done in respect of promotion of international instruments and of legal training and assistance, two related but distinct areas of endeavour which sometimes risk being confused. Here coordination is still at a substantially embryonic stage, although examples of inter-agency cooperation are certainly not wanting.

We in UNIDROIT are indeed fully conscious of the debt of gratitude we owe to the organizers of this Congress, and in particular to the Secretary of the Commission, Gerold Herrmann, for having included in the programme consideration of the UNIDROIT Convention on International Financial Leasing. I imagine that my colleague Joachim Bonell will not fail to mention the draft UNIDROIT Principles for International Commercial Contracts when addressing the Congress on the subject of non-legislative forms of harmonization. Similarly, I recall with appreciation the opportunity afforded to UNIDROIT by the previous Secretary of the Commission, Eric Bergsten, to make a presentation of the UNIDROIT Convention on International Financial Leasing and the UNIDROIT Convention on Agency in the International Sale of Goods at the AALCC/UNCITRAL/UNCTAD seminar held at New Delhi in 1989, while for its part UNIDROIT gave prominence to the United Nations Sales Convention at its International Congress on Uniform Law in Practice, held at Rome in 1987.

Welcome, however, as are these instances of cooperation, and these are but examples, they tend to remain exceptions, and as the formulating agencies are regularly encouraged by what are after all their paymasters, the States themselves, to concentrate increasingly on the consolidation of existing achievements, it would seem that greater efforts could be deployed by the organizations to maximize the limited resources available.

Leaving aside celebratory occasions such as this, which are naturally devoted essentially to the achievements of the host agency and its ongoing work, and the achievements of UNCITRAL over the last quarter of a century are truly outstanding, most of the bread-and-butter work of promotion is done out on the road; and there may well be circumstances, especially when congresses or seminars are held in those parts of the world which infrequently receive direct exposure to the fruits of the harmonization process, in which a joint presentation by the secretariats of various agencies would have a greater impact, and indeed be much more cost-effective, than a succession of separate visits by representatives of those organizations, often accompanied by the very same experts who have represented Governments during the formulation phase.

As to the provision of legal training and assistance, similar considerations would seem to apply as to the promotion of instruments. Resources are limited. International organizations seeking financial support outside their regular budgets are likely to turn to the same sponsors, whether the object of the funding be the organization of a seminar at the headquarters of the agency or *in loco*, or the provision of internships with an agency. In this latter context, I might mention that the UNIDROIT Secretariat contemplates the institution of a pilot scheme of research scholarships in the field of uniform law for lawyers from what, for want for a better term, may be called developing economies, to be implemented as far as possible in association with other international organizations and with comparative law institutes. It goes without saying that if this initiative were to commend itself in principle to our Governing Council and to offer prospects of financial viability, then it is one in regard to which we would seek the full cooperation of such agencies as UNCITRAL and the Hague Conference, with the latter of which some encouraging preliminary contacts have already been established.

I might recall that as long ago as 1973 the Vth UNIDROIT Meeting of the Organizations concerned with the Unification of Law was convened at Rome; the two principal themes of the meeting were methods of coordinating the activities of the different international organizations and uniform law as a means of technical assistance to developing countries. Curiously enough, few speakers sought to draw those two threads together, and I would respectfully suggest, 20 years on, that it is high time to seize the occasion afforded to us by UNCITRAL to do so. I am glad to announce that the UNIDROIT Secretariat envisages within the next two or three years the convening of a seminar in Rome to examine ways and means of intensifying cooperation among the agencies with a view to maximizing the advantages to be derived from our respective programmes of training and assistance.

Finally, I have had the pleasure and privilege, over the last 20 years, of meeting and working with all six secretaries of UNCITRAL. This has proved a most rewarding experience, and it is therefore perhaps fitting that I should round off this intervention with a quotation from the concluding statement at the 1973 Rome Meeting of the first Secretary of UNCITRAL, Paolo Contini, who said on that occasion: "Another factor not to be overlooked is the human element. Genuine cooperation requires genuine sharing, not niggardly withholding of information and advice. A spontaneous and informal habit of consultation between secretariats based on personal rapport may be more effective than an institutionalized coordination arrangement half-heartedly implemented. In any unification endeavour where at least two agencies are involved, it is essential that the participants should be aware that a cooperative work successfully accomplished tends to generate more work, whereas a jurisdictional battle over the same project may leave the contestants empty-handed."

Paolo Contini was of course referring on that occasion essentially to the negative effects of competition among agencies at the formulation stage, but his words of wisdom are relevant to the whole process of harmonization. The spirit he called for has, I believe, always informed not only the relations between UNCITRAL and UNIDROIT, but also the dealings of our two agencies with other organizations. There is no reason to doubt that such a spirit will prevail in the challenges which await us as we draw close to, and then embark upon, the twenty-first century to which the organizers of this Congress have so imaginatively directed our attention.

3. The Hague Conference on Private International Law

MICHEL PELICHET
Deputy Secretary-General, The Hague Conference on Private International Law, The Hague, Netherlands

It is with a sense of admiration that I have today not only the honour but the pleasure to convey to UNCITRAL the greetings of the Hague Conference on Private International Law on the occasion of this Congress, which is dedicated to the twenty-fifth anniversary of the Commission. It is impossible in fact not to feel a sense of admiration in the face of the remarkable achievements of this organization, which, at only 25 years of age, is the youngest of all the organizations endeavouring in one way or another to bring about unified laws. I shall not seek, in the limited time available to me this morning, to examine in depth the conventions or model laws that UNCITRAL has devised; this will be the subject of more detailed discussions in the days to follow. I might simply recall at this time the particular case of international sales, an area in which it has been possible to achieve harmonious coordination between UNCITRAL and the Hague Conference. What I should like to stress in this first part of my statement is that we at The Hague are certain that the remarkable results achieved by UNCITRAL are due in part to the fact that the organization has ceaselessly sought to

develop and maintain contacts with other organizations involved in the unification of law, whether governmental or non-governmental, and that it has been concerned to play the role that was assigned to it at the time of its establishment, namely one of coordinating the work of these various organizations.

However, it should be noted that this essential task of coordination is not easy and requires a great deal of skill. Apart from the problems of sensitivity that it may raise, coordination between organizations that differ in certain specific respects, and that do not consequently share common interests, may give rise to serious problems. In this regard, the example of the Hague Conference is instructive. The objective of our organization, it will be remembered, according to article 1 of its Statutes, is to work for the gradual unification of the rules of private international law. This means that the Conference is faced with a true dilemma. On the one hand, its area of activity is very limited, since it deals only with private international law, but within that area the Conference is concerned not only with trade law, but also with family law, the law of succession, extra-contractual liability, mutual legal aid and the vast field of judicial competence and the recognition and execution of judgements. On the other hand, however, this limited area of activity is reflected, I should actually say projected, into all the areas of substantive law, as a consequence of which there can be no efforts at unifying substantive law, regardless of the framework within which these efforts are undertaken, that do not raise problems of private international law. For UNCITRAL, coordination of its work with an organization such as the Hague Conference, and even possible collaboration with it, seemed a delicate task, for the reason that in the case of all the subjects of substantive law tackled by UNCITRAL, a balance needs to be struck between the problems of private international law in its pure form, the settlement of which should lie with the Hague Conference, and those that are more directly involved in substantive law, and might accordingly be dealt with in a regulatory instrument of the UNCITRAL type.

As it happens, during the first 25 years of the existence of UNCITRAL its collaboration and coordination with the Hague Conference has been harmonious and appears to have been successful in every way. It might be recalled, in this connection, that as long ago as 10 years before the establishment of UNCITRAL, the Hague Conference concluded a cooperation agreement with the United Nations. In November 1958, the Secretary-General of the United Nations, Dag Hammarskjöld and the Secretary-General of the Hague Conference, Matthijs van Hoogstraten, agreed in an exchange of letters to organize a form of cooperation under which both organizations envisaged a general exchange of information and the dispatch of observers on matters of common interest. Above all, however, there was provision that in certain special areas either of the organizations could call on the other with a request to initiate the work. Quite naturally, this agreement found an ideal area of application following the establishment of UNCITRAL, and has made possible the subsequent harmonious development of cooperation between the two organizations. In this way, in the case of the work on negotiable instruments, an observer from the Hague Conference regularly monitored the UNCITRAL meetings, and even took part in a number of drafting groups and played an active role in the discussions of the problem that the relevant convention had raised with regard to scope of application. What is more, since the new United Nations Convention on International Bills of Exchange and International Promissory Notes raises a specific conflict-of-law problem for the reason that it is based entirely on the autonomous will of the parties, the Hague Conference has included in the agenda for its future work the preparation of a convention on the law applicable to negotiable instruments.

The same is true in the area of international sales: the Conference has not only followed the work carried out within UNCITRAL, but for its own part, in collaboration with the United Nations and with its support, has prepared a Convention on the Law applicable to Contracts for the International Sale of Goods, a convention complementary to the one adopted by UNCITRAL at Vienna

in 1980. Further, the United Nations has agreed to translate the text of the Convention adopted by the Hague Conference into the official languages of the United Nations other than French and English, which are the only official languages of the Hague Conference.

Will this harmonious cooperation between the Hague Conference and UNCITRAL continue in the future so as to further develop uniform trade law, the subject of this Congress, into the twenty-first century? This is naturally the wish of the Hague Conference, and the secretariat of that organization will do everything in its power to see that it happens. Nevertheless, I cannot conceal that we at The Hague have certain misgivings. The fact is that a new trend with regard to unification of trade law appears to be taking shape within UNCITRAL, a trend that will inevitably raise certain questions for the Hague Conference. While until now UNCITRAL has focused its attention, in the form of conventions, on the traditional areas of international trade law, it is increasingly undertaking work in very specific and frequently more limited and unexplored areas such as electronic funds transfer, first-demand guarantees or computerized data exchanges. Added to this is the fact that this work is, with increasing frequency, being approached in the form of model laws, given that unification in the form of a convention may not be justified in the case of the very circumscribed subject areas in question.

The new tendency on the part of UNCITRAL, unseen until now in the traditional approach to unification in the form of conventions, is to adopt in its model laws in the substantive law area conflict-of-law rules and rules governing jurisdictional competence. Now while the Hague Conference can have no objection in principle to a model law's containing a conflict rule - although the technique, which consists in adopting in a substantive law instrument a conflict rule for the specific purpose of determining the application of the model law, appears highly doubtful and likely to lead to a vicious circle - it cannot but regret that the conflict and jurisdictional competence rules have been proposed in the model laws without any real research having been carried out in the area in question. Private international law is a very particular and delicate subject, which must be based on comparative law research, especially in partially new or unknown areas or in areas in which a hastily devised conflict rule may lead to surprising results. It is clear that if this new trend on the part of UNCITRAL were to continue, in other words if UNCITRAL were to insist on adopting conflict-of-law and jurisdictional competence rules in its substantive law regulations - a trend regarded as regrettable by the Hague Conference - a new form of collaboration would have to be developed between the two organizations.

At its seventeenth session in May 1993, the Hague Conference on Private International Law is to celebrate the hundredth anniversary of its establishment. As in the case of the observance of the twenty-fifth anniversary of UNCITRAL, this centenary anniversary of the Conference will provide the occasion for a critical examination of the organization's working methods and its relations with the other international organizations. It might well be useful to envisage at that time new forms of collaboration, for example by providing for joint-working group meetings between UNCITRAL and the Conference to settle specific problems of private international law. If an approach of this kind necessarily implies a radical change in the working methods of the Conference, it will also require adaptation on the part of UNCITRAL, but this adaptation can only be beneficial for the development and unification of international trade law.

However, and I should like to conclude my comments with this observation, good harmony between the different international organizations dealing with the unification of law, coordination of efforts and cooperation at the implementation stage can only exist if there is a corresponding desire for collaboration and coordination within the national administration of each of the various States concerned. Too often, as it happens, States are represented in the work of the different international organizations by experts or delegates who have no idea of what is being done, frequently in parallel, in other organizations; what is more, it sometimes happens that the same experts or delegates represent

their countries in two organizations, where, for frequently obscure political reasons, they espouse diametrically opposite attitudes. This leads to unfortunate results, which are detrimental not only to the collaboration between the organizations in question, but, in the final analysis, to the actual unification of the law. If, therefore, the desire is that coordination between the international organizations should be harmonious and effective, it is indispensable that within each national administration this kind of coordination should be organized, encouraged and respected. This is an imperative condition if the unification of the law is not to proceed in a disorderly fashion.

4. International Chamber of Commerce

DOMINIQUE HASCHER
Secretary, Commission on International Arbitration, International Chamber of Commerce, Paris

The International Chamber of Commerce (ICC), which was founded in 1919, is the world organization for the business community. At the organizational level, the ICC is an international non-governmental body to which the United Nations, during the third session of the Economic and Social Council in 1946, conferred consultative status in category I. Its international headquarters is in Paris. The members of it, of whom there are more than 7,000 in 110 countries, are mostly grouped together in the national committees.

The ICC maps out and coordinates the position of the world business community with regard to certain basic objectives, and defends these points of view in international organizations and their member States. It therefore maintains close relations with the Organization for Economic Co-operation and Development (OECD), the European Communities, the World Bank, the International Monetary Fund (IMF) and the General Agreement on Tariffs and Trade (GATT), whose negotiations within the ICC-United Nations-GATT Economic Consultative Committee it closely follows, as well as relations with institutions and specialized bodies such as the World Intellectual Property Organization or the United Nations Centre on Transnational Corporations.

The ICC contribution to the work of intergovernmental organizations is one of long standing. It may be recalled, for example, that the ICC submitted to the League of Nations drafts of several international conventions on the status of foreigners and on arbitration, and that since its beginning it has taken part in diplomatic work on maritime transport (Brussels Conventions of 1924), or on intellectual property and the law of international sales. As a result, ICC today provides active assistance for the activities of UNCITRAL, which it congratulates on its twenty-fifth anniversary, and which it commends for the work accomplished in the service of the international community.

In addition, ICC harmonizes international trading practices and regulations. Its Commission on International Commercial Practice formulates recommendations on desirable trends in legal and commercial practices and proposes solutions for differences between national laws affecting international trade. For the purpose of standardization, ICC first established standardized definitions and interpretations of trade terms, of which Incoterms are an example. In 1920, on the occasion of its first congress, ICC laid down the principle of preparatory work in this field. The need for standard interpretation of the business terms used in sales contracts soon became apparent when the different and sometimes contradictory meanings that national usage gave to the same expressions had been established. For example, in 1936, ICC placed standard regulations - the first Incoterms - at the disposal of the international community. The latter were later revised (in 1967, 1976, 1980 and, most recently, 1990), and the latest version takes into account the exchange of computerized data in the sales documents as well as the new techniques of transport.

The ICC drafts rules and standard clauses. In 1933, the uniform customs and practice for documentary credits were adopted for the first time; these set a certain number of standards applicable to credit transactions. The readaptation of these rules, applied today by banks in 160 countries, is a constant process to which the Commission on Banking Technique and Practice devotes itself. Clearly, these written rules must be interpreted in the light of the practical experience of those applying them. This task is entrusted to an expert group of the Banking Commission, which answers questions regarding the specific application of the rules raised by the banks, enterprises or even private individuals. Moreover, in order that this expert advice should be known, since it helps to maintain uniform application, it is recorded in publications.

Mention could further be made of the uniform rules for contract guarantees and the uniform rules for demand guarantees, the uniform rules on collection and the guiding principles for the international transfer of funds between banks and for compensation.

With regard to law governing transport, the ICC and UNCTAD have jointly drafted rules applicable to multimodal transport documents in order to introduce a legal framework for the case of private contracts in a field where an international regulatory text is non-existent.

The ICC likewise offers international business operators legal guides informing the parties concerned of the problems arising in international trade. This has led to the drafting of guides on agency contracts or distributorship contracts, and of standard rules of behaviour for the electronic exchange of commercial data.

ICC has been able to stimulate self-regulation in the business community, and in this respect special mention should be made of the marketing codes, the first of which appeared in 1937.

For its part, the work of the Commission on Arbitration has dealt with the rules on maritime arbitration in collaboration with the International Maritime Committee, the rules of ICC as the nominating authority within the UNCITRAL Arbitration Rules, or the prearbitral referee procedure rules. Generally speaking, the Commission concerns itself with major problems in the law governing arbitration, such as multiparty arbitration.

ICC activities thus supplement the initiatives developed by the State aimed at establishing rules accepted by the international community. Furthermore, the jurisprudence of the State and arbitral courts has recognized the practices codified by ICC to be one of the sources of practical law governing international commercial relations.

With regard to arbitration, the basic achievement of ICC is to have provided international business with improved rules for conciliation and arbitration, pragmatically amended and adapted since 1923 to the changing needs of international society, thereby introducing this method of resolving disputes as the procedure of general law in international relations.

In themselves the ICC rules on arbitration contain a certain number of principles which maintain the efficiency of the arbitration procedures and strengthen the validity of the rulings, more particularly through the control exercised by the International Court of Arbitration. Thanks to these rules, which represent true legal and ethical principles, ICC has helped to establish a model for settling world trade disputes which fulfils a genuine mission of public service for the benefit of the international community.

One of the effects of these rules is not only to prevent disputes in international business, but often to avoid potential difficulties, in the intermediary sense, between the Governments which are involved

directly or indirectly in a large number of disputes, and are aware of the effect of the latter on the economic community and on public opinion. It therefore offers security in a field where poor management and uncertainty endanger State interests.

It was with the cooperation of ICC that the first international instruments on arbitration were negotiated at Geneva in 1923 and 1927. These agreements have been largely replaced by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, the initiative for which goes back to ICC. The draft that ICC put before the Economic and Social Council in 1953 moved in the direction of full autonomy for the arbitral rules. The ICC ideal of truly international arbitration freed from the constraints of State control also inspired to a large extent the Geneva European Convention on International Commercial Arbitration of 1961, drawn up under the auspices of the United Nations Economic Commission for Europe. Furthermore, the text mentions ICC in the modalities for its implementation. More recently, ICC has taken part in the work of UNCITRAL on the Model Law on International Commercial Arbitration that has made a considerable contribution to the dissemination of arbitration in the world.

Hence, ICC can usefully contribute to the effort deployed by the United Nations during the Decade of International Law, which it welcomes, and for which it has already submitted to the Secretary-General of the United Nations a report on its role in the creation of a universal economic and legal system.

For this purpose it is ready to study improvements which could be made to the conciliation and arbitration procedures and, in a more general manner, to consider practical ways of collaborating in order to induce States and public bodies to resort to international arbitration and contribute more and more to the development of arbitration as an institution of peace.

5. Open floor

JEAN-PAUL BERAUDO
President, Court of Appeal, Grenoble, France

I would like to say a few words about a problem which can arise because of the specialization of international organizations and the necessary coexistence between various methods of harmonizing international law. Apart from ancient Egypt and ancient Rome, which were fully aware of the methods of conflict of laws and of uniform substantive law where it all coincided and coexisted, in Europe, starting with the Middle Ages, it was the method of conflict of laws which prevailed, apart from the usages in commercial trade fairs.

It is for that historic reason that the Hague Conference was chronologically the first to come into being in 1893, and the coming into being of uniform law required an international society which was capable of making more and more concessions; it is therefore quite understandable that the International Institute for the Unification of Private Law, UNIDROIT, appeared 30 years later. The purpose of the Hague Conference was to standardize international private law, essentially the rules of conflict of law; UNIDROIT was designed to create a uniform substantive law. UNCITRAL, according to the methodology attributed to it, received from the General Assembly the mission of doing away with and reducing the obstacles to international trade.

But the reality of a unifying international law as we have experienced it, and as I have been able to witness it since 1977, as I have been closely following all the negotiations which have been taking

place in the three organizations I refer to, is much more complex. According to practice, the Hague Conference resorts to the method of uniform law. Many conventions of cooperation or judicial authority are uniform laws, such as the 1985 Convention on the Law Applicable to Trusts and on their Recognition, in which is summed up in two parts of the same international instrument both the method of conflict of laws and the method of uniform substantive law. In UNIDROIT, when States are not prepared to harmonize their substantive law, then they also resort to the method of conflict of laws and sometimes in a very innovative way, for example, article 7 of the 1988 Convention on Credits, which stipulates very precise conflict-of-law rules regarding the credibility of the credit raiser. The Secretary-General of the Hague Conference himself noted with some regret the plurality of methods and rules used: the rules of conflict of law are in existence and also the rules of uniform law. In the most recent Convention of the United Nations of 1991 on the Liability of Operators of Transport Terminals, we note also that we have here likewise elements relating to the conflict of laws which are very precise, for example, with respect to the right of retention of the operator of a transport terminal.

What can we conclude, therefore, from the situation where the practice or the necessity means that we have the coexistence of different methods? As we have indicated, the main thing here is cooperation, but cooperation which goes well beyond purely normal cooperation, beyond sharing information regarding work undertaken and its results. The cooperation must be broadened, it must become complete, it must perhaps also involve participation in the work of members of other organizations and specialized agencies, either in the conflict-of-law method or in the method of substantive law, but perhaps even this may involve the creation of groups of experts who can really scrutinize certain provisions to be found in a draft being elaborated in a particular organization which does not have the same specialized area.

MANUEL OLIVENCIA
University of Seville, Spain

Allow me first of all, speaking on behalf of the Spanish delegation to UNCITRAL, to express our pleasure and to tell you how moving it is for us to be here at this Congress, where an inventory is taken of the past and the paths for the future are being prepared. Allow me to recall here and pay a tribute to the memory of one who contributed to the success of the work of UNCITRAL from the very first moment, Professor Joaquín Garriguez. I would like to remember him together with all those who today are not with us, but who made a contribution to the creation, implementation and original success of this body.

Spain has been present in the Commission from the very first moment and constantly participated in its work. We are happy about the contribution of our country to the work of UNCITRAL, but allow me also, since we are here at this Congress to speak not only as the delegation of Spain, to speak personally on the basis of my own experience. I have followed the work of UNCITRAL since the fourth session - that is a long time - and I think I have made a very modest contribution, but I have acquired very rich experience during this time too.

Our goal, the harmonization and unification of law, is ambitious, and clearly it is a difficult task which requires a great deal of patience and caution. I think the enemies of our work would have been haste and recklessness. I think that the history of UNCITRAL is the history of patience and caution and successes. We have been through many long phases. We have overcome, this Commission - and I think the Commission should be satisfied with this - has overcome many obstacles, many confrontations, and we need to say this today. At worst times we have overcome political confrontation. We have transcended tension with a spirit of jurisprudence, with the prudence of law. I think we have helped to improve dialogue, the difficult East-West and North-South dialogue. We

have tried to highlight, as the Secretary-General said today, the importance of law in the dialogue between development and paths to development. I think that we have also sought to overcome cautiously and patiently the differences between various legal systems, the civil law systems and the common law systems: surely for us jurists the most delicate and most difficult confrontation. And I think that we have helped to bring about an exercise of thinking about what State sovereignty represents in a world of law.

Beginning with a somewhat dangerous concept of sovereignty which conceived law to be emanating from power, this antiquated concept of sovereignty increased the differences between States, at least in the legislative production of law. I think that we have contributed, that the Commission can be satisfied at having contributed, to a new concept of sovereignty which has moved away from the two original sins, this concept of the old sovereignty, and at the other extreme, imperialism of legality, of legalism - to be extended to include other countries. I think today the exercise of sovereignty consists in having pacts concluded between States. There has been the cession of power from States to supranational organizations, as has been our experience with community legislation in Europe, and I think that in the Commission work has been done to this end. Today, we here feel that we benefit from the winds of history, we feel that this is all playing in our favour, the world is becoming smaller. The world requires a single market and consequently single regulation of this market. Things are playing in our favour and I think that we, for our part, need to continue to keep pace with the evolution of law. Ultimately, my experience is to persist in following the path of caution and patience, but also to persist in steadfastness and constancy into the twenty-first century.

C. Various techniques of unification

1. Legislative means of unification

PROFESSOR SERGEJ LEBEDEV
Moscow

In the statement made by the Secretary-General and in other statements, there is an indication of the exceptionally important role played by unification and harmonization in international trade which is, in the final analysis, one of the areas of commercial relations which arise between partners in various countries. This series of problems is the focus of a great deal of attention, and many studies are devoted to it by prominent jurists. In the broad sense, unification is talked about even in discussing the preparation of general conditions for model forms of contract, definitions, codes of conduct etc. However, given all the importance of harmonization, one would think that unification of law can only be considered when discussing the achievement of uniform regulations in accordance with the legal systems of various countries participating in the unification process or endeavour.

Unification in this narrow sense of the word began as something that was well known at the end of the last century, in the 1880s and 1890s, when a number of international conventions were adopted aimed at achieving unified legal rules in various areas. In Europe, there was the organization of the Hague Conference on Private International Law in the 1890s, and in Latin America the first congress of 1885 at Montevideo. There was also the Paris Convention on Intellectual Property and other conventions which, in the final analysis, were the predecessors, the forerunners, of that process which is now taking place today.

The preparatory work in the area of unification and harmonization at the present time is basically carried on within and under the auspices of the international organizations. Various organizations, to

one degree or another, are engaged in the unification process. The results of the activities are not the same, they are different in nature, but each of these efforts, each unification action, is useful in and of itself for international trade as a whole. The establishment of UNCITRAL serves as a graphic demonstration of the possibilities of broad, universal, international cooperation on unification of legal regulations in this field. The experience of UNCITRAL has shown that various levels of economic development, differences in social and economic approaches, and other things do not constitute an impediment to the attainment of positive results in progressive unification. The changes which are now taking place, including those in the countries of Eastern Europe and the Russian Federation, aimed at strengthening and introducing market economies, should help to make more active the unification work. For many countries, this is a circumstance which no doubt will help to further the development of unification in this field.

Given all the nuances, international unification of law takes place through the utilization, or with the assistance, of two basic models. First of all, there is the conclusion of provisions which are directly in the text of international conventions or instruments. Secondly, there is the inclusion of uniform regulations, or provisions in a convention which Governments bind themselves to apply within their territory. It is a well-known fact that a number of conventions were adopted according to the second approach, including the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930, and the Bustamante Code on Private International Law, the latter of which was an addendum to the Havana Convention on Private International Law of 1928. This path has certain advantages, although generally speaking, another method prevails at the present time. That is the conclusion of the so-called integral conventions where the unified rules come into the very make-up, or composition, of the convention. The utilization of either of these paths is connected with certain particular features. Specifically, in case of the adoption of a uniform law which is annexed to the convention, there is an assumption that, together with ratification and adoption of the convention, the State should adopt a second instrument, that is, the text of the uniform law. And that text of the uniform law, strictly speaking, continues to exist and will be adopted independently of the convention because the cessation or termination of the convention does not automatically entail the cessation or termination of the uniform law as an independent national normative law if there is no specific indication of this.

However, regardless of whether the integral convention or the uniform law as an annex to the convention is adopted, both cases involve unification engaged in by each State as an international treaty obligation, the implementation of which has been assumed by a State participating in such unification. This also occurs when an international treaty is adopted, not by a diplomatic conference, but by a body like UNCITRAL, which for example adopted the United Nations Convention on International Bills of Exchange and International Promissory Notes, which was then opened for signature by a resolution of the General Assembly.

Such a course is attractive for many reasons. It simplifies to a significant degree the adoption of the text prepared by UNCITRAL, and does not involve the expenditure that would arise if it was prepared by an international conference. And there are other advantages as well. But it seems that the utilization of this path in practice is not really advisable as a constant method. It can be utilized in instances when, for example, total agreement has been reached on the text prepared within UNCITRAL, and when one has reason to expect that no further complications will arise in connection with the adoption of the document. If there is no such certainty, then that method can involve certain complications.

One other method of unification of law is the adoption of a model law. I spoke of uniform laws, but it is very clear that uniform laws and model laws are different things, different concepts, different categories. Various organizations have had discussions on the advisability of utilizing this second

method, of preparing a model law. On the one hand, the adoption of a model law has an advantage: there is no need for a diplomatic conference again, which entails certain problems as mentioned earlier; and the method of preparing a model law is used by a number of countries, in particular in the unification of internal domestic law. On the other hand, the adoption of a model law may entail certain difficulties as well, connected with the fact that the State adopts such a model law and may make certain changes in it, and there then exists a danger that the desired degree of unification will not be achieved. All internationally prepared texts constitute and contain in themselves elements of compromise, concessions and agreements made between those who participated in drafting the texts, which might not be implemented by States, and therefore the goal of unification might not be achieved.

Experience in a number of international organizations shows that such practice is applied. The path was followed by UNCITRAL when it drew up a Model Law on International Commercial Arbitration, which has been adopted by a number of countries. There are certain differences in the national instruments which were adopted in national legislation in individual countries, but nevertheless it seems that the utilization of this method within UNCITRAL has its advantages as well. There are certain guarantees with regard to the text; although the State which adopts it may make certain changes in it, such changes would not be significant. There are many reasons for thinking this, and a number of factors might be taken into account in this connection. In particular, it is important that all texts, including future texts, (another model law, on international credit transfers, will be adopted at the current session), are then adopted by the General Assembly, following their submission for consideration by all Members of the United Nations. When the General Assembly adopts the text, there is reason to expect that, if it is then adopted under national law, it will be adopted in the form in which it was prepared by UNCITRAL. An important guarantee for this is the fact also that the texts which are prepared by UNCITRAL are texts which are devoted only to international commercial relations. Hence, there is a possibility for the texts to be adopted without any conflict over the norms existing in particular countries. This specialized nature is a guarantee that the uniform law adopted by UNCITRAL will be adopted universally, without substantial changes.

The norms established in international treaties are norms of international public law. At the same time the norms are then transformed into domestic norms within each State by legislation or by some other method in accordance with the established procedures in each State. As a result, these norms become norms of domestic legislation, which is inevitable because the norms are regulated by relations between legal and physical juridical persons which are subjects of the domestic law in each State and not subjects of international law. The norms, however, within the context of domestic legislation, have certain specific characteristics. They are not only of a special nature in terms of their sphere of application relating to international relations, but they are autonomous norms within domestic legislation whose interpretation and application is bound by general principles within that legal system. This problem is involved in making uniform the interpretation of the norms; it is an important problem which has been the focus of a great deal of attention within UNCITRAL, beginning with the 1974 Convention on the Limitation Period in the International Sale of Goods, and involving all other conventions which contain a paragraph designed to ensure uniform interpretation in their application.

The information system currently organized in the Commission involves the assistance of national correspondents who must collect the decisions of judicial and arbitral bodies in their own countries, thus making it possible to define or identify the differences which might arise, in the hope that they could be avoided in practice when the various documents prepared in the Commission are applied. Generally speaking, however, authoritative studies which have been carried out in the field of unification have shown that substantial differences in the application of unified texts in different countries have not arisen. The divergences encountered do not compromise or discredit the idea of

unification, although there is no jurisdictional body which would ensure uniformity in the application of such norms.

The experience acquired by UNCITRAL in the 25 years of its activities is based on the high level of participation in the Commission, the outstanding work of the Secretariat which prepared the material and documents, the close attention paid by many Governments to the activities of UNCITRAL and the knowledge they have of the many tasks carried out by the Commission in the interest of promoting international trade. UNCITRAL has done a great deal of work. In terms of the unification of international trade law, and compared with other organizations acting in this field, UNCITRAL in this period has dealt with the greatest number of problems. Although 25 years is not a very long time, the Commission has been able to accomplish a great deal. The adoption and implementation of conventions prepared by it is an ongoing process. It is perhaps not a quick process, but it is quicker than the process of adopting conventions prepared by other organizations.

In the Commission, in the forthcoming period, many new problems are coming up. I hope the Congress will be able to indicate the range of these problems. Without going into details at the present time, I should like to make the following points: many documents which have been adopted by UNCITRAL prepare the groundwork, not only for work by the Commission itself, but for work by other organizations and formulating agencies as well. One example of this is the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, which can be said to be a satellite of the United Nations Sales Convention of 1980. We hope that the most of the other questions, including the reservation of title until complete payment and barter transactions, will be taken up in the future. The United Nations Convention on the Carriage of Goods by Sea, the Hamburg Rules, and the Convention on the Liability of Operators of Transport Terminals all constitute a good basis for action by many States.

Many other problems also require attention, including that of investments and investment guarantees, and quite a number of other problems. In other words, UNCITRAL has a wide sphere of activity and a substantial contribution to make to the United Nations Decade of International Law, as proclaimed for the 1990s.

2. Non-legislative means of harmonization

PROFESSOR MICHAEL JOACHIM BONELL
University of Rome I "La Sapienza", Legal Consultant, UNIDROIT

The unification of law was long conceived to be the prerogative of State legislators. Nor could it be otherwise. When the unification process was first launched in Europe some 100 years ago, legal positivism and the identification of law with State-made law were the dominant credo. As a consequence also, any unification of law could only come about in the form of uniform legislation agreed upon by the States at the international level, which they undertook to introduce into their internal legal systems.

There are a number of reasons for this picture to have changed in recent times. A broader concept of law together with a diminished confidence in the omnipotence of State legislators, on the one hand, as well as a greater complexity of international relations and an increased consciousness of business communities, on the other, are among the factors which led to the recognition that the unification of law might well be achieved also by non-legislative means or techniques. This is the case, first of all, of the activity of both courts and arbitral tribunals when called upon to apply

international uniform legislation; secondly, of the contribution of legal writing in both the preparation and proper interpretation of new uniform law instruments and in the rationalization of existing law; and thirdly, of the standardization of contract practices by the business circles themselves.

The following remarks are intended to examine in more detail the importance of these three additional means or techniques of unification, namely of what may be called the judicial unification (a), unification by legal doctrine (b), and the unification by contract practice (c).

"Judicial" unification

In the context of the unification process the attention of both academics and practitioners has long focused almost exclusively on the drafting of legislative texts. Yet, there is no doubt that, with the approval by the contracting States of the single conventions or uniform laws, only a first, albeit important, phase in the unification process comes to completion. For it to be fully achieved it is further necessary for the uniform legislation, once it has been introduced into the various national legal systems, to be interpreted and applied in a uniform manner by judges and arbitrators.

The role of the Court of Justice of the European Communities in the development of European Community law

The most radical means of ensuring this result would be that of granting an international court the power to make preliminary rulings on questions of interpretation of the single uniform law instruments, while at the same time requiring national judges to suspend their decisions until this international court has passed its judgment and then to abide by this judgment.

In the framework of the European Communities it is the European Court of Justice which has been given the competence to render, at the request, which may in some cases be compulsory, of national courts, binding decisions on interpretation questions relating to Community law in the narrow sense,[4] as well as to international conventions adopted by the member States, such as the 1968 European Economic Community (EEC) Convention on Jurisdiction and Judgments[5] and the 1980 Rome Convention on the Law applicable to Contractual Obligations.[6]

The importance of this system for the ultimate fate of community law is hard to overestimate. This is primarily because, although the rulings rendered by the European Court are formally binding only on the referring court, in practice the effects of the interpretation given in a particular case necessarily go beyond the case referred since any other national court, faced with the same problem of interpretation, must either follow the ruling of the European Court, or again refer the question to it.[7] Nor do national rules on precedent have any effect on this result: in other words, even in systems with the doctrine of binding precedent, a lower court cannot be bound by any decision of a higher court, unless such a higher court has itself already obtained a ruling from the European Court of Justice on this particular point.[8]

Yet the system is even more remarkable if one considers the way in which the European Court of Justice has so far exercised its prerogatives. Taking only the extensive case law which has developed in relation to the 1968 EEC Convention on Jurisdiction and Judgments, already the method followed by the Court in its interpretation of the Convention, i.e. the fact that it does not stick to the literal and grammatical meaning of the text but instead looks, whenever appropriate, at the underlying purposes of the individual provisions, as well as of the Convention as a whole, represents a novelty, at least for the common law systems, where its influence has in the meantime begun to be seen even in the approach adopted by the national courts.[9]

Still more significant is the role which the Court plays in clarifying and supplementing the actual content of the Convention. In the judgments it has so far rendered,[10] the Court has developed a number of important principles to be followed in the interpretation of the Convention, such as that of limiting as much as possible the possibility of multiple jurisdiction by admitting any special jurisdiction in addition to the general jurisdiction of the domicile of the defendant only when it is based on solid reasons,[11] or that of the protection of the defendant.[12] Moreover, when faced with terms used in the Convention, but not defined therein, it has, whenever possible, endeavoured to interpret them autonomously, i.e. in the light of the objectives of the Convention itself and/or of a comparative analysis of the legal systems of all Contracting States, and not by referring to the meaning traditionally attached to them within a particular domestic law. Suffice it to mention, for instance, the interpretation given to the concepts of civil and commercial matters (article 1), bankruptcy (article 1), contract (article 5(1)), place where the harmful event occurred (article 5(3)), branch, agency or other establishment (article 5(3)), sale of goods on instalment credit terms (article 13), rights *in rem* in, or tenancies of, immovable property (article 16(1)), proceedings involving the same cause of action (article 21), document which instituted the proceedings (article 27(2)), and ordinary appeal (articles 30 and 38).[13]

The role of national courts and arbitrators in the interpretation of international conventions

In the absence of a supranational judicial tribunal capable of ensuring uniformity in the interpretation of uniform law instruments, it will be essentially up to national judges and arbitrators to ensure their uniform application to the greatest extent possible.[14]

The most effective way to reach this objective is to have regard to the way in which the single convention or uniform law is interpreted in the other countries. In other words, a judge or arbitrator who is seized of a question of interpretation concerning a specific uniform law text should always take into consideration the solutions elaborated in other contracting States. If there is already a body of international case law, it may well be accepted as a kind of binding precedent. Alternatively, the reasoning behind the different decisions ought to be given at least a certain persuasive value, in the sense that the preference accorded to one argument rather than to another, as well as the decision to adopt a new solution, ought to be adequately justified.

In practice this approach encounters difficulties mainly because of the insufficient dissemination of the decisions regarding the various conventions and uniform laws. Only a few international bodies, such as the International Labour Office or the World Intellectual Property Organization, to some extent provide for the collection of decisions rendered in contracting States in relation to the uniform instruments elaborated under their auspices. In turn, UNIDROIT and the Asser Institute of the Hague periodically publish a selection of case law from the various countries on the most important conventions of uniform substantive law and uniform private international law, respectively. Without denying the value of these or other similar initiatives; it is only too evident that as a whole the situation is far from satisfactory, in the sense that there is practically no complete, and sufficiently easily accessible, source of information available to judges or arbitrators who want to know how a specific provision of uniform law has been interpreted in the other contracting States.

The UNCITRAL initiative for the collection and dissemination of international case law

Under these circumstances, it comes as no surprise that international conventions and uniform laws are prevailingly interpreted in a purely domestic context, with the result that the decisions on the one and same issue vary considerably from country to country.[15] National judges who, faced with a question of interpretation of a specific uniform law instrument, try to take foreign precedents into

account, in a more or less systematic and complete manner, and to adhere to them whenever appropriate, unfortunately still remain the exception.[16]

There are, however, good reasons to believe that the situation is destined to improve. In the first place, this is because nowadays the uniform law instruments themselves more and more often expressly require that - to use the words of Article 7 of the United Nations Sales Convention - "in their interpretation [. . .] regard is to be had to [their] international character and to the need to promote uniformity in [their] application [. . .]".

Secondly, UNCITRAL, following a suggestion put forward by the delegation of Italy,[17] is creating a network of "national correspondents" to which to entrust the collection of the decisions rendered in their countries in application of the different conventions and model laws elaborated under its auspices and their presentation, in the form of an abstract, in one of the six official languages of the United Nations. The expectation is that in this way a satisfactory system for a possibly complete collection and worldwide dissemination of all the most important national decisions rendered will have been created, which permits all concerned to have easy access to information on the extent to which there is agreement or disagreement in interpretation.

Unification by legal doctrine

The role of legal doctrine in the unification process in general: from the preparatory studies for international conventions to the commentaries on them

An important contribution to the unification process is made also by legal writing or legal doctrine. Thus, already in the selection of the subjects to be proposed for possible international unification, and naturally later on, in the course of the actual elaboration of the uniform rules, it is not possible to do without comparative law studies intended to highlight the divergencies existing between the different national laws concerned, as well as to indicate the solutions which might be generally acceptable.

For instance, the international unification of sales law first through the two 1964 Hague Conventions relating to uniform laws and then through the 1980 United Nations Sales Convention could not have been achieved without the thorough preparatory studies carried out under the auspices of UNIDROIT mainly by E. Rabel and his collaborators of the *Max-Planck-Institut für ausländisches und internationales Privatrecht*.[18]

On other occasions it was precisely due to less accurate preparatory work that unification projects led to deadlock. Thus, for example, when in 1935 UNIDROIT first launched the idea of unifying at international level the law on agency, the group of experts charged with the preparatory studies decided to prepare two different instruments, one dealing with agency *(représentation)* in general, understood as the abstract authority granted by one person to another to perform legal acts with third parties on the principal's name and on its behalf, and the other to regulate a particular type of agency, i.e. the commission-agency relationship (*contrat du commission*), characterized by the fact that one person, the commission agent, undertakes *vis-à-vis* the principal to purchase or sell goods from or to a third party in its own name but on the principal's behalf. In this way the group, which was also composed of distinguished English lawyers, clearly followed, whether deliberately or not, the traditional civil law approach, with the result that, when the two drafts were finally submitted to the examination of a committee of governmental representatives, they turned out to be absolutely unacceptable to the common law countries. It was only years later, when the Institute, confronted with the risk of a definitive deadlock, asked for the advice of other experts, that a compromise solution was found which ultimately permitted the successful completion of the project with the adoption of the

1983 Geneva Convention on Agency in the International Sale of Goods.[19] Equally evident is the importance of legal writing in the interpretation of uniform law once it has been adopted by the States concerned. Normally there will be an interaction between case law and comments by legal writing in the endeavour constantly to improve the understanding of the legislative texts. At times, however, the importance of scholarly opinion is even greater; this is true where, as is the case, for example, with the above-mentioned EEC Convention of 1968 and Rome Convention of 1980, the texts are accompanied by semi-official reports drawn up by the rapporteurs of the convention drafting groups and intended to provide a quasi-obligatory source of reference for courts of different contracting States for the interpretation of the uniform laws concerned.[20]

The idea of an international restatement of contract law: the UNIDROIT draft Principles for International Commercial Contracts

Yet, legal doctrine may even become the protagonist of specific unification projects. The idea of reviving the ancient *ius commune* which for centuries had constituted a unitary legal basis in medieval Europe, notwithstanding its division into a myriad of distinct political entities each of which had its own particular statutes, is as old as the movement for unification itself. Yet, while for long it was considered to be little more than utopian, its realization has recently been advocated as being a real necessity in the present, in many ways far from satisfactory, situation of uniform law. In fact, following the proliferation of conventions and uniform laws which are extremely limited in scope and fragmentary in character, the need is increasingly felt for a system of general principles and concepts to which to have recourse for the interpretation and supplementing of the single uniform law instruments. What better model is there than the old *ius commune* with its principles and rules, which the legal science of continental Europe developed between the twelfth and the eighteenth centuries on the basis of the Justinian *Corpus Iuris*, and which had ensured a common understanding over and beyond the various local laws?[21]

A first attempt in this direction may be seen in the American Restatements of Law prepared and periodically brought up to date by the academic élite of the United States under the auspices of the American Law Institute. As is well known, officially the objective of these initiatives is only that of restating in a systematic way the law on subject-matters such as contracts, torts, agency etc., which traditionally fall within the competence of the common law of the single states. However, by presenting the results in the form of "black-letter rules", the authors of the single Restatements often end up choosing one of the different solutions followed by the courts of the various states, thus contributing to the future development of a more and more uniform law throughout the country.[22]

Two other similar projects launched at an international level are of even greater interest in the present context. The first of these is limited to the countries of the European Communities, and is intended to elaborate a kind of "restatement" of European contract law, i.e. a compilation of principles and rules in the field of contract law which are common to all the member States and/or may be considered to express the most advanced solutions. For this purpose, in 1980 a special commission was set up under the chairmanship of Ole Lando of Denmark and mainly composed of academics. So far, work has concentrated on the areas of performance and non-performance of contracts, and a text of some 50 articles together with comments and notes with references to the law of the single member States will soon be published. Once completed, the "Principles of European Contract Law" should first and foremost assist EEC institutions, in particular the European Court of Justice, as well as national judges, in the elaboration and interpretation of Community law. But also private parties, especially when contracting across frontiers, may make use of them by referring to them as the proper law of their contract, within the limits of the conflict of laws rules of the forum.[23]

Even more ambitious is the project of UNIDROIT for the preparation of "Principles for International Commercial Contracts". It is, in fact, an attempt to codify general principles of contract law at a universal level, that is to say, it is intended to reflect all the major legal systems of the world and to be used in both East-West and North-South relations.[24]

After the preliminary studies carried out by a restricted steering committee chaired by Professor René David, in 1980 a special working group was set up with the task of preparing the various draft chapters of the Principles. The members of the Group, which in time came to include representatives of all the major legal and socio-economic systems of the world,[25] are leading experts in the field of comparative law and international trade law. Most of these experts are academics, some are high ranking judges or civil servants, but they all sit in a personal capacity and do not express the views of their Governments. The Group is currently engaged in the final reading of the more than one hundred articles of the draft, divided into six chapters, the first of which contains general provisions, the others concerning, respectively, the formation, interpretation, substantive validity, performance and non-performance of contracts. It is estimated that the final text of the Principles, together with the commentary, will be submitted to the Governing Council of UNIDROIT for final approval within the next two years.

The universal vocation of the UNIDROIT Principles explains why it from the very beginning was felt to be necessary to limit their scope to international commercial contracts, thereby excluding purely domestic contracts or contracts concluded with consumers. After all, it is precisely in the context of international relations that the greatest need for such an instrument is felt. Thus, with the assistance of the Principles, judges or arbitrators called upon to decide questions of interpretation or to supplement international legislative texts will find it easier to avoid having recourse to criteria and rules peculiar to this or that other domestic law and to adopt an autonomous and internationally uniform solution. Furthermore, the parties, when deciding which law should govern their contract, will no longer be faced with the necessity of either choosing a particular national law, which inevitably would be unknown or less familiar to at least one of them, or referring to not better defined "international trade usages and customs" or to the enigmatic *lex mercatoria*, the precise content of which may well vary depending on the particular cultural background of the arbitrators. By adopting the Principles, the parties will have available a set of rules which in view of the way in which it was elaborated offers every guarantee of impartiality, and at the same time is sufficiently detailed and precise to permit the adoption of predictable solutions.

Unification by contract practice

The third, and last, form of unification to be considered is that which is achieved at a contractual level, by means of standard forms of contract or other terms widely used internationally.[26]

It is well-known that already from the middle of the last century, business people, faced with the inadequateness of the traditional domestic laws to meet the new technical and economic needs of international trade, began to develop their own rules to regulate their business relations in a more satisfactory manner. Initially these rules, which took the form of standard terms, general conditions and model contracts, were predominantly produced by individual firms or by national trade associations operating in the most important European and North American commercial and financial centres. Consequently, in most cases their content was one-sided and inevitably influenced by the principles and legal concepts of their respective countries of origin. In addition, since practically all the standard forms elaborated by the trade associations contained an arbitration agreement granting exclusive competence for the settlement of any dispute which should arise between the parties to their own arbitral tribunals, it was inevitable that there developed a veritable "battle of forms" in the business community, which was due not only to the differences in content of the various national

forms, but also to the desire of each party to be able to rely, in case of controversy, on an arbitration being held in its own country.[27]

It was to overcome this situation, which clearly did not favour orderly trade relations, that some independent international or supranational organizations took the initiative to elaborate contractual instruments intended to be more balanced in content and truly international or transnational in form, i.e. drafted in such a way as to be capable of being understood in a substantially uniform manner by whoever would adopt them.

The International Law Association began with the adoption of the York-Antwerp Rules on general average in 1890 and of the Warsaw-Oxford Rules on cif sales in 1932, but other organizations were soon to follow suit: first of all, the International Chamber of Commerce with the Uniform Rules and Customs relating to Documentary Credits, published for the first time in 1933, the latest version of which dates from 1983 and has been adopted by the banking associations of more than 150 countries, and with the Incoterms, containing rules for the interpretation of the most commonly used trade terms, the first version of which goes back to 1935, the latest having been adopted in 1990. There is currently an impressive number of model clauses and definitions, general conditions and standard forms elaborated at international or supranational level; promoters of these initiatives are no longer only private organizations such as the International Chamber of Commerce or the *Comité maritime international*, the International Federation of Consulting Engineers and the International Federation of Freight Forwarders Associations, but also the United Nations or its bodies and specialized agencies, such as UNCITRAL, the Economic Commission for Europe, the United Nations Conference on Trade and Development, the International Maritime Organization, the World Intellectual Property Organization and the United Nations Industrial Development Organization, as well as other intergovernmental organizations such as the Council of Europe and the Asian-African Legal Consultative Committee.

It is difficult to establish to what extent these recent truly international instruments have in practice succeeded in replacing the traditional *Verbandsrecht* or *droit corporatif*. The former would appear to be generally preferred in the sector of manufactured products, while the latter still hold their own in the commodities sector. Yet, even here contract practice may serve as a factor of unification: in fact, also among the contractual instruments of national origin there are those, such as the English forms in the commodities sector, in the maritime transport or the insurance sectors, which due to the influence and prestige of the trade or professional associations which elaborated them, are widely used also outside their restricted membership, thus in practice becoming internationally accepted instruments.

What still remains is the question of the relationship between all these rules and practices, or - as they are at times emphatically called - this new law merchant or modern *lex mercatoria,* and uniform legislation.

There are those, particularly in the business community itself, who maintain that as by means of these rules the interested business circles succeeded in providing themselves with an exhaustive and satisfactory regulation of the various trade transactions concerned, any pretention to interfere from the outside, through the imposition of uniform legislation, would be inopportune and in any case doomed to failure.[28] Yet, this opinion cannot be accepted.

To begin with, it moves from the faulty assumption that the supposed autonomous law of international trade is self-sufficient and entirely satisfactory. In fact it is neither. Most of the contractual instruments referred to regulate only some aspects or problems of the transaction concerned. Moreover, as has been shown, only relatively few of them represent the views and interests

of all the parties involved, while the majority were drafted unilaterally by single firms or by trade or professional associations with a dominant position in the respective sectors.

Under these circumstances, the conclusion that any regulatory intervention from the outside would be inopportune or at best useless falls flat. At most it can be disputed whether in an area already to a large extent covered by rules elaborated by the business circles concerned, it is suitable to have recourse to the traditional form of an international convention, or whether it is not preferable to elaborate instruments which are of the same kind as those already used in practice, but which, just because they come from a neutral source, are more balanced in content. In other words, instead of imposing authoritatively a binding regulation which, after all, by its very nature would lack the necessary flexibility and risk having gaps, it would appear to be preferable to insist on elaboration of model and truly international rules and contract terms on the assumption that, by virtue of the prestige of the organization which adopted them and of their more balanced content, they should sooner or later be able to replace in practice the existing unilateral instruments of national origin.

It is true that such contractual instruments presuppose the existence of a more general regulatory system to which to refer whenever they give rise to uncertainty as to their precise meaning or need to be supplemented. For this purpose, recourse may be had to compilations such as the "Principles for International Commercial Contracts", being prepared by UNIDROIT, or the "Principles of European Contract Law", prepared under the auspices of the EEC, even if they are applicable only *imperio rationis* and not *ratione imperii,* thus avoiding the resort to single national laws.

Conclusions

The unification of law has definitively ceased to be the prerogative of State legislators. In the contemporary world there are a number of other protagonists in the unification process. None of the different non-legislative means or techniques of unification here examined - judicial unification, unification by legal doctrine and unification by contract - are to be considered an absolute alternative to unification by legislation, they are complementary. Nor are they mutually exclusive; on the contrary, to a large extent they depend on and benefit from each other.

The founding fathers of UNCITRAL, the twenty-fifth anniversary of which we are here to celebrate, were wise enough to confer on the new organization a sufficiently broad mandate to cover unification by both legislative and non-legislative means.[29] So far the Commission has succeeded in finding a satisfactory balance between the preparation of international conventions and model laws, on the one hand, and of non-legislative texts, on the other. Suffice it to mention, for the former, the 1980 Convention on Contracts for the International Sale of Goods and the 1985 Model Law on International Commercial Arbitration, and, for the latter, the Legal Guide on Drawing up International Contracts for the Construction of Industrial Works and the Legal Guide on International Countertrade Transactions, all of which may be considered a success. The hope of all of us who believe in the necessity of a flexible and pluralistic approach to the international unification of law, is that this equilibrium will be maintained also in the future.

D. Application and interpretation of uniform legal texts

1. Principles of interpretation of a uniform law and functions of travaux préparatoires, *commentaries and case collections for interpretation of a uniform law*

ZHANG YUQING
Department of Treaties and Law, Ministry of Foreign Economic Relations and Trade, Beijing

The adoption of a uniform legal instrument on international trade implies that we have merely reached the halfway mark along the path leading to the unification of law in that field. Our objectives have not yet been fully achieved. It is only when a uniform law is widely and uniformly applied, and accurately and uniformly interpreted, that the intentions and objectives behind the unification of law are ultimately achieved, i.e. the promotion of the smooth development of international trade. My statement will focus on the principles of interpretation and the functions and roles played by *travaux préparatoires*, collections of cases and relevant commentaries in the interpretation of a uniform law. I will also make a few proposals as to how such efforts could be strengthened.

Different approaches to interpretation of domestic law

On the questions of how to interpret the law, as legal traditions vary from country to country, the principles adopted may also be different. Taken overall, there are two different approaches to interpretation of domestic law: one prevailing in legal systems of continental Europe and the United States, and the other prevailing in the United Kingdom legal system.

Subjective principle

Under this principle, the court, in interpreting the law, takes the literal meaning of the provisions as the first step. When the legal text poses problems of ambiguity or excessive vagueness or multiple meanings of the terminology, the court may turn to invoke the *travaux préparatoires* of the law, i.e. to look into the historical background to pursue the exact meaning of the legal rules in question. Such an approach can help judges or arbitrators find out the actual meaning of the legal rules, thereby realizing the purpose of legislation. This approach is known as the principle of subjective interpretation, an approach focusing on legislative intent of the legislative body and emphasizing the motives and objectives behind the legislation.

Objective principle

The second approach is solely to pursue the *ex facie* meaning of the legal text in question, i.e. strictly abiding by the meaning of the language of the statutory law itself and using as a basis the grammatical relations of words or word groupings to arrive at the meaning of the rule, thus excluding the need to retrace to the legislative intent outside the text. Such an approach is commonly known as the principle of objective interpretation.

This tradition came to change, however, since the mid-twentieth century, gradually moving towards permitting the court to invoke *travaux préparatoires* as an aid to the interpretation of legal texts or of a relevant international convention.

Rules of interpretation for a uniform law

A uniform law comes out as a result of the joint efforts of Governments, international organizations and legal experts and scholars. It is not an adapted version of the law of one country or another, nor is it derived from one particular legal system; it is but rather a piece of international legislation. Therefore, the question of how it is to be interpreted is not merely a theoretical issue but also a matter of practical importance having a bearing on whether the objectives and purposes of the uniform law can be attained. Should different States adopt different standards and guidelines in applying and interpreting a uniform law, it is possible that the objectives of the uniform law would be undermined.

Rules established by the Vienna Convention on the Law of Treaties

Article 31 of the 1969 Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in good faith 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. The rules established by that article are: the ordinary meaning of the term; its object and purpose; and observance of the principle of good faith.

Article 32 of that Convention further provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the *travaux préparatoires* of the treaty and the circumstances of its conclusion, 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 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Here it clearly establishes the principle permitting the use of *travaux préparatoires.*

The Vienna Convention has in fact adopted a principle which combines both objective and subjective criteria and, at the same time, clearly puts forward the principle of observing good faith in interpreting a treaty. The adoption of the Convention and its coming into effect has provided the court or the arbitration tribunal with a set of fundamental principles and means for interpretation of a uniform law, which is one of the important preconditions for the attainment of the objectives of a uniform law.

Rules established by the United Nations Convention on Contracts for the International Sale of Goods

UNCITRAL is a body specifically engaged in the unification and coordination of the trade and commercial laws of States. The uniform laws it has formulated and adopted in the past 25 years fall within the domain of private law, different from treaties in the area of international public law. The interpretation and application of the former is carried out separately by the courts and arbitration tribunals of States. In fact, there does not exist a centralized court or arbitration tribunal beyond the jurisdiction of States to interpret and apply those conventions and model laws. Therefore, how to interpret these uniform laws falling within the realm of private law represents a particularly important issue.

On the basis of decades of hard work on the part of Governments and the relevant international organizations, and bringing together the collective wisdom of commercial law experts of all countries, UNCITRAL has finally developed, in the United Nations Convention on Contracts for the International Sale of Goods, a set of important principles and methods for interpreting uniform laws in the private law domain.

International character

Paragraph 1 of Article 7 of the United Nations Sales Convention requires that, in interpreting the Convention, the courts and arbitration tribunals must have due regard to the international character of the Convention. That is to say, it should not be regarded as a piece of domestic legislation, even less should its articles or concepts be interpreted by reference to their corresponding meaning in the domestic legislation of any one country or legal system. The Convention is a product integrating the different legislations of various States. It is an independent international piece of legislation. Even if a certain article or concept in the Convention was developed by drawing on an idea or concept from a certain legal system, it does not imply that its meaning should be determined in accordance with that legal system.

Uniformity

The Convention requires that, in its application, attention be paid to the need to promote uniformity. Uniformity and international character are closely interrelated. Having due regard to the international character of the Convention, the courts of various countries may reach more or less the same decision on similar cases. Therefore, uniformity is the outcome of having due regard to the international character of the Convention. It is possible, however, that on a similar case, a court in one country may not reach a decision identical to one made by a court of another country, even though due regard has been given to the international character of the Convention. The question arises, therefore, as to how a court of one State should give due regard to the court decisions of another State. In order to achieve uniformity and to avoid a substantial divergence in judgements on similar cases with the same situations, courts of different countries should respect each others' interpretations and judgements. As long as the other side has been accurate in applying and interpreting the uniform law, the judgement of the courts of the other side should be considered as having a binding effect, or at least a persuasive effect. This respect and reference to applications and interpretations of foreign courts will lead to enhancement of persuasive effects of the domestic court decisions in foreign courts as well. In this way uniformity will be finally realized in the application of a uniform law.

Principle of good faith

The principle of good faith has had a long history in domestic legislation, whether regarding business contract negotiations or the establishment and fulfilment of such contracts. A broader significance is achieved, now that for the first time this principle of domestic law has been introduced to a uniform law drafted by UNCITRAL. Firstly, the inclusion of the principle of good faith in article 7 is a clear indication that an additional principle is available for national courts and arbitration tribunals in interpreting the United Nations Sales Convention.

Secondly, judged by its context, the principle of good faith now constitutes a "general principle" of the Convention. On the one hand, parties to an international sales contract should act in accordance with this principle, and, on the other hand, this principle serves also as a standard by which any party could give account of its acts. However, what constitutes the principle of good faith in international trade? What should be its content and implications? The Convention contains no provisions with respect to this issue, which still awaits further study on the part of jurists of various countries and depends on the practice of national courts and arbitration tribunals. In determining the concept and norms contained in the principle of good faith in international trade, attention should be paid to their uniformity and international character.

General principles

Though the United Nations Sales Convention contains as many as 101 articles (or 88 articles excluding final provisions), its provisions could neither cover all aspects and issues which could arise in establishing a contract for international sale of goods, nor deal with every problem concerning the rights and obligations of all parties. The drafters of the Convention could not anticipate all the problems possibly arising in transactions of all kinds of goods and lay down provisions accordingly. Like domestic legislation, that Convention also left some gaps. To encourage national courts and arbitration tribunals to settle disputes in accordance with the provisions of the Convention rather than readily resorting to domestic law, article 7 further stipulates that questions concerning matters governed by the Convention, but which are not expressly settled in it, are to be settled in conformity with the general principles on which the Convention is based.

The discovery and establishment of general principles as such should be based on the interpretation of the specific article or articles and on the inference from their application, and by no means on groundless speculation. It is an encouraging fact that international scholars who are enthusiastic in the cause of unification of commercial laws have put forward quite a number of such "general principles" in their academic works or articles, providing useful reference for courts and arbitration tribunals in their application of the United Nations Sales Convention.

The above-mentioned principles and methods regarding the interpretation of the United Nations Sales Convention are of great importance since they constitute the basic principles underlying the interpretation of uniform legal instruments in the field of international private law.

Aids in interpretation of uniform laws

Practice has proven that, in spite of the text of a uniform law and the basic principles guiding our interpretation and application of the uniform law, under many circumstances we are still unable to fathom the real meaning of the provisions in question. It is most true of the uniform law. Therefore, courts and arbitration tribunals still need some help from *travaux préparatoires*, from the commentaries on individual articles and also from the interpretations of, and decisions on, similar issues by courts and arbitration tribunals of other nations. This is an important means of understanding the meaning of the articles of the uniform law, and of achieving uniform application and interpretation of it in order to secure uniform results.

Travaux préparatoires *and commentaries*

As is mentioned above, the text or provisions or concepts of a uniform law must not be interpreted in accordance with their possible meaning in a domestic law or in a particular legal system. Even though some terms or language of a concept may be the same as used in a certain domestic law, it should not be taken for granted that they are to be understood and interpreted in the same way as in the domestic law.

It can be noted that, in UNCITRAL's practice of legislation over the past 25 years or more through the drafting of uniform laws, the authors have made every effort to use concepts and terms that are neutral and do not come from any legal system. Their intention is to prevent judges and lawyers from using domestic law as aids to interpretation, thus affecting the uniform application and interpretation of the convention. The uniform laws drafted by UNCITRAL have to be rendered in six official language versions, and it often happens that for the same concept the six language versions vary in their use of terms that do not have the same meaning. Sometimes, for a given term, there does not exist in another language a corresponding term that has the same meaning. Moreover, a uniform

law is meant to be applied in all countries of the world, but due to differences in political, economic and legal systems all over the world, the text of some articles could only come out as a compromise or something abstract. It will be unrealistic to attempt to subsume multifarious complex situations and have them all covered by a single uniform law.

The situations described above are a clear indication that, in applying and interpreting the uniform law, it is not enough just to understand the surface meaning of the text in a particular language version, or derive an understanding of the meaning of individual articles simply from their syntax. One must also rely on the *travaux préparatoires* in the entire process of drafting the uniform law, the commentaries prepared by the Secretariat of UNCITRAL and the publications of scholars in the field concerned. Such documents, materials and publications can serve as aids for judges and lawyers to understand the intentions of the legislators as well as the real meaning of the provisions of the uniform law.

Grasping the legislative intents and purposes and understanding the real meaning of the provisions are among the important prerequisites for a uniform law to be exactly applied. The *travaux préparatoires*, commentaries and scholarly publications constitute a bridge by which we could attain the objective of uniform application and interpretation.

In fact, almost all Governments find it necessary to undertake a serious study of a convention or a model law before signing or acceding to it or incorporating it into domestic law. This study is not limited to the text of the uniform law itself, but includes its *travaux préparatoires* and commentaries as well. A Government will find it very difficult to accept a uniform law without first undertaking a study of such materials.

We all know that the process of domestic legislation, from proposals to discussion, revision and adoption, usually lasts as long as a number of years. Once a law is officially adopted, it leaves a host of materials from its legislative process. Such materials are very important as a guide to the application and interpretation of the law. However, when a State decides to accept a uniform law or incorporate it into its national law, only a simple legislative procedure is needed, which does not leave as much materials as in the case of domestic legislation. Under these circumstances, for the precise interpretation and application of such a "national law", it is necessary for the State to refer to the *travaux préparatoires* and the relevant commentaries developed during the elaboration of the uniform law. Without such materials or without consulting them, we shall not be able to attain the objectives of the uniform law.

In short, the role of the *travaux préparatoires* and commentaries of the uniform law is obvious. For the States that accept the uniform law and for the courts or arbitration tribunals that apply the uniform law in resolving international trade disputes, it is not only necessary to give legal force to provisions of uniform law, but also, for interpreting and applying the law, to give serious consideration to its *travaux préparatoires* and commentaries as a useful guide to understanding it.

Decisions of foreign courts or arbitration tribunals

In judicial practices, references by one court in implementing domestic laws to decisions of a foreign court on related matters go back a long time. These cross-references are all the more necessary when it comes to the interpretation and application of one and the same uniform law. Being the final agents in realizing the purposes and objectives of the uniform law, courts and arbitration tribunals of all States need to respect each other, exchange information, and cooperate with each other in the interpretation and application of the uniform law. In this respect, it is necessary to overcome obstacles posed by legal traditions and jurisdictions in order to give legal effect to the rulings of

foreign courts or arbitration tribunals relating to the uniform law. Should it happen that something is found to be unreasonable or imprecise in the interpretation and application of a uniform law by a foreign court, the best thing to do is to conduct an exchange of views. Courts and arbitration bodies of all States should join efforts for the realization of the objectives of uniform laws.

Considerations on the promotion of uniform interpretation and application

With the rapid progress of science and technology, possibilities of worldwide cooperation are constantly increasing in economic and commercial fields. Responding to the needs arising in such a situation, a number of uniform laws on international trade have been developed by the United Nations and other international intergovernmental organizations, still more uniform laws will emerge in the future.

Uniform laws on international trade will play an increasingly important role in furthering the development of international trade and in settling international trade disputes. Therefore, how to manage and promote the uniform interpretation and application of these laws has become an important task facing UNCITRAL, other relevant international organizations and Governments alike. Here, I would like to venture some ideas on how to realize the objectives of the uniform law.

Wide dissemination of the text of the uniform law and its travaux préparatoires and commentaries. While texts of uniform laws are widely distributed in most States, this is not the case for the *travaux préparatoires* and commentaries, both of which are inaccessible sometimes even to lawyers, judges and arbitrators. Such a situation cannot but have a negative effect on the application and interpretation of the uniform law. It is therefore necessary for UNCITRAL, relevant international organizations and Governments, after the adoption of the uniform law, to decide also on the scope and content of its *travaux préparatoires* so that, together with the text of the new law and the commentaries, they can be widely distributed by Governments.

Collection and compilation of cases. With States belonging to different judicial systems and having different judicial procedures and arbitration regimes, it is extremely difficult to have an exhaustive compilation of court rulings based on the uniform law by all States. For instance, in some countries, there is no rule requiring the publication of court rulings, and in other countries the parties would not allow the arbitration body to make public its arbitration award. If UNCITRAL is able to collect only cases which are allowed to be published, its collection would not be comprehensive, and hence its universal character could be doubtful. The system of national correspondents used by UNCITRAL now represents a useful endeavour, but it still needs further improvement in order to be as fully effective.

Firstly, I believe that we need a convention in the area of public law, a kind of convention on the principles regarding the interpretation and application of the uniform law. The convention should stipulate, among other things, that States in interpreting the uniform law: (a) should always refer to its *travaux préparatoires* and commentaries, as well as other writings by scholars; (b) should give certain legal force to the rulings of foreign courts and arbitration tribunals, based on whether they should be binding or only persuasive; (c) should undertake the obligation to make public all court rulings and to report them to the authorities concerned etc.

Secondly, pending agreement on this convention, the question of collecting national cases regarding the interpretation and application of the uniform law should be considered by the General Assembly with a view to adopting a resolution making this an obligation on all Governments in order to have such a system actively put into practice.

Seminars and expert review panels. Interpretation and application of the uniform law require sophisticated professional knowledge. Despite the existence of *travaux préparatoires*, commentaries and writings by scholars, courts and arbitration bodies in different States may make different decisions on cases of the same nature or even on cases arising under entirely similar circumstances. This is possible for various reasons, including differences in political, economic and legal systems. That would be a disturbing situation. In order to avoid and overcome discrepancies in the interpretation and application of the uniform law, UNCITRAL should periodically organize regional or international seminars on the uniform law and the rulings based on the uniform law, so that specific legal questions can be studied and discussed and consensus be reached.

Also, under every convention that has come into effect, an expert review panel should be established by UNCITRAL to review and investigate complaints made by States parties about problems on the interpretation and application of the uniform law by foreign courts and arbitration tribunals, and to give its advisory opinion to UNCITRAL so that UNCITRAL could mediate for States in dispute. On the other hand, having discovered that different interpretations and decisions had been made by courts or arbitration tribunals of different States on similar cases arising under identical circumstances, the expert panel could also carry out investigations by its own right and put forward its own comments in order to maintain the uniform interpretation and application. In this connection, the approach adopted by GATT in the implementation of some of its codes, and the approaches adopted by some other conventions, have set very good examples.

The work on uniform law under the auspices of UNCITRAL and other international organizations is a very important and relevant one, because it is in the interest of the development of the world economy and trade as well as friendship between peoples and world peace. It is indeed our sacred duty to ensure the uniform interpretation and application of the uniform law.

2. *"The cook who eats his own soup": experiences of a judge applying a legal text codrafted by him*

HOWARD M. HOLTZMANN
Judge, Iran-United States Claims Tribunal, The Hague, Netherlands

The last time I had a function to perform in this hall, which is the home of the General Assembly, was on 15 December 1976. The agenda of the General Assembly that day included consideration of a resolution to recommend worldwide use of the UNCITRAL Arbitration Rules. I had participated in drafting those Rules, and the United States representative invited me to sit with him to provide information in case any detailed questions arose in debate on the resolution. But UNCITRAL was so widely respected that there were no questions at all. As a result, the proceedings were quick and simple. The chairman announced the resolution, asked if anyone wished to comment, and with hardly a pause he declared that the resolution was adopted. No voice rose in opposition. Thus, the UNCITRAL Arbitration Rules became a part of the system of international justice.

As I sat in this room that day 16 years ago, I could not have imagined that the UNCITRAL Arbitration Rules would have the far-reaching influence that they have achieved in moulding modern arbitration practice. And I certainly could not have dreamed that one day I would be a member of a tribunal that would have the task of arbitrating more than 4,000 cases in accordance with those Rules. But that is what occurred. I have for the last 11 years been a member of the Iran-United States Claims Tribunal, perhaps the largest arbitration in history thus far, measured by the number of cases and the total amounts involved.

That experience in applying the UNCITRAL Arbitration Rules in so many cases is the reason why the Secretary of UNCITRAL has entitled my topic this afternoon, "The cook who eats his own soup." In one respect, that title is quite accurate: I have eaten many bowls, indeed barrels, of a soup that I helped to create. In another respect, the title requires some clarification. For although I am a cook who eats his own soup, I am not the only cook who made the soup. As I will discuss in a few minutes, the strength of the UNCITRAL Arbitration Rules is that there were many cooks who contributed recipes, ingredients and skill.

The rules of the Iran-United States Claims Tribunal incorporate the UNCITRAL Rules with only limited modifications to take account of the special circumstances of the Tribunal, such as its nine-member composition and its continuing nature. The Tribunal has thus been a severe testing ground for the UNCITRAL Rules. In my view, the effectiveness of the Rules can be summed up in two words: they work. The Rules have proved to be comprehensive enough to cover every procedural contingency that has arisen in thousands of cases conducted under considerable pressure. They are sufficiently flexible to allow the arbitral process to meet special circumstances, and yet are detailed enough to provide the guidance needed by parties and arbitrators alike.

My appraisal of the effectiveness of the Rules is based on the actual experience of the Tribunal in applying them in disputes between the two States, as well as in cases involving private parties. The variety and volume of the cases before the Tribunal is revealed by the wide range of trade and investment transactions from which the claims arose. There were, of course, major contracts related to drilling and export of oil. There were massive construction projects for industrial facilities, housing developments, and even an amusement park. The United States Government and United States defence contractors had contracted to supply weapons and services. Extensive arrangements were made for technology transfers, many relating to computers and electronics. Large amounts of grain and other commodities were traded; hotels were built and operated; insurance companies were founded; milk and soft drinks were bottled; a good deal of shipping and container transport business was conducted. Almost every conceivable sort of product was bought and sold. To support these transactions, banks made loans, took deposits and issued a variety of letters of credit. After the Islamic Revolution, disputes arose relating to most of that vast business activity. Moreover, the Islamic Republic of Iran had claims against the United States, including an estimated $22 billion demand largely relating to military equipment that the Islamic Republic of Iran asserts it paid for in advance but did not properly receive. In addition, there have been serious disputes of a public international law character concerning the interpretation and performance of treaties between the Islamic Republic of Iran and the United States. A mountain of documents has been produced in these cases, all governed by the Arbitration Rules. For example, in addition to awards and decisions that already fill more than 25 printed volumes, the Tribunal had, by 31 March 1992, issued 18,468 procedural orders, and parties had filed more than 25,800 separate documents. In all this massive litigation, the Rules have stood up well.

The title of today's programme bids us to seek lessons for the future from UNCITRAL accomplishments of the past. As we look to the future, it is useful to consider not only whether the Arbitration Rules work well, but also why they are effective, and what factors in their preparation led to their success. The history of the Arbitration Rules illustrates eight key factors that contributed to their acceptance and success. Because these same factors can contribute to the preparation of other unified international commercial texts, it may be useful to refer briefly to them.

The first factor necessary for the success of a unified text is that it should fill a widely recognized need expressed by the international community. Although before the Rules were prepared, there were already many arbitration rules, all of them were either issued by particular arbitral institutions, or designed for special trades, or intended primarily for use in certain regions or economic systems. An

extensive study conducted for UNCITRAL by Ion Nestor indicated that, while these existing rules were valuable, there was also a need for more universal rules. Reflecting that need, the International Council for Commercial Arbitration, an organization consisting of arbitration experts and representatives of arbitral institutions, urged UNCITRAL to undertake the project of preparing new rules. Because of this widespread support for developing the Rules, many arbitration experts were anxious to assist in the task.

That brings me to the second factor necessary for successfully preparing a unified commercial text: the drafting should be done by experts who have practical experience in the field. The UNCITRAL Arbitration Rules benefited from that great advantage. Pieter Sanders was appointed at the outset as consultant to the Secretary-General, and he brought vast experience as an arbitrator and as a draughtsman of other rules. Moreover, many States included leading arbitration practitioners in their delegations to UNCITRAL. In addition, the observer delegations included, among others, representatives of ICC, the American Arbitration Association and the Inter-American Commercial Arbitration Commission.

Those experts not only knew arbitration, but they also provided information and insights from all geographic regions and legal, political, social and economic systems. That is the third factor that contributed to the effectiveness of the Arbitration Rules. There is an old saying that too many cooks spoil the soup. That may be true if one is speaking of chicken soup being made in a grandmother's kitchen; but it is not true if one is preparing an international text. For it is necessary that a text designed for worldwide use be compatible with, or at least adaptable to, many different legal and commercial cultures. Consider, for example, that at the Iran-United States Claims Tribunal the Arbitration Rules must be capable of being applied by arbitrators who have backgrounds in civil law, common law and Islamic law. That universality can only be achieved when the international text reflects - and respects - the approaches of draughtsmen from all parts of the world.

But the draughtsmen cannot do it alone. This brings me to the fourth important factor in preparing an effective text: the draughtsmen must have close and continuing contact with the community that will use and be affected by the international text. In the case of the Arbitration Rules, it was necessary to have comments on the work in progress from the users of international commercial arbitration - businessmen, lawyers, and arbitrators. Delegates to UNCITRAL consulted extensively when they went home between Commission sessions; arbitral institutions and Governments reviewed and commented at every stage of the draft. More than 200 experts from all parts of the world had a lively discussion of a draft at a four-day conference at New Delhi, held under the sponsorship of the International Council for Commercial Arbitration. The Commission took careful account of the comments from the New Delhi conference. The Rules were improved by this open-minded process.

But no matter how wise the experts and how wide the consultations, draughtsmen cannot foresee every future contingency or the unique character of some transactions. For those reasons, a fifth key factor in the success of an international commercial text is to embody in it as much flexibility and party autonomy as possible. This was done in writing the Arbitration Rules, and is an important reason for their acceptability and usefulness.

The preparation of an effective international text requires cooperation by many people from all parts of the world, which, in turn, requires extensive organization and coordinated effort. Thus, the sixth key factor is a highly professional secretariat to furnish support and infrastructure. That indispensable role was provided for the Arbitration Rules - as for all other UNCITRAL texts - by the International Trade Law Branch of the Office of Legal Affairs. In addition, a final text cannot be completed in a reasonable time without an experienced chairman who has the drive needed to focus discussion and achieve consensus within the Commission. That is the seventh vital factor. Roland

Loewe of Austria, who led the sessions in which the Arbitration Rules were prepared, is a fine example of a chairman who supplied that necessary element.

In the end, even the best text will not be widely accepted unless one further factor is present. The text must be issued by a respected international body whose competence, fairness and neutrality are widely recognized. That is the eighth necessary factor. Rules elaborated by UNCITRAL, and recommended by the General Assembly, enjoy that great advantage. They do not represent any single viewpoint. They are successful rules because they are everybody's rules.

A last point is that a good international commercial text has influence not only on those who use it directly, but also on those who look to it as a model, or a benchmark, in preparing other rules. Thus, echoes of the UNCITRAL Arbitration Rules reverberate in many other modern rules. To cite only one very recent example, the Permanent Court of Arbitration at The Hague, the oldest continuous international arbitration system in existence, is now modernizing its procedural rules, and in doing so is using the UNCITRAL Rules as its model.

Let me conclude by recalling a favourite story of Justice Louis Brandeis, one of the great justices of the United States Supreme Court. Brandeis told of a lawyer who was invited to draft a code of laws for a newly independent State. According to Brandeis, the lawyer "proceeded to that country and for two years literally made his home with the people - studying everywhere their customs, their needs, their beliefs and their points of view. Then he embodied in the law, the life which [they] lived". The UNCITRAL Arbitration Rules are effective because they embody the life that users of arbitration actually live. That is the secret of every successful uniform commercial legal text.

3. Uniform laws require uniform interpretation: proposals for an international tribunal to interpret uniform legal texts

PROFESSOR LOUIS B. SOHN
George Washington University, Washington, D.C.

First, it is necessary to make clear that uniform laws come in many guises; some of them are actually called uniform laws, which are submitted as such to national legislatures for adoption. Others are connected with international conventions in a variety of forms: some are attached to a convention as annexes (e.g., the annexes to the Convention on International Civil Aviation); some are enacted later to implement the Convention (e.g., the regulations of the World Health Organization); some are actually in the form of conventions (e.g., the more than 30 conventions approved by the Hague Conferences on Private International Law, or the more than 170 conventions of the International Labour Organisation); some are adopted in the supposedly less binding form of sets of rules, codes of conduct, model laws, declarations or guidelines (e.g., in environmental matters), but are often enacted nevertheless as domestic legislation. In many other fields, where there are no internationally agreed uniform laws, national laws are in fact uniform, as they borrow from the same international or national instrument, without expressly acknowledging the fact. Some agreements embodying uniform laws do not cause many difficulties, but some like the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air have resulted in hundreds of national court decisions, including some by the Supreme Court of the United States, which often differ considerably in their interpretations of the Convention.

Once a uniform text has been adopted, new international problems start to arise. There is, for instance, the task of making sure that the uniform law will become a part of the domestic law of

various countries. Next, the interpretation of these laws by domestic courts may differ. And finally, can a way be found to ensure that uniform laws will be uniformly interpreted?

It is generally recognized that the process of unifying the laws of various countries that affect international trade and other transnational relationships is a complex operation. It requires not only a long, international effort of negotiating a uniform text, but also separate national efforts to incorporate the uniform texts into national legal systems and to alert the local lawyers to the existence and value of these texts.

A second problem arises when national courts begin applying the text, as various courts immediately start providing their own interpretations of the text, especially if it has been translated, not always accurately, into a local language. Usually slowly, but sometimes rapidly, the text loses its uniformity, the value of the uniform text starts diminishing, and the laborious effort to reach agreement on its content is thus wasted.[30] Some clever lawyers may then start taking advantage of this change, and begin forum-shopping in order to obtain an interpretation of the text that is most favourable to their clients.

Third, since the need to obtain a uniform interpretation of uniform law and of conventions on private international law was recognized long ago, various remedies have been suggested.

Several international organizations have developed varying means for interpreting uniform conventions concluded under their auspices. Some arranged for binding decisions by their principal political organs. Others resorted to clarifying interpretations by their secretariats, which were usually based on the legislative history of the convention, a careful study by the legal office of the particular secretariat of preparatory materials which are often in the custody of that office. UNIDROIT studied the usefulness of these procedures in 1959, especially those developed by the International Labour Organisation and the International Civil Aviation Organization.[31] UNCITRAL prepared another study in 1985, which mentioned the possibility of the Commission: (a) expressing its opinion on proper interpretation of a uniform text in case of a conflict between decisions of national courts; (b) responding to a request by a national court or arbitral tribunal for such interpretation; or (c) replying to abstract questions by private parties. Instead, the study proposed a more limited approach based primarily on dissemination and analysis of national decisions.[32]

The success of international arbitrations in the nineteenth century inspired international lawyers to apply this remedy for international ills to the new problem of maintaining uniformity of common rules and ensuring their proper interpretation. It is not surprising, therefore, that already in 1911 Hans Wehberg, one of the most eminent international lawyers of the first half of this century, proposed that an international tribunal for private matters be established that would deal, *inter alia*, with: "disputes relating to questions of private international law (on appeal from national courts); and private claims based on international treaties establishing uniform laws (on appeal from national courts)".[33] He thus recognized that two arrangements were necessary - the establishment of a special international tribunal and some procedure for referring a question of interpretation from a national court to that tribunal.

The issue was raised again in 1920, in connection with the preparation of the Statute of the Permanent Court of International Justice, the predecessor of the International Court of Justice. At that time, the Interparliamentary Union, in which many national parliaments were represented, suggested that the Permanent Court be granted jurisdiction with regard to conflicts between private persons relating to the interpretation of conventions concerning private international law, as well as of conventions relating to industrial and literary property, commercial law and maritime law, which establish uniform rules for these important areas of law.[34] The Advisory Committee of Jurists that

prepared the Statute of the Permanent Court was, however, not receptive to this idea, and the jurisdiction of the Court was limited to disputes between States.

The idea of devising a procedure for dealing especially with the interpretation of the increasing number of conventions establishing uniform rules of private law or uniform conflict of laws rules (called private international law in Europe) was revived in the 1930s. In 1931, a protocol was signed at the sixth session of the Conference on Private International Law, held at The Hague, by which the States parties to that protocol recognized the jurisdiction of the Permanent Court of International Justice over disputes relating to the interpretation of the conventions elaborated by the Hague Conferences on Private International Law which they have ratified or to which they have acceded.[35] Any party to such a dispute which has ratified the protocol was authorized to bring it to the Court against another State that also ratified the protocol. Consequently, if two States had ratified one of these conventions and the protocol, and a dispute had risen between them concerning the meaning of a provision of that convention, either of them would have been able to bring the issue before the Court. This remedy was not considered satisfactory, as only States can bring cases before the Court, and private persons have no access to it. Most problems of interpretation of uniform law arise in disputes between two private parties, who should have some way of obtaining an interpretation from an international institution.

The 1931 Hague protocol was ratified by only a few States, and was never resorted to by any State. It should be noted, however, that, without relying on the 1931 protocol, a dispute relating to private rights under a Hague convention was actually submitted to the International Court of Justice in 1957. The Court interpreted a 1902 convention restrictively, distinguishing between the private law of guardianship and social laws designed to protect a child against threats to its health, mental state or moral development, and gave preference to a Swedish social law rather than to the convention.[36] Thus, this case did not encourage submission to the Court of other issues of interpretation of uniform law conventions, and the search for a more adequate solution continued.

In particular, jurists became concerned with the fact that not only the Hague Court but also other international tribunals were seldom accessible to individuals and corporations, especially as they also noted that States became more reluctant to espouse claims by individuals or corporations against friendly States. A State was seldom willing to cause international complications by treating a claim by one of its nationals against another State as a dispute between States. It was thought that many private matters might be decided satisfactorily by a smaller international tribunal without resort to the Court at The Hague. If such private claims could be treated as a routine matter by a special tribunal composed of jurists trained in private international law, an important cause of irritation would be removed from inter-State relations. The matter was brought before the International Law Institute, which in 1929 adopted a cautious resolution suggesting that "in certain cases it might be desirable to recognize the rights of individuals to bring before an international tribunal directly, subject to conditions to be determined, their disputes with States".[37] A draft for such a Belgian-French tribunal was prepared by a joint commission in 1934.[38] Geouffre de Lapradelle then proposed that this idea be applied to "disputes relating to the application of international conventions of private law", and the International Law Association approved this proposal in 1934.[39] This proposal was also endorsed by the Interparliamentary Union in 1936, after considerable discussion.[40] A series of similar proposals to establish international tribunals for private matters was made after the Second World War, including suggestions that the United Nations should establish subsidiary judicial authorities for deciding claims by individuals and corporations against States. This idea was considered, for instance, by the American Bar Association in 1953.[41]

Another approach was suggested by the French jurist André Prudhomme, then editor of the main periodical devoted to private international law, the *Journal du droit international*. He drafted a

proposal for an international tribunal to consider appeals from national tribunals in cases arising from contracts between States and private persons.[42] By 1939 Pietro Valindas had collected a series of proposals for special tribunals to interpret international conventions designed to promote uniformity of private law or private international law.[43]

After the Second World War, similar proposals were made with respect to the establishment of a tribunal that would provide uniform interpretation of private air law conventions.[44] There was also interest in establishing an international trade tribunal.[45]

Some proposals have been limited to special economic transactions. For instance, UNIDROIT prepared in 1946 a convention for an international loan tribunal.[46] There was also a 1935 proposal on the subject by the Netherlands, which resulted in 1939 in the publication of a draft for such a tribunal by a League of Nations committee for the study of international loans contracts.[47] Similarly, proposals have been made for an arbitral tribunal for foreign investments.[48]

The 1982 United Nations Convention on the Law of the Sea provides, *inter alia*, for an International Tribunal for the Law of the Sea, the jurisdiction of which includes disputes involving private persons.[49]

Even more recently, the increase in multipartite conventions dealing with various aspects of global environment led to proposals for establishing an international environmental tribunal and for an ombudsman authorized to request an advisory opinion from that tribunal in case of an incipient dispute about the interpretation of one of the conventions.[50]

Conclusions

Combining all these ideas, it would seem desirable to establish a tribunal, parallel to the International Court of Justice, to deal with the problems created by inconsistent interpretations of international agreements containing a variety of uniform laws, codes of conduct and declarations. Such a tribunal might be composed of 17 jurists (judges, lawyers and professors) who are experts on various aspects of private international law, or have had experience in the preparation, application or interpretation of uniform laws or uniform conventional rules. The jurisdiction of the tribunal would be specified in a protocol which would contain an easily amendable list of multilateral conventions, and a State ratifying the protocol would accept the jurisdiction of the tribunal with respect to at least one or, if possible, more conventions, and would be encouraged to make additional acceptances from time to time. Should a dispute arise in a national Court of a State with respect to the interpretation of a convention for which that State has accepted the jurisdiction of the tribunal, the court on request of one of the private parties to the dispute would refer the matter to the international tribunal for an advisory opinion, and the private parties would be allowed to present their views to the tribunal. The interpretation rendered by the international tribunal, though not binding, would be authoritative. It is likely to be applied by the court that requested it, and would be given substantial weight in cases raising the same issue in courts of other States that have accepted or may accept in the future the jurisdiction of the tribunal for the convention in question. In acceding to the protocol, a State may also declare that an interpretation made by the international tribunal will be binding henceforth on all its courts when rendered in a case referred to the tribunal by one of its courts. It might also declare that interpretations made by the international tribunal in cases referred to the tribunal by courts of other States will also bind its courts.[51]

It seems also desirable, at least at this time of financial stringency, to have only one such tribunal for all conventions on uniform laws or on private international law, as this would avoid the excessive

cost of maintaining simultaneously a constantly increasing number of tribunals for one topic after another.

The modalities of procedure and other issues would have to be solved, but the trail has been blazed not only by many interesting proposals and reports, but also by some existing institutions. In particular, the authors of the statute of the proposed international tribunal would be able to draw on the experience of the Court of Justice of the European Community, of the International Centre for Settlement of Investment Disputes (accepted by 97 States by January 1992), of the Iran-United States Claims Tribunal, of the arbitral panels established under the Canada-United States Free Trade Agreement, and of several less-known tribunals functioning in various areas of the world.

Once established, a general tribunal would be able to develop techniques enabling it to deal with any subject, however difficult or specialized. Such a tribunal is long overdue. Its establishment would be greeted with a sigh of relief by many foreign ministries which would no longer have to deal with angry claimants and the dilemma whether it would be less dangerous to have a dissatisfied citizen or an aggravating confrontation with a foreign Government.

A tribunal for the interpretation of uniform laws and conventional rules of private law or private international law would constitute an important contribution to the development of international trade law and the United Nations Decade of International Law.

E. Value of universal application for regional integration and development

1. Asian-African Legal Consultative Committee

D. S. MOHIL ON BEHALF OF F. X. NJENGA,
Secretary General of the Asian-African Legal Consultative Committee

At the outset, permit me to convey to UNCITRAL on behalf of the Asian-African Legal Consultative Committee (AALCC) our warm felicitations on organizing this Congress as its contribution to the United Nations Decade of International Law, and with the objectives of reviewing the accomplishments achieved by UNCITRAL in the progressive unification and harmonization of international trade law during the past 25 years and identifying the practical needs on which its future programme would be based.

The establishment of UNCITRAL in 1966 as the core legal body within the United Nations system in the field of international trade law was considered to be of momentous significance. It was particularly welcomed by the developing countries in their quest for examination of the existing rules and practices in the field of international trade and commerce and the development of norms that would be suited to the needs of the changing structure of the international community in the post-colonial era. It was felt that, if public international law to regulate the conduct of nations was the product of the West, the law relating to international trade and commerce was primarily developed by chambers of commerce, trade associations and legal bodies in the metropolitan capitals. This was an area where the knowledge and expertise in developing countries needed to be pooled together in an appropriate forum in association with the older nations to arrive at just and equitable solutions. The establishment of UNCITRAL was looked upon as a step forward in that direction.

AALCC was, therefore, particularly gratified to respond to the call for cooperation extended by the then Chairman of UNCITRAL, E.K. Dadzie of Ghana, when he came to attend its tenth session

at Karachi in 1969. This was followed by the active participation of John Honnold, the Secretary of UNCITRAL at the Accra session in 1970. This helped to establish formal links between the two bodies resulting in close working relations and inclusion of agenda items of mutual interest in our respective work programmes. It also led to the establishment of an open-ended standing Sub-Committee on International Trade Law Matters of AALCC entrusted with the twin task of monitoring and reviewing recent developments in the field of international trade law from the Afro-Asian perspective and undertaking projects on its own which would cater to the needs of the region. Since UNCITRAL was designated as the principal instrumentality within the United Nations system for furthering the task of progressive harmonization and unification of the law of international trade, it was quite natural for the Sub-Committee since its very inception to focus its attention on the activities of the Commission. As such, the Sub-Committee has commented upon and provided legal inputs for all the major texts prepared by UNCITRAL during their preparatory stages, and those comments and inputs have influenced the final versions of those texts.

However, it should be noted that the AALCC contribution to the development of new rules of international trade law by UNCITRAL has not been limited to active participation in the preparatory stages. Of equal importance and value has been its support, after the conclusion of a project, in terms of disseminating information and enhancing acceptance of any new legal text emanating from the work of UNCITRAL. AALCC has promoted the work of UNCITRAL by periodically organizing regional seminars in association with UNCITRAL and other organizations active in the area and publicizing their proceedings in the Afro-Asian region, and by promoting the legislative texts through formal recommendations or resolutions adopted at its annual sessions. Recently, in October 1989, the AALCC organized a Seminar on International Trade Law at New Delhi in association with UNCTAD, UNCITRAL and UNIDROIT. The main objective of the Seminar was to promote an awareness and wider acceptance in the Afro-Asian region of a number of international conventions prepared by the United Nations and UNIDROIT in the field of international trade, financing and transport. The report and proceedings of the Seminar were printed and widely circulated in the Afro-Asian region.

With respect to the promotion of UNCITRAL texts among the membership of the AALCC through formal recommendations or resolutions, mention may be made of the attention given by AALCC to the United Nations Convention on the Carriage of Goods by Sea after its adoption at the diplomatic conference held at Hamburg. The Committee considered the Convention at its sessions at Seoul (1979), Colombo (1981) and Arusha (1986), and expressed the view that the Convention has taken into account the interests of developing countries and achieved a more equitable balance between the interests of the shipper and the carrier. AALCC therefore urged its Member States to consider adhering to the Convention so that the outmoded Hague regime governing the international carriage of goods by sea could be replaced by the Hamburg rules.

Another pertinent example in this context is the recommendation made by the AALCC at its Doha session in 1978 requesting UNCITRAL to establish a working group to study the implications of the establishment of a new international economic order for international trade, thereby giving a new orientation to its activities. This has led to the very practical work being undertaken by the Working Group on the New International Economic Order established by UNCITRAL.

Another area where UNCITRAL and AALCC have worked very closely over a number of years and provided complementary inputs into each other's work relates to the topic of international commercial arbitration. The impetus for the work of AALCC in this field was provided by the report of Ion Nestor, the special rapporteur of UNCITRAL, in which he contemplated the possibility of the establishment of regional and national institutions in the developing regions for handling international arbitrations with a view to promoting wider acceptance of arbitration as a means of settling international commercial disputes. The idea seemed to be particularly attractive to AALCC member

States when the matter was discussed at its Tokyo session in 1974, and two years later the proposal for the establishment of regional centres for arbitration received further impetus with possible linkage with the promotion of the UNCITRAL Arbitration Rules 1976 which had just then been adopted.

The following year, when a decision was taken by AALCC at its Baghdad session to establish two regional centres, one at Kuala Lumpur for the Asian region and the other at Cairo for the African region, the functions allocated to them included promotion of the UNCITRAL Arbitration Rules, provision of facilities in the conduct of ad hoc arbitrations under the UNCITRAL Rules and provision of institutional arbitration under those rules where appropriate. The Kuala Lumpur and Cairo centres are now fully operational, and a third one inaugurated in Lagos in March 1989 is soon to commence activities. AALCC was indeed the very first organization which had endorsed and begun promoting the UNCITRAL Arbitration Rules even before their adoption by the General Assembly. The twin actions of AALCC, to ensure that the regional centres for arbitration would administer ad hoc arbitrations under the UNCITRAL Rules and that the Rules would serve as the institutional rules of those centres, have been emulated by several other arbitral institutions around the world.

As for the UNCITRAL Model Law on International Commercial Arbitration, its origin can be traced to an initiative taken by AALCC. In 1976, AALCC had suggested that UNCITRAL clarify certain issues in a protocol to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although UNCITRAL did not agree on amending the 1958 Convention, it did agree to prepare a model law on arbitral procedure to meet the concerns expressed by AALCC. AALCC continues to promote the UNCITRAL Model Law in the Afro-Asian region.

In this context, I would also like to refer to two of our activities which have helped many developing countries to play a wider role in the work of UNCITRAL itself. First, we consider as a regular feature at each of our annual sessions a report on the work of UNCITRAL. This has helped to place special emphasis on the importance of the work of UNCITRAL. Secondly, the notes and comments we prepare on the UNCITRAL report for the Sixth Committee debates assist member States of AALCC to participate more effectively in the discussions of the Sixth Committee on the work of UNCITRAL.

I now wish to briefly refer to our own initiatives for the development of international trade law in a regional setting. The first important initiative was the formulation of standard or model contracts for sale transactions in commodities of particular interest to developing countries exporting agricultural produce, minerals and other types of raw material. Our work in this area has resulted in the adoption of two standard contract forms for sale transactions in commodities, one on f.o.b and the other on f.a.s terms. These were published as documents of the Economic and Social Council in 1977. Subsequently AALCC has also adopted a standard contract on c.i.f (maritime) terms applicable to light machinery and durable consumer goods.

Another initiative of AALCC has been in the area of investment promotion and protection. At its Kathmandu Session in 1985, AALCC adopted three models of bilateral agreements on promotion and protection of investments. These models have been publicized by the World Bank and the American Society of International Law.

Another project undertaken by AALCC aimed at facilitating industrial collaboration in North-South and South-South contexts has been the preparation of a *Legal Guide on Industrial Joint Ventures in Asia and Africa*. The secretariat finalized the *Guide* after working over a number of years, and the text was approved at the Cairo session in 1990 for circulation to the Governments of our member States. The secretariat is presently engaged in studying the legal aspects of privatization of public sector undertakings, with the aim of preparing a guide on legal aspects of privatization to assist

the Governments of our member States in carrying out their privatization programmes without detriment to their national interests.

The world today is experiencing profound political and economic changes. Deregulation and liberalization of national economies has become the watchword in about 150 countries around the globe. These developments necessarily call for substantial changes in the national laws and regulations governing the foreign trade of those countries. In response to such developments, AALCC has recently set up a computerized data collection unit as an integral part of its secretariat to serve as a storehouse of information on economic laws and regulations of its member States.

In conclusion, the track record of UNCITRAL since its creation in 1966 has been impressive in terms of both the quality and quantity of the legislative works it has produced. What is even more heartening and reassuring from our point of view is the fact that it has shown itself to be at the disposal of both developing and developed countries alike in the formulation of a body of international trade law which is designed to permit parties from all regions to engage in international trade and commerce on the basis of equality.

2. Organization of American States

GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES

The Organization of American States (OAS) has followed with great interest the work carried out by UNCITRAL since its establishment. That could not be otherwise, not only because of the intrinsic value of the work of codification - understood in its broad sense - of the legal rules applying to international trade, but also because one of the aims that OAS, as a regional organization, has itself pursued since its earliest beginnings in the efforts to promote international cooperation on the American continent is the development of friendly relations and mutually beneficial commercial links among the States of the region. One of the ways of achieving these goals has been the progressive codification of both public and private international law.

It will suffice to recall, purely by way of historical illustration, the resolution adopted at the Second International Conference of American States (Mexico 1902), in which the American States agreed:

> "... to draw up a Convention on the establishment of the Codes of Public and Private International Law of the Americas, on the following terms:
>
> "... The Secretary of State of the United States of America and the Ministers of the signatory Republics, accredited in Washington, shall appoint a Commission of jurists of acknowledged repute, five from the Americas and two from Europe, to be responsible for preparing, as quickly as possible in the interval between the present and the following Conference, a Code of Public International Law and a Code of Private International Law, which shall govern relations between the nations of the Americas."

It would be exceeding the intention of this presentation to relate in detail the methodological developments that have taken place, within the framework of inter-American cooperation, in the gradual efforts to codify these two branches of the law. It will suffice to refer to the past work of the Inter-American Council of Jurists and to the present initiatives and work of the Inter-American

Juridical Committee. The area of codification in which the work of UNCITRAL has been particularly welcomed is that of private international law.

Mention should be made of the changes in the methodological approach to cooperation among the American countries, first in the form of a global vision within the inter-American system, and later through a sectoral process of codification pursued through a series of Inter-American Specialized Conferences on Private International Law (CIDIP-I, -II, -III and -IV). The most notable achievement of the initial stage was the Code of Private International Law (the "Bustamante Code"), which was adopted at the Sixth International Conference of American States, held at Havana in 1928. The Code includes various titles, chapters and articles on this topic in its second book entitled "International trade law". At the Specialized Conferences that have pursued the work of sectoral codification, topics relating to international trade law have had a permanent place from the very outset, and are being given special prominence in the plans for future related activities in the region.

During the preparatory work for CIDIP-II, the Inter-American Juridical Committee adopted a resolution on 5 August 1976 under which it decided to refrain from undertaking any study on the subject of the international sale of goods, in recognition of the important work that had already been carried out by UNCITRAL on that topic. The text of that resolution accordingly included the following paragraphs:

> "The preliminary draft agenda prepared by the Permanent Council of the Organization of American States for the Second Inter-American Specialized Conference on Private International Law (CIDIP-II) includes an item relating to the international sale of goods; ...
>
> "With regard to the item concerning the international sale of goods, it should be pointed out that there are already in existence useful documents and studies that have virtually exhausted all the issues relating to this subject. Mention should be made in this respect of the work that the United Nations Commission on International Trade Law (UNCITRAL) has for several years been carrying out;"
>
> ...

The Fourth Inter-American Specialized Conference on Private International Law (CIPID-IV), held at Montevideo, Uruguay, from 9 to 15 July 1989, adopted a resolution which recommends:

> "... to those member States of the Organization of American States that are not parties to the United Nations Convention on Contracts for the International Sale of Goods, adopted at Vienna on 11 April 1980, that they consider the advisability of ratifying or acceding to it."

A further resolution was also adopted at CIDIP-IV, entitled: "OAS work in the sphere of private international law", which states, *inter alia*:

> "The work of CIDIP involves a codification process and system endowed with distinct characteristics that reflect the singularities of the region;
>
> "Among those characteristics are the efforts to harmonize legal systems of Roman-Germanic origin with those based on common law;
>
> "The inter-American system of private international law being established through the work of the Organization of American States is part, moreover, of a legal world in which

other regional and universal forums are engaged in efforts that must be closely studied for the sake of proper coordination and consistency."

The resolution refers, *inter alia*, to the following as topics for consideration:

"Study of the inter-American system of private international law in relation to the work of other forums dealing with the subject;

"Study of the regulation of principal international commercial contracts, with particular stress on contracts for the carriage of passengers, excursion contracts, and contracts for the transfer of technology;

"Partnerships and mergers, and corporate agreements in general;

"Relationship between the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes and the 1975 Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices."

The examples quoted illustrate the receptive and accommodating attitude of OAS, as a regional organization, to the work of UNCITRAL. This is not surprising, not only because, in the inter-American context, instruments that are adopted by the Inter-American Specialized Conferences on International Private Law contain primarily provisions of form rather than of substance, but also because the increasing importance of having uniform legal rules on international trade that are widely shared by the greatest number of States in the international community is now recognized as a means of facilitating progress towards a global economy based on just and equitable principles that will guarantee benefits to be shared by all participating countries.

The globalization of the international economy and of international trade entails a special requirement for regional organizations in the regional integration process, that is the adaptation, within this new universal framework, of the pursuit of their objectives to the special historical and neighbourhood relationships that unite the countries of one and the same region. In this way, the global system that is now being shaped will be established on a sounder footing.

One notable example of such efforts to develop regional legal instruments while at the same time preserving what has been achieved in a universal context is the fact that all the new initiatives recently welcomed by the Organization of American States are being conceived and examined from the point of view of their compatibility with the analogous activities that are being carried out in the legal sphere by other international organizations, in particular the United Nations, and with an eye to the coordination of the efforts involved.

3. Preferential Trade Area for Eastern and Southern African States

DR. HAWA SINARE
Legal Adviser, Preferential Trade Area for Eastern and Southern African States

It is for the Preferential Trade Area for Eastern and Southern Africa States (PTA), and for me personally, a great honour to have been invited to participate in this very important UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century, and to make a presentation on the value of universal unification of commercial law to regional integration and development.

Before I do so, I wish to take this opportunity to express, on behalf of PTA and on my own behalf, our deep gratitude to UNCITRAL for inviting PTA to participate in the Congress. The timing of this congress could not have come at a better stage in the development of PTA, for only a few months ago, on 31 January 1992, three historic decisions were taken by the PTA Authority made up of Heads of State and Government. The first decision was that time was ripe for the preferential trading system of the PTA to be transformed into a Common Market for Eastern and Southern Africa (COMESA) in accordance with article 29 of the PTA Treaty.

The second decision was that PTA and the Southern African Development Coordination Conference, which previously focused on coordinating development aid but was now poised to be transformed into an economic integration organization, be merged to form one single economic integration organization called COMESA.

The third decision was the adoption by the PTA Authority of the PTA trade and development strategy, which embodies the details of the strategy for integration and economic development for PTA for the 1990s and beyond. The trade and development strategy will henceforth be the blueprint for the integration programme of COMESA.

In addition, this Congress is being held almost a year after the African Heads of State and Government signed what is commonly referred to as the Abuja Treaty, paving the way for the establishment of an African Economic Community. Once again, the OAU reaffirmed the importance of regional integration to the economic development of the continent. The signing of the Abuja Treaty was one concrete step towards the implementation of the Lagos Plan of Action adopted by the Organization of African Unity, although the target year for the achievement of the agreed objectives has been postponed beyond the year 2000.

This Congress is being held at a time when the relevance of regional integration to economic integration is being reasserted all over the world. Even stronger countries of the West are regrouping and consolidating their frameworks of economic integration or even creating expanded trading areas or blocks.

It is no wonder that the countries of the Eastern and Southern African subregion have decided to consolidate their cooperation arrangement into a common market. This programme for establishing a common market is now well under way, and I believe it will be completed well in advance of the year 2000, which is the target year for the completion of the single market. This implies that tough political and economic adjustments will have to be made to facilitate the implementation of the new strategies. Beyond the signing of the treaties, concrete measures will have to be put in place, a timetable of implementation will have to be adopted, the secretariat will need to be clothed with some executive powers to follow-up more effectively on the implementation of the programme, and the PTA tribunal will have to have expanded jurisdiction in order for it to be able to service COMESA adequately.

An integration programme must lead to economic development, otherwise it will be of no value to its sponsors - the member States. Economic integration, simply put, is about member States adopting and implementing measures that would make doing business within the grouping cheaper by removing all constraints to intraregional trade and investment and adopting measures which are conducive to trade and investment. One of the non-tariff barriers to intraregional trade and investment is the disparity in the national commercial laws.

The PTA, established on 30 September 1982, has a membership of 18 countries, namely Angola, Burundi, Comoros, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Rwanda, Somalia,

Sudan, Swaziland, Uganda, United Republic of Tanzania, Uganda, Zambia and Zimbabwe. Zaire has just submitted a request to join PTA under article 46 of the Treaty, and an agreement is currently being negotiated. Zaire will become the nineteenth member State by the end of 1992. From the membership of PTA, the subregion has different legal systems ranging from the common law, Dutch-Roman law, civil law, Islamic law and in some cases a mixture of two or more of the aforesaid systems. Disparities in the national commercial laws arising from the differences in legal systems as well as differences in the provisions of the law exist. This is where the achievements of UNCITRAL in the universal unification of commercial laws are so valuable to the regional economic integration programme of the Eastern and Southern African States. Since its inception, UNCITRAL has achieved unification and universal application of its texts, such as the following: the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules and the UNCITRAL Model Law on International Commercial Arbitration; the *Legal Guide on Drawing up Contracts for the Construction of Industrial Works;* the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules); the Convention on Liability of Operators of Transport Terminals in International Trade; the Convention on International Bills of Exchange and International Promissory Notes; and the Model Law on International Credit Transfers.

One of the most notable achievements of UNCITRAL which will be of immense value to the regional integration programme in Eastern and Southern Africa is the Convention on the Limitation Period in the International Sale of Goods. The provisions of the Convention, particularly the provisions relating to the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against the other party to assert a claim arising from the contract or relating to its breach, termination or invalidity have removed the uncertainty and injustice of parties having to institute legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost. As is well known, most legal systems limit a claim from being asserted after the lapse of a specified period of time, but numerous disparities exist in the length of the period and in the rules governing the limitation. The result of such disparities in a subregional economic integration is the difficulty in the enforcement of claims arising from international sales transactions, which thus constitutes a hindrance to intraregional trade. The other notable UNCITRAL texts which will contribute to regional integration in Eastern and Southern Africa are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), and the UNCITRAL Rules of Arbitration and Conciliation, both of which have been accepted by the PTA Council of Ministers as the instruments which should be applicable in the subregion. The PTA member States have agreed to accede to the New York Convention. This Convention has shown that it will facilitate the recognition and enforcement of foreign arbitral awards in the subregion, particularly awards granted under the auspices of the PTA Centre for Commercial Arbitration based in Djibouti.

Other areas of universal application of unified texts include the GATT agreement on valuation of goods for customs purposes. This agreement has been adopted by PTA member States as the unified method of valuation to be applicable in the PTA subregion, and negotiations are ongoing with the secretariats of GATT and the Customs Cooperation Council on the matter. The presence of different methods of valuation of goods for customs purposes would constitute a non-tariff barrier to intraregional trade. The PTA member States have also adopted a common tariff classification of goods, so that a product produced or imported into one member State has the same tariff nomenclature throughout the PTA subregion. Different methods of classification of goods would constitute a non-tariff barrier to intraregional trade. In addition, the PTA secretariat will soon embark on a comprehensive legal programme for the Common Market which will involve, *inter alia*, the harmonization and/or mutual recognition of some of the commercial laws, such as: standardization and quality control and labels laws (linked to the African Regional Organization for Standardization and the International Organization for standardization); industrial specifications laws; laws on weights

and measures; patents and trade marks; customs regulations and procedures; and procedures for the establishment and operation of free zones, free ports and customs-supervised factories or export processing zones.

The PTA member States will definitely have to catch up with developments in the informatics field, and, in particular, will depend more and more on the use of computers and other electronic devices to transact business as well as to transfer funds. Therefore, the UNCITRAL Model Law on International Credit Transfers and the work being done on electronic data interchange would be of practical value to the member States.

Since about seven of the PTA member States are landlocked, special mention should be made of the value of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, which has to do with universally accepted rules of liability for loss of and damage to goods before, during and after international transport. In the absence of the Convention, disparities were prevalent as some national laws permitted terminal operators to restrict their liability through contractual conditions. The Convention will impose an obligation on the terminal operators to be responsible for the goods from the time they have taken them in charge until the time they have handed them over or made them available to the persons entitled to take delivery of them.

There is, therefore, no doubt that universal unification of commercial law has removed problems arising from disparities in the national commercial laws and intraregional trade and investment.

It may be useful for UNCITRAL in the future to encourage uniform interpretation of the UNCITRAL Conventions.

4. European Economic Community

PROFESSOR UWE SCHNEIDER ON BEHALF OF HARRIS-BURLAND
Representative of the Commission of the European Communities to UNCITRAL

I was asked to present the text of a statement prepared by the representative of the Commission of the European Communities to UNCITRAL and myself on the topic of the value of universal unification for the process of harmonization of laws in the European Communities.

The issues are, we think, in a sense both simple and complex. There is certainly scope for confusion, but in such circumstances we take courage from the remark, which is currently much heard in the world of payment systems, that "if you are not confused, you have not understood the issues".

The main themes of our remarks will be: first the differences, second the similarities, and third the relevance of regional harmonization for the global process of legal harmonization.

Let us start with the conceptual differences. The particular goal of UNCITRAL - within the wider purpose of the United Nations - is to contribute to facilitating trade and economic development by harmonizing legal rules affecting trade between the diverse nations of the world. So first, the law applying to trade within the nations is in principle unaffected. And second, legislation recommended by UNCITRAL should ideally be suitable for adoption by all interested parties, with very different economies, markets and legal traditions.

By contrast, the European Community (EC) is a community of common values, and it is a community with a special economic order. The EC economic order has always been essentially based

on four liberties of movement, namely for persons including corporations, goods, services and capital. The freedom described was not simply freedom to trade across the border, but freedom to establish a business or branch in any part of EC. It was a result of years of law-making and the development of case-law by the European Court of Justice, which had to take into account often different legal concepts in the member States, that these freedoms have to a very great extent been fully realized. In the early 1980s it became realistic to talk in terms of aiming to achieve a single market which would require an even more extensive common legal order, and a timetable to achieve that, by the end of 1992, was laid down. In the white paper of 1984 the Commission of the European Communities proposed over 300 legislative texts (of which two thirds have already been adopted) for achieving this. They cover such diverse subjects as laws on the permissible noise levels for lawnmowers, and the scope of banking activity (including what is in effect a single banking licence). Here a first important conceptual difference becomes evident. The EC is not only an economic community. It is also a community of law. It creates law through regulations and directives, and the directives are intended to harmonize the national laws.

A second important conceptual difference follows from the intention to create an internal market. The harmonization of laws relates not only to cross-border transactions, as in the case of the United Nations Sales Convention. Instead the legal acts undertaken by EC are intended to govern cross-border as well as domestic transactions in the same way.

A third important difference follows from the four freedoms described. The EC laws apply not only to trade, but also to establishment.

The purpose of legislation at EC level is to remove differences or fill gaps where common or compatible legal rules are necessary to achieve the aim of creating a single area for economic activity. This goes a long way beyond the international trade concepts of harmonization and "national treatment", because it implies in the case of EC the mutual recognition by each State of the legal order of the others where there is not a comprehensive set of EC rules. This is the concept of mutual recognition.

And here we should add a fourth important conceptual difference: the authority of the European Community to harmonize the law is not restricted to commercial law. In contrast, among the 300 legal acts already mentioned none of these deals with commercial law in a strict sense. Instead, they deal with the harmonization of administrative law reaching from safety standards to banking and insurance supervisory law, and from environmental law to the harmonization of tax law. On the other side, the independent law-making powers of EC cover all economically relevant areas of private law, such as consumer protection law, company law and labour law. Therefore, EC is not only a community of economically relevant private law.

We now propose to examine some features which are similar. As a matter of general approach or philosophy we have the strong impression that UNCITRAL seeks to harmonize those particular rules on which it is necessary to achieve a common approach. This may seem self-evident, but is an important point. In EC we have several phrases to describe the idea; they include the concept of key issues, subsidiarity and minimum harmonization. We would like to draw some parallels between the approach leading to the newly adopted UNCITRAL Model Law on International Credit Transfers and that of a typical piece of EC legislation in the banking field. The Model Law was conceived after a very thorough process of identifying the key issues, a process which continued throughout as some issues were discarded while others were introduced. It is fair to say that no legal issue which is not essential to the process of successfully effecting a credit transfer can be found in it. The same intellectual process guided the EC banking directives.

The term subsidiarity is much employed in the EC these days, and is now formally introduced into the EEC Treaty, but is not a new concept. In EC it means leaving rule-making to the lowest level which is compatible with the object in view. The Model Law on Credit Transfers would also pass this test by providing for the widest possible level of rule-making at the level of the individual parties themselves; it also recognizes "groups" of parties - funds transfer systems - and their collective rule-making role, and of course the level of the local law applicable. A further similarity of approach can be seen in the concept of minimum harmonization. The technique has sometimes been misunderstood in Europe; it does not mean enacting a low legal standard. On the contrary, it means setting a good legal standard, but one which allows for the existence or development of a higher standard of, for example, legal certainty or safeguards. We can think of several examples of this principle in use in the UNCITRAL Model Law, which there is no time to go into now.

We would like to finish by saying that the short answer to the question why the work of UNCITRAL is relevant to the law-making process in EC could be that it is (among others already mentioned) a matter of trade interests. If around half of the EC trade is internal, around half is external. The European Commission has never failed to emphasize that the external dimension of harmonization should be taken into account, and a particular point has been made about the relevance of the work of UNCITRAL on credit transfers in the recent EC communication and work programme on cross-border payments. Indeed, we would like to quote to you from two of the three paragraphs in which UNCITRAL is mentioned. Under the heading "legal issues", the report states that "a Commission working party will be established in the second half of 1992 on the basis in particular of the UNCITRAL conclusions and taking into account relevant aspects of consumer protection in order to undertake this task". Under the heading "third country dimension", it is stated that: "The steps outlined above, and others recommended in this report, would be compatible and where possible synchronized with those taken outside the Community. Continued dialogue and liaison with key third country "players" and international organizations and bodies (e.g. the Group of Ten major industrialized countries, the International Organization for Standardization, UNCITRAL) will be necessary for this to come about."

Notes

[1]*Yearbook of the United Nations Commission on International Trade Law 1968-1970* (United Nations publication, sales No. E.71.V.1), part one, chap. II, sect. B, para. 218.

[2]Ibid., para. 221.

[3]*Official Records of the General Assembly, Twenty-third Session, Supplement No. 18* (A/7618), chap. II, sect. A, para. 38.

[4]See article 177 of the EEC Treaty.

[5]See the Protocol on the Interpretation of the 1968 Convention by the European Court, signed at Luxembourg on 3 June 1971, Official Journal of the European Communities, No. L 204 (2 August 1975), p. 28. The Protocol, originally signed by the six founding EEC member States, was subsequently accepted with no substantial modifications by the other member States on the occasion of their accession to the Convention.

[6]See the two Protocols on the Interpretation of the 1980 Convention by the European Court, signed at Brussels on 19 December 1988.

[7]On the legal effects of the preliminary rulings of the European Court in general, see J. Schwarze, "The role of the European Court of Justice (ECJ) in the interpretation of uniform law among the member States of

the European Communities (EC)", UNIDROIT, ed., *International Uniform Law in Practice* (Dobbs Ferry, Oceana, 1988), p. 193 ff., pp. 219-221 (with references to pronouncements of the European Court itself).

Sometimes the indirect effects of the decisions rendered by the European Court referred to in the text are expressly stated in the law: thus, the 1982 Civil Jurisdiction and Judgments Act, which implemented the EEC Convention on Jurisdiction and Judgments in the United Kingdom, in section 3(1) provides that "any question as to the meaning or effect of any provision of the Conventions shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court".

[8]For further details on this point, see L. N. Brown and F. G. Jacobs, *The Court of Justice of the European Communities* (London, Street and Maxwell, 1983), p. 282 ff.

[9]See on this point, also for further references of both case law and legal writings, L. N. Brown and F. G. Jacobs, *op.cit.*, p. 239 ff; still with respect to English courts, see more recently, "In re State of Norway's Application (No.2)(C.A.)", vol. 3 (1988), p. 603; The "Atlantic Emperor", *Lloyd's Law Reports* (London, Lloyd's of London Press Ltd, 1989) vol. I, p. 548.

[10]Up to and including 1987, when the 1971 Protocol was still in force only between the six original Contracting States, the Court had already rendered judgments in some 50 proceedings; see E. Jayme and Ch. Kohler, "Das Internationale Privat- und Verfahrensrecht der Europäischen Gemeinschaft - Jüngste Entwicklungen", *IPRax*, No. 3 (1988), p. 133 ff (p. 136).

[11]Ch. Kohler, "Fortbildung des Brüsseler Gerichtsstands- und Vollstreckungsübereinkommens durch den Europäischen Gerichtshof: Freizügigkeit oder effektiver Rechtsschutz?", F. Schwindt ed., *Europarecht, Internationales Privatrecht, Rechtsvergleichung* (Wien, Österreichische Akademie der Wissenschaften, 1988), p. 125 ff. (142 ff.), who in this respect refers in particular to the decisions of the European Court restricting the scope of article 5(1) (special jurisdiction of the place of performance of the obligation in question in contractual matters) and of article 5(5) (special jurisdiction of the place in which the branch, agency, or other establishment is situated in disputes arising out of the operations of such a branch, agency or establishment).

[12]See again Ch. Kohler, *op. cit.*, p. 146 ff., with references to decisions in favour of a liberal interpretation of provisions safeguarding the procedural rights of the defendant, and to decisions recommending a narrow interpretation of the formal requirements of jurisdiction agreements in derogation of the general jurisdiction of the court of the domicile of the defendant.

[13]See more in detail and also for the necessary references of the various decisions, P. A. Stone, "Civil jurisdiction and judgments - recent decisions of the European Court", F. D. Rose, ed., *Lloyd's Maritime and Commercial Law Quarterly* (London, Lloyd's of London Press Ltd., 1988), part 3, p. 383 ff.

[14]On this point, see also for further references, J. Kropholler, *Internationales Einheitsrecht* (1975), p. 258 ff.; and, most recently, F. Enderlein, "Uniform law and its application by judges and arbitrators", UNIDROIT, ed. *International Uniform Law in Practice* (Dobbs Ferry, Oceana, 1988), p. 329 ff.

[15]See e.g., the impressive examples given by M.F. Sturley, "International uniform laws in national courts: the influence of domestic law in conflicts of interpretation", *Virginia Journal of International Law*, vol. 27 (1987), p. 729 ff., in relation to the Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules").

[16]For examples of decisions of this kind rendered by courts of different countries, see O. C. Giles, *Uniform Commercial Law* (Leyden, A. W. Sijthoff, 1970) p. 35 ff.; for a more recent survey see the National Reports to the XIIth International Congress of Comparative Law (Sydney, 1986) on the topic "Methodology in applying uniform law for international sales under the United Nations Convention (Vienna 1980)" of e.g. Australia (K. Sutton), Canada (J. S. Ziegel), Germany (P. Schlechtriem), Finland (L. Sevon), Italy (M. J. Bonell), Netherlands (F. van der Velden), New Zealand (J. H. Farrar) and United Kingdom (M. Clark).

[17]See "Report of the United Nations Commission on International Trade Law on the work of its twenty-first session", New York 11-22 April 1988 (A/43/17), paras. 98-108. For a more far-reaching proposal, formulated for the first time at the UNIDROIT Congress in 1987 and which however did not receive sufficient support at the above-mentioned session of UNCITRAL, see M. J. Bonell, "A proposal for the establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention", UNIDROIT, ed., *International Uniform Law in Practice* (Dobbs Ferry, Oceana, 1988), p. 241 ff.

[18]For the complete collection of the travaux préparatoires published between 1929 and 1957, see *UNDIDROIT Etude IV, Loi internationale sur la vente*, documents. 1-105. As to the comparative studies carried out by the Max-Planck Institut, they are reproduced in E. Rabel, *Das Recht des Warenkaufs*, 2 vols. (Berlin, de Gruyter & Co., 1939/1957).

[19]For further details with respect to both the basic ideas which led first to the preparation of the two separate drafts and ultimately to the adoption of the 1983 Geneva Convention, see M. J. Bonell, "The 1983 Geneva Convention on Agency in the International Sale of Goods", *The American Journal of Comparative Law*, vol. 32 (1984), p. 717.

[20]See for the Brussels Jurisdiction and Judgments Convention the report by P. Jenard on the 1968 Convention, and the report by P. Schlosser on the Accession Convention, *Official Journal of the European Communities*, No. C 59 (5 March 1979), p. 1 ff. and p. 71 ff. respectively. As to the Rome Convention on the law applicable to contractual obligations, see the Report on the Convention by M. Giuliano and P. Lagarde, *Official Journal of the European Communities*, No. C 282/18, 31 October 1980.

A recognition of the special status of these reports may be seen in the fact that the English Acts implementing the two Conventions expressly refer to them as a means of interpretation: see article 3(3) of the Civil Jurisdiction and Judgments Act 1982, and article 3(3) of the Contracts Jurisdiction and Judgments Act 1982, and article 3(3) of the Contracts (Applicable Law) Act 1990.

[21]On this point, see in general R. David *et al*, eds. *International Encyclopedia of Comparative Law*, vol. II, chap. 5, "The international unification of private law" (Tübingen, Mohr, 1971), p. 67 ff.; H. Kötz, "Gemeineuropäisches Zivilrecht", *Festschrift für Konrad Zweigert* (Tübingen, Mohr, 1981), p. 481 ff. (p. 486 ff.); A. Flessner, "Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 56 (1992), p. 243 ff.

[22]For some significant examples in the field of contract law see E. A. Farnsworth, "Ingredients in the redaction of the restatement (second) of contracts", *Columbia Law Review*, vol. 81 (1981), p. 1 ff.

[23]See O. Lando, "European contract law", *American Journal of Comparative Law*", vol. 31 (1983), p. 653 ff. On the latest developments of the project, see U. Drobing, "Ein Vertragsrecht für Europa", *Festschrift für Ernst Steindorff* (Berlin, de Gruyter, 1990), p. 1141 ff.

[24]See, M. J. Bonell, "Das UNIDROIT-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 56 (1992), p. 274 ff.

[25]The Working Group is composed of P. Brazil (Canberra); P. A. Crépeau (Montreal); S. K. Date-Bah (Accra-London); A. Di Majo (Rome); U. Drobing (Hamburg); E. A. Farnsworth (New York); M. Fontaine (Louvain-la-Neuve); M. P. Furmston (Bristol); A. S. Hartkamp (The Hague); A. S. Komarov (Moscow); O. Lando (Copenhagen); D. Maskow (Berlin); D. Tallon (Paris); D. Huand (Beijing). In the past the Group benefited also from the contributions of C. M. Bianca (Rome); J. Rajski (Warsaw); T. Wade (The Hague) and Z. Wang (Beijing).

The author of this paper coordinates the work of the Group; Secretary to the Group is L. Peters of the UNIDROIT Secretariat.

[26]See most recently H. J. Mertens, "Nichtlegislatorische Rechtsvereinheitlichung durch transnationales Wirtschaftsrecht und Rechtsbegriff", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 56 (1992), p. 219 ff.

[27]See M. J. Bonell, "Le regole oggettive del commercio internazinale"; *clausole tipiche e condizioni generali* (Milano, Giuffre, 1976), p. 3 ff.

[28]For the reasons which are behind this position see J. Carver, "Uniform law and its impact on business circles: the experience of the legal profession", UNDIDROIT, ed., *International Uniform Law in Practice,* (Dobbs Ferry, N.Y., Oceana, 1988) p. 411 ff.

[29]According to the General Assembly resolution 2205 (XXI) the Commission's task is that of furthering the unification of the law of international trade not only by "preparing or promoting the adoption of new international conventions, model laws and uniform laws", but also by "promoting the codification and wider acceptance of international trade terms, provisions, customs and practice, in collaboration, where appropriate, with the organizations operating in this field".

[30]See, e.g., R. David *et al.*, eds. *International Encyclopedia of Comparative Law*, vol. II, chap. 5, "The international unification of private law" (Tübingen, Mohr, 1971), p. 95.

[31]International Institute for the Unification of Private Law, *Unification of Law - Year-book 1959* (Rome, Editions "UNIDROIT, 1960), pp. 300-333.

[32]See A/CN.9/267; *Yearbook of the United Nations Commission on International Trade Law, 1985* (United Nations publication, sales No. E.87.V.4), pp. 388-390.

[33]*H. Wehberg, Ein internationaler Gerichtshof für Privatklagen* (Berlin, 1911), p. 23.

[34]League of Nations, Advisory Committee of Jurists, "Documents relating to the existing plans for the establishment of the Permanent Court of International Justice" (1920), p. 335.

[35]League of Nations, *Treaty Series*, vol. 167, p. 341; M. O. Hudson, *International Legislation* vol. 5 (1936), p. 933. The Protocol entered into force in 1936.

[36]ICJ Reports, 1958, p. 55.

[37]*Annuaire de l'Institut de droit international*, 1929, vol. II, p. 311.

[38]*Journal du droit international*, vol. 62, (1935), pp. 775, 792 and 793.

[39]Report of the 38th Conference of the International Law Association (1934), pp. 71-75, 110-112.

[40]Interparliamentary Union, Report of the 32nd Conference, pp. 26, 38, 203-219, 375, 400, 597-600 and 609-610.

[41]American Bar Association, Proceedings of the Section of International and Comparative Law (Boston, 1953), pp. 100-103. For a summary of these proposals, see L. B. Sohn, "Proposals for the establishment of a system of international tribunals", M. Domke, ed., *International Trade Arbitration* (1958), pp. 63, 71-74.

[42]André-Prudhomme, "Détermination de la juridiction compétente à l'égard des litiges nés à l'occasion des contrats conclus entre Etats et ressortisants d'un autre Etat", vol. 53 (1926), *Journal du droit international* (1926), pp. 311-317.

[43]*Annuario di diritto comparato e di studi legislativi*, vol. 14 (2nd sec., 1939), pp. 381-437. See also, among the many writings on this subject, Ch. Carabiber, *Les juridictions internationales de droit privé* (Neuchatel, Editions de la Bacounière, 1936), pp. 297-309.

[44]See the article by Dean P. Chauveau, *Revue française de droit aérien,* vol. 9 (1955), p. 465; and the article by Drion, *Journal of Air Law and Commerce,* vol. 19 (1952), p. 423, which envisaged the Council of ICAO requesting the International Court of Justice for advisory opinions on questions of interpretation of private air law conventions.

[45]See articles by Thompson, *Proceedings of the American Society of International Law*, vol. 34 (1940) p. 1; and by Turlington, *Georgetown Law Journal*, vol. 33 (1945), p. 373.

[46]See UNIDROIT Study XX, document 6.

[47]League of Nations, document C.1145.M.93.1939.II.A. See also M. O. Hudson, *International Tribunals: Past & Future* (1944), pp. 210-212.

[48]See. e.g., International Law Association, *Report of the 50th Conference* (1963), p. 133; Snyder, "Foreign investment protection," *Journal of Public Law*, vol. 11 (1962), pp. 191, 201-235 (draft convention for a system of regional arbitral tribunals with a Supreme Arbitral Tribunal).

[49]United Nations, *The Law of the Sea - United Nations Convention on the Law of the Sea, with Index and Final Act of the Third United Nations Conference on the Law of the Sea.* United Nations publication, Sales No. E.83.V.5; *International Legal Materials* - Documents 1982, vol. 21 (Washington D.C., American Society of International Law, 1983), p. 1261. See, in particular, article 187.

[50]See A/CONF.151/PC/102, pp. 36-38.

[51]J. C. Sauveplanne, "Mesures tendant à concilier les divergences et à résoudre ces divergences par voie juridictionnelle", UNIDROIT, *Unification of Law - Year-book 1959* (Rome, Editions "UNIDROIT", 1960), p. 287.

III. From goods to services

A. Sale of Goods

1. United Nations Convention on Contracts for the International Sale of Goods: an overview and consideration of some practical issues relating to it

S. KOFI DATE-BAH
Commonwealth Secretariat, London

History of the Convention

The United Nations Convention on Contracts for the International Sale of Goods, adopted at Vienna on 11 April 1980 and opened for signature on the same day, is the culmination of half a century of scholarly endeavour to unify international sales law. The roots of the Convention go as far back as April 1930, when UNIDROIT decided to begin work on a uniform law on the international sale of goods. Work based on initial drafts produced under the auspices of UNIDROIT culminated in the 1964 Hague Conventions. The Government of the Netherlands called a diplomatic conference at the Hague in 1964 which adopted: the Convention relating to a Uniform Law on the International Sale of Goods; and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.

To these conventions were annexed, respectively, a Uniform Law on the International Sale of Goods (ULIS) and a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). Upon a State ratifying these conventions, it assumed an obligation to incorporate into its legislation the uniform laws annexed to the conventions.

However, the Hague Conventions never achieved wide acceptance, probably because of the Eurocentric nature of the course of negotiations leading to their adoption. After UNCITRAL had been established by a General Assembly resolution of 17 December 1966, which gave as the object of the Commission "the promotion of the progressive harmonization and unification of the law of international trade", UNCITRAL at its first session in 1968 adopted as one of its priority items the unification of the law of international sale of goods.

It may be asked: What was the need for according to this item priority? One of the recitals to the United Nations Convention on Contracts for the International Sale of Goods gives a fair answer to this question. The recital states that:

> "The states parties to this convention, . . . Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of the international trade . . ."

The facilitation of international trade through diminishing the need of traders to resort to foreign and incomprehensible legal systems in order to ascertain their legal rights is the rationale for the effort

to devise a uniform law on contracts for the international sale of goods which it is hoped can become of universal application.

Following the adoption of unification of the law of international sale of goods by UNCITRAL as one of its priority items in 1968, it decided in 1969, at its second session, to set up a working group to ascertain in relation to the Hague conventions: "which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose . . .".

The United Nations Sales Convention is largely the product of this working group, which after seven sessions produced a draft Convention on the International Sale of Goods, which was such a thorough revision of ULIS as to qualify for characterization as a new text. This draft Convention was adopted by UNCITRAL in 1977 at its tenth session, with some amendments made during that session. The working group held two more sessions, after which it produced rules on the formation of contracts for the international sale of goods. Again, in pursuing its mandate to ascertain which modifications of ULF might make it capable of wider acceptance by countries of different legal, social and economic systems or whether to elaborate a new text for the same purpose, the Working Group ended up proposing what was substantially a new text, although it had intellectual links with ULF.

I was privileged to chair the session of UNCITRAL in 1978 at which these rules on formation were adopted. At the same session, UNCITRAL decided to integrate the rules on formation with the text of the draft Convention on International Sale of Goods adopted in 1977. Thus, instead of the two conventions adopted at the Hague dealing separately with the rules on formation and rules on sales, UNCITRAL broke with that scheme of things to adopt one comprehensive convention comprising the rules on both formation and sales. It was this comprehensive draft Convention on Contracts for the International Sale of Goods that the General Assembly, on 16 December 1978, referred to a conference of plenipotentiaries to be convened in 1980. And it was that conference of plenipotentiaries which concluded its work on 11 April 1980 adopting a United Nations Convention on Contracts for the International Sale of Goods in a single original with the Arabic, Chinese, English, French, Russian and Spanish texts being equally authentic.

Highlights of the Convention

Structure of the Convention

The Convention is divided into four parts. Part I deals with the sphere of application of the Convention and its general provisions. Part II contains the rules on formation of contracts for the international sale of goods, while Part III deals with the substantive rights and obligations of buyers and sellers arising from contracts for the international sale of goods. Part IV contains the final clauses of the Convention dealing with matters such as ratification, declarations and reservations. One of the articles in part IV (article 92) permits a contracting State to declare at the time of signature, ratification or accession that it will not be bound by part II or by part III of the Convention. In other words, a State may choose to be bound by only the rules governing formation of contracts or by only the rules on sales. However, if there is a ratification *simpliciter* without any such declaration, then the Convention in its entirety will be binding on the contracting State.

Sphere of application

Chapter I of part I of the Convention regulates the sphere of application of the Convention. Article 1 contains the basic provision relating thereto. It states that the Convention applies to contracts of sale of goods between parties whose places of business are in different States, either when the

States are contracting States or when the rules of private international law lead to the application of the law of a contracting State. With this basic approach may be contrasted that adopted in ULIS where, in article 1, the rules of private international law were excluded.

Under ULIS, if any of certain specified criteria were satisfied, then the courts of the contracting State were to apply ULIS to the transaction concerned, whether or not there was a significant connection between the contract of sale and a contracting State. In other words, the rules of private international law were excluded.

As this approach was found objectionable by many States, the United Nations Sales Convention adopts the different approach of authorizing the courts of a contracting State to apply the Convention to contracts of sale of goods between parties whose places of business are in different States only if those states are contracting States or, alternatively, if the rules of private international law lead to the application of the law of a contracting State. Thus, the Convention is automatically applied only if the place of business of both the buyer and the seller are in different contracting States. Otherwise, there is need to resort to conflicts rules before determining the applicability of the Convention. Thus the Convention is likely to be applied to a sales contract only when there is a connection between the sales contract and a Contracting State.

It should be noted, however, that article 1(1)(b) (which provides for the application of the Convention when the rules of private international law lead to the application of the law of a contracting State) implies that the Convention may be applied to a transaction, even where both parties to it have their places of business in a State which is not a contracting State. However, the selection of the law of a contracting State in such a scenario by the application of conflicts rules of the forum State will usually indicate some connection between the law of the contracting State and the transaction in question. An important illustration of such a connection would be the express choice by the parties of the law of a contracting State. Where there is such an express choice of the law of a contracting State by the parties to the sales transaction, the Convention will automatically apply to their contract even if either or both parties do not have their places of business within the contracting State.

It should be pointed out, while article 1(1)(b) is under discussion, that article 95 of the Convention permits any State to make a reservation under the Convention at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (l)(b) of article 1.

Article 2 specifically excludes certain types of sales from the sphere of application of the Convention. The first of such exclusions is consumer sales. It provides that the Convention does not apply to sales "of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use". The rationale for this exclusion is that the Convention is meant to govern contracts principally between traders. It has not been designed to regulate the relatively small volume of international sales to consumers. In most, if not all, national jurisdictions, legislation provides for various kinds of consumer protection. If the Convention were to cover such consumer sales, there would have been need to devise appropriate provisions for the protection of consumers in the wide range of jurisdictions represented by the contracting States. This would have been too complicated a task. Accordingly, consumer sales, even when they are international, will continue to be regulated by the national rules.

For similar reasons, article 5 of the Convention excludes from its sphere of application the area referred to in some jurisdictions as "products liability". It provides that the Convention is not to apply to the liability of the seller for death or personal injury caused by the goods to any person. This

provision enables the Convention to avoid tackling the complicated task of dealing with product liability issues in an international context. National rules will continue to regulate such issues.

The other exclusions effected by article 2 are: (a) auction sales; (b) sales on execution or otherwise by authority of law; (c) sales of securities, negotiable instruments or money; (d) sales of ships, vessels, hovercraft or aircraft; and (e) sales of electricity. These are all outside the ambit of the Convention for various reasons. The reason for the exclusion of the objects listed under (c), (d) and (e) relate to doubts in some national jurisdictions as to whether these are goods.

Finally, it should be mentioned that the Convention (in article 4) expressly excludes from its ambit issues relating to: the validity of the contract or of any of its provisions or of any usage; and the effect which the contract may have on the property in the goods sold. These issues are left to be regulated by national rules.

Non-mandatory nature of the Convention

The principle of the autonomy of the parties is explicitly preserved in article 6, which provides that:

> "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."

Thus, even if a sales contract would appear to come within the ambit of the Convention as specified in article 1, the parties may nevertheless negate the application of the Convention to their transaction, either explicitly or implicitly. Even when the whole Convention has not been excluded by them, the parties to a particular sales contract may exclude particular provisions of the Convention, with the exception of article 12. Article 12 was a concession to the former Union of Soviet Socialist Republics (USSR) in UNCITRAL and at the Vienna diplomatic conference. The law of the former USSR, according to its representatives, required that before any of its foreign trade organizations was bound by any contract, that contract had to be in writing and signed by representatives whose authority so to sign was publicly on file. This mandatory requirement of writing was inconsistent with the national law of most legal systems. This insistence by the former USSR on a requirement of writing for contracts for the international sale of goods could not therefore be accepted as a general rule in the Convention. The general rule was in fact expressed in article 11 in the following terms:

> "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

However, to accommodate the former USSR and to enable it to become a contracting party, in spite of the strict insistence of its internal law on the requirement of writing, it was decided to insert article 12 into the Convention enabling a State to make a declaration that the provisions of the Convention permitting contracts to be made otherwise than in writing are not to apply to contracts with a party whose place of business is in the territory of such declaring State. In order to preserve the substance of this concession, it was necessary to take away the right of parties to derogate from article 12.

Apart from this one mandatory requirement, the Convention gives wide recognition to the principle of party autonomy. It is to be remembered, however, that this is within the context of national rules on validity, since validity questions are outside the ambit of the Convention.

Practical aspects of the rules on formation

Revocability of offers

Among the rules on formation in the Convention which stand out as deserving of comment because of the practical impact is the rule on the revocability of offers, which is contained in article 16 of the Convention. This article follows a common law approach, in contrast to the civil law systems, where, while some systems (e.g. the French) may allow revocation, particularly where the offer states a fixed time for acceptance, such revocation results in the offeror being obliged to indemnify the offeree or to pay damages,[1] while in other systems (for instance, the German) an offer is binding unless the offeror stated that the offer was revocable. Because article 16 adopts a rule which permits revocation of an offer by the offeror with impunity, traders and lawyers from legal systems which restrict the revocability of offers need to take note of it and take it into account in conducting their international sales transactions.

Article 16(1) provides that:

> "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance."

Thus the article makes provision not only for the revocability of offers, but also for an acceptance by dispatch rule, which is also a common law approach. The acceptance by dispatch rule shortens the time available to the offeror for revocation in contracts concluded by mail, in that as soon as the offeree dispatches his letter of acceptance, even though this fact may be unknown to the offeror, a contract is concluded and any purported subsequent revocation by the offeror would be ineffective. In many civil law countries, by contrast, the period within which revocation is possible would last until the letter of acceptance reaches the offeror. In other words, the receipt theory is applied.

The general rule of revocability of offers contained in article 16(1) is qualified by article 16(2), with the following provisos: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

The qualification in paragraph (a) of article 16 (2) encompasses two kinds of situations: (i) where the offeror promises not to revoke his offer during a fixed period (the firm offer situation); or (ii) where the offeror indicates that his offer will terminate after a certain period of time, without promising not to revoke his offer during this period (the lapsed offer situation).

The paragraph however fails to distinguish between the two kinds of situations. It lumps them together and purports to make the offer irrevocable in both situations. At the diplomatic conference, the common law delegations rightly argued that this provision constituted a trap for traders from common law countries. For instance, the United Kingdom delegate argued:

> ". . . that traders in common law countries would be exposed to a trap if, under the convention, indicating a fixed period without any mention of irrevocability brought about a situation where an offer was deemed to be irrevocable. They should be protected by a provision stating that such was not the case unless there was some other clear indication that the offer was intended to be irrevocable."

However, this argument failed to convince the conference to amend the present text of the Convention quoted above. The reason is the civil law notion of the irrevocability of the offer. The

civil law delegations believed they had made a big enough concession by accepting the general principle of the revocability of the offer. Therefore the common law countries should also make the concession of accepting the irrevocability of the offer, once it is coupled with an indication of a fixed time for acceptance, even where the offeror intended merely to fix a time for lapse. Where the offeror promises not to revoke his offer during a specified period, that poses no problem. The problem arises only when the intention of the offeror is to fix a time period for lapse; in that situation, the present language of the text is a trap for traders in common law countries, which should be noted by their lawyers.

Paragraph (b) of article 16(2) indicates that there may be situations where, without the offeror fixing any time for accepting or promising not to revoke his offer, the circumstances may be such that it is reasonable for the offeree to treat the offer as irrevocable in order to carry out certain acts in reliance on the offer. The commentary prepared by the secretariat of UNCITRAL on this paragraph provides insight into it as follows:

> "Article [16(2)(b)] provides that the offeror cannot revoke his offer if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination."

Acceptance in prescribed limited circumstances need not be a mirror image of an offer

One of the rules on formation which generated considerable controversy in the discussions preceding the adoption of the Vienna Convention is that relating to a purported acceptance which contains additions, limitations or other modifications to the offer it is intended to be responding to. Because of the impact of this rule on the "battle of forms" between international sellers and buyers, it is a rule of considerable practical import and deserves some consideration.

I now refer to article 19 of the Convention. This article purports to modify the so-called mirror-image rule of acceptance, but only to a very limited extent. The traditional mirror-image rule is embodied in paragraph (1), which in effect requires an acceptance to be a mirror-image of an offer. If the purported acceptance contains any terms different from those of the offer, then it is to be considered a counter-offer.

Paragraph (2) is intended to qualify this strict rule. Paragraph (1) probably represents traditional contract doctrine in all advanced legal systems.[2] At the Vienna diplomatic conference, delegations subscribing to the traditional school of thought attempted to delete paragraphs (2) and (3), but this effort was defeated by the reform-minded delegations.

When paragraph (2) of article 19 was adopted in the UNCITRAL working group at the instigation of the reformers, the traditionalists had a predecessor of paragraph (3) inserted to ensure that paragraph (2) was not given a broad scope. The effect of paragraph (3) is that most of the usual clauses that in practice will purport to vary the terms of an offer will be regarded as materially altering the terms of the offer and therefore constituting a counter-offer.

Paragraph (2) is thus a very limited exception to the mirror-image rule. However, if the acceptance, though containing additional terms, does not materially alter the terms of the offer, then unless the offeror, without undue delay, objects to the discrepancy or dispatches a notice to that effect, the acceptance will create a contract. The terms of that contract will be those of the offer as modified by

the additional terms contained in the acceptance. However, if the offeror objects, then no contract is formed.

The practical importance of these rules is in the so-called battle of forms, in which typically a buyer will send his printed purchase order containing the terms of his offer in response to the seller's printed catalogue or price-list. In accepting this offer, the seller may in turn send his printed acknowledgement of order, containing printed terms which may not exactly match the offeror's offer, although agreement may have been reached on the price and quantity of the goods to be sold.

Where no disputes arise under transactions conducted under such conflicting forms, the parties may believe they have contracts. But where disputes arise and there is a legal analysis of their transaction, the conclusion may sometimes have to be that there is no contract.

Under article 19 of the Convention, if, before any performance has been rendered under an apparent contract concluded through conflicting forms, one party relies on a discrepancy for resigning from the bargain on the ground that no contract has been formed, then the effect of paragraph (1) is to allow him to do so, unless the limited exception in paragraph (2) is applicable, or unless the courts in the forum State apply some of the judicial techniques developed to mitigate the harsh effects of the mirror-image rule, such as interpreting the additional terms as mere suggestions separate from the acceptance, which the offeror could accept or reject, or alternatively to interpret the additional terms as no more than what was already impliedly contained in the offer by usage or by an implied term.

Where, however, the dispute arises after there has been performance by both parties, a legal analysis of the battle-of-forms scenario usually leads to the conclusion that there is a contract. What is in issue, however, are the terms of that contract. Which of the conflicting terms in the two forms is to be regarded as prevailing? The traditional mirror-image rule in paragraph (1) of article 19 will result in the so-called last shot in the battle of forms prevailing. According to this analysis, each subsequent form is a counter-offer if it contains terms different from those in the previous one, subject of course to paragraph (2) of the article. The terms of the contract will thus be those of the last counter-offer, which is then accepted by the offeree's actual performance. Since, in the usual scenario which I have outlined, it will be the seller who sends his printed acknowledgement, he gets to fire the last shot and his terms will prevail, unless paragraph (2) of article 19 can be invoked.

Because paragraph (2) is only applicable if the acceptance does not materially alter the terms of the offer, in most cases it will not apply, since in practice the seller's acknowledgement will contain terms which do materially alter the terms of the offer.

Practical aspects of the obligations of buyers and sellers

In discussing part III of the Convention, which deals with the substantive obligations of buyers and sellers, I will concentrate on the remedies available for breach of contract by either party. This is because from the practical point of view what matters to an aggrieved party is the redress that the Convention will enable him to seek where the other party has not fulfilled his obligations. The scheme in the Convention relating to remedies is in marked contrast to that obtaining under ULIS, which distinguishes between several types of breach and correspondingly divides up the available remedies. Under the Convention, there are only two basic types of breach: breach by the seller and breach by the buyer, with uniform remedies attaching to both types of breach. These will now be examined.

As already indicated, the approach adopted by UNCITRAL and accepted at Vienna was to bring together in one area of the Convention, namely part III, chapter II, section III, in relation to breach

by the seller, and in part III, chapter III, section III, in relation to breach by the buyer, all the rules concerning remedies for such breach. This comprehensive setting-out of the remedial rules is preceded by a comprehensive listing of the obligations of the seller and of the buyer, respectively.

Let us then first consider the remedies available to the buyer for the seller's breach of contract. These remedies may be summarized as follows: (i) specific performance; (ii) avoidance; (iii) damages; (iv) reduction in price; (v) the giving of a notice fixing an additional period for performance; and (vi) cure by the seller after the date of delivery.

Conversely, if a buyer fails to perform his obligations under the contract or the Convention, the seller's remedies may be summarized as follows: (i) specific performance; (ii) avoidance; (iii) damages; and (iv) the giving of a notice fixing an additional period for performance.

These remedies will now be discussed briefly. It will be noticed that both the buyer and the seller have the right to require each other to perform their obligations under the contract and the Convention.

The Convention thus asserts the primacy of specific relief, in contrast with the common-law approach of usually giving to a party whose contract of sale has been breached only damages, or damages coupled with the right to repudiate. Under the Convention, the innocent party can insist on performance by the party in breach. However, to accommodate courts in common law jurisdictions, article 28 was included in the Convention. It reads as follows:

> "If in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

Thus, if a court in a common law jurisdiction is required by a party to give it specific relief in circumstances where under the court's domestic law such relief would not be available, it can refuse to give such relief.

The drastic remedy of avoidance may be resorted to by a buyer or a seller if the other party has committed a fundamental breach within the meaning of the Convention. Under the Convention a breach is fundamental ". . . if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

Where a breach of contract is not fundamental in the sense explained above, it can still lead to an avoidance by the innocent party, if the innocent party fixes an additional period of time under article 47 (in the case of a buyer) or under article 63 (in the case of a seller) within which the party in breach is to perform his obligations. If at the end of the additional period of time, the party in breach has still not performed, then the innocent party may terminate the contract by avoidance.

The remedy of price reduction is one that is available only to the buyer. It is provided for in article 50 of the Convention in the following terms:

> "If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming

goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price."

The remedy is thus distinct from damages which are regulated by articles 74 to 77. It is a non-judicial remedy in the sense that it may be resorted to unilaterally without a prior judicial adjudication. However, if the seller considers that it has been wrongfully invoked, he may go to court to challenge the price reduction or the quantum of it. The non-judicial character of the remedy of reduction of price would seem to be the main difference between it and the remedy of damages.

The remedy of damages is familiar to lawyers from all legal systems, and therefore I will not dwell on it, but pass on to the so-called right to cure, which, though not strictly speaking a remedy, has an effect similar to a remedy. Article 48 authorizes a seller, even after the date for delivery, to remedy or "cure", at his own expense, any failure on his part to perform his obligations, provided that he can do so "without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer". This right to cure is however made subject to the buyer's right to claim damages, and also it must be exercised before an avoidance of the contract by the buyer pursuant to article 49. A similar right to cure is conferred by article 37 on the seller, if he has delivered goods before the date for delivery. He is permitted "up to that date [to] deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense."

Conclusion

This presentation has attempted to give an overview of the United Nations Convention on Contracts for the International Sale of Goods, one of the solid achievements of UNCITRAL during its first 25 years. There is little doubt that, to quote the words used at the closure of the Vienna diplomatic conference by the president of the conference "the instrument which had just been signed constituted an enrichment of international trade law." It is hoped that UNCITRAL will continue to enrich international trade law well into the next century.

2. *Novel features of the ICC Incoterms 1990*

JAN RAMBERG
Professor of Private Law, University of Stockholm, Stockholm

Purpose of Incoterms

Trade terms constitute an early example of simplification of commercial practices. By reference to shorthand expressions, such as free on board (FOB) and cost, insurance and freight (CIF), merchants could determine the division of important functions, costs and risks between themselves. Thus, trade terms deal with, *inter alia*: transfer of risk; arranging carriage and insurance; export and import licences and duties; packing and marking of goods; nature and type of documents; checking operations and certificates of the quality and origin of the goods; and notifications of arrangements made.

While such trade terms to a very large extent constitute practical rules for the implementation of the international contract of sale, they do not deal with matters that are to be found in national laws, international conventions or general conditions relating to contracts of sale. With some simplification it could be said that trade terms are of importance in any international contract of sale, while other general rules and conditions - as distinguished from specific terms giving the contracts their individual characteristics - primarily deal with abnormal situations of breaches of contract and unforeseen circumstances.

It goes without saying that the need for unification of the interpretation of trade terms is particularly important. First, the shorthand expressions used by merchants do not specifically spell out the obligations falling upon the seller and the buyer respectively. Second, national laws may differ not only in various details, but even with respect to the fundamental meaning of trade terms. ICC, in the early 1920s, embarked on the task of unification by exploring the meaning of the most important trade terms, and presented the first version of a set of rules for the interpretation of such trade terms as Incoterms 1936. The first version was later followed by Incoterms 1953, Incoterms 1980 and now by the present 1990 version, which recently has been endorsed by UNCITRAL. By referring to Incoterms, merchants could ascertain that the chosen trade term would be interpreted as set forth in Incoterms, and any unpleasant surprise caused by different interpretations under various applicable laws could be avoided.

Thus, at first sight, the legal nature of Incoterms would seem to be of the same kind as a standard contract which could be incorporated by reference. But I think it is true to say that Incoterms, at least in some regions, have now reached the status of an international custom of the trade.

Choice of trade terms

Traditional attraction of shipment contracts

It is probably true to say that most merchants do not analyse the possible effects of choosing one or another trade term, but rather, without much reflection, continue to sell as they and their ancestors have done previously. Trade terms are incorporated into their "trading system", standard conditions and forms. This, however, may well mean that they have to pay more for the goods than is really necessary or, even worse, that they may not reap the full benefit of their bargain.

It is understandable that sellers wish to avoid the risk of circumstances which may occur in the buyers' country and, conversely, that buyers do not wish to take upon themselves the risk for matters which may occur in the sellers' country. This explains the worldwide success of the traditional trade terms cost and freight (CFR), CIF and FOB, where the risk is divided at the ship's rail at the port of shipment. True, the risk of something going wrong during international transport still remains, and, by the above-mentioned trade terms, is placed upon the buyer. But that risk could be shifted to the seller by the trade terms ex-ship and ex-quay.

Governmental policy considerations "buy FOB and sell CIF"

The choice of trade terms may also be greatly influenced by national interests. In many countries, it is important to gain as much foreign currency as possible on exports and to save as much as possible on imports. It may then be tempting to direct domestic merchants to buy on the cheapest offer (usually FOB) and to sell on the most expensive offer (usually CIF). However, this might result in the products of the exporting country simply not being competitive in foreign markets, since a FOB price might have been more competitive. Conversely, the import might be unnecessarily expensive

owing to the fact that a CIF price would have been the better one. In these situations, governmental directions to merchants would, in fact, have the same effect as export and import duties.

Trend towards destination contracts

However, one must not forget that most risks are directly or indirectly related to the price. The more functions and risks the seller accepts, the more expensive his offer becomes. Needless to say, a CIF seller, as compared with a FOB seller, must add the cost of freight and insurance to the FOB price. But he should also include the risk of cost increases between the time of his offer and the time of shipment, unless he has effectively guarded against such cost increases by a proper clause in the contract. For these reasons, it may not be of such great importance where the function or risk is placed. It may well be much more important to ascertain whether the seller or the buyer would obtain the best bargain when arranging the contracts of carriage and insurance. Undoubtedly, a seller with large and regular sales volumes would be able to arrange transport better and cheaper than the occasional buyer of smaller quantities. Consequently, such a seller would be able to quote a more competitive CFR and CIF price than FOB price.

While under the traditional shipment contract the seller is freed in legal terms from further obligations to his buyer upon shipment, commercial factors may well prevent him from making full use of this advantage. A manufacturer who sells goods in a competitive foreign market cannot remain idle if something has happened to the goods after shipment. He must see to it that the goods reach their destination in perfect condition. In fact he may have to go further than this, in view of the necessity to guarantee the condition and performance of the manufactured goods even after they have been delivered to the ultimate consumer. The same is true with respect to erection of plants under so-called turnkey contracts, where the obligations of the seller extend to the country of destination and remain until the plant has been made ready for use and the key has been delivered to the buyer.

The trend towards destination contracts is further evidenced by the addition of one more "delivered" term in Incoterms 1990, namely "delivered duty unpaid" (DDU). This term will enable a seller to arrange for the carriage of the goods to the ultimate destination in the buyer's country but without undertaking the task to pass the goods through customs and paying duties, taxes, value added tax or other official charges payable upon importation. Problems may arise for the seller to arrange on-carriage if the goods are held up by the customs authorities, but, in such a case, Incoterms DDU B.5 stipulates that the buyer must bear "all additional risks of loss of or damage to the goods" incurred by his failure to arrange for customs clearance.

Interrelation between trade terms and other terms of the contract of sale

It is, of course, possible by other terms - usually in the form of general conditions - to reduce the risk arising from a particular trade term. While a CIF seller, as distinguished from a FOB seller, undertakes to arrange for the transport of the goods to the named destination, he would also incur the risk that transport becomes unavailable or, perhaps, considerably more expensive. This is evidenced by the well-known Suez Canal cases (see *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl GmbH* (1962) A.C. 93 and Ramberg, Cancellation of Contracts of Affreightment (1969), pp. 336-355).

The risks falling upon the seller who has undertaken to deliver the goods in the buyer's country are further increased. In particular, it must be observed that the loss of the goods in transit is not simply a matter of insurance, since the loss would also prevent the seller from fulfilling his obligation to deliver the goods in time or at all. Risks such as those now mentioned can, however, be eliminated, or at least reduced, by clauses relating to price adjustment, extension of time for delivery, *force majeure* or other types of clauses giving the seller relief in situations not contemplated at the

time of his offer. It is evident that the position of the respective contracting parties cannot be fully understood merely by an analysis of the chosen trade term; the contract as a whole with all its terms and conditions including the applicable sales law would have to be properly analysed.

Innovations of Incoterms 1990

While the 1980 revision was triggered by the so-called container revolution, and the need to avoid the proliferation of a number of particular container trade terms, the 1990 revision focused on new documentary practices. Also, efforts were made in connection with the 1990 revision to make Incoterms more user-friendly by placing the various obligations falling upon the seller and buyer respectively in a logical and coherent order. The so-called mirror method of presentation was maintained and further developed, so that for each particular function one could easily ascertain what the seller and the buyer respectively would have to do.

From a legal viewpoint, it is important to note that the traditional supremacy of FOB, CFR and CIF contracts will, in modern carriage of general cargo, have to yield to free carrier (FCA), carriage paid to (CPT) and carriage and insurance paid to (CIP) contracts respectively, simply because the traditional function of the ship's rail as the dividing point between the functions of sellers and buyers has been replaced by other points, such as various cargo terminals or other reception facilities. Needless to say, this has also influenced documentation and significantly reduced the use of on-board bills of lading. Thus, even in the carriage of goods by sea, bills of lading have been replaced by non-negotiable sea waybills. While CFR and CIF still require the seller to present on-board bills of lading, CPT and CIP are neutral as far as documentation is concerned; reference is only made to the usual transport document. FOB and FCA really do not require the seller to do anything with respect to carriage except to hand the goods over to the carrier nominated by the buyer. Nevertheless, it is customary practice that, in spite of this, the sellers would book the cargo for carriage. FCA Incoterms 1990 contains a specific rule taking such commercial practice into consideration. Thus, the following is stipulated in FCA A.3:

> "However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer's risk and expense. The seller may decline to make the contract and, if he does, shall promptly notify the buyer accordingly."

In Incoterms 1990, FCA has become perhaps the most important of all trade terms, since it can be used irrespective of the mode of transport. The former trade terms for air and rail carriage - FOB Airport and FOR/FOT - are no longer to be found in Incoterms. As a result of this it was deemed appropriate to spell out in some detail how the goods - in the absence of an agreement to the contrary - are to be handed over for carriage in the respective modes (rail, road, inland waterway, sea, air, unnamed and multimodal transport - see FCA A.4). Thus, the detailed provisions of FCA (A.4) constitute a most important implementation of the general principle of article 67 of the United Nations Sales Convention that the risk passes from seller to buyer "when the goods are handed over to the first carrier".

A further important innovation in Incoterms 1990 has been deemed necessary because of the increasing trend to replace paper documents by electronic data interchange (EDI). Thus, in all A.8 sections of Incoterms (except ex works where normally particular paper documents are not required) reference is made to this new practice by the following text:

"Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message."

While it is easier to replace paper documents by EDI when only the evidentiary function is needed, it becomes quite difficult to imitate the function of the bill of lading as a legal symbol - as it is often said - to represent the goods themselves. As the bill of lading under most national bill-of-lading acts or corresponding provisions of maritime law has been accepted as a negotiable (or in any event quasi-negotiable) transport document, the possession of the original paper document itself is needed for the right to give instructions with respect to the goods in transit and to get them from the carrier at destination. And, this being so, the bill of lading serves a very important function to enable sale of goods while they are still being carried ("sale afloat") by the transfer and endorsement of the original(s) of the bill of lading (the "transferability function"). How can this symbolic legal function of the bill of lading ever be replaced by EDI? Is it possible to achieve a legally valid transfer of rights by private agreement only or is legislation indispensable? The subject of replacing the paper bill of lading by electronic procedures was taken up by the *Comité maritime international* (CMI) and resulted in the 1990 Rules for Electronic Bills of Lading available for voluntary adoption by such parties who have agreed to communicate electronically. The essence of these Rules could be briefly explained as follows.

First, the bill of lading is imitated by recording electronically the usual information, e.g. the leading marks necessary for the identification of the goods and number of packages or pieces, quantity or weight as furnished by the shipper, as well as the apparent order and condition of the goods.

Secondly, the Rules ensure that the usual terms and conditions of the contract of carriage apply as they would have if a bill of lading had been issued. Thus, by reference to the CMI Rules, the mandatory effect of the Hague Rules, Hague/Visby Rules and Hamburg Rules is preserved.

Thirdly, the electronic transfer itself is achieved by connecting the so-called right of control and transfer to a "private key", which is unique to each successive holder and transferable by him. This private key must be separate and distinct from any means used to identify the contract of carriage and any security password or identification used to access the computer network. The carrier is only entitled to take instructions from or deliver the goods to a person able to verify his possession of the right of control and transfer by reference to the private key which could be passed on to a new holder by the carrier's cancellation of the previous key and issuance of a new one to the next holder following a notification and confirmation procedure according to the Rules (Rule 7).

Owing to the cooperation between ICC and CMI it has been possible to envisage the above-mentioned scheme in Incoterms 1990, and this is apparent from the words of the important A.8 provisions of the CFR and CIF terms.

Proof of delivery, transport document or equivalent electronic message

Unless otherwise agreed, the seller must, at his own expense, provide the buyer, without delay, with the usual transport document for the agreed port of destination.

This document (for example, a negotiable bill of lading, a non-negotiable sea waybill or an inland waterway document) must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer (the negotiable bill of lading) or by notification to the carrier.

When such a transport document is issued in several originals, a full set of originals must be presented to the buyer. If the transport document contains a reference to a charter party, the seller must also provide a copy of this latter document. Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent EDI message. In the *ICC Guide to Incoterms* (publication 461/90), reference is made to the vital importance for the buyer to know that the seller has fulfilled his obligation to deliver the goods onboard the ship. The transport document usually constitutes proof of such delivery.

Non-negotiable transport documents

Generally, it suffices for the parties to refer to the usual transport document obtained from the carrier when the goods are handed over to him. But in maritime carriage different documents can be used. While traditionally negotiable bills of lading were used for carriage of goods by sea, other documents have appeared in recent years, e.g. transport documents which are non-negotiable and similar to those used for other modes of transport. These alternative documents have different names: liner waybills, ocean waybills, cargo quay receipts, data freight receipts or sea waybills. The term sea waybill is frequently used to include all of the various non-negotiable transport documents used for carriage of goods by sea.

Unfortunately, international conventions and national laws do not yet provide specific regulations for these non-negotiable transport documents (the exception is the United States, where a non-negotiable bill of lading is recognized; this is the so-called straight bill of lading). For this reason, in June 1990 CMI adopted Uniform Rules for Sea Waybills. The parties should refer to these Rules in the contract of carriage to avoid any legal uncertainties stemming from the use of non-negotiable documents.

Sale of goods in transit

In most cases, goods intended for carriage by regular shipping lines will not be the subject of a further sale in transit. But with respect to goods intended to be carried in chartered ships, the situation is frequently quite different. For example, when commodities are sold on the spot market, they are often sold many times before they reach destination. In such cases, the negotiable bill of lading has traditionally been very important, since the possession of the paper document enables the subsequent buyer to claim the goods from the carrier at destination. He does this by surrendering the original bill of lading to the carrier in exchange for the goods. However, when no sale of the goods in transit is intended, there is no need to use a bill of lading if the buyer's right to claim the goods from the carrier at destination is ensured by other means, such as by reference in the contract to the CMI Uniform Rules for Sea Waybills.

A buyer intending to sell the goods in transit to a subsequent buyer has the right under CFR and CIF terms to claim a negotiable bill of lading from his seller. This sale in transit can also be arranged, however, without a bill of lading. It can occur if the parties involved use a system which calls upon the carrier to follow instructions to hold the goods at the disposition of subsequent buyer(s).

EDI and the bill of lading

Section A.8 takes into account that the parties may wish to engage in so-called paperless trading. If the parties have agreed to communicate electronically, the requirement that a paper document be presented is no longer compulsory.

Needless to say, the traditional bill of lading is out of step with the modern development towards paperless trading. For this reason, in June 1990 CMI designed the Uniform Rules for Electronic Bills of Lading, which cover situations in which EDI messages between the parties involved are intended to replace the need for the traditional paper bill of lading.

These Uniform Rules are based on EDI messages to the carrier which serve the same purpose as the words "notification to the carrier" in A.8. Parties which have not agreed to use the "Uniform Rules for Electronic Bills of Lading", however, have to continue the traditional practice of requiring negotiable bills of lading.

Summing up, Incoterms 1990 reflect the contemporary developments with respect to transport techniques, documentation and EDI, and thus fulfil the important task of supplementing the 1980 United Nations Sales Convention in a field where there is a need for a continuous adaptation to new circumstances which cannot easily be met by legislation.

3. Voices of international practice

HANS VAN HOUTTE
Professor and Attorney, Brussels; Chairman of the Subcommittee on International Sales, International Bar Association

The International Bar Association (IBA) is very well aware that UNCITRAL is designing the international trade law of the twenty-first century. One of the most prominent UNCITRAL texts - the United Nations Sales Convention - will be of crucial importance for practising lawyers from all over the world, many of whom are members of IBA. Therefore, a specific subcommittee has been recently established within IBA to discuss how the Sales Convention is being implemented in the various legal systems. In Cannes, in September 1992, at our biannual conference, a full session will be devoted to the implementation of the Sales Convention.

As I do not wish to anticipate the results of the Cannes conference, I shall only share some suggestions on the follow-up of the Sales Convention.

The Sales Convention, the baby UNCITRAL delivered in 1980, was well built. It has to be conceded, it was not of unheard-of beauty. It had the small defects and deficiencies common in any man-made product. But after all, and in spite of some imperfections, at the moment of birth the Sales Convention looked more attractive than its 16-year-older cousin, ULIS. The Vienna baby has now grown up into a 12-year-old youngster, who becomes more and more accepted in the world. However, as we all know, 12-year-olds need in some ways even more attention and care than newly born babies. Similarly, the Sales Convention needs probably even more attention and nurturing now than in the 1980s. The follow-up of the Sales Convention has to focus in the first instance on States, for the Sales Convention needs their ratification.

I know that international arbitrators may apply the Sales Convention without going through the exercise of article 1, that is, without examining whether relevant States have ratified or accepted the Convention. An ICC award of 1989, for instance, has applied the Convention, although neither the country of the buyer nor the country of the seller were parties to the Convention. The arbitrators applied the Sales Convention as they considered it to be a codification of trade usages. The Sales Convention as *Lex mercatoria*: ". . . there is no better source to determine the prevailing trade usages than the terms of the . . . Vienna Convention."[3]

I doubt, however, that national courts will apply the Sales Convention as part of a *Lex mercatoria*. The National courts will apply the Sales Convention only when the relevant States have accepted the Convention. Consequently, worldwide application requires worldwide ratification.

At present, 34 countries have already ratified or accepted the Convention. This appears to be a considerable achievement. But there are some 160 countries in the world. Only one fifth of them have accepted the Convention. Why did Japan, the United Kingdom and many other countries not ratify the Convention? Belgium, for instance, failed to ratify the Vienna Convention, not because it dislikes the Convention, not because it wants to stick to ULIS - which is anyway being deserted by the former contracting States. The only reason why Belgium did not ratify the Convention is a lack of political interest. Therefore, in all countries which did not yet ratify the Convention, national lawyers' associations and individuals should contact the government authorities and inquire about the ratification of the Convention. They should interest the politicians in the Convention, and promote its ratification or acceptance. Otherwise, the ratification wave will lose its momentum, and the Convention will finally only have been ratified by some 50 countries, and will not be universally applicable. The follow-up of the Sales Convention has also to focus on practitioners and judges. After ULIS became law in Belgium, it has taken some 15 years before it truly became part of the legal culture. Indeed, for a long time the practitioners simply ignored ULIS. It was only during the last six or seven years (ironically at a moment that ULIS was fading away on the international scene) that ULIS became regularly applied by Belgian courts. This final acceptance of ULIS may be explained by two factors:

(a) First, around 1985, several articles on the application of ULIS by domestic courts were published, and made it evident to practitioners that ULIS was indeed part of Belgian law and had to be applied;

(b) Second, in the same period ULIS came to be taught in law school. The younger generations of lawyers spread the news of the existence of ULIS in law firms and courts.

The following steps could be taken to make lawyers more familiar with the Sales Convention:

First, especially in countries with substantial international trade, universities should include the Sales Convention in their regular curriculum. Students of today are the attorneys and judges of tomorrow. If they study the Convention now, they will apply it later.

Second, the Sales Convention should be the subject matter of publications. I am delighted to see that publication of decisions relating to the Convention in different contracting States has already been organized. ULIS had to be already 12 years in force before the first collection of court decisions from different ULIS countries was published. It is a good omen that a comparative publication of decisions relating to the Sales Convention already is envisaged at an earlier stage of existence.

It may be feared that such comparative publications on the Sales Convention will only reach a selected audience of specialized international lawyers. However, most international sale contracts never come to the attention of these international lawyers. They are handled by local companies, attorneys and courts, who do not have a sophisticated knowledge of international trade laws and who have no access to specialized publications on the Sales Convention.

From time to time, therefore, general law reviews with a large audience should also discuss the Sales Convention and publish surveys of domestic court decisions relating to the Convention. Through such surveys, the news will spread in each country that the Convention has become the law of the land and that it has to be applied.

Finally, the follow-up should also focus on the companies, the customers for which the Convention is intended. Some companies exclude the Sales Convention - as is allowed under article 6 of the Convention - because they dislike some of its provisions, such as for instance article 19 on the altered acceptance of their offer. Those companies should be informed that the Sales Convention contains not only less favourable rules, but in fact contains more favourable rules than the ones contained in domestic law (e.g. the possibility of anticipatory breach of contract, as provided for under article 71 of the Sales Convention, does not exist in Belgian or French domestic law). Companies should become aware that the Sales Convention strikes a fair balance between the rights and the duties of the seller as well as of the buyer.

When the companies become better acquainted with the Convention, they will not exclude it on emotional grounds.

In brief, UNCITRAL has done a great job by creating the Sales Convention. But now that the Convention is in force, it is our task to make sure that politicians will ratify it, that attorneys and courts will apply it, and that companies will use it.

BURGHARD PILTZ
Attorney, Gütersloh, Germany; Union internationale des avocats

I shall limit my remarks to the important practical and most relevant aspects of uniform laws considered from the point of view of an attorney working primarily on international cases.

International uniform laws, in general, are undoubtedly of great practical significance. National Laws primarily focus on domestic transactions and do not deal with the particular problems of cross-border business. In contract negotiations, uniform laws are accepted as a neutral basis for the choice of law, since they are the laws of neither party, and therefore no party deems itself at a disadvantage by consenting to a foreign set of legal rules and regulations.

Of all the uniform laws, the 1980 United Nations Sales Convention is of particular practical importance, outweighing other uniform laws due to its almost worldwide acceptance and its mechanism of automatic application. I will for this reason focus on the particular problems of the United Nations Sales Convention only.

Surprisingly, only a very limited number of Sales Convention cases - in Germany as elsewhere - has been reported until now. What are the reasons for this? I think this is not because the Sales Convention does not cover all aspects of practical business necessities, or because it is unsuitable for the purpose. Rather, from my experience, I believe it is due to the fact that it is just not in the forefront of everybody's mind. This lack of publicity should be considered by the father of the Convention, UNCITRAL, in its future activities. And it should take affirmative steps to correct this oversight. The Sales Convention deserves to be widely known and applied.

The Sales Convention is very carefully drafted. It covers, in comprehensive detail, all aspects of practical importance in the international sale of goods, and does so in a way that not only lawyers but also businessmen can understand. This is why the German commission for a reform of the law of obligations has recommended to redraft the pertinent parts of the current German civil and commercial codes in accordance with the Sales Convention.

One would hope that the Sales Convention will be a pattern for the now ongoing legal restructuring processes in many Eastern European countries. This brings me back to a prior point: the need to publicize the Convention.

Although the drafters of the Sales Convention in general did an excellent job, as proven by its widespread acceptance all over the world, some aspects of the Convention may need to be given further consideration.

The battle of forms, for example, has not been dealt with explicitly within the Convention. Instead, the problem is left to the general rules concerning the formation of a sales contract; in short the Convention does not offer any solution to this problem. One can find almost any theory imaginable as a solution to the battle of forms. Just within Europe, for example, there are the following: first shot (article 225, paragraph 3, of the New Civil Code of the Netherlands); last shot; no form shall be included in the contract; and all provisions of both forms shall be taken which are consistent with each other, while the rest shall not apply (Germany, Austria). Since this is a very important and recurring issue, an explicit set of guidelines covering the battle of forms would increase the practical acceptance of the Convention.

Second, article 79, which covers exemptions from liability, is written in such broad terms that the results under this rule can hardly be predicted. What shall an attorney advise to a client? What is an "impediment that he could not reasonably be expected to have taken into account"? This problem is far from being irrelevant from a practical point of view. In many cases, exemptions are the critical issues, and the answer the Convention offers is unsatisfactory and unpredictable.

Article 49, where the buyer may declare the contract avoided if there is a "fundamental breach of contract", also raises a difficult question. What is a fundamental breach? In view of the severe consequences of a fundamental breach, one would desire at least some guidance.

Another example in this line is the phrase "reasonable time" or "short time". The Convention gives no hint as to what is meant. The parties are legally required to act within a reasonable time or within a short time, without knowing whether they are within the time-limits or not.

These examples are certainly not exhaustive, but they do cover some of the problems frequently found in day-to-day practice. For those handling the Convention, especially for the business community it is very important to have some certainty as to what the law is. It is more agreeable to most of the business clients if a requirement is clearly not fulfilled than to reply: "I cannot tell". Uncertainty prevents amicable agreements and encourages litigation.

Perhaps it is possible through international cooperation coordinated by UNCITRAL to issue official comments and recommendations for the application of the Sales Convention. A model could be the Official Comments to the United States Uniform Commercial Code. This could pave the way for a uniform application of the Sales Convention.

Some problems of practical importance are not covered at all by the Sales Convention. One example is the right to set-off which might give rise to complicated legal questions. Assignment of claims governed by the Sales Convention is an issue also left unaddressed by the Convention.

Finally, on a more general note, I would suggest further work on uniform laws. Such laws could cover the problems of retention of title and of bank guaranties. If these projects could be realized, we could use them, together with the Uniform Customs and Practice for Documentary Credits, and thereby take recourse to uniform laws not only dealing with the immediate relationship between buyer and

seller, but also with payment obligations. Since shipment of the goods to a large extent is covered by uniform laws already, we could provide the business community with a full set of rules dealing with all problems typically arising in the course of a standard sales transaction.

In conclusion, speaking as a practitioner, my experience with the Sales Convention has been very promising, and there seems to be a fair chance that it will eventually develop into a uniform world sales law.

RAFAEL EYZAGUIRRE
Professor of International Commercial Law, University of Chile, Santiago;
President, Inter-American Commercial Arbitration Commission

I shall refer to just a few points concerning the Conventions adopted by UNCITRAL and by the General Assembly and also to the rules of international commercial arbitration. My comments relate to the United Nations Convention on Contracts for the International Sale of Goods, and to international commercial arbitration and the Inter-American Commercial Arbitration Commission (IACAC).

International sale of goods

Chile was represented at the 1980 Vienna diplomatic conference by myself and by the Chief Legal Officer of the Ministry of Foreign Affairs, and, at the end of the Conference, we signed the Sales Convention.

A special commission was appointed in our country to study the Convention. This commission, which was composed of professors from the Law Faculty at the University of Chile and lawyers from the Legal Department of the Ministry of Foreign Affairs, submitted a favourable report to the Government, recommending that Chile should ratify this international instrument. The Convention was signed into law in February 1990 and entered into force on 1 March 1991.

What concerns me is that only four Latin American countries have ratified the Sales Convention, namely Argentina, Chile, Ecuador and Mexico.

International selling can involve complicated situations stemming from difficulties in determining the law applicable to the contract. This can give rise to conflicts in which one or both of the parties is or are subject to foreign law.

The purpose of the Sales Convention is therefore precisely to prevent such obstacles to the flow of international commerce, thereby facilitating the development of trade, primarily in developing countries.

It is therefore important to encourage the adoption of the Convention as an instrument that will make it possible to conduct important negotiations in accordance with uniform rules that are laid down for such contracts and to dispense with the domestic law of the parties, thus avoiding the application of different rules for buyer and seller, something that can give rise to disputes that are difficult to resolve and are not always amenable to settlement under the conflict-of-law rules governed by private international law.

Accordingly, recognizing the importance of contracts of sale and transport in their various forms, we insisted on referring this matter to the Inter-American Bar Association. That institution has agreed that the bar associations of the various American States should urge their Governments to ratify the

Sales Convention, the United Nations Convention on the Carriage of Goods by Sea and the United Nations Convention on International Multimodal Transport of Goods, without prejudice to other conventions concerning the carriage of goods by air and road, for whose ratification we have also been pressing.

When one considers that the Sales Convention is not binding upon the parties, who may thus exclude its application if they choose a different law to govern their contract, there can be no objections to the adoption of the Convention, with or without the reservations it provides. Furthermore, the parties may derogate from or vary the effect of any of its provisions.

In other words, this instrument adopts the principle of party autonomy, which is a firmly established principle in comparative law and, naturally, in Chilean and Latin American law also. It should also be borne in mind that, in evaluating the Sales Convention, one must be aware that it entails a compromise between States that have different legal, political and economic systems and are at different stages of development.

Finally, this instrument is intended exclusively to govern international contracts of sale. The sales contract regulations that exist in various Latin American countries are of an internal and purely domestic nature.

The representative of OAS yesterday referred to the resolutions of the Inter-American Specialized Conferences on International Private Law organized by OAS, and in particular to the resolution adopted by the Fourth Conference on Private International Law (CIDIP-IV), held at Montevideo, Uruguay, from 9 to 15 July 1989, namely the resolution on the international sale of goods, in which member States were urged to ratify or accede to the Sales Convention.

The provisions of the Sales Convention should, in our opinion, be supplemented by those adopted by the Hague Conference on Private International Law concerning conflict-of-law rules in the international sale of goods.

There is also a very important link between the International Rules for the Interpretation of Trade Terms (Incoterms) and the international sale of goods, since Incoterms serve to determine the fulfilment of the seller's and buyer's obligations and their liabilities. These obligations are closely bound up with the transportation of the goods, the documentation used, the insurance, and the export and import formalities.

The latest version of Incoterms (1990) takes into account the changes that have occurred in transportation techniques, in order to adapt the terms to the use of EDI. This is in fact stated by ICC in the preamble to the 1990 version of Incoterms.

With regard to the sphere of application of the Sales Convention, the key rule is the applicability of the Convention to contracts for the sale of goods between parties having their places of business in different States. It is understood that the Convention governs only the formation of the contract or indication of intention, and also the rights and obligations of the parties arising from the contract. It expressly excludes matters relating to the validity of the contract and the effect that the contract may have on the property in the goods sold. Such matters are to be referred to the law applicable according to the private international law rules of the forum.

As regards the interpretation of the Sales Convention, its provisions emphasize its international character and the need to promote uniformity in its application. Consequently, this instrument should not be interpreted in the light of national legal systems, nor should the terms used in it be construed

on the basis of internal legal definitions. Questions concerning matters governed by the Convention that are not expressly settled in it have to be resolved in conformity with the general principles on which it is based. Only in the absence of such principles will unresolved questions be settled in accordance with the law applicable by virtue of the private international law rules of the forum.

In addition to the intent of the parties and the observance of good faith, the Convention stipulates the relevance of commercial law in dealings of this kind. The parties are in effect bound by any usage to which they have agreed and by any practices that they have established. Also, the parties will be regarded as having impliedly made applicable to their contract or to its formation any usage of which they were or ought to have been aware.

International commercial arbitration and the Inter-American Commercial Arbitration Commission

The inter-American system of commercial arbitration originated with the establishment in 1934 of IACAC as the outcome of resolution 41 of the Seventh International Conference of American States, held at Montevideo, Uruguay. IACAC is a private body whose objectives are to set up and maintain an inter-American system of conciliation and arbitration for the settlement of international disputes.

The aforementioned resolution urged the chambers of commerce of the American States to draw up and sign an international arbitration convention, laying down the rules to be followed in arbitral proceedings. The seat of IACAC is located at the headquarters of OAS, at Washington, D.C., in offices specifically allocated by OAS for that purpose. The origins of the Commission can thus be traced back to a resolution of the American States.

The Inter-American Juridical Committee, on the instructions of OAS, proposed several draft inter-American conventions on international commercial arbitration in 1956 and 1967. Finally, in January 1975, the Inter-American Convention on International Commercial Arbitration (known as the "Panama Convention") was adopted at the First Inter-American Specialized Conference on Private International Law, organized at Panama City under the auspices of OAS.

The main provisions set out in this Convention include the following:

(a) The validity of arbitration clauses and arbitration agreements in international commercial transactions is established. Also, arbitration agreements may be effected by modern means of communication, such as telex;

(b) Rules are laid down concerning the appointment of arbitrators, who may be nationals or foreigners, and whose appointment may be delegated to a third party. The latter may be either a person or an institution, the Inter-American Commercial Arbitration Commission thus being empowered to serve as an appointing authority;

(c) The conduct of arbitral proceedings is regulated, and it is stipulated that, failing express agreement of the parties in dispute, the 1987 Rules of Procedure of the Inter-American Commercial Arbitration Commission shall apply;

(d) Arbitral decisions or awards that are not appealable under the applicable law or procedural rules shall have the force of a final judicial judgement. Also, the grounds on which the recognition of an arbitral decision or award may be refused are set out.

IACAC is organized on the basis of national sections in each country of the Americas. In the United States of America, for example, the National North American Section of the Commission is the American Arbitration Association. National sections do not, however, exist only in the Americas; there is also one in Spain, which joined IACAC through the Madrid Chamber of Commerce and Industry, whose court of arbitration thus became the Spanish National Section of the Commission.

In 1978, IACAC adopted the UNCITRAL Arbitration Rules, with a few minor changes reflecting the nature of IACAC.

In October 1984, on the occasion of the meeting of the IACAC Executive Committee held at Guayaquil, Ecuador, a joint meeting of IACAC and the Ibero-American Association of Chambers of Commerce (AICC) also took place. At that event, a cooperation agreement between the two organizations (the AICC-IACAC Protocol) was signed, on 30 October 1984, with the aim of promoting the use of international commercial arbitration proceedings to resolve commercial disputes through the chambers of commerce that are AICC members. These chambers of commerce could become national sections of IACAC in various Latin American countries, and would thus be qualified to provide administrative services in arbitration cases in their respective countries.

At all its meetings, IACAC has striven to promote the accession of the Latin American countries to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the OAS Inter-American Convention on International Commercial Arbitration (Panama, 1975), and also to plan seminars, workshops and courses in the various countries of the region, calling upon the chambers of commerce in the western hemisphere to join the arbitration system and to set up arbitration centres in order to familiarize their members with the workings of the system.

As a result, 17 countries in the region have now ratified the 1958 New York Convention and 14 have acceded to the 1975 Panama Convention. Several countries, including Chile, Ecuador, Mexico, Panama, Peru, the United States of America and a number of Central American countries, have ratified both Conventions, which constitutes an important step forward in the adoption of international commercial arbitration practice in the Americas.

As already noted, the Panama Convention, because it refers to IACAC, has opened up the way to two very important developments for commercial arbitration in the Latin American region: (a) it acknowledges institutional or administered arbitral proceedings; and (b) it makes specific reference to IACAC in stipulating that, in the absence of any agreement regarding procedure, the IACAC rules are to apply. Those rules are the same as the UNCITRAL Arbitration Rules, which tend to be applied in the major arbitration centres in Africa, Asia and even in Europe and the United States.

The Commission is now committed to setting up commercial arbitration centres in the various Latin American countries under the auspices of the chambers of commerce that are AICC members. Chile, Colombia and Mexico have established or are in the process of establishing arbitration centres for the settlement of national and international disputes.

Finally, the Commission is also endeavouring to encourage the Latin American countries to adapt their legislations to the UNCITRAL Model Law on International Commercial Arbitration - either by adopting the Model Law or by amending certain aspects of their national arbitration laws - as a means of promoting the harmonization of the rules applied in the settlement of disputes by commercial arbitration.

Since I must be brief, I shall not refer to such important issues as the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), the UNCITRAL rules on negotiable instruments

and electronic funds transfer, or other instruments of equally fundamental importance to the unification of international trade law that are the product of the diligent and efficient work carried out by UNCITRAL.

HELEN ELIZABETH HARTNELL*
Associate Professor of Law, Tulane Law School; Chairperson, Private International Law Committee of the American Bar Association Section of International Law and Practice; member of the Illinois State Bar Association

I am greatly honoured to address this Congress commemorating the twenty-fifth session of UNCITRAL on behalf of the American Bar Association Section of International Law and Practice.

Let me begin by invoking our shared goals. For generations, legal experts have worked together in the belief that unifying and harmonizing the laws of international commercial transactions would promote universal harmony by facilitating world trade. In recognition of the value of these patient efforts to reduce the conflicts arising from the laws of different nations, and thus to eliminate obstacles to international trade, the General Assembly created the Commission which we celebrate this week. UNCITRAL has lived up to the high expectations which attended its birth. Its greatest accomplishment has been to involve the full diversity of nations in the process of creating and improving the laws that govern private international economic relations.

The Commission deserves equal praise for its many other accomplishments. Today I would like to focus my comments on the United Nations Convention on Contracts for the International Sale of Goods.[4] We know that this uniform law is the pinnacle of a half century's work, and that it has been widely adopted by a cross-section of developing and developed countries. However, the true measure of the success of the Sales Convention depends on how well it suits those needs of modern international commerce which were of central concern to its drafters.

The Convention does replace some obsolete domestic rules with a "modern law . . . appropriate for transactions of an international character."[5] It also promotes fairness in international commerce by providing a level playing field which has been cleared - at least partially - of the "snares and traps"[6] embedded in domestic legal systems. This is of special value to economically weaker traders who have limited access to legal advice. It is flexible, in that it permits parties to derogate from nearly all of its rules, and thus gives wide berth to party autonomy. And finally, the Convention substitutes substantive rules of contract for the repeated interplay of the rules of private international law, and thus reduces the need to resort to conflict-of-laws analysis.[7]

Historically, the drafters viewed the unpredictability resulting from the conflict of laws as the primary evil to be eradicated. If parties have not agreed which law governs their contract, then it is uncertain which law will be applied if a dispute arises; and even when contracting parties have exercised their autonomy, the law they have chosen may not actually govern a disputed issue if strong public policies - so-called mandatory or imperative rules of law - override the parties' choice. Thus, uncertainty as to applicable law hinders the process of negotiation and drafting, complicates the resolution of transnational disputes, and burdens international trade by imposing significant transaction costs. The Sales Convention significantly reduces this type of uncertainty by permitting recourse to the rules of private international law only when a disputed issue is excluded from the scope of the

*The views presented in this paper are those of the author, and do not constitute an official position of the American Bar Association Section of International Law and Practice.

uniform law, or when a tribunal is unable to discover general principles sufficient to resolve a matter "governed by the Sales Convention but not expressly settled in it."[8]

Article 4(a) thus "reintroduces the conflicts methodology that the Convention was meant to eliminate."[9] In addition, it precludes discussion of validity issues within the international community and blocks the development of an international body of case-law to guide traders and their counsel. The practical impact of article 4(a) depends on the commercial significance of the issues that are excluded from the international legal order. Most of the validity issues thus preserved to the domestic legal order - such as fraud, duress, illegality, immorality, and perhaps also mistake and misrepresentation - are issues that do not figure largely in the process of planning contracts for the international sale of goods. While excluding such issues from the uniform law does make it uncertain which law will govern in case a dispute arises, it does not seriously endanger the integrity of the international legal order for international sales. Indeed, the Commission recognized during the drafting of the Sales Convention that these problems are relatively insignificant in international trade.

However, some of the excluded validity issues are of great practical significance to international traders and their lawyers. I am referring to domestic rules through which courts control unfair, unreasonable or unconscionable terms. It is almost universally agreed that these are rules of validity that apply to contracts for the international sale of goods by virtue of article 4 of the Sales Convention. These domestic rules play a central role in connection with clauses that "restrict, exclude or modify a liability, duty or remedy that would otherwise arise from a legally recognized relationship between the parties to a contract for the sale of goods from the contract of sale."[10] Such contractual provisions are variously referred to as exemption, exclusion, or exculpatory clauses, or disclaimers.

It is no exaggeration to say that exemption clauses are found in nearly every contract for the international sale of goods that involves writing, and that such clauses are of immense practical significance. The single greatest concern of lawyers who draft individual or standard form contracts for the international sale of goods is the need to provide clear - and enforceable - warranty and liability limitation clauses. Many practising lawyers have expressed to me their wish for further guidance in this area.

It is vital that parties be able to exercise their contractual freedom to allocate risks. In order to do so in a meaningful way, the parties (or their lawyers) must be able to ascertain whether it is possible - and if so, how - to effectuate the client's wish. In an individually negotiated contract, the parties can usually eliminate uncertainty by choosing the applicable law. However, they may still face the problem that the standards for valid exemption clauses are not clear under the applicable domestic law.

The uncertainty is more acute for international traders or lawyers who draft standard terms and conditions to be used by clients in export transactions. The drafter cannot easily control applicable law in cases that involve the battle of the forms. I believe that a large percentage of contracts for the international sale of goods does involve the battle of the forms. I further believe that the Sales Convention will govern these contracts, except in rare instances where both parties' forms designate the same controlling law or coincide in providing that the Sales Convention shall not govern. Where the Sales Convention is applicable law, the validity of an exemption clause drafted by the seller's counsel may end up being evaluated under a foreign law,[11] since it is conceivable that a tribunal would apply domestic rather than foreign law when a local buyer brings suit in a local tribunal against a foreign seller, even though the weight of modern private international law rules seems to favour applying the law of the seller's place of business. For example, the conflict of laws rule of section 1-105 of the Uniform Commercial Code is flexible enough to permit this result. Thus, an exemption clause in a contract prepared by a foreign seller might be evaluated under the

unconscionability or another standard found in the Uniform Commercial Code. Needless to say, United States exporters could suffer a similar fate abroad. Unless it is clear which law will ultimately be applied to determine the validity of an exemption clause, the seller's lawyer faces a drafting dilemma. This is more than just a technical lawyer's problem: exemption clauses are often the key to the rights and obligations of the contracting parties. I join a number of other commentators in regretting that such vital issues were excluded from the uniform law for international sales.[12]

I would like to urge the Commission to study the problems surrounding the essential issues of warranty, limitation of liability, and the use of standard forms in contracts for the international sale of goods, and to search for appropriate ways to provide guidance for international traders and their lawyers. Some of the uncertainty would be reduced if there were clear uniform private international law rules for substantive or formal validity. The 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods contains such rules - although I cannot in good faith assert that I understand them.

I believe it would be useful to formulate model texts setting forth a variety of approved warranty and corresponding liability limitation clauses from which parties could chose. The ICC *Guide to Penalty and Liquidated Damages Clauses*[13] could provide a useful model here. At the very least, spelling out a variety of options would facilitate the process of making the negotiated price reflect the intended allocation of risks. In the end, however, I do not believe that the model clause solution is a sufficient solution to the problem of exemption clauses, since they - like penalty and liquidated damages clauses - are ultimately subject to avoidance under the peculiar rules of the domestic jurisdiction whose law happens to apply.

In the interests of predictability and fairness, I would like to encourage the Commission to examine the feasibility of achieving some measure of unification with respect to the validity of exemption clauses in a transnational setting. A modern, fair set of international norms "would be a useful guide to the drafting" of individual and standard contracts, and would in addition supply a "recognised legal basis for them" and facilitate their interpretation.[14] Even a general standard - such as the "gross unfairness" standard found in article 6.4.13 of the UNIDROIT Principles for International Commercial Contracts[15] - would in time lead to the development of a jurisprudence of validity for international sales and thus encourage the progressive development of international law and its codification. We should begin to move towards developing international standards for evaluating unfair, unreasonable or unconscionable terms or contracts. What better way to "promote the observance of good faith in international trade?"[16]

We should not shrink back from this task merely because it raises issues of public policy. Whatever good historical reasons may have prevented unification efforts in this field, they are no longer so compelling. Nations have increasingly recognized that the needs of international commerce can outweigh their traditional concerns over public policy, and have worked towards unification in areas - such as prescription[17] and property law - that were once viewed as too complex or controversial. Some of you in the audience may remember the debates during the preparation of the 1964 Hague Convention Relating to a Uniform Law on the International Sale of Goods[18] concerning the hotly disputed topic of warranties for live animals. Professor Tunc observed at one point that "he had the impression that a certain anxiety had been shown in 1930 in the memory of Roman law, and that this anxiety had been handed down from generation to generation without any re-examination of the problem".[19] We, too, should look past our hereditary anxiety and reexamine the feasibility of achieving unification in previously taboo areas where an international standard would further serve our goals.

Ernst Rabel believed that the utility of a uniform sales law depended on the extent to which important contractual issues could be removed from the domestic to the international realm. In particular, he believed that an international sales law should lay down rules for the maximum possible number of "matters which are imperative or which lie at least partially beyond the autonomy of the parties".[20] The validity of exemption clauses is an important contractual issue which needs to be removed from the domestic to the international realm. In order to solve practical problems caused by differences in national rules of validity, we must edge our way towards a new consensus in areas in which traditional national public policy considerations unduly hamper the contractual autonomy of international traders.

MICHAEL L. SHER
Attorney, member of the Bar of the State of New York, the Bar of the District of Columbia and the Association of the Bar of the City of New York

I am honoured and pleased to have this unique opportunity on the silver anniversary of UNCITRAL to present a few comments on the practical implications of the 1980 United Nations Convention on Contracts for the International Sale of Goods for the practice of law in New York, from the perspective of members of the New York Bar, including private practitioners and members of the legal staff of multinational companies with a nexus to New York.

I am a member of the Association of the Bar of the City of New York (ABCNY) and its Council on International Affairs, and the duly designated representative of ABCNY to this UNCITRAL Congress.

While the City of New York is one of the principal commercial and financial hubs in the United States, and the laws of and the judicial system in and of the State of New York are representative of the laws and judicial system of the other states of the United States, no representation is made in this statement that the situation in the City or State of New York is an absolute representation of any other city, state, region or all of the United States.

With the diminution of the relative remoteness and isolation of the sovereign States in all parts of the world, east and west, north and south, developed and developing, by the aeronautical advancements of ever swifter aircraft with ever-increasing load-carrying capacity at continuously reduced costs, the universal advent of instantaneous two-way audio, visual and hard-copy telecommunications by telecopier and computer, the relatively recent swift events leading towards the harmonization of social, economic and political systems, the instantaneous reporting by journalists and the equally timely worldwide dissemination of news by the global news-gathering organizations, there is an ever-increasing need for the harmonization of legal systems relating to and supporting commerce and communications, including contracts for the international sale of goods. Such legal systems consist of laws, rules and regulations, and procedures for making and publishing judicial determinations.

The United States was among the first sovereign States to ratify the Sales Convention. The Sales Convention was adopted on 11 April 1980 by a United Nations diplomatic conference held at Vienna. The United States signed the Sales Convention on 31 August 1981, and completed the ratification process on 9 October 1986. On 11 December 1986, together with China and Italy, the United States deposited its instrument of ratification with the Secretariat of the United Nations. Those three States joined with eight other States which had previously deposited their instruments of ratification, and thereby enabled the Sales Convention to come into force on 1 January 1988. The United States was and is proud to be one of the original 11 contracting States.

The relative rapidity with which the United States ratified the Sales Convention after its execution, and the fact that the ratification vote in the United States Senate was unanimous, 98 to 0, may have conveyed what has turned out to have been the false perception that the United States would just as expeditiously and unanimously move to routinely utilize the Sales Convention. Since its unanimous ratification on 6 October 1986, whatever enthusiasm there may have been for the Sales Convention seems, based upon the general lack of utilization, to have waned to the level of a pragmatic, wait-and-see approach.

The Constitution of the United States specifically provides that the Constitution and laws of the United States and each of the treaties to which the United States is a signatory and has ratified are as much a part of both the law of the United States and each of the 50 states as is the so-called local law of that state. Thus, the Sales Convention, a treaty which the United States has signed and ratified, and to which it is a party, is the law of the United States and of each of its 50 states.

Furthermore, at the time of its ratification of the Sales Convention, the United States elected to make a reservation under article 1(1)(b). Pursuant to such reservation, until additional States become contracting States there will be a limitation on the contracts for the international sale of goods to which the Sales Convention is, automatically, the applicable law in the United States. Two of the significant trading partners of the United States, Japan and the United Kingdom, are not contracting States.

In the preparation of this statement I sought out and spoke with various representative members of the Bar of the State of New York and other lawyers, each of whom had a particular reason to be interested in the subject-matter of these proceedings. My conversations, all of which were on a confidential basis, were with private practitioners, the general counsel and other members of the legal staff of United States oriented multinational corporations, and members of the academic community, including members of the faculty of several of the law schools located in the City of New York. In addition, to serve as the basis of comparison and to receive a different perspective, I also spoke with members of the bar of a few foreign sovereign States.

In addition, I conducted a search of the most comprehensive and up-to-date computerized database of decisions by the courts of the United States, the courts of the State of New York and the courts of other states of the United States to ascertain what decisions of any of those courts might have invoked the Sales Convention and, when invoked, the manner in which the Sales Convention had been applied.

At this time, in the State of New York as well as in other states of the United States, there is no body of judicial decisions or other official materials, such as official opinions of the Attorney General or other governmental authority, pertaining to the Sales Convention on which the practising lawyer may rely in preparing and rendering professional advice. As is generally known, under Anglo-American jurisprudence, great reliance is placed on the interpretation of statute law by the courts, the principle of *stare decisis*. It is equally well known that the same weight is not attributed to judicial decisions in the civil code jurisdictions. Consequently, the lack of a body of judicial determinations is a less significant impediment to the adoption of the Sales Convention as the standard law for the international sale of goods in the civil code jurisdictions than such a lack of determinations is in the United States and other common law jurisdictions.

In the United States, there is no significant body of judicial decisions or other materials pertaining to the Sales Convention. There is only one case, decided as recently as 14 April 1992, in which the United States District Court for the Southern District of New York has, in any meaningful manner,

even mentioned the Sales Convention. The case to which I refer is *Filanto, S.p.a., v. Chilewich International Corp.* (91 Civ. 3253 (CLB), USDC, SDNY, 1992 U.S. Dist. Lexus 5011, 14 April 1992).

In *Filanto*, it was held that the Sales Convention was the applicable sales law. Judge Charles L. Brieant wrote in his opinion that "the 'general principles of contract law' relevant to this action, do not include the Uniform Commercial Code; rather, the 'federal law of contracts' to be applied in this case is to be found in the United Nations Convention on Contracts for the International Sales of Goods, codified at 15 U.S.C. Appendix (West Supp. 1991)". However, in *Filanto*, the ultimate judicial decision was not based upon the choice of applicable law; that is, the Sales Convention or the Uniform Commercial Code. Accordingly, there is no reported case in the United States in which the Sales Convention has been the determining substantive law.

Because of the great reliance in the United States on the judicial interpretation of statute law, the lack of judicial determinations on the Sales Convention has been and continues to be a significant impediment to the adoption and utilization of the Sales Convention as the standard law for contracts for the international sale of goods.

In view of the apparent lack of contracts for the international sale of goods drafted by New York practitioners to which the Sales Convention applies, it is a natural result that there is a paucity of judicial decisions by courts of the State of New York or by other courts in the United States in which the Sales Convention was the relevant sales law. A vicious circle!

While UNCITRAL has adopted a procedure for the collection of judicial decisions regarding the Sales Convention, currently, on a worldwide basis, there are few decisions included in the collection. Once the flow of decisions begins, it is imperative that lawyers have instant access to the decisions of the courts.

As a secondary source for the interpretation of laws, the New York lawyer frequently turns to the official commentary, sometimes in the form of a report by the drafters or a reviewing legislative committee. However, there is no official commentary to the Sales Convention. Consequently, this secondary source of guidance is not available to the New York lawyer or other practitioner.

A tertiary source is the excellent unofficial commentary of John O. Honnold (Secretary of UNCITRAL, 1969-1974). In addition, there are the other writings of Professor Honnold, the writings of E. Allan Farnsworth, and the *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods UNCISG* by Albert H. Kritzer (Kluwer Law and Tax Publishers, Boston, 1988, regularly updated), which physically lays, side by side, in columnar manner, the analysis of and comments to the Convention and the generic version of the Uniform Commercial Code.

Accordingly, other than the works just mentioned and scholarly works by renowned and well-respected commentators, such as Farnsworth, Honnold and Kritzer, there is no traditional source from which a conscientious lawyer in New York, as well as elsewhere in the United States, might receive consistently up-to-date, authoritative, practical information on the Sales Convention.

At the time of the formation of an agreement, including contracts for the international sale of goods, practitioners want predictable law available to them. Predictability is now lacking!

The law schools in the City of New York do not devote significant course time to the study of the Sales Convention. At one such law school the amount of time devoted to it has declined. Bar

associations, law schools and other programmes for the continuing legal education of practising lawyers have not recently provided any significant course or programme on the Sales Convention.

The benefits to be derived from the utilization of any law or convention coming into widespread use, but not yet having arrived at such a level of use, are not, collectively, sufficient inducement to a lawyer in New York or the client of such lawyer to move to the arena of the scantily understood Sales Convention from the safe harbour and professional comfort of the familiar and well understood Uniform Commercial Code and other well known and understood bodies of relevant law.

It is well known that in the United States *vis-à-vis* the rest of the world, there are a great number of practising lawyers, that the ratio of lawyers to potential clients is among the highest in the world, and that persons and entities in the United States traditionally consult with their legal counsel before making a serious decision or taking an important action. Reputedly, persons and entities in the United States are more litigious than persons and entities in other sovereign States. Lawyers in the United States are careful and cautionary, some say too careful and too cautionary, in the provision of professional advice and rendering of professional services. The uncertainty of the interpretation, and hence of the application, of the Sales Convention makes the New York practitioner wary, and thus reluctant to utilize the Sales Convention. The New York practitioner elects to opt out of the utilization of the Sales Convention in favour of a law with which he or she is more familiar, and therefore more comfortable. There is a tendency of the New York practitioner to opt out even in those situations where the likely outcome under the unsettled law of the Sales Convention may be more favourable to the position of the practitioner and his or her client than the likely outcome under the settled law of the familiar Uniform Commercial Code.

To provide for the application of a particular law to agreements, including contracts for the international sale of goods, the typical New York practitioner when drafting such a document will include an application-of-law provision.

The simplest form of a standard application-of-law provision is as follows:

> "This agreement shall be governed by the law of the State of New York."

Such a form, or a variant thereof, is normally utilized in contracts and other agreements and documents prepared by a New York practitioner. However, by such procedure, because of the previously mentioned provision of the constitution of the United States with respect to contracts for the international sale of goods, the applicable law is the Sales Convention, not the Uniform Commercial Code, as adopted by the State of New York.

Regardless of the interest of the parties, the application-of-law provision should be drafted in more clear terms and should be more specific in substance, so that the meaning and effect of it are clearly understood by all parties. An example of such an application-of-law provision by which the parties to the contract clearly opt out of the Sales Convention is as follows:

> "The rights and obligations of the parties to this Agreement shall not be governed by the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods; rather, these rights and obligations shall be governed by the law of the State of New York including its provisions of the Uniform Commercial Code."

Another example of a particular and specific application-of-law provision is as follows:

"The rights and obligations of the undersigned under this Agreement shall not be construed or governed by the 1980 United Nations Convention on Contracts for the International Sale of Goods (sometimes known as "The 1980 Vienna Convention"); rather, such rights and obligations shall be construed and governed by the internal, local, domestic, substantive law of the State of New York, including, without limitation, the provisions of the Uniform Commercial Code as enacted in the State of New York (McKinney's Consolidated Code), as all such law is construed by the Courts of the State of New York."

Because of the sometimes diametrically contradictory result upon the application of the local law of the State of New York (i.e., the Uniform Commercial Code, as adopted by the State of New York) versus the result upon the application of the Sales Convention, New York practitioners, to maintain consistency of result throughout a client's commercial activities, may extend the renunciation of the Sales Convention.

Under the Uniform Commercial Code, a writing signed by the parties is normally required to establish an enforceable contract for the sale of goods. Thus, the publication by a potential seller of a price list and a subsequent order by a potential buyer would not necessarily result in the formation of a contract for the sale of the goods so ordered by the potential buyer. However, under the Sales Convention, the contrary would probably be the result. An enforceable contract for the international sale of goods might be held to have been made upon the placement of the order by the potential buyer. Consequently, to protect a client from being inadvertently and unexpectedly contractually bound for the international sale of goods, it is prudent to include a special protective qualifying provision in price-lists, catalogues etc. An example of such a suitable qualifying provision is as follows:

"This price-list (catalogue etc.) is not an offer to sell by the undersigned, but merely an invitation to the public to make an offer to purchase the goods at the prices indicated, which offer is subject to acceptance by the undersigned."

Under Anglo-American law, parol evidence may be introduced to explain, not to modify, a written agreement. Accordingly, New York practitioners, in order to confine the agreement between the parties to the document executed by the parties, will include a provision to such effect. An example of a merger provision is as follows:

"This Agreement represents the entire understanding of the parties, and supersedes and replaces all prior agreements, communications, correspondence, negotiations, and proposals between the parties."

In addition, the Sales Convention permits parol evidence, something contrary to the precepts of Anglo-American law. Accordingly, a New York practitioner may seek to strengthen the entry of the Sales Convention by a stronger merger provision. An example of a stronger merger provision is as follows:

"This agreement represents the entire understanding of the parties, and, in derogation of article 8 of the Sales Convention, supersedes and replaces all prior agreements, communications, correspondence, negotiations, and proposals between the parties."

Law schools in the City of New York do not offer significant course time to the study of the Sales Convention.

Based upon my examination of the record, such as there may be, and upon conversations with members of the faculty of some of the law schools in the City of New York, there seems to have been

no widespread effective concerted activity related to or in support of the adoption of the Sales Convention as the standard platform for the negotiation and formation of transactions involving the international sale of goods.

Bar associations, law schools, and other providers of instructional programmes for the continuing legal education of practising lawyers have not provided, in any significant manner, courses or programmes on the Sales Convention.

With respect to commentaries, guides, handbooks, monographs and treatises on the Sales Convention, the works of two esteemed experts on the Sales Convention, Professors Farnsworth and Honnold, should be mentioned. In comparative situations, I am particularly fond of those commentaries, guides, handbooks, monographs and treatises which lay side-by-side, in columns, the official text of and commentaries to the Sales Convention and the existing operative law to be superseded by the Sales Convention. An excellent example of such a work is the *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods.*

In response to the request of UNCITRAL for suggestions on action to be taken to encourage the worldwide implementation of the Sales Convention, I note that UNCITRAL is confronted by a situation similar to that which existed three decades ago in respect of the adoption and implementation of the Uniform Commercial Code in each of the fifty states of the United States.

The traditional regional, economic and political groupings of States, East and West, North and South, developing and developed, are imploding. Multinational trading groups and organizations, including the European Community, are expanding in importance. The level of commercial intercourse within, between and among sovereign States and organizations is expanding at an exponential rate. Instantaneous two-way oral and written communication is now commonplace; standardization of business practices and procedures is probably in the interest of all concerned. The time for a harmonization of commercial law is at hand, and it is probably in the best interest of commercial parties in all parts of the world.

Effective harmonization includes both the harmonization of statutory law and the harmonization of judicial determinations.

Approximately three decades ago, the United States legal community confronted a situation parallel to the situation currently before UNCITRAL. Then, the commentators and scholars had produced the Uniform Commercial Code, a major revision to the body of commercial law designed to address the then current practices, procedures and customs of the domestic commercial community. Practising lawyers throughout the United States were reluctant to switch from the comfort and safe harbour of the then well-known and well-understood operative statutes, including the Uniform Sales Act. In addition to not wanting to spend their personal non-remunerative time and energy to learn the new law, the Uniform Commercial Code, practising lawyers were not confident of the manner in which the courts would resolve the controversies that were certain to emerge. The effort to be expended coupled with the uncertainty of judicial interpretation of the new statute formed a severe and, for a while, an absolute impediment to the widespread adoption and implementation of the Uniform Commercial Code. The State of New York, because of the commercial and financial importance of the City of New York in the United States, became the key state. Once the Uniform Commercial Code was adopted by the State of New York, other states quickly adopted the Uniform Commercial Code, and the Uniform Commercial Code has ever since been the fundamental commercial law throughout the United States. Forty-nine of the fifty states have long since adopted and implemented the Uniform Commercial Code; the State of Louisiana has retained a degree of its historic affinity with the Napoleonic Civil Code.

As was the situation in the United States with respect to the impact of the adoption by the State of New York of the Uniform Commercial Code, while many of the sovereign States important in international commerce, and specifically the international sale of goods, have signed and ratified the Sales Convention, none of those which are the linchpins of international commerce has, in the operative sense, adopted the Sales Convention as its fundamental law on the international sale of goods, and such is not to be expected without some new incentive or motivation.

The programmes of UNCITRAL for the promulgation of the Sales Convention in developing sovereign States as the universal standard law for contracts for the international sale of goods between parties is commendable. However, the generally superior negotiating position of the parties in developed sovereign States and the reluctance of lawyers in those States to select the Sales Convention as the sales law applicable for the international sale of goods may be a barrier to the Sales Convention becoming the universally accepted standard sales law applicable to contracts for the international sale of goods.

The problem of how to most effectively advance the implementation of the Sales Convention is similar to the question of how to eat the pretzel. At which loop of the pretzel does one begin to eat? In the present situation, at which of the loops should UNCITRAL begin to eat, that is, to focus its energies?

Continuing legal education programmes are essential. The successful promotion of traditional academic courses and programmes on the Sales Convention for law students would create, in a few years, a substantial pool of lawyers who would have become so familiar and comfortable with the Sales Convention that it would become the primary law applicable to the international sale of goods.

The promotion and dissemination of standard international judicial interpretations of the Sales Convention are also essential.

The first step must be to have an educated, informed Bar: lawyers conversant and comfortable with the Sales Convention and with cases and controversies brought before the courts and other tribunals in their jurisdiction and elsewhere.

Similarly, courts and other tribunals must become conversant and comfortable with the Sales Convention. This is more likely to be accomplished as arbitrators become conversant with the Sales Convention, and as lawyers conversant and comfortable with the Sales Convention become judges. As more arbitrators and lawyers who have been a part of the harmonization of commercial laws become judges, the greater the likelihood of the harmonization of judicial and other decisional treatment of the Sales Convention.

Harmonization of the statutory text of the law is without meaningful practical effect without the concurrent harmonization of judicial determinations of interpretation of such statutory text of the law. Unless and until judicial determinations become standard and predictable by the legal community, practising lawyers and house counsel will be reluctant to transfer allegiance from the familiar and predictable to the unpredictable results under the Sales Convention.

Harmonization of judicial determinations and the relief granted is complicated by the tendency of courts in common law jurisdictions to grant money damages and for courts in civil law jurisdictions to grant specific performance and other forms of equitable relief. Additional interference with the harmonization of judicial determinations exists because the courts in the various States have differences in their local rules of evidence, practice and procedure. Accordingly, the judicial determination on identical facts may be substantially different in nature, timing, substance and relief

depending on the State in which venue has been laid. Because of the possibility of diversity of decisions based on identical facts, during the negotiating and drafting of a contract for the international sale of goods there might properly be serious negotiations regarding the choice-of-venue provision and the inclusion in the contract of a designation of venue for the resolution of all disputes, as well as submission of personal jurisdiction in the venue designated. Such divergence of the ultimate determination of a dispute between the parties strikes at the heart of the intention of harmonization of the law of contracts for the international sale of goods. If there is to be a true harmonization of such law, there must be a harmonization of the judicial determination of such law. For example, care must be taken to avoid the so-called "article 16 trap" with respect to the duration of an offer and the formation of a contract.

In order to achieve the universal acceptance and common use of the Sales Convention as the law applicable to contracts for the international sale of goods, it is suggested that UNCITRAL establish the International Trade Law Moot Arbitration Programme and annually conduct a global competition open to teams representing locally accredited educational institutions with a nexus to international trade. Such teams would be comprised of matriculating students from any graduate-level business school or school of international affairs and any law school.

The proposed Moot Arbitration Programme would provide a valid basis for a dramatic increase within all sectors of the academic community (students, professors, publishers etc.) interested in the Sales Convention. Such an increase would, within a few years, result in persons then actively engaged in international trade being familiar and comfortable with the Sales Convention, and therefore favourably disposed to its utilization as the standard applicable law for transactions involving the international sale of goods in which they had a role. Meaningful awards to the victorious teams, coaches etc. could be presented, and would serve to encourage individuals and schools to enter such competition. I envision "named" financial prizes and trophies, public- and private-sector internships, externships, fellowships and entry-level professional opportunities, the publication of briefs revised to the format of an article etc. as such stimuli.

An UNCITRAL moot arbitration competition based on a problem stemming from transactions for the international sale of goods and open to teams from schools of business, international affairs and law would stimulate and captivate the interest of persons on the campus. The preparation of the briefs for submission to the Moot Arbitration Board would enlist an expansive spectrum of competent persons to ponder and comment on Sales Convention issues present in real world transactions as framed by the problem. The Moot Arbitration Programme would also engage the interest of jurists, practising lawyers, arbitrators, academicians and others invited to serve as moot arbitrators.

Procedures and policies for utilization in the real world would be developed, and could then be tried and refined under simulated conditions involving the participants in the UNCITRAL moot arbitration competition without the risk of improper, premature or undesirable interference with contracts for the international sale of goods.

Just as the Sales Convention is the state-of-the-art statutory component of transactions for the international sale of goods, it is suggested that the resolution of disputes between parties involved in transactions for the international sale of goods also be at the forefront of technology - teleconferencing. It is envisioned that the competitors from throughout the world in the UNCITRAL Moot Arbitration Programme would not be obliged to gather at one central place to argue their cases, but rather would engage in oral argument by teleconferencing. There would be by conventional means an initial round for the determination of each of the national champions, and then regional rounds for the determination of the regional champions. Finally, immediately after the conclusion of the regional round, the regional champions would engage in the international final round. The teams could remain relatively

near their respective school, and the panels of arbitrators could be in one or more locations. Thus, the degree of proximity or remoteness of any school to any other school and to the panel of arbitrators would be immaterial to the logistical practicality of the competition. From the viewpoint of the providers of teleconferencing services, the UNCITRAL Moot Arbitration Programme would serve as a test bed for operational and technical matters and, once arbitration by teleconferencing had been honed into a commercially practical, legally acceptable package, then the providers of teleconferencing services could utilize the UNCITRAL moot arbitration competition as an effective worldwide demonstration of the benefits and practicalities of teleconferencing services and technology.

Furthermore, the UNCITRAL Moot Arbitration Programme, itself, would serve as the test bed for both the mechanism for the harmonization of judicial determinations under the Sales Convention and for the UNCITRAL arbitration procedures. As noted previously, without a harmonization of judicial decisional law, the harmonization of statutory text is, in practicality, an insufficient degree of harmonization. With the harmonization of only statutory text and not of judicial determinations, truly practical harmonization, the ultimate objective is not achieved or realistically achievable.

As a second suggestion for action to encourage the worldwide implementation of the Sales Convention, I endorse the establishment of a worldwide supreme tribunal for the ultimate resolution of questions of the interpretation of the Sales Convention in cases and controversies arising thereunder. The UNCITRAL supreme tribunal would serve as one means of effecting the maximization of judicial determinations. Such an UNCITRAL body would be the final decisional authority with respect to the interpretation and application of the Sales Convention to certified facts and questions of law. Such certifications would be accepted by the UNCITRAL supreme tribunal from only the highest court in the State with jurisdiction of the facts and the question then being certified. It is specifically suggested that such an UNCITRAL supreme tribunal not be a traditional decisional judicial body of original or appellate jurisdiction or a form of supernational court.

Even with the suggested centralized response to certified questions of law involving the interpretation of the Sales Convention and the collection, translation and dissemination by UNCITRAL of written decisions by courts and other tribunals throughout the world, the ultimate judicial determination of a particular case might vary from State to State because of diversity among States in their rules of evidence, standards for burdens of proof, availability of remedies, level of awards of money damages, local calendar delays, local practice procedures etc. However, the endeavour to have a universal monolithic interpretation of the Sales Convention is one of the requisite steps in the global adoption of that Sales Convention.

If such an UNCITRAL supreme tribunal were to prove to be an effective mechanism in respect of the Sales Convention, then its jurisdiction could be expanded to include other aspects and conventions of UNCITRAL.

As my third suggestion, I refer to the establishment and operation by UNCITRAL of a centralized system for the collection of judicial decisions. It is suggested that UNCITRAL establish and operate a computerized database containing all decisions involving the Sales Convention, including all decisions which only mention or identify the Sales Convention by name or reference. Such an UNCITRAL database should be accessible on a "dial-up" basis from any standard (1,200 baud or better) modem-equipped IBM personal computer, IBM-compatible personal computer or Macintosh computer, and be established and available on a 24-hours-per-day, seven-days-per-week, basis. It would be practically beneficial and probably technically feasible for UNCITRAL and others if there were an automatic transparent interconnect between all of the providers of on-line computer legal research services, such as Lexus and Westlaw in the United States, and the UNCITRAL database. The

access to and use of the UNCITRAL database must be user-friendly and continuously available without the necessity for sophisticated hardware or software.

With the foundation of familiarity with the Sales Convention among the younger members of the Bar, and with harmonization of its judicial treatment, a "virtuous circle" will develop; the rapidity of movement towards the universal adoption of the Sales Convention as the standard law for contracts related to the international sale of goods will increase; and the objective of UNCITRAL in respect of the Convention will be achieved.

4. Open floor

K.T.S. TULSI
Solicitor-General of India, New Delhi

I should like to suggest that amongst the future projects of UNCITRAL, it might also consider taking up the issues of intellectual properties and patent laws, keeping in view the reputation that UNCITRAL has established for drafting legislation, either model laws or conventions, which are known to be the fairest to various sections of the world, either developed or developing. I would consider that if UNCITRAL were to take up the task of drafting model laws on patents and intellectual property rights, perhaps it would do a great service to achieving the objective of uniform commercial laws in the twenty-first century. I make this suggestion because when I go through the text of the guide proposals and the draft presented by Arthur Dunkel on the Uruguay Round of GATT negotiations, I get a distinct impression that either the text lacks in clarity or in some places it lacks fairness. Most of the time it is misunderstood perhaps because of the language which is employed in some of the clauses. I do not want to specify the deficiencies that have been found in the Dunkel text, but I do consider that it would be highly desirable for larger acceptance by Governments with regard to the proposals on patent laws and intellectual property rights and for achieving completely the objective of uniform commercial laws that UNCITRAL in its future programme consider taking up these matters.

PHILIPPE KAHN
University of Burgundy, Dijon, France

I would like to go back to the suggestion made this morning concerning the Sales Convention. It seems to me that for that Convention and many others, the weak point in our organization is the fact that there is no follow-up or monitoring by the organization itself to see what happens next. The phenomenon of the consolidation of the Convention itself is not followed up vigorously enough. It seems that at present the Convention which was welcomed everywhere by everyone who is familiar with it is suffering from the fact that it has not yet been well introduced into professional circles themselves through professional organizations. Eminent scholars in all the main scientific magazines have commented on it, and once the comments have been made, the best students and the professors themselves have read them, but there is a whole professional group that is not informed of this in a less technical, less scientific language that would enable it to be familiar with the advantages and the drawbacks of this type of convention. I think that at the present time, if one truly wishes to ensure the success of the Convention, which would represent a perfectly appropriate solution for international trade relations, it is necessary to make a major effort and devote a great deal of energy to the task of transferring this entire system to the professional circles in an ongoing way. There could be a follow-up committee on the Convention within UNCITRAL. There could be recruitment among responsible people in every country to put constant pressure on those who are active in the

professional organizations which are most concerned, particularly the bar organizations and lawyers' associations. There could be this entire apparatus that the ICC employs quite well in certain areas, proposing various alternatives in relation to the Convention by drafting model solutions, if not model clauses.

MARY HISCOCK
University of Melbourne, Melbourne, Australia

I would like to make a suggestion relating to future work of the Commission in the light of the earlier discussions. The subject is the question of the enforceability of penalty clauses and damage clauses in international transactions. It seems to me that this is still one of the great divisions which exists in international trade, and that in the light of the work done by UNCITRAL on counter-trade, where this question is of particular importance and the negotiation of penalties has become a very critical matter, it would be of great assistance to countries like Australia, which deals frequently with legal systems where such clauses are recognized, but which in its own system does not recognize such clauses; this means that many people must enter into transactions which we know would not be enforceable within our courts. I think this is a good example of how in the decade since the Vienna Diplomatic Conference, moving through to the present work on counter-trade, the traditional forms of sale have receded in world importance. I would therefore like to request that the Commission consider going back to its work on rules relating to penalties and liquidated damages, but taking into account its experience in relation to both the Sales Convention and the work on counter-trade.

DONATO CARPIO
Member of the Peruvian Association of International Law, Lima, Peru

First of all, I would like to go back to the idea put forward concerning the need to draw attention to the great importance of the follow-up phase and the need to strengthen acceptance, endorsement or ratification of the Sales Convention. In this connection, we would suggest that UNCITRAL try to bring together national sections which would be authorized by UNCITRAL to play an extremely important role, that of influencing legal and political opinion in each country in order to promote ratification. I think that is one of the ultimate goals, one of the main goals, of UNCITRAL, and we are neglecting this. But this proposal would be incomplete unless at the same time the signing of the Convention is promoted as much as possible. There should not be too many reservations. We recognize that it is important for countries to understand that there is flexibility and for them to be encouraged to incorporate the Convention or a part thereof in their internal legislation. I do not think that reservations should be the most important aspect. If 34 countries have accepted and ratified the Convention, 20 of these have made reservations. That being so, I think we need to question what we are unifying, what we are seeking to render uniform in international commercial law.

ANA QUIÑONES ESCAMEZ
Central University of Barcelona, Barcelona, Spain

I would like to emphasize the role of applicability of part I, article 1(1)(b), of the Sales Convention and the reservation in article 95. Originally I had thought that article 1(1)(b) was superfluous, since States parties to the Convention would apply this rule of applicability when the rule of applicability was incorporated into their law, but States that are not parties to the Sales Convention could also apply it by way of *ex clause*. But the reservation provided for in article 95 is dangerous:

in many cases it would be better not to ratify the Convention, rather than to ratify it with reservations under article 95, since, as has already been indicated, not all States are parties to the Convention.

In order to avoid the conflict of law in this connection, the 1985 Hague Conference on the Law Applicable to Contracts for the International Sale of Goods, in cooperation with UNCITRAL, prepared the 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods, but that Convention for the time being is a failure, because only Argentina has ratified it for reasons that we at this time cannot analyse, and the discussion has been politicized. All of this prompts me to draw attention to the need to develop in depth the question of uniform law and international private law.

PROFESSOR DONALD KING
School of Law, Saint-Louis University, Saint-Louis, Missouri, United States of America

For the future work of UNCITRAL, may I suggest that perhaps some of the things that were omitted very wisely from its past work now deserve attention. It has been said that international trade and the United Nations Sales Convention does not affect consumers and consumer goods. But if we look at the reality, consumers are very heavily affected by the transactions between businessmen who ship the goods, and indeed should a consumer in the United States be treated differently than one in Africa or another country? We live in the same world; we look at the same sun and the same moon, the same sky. Why should we be treated differently as to the quality of goods and as to advertising which is deceptive, and to other consumer practices which exist? I believe consumers should be considered in the future work of UNCITRAL.

The other thing which was omitted was the matter of validity which involves unfair contracts. I think we should not shy away from covering commercial ethics, delving into unconscionability and good faith and setting further international standards, for there are very basic standards of fairness which apply to people in the United States, in Asia, in Africa and in Europe: these basic standards of fairness and commercial ethics should be dealt with.

Finally, there is the matter of uniformity, which was also omitted when we shied away from setting up an international tribunal to rule on the decisions in regard to the Convention. That was perhaps a wise and deliberate decision at the time, but I think Professor Louis Sohn's idea of yesterday, that is, the setting-up of an international court to give uniformity to the decisions that come out of and are conflicting in the different regions of the world, deserves attention or perhaps an intermediate step. Perhaps these things which were wisely omitted in the past so as to gain uniformity or some consensus are now the challenges of the future.

PROFESSOR SAMIA EL-SHARKAWI
Professor of Commercial Law, Cairo University, Cairo, Egypt

I cannot start my comment without referring to Mohsen Shafik, Professor of Commercial Law at Cairo University, who was one of the pioneers who participated from the very beginning in the constitution of UNCITRAL, and who followed for 22 years the sessions of the Commission. Unfortunately, he was not able to attend this ceremony.

The international law relating to the international sale of goods has a strong relationship with marine insurance contracts and letters of credit. It would be important for UNCITRAL to consider in future sessions the rules of marine insurance contract with respect to goods which are subject to

international sale, or, as a proposal, the preparation of a legal guide on this important contract which is of relevance to the international sale of goods.

PROFESSOR CAROLINE RIDER
Red Hook, New York, United States of America

I teach courses on the United Nations Convention on Contracts for the International Sale of Goods to both undergraduate students and graduate students who are taking a degree of Master of Business Administration, but I do not find that this is common practice. I wonder if UNCITRAL might invite business professors to a congress like this, business professors not only from the United States, but also from other countries. I wonder if UNCITRAL might perhaps especially emphasize developing connections with organizations such as the American Association of Collegiate Schools of Business, which is the main accrediting agency for business schools in the United States. I think that if the business people of tomorrow know about the possibilities of the Convention, they will drag their lawyers with them, as opposed to the other way around.

B. Supply of Services

1. Practical questions relating to the UNIDROIT Convention on International Financial Leasing

PROFESSOR ROY GOODE
St. John's College, Oxford, United Kingdom of Great Britain and Northern Ireland

In expressing my pleasure at being invited to address you on the UNIDROIT Convention on International Financial Leasing, I feel I must begin by making a confession. Yesterday, Judge Howard Holtzmann stressed the need to ensure that a proposed harmonization project was of practical relevance and importance in addressing real problems, and he is of course very knowledgeable in these matters, so I am sure that he must be absolutely right. But I am an academic and, as you may know, we academics, particularly those from the University of Oxford, are at our happiest when we are engaged in projects of no practical importance whatsoever! There are, of course, the exceptions to this rule and among them are the harmonization projects initiated by such bodies as UNCITRAL, UNIDROIT and the International Chamber of Commerce. So here I am to talk to you about the UNIDROIT Convention on International Financial Leasing. I am not going to give you a word-by-word or line-by-line analysis, simply an overview in which I want to use the Convention and the preparatory work that went into it as a vehicle to illustrate the harmonization process, some of the problems that we experienced and some of the conclusions that might be drawn.

Now, I suppose one asks the question in this field of international leasing, "Why harmonize at all?" There is an interesting form of examination question for law students in which the candidate is told: "Here is the solution. Now find the problem." Well, the Governing Council of UNIDROIT went to great lengths to avoid this sort of thing and to ensure that there were real problems that needed to be solved before we started solving them. First of all, there was a preliminary report from the UNIDROIT secretariat. Then, there was a small working group set up to consider the feasibility of the project, and it reported favourably. This was followed by the circulation of a detailed questionnaire to leasing experts and operators from all over the world and an analysis of the answers, which did show that there were problems to be resolved.

Still, the Council wanted to be quite sure, so it set up a restricted exploratory working group to consider whether the private law aspects of financial leasing could be disentangled from the fiscal aspects, and whether leasing could sensibly be dealt with in isolation from the general law governing security interests. That group reported favourably, and only then did the Governing Council authorize the approval of the project and the setting up of a study group under the chairmanship of Ambassador Reczei of Hungary.

What are the problems of international financial leasing that necessitated all this labour? The first is differences in the legal characterization of a financial lease. In some jurisdictions, it is treated as an ordinary lease. In others, it is considered a disguised sale. In yet other jurisdictions, it is treated as a form of security interest. And the legal treatment depends heavily on the way the transaction is characterized.

Secondly, there are differences in the necessary legal elements. Under French law, for example, the lease has to include an option to buy the equipment in order for it to fall within the law on *crédit bail*. Under English law, by contrast, the inclusion of an option to purchase destroys the character of the lease as a lease and converts it into what we call a hire- purchase agreement. In the United States, the inclusion of an option to purchase is likely to convert the transaction into a secured transaction. So there is a cluster of problems.

If the equipment proves to be defective, there is another group of problems. The lessee's claim is not against the supplier, who was responsible for the defects, because he has no contract with the supplier. His claim is against the lessor, who had no control over the equipment, did not select the equipment, did not select the supplier, never saw the equipment, never took delivery, never delivered it. So the liability rests on the person who had no real control, simply because he was the legal supplier.

The fourth problem is probably peculiar to common law jurisdictions, and this relates to the ability of a contracting party to specify a sum of money payable as damages in the event of a breach. Civil law jurisdictions allow the imposition of a penalty for breach of contract in order to encourage performance. Common law jurisdictions do not. And in international leasing, this can create problems.

Then there is anxiety about the possible liability of a lessor to third parties who were injured by the equipment, or who suffered damage. Can a lessor, because he is a legal supplier, incur a liability for damage? And it might be very expensive damage. It might be equipment that caused an explosion. Could the lessor be liable?

Finally, there are various jurisdictions in which the lessor's title to the equipment is not recognized if the lessee becomes bankrupt.

So, we have a cluster of problems, and the result is to discourage true cross-border financial leasing and to impel lessors to lease through subsidiaries or associated companies in the lessee's country.

In embarking on its work, the study group took three basic decisions which were considered crucial to the success of the project. The first was to limit its scope to what was necessary and feasible, not to be too ambitious. The second was to involve leasing specialists right from the outset, people who actually knew how leasing contracts worked: lawyers from different countries knowledgeable in both theory and practice; representatives of Leaseurope, which is a federation of European equipment leasing associations. They all played a part right from the start. And then, at

a later stage, we exposed drafts of the Convention to conferences in New York, in Zurich, in Hong Kong, to see whether these provisions really did work, or whether there were problems we had not identified.

The next decision was to allow a wide measure of party autonomy, ability to exclude or to vary the Convention, because we did not think there was much point in trying to force on parties who are able to look after themselves contract terms they did not want. So the Convention gives the parties wide power to make their own agreement.

And, finally, we had the objective of balancing the interests of lessor and lessee, the interests of developed countries and less developed countries, maintaining a balance to produce an overall fair and workable Convention.

Now this Convention has a number of limits on its scope. It is confined to the leasing of business equipment, as opposed to equipment for private use. It is confined to financial leases because it is the financial character of the transaction and the lessor's non-involvement in the selection of the supplier and the equipment which justify the special immunity to be given to lessors against claims by lessees and third parties, and a direct right of action in favour of the lessee against the supplier. So operating leases were excluded. The Convention is confined to international transactions, that is to say, transactions where the lessor and the lessee carry on business in different States. This limitation was adopted, first, because it was the differences in laws that created the main problem and, secondly, because States are very wedded to their own legal systems and rules, but they are much more relaxed as regards transactions with foreigners.

The next problem concerned the connecting factor. What should be the factor, or factors, that connected a transaction to contracting States? And here we had a rather unusual problem. In virtually all prior trade Conventions the subject-matter was a single contract. But in leasing, as in factoring, on which there is a parallel Convention, there are two contracts: in the case of leasing, the supply agreement and the leasing agreement, together involving three parties, one of whom, the lessor, is common to both agreements. So this triangular relationship had to be taken into account in fixing on the connecting factor. Accordingly it was provided that, in order for the Convention to apply, all three parties should in some way have submitted themselves to the law of a contracting State, either because all three parties had their places of business in a contracting State, or because both contracts were governed by the law of a contracting State.

Now, what are the key elements of this Convention? First, we have the immunity of the lessor from liability to the lessee. Even though there is a contractual relationship between them, the lessor incurs no liability for defects in the equipment to the lessee except in certain special cases. One is if the lessee suffers loss through reliance on the lessor's skill and judgement and to the extent of the lessor's intervention in the supply transaction. The second is if the lessee never gets the equipment at all, or rejects equipment because it does not conform to the contract. In this case he can recover all his rentals he has paid and escape liability. Thirdly, the lessor will be liable for other claims, to the extent that these result from his act or omission. And finally, he is liable if he breaks the warranty of quiet possession.

Now some leasing interests, it has to be said, complained that these exceptions to immunity from liability were contrary to leasing practice because, invariably, the leasing agreement excluded all liability. That, I think, misses the point. This Convention is not designed as a lessor's charter, it is designed to maintain a fair balance and to require the lessor to do what is necessary, which is to negotiate for exemption from liability. And, to test the utility of the Convention, what lessors should be doing is comparing its provisions, not with those of the typical leasing contract, but with the

provisions of the lessor's own existing national laws. And if lessors do that, they will find that the Convention has many advantages and hardly any disadvantages.

The next feature is the lessee's direct right of action against the supplier, as if the lessee had been a party to the supply agreement. This I think illustrates the practical approach of the Convention. It cuts through doctrinal difficulties. It gives the lessee a direct right of action against a party with whom he does not have a contractual relationship as if he did have a contractual relationship with him.

And then we have various default remedies provided, which lessors always like, a right to recover arrears of rent, to accelerate rental liability, to terminate the agreement for default and repossess equipment. This is not always very easy nowadays, for example, in the leasing of satellites. But I believe that, if you pay a few million dollars, you can actually send a repossession agent up into outer space to recover your satellite by hand. So we are moving into new areas the whole time.

Then there are damages for loss of the bargain on termination: freedom for the lessor to stipulate what the damages should be, so long as they are not too disproportionate to his actual loss.

And then we have an immunity given to the lessor against liability to third parties. This is an immunity only from liability that he might otherwise incur by virtue of being a lessor. In other words, he will not be liable to third parties merely because he has agreed to supply equipment under a financial lease. He could still incur a liability in his capacity as owner or under some other Convention, or if he repossesses the equipment, he then becomes a physical supplier.

Finally, the Convention provides that the lessor's interest shall be recognized against the lessee's trustee in bankruptcy and execution and attachment creditors. So there is an important safeguard there.

France has the honour of being the first, and so far the only, State to ratify this Convention, but others are moving towards it, including, I believe, the United States. England, of course, will no doubt get there in the end, but we are not the fastest people on Earth when it comes to ratifying Conventions. English common law and legislation tend to look at time in terms of centuries rather than months or years. But, no doubt, some time in the twenty-first century we shall get there, hopefully at the beginning, not the end. What we have to do is to do what John Honnold did so successfully with the United Nations Sales Convention, which was to travel round from place to place, educating people, selling them the Convention and really getting an impetus behind it.

Now, what conclusions, I wonder, can one draw from this work? First of all, as has been said, one has to establish that there is a need for the Convention. Secondly, it must not be too ambitious in scope. A lot of projects fail because they try to be too big. Thirdly, one has to be ready to compromise. Fourthly, one has to involve experts from the outset, and to expose drafts to outside views before the project gets too crystallized.

But the real problem - and this is true of all Conventions - is the time factor. From start to finish, it took us 14 years. This is quite normal. It is virtually impossible to get to an international trade convention in under 10 years. And one gets used to this sort of concept of time. We had a case in the English Court of Appeal some time ago when the barrister conducting the case was being very long-winded, went on and on and finally, rather apologetically, said "I hope that I have not taken up too much of your lordships's time", and the presiding judge said: "Time, Mr Smith, time", he said, "you have exhausted time and trespassed on eternity".

Now, there are many reasons why it takes all these years to get a convention going: there is the difficulty in getting parties from many jurisdictions together; there is the expense; there is the limited

time that any group can spend at any one session before they go back home; there is the pressure on the relevant secretariat of the body that is sponsoring the convention. These lengthy periods of gestation do cause problems. They tend to generate inertia, the composition of the groups changes, so that old issues are constantly discussed all over again, it is all too easy to forget why a particular rule was framed at an earlier meeting, and who initiated it. And it is not at all uncommon for a delegate to criticize very strongly a particular formulation, only to be reminded that, at a meeting two years previously, it was he himself who had prepared the formulation in question. So we have problems.

I think we ought to give much more thought to the planning of the entire process. I do not think we ought to accept that it should inevitably take 12, 14, 20 years to get to the stage of concluding a convention. And that, of course, is only the first stage, because then it has to be ratified.

I would suggest that some thought be given to a small team of academic researchers, practising lawyers who are on sabbatical leave, to work intensively on a draft and on the reports of meetings to speed the whole project up. It would cost money, but a lot more money would be saved by speeding up the project and reducing the number of meetings. It seems to me there might be some merit in that.

I think, myself, though of course I am not unbiased, that the UNIDROIT Convention on International Financial Leasing is a good Convention. It has been tested by the fire of exposure to outside interests, leasing interests, user interests and Government, and I think it embodies both deep theoretical knowledge and the practical expertise of the many people who took part in it. I certainly strongly hope that it will receive widespread implementation.

I should like in conclusion to pay my own tribute to Clive Schmitthoff, in whose honour we stood at the beginning of this Congress, and whose work provided the impetus for the creation of UNCITRAL.

2. *The UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*

JAMES J. MYERS
Gadsby & Hannah, Boston, Massachusetts, United States of America

At the outset I would like to express my gratitude for the opportunity to present two important legal texts in the field of international construction law. In keeping with the theme of this Congress concerning the unification of international commercial law, my role is first to present a product of UNCITRAL, the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*, and second to present a model international construction contract not created by UNCITRAL. Neither of them embodies an international convention or uniform laws. Both of them are promoting uniformity in international construction law.

In conjunction with the resolution adopted in the early 1970s by the General Assembly of the United Nations dealing with economic development and the establishment of a new international economic order, UNCITRAL established a working group which investigated and reported its conclusion to the Commission that "the study of contractual provisions commonly occurring in international industrial development contracts" would be of special importance to developing countries in view of the role of industrialization in the process of economic development. In 1981 the

Commission instructed the working group to prepare a Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

A guide was needed because contracts for construction of industrial works are extraordinarily complex documents, with the technical aspects interacting with the legal relationship between the parties. The obligations of contractors extend over a relatively long period of time. Thus, this type of complex long-term construction contract is felt to be unique. The *Guide* was prepared with a view towards the technical and legal nature of such contracts in the field, and the knowledge that purchasers of industrial works without sufficient knowledge and expertise would be aided by such a work.

The *Guide* has therefore been designed to be of particular benefit to purchasers from developing countries, while at the same time taking a balanced approach to protect the legitimate interests of contractors.

The *Guide* seeks to assist the parties in negotiating and drawing up international contracts for the construction of industrial works by identifying the legal issues involved in those contracts, discussing possible approaches to the solution of the issues, and where appropriate, suggesting solutions which the parties may wish to incorporate in their contracts. The *Guide* conceives an industrial work as an installation which incorporates one or more major pieces of equipment and a technological process to produce an output. Examples of industrial works include petrochemical plants, fertilizer plants and hydroelectric plants. In addition to being obligated to provide the buildings and machinery, contractors often assume other important obligations such as the design of the works, the transfer of technology, and the training of the purchaser's personnel.

The *Guide* has been designed to be of use to persons involved at various levels in negotiating and drawing up industrial works contracts. It is intended to assist parties in negotiating and drafting their contracts. It is not intended to be used as a document for interpreting contracts entered into either before or after publication of the *Guide*.

The arrangement of the Guide

The *Guide* is arranged in two parts. Part one deals with matters arising prior to the time when the contract is drawn up. Chapter I deals with pre-contract studies, chapter II with various contracting approaches which the parties may adopt, and chapter III with how the contract is to be procured and the form and validity of the contract.

Part two of the *Guide* deals with drawing up specific provisions in a works contract. It defines those provisions and suggests different approaches to the treatment of the issues with respect to those provisions. Many believe part two to be the actual core of the *Guide*. Part two deals with some general comments in connection with drafting the industrial works contract, describing the works and obtaining a quality guaranty, transfer of technology, price and payment provisions, the supply of equipment and materials, provisions relating to construction on site, the consulting engineer, subcontracting, inspection and testing during manufacture and construction, completion, takeover and acceptance, allocating the risk of loss of materials and equipment, transferring ownership, insurance, security for performance, delay, defects and other failures to perform, liquidated damages and penalty clauses, damages, *force majeure* (exempting impediments), hardship clauses, variation clauses, suspension of works, termination, supply of spare parts and services after construction, transfer of contractual rights and obligations, choice of law, and dispute settlement.

I should also call to your attention that the *Guide* contains some illustrative provisions which are set forth in the footnotes. These usually are forms of clauses that may be used in contracts, but the

Guide really does not serve as a form book. The illustrative provisions are fairly sparse and not consistently used throughout the *Guide*.

In addition we should note that there is a summary at the beginning of each chapter in the *Guide* of what is contained in the chapter. In my view, the summaries are excellent and provide a quick reference to the rather complete discussions of various complex topics with which each chapter deals.

It was thought by many when the *Guide* was issued that it was an overly formidable document that was not "user friendly" for procurement personnel in developing countries. It is almost an encyclopedia of the various contract subject-matters, and in most instances there is a rather in-depth discussion of the various alternatives to each subject. Thankfully, the summaries in the *Guide*, to those that are familiar with it, save the day. By reading the summaries one can understand the content of each chapter, and then go back and use the detailed chapter itself as a reference source if a problem is identified in one particular area or another. When working on industrial development contracts for developing countries, what we have done on many occasions has been simply to take the summaries of each chapter and use them as an introduction to the *Guide*.

Chapter I - Pre-contract studies

This chapter points out the need for feasibility studies, opportunity studies and other detailed studies that will assist the purchaser in defining its need. It encourages the purchaser that does not have sufficient expertise in-house to engage outside consultants, and suggests competitive means to select prospective consulting firms. It also discusses the potential problems and advantages of having the pre-contract studier engaged as the contractor to construct the works.

Chapter II - Choice of contracting approach

This chapter points out that a purchaser can contract with a single contractor for the entire works or with different contractors for different parts of the works. A common approach in dealing with a single contractor is the turnkey approach. The benefits and the dangers of the turnkey approach are discussed. If a purchaser decides to contract with a group of different contractors for different parts of the work, it may still be advisable to have one contractor responsible for producing the industrial output promised.

This chapter also suggests various methods that the employer may use to manage the works such as engaging a consulting engineer or alternatively engaging a construction manager when more than one contractor is involved. Contracting with joint ventures and the legal aspects of the responsibilities of joint venturers to the employer are also discussed.

Chapter III - Selection of contractor and conclusion of the contract

This chapter essentially discusses the technique of procuring the contract by either open or limited tenders on the one hand, with or without prequalification of tenderers, by advertising or by inviting certain tenderers which it considers to be responsible; or alternatively, by simply negotiating the contract with the contractor which the purchaser desires or selects through interviews.

Chapter IV - General remarks on drafting

This chapter describes the normal drafting approach and the process of interchange between the parties, as well as methods of handling language differences, incorporating documents, describing the parties, defining where legal notification is to be sent and defining terms used in the contract.

Chapter V - Description of works and quality guaranty

This chapter relates to how specifications describing the works to be constructed should be prepared. Internationally accepted standards and codes are encouraged and should be identified in the contract. Confidential processes must be protected. A quality guaranty, guaranteeing against defects, is recommended. The use of general and special provisions in the contract and in the technical specifications is discussed.

Chapter VI - Transfer of technology

This chapter relates to transferring information on the technological processes necessary for production, operation and maintenance of the works. The possibility of licensing the technology is discussed along with the training of the purchaser's personnel. The frequent importance to the seller that the purchaser maintain confidentiality with respect to the know-how supplied is also discussed.

Chapter VII - Price and payment conditions

Lump sum, cost and unit price methods are discussed. Bonus payments for early completion, provisions concerning currency fluctuation, and how and when payment should be made to achieve various goals of the purchaser are also discussed. Advance payments and progress payments to the purchaser, as well as payments after substantial and final completion, are also discussed.

Chapter VIII - Supply of equipment and materials

The *Guide* points out that equipment and materials supplied under works contracts may be governed by a different body of law than equipment and material supplied separately which are considered "goods". Provisions for transport, customs duties, risk of loss, import restrictions, storage, and descriptions of the quantity and quality of material and inspection rights are also discussed.

Chapter IX - Construction on site

This chapter deals with civil engineering, building and the installation of the equipment. The contractor's obligation to obtain necessary licences, and contract clauses which may overcome problems for the contractor in importing equipment for work on site are also discussed. Construction scheduling is recommended. The contractor's obligations with respect to the installation and start-up of equipment on site should be spelled out. Rights to access and site housekeeping (cleaning) provisions are also addressed.

Chapter X - Consulting engineer

The authority of the purchaser's consulting engineer should be clearly set out in the contract. The contract should clearly advise the contractor as to the functions on which the engineer is to act independently, and the functions which require purchaser approval.

Chapter XI - Subcontracting

The *Guide* recommends that the contract contain provisions dealing with the permissible scope of subcontracting, with the selection of subcontractors and with other aspects of approaches to selection of subcontractors. Subcontractors should be selected prior to entering into the works contracts. The nominated subcontractor system (used by the *Fédération internationale des ingénieurs-conseils* (International Federation of Consulting Engineers) (FIDIC)) is discussed. Indemnification

provisions for losses caused by the subcontractor to the employer, the desirability of creating some direct rights of the employer to enforce subcontractor obligations, and to control the payment by the general contractor to subcontractors, as well as communication with subcontractors through the prime contractor are discussed.

Chapter XII - Inspections and tests during manufacture and construction

Inspections and tests during manufacture and construction are for the purpose of satisfying the purchaser that manufacture and construction are proceeding in accordance with the agreed time schedule and in accordance with the contract specifications. The contract should set forth the character of the inspections and the tests to be conducted during manufacture, as well as the consequences of inability to complete or satisfy contract test thresholds. Depending on when title and risk of loss for the equipment passes, the time and nature of the testing should be varied.

Chapter XIII - Completion takeover and acceptance

The contract should specify when completion, takeover and acceptance occur and their legal consequences. Completion usually occurs only after the contractor conducts successful completion tests. The contract should specify when the purchaser is obligated to take over the works, and the contract usually obligates the purchaser to accept the works in the specified period after the conduct of successful performance tests. The contract should also provide the legal consequences of provisional acceptance and full acceptance.

Chapter XIV - Passing the risk

Equipment or materials incorporated into the works before or after completion as well as construction machinery may be damaged or lost. The contract should provide for which party bears the risk of loss at what point in time. Different legal systems have different rules with respect to equipment and materials incorporated into the works or the real estate. Where a single contractor is responsible for the works, the *Guide* recommends that the contractor bear the risk of loss until takeover or acceptance by the purchaser. The contractor should always bear the risk of loss with respect to its tools and equipment which are in his possession.

Chapter XV - Transfer of ownership of property

Whether the property involved in construction is owned by the contractor or the purchaser, the question of ownership is important with respect to questions of insurance, taxation, liability to third persons, seizure in bankruptcy proceedings of one party, and maintenance. The legal system applicable at the site of the works often governs when title passes, and when goods or personal property incorporated into the works become real estate or real property. Owner-furnished equipment is a special issue discussed. Title to owner-furnished equipment should not be passed to the contractor unless the contractor pays for it prior to incorporation into the works.

Chapter XVI - Insurance

Works contracts should require property insurance and liability insurance, specify the risks insured against, the party obligated to obtain the insurance, minimum amount of insurance and deductibles and the period of time for which the insurance must cover. Special rules apply to insuring equipment or materials that are to be incorporated into the works.

The contractor should be required to provide liability insurance for loss or damage caused by his performance of the contract, by acts or omissions of his employees, subcontractors or suppliers or liability under indemnity provisions in the contract. The techniques for providing certificates and other proof of insurance that may be utilized in contract provisions are also discussed.

Chapter XVII - Security for performance

The purchaser usually seeks security against failure of the contractor to perform. It usually takes the form of tender securities, guaranties of contract performance, repayment guaranties for advance payments which can be accomplished through letters of credit, performance bonds or other mechanisms. These provisions should, of course, be clearly stated in the contract. Purchasers may also be required to guarantee payment of the purchase price by security such as a letter of credit.

Chapter XVIII - Delay, defects and other failures to perform

The purchaser is usually entitled to certain remedies for delayed or defective performance by the contractor. The contractor may be entitled to certain remedies for failure of the purchaser to comply with its agreement. Contracts should specify the remedies each party has for failure of the other party to provide the promised performance. The contract should spell out the purchaser's remedy when the contractor delays in the performance of the contract or provides defective performance. Methods of providing for notice that a party intends to invoke a remedy and for the other party to cure defective performance in contract provisions are discussed. Failure by the purchaser to accept and take over the works as required by the contract normally gives rise to a remedy on the part of the contractor.

Chapter XIX - Liquidated damages and penalty clauses

Liquidated damages and penalty clauses are almost invariably either affected or governed by local law. How to use these contract mechanisms in a balanced and effective way is discussed in this chapter.

Chapter XX - Damages

In the absence of a contract provision, the applicable law will prescribe which damages are recoverable from a party who has failed to perform; the *Guide* points out that parties may provide for certain types of damages and limitations of damages in the contract, which provisions are usually respected by applicable law.

Chapter XXI - Exemption clauses

This chapter deals with what are referred to as "exempting impediments." These are excuses for non-performance, sometimes referred to as force majeure events. The chapter refers to certain problematical areas such as acts of the government in withdrawing and approving licences, and how to approach the drafting of such a contract clause either by listing all of the exemption events or by establishing the criteria for exempting events.

Chapter XXII - Hardship clauses

The *Guide* uses the term hardship to describe changes in economic, financial, legal or technological factors which cause serious adverse economic consequences to a contracting party, thereby rendering contract fulfilment substantially more difficult. Most hardship clauses provide for a renegotiation to adapt to the new situation. The advantage of hardship clauses is that they make the

contract more stable. If hardship clauses are used, they should be drafted to minimize the uncertainty by, for example, specifying exact events that fall within the hardship clause.

Chapter XXIII - Variation clauses

Variations are what we commonly refer to as "change". Changes clauses should provide that the owner is entitled to unilaterally order changes in the contract work and the methods. Changes will adjust the contract if they affect the contract time or affect the contract price. In the event of the inability of the parties to agree on the price or the additional time of the change, it is advisable that the parties specify the method of settlement of the dispute. The changes clause should specify the formula for determining the amount of the adjustment in the contract time or contract price resulting from such change, and a method whereby disputes relating to application of the method can be resolved.

Chapter XXIV - Suspension of construction

While the law applicable to the contract may define certain situations under which construction may be suspended by either party, it is advisable that the parties define in their contract the circumstances under which suspension may be invoked and describe the legal effects, when work is to be resumed, and the time and financial consequences to the parties. In lengthy suspensions, the right may be given to the parties to terminate the contract rather than suffer too lengthy an extension.

Chapter XXV - Termination of contract

The *Guide* points out that it is advisable to include a termination clause in order to provide for an orderly and equitable procedure in the event that circumstances make it prudent or necessary to terminate the contract. The grounds for termination should be specified in the contract. In addition, the contract should specify whether the purchaser is entitled to terminate the contract for convenience, i.e. without cause. The rights and obligations of the parties upon termination should also be specified. Upon termination, the contractor should be obligated to transfer or assign his subcontracts to the purchaser so as to enable the purchaser to complete the work.

Chapter XXVI - Supplies of spare parts and services after construction

After construction is completed and the works have been taken over by the purchaser, the purchaser will have to obtain spare parts to replace those which are worn out or damaged and to maintain, repair and operate the works. Particularly for purchasers from developing countries, it is advantageous to acquire or have locally available the spare parts, technology and skills necessary to maintain repair and operate the works. The parties in their contract may address issues connected with the ordering and delivering of spare parts, as well as the spare parts to be provided by the contractor as part of the contract itself. Standards for maintenance service that may be provided by the contract are discussed, as well as the contractor's repair obligations and obligations in connection with the technical operation of the works. These types of services should be separately priced and spelled out in the contract.

Chapter XXVII - Transfer of contractual rights and obligations

The rights of parties to transfer or assign their contract rights or obligations with or without the consent of the other party should be covered in the contract. The legal consequences of the transfer to both parties should also be stated in the contract.

Chapter XXVIII - Choice of law

In the absence of a choice-of-law clause in the contract, each court will apply the rules of private international law of its own country, and in most cases the rules become exceedingly complex and subjectively applied. Consequently, the parties may wish to add certainty and provide a choice-of-law clause in their contract. Local law at the site of the construction as well as local administrative rules must be taken into account in drafting a choice-of-law clause.

Chapter XXIX - Settlement of disputes

Disputes that arise under works contracts frequently present problems that do not often exist in disputes arising under other types of contracts. A works contract should contain a dispute settlement clause. That clause may provide some means to facilitate settlement of two or more related disputes in the same proceeding. The clause may provide for negotiation and conciliation under the UNCITRAL Conciliation Rules. The possibility of referring disputes to an arbitral referee is also discussed. Ultimately the *Guide* recommends that disputes be settled by binding arbitration. The parties should draft the arbitration clause to suit their particular needs.

Conclusion

The *Guide* has indeed enriched the available body of knowledge for drawing up international works contracts and is one of the distinct achievements of UNCITRAL. The *Guide* is being used by Governments as a training and reference source by procurement and contract administration officials throughout the world. It summarizes approaches and practices in drafting complex construction contracts, and enables officials to review different approaches and select an approach appropriate for their particular construction contract. The *Guide* is a unique document, available to both the public and private sectors, which advances uniformity of approach and expectations in international construction contracts.

Recommendations

First, the *Guide* would be considerably more useful if it incorporated a model contract and model forms of contract clauses on a reliable basis. UNCITRAL should consider supplementing the *Guide* to include a model contract and model clauses.

Second, the style and techniques of the *Guide* and its contents should be expanded to discuss the form and substance of Build-Operate-Transfer (BOT) contracts and other types of contracts that implement privatization and are urgently needed in Eastern Europe and the former Union of Soviet Socialist Republics, as well as in many other areas of the world where Governments are privatizing industry.

The FIDIC Conditions of Contract for Works of Civil Engineering Construction

The FIDIC Conditions of Contract for Works of Civil Engineering Construction is in common and constant use throughout the world. It is perhaps the single most used model of construction contract in the international construction field. Most World Bank contracts are done on the FIDIC model contract and other large funding agencies such as the United States Agency for International Development utilize this form of contract. It is specifically addressed for use in civil engineering construction projects, but I have seen it used in various types of building projects which one might call "architectural contracts," and special projects such as airports and bridges. For better or for worse, this contract has gained more use and acceptance than any other, and has become the leading form

contract in international construction. The FIDIC documents are printed and available in English, French, German and Spanish.

This contract is affectionately known as the "Red Book". FIDIC also produces another form contract, the "Yellow Book," which is FIDIC's form contract for mechanical and electrical works, a design/build form of contract. We will concentrate our remarks here on the Red Book, as it is in considerably wider use than the Yellow Book.

The form of contract itself is actually a turnkey model for the entire procurement process of a construction contract, either by invited tenders or by limited tenders, by international competitive bidding, or even by negotiation.

Part I consists of a form of tender for the contract as well as a pro-forma contract agreement incorporating the tender, the conditions of contract, the specifications, the drawings and the bill of quantities. Part I also contains the general conditions of contract, which we will discuss in more detail in a moment.

A separate booklet, part II, contains the conditions of particular application, which we might call special conditions unique to a particular construction contract, with guidelines for preparation of part II clauses.

It is important to know how the FIDIC works contract evolved. The FIDIC works contract actually evolved from the contract forms which were originally prepared by the Institute of Civil Engineers in London. Thus, the FIDIC works contract has a common law heritage, even though it has been embraced in almost all legal systems throughout the world - civil law, Islamic law, etc.

FIDIC first issued this contract almost 40 years ago. The third edition was issued in 1977, and the fourth edition was issued in 1987.

The FIDIC Red Book is now revised every 10 years by the FIDIC Civil Engineering Contracts Committee. This committee consists exclusively of engineers. Their drafting goals have been to maintain the basic role of the engineer, change the contract only where necessary, deal with certain problem areas which had been reported on the previous edition of the contract, and achieve more consistency with the definitions in the electrical and mechanical (Yellow Book) contract form.

While the FIDIC works contract has been embraced in international construction projects in civil law as well as in common law countries and in the Middle East, it has been pointed out by distinguished civil lawyers that complications arise when this common law form is used in civil law jurisdictions. The civil law system divides public and private law, and contains imperative rules which cannot be varied by contract. One of the main branches within public law is administrative law, which applies to contracts in which one party is a public agency. Irrespective of the argument between the parties, the mandates of administrative law apply where the contract is with a public agency. In addition, private civil law mandates other rules which cannot be changed, such as property rights where immovable property, i.e., real estate, is situated, the doctrine of *force majeure*, and liquidated damages rules. While we cannot here review all contract provisions that may be affected by civil law, the point is to demonstrate that while the FIDIC contract has proven to be adaptable and flexible, some of the common-law-based provisions of the FIDIC contract model must be changed in civil law countries in both public and private works contracts.

Role of the engineer

The traditional role of the engineer in the United Kingdom and other English-speaking common law countries is that the engineer acts as the agent of the owner. The engineer designs the works, assists the employer in procuring the contract, oversees the construction by the contractor, and has important administrative and quasi-judicial powers to make decisions, at least in theory, independent of both the owner and the contractor. Thus English law, under which the FIDIC contract was conceived, gives the leading role to the engineer (or architect). This system has no equivalent in civil law. Apart from preparing the drawings, the engineer or architect in civil law jurisdictions basically furnishes only advice and control without acting as an agent for the employer so as to bind the employer. This authority is merely technical, unless the engineer is expressly given additional authority by the owner. In continental Europe, the civil law domain, the powers of the engineer or architect are much more restrained, and the authority of the employer is commensurately greater.

Under the English system, the engineer acts in a dual role. On the one hand, he is the agent for the employer supervising construction and ensuring that the contractor executes the work properly in accordance with the terms of the construction contract. On the other hand, he performs certain administrative functions, and, in particular when exercising discretion accorded to him under the contract such as dispute settlement, the engineer is required to act impartially. Consequently, an employer cannot instruct the engineer as to the position he should adopt when he is required to act impartially. It is somewhat naive to expect an engineer to perform administrative functions totally impartially, especially when a claim calls into question his own conduct. Where the engineer is called upon to make a decision involving his own conduct, the old maxim should apply, that no one ought to be allowed to be a judge of his own case.

While it may have been implied in earlier versions of the contract, the fourth edition of the FIDIC works contract, in subclause 2.6, states that the engineer shall act impartially when making decisions in certain matters. In addition, for the first time, in subclause 6.4, the engineer is required to consult with both parties to the contract before making a determination with respect to the contract time, the contract price or costs. The term used in the contract is "due consultation" which will be a term that will have to be developed through case law, since it is not defined.

The fourth edition also recognizes the growing role of the contractor in designing parts of the permanent works, and now includes a procedure, in subclause 7.2(b), whereby the contractor has responsibility for the design of part of the permanent works.

Claims

The procedure for contractors making claims for adjustments in the contract time or price has been spelled out in much greater detail and has become considerably more complex (clause 44.2). The notice provisions in clause 44 are much more complex than in prior editions. This is the same modern phobia for spelling out every detailed action that must be taken by each party within certain time limits in processing a claim.

The third edition had no standard clauses in the general conditions relating to payment. The FIDIC fourth edition spells out the requirement that the engineer must certify the contractor's monthly payment requisitions to the employer which the engineer considers due to the contractor and the time within which those requisitions are required to be paid. This new provision now rectifies this omission. A conservative interpretation of these provisions would also dictate that the contractor should include in his monthly requisitions any claims that he may have for damages for breach of

contract, as a "matter or thing arising out of or in connection with the contract or the execution of the works".

In addition, the fourth edition for the first time expressly recognizes, in clauses 69.4 and 69.5, that contractors who are not paid within the time period required by a contract may suspend or reduce the rate of work.

Lastly, under the third edition it was always a matter of controversy and unclear as to what action a party was required to take within 90 days after receiving an engineer's decision (or, if the engineer had rendered no decision, within 90 days of the 90-day period allowed to him to render his decision) in order to reserve the right to arbitrate a dispute. Some ICC arbitration tribunals interpreted the clause to require the submission of a request for arbitration to the ICC, thereby commencing an ICC arbitration and communicating a copy thereof to the engineer. Others held that sending an appropriate notice letter to the engineer and the other party of an intention to arbitrate was sufficient. The consequences of uncertainty were serious, as the failure to take the right action would bar the claim.

Under the new FIDIC fourth edition this ambiguity has now been cleared up. Clause 67 now clearly provides that to be entitled to arbitrate a dispute, a party must, within 70 days after receiving a decision (or, if there has been no decision, within 70 days after the expiration of the 84 days allowed for the decision) give a notice to the other party, with a copy to the engineer, of his intention to commence arbitration. The giving of such a notice is necessary to be entitled to later commence arbitration with respect to the disputed issue. Assuming such notice has been given, arbitration need not be commenced by any particular time.

Conditions of particular application

Part II, the conditions of particular application, not only suggest the topics that should be considered and addressed in the contract for the individual project involved, but also contain commentary, and now in most instances, contain examples of clauses that can be used to cover the various subjects. Some of the most important subjects include the engineer's duties, the language in the law of the documents, performance security, site inspection, insurance, time for completion, defects liability, variations and dispute settlement.

Tender appendix

It should be noted that the appendix to the tender documents contains important project-specific items for each tender, such as the time for completion, amount of liquidated damages, the defects liability period, percentage of retention and amount of security for performance. This appendix is to be separately completed for each project and furnished to tenderers as part of the tender documents. Each item in the appendix is integrated with parallel clauses in the conditions.

Conclusion

The FIDIC model works contract has emerged as the leading international construction contract. The FIDIC conditions are the only standard form of conditions of contract issued at an international level, specifically for engineering construction. All the FIDIC works documents, consisting of the tender, the tender appendix, the contract, the general conditions and the conditions of particular application are integrated and cross-referenced. This document is not only most frequently used, but it has become the standard from which to draft other documents, and often to negotiate clauses or solutions in other international construction contracts. General acceptance of this model of contract promotes uniformity in international construction contracts.

3. *Voices of international practice*

JUSTICE R. D. NICHOLSON
Judge, Perth, Australia;
The Law Association for Asia and the Pacific

The Law Association for Asia and the Pacific, known as LAWASIA, was formed on 10 August, 1966. LAWASIA therefore shares a birth year with UNCITRAL. It was formed by the Law Societies and Bar Associations of the countries in the region of the Economic and Social Commission for Asia and the Pacific (ESCAP). As a consequence, its member bodies extend from the Islamic Republic of Iran in the West to Japan in the East and from China in the North to Australasia in the South. It has 35 national law societies and bar associations as its constituent members and 13 local law societies and bars, including two law students associations. LAWASIA therefore represents lawyers in developed and undeveloped countries.

LAWASIA is organized through an executive, a council, committees, sections, biannual conferences and a secretariat. It publishes within the region a magazine, a journal, a directory, a human rights newsletter as well as newsletters of its standing committees and sections.

LAWASIA recognizes that services have become more important in the economies of developed and developing countries alike within its region and are a major source of job creation. It supports the move to develop a multilateral framework of rules and principles which will provide for fair trade in services akin to the GATT rules and principles that govern goods trade. Core principles of such a development would be non-discrimination amongst parties to a general agreement on trade in services, transparency in trade-related regulations, and other provisions relating to monopolies, subsidies, government procurement and domestic regulation. It recognizes the complexity of recognition of qualifications throughout the region, but offers its support to the use of its regional structure to encourage law societies and bars to consider and decide upon the issues relevant to such recognition.

The resources which LAWASIA can offer to consideration of these issues within the region are its regional meetings, its constituent national law societies and bar associations, its law firm members, its legal practitioner members and its work in legal education.

Regional meetings

The LAWASIA conference is held on a regular two-year basis within the region and provides a unique regional forum for discussion and consideration of developments desirable for the region. Papers on trade law have been included within the programme of past conferences, and the issue of supply of services within the region could in future be usefully featured at conferences. At the plenary session of the LAWASIA Conference held at Perth, Australia, in September 1991, a paper by Kartini Muljadi on "The Role of Lawyers in Developing Countries" was presented. Other papers were given at that conference on topics relating to trade law, such as "Indonesian capital markets", "Securities regulation in Hong Kong", "The capital market in Korea", "Privatization in Thailand", "Opportunities for regional legal cooperation", "The effect of future Asian trade on intellectual property", "Banking and security regulations in India" and "Tax measures by the ASEAN and the Pacific countries in promotion of trade and commerce".

Following the last conference, an inaugural meeting of Presidents of constituent bodies in LAWASIA was held. It was agreed by that meeting that LAWASIA, being the representative body

for the region, should act as the depository for information concerning foreign and national admissions in the region.

In addition to the conference, sections and standing committees of LAWASIA hold regional meetings from time to time. These sections could focus additional regional attention on supply of services. The sections are the Judicial Section, the Family Law and Family Rights Section and the Energy Law Section. Standing committees exist on human rights, business and banking law, communications and media law, criminal law, enforcement of foreign judgments, environmental law, insolvency law, intellectual property, labour law, legal aid, legal education, status of women and taxation law.

Constituent member bodies

LAWASIA draws attention to its unique contact on a regional basis with the law societies and bar associations which are its constituent members. Through them it is able to bring attention to the issues associated with supply of services and to have placed on the agendas of those national legal bodies discussion of the issues which need to be resolved to further regional supply of services.

In the context of economic development within the LAWASIA region, LAWASIA draws attention to the recognition given by its member countries Japan and Singapore and the territory of Hong Kong to the role of the supply of legal services to economic growth and international trade by adopting more open regulatory regimes.

Hong Kong

LAWASIA mentions that its member territory of Hong Kong has recently undergone a change of regulatory sentiment in respect of foreign lawyer services which is consistent with more open market access, but has not yet made a market access offer for legal services under the Uruguay Round of GATT trade negotiations.

Japan

LAWASIA notes that its member country Japan, like the United States, the European Community and some other countries, has offered a "standstill" market access concession for legal services under the Uruguay Round.

Singapore

The LAWASIA member country Singapore has, since the late 1970s, permitted foreign law firms under licence.

Australia

The constituent member of LAWASIA for Australia is the Law Council of Australia, the national council of lawyers. The Council has joined with the Australian Department of Industry, Technology and Commerce in equally funding the preparation of a report on Australian business law services. The study was carried out under the Service Industries Research programme set up by the department and the Coalition of Service Industries under the supervision of the International Legal Practice Committee of the Law Council's International Law Section. The study recommended three complementary approaches to improve Australia's contribution to the supply of services internationally. First, more Australian lawyers should be encouraged to gain overseas accreditation. Second, foreign lawyers

should be encouraged to locate their practices in Australia. Third, the formation of multinational partnerships should be allowed in Australia.

The policy of the Law Council is that developments in Asia and the Pacific require the involvement of Australia. The Council considers that Australia must encourage foreign lawyers from countries accrediting Australian lawyers to practice in Australia, and to that end the Council has adopted a statement of policy on legal practice in Australia by foreign lawyers and is encouraging the development of a uniform policy throughout Australia on that question.

The legal profession in Australia through the Law Council of Australia is represented on the International Legal Services Advisory Committee (ILSAC), established by the Government of Australia in late 1990 to foster the export of Australian legal services. Specifically, the purpose of ILSAC is to improve Australia's international performance in the legal and related services area. It seeks to do this by providing advice to government on policy issues and programme coordination, by facilitating communication between Government and the private sector, and assisting private sector initiatives by gathering, researching and disseminating information. Its interests cover four main areas: the globalization of legal practice; the development of Australia's international commercial dispute resolution services; legal education and training; and improved legal cooperation at the government-to-government level. LAWASIA's member, the Law Council of Australia, by its membership of this committee, brings the support of the Australian legal profession to these objectives.

New Zealand

New Zealand and Australia, both represented in LAWASIA, have concluded the Agreement for Closer Economic Relations. Within the LAWASIA region, the firms of one country are represented in the other countries of the region. The services thus made available are services to business enterprises such as financial, accounting, advertising and legal services.

LAWASIA numbers among its financial members 62 law firms in the LAWASIA region. Those firms, by their membership of LAWASIA, have manifested their interest in being regionally active.

Legal practitioners

LAWASIA has approximately 2,500 individual members from countries of the LAWASIA region and elsewhere. These members are active in regional aspects of the law, and are persons likely to be interested in considering the issues associated with the regional supply of professional services, and are equipped to do so.

Legal education

The increasing export of legal education services within the LAWASIA region offers support for development of supply of services. For example, in the calendar year 1991, of the 569 overseas tertiary students pursuing legal studies in Australian higher education institutions, the majority were from Asia (60 per cent) and the Pacific (7 per cent). Such a development has been encouraged by a change in rules in 1986 to permit enrolment of full fee-paying overseas students.

LAWASIA conferences and committees have provided the opportunity for academic lawyers within the LAWASIA region to contribute to the legal thinking of the region and to exhibit the professional and academic skills available in the region.

LAWASIA's Legal Education Standing Committee recently held a highly successful continuing legal education seminar at Port Moresby, and its future programme will involve it in further promotion of continuing legal education within the region, the supply of services being an appropriate subject for consideration in that context.

Conclusion

LAWASIA states its interest in and support for the consideration of issues associated with the regional supply of professional legal services. It recognizes that the supply of such services is capable of making a vital contribution to the economies of the developing and developed countries among its members. It considers that its regional role places it in a unique position to further that consideration. It offers its assistance in the ways outlined to advance the discussion, debate and analysis, and to make enhanced regional supply of professional legal services a reality.

RICHARD E. LUTRINGER
Attorney, New York, New York, United States of America
President, American Foreign Law Association

It is a great honour and privilege for me to address the UNCITRAL Congress on behalf of the American Foreign Law Association, which has over 650 members consisting of lawyers working in law firms, corporations and international organizations, as well as professors and judges. The Association is primarily devoted to the understanding and application of foreign, comparative and private international law, and is vitally interested in the international unification of private law.

As one of the "voices of international practice" I have been asked to comment on the practical value of existing legal instruments dealing with the supply of services and to suggest topics for uniform international treatment in the future, whether by UNCITRAL or other organizations.

With respect to the existing conventions and texts relating to the supply of services, I will limit my remarks to two well-known documents, the UNIDROIT Convention on International Financial Leasing and the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works.*

UNIDROIT Convention on International Financial Leasing

The UNIDROIT Convention on International Financial Leasing is a welcome and needed addition to the library of uniform legal texts of international commercial law.

With some trepidation, due to the obviously careful, scholarly and practical efforts which went into what is an excellent Convention and with an understanding that any such document contains difficult compromises, I offer the following few comments from the standpoint of a practitioner.

There is obviously a benefit in using neutral terms in international private law conventions, rather than words and expressions which may have a particular meaning in one or another language or legal system. The use of a number of undefined terms in the UNIDROIT Convention, however, raises the spectre of uncertainty among commercial lawyers and their clients. A definitional section or an official commentary to each paragraph of the Convention would help ease the uncertainty and assist in the adoption of the Convention by many countries as a standard tool of international commerce.

With respect to party autonomy, the ability of the contract parties to form their own remedy in the event of a breach by the lessee is limited by the Convention to an amount which would not substantially exceed an amount which would place the lessor in the same position it would have been in if the lessee had performed (section 3, section 2(b)).

Under the Convention, this provision regarding party autonomy is one of the few provisions which may not be altered by contract. The provision sounds reasonable and probably is in most cases. The problem is that it is impossible to tell in advance what will seem reasonable five years hence. If the lessor wants to syndicate its rights to third parties, the plot thickens even more. Will the lessor's rights in leases covered by the Convention be worth less than those that are not? Will a lease with a liberal liquidated damages clause not be "enforceable in accordance with its terms", to use the standard wording of warranties and legal options?

Recent amendments to the United States Uniform Commercial Code (UCC) adding article 2A to deal specifically with leasing, make it very clear that the parties can provide for any formula to determine damages which was reasonable at the time the lease was entered into (UCC paragraph 2A-504). Article 3(b) of the UNIDROIT Convention, on the other hand, would seem to allow second guessing based on circumstances at the time of the breach.

Also troubling, although understandable, is the provision of article 13 (5) of the Convention pursuant to which the lessee must be given notice of default and an opportunity to cure before the lessor may exercise a right of acceleration or termination. Although this provision may be modified by contract, it is diametrically opposed to the provision of UCC paragraph 2A-502, which allows the lessor to exercise its rights without notice. True, the parties can modify this provision of the Convention by contract, but where the lease is silent, the practical effect when speed may be crucial, and other creditors are circling, may be for the non-Convention lessor to begin his remedy when the Convention lessor is waiting to see if the lessee can cure. Remember, at the time of default in the payment of rent, the lessor has fully performed its obligations by having provided the funds to purchase the item of equipment which the lessee is using in its business.

In sum, the attempt to make the Convention balanced or fair to the lessee, at the very least, improves the lessee's negotiating position after a default in payment, but may be one reason practitioners representing lessors from jurisdictions with a long tradition of leasing may tend to opt out of the Convention. On the other hand, in those legal systems of the world where financial leasing is not an established tradition, the Convention may very well be the seed which gives more certainty to a useful and previously unknown legal device.

UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works

The *Guide* is extremely useful in providing a discussion of the economic implications of the choice of contract provisions in major construction projects. To my mind, the *Guide* could be even more useful if it contained a set of model agreements. Although the *Guide's* use of selected illustrative provisions is very helpful, it does not replace a review of an entire document. Despite the risk of creating de facto an "approved" model contract, for a practitioner to read a complex provision in the context of an entire contract is just as useful as a discussion of the practical economic effects of such a provision, and together they complete the circle. The FIDIC Red Book provides some of this, but is not coextensive with the *Guide* and is not the only international standard form of construction contracts. Perhaps a future edition of the *Guide* can integrate one or more model forms into the text.

Suggestions for future work on services

I would like to turn to a few suggestions for the future direction of uniform commercial law in the twenty-first century.

The challenges facing the nations of the world today are unique and unparalleled in this century. Entire nations are dissolving into new entities, economic systems are being converted virtually overnight from centralized command systems to the free market without the devastation of a war or the dictate of an occupying power. What a challenge for the international legal community! And what an opportunity to use the international uniform law process to help build the next century's legal infrastructure for trade and investment. UNCITRAL, UNIDROIT, ICC and other leading institutions in the field of unification of private law have the experience and the respect throughout the world to cooperate with other institutions, whose expertise may be in specific substantive fields.

A few specific suggestions for the future unification work in the area of supply of services are given below.

Build-operate-transfer (BOT) contracts

The recent BOT legislation in the Philippines represents a legal regime which can be a precedent for many other countries. By permitting a private party to build a major highway, power plant or bridge, for example, to operate it for user fees for a number of years and thereafter transfer the facility to the country when payback has been theoretically complete, diminishes the country's up-front capital requirements and spreads the risk by "privatizing" a public sector improvement. Many interesting questions and distinctions need to be worked out here, and it would seem useful for UNCITRAL to take the lead in this area as a natural extension of its work on the *Guide* on the construction of industrial works.

Trade secrets

In the area of secret technical data as well as confidential business information, standard and acceptable definitions of what can and should be protected by the courts and the remedies available for misappropriation are good candidates for international agreement. Some countries only recognize technical information as trade secrets, others include business information which is held in confidence. Some require registration, others do not. Confidentiality and secrecy agreements have become common in international transactions, whether joint ventures, acquisitions or licensing. In the United States, the Uniform Trade Secrets Act has been adopted by many individual states, and has brought a measure of uniformity to the issue of defining and protecting trade secrets. An international standard of trade secrets would be a valuable and important addition to the growing network of other international conventions.

Environmental terms - "green labelling"

A number of countries have introduced a form of "official seal of approval" for products which meet certain criteria as to environmental friendliness. Reaching an international agreement on the standards which a product or service must meet in order to qualify for approval could prevent the development of varying standards. A teaming of UNCITRAL expertise on uniform laws with national and international environmental organizations could produce a voluntary worldwide standard. Also, some agreement on the meaning of such words as "natural", "recyclable" and "biodegradable" would be useful for multinational marketing. One way to approach this could be through an addition to the

ICC International Code of Advertising Practice, similar to the Guidelines for Advertising Addressed to Children.

Insurance

Although insurance is a necessary component of doing business on an international basis, there often exist divergencies among jurisdictions on the meaning of crucial terms. In the United States alone, there are variations from state to state in defining the extent of coverage under identical works in insurance policies. UNCITRAL, together with leading national and international associations of insurance companies and other industry groups, could assist in the promulgation of uniform definitions which would be useful both for the beneficiaries and the carriers of insurance in determining in advance the extent of coverage.

Franchising

As much as the emerging democracies of Eastern Europe and elsewhere in the world need capital for infrastructural improvements, they also need technology and know-how to efficiently distribute goods and services. A good franchise relationship gives the local franchisee, often a small business, a trade mark or service mark with an international reputation, tested operating systems and procedures, management training and standardized products or services. To create the franchise relationship there must be intellectual property protection, a competition law which understands the nature of the franchise relationship and the ability to pay royalties to the franchiser outside the country. Potential franchisees need to know the background, finances and services to be provided by the franchiser. The franchiser, whether a chain of restaurants, bridal stores or secretarial service needs the efficiency of one standard form of disclosure. The concept of a standard disclosure form has been highly developed by the United States Federal Trade Commission and a number of individual states in the United States. UNCITRAL might consider both a guidebook for franchisees (like the UNCITRAL *Guide* on the construction of industrial works, but on a more modest scale) and a model disclosure law which, among other things, would set the disclosure standards for franchisers.

Security interests

The growth and importance of international financial transactions is shown by the negotiation of the Convention on International Factoring and the Convention on International Financial Leasing of UNIDROIT. Another conceptional framework which would encourage third-party financing of international trade is the ability to obtain security interests in personal property. One particular area which has tremendous importance for international franchising is the ability to obtain a security interest in trade marks and service marks. The Foreign and Comparative Law Committee of the Association of the Bar of the City of New York is currently engaged in a study of the legal regimes in various countries regarding security interests in trade marks and service marks. A preliminary analysis indicates uncertainty in many countries as to how this problem should be treated. Because of the diversity in treatments, it would be appropriate to make this area the subject of international agreement by convention or model law in order to encourage third-party financing.

Conclusion

The examples mentioned are only a few of the many areas where the international unification movement can be of assistance to foster international trade. Other areas worthy of exploration include countertrade, buyback agreements in joint venture transactions and management contracts by non-equity owners. Most helpful would be official commentaries on each convention and continual reporting on judicial decisions interpreting the conventions.

If international trade is the fuel which will feed the growth of the world economy, international trade law and organizations like UNCITRAL are the lubrication to keep the engine moving efficiently and with the momentum necessary to achieve a mutually dependent and growing international economy in the twenty-first century.

JOSÉ IGNACIO CRUZ
Attorney, New York, New York, United States of America; Mexican Bar Association

It has been entrusted to me to speak about the needs, if any, of the unification and harmonization of legislation in the area of the supply of services within international trade law.

In this respect, as the representative of the Mexican attorneys community, I would first like to welcome the results that the Commission on international trade law has so far achieved in developing uniform rules in vast sectors of international trade.

As many of you know, Mexico as a developing nation was not long ago one of the most protected economies in the world. Our domestic industry was fearful of international competition because competition was not easily allowed inside our country, and when allowed, the conditions under which it was accepted guaranteed that foreign competition would not displace the national investor.

Today Mexico is a different country, a country committed to its role as a serious player in the international market, where it recognizes that an active participation is needed to cope with a rapidly changing world.

In view of Mexico's positive attitude towards an international market, Mexican attorneys also understand and support the unification and harmonization of legislation in all areas of international trade, including the supply of services. In this specific area we would like to bring the following topics to the attention of the Commission.

Brokerage services

In referring to brokerage services we talk not only about the financial stock market but also to real estate and commodities brokerage. This area of services in our opinion represents open ground for future work not only in the unification of legislation, but also in the drafting of model forms for each type of brokerage service.

In this respect, we have seen from past experience that each brokerage firm develops its own contractual documents, from the very simple to the very elaborate, some of them with provisions referring to the authority vested in the broker in a broad manner, others in a restricted manner, and others in a manner that makes it difficult to understand how the broker will act on behalf of its client.

We also all know that in some countries, in order to become a broker or to establish a brokerage firm, various conditions must be fulfilled depending on the brokerage area where the individual or the corporation will work. Unfortunately, there are countries where a real estate broker or a commodities broker does not have to fulfil a single condition, and if so, those conditions may not necessarily guarantee to the potential client the qualifications and preparation of the broker itself.

In this respect, it is important to realize that in the international community the use of the broker plays, in some cases, a very important role. Each country should therefore attempt to adopt uniform

regulations that would ensure to the international community that the authorized brokers at least meet minimum international standards of preparation and ethics.

Tourist services

This is another area that we would like to propose as an area that needs uniform legislation. In many countries we find that this type of establishment is not always duly regulated, and worse than that is the fact that in many cases the tourist, because of a lack of knowledge of the local regulations, does not know what his or her rights are and how to enforce them.

Because of this lack of knowledge, we have had experience of individuals seeking help in obtaining monetary relief because either the establishment did not honour its commitment or provide the services as required and as represented by the travel agency through which all arrangements were made, or because the individual suffered personal injury or loss of property as a result of the establishment's negligence.

In this respect, there are countries with tort legislation that provide the injured party with expedited and inexpensive legal means of obtaining relief from this type of establishment, but unfortunately there are other countries where the legislation is poor or non-existent and the administration of justice is lengthy and expensive.

We therefore believe that this is an area that should be addressed by the UNCITRAL in order to request from each member State the adoption of uniform legislation in this respect. We encourage UNCITRAL to continue with the efforts to give the world reliable uniform legislation that will guarantee to the members of the international community a clear understanding of their rights and obligations in a world that is every day becoming smaller.

EDWARD V. LAHEY
Vice-President and General Counsel,
Pepsico Inc., Purchase, New York, United States of America;
Westchester-Fairfield Corporate Council Association

We are witnessing the rapid growth of services on a global basis, an activity formerly the sole province of local or, at most, national businesses. Today, for better or for worse, one can use the American Express card in 160 countries, dine at Kentucky Fried Chicken restaurants in 63 countries, stay at Inter-Continental hotels in 114 countries, and now, even Disney World has magically replicated itself in Japan and France. In large measure, this has occurred as a result of technological advances in communication and transportation. However, an element which ties it all together, both from a marketing and legal perspective, is the concept of brand identification, or what we lawyers call "trade marks".

Trade marks are essential to the modern-day marketing of consumer services. Trade marks are symbols, words or other indicia that identify the services of a particular business and distinguish them from the services of others. Simply put, trade marks help consumers to select services efficiently and effectively. They allow purchasers to identify those services which have been satisfactory in the past and to reject those which have not.

By identifying the source of the services, trade marks convey valuable data to consumers, and thus easily recognizable trade marks reduce the searching costs consumers incur when making purchasing decisions. Furthermore, trade marks fix responsibility, thereby inducing the supplier of

services to perform at a high and consistent level of quality. This benefit is then multiplied when other firms are forced to undertake measures to improve the quality of their own services in order to compete.

A recognized and respected trade mark can become a business asset of incalculable value, usually referred to as goodwill. A trade-mark owner will only be willing to take the risk of investment in its mark, however, if it can avail itself of sufficient legal protection. The more valuable the trade mark, the more the possibility exists that other firms will be tempted to adopt the same or similar mark in order to confuse consumers into selecting the wrong services. Confusingly similar marks not only dilute the value and goodwill of the legitimate mark, but increase inefficiencies and consumer costs in the market-place. By safeguarding consumers from confusion between various suppliers of services, the law simultaneously preserves business goodwill. Accordingly, almost every legal jurisdiction in the world recognizes the need for trade-mark protection.

Unfortunately, the existing fragmentary and divergent country-by-country nature of the legal protection for trade marks continues to be a significant impediment to international commerce. There are about 170 jurisdictions with 170 different laws, 170 different sets of standards, 170 different sets of regulations, 170 different sets of forms, 170 different sets of documentary requirements, and, of course, 170 different levels of fees.

Protecting a valuable trade mark on a worldwide basis can therefore be a hypertechnical gauntlet. It requires global as well as local legal expertise, patience, luck, a great deal of time and a well-endowed cheque-book.

Advances in technology and communication are shrinking the commercial world. We are fast approaching a time when services can be supplied on a multicountry basis in a matter of minutes, yet it may take four to five years to perfect trade-mark rights in some countries, and even longer to enforce trade-mark rights in others. In some countries, recurring and blatant piracy persists, so a legitimate trade-mark owner can be pre-empted from using its own mark by a quick-witted party who may have instantaneously learned of a new branded service in another country on worldwide cable television. In other countries, counterfeiting of legitimate goods and services remains rampant, with the resultant deception of consumers and often irrevocable damage to legitimate investment in valuable trade marks.

At present, there are two important multicountry arrangements administered by the World Intellectual Property Organization (WIPO). First, 102 countries are parties to the Paris Convention for the Protection of Industrial Property, including most commercially important countries. However, it only provides for a basic minimum of protection and has no enforcement mechanism.

The other, the Madrid Agreement, to which 30 States belong, has in essence evolved into a regional arrangement. It does provide some assistance in filing and post-registration activities, but merely supplements national systems, which remain divergent in many respects, and does not have any effect on the enforcement of rights. Accordingly, it too falls far short of what is really necessary.

In this vacuum, intellectual property, especially trade marks, have become a significant theme in trade negotiations involving GATT, which has over 100 signatory countries. GATT has clearly recognized the ascending importance of services in the world economy. Moreover, as a matter of practicality, GATT enforcement mechanisms have been used with increasing frequency to resolve imbalances in protection for trade-mark rights. On the other hand, GATT does not provide any private right of enforcement.

Let me highlight the significant issues. Trade-mark owners require timely and effective legal protection with as much consistency and certainty as possible. The three key requisites are speed, reliability and reasonable cost.

Clearly, it is not yet practical to advocate a completely centralized, global system of trade mark protection at this point in time. Indeed, it is important to recognize the importance of local, national and regional tastes, attitudes, languages and cultural differences as they impact upon trade-mark usage and protection. Moreover, we cannot ignore the fact that there are many different legal systems and traditions, and the economic reality that certain Governments have a better level of funding for government operations than others.

None the less, there is a pressing need for action with regard to reducing, and some day eliminating, the bureaucratic and formalistic obstacles to the acquisition, maintenance and exercise of trade-mark rights. Attention should be directed to the simplification and standardization of the requisite formalities and to documentation, as well as the harmonization of basic principles of trade-mark protection. Moreover, greater scrutiny should be given to those jurisdictions with ostensibly adequate laws, but with wholly inadequate means of enforcement. This entire analysis must include an emphasis on speed and cost containment as essential elements to effective protection.

In conclusion, from a purely business perspective, barriers to the international marketing of branded services are shrinking as the world is shrinking. For a variety of reasons, including improved communications, increased travel, better language education and a number of psychological factors, brands which are successful in one market are increasingly likely to have appeal to consumers on a regional or even an international basis. Moreover, through licensing and franchising to local businesses, these globally used brands provide many economic benefits to local economies.

Yet, excessive and unnecessary bureaucratic barriers to trade-mark protection remain and constitute an anachronistic disincentive to effective and efficient commerce. The time for action is upon us. The longer we wait, the wider the gap will become between the pace of international marketing and commerce, on the one hand, and the legal framework for protection of invaluable trade-mark rights, on the other. This is an area ripe for further harmonization. Let us begin.

4. Open floor

PROFESSOR LARS HJERNER
University of Stockholm, Stockholm;
Vice-Chairman of the Commercial Practice Commission of the International Chamber of Commerce

I have been heavily involved in the work on the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the Sales Convention) since the very start. I would suggest that UNCITRAL include on its agenda a general review of the most common standard conditions in the field of international sales, such as the EEC directive 188 or 574, and other such general sales conditions, and particularly the choice-of-law clauses in those conditions, so that they may be revised or reviewed in the light of the Sales Convention, favouring the application of the Sales Convention as far as possible. I cannot bind ICC in this respect, but both I and my colleague, Roy Goode of St. John's College, Oxford, who is also a Vice-Chairman of the Commercial Practice Commission, will work in favour of cooperation between ICC and UNCITRAL, particularly to ensure access to national committees and to information on the standard conditions most used in international sales contracts.

J. B. DADACHANJI
Advocate, Supreme Court, New Delhi

I wish to make a few comments on the paper presented by James Myers.

From 1983 onwards I had the privilege of being a member of the Working Group which formulated the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*, and was closely associated with its work, which was greatly assisted by the secretariat of UNCITRAL, until the *Guide* was finally published in 1988. There is a very big qualitative difference between FIDIC rules and the *Guide*. The impression was created as though the FIDIC rules are the most accepted rules. The qualitative difference is, as James Myers pointed out, that the FIDIC rules originated from the Institute of Engineers, which saw them as an engineering project having nothing to do with economic development or the establishment of the new international economic order, which were the two key objectives of the UNCITRAL decision taken in 1981, pursuant to which the efforts were made to formulate the *Guide*. In fact, the FIDIC rules were considered - it would not be proper for me to say what was discussed - and found wholly inappropriate in the present economic context. They were useful a few decades ago, and they have been usually followed because there was a vacuum; no guide was available, and they served as the nearest guide. During the last 20 years the World Bank, the Asian Bank and all the international development agencies have been pouring billions of dollars into the developing world to promote its economic progress and development. They have accepted forms of agreement wholly at variance with those of FIDIC. In the course of the proceedings of the Working Group we produced innumerable forms of agreement totally different from those of FIDIC. In fact, FIDIC may be useful for building bridges and roads or turnkey jobs, but the real test of the development of a developing country is the progress from turnkey to semi-turnkey projects. That is the test of economic development. FIDIC is useful for turnkey jobs which involve only engineering work, but not at all suitable for projects involving the transfer of technology, and most of the projects financed are for the transfer of technology - petrochemicals, fertilizers, hydroelectric power - to develop and train personnel and transfer that technology to the local people. That is the objective of the UNCITRAL decision taken in 1981. Therefore, it is inappropriate to take the FIDIC rules, which are only the rules of a professional body, and compare them with the work of UNCITRAL.

The most important distinction that the UNCITRAL *Guide* makes is that between turnkey jobs and semi-turnkey jobs, and it makes provision for the developing country to participate in the project depending on its state of development. That is of great importance for the establishment of the new international economic order.

It was years ago that the World Bank accepted FIDIC because there was nothing else available. A senior representative of the World Bank formed part of the Working Group which formulated the *Guide*, taking into account all the forms of contract which the World Bank had financed over a period of years in developing countries, which forms are totally at variance with FIDIC rules.

Among the subjects not dealt with in the *Guide* was taxation, which is a matter of utmost economic importance. For instance, the impact of double-taxation relief treaties, excise duties and sales tax affect the grant of international tenders. A country which has not signed a double-taxation relief treaty with a developing country will stand at a disadvantage in comparison with a country which has signed such a treaty. Another example is that of Commonwealth countries which apply the concept of business connection and tax the non-resident foreigner's income on the basis of a business connection with a plant that is built in the country. That totally affects the picture and the profit earnings of the non-resident. Such problems have to be considered in a special study of the impact of taxation, including the sales tax, the excise duty etc. An important factor is that many of the

Commonwealth countries compare themselves to the House of Commons and apply retroactive taxation. That is the biggest bane for foreign investment and foreigners providing technology. Suddenly they find that a retroactive income tax is in force.

All these problems could be dealt with in a detailed study. Similarly, as suggested by the Solicitor-General of India, there is a need for a special study of intellectual property. I think it would be trespassing into the domain of GATT and the proposals by Arthur Dunkel on the Uruguay Round of trade negotiations if we started such a study now. In fact, when the *Guide* was being drawn up WIPO and other bodies in Europe were formulating rules or guidelines for the protection of patents and trade marks, so we did not deal with them. But it will eventually become necessary to make a detailed study not only of patents and trade marks, but also of know-how, which today is only protected by contractual provisions of confidentiality.

Another problem area is the environment. On this subject we should await the outcome of the United Nations Conference on Environment and Development, but certainly a study of environmental laws and of a uniform code or guidelines for them would be very necessary.

Professor Hiscock of Australia spoke about damages. I think a special study of the law of torts is essential because a different jurisprudence is being applied in different countries. For instance, in a particular country the capacity to pay damages depends upon the capacity of the balance sheet. It is not measured by the actual damage, but by the capacity to pay. Such ideas are new in the field of jurisprudence. Particularly with the impending environmental disasters, the question of damages will become a very important factor. In the light of such events as the Union Carbide disaster at Bhopal, there should be a study of what the law of damages should be in principle and in theory, as different courts have tried to interpret it differently.

Therefore, a law of torts, taxation and intellectual property - these are the three areas, I would suggest, where further studies could be pursued.

WILLIAM PIERCE
Partner, law firm of Pierce & Kennerson, New York, New York, United States of America

I would like to address the question of trade in services as it is linked to intellectual property. I am talking about computer software, franchises, licences of trade secrets, patent licensing, transfers of technology and turnkey contracts followed by long-term or intermediate-term maintenance agreements.

In United States jurisprudence, until recently there was the right of the bankruptcy trustee of the owner of intellectual property to reject executory contracts and thereby deprive licensees of rights to continue to use the intellectual property which had previously been licensed by the licensor when the licensor was still a viable business entity. In the Lubrasol case a judge held that the licensee of some computer software had no right to continue to use that software because the trustee in bankruptcy had the right to terminate that licence, merely by reason of the bankruptcy of the licensor. That problem was rectified in section 365N of title 11 of the United States Code in 1988, and that modification permits licensees to continue to use the intellectual property right without necessarily seeking the continuing executory performance by the licensor. Such rights are important to licensees, particularly in international transactions and in the categories I have described above, so I suggest that this would be a topic for consideration. In looking at the GATT arrangements, I do not see that this is covered by the Dunkel proposals, so there is much to be done in this area.

PROFESSOR SAMIA EL-SHARKAWI
Professor of Commercial Law, Cairo University, Cairo, Egypt

I wish to comment on the adoption of FIDIC clauses and the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works.* FIDIC clauses have international acceptance in texts despite their non-compliance with the different interests involved and different legal systems as far as concerns legal aspects, which are difficult to indicate in the limited time available. The example which I have in mind at the moment is the distinction between liquidated damages and penalties. On the other hand, I noted that the *Guide* is flexible by nature and that it admits different alternatives which achieve balance between the different interests and requirements in the different legal systems. However, the *Guide* has not been promoted in different countries and by specialized organizations. I am sure that when it takes the place which it deserves, especially in developing countries, it will have widespread application in the new international economic order.

However, it has only been a very short time since the *Guide* was issued in 1988. In this connection, I am looking forward to the speech of Dr. Gerold Herrmann on promoting wider awareness and acceptance of uniform legal texts.

PROFESSOR EGON GUTTMAN
Professor of Law, American University, Washington College of Law, Washington, D.C.

I would like to pull together the statements of three speakers, Professor Roy Goode, José Ignacio Cruz and Dr. Burghard Piltz. Basically, as Professor Goode mentioned, it takes 14 years to get something effective on the books; therefore, it may be time to start getting involved in the question of securities markets. We are now seeing the globalization of security trading and the transfers of securities in foreign corporations traded in the New York Stock Exchange, the Amsterdam stock exchange and the international London stock exchanges. We find that some securities are dematerialized or uncertificated, and these create international or cross-border problems.

The question for UNCITRAL to become involved in is, as Mr. Cruz pointed out, the qualifications of brokers who will be transacting the trades on foreign markets, through whom brokers in, for example, the United States will have to act in order to have a trade executed in London or Amsterdam, Brussels etc. and vice versa. This calls for internationalization of the qualifications of brokers, not just their domestic qualifications, but also the question of their financial responsibility, which is very important. With regard to banks we have the FIREA and the meetings which developed financial responsibility rules for international banking. This also involves some regulating of industries, for example in the developing markets that are blossoming forth in eastern Europe, where securities markets are being opened and effective trading is expected, as in the case of Czechoslovakia, within a very short time. The question of globalization in the sense of transacting businesses in other jurisdictions is becoming very serious.

We may not be ready yet for an international rule, but a foundation should be laid by finding out what the financial institutions, what the industries, are looking for, so that there will be a confidence in the ultimate development of a global market in which everybody participates, as opposed to the individualized markets in which people will be investing through brokers. A final important point, to which Mr. Piltz drew attention, is that whatever is drafted will ultimately have to be supported by a series of comments which will make it clear that, though verbal similarities may exist, we are going to be divided. As George Bernard Shaw once said, "Never have two nations like England and the United States been so divided as by the same language". We use language in different ways, and comments will at least clear up some of the confusion that certain words may cause.

Notes

[1]See G. Eörsi, "Article 16 - Revocability of offer", C. M. Bianca and M. J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan, Giuffre, 1987) p. 155.

[2]See E. A. Farnsworth, "Article 19 - Modified acceptance" op. cit. p. 178.

[3]*Yearbook Commercial Arbitration* (Deventer, Kluwer Law and Taxation Publishers, 1990), vol. XV, p. 72.

[4]For a more detailed analysis of the topic addressed in this paper, see Hartnell, "Rousing the sleeping dog: validity of contracts for the international sale of goods", *Yale Journal of International Law*, vol. 18 (1992).

[5]Commentary on the Draft Convention on Contracts for the International Sale of Goods (A/CONF.97/5), United Nations, *United Nations Conference on Contracts for the International Sale of Goods*, Official Records (United Nations publication, Sales No. E.81.IV.3), p. 15; J. O. Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer, Kluwer, 1989), p. 405.

[6]A. Tunc, "Commentary on the Hague Convention of the 1st of July 1964 on international sale of goods and the formation of the contract of sale", Ministry of Justice of the Netherlands, *Diplomatic Conference on the Unification of Law governing the International Sale of Goods, the Hague, 2-25 April 1964*, vol. I, Records (The Hague, Government Printing Office, 1966). p.358.

[7]See, e.g., A/CONF.97/5, United Nations, *United Nations Conference on Contracts ...*, p. 15; and J. O. Honnold, op. cit., p. 405.

[8]Article 7(2) of the Sales Convention.

[9]B. Audit, "The Vienna Sales Convention and the lex mercatoria", T. E. Carbonneau, ed., *Lex Mercatoria and Arbitration* (Dobbs Ferry, N.Y., Transnational Juris Publications, 1990), p. 154.

[10]D. Yates and A. J. Hawkins, *Standard business contracts: exclusions and related devices* (London, Sweet & Maxwell, 1986), p.4.

[11]If article 19 of the Sales Convention does preserve the "last shot doctrine" - as many commentators have suggested - then the standard terms printed on the seller's form (including warranty and limitation of liability clauses) will become a part of the contract for the international sale of goods.

[12]See, e.g. Hellner, "The Vienna Convention and standard form contracts", P. Sarcevic and P. Volken, eds., *International sales of goods: Dubrovnik lectures* (New York, Oceana, 1986), pp. 360-361; F. Enderlein, D. Maskow and M. Stargardt, *Kaufrechtskonvention der UNO (mit Verjährungskonvention)* - Kommentar (Berlin Staatsverlag der DDR, 1985), p. 45; J. Tiling, "Haftungsbefreiung, Haftungsbegrenzung und Freizeichnung im einheitlichen Gesetz über den internationalen Kauf beweglicher Sachen", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 32 (Tübingen, 1968), p. 281; M. Wolf, "Auslegung und Inhaltskontrolle von AGB im internationalen kaufmännischen Verkehr", *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (Heidelberg, 1989), vol. 153, pp. 300-321; J. S. Ziegel and C. Samson, "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods" (July 1981), p. 42.

[13]ICC publication No. 478 (1990).

[14]Riese, "International problems in the Law of Sale", Symposium: Some comparative aspects of the law relating to sale of goods, *International and Comparative Law Quarterly, Supplement Publication* Series No. 9 (1964), p. 36.

[15]*UNIDROIT Study L*, document 40, Rev.9 (January 1992) (eleventh consolidated version prepared by the UNIDROIT Secretariat on the basis of the drafts discussed by the Working Group for the Preparation of Principles for International Commercial Contracts).

[16]Article 7(1) of the Sales Convention.

[17]See e.g. United Nations Convention on the Limitation Period in the International Sale of Goods, done on 14 June 1974, amended by 1980 Protocol.

[18]Ministry of Justice of the Netherlands, *Diplomatic Conference on the Unification of Law governing the International Sale of Goods, the Hague, 2-25 April 1964*, vol. I, Records (The Hague, Government Printing Office, 1966), p. 65.

[19]Ministry of Justice of the Netherlands, "Records of the third meeting of the Committee on the draft Uniform Law governing the International Sale of Goods", op. cit, vol. I, Records, p. 35.

[20]Rabel, "Observations on the utility of unifying [the] Law of Sale from the standpoint of the needs of international commerce" (1929) League of Nations, Draft of an International Law of the Sale of Goods (1935), p. 128 (e.g. passage of property and of risk; defects; form and formation of contract; the domicile of the party in breach and its consequences; the assessment of damages; prescription; and mistake).

IV. From traditional payments to electronic messages

A. Payments, credits and banking

1. A banking lawyer's assessment of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes

BRADLEY CRAWFORD, QC
Professor and Attorney, Toronto, Ontario, Canada

The United Nations Convention on International Bills of Exchange and International Promissory Notes of 1988 seeks to make a modest contribution to the facilitation of international trade and commerce by facilitating the use of bills and notes internationally. It was created in response to the recognition by UNCITRAL of two impediments: (i) the many differences between the rules of the various common law and civil law systems governing negotiable instruments; and (ii) the generally unsatisfactory rules of both for the resolution of conflicts. To address both problems, the Convention, which is the result of nearly 20 years of effort by UNCITRAL, creates a complete code of law on international negotiable instruments that fall within its scope. The new regime that it creates is a hybrid of rules taken from the existing common and civil law systems. It is highly technical and detailed, and not easily accessible to the average reader, but persons familiar with either existing system will immediately see the many points of similarity.

The Convention was adopted by the General Assembly Plenary Session on 9 December 1988.[1] It will come into force when it has received the signatures of 10 subscribing states. At the date of writing, four states have signed or ratified.[2]

I was asked to present to this forum an appraisal of the merits and faults of the Convention from my perspective as a Canadian lawyer with a somewhat specialized practice in the law of banking and payment. My conclusion, not surprisingly, is that I anticipate experiencing both advantages and disadvantages in using this new instrument. Like those jokes that were popular a few years ago: "I have both good news and bad news". The good news is that there are a lot of attractive new features in the legislation with no serious new difficulties, and I think it will work very well for us. The bad news is, it might not work at all.

I would first like to review briefly some of the details of the new law and the reasons why I think they will appeal to (or disturb) practising bank lawyers. Then, to illustrate how the Convention might work in practice, I will describe a recent English decision on the application of the rules of conflicts to a set of international bills of exchange, and show how much more easily the issues might have been resolved by the application of the Convention.

The formal requirements of the Convention for bills and notes are a mix of familiar elements from the existing systems' rules and of modernizing innovations. They include:

(a) A distinguishing legend and text invoking the Convention and displacing the old domestic law;

(b) Familiar data elements;

(c) Facts of internationality must appear on the face of the document, but need not be investigated;

(d) The Convention does not apply to cheques, neither does it define them;

(e) Helpful rules to resolve ambiguity concerning intended currency and interest commencement date;

(f) Interest may accrue at floating rate without loss of negotiability;

(g) Instruments may be payable in European currency units or special drawing rights.

Similarly, the rules of the Convention on the transactional validity of instruments subject to it are a generally satisfactory mix of familiar and new, including:

(a) Capacity to contract remains governed by national law, but an instrument is not a nullity even though a person lacking the required capacity is a party - even the principal party;

(b) Forms of endorsement are familiar and need only appear to be valid and unbroken to enable holder to effect a new negotiation;

(c) Collecting agents do not warrant authority of their principals to endorse if acting in good faith without knowledge of a prior forgery;

(d) Protected holder status presumed and probable for commercial parties dealing in good faith in the ordinary course of business, and few defences available against such holders;

(e) Those defences (e.g. forgery of defendant's signature, material alteration, non-performance of holder's duties at maturity, limitation of action) either controllable or fair trade-off;

(f) Loss of protected holder status does not expose holder to unlimited defences of prior parties;

(g) The stringency of the liability of one who gives an aval will greatly enhance the credit-worthiness of instruments in trade;

(h) The rules for distinguishing between the two forms of guaranty may be confusing for some for a time.

The holder's duties at maturity (presentment for acceptance and payment, notice of dishonour, protest etc.) are retained from the existing systems, but the requirements of timely performance are relaxed.

The rules protecting the principal obligor are attractive. Payment to the holder in good faith at maturity discharges the acceptor and/or maker even if the holder's title to the instrument is "defective". Provision is made for partial payments by agreement, to mitigate damages. By contrast, the rules on lost instruments seem to me to favour the unfortunate loser at the expense of the principal obligor, without making sufficient provision for compensating him for the additional effort and risk.

Thus, the Convention appears to offer a fair, reasonably well-balanced and modern law for international payment instruments. Do we need that? I think so, for the following reasons.

(a) It is often difficult or impossible to get reliable information about foreign bills and notes laws on a timely and commercially reasonable basis. Some important new trading nations do not have modern - or any - clear laws on bills and notes;

(b) Even where foreign law is accessible, the application of conflicts of law rules to international bills and notes is conceptually difficult and not always productive of predictable or even acceptable results, due to the age and deficiencies of the rules themselves in the laws of many important jurisdictions.

These two problems are neatly illustrated by the fairly recent decision of the English Court of Appeal in *Montage v. Irvani* [1990] 1 W.L.R. 667. The facts were simple and not exceptional for international commerce on bills, yet the case raised extremely difficult conceptual issues for the English Court and required 10 years of litigation to resolve. The interesting thing is that if the Convention had applied it seems probable that the matter would never have got to court, since the Convention provides such clear and apparently just rules.

In the Montage case, 30 bills for identical sums, payable in London at one-month intervals, were prepared by German contractors in payment for some installation works in the Islamic Republic of Iran, and mailed from Germany to the Islamic Republic of Iran for acceptance by the owner and guaranty by blank endorsement of the principal shareholder of the owner. Upon return from the Islamic Republic of Iran, the bills were signed by the drawer and discounted to a German bank. At the request of the bank, the blank endorsement was more clearly identified as an aval by the addition (in Germany, but with the authority of the endorser) of the words "*bon pour aval pour les tirés*" above the endorser's signature. They were then endorsed to a United States bank and then to a United Kingdom bank, presented for payment and dishonoured. No notice of dishonour (other than the return of the bills to the drawer) was given. The bills were protested, but not in all cases within the time limited by the United Kingdom Bills of Exchange Act.

The dispute and litigation extended over 10 years. The trial before Saville J. occupied some 21 days and the argument on the appeal another four days. The reasons given for judgment by the three members of the Court fill 23 printed pages. The reasoning is intricate and protracted, often of great difficulty. I have tried elsewhere[3] to explain and comment on the points of interest to common-law lawyers. Without trying to summarize them all, I shall illustrate the sources of the main difficulties. The Court had to address the issues of whether the laws of Germany, the Islamic Republic of Iran or England should determine whether the instruments qualified as bills of exchange in the first place; whether the guaranty endorsement was made in the Islamic Republic of Iran where it was signed, or in Germany when the clarifying words were added; whether English law could take cognizance of the legal relation of aval that the parties in Germany and the Islamic Republic of Iran thought they were creating, and if so, whether the payee could enforce it. A related issue was whether the United Kingdom Bills of Exchange Act applied to an aval, either because it was a form of endorsement recognized by that Act, or so nearly resembled one of the recognized forms as to be governed by it by analogy. At issue on this point was the question of whether the avaliste should be discharged for want of notice of default (as English law would provide if aval were to be equated with anomalous endorsement), or whether the Court should somehow apply the law of Germany or the Islamic Republic of Iran on the point, neither of which discharges an avaliste for want of notice of dishonour. There were also issues raised as to whether the Statute of Frauds (United Kingdom) requiring signed memoranda of guaranties applied to the aval; and whether the Court would apply

mistake in the amount payable by one of the 30 bills, or English law to exclude evidence of the parties' intention.

If the Convention were applied to the facts of the Montage case instead of English law, there would be fewer issues, the process would be much simpler, and the resolution of the issues quite straightforward. The bills would satisfy the tests of the Convention as international bills (assuming the parties had correctly invoked the Convention by adding the required legend).

It would not be material that they were accepted and guaranteed before the drawer signed: that is expressly authorized as a useful precaution against interception and forgery.

There would be no difficulty identifying the endorsement as an aval, once the words "*bon pour aval*" were added, and probably no difficulty with the fact that the words were added later, by an agent specially authorized for the purpose.

The payee's status as a protected holder and his right to enforce the liability of the avaliste would not be in doubt under the Convention. No defence was offered other than failure to give notice of dishonour. Although that was the point that raised such difficult conceptual problems for the English conflict rules, it would raise no issue at all under the Convention. Nor would the delay in protest, provided that it was not more than four days' duration.

There might be an issue in harmonizing the Convention's fairly lax requirements of written evidence of a guaranty with the more stringent domestic (United Kingdom) Statute of Frauds requirements on the same point. However, the English Court resolved that issue in favour of the bills under common law, and presumably would be no more harsh to instruments under the Convention.

The only point on which the Convention's rule might be considered to be less attractive than the decision in the Montage case is on the effect of an obvious error that reduced the sum payable in one of the bills. The court applied German law to give effect to the intent of the parties. The Convention would require the guarantor to pay only the smaller sum.

The simpler concepts and procedures of the Convention are obviously better adapted to resolving disputes such as *Montage v. Irvani* than the common law, when the internationality of the bills requires the discovery and selective application of foreign law.

I have only one serious reservation concerning the ability of the Convention to function effectively and more efficiently than the existing law. That concerns the willingness of courts in non-contracting States to give effect to the Convention's novel concept of party autonomy to select the Convention to govern their bills or notes.

The Convention's doctrine of application by choice of the parties represents an entirely new approach in international law. It expands upon currently accepted concepts of the proper scope of the choice of law available to parties by not requiring a bill or note to have any substantial contact with a State that has adopted the Convention as its law governing international bills and notes. At the same time, it also expands upon currently accepted concepts of the legal requirements for creating new forms of negotiable instruments unless they are validated by competent legislation or clearly shown to have been given negotiable quality by custom or long usage. The Convention seeks to go beyond that in asking the courts of both contracting and non-contracting States to accept the parties' choice of law and to apply the Convention's rules of negotiability rather than their own national laws. It is a somewhat daunting prospect. The risk can be minimized or perhaps neutralized by efforts to reduce

or eliminate the number of non-contracting States, and by the efforts of its supporters to create a favourable conceptual climate by advocating acceptance by courts and practitioners.

I hope this programme will encourage those present to support the adoption of the Convention in their countries, and to help bring the UNCITRAL initiative to a successful and useful conclusion.

2. *"UCP 500": proposed revision of the ICC Uniform Customs and Practice for Documentary Credits*

SALVATORE MACCARONE
Professor and Attorney, Rome

The Uniform Customs and Practice for Documentary Credits (UCP) is indeed one of the most successful pieces of international law. It is observed and adhered to by banks and commercial and financial operators in more than 100 countries.

It cannot, of course, be qualified as a law proper, not being the result of the activity of legislators, but still it is as influential and effective as any true law could possibly be.

UCP has recently been defined by a United States scholar - Professor Boris Kozolchyk - as the "living law of documentary credits". It is certainly so. It reflects, as its very name implies, the customs and practice of the commercial and banking world in international trade. Customs and practice that have changed in the course of time, and very rapidly so during the last decade, and thus require a regular updating to keep them alive and consistent with the practice, as any living law needs to be.

Furthermore, the mechanism of the letter of credit that is behind all documentary credit operations has been increasingly used for financial, together with commercial, purposes, particularly in the United States, in the form of the so-called stand-by letters of credit.

ICC is the guardian of the healthy life of UCP through periodical revisions, the last of which is now approaching its completion.

The first draft of what was to become UCP - as Dan Taylor, President of the United States Council on International Banking, reported in a 1990 article - saw in fact the beginning of its life in the United States, about 60 years ago, on the initiative of New York bankers and in the form of Regulations Affecting Export Commercial Credits. Those Regulations were reviewed several times, until in 1933 ICC adopted the first version of UCP, which, in many ways was similar to, if not altogether derived from, the United States Regulations. Finally, in 1938, after a decision of the American Committee on Foreign Banking, UCP, the son, dethroned the father and eventually replaced the Regulations.

Since 1933 ICC has been in charge of revising UCP, which has so far been revised five times, the last one dating back to 1983. The present revision was started about two years ago, and I dare say it is one of the most thorough and comprehensive revisions ever made.

There was in fact reason for this: international trade is no longer what it has been for decades. The new technologies have deeply affected it, in particular as regards the documents used in the course

of transport operations, both because new documents have been conceived and put into use and because the traditional ones appear extensively modified, often in some of their most peculiar features.

In view of this, ICC entrusted two separate working groups to prepare a new text of the rules. One working group, which I had the privilege to chair, with the task of revising all articles, with the exception of those on transport documents, whose revision was entrusted to the other working group, chaired by one of the fathers of the UCP, Bernard Wheble. After preliminary work, the groups have been consolidated into one, and we expect to be able to soon release a final draft for submission to the ICC Banking Commission for approval at its session in November 1992.

The ICC secretariat, on the basis of comments and queries received during the past years, has clearly set out the guidelines of the revision. The existing rules had to be simplified and made consistent with current banking practice, with a view to attaining, or at least facilitating, standardization and uniformity.

On a more substantive level, the integrity and reliability of the credit promise was to be enhanced by a better description of duties and liabilities of the parties, together with rules aimed at promoting the developing practices.

Given these premises, I think it could be interesting to refer to some of the major issues that the now one working group has had to face. There are several, some traditional, others new, which have surfaced in the past few years, also in connection with other projects that ICC was carrying out.

Among the first, the most general and traditional one is probably that related to the nature of UCP and to its field and scope of application.

In this respect, the attitude of the individual legal systems is varied. In some, UCP enjoy the status of usage in proper terms, and its rules are therefore applicable as such to documentary credit operations, regardless of any specific reference to it in the actual letter of credit. Conversely, in other systems UCP is still regarded as a contractual set of rules that, in order to be applicable, requires that the parties expressly refer to it. Lacking such a reference UCP would not apply.

On the occasion of the present revision, the working group again felt that this second approach should still be retained. I would personally have preferred an "act of faith" in the customary nature of UCP, but I understand that, if such had been the case, the diversity of the conclusions reached under the various legislations could have led to the inapplicability of UCP in some cases.

Article 1 therefore retains the traditional approach and provides for the incorporation of UCP in the operative credit instrument.

I would however wish to stress that UCP is, and is deemed to be, a whole and unitary set of rules. Therefore, if the parties wish to exclude the application of one or more articles they have to say so expressly: failing this, and subject to the special case of stand-by letters of credit, UCP would apply as a whole in all its articles.

Another issue, also of general nature, is in fact that of the applicability of UCP to stand-by letters of credit.

The reference to stand-bys was introduced in article 1 of the 1983 revision, on the ground that the structural identity of stand-bys to commercial letters of credit should prevail over the diversity of the functions performed.

The issue, however, came up again, in connection with the rules on demand guarantees that ICC at that time was in the course of drafting, and that have now been issued.

It is perhaps worth noting that not long ago the ICC Banking Commission stressed the difference between stand-bys and commercial or documentary letters of credit, in that the former are a "default" instrument, whereas the latter are a "performance" instrument.

This same idea was behind the opinion of some members that stand-bys are much more closely related to first demand guarantees than to commercial letters of credit, and that the functional approach should therefore prevail. Stand-bys should then be taken out of UCP and put - as in fact they are - only in the guarantee rules.

Although I think that such an approach would in principle be correct, I understand the reasons for the strong opposition that has come from various sides, and in particular from the United States representatives. It was pointed out, among other things, that an increasing number of stand-bys are in fact issued as paying instruments as much as an ordinary commercial letter of credit, unlike other stand-bys that, as we all know, are the United States surrogate for the European type guarantee bonds.

Furthermore, the rules on guarantees are far from having - and it is in fact uncertain if they will ever have - the degree of acceptability that UCP has attained in the course of the time, thus giving rise to the fear that stand-bys could find themselves in a legal vacuum, which is of course a highly undesirable result.

Taking all this into account, the working group felt that article 1 should retain the reference to stand-bys, but that no effort should be made to identify what specific rules of UCP would or would not be applicable to them.

Clearly, many articles do not apply to them, and some thought was given to the idea of specifying them; in the end, though, the working group eventually came to the conclusion that this was not advisable, and would ultimately be useless.

I share this opinion. The articles of UCP that are not fit for stand-bys will not apply, regardless of any express exclusion by the parties in the credit instrument, as stated in the same article 1. On the other hand, I do not think it is in any way difficult for the courts to establish, in individual cases, which rules apply and which do not apply.

Incidentally, we must acknowledge that UCP does not make for easy reading, despite our efforts to make it as clear and simple as possible, avoiding whenever practical, among other things, internal cross-references to other articles.

UCP would become even more complicated if the working group were also to identify which principles apply to stand-bys and which do not.

Yet another issue of general nature, particularly relevant for stand-bys, relates to the consequences of one of the basic principles of documentary credits, namely that of abstraction and independence of the letter of credit from the underlying transactions.

These principles are clearly set forth in articles 3 and 6, but the case-law of the past years has shown that this might not be enough. For this reason, the working group felt it appropriate that UCP itself should draw specific consequences from the above-mentioned principles, and therefore inserted in new article 3 the additional and consequential principle that defences related to the underlying trans-

actions cannot be raised to prevent payment by the issuing or confirming bank, whose undertakings derive only from their own promises to pay (i.e. the issue or confirmation of the letter of credit), and not from the undertaking of the applicant, as stipulated in the underlying contract.

Similarly, it has been clearly spelled out that the beneficiary can in no case avail himself of the contractual relationships existing between the applicant and the issuing bank. Both principles should in fact be clear enough, but it is seemingly not always so, and I think it is sound if UCP expressly highlights them.

Equally related to the independence and abstraction principles is the well-known problem of "non-documentary" conditions and requirements. Despite the statement in article 22 of UCP 400 that all instructions "must precisely state the document(s) against which payment, acceptance or negotiation is to be made", any banker knows that a large number of credits still contain conditions without specifying the documents to be presented in compliance therewith.

When this happens, the banker who tries to establish outside the documents presented whether such conditions and requirements are complied with would surely not behave in a proper professional manner, since he would violate the fundamental rule that banks deal only with documents, and that they establish the right of the beneficiary on the basis of the documents alone.

In tackling this issue the working group was aware that in many cases a conceptual confusion occurs between "terms and conditions", leading to the conclusion that non-documentary conditions are inevitable, as in the case of the time for expiry and presentation of documents, which is established without any supporting documents.

This is, however, wrong. Terms that are events certain to take place (such as a date) cannot be confused with conditions, which by their nature are events uncertain in their occurrence at some future time (such as the departure or arrival of the ship). Therefore, when referring to non-documentary conditions we mean conditions, that is to say those future and uncertain events, whose occurrence cannot be established by the documents indicated in the letter of credit. Under the present rule, this problem has no solution.

The working group was aware of the relevance of the question, and concentrated on two possible solutions, namely the granting to banks of some degree of discretion in deciding what documents would be acceptable in compliance with the non-documentary conditions, or disregarding them altogether. The second alternative was adopted not only for its simplicity, but also in order to focus the attention of the applicant and the issuing bank when formulating the instructions and drawing the letter of credit.

The part, however, that was debated most by the working group was that related to article 15, which embodies the very substance of documentary credits, by spelling out the meaning and implications of article 4, according to which all parties concerned deal only with documents.

The principle has no actual meaning though, if not translated into operational practice, and this is what article 15 does, by stating, in the UCP 400 revised text, that banks must establish, on the basis of documents alone, the compliance with terms and conditions of the credit. If such compliance exists, then, and only then, is the issuing bank discharged.

The reference to documents alone means that the bank must not, in its own as well as in all other parties' interest, look anywhere else, in deciding whether or not to honour the beneficiary's request for payment, and in more general terms to accept and take up the documents as tendered. It is crucial,

therefore, to establish how far the bank has to go in its examination, in other words, to establish how strict the compliance of documents to the terms of the credit has to be. This is in fact a traditional problem of documentary credits, which in the course of time has been dealt with by law courts in a varied manner.

I think we all believe that the checking of documents is not merely a mechanical process. Discrepancies occur all the time, but not all of them have the same relevance and effect; as any banker knows, some discrepancies are indeed critical, and thus fatal, while others are minor and irrelevant, and others yet can be cured by seeking the approval of the principal. The list could be endless: spelling mistakes, transposition of letters, absence of statements etc.

The problem therefore arises as to what grounds and criteria the banker must use to establish such relevance and decide whether to accept or refuse the documents.

As Professor Kozolchyk has stated, "the most basic fact of the letter of credit business is that the letter of credit is a payment instrument and, ordinarily, banks are expected to pay and not to look for hypertechnical excuses not to pay or to disregard significant discrepancies that warrant dishonour". On the other hand, "if banks dishonoured credits without allowing the cure of minor or insignificant discrepancies, their role as trusted paymasters would be seriously undermined".

The working group made an extensive survey of the case law in various countries, and was faced with a variety of solutions. The problem however seems to be most worrying in the United States, where courts tend to be more and more inclined towards the most strict formalism, thus rendering the checking of documents an uncertain and expensive business.

The problem is closely related to the not uncommon efforts of the applicants to induce the bank to refuse payment, by alleging real or fictitious discrepancies, in all cases where the sale contract is no longer profitable to them for market reasons. Obviously, banks cannot support such an attitude; they are and have to remain neutral and decide to accept or refuse the documents, as article 15 says, on the basis of the instructions and directions of the letter of credit.

Unfortunately, this fundamental principle of the documentary credit is not always observed by banks, and we all know that in certain areas of the world this happens more often than in others.

On the other hand, in many cases, as I anticipated, this is induced by us, lawyers and courts of law, with the latter seemingly more and more willing to adopt a truly legalistic approach in applying the principle of compliance, as synonymous with strict compliance.

A case in the United States (*Beyene v. Irving Trust Co.*) was often referred to as particularly significant in this respect, in so far as the Court held that a misspelling in the name of the "notify party" (*Mohammed Soran* instead of *Mohammed Sofan*) was such that the bank should have dishonoured the credit. The survey made by the working group showed similar examples also in the jurisprudence of other countries.

This not uncommon attitude of the courts has obviously compounded the problem, by giving good arguments to banks unwilling to honour the credit, either out of fear not to get reimbursement by the issuing bank or by the account party, as the case may be, or because they wish to protect the interests, or worse the capricious intentions, of the parties.

All this has, at its best, induced the practice - which now represents the vast majority - of "payments subject to reserve or to a recourse to the beneficiary" on the part of the confirming or negotiating bank and accompanied by the listing of as many discrepancies as possible.

In such a situation the working group felt that something had to be done to alleviate the problems encountered daily by document checkers and to prevent abuses, paradoxically made possible by the legalistic attitude of the courts. The only way to achieve this was by clearly stating in article 15 (now article 13) the criteria upon which the compliance of documents must be established by the bank to which they are presented.

The most natural way to approach the problem seems to be that of referring to what any good, honest and experienced banker would do in a given situation, i.e. to what was initially defined as "standard banking practice", meaning by such an expression the practice employed by such a good, honest and experienced international banker when checking documents.

This approach, although supported by the majority of the members of the working group, has not received the approval of the National Committees, basically for two reasons. First of all, the fear that any change in the rules could change the precarious balance somehow achieved in international trade. Secondly, the widespread worry that the reference to banking practice could entitle, or at least encourage, unusual and extravagant national banking practices, thus creating more problems rather than solving the existing ones.

Personally, I do not share these worries. On the contrary, I am firmly convinced that a banking practice, in order to be standard, cannot be unusual or extravagant. Neither the bankers nor the commercial operators as a whole can be, anywhere in the world, regarded as extravagant. Only what can be expected by a good banker or an average merchant can be defined as standard, since this is what most often happens in the market-place.

The proposal, however, was criticized, and the working group eventually adopted a different language, albeit not a different concept, by referring to the international banking standard practice as reflected in UCP. While I do not think that such an expression adds to, or differs significantly from, the other, I would still have preferred the original proposal, mainly for the reason that there is not (yet) such a thing as an international practice, but rather different practices, that can vary not only from one country to another, but even from one bank to another, and that could even be all acceptable in individual cases.

I understand, however, the reasons for the uneasiness felt by several National Committees, including that of my own country, and hope that at least with this language article 15 can be modified, and the dangerous path that some courts have taken be somehow counteracted.

Another point worthy of attention is the drafting attitude chosen by the working group as regards the rules on transport documents.

In UCP 400 there is no clear distinction between the various transport documents, which are dealt with often together in several rules, thus making it sometimes necessary to look at different articles when only one single transport document is being examined.

For the sake of simplicity and systematic clarity the working group felt that each document should be exhaustively dealt with in one single article, even if this approach might, as it in fact did, entail some repetitions, where certain requirements are common to more than one transport document.

An approach of this kind has other merits. We all know that labels and names of transport documents are not always properly used, thus inducing doubts about the acceptability of actual documents. In view of this, the working group felt it appropriate to enumerate in all articles covering a specific type of transport document the minimum requirements which must appear on such documents, regardless of the name or label actually used by the issuer of the document in question.

The new draft covers the marine/ocean bill of lading, the charter-party bill of lading, the multimodal transport document, the air transport document, the road, rail or inland waterway transport documents, the courier and post receipt and the freight forwarders transport documents.

In an earlier draft, a separate article had also been drafted on the sea waybill, a rather novel transport document developed from the practice mainly in Scandinavian countries. As to the nature of such a document, the working group unanimously reached the conclusion that it is not a document of title or even a proper receipt of goods, and does not confer any right to them.

The comments received from National Committees showed, however, that this mode of transport is limited, not well recognized in most international markets, and not well defined for inclusion into UCP, at least at this time. The corresponding article was therefore deleted.

These are only a few of the many problems encountered by the working group in its revision work. It is not for me as a member of that group to say how good our work has been. I can only say that the present revision has taken much more time than any other previous one. I hope that all this time is justified by the results achieved.

3. Voices of international practice

ROBERT D. WEBSTER
Attorney, New York, New York, United States of America;
Banking Law Committee of the International Bar Association

Almost from its beginnings, banking has been a cross-border business. The role of banks in financing trade and serving as an intermediary in transferring value has required them to cope with the legal regimes of various jurisdictions. Until relatively recently, the development of rules governing multinational financial transactions was remitted to the occasionally conflicting concepts of the law merchant of individual States and custom and usage acknowledged by the participants. The objective of legal certainty regarding multinational financial transactions was elusive, and dispute resolution depended more on the pragmatism of counterparties than the availability of judicially enforceable legal principles.

In the last half of the twentieth century, with gathering momentum, there have developed various efforts to formalize the rules governing the transfer of value in cross-border contexts. The goal has been to achieve a greater degree of predictability as to the legal consequences of cross-border transactions and the rights of the parties to those transactions. These efforts have been undertaken by a wide spectrum of bodies. I cannot pretend to set forth a complete catalogue of those bodies or the range of projects that have been undertaken. But the following are representative of the significant efforts in this respect.

Transnational bodies

UNCITRAL has undertaken a wide variety of projects to further its objective of reducing legal obstacles to the free flow of international trade. Of particular relevance to the present Congress is the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes and its Model Law on International Credit Transfers.

The Commission of the European Communities has provided guidance on payment systems, most recently in the form of a working document entitled "Easier cross-border payments: breaking down the barriers". The paper was prepared with the contribution of two working groups -- the Payment Systems Technical Development Group with members drawn from commercial and central banks and the Payment Systems Users Liaison Group consisting of representatives of banks and consumers. The working document sets forth a series of considerations for improving cross-border prepayment systems in advance of European monetary union.

The central banks of the Group-of-Ten countries have collaborated on a variety of matters affecting commercial banking and, directly or indirectly, payment systems and transfers of value. For example, the Group-of-Ten central banks formed a high level ad hoc group to analyse the policy implications of cross-border and multicurrency netting arrangements. In November 1990, this group delivered its report which analysed the credit and liquidity risks associated with netting schemes, and articulated the principles which should be followed if such arrangements were to be effective in reducing exposures.

Transnational associations of private entities

The International Swap Dealers Association was formed in May 1985 by representatives from international investment firms, commercial banks and merchant banks for the primary purpose of promoting practices conducive to an efficient swap market, and in that connection to develop standard forms of documentation for that financial product. The Association has expanded its activities into related areas and has, for example, drafted a model statute authorizing sovereign States and local Governments to engage in swap transactions.

The Commission on Banking Technique and Practice of the International Chamber of Commerce is a body within ICC composed of banks from both industrialized and developing countries throughout the world that are active in trade finance matters. Perhaps its most significant accomplishment has been the promulgation of the Uniform Customs and Practice for Documentary Credits. The UCP has won wide acceptance as the seminal rules governing documentary letters of credit. A new version, UCP 500, is expected to come into effect in 1994, with the hope that it will carry forward into the twenty-first century.

The New York Clearing-House Interbank Payment System (CHIPS), while not strictly speaking a transnational association, includes as participants 126 banks headquartered in 30 countries, each with operations in New York. CHIPS has developed rules and procedures for the effectuation of interbank payments and their settlement on a net-net basis. It has worked closely with United States bank regulatory authorities in developing risk-control techniques, and has carefully addressed the issue of counterparty insolvency in a system involving participants chartered in a variety of different jurisdictions. A similar system in England, the Clearing-House Automated Payment System (CHAPS), was established in 1984 for the sending of unconditional payments in pounds sterling for same-day settlement among the settling banks. Those banks currently consist of 12 United Kingdom and one United States bank.

Ad hoc Groups of Private Entities

The ICOM group consists primarily of lawyers from United States and United Kingdom commercial and investment banks who have formed an ad hoc group with the encouragement of the Foreign Exchange Committee sponsored by the Federal Reserve Bank of New York acting in conjunction with the British Bankers Association. This group is seeking to develop standard forms of documentation for certain foreign exchange transactions for use in the inter-dealer market. A model Foreign Exchange Option Netting Agreement was finalized in April 1992 and addresses the formation, exercise and settlement procedures for foreign exchange options and procedures in the event of default. This group will next turn to standardized documentation for the netting of spot and forward foreign exchange transactions.

North American Clearing-House Organization is an informal group of United States and Canadian banks that is exploring the establishment of a clearing-house for foreign exchange transactions that would provide for settlement on the basis of multilateral netting. Its progress has been slowed by the withdrawal of some of the initial participants and the need to resolve issues with respect to the costs and commitments involved. But the effort is continuing. A similar group, the European Clearing-House Organization has been formed, and is also in the exploratory stage.

It should be emphasized that this roll-call of efforts is not intended to be exhaustive, but merely to give an indication of the mosaic of undertakings to develop sets of commonly accepted rules with respect to transnational exchange of value. An objective of each of these efforts is to achieve certainty in the legal principles governing these transactions. This objective is not only desirable from a commercial point of view, but is important for governmental bodies charged with supervising the affairs of banks and other financial institutions. These bodies have focused on the necessity that the rules governing multinational transactions rest on a sound legal basis. For example, the Group-of-Ten Central Bank Committee on Netting in its November 1990 report (paragraph 2.23) stated:

> "Any netting scheme which provides for the settlement of net balances, on large numbers of transactions, can reduce the participants' day-to-day operating costs and routine liquidity needs. But only if the net amounts are legally binding in the event of a counterparty's closure will the participants experience reductions in their true credit and liquidity exposure."

Unless legal certainty is achieved these efforts may actually turn out to be counterproductive. Again in the words of the Group-of-Ten Central Bank Committee on Netting (paragraph 2.2):

> "But netting can also contribute to an increase in systemic risk. This may be the case if, instead of achieving reductions in participants' true exposures, it merely obscures the level of exposures. Effective reductions in actual exposures depend on the legal soundness of a netting scheme."

To be effective, the development of rules governing transnational transactions must rely on the active participation of a number of constituencies. Of course, as a lawyer, I have just indicated the need for legal expertise in developing rules that will be enforceable in the multiple jurisdictions involved. Particularly important in this respect is whether the insolvency laws of the relevant jurisdiction will recognize private sector arrangements. But at least as important is the participation of users and participants in the relevant value transfer systems. Legally certain rules would be of little value if they mandate a system that won't work because of either the costs or exposure involved, technological or operational difficulties engendered or user or participant resistance to the system's configuration. The development of such rules will also prove to be merely an academic exercise if

they depend on the adoption of legislation which is politically unfeasible or if they offend the objectives or agendas of regulatory agencies.

These often conflicting considerations in effect validate the process by which a variety of bodies, formal and informal, address the rules governing transnational transactions. Each body brings its own combination of strengths and weaknesses to the effort.

For example, bilateral or multilateral efforts by private participants and users of value transfer arrangements will reflect the commercial requirements and values of the private sector, and are essential in assuring that the rules governing the relevant transactions will accommodate the practical considerations of the market-place. The regulated status of the participants, however, also require that the arrangements address individual and systemic risks in a manner acceptable to supervisory authorities and the monetary policy concerns of the central bankers. Moreover, these risks and concerns can only be reliably addressed if the rules devised by private entities achieve legal validity, and this may require legislative actions. Particularly because so many jurisdictions may be involved, the sponsorship of public or quasi-public bodies may be desirable to assuage political concerns that the requested legislative action may be furthering parochial concerns of a particular interest group. But conversely, public or transnational bodies cannot work in a vacuum. The rules devised by such groups will be of practical value only if they define a system which will be widely accepted by the private sector. This objective will only be achieved if the rules reflect private sector considerations regarding technological capacity, usage patterns, risk tolerance, profitability and capital requirements.

The integration of these various, sometimes competing, public and private considerations can occur in several ways. Groups established to address payments and other value exchange systems can include representation from the various groups. This can occur as a matter of formal structure, as was the case with the Commission of the European Communities (CEC), which established two liaison groups (the Technical Group and the Users Group) in developing its working paper on the Retail Cross-Border Payments System. It can also occur informally as was the case with CHIPS. Parallel efforts by the Federal Reserve Board to contain systemic risk in the payment system and the New York Clearing House's efforts to achieve finality of payment were melded in the recently adopted amendments to the CHIPS rules. The process involved active discussions between the private sector and a supervisory authority. This cooperative effort continued on the legislative front where, with support from both groups, the United States Congress in 1991 adopted legislation recognizing the netting regime adopted by CHIPS. The contribution of the various public and private groups to the process of developing rules in this area may be accomplished even without structured cooperation, but rather simply because the quality of one group's efforts is recognized by another. For example, the CEC, in its working paper entitled "Easier cross-border payments: breaking down the barriers", stated:

> "There is a need to harmonize legal rules in order to assure finality of payment and to remove the uncertainty which can exist in net settlement systems. The Commission intends that such harmonization should be consistent with wider international developments and therefore proposes to draw in particular on the work of UNCITRAL... in preparing legislation for the minimum community legal framework."

While it may not be the case in this area that all roads lead to Rome, certainly many of them do.

UMBERTO BURANI
Secretary-General, Banking Federation of the European Community, Brussels

We are currently witnessing on a worldwide basis a process of general deregulation and liberalization of services. This development is paralleled by banking on an increasingly global scale, which is indispensable as industry and commerce spread their activities beyond national boundaries. This trend is reflected in moves to liberalize still further trade in services through negotiations in the Uruguay Round of GATT. Banks greatly welcome any extension of their ability to operate internationally.

The internationalization of banking activities is such that the establishment of branches or subsidiaries in foreign markets is more necessary than ever before. Banks are making considerable investments in this respect, and in doing so they rely on national legislation to allow them to establish themselves under the same conditions as national concerns. There is a need therefore to be able to anticipate changes to legal frameworks which will affect branches or subsidiaries in the relevant host country and to ensure that these will not affect branches in other countries.

In parallel there is also a need to ensure that policies of those countries in which they are established present a certain degree of coherence. Whilst involving at least two countries, a cross-border banking transaction is technically a single operation. Thus, were one part of the transaction to be subject to one set of regulations in the country of origin but the other to conflicting laws in the place of destination, this would impose considerable constraints on international banking and thus on international business.

There is potential for such a conflict of interests in current reporting requirements where two different approaches can be seen, that of the United States and that of the European Community (EC).

The implications of the United States approach in the case of wire or electronic funds transfer instructions received by a respondent financial agency or sent by a respondent financial institution to a foreign financial agency are that the following information should be reported: name, address and number of the account being credited or debited by a respondent financial institution; and the date and amount of the transaction and any other information normally appearing on the respondent financial institution's internal wire or electronic fund transfer entries. The purpose of the United States authorities is ostensibly to trace the flow of the proceeds of crime being laundered via message or transfer systems. Within the framework of United States legislation on banking secrecy, a set of provisions concerns financial record-keeping and reporting of currency and foreign transactions. Under these provisions the United States Secretary of the Treasury may promulgate regulations requiring specified financial institutions to file reports of certain transactions with designated foreign financial agencies. Such legislation could thus have an impact outside the United States.

This is obviously the case in international transactions where, for instance, a citizen from a European country gives instructions to his local bank to execute a payment to his bank's United States branch. Since the United States bank would have to report the transaction to the United States authorities, the European branch could be said to have indirectly communicated data on a European resident.

The effect of such legislation could moreover extend to a local banking transaction within Europe. Under the principle whereby a currency is only to be found in its home country, data would have to be communicated to the United States if a person in Europe wished to make an investment in dollars

with his local bank or issued instructions to pay dollars into an account in another bank in the same or another European country.

The approach taken by the EC is rather different. An instrument has been adopted to combat money laundering (Directive 91/308 of 10 June 1991 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering).

Past experience throughout European history has meant that the Community is extremely cautious about providing the authorities with excessive powers with regard to data relating to individuals. Since the very act of reporting a transaction is in itself a breach of privacy except where it is necessary and reasonable on the grounds of public safety, as confirmed in article 8.2 of the Convention of the Council of Europe for the Protection of Human Rights and Fundamental Freedoms, the directive does not establish a systematic reporting requirement for transactions but imposes an obligation to notify only those transactions which are felt to be suspicious.

Particular attention to privacy has likewise been paid by the EC in the proposed Data Protection Directive, which could in its turn have an impact outside the EC. Indeed, it states that: "Member States shall provide in their law that the transfer to a third country, whether temporary or permanent, of personal data which are undergoing processing or which have been gathered with a view to processing may take place only if that country ensures an adequate level of protection". This could seriously hamper trade, since most international banking transactions carried out in Europe are with citizens from countries not ensuring an adequate level of protection.

It becomes evident for banks that it will be extremely problematical whether it would be possible to comply with both United States reporting requirements and with EC data protection and banking secrecy laws. For example, United States legislation grants the Secretary of the Treasury the discretion to disclose information reported under banking legislation to another agency of the United States, to an agency or a state or local government, or to an agency of a foreign Government, upon the request of the head of such department or agency.

Given the systematic reporting requirement in the United States, one could venture to suggest that, under a literal interpretation of this rule, the United States would be perceived by the EC as not ensuring an adequate level of privacy. As a result, the transfer of financial personal data (e.g. name, address, account number) to the United States could be prohibited, thereby preventing international payment systems from operating.

In addition, United States legislation indicates that the Secretary of the Treasury may prohibit disclosure of the existence or provisions of a reporting requirement to a designated foreign financial agency or to another party. However, under the proposed EC Data Protection Directive, the controller of the file must inform the person to whom the data refer, that is to say the data subject, of the fact that the data have been communicated.

Thus, corporate bodies in Europe would be obliged to inform the data subject of the fact that the information had been communicated to the United States authorities, at which point in time the data subject would have the right under the Data Protection Directive to request the bank to cease communication. The United States branch of a European bank would be obliged, however, not to divulge the fact that it had communicated the data. United States legislation would thus be unable to achieve its objective.

Complications could also arise with respect to banking secrecy regulations. Since national penal law is generally applicable to offences perpetrated abroad by nationals against nationals from the same

country, problems could occur if the United States branch of a bank in an EC country with stringent banking secrecy provisions were to employ a banker of that EC country. If transactions originating in the bank's European headquarters and relating to a citizen of that European country were reported, the banker, being of the same nationality, might find himself in breach of his banking secrecy obligations.

All such apparent conflicts between United States and European provisions could prevent the integration of information systems between the European headquarters and the United States branches of a European bank, since it might not be possible to allow the United States branch to have free access to the databases of the European headquarters, which would pose problems for banks wishing to expand their business internationally.

Whilst there can be no doubt that the prevention of money-laundering and the need to protect the privacy of individuals are of prime concern to both the United States and EC countries, the approach to the problems is, however, very different on both sides of the Atlantic, and the sensitivity of the issues involved varies considerably between the United States and Europe.

Harmonization of laws on sensitive matters such as prevention of money-laundering and protection of individual privacy is therefore a somewhat hazardous exercise. It would however be naive to think that it would be possible for each State to go its own way.

Although it is often contended in international forums that such matters should be harmonized and that cooperation should be tightened, it must be admitted that such avowals have rarely been put into practice. Concrete steps must however be taken to enforce some form of harmonization. The question is not so much whether action should be taken, but the scope and form it should take. Because of the difficulty of reconciling the approaches of the United States and the EC, certain internationally accepted core provisions should be determined which are essential to combat money-laundering whilst guaranteeing the individual a maximum level of privacy.

Minimum harmonization may seem a somewhat unsatisfactory solution, yet it would at least have the merit of providing a more workable solution at an international level. It should be remembered that the best is the enemy of the good.

CARLOS ZEYEN
Attorney, Luxembourg

Within the span of time which has been reserved to my address, I would like to give a brief and general overview on how the Luxembourg banking community understood the progressive unification and harmonization of international trade law and what are considered to be, from a Luxembourg perspective, the needs for the future.

To start, let me point out that my address was prepared in light of information gathered from the various financial institutions, together with their umbrella organization, the *Association des Banques et des Banquiers de Luxembourg*, as well as different banking associations (CREDIMPEX Luxembourg, ALGAFI Luxembourg, FOREX Luxembourg).

Long identified almost exclusively with a powerful, flourishing iron and steel industry, Luxembourg, a member State of the EC, is now being seen increasingly as an important international financial centre in the heart of Europe, with more than 180 different banks out of which 98 per cent are branches or subsidiaries of major foreign banks.

Although many Luxembourg banks are active in trade finance mostly by making available short-term credits, discounting bills and promissory notes for group customers or their buyers and suppliers, few banks have in fact specialized in handling documentary operations, letters of credit etc.

Status quo of the Luxembourg perception of harmonized rules

As of today, one can say that the banking aspects of the transnational transactions are rather well organized. This is also due to the fact that the mutual confidence of banks depends heavily on a network of reciprocal deposits. Groups of correspondent banks typically collaborate by maintaining such deposits and also exchange market and credit information.

In the absence of specific regulations, Luxembourg bankers have welcomed the rules elaborated under the auspices of the ICC and UNCITRAL as excellent tools reflecting the needs of bankers and traders and providing most reliable solutions in the field of payments of transnational transactions. As an illustration, Luxembourg documentary credit operations are governed up to 99 per cent by the ICC Uniform Customs and Practice for Documentary Credits, as revised in 1983 (ICC publication No. 400).

Also, Luxembourg bankers are quite satisfied with the frequent updating realized by the Commission of Banking Technique and Practice within the ICC as the changes and developments in procedures, transport and communication which affect international trade are widely taken into consideration. I should also add that the opinions for the guidance of interested parties elaborated by that Commission are read with interest and taken note of by Luxembourg bankers and traders.

One may even question to what extent the ICC rules (mainly codifying prior practices and established applicable solutions) do not already represent in fact the *lex mercatoria*, at least as far as Luxembourg is concerned.

Future developments

Ways and means to achieve unification

One of the main issues at stake is to determine whether the enhancement of unification could and should be realized through international binding agreements, mandatory for all parties to the transactions, or through the improvement of ICC-type rules. A good example of the effectiveness of mandatory unified rules is, for instance, the Geneva Convention on Commercial Bills of 7 June 1930, introduced in Luxembourg legislation by the law of 8 January 1962.

The European Community has successfully managed to unify legislation of its member States with mandatory rules. Under the reservation of what was said yesterday by Professor Schneider on the conceptual differences between the aims and rules of the EC and UNCITRAL, the EC *modus operandi* could nevertheless serve as a model or at least inspiration for harmonization worldwide.

In this context, it should, however, not be forgotten that harmonization does not necessarily mean to regulate in a restrictive way. As in the EC, harmonization should aim at free circulation of goods, services and capital. On the other hand, the unified rules should only be of subsidiary character.

Possible obstacles to be removed

The differences between the common law and the civil law approaches may constitute a serious impediment to harmonization. Every practitioner on the Luxembourg finance market has already

encountered this type of difficulty. On the other hand the EC shows us that it is finally possible to apply unified rules to both the United Kingdom and France.

Also, to a certain extent, I think that unification of international trade law is not so much a legal problem, but rather a problem related to the development of the banking system in particular and development in general. Indeed, unified rules are of almost no use if the potential contracting partner has for example no convertible (*de jure* or de facto) currency.

It is generally felt that it is easier to unify rules in legal areas that are left to the contractual freedom of the parties by their countries, whereas it seems sometimes impossible to do so in areas where compulsory rules are to apply. From my experience it clearly appears that the most difficult legal areas to harmonize are usually those where unification is also the most crucially needed, for instance in the area of bankruptcy rules.

Having been involved for almost one year now with issues related to the Bank of Credit and Commerce International (BCCI), my firm has particularly experienced the lack of harmonization in the field of bankruptcy and insolvency proceedings in general. As you are certainly aware, BCCI Holdings has its registered office in Luxembourg and used to control almost all of BCCI banks in the world. In my opinion it is imperative to take appropriate measures in order to remove discrepancies existing between the different countries.

Conclusion

I would like now to conclude briefly. I believe, like many of my Luxembourg colleagues, that international legislation, that is, deliberate normative regulations agreed upon by States, either under the form of international conventions or model laws, would be the most efficient way to achieve the unification of international trade law. It is my personal opinion that harmonization should aim at free circulation of goods, services and capital.

The role played by UNCITRAL is crucial, and I am convinced that Luxembourg practitioners would be honoured to make a dynamic contribution to the development of realistic and unified international trade rules.

GEORGE A. HISERT
Attorney, San Francisco, California, United States of America;
Chairman, Letter of Credit Subcommittee, Uniform Commercial Code Committee, California State Bar

I am pleased to have this opportunity to make a small contribution to the tremendous efforts of UNCITRAL to create trade laws and conventions which facilitate international commerce. I would like to focus my remarks on the transfer and assignability of letters of credit.

There are currently three significant developments occurring with regard to letters of credit. As we heard this morning, the Uniform Customs and Practice 500 is almost in final form. Second, UNCITRAL is in the process of preparing a model law or convention on bank guarantees and stand-by letters of credit. Third, in the United States, Uniform Commercial Code article 5, which governs letters of credit in most of the United States, is in the process of revision. All of this activity is indicative of the increasing importance of letters of credit both to international trade and to trade within individual countries.

One of the areas of debate with regard to UCP 500 and the proposed revisions of the Uniform Commercial Code in the United States concerns the mechanics of transfer of letters of credit and the assignability of the proceeds of letters of credit. This debate is caused by the very success of letters of credit as an instrument of payment. On the one hand, issuers of letters of credit wish to have tight control over the identity of beneficiaries. Issuers wish to minimize the risk of having competing claims under the letter of credit. On the other hand, lenders have discovered the desirability of taking assignments or transfers of letters of credit in order to support the financing of the beneficiary. Often banks are on both sides of the debate, since banks routinely are both issuers of letters of credit and lenders to beneficiaries.

One increasingly common phenomenon which I have seen in my practice is as follows. Normally United States lenders will lend only against domestic United States accounts receivable. In case of a default by the borrower, the lender needs to be in a position to efficiently collect the accounts receivable directly against the borrower's customers. United States lenders normally are reluctant to lend against accounts receivables from non-United-States customers because of the problems in collection posed by differences in legal systems. However, businesses increasingly have a substantial number of international accounts receivable. The suggestion is usually made that, if those international accounts receivables are backed by letters of credit, the lender should be willing to lend against the security of those accounts receivable. The theory is that, if need be, the lender can draw on the letter of credit instead of undertaking collection efforts against the international customer.

In the very large deals, the traditional structure of letters of credit has not posed a significant problem with regard to transfers or assignments of proceeds. The parties negotiate in advance and often name the lender as the direct beneficiary of the letter of credit. The difficulty arises where the beneficiary is borrowing against a portfolio of numerous and ever-changing accounts receivable, many of which may be backed up or evidenced by commercial letters of credit. In many cases it is not feasible to have the beneficiary's lender substituted as the direct beneficiary on each letter of credit. First, there is the administrative expense. Second, lenders may change during the life of a letter of credit. Third, beneficiaries are often reluctant to disclose their financing arrangements to their customers. Even if a beneficiary is willing to assign a letter of credit, proposed UCP article 46 creates a number of hurdles. Indeed, under proposed article 46 the word "transferable" really means, from a lender's point of view, "non-transferable without significant difficulty".

Lenders, of course, can take an assignment of the proceeds of the letter of credit. However, converting the assignment of proceeds into a lender's right to receive direct payment on the letter of credit may be difficult. In the United States, many issuers of letters of credit are reluctant to make payment to anyone other than the named beneficiary unless the bank's own forms concerning assignments of proceeds are completed. In addition, an assignee of proceeds currently has little protection because the issuer is not obligated to give notice to the assignee of amendments or even cancellations of a letter of credit. From a lender's point of view, the process of taking an assignment of proceeds needs to be structured so that the benefits of the assignment cannot be defeated by the action of the beneficiary.

Issuers of letters of credit have a legitimate desire not to be caught in the middle of an argument between the beneficiary and an alleged assignee or between multiple alleged assignees. These are legitimate concerns but should not be insurmountable. The California State Bar Uniform Commercial Code Committee will shortly be introducing legislation in California which addresses similar issues with regard to security interests or liens on bank deposit accounts. With bank deposit accounts, banks had initially expressed concern about being caught in the middle of disputes between depositors and one or more assignees of the deposit. I believe that we have worked these issues out. Whether a similar structure can be transferred to the letter-of-credit context remains to be seen.

As more and more borrowers with international accounts receivable attempt to borrow on the security of those accounts receivable and related letters of credit, lenders will be increasingly trying to find a way to obtain appropriate and secure assignments of letters of credit, and these issues are just beginning to be addressed. A solution will need to be found that will satisfy the legitimate concerns of both issuers and lenders.

4. Open floor

HOSNY HASSAN AL-MASRY
Professor of Commercial Law, Kuwait University, Kuwait

I would like to say how honoured I am to take the floor in this important Congress, and I am pleased to express my optimism as to the unification of international trade law in the dawn of the next century. This optimism is due to the fact that scientists and specialists in international trade law from different parts of the world have gathered here in order to realize the desired aim of this Congress, which is the unification of international trade law.

As to the elaboration by UNCITRAL of the United Nations Convention on International Bills of Exchange and International Promissory Notes, I think this will not embarrass any other international convention which might be concluded on electronic credit transfers. The first concerns the international negotiable instruments (written ones), except cheques, while the other will deal with instruments that are not drafted in paper-based form; for instance, the automated banking operations or facsimile or any other instrument of such nature. The contradiction between the two instruments will not exist because guarantees which are available for bills of exchange and promissory notes under the Convention on Bill and Notes will not be extended to the instruments of electronic credit transfer. This is because the first category of commercial instruments is dealt with by means of endorsement which is deemed to require the signature of endorsers. In this case collective solidarity between signers stands as an important guarantee for the title holders and entitle them to receive its value in due course. In addition, the instruments are subject to the rules of the reserved guarantee whenever the instrument requires the signature of guarantor in reserve, while not all the guarantees are available for the electronic credit transfers, given the current situation in international trade dealings.

However, two remarks as to the Bills of Exchange and Promissory Notes Convention can be made.

First, I think it was not necessary to provide in article 1, paragraph 1, the requirement to mention at the head of the bill the expression "UNCITRAL International Bill", and in addition to mention it again in the wording of the bill itself. It was quite enough, to my mind, to put that at the head of the bill and to avoid it in the wording. As to involved dealers, they should be reminded to observe the rules of the Convention.

This opinion is based on the rules of the Geneva Convention of 1930, which provide only for the identification of the title, if it is a "bill" or "note". This solution seems to be a flexible and simple one as to the wording of the commercial papers. Equally, the opinion we support will avoid any decision of nullity as to the bill and notes under the Bills of Exchange and Promissory Notes Convention, if that mention is not included in the wording of the bill itself. It is well-known that the nullity decision in this case is prejudicial to the holder in good faith. The same will be said as to article 2, paragraph 1, relative to notes.

Second, since the aim was to unify international trade law, it is hoped that there will be a large scope for the application of the Bills of Exchange and Promissory Notes Convention. This could be done - as a proposed amendment - by providing in the Convention that it is applicable in cases of express consent by involved parties in a bill of exchange or promissory note. I mean by these cases those which do not fulfil the conditions of application of the said Convention; for instance, if one of the parties belongs to a State which is not a party to the Convention.

In conclusion, I would like to salute the efforts exerted by those in charge of UNCITRAL and to commend their work for the unification of international trade law.

PROFESSOR CARL FELSENFELD
Fordham University, New York, New York, United States of America

I am very pleased to have the opportunity to speak to this gathering.

I am going to join with Carlos Zeyen of Luxembourg to propose to UNCITRAL that it considers some work in the future in the area of international bankruptcy. I had not expected to hear Mr. Zeyen speak; on the other hand, it is no coincidence that he and I speak on the same topic, because international bankruptcy is growing and is becoming an increasingly pressing problem throughout the world. Many companies will declare bankruptcy in one State in one jurisdiction, and will also own assets in other jurisdictions, and it is because of the conflict between those jurisdictions that the problem arises. The bankruptcy State, the State where the bankruptcy is declared, will probably claim, or attempt to claim, jurisdiction over those assets as part of the estate in bankruptcy, and claim its own jurisdiction and ability to distribute them among creditors. On the other hand, the other State where the assets are located will surely claim jurisdiction over those assets simply because they are located there, and the other State will assert that it has the right to determine where those assets should go.

It is the nature of these conflicting claims that causes me to make this proposal to UNCITRAL. As Mr. Zeyen also mentioned, I think it is not practical to think of harmonizing the bankruptcy laws of these different jurisdictions: in the evolution of international law we are simply too far from any time when we could expect countries to have similar bankruptcy laws in an effort to stimulate international trade. However, in the area of international bankruptcy we can reduce the problem to a much more manageable level, and I suggest to UNCITRAL that it work in that area. That is, it may look to the State where the assets are located as contrasted to the State where the bankruptcy is declared and try and answer the question of how those assets should be handled. Should they be handled under the law of the jurisdiction where bankruptcy is declared as one centralized area? Should they on the other hand be handled under the law of the State where the assets are located? If the latter, if they should be handled under the law of the State where the assets are located, should they be handled under its bankruptcy law? Should they perhaps be handled under its general law dealing with the relationship of creditors and debtors?

We have in the United States, of course, a complex series of laws dealing with debtor-creditor relationships, the unfortunate basis of which is "the first in time is the first in right", which results in a scramble, a race to get hold of the assets. Is that the appropriate way of dealing with them? Or should there perhaps be some combination which can be worked out for the State of the jurisdiction of the bankruptcy and the State where the assets are located, which is a method which has been attempted from time to time? I am aware that as this problem grows others have looked at it, other organizations have attempted to meet on it, there are some writings in the field, but I submit to UNCITRAL that as a part of its future it seriously consider this international bankruptcy problem in the limited sense I have proposed.

Paper read by the Secretary of UNCITRAL on behalf of Professor Alejandro Garro, Columbia University, New York, New York, United States of America

There is no question that security interests in movable property play a significant role in a credit system. A modern and reliable system of personal property security law is an effective means of reducing the cost of credit, and it is to the advantage of both debtors and creditors to reduce creditors' risks in lending. Modernization and flexibility in the law of secure transactions has received special attention in some countries at the national level, and it is an area which has attracted the attention of a few international organizations in recent years.

The most ambitious undertaking thus far has been that of UNCITRAL, which in 1968 authorized the Secretary-General to carry out a comparative study of the law of security interests in personal property. In 1980 UNCITRAL concluded that the complexities of this area of the law and the differences among legal systems were of such magnitude as to discourage, at least for the time being, efforts towards the international harmonization of personal property security law. Admittedly, the efforts towards harmonizing different legal approaches to secured financing would involve a great deal of dedication and resources, and it makes little sense to engage in such an undertaking unless those efforts are important to the business community affected by the shortcomings of national laws and their divergent approaches to similar policy issues. However, it is not always easy to demonstrate a need for change in the law, and the advantage of harmonization is not a popular issue of concern in business circles. It is UNCITRAL's role to bring to the attention of those affected by the unavailability and high costs of credit how legal reform in the context of unification efforts may facilitate credit transactions and foster international trade.

I submit that the withdrawal of UNCITRAL from involvement in the efforts towards the unification of personal property security law cannot be persuasively justified on the basis of the different conceptual approaches to security interests held by countries belonging to different legal traditions. After all, it is precisely wide divergences among legal systems, many times due to mere intellectual inertia, what makes worthwhile the task of UNCITRAL. A more significant and perhaps more relevant reason for the unwillingness of the Commission to go forward might have been the realization at the time that unification was not necessary on a world scale. It is reasonable to assume that harmonization efforts will have a higher chance to succeed among jurisdictions that share common borders, similar socio-economic patterns and a familiar legal culture. Yet in matters of trade law, the benefits of harmonization are more likely to be experienced if those efforts are geared to a world scale, at least as long as many countries, both developing and industrialized, common law and civil law, continue to maintain significant commercial relations with each other. My own experience with the law of security interests in personal property in Latin America indicates that secured credit to the extent that it is available is mostly linked to urban real estate and large rural land holdings. Secured transactions in goods are of little use. This may be due to various reasons, including the lack of adequate filing systems capable of tracing security interests in movable property, the lack of clear priority rules tuned to economic convenience, a slow and cumbersome enforcement procedure and structural gaps in the governing law. Those shortcomings limit the volume of credit available for economically productive transactions and to a significant extent reduce the overall potential for economic growth in the context of international trade, regional integration and development.

We are gathered in this forum to discuss the prospects of uniform commercial law in the twenty-first century. I submit that UNCITRAL's efforts in the harmonization and unification of personal property security law should be revived, if at all possible during this century. The momentum for harmonization originally developed by UNCITRAL was subsequently taken by UNIDROIT's successful efforts in international financial leasing and factoring and by the ongoing project towards the international regulation of security interests in mobile equipment. This momentum should not be

allowed to dissipate. I take this opportunity to suggest that they provide sufficient evidence regarding the need and feasibility of UNCITRAL's unification efforts with respect to security interests in personal property.

B. Electronic data interchange

1. Electronic commerce and the law

AMELIA H. BOSS
Professor of Law, Temple University School of Law, Philadelphia, Pennsylvania, United States of America

Although the topic for this UNCITRAL Congress is international commercial law in the twenty-first century, we would be remiss if we did not ask the fundamental question of what international commerce will look like in the twenty-first century. I submit to you that the patterns of international commerce have changed radically in the short time since the birth of UNCITRAL, and will continue to change in ways that may fundamentally challenge both our current domestic legal structures and the developing international commercial code which is the topic of this Congress.

One of the most fundamental changes that has occurred in this century is the introduction and use of the computer - and electronic technologies in general - in the commercial market-place. Increasingly, companies engaging in international commerce are turning to computers and electronic technology to serve a variety of functions in the business environment - to keep information vital to the operations of the company, to monitor production, inventory, finances. The attributes of electronic technology - speed, the ability to store vast amounts of information, the ability to transmit and reproduce information accurately, and the ability to access, integrate and manipulate voluminous data quickly and easily - combine to create substantial benefits to the users of that technology. Users discover that the elimination of the need to rekey information leads to increased accuracy; increased speed leads to the elimination of costs through reduced inventory; elimination of the need to manually re-enter and manipulate data leads to reduced labour costs; and increased storage capacity combined with the ability to access, integrate and manipulate huge amounts of data with ease allows the consolidation of the operations of different departments within the business, leading to more streamlined operations and greater integration of business functions.

The use of computer technology is not limited to intra-firm functions, however. Computers are being used to communicate outside the firm - with suppliers, customers, transporters, financiers, banks, insurers - in inter-firm communications. Electronic data interchange (EDI), which is defined as the computer-to-computer exchange of information in predetermined formats, is being used in routine business transactions, as companies discover that the use of electronic communications, combined with the elimination of paper, results in reduced communication and storage costs as well as increased speed in establishing and executing the transaction. As the benefits of electronic commerce are being realized by companies inside and outside the firm, the users are recognizing that they enjoy a competitive advantage in the market-place and that, increasingly, the use of such technologies as EDI is becoming a competitive necessity. In the automotive industry in the United States, for instance, no major manufacturer will do business with you if you do not "do EDI".

Although it is impossible to foresee all the implications that electronic technologies may have for the political and cultural worlds of the future, it is becoming evident that the use of such technologies in the commercial arena has had three major effects on commercial relationships, effects which will undoubtedly continue into the twenty-first century. What I would like to do today is to describe these

three effects, and then discuss the manner in which our emerging international commercial law might respond in order to achieve the harmony and uniformity critical to the facilitation of international trade and the elimination of artificial trade barriers.

First, the use of electronic technologies to organize, communicate, store and process data is fundamentally changing the way companies transact business. Computer-to-computer linkages are not simply replacements for paper communications; they are now leading to internal reorganization of a company's operations and restructuring of its relationships with its trading partners.

In a "just-in-time" scenario, a manufacturer's computer may be programmed to monitor inventory needs during the manufacturing process, and to issue purchase orders electronically when inventory levels reach a certain amount. This electronic purchase order is transmitted to the supplier, whose computer may immediately generate an electronic shipping order which is immediately filled by the supplier's warehouse. No human will have monitored or approved that transaction. In a slightly different scenario, that of "quick response", a supplier's computer can be programmed to monitor its customer's inventory and, when that inventory dips below certain pre-established levels, generate an electronic shipping order for prompt shipment. No specific contract for the purchase of those goods will have been negotiated. Indeed, in many respects the boundaries between the computer systems of the supplier and the customer have become irrelevant. Thus, the introduction of electronic communications technologies into the commercial sphere may fundamentally change the way companies transact business and call into question our legal framework for analysing the creation and nature of enforceable commercial transactions.

Second, as companies expand their use of electronic communications technologies, a new service industry is emerging. Past modes of communication have involved carriers responsible for transmitting messages from one party to another - mails, telecommunications carriers, and post, telegraph and telephone systems are examples. In most of these situations, however, the responsibilities of the carriers have been limited to moving the messages. The growth of electronic communications technologies has brought with it a new service industry - third party providers or value added networks. These providers or networks do more than merely transmit data. They add value, performing such functions as protocol conversion; storage, transmission and retrieval services; format translation; message tracing, delivery notification and integration reports; record retention services; implementation training and consultation; security enhancement; and database development. These companies, in turn, move information between themselves for the benefit of their customers, creating an infrastructure which is integral to an effective system of international electronic communications.

These service providers play a critical, but as yet unexamined, role in the electronic movement of trade data and the facilitation of international trade. Although GATT and other international entities are considering the regulatory and other policy factors relating to trade in services (including telecommunication and related services), few have begun to consider the legal and practical considerations affecting this emerging services industry.

The third major impact of the advent of and growth in the use of electronic media is the emergence of a new type of property with commercial value. In the past, the main types of international commercial transactions involved the sale, financing, transport and payment for goods and services. Over the past few decades, we have seen a decline in the prominence of the goods-based contract in international commerce, and the rise in the predominance of service contracts. In addition, we are beginning to see another change - the evolution of transactions in which the subject of the transaction is not goods, or services, but information. Indeed, in the minds of many, this is the "information age". And much of that information is electronically processed, stored, and transmitted.

The fact that in this information age, information has become a highly prized and valuable commercial commodity will force us, in the future, to re-examine the nature of property rights and their application to this new and emerging species of property. Already, on the international scene, the importance of information as a commodity is seen in such international conventions as the Bern Copyright Convention. But the Bern Convention deals primarily with only one aspect of what may be deemed to be property rights in information - the ability of "non-owners" to copy that information.

The ability to control the copying of information is not the only right that may be claimed in information. There is, for example, the right to control access to information, a right which takes on special significance in a computerized society. As important commercial data, which may have independent value because it reveals information concerning the purchasing, selling or other commercial activity of a company, passes through multiple hands, potentially finding its way into the hands of a third party, the right to control access to that information, combined with the right to control its use and disclosure, becomes crucial.

There is lacking in our law today a coherent analysis of these rights in information as property. There are, it is true, certain areas where information is protected, in addition to the copyright area mentioned above. The recognition that information is deserving of protection, however, may result in the imposition of administrative or legal controls which ultimately interfere with the use of electronic communications technologies as a means of transacting business internationally.

An example is the imposition of controls to protect the privacy of personal data, through such initiatives as the proposed EC directive regulating the trans-border data flow of information containing personal data. Conceived with the laudable goal of protecting the privacy of persons who individually could not bargain to protect that information from disclosure, such initiatives may have the net effect of prohibiting the legitimate commercial transfer of information from one country to another. A bank wishing to send account information to a computer centre in another country for the legitimate commercial purpose of electronic processing, for example, may run afoul of such regulations. Thus, any emerging legal structure governing property rights in, or the commercial attributes of, data should be analysed to assess its impact upon the open facilitation of international commercial trade.

What we are seeing, and will continue to see into the twenty-first century, is the growth and maturation of electronic commerce, where information is stored and transmitted electronically; where a global infrastructure of data carriers and service providers is developing to support that commerce; where, increasingly, electronic information itself is the subject of commerce. The challenge we are confronted with in this century - to prepare us for the coming one - is attempting to integrate this electronic commerce into our growing international legal framework.

The challenge of developing appropriate international legal responses to the issues presented by the growth of electronic commerce is a far different challenge from the one that has faced us with respect to other areas of international trade and commerce - such as the sale, transport and financing of goods. In those areas, most countries had a legal regime in place which governed such transactions on the national (as opposed to international) level. Because of our divergent legal cultures, the legal regimes were at times contradictory. The challenge was thus to reconcile these divergent legal systems, which treated the issues at hand in disparate ways, and to develop an international framework which harmonized and conformed the laws of the nations.

The challenge in the area of electronic commerce is drastically different. In this area, developing and developed countries, common law and civil law countries, countries of different cultural and legal heritages, have an important element in common - none of them has yet developed a comprehensive legal structure governing electronic commerce. Thus, the challenge is to take countries of divergent

economic capabilities, countries of different cultural and legal heritage, and bring them together to develop common analyses of, and approaches to, problems never dealt with before.

It is important for the countries to study and approach these problems together, at the outset, in order to develop common understandings as the basis on which a universal system may be built. Otherwise, each national system may react or respond to the issues and problems in an idiosyncratic way which makes future attempts at unification more difficult. There is a marvellous opportunity to nurture and develop a common understanding among the countries, before the laws and attitudes of individual nations are too far developed and crystallized. Moreover, because the area of electronic commerce itself is rapidly developing, we have the opportunity to assure that the law develops as practices develop, and that the partnership which is at the heart of commercial enterprise flourishes.

Although there is currently a lack of any developed legal framework, national or international, to guide the conduct of electronic commerce, electronic commerce is still occurring, and occurring on a substantial basis. The advantages of electronic commerce are perceived as so great that companies have moved ahead and implemented electronic communications technologies despite the difficulty of determining the legal efficacy and effect of electronic transactions. In the United States, prior to the enactment of article 4A of the Uniform Commercial Code, over US$3,000 billion a day were sent electronically, despite the fact that there was no legal structure governing such funds transfers. Similarly, companies are implementing electronic data interchange in other areas of commerce despite the lack of clear legal guidance. It is clear that the world of electronic commerce has moved ahead. The challenge today is to activate the international law reform process to recognize these important commercial practices and to facilitate international trade by providing a legal framework against which parties may structure their transactions.

How have commercial parties been structuring transactions on the national and international level in the absence of any governing legal structure? Many of them do so by creating their own law. So, for example, many trading partners who are exchanging information electronically or conducting business electronically enter into interchange agreements (or trading partner agreements) by which they enter into a consensual understanding as to the rules of conduct governing their transactions. The past decade has seen the proliferation of such model interchange agreements.

Other commercial parties who conduct business electronically do so through an intermediary - or through a system - which imposes rules of conduct on all its participants. An example is the SWIFT system which has a comprehensive set of rules governing the banks which are members and utilize its systems. Similarly, the SABER airline reservation system is conducted according to a complex set of rules set out in a manual used by all participants.

Still other commercial parties make their own rules by seeking special legal or regulatory treatment within an individual country. Thus, the World Bank, which issues approximately US$11 billion to US$12 billion worth of bonds annually to finance loans to developing countries, issues approximately half of those bonds in electronic form. In order to assure itself of the legal rules governing such issuances, the World Bank approaches the regulators within the affected countries to adopt or modify their legal structure to accommodate these electronic issuances by the World Bank.

Although parties presently trading electronically may appear to be coping quite well without any imposition of a legal regime of any type, that appearance is misleading. Many commercial entities, for one reason or another, are unable to avail themselves of the self-regulatory methods referred to above. Or, to the extent they do use such self-regulatory methods, the legal uncertainty and resulting need to negotiate or recreate a legal structure for each transaction drive up the costs of doing business, or the transaction costs. In a most vivid example, that of the World Bank, the transaction costs

required to seek special legal treatment in each country drive up the cost of financing to developing countries.

There are a number of ways to respond from a legal perspective to the challenges of electronic commerce.

The first is to allow business to regulate itself. But, as noted above, there are limits on the ability of the industry to do so. Interchange agreements, for example, are of limited utility, depending upon the agreement of the parties and failing to bind parties not privy to the contract. Moreover, they are not practical in an open electronic environment where people begin to transact business electronically without a pre-existing business relationship. Self regulation is not sufficient to remove those legal and administrative requirements such as writing and signature requirements, which operate as trade barriers to electronic commerce.

The second possible way to respond to the challenges of electronic commerce is wait and see what responses occur on the national level before any attempt is made at the international level. The disadvantage of such an approach is that it opens the door to the proliferation of differing legal structures governing electronic commerce, making future attempts at unification more difficult.

The third possible response to electronic commerce is to develop a sectoral approach - to examine the use of electronic commerce in each industry or area of international commerce and develop a legal regime for each. To some extent, such an approach is under way. UNCITRAL, for example, has just approved the Model Law on International Credit Transfers, which will deal with electronic funds transfer. Although there are advantages to this approach, there are also disadvantages: the relegation of the subject to industry-by-industry treatment deprives us of a coherent, rational treatment of issues which cuts across sectors and industries. Companies which operate in a number of sectors may find different aspects of their operations governed by arguably inconsistent rules.

A last approach - and one which is currently being explored by UNCITRAL - is an examination of the fundamental nature of electronic commerce and an attempt to identify common themes and develop appropriate resolutions which could then be implemented either globally or sectorally.

Whether the response to electronic commerce is sectoral or more broad-based, the nagging question is what should that response be? At a minimum, any law revision project in the area of electronic commerce should attempt to eliminate the media bias that currently exists in favour of paper-based transactions. As an example of this type of approach, some international conventions have begun to redefine traditionally paper-based terms such as writing, signature or document to include electronic communications technologies like telex, telegram, or EDI. An example is the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (adopted on 19 April 1991), which redefines a document as "any form which preserves a record of the information contained therein", specifically including EDI messages (if the parties have agreed to communicate electronically).

Elimination of "media bias", however, may not be sufficient. A different response is to return to the purposes and policies underlying the current commercial framework to determine how those goals may be accomplished in an electronic environment. A refinement of this approach is to ask whether the policies and goals of the past are relevant at all in today's electronic environment, and if not, to eliminate requirements premised on the acceptance of those policies. On a technical level, examination of the underlying commercial transactions may reveal that in an electronic environment it is not necessary or efficient to retain all of the documents typically used in a paper-based transaction, converting them to electronic documents. Thus, with the advent of evaluated receipt settlement

in the United States, the invoice is no longer essential. Similarly, legal requirements may no longer be needed, while others may be required instead.

On another level, it may be necessary to analyse electronic commerce to determine whether, apart from whatever was the case under pre-existing law, new laws are necessary to appropriately accommodate issues emerging in the electronic environment. The advent of electronic securities in the United States and elsewhere, for example, is causing a re-examination of the entire system for recording title to and interests in securities. Similarly, attempts to introduce electronic bills of lading are causing a re-examination of the law of negotiability and an exploration of alternative methods of documenting claims to goods covered by electronic bills. In many respects, the issues which are being revisited are issues which existed in a paper-based system. With the advent of electronic communications, however, these risks have increased in degree or changed sufficiently in nature that the issues are deserving of particular attention in an electronic environment.

The increasing prominence of international electronic commerce and the need to establish rules for its conduct has begun to attract considerable attention from the international legal community. National efforts to examine the issues have led to the development of numerous model interchange agreements for commercial entities to use in establishing electronic trading relations, and current attempts are under way to develop truly international model interchange agreements. The first attempt by the international EDI community to harmonize and unify its practices resulted in the adoption by the ICC in 1987 of the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID). Set in the form of non-mandatory rules which users of electronic communications technology and suppliers of network services could incorporate by reference into their communication agreements, UNCID covers such issues as the required care for transferring and receiving messages; identification of the parties throughout the communications process; acknowledgement of receipt of a message, if requested; verification of the completeness of a received message; protection of commercial information exchanged; and the maintenance of records on the transmission and storage of data.

The ICC's activity has provided guidance to the efforts of a number of other groups. The CEC, through its Trade Electronic Data Interchange Systems (TEDIS) programme established in 1987, has conducted research into the legal issues inhibiting the development of EDI trade in the EC, identifying three principal legal impediments to the development of EDI - requirements of paper documents, problems of evidence, and problems in determining when a transaction is effected through the use of EDI. In its second phase of operations, the TEDIS programme is concentrating on the appropriate response to these legal problems.

The Working Party on the Facilitation of International Trade Procedures, operating in Geneva under the auspices of the Economic Commission for Europe (ECE), is the body responsible for the development of international standards for EDI. In the mid-1970s, it recognized that true facilitation of international electronic trade would require the elimination of legal barriers that currently exist on both domestic and international levels, whether arising from statutory or regulatory requirements or established commercial practices. The Working Party has set an aggressive programme of work which includes, *inter alia*, drafting of an international model interchange agreement, study of writing and signature requirements, and re-examination of concepts of negotiability.

Finally, UNCITRAL, having had the topic of automated data processing or EDI on its agenda since 1984, last week approved the recommendation of its working group and authorized the drafting of model rules or laws in the area of electronic commerce. That move is an important step forward in international efforts to meet the legal challenges presented by the growth of electronic commerce.

Ultimately, the challenges we are confronted with are demanding. What is needed is a partnership between all international legal organizations, between industry and lawmakers, between public and private parties, so that we as a global community can adequately respond as we enter the twenty-first century.

2. Uniform legal rules needed for EDI

JOSÉ MARÍA ABASCAL ZAMORA
Professor and Attorney, Mexico City

The task now before me is to talk about the various legal norms that may be required or may be elaborated in connection with the phenomenon of EDI. And the first thing that I must do is thank Professor Amelia Boss for the outstanding way in which she has cleared the path for me, when I come to addressing the possible legal norms, and as I refer to them in the light of the work that the UNCITRAL Working Group on International Payments did at its thirteenth session, and also the whole thinking process on this subject which has taken place in the Commission.

I would also like to underscore something that Professor Boss already touched upon very skilfully, and that is the opportunity that we have now to draw up norms in an area in which traditional established legal norms are lacking in the various countries that have different case-laws and traditions which are an impediment to harmonization. As we move forward, we shall see that virtually all of the questions concerning EDI in the practice of electronic commerce are long-standing issues bound up with the law governing obligations and contracts in commerce. However, these long-standing questions are couched in a new fashion involving a new form of transmission of ideas and expressions of will, a new form of storage and of compiling information which can be done so rapidly and in such great volume that truly much change is required, as Professor Boss has already said. It is a revolutionary thing.

This meeting, quite apart from the fact that it has been an extraordinary meeting of people involved in the practice of international trade law, has also demonstrated that it is an excellent meeting of cooks. There has been quite a lot of reference to the various culinary skills of the groups within UNCITRAL. There has been reference also to the work of other bodies that are setting out to draw up norms in the area of EDI. And when we look at these things, we come up with a whole staff of cooks, and we do not know whether they are going to come out with soup or some other kind of dish. There are still vegetables that are looking pretty green, others already more ripe; some are dealing with meat; we do not know whether we are going to have to use a saucepan or a frying-pan; and there are some pessimists who think that maybe we should just go to a restaurant and be done with it.

However, here in UNCITRAL we are very optimistic, maybe unrealistically, but we are very optimistic. And it is our intention to come out with a good meal no matter what.

First of all, whatever we cook up should start from a principle which to legislative minds may be a little unacceptable. We are faced with a lot of traditions which might perhaps be considered to give almost a religious role to signatures, to paper, to all the traditional instruments. So our first function in our work is that it is an educative one demonstrating how, through EDI, it is possible to achieve something similar and indeed better than has been done with paper.

Secondly, as in the case of all international instruments, there has to be a great deal of flexibility. Great flexibility, especially in the commercial area, means broad concessions to autonomy of will. Over the centuries it is the merchants and traders in transactions and contracts who have generated

trade law. This has to continue, and so our desire to regulate must be a minimal one and very often simply supplement, if you like, and bend itself to the autonomy of the will.

In EDI the parties that communicate electronically are carrying out business. They are doing business by electronic means and they are doing this on the basis of prior agreements, so we cannot overlook the fact that these previous agreements may, as technology advances, change in nature. Sometimes, indeed, prior agreements may not even exist, and so we need additional rules to govern that kind of situation.

But if we are seeking to achieve unification on a global level in an area which is still diffuse, this is a tremendously difficult job.

The work that we shall have to tackle will have to be approached modestly, realistically. We need to define the scope of application. And here we run into a large number of possibilities ranging from considering all the phenomena of electronic commerce such as the use of telefacsimile and electronic mail services - and indeed contracts that for many years now have been made by telephone, by voice recognition - to very narrow and strict EDI concepts, including the definition of what EDI is, and also exchange and transmission of commercial data from terminal to terminal in a standardized format. It might even be stricter to talk about a closed transmission network, but a still broader view could be taken, with open transmission networks which are intercommunicating. So the possibilities range from a closed concept in which EDI is considered as only a teletransmission of messages, to the broad view which regards EDI not only as transmission but also processing, storage and all the other services that such networks can provide.

The first option that the Working Group took in trying to get a broad overview of all the problems involved was to take a broad approach in order to become acquainted in general with all the problems associated with electronic commerce. Subsequently, when we opt for one direction or another, then of course that concept will have to be narrowed somewhat, as will also be true with a view to establishing uniformity and defining a concept of internationality which would permit States intervening in any negotiations to further circumscribe the scope of application of the norms merely to foreign trade transactions. For as Professor Roy Goode so rightly said yesterday, one can do almost anything to foreigners - things that you cannot do to your own nationals.

And then probably - not just probably but almost certainly - there will be a need to restrict the scope, excluding those regulations that protect the consumer.

This, then, very broadly and rapidly would be the possible scope of application.

What are the problems involved? Probably the first and most important one that we will encounter is that of the mandatory requirement of a piece of paper-based writing. This is really a barrier to the development of electronic commerce. And it is a barrier that continues to exist in most national legislations. But it also exists in the international sphere. For example, the International Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 1929) requires recognition in writing. The same is true of the Hague Rules and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). These all require a paper-based piece of writing.

So the written document is something that exists and at a certain point is a barrier to the development of electronic commerce. What can be done? Can we eliminate the idea of a piece of writing or can that concept be expanded and enlarged to make it encompass EDI techniques? It is possible to have recourse to techniques that represent what have been called "functional equivalents" of a

written document. What are these functional equivalents? First of all, they should permit that a document remains unaltered over a long period of time. Secondly, a document should be reproducible so that each party has a copy of the same data. Thirdly, there is a need for authentification of data by means of signature, and fourthly, documents have to be presented in an acceptable form to political authorities and to the courts.

The current state of technology permits all these functions to be carried out with the same or a higher level of security than is now done on paper, provided that certain technical and legal requirements are met.

It is also appropriate to mention the fact that there are certain definitions in this area which recognize the value and the validity of electronic data exchange on an equal footing with writing. Article 4 of the recent United Nations Convention on the Liability of Operators of Transport Terminals in International Trade speaks of notice and request for application and, under that heading, the article defines these as a request for application submitted in any form which maintains a record of the information contained therein. Now as I see it, if I am not mistaken, this definition stems from the earlier formulation of UNIDROIT in international financial and factoring regulations which already used that concept. The important point is that these requirements should be met and that the document "should be legible". Of course, disks or tapes can be included under this concept, and one must be careful to ensure that the definition is not so restrictive that it would prevent future technological advances from being taken into account and regarded as documents.

This leads me to recall a criticism of the UNCITRAL Model Law on International Credit Transfers. Somebody asked me: "We thought that you were working on electronic funds transfers?" Well, one reason why the preference given to electronic transfers was eliminated was that the electronic transfer medium would be restrictive in the near future because you cannot define it too closely. You have to take into account technological advances. At the same time, in practice, parties draw up framework contracts, as Professor Amelia Boss has already noted, for electronic trading transactions, and in those contracts the parties are accustomed to defining or giving consideration to written documents. And since we are trying to give full respect for autonomy of will, it is very hard to establish legal validity for electronic transfers in certain legislations which find it hard to give the proper respect to such transactions. It is hard to establish the legal validity of such electronic transactions. But we already know that many electronic data exchanges are recognized as equally valid as paper. Incoterms 1990 recognizes this, and so does the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.

There is also the problem of proof or evidence. Here we have three main problem areas. First is the admissibility and presentation before courts of electronic archives or registers of records when considered as evidence. The second problem is whether or not such records can be considered to have evidential value. On a third level, you have the problem of attributing the burden of proof when parties are communicating electronically.

In the first question of admissibility and presentation of facts before tribunals and so forth, it is clear that there is great disparity in this area among legal systems. For example, in my country you have the system of open evidence - all kinds of evidence are accepted. In other systems - under common law, for example - I understand that evidence can only be introduced by a witness, and it may be considered that evidence derived from EDI may be regarded as purely hearsay evidence, which would not be acceptable under common law. And in such countries, the possibility is admitted of commercial expediency, that is to say, whoever presents the evidence states that the data presented is part of the information recorded in the normal process of transactions. Or in some systems you have

the possibility of presenting the best available evidence on condition that such evidence is legible by or interpretable by a human being and not just by a machine.

Of course, all of this depends on the nature of the facts to be proved. Proving that a message was received is both very hard and rather different from proving the content of the message received.

Then you come to the question of the value of this evidence, whether it has weight as evidence - evidential value. This really depends on the appreciation of the court and the discretion of the judge. But this is where we come back to the educative task of which I have already spoken. Little by little we need to accustom judges to the idea of recognizing that they are faced with a genuine lasting phenomenon which provides a sound basis for judgement.

And then you come to the question of the burden of proof. Generally speaking, the rule is that whoever brings a case has to prove his or her charge. But in many legal systems there have always been exceptions to this. There are inequalities between the parties, for example, and this may occur in many cases in EDI. And here once again it is important to give generous latitude to autonomy of will. It must be the parties that establish burden of proof in accordance with their own stipulations. The problem of the legal burden of proof would be difficult to resolve in a general fashion in full detail because it depends entirely on proceedings and procedures within varying national legislations, but one should not discard the possibility of at least recommending solutions which could be implemented on a national level. This was done recently in some aspects of the Model Law on International Credit Transfers.

Another barrier presented by national systems to the use of EDI is the requirement of the presentation of an original document. There are a number of instances in which presentation of an original is required, for example to provide evidence of title for the granting of a security interest, where there is deposit of a document of title, for the transfer of securities and to comply with certain statutory and administrative requirements. And in this concept of the original, the concept of the signature is very important, as is the question of authentication. The signature has traditionally indicated the source of the document and has signalled that the person signing the document approves its contents. In the electronic context this can be achieved through authentication and through digital signature. These issues are already known in legislative fields, particularly at the international level.

Digital authentication and signature have their precedents in early UNCITRAL documents, such as the definition of signature which can be found in the United Nations Convention on International Bills of Exchange and International Promissory Notes, which defines signature not only as manuscript but as facsimile of manuscript or any other equivalent means of authentication. This definition was also picked up by the Convention on the Liability of Operators of Transport Terminals in International Trade. And more recently in the Model Law on International Credit Transfers, authentication was defined as a procedure established by an agreement by means of which a payment order or modification of a payment order was issued by the person designated as sender of that order. Signature is a traditional and generally accepted means of protection against unauthorized payment orders.

There is another problem which stems from this, and I cannot really go into it in proper depth at this point, but this is a problem related to expression of will in an electronic context. It is quite feasible in the modern world to imagine that a machine may communicate with another and draw up a contract without involving the human will. In practice this does arise on a daily basis, however it is usually based on a prior agreement between the parties to communicate electronically. But it is very easy to see that as technological advances move on, prior agreements will be superseded and electronic means may continue to develop and overstep the prior agreements. It may be that we will buy, for example, cigarettes or subway tickets, and maybe we will do this mechanically without really any

expression of will on our part. And at a certain point we may be faced with the problem of proving the time and the context and the place in which the contract was concluded. This is unfortunately an area into which I cannot go in any depth, but it is all part of the vegetables and the raw meat which the various forums dealing with this have to cook with. And then you also have the problem of responsibility and liability. You have networks that transmit messages, and you have the question of the liability of parties in cases where you need to conserve confidentiality of information and also to maintain records of operations.

Lastly, you have the question of the negotiability of these contracts. When we are speaking about negotiable titles - and Professor Jan Ramberg mentioned this - you are talking about bills of lading in maritime trade, or you have stock-market values, certificates of deposit and other such transactions. And then again, we have all the problems associated with the possibility that these instruments and mechanisms may be set up by agreements between parties, agreements stemming from autonomy of will, or, by contrast, all those problems which arise from the lack of knowledge of legal systems and the possibility of setting up negotiable instruments which are an expression of autonomy of will but do not stem from proper knowledge of legislation.

As you see, this is a very broad field indeed, and there are a multiplicity of problems and many issues that can be the subject of uniform legislation, but many others that would not be regulated in this way.

3. Voices of international practice

JEFFREY B. RITTER
Attorney, Columbus, Ohio, United States of America;
Economic Commission for Europe Working Party on the Facilitation of International Trade Procedures

As a global society, we cannot underestimate the impact which EDI will have on our ability to evolve a global economic market. As sectional dependencies break down, and as interregional cooperation emerges as the key strategy for international business, the essential tool required by any business, irrespective of its geographic location or its level of economic development, will be the ability to communicate business information.

Historical trade barriers based on languages, physical distances, cultural variations and political differences, more than anything, are found to have a common element in their impact on the effectiveness of communication. Thus, driven by the needs of businesses and Governments to exchange information by a means that makes sense, EDI provides an opportunity for international business to occur. Standardizing information into formats that can be read and processed, irrespective of our native languages, allows us to communicate and, in doing so, allows us new opportunities to do business. EDI is more than a technology developed in the laboratory - it is a product of the needs of the international market to balance the increasing burden of moving information within a manufacturing and distribution culture that requires efficiency and speed of operation.

We cannot, therefore, underestimate the potential fundamental impact of EDI upon the future evolution of uniform law. EDI has the potential to offer us a global language for business. But at the same time, EDI demands more than just the ability to communicate information - it requires the development, the implementation, the modification and the growth of supportive business practices. It is not enough to send the information; to use the information effectively we must cooperate -

irrespective of commercial or geographic sectoralism - in understanding both the applications and the information.

EDI therefore presses us towards an understanding and an acceptance of uniform business practices. With EDI, we not only receive the information, but we must understand and give it significance in terms of the formation of our contractual obligations and the performance of our commitments. EDI therefore presses us not only towards uniformity in business practices, but also to establish a foundation for the evolution of uniform law. For uniformity in law is but a reflection of the degree to which we as an international community can establish uniformity and harmonization in how we conduct business. Therefore, to speak of EDI - to speak of electronic commerce - is to speak, I suggest, of one of the most important tools in the evolution of uniform commercial law, the topic to which this Congress has been committed.

From that perspective, allow me to offer a few observations. First, law-making as it occurs in this forum is, and always will be, a reflection of law-making at a different level, at the intimacy of bilateral and multilateral trading in the field. The work of the ECE Working Party on Facilitation of International Trade Procedures (Working Party 4) is not focused upon law-making at the statutory level; rather, Working Party 4 has committed itself to developing solutions for the facilitation of trade which, in effect, mandate and encourage the adoption of uniformity in business practices.

In 1991, Working Party 4 adopted an agenda of projects which offers an integrated response to the issues of EDI in trade. Working Party 4 is not European in its dominance. Increasingly, virtually each continent has representation in its affairs. It is neither focused on governmental needs for information nor the similar needs of business, but represents a dynamic, invigorating dialogue of the participants in all sectors of international trade: bankers, insurers, carriers, the movers of data themselves and the Government representatives are all in attendance. Working together, we have embarked in Working Party 4 on law-making at the intimate level, pursuing a programme of projects which includes such matters, for example, as a uniform international model interchange agreement.

At this point nearly 15 agreements have been developed at the national level around the globe. They offer different solutions to different issues, and in their existence they create for multinational business a potential barrier to the efficiencies and integration of operations which business requires.

A second project on our agenda involves identification of the types of barriers of which Professor Zamora has made note, the kinds of requirements at law and in commercial practice which preclude the efficient migration of business from paper-based to electronic activity. It is not enough to simply recognize the existence of formal requirements for signatures and writings. Many such requirements exist on the docks and at the borders across which international trade occurs. Our inquiry, which should be under way this year in earnest, is designed to identify in a comprehensive manner all of the existing barriers. With that basis of information, we can then move towards solutions for resolving the barriers, some of which may properly be the business of statutory rule-making.

A final project of Working Party 4 to note is the project on negotiability. We seek to promote a basis of rule-making - learning from the lessons of existing networks and existing projects like the initiative of the *Comité maritime international* - by which sectors of commerce can adopt a methodology for transferring legal rights through the exchange of electronic messages. In doing so, we believe we can develop a prototype, whether applied in banking, carriage of goods or the transport of data, for the evolution of commercial practices which are uniform across different sectors.

The evolution of EDI teaches us that there are three or four fundamental distinctive characteristics about electronic commerce that have not yet been noted in today's remarks. First, we have the evolu-

tion of information as an asset. As Professor Boss noted, electronic data can be bought, sold, stored and transported. And EDI enhances the ability of businesses to do so. Second, in responding with rule-making for electronic commerce, the rule-making cannot occur on a sectoral basis. The fine work of UNCITRAL on electronic funds transfer and the fine work of the ICC on Incoterms, to give two examples, are but first steps toward a more comprehensive, integrated approach that must be undertaken in order that we can provide a template for future expansion of electronic commerce.

Third, in the making of commercial law, the legal community must be mindful that it will be increasingly difficult to maintain a distinction between commercial law and administrative law. Current administrative efforts, for example, the EC data privacy directive and initiatives within the customs and taxation fields to accommodate and require electronic filings, if developed along differing directions, could present to the business community the potential for inefficiency, providing administrative legal solutions which could be contradictory to the integrated approach that businesses desire in support of the movement of information in international trade. Thus, our rules, both at the level of bilateral contracts and at the statutory level, must be harmonized.

Finally, I would like to make note of a further development with EDI that I believe offers tremendous challenges for the future. We conventionally think, in discussing EDI today, of electronic messages as the functional equivalents of documents. But today we are seeing the document disappear as a realistic analogy for the movement of electronic information. Businesses are moving information in smaller packages; they still make their decisions on the same collected body of information, but not by exchanging electronic purchase orders, invoices and other electronic documents. And without those documents in electronic form, our Governments will be challenged to discharge their responsibilities in administering international trade. Imagine customs officers that seek to examine bills of lading, warehouse receipts and purchase orders which will no longer, as a practical matter, exist. The need, therefore, is to reform administrative and commercial laws to rely upon the movement of information, not the delivery of documents.

With these perspectives, then, as the voice of a practising attorney, I would encourage UNCITRAL to move forward in harmonizing the international law for commerce on a foundation of uniform business practices; to recognize that EDI is a potential tool and not a challenge; and to recognize that the harmonization of law will ultimately best be accomplished by reflecting and encouraging the use of tools which harmonize the business practices which are first required.

SYLVIA KHATCHERIAN
Attorney, New York, New York, United States of America;
Committee on International Computer and Technology Law, International Bar Association

I am very honoured to have this opportunity today to present some comments on the various issues that have been identified as possible areas of future work in EDI. I would like to note that my comments are from the perspective of a private practitioner in the areas of computer and technology law.

I will focus on two issues. First, the development of legal norms concerning liability, in particular, norms concerning liability of the intermediary network service providers and the potential consequences of such norms. Second, the state of existing and proposed national laws governing trans-border data flow and their potential effect on expanded use of EDI.

As a preliminary matter, I would like to point out that the development of the various model standard interchange agreements have gone a long way in providing practitioners with a framework

for contractually overcoming the legal uncertainties in the formation of contracts and trading by electronic means. Some of these model agreements also address issues of liability and the responsibilities of the trading partners for failures or errors in communication in the transaction. By way of example, the model trading partner agreement developed by the American Bar Association provides that neither party shall be liable for special, incidental, exemplary or consequential damages arising from or as a result of any delay, omission or error in electronic transmission. The model developed by the United Kingdom EDI Association imposes on each party the responsibility of ensuring that all messages are complete, accurate and secure, and provides that each party shall be liable for direct consequences of any failure to perform those obligations.

As these model agreements are intended to be between the trading partners themselves, they obviously do not propose provisions regarding the responsibilities and liabilities of the intermediary network service providers. These intermediaries are typically private value-added service providers who can offer a range of services. In addition to mere transmission of data, they can provide back-up and archiving of data, multiple levels of security for the data, as well as the ability for multiple communication speed and protocol conversions between the partners.

I would like to briefly address how liability issues are typically handled to date by such providers and the underlying business reasons.

In practice, the level of liability that private providers will accept is contractually limited. Liability exposure is a key issue that has a direct impact on the cost of providing the services and can affect the availability of the services. The contractual limitations provisions that are used reflect the standards developed generally in computer technology and related services industry, which standards are generally viewed by the users and providers as commercially acceptable allocations of risk. The common practice is to exclude liability of the service provider for consequential or incidental damages. This does not mean that these limitations provisions exclude all liability.

The service providers will generally accept responsibility for their failure to perform in accordance with the particular standards agreed on in the contract, including any agreed upon standards on data storage, security and confidentiality. In some instances, and with certain qualifications, they may agree to specific remedies such as reconstruction of data lost or destroyed due to their fault.

Service providers will, however, invariably limit their overall liability for direct damages to an amount that has some bearing on the benefit the service provider receives from the transaction. There is a simple business reason for this. The fees charged for services may be nominal when compared to the potential consequential damages where the underlying transaction may be valued at millions of dollars. If the service provider has to assume unlimited exposure, its protection will be, in most instances, in the form of additional insurance. The cost of insurance, assuming it is available at all, is inevitably factored into the cost of offering the services.

Accordingly, in the computer and related services industry to date, users and providers have struck a balance, with the tendency being to view most computer software and related processing services as aids in the carrying on of the user's or client's business. Since the service provider itself does not share in the benefit from the client's underlying business transaction, it typically will decline to assume responsibility for the underlying transaction. Also in addressing issues relating to liability of a provider, one must keep in mind that they are often in turn communicating with a variety of telecommunications carriers that are themselves subject to regulations and do not accept, or have very low levels of, liability.

As long as the liability of a private provider is not totally excluded and the user has a choice, and these are important qualifications, the parties to a network service agreement may, in effect, be in the best position to contractually address issues of liability and allocate the risks involved in the transaction. This can include different levels of liability and different types of remedies for breaches of different obligations. Often, the remedies agreed upon or liabilities insisted on are based on the parties' assessment of who is in the best position to affect risk reduction, and in the best position to select and implement appropriate checks and controls necessary to minimize the damages.

Given the direct relationship between risk exposure and the cost of providing services, a study of industry practices would be particularly warranted in developing norms on liability, in order to ensure that proposed norms do not have the undesirable consequence of limiting users' options and/or making the cost of network services prohibitively expensive.

I would like to point out that the computer industry has had a history of very fast changes. As the use of EDI matures, the role played by the network providers and the nature of services provided by them may change, which in turn may result in a reassessment of the users' and providers' views as to what is a commercially reasonable allocation of risks. Also, perhaps because of the level of confidence in the technology and the technological controls in general, and the obvious benefits of conducting business by EDI, liability issues often do not prevent the business people from moving on to an EDI environment. This should of course not be taken to imply that standards and norms would not be welcomed.

With the remaining time, I would like to address the situation presented by the existing and proposed laws governing the trans-border flow of data. The absence of consistency and the lack of clarity in the varying requirements and guidelines that must be complied with under the current laws can act as obstacles for companies that have operations in many jurisdictions and are involved in trans-border activities with partners or affiliates in multiple jurisdictions.

The data protection laws, which regulate the collection, disclosure and transfer of data, are typically based on principles of protection of privacy and provisions of security safeguards in the processing of data (such as those reflected in the OECD Guidelines Governing the Protection of Privacy and Transborder Flow of Data and the Council of Europe's Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data). While there is general uniformity in the principles to be applied, there are differences as to how those principles are being implemented, including disparities as to the type of data that is covered. For example, there are differences in whether the coverage is limited to data relating to individuals, or extends to legal entities - the latter often based on considerations of protection of business and technical data, not just of personal privacy. Also, some laws make data transfers subject to registration or notice, others require a licence. Some require the data subject's consent for transfers, some for only particular transfers.

Moreover, although the data protection laws do not prohibit transfers of covered data outright from one jurisdiction to another, they generally require that there be equivalent protection and security safeguards if the covered data is to be transferred from one jurisdiction to the other. Some jurisdictions, including the United States, do not have an overall national approach to data protection, raising uncertainties in transfers of covered data into such jurisdictions from countries where protection laws exist.

This state of affairs makes compliance very difficult, and creates what may be unnecessary difficulties for those companies that want to take advantage of electronic information transfer and will ultimately be accountable for non-compliance. Private network service providers may be independently subject to their own security obligations with respect to disclosure of stored data, either under

certain national laws or under proposed rules that suggest that both subscribers and network providers may have responsibilities. Ultimately, however, it is the user's responsibility to use the services in accordance with applicable laws, including data privacy laws, and the user's responsibility to select from security procedures made available by the service provider.

While to date EDI has typically involved exchange of commercial data, it is not unforeseeable that, as use expands and as data protection laws develop, EDI will involve transfer of data relating to individuals and legal entities within the ambit of the laws governing trans-border data flow.

Therefore, revisiting the feasibility of developing clarity and uniformity in the national standards on data protection at this point would not only be timely but would be welcomed by companies that have to comply with them and by the counsel who may have to advise them.

PAPA MOUSSA NDIAYE
Legal Adviser, International Centre for External Trade of Senegal, Dakar

The paper that I am about to read on the topic "The prospects offered to African countries by the development of electronic data interchange (EDI) and the legal adjustments necessary for such development" is a contribution from the International Centre for External Trade of Senegal (CICES), which I have the honour to represent at this UNCITRAL Congress.

CICES is a semi-autonomous service of the State of Senegal responsible for the promotion of external trade. It also provides secretariat services for the Senegalese committee for the facilitation of international trade procedures, known as the SENPRO Committee.

Our paper will be centred mainly on EDI and the contribution it can make in our countries, and in Senegal particularly, as well as the legal obstacles that may be encountered in its development. We shall begin by describing the present situation in the area of data circulation in our countries.

The present situation

In most of the African countries, an external trade operation necessitates the completion of a large number of different documents intended for the various departments of the enterprise and for its many correspondents: customers, bankers, insurers, carriers, customs officials etc.

Among these documents, some are of a private nature while others are of an administrative character and are called for under national, community or international regulations. Many copies of the same document are often required. This places a very heavy burden on the enterprise. At the same time, the documents drawn up always contain a large quantity of common data.

It is an accepted fact that compliance with delivery schedules involves a rapid processing of information. It is often found, however, that goods travel faster than documents. The absence of documents or of the information that they contain is highly prejudicial for the satisfactory completion of an external trade operation. These phenomena have adverse consequences for the enterprise and also for the administrative department responsible for supervising and monitoring movements of goods. There was thus an urgent need to rationalize these burdensome and costly procedures, and prepare standardized documents in order to facilitate the presentation of information and its transmission to all the parties concerned.

Our country, like many others, has considered this problem and has established, *inter alia*, a national committee for the facilitation of external trade procedures, which concerns itself with these manual procedures which are often the cause of delays in delivery incompatible with the criteria of quality and competitiveness aimed at by enterprises today.

The system of electronic data interchange

Definition

EDI means more precisely electronic data interchange in the form of the "telematic" transmission from computer to computer of data structured in standardized messages. EDI is an information technology which makes new means available to users. It offers definite advantages in terms of cost savings and the speeding of information flow.

Like any new technology, however, EDI raises questions to which replies are needed.

These include questions relating to:

- The identity of the sender of the message;
- Receipt of all parts of the message, and in the right order;
- Security and confidentiality in the transmission of information between the sender and the recipient, etc.

To all these questions, EDI has tried to identify solutions offered by value-added network procedures and technology related to communications and the use of message syntax.

For example, let us consider the question: "What credibility can be attached to this message as a form of contract with the sender for the supply of goods and services?"

Is it still necessary for paper documents to be provided by the sender as a supplement to the message in order to give it a certain legality or to conform to the commercial and administrative practices normal in our countries? Or is there a way of certifying that messages received are reliable as a form of contract?

The replies to these questions are as follows:

The sender and the recipient are bound by the interchange agreement that they have accepted *vis-à-vis* each other and the supplier of the X 25 network. Using the available technology with care, they can rely on the network and the EDI message.

The agreement thus replaces a code for their commercial transactions. When this agreement is recognized as part of standard commercial practice, a legal basis will be available to the various partners to enable them to strengthen their commercial relations.

Potential of EDI for the African countries

The application of EDI represents a possible development tool for the African countries, which should adapt to this new technology in the interests of a better integration of the media of communication.

The Government of Senegal, conscious of the importance of this problem, set up, at a very early stage, first a Department of Informatics and then a Ministry responsible for technology and State modernization. This Ministry has plotted the main lines of advance which, all being well, will bring Senegal into the third millennium.

Admittedly, we are only just making a modest beginning in the introduction of this new technology; however, it must be recognized that, in relation to sub-Saharan Africa as a whole, Senegal has made considerable progress.

EDI is not yet applied in our countries, which still use traditional methods such as the telephone, telex, telefacsimile and postal communication.

With the new methods, some African countries are using more modern means of data transmission, utilizing the X 25 norm drawn up by CCIT. This is true, in particular, of Cameroon, Côte d'Ivoire, Gabon, Morocco, Senegal and Tunisia.

SENPAC, which corresponds to the X 25 norm, is called CITRAPAC in Côte d'Ivoire and FASOPAC in Burkina Faso. SENPAC is the Senegalese network for the package transmission of data. Users connected to SENPAC will be able to exchange information using simple communication procedures, as opposed to EDI. The Senegalese administration and most public enterprises have begun to automate their media of communication.

Prospects offered by EDI

The utilization of EDI presupposes the establishment of a network for the package transmission of data. In order for it to be possible for data to be sent from point A to point B, a network constructed using the X 25 norm is necessary. X 25 is the physical layer that will permit EDI data to be sent. Without this layer, communication would be very difficult because EDI uses X 25 protocols.

The use of EDI should permit better integration among African countries in regard to the exchange of information and data; besides this integration aspect, it must not be forgotten that such utilization will permit development of the media of communication, rationalization and improved mastery of the transmission of information and data.

The prospects offered by EDI to some of the Senegalese government departments, such as the external trade administration, are as follows:

In the area of legislation on external payments and trade, the services of the Ministry of Commerce and the Ministry of Finance could, for example, with the development of EDI, authorize economic operators so requesting to utilize data that can be processed by a machine or the teletransmission of data for preparing import or export declarations.

In the area of external trade statistics, the collection of data takes place at two levels: first with listings sent by the customs and then through questionnaires. Respondents who complete the questionnaire must authenticate the data provided by manual signature. EDI will permit simplification of the procedures used at this level.

With EDI, the Directorate for Statistics of Senegal could, for purposes of simplification, allow external trade statistics to be provided in the form of tables produced by computers.

The legal difficulties that might stand in the way of the development of EDI in Africa

Legal instruments transmitted by EDI may raise problems in regard to their validity, their use as evidence, their authenticity etc. Since the documents in question generate rights and obligations that can be enforced against the various parties once they are constituted, the problem of proof necessarily arises.

What proves that the document represented by EDI in a commercial transaction is authentic and legally valid as evidence? We shall try to examine this question in the light of certain provisions contained in Senegalese positive law.

Senegalese positive law

Article 4 of the Code of Civil and Commercial Obligations stipulates four conditions for the validity of a contract:

- The consent of the parties;
- Legal capacity to enter into contracts;
- A determinate and lawful object forming the matter of the contract;
- Obligations resulting from it.

Consent means both the will of each contracting party and the agreement of these two wills.

- The will to contract must be present in both of the parties (article 58) and it must be conscious (article 59), stated (article 60) and not vitiated (articles 61-64).
- The Senegalese legislator also requires the will of each party to be lucid. Thus article 59 states that consent must emanate from a person enjoying his intellectual faculties.
- The internal will of the contracting parties, even if it is conscious, is nevertheless not sufficient. It must also be stated, and this external manifestation may take various forms (article 60). It may thus be express or tacit (article 81, para. 2).
- Lastly, the will can give rise to a valid contract only if it is not vitiated by error, fraud or violence (article 61).

Besides the conditions relating to the will of each contracting party, there is the need for an agreement between the two wills which is designated an "exchange of consent".

Roughly speaking, "a contract is formed by an offer or solicitation followed by acceptance". Naturally, conformity of wills is required and such conformity must, in principle, extend to all the clauses (article 79, para. 1). However, the Senegalese legislator has decided that "the contract shall be considered concluded when the parties have agreed on the essential points" (article 79, para. 2).

When offer and acceptance are not simultaneous, another question arises: that of the time and place of formation of the contract. The Senegalese Code decides in favour of the date and place of issuance of the acceptance (article 82).

As far as capacity to enter into contracts is concerned, the Code rules that any person may enter into a contract who is not declared incapable by the law (article 57). In other words, capacity to enter into contracts is the rule, and incapacity the exception.

The object of the contract means the performance promised, or it may mean the thing to which this performance relates.

The object must satisfy a dual requirement. In the first place, what the parties intended must be clearly stated and materially practicable. Nor is the contract valid if there is a material impossibility (article 74, para. 2) to provide the performance promised or the thing that is the object of the performance.

In the second place, the will of the parties must have a lawful content, a requirement which relates both to the object of the contract and to the object of the obligations (article 47). Thus the parties must first fix the object of the contract "within the limits placed on contractual freedom" (article 73) - that is to say, within the limits allowed by public order and morality. The thing to which the performance relates must also be lawful.

The Senegalese Code mentions "cause" among the conditions for the formation of a contract (article 47). The cause is the reason why a person entered into an undertaking.

Violation of one of the conditions for the formation of a contract leads to the nullity of the contract (article 84). However, these conditions are in some cases "decreed for general interest", in which case nullity is absolute (article 85), and in some cases intended to protect a private interest, in which case nullity is relative (article 86).

As far as proof of the obligations is concerned, the various modes of proof provided for by the Senegalese Code - that is to say, a written document, testimony, presumption of fact (*praesumptio hominis*), admission in court and decisive oaths (article 12) - do not all have the same value.

Firstly, the probative force of the writing varies depending on whether or not what is involved is an authenticated instrument, i.e. a document "which has been received by a competent public officer acting in the forms required by the law" (article 17), or an act under private seal. An authenticated instrument is authentic *vis-à-vis* all until falsification is shown in the case of personal certifications made by the public officer (article 18, para. 1), and until the contrary is proved in the case of other statements (article 18, para. 2). An act under private seal has less probative force.

Writing and signatures must be recognized by their author or declared genuine by the judge (articles 25 and 26). The content is evidence only until the contrary is proved (article 23), and the document only exceptionally acquires a legal date *vis-à-vis* third parties.

The Code specifies the probative force of other written documents. A private letter "constitutes evidence of the undertakings that it contains against the signatory" (article 27), but its probative force depends on the content of the undertaking. Thus, depending on the case, a private letter may have the value of a written document or serve as the (prima facie) commencement of evidence on the basis of writing. With regard to copies, photocopies or all other reproductions of an authentic act under private seal, they have the same probative force as the act itself if they are certified as true copies by a public officer (article 28).

Other means of evidence do not all have the same probative force

The evaluation of testimony is left to the free discretion of the judge (article 30). The same is true regarding *praesumptio hominis* (article 30), to which the law assimilates methods of reproduction of speech (article 31) and extrajudicial admissions (article 32). On the other hand, the Code attaches great probative force to an admission made in court, which "is fully conclusive against the person who makes it" (article 33), as well as to a decisive oath or refusal to take such an oath (article 35).

Depending on whether it is a matter of establishing a legal fact or a legal act, admissibility of means of evidence is governed by contrasted principles.

In the first case (legal fact), all means of evidence indicated by the law can be used (article 13, para. 1), whereas in the second case, except in commercial matters where proof is free (article 13, para. 2), it is the system of preconstituted proof that prevails.

A written document is thus required "in the case of any agreement of which the object exceeds 20,000 CFA francs (or 400 French francs)" (article 14), and the corollary of this principle is the admissibility of testimonies and presumptions of fact in the case of suits whose value does not exceed this sum (article 29, para. 1). However, the Code provides for derogation from the need for a written document above the limit of CFAF 20,000. Firstly, it allows admission in court and decisive oaths in respect of all matters (articles 33 and 34). Secondly, it provides that testimonies and presumptions of fact are receivable "when it has not been possible for the creditor to obtain or produce written evidence" (article 15), or when there is a "commencement of written evidence" (article 16). The Senegalese legislature means by this "any writing that makes the alleged fact probable and emanates from the person against whom it is put forward in evidence, his predecessor in title or his representative" (article 16, para. 2). The Code of Civil and Commercial Obligations enlarges the notion of a commencement of evidence by incorporating in it declarations made in the course of a personal appearance ordered by the judge (article 16, para. 3).

In addition, the Code of Civil Procedure, in article 192, states that failure to appear or refusal to reply by one of the parties may also be considered a commencement of evidence based on writing.

When a legal act is established by means of a written document, the authority of this document yields in the face of an admission in court or a decisive oath (articles 33 and 35). On the other hand, a written document prevails absolutely, in principle, over testimonies and presumptions of fact, since these means of proof are not receivable "against and beyond the content of a written act" (article 29, para. 2).

In short, the law relating to the need for and authority of written evidence may hinder the application and development of EDI in the countries of French-speaking Africa, where the legal system is practically the same.

Where computers are concerned, the plaintiff presents his own evidence emanating from his own machine. What weight can a listing from a data bank have?

Nothing is codified in this area in our countries. Generally, for example in the case of Senegal, courts accept this kind of evidence as a commencement of proof on the basis of writing. The jurisprudence does not reject a computer record, but nor is it full proof.

Senegalese judges have already ruled on specific cases submitted to them. Let me mention, for example, a lawsuit between the national electricity corporation and one of its customers. The problem

was one of debt recovery. The company had presented to the court a computer printout of the customer's statement of account together with the particular conditions of the supply contract. The judge considered that the computer printout of the statement must necessarily be accompanied by the policy signed by the two parties.

In another field, we have the Senegalese tax administration rejecting any electronic data medium for use by Senegalese companies as a way of making declarations. For example, declarations of wages are not accepted on listings emanating from computerized payment programmes; the taxpayer has to use the standard forms provided by the tax administration.

The necessary legal adjustments

The traditional method of exchanging documents on paper medium constitutes an important element needed in our countries. Legislation is required in this field, because law is usually developed only to codify a new situation.

The reliability of all the data must be ensured, hence the need to supervise the whole EDI system.

Certain legal adjustments are perhaps necessary in regard to the methods of proof that have been used up to now.

EDI can expand only if it is accepted worldwide. We feel that international legislation is essential in order to assist the development of EDI.

Conclusion

The EDI system offers enormous possibilities for the African countries with regard to data in the fields of administration, commerce and transport. However, people must be prepared and regulations established to allow effective and efficient utilization of this tool which our countries are condemned to use if they wish to take advantage of the new technology in question. With the establishment of a system of federated networks among African countries, users will be able to profit from each other's experience.

CIRO ANGARITA BARÓN
Constitutional Supreme Court Judge, Bogotá

Allow me, both as a constitutional court judge and as someone confined to a wheelchair, to preface my short statement with an expression of sincere thanks to the organizers of this Congress, who have guaranteed my equal right of access to this distinguished and universal podium. As you can now observe, they have spared no effort in converting my wheelchair, if only provisionally, into a veritable mobile microphone. Within the modest confines of my own existence, I feel that this gesture represents a significant landmark in the observance of human rights in everyday life.

In keeping with the same tradition that prompted my country in the past to become a founding member of UNIDROIT, it is indeed an immense and gratifying privilege for me, as a Colombian, to be able to participate in these twenty-fifth anniversary celebrations of UNCITRAL.

Within the time-limits imposed by an event of this kind, I propose to present to this select audience of experts a partial summary of a study that I undertook in 1991 for the programme of the United Nations Development Programme and the United Nations Industrial Development Organization

relating to cooperation in informatics and micro-electronics on the most significant developments concerning EDI in Latin American law. I shall be referring in particular to such aspects as the evidentiary value of EDI records, the use of EDI for accounting and tax purposes, the issuance and negotiation of securities, and the impact of EDI on acts of the public authorities.

Evidentiary value of EDI records

We are now witnessing a gradual abandonment of the traditional concept of documentary evidence in several countries of the region. In Colombia, for example, the notion of "document" is no longer strictly confined to a paper-based writing in a specific language, but includes any object that can provide factual information on matters in dispute. This broader view is today embodied both in the Code of Civil Procedure, which defines a document as "a movable object of a representative or declarative nature",[4] and in the Code of Criminal Procedure, in which a document is "any statement by a known or identifiable person, made in writing or printed by any mechanical means".[5]

This broader concept has also been adopted in Argentine legal doctrine.[6] Furthermore, the new text of article 289 of the Mexican Code of Civil Procedure stipulates that "any information that can satisfy a judge about disputed or uncertain facts shall be admissible as evidence". This clearly allows for the submission of evidence that could well be electronically generated.

In Uruguay, legal opinion is divided between those who advocate a narrow definition of "document" and those who construe the term in a broader sense. For the former, the term document encompasses solely paper-based writings bearing the handwritten signature of their author; for the latter, a document is any object that contains information, irrespective of its recording medium, method of creation or signature.[7]

The acceptability of EDI-generated evidence depends on various factors relating to the specific features of national legal systems, such as the evidentiary system, the value of the document, its nature (whether public or private) and its authenticity.

The method in force in Colombia is one of discretional evaluation, the judge being called upon to assess the evidence by applying the principles of a sound critical analysis, logic and juridical psychology.[8] Thus, in contrast to the system of strictly defined legal criteria, the discretional evaluation method allows judges greater latitude in weighing the evidence, although not to the extent of permitting arbitrary judgements.

Owing to the lack of specific rules governing non-traditional forms of evidence and because the information contained on an electronic medium is in fact a kind of document, its value as evidence is generally held to be equal to that of a document, with specific features as regards nature and form (telex, telefax, SWIFT, computer memory, diskette, voice recordings).

In Argentina, the need to overcome the limitations that the Civil Code imposes with regard to writing and signature - and that clearly constitute an obstacle to the use of electronic documents - has prompted the Ministry of Justice to draft a bill to reform the existing legislation, whereby such documents would be admissible under certain conditions.[9]

In Brazil, a draft Civil Code prepared as long ago as 1972 contains provisions that recognize the full evidentiary value of information stored on magnetic tapes and disks, thereby overcoming the restrictions of the traditional concept of the written document.

Under the terms of recent draft legislation in Chile, "computer-generated printouts produced by the public authorities" in accordance with the applicable regulations would be deemed "public papers", and "computerized evidence consisting of disks, tapes or any type of magnetic memory or computer file and the reproduction of their contents by any means" would be admissible.[10]

In Uruguay, the evidentiary value of electronic documents has given rise to differing currents of opinion, according to whether the evidence is assessed on the basis of the traditional codes or the new regulations. The commentators on these codes view such messages either as "other evidence" that is subject to the rules of a sound critical analysis,[11] or as a type of document whose value depends on whether it is public or private in nature.[12] By contrast, under new regulations such as the Code of Civil Procedure, computer-generated documents are presumed to be authentic unless they are disavowed or challenged as forgeries.[13]

Use of EDI for accounting

As is already happening elsewhere in the world, some Latin American countries are promoting the use of EDI in accounting. In Colombia, not only is the extent to which EDI is being accepted for accounting purposes worth mentioning, but also the fact that the evidentiary value of EDI messages is the same as that of paper-based documents.[14] Furthermore, under the new system known as the "single plan of accounts", financial institutions are now required to send their statements to the banking supervisory authority by modem.[15]

In Argentina, article 61 of Law No. 19550 (amended by Law No. 22903) expressly authorizes the use of computers for accounting purposes, subject to certain conditions and exceptions (inventory registers and balance sheets).

In Brazil, mechanized or electronic accounting is permitted under article 1181 of the preliminary draft of the Civil Code in its revised 1984 wording.

In Uruguay, the Commercial Companies' Act (Law No. 16060) authorizes the use of electronic accounting.

Issuance and negotiation of securities

Some Latin American legal systems allow tax information to be communicated by electronic means.

In Colombia, for example, under article 622 of Decree No. 624 of 1989 (known as the Tax Statute), organizations that are required to supply information on persons or entities that they supervise, administer or provide services for (the banking supervisory authority, chambers of commerce, stock exchanges, notaries' offices etc.) may do so by magnetic means. In exceptional cases, the use of such means is not simply an option but a mandatory requirement (e.g., in the case of entities having gross assets in excess of 200 million pesos).[16]

In Argentina, it is possible to transmit tax data to the Inland Revenue Department electronically.

Some Latin American legal systems allow for stock certificates to be entered on an electronic data medium so that they can be handled by computer.

In Colombia, article 7 of Decree No. 1798 of 1990 expressly authorizes public limited liability companies to operate share registers and process share transfers by electronic means.

Legal opinion in Uruguay is divided as to whether the issuance and transference of securities using the new technologies is permissible under the law.[17]

In Argentina, Decree No. 83 of 1986 permits the computerized registration of non-endorsable registered shares, in which cases the authorization of the General Inspectorate of the Judiciary is contingent on the description of the features of the computer system, the security procedures and the possibility of printing, at any time, the relevant data on paper.[18]

Impact of EDI on the acts of public authorities

A recent ruling by the Council of State of Colombia accepting the validity of a presidential decree issued via telefax from Seoul, Republic of Korea, has opened up the way for administrative acts to be produced by electronic means, since, as was clearly acknowledged by the Council of State, "legal science cannot ignore or stand aloof from the innovations and advances that modern technology - particularly in the field of electronics - is imposing in the material recording and transmission of thought".[19]

In Argentina, legal opinion holds that the application of information technology to the area of government administration is a necessity and can have a major impact in streamlining its operations. Among the positive effects cited are: the setting up of public data banks and their access via computer; justification, publicizing and proof of administrative acts; direct participation of the general public in government administration; follow-up monitoring of acts of the public authorities; and identification of the parties responsible for error or loss.[20]

In Chile, the draft legislation previously referred to excludes data files that have been or are to be set up by government agencies under specific laws or regulations, but does cover files administered by public bodies.

Conclusions

Latin American law is beginning to respond in an effective and positive way to the needs arising from the increasing use of EDI in such areas as evidentiary methods, accounting, tax information, share certificates and acts of the public authorities.

In marked contrast to the foregoing, the question of electronic funds transfer has still not been specifically regulated in Latin America. As a result, it is necessary to resort to the application by analogy of general or specific provisions governing other matters and to a proper critical analysis.

Also, there is no clear evidence in the region of any trend towards the acceptance of contract formation by EDI.

Recommendations

A careful study should be made of whether it is necessary, possible and desirable for all EDI-based transactions entered into in the Latin American region to be conducted within the strict framework of a unified legal system.

Ongoing regional cooperation programmes should be undertaken with a view to overcoming the restrictions that are currently blocking the use of electronic documents in certain countries of the region, e.g., requirements that paper-based documents be issued and/or kept, or that they be personally

signed or presented as a precondition for the exercise of the rights they contain, as well as requirements specific to the countries' evidentiary systems.

The significant progress made towards the acceptance of electronic documents should be built upon and expanded through the specific regulation of those aspects where there are still gaps that need to be filled as quickly as possible, such as the electronic transfer of funds or conclusion of contracts. Such regulatory action should take into account the prevailing international trends in this area.

PROFESSOR OLAV TORVUND
Norwegian Research Center for Computers and Law, Oslo

I would like to address the following four issues: regulatory perspectives and approaches; use of commercial information; network providers; and negotiability.

Use of commercial messages (information)

I will distinguish between the use of information between the contracting parties, and the use of this information by others. Between the parties, messages are used to conclude a contract, send an invoice, send a payment order etc. I will call that primary use of the information. In some cases this information must be in writing, but usually the parties will be free to choose the form and medium.

The information is also used by others. It is used for customs, value-added tax, auditing, insurance, finance etc. One might also include litigation. I will call this secondary use. An invoice is sent to tell how much someone has to pay, it is not sent because of customs, tax authorities or for any other purposes. But since the invoice usually is there, it is used for other purposes as well. To deduct what you have paid in value-added tax from what you have received, you must have some kind of documentation. And then what was originally used might become the main purpose: You don't need the traditional invoice to tell the buyer what he has to pay, but the tax authorities might say that they will not accept any other documentation.

When one is trying to facilitate the use of EDI between the primary users of the information that is transmitted, one will often run into problems related to the secondary use. And when the issues related to the primary use of information might be treated on an international law level, the secondary use will often be subject to national law that might vary a lot from country to country. It is and has for a long time been obvious that contractual issues in an international contract must be treated on an international level. But, for instance, taxation has been an issue between one company and the authorities in its home country.

One conclusion is that issues that have been dealt with on a national level must now be addressed on an international level.

Regulatory perspectives and approaches

Regulation of EDI or the use of EDI should in my opinion be viewed in two different perspectives. When we are dealing with EDI on a general level, we are covering many types of different transactions. We are on the surface of all those transactions, and I will call this a horizontal perspective.

The other approach is to regulate the EDI issues related to a certain kind of transaction. It can be a regulation of the EDI-related issues only, such as in the CMI rules for electronic bill of lading,

or it can be incorporated into a more general regulation, such as in the UNCITRAL Model Law on International Credit Transfers.

On a horizontal level one should deal with issues that are related to the communication, regardless of the type of transaction. This includes communication procedures, authentication, logging etc. One might also include formation of contracts and evidence in litigation. The issues have been very well identified, but the problems are not solved. An international convention might be the right approach to these issues.

All the issues that are related to the content of the transaction, including the obligations of the parties, must be dealt with within the regulation of that particular transaction. It might be sale of goods, transport, insurance, banking, etc. And I will stress that liability must be dealt with on this level, and not on a general EDI level. One is liable for late delivery, late payment etc., not for a delayed message as such.

Network providers

Value-added network services, or enhanced services, will become very important when EDI is used. Time does not allow me to say much about the issue. But very little has been done so far. It is necessary to analyse how these services relate to and influence the way business is conducted. One will very often see that we are going from a two-party to a three-party transaction, and we know very little about what the third party is doing there. And we do not know its liability.

Negotiability

The concept of negotiability is one of the hard problems related to EDI. I think one has to rethink the concept, and free oneself from the traditional concept of a negotiable instrument. One has to analyse the functions, and try to find a way to maintain these functions within an EDI environment. One has to deal with the problems for each business sector separately. In practice, it seems that the concept of negotiability mainly causes problems in maritime transport, and thus one should try to solve the problems within that sector without carrying the burden of a general concept of negotiability in an EDI environment.

Some concluding remarks

It is important to solve the legal problems related to EDI. But I do not think an EDI regulation will be an important part of future commercial law. It will play a similar part as postal regulation and telecommunication regulations do in traditional commercial law. Once the regulation is set, you can forget about it. I think that in many areas of law where one is now very concerned about EDI, one will have the same experience as UNCITRAL had with electronic funds transfer: the technology turned out to be of minor importance to the legal issues. But EDI is changing the way business is done, and the regulation of the business must be changed accordingly.

References:

Norwegian Research Center for Computers and Law has published two reports on EDI in English:

Andreas Galtung: Paperless systems and EDI, Complex 4/91, and
Rolf Risnaes: Implementing EDI - a proposal for regulatory reform.

Both are available from NRCCL, at this address: Norwegian Research Center for Computers and Law, University of Oslo, Niels Juels gt, 16, N-0272 Oslo, Norway.

4. Open floor

SAM MADUEGBUNA
Nigeria

I have a few comments to make on the relationship between EDI and developing countries, but first may I thank the UNCITRAL secretariat for permitting me to participate in this august conference of distinguished scholars and practitioners. I wish to point out that EDI is an application of information technology, and information technology, simply put, is the convergence of computer and telecommunications technology, so that in societies where basic telecommunications facilities are not available, EDI is not a tool but is a challenge for them. Indeed, they cannot trade electronically, because they do not have the basics upon which to trade electronically.

In the past few months I have been looking at the effects of electronic banking techniques on instruments such as bills of exchange, letters of credit and documentary collection, and I have come out with the distinct impression that perhaps what we are witnessing is a development of two systems of trading procedures, one that is based on electronics, and one that is largely paper-based. Accordingly, it seems that the international trading community is being divided along technological lines. My intervention this evening is just to point out this fact, so that in any unification of laws the fact must be taken into consideration that some parts of the world do not have the technology to participate effectively in EDI.

To the credit of UNCITRAL, I know that they have been fair in this regard. Indeed, the Model Law on International Credit Transfers bears testimony to that fact, because there have been attempts by some States to make it more sophisticated than it is now. The UNCITRAL secretariat was able to stand its ground and provide a Model Law that is capable of being adopted by States that do not have the technology. So my comment, in conclusion, is that this matter should be addressed, and, if possible, UNCITRAL should consider the possibility of working with other organs of the United Nations and other international organizations that are involved in technology issues, to see how developing countries that do not have this technology can be provided with it.

MICHAEL BAUM
Attorney, Cambridge, Massachusetts, United States of America

I would first like to commend the Commission for beginning a serious consideration of EDI. I think it is properly timed and very important. My comments seek to bridge a few issues raised in discussion of electronic payments, for example the Model Law on International Credit Transfers, and in discussion of EDI. For example, what is the relationship between the two: how do they work together? The legal analysis of EDI issues both domestically and internationally to date has largely been focused on contract formation and related and important evidentiary issues. But the many high-quality EDI agreements, or trading partner agreements, again both domestically and internationally, have increasingly stopped short of dealing with the back side of EDI, namely payments.

In fact the EDI community has responded to the payments area with some specificity. During the last two or three years, more specifically, the field has really begun to develop. It has been coined financial EDI. It concerns in part the initiation of payment instructions via EDI, right from the

originator of a commercial transaction, and also the communication of potentially substantial if not voluminous amounts of remittance detail that would otherwise go along, for example, with a cheque stub. That information would be passed either through a funds transfer system, through value-added networks or even both. The architectural possibilities of a communication of that information can even become mind-boggling.

My remarks concern the effect of financial EDI, though on the underlying contractual obligations of trading partners rather than between a customer and a bank or between banks. In that respect, of course, the Model Law on International Credit Transfers tends to deal with such issues. Let me very quickly hit just a few issues that perhaps might be worthy of later consideration.

For example, how about the issue of float? When you go from a paper-based cheque environment to an electronic environment, in many cases the payer loses the time value of the money because payment becomes instantaneous. What do you do to ensure that neither party is disadvantaged in that situation? Also, what about liabilities, or the general effect of delays in the funds transfer system with respect to the underlying commercial obligation? What about the effect of partial payments and the capacity electronically to create accord and satisfaction? What is the proper method to go ahead and say, "payment in full" or "payment in protest" on the back of an electronic communication?

Also, how do we undertake electronically returns, adjustments, credits or rebates, to the extent that you initiate electronic payments for EDI? Is there an obligation then to return it in electronic form? Finally, how can remittance information be communicated in an appropriate manner reliably and consistent with the payment mechanism?

In conclusion, then, financial EDI can be viewed at the intersection of electronic credit or debit transactions and EDI in general. However, financial EDI has not been rigorously evaluated by the international legal community, and presents, I believe, fertile ground for consideration in both a payments and EDI context. In that respect, a model EDI payments agreement, or electronic payments agreement, has been created by one of the EDI groups within the American Bar Association. Finally, with respect to the issue of digital signatures, which came up earlier, I have made a copy of a paper on that subject-matter with respect to its implications for electronic commerce, and it is available to anyone interested in the subject.

ROBERT FEINSCHREIBER
Attorney, Key Biscayne, Florida, United States of America

My view of electronic interchange is that the UNCITRAL Legal Guide on Electronic Funds Transfers should be revised. The Guide as it is now constituted does not adequately respond to the incidence of flight capital or to tax evasion. Regrettably, electronic transfer is often the mechanism by which these activities take place. These abuses accumulate in countries in which currency controls or taxation take place. There are situations in which international banks are encouraging tax evasion and flight capital for selective customers because these banks earn income from such devices. Both situations weaken the economies of a country in which the countries are doing business. Such international banks have a heavy responsibility in this regard. Because of bank secrecy in the tax havens, the banks siphon funds through the electronic mechanism from countries in which the customers are located. Some banks are outrageous enough to lend money to the same banks from which they have siphoned money: a vicious circle.

Governments have every right to challenge the validity of the loans that are created thereby. Destruction is created by international banks to disguise the relationship with the affiliates and the customer, depriving the currency control officials and the tax authorities of the information. In that regard I agree specifically with the points mentioned by Olav Torvund. The customer under that situation is free to establish transfer pricing and do what he wants without regard to the tax authorities because of the devices made possible by data-aided interchange. In that regard, I think that it has a big effect on the Bahamas and the Cayman Islands specifically, and that the capital structure has a big effect on Argentina, Brazil and Venezuela and in the formerly communist countries. Therefore, I think that the Guide should be revised to deal with the capital flight and tax evasion situation. That is an important aspect of EDI.

Notes

[1]General Assembly resolution 43/165. The resolution and the Convention are reproduced in A/43/820 of 21 November 1988, Annex.

[2]United States of America, Union of Soviet Socialist Republics, Guinea and Canada. The effect of the USSR as a signatory of the Convention has not yet been determined.

[3]See Crawford, "Montage v Irvani: conflicts or harmonization of laws", *Banking and Finance Law Review*, vol. 7 (1991), pp. 85-109.

[4]See article 251.

[5]See article 279.

[6]See J. O. Allende, "Documento electrónico. Necesidad de reforma del Código Civil", Congreso Internacional de Informática y Derecho: en los umbrales del tercer milenio (Actas del Congreso, Buenos Aires, octubre 1990), p. 563.

[7]See M. Wonsiak, "Valor probatorio de los documentos emitidos por sistemas informáticos en la legislación uruguaya", Congreso Internacional de Informática y Derecho: en los umbrales del tercer milenio. (Actas del Congreso, Buenos Aires, octubre 1990) p. 579.

[8]See Colombia, *Código de Procedimiento Civil*, article 187.

[9]See C. M. Correa, "El derecho informático en América Latina", *Derecho y Tecnología Informática* No. 4 (Bogotá, mayo 1990) p. 58.

[10]Ibid.

[11]See G. Bello and L. A. Vieira, cited in M. Wonsiak, op. cit., p. 595.

[12]See M. Wonsiak, op. cit., p. 594.

[13]Ibid., p. 598.

[14]See Colombia, *Código de Comercio*, articles 68 ff.

[15]See Superintendencia Bancaria, "Carta Circular No. 004", 13 enero 1989.

[16]See Colombia. *Decreto 1624 de 1989*, article 631, para. 2; Resolución No. 1964 del 10 diciembre 1990, Dirección de Impuestos Nacionales, article 2.

[17]See M. Wonsiak, op. cit., pp. 36 and 37.

[18]See C. M. Correa et al., *Derecho Informático* (Buenos Aires, Ediciones Depalma, 1987) p. 299.

[19]See Colombia, Consejo de Estado, Sala de lo Contencioso-Administrativo. Sección Primera. Sentencia del 23 de Octubre de 1990. Consejera ponente: Doctora Myriam Guerrero de Escobar.

[20]See C. M. Correa et al., *op. cit.*, pp. 303 and 305.

V. Transport and dispute settlement

A. Transport

1. From the Hague to Hamburg: towards modern uniform rules for maritime transport

PROFESSOR H. M. JOKO SMART
Head, Department of Law, Fourah Bay College, University of Sierra Leone; Attorney, Freetown

Before the twentieth century

Historically, the shipowner (carrier) was liable for loss of or damage to cargo whether or not he was guilty of negligence. He was exempted only for: acts of God; acts of a public enemy; inherent vice of the cargo; fault of the cargo owner; and general average sacrifice. Furthermore, the shipowner must provide a seaworthy ship that would commence and carry out the contractual voyage with reasonable diligence and without unjustifiable deviation.

Cargo ships were sailing ships and carried non-perishables. With the advent of the steam engine, the volume of maritime trade increased and with it the risks of carriage. Disputes arose between shippers and carriers as to who should bear what risks. Consequently, cargo owners started insurance with underwriters and shipowners organized themselves into protection and indemnity clubs and made use of exemption clauses in bills of lading.

Period from 1893 to 1920

Disparate rules of law relating to the allocation of risks between carrier and shipper began to emerge. Some countries upheld exemption clauses, others did not, for example in the United States Harter Act 1893, Australia's Carriage of Goods by Sea Act 1904, New Zealand's Carriage of Goods by Sea Act 1908, and Canada's Water Carriage Act 1910.

Period from 1921 to 1968: the Hague Rules

By 1920, the Maritime Law Committee of the International Law Association held several conferences with a view to agreeing on a model international bill of lading that would reflect only minimum standards of liability for shipowners. The outcome of the conferences was the International Convention for the Unification of Certain Rules relating to Bills of Lading (Hague Rules), drawn up in 1921 and adopted at Brussels in 1924. They came into force in 1931. Amendments to the Hague Rules were made at Visby in 1964 and adopted by the Brussels Protocol I in 1968. Amendments came into force in 1977 as the Hague/Visby Rules. A further amendment was made in 1979 by the Brussels Protocol II. This came into force in 1984. Both amendments dealt intrinsically with the increase in the limits of liability of carriers for loss of or damage to goods.

Period from 1968 to 1978: need for reform

Dissatisfaction with the Hague Rules saw the need for a more equitable regime. Arguments for replacing the rules can be summarized as follows:

(a) The Rules contain elaborate defences in favour of the carrier which exculpate him from almost every conceivable fault on his part (article IV(2)). He is only liable for loss of or damage to cargo if he failed to provide a seaworthy ship at the commencement of the voyage. Modern technological progress culminating in highly sophisticated satellite navigation has rendered these defences, particularly the nautical fault defence, inappropriate;

(b) Several provisions of the Rules give rise to ambiguity and uncertainty which result in higher costs of transportation by the shipper, who not only pays the prescribed freight, but also, *ex abundanti cautela*, insures cargo against risks of which he is uncertain as to whether or not they are covered by his insurance policy (e.g. article IV (2));

(c) The carrier is liable only for his own fault. He can put up the defence of the fault or neglect of the master of the ship, the servants and agents. Such a defence can no longer stand with the advent of modern satellite communication, telex, telefacsimile and telephone which can enable crew to contact the shipowner in a matter of seconds with the push of a button;

(d) The geographical scope of the Rules is narrow (article X). The Rules take cognizance of the port of loading only and not the port of discharge;

(e) The documentary scope is also narrow. The Rules deal with contracts covered only by a bill of lading. They take no cognizance of other transport documents used in modern sea transportation such as sea waybills, mate's receipt, freight forwarder's certificate of receipt, dock receipts and booking notes, which are also documents evidencing the contract of carriage;

(f) The period of coverage of the carrier's responsibility for the cargo is limited, only from "tackle to tackle", i.e. from time of loading to discharge. This period does not cover the additional period before loading and after discharge during which the goods are under the control of the carrier;

(g) There is no liability for delay nor for carriage of live animals and deck cargo. They are carried at owner's risk;

(h) The unit of account was formerly the pound sterling gold value. By 1925 the pound had lost its convertibility into gold. The downward trend continued. Conflicting rules appeared as each contracting State converted the 100 pound sterling limit of liability in its own way. The Brussels Protocol I adopted the Poincaré franc also in gold;

(i) The financial unit of liability for loss of or damage to cargo of 100 pounds sterling per package or unit became very small by modern standards. The Brussels Protocol I put it at 10,000 Poincaré francs per package or unit, or 30 francs per kilogram gross weight. Brussels Protocol II put it at 667.67 special drawing rights (SDR) and 2 SDR respectively. The Rules contain no provision for the revision of the financial limits;

(j) With regard to the unit of cargo, under the Hague Rules there was a single criterion of package or unit. The Brussels Protocol I introduced a dual criterion of weight and package or unit. Both sets of Rules are however not clear whether the unit is a shipping unit. This creates problems if

goods are in containers. Is each separate cargo a shipping unit or is it the container that is the shipping unit? Both Rules fail to satisfactorily answer this question;

(k) Under the Hague Rules it is the contracting carrier and not the actual carrier that is liable on the contract of carriage. Thus difficulties arise for the shipper for loss of or damage to the goods during transhipment or "through carriage";

(l) Claims and actions under the Hague Rules:

(i) Notice of loss of or damage to the cargo must be given by the consignee before or at the time of the removal of the cargo, if apparent;

(ii) Judicial and arbitral proceedings: the Hague Rules contain no provision for arbitration. Brussels Protocol I has a rule which is merely sketchy (article 8). Also, there is no provision for jurisdiction. The practice therefore arose for parties to stipulate on bills of lading a place where an action may be instituted which is usually selected by the carrier to suit his convenience;

(iii) Limitation of Action: action is time-barred after one year.

Advent of the Hamburg Rules

The work of UNCITRAL

First session (1968). The Chilean Delegation drew attention to the inadequacies and shortcomings of the Hague Rules and advocated a more equitable regime. In the same year, UNCTAD recommended to the Trade and Development Board to instruct the Committee on Shipping to establish a Working Group on International Shipping Legislation. The Working Group was established in 1969 with a mandate to make amendments to the Hague Rules.

Second session (1969). The topic, international shipping legislation, was put on the agenda of UNCITRAL as one of priority. A Working Group was set up to deal with it. The General Assembly, in its resolution 2635 (XXV) of 12 November 1970, gave added impetus to the Commission. The mandate of the Working Group was to examine the Hague Rules and the Brussels Protocol I of 1968 with a view to revising and amplifying the Rules, and to prepare an international convention, if appropriate.

The Working Group at its eighth session (1975) prepared a Draft Convention on the Carriage of Goods by Sea. The draft was approved by UNCITRAL at its ninth session in 1976. The draft was circulated to Governments and interested international institutions for their comments. The General Assembly, in its resolution 31/100 of 15 December 1976, decided upon a diplomatic conference to adopt the Convention. The diplomatic conference was convened at Hamburg from 6 to 31 March 1978.

The Hamburg Rules

The Rules seek to remove the uncertainties and inequities and meet the inadequacies of both the Hague Rules and the Brussels Protocols, and to bring about a more equitable regime.

The elaborate defences in the Hague Rules are removed. Except for fire, fault on the part of the carrier is presumed unless he can rebut by proof that he took all reasonable measures to avoid the

occurrence. In the case of fire, the burden is shifted on to the shipper. This was part of a package at the diplomatic conference (article V).

With presumed fault there is now a degree of certainty as to the risks that are covered by the contract of carriage.

In the case of fire, the carrier is liable for loss of or damage to the goods or delay in delivery caused either by his own fault or the fault of his servants or agents, but the burden of proof remains on the claimant (article IV(a)).

The geographical scope of application of the Hamburg Rules is not limited to the port of loading but extends to the port of discharge of the cargo as provided for in the contract of carriage, and to an optional port of discharge in the contract identified by the parties if the goods are actually discharged there (article II).

The documentary scope too is now wide. Apart from bills of lading, the Rules mention "other documents evidencing the contract of carriage by sea" as documents to which the Convention applies (articles 2(1)(d), 2(1)(e) and 18). These will include sea waybills etc.

The period of coverage of responsibility for the goods now extends beyond "tackle to tackle". The carrier is now responsible for the cargo from the time he takes charge of it at the port of loading, during the carriage and at the port of discharge (article 4(1)).

There is now liability for delay (article 5(2)). Except for financial limitations of liability, delay is on the same footing as loss of or damage to the cargo (articles 5, 6(1)(b) and 8(1)).

Liability for carriage of live animals: as a general rule, a carrier is liable for loss of, or injury to, or delay in the delivery of live animals. An exception is that the carrier is not liable for specific risks inherent in the carriage of the animals (articles 1(5) and 5(5)).

Liability for deck cargo: goods carried on deck are no longer at owner's risk. The Rules cover them provided: (i) they are carried by agreement between carrier and shipper; (ii) the usage of the particular trade permits it; or (iii) it is required by law to do so (article 9 (1)).

The unit of account is now the SDR (article 26). For a contracting State which is not a member of the IMF, the value of its currency in terms of the SDR is to be calculated in a manner to be determined by the State concerned. Special provision is made for States not members of the IMF, and whose laws do not permit the application of the SDR, to retain gold as unit of account (article 26(3)). The unit of account can be changed at a conference convened at the request of one quarter of the contracting States.

The financial limits of liability are:

(a) For loss or damage: 835 units of account or 2.5 units of account of gross weight of the cargo, whichever is higher. Limits higher than these can be agreed upon by carrier and shipper (article 6(d)). For countries which cannot use the SDR and are permitted to use gold, the limit is 12,500 monetary units per package or other shipping unit, or 37.5 monetary units per kilogram of gross weight of the goods (article 26(2)). These financial limits are 25 per cent higher than those under the Hague/Visby Rules;

(b) For delay: an amount equivalent to two and a half times the freight payable for the goods, the amount not to exceed the total freight payable on the contract of carriage (article 6(2)(b)). There is a provision for the revision of these limits (article 33).

The dual unit of cargo introduced by the Hague/Visby Rules is retained, but the Hamburg Rules clarify the unit as being a shipping unit. Not only the goods in a container but the container itself is now a separate shipping unit, provided it is not owned or supplied by the carrier (article 6(2)(b)).

The liability regime now covers both contracting carrier and actual carrier (article 10). The former remains responsible for the entire carriage, while the latter is responsible only for that part of the carriage which he performs himself.

With regard to claims and actions, the following provisions are applied.

(a) Notice of loss of or damage to the cargo. This can now be given even after the cargo has been delivered, but not later than the working day after the day of delivery to the consignee (article 19(1)). Where loss or damage is not apparent, the period is now within 15 consecutive days, instead of 3, of the delivery of the cargo (article 19(2)). Conversely, if loss or damage to the carrier or actual carrier is occasioned by the shipper, he must give the shipper notice of it within 90 days of its occurrence or after delivery of the goods (article 19(7)). For delay in delivery, notice must be given by the consignee within 60 consecutive days after the date of delivery of the goods (article 19(5));

(b) Judicial and arbitral proceedings. Disputes can now be settled by arbitration if the parties have agreed on it beforehand in writing or after a claim has arisen (article 22);

(c) Jurisdiction. The Rules provide a wide range of jurisdictions in which proceedings can be instituted. These include the principal place of business of the defendant; the place where the contract was made; the port of loading or discharge; and any place designated by the contract (article 21(1) and (22)(3));

(d) Limitation of actions. The period is now extended to two years.

Comment

It is now 14 years since the Hamburg Rules were adopted. Seventy-eight States participated in the diplomatic conference, among which were big ship-owning States and many developing countries. To date there have been 20 ratifications. The Rules will enter into force on 1 November 1992. With the exception of Hungary, Romania and Lebanon, the countries which have ratified are developing countries from Africa and the Americas.

Some of the criticisms levelled against the Convention are: (i) it abandons freedom of contract; (ii) there will be uncertainty of interpretation; (iii) it will not lead to real uniformity of application; (iv) it shifts too much risk onto the shipowner; (v) it is not in the interest of developing countries, otherwise a good many of them would have ratified it.

Criticisms (i), (ii) and (iii) are not new; they were used even against the Hague Rules before adoption and ratification. As for criticism (iv), the shift of burden was done in the spirit of the new international economic order. In respect of criticism (v), there have been factors in developing countries militating against the Convention, such as: lack of awareness; other pressing government matters; united front and effective campaign against the Convention by ocean carriers and marine cargo insurers.

Now two regimes are in force - Hague and Hague/Visby. Soon, there will be three with the coming into force of Hamburg. This is not good enough for uniformity.

2. *The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991)*

JEAN-PAUL BERAUDO
Chairman of the First Committee of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade; President, Court of Appeal, Grenoble, France

Background of the Convention

The United Nations Convention of 19 April 1991 on the Liability of Operators of Transport Terminals in International Trade originated in a project carried out by UNIDROIT. The decision to frame such a convention goes back to 1960 when the UNIDROIT Governing Council decided to put warehousing contracts on its work programme. The work was to be guided by a report submitted by Professor Le Gall of the Faculty of Law at the University of Paris, submitted in 1966, the conclusion of which already specified quite clearly the aims of the future convention: the text should govern the obligations and responsibilities assumed by persons and institutions other than the carrier acting in his capacity as carrier, relative to the safety of goods between the time when they are physically handed over by the consignor and the time when they are physically taken over by the consignee. The project then fell asleep, so to speak, until it was revived by various projects in progress within UNCTAD and UNCITRAL which revealed the gaps in existing international conventions on transport, especially maritime transport, in relation to everything preceding and following the actual transport phase.

It was in fact during the preparatory work on the text which was to become the Hamburg Rules that UNCITRAL, at the proposal of the delegation of Germany, asked UNIDROIT to prepare a draft convention on the subject.

Following the updating of the initial report, consultations with the Governments of Member States of the Organization and the deliberations of a group of independent experts who met in 1978, 1979 and again in 1981 to examine new observations made by States and international organizations, a draft text already formulated as an international convention was transmitted to UNCITRAL. This was a sound text, juridically clear and solid, but limited to the custodial activities of the terminal operator.

In UNCITRAL, work on the Convention began in 1984, in the working group on international contract practices chaired by Professor Joachim Bonell of the University La Sapienza at Rome. The achievements of the UNCITRAL experts can be summed up as a broadening of the operative field of application of the Convention, and also a harmonization of the legal rules with those of other recent international conventions, mostly in the transport field.

In keeping with the usual UNCITRAL procedure, the Commission itself debated the draft in 1989 and then recommended that it be examined by a diplomatic conference. The United Nations Conference on the Liability of Operators of Transport Terminals in International Trade was convened upon the initiative of the General Assembly, and was held at Vienna from 2 to 19 April 1991, with the participation of nearly 70 States and international organizations. The Conference elected Professor José Maria Abascal of Mexico as its President and entrusted the practical work to two committees, presided over respectively by Jelena Vilus of Yugoslavia for the final clauses and by the author of these lines for the operative provisions (articles 1-16).

As everyone can see, the Convention went through an elaborate period of gestation in which the best specialists in transport law and international trade law were involved in one way or another. The edifice that emerged from their common efforts represents a synthesis which takes into account the different legal traditions of the world while endeavouring to maintain the juridical coherence essential to the text of the Convention as a whole.

The Convention has already been remarkably successful, for it has been signed by France, Mexico, Philippines, Spain, and the United States of America. All that is required, therefore, is that these signatures should become ratifications; the law applicable to transport terminal contracts will then be correspondingly modified in Asia, the Americas and Europe.

In describing the Convention, we shall remain faithful by and large to the plan followed by the framers of the Convention, who dealt successively with its scope of application and with the rules relating to liability. We shall also say a few words about special rules which have no true equivalents in other international conventions now in force.

Field of application

Aims of the negotiations

The original aim stated for the negotiation of this Convention was "to facilitate the movement of goods by establishing uniform rules concerning liability for loss of, damage to or delay in handing over such goods while they are in the charge of operators of transport terminals and are not covered by the laws of carriage arising out of conventions applicable to various modes of transport" (preamble).

There is no doubt about the fact that the negotiators were filling a gap which had been left open by previous international conventions on transport. If we confine ourselves to marine transport, which accounts for by far the largest tonnage and the largest value of goods in international trade, we find that the Brussels Convention of 1924, which is still in force, provides for liability of the carrier - and only very imperfectly at that - only when the goods have been loaded on board ship. Some States party to the Brussels Convention bring loading and unloading operations within the Convention's scope of application when those operations are carried out by the ship's own equipment.

The Hamburg Rules of 1978, which are to enter into force on 1 November 1992, extends the liability of the maritime carrier to the periods in which the goods are within his custody - during transport, of course, but also at the ports where the goods are loaded and unloaded (article 4 (1)); but gaps and uncertainties persist when the goods are stored in a terminal outside the port zone, or when they have ceased to be handled by a lighterage contractor or any other docker.

In varying degrees, this legal obscurity also affects other modes of land transport, the International Convention concerning the Carriage of Goods by Rail (CIM) of 1970, the Convention on the Contract for the International Carriage of Goods by Road (CMR) of 1956 as well as air transport, although the Warsaw Convention does in fact apply to collection and delivery.

In situations where there is a legal void, practice is rarely favourable to the shipper or the consignee. In the most favourable case a contract is concluded with the terminal operator, who limits his liability as much as possible or actually accepts no liability at all. From the formal standpoint, such contracts consist in a storage voucher or a payment voucher covering the cost of handling the goods and making reference to a model contract which the depositor of the goods can consult on request.

Very often there is no mutual consent agreement, and hence no contract properly speaking. The depositor receives an identification number for his goods, but in the terminal itself there are warnings and posters stating that deposition of goods and all operations involved therein are carried out at owner's risk.

Legal scope of application

It was to overcome and correct these problems, which can have distinctly harmful consequences, that the Convention was prepared.

Subsidiary nature of the Convention

It emerges clearly from the preamble cited above that, whenever an international transport convention covers a specific situation, it takes precedence over the Convention on the liability of terminal operators. Article 1 states, more broadly, that a person is not considered an operator - in other words is not subject to the rules of the Convention - "whenever he is a carrier under applicable rules of law governing carriage". Thus the 1991 Convention plays a subsidiary role in relation to other agreements governing transport.

Definitions

A terminal operator is defined as a "person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use".

It is thus the legal concept of custody which governs the liability regime applicable to the operator. There are other conditions as well. The actions of the operator must relate to goods which are involved in international carriage. The international carriage itself is identified in a highly pragmatic way, on the basis of labels affixed to the goods or the documents accompanying them. And what is at issue is "carriage in which the place of departure and the place of destination are identified as being located in two different States" (article 1(c)). Thus the Convention governs operations performed within the national segments of international carriage.

The list of services which the operator may perform became very large in the course of negotiations. The concept of a deposit or storage contract which inspired the first work done within the framework of UNIDROIT gave way to services such as "storage, warehousing, loading, unloading, stowage, trimming, dunnaging, and lashing" (article 1(d)). Thus the Convention covers, in a non-limiting way, operations associated with carriage as well as other activities relating to the goods which have nothing whatever to do with carriage: for example, cleaning of the goods, smoking and conservation operations, packing with a view to distribution and so on. To sum up, then, the Convention covers everything which is done at present in modern terminals and everything which could conceivably be done in the future.

Rules governing liability

Borrowing a formulation from the Hamburg Rules, article 3 provides that "The operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them".

Liability regime

If, during this time, loss, damage or delay occurs (for example, a delay in handing over the goods which are to be carried), the operator is presumed to be liable.

However, it is not impossible to call this presumption into question. The operator can exonerate himself by proving "that he, his servants or agents or other persons of whose services [he] makes use . . . took all measures that could reasonably be required to avoid the occurrence and its consequences" (article 5).

The liability regime established by the Convention is related to the presumed fault system. The presumption extends to the servants of the operator, but likewise to persons whom he has substituted for them in execution of the contract: agents, subcontractors and other performers of services.

Multiple causes of damage

When a number of causes have combined to produce damage, the operator may be only partially liable. He is then required to prove what part of the damage cannot be imputed to any fault of his own. By implication, this means that he must prove that some other person is legally responsible for the harm caused.

On the other hand, the liability of the other person is determined by the law governing his relations with the operator. The law in question varies to a substantial degree depending on whether the co-author of the damage is a salaried employee (in which case the operator will normally be required to demonstrate the fault of that employee, sometimes even an inexcusable fault) or an independent provider of services subject, like the operator, to the rules regulating the liability of professional workers. For the latter the presumed fault regime may also come into play.

One consequence of this is that the operator will only rarely be able to invoke a division of liability if the person with whom he is to share it is his own employee; it will be much easier for him to do so when he has subcontracted certain tasks to an independent professional.

The action of the victim of the damage against a third party jointly responsible therefor is subject to the same immunities and limits of liability as if the defendant were the operator himself (article 7.2).

Limitation of liability

To counterbalance the presumption of liability weighing upon him, the operator benefits from a limitation of his liability similar to that granted, at different levels, in all Conventions on international carriage.

A special characteristic of the system introduced by the new Convention, however, is its dual nature. This in fact has a precedent in the 1980 United Nations Convention on the International Multimodal Transport of Goods. The operator's liability is limited in principle to 8.33 units of account per kilogram of gross weight of the goods lost or damaged (an amount based on the CMR regulating road transport). However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if they are handed over to him for the purposes of such carriage, the limit of liability drops to 2.75 units of account, a figure taken from the Multimodal Transport Convention.

These sums will certainly seem too low to many consignors, especially when the terminal used is an airport. However, we must bear in mind that the Convention is not exclusively a convention on terminals. Unlike transport operations involving an obligatory passage through a terminal for the shipper of the goods or for his consignee, the time spent by the goods in the transport terminal can be shortened or eliminated altogether by a vigilant loader.

Note that the Convention is careful to specify that when the losses sustained by part of the goods affect the whole of the shipment, it is the total weight of all the goods affected which serves as a basis for calculating the limit of liability (article 6(1)(c)).

Forfeiture of the right to limitation

The limitation of liability is not, however, designed to benefit an operator who proves to be professionally incompetent.

Following a formula which originated in the Warsaw Convention and which is tending to find its place in agreements on other forms of transport (e.g. the Hamburg and CIM 1990 rules), the present Convention provides that "The operator is not entitled to the benefit of the limitation of liability . . . if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with the knowledge that such loss, damage or delay would probably result" (article 8).

Obviously, it will most likely be reckless behaviour on the part of the transport terminal operator which, in practice, extends his liability beyond the ceiling normally specified.

According to the interpretation of this text based on the Warsaw Convention, the only agreement now in force which has already given rise to legal proceedings, the benefit of the limitation of liability is lost when the behaviour of the professional operator is irrational. Serious operators are protected. On the other hand, users of terminals run by adventurers will also be protected.

Forfeiture of the right to a limitation of liability likewise affects those persons who share, in whatever legal manner, in the implementation of the contract concluded by the operator.

Additional provisions

Issuance of a document

The Convention includes a number of additional provisions, among which we should mention in the first place a provision concerning the issuance of a document (article 4). In the absence of a document which mentions any existing damage, the operator is presumed to have received the goods in apparently good condition.

Dangerous goods

Another provision concerns dangerous goods. When the operator has not been informed of their dangerous character, he is entitled to render the goods innocuous or to destroy them at the cost of the person who failed to fulfil his obligation of informing the operator (article 9).

Right of retention of goods

The operator also enjoys the right to retain goods and the option of selling those goods "to the extent permitted by the law of the State where the goods are located" (article 10(3)). The right of retention provides the operator with a guarantee of payment for the services which he has undertaken to perform. It is in the nature of the right of retention that it can be exercised even in relation to goods which belong to a person other than the debtor. The negotiators did, however, allow an exception by providing that the right to sell does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or shipper and which are clearly marked as regards ownership (article 10(3)).

The paragraphs of article 10 provide a fine example of the cumulative effect of an approach which accepted the legal and regulatory conflicts which were bound to arise in a situation where not all States could accept, in connection with a Convention on the operators of transport terminals, a right to sell retained goods the scope of which went far beyond the range of this particular economic activity.

Time limit on recourse actions

Legal actions must be instituted within two years of the day when the operator has ceased, or is presumed to have ceased, the activities he had undertaken to perform. In this connection the Convention introduces a special provision to deal with recourse actions. A recourse action against the operator is not subject to any limitation if it is "instituted within 90 days after the carrier or other person has been held liable . . . or has settled the claim on which such action was based". There is also a provision, however, to the effect that the operator must be advised of the possibility of a recourse action within a reasonable period of time after the filing of a claim.

Conclusions

To conclude this panoramic presentation of the Convention, it is perhaps well to point out that the Convention contains only minimal rules. It is thus, so to speak, a framework Convention. The will of the parties, or the desire of an operator to attract more clients, could lead to improvements in the liability regime foreseen. In fact articles 6 and 13, respectively, authorize higher limits of liability and a stricter liability regime. Thus the Convention is adaptable to different economic situations, a fact which we can surely regard as a pledge of its success.

3. Voices of international practice

O. P. SHARMA
Senior Advocate, Supreme Court of India; Senior Vice-President, Asia Pacific Lawyers Association; President, Indian Chapter of the Asia Pacific Lawyers Association

It is both an honour and privilege for me as Senior Vice-President of the Asia Pacific Lawyers Association (APLA) (world body) and President of its Indian chapter to address this august body of practicing lawyers, jurists, corporate counsel, judges, ministry officials, arbitrators and teachers of law in this historic hall of the General Assembly. APLA is a body of 75 countries and was established in 1984 by President Mr. Byong Ho Lee at Seoul, Republic of Korea. Since its inception APLA has continued to sponsor conferences and symposia in different countries. In June 1985, APLA convened its Council Meeting and General Assembly at Manila. In 1986, APLA co-hosted two joint conferences, one was in cooperation with the Japan-Hawaii Lawyers Association and the other in association with

the American Bar Association. It has also established cooperative relationship with the International Bar Association and the Inter-American Bar Association. APLA held its second General Assembly at Bangkok in 1987 on the role of lawyers in modern society. APLA held its third Council Meeting and Conference in Hanzhuning, China, in 1987. The third General Assembly and Conference of APLA was held in Hawaii in January 1989 and the fourth General Assembly and Conference was held at Beijing. India has the privilege to host its fourth Council Meeting and Conference on the role of law in the social and economic development in the Asia and Pacific region at New Delhi from 7 to 10 February 1992.

The world has been experiencing a rapid growth over the last years. UNCITRAL has been able to achieve a great success in the unification of international trade law and will continue to enrich it in the coming days. It deserves high appreciation for unification of laws in different fields. We work in the same world, under the same sky, under the same sun and under the same moon; then, why should we be treated to different commercial ethics? There should be basic standards of fairness and uniformity in the establishment of international tribunals, framing rules and conventions and in the uniform application of decisions.

The topic for discussion this morning is transport and dispute settlement. Transport is all-embracing in the widest possible sense, incorporating a multitude of different skills, systems and services. There have been many ways of transportation by road, rail, air and sea and, if I am not mistaken, there will be space transport by the twenty-first century, and 25 years hence we will have full space transport all over the world.

After many experiments in the field of business activities all the world over, a perception has got hold over the minds of the people that their welfare is wholly related to free marketing and unhampered production of goods which has given an added importance to transport. The importance of carriage of goods by sea, with nations and corporations doing commerce with other distant nations and corporations, led the United Nations Conference on the Carriage of Goods by Sea, held at Hamburg in March 1978, with the participation of 78 States including many developing countries, with the object of striking a fairer balance between carriers and shippers in the allocation of risks, rights and obligations with regard to liability.

At this Conference the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) was adopted. The Hamburg Rules are modelled on conventions relating to land and air carriage elaborated after the Hague Rules, particularly the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Warsaw Convention, both of which have passed the test of practical applicability. After adopting the Hamburg Rules a need was felt for creating a measure of uniformity in multimodal transport, for which purpose the United Nations Conference on a Convention on International Multimodal Transport of Goods was held at Geneva in May 1980, and the United Nations Convention on International Multimodal Transport of Goods was adopted with the participation of 84 States, including 51 developing countries.

The legal consequences of the entry into force of both the Hamburg Rules and the Convention on Multimodal Transport will be a streamlining of the multitude of liability regimes which currently purport to govern ocean and combined transport. The economic and commercial consequences of the entry into force of the two Conventions will be limited. The commercial consequences of the entry into force of the two Conventions will be to endorse many of the present commercial practices. Their entry into force will result in a better protection of shippers' interests compared with the present system, and the transport industry should be able to adjust itself to the new regimes with little difficulty.

By the end of the last century, ocean carriers had managed to limit their liability for the carriage of goods by sea to a degree that finally became unacceptable to cargo interests, i.e. shippers and consignees. In the United States this resulted in 1893 in the so called "Harter Act" being passed. This law, however, did not end the controversy, and at the beginning of the second decade of the century negotiations were held, resulting in a diplomatic conference at Brussels, with 26 participating countries, including a few developing countries, which adopted in August 1924 the International Convention for the Unification of Certain Rules relating to Bills of Lading, commonly known as Hague Rules. The Hague Rules entered into force in 1931. Today there are 77 contracting parties; the Visby protocol, together with the Hague Rules, created a liability system which is generally known as the Hague-Visby Rules.

In spite of these activities, it may be said that commercial circles have been compelled to develop new rules and trading systems in order to deal with the demands of modern trade and transport with respect to cargo handling and documentary practices, but these changes clearly show that even the various amendments made to the Hague Rules in one form or another can no longer hide the fact that technological developments have rendered those Rules outdated. Furthermore, it was felt by many States that their interests as shipping States were not sufficiently covered by the existing Rules. In 1968 this realization led the second session of UNCTAD to recommend to the Trade and Development Board that it instruct the Committee on Shipping to establish a Working Group on International Shipping Legislation. Among the points to be taken up by the Working Group would be amendments to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924. Consequently, the Trade and Development Board so instructed the Committee on Shipping in its resolution 46(VII), and the Committee on Shipping subsequently established the working group by its resolution 7 (VII) of April 1969. The law of international carriage of goods by sea is an integral part of international trade law, since most goods sold from one country to another are carried by sea. One of the aims of UNCITRAL is to promote wider acceptance and, if necessary, revision of international conventions in the field of international trade law.

By covering practically every carriage by sea touching a contracting State, the Hamburg Rules have broad geographical scope. This wide scope was favoured by a majority of States within UNCITRAL and of States participating in the Hamburg Conference. One reason was that since ratification of or accession to the Hamburg Rules by 20 States is required for the Convention to enter into force, the geographical coverage of the Rules would be far reaching immediately upon their entry into force. The Hamburg Rules have now obtained the required number of ratifications, and will come into force on 1 November 1992. This will create momentum for replacement of the Hague Rules system with the Hamburg Rules system, and thus lead to achieving international uniformity of law.

Article 3 of the Hamburg Rules is an innovation in international transport law. Article 3 of the Rules lays down that "in the interpretation and application of the provisions of the Convention regard shall be had to its international character and to the needs to promote uniformity." It encourages the contracting states to promote uniformity of interpretation of uniform rules, which is of course essential if the aim of unification of law is to be reached. Here the question raised by John O. Honnold, Professor at the University of Pennsylvania, Philadelphia, may be recalled: what are the goals that should inspire the work of UNCITRAL? Let us consider these four goals in the interpretation of the Rules: clarity, flexibility, modernization and fairness. The best way to move towards clarity in thought and decisions is to focus on concrete factual examples and avoid misleading local legal idioms. Further we should examine ways to make international trade law clear and predictable. For flexibility and adaptability to different situations we should prepare uniform rules that are sufficiently flexible to accommodate the diverse and changing circumstances of international trade.

For modernization we should have rules which are best for international trade and today's conditions.

For fairness we should have a well-designed principle to develop rules that are fair to both parties, there should be fair negotiations with both parties, and they need to be well-informed.

So interpreting the Hamburg Rules, it must be borne in mind that they are not a complete code of maritime law relating to contracts of carriage by sea. As to other questions not dealt with by the Hamburg Rules, for example, when non-cargo damage is caused by the carrier, or low compensation is being assessed and other such losses are to be calculated, it will be necessary to refer to national laws.

Article 21 of the Hamburg Rules sets out a list of places where judicial proceedings, at the option of the plaintiff, may be instituted.

Article 21(1) lists four places:

(a) The principal place of business or residence of the defendant;

(b) The place where the contract was made, provided the defendant has a representative in that location;

(c) The port of loading or discharge;

(d) Any additional place designated for that purpose in the contract.

One purpose of unifying the law relating to the carriage of goods by sea is to eliminate the relative advantages and disadvantages of bringing a claim in a particular forum. However, the Hamburg Rules allow such a wide variety of optional jurisdictions that forum shopping by the claimant is still possible, owing, for example, to differences in the size of awards, time and cost of litigation, procedural rules and enforceability of awards.

The Hamburg Rules deal with arbitration as an alternative to judicial proceedings, whereas the Hague Rules have no rules on arbitration, and the Hague-Visby Rules contain, in article VIII, only limited provisions for it. Article 22(1) of the Hamburg Rules provides that the parties may agree to submit their disputes under the Hamburg Rules to arbitration. Such an agreement must be in writing. Article 22(2) provides that an arbitration clause contained in a charter party does not bind a third party who in good faith acquired the bill of lading issued under the charter party, unless the bill of lading expressly refers to the arbitration clause. The Hamburg Rules require arbitration proceedings to be instituted, at the option of the claimant, in one of the places listed in article 22(3). These places correspond with the places mentioned in article 21(1), where judicial proceedings must be brought. This provision provides a convenient method of settling disputes.

But apart from the efforts under the Hamburg Rules to bring about uniformity of action and flexibility in choice of forums for initiating judicial claims, the question of national laws of some countries being in conflict with each other and with the Hamburg Rules may arise. For obviating such situations some mechanism should be devised under the auspices of the United Nations to bring coercive pressure upon the recalcitrant States to act in line with the spirit of the Hamburg Rules, failing which some sort of sanctions by the world body may be exercised. This will help the free-market economy stay on an even keel. The uniformity of international law will be very difficult to achieve, and, if achieved, sustained, till such time as UNCITRAL does not bring under the umbrella of United

Nations protection most of the nations whose research in modern technology in the development of all kinds of transport, including space transport, is jeopardized by sanctions imposed by the powerful economic nations solely on economic considerations.

What will be the ultimate goal of uniformity of laws as desired by UNCITRAL if the powerful nations adhere to the principle that "might is right"? I am just referring, without any bias towards any nation, to the possibility of a powerful country misusing its powers unilaterally, arbitrarily, motivated only by commercial interest with the sole purpose of free enterprise for them and no enterprise for others. An enlightened approach to this must be based on the wise counsel by Dr. Klaus W. Grewlish, Director General for International Affairs at Telekom in Bonn. "Technology cannot be reduced to machines. It is connected with knowledge, understanding and wisdom. Part of this knowledge exists in objectified form in machinery and databases. The lion's share of technology and know-how, however, exists in the minds of human beings, in their attitudes and organizational structure". It is necessary to devise disputes settlement tribunals for this purpose, for it appears to be that things are moving to ultimate confrontation between national economies. At that point in time such an authority will serve a very useful purpose. Law must take into consideration all aspects to meet the purpose for which it is made.

LENNARD K. RAMBUSCH
Attorney, New York, New York, United States of America; Maritime and Transport Law Committee, International Bar Association

The Maritime and Transport Law Committee of the International Bar Association is very honoured by the invitation to join in this Congress celebrating the twenty-fifth anniversary of the establishment of UNCITRAL. On behalf of our 950 practitioner members from over 60 nations, I am pleased to express our warm felicitations, our respect for the work of UNCITRAL and our encouragement for its future endeavours.

There can be no doubt that in our increasingly global economy the United Nations and UNCITRAL will have a leading role in the development of international legislation governing the relationships between and among commercial interests engaged in international trade.

Over the past 25 years, several commissions of the United Nations have been active in developing conventions relating to transport. In the marine field, these commissions have taken on some of the role which, since 1897, has been carried by CMI. CMI is a non-governmental organization made up of the national associations of maritime law of about 50 countries. Like UNCITRAL - CMI is devoted to the unification of maritime and commercial law, including maritime customs, usage and practices. Many of the members of our committee participate in the work of the CMI through their national associations of maritime law. Our committee maintains a link with CMI as it does with several United Nations commissions. In the past, representatives of UNCITRAL, the International Maritime Organization (IMO) and UNCTAD have participated in and made valuable contributions to our meetings. Our committee has been granted consultative status by IMO.

In recent years, UNCITRAL has increasingly sought advice and input from experts in various fields including - in the maritime field - its sister organizations such as IMO, as well as from leading academics and industry groups. We take your invitation to our committee to participate here today as indicative of UNCITRAL's desire to reach out for the views of maritime practitioners. We applaud this trend. We truly hope that this will lead to a meaningful and productive cooperation between UNCITRAL and members of the bar whose practice is devoted to the areas of international trade law under review and revision by UNCITRAL.

Other colleagues will comment on the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade. I will confine my remarks to the Hamburg Rules. However, I do wish to take this opportunity to acknowledge the usefulness to maritime practitioners of the UNCITRAL Model Law on International Commercial Arbitration - which has been adopted, for example, in Canada and recently in Hong Kong, and will be of use to practitioners in providing the procedural framework for resolving maritime disputes submitted to arbitration.

Conventions relating to the carriage of goods by sea

After 10 years of study and debate, first under the auspices of UNCTAD and then under the guidance of UNCITRAL, the Hamburg Rules were completed in 1978 at a diplomatic conference convened in Hamburg under the auspices of UNCITRAL. On 7 October 1991, the last of 20 countries necessary for the Hamburg Rules to come into force adopted the Convention. The countries which have - to date - adopted the Hamburg Rules account for about 5.6 per cent of the world's trade by sea.

The Hague Rules originally promulgated in 1924 were revised by the Visby Amendments in 1968 and the 1979 Protocol to the Visby Amendments concerning special drawing rights. Currently 29 nations comprising about 36 per cent of the world's trade by sea have ratified or otherwise adopted the Hague Rules as modified by the Visby Amendments.

Since the completion of the Hamburg Rules in 1978, the comparison of the liability schemes of Hamburg and Hague-Visby has occupied centre stage in a truly historic debate - not only at diplomatic conferences and working sessions and CMI assemblies, but also at meetings and seminars organized by national maritime law associations and international bar groups. Thus, for example, our committee debated the Hamburg Rules at the Twenty-first Biennial Conference of the International Bar Association at Buenos Aires in 1989, and will again give its attention to this subject at our upcoming conference at Cannes in September 1992.

The debate has also involved maritime industry groups. Generally speaking, vessel owners, operators, protection and indemnity (P&I) clubs and cargo and hull insurers support Hague-Visby, while many shippers and organizations of shippers support the Hamburg Rules.

Hamburg's basis of liability: article 5

The most controversial difference between the Hamburg Rules and the Hague-Visby rules lies in article 5 of the Hamburg Rules, which eliminates Hague-Visby's so-called nautical fault defences - the defences of negligent navigation and error in management. The Hamburg Rules, under article 5(1), place the burden on the shipowner to prove ". . . that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence (resulting in the loss of or damage to cargo or delay in delivery) and its consequences".

The risk allocation provisions of the Hamburg Rules do not list the other exceptions enumerated in article IV, subsection 2, of the Hague Convention. But, when the Hamburg standard is examined and compared with the Hague-Visby standard, it can be argued that, if the carrier meets his burden of proof, most of the exceptions in Hague-Visby's list of exceptions, except error in navigation and management, are encompassed - at least to some extent - within the provisions of the Hamburg Rules.

The Hamburg-Hague-Visby debate now seems to have reached a stalemate. We are at an impasse.

On 1 November 1992, the Hamburg Rules will come into force and the maritime community will be faced with three different liability regimes: the Hague Rules, the Hague Rules as modified by the

Visby Amendments and the Hamburg Rules. The stage for the Hamburg-Hague-Visby debate will then shift, at least in part, from international forums such as this - which have developed the conventions - to courtrooms around the world. The provisions of Hamburg - where Hamburg governs liability to cargo - will be considered by courts in both civil law and common law countries.

Unseaworthiness

The omission of the concept of seaworthiness from the Hamburg Rules is another area which is likely to spawn litigation. Under the Hague Convention the shipowner has a duty to exercise due diligence to make the ship seaworthy at and before the commencement of each voyage. Under United States case-law, this duty has been held to be non-delegable. For example, a shipowner might hire the best shipyard in the world to repair leaky hatch covers. But if the shipyard negligently repairs the hatch covers in such a way that the shipowner cannot be expected to find the negligent repair, under United States common law, the shipowner would still be held liable to cargo under its non-delegable duty to provide a seaworthy vessel at the commencement of the voyage. It appears that under the Hamburg Rules, the shipowner probably would not be liable. Hiring the best shipyard in the world would probably meet the standard that the shipowner took all measures that could reasonably be required to avoid the occurrence and its consequences.

Common law countries in particular will require development of case-law to identify and test the burdens of proof and define exceptions which will be urged as having applicability under the Hamburg Rules. It is possible that as the case-law interpreting the Hamburg Rules evolves, there will be as many exceptions under the Hamburg Rules as now exist under Hague-Visby.

It is, of course, impossible to predict how the courts which may be asked to consider various provisions of the Hamburg Rules will rule. But, what is possible to predict is that there will be a period of great uncertainty - hopefully parallelled by continued efforts of the proponents of Hague-Visby and Hamburg to reach a solution.

The need for continuing discussions

Whatever may be said about the economic impact on various segments of the maritime industry which will result from the Hamburg Rules' reallocation of the risk of liability for cargo damage, loss or delay, it is clear that several features incorporated in the Hamburg Rules and the debates surrounding the development of the Hamburg Rules have focused the attention of the maritime industry and the maritime bar on how best to deal with technological innovation in the transport industries, innovations which relate particularly to containerization, to multimodalism, to combined shipment and to electronic data flow.

UNCITRAL is to be commended for identifying the need to address these technological advances, and for providing the mechanism to reach several important compromises.

Whether the objective of uniformity is to be achieved via Hague-Visby, via the Hamburg Rules or via some compromise between the two remains to be seen. As practitioners, we do hope that the supporters of these conventions will work together and will listen to each other with a view to achieving a resolution that will unify and harmonize international law relating to the carriage of goods by sea.

The quest for uniformity must continue.

GEOFFREY J. GINOS
Attorney, New York, New York, United States of America; Section on International Law and Practice, New York State Bar Association

I am grateful and honoured to have the opportunity to address you this morning on behalf of the New York State Bar Association's Section on International Law and Practice.

As a practising attorney who has worked all over the world in the areas of maritime law and general international commercial law, I am particularly appreciative of UNCITRAL's work in attempting to achieve a uniform worldwide system of commercial law. I know this sentiment is shared by my colleagues in the Section. Having said that, I will now proceed to a few brief comments.

I would like to focus on the Convention on the Liability of Operators of Transport Terminals in International Trade in particular, and more specifically on one section of this Convention which gave rise to considerable controversy during the negotiating sessions. The section is concerned with the definition of "terminal operator", and I approach this from the viewpoint of the United States delegation. An issue arose as to whether or not stevedores would be considered as coming within the definition of terminal operators as "carriers", and the consequences of this were substantial, at least from the viewpoint of stevedore operators in the United States. Quite simply, the issue had to do with whether, as agents or servants of carriers, these stevedores would have access to protection under the Hamburg Rules through the bill of lading, or whether in fact they would be denied any opportunity for exculpation through this manner.

I will not go through all the stages of the debate or the various definitions of operator. Suffice it to say that, at the end of the day, the definition of operator that remained in the Convention excluded stevedores.

I shall read very briefly from article 1(a) of the Convention, which defines the operator of a transport terminal as "a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right to access or use". The following line bears upon my comments. The definition continues: "However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage . . ." And yet, we have heard how very recently the United States has signed the Convention. Clearly, whatever United States reservations or objections existed have been dealt with. The manner in which this occurred is simple. First of all, the preamble of the Convention states: "The Contracting States . . . intending to facilitate the movement of goods by establishing uniform rules concerning liability for loss of, damage to or delay in handing over such goods while they are in the charge of operators of transport terminals and are not covered by the laws of carriage arising out of conventions applicable to the various modes of transport, have agreed as follows . . ."

It is this language, indicating that the Convention's rules apply only when laws of carriage arising out of other conventions applicable to various modes of transport do not, which forms one basis for an interpretation of the Convention as enabling stevedores to take advantage of the Hamburg Rules.

Additionally, article 15 of the Convention provides that it will not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to the Convention. This, too, forms a basis for the viewpoint which the United States delegation wish to be advanced.

Thus, although there were those who feared having language which would result in total exculpation of stevedores, we believe that the final result has satisfied their concerns, while at the same time, under United States law which permits a limited exculpatory right to stevedores under certain conditions, the concerns of the United States are also addressed.

I would like to bring up one final point which concerns article 10, and this is an issue which had been raised rather late in the consideration of the Convention. Article 10 concerns itself with rights of security in goods, and the very first sentence of that provision states that: "The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods both during the period of his responsibility for them and thereafter". Some concern has been raised over the word "due". The operator, that is to say, the terminal operator, has a right of retention over the goods for costs and claims which are due.

It is probable that when the Convention comes before the United States Congress - the Senate specifically - there will be, by way of some clarification or some footnote, an indication that it is the understanding of the United States that this reference to sums due to the terminal operator is a reference to sums owed to him by cargo owners or shippers with a proprietary interest in these goods. In other words, it is not intended that he should have a lien over the cargo where those cargo interests do not owe him anything and are innocent, and the sums due are owed, for example, by the ocean carrier.

4. Open floor

GEOFFREY JONES
International Union of Marine Insurers

I wish to make some remarks about the Hamburg Rules on behalf of the International Union of Marine Insurers (IUMI). In the matter before us, several issues stand out: uniformity of law, cost efficiency and fairness. Regarding the first, the adoption of the Hamburg Rules will leave us with three regimes, as we have heard - the Hague Rules in about 57 nations, the Visby Amendments in perhaps 31, and the Hamburg Rules in 20. This does not promote uniformity: it breeds uncertainty and confusion, and creates the possibility of forum shopping. In the unlikely event that the Hamburg Rules were to be universally adopted, there would be many years of uncertainty as the courts interpreted the rules for us. If the Hague Rules are still being litigated nearly half a century after their completion, it is clear that the Hamburg Rules would not be defined within the working life of anyone in this room. It takes a great stretch of imagination to conclude that the Hamburg Rules lead to any measure of uniformity.

Regarding cost efficiency, insurance premiums and freight charges, which include a carrier's own loss and insurance costs, all fall back on cargo owners and, in turn, the consumer. So it is desirable to keep these costs as low as possible. It has been stated that the Hamburg regime would transfer some of those costs from cargo owners to shipowners. If so, freight costs would rise to reflect this. But it is wrong to assume that cargo insurance rates would necessarily be reduced commensurately. A likelier outcome is an increase in cargo insurance rates to reflect the increased cost of the recovery process arising from now having to engage attorneys on so many more claims. Cargo insurer insolvency is almost unheard of, but shipowners are subject to no solvency requirements and frequently fail, which would give cargo owners no certainty of collecting claims. There is no cost-effectiveness in raising expenses and adding uncertainty to the collection process.

The last issue is fairness. When announcing the Hamburg Rules, UNCTAD cited the importance of the new Convention as being especially for the benefit of the developing nations. Had this been

true, the Convention would probably have been met with more enthusiasm by the major shipping nations than has been the case. In fact, no one has yet been able to reliably demonstrate just how the developing nations would actually benefit from the proposed change of regime.

Marine insurers provide financial and practical services to world trade. Through their work and experience they gain substantial knowledge of the ingredients that create a sound environment for the prosperous development of international trade. The marine insurance contract works as a critical part of the contracts that together form the basis for world trade. What is good for trade is good for the insurance industry. It is therefore of vital importance for the industry to make its voice heard when new ideas, good or bad, are promoted. Since marine cargo insurance will still have to be purchased, and since war risk insurance will have to be purchased, marine insurers will not be seriously affected by a possible enactment of the Hamburg Rules. Some may even benefit from such a development. The reason why so many individual underwriters, so many companies, so many national marine insurance associations and IUMI had disputed the value of the Hamburg Rules is simply that the rules do not comply with the requirements as defined above. Whatever technical or legal advantages may be perceived are far outweighed by disadvantageous financial and practical consequences. World trade would surely be far better off if the present regime were revised and updated rather than discarded. IUMI supports this approach and therefore remains in opposition to the Hamburg Rules.

PROFESSOR SAMIA EL-SHARKAWI
Professor of Commercial Law, Cairo University, Cairo, Egypt

Although the Hamburg Rules can be considered as a significant evolution in the liability of the carrier in favour of the shipper, in comparison with the Hague Rules, with regard to certain aspects such as limits of liability, loss caused by fire, live animals and deck cargo, they do not however realize significant progress relating to the most important issue of the carrier's liability, which can be considered as the core of the whole issue: namely, the basis of liability. According to the Hague Rules, the carrier is under an obligation to exercise due diligence to make the ship seaworthy before and at the beginning of the ship's voyage. The carrier is also under an obligation to carry the goods with due diligence. Consequently, the carrier would be liable for loss incurred to the goods unless he proves one of the exceptions enumerated by article 4 of the Hague Rules. According to article 5 of the Hamburg Rules, the carrier is liable for loss resulting from loss or damage to the goods while the goods were in his charge, unless he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

Although the common understanding is that the carrier's liability under the Hamburg Rules is based on the principle of assumed fault as an objective liability, it is quite easy to prove that the carrier took all necessary measures to avoid loss. In such a case he would be exonerated of liability. Therefore, the comparison between the Hague Rules and the Hamburg Rules would lead consequently to the privileged position of the carrier under the Hague Rules still existing under the Hamburg Rules, taking into consideration the dominant opinion that the carrier's liability under the Hague Rules is based on obligations of achieving a specific result or *obligation de résultat*, according to the relative legal systems, through the 17 exceptions described by article 4. Therefore, the basis of liability would be placed, under the Hamburg Rules, on the obligation of means - *obligation de moyens* (it is based in the Hague Rules upon the *obligation de résultat).* The carrier can be exonerated from liability under the Hamburg Rules if he proves that he carried out the necessary measures to avoid loss, while under the Hague Rules he can also be exonerated if he proves one of the 17 exceptions prescribed by article 4.

I would conclude that in so far as the consequences of the carrier's liability would be the same under the Hague Rules and the Hamburg Rules, it is unlikely that the expenses of marine insurance

would be reduced due to the application of the Hamburg Rules, as is expected. The Hamburg Rules, in my opinion, reclaim with one hand what it gives to the shipper with the other.

PROFESSOR JOHN HONNOLD
University of Pennsylvania, Philadelphia, Pennsylvania, United States of America

Professor Joko Smart, who opened this discussion this morning, spoke appropriately of his concern for the interests of developing countries. However, there are large developed countries which are concerned, as he is, with the rights of sellers and buyers who are shipping and receiving goods, that is, the cargo interest, and which therefore are interested in the Hamburg Rules. This is not a struggle between developed and developing countries.

However, some countries, although large and developed, have some legislators who are not so large and well-developed, at least in their ability to withstand pressure. Thus, they can be frightened, and have been discouraged by the militant attacks of organized professional representatives of the ocean carriers. Their principal attack, launched here as with respect to almost any significant piece of legislation, is to assert that this new law would unsettle the clarity and worldwide uniformity established under Hague-Visby. Anyone who works seriously in this field knows that this claim is a myth. Hague-Visby does not even face the most important problems that are current in modern sea transport, and the international case-law trying to find solutions country by country to these problems, without the help of any international legal provision, is in wild confusion. There is, I am embarrassed to say, even conflict among the federal courts in the United States.

The fear of extended litigation under the Hamburg Rules is in this case, as often when new laws are proposed, exaggerated. It is exaggerated because the Hamburg Rules squarely face the current problems of marine transport. On a personal note, I happen to be working on a paper to expose this myth. I cannot gather case-law in all countries. If there is anyone here who is in a position to help me with research in his or her corner of the world, I would be grateful to hear from you, and you would be compensated royally by a reference in a footnote.

One final point. The developed country where I live, although a signatory of the Hamburg Convention, has a special disability. Ratification requires a two thirds vote in the Senate, and it is easy to frighten one third of our Senate even with myths. So my final words are an appeal for help from countries that are not subject to this disability.

D. JACOBSEN
Attorney, New York, New York, United States of America

I am concerned about article 10(1) of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade. This was touched upon earlier by Judge Beraudo and just a few minutes ago by Geoffrey Jones, particularly the part where it states that the operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him.

In a case where you have a liner service and a cargo owner has a container on which he has paid the freight due with the bill of lading, and there has been a dispute between the terminal operator and the carrier, then the cargo would be a pawn in the dispute between the carrier and the terminal operator. In other words, the cargo owner would have no dispute, but he cannot get his cargo. This is wrong. I understand this was not intended by the people drafting the Convention, but there it is. This point

was discussed at length by the Maritime Law Association of the United States, meeting in New York at the beginning of May. It has also been discussed by the American Institute of Marine Underwriters.

JEAN-PAUL BERAUDO
President, Court of Appeal, Grenoble, France

I will try to respond to the question that has been raised by D. Jacobsen. The first paragraph of article 10 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade indicates the cases in which the operator has the right to keep the goods. This right to keep the goods can be exercised once the amount is due to the operator for services which he has fulfilled with respect to the goods regarding which he is exerting his claim to keep them. This article does not distinguish according to the debt or absence of payment between the carrier or the owner of the merchandise. Moreover, in practice, the price paid for the transportation contract by the shipper covers specifically the loading and unloading operations of the goods. If the carrier who has received his payment for transportation does not pay the amount due during the loading or unloading of the goods, then the terminal operator who has fulfilled his loading and unloading operation can exert his right to keep the goods. This is a situation which was one covered by the Conference which adopted the Convention. The remedy provided by the Conference for this purpose is indicated in the second paragraph of this same article 10. The owner of the goods might prefer to pay directly himself to the operator of the transport terminal, or deposit in the hands of a third party a sufficient guarantee to free the goods. At this point the operator of the transport terminal with the benefit of the guarantee has to free the merchandise, and it has to be known between the carrier or the operator what their specific rights are. I think that the Conference, in paragraphs 1 and 2 of article 10, has in this respect provided a rule and principle which satisfies the interests of the operator of the transport terminal, and also an auxiliary rule, that is, conciliation and guarantees, which covers the interests of the owner of the goods.

B. Dispute settlement

1. Some practical questions concerning the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

ALBERT JAN VAN DEN BERG
Professor and Attorney, Amsterdam; member of the International Council for Commercial Arbitration; Vice-President, Netherlands Arbitration Institute

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) is generally acclaimed to have been the most successful treaty in the field of international private law. While UNCITRAL, with all its modesty, does not count the New York Convention as one of its achievements, it must be publicly acknowledged that UNCITRAL has largely contributed to the Convention's success. Look at the number of contracting States. When UNCITRAL was established in 1967, 31 States were parties to the Convention. As of its inception, UNCITRAL has actively promoted ratification of the Convention. Now, 25 years later, UNCITRAL's promotional efforts have had as a result that 85 States are parties to the Convention.

The Convention's success is evidenced not only by the number of contracting States. It is also demonstrated by the court decisions in which the Convention has been interpreted and applied worldwide. These court decisions have been monitored and analysed in the *Yearbook Commercial Arbitration* since the first volume in 1976. The 17 volumes of the *Yearbook* which have appeared to

date have reported more than 475 cases from 35 contracting States. The cases show that the courts generally interpret and apply the Convention in a rather favourable manner. In fact, the following percentages evidence the outstanding achievement of the New York Convention: the referral by the courts to arbitration, which is the first action contemplated by the Convention, has been refused in 5 per cent of the cases only. Even more impressive is the percentage concerning the refusal of enforcement of the arbitral award, which is the second action provided by the Convention: in only 2 per cent of the cases was enforcement of an award refused by the courts.

Having regard to these percentages, one is inclined to think that the Convention is practically trouble-free. To a large extent, this is indeed the case. I should add: not withstanding the text of the Convention itself, which is not always clear as it reflects compromise solutions at various places.

Yet, the Convention has raised certain problems in practice. I have listed a number of these problems in the form of six questions which may be found in summary number 20 of the papers distributed at the Congress.

Before discussing a number of these six questions, a few words may be devoted to their solution. They are identified in the summary as well. Here a distinction should be made between (i) a solution which can likely be achieved by a reasonable interpretation of the Convention itself, and (ii) a solution which is not likely to be achieved by a reasonable interpretation of the Convention, but by some other measures.

As regards the solution on the basis of an interpretation, it is my view that the interpretation should be easily acceptable by courts in a great variety of jurisdictions. This rules out interpretations which are squarely against the system and text of the Convention. It also rules out certain interpretations that are the result of what may be described as sophisticated academic thinking. In my opinion, the Convention should be construed in a manner that is readily understandable to judges and practitioners in all corners of the world. If these principles of what I call "reasonable interpretation" are not adhered to, the present certainty, which is offered by the Convention, may be lost.

With respect to solutions that are not likely to be achieved by an interpretation of the Convention, the measures may include the following. First, there is the possibility of a new treaty. A new treaty has the advantage that the problems can be solved in a uniform manner on a supranational scale. It has the additional advantage that the Convention, which is now some 34 years old, can be modernized. On the other hand, a new treaty has the disadvantage that it takes a long time before a sufficiently large number of States have become a party to it. In the interval, uncertainty will exist as to which regime applies.

The second measure is an amendment of the present Convention, for example by means of a protocol. The advantage is that it may again solve the problems on a supranational scale. However, the same disadvantages as for a new treaty apply also to amendment of the Convention by means of a protocol or the like.

The third measure is a model law setting forth a uniform implementing act for the New York Convention. As you may know, a number of countries have implemented the New York Convention by means of an implementing act. Examples are chapter 2 to the Federal Arbitration Act of the United States and the English Arbitration Act 1975. It appears that the implementing acts are widely divergent. The advantage of a model law setting forth a uniform implementing act is that this divergence will disappear. In the model law, the problems may be solved by appropriate provisions. Another advantage of a model law on implementing the New York Convention is that it may be easier to accept a model law than a new international treaty or protocol to the existing Convention. The

disadvantage of a model law is that not all States require an implementing Act for a convention to become effective within the internal legal order. Another disadvantage is that it may take a long time before a sufficiently large number of States have adopted the model law. Furthermore, being a model law, States will be free to deviate from its text.

Finally, the fourth measure is the adoption of the UNCITRAL Model Law on International Commercial Arbitration. The Model Law incorporates the New York Convention in its article 36. The Model Law can be applied instead of the New York Convention both to the referral by a court to arbitration and to the enforcement of an arbitral award made in another state. The New York Convention, in its article VII, paragraph (1), provides for reliance on the law of the country where enforcement is sought, if that law is more favourable to the enforcement of foreign arbitral awards than the Convention itself.

Against this background for solving the six questions which have arisen in practice and which are identified in the summary, I may now briefly phrase for each question the issue and the solution which I would recommend.

Question 1

Does the Convention's field of application need to be clarified with respect to the question what is to be understood by the place where the award is made (article I(1))?

The issue

According to article I, paragraph (1), the Convention applies to the recognition and enforcement of arbitral awards ". . . made in the territory of a State other than the State where the recognition and enforcement of such awards are sought".

In a recent decision of the United Kingdom House of Lords - the *Hiscox* case - the following happened. The arbitration was in all respects English. The two parties were English. The arbitration hearings were held in London. The contract was governed by English law. And the arbitrator was an English Queen's Counsel. In the award, just above the signature, the arbitrator stated "dated at Paris, France, this 20th day of November 1990". Why? Well, because the arbitrator had joined the French office of a United States law firm and resided overseas, that is, in Paris.

In setting aside proceedings with respect to the award before the English courts, the question arose whether these proceedings could be entertained. It was argued by one of the parties that the award was made in Paris and therefore governed by the New York Convention. The House of Lords indeed accepted the argument that the signing of the award in Paris meant that the award was made in Paris and that, therefore, the Convention applied.

A number of problems arise out of this interpretation of the Convention. One of them is a rather practical one: for the sole purpose of signing an award, arbitrators have to travel to the place of arbitration. This is contrary to current practice, according to which an award is signed by circulating it amongst the members of the arbitral tribunal. The House of Lords' interpretation, therefore, may cause a significant increase in the costs of the arbitration.

Suggested solution

The first question can be resolved by a reasonable interpretation. It is a generally accepted principle that the award should be made at the place of arbitration. Or, as the UNCITRAL Model Law

correctly puts it in its article 31(3): "The award shall be deemed to have been made at [the] place [of arbitration]". Consequently, the inquiry as to where the award has been made for the purposes of the Convention is an inquiry as to which was the place of arbitration, and not - as the House of Lords assumed - which was the place of signing of the award.

It is current practice and a requirement under many arbitration laws that the award specifically mentions the place of arbitration. If arbitrators have omitted to do so, one is permitted to look to the agreement of the parties as to the place, or to a determination by the arbitral tribunal to that effect during the arbitral proceedings.

By following these rules in practice, no problem will, in my opinion, arise.

Question 2

Does the field of application of the Convention need to be clarified with respect to the question whether it applies to an "a-national" award (i.e., an award resulting from an arbitration which, by agreement of the parties, is detached from any national arbitration law)?

The issue

In the context of the New York Convention, denationalized arbitration is rather exceptional in practice, because in almost all cases an arbitration appears to be governed by the arbitration law of the place of arbitration. This practice is confirmed by the 475 decisions concerning the Convention that have been reported so far.

The Supreme Court of the Netherlands, by a decision rendered in 1973 in the famous case *SEEE* v. *Yugoslavia*, seems to be one of the three courts which is of the opinion that the "a-national" award comes within the purview of the Convention. This view is shared by the French Court of Appeal of Rouen with respect to the same award in the *SEEE* v. *Yugoslavia* case. The third court is the United States Court of Appeals for the Ninth Circuit in *Gould* v. *Iran*, which ventured the concept of denationalized arbitration in relation to the Convention and the special category of arbitrations of the Iran-United States Claims Tribunal.

Suggested solution

The second question can be solved by a reasonable interpretation. The Convention can be kept simple and clear if one follows the interpretation that the Convention does not apply to denationalized arbitration. There are good arguments in support of this interpretation. Article I read in conjunction with article V(1)(a) and (e) of the Convention show that the Convention requires that the arbitral award be based on an arbitration that is governed by a national arbitration law. This requirement is confirmed by the *travaux préparatoires* of the Convention.

More generally, the Convention should, in my opinion, be limited to what is generally understood as arbitration. Its clear object should not be blurred by what may be called "wildcat" proceedings, such as denationalized arbitration, or alternative dispute resolution relating to mediation and conciliation. If the scope of the convention were to be widened to include these proceedings akin to arbitration, much confusion would arise because of the uncertain legal status of these proceedings.

Question 3

Is the written form required by the Convention too severe for the practice of international trade (article II(1)-(2) of the Convention)? In particular:

(a) Should it validate a tacit acceptance of the contract containing the arbitration clause?

(b) Should it cater to an arbitration clause in standard conditions?

The issue

Article II(2) of the New York Convention provides: "The term 'agreement in writing' shall include the arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." This requirement as to the form of the arbitration agreement offers two alternatives for the validity of the arbitration agreement.

The first alternative is an arbitration agreement or an arbitration clause in a contract signed by both parties. This alternative, of course, does not pose a problem.

The second alternative is that the arbitration agreement or arbitration clause is contained in an exchange of letters. This excludes a tacit acceptance of the arbitration clause. And that does pose a problem. It regularly happens in practice that after a contract is concluded by, for instance, telephone, a party sends a purchase or sales confirmation to the other party which does not return it to the former party. Then, during or after performance, when a dispute arises, the latter party invokes the lack of formal validity under article II, paragraph (2), of the Convention on the grounds that the arbitration clause has not been contained in an exchange of letters. This could not happen under most national arbitration laws since they are less stringent than the New York Convention regarding the required form of the arbitration agreement.

As regards an arbitration clause contained in standard conditions, the text of the New York Convention is totally silent thereon. Yet, standard conditions are frequently used in international trade, so that appropriate solutions are needed.

Suggested solution

The above question in subparagraph (a) might be solved on the basis of a reasonable interpretation. The requirement as to form laid down in article II, paragraph (2), is generally conceived as both a rule of uniform law and a maximum and minimum requirement. Thus, the form of the arbitration agreement may not be subjected to more onerous or less onerous conditions. Of course, the exchange of letters can be interpreted in a broad way, in the sense that it is readily accepted that an exchange did occur. However, this does not solve all problems. In those cases a textual interpretation may help. The text of the second paragraph of article II states: ". . . shall include . . ." Textual interpretation might then be ". . . shall include but is not limited to . . ." As a consequence, a court may accept an arbitration agreement which is in writing, but which has only been tacitly accepted, provided that such acceptance is legally valid under the applicable law.

I hasten to add that this interpretation has scarcely been advanced under the New York Convention to date. This interpretation, however, is permissible because it is not against a text of the Convention and would be in conformity with the current needs of international trade.

While I think that the above interpretation is reasonable, in the event that it is not accepted, the solution would seem to be the adoption of one of the measures 1, 2 or 3 mentioned in my summary.

As regards the above question in subparagraph (b) concerning the arbitration clause in standard conditions, this can be solved by a reasonable interpretation as well. The courts have established in cases under the New York Convention that if the arbitration clause is printed on the back of a contract, a general reference clause on the front page of the contract to the conditions on the back will suffice. If the standard conditions are printed on another document, the reference clause in the contract should be more specific. It should then draw specific attention to the arbitration clause in the general conditions. It appears that practice is increasingly aware of this requirement for the reference clause as more and more standard contracts contain reference clauses which draw specific attention to the arbitration clause, in the standard conditions.

This interpretation regarding standard conditions is also laid down in the UNCITRAL Model Law. Article 7(2), provides as follows: "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

Question 4

Should the Convention specify which arbitration agreements fall under the referral provisions of article II(3)?

The issue

Article II (3) of the Convention contains the first action envisaged by the Convention. It provides that a court of a contracting State shall, at the request of one of the parties, refer the parties to arbitration when it is seized of an action concerning a matter in respect of which the parties have made an arbitration agreement. However, the Convention does not specify which arbitration agreements qualify for referral to arbitration pursuant to article II (3).

Suggested solution

This question can be solved by a reasonable interpretation. For solving the omission, it would be consistent to interpret article II(3) in conformity with article I which provides for the Convention's field of application in respect of the arbitral awards. Article I is mainly based on an award made in another State. Accordingly, article II(3) can be deemed applicable to an agreement providing for arbitration in another State. This interpretation is generally followed by the courts in the contracting States.

Two other categories of arbitration agreements may pose more problems: an agreement providing for arbitration within the State in which it is invoked, and one failing to indicate the place of arbitration. It is clear that article II(3) does not apply to purely domestic arbitration agreements. Possible criteria for the application of article II(3) in these two cases therefore can be: (a) foreign nationality of at least one of the parties; and/or (b) an international element connected with the contract to which the arbitration agreement relates. The implementing acts and the courts are not yet unanimous with respect to the application of these criteria in the case of an arbitration agreement providing for arbitration within the State in which the agreement is invoked.

In this connection, I should mention that no problem of this sort will arise if a country has adopted the UNCITRAL Model Law. The Model Law simply obliges a court to refer to international arbitration

whether the place of arbitration is within or outside the State where the arbitration agreement is invoked (article 8(1) in conjunction with article 1(2)).

Question 5

With respect to the ground for refusal of enforcement set forth in article V(1)(d) of the Convention, should enforcement be refused:

(a) In the event that the parties' agreement on the arbitral proceedings violates the mandatory provisions of the arbitration law of the place of arbitration;

(b) In the event that, in the absence of an agreement of the parties on the arbitral proceedings, the proceedings do not comply with a mandatory or non-mandatory provision of the arbitration law of the place of arbitration.

The issue

Article V(1)(d) of the Convention provides that enforcement of an award may be refused if the respondent can prove that: ". . . the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." According to this text, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first; only in the absence of such agreement would the law of the country where the arbitration took place have to be taken into account.

What happens if, in a deviation from the parties' agreement, the mandatory rules of the place of arbitration have been followed? For example, it may happen that the arbitration agreement provides for two arbitrators, whilst the arbitration law of the place of arbitration requires an uneven number of arbitrators. If indeed the arbitration has been conducted by an uneven number of arbitrators, may enforcement then be refused because the number of arbitrators was not in conformity with the agreement of the parties? This has led to diverging decisions. The Italian courts refused enforcement of the award in this case. On the other hand, Spanish and United States courts were of the opinion that the mandatory rules of the place of arbitration prevailed.

Suggested solution

The question can be solved by a reasonable interpretation. Article V(1)(d) should not be read in isolation but in the context of the entire article V. Without going into details, this has as a result that in all cases the mandatory rules of the place of arbitration prevail.

The same applies to compliance with non-mandatory provisions of the arbitration law of the place of arbitration. However, an enforcement court can be deemed to be allowed to disregard a minor violation of the arbitration law of the place of arbitration. Such a latitude is conferred upon the court by the introductory language of the first paragraph of article V which says that a court "may" refuse enforcement.

Question 6

With respect to the grounds for refusal of enforcement set forth in article V(2) of the Convention:

(a) Should the Convention make an explicit distinction between public policy as to procedure and public policy as to substance?

(b) Should the Convention expressly provide for "international" public policy as grounds for refusal of enforcement?

The issue

Article V(2)(b) of the Convention provides that recognition and enforcement of the arbitral award may be refused if the enforcement court finds that "the recognition and enforcement of the award would be contrary to the public policy of its country". This provision does not make a distinction between public policy as to procedure and public policy as to substance. Nor does it limit the public policy to the so-called "international" public policy.

In practice, the courts bring both procedure and substance under the public policy provisions of the Convention. As regards procedural questions, it may be wondered whether this is not a duplication of the grounds for refusal set forth in article V under (1) (b), according to which enforcement may be refused if the respondent can prove that he has not received proper notice of the appointment of the arbitrator or of the arbitral proceedings, or has otherwise been unable to present his case (the so-called due process provisions). The difference between the first and second paragraph of article V is that the grounds for refusal of enforcement listed in the first paragraph must be asserted and proven by the respondent, whilst those of the second paragraph can be applied by an enforcement court on its own motion.

A limitation to international public policy has as a consequence that the number of matters pertaining to public policy may be smaller than those prevailing in domestic situations. Consequently, local particularities will have less influence on the international arbitral process.

Suggested solution

Both questions can be solved by a reasonable interpretation. As regards the distinction between procedure and substance, it does not matter that due process violations can be based on two provisions. In fact, it seems justified that procedural violations are also included in the public policy provisions which can be applied by a court on its own motion. This may in particular be appropriate in those cases where the respondent does not participate in the enforcement proceedings. The enforcement court then still has the possibility to block enforcement in cases of a serious violation of due process.

As regards the international public policy, an increasing number of courts is interpreting the Convention in this way. Considering this judicial trend, there does not seem to be a need to lay down specifically in the Convention itself the notion of international public policy.

Conclusion

Due to time constraints, I have to leave aside questions 3 through 6 listed in my summary. Suffice it to say, in conclusion, that all the above questions can be solved by a reasonable interpretation, with one possible exception, question 3 (a) above concerning the requirement that the arbitration agreement be contained in an exchange of letters. Although this question might be solved by a reasonable interpretation, if such an interpretation is not accepted, action by UNCITRAL may be required. However, I submit that the problem is not so critical that it justifies the setting into motion of an amendment process which will require much effort and time. It has not undermined the overall success of the Convention, and practice has shown that we can live with certain imperfections.

One final observation. Most of the interpretations which are given above are expressly confirmed by the UNCITRAL Model Law on International Commercial Arbitration. This fact underscores the usefulness of the Model Law. The message then seems to be clear for future action: keep the venerable, well-established New York Convention in place as it is, and direct all efforts towards the adoption of the UNCITRAL Model Law, or at least legislation modelled thereon, by as many States as possible.

2. Useful additions to the UNCITRAL Model Law on International Commercial Arbitration

IVÁN SZASZ
Professor and Attorney, Budapest

The United Nations developed a family of laws and rules of international commercial arbitration. From the beginning of the work of UNCITRAL, arbitration was on the priority list of its work. The first piece of the series of laws, model laws and rules concerning arbitration was passed before the creation of UNCITRAL, and this was the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention has a very important role in UNCITRAL's work concerning arbitration. It was taken as a cornerstone, and all the subsequent pieces of work were based on it. UNCITRAL did a lot of work relating to the New York Convention. It enhanced the ratification procedure. It is monitoring the practical application of the New York Convention, which is very important, and in due time it will take action if necessary. So after 25 years, I regard the New York Convention as it is now, together with its practical application, as an achievement not only of the United Nations, but also of UNCITRAL.

The later pieces, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration, together show a very strong interrelationship between those laws and rules. So when making any changes, when considering useful additions, one has to consider not only their impact on the application of one piece of the system, but also the implications for the whole system.

The first question that I wish to address is the following: Is there a necessity to amend the text of the Model Law on Arbitration, based on the practice of the last seven years? I might tell you that in my analysis the final answer will be a firm no. Another question distinct from this is as follows: In national parliaments as they adopt laws on international arbitration, is there a need, or is there a possibility, or is it useful to add to the already existing texts. Here you will see that my answer will be yes, but under certain conditions.

First one has to address the following problem: Is the UNCITRAL Model Law adequately addressing all the questions which a law should address on international, commercial arbitration? You might approach this problem from two angles. If you compare the volume, the quantity, of provisions of the UNCITRAL Model Law with existing national laws, you might come to the conclusion that perhaps the UNCITRAL Model Law is too long, that it has too many paragraphs and too many provisions compared with other existing laws. I think the comparison is not justified because other existing laws on international commercial arbitration or on arbitration in general, are embedded in a certain system of civil procedure, in a national system, and it is sometimes not necessary to make a complete set of rules and provisions as may be found in the UNCITRAL Model Law.

But there is another approach as well. A distinguished Swedish scholar, Gillis Wetter, constructed a list of questions which according to his approach should be addressed by a modern law or a model

law. There are more than 100 questions, and one might say that the UNCITRAL Model Law addresses only a half or less than a half of those questions. The question is, when making legislation, should we address all the questions in detail or only the most important ones?

In Europe I studied several legal systems and came to the conclusion that after a certain point the more questions you address the more lacunae you find. There are no perfect systems; the UNCITRAL Model Law, from a quantitative point of view, addresses virtually all the important questions relating to unification, but of course in every legal system new questions constantly arise.

To find useful additions I had to find a method. One method is for the scholar to think carefully and invent questions which have to be addressed by the law. I did not choose this approach, but rather I analysed the already adopted national laws on international commercial arbitration, laws which are based on the UNCITRAL Model Law, and I focused on the additional paragraphs and provisions to be found in those laws. So far more than 20 parliaments have passed and adopted laws based on the UNCITRAL Model Law; you can therefore find a considerable number of questions which they considered, and which were not considered, or were considered in a different way, in the Model Law.

But first, I would like to speak about the scope of application of the Model Law. As is well known, the scope of application of the Model Law is international commercial arbitration. That is what we are going to unify or what we have already unified in certain respects. It has, of course, a big advantage, and I have seen in textbooks how important it is to have unified rules for international commercial arbitration as distinct from national arbitration. I have seen this in works of German scholars and others. But there is also an interest in having unified rules in certain legislation irrespective of whether it addresses international or national cases. So one has to put the question: Is the Model Law not good enough to use in local arbitration, in national arbitration, or is there a possibility to extend the use of the Model Law especially in those countries where there is no tradition of national arbitration, and could not one use the Model Law both for national and international arbitration? I have tried to analyse the law from this point of view, and I might tell you that we in Hungary came to the conclusion, after more than one and a half years of analysis, on the basis of the work of many Hungarian scholars, that in the Model Law there are no rules, or only one or two which have to be modified. All the others can be used for national arbitration as well. The draft law submitted to the Hungarian parliament is therefore based on the Model Law on arbitration, but will be used for both international and national arbitration. I do not believe that one has to restrict the use of the Model Law to international matters.

I do not now want to analyse which paragraphs have to be slightly amended when used also for national purposes, but they are not many.

With regard to the possible amendments, or additions, the first question is how to enact the Model Law, because that question was not addressed by the Model Law itself. I found three basic approaches. The one I liked best was to accept it unchanged. It had an enormous advantage in that it gives transparency. You go to a country and see in the law the same system you are acquainted with. So that is the best solution. But even if you want to add certain provisions to the Model Law, it is better not just to change paragraphs and to amend provisions, but to keep those amendments separately, and you can find this method as well in present legislation. That is, you have the body of the law, the Model Law, and additionally in your national laws you have some provisions which show the differences or which contain useful additions. And I have even found a third solution, for instance in Canada, which is also helpful from the point of view of transparency. It is that in the law itself the additions and amendments are indicated by putting them in italics or somehow showing the reader which are the original texts of the Model Law and which are innovations.

One very important innovation that I found and support is the rules of interpretation, and in many legislations a very important basic rule of interpretation is to have recourse to UNCITRAL documents. That is, national judges should use the UNCITRAL documents when interpreting the law, which is based on the Model Law of course. Again, you can find here different systems but I like all of them. There are some which refer to all UNCITRAL documents, and there are others which refer to selected documents, and even which indicate the documents to which they refer. Normally they refer, of course, to the documents of UNCITRAL and also to the relevant commentary, and in certain laws they refer to the documentation of the working group which developed the Model Law.

A very important useful addition which is addressed in a number of laws relates to the consolidation of two or more proceedings. It has not been addressed by the Model Law, and I have now seen very similar solutions in several laws. The main idea is to give the possibility to the parties to consolidate two or more proceedings. If the parties have the wish but are unable to do so, then the services of the courts are offered, and the courts have the duty, where they deem fitting, to consolidate on terms they consider just, or to use other methods. For example, they may order one proceeding to stay until the other is under way, or they may hear more proceedings in parallel or one after the other, that is, they may find certain methods for consolidation. This you can find provided for in different laws in Australia, California and certain provinces of Canada, which shows that this solution has been preferred in many subsequent legislative procedures.

Another question which I find important and positive concerns provisions to encourage settlements and to use mediation or conciliation. Here the main idea is that the arbitrators are encouraged to use these methods and to reach an award on agreed terms, and it is very important that the arbitrators involved - of course at the request of the parties - are not disqualified in further proceedings.

Another question is the repetition of proceedings in case of a new arbitrator. I think here again that it is wise to bring clarity to this matter. In one law I found provisions concerning the effect of the arbitration on the limitation periods, which is useful. And in a number of laws there are provisions with regard to costs and interest. It is a very important and sensitive question, as sensitive as the liability of arbitrators. Until now I have found one law which addressed this problem. In the drafting of the text of the Model Law this issue was raised, but because of its sensitivity, it was not dealt with in the provisions of the Model Law.

The solutions given to some questions in the Model Law are therefore disputed by many legislations, which is understandable because during the deliberations on the Model Law, the Commission was equally divided on some of the solutions. And it is interesting that answers are given in the national legislations of many countries. What are the questions?

One is how to select the applicable law. You will remember that the solution of the Model Law is to select it through conflict-of-law rules, if the parties did not agree on the applicable law.

Another question is the procedure in case of challenge. Under the system of the Model Law, if one of the parties has the right to go to court, either on questions of jurisdiction or in case of challenge, the arbitration tribunal still has the right to consider and to proceed. This solution is very favourable from the point of view of the effectiveness of the arbitration procedure, but in some laws it was not accepted. Similarly, for instance, Bulgarian law does not accept the correction or elimination of grounds for setting aside as is provided for in article 34(4).

Another problem is what qualifies as falling under public policy. In common-law countries, in particular, it has been found necessary to explicitly declare that fraud, corruption and breach of natural justice are matters of public policy. This reminds me of another very interesting finding in the history

of the Model Law, namely that, until now, the Model Law has been accepted by 99 per cent of the countries with a common-law heritage, and only exceptionally by countries with another heritage. I think it is too early to draw conclusions, but one has to register this fact. If this trend continues, then one has to analyse why it is so. It is, for me at least, striking, and I think that it merits further analysis.

I mentioned 10 or 12 additions which you find not only in one, but in a number of legislations and laws based on the Model Law. Because of time constraints, I will not mention another five or six which I found, but the results of the analysis are reflected in my conclusions, which I shall now present.

As I mentioned at the beginning, I do not think that any addition to the text of the Model Law is necessary at present. The Model Law has proved to be a good piece of work. No dramatic changes or rejection can be expected, neither in the legislative process of national parliaments, nor by countries that plan to draft laws on international commercial arbitration and are in the preparatory stages. After seven years it is too early to discuss changes and additions to the Model Law itself. Any, even useful, additions would seriously affect both uniformity and transparency. It would result in differences among national laws, simply because of the choice or adoption of previous or subsequent texts. It is a different matter, as I already indicated, to consider, in the process of enacting national laws based on the Model Law, useful additions to the text.

A policy that I may recommend on the basis of existing legislation is to follow the Model Law as closely as possible. May I mention that in Hungary, the country of which I have the most experience, we discussed the adoption of an arbitration law based on the Model Law, and in the first round we had splendid ideas about amendments to the Model Law. But finally we came to the conclusion that it is of much more value, from the point of view of unification and transparency, to remain on the basis of the Model Law and to make only those amendments which are really necessary in the context of our national heritage.

My next point is that although I recommend following the Model Law as closely as possible, legal traditions, basic institutions and national laws may, however, require and justify useful additions in order to integrate the Model Law into the national legal system. A number of such additions have now been presented to you.

I mentioned another type of useful addition. Some legislations address subjects not dealt with in the Model Law. The provisions involved may remain isolated, or other countries with other laws may follow the example and have similar provisions as well. This leads to their becoming part and parcel of the unification process. In my inventory, I have mentioned such provisions, for instance in relation to consolidation of proceedings.

In the progressive harmonization of laws, the proportion and balance between uniform solutions and new ideas that might enrich the international unification process, between stability and progress, are of paramount importance.

3. Voices of international practice

GIORGIO BERNINI
Professor and Attorney, Bologna, Italy; President, International Council for Commercial Arbitration

It is indeed gratifying to address such an esteemed audience from so illustrious a podium. I recall the memorable days, from 1968 to 1970, when I had the honour to represent my country in the first

three sessions of UNCITRAL, and a number of eminent colleagues with whom I was privileged to collaborate, some of whom are still here.

The very stimulating speeches which I heard from Professor Albert Jan Van den Berg and Professor Iván Szasz suggest some additional matters for thought. I therefore cannot refrain, to the risk of cutting down my own report to a bare minimum, from making a short comment on some of the ideas expressed by them.

I was gratified to hear that Professor Van den Berg is releasing a bit, though very cautiously, his stern grip over strict interpretation of the requirement of form set forth under article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). If I understood correctly, he seems to admit that one may envisage an arbitration clause also through the tacit acceptance of the contract into which such a clause is embodied. I personally favour this trend of thought. In truth, I would possibly go even further, as Professor Van den Berg well knows since we have been exchanging ideas and published our respective views on this very issue. In essence, I admit the possibility that article II of the New York Convention may be reasonably construed as setting only the maximum requirements of form beyond which no further (or heavier) requirement can be imposed by national laws: any bars to enforcement based upon alleged formal deficiencies in situations which comply with the provision of article II would amount to a breach of the Convention. To read article II as also establishing a minimum ceiling of formality would limit the scope of the Convention as a whole. Furthermore, it would also restrictively construe the proviso of article V(1)(a) where no distinction is made, as regards the law applicable to the arbitration agreement, between requirements of form and requirements of substance. I appreciate the advantages of a uniform interpretation of the Convention, as supported by Professor Van den Berg. On the other hand I submit that a rigid limitation of the scope of article II is too great a sacrifice to be performed on the altar of uniformity. Even at the level of opportunity (which one may even define in terms of "policy-making" in the furtherance of international arbitration), I fail to recognize irrefutable reasons whereby one should discourage a more liberal approach, on the part of domestic lawmakers or judiciaries, in so far as the requirement of form applicable to the arbitration agreement is concerned. Just to quote an example from national judiciaries, the Italian Court of Cassation (Corte di Cassazione, 20 gennaio 1977, n. 272, in Riv. dir. int. priv. e proc., 1978, 341) found no difficulty in enforcing in Italy an award rendered in the Federal Republic of Germany, although the arbitration agreement did not consist of an agreement in writing. The Court applied the law of the Federal Republic of Germany, as being the law of the country where the award was rendered, under which in trade relations among merchants the intent to arbitrate need not be expressed through an agreement in writing.

Another issue touched upon by Professor Van den Berg deserves a word of comment. If I understood correctly, he apparently excluded quite definitely the so-called floating awards, that is, the awards which are not supposed to land in the framework of a given domestic system. This involves the appraisal of the value and impact of the *lex mercatoria*, that is, an a-national source of rules and principles which are legally binding in the realm of international trade. I personally view the application of the *lex mercatoria* with prudence: however, I do not see the reason why one should penalize the utilizers of arbitration willing to have their dispute adjudged under the rules of *lex mercatoria*. Furthermore, as to the literal interpretation of the New York Convention, I would respectfully suggest that the references made by Professor Van den Berg could be countermanded by a careful reading of article VII, which is sometimes forgotten. On the contrary, this article has given rise to an interesting case law at the level of domestic jurisdiction. I would cite, in this connection, the French case *Norsolor* (Court of Cassation, 9 October 1984, in Rec. Dalloz, 1985, 101), where, after conflicting holdings, the Court of Cassation found that an award rendered under the *lex mercatoria*, which had been vacated by the Court of Appeals of Vienna, could be deemed valid and enforceable under French law. The principle thus asserted is of great importance, as it strengthens the "chain of

enforcements" created by the New York Convention. This result is achieved by allowing the enforcement of an award under the rules prevailing in the country where the same is sought, even if the award itself had been vacated by the courts of a different country. To follow up the metaphor of the chain, the principle laid down by the Norsolor case strengthens the weakest link of the chain.

Regretfully I cannot go any further. This subject-matter is most interesting and I hope it will emerge again during the discussion.

My next reference is to the report of Professor Szasz. He mentioned multi-party arbitration, which is indeed a difficult subject: the pet and the nightmare of each lawyer. Multi-party arbitration cannot be identified, as a category, in univocal terms. It encompasses a variety of situations which are vastly different and call for a distinct set of remedies. For the purposes of this discussion the basic dichotomy with which one is confronted when dealing with multi-party arbitration is the following: multiplicity may be referred to the arbitration proceedings which remain separate though characterized by certain elements of connection; the parties to the contract embodying the agreement to arbitrate are more than two.

The organization of the arbitral proceedings may vary with regard to each of the above-mentioned situations. The arbitrator is not a judge. This obvious statement brings about the equally obvious consequence that the jurisdiction of the arbitrator is strictly confined to the individual proceedings in the context of which its appointment took place. The same applies *a fortiori* to the effects of the res judicata.

Lacking a general consensus (including the parties as well as the arbitrators), no measure can be forcibly taken by the arbitrators themselves or by the body or agency administering it, as the case may be, to bring within the same arbitral context identical or connected issues which are debated in the ambit of different proceedings.

The same principles apply *mutatis mutandis* whenever a situation exists calling for the intervention of a third party in a pending arbitration. Such intervention may take place only with the unanimous consent of the parties and of the arbitrators. Furthermore, borrowing a brocard coming from the Roman Law, the intervention should be deemed *in statu et terminis*, that is, without the need of reopening, lacking unanimous agreement to the contrary, the procedural activities already completed.

Experience has indicated the extreme difficulty, if not altogether the impossibility, of working out a multi-party arbitration clause in the framework of an ad hoc arbitration. The variables, corresponding to the unforeseeable variety of the events which may occur in the future, are too many to allow a workable draft.

Administered arbitration may offer a practicable alternative by attributing to the administering body or agency the power to order the consolidation of different arbitral proceedings and/or the intervention of third parties in a pending arbitration.

The foregoing conclusion is largely influenced by the acknowledgement of a reality which can be hardly disputed. Administered arbitration is paving the way for the acceptance of more rigid and complexly regulated proceedings. In all fairness, however, when dealing with multi-party arbitration the issue exceeds the terms of the dichotomy between ad hoc and administered arbitration. What is really at stake is the persistence of the institutional limit consisting of the contractual background of arbitration. If one wishes to achieve workability in a maze such as that of the typical multi-party situations, one must loosen the contractual ties between the parties and the arbitrators and widen the powers of the administering agencies and/or bodies to which the authority of ordering consolidation of

connected proceedings, or else intervention of third parties, should be entrusted in general terms beforehand. *Mutatis mutandis* it is the same situation which exists whenever the courts are empowered to order consolidation.

The topic of consolidation brings about further debate. May I only point out that when solved through an intervention *ex lege* of the courts of justice, the issue acquires a new dimension. This solution, more often encountered within the common law systems, has also been adopted by new legislation in the Netherlands.

A like principle deserves a comment which again exceeds the bounds of this report.

The need for court intervention demonstrates that arbitration alone cannot cope with situations requiring the exercise of institutional powers which are external to the scope of the parties' intent as consecrated in the arbitration agreement. In terms of principle such an occurrence should not be looked upon disfavourably *per se*. However, one should also stress that this type of court intervention injects a different dimension into the traditional ambit of the relations - or links, to use an accepted terminology - existing between arbitrators and the courts. The ambit diverges under the various legal latitudes: however, as a common denominator, one may possibly cite only judicial assistance concerning the appointment of arbitrators. If one goes further, the sphere of discrepancy among different domestic laws sharply increases. This is certainly the case when dealing with the subject of consolidation of different arbitral proceedings.

If consolidation or similar measures can be ordered by the courts without the parties' assent, the classic notion of arbitration undergoes a serious alteration. One is in fact faced with the parties' prior (and blank) acceptance of the future possibility that the original arbitration pattern contractually agreed upon be subjected to radical changes as regards, *inter alia*, the number of the parties, the method of appointment and the number of the arbitrators, as well as the ambit of the subject-matter in dispute. Last, but certainly not least, the occurrence in question may bring about the result that, after the consolidation, the parties risk being confronted with a decision rendered by arbitrators who were neither designated by them nor appointed by an authority indicated in their original arbitration agreement.

The narrow limits of this report hardly allow for value judgements. However, one should not forget that advisability of multi-party arbitration and its unquestioned acceptance by the parties are not to be taken for granted. In many a situation, the parties' attitude on the subject has appeared quite controversial. Further argument on this subject may be of help for a realistic appraisal of the situation.

I have almost exhausted my 10 minutes in commenting upon somebody else's speeches. I apologize, but I also have a few ideas of my own.

I fully agree with the acknowledgment that the New York Convention plays a major role in the strengthening and diffusion of international arbitration. However, due recognition should be given to the fundamental function of UNCITRAL, the true nerve centre of a system leading to harmonization on many crucial subjects of international trade law, among them arbitration. The UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules are the living example of an excellent codification embodying the rules of art in the domain of arbitration. However, when confronted with domestic legislation of consolidated tradition, bulk and importance, rooted in a habitat favourable to arbitration, the adoption of a package of exhaustive and articulate rules and principles, such as those characterizing the Model Law, may encounter a certain resistance.

Be that as it may, there is no doubt that the model rules produced by UNCITRAL constitute guidelines which the national lawmakers should consider when taking action aimed at improving the

existing legislation, as demonstrated by the ever-increasing number of countries which have adopted the UNCITRAL Model Law. It is to be hoped that the future work programme of UNCITRAL will bring about further contributions to the development of a body of rules consonant with the needs of arbitration in its contemporary perspective.

I stated that the potential difficulty inherent in the adoption of a body of arbitral rules at domestic level is directly proportional to the number and complexity of such rules. For this reason, whilst no effort should be spared in the pursuance of legislative reforms as comprehensive as possible, in terms of *realpolitik* a prompt action may be envisaged, even on an interim basis, limited to the adoption of a few basic principles, which may break the ice of a legislative reform in the framework of systems where arbitration is still regarded with suspicion, if not altogether hostility.

The principles to which I allude are the outward expression of basic requirements of fairness and legality constituting inalienable guarantees for the parties and for the arbitrator as well. Compliance with the principles in question will favour the use of international arbitration in a wider legal, cultural and geopolitical perspective. These principles can be summarized as follows:

(a) The arbitrators should strictly adhere to the parties' contractual intent as regards the implementation of proceedings aimed at solving disputes. In particular, their primary task is to establish whether the parties seek an adjudicatory method (arbitration), as opposed to a non-adjudicatory method (conciliation, mediation or other dispute resolution methods) for the settlement of their difference;

(b) The arbitrators may settle the dispute in equity, or *ex aequo et bono*, only upon the parties' express authorization;

(c) The arbitrators should be independent of the parties, neutral and impartial, and their qualifications should not be restricted on grounds of nationality, religion, political belief;

(d) The method for designating and appointing the arbitrators should always ensure that the above-mentioned principles are fully complied with;

(e) When signing the arbitration agreement States and other public entities should be deemed to have waived any and all sovereign prerogatives and immunities;

(f) In international trade no national laws should be successfully invoked to contravene contractual obligations into which States or other public entities have freely entered, nor should said States or public entities be permitted to successfully challenge, after the difference has arisen, their obligation to appear in arbitration;

(g) Whether or not international arbitration is made the object of ad hoc legislation, its specificity should be recognized by national legislators and judiciaries, and its regulations should be substantially patterned upon principles compatible with the provisions of the 1958 New York Convention and the philosophy which has inspired the UNCITRAL Model Law;

(h) In establishing procedural rules, the arbitrators should see that fair standards are set, ensuring, *inter alia*, the parties' basic right to be heard and to debate on equal terms;

(i) In international trade the grounds upon which an award may be set aside should be the same as those upon which recognition and enforcement of the award may be refused, and the scope of such grounds should substantially coincide with the provisions of the New York Convention;

(j) When invoked in the realm of international trade, the ground of public policy should be narrowly construed and its ambit should be confined to international public policy as opposed to national (or domestic) public policy.

The topic of public policy opens the door to an ulterior consideration.

Article V(2) of the New York Convention provides that the competent authority in the country where recognition and enforcement are sought may refuse the same if the subject-matter in dispute is not capable of settlement by arbitration or if the exequatur would be contrary to the public policy of that country.

Public policy defences are known in the domain of enforcement of foreign judgements as well as that of arbitral awards. It should be stressed, however, that at present in arbitration matters such defences are seldom invoked with success. National judiciaries have generally upheld the distinction between international and domestic public policy, whereby the public policy ground for refusal of the exequatur under the New York Convention should be construed narrowly. In other words, under this circumscribed public policy doctrine, only international public policy, and all violations thereof, come into play as grounds for refusing recognition and enforcement under the New York Convention.

The notion of arbitrability is the source of frequent difficulties as it still varies in the light of the different systems. In common-law countries wider and more flexible criteria are used in defining the scope of arbitrability. In civil-law countries the approach is generally narrower. The arbitrability of the dispute represents a serious problem with particular reference to certain matters likely to be the object of differences submitted to arbitration in connection with problems arising out of the interpretation and/or performance of contracts which have become very frequent in contemporary business life. Reference is made, *inter alia*, to the field of industrial property (know-how, technical assistance, patent and trade-mark licences or assignments), as well as to issues touching upon the enforcement of antitrust laws and certain branches of the law of unfair trade practices. At the root of the problem there lies the finding that when facing imperative (or mandatory) rules often reflecting public policy issues, it is hard to discriminate between disputes touching directly upon the source of an exclusive right (i.e. the grant of a patent or a trade mark) and disputes where such rights can be severed from a set of contractual provisions, arbitrable as such. Even in the field of antitrust and unfair trade practices, it is equally difficult to draw a line between disputes strictly connected with imperative prohibitions reflecting public policy issues (such as the relevant provisions of the United States Sherman or Clayton Acts, or else articles 85 and 86 of the EEC Treaty or articles 65 and 66 of the European Coal and Steel Community Treaty) and disputes which merely touch upon contractual rights falling within the power of disposal of the parties.

In arbitration the issue of arbitrability branches out into a wider problem, that is, whether the arbitrators should take into account public policy issues which do not strictly pertain to the laws applicable to the subject-matter in dispute, whenever such issues have a bearing upon the possibility for the award to be enforced in a country other than that where the arbitration takes place or under laws other than those applicable to the subject-matter referred to arbitration. This topic is of great importance for its manifold aspects, and it should be also assessed in the light of the EEC Convention on the Law Applicable to Contractual Obligations, adopted at Rome in 1980. In competition matters the issue is further complicated by the fact that on both sides of the Atlantic the theory of extraterritorial application of the antitrust laws has gained the full status of citizenship.

Especially in the light of civil law systems, the notion of arbitrability should be traced to the basic prerequisite that the rights in dispute be disposable by the parties, i.e. that one is facing rights that can be disposed of by means of contractual instruments. This traditionally narrow approach, which may

seriously affect the ambit of arbitrability, tends to fade away when confronted with legislations setting less severe requirements whereby the ambit of the matters capable of settlement by arbitration appears wider. However, even when confronted with a persistent adherence to the traditional criteria defining arbitrability, as is still the case in many civil law countries, doctrinal opinions and court holdings have now evolved through a recourse to the notion of principal finding as opposed to that of findings occurring only *incidenter tantum* (incidental findings). In the first instance, where arbitrability is excluded, the non-disposable right is the object of the principal claim, or else of an incidental finding to be adjudged with the effect of res judicata; in the second instance, where arbitrability is admitted, the non-disposable right merely refers to a preliminary issue, which is not going to become part of the res judicata.

The same distinction applies whenever a limit to arbitrability is set with reference to disputes requiring, under the applicable law, the obligatory participation of the Public Prosecutor (*Ministère public*, who in the civil-law systems generally belongs to the judiciary). In deciding upon such obligatory presence, paramount consideration should be given to the fact that the subject-matter calling for the participation of the Public Prosecutor constitutes the object of claims which are going to fall within the scope of the res judicata. Otherwise, when the debated issues are merely preliminary in nature, and their decision is not going to become part of the res judicata, no obligation exists for the Public Prosecutor to participate in the proceedings. The separate treatment of the two situations is of the essence, because the arbitrability is excluded only when the participation of the Public Prosecutor is found to be obligatory.

Under the principles so sketched, within the same dispute, disposable rights can be distinguished from non-disposable rights, thus allowing a margin of arbitrability in fields which would otherwise be totally precluded to the arbitrators, such as patents, trade marks, antitrust matters and, more generally, fields falling within the scope of public regulation of business, wherein the sphere of activity open to purely contractual discipline appears severely reduced.

The above remarks demonstrate that if a pragmatic approach were not adopted as regards the width of arbitrability, the arbitral function as such would suffer grave limitations. This reference to pragmatism allows a final remark. Practice, a word which has often echoed in this illustrious conference hall, is not a synonym of pragmatism. With the latter expression one defines a doctrine that privileges the practical bearing of assertions and actions upon the reality of human interests. However, pragmatism certainly does not exclude the recourse to theoretical speculation for the building-up of the premises and principles whose practical effects are going to impinge upon concrete interests of the parties.

The doctrine developed in civil-law countries, whereby the scope of arbitrability is pragmatically extended, offers the best example of this assumption. Classical principles of procedure, mainly theoretical in nature, have been used to bring about an eminently practical result.

This finding should sound as a warning against a commonplace often resounding in legal gatherings, and consisting in an indiscriminate hymn to practice which seems to forget that behind any sound and correct practice there lies an impeccable theoretical support.

JOHN TOWNSEND
Attorney, Washington, D.C.; Law and Corporate Counsel Committee, American Arbitration Association

Discovery (as United States lawyers use the term) began to take its present shape during the 1930s as a reaction to the old rule of trial by ambush. Gradually, in the view of many, the cure has become

worse than the disease. It is not uncommon, in United States civil cases, for discovery to last for years and to account for three-quarters of the lawyers' time devoted to the case. Many non-United States lawyers point with horror to discovery as the main reason for avoiding United States litigation. The word itself can hardly be uttered in polite European company.

Many of those same lawyers point to discovery as the main reason for avoiding United States arbitration. There is some reason for this. United States litigators, sitting as arbitrators, are more likely to be disposed to allow parties to conduct discovery of each other than non-United States litigators, or non-lawyer United States arbitrators. Even among United States practitioners, there may be a feeling that discovery in arbitration has gone far enough. In a recent poll on arbitration informally conducted by the American Arbitration Association (AAA), 56 per cent of those responding thought that discovery should not be encouraged in arbitration.

In fact, at least in international cases, a consensus seems to be emerging on an appropriate degree of discovery or, to use a more generally accepted term, pre-hearing exchange of information. The aim seems to be to provide each side with sufficient detail about the other side's case to permit preparation and to prevent surprise. At the same time, there clearly is great reluctance to embrace the United States system of allowing a party to find out what information and documents in its opponent's possession might be helpful for its case. There is even more reluctance to allow United-States-style depositions: examinations of adverse witnesses under oath in advance of trial.

The new AAA International Arbitration Rules thus provide as follows:

(a) That the tribunal may order each party to deliver to the other a summary of the documents and exhibits that party intends to present (Article 20.2);

(b) The tribunal may order parties to produce other documents or evidence it deems necessary or appropriate.

These provisions are consistent with the International Bar Association Rules of Evidence and with the UNCITRAL Arbitration Rules, (article 24), which together have established the international norm for many years.

The ICC rules are less forthcoming, and depend more on the arbitrator's power to use the powerful weapon of the negative inference to enforce production of documents. But ICC practice does not seem terribly different.

United States litigators often initially feel hobbled by the inability to ransack their opponents' files at will and to take depositions. But in recent surveys accompanying consideration of revisions of the AAA domestic commercial and securities arbitration rules, no significant body of opinion has emerged in favour of more discovery.

United States and international practice seem to be moving more in line with each other, providing enough exchange of information to avoid surprise and to join issue fairly, but not allowing the unlimited exploratory discovery often found in United States litigation. Both United States and non-United States lawyers doubtless feel they give up something to achieve this balance. But the result is a movement toward a fairly flexible, economical and effective system. An international consensus thus seems to be successfully building up around a solution first clearly formulated in the UNCITRAL Arbitration Rules in 1976.

DOMINIQUE HASCHER
Secretary, Commission on International Arbitration, International Chamber of Commerce, Paris

With the exception of some international transport conventions,[1] international conventions do not generally mention their application by arbitrators. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards regulates the judicial enforcement of arbitration agreements and arbitral awards to facilitate the submission of disputes to arbitrators as well as the international currency of awards. As its name indicates, the New York Convention is designed to be applied by national tribunals. Although the New York Convention makes no reference to its application by arbitrators, a significant number of awards, refer to, apply, and interpret the New York Convention. For this reason, to fully understand the scope of the Convention, this speech deals with the arbitrators' application and interpretation of the New York Convention.

Conditions of the application of the New York Convention by arbitrators

Article I of the New York Convention defines the field of the Convention's application. It gives a two-tier definition of enforceable foreign arbitral awards. Such an award is an award either made in the territory of another country or not to be considered as domestic in the country where its recognition or enforcement is sought. Article I does not mention the kind of arbitration agreements falling under the Convention's scope of application. The Convention covers agreements for arbitration in a country other than the country where enforcement of the arbitration agreement is sought. In addition, arbitration agreements involving at least a foreign national party or relating to a dispute arising out of international trade remain within the scope of the Convention.[2]

The Convention does not govern arbitration proceedings. Accordingly, in one award, applying the Rules of the Netherlands Oils, Fats and Oilseeds Trade Association, an arbitral tribunal declined to apply the New York Convention because it:

> . . ."deals only with the recognition and enforcement in a Contracting State of arbitral awards made in another Contracting State. The Convention does not contain substantive provisions which are directly applicable to the determination as to the competence of arbitrators according to the law of the country in which the arbitral award is rendered. The arbitrators are therefore not bound by the Convention in determining their competence. The question whether in the present case there exists a written agreement within the meaning of article II, paragraph 2, of the Convention therefore does not have to be answered by the arbitrators."[3]

The arbitral tribunal's decision stems from the premise that only national tribunals can apply the New York Convention. In sharp contrast, a majority of the awards dealing with the validity of the arbitral clause apply the New York Convention. These awards rely on the arbitrators' authority to determine their own jurisdiction. Indeed, when their competence is challenged, arbitrators should, at the outset, examine the validity of the arbitration agreement from which their power to arbitrate derives. When the arbitration agreement is, to use the language of article II, paragraph 3, null and void, inoperative or incapable of being performed, national tribunals would assume jurisdiction.[4] This was clearly stated in ICC case 5103:[5]

> *"De deux choses l'une en effet. Ou bien [la convention d'arbitrage] est valable et attribue compétence pour connaître d'une demande alternative aux arbitres: les tribunaux judiciaires doivent alors, si elle est invoquée devant eux, en le constatant, se déclarer incompétents. C'est ce que décide la Convention de New York du 10 juin 1958, dans son article II, paragraph 3 . . . et le tribunal de son côté, dans les mêmes conditions, se reconnaîtra compétent. Ou bien au contraire la convention d'arbitrage n'a pas été invoquée par le*

défendeur, ou est nulle, ou ne vise pas le différend porté devant le juge judiciaire et celui-ci se déclarera compétent par application des régles de son for, tandis que l'arbitre renoncera à connaître de ce litige."

Similarly, an arbitral tribunal constituted under the Rules of the Netherlands Hide and Leather Exchange Association decided:

> "Article II, paragraph 1 of this Convention requires that the arbitration agreement be in writing. Article II, paragraph 2, provides that the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. According to the prevailing interpretations by the Courts in the various Contracting States, article II, paragraphs 1 and 2, constitutes an internationally uniform rule for the formal validity of an arbitration agreement, which rule does not leave any room for the applicability of domestic law."[6]

This holding rests on the uniform character rule of article II of the New York Convention. This reasoning appears to be adopted in a host of other cases where arbitrators have referred to the conditions set out in article II for ascertaining the validity of the arbitration agreement.[7] Because of their uniform character, the standards of article II prevail over the requirements otherwise imposed by national laws which, if applied, would invalidate the arbitration agreement and render the arbitrator incompetent. More generally, as it will be examined below, arbitral tribunals think that the requirements of article II concerning the form of an arbitral clause are sound rules for deciding the validity of arbitration agreements. However, in many cases, the arbitration agreement may not comply with the requirements of article II. In view of upholding these agreements, the arbitrators may turn to the more-favourable-right provision of article VII.

A valid arbitration agreement is one of the required conditions for the enforceability of an award. Evidently, article V of the Convention dealing with the enforcement of awards is primarily written for national tribunals. The legislative history of the Convention reveals that the drafters of the New York Convention were principally concerned with improving the conditions of the international movement of awards.[8] For this reason, enforceability of the award is frequently discussed before arbitral tribunals. This is so, in particular when the arbitrators' competence is challenged for lack of arbitrability of the subject-matter of the dispute or when their decision may appear to be contrary to the public policy requirements of the potential place of enforcement. Judges are faced with the New York Convention, and therefore arbitrators too have to take its provisions into consideration. Application of article V by arbitral tribunals forms part though of the more general question whether arbitrators should be concerned with the enforcement of their decision. To start with, arbitrators should have regard to the validity of the award in the country of origin because, notwithstanding the increasingly recognized autonomy of international arbitration, annulment of their decision in the country of rendition will often preclude its enforcement in other countries. Indeed article V(1)(e) of the New York Convention bars recognition or enforcement when the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made. It should be noted in passing that article II may not be invoked in the country of origin because the New York Convention addresses neither annulment of the award nor enforcement in such country. Once this threshold question is resolved, arbitrators should then deal with the enforcement problem of their award. Article 26 of the ICC Rules invites the arbitrator to make every effort to make sure that the award is enforceable. Certainly, it is incumbent upon the arbitrators to render an award with an eye towards enforcement difficulties so as not to frustrate the intent of the parties to have their difference finally decided by an out-of-court settlement. Conceivably, the arbitrators' concern with enforceability is limited to an examination of the conditions prevailing at the most likely places of enforcement, such as the home countries of the parties where assets are often situated.[9] In all these circumstances, a

significant number of awards refer to the relevant provision of article V.[10] But in the country of origin, setting aside may not occur on the basis of non-compliance with article II, as the New York Convention addresses neither annulment of the award nor enforcement in the country of origin. The provisions of article V of the New York Convention have been reproduced in other international instruments and have been incorporated in national arbitration laws.[11] The grounds for enforcement are therefore converging and, in this regard, the conditions of article V could be especially considered by arbitral tribunals.

The New York Convention's field of application may be restricted by two reservations. Article I(3) leaves the possibility open for the Contracting States to limit the applicability of the Convention to awards made in the territory of other Contracting States (reciprocity reservation), as well as to the disputes considered to be of a commercial nature under the law of the forum (commercial reservation). Courts of a Contracting State should enquire whether the tests for the New York Convention's applicability are met. It follows that they are bound by the international conventions ratified by the legislation forum and by the reservations made to such ratification or adhesion. Unlike national courts which represent a sovereign, arbitrators derive their authority from the parties. Therefore, an international treaty should at first be observed by an arbitral tribunal when the treaty's provisions are incorporated in the legal systems governing substantive or procedural issues. To decide the validity of an arbitration agreement, arbitral tribunals would generally refer to a legal order that incorporates the requirements of article II or of article V(1)(a). The same would hold true when the arbitration is held in a country that has signed the Convention. In the ICC award 6379[12] the arbitrators declared that:

> "The present dispute is characterized by the fact that the parties are legal entities having - at the moment of conclusion of the arbitral clause - their seat in Italy and Belgium respectively, i.e. in two Contracting States other than the Contracting State in the territory of which the arbitral award shall be made . . . hence, all requirements of Article 2 of the New York Convention of 1958 . . . are met in this case."

Other arbitral tribunals, however, have applied the New York Convention without inquiring whether the concerned jurisdictions have ratified the Convention.[13] Such a view stems from the proposition that the principles enshrined in the New York Convention are of general interest for arbitrators. Furthermore, the suggested approach would buttress the universality of the New York Convention. Even arbitrators who refer to the ratification of the Convention do not verify whether the concerned jurisdictions have all ratified the Convention. To a certain extent, this attitude may be taken to support the foregoing view that the arbitrator may apply the Convention whether or not a concerned jurisdiction has ratified the Convention.

Interpretation of the New York Convention

Arbitrators have interpreted the New York Convention in line with its letter and spirit. The uniform character rule of article II has been widely recognized by arbitrators; they have held that the requirements of article II supersede the provisions of municipal law.[14] The uniform character of article II implies that its conditions with respect to the formal validity of arbitration clauses constitute both maximum and minimum requirements. One arbitral tribunal has, however, decided that the Convention:

> "does not lay down in its Article II, paragraphs 1 and 2, a requirement of a written form for the arbitration agreement. In any case, the Convention does not prevent the parties from concluding an arbitration agreement orally or in another form."[15]

Article VII(1), as written, leaves room for ambiguity as to whether the more-favourable-right provision should apply in the context of Article II. Two arbitral tribunals have clearly stated that article VII(1) upholds the validity of an arbitration agreement if less stringent conditions than the written form requirement of article II are recognized by national laws or by another international treaty. In one award rendered under the Rules of the Netherlands Arbitration Institute, the arbitrators declared that:

> ". . . should they reach the conclusion that there is no such agreement, they will have to ascertain whether there is an agreement to arbitrate which is valid under some applicable domestic law or under some treaty other than the New York Convention. This is confirmed by the first sub-paragraph of Article VII of that Convention."[16]

The written form requirement of article II has been extensively discussed by arbitrators as well as by national courts. An exchange of telexes is considered as tantamount to an exchange of letters or telegrams and is therefore sufficient for the written form requirement.[17] When parties have not made reservations to the terms of reference, such document may constitute an arbitration agreement within the meaning of article II.[18] An arbitration clause may not be signed in the case of an exchange of letters or cables.[19] A tacit or oral acceptance of an arbitration would not meet the conditions of an exchange of written communications. In one case, the confirmation of sale and its addendum sent to the buyer both contained an arbitration clause. These documents were never forwarded back to the seller and remained unsigned by the buyer. The arbitrators held:

> "In this connection, we would further point out that the requirement of a written expression of consent by both parties is not fulfilled if one of the parties does not react to a confirmation (containing an arbitral clause) emanating from the other party."[20]

Relying on the spirit of article II, another arbitral tribunal decided that a party's reference, in a subsequent written communication, to a contract containing an arbitration clause satisfies the exchange in writing requirement of article II.[21] In some other cases, the arbitration clause was contained in a charter party to which the bill of lading referred, or in general conditions of sale to which the standard conditions supplied by one party made reference, or in a contract which a second contract referred to explicitly.[22] In these cases, as one arbitral tribunal held, the language of article II requires that the opposing party be aware of the existence of an arbitration agreement:

> "It may be true that Article II does not require the existence of a written document specifically spelling out the full text of the arbitration agreement. The document must however be such as to lend itself to a construction so as to prove the intention of both parties to be bound by an arbitration agreement."[23]

Article III of the Convention, which, besides setting out rules of procedure for enforcement of awards, contains a requirement to recognize awards falling within the Convention as binding, has also been considered in one case, therefore demonstrating that all articles and provisions of the New York Convention may be of interest to arbitrators.[24] Arbitrators have applied the uniform conflict rules considered in article V(1)(a) for determining the law applicable to the arbitration agreement.[25]

One arbitral tribunal has relied on Article V(1)(d) of the New York Convention, which submits in the first place the arbitral procedure to the agreement of the parties, to decide that arbitration proceedings may be detached from the national laws:

> "This was well expressed in the New York Convention of June 10, 1958 . . . under Article V(1)(d) of which recognition or enforcement of a foreign arbitral award may only be refused if either the composition of the arbitral authority or the arbitral procedure was not

in accordance with the agreement of the parties, or, failing such agreement, not in accordance with the law of the country where the arbitration took place."[26]

Finally, as to article V(2), arbitrators have stressed that the public policy exception includes only what is necessary to safeguard the political, social and economic concepts of the forum's legal system.[27]

Conclusion

Arbitrators should be encouraged to apply the New York Convention. The two main concerns underlying the New York Convention (the enforcement of the arbitration agreement and the enforcement of the award) demonstrate that the Convention is intended to be applied by national tribunals. Conversely, arbitrators, who are not public authorities, are not the direct addressees of its provisions. There is, however, no reason for arbitrators to disregard the New York Convention as this Convention is in force in more than 80 countries, and as it reflects a consensus of the international community on the most currently disputed issues in international arbitration. Whenever such problems arise, arbitrators should pay heed to the New York Convention, not because they are bound by the Convention by reason of its ratification, but as a source of inspiration. To this effect, application of the Convention by arbitrators, which was not contemplated by its drafters, would serve as a major source for the unification of the law relating to the international settlement of disputes in commercial matters, which UNCITRAL has committed itself to achieving.

JAN PAULSSON
Attorney, Paris, Users' Council, London Court of International Arbitration

The challenge is not to eradicate commercial conflicts. After all, this could be effected simply by eliminating trade altogether - which is the opposite of what we wish to achieve. Rather, the challenge is to reduce the disruptiveness of business disputes.

International unification of commercial law and practices clearly contributes to this goal. If the resolution of disputes abroad were thought to entail hidden and unspeakably dangerous traps that would test the survival skills of the most ingenious, that would be an incentive to avoid international transactions. But if to the contrary it is perceived that the occasional and statistically inevitable dispute will be disposed of in a fair and predictable manner, and that its result will be given practical effect, such mental barriers fade away.

Much has been done already. Various international bodies have promulgated rules for international arbitration which reflect a remarkable consensus as to the broad principles of a neutral process. And of course the achievement of the New York Convention with respect to the enforcement of awards has been nothing less than towering.

But much remains to be done, particularly outside the area of trade among the highly industrialized countries. I would like to mention two areas of great practical importance where further unification efforts would appear most useful.

First, the effectiveness of implementation of the New York Convention in countries where it has been rarely used. I am not referring here to whether the Convention is applied correctly, but whether it is allowed to apply at all. A number of countries have ratified the Convention without subsequently passing implementing legislation. The effect is that judges simply do not acknowledge the Convention as being binding on them. Another country recently adopted implementing regulations which

erroneously provide that foreign awards will be enforced only if the enforcing country's diplomatic officers in the place of arbitration certify that the party seeking enforcement is a national of a country which is a party to the Convention. This is an impermissible addition to the requirements of the Convention. The courts of yet another country require a 10 per cent registration fee for an enforcement action as though the dispute were going to be heard for the first time on merits.

Such obstacles to proper application of the Convention obviously have serious adverse consequences in practice. The truth is that lawyers in quite a few countries, after assuring that in principle their country is a party to the New York Convention, have not the faintest idea of how it could be made to work concretely.

Because I have the strong sense that these impediments result more from unawareness than from obstructionism, I feel it would be valuable for UNCITRAL to conduct a survey as to the purely procedural mechanisms which various countries have put into place to make the New York Convention operative. I am not referring to the substantive criteria for the enforcement of arbitration agreements under article II of the Convention, nor to the enforcement of awards under article V. Professor van den Berg and others are already doing an admirable job of surveying the way the Convention is being applied. I am referring to the more basic issue of whether the Convention has been properly made part of the procedural apparatus of various legal systems. The very existence of such a survey would increase awareness, and would hopefully create incentives for individual countries not to be seen as laggards in the "hit parade" of dutiful implementation of the Convention, which, after all, should be viewed as a benchmark of true acceptance of the transnational legal process.

My second area relates to awards of interest in international commercial arbitration. This is a matter of an enormous and yet too often disregarded practical effect. In many disputes, the isolated controversy over interest is quantitatively superior to all of the substantive claims put together. This is troublesome enough in the context of a purely national dispute, but it is far worse in the international sphere due to the vast differences between national laws. Some legal systems are unclear as to whether arbitrators may award interest at all. Other systems make more or less comprehensible distinctions between interest computed before the claim is raised, interest running during the course of the proceedings, and post-award interest. Some add yet another layer of complexity by distinguishing between liquidated claims for damages, which are limited to a defined so-called legal rate of interest, and non-liquidated damages, with respect to which interest may be incorporated at commercial rates. None of this is helped by the fact that these standards, often poorly understood even within national legal systems, are yet less confidently applied by international tribunals composed of arbitrators of different nationalities. Dare I add that there are some countries which consider the issue of interest to be part of the law of remedies and therefore ruled by the *lex fori*, whereas others consider that interest is a matter for the substantive governing law?

In a nutshell, depending on the arbitrator's choice and understanding of applicable law, recovery on account of interest may range from 0 to 20 per cent per annum. If one considers that an international dispute may take some years to be resolved, the practical importance is obvious. And of course with respect to post-award interest, an award which runs at an interest of 5 per cent or less may be an invitation to resist compliance.

The result is that two identically valid claims may be given vastly different values depending on which law is chosen to govern, and how it is applied. Given the multiplicity of potential claims to applicability, particularly in the context of complex international contracts whose centres of gravity are debatable, this is obviously an area that cries out for efforts of harmonization.

I leave for another discussion the question of who is best suited to initiate such efforts.

MOHAMED ABOUL ENEIN
Director, Cairo Regional Centre for International Commercial Arbitration, Cairo

Background

The Cairo Regional Centre for International Commercial Arbitration (hereinafter the Cairo Centre) is a non-profit independent international organization. Its activities aim at contributing to economic development in the countries of Asia and Africa through the specialized services provided in the settlement of international trade and investment disputes. This is done through fair procedures and an independent forum, both of which constitute a complete system providing the benefits of a quick, efficient and inexpensive mechanism for dispute settlement.

The establishment of the Cairo Centre has gone through the following stages:

(a) January 1978. The decision of the Nineteenth Session of the Asian-African Legal Consultative Committee (hereinafter the Committee) to establish several arbitration centres within the Afro-Asian countries;

(b) January 1979. The agreement concluded between the Committee and the Government of Egypt for the establishment of the Cairo Centre;

(c) December 1987. The Headquarters Agreement concluded between the Committee and the Government of Egypt, which guarantees that the Cairo Centre will enjoy all the privileges and immunities of independent international organizations in Egypt;

(d) July 1989. The agreement concluded between the Committee and the Government of Egypt for the permanent financial and structural arrangements of the Cairo Centre.

The role of the Cairo Centre and its activities may be summarized in a principal direct role and an indirect role which is of no less importance than its principal role, taking into consideration its impact on the investment climate in general. The principal role is providing for arbitration and conciliation according to the UNCITRAL Arbitration Rules. Technical expertise could also be provided under the auspices of the Cairo Centre.

The indirect role of the Cairo Centre consists in the provision of training programmes organized by it for nationals of Asian and African countries. These programmes are prepared and conducted by selected highly qualified experts and arbitrators from all parts of the world. The programmes aim at creating a generation of Asian and African arbitrators who would be one of the principal elements in the progress of the countries of the region. The programmes also help promote arbitration in the region generally.

In addition to the training programmes, the Cairo Centre also organizes specialized conferences and seminars in the various fields of dispute settlement. The electronic data bank within the Cairo Centre provides all necessary information about the developments in international conventions, national legislations, rules and jurisprudence in the field of trade and investment in the region and with reference to international commercial arbitration and other amicable means of dispute settlement. This service is available for all who contact the Cairo Centre, whether they are legal researchers and scholars or parties to disputes, or individuals and organizations.

Though the decision to establish the Cairo Centre was adopted by the Asian-African Legal Consultative Committee in January 1978, the necessary financial and administrative preparations which had to be completed enabled it to be operational only in 1983.

Arbitration under the auspices of the Cairo Centre includes the benefits of ad hoc and institutional arbitration. Arbitration cases are administered under the UNCITRAL Arbitration Rules. The Centre also provides assistance to the parties in the enforcement of arbitral awards, which is a very important benefit provided for the parties whose arbitrations are administered by the Cairo Centre.

The Centre's schedule of administrative and arbitrators' fees keeps the costs of dispute settlement at very reasonable standards compared with other arbitral institutions. The total number of cases registered with the Centre to date is 31 international arbitration cases. The average time period for the settlement of the arbitration cases is a record time compared to the average time in other arbitral institutions.

The Cairo Centre established in July 1989 the Institute for Arbitration and Investment (hereinafter the Institute) to operate under its auspices. The establishment of the Institute was a step to consolidate and further support its efforts in organizing conferences, seminars and training programmes as well as research activities, of which the most important was the Conference on International Commercial Arbitration and the Promotion and Protection of Foreign Investments in the Afro-Asian Region, organized in cooperation with the UNCITRAL secretariat and held at Cairo from 10 to 21 March 1988.

The Institute is entrusted with the responsibility of organizing conferences, seminars and training programmes as well as fostering and promoting research and the publication of periodicals and other publications. The Institute also supports all countries of the region, including their nationals, in providing information and data in the fields of international trade and investment.

The different array or roles entrusted to the Institute may all be categorized under the indirect objectives of the Cairo Centre; however, they are of vital importance to the Cairo Centre's direct objectives and enable it to further develop its activities in training and research and to undertake its objectives in harmony and efficiency.

Against this background, which reflects a future view of its roles and objectives, the Cairo Centre considered the creation of a generation of qualified businessmen, legal scholars and arbitrators one of its main objectives.

Since its establishment the Cairo Centre has organized to date four international conferences and nine international training programmes. Each training programme was attended by more than 10 nationalities of the region. Other training programmes are planned to take place in other countries.

In all these conferences and training programmes the need for harmonization and unification of international trade law was one of the main issues. The objective of stressing this need is not merely for the material advantages that could be realized, but because international trade has its great influence in strengthening mutual understanding, confidence and collaboration between different nations with different social and economic backgrounds. Three main subjects are always present in all the promotional activities of the Centre: the New York Convention of 1958, The United Nations Convention on the Carriage of Goods by Sea, 1978, and the UNCITRAL Model Law on International Commercial Arbitration.

Role of the Cairo Centre in promoting the New York Convention

The importance and usefulness of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards were stressed in the above-mentioned programmes and in other contacts with the countries of the region, and adherence to it was always promoted. In these programmes instructors used to explain that the New York Convention, by its very existence, by its permanent application, by its gaining a singular momentum, has established comity - a concept known to public international law - between the trading nations, whether signatories or not. No longer can one escape these certain standards of common practice or private or institutionalized administration of arbitral procedure, including mutual respect, self-restraint and self-discipline, growing awareness of an arbitral establishment and a 34-years tradition.

Thus, judges and lawyers who are involved in the enforcement of foreign arbitral awards in the region and who are always invited to the above-mentioned programmes are becoming more familiar with the New York Convention.

Alexandria Conference of 1992 on Maritime Arbitration and the Promotion of the United Nations Convention on the Carriage of Goods by Sea, 1978

In its endeavour to become an organization with extended arbitral jurisdiction, the Cairo Centre took a great leap forward by establishing a new branch specialized in maritime arbitration at Alexandria.

The advantages for establishing this new branch at Alexandria, the largest Egyptian port on the Mediterranean Sea, are great for all Afro-Asian countries of the region which will find for the first time a specialized Centre for maritime cases established under the auspices of the Committee.

A conference on maritime arbitration is planned on the occasion of the inauguration of the Centre at Alexandria at October 1992. The United Nations Convention on the Carriage of Goods by Sea is going to be one of the most important items in the programme.

Role of the Cairo Centre in promoting the UNCITRAL Model Law on International Commercial Arbitration

International arbitration is by its vocation universal. No one can doubt that arbitration, in its very essence, is a phenomenon expanding its roots to a cultural habitat exceeding the bounds of law in a narrow sense.

Thus, the principles stemming from the international conventions should prevail over national laws on arbitration, so that purely domestic peculiarities should not be raised as obstacles to the implementation of arbitral proceedings and to the recognition and enforcement of arbitral awards.

One of the most important objectives in the field of international commercial arbitration is that evasive and dilatory tactics brought about by the parties should not be allowed to succeed in frustrating the arbitration or in opposing recognition and enforcement of foreign arbitral awards. Moreover, adequate conditions should be always ensured to provide for the appointment of neutral and impartial arbitrators so as to prevent the parties themselves from paralysing the arbitration from its inception through the mere failure to designate their arbitrators and to agree upon the third arbitrator. Fair procedural principles should always prevail, so as to allow the parties to put forward their claims and raise their defences, without ever forgetting that international arbitration is a living reality which takes place every day.

Thus, when the UNCITRAL Model Law on International Commercial Arbitration was adopted by UNCITRAL and by the General Assembly, fulfilling the main requirements for international commercial arbitration, the Model Law was one of the main items in the Cairo Centre's promotional activities. The Minister of Justice of Egypt replied positively to the Cairo Centre's memoranda concerning the Model Law. The suggestion of the Cairo Centre to establish a Committee in the Cairo Centre to prepare a draft law on international commercial arbitration for Egypt was accepted. The Committee was presided over by Professor Mohsen Shafic, and included among its members Professor Samia Rashid, Professor Samia El-Sharkawi and the Director of the Cairo Centre. After several meetings in the premises of the Cairo Centre the draft law was prepared.

Having been examined by the Legislative Department of the Ministry of Justice of Egypt, this project is now ready to be submitted and adopted by the Egyptian People's Assembly at its current session. Once finally adopted, the Cairo Centre will hold an international conference in order to highlight the wider perspectives which this law offers in the field of international commercial arbitration.

The draft law was distributed to some interested departments and institutions in the Arab countries. Some States are also considering drafting their own legislation adopting the Model Law.

New Egyptian draft law is prepared as lex specialis in the Egyptian legal system

The reform committee decided to work on the reform of the rules pertaining to arbitration in international business relations. At the same time, it was noted that the amendment of the Code of Civil and Commercial Procedures (CCCP) could lead to opposition from traditionalists refusing the modern tendencies reflected in the UNCITRAL Model Law, which favours the liberation of arbitration from the old nationalistic dogmas by recognizing to a large extent its autonomy *vis-à-vis* the domestic State courts. Thus, the draft law was prepared as an independent legislation and as a *lex specialis* in the Egyptian legal system to be applied basically in international commercial arbitration. However, the draft law permitted the application of domestic arbitration if the parties agree to that.

The proposed law would accordingly be achieved without amending the provisions of the CCCP, which would remain applicable to domestic cases falling outside the scope of the new *lex specialis*.

According to the language adopted by the committee, all disputes relating to trade, investment or business or other economic relationships are covered by the draft. The drafting committee left no chance for evading submission to the new legislation when promulgated by claiming that the relationship is not deemed to be commercial under the domestic law, with all the consequences resulting therefrom in terms of non-arbitrability or the introduction of a pseudo-distinction between matters arbitrable abroad and matters which can only be the subject of arbitration in Egypt.

Moreover, the reform committee decided that non-arbitrability should be defined by a single clearly stated criterion: matters which cannot be subject to settlement. *A contrario* any matter that the parties can settle by their mutual consent, either in court or out of court, would be considered by its nature as arbitrable, and no reference is made to the concept of public policy matters which had been utilized in the past to unduly restrict the scope of arbitrable matters.

The draft law also provides that the parties are free to choose the place of arbitration, and they are free to choose a place outside Egypt.

Meaning of International Arbitration in the draft law and its territorial scope of application

The committee followed the same criterion contained in the Model Law for the purpose of determining the cases in which the arbitration can be characterized as international.

The committee has found it appropriate to provide that arbitration is considered also international in all cases where the parties have agreed to refer to an international organization or centre for arbitration in accordance with the rules made applicable by that organization or centre. Hence, an arbitration agreed to be conducted under the auspices of the ICC, the AAA or the Cairo Centre will always be considered as "international" even if taking place among Egyptian parties in relation to what could normally be considered as a domestic relationship.

The committee adopted the same policy in the provisions of the draft Law which determine the geographical scope of application of the new law. The draft law clearly indicates that the provisions of the new legislation are not simply of territorial application, in the sense of being intended to govern only those arbitrations taking place within the country. On the contrary, the new law could have extraterritorial application if the parties agree to choose the new Egyptian legislation as the applicable law on the arbitration.

The Committee adopted a liberal attitude with regard to the possible extraterritoriality of the new Egyptian law on arbitration. The new draft law provides for the freedom of the parties to choose the *lex arbitri* to govern an arbitration taking place in Egypt.

Following the UNCITRAL Model Law, the draft law makes it clear that the choice of the arbitrators is not required to be undertaken by the parties themselves. Accordingly, it puts an end to the abusive recourse to article 502, paragraph 3, of the CCCP to claim that the appointment of the arbitrators by third parties is contrary to a rule of domestic law deemed to be of public policy. Moreover, the draft law recognizes the autonomy of the arbitration clause, and clearly prescribes that the domestic courts must give it full effect by declaring inadmissible any judicial action brought in defiance thereof. Also, the draft law provides that any challenge to the validity of the arbitration agreement, the determination of its scope and other matters related to its interpretation are all within the jurisdiction of the arbitral tribunal.

Inspired by the UNCITRAL Model Law, the draft law included some basic changes in the legal regulation of arbitral procedures. Contrary to the concept prevailing under the CCCP, which prohibits any possible judicial interference in the process of appointment of the arbitrators, the new draft legislation empowers the domestic courts to replace the reluctant party in appointing the arbitrators.

The draft law equally removes all controversy about the possibility of using languages other than the official Arabic language in the conduct of arbitrations taking place in Egypt, as well as the possibility to rely on copies without requiring the submission of the original documents as prescribed by the CCCP.

In addition to the various detailed rules of procedure and other refinements provided for in the UNCITRAL Model Law and adopted in their entirety by the Egyptian draft law, the reform committee introduced some new rules of great practical significance which can be summarized as follows:

(a) In line with the French reform of 1981, the Egyptian draft law concentrates all matters relating to the arbitral procedures within the competence of one of three Courts of Appeal (Cairo, Alexandria, Assiout) as agreed upon between the parties, and failing their agreement only the Cairo Court of Appeal may assume jurisdiction;

(b) All the periods provided for to undertake certain acts have been reduced in the Egyptian draft from 30 days, as envisaged by the UNCITRAL Model Law, to 15 days;

(c) In cases where the arbitral tribunal has rendered a preliminary award which is subsequently challenged before the competent court of appeal, the judgement dismissing the challenge becomes definitively binding. According to the draft law, the grounds on which the challenge has been based may not give rise to a request for nullity once the final award is issued;

(d) It was deemed important to specify that the arbitral tribunal has the freedom to conduct the hearings without being restricted by the formalities provided for in this respect by the CCCP;

(e) The reform committee introduced an article, which has no equivalent in the UNCITRAL Model Law, that codifies a basic principle on the necessity of treating with total equality the two parties, securing for each a fair opportunity to plead his case fully.

The reform committee considered adequate the concept adopted by the UNCITRAL Model Law with regard to the necessity of providing for a reasonable period during which the losing party in the arbitration may challenge the award before domestic courts. In order to limit that period of uncertainty, the draft law requires as a general principle that the interested party deposit its request for annulment of the arbitral award within the 90 days following its receipt of the award.

The innovations introduced by the Egyptian draft include the following rules:

(a) The arbitral award does not become final except in one of two cases: the expiration of the 90 days without the deposit of a request for annulment: or the dismissal by the Court of Appeal of a request for annulment. Prior to that, the award is not susceptible to enforcement by the Courts;

(b) Once the award becomes final according to the rule stated above, its enforcement may be requested according to considerably simplified procedures, subject from a practical point of view to only one exceptional ground, namely that it is not proved contrary to the public policy of the country where enforcement is sought.

Finally, it should be noted in this respect that the Egyptian Court of Cassation has clearly indicated on various occasions the need to construe restrictively the concept of "public policy". According to the established case law of the highest Egyptian court, this concept is similar to that of *ordre public internationale* as understood by the French judicial and doctrinal authorities.

4. Open floor

PROFESSOR GILBERTO BOUTIN
Panama

I just wish to make a few comments on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) as it relates to Latin America. The Inter-American Convention on International Commercial Arbitration (Panama, 1975) is inspired by the New York Convention and, thanks to the Ecuadorian delegation, incorporates it. For the purposes of Latin America it has been quite positive, for the simple reason that arbitration, either through the Panama Convention, which is the central point of dispute settlement, or the New York Convention, has allowed two effects to take place: cooperation in the jurisdictional sphere and integration of Latin American law in the area of commercial law. These two effects are essential, simply to recall a nostalgic,

territorial law in Latin America, inherited from the Spanish colonies, which without this Convention perhaps would not have allowed integration of a supranational modern law.

There are some difficulties, above all in the area of Panama as a financial, maritime and reinsurance centre. Among them is the problem of the nationality of the award and the problem of violation of due process, which virtually constitute situations of which jurisdictionally speaking there is no clear definition. European, especially French doctrine, has contributed greatly to this matter. No doubt we can say that this contributed to the integration of Latin American law.

ARON BROCHES
Former Vice-President and General Counsel, World Bank, Washington, D.C.

I shall be very brief. I asked to speak in order to express disagreement with the views of Albert Jan van den Berg, a great authority on the New York Convention, as to his interpretation of the coverage of non-national or national awards. In the meantime, the same view that I want to express has been expressed by Professor Bernini, and I therefore do not find it necessary to take the time of this meeting by enlarging on the point.

LUIS COVA ARRIA
President, Centro Permanente de Arbitraje Marítimo, Caracas

I have asked for the floor in order to offer a few ideas with respect to arbitration in developing countries. The previous speaker advocated arbitration by the Cairo Regional Centre. What has happened is that regional centres of arbitration are being created in developing countries. The situation is that, unfortunately, arbitration has become a business. Not only has this been said by people in the developing countries, but distinguished judges in arbitration centres such as London frequently devote themselves to travelling to various countries, advancing the idea that London, or New York or other centres should be chosen as the centre for arbitration. This of course presupposes large fees for lawyers, transport of witnesses and so on. Let us be frank: for the developing countries this represents additional costs to their economies. Therefore, the need has been felt for the creation of arbitration centres in developing countries. Of course it is difficult because those traditional centres do have their advantages. They have created what is known as the *lex mercatoria*. It is said to be a law, and that is what is being sold in a sense. There is a tendency in the business community to consider that that is the true law. But we can understand that the *lex mercatoria* is increasingly becoming the common law: the principle that the laws of other countries of the civil law or continental tradition do not seem to apply very often.

In a very specific field of international law, namely maritime law, an association has been created, the Ibero-American Association for Maritime Law created in the year 1987. One of its chief functions from its inception was to promote maritime arbitration. It has created a centre for maritime arbitration, a permanent centre known as CEAMAR with headquarters at Caracas, whose function incidentally is to try to address a great many maritime issues.

This of course has an advantage, because for our countries it means replacing ordinary processes of justice that are often, for reasons of efficiency and economy and professionalism, not adequate. It is felt that this could be more economical. Within the region there already exist people with the necessary training, perhaps over a long period of years, to replace the prevailing situation of dominance of the traditional centres of arbitration that I mentioned earlier.

I wanted to inform you of the existence of that centre, and to request members of the Ibero-American group who are present here to ratify the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), as well as another Convention, which has been mentioned at this Conference by the representative of Chile, Rafael Eyzaguirre, the Inter-American Convention on International Commercial Arbitration (Panama, 1975), which is much more complete than the New York Convention. It is broader in scope and offers possibilities for administrative arbitration, arbitration that allows the use of arbitration centres.

BONITA THOMPSON
Vancouver Centre for Commercial Disputes, British Columbia International Commercial Arbitration Centre, Vancouver, British Columbia, Canada

First of all, I would like to express on behalf of Canada and those people involved in the international arbitration business our great gratitude to UNCITRAL and to its secretariat for the work that has been done with respect to international commercial arbitration. But for the work of UNCITRAL, we in Canada would not have the opportunity at this date to participate in international commercial arbitration both inside and outside our boundaries, to the extent which others have enjoyed for such a long period of time. We thank you and the secretariat very much for that.

My intervention at this point comes from my experience of being an academic, then a legislative draughtsman working on the UNCITRAL Model Law in Canada, and then an executive director of an arbitral institution at Vancouver, and subsequently acting as a consultant in private practice. I would like to address an area which I believe is being overlooked. In working with commercial parties in all these various life forms that I have had, I found that we tend as lawyers to forget about the commercial realities. The commercial realities often deal with the reasons why disputes occur. They arise because of misunderstandings, poor communications and a variety of other ills which are not initially perceived as being legal rights, or disputes over legal rights, but ultimately, when they get into the hands of lawyers, become addressed in those terms. So although it is very important to work on unification and uniformity in the area of defining legal rights, it is also important to talk about the process that we use to deal with disputes that occur in these contracts.

In that area I have become very interested in working on the design of consensus and collaborative-based processes which can be combined with final adjudication processes such as arbitration. I think it is very important to begin to have people aware of these various kinds of consensus-based processes, how they work, their design objectives, and how they can be incorporated properly into an agreement so that the parties do not spend undue time trying to figure out what the process is to resolve the disputes, but are rather able to focus on the substance of those disputes.

I suggest that perhaps it would be appropriate in this august body to consider the possibility of providing assistance to parties in the international commercial arena to develop and incorporate options for consensus-based processes, combined with final adjudication processes, into their clauses and into their contracts. It seems to me that if we can provide a convenient and easily understood road-map to a variety of these processes, we will then be on the road to a more harmonious business relationship internationally, and parties will not spend so much time and energy on the design of the process at that late stage. It is a focus on preventive practice of law.

CÉSAR GUZMÁN-BARRÓN
Sobrevilla, Lima, Peru

I represent the Commercial Arbitration Centre of Peru, which is affiliated to the International Centre of the Inter-American Commission on Arbitration. Peru as an integral party has signed the 1975 Panama Convention and the 1958 New York Convention. I wish to share with you the Peruvian experience in arbitration.

First, I wish to announce that by legislative decree of 4 March 1992 Peru has adopted the UNCITRAL Model Law on International Commercial Arbitration, which has been a step forward in international arbitration. The work leading to the adoption of the decree was for us a significant experience which we should like to share with you. The adoption of the Model Law arose from the fact that four years ago we learned that our association could serve as a counterpart to UNCITRAL and proposed to our Government the incorporation of the Model Law.

In incorporating the Model Law, however, we are studying, in a Commission of the Bar Association of Lima, a very important subject for Peru and, I presume, for several Latin American countries and possibly other developing countries. Judicial power has proved to be a very negative experience. The alternative, an autonomous process for conflict resolution not only in commercial matters, as in arbitration, is very important. For this purpose, we should again analyse article 6 of the Model Law, which says that a court can supervise and will have to cover aspects not designated. In this respect, in Peru we are studying the possibility that it may be an ad hoc court, a special court, that would be entrusted with the supervision of arbitration; would execute any unexecuted awards without having to appeal to judicial solution; and would designate arbitrators when they are not designated by the parties. In other words, it would truly create a parallel, independent, autonomous jurisdiction. We think that would be the only way in Peru for businessmen to achieve arbitration, to achieve this solution to their conflicts. This is the position that we are considering. It would be very important to bear it in mind in the work of UNCITRAL. Although it is true that we have adopted the Model Law, we are leaving the door open to continually refining that legislation. We can say the same about the experience of Peru in relations with UNCITRAL. This Congress for us has been a very important experience.

In the Bar Association, we have decided to organize a national congress on international trade law. On that occasion we will analyse the desirability of signing the conventions on transport and international sales. That is where we stand and we have indicated that there is a relationship - not yet a totally binding one - between UNCITRAL and other organs such as the Paris Chamber of Commerce. For this reason, in Peru we have decided to establish a support commission to serve as an informal counterpart of UNCITRAL. Unfortunately, however, because of other important matters, we have not been actively involved in UNCITRAL activities.

There should be a national counterpart group in that forum. That is where we will find present those whom we should have liked to hear at this Congress: the corporate groups that either use or do not use the conventions, the universities and specialized organs. That is why - and I beg your indulgence for addressing something other than arbitration - we would like to stress that there should at some time be, as a result of this Congress, mention of the need for countries like Peru, which cannot be actively involved in UNCITRAL, to have support groups made up of those in the legal, corporate and university community and the Government, who have a special interest in the development of the very important activities of UNCITRAL.

J. B. DADACHANJI
Advocate, Supreme Court, New Delhi

Mr. Chairman, we heard the excellent lectures by Professor van den Berg and Professor Ivan Szasz. I as a practising lawyer involved in arbitration would like to point out the practical difficulties which arise out of article 2 of the New York Convention in the developing countries.

Article 2 has not defined what a domestic agreement is, or what an international agreement is, or an agreement with an international flavour, as some authors have called it. The result is that there are varying views taken by courts of law in the developing countries. In England, for example, it is enough if one of the two residents in England happens to be a foreigner; an agreement is treated under the 1975 Act as an international agreement. In the United States, I understand that even if there are two United States nationals signing an arbitration agreement, if the subject-matter is outside the United States and involves rights and liabilities in a third country, it is treated as an international agreement.

On the other hand, there are other judgements in developing countries which are to the effect that unless the agreement results in a foreign award it cannot be treated as an international agreement, but a domestic agreement, particularly because in many developing countries, because of the national laws, the collaboration agreements with developed countries have a clause saying - it is a standard sort of language - that the local law of the developing country will govern the contract. Then comes the problem. If the local law of the country governs the contract, the arbitration law and the law of the land would treat the arbitration to be under the local law, the national law, and it would be a national award, but not a foreign award.

These are the views which are currently floating in the litigation world. Certainly it requires some kind of inquiry by UNCITRAL to recommend what should be done. Professor van den Berg said that it is a question of interpretation. But where do we end with interpretation? There may be conflict of judicial opinion in the same country; it has happened in my country, India. Then there is the conflict of judicial opinion between different countries. In one country the court may take one view of what a foreign award or a domestic agreement is. Another country may take a different view. How are we to settle these conflicts of interpretation? Is it necessary to have an international tribunal constituted, and is it worthwhile investigating and attributing to that tribunal the decision as to the interpretation of the New York Convention? Or is it that under the ICC rules some further amendments may be made, and the tribunal may be given the power to interpret the clauses of the treaty? Or should there be a separate Convention to define these problems, particularly when there is a practice growing in developing countries in joint venture agreements with foreign collaboration, to say that the local law of the country will govern the contract.

The other problem would be as to the enforceability and the challenge to the enforceability of awards. The public policy which has been commented upon by the previous speakers is a very elastic and flexible term. Many awards have been set aside. For instance, a London award granted damages to a London party for breach of contract by a public sector in another country on the grounds that the directors were all government officials, and the government officials, wearing two hats, banned the export of that particular commodity to England. The London arbitrator said that that was not a *force majeure* clause. It was avoidable, because the same people were in the ministry as well as directors of the company. When it came for enforcement in the country where the public sector was, the high court took the view that it was against public policy, because in the law of the land public sector companies, although held 100 per cent by the Government, are totally different entities. I want to point out these practical difficulties. The previous speaker suggested that UNCITRAL is the right remedy. Yes: I say that. I would recommend it as a lawyer. But what about the existing agreements, the ICC Rules, the New York Convention?

Notes

[1]United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), article 22; 1956 Convention on the Contract for the International Carriage of Goods by Road, (CMR), article 33; 1961 International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV), article 61; 1970 International Convention Concerning the Carriage of Goods by Rail (CIM), article 61; 1970 International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV), article 57; 1980 United Nations Convention on International Multimodal Transport of Goods, article 27; 1971 Budapest Agreement on Cooperation in Maritime Commercial Navigation, article 13.

[2]A. J. van den Berg, *The New York Arbitration Convention of 1958* (Deventer, Kluwer, 1981).

[3]*Yearbook Commercial Arbitration*, vol. III, (Deventer, Kluwer, 1978) p. 225.

[4]A. J. van den Berg, "Should an international arbitrator apply the New York Arbitration Convention of 1958?", J. C. Schultsz and A. J. van den Berg, eds., The *Art of Arbitration*, (Deventer, Kluwer, 1982) p. 39.

[5]*Journal du droit international*, No. 4, 1988 p. 1207.

[6]*Yearbook* . . ., vol. III, p. 137.

[7]*Yearbook* . . ., vol. III, p. 212; *Yearbook* . . ., vol. VI, p. 142; *Yearbook* . . ., vol. XI, p. 185; *Yearbook* . . , vol. XIII, p. 129; *Yearbook* . . ., vol. XIV, pp. 156 and 191; *Yearbook* . . ., vol. XVI, p. 13; ICC award 6531; *Yearbook* . . ., vol. XVII, pp. 221-225; ICC awards 6752 and 5597, unreported.

[8]A. J. van den Berg, *The New York Arbitration Convention of 1958* (Deventer, Kluwer, 1981).

[9]ICC award 4604, *Collection of ICC Arbitral Awards, 1974-1985* (Deventer, Kluwer, 1990), p. 546. See also P. Bellet, "Prospects for and enforcement difficulties of the arbitral award", Colloquium of arbitrators, May 1990, ICC Institute of International Business Law and Practice.

[10]ICC award 2730, *Collection of ICC Arbitral Awards, 1974-1985* (Deventer, Kluwer, 1990) p. 490; ICC award 5485; *Yearbook* . . ., vol. XIV, p. 156; ICC awards 6733, 6223, unreported; ICC award 6697, *Revue de l'arbitrage* No.1 (1992), p. 135.

[11]See European Convention of 1961, Panama Convention of 1975, UNCITRAL Model Law on International Commercial Arbitration.

[12]ICC award 6379, (*Yearbook* . . .), vol. XVII, pp. 212-220.

[13]ICC awards 5385, 6223 and 6733, unreported.

[14]*Yearbook* . . ., vol. IV, p. 191; *Yearbook* . . ., vol. VII, p. 137; ICC award 6379, see note 12 above.

[15]*Yearbook* . . ., vol. III, p. 212.

[16]*Yearbook* . . ., vol. VI, p. 142. The arbitral tribunal of the Netherlands Hide and Leather Exchange also said: "It may be added that if the New York Convention were not to be applied by virtue of its article VII, paragraph 1, the formal validity of the arbitral clause is still to be upheld" (*Yearbook* . . ., vol. VII, p. 137).

[17]*Yearbook* . . ., vol. XVI, p. 13.

[18]ICC award 6531; *Yearbook* . . ., vol. XVII, pp. 221-225.

[19]ICC award 5597 unreported.

[20]*Yearbook* . . ., vol. VI, p. 142.

[21]*Yearbook* . . ., vol. VII, p. 137.

[22]*Yearbook* . . ., vol. X, p. 89; *Yearbook* . . ., vol. XIV, p. 191; *Yearbook* . . ., vol. XVI, p. 13.

[23]*Yearbook* . . ., vol. VI, p. 142; see also *Yearbook* . . ., vol. XI, p. 185.

[24]ICC award 4589; *Yearbook* . . ., vol. XI, p. 148.

[25]ICC award 5485; *Yearbook* . . ., vol. XIV, p. 156; award 3383, *Collection of ICC Arbitral Awards*, p. 394; award 5385, unreported; MAC award, *Yearbook* . . ., vol. XIV, p. 209.

[26]ICC award 1512, *Collection of ICC Arbitral Awards*, 1974-1985, p. 33.

[27]*Yearbook* . . ., vol. XIV, p. 156.

VI. The future role of UNCITRAL

A. The changing role of UNCITRAL

PROFESSOR KAZUAKI SONO
Sapporo, Japan; Assistant General Counsel, International Monetary Fund; Secretary of UNCITRAL, 1980-1985

Professor Boss noted at this Congress that 3 thousand billion dollars are transferred every day through the Clearing-House Interbank Payment System (CHIPS) in New York City alone, many of which of course extend to various corners of the world. Of these 3 thousand billion dollars, the share of payments which are related to traditional trade is only a few per cent. The rest are for other purposes in these days of free capital movements which transcend national boundaries. Traditional trade in exchange of goods is no longer a dominant driving force for the global distribution of resources.

Before the rise of modern sovereign States, order and stability were maintained through adherence to universally accepted practices. However, with the rise of modern States, each State, in the exercise of its sovereignty, promulgated laws governing economic activities within its boundaries. In those days, the pattern of economic interaction between States was rather simple and mostly through the exchange of goods by trade. The idea of and attempts at attaining uniformity of national laws relating to international trade, which emanated from the 1920s,were based on that order. The year 1966 when the Commission was created still belonged to such a period. It was the time when the door for East-West trade was opening after some breeze over the iron curtain.

During the early years, UNCITRAL therefore engaged almost exclusively in rule-making in those areas in which the law under various national legal systems was well-developed, such as international sale of goods and carriage of goods by sea. In such cases, the jurisprudential base and the practical consequences of the existing rules were well-known. UNCITRAL could be proud to be the "king bird". It was the period of unification of private laws of each nation relating to the traditional pattern of trade, without questioning the adequacy of the then existing scheme of international legal order relating to trade.

However, the Bretton Woods system which was also originally structured on the aggregate basis of localized domestic orders collapsed at the time when the surroundings for economic activities were already being transformed to accommodate the freedom of direct foreign investments and the liberalization of capital movements. The decisive blow emerged in the form of the floating exchange rate system in March 1973. Since then, also simultaneously supported by technological innovations in communication and transportation, the globalization of economic activities has swiftly integrated most commerce in the world and the pattern of commerce has significantly changed.

In response to the changing pattern of global economic activities and shift in the importance of their types, the work programme of the Commission gradually evolved away from the traditional trade areas. Examples were the preparation of a legal guide on large industrial works and a legal guide on electronic funds transfers. The preparation of the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works* was also regarded as suitable for the

first project of the UNCITRAL Working Group on the New International Economic Order, which was created in 1980.

We cannot deny that the use of a highly politically charged term such as new international economic order for the name of one of the UNCITRAL working groups at that time was in response to the waves of political pressure within the United Nations system directed toward making UNCITRAL undertake some work in the field of the new international economic order. However, as the report of its first session clearly indicated, the Working Group did not believe that a mere exchange of battle cries or political slogans which were then prevailing were productive. But it was this political timing which provided an excellent opportunity for the Commission to expand its work programme beyond the traditional areas in the light of the changing pattern of global economic interaction. The historic mission of the Working Group on the New International Economic Order, however, will be completed next year by the adoption of a Model Law on Procurement by UNCITRAL. In this connection, let me add that, at the present Uruguay Round negotiations of GATT, uniform rules with fair and transparent standards are also sought in such areas as rules on preshipment inspection, and rules on import licensing procedures, with a striking similarity in the basic philosophy with the UNCITRAL project on procurement.

The picture of commerce has changed dramatically even since the time when the new international economic order was hotly debated during the 1970s. In this context, it may be of interest to note that the International Law Association's Committee on Legal Aspects of a New International Economic Order, which was created at its Belgrade Conference in 1980, the same year as UNCITRAL's Working Group on the New International Economic Order was created, already changed its name to the Committee on the Legal Aspects of Sustainable Development at its Cairo Conference of the Association last month. The time may also have come for UNCITRAL, with the expected completion next year of the present work programme on the new international economic order, to rename the Working Group perhaps as the Working Group on the Globalized Economy, which would consider the broad implications of the globally integrating economy and the adequacy of the existing legal approaches and adjustments which may be required in response to this reality.

If economic activities have become global without boundaries, the law also ought to deal with them at the same dimension by delocalizing itself. For example, if the notion of fairness in trade continues to be dealt with at a localized national level in the traditional manner, it is quite conceivable that the notion could bear more and more the colour of protectionism. Initially each nation's economic regulations were designed primarily for the maintenance of an orderly domestic market, and that was suitable in those days of traditional trade. However, recently, increasing attempts to expand the applicable scope of such regulations extraterritorially are already creating conflicting jurisdictional assertions which will entirely confuse parties who are engaged in economic activities.

In the field of the settlement of international commercial disputes, the success of UNCITRAL's activities in international commercial arbitration was fortunate, as they coincided with the period of the formation and expansion of globalized economic activity in the 1970s. The flexibility of arbitration often enables arbitrators to manoeuvre away from those not-so-helpful national laws, particularly for the settlement of disputes involving complex modern contracts. And, through arbitral awards, there is the phenomenon of a resurgence of the rule of reason at a delocalized level away from the legal positivism and traditional dogma.

For complex transactions which were seldom heard of in the past, there is a tendency to have resort to "the general principle of law", *lex mercatoria*, or "the principle of good faith and fair dealing" particularly through arbitration clauses. During the Congress, I have been told personally from a reliable source that 5 to 10 per cent of the disputes which are submitted to arbitration now contain

such clauses. The person who provided me with this information said "only 5 to 10 per cent", but to me it is an extremely significant percentage. Yet, the contents of these principles are still far from certain. However, it is interesting to note in this context that international bodies such as UNIDROIT and EC are currently undertaking to elaborate their contents more concretely in the form of principles of international contract law under the influence of the United Nations Sales Convention, which continues to make a valuable contribution to reorient the traditional dogma-oriented jurisprudence beyond the area of sales. The International Law Association has also started to elaborate global contract principles, interestingly through its Committee on International Commercial Arbitration.

As Professor Don King also indicated, a need may soon be felt for the establishment of a global court of commerce initially for cases where resort has been made in arbitration to a national *lex mercatoria* or to general principles of contract law. At this Congress, we already heard a suggestion of Professor Sohn for the establishment of an international tribunal to interpret uniform legal texts.

The globalized economy is dismantling the old order. The current EC unification process, which calls for gradual and voluntary surrender of sovereignty by its members, is in part in response to this reality. We have already heard an inspiring statement by Professor Uwe Schneider in this regard. The statements by Professor Manuel Olivencia Ruiz and Professor Joachim Bonell were also generally supportive of this trend. The waves of "deregulation" or "liberalization" of administrative or economic regulations at local domestic levels are only preparatory and lay the basis for the future global order. Liberalization as such is not an ultimate goal. Once old straps are untangled, the world would have to discuss, whether in the name of a new ideology or not, the direction which the global village should pursue. In the field of economic activities, even the discussion of a uniform antimonopoly law at the delocalized level is already easily conceivable. We should truly reflect upon the distortion which exists between the reality of globally integrated economic activities and the mutually independent localized regulatory orders.

We should look far ahead. We should be innovative in considering desirable patterns of legal order for the twenty-first century which would ensure the smooth functioning of globalized commerce for the benefit of all regions.

At this Congress, we have already heard several interesting proposals of specific topics which UNCITRAL could consider. For example, Professor King stated that those areas such as consumer protection, which UNCITRAL wisely avoided in the past, could now be taken up, and that we should no longer shy away from them. Professor Helen Hartnell referred to the need for uniform international standards for the substantive validity of the contract, including issues such as good faith, fairness and fraud, which relate to public policy. She indicated that, whatever may have been the historic background to leaving such matters to domestic law, we should no longer be afraid of engaging in global public policy discussion in the light of changes. There were also proposals to undertake work in the fields of intellectual property rights, patents, trade marks, international bankruptcy or insolvency law, security interests, brokerage services and even transnational tax law.

Of course, UNCITRAL cannot take up all these subjects, nor should it pick up any of them simply because they are proposed. Furthermore, although in the past the creation of a project by a piecemeal approach did not necessarily disturb the basic legal order, we should realize that these are now being proposed in the context of the changing pattern of global commerce. Therefore, a piecemeal approach would be dangerous, unless we are clear about a common philosophy before undertaking it. Moreover, there are also other bodies qualified in specialized fields. For example, if the elimination of confusing discrepancies arising from conflicting jurisdictional assertions is one of the goals to be attained in the field of international bankruptcy or insolvency, the Hague Conference may be the most suited, although the project would no longer be confined to the area of the traditional

choice of local laws. In the field of security interests, UNIDROIT could be encouraged to undertake work in the light of its accumulating expertise in closely related areas such as finance leasing and factoring. In any event, if our new work is prompted by the changed pattern of commerce, there is a need for an integrated approach in a concerted manner, as Mr. Jeffrey Ritter indicated. Otherwise, each effort will not only be inefficient, but may be even counter-productive, particularly when we are aiming at a new legal order suited to the globalized economy.

Perhaps, through a body such as the UNCITRAL Working Group on the Globalized Economy, whose establishment I suggested, we could begin identifying those traditional legal frameworks, approaches or concepts which were suitable in the past, but may have become obsolete or no longer well suited in the light of changes, and we could first deliberate on conceivable basic approaches or philosophies to cope with the changes before elaborating any specific rules. There is a clear need to substantially revise certain criteria which are still based on the localized legal order and to adjust the traditional distinction between private law, public law, economic law and public international law.

UNCITRAL, as the core legal body in the field of international commerce together with its important coordinating role in relevant activities of other international organizations in this field, which role it has not yet exercised to the fullest extent, could assume a modest leadership in this new direction. The change would have to be gradual to avoid confusing frictions, and proper timing would be very important for any specific concrete project. But the globalized economy is clearly inviting new thinking whatever our background may be in legal training. The United Nations needs such a body that looks ahead and prepares for the future. I feel that this Congress is marking a decisive turning-point in that direction.

B. Promoting wider awareness and acceptance of uniform law texts

SECRETARIAT OF UNCITRAL

Need for promotion

Let me start with a somewhat heretical question. Why is promotion needed if there is such a crying demand for uniform commercial law? After all, I do not know of any fire department that engages an advertising agency. So let us diagnose what are the reservations against the acceptance of uniform law, what are the obstacles?

General obstacles as identified by René David

Here we can look back to what Professor René David said: The first obstacle is conservative routine, prejudice and inertia. He did not simply refer to Governments or ministry officials who, as we know, are overworked and may have other priorities at times. What he meant is that "lawyers and businessmen are attached to the status quo, to the order of things which they know, and to which their behaviour and their ways of doing things have been adapted. They view all reform with suspicion, seeing primarily the trouble it will cause, rather than its beneficial effects and the progress which it is intended to produce . . . This attitude can be clearly seen when the international unification of law is considered. Everyone accepts unification provided this means the others falling into line with [his] national law".[1]

There exists a somewhat more subtle form which is that one praises the new uniform law and recommends it to other States. As a newspaper headline about the Lausanne Congress of the International Council for Commercial Arbitration in 1984 read: A model law wished on others.

René David has identified a second obstacle which is the "diversity of nations with their different economic, social and political structures and divergent ideas of justice." A third difficulty in unification is the "diversity of methods used by lawyers of the various countries in the elaboration and development of the law". "This obstacle", he says, "may be considerable, but it should not be insuperable if powerful interests call for unification - methods must be governed by man, not man by methods."[2]

Specific objections to individual text

Then there are specific objections to an individual text. The known devil is preferred to the unknown angel, or a novel law is rejected as a synthetic compromise on the lowest common denominator without supporting case law. I remember that the UNCITRAL Model Law on Arbitration was once labelled "Esperanto law" and "UNCITRAL fast food". When I heard this first I thought the critic was ignorant of the efforts that went into developing Esperanto or he was not a gourmet. Then I learned that he was the co-author of a new national law that followed the recipes of traditional home cooking which are: do not look beyond your own plate and kitchen, and never ask customers - let alone foreign ones - about their views and wishes.

Let us now look at the possible therapy, i.e. how to overcome or to reduce the obstacles.

An original French proposal for radical cure

First there is an original proposal for a radical cure presented already at the second session of UNCITRAL by the representative of France who happened to be René David. He concluded that only a fundamental methodological change would have a chance to reduce the gap between the slow pace of international legislation and the requirements of the modern world, especially in the field of international trade. He suggested that States should agree, by way of a general Convention, to accept rules established by the Commission, or under its auspices, as a body of common law (*droit commune*). The rules would apply only to international transactions, and could be avoided by a State if it took the initiative and rejected a particular instrument, indicating the rules that it would apply instead.

The French proposal has been advanced twice or three times in the early sessions of UNCITRAL, and, as Professor Alan Farnsworth reported, each time it has drawn respectful attention but little enthusiastic support. Professor Farnsworth then said (in 1972): it is "doubtful that the time has come for such a dramatic departure from the traditional technique of State-by-State ratification. Unhappily it is also doubtful that the traditional technique can meet the challenge of advancing UNCITRAL's goal of the promotion of the progressive harmonization and unification of the law of international trade".[3]

My own conclusion would be that probably the time still has not yet come. Perhaps in the twenty-first century one will look again at this proposal, possibly in a somewhat more limited way, for instance, limited to those States that attend a conference concluding a particular convention and that vote in favour of that convention at the conference (although this very method might endanger the whole project). So I think we have to look for less radical ways of dealing with the obstacles, and many references have been made during the Congress, so that at this stage I will merely present a few of those in summary fashion.

Less radical treatment during preparatory work

First there should be responsibility and care in assessing the desirability and feasibility of any proposed project. This Congress is but one of many means of getting practice and expert input for the future work programme of any of the international organizations in the field. Of particular relevance are the comments and views by concerned circles, concerned in the double sense of the word.

Let us also learn from René David again: "Routine is the worst and most dangerous enemy of the unification of law, which is therefore most likely to be achieved in 'new subjects' where there are no well-established national traditions, and where it is also more evident that a new system of law, adapted to the needs of a new world, must be constructed."[4]

Then there should be a conscientious delimitation of the substantive scope of application and a realistic choice of the form or vehicle of unification. We heard and learned a great deal about the difference between convention and model law, and about legislative and non-legislative means of unification.

The next important factor is to utilize, during the preparation of a text, the common wealth of experience of experts from diverse regions and legal systems, from all States and interested international organizations, for elaborating a text of high quality with just and practicable solutions. That text should be in plain words and corresponding language versions in Arabic, Chinese, English, French, Russian and Spanish (all these languages to be used during the preparation of the text).

Texts of dubious quality that do not meet an evident need cannot successfully be promoted, we wrote in a secretariat paper four years ago. I would add that they should not be promoted at all because it would constitute irresponsible conduct on the part of a formulating agency, it would create confusion and disharmony, and it would constitute a disservice to the cause of unification in general. However, I think a good text justifies its high production costs. These costs, by the way, are higher than many people in the room believe. My estimate, for example, of the United Nations Sales Convention's costs only to the United Nations, i.e. excluding all the costs for delegations, would be about US$ 4 million. Once you have spent that amount of money I think there is some justification for spending a little bit more for making known that text, because, as many have said during the Congress, the real answer is: information, information and information.

Information, information and information

Information should be disseminated to all interested circles during the preparatory work, and their comments and suggestions should be solicited. Information must go to all addressees and ultimate users of a given text, the practitioners, the professional circles, and I would especially add judges. Information to all interested persons should also explain the general goals and advantages of uniform commercial law.

Let me mention some of the messages to be spread by the disciples of the "unification church". First, make known and explain the new text, point out the seriousness of the preparation and the wealth of expert input, describe the underlying policy considerations and dispel misconceptions. Examples of frequent misconceptions are: The UNCITRAL Arbitration Rules are only for ad hoc proceedings. The answer is: No, it is not just for ad hoc any more. Or: there is legal certainty with my own law, let us not get a new law. Well, at least in many cases this is not more than a myth if one looks closer.

Professor Iván Szasz gave the example of the 10 Hungarian professors looking at the Model Law on Arbitration. In the beginning they had many concerns and wanted to change a great number of provisions, and at the end they stayed very close to the text of the Model Law. I can personally assure you that, having witnessed the same exercise in quite a number of jurisdictions, it was exactly the same case everywhere.

When you explain more about what went into a rule, what were the main policy considerations, I think that texts, once they are better understood, are more easily acceptable. One can point at many compromises not being on the lowest common denominator. There are quite a number of very innovative compromise solutions which are better than any of the two conflicting sides for which a compromise was necessary. A good example is article 16(3) of the Model Law on Arbitration. The fact that the list of participants in the UNCITRAL meetings on arbitration closely resembled the "Who's who in arbitration" is, of course, less impressive to any of those experts that were not in the room when the arbitration law and rules were prepared.

Then one should describe the need for departures from traditional domestic law, and suggest that the relevant "comparative law" is not one's own familiar law but any foreign law, foreign in the double sense of the word, in that it is also perceived as strange or unknown. We should emphasize that an acceptable uniform law is soon a widely known quantity and increasingly refined by centrally collected court decisions of many countries. For model laws the "hi-fi factor" should not be underestimated. It would be best to strive for the highest possible degree of fidelity to the structure, the language and the contents of the model law. That was clearly recognized by the Hong Kong Law Reform Commission when it concluded: We have no problems with our law, we heard no criticism, but this Model Law is easily recognizable by foreign users, and that is the main reason for enacting it in a new ordinance in Hong Kong.

Finally, one should create awareness about the fact that an international contract or transaction is not naturally rooted in one particular domestic law, and that its international specifics are best catered for in a uniform law. Two short examples may suffice. Take an international sales contract that typically involves carriage of goods, often over a long distance. In case of minor defects, the traditional answer of allowing avoidance of contract with the need to ship back the goods is economically less sound than the Convention solution of preserving the contract and of compensating the loss by payment of damages. Also, general conditions for import or export sales to a variety of countries are more adequately formulated against the background of the widely known and used United Nations Sales Convention than that of a single domestic law. Even more apparent is the need for uniform law in the case of multilateral transactions such as credit transfers or, even clearer, bills of exchange; the rights and obligations of the various parties to one and the same circulating negotiable instrument can be determined adequately only by one single system of law running with that instrument rather than being subject to the current unsatisfactory "departmentalization" of law.

Current methods and their possible improvement

Let me now indicate the current methods of the Commission and the secretariat so as to take stock of what is being done already, which in itself may be of informational value to some of you, and then see what improvements can be made.

Activities of the Commission and its secretariat

First we have the publication of uniform law texts and of related materials. Thus we have the *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, published in the early years of UNCITRAL; these were texts of other organizations at the time. Then we have

the official records of diplomatic conferences concluding conventions, and the book of UNCITRAL, of which an advance copy of the second edition has been distributed to Congress participants. We have the yearbooks of UNCITRAL which comprise the regular documentation of the particular years, including the report of current activities of other organizations and the status of conventions. We also have brochures with explanatory notes that we call the "ten-pagers". These are very useful, we are told, to busy ministry officials who have to prepare an explanatory memorandum in order to introduce legislation. Then we have the case-law on UNCITRAL texts, known as "CLOUT", soon to be published.

Finally, we co-author promotional material of other organizations. For example, UNCTAD published a study on the economic and commercial implications of the Hamburg Rules and of the United Nations Convention on International Multimodal Transport of Goods. The Commonwealth Secretariat publishes accession kits and we have assisted in the preparation of one on the United Nations Sales Convention; Professor Muna Ndulo is the author. There is one by Professor H. E. Joko Smart on the Hamburg Rules, and the latest is by Gavan Griffith, the Solicitor-General of Australia, on the Model Law on Arbitration.

Then, as you know, we organize or co-sponsor regional or national seminars and similar programmes. Regional and national seminars have their advantages and disadvantages in terms of cost-effectiveness, in terms of participation, in terms of the effects they might have. We in the secretariat believe that both types should be used, tailored to the individual needs. I trust we will hold considerably more series of national seminars in the future.

Then there are presentations of UNCITRAL texts by delegates, members of the secretariat and others at conferences, meetings and symposia organized by other organizations. We have not counted them, but my estimate would be that there were at least 60 organizations that sponsored such events where UNCITRAL texts were discussed. Only mentioning that number I think supports what Malcolm Evans, the Secretary-General of UNIDROIT, said about the dire need for coordination which I would fully support. It presumes knowing about these events well in advance; I feel that this is the main problem in this particular area. It is probably not the main problem in another area of coordination, namely that regarding the division of labour in the preparation of texts (but that is another story).

We have provided, and continue to provide, technical assistance. In particular, we assist in consultations in the process of legislative reform. This may be on a somewhat more general level, for example, by preparing an analytical comparison of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and the United Nations Sales Convention which was of use to ULIS States, or a comparison between the Hague Rules and the Hamburg Rules. Or it may be a more specific task like reviewing reports of law reform commissions or commenting on draft legislation.

We also brief visiting lawyers and, at times, business representatives. A month ago we had a visit of Belgian industry representatives. I think that it is very useful to talk not only to ministry officials and lawyers but also to business representatives.

Finally, we train interns and host scholars; unfortunately, that has to be done at their own expense since we have no funds.

Activities of others relating to UNCITRAL texts

I have only mentioned activities that the secretariat or the Commission are currently doing in the area of promoting wider awareness of uniform law. But we should not forget that there are many

more activities out there that are done by others, without our initiative or assistance. For example, there are recommendations or endorsements by other organizations, national or regional seminars and similar briefings, writing, teaching and research, often carried out or initiated by delegates. When one looks back at what has been done, or what is still being done, one should recognize that there are certain results already. I remember that, when I started 17 years ago and I said I was working for UNCITRAL, some people asked: what is that? Some might have suspected it to be an organization for the boycott of citrus fruit because of its strange English name. Now, the fact that UNCITRAL has become widely known does not mean that we should rest on our laurels. We should look ahead and do even more.

Possible improvement of UNCITRAL activities: more of the same

As for the activities I have outlined, I think the answer is simple. We should do more of the same, subject to availability of human and financial resources, and these are limited with nine professionals and a lean budget. The same applies to the last part of my talk where I will mention possible additional activities.

Possible additional activities

What I am going to present now should not be understood, please, as a plan of action. Nothing has been decided and certainly no financing has been secured for any projects that would require additional funds. These are simply ideas for future consideration, some more easy to implement than others.

New publications

First, and here I pick up a proposal that was made by Singapore about four years ago, we could publish an UNCITRAL newsletter, although unfortunately it is believed that there are already too many newsletters in the United Nations and we would have a problem of financing. Such a newsletter should not only contain ratifications and enactments, news about obstacles, references to new abstracts of cases, to new publications and to seminars on UNCITRAL texts, but also, and in particular, a digest of UNCITRAL's current work, i.e., a summary of ongoing projects that is easy to digest. After all, very few people have the time to go through all the relevant preparatory documents in order to find out what is being done and what are the aims. As part of the newsletter, or as separate flyers, one could have "two-pagers" on given texts, guides to conventions, model laws and legal guides. These could be reprinted in bar journals or trade journals.

Second, one could have a comparative table of national enactments of UNCITRAL model laws, list modifications or any additions so as to monitor acceptance and, more importantly, to provide transparency. This would further increase the use of the model law as a standard; as the corporate counsel of a large enterprise revealed at an arbitration conference, he had a user's dream: he wanted a little brochure which contained all the arbitration laws of the world, and under the structure of the model law you could easily see where any deviations and additions were.

Then, classified bibliographies for each UNCITRAL text could be prepared.

Official commentaries have not been favoured by the Commission. We had one from Professor Kazuaki Sono on the Convention on the Limitation Period in the International Sale of Goods, but never thereafter was there an official commentary prepared on a final text. However, I sense there is a trend, at least as regards model laws, towards having a commentary. That is certainly true in the

project on procurement, and is similarly true with credit transfers, and I sense that there is a similar wish developing as regards the uniform law on guaranty letters.

Then, one could envisage an analysis of court interpretation of UNCITRAL texts, with possible recommendations for uniform interpretation. Much has been said on this during the Congress. In my view it is not realistic to assume that there would be in the near future an international tribunal rendering binding decisions on the interpretations; but what such a tribunal or similar board could do is render advisory opinions which are clearly not binding, but should be persuasive.

Then, one could soon have on-line the status of conventions, the bibliography and similar information. And to look more into the future one could imagine having one international documentation centre for commercial law as in other areas, such as that for labour law in Geneva.

Cooperation with national support groups

One very important point is to strengthen cooperation with national liaison persons or groups as regards those countries where we have contacts, often with members of the Commission or with former delegates (there is a high correlation between membership and adoption of texts, as we showed in a secretariat note four years ago). In respect of other countries, we should establish close links with ministry officials and other interested persons, providing them with constant and full information about our activities, and consulting them on the most appropriate measures for providing wider awareness and acceptance of UNCITRAL texts. After all, they are the best people to know what is needed in a given country and who would be competent for initiating action towards ratification. You heard during the Congress references to such possible support groups or persons; for example, the comments of César Guzmán-Barrón Sobrevilla about developments in Peru.

Expert advice and other technical assistance

One could try to meet requests, in particular from developing countries, for expert advice on law reform and other technical assistance. Possible tasks would include: review and revision of commercial laws in a country or in a region; technical assistance in establishing required elements of legal infrastructure, for example, an arbitral institution, a procuring entity or an investment office; technical cooperation with United Nations Economic Commissions and other regional organizations, and world bodies like the World Bank and the International Maritime Organization and their regional advisers. Here, the first point would be to explore funding possibilities, either from UNDP or other multilateral aid agencies, or perhaps bilateral aid agencies or even individual sponsors.

Assistance for teaching and research

Finally, I think that it might be a good idea to provide assistance for teaching and research in the field of international trade law. It could start with a worldwide survey of courses at universities and other institutions, to ascertain the extent of the coverage of uniform law. One might also think of providing assistance in installing such courses. In that respect one could think of another seminar similar to the one held in 1975, the goal of which was to teach how to teach. One might consider preparing a compilation of recommended teaching materials, and one might initiate dissertations and similar studies on UNCITRAL texts and on possible topics for future work, as I understand the CEC does.

Finally, and that is my last idea at this hour, one might organize or co-sponsor summer courses on uniform commercial law, perhaps similar to the ones at the Hague on private international law and public international law. I confess to believe that uniform commercial law is at least as important as

private international law in the traditional sense. The courses should be practice-oriented and possibly last for only two weeks for that reason. I could even envisage having in the future something which is already in place for maritime law, namely a World Commercial Law Institute, or a United Nations School of Trade Law.

Conclusion

Let me conclude by revealing what we in the secretariat say at times, namely that we shall continue with our unification efforts as long as we do not too adversely affect international trade.

Speaking of efforts, and more seriously, I should like to take the opportunity of thanking my colleagues and team mates for the tremendous work they have put into preparing this Congress. We pledge to continue with our efforts to assist the Commission in its historical mission to contribute to the establishment of a comprehensive body of uniform law for world commerce in the twenty-first century.

C. Aspirations and priorities of developing countries - Representatives from various regions summarize what developing countries expect from UNCITRAL

ABBAS SAFARIAN NEAMAT ABAD
Head, Department of Treaties, Ministry of Foreign Affairs, Tehran, Islamic Republic of Iran

I should like to pay tribute to the accomplishments of UNCITRAL on the occasion of its twenty-fifth anniversary.

I also very much hope that, in the coming years, the Commission will be able to attain its main objectives as regards the unification of the laws and rules governing international trade. Such unification can only come about by positive action being taken to harmonize different national legal systems through the elaboration of international conventions and uniform laws and through the formulation of appropriate and necessary legal recommendations in the form of legal guides and model laws.

During its first 25 years, UNCITRAL has achieved major progress in furthering the process of the unification of international trade law, and has thus been able to make a significant contribution towards harmonizing the different legal systems in existence.

A simple comparison between the international trade situation in 1966 and the situation today reveals just how successful UNCITRAL has been in fulfilling its mandate.

The developing countries, including my own, are fully aware of the importance of the tasks that UNCITRAL has embarked upon, bearing in mind the paramount role played by international commerce in fostering harmonious international relationships, not only in the economic but also in the cultural and human spheres.

As a representative of a developing country that is a member of UNCITRAL, I feel I must draw attention to the fact that there are other, less-advanced developing countries that, despite a genuine desire to become actively involved in UNCITRAL's sessions, are unfortunately unable to do so for want of financial resources. It is thus necessary - and this point has been underscored by the General Assembly on several occasions - to seek suitable ways and means of enabling that group of States to

take part in the deliberations of this international trade law forum. It is only in such circumstances, with the participation of all nations, that UNCITRAL can be certain of having adopted decisions that are consistent with the ideals stemming from the different legal systems existing across the world.

The global political scene has undergone profound changes in recent years, changes that took on new dimensions in 1991, when the economic systems based on the socialist model collapsed, and a fairly large number of States declared their independence and adopted new economic visions. Those nations are in great need of help and assistance in overcoming the adverse economic factors of this transitional phase. I believe that UNCITRAL should support those countries, at least through the dissemination of information.

We are now in an era of *détente*, the period of the cold war having ended and the threat of armed conflict having thus considerably diminished. These developments prompt us to believe that the logic of weapons will sooner or later give way to the logic of dialogue. A world no longer burdened by the arms race will be able to devote greater efforts to its economic life, which will lead to a substantial expansion of international commerce. In such circumstances, UNCITRAL will have an additional responsibility, namely that of formulating uniform rules and international conventions that will promote the development of trade in a just and equitable environment, where account is taken of the mutual interests of all parties, be they the rich and industrialized countries or the less advanced and developing countries. It should be noted that an approach of this kind is in the interests of the rich, developed countries. Indeed, the world's long-term socio-economic stability requires that the developed countries bring their North-South economic relations into balance, so as to meet the emerging needs of international trade. In other words, it is necessary that they accord increased importance to the process of building up the economies of their poorer partners. The economic prospects for the year 2000 appear very different from the situation existing today. According to some experts in the field of international economics, the end of the cold war could give way to the emergence of a trade war. The outcome of such a development will undoubtedly affect differently the developed countries of the North - with their strong economies and advanced technologies - and the developing or less advanced countries of the South.

In general terms, commercial activity in Asia can be divided into two distinct areas: regional trade and trade on a worldwide level, in particular with the West. Most Asian countries will be seeking in the future to develop their trading links with very distant partners. However, it should be noted that the countries of the Asian continent differ considerably from one another in regard to their national income: per capita income in Japan is over US$ 20,000, in the Republic of Korea and Taiwan Province of China it is only US$ 2,500, and in South-East Asia it is no more than a few hundred dollars.

It thus appears reasonable, and indeed necessary, that some of the resources that become available from reductions in military spending should be allocated to meeting the needs of the developing countries during the coming decade, with those countries being encouraged to improve their terms of trade. In the field of international commerce, the less advanced and developing countries need to be offered greater opportunities to enable them to contribute to their own economic recovery, and hence to the equilibrium and stability of the world economy.

With regard to the technology of electronic funds transfer, which today represents a necessary factor in the development of international commerce, we feel that more positive and constructive action should be undertaken in this connection, not only at the national but also at the regional and international levels. We fully share the view that this technology should be exported at an appropriate and affordable cost. We realize that our conventions and our unifying laws and rules will receive wide

international support only if most countries have access to advanced technologies, particularly in the fields of banking and telecommunications.

Clearly, if the developing countries cannot take an active part in the work of UNCITRAL, the outcome of the Commission's deliberations will always favour those States that have the best research facilities. In such a situation there is a risk that the global economic order will fail to serve the interests of some trading partners in the future. That would have detrimental consequences for the main objectives of UNCITRAL, which has set itself the task of promoting the development of trade with all countries.

As I have already said, trade - as a key element in furthering international relations - will be able to play a clearly beneficial role for the developing countries only if the structure of international commercial relationships is based on just and equitable principles. It is only in such circumstances that mankind can achieve the goals of true social justice within the economic sphere and guaranteed world peace and security.

I should also like to raise a number of points concerning the views of developing countries regarding the terminology used by UNCITRAL. It has been observed that texts often contain terms and expressions whose usage is not yet standard in the trade law of some countries. The same also applies to the use of sophisticated work methods and highly advanced technologies. There is a need for the UNCITRAL secretariat to take steps to ensure that its draft laws and conventions are, to the extent possible, worded in conformity with the legal concepts current in all countries.

In view of the limited time available to me, I should like to conclude with the following few suggestions concerning UNCITRAL's programme of activities in connection with the United Nations Decade of International Law.

First, the Commission should continue - as in the past and even on a larger scale - to sponsor regional seminars and symposia with a view to providing jurists and legal practitioners in the developing countries with all necessary information about the process of unification and the techniques used to further it, and also on the advantages that unification will bring them.

Secondly, it would appear necessary at this point for UNCITRAL to set aside a special place on its agenda for the drafting of uniform rules on a number of contemporary economic issues, such as provisions governing relations between foreign investors and the countries in which they invest.

Thirdly, thought should possibly be given to the formulation of a uniform text for the international harmonization of foreign currency exchange dealings. This would be of considerable advantage to those countries that do not possess a single foreign exchange system.

I shall conclude with my fourth and final proposal, which also forms the main focus of my statement. Since I am speaking here in the General Assembly Hall, I should like to address my remarks not only to UNCITRAL but also to the International Law Commission and to all other organizations responsible for the codification of international law, whose attention I wish to draw to the highly important points set out below.

It is essential that the process of the progressive elaboration and codification of international law should take into account, *inter alia*, the principles of Islamic law.

Indeed, how can one ignore such an ancient and rich legal culture that today represents the basis of the legal regimes of some 50 nations? The first step would be the harmonization and widespread dissemination of the contents of Islamic law.

ANA ISABEL PIAGGI DE VANOSSI
Professor and Judge, Buenos Aires

Argentina is pleased to be able to participate in this Congress, which is being held to mark the United Nations Decade of International Law. My country is committed to improving both its domestic economy and the economy of the region. To that end, it wishes to express the views presented below.

UNCITRAL has prepared uniform rules on some of the most important aspects of international trade. Nevertheless, a major part of its mandate relates to training and assistance. It should currently intensify its efforts in these areas by organizing its own symposia or arranging regional seminars with a view to familiarizing professional lawyers and other interested parties with the problems encountered and progress made in the field of international trade law. This would be one way of speeding up the process of ratification of the conventions.

The main purpose of the technical assistance programmes could thus be to focus on the promotion of the existing international conventions and other instruments being drafted by the Commission.

More fellowship programmes should be organized so that young lawyers in developing countries can receive training and practical instruction in international trade law. In addition, the secretariat could urge the Governments of the developed countries to inquire whether their commercial and financial enterprises would be willing to accept interns from developing countries. Consideration could also be given to the possibility of seminars on international trade law being organized for those countries by the United Nations Institute for Training and Research.

The training of specialized personnel is of particular importance to us, the lack of such personnel being one of the most serious shortcomings in the field of international commerce. It is in this spirit, and in the knowledge both of the advantages to be gained and of the difficulties involved, that we voice these needs.

Argentina's comments stem from its recognition of the commendable and positive efforts that UNCITRAL has made during its first 25 years of existence to overcome obstacles and fulfil its mandate.

My country earnestly requests that renewed efforts be directed towards achieving a common understanding in the sphere of international trade law.

As you will appreciate, there are significantly fewer training opportunities and specialists working on international legal issues in the developing countries than in the developed countries. This situation is inversely proportional to the needs of development, since progress in our countries means mere survival, whereas in the developed countries it is simply a question of improving the existing standard of living.

As will be realized, the human values at stake are different, and UNCITRAL can provide considerable assistance to those countries that are struggling to embark on their economic and social development. To quote a metaphor used by a former President of the General Assembly, failure to

grasp this fact would seem to be as reckless as travelling first class on an aircraft with bombs on board.

The Commission can, through various forms of advisory services, implement extensive training activities under the umbrella of the United Nations. It thus has the ability to alter the direction and course of international collaboration among the developing countries.

A proposal for future work. Bearing in mind the Commission's specialized expertise and the terms of its mandate, my delegation feels that it would be useful for a study to be made of the contractual provisions that frequently appear in international privatization agreements, in view of the importance of privatization to the restructuring of the developing countries and to their economic growth. It will be appreciated that this is a topic of vital importance, and UNCITRAL might well find it appropriate, as part of its substantive work, to prepare a legal guide on the drafting of privatization contracts. The preparation of international contracts of this kind usually entails complex issues with respect both to the legal relationship between the parties and to the obligations created, which often extend over a long period.

The aim of the proposed guide could be to identify the legal issues raised by privatization and to examine possible approaches to dealing with them. By pointing out the problems and indicating ways of solving them through suggested solutions that take into account the differences between the various legal systems across the world, such a guide would be a useful tool in the contract negotiation and drafting stages. It would thus be of assistance to countries that are in process of privatizing their enterprises, and would ensure that the buyer's legitimate interests are respected. It is a known fact that privatization arrangements are being conducted in a partial legal vacuum.

The proposal that this document should take the form of a guide stems from the fact that States have not yet had sufficient time to define their positions on this matter, and from the difficulties involved in drawing up a single set of rules for so wide a variety of situations.

Argentina calls upon the Commission to continue to give special consideration to the interests of the developing countries, and should be grateful if, when examining its long-term programme, the Commission would take into account the special problems affecting those countries.

B. M. KOENTJORO-JAKTI
Assistant to the Minister of Trade, Jakarta, Indonesia

It is becoming increasingly clear to the world community that, in the progressive development of international trade law, the principle of equality of States should above all be interpreted as the right of every State and people, not only to exist, but also to develop. Indonesia as a former colony and a developing nation is firmly of the view that codification of international trade law should have as its goal a set of rules regulating international relations, with an eye to promoting equity, mutual redress and compensation for the inequalities of developing countries *vis-à-vis* the developed countries.

In order to promote and formulate uniformity in international trade law, the United Nations General Assembly in 1966 mandated UNCITRAL to codify a global code of trade law. The invaluable contribution of UNCITRAL towards the harmonization of legal norms relating to international business transactions proved highly desirable in fostering and facilitating the development of international trade and economic relations among nations. Another objective of UNCITRAL was to foster closer relations with UNCTAD. Its work has included: the 1974 Convention on the Limitation Period in the International Sales of Goods; the 1980 Vienna Protocol amending the Convention on the Limitation

Period in the International Sale of Goods; the 1978 United Nations Convention on the Carriage of Goods by Sea; the 1980 United Nations Convention on Contracts for the International Sale of Goods; and the UNCITRAL Model Law on International Commercial Arbitration. All the foregoing instruments have entered into force. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has also come into force, while the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes and the 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade have not yet entered into force.

It is evident then that UNCITRAL's work was mainly directed towards fulfilling the needs of trading partners involved in private international transactions. Also evident is the fact that only a small number of the newly independent States of the Asian region have ratified, acceded to or signed the conventions. In this connection, an exception is the 1958 New York Convention, which has been ratified by 15 States, including Indonesia, and which has been signed by one State. None of the Asian countries have signed, ratified or acceded to the 1974 Convention on the Limitation Period in the International Sale of Goods and the Protocol amending it and the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes. Four countries have signed the 1978 Hamburg Rules, four States have signed, ratified or acceded to the 1980 United Nations Sales Convention, while one State has signed the 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.

Could this development be an indication that the Asian countries are more concerned with matters of international trade that better fulfil their respective specific needs? Member States have shown their interest by participating in deliberations of the Commission. However, financial constraints prevent them from taking a more active role in every session.

The problem therefore in its simplest denominator is that perhaps the priorities of UNCITRAL are considered not relevant or at least not central to the basic needs and interests of the developing countries, including those in the Asian region and Indonesia. Thus, in our opinion, the solution should be shaped in terms of identifying the key areas of interest to the developing countries that are also within the context of harmonizing and unifying international trade law and the competence of UNCITRAL. I would point to international commercial contracts in general, commodities, industrialization, transnational corporations, transfer of technology, industrial and intellectual property, international payments, international transport, international commercial arbitration, private international law and trade facilities, as possible examples.

Concentration on such areas of concern would, I believe, not only reflect the top priorities and aspirations of the developing countries in their fundamental pursuit of development, but also generate their greater participation in UNCITRAL. Only then would it be possible to formulate relevant legal instruments of a convention or of a model law nature.

As to the developing countries of the Asian region, their development thrust is heavily oriented towards international trade, and they are especially interested in many of the critical issues and activities of UNCTAD and GATT. It is therefore within those areas of core interest to both developing and developed countries that UNCITRAL could attract and engage the participation of developing countries. Resulting agreements could be of a bilateral, regional or multilateral nature.

Another constraint, as already expressed, is that of the process and procedures undertaken in ratifying such laws and conventions within the legislative systems of the developing countries. Common ground and specific needs of the developing countries should be sought to facilitate more

acceptable passage. Such measures would therefore serve, particularly in the long run, the UNCITRAL goals of greater harmonization and unification in world trade law.

A brief reference to the evolution of development thinking by the newly independent countries of Asia may assist our understanding. The States newly emerging from colonial occupation first found it imperative to assert their independence and consolidate their sovereignty. In the economic sphere this was achieved through such strategies as import substitution, thus incurring the proliferation of protective trade barriers. When the shortcomings associated with these policy measures became evident, many countries redirected their efforts towards more outward and open trading policies. While such policies carried a higher risk to fledgling industries and even to sovereignty, they also ensured rapid development, mainly through increased export earnings.

In this way the Asian development experience has been visibly successful to date. Two prime examples of this trend are the Republic of Korea and Singapore, as two of the four newly industrializing countries of Asia. This does not mean that abiding by GATT rules comes easily. As a matter of fact, while our commitment to a free, open, rule-based and non-discriminatory international trading system cannot be questioned, some of the developed countries, which are also contracting parties to GATT, have sought various means to circumvent its rules through non-tariff barriers, managed trade etc. Moreover, while many Asian developing countries, including Indonesia, have unilaterally liberalized their international trading activities and procedures, many developed countries have not reciprocated by easing their access regulations to their markets.

The developing countries of Asia were therefore in a sense forced to give more priority to implementing trade policies in the context of public international trade law. This, however, can also be seen as an indirect way of achieving the objective of UNCITRAL, that is, of harmonizing and unifying private international trade relations, which is in the context of private international trade law.

In a similar vein, Indonesia has been adjusting itself with a certain measure of success to the important dynamic and fundamental changes which have occurred in the world economy in the late 1970s and early 1980s. That is, Indonesia has directed its economic policies towards a more free, open and rule-based economic system.

After its independence and for the best of motives, Indonesia focused on import substitution, preferential treatment for State-owned companies and heavy subsidies. With the advent of the recession in the late 1970s and 1980s, Indonesia looked for greater competition and export orientation in its development policies. Deregulation packages were designed and implemented to both stimulate export earnings, diversify the economy and increase the participation of the Indonesian business community. In this connection, it is pertinent to note that Indonesia and its foreign partners jointly doing business in Indonesia have the choice of applying their mutually agreed terms and conditions under acceptable international law on business transactions and in accordance with the public order of Indonesia. Furthermore, any disputes arising from such international transactions can be arbitrated under the 1958 New York Convention.

By 1991, Indonesia's efforts bore fruit. The composition of its total export products, which before 1982 was dominated by oil with 80 per cent of the total, changed dramatically. By 1991, the exports of non-oil products had already reached more than 60 per cent of total exports, as compared with only 20 per cent in 1982. At the same time a substantial change occurred in the composition of the non-oil exports. Where until a decade ago, such exports principally consisted of primary commodities, today processed and manufactured goods dominate. Moreover, the export trading business involves not only large-sized companies, but also medium- and even small-sized ones.

The results so far are encouraging. The newly-oriented trade policies, supported by the business community, have brought about an environment conducive to international trading activities, and Indonesia is optimistic that its development progress will propel it to become one of the newly industrializing countries of Asia. Other Asian countries too are on the same track.

By observing such phenomena, UNCITRAL, should, I believe, draw the conclusion that, forced by certain important changes in the world economic situation, developing countries in the Asia region have set priorities in their efforts to achieve their development aspirations. UNCITRAL could therefore perhaps act as a catalyst in promoting the efforts to implement UNCTAD recommendations, such as those relating to restrictive business practices, in accordance with General Assembly resolution 35/63 of 5 December 1980, and to promote their acceptance by developed countries. This would follow the precedent set by the developing countries in accepting GATT trade policies and rules. By acting in that way, it is our sincere hope that UNCITRAL can fulfil its main obligations and objectives in preparing its role for the twenty-first century.

ROBERT RUFUS HUNJA
Permanent Mission of Kenya to the United Nations

Before I give my views on the future aspirations and priorities of UNCITRAL allow me to spend a minute on a general overview of the past 25 years from the perspective of a developing country delegation.

When one reads General Assembly resolution 2205 of 17 December 1966 by which UNCITRAL was created, it is very clear that the Commission was mandated, in paragraph 9, to "bear in mind the interests of all peoples and particularly those of developing countries, in the extensive development of international trade."

In this paragraph lies one of the main reasons as to why the Commission was created. When one reads the *travaux préparatoires* of the resolution quoted above, it is quite clear that one of the basic arguments for creation of the Commission was that the international trade law then existing was not amenable to universal application or acceptance. The obvious reason for this was that most of the international trade law then existing was primarily developed by trade associations and other organizations mainly in the West, and therefore primarily represented their interests. Thus, in the interests of fairness and universal acceptance and application, international trade law had to take into account the changing nature and structure of world trade. The Commission was therefore charged to take account of the particular interests of developing countries that were largely the new players in world commerce.

After 25 years in existence it is therefore only fair to ask how successful the Commission has been in this particular important mandate. My submission is that success in this respect has been rather limited. Allow me very briefly to mention some of the reasoning that leads me to this contention.

The first problem is the lack of will on the part of the international community to change unfair trading laws. I shall use, as an example of this unwillingness, the United Nations Convention on Carriage of Goods by Sea (the Hamburg Rules). This is one convention (as was very eloquently described by Professor Joko Smart yesterday) in which UNCITRAL enacted a new, fair, equitable and workable regime on the carriage of goods by sea. And what has so far happened since its adoption in 1978? Though it is coming into force later this year, one cannot fail to note that the majority of States parties are African countries joined by a few Latin American and former socialist countries of

Eastern Europe. The failure of the large trading countries to ratify this particular Convention is indeed very telling.

The other serious problem is one of representation. States and business people will only feel an obligation to adopt and apply international trade law if their interests are part and parcel of the grand bargain that forms that law. This means that developing countries have to be involved in the formulation of international trade law if they are to be expected to adopt and apply it. This does not just involve representation in the working groups and the Commission, but has to start with representation at the earliest study group level where the agenda and direction of most projects are set. On representation in the working groups and the Commission, the Secretary-General of the United Nations presented a report in 1991 to the Sixth Committee of the General Assembly in which he decried the inadequate representation of developing countries. This situation can be traced to the lack of funds to send experts to meetings. All of you whose Governments can assist have therefore to be ambassadors of UNCITRAL on this issue to your Governments. Otherwise the lack of universal acceptance and application may persist to the level where UNCITRAL will have failed in one of its most basic and primary aims.

I must also state that from the perspective of developing countries, the choice of topics to be dealt with by the Commission has not of late fully reflected their most urgent needs. This is not to say that electronic funds transfers, electronic data interchange or electronic contracting, *inter alia*, are not important and useful topics. They indeed are very important and cater to the technological revolution of the last decades. But for most developing countries, and especially on the continent of Africa, their barriers to trade and the lacunae and problems they face in international trade are much more basic. Thus UNCITRAL must not only take into account the interests of developing countries while dealing with these topics already before it, but in the future it must also deal with issues of particular relevance to developing countries, such as fair commodity sale contracts and intellectual property rights.

I should also like to briefly mention one or two issues of great importance to the continent of Africa in which UNCITRAL could play an important role. We in Africa have not failed to see the growing trend towards formation of regional trading and investment blocks in the Americas, in Asia and in Europe. Faced with this possibility of being marginalized in world trade, Africa is turning inwards to exploit all the possibilities and benefits of a well developed intra-African trade. Such regional organizations as the Preferential Trade Area for Eastern and Southern Africa and the Economic Community of West African States are geared towards the promotion of trade among African States with the aim of creating an African common market in the early decades of the next century. UNCITRAL could be of great help to the States members of those organizations and the organizations themselves, as they undergo the process of regional unification of trade law. I would urge that UNCITRAL cooperate on issues of funding with other United Nations bodies, such as the United Nations Development Programme and the Centre on Transnational Corporations, and, together with the secretariats of regional organizations, they could map out ways in which UNCITRAL expertise in the development and unification of trade law could be useful.

In conclusion, I must say that whereas UNCITRAL has produced excellent, high quality texts in its area of competence over the last 25 years, some fair amount of thought and ingenuity needs to be given to ways in which the wider and full interests of developing countries can be taken into account in the future.

D. Final suggestions for the future activities of UNCITRAL

I. W. HARRACKSINGH
Attorney, Trinidad and Tobago

It is unnecessary for me to put forward any further commendation of UNCITRAL. Enough has been said of its work and achievements. My simple observation is that, having regard to the lamentable delays that are experienced between the preparation of a text and its universal acceptance, we might usefully consider whether the resources of UNCITRAL may not be apportioned between the promotion of the universal acceptance of its texts and in the development of new texts.

The other aspect that I would like to speak on is dispute settlement. The delay when disputes have to be determined in local jurisdictions has been ably covered in this Congress, but I wish to add that when an international transaction reaches a dispute, invariably the principals, that is the vendor or the purchaser, the lessor or the lessee, become transformed from principals to proxies, and they are just the proxies of the banks, the insurance companies or the transport companies. I would therefore urge that these organizations be persuaded to take a more active role in the development of any future codes.

Finally, I should like to add a special tribute to Professor Clive Schmitthoff, and to suggest that consideration be given to establishing an endowment or scholarship fund in his honour.

SERGEI KELADA
Belarus

I listened to Gerold Herrmann with satisfaction today, when he talked about facilitating information about the unification of legal texts. Here I would like to express a wish that the secretariat of UNCITRAL would come up with a programme for consultant services within which one might prepare a training course for use in legal schools when they study a text drafted by the Commission. It would be useful for many countries, including my own, to have this. Also it would be good for other countries in the territory of the former Union of Soviet Socialist Republics. As far as we know, the Centre for Human Rights at Geneva is doing this kind of work and preparing manuals for training in human rights. It would be excellent publicity for UNCITRAL, and it would be valuable practical material. We could have national textbooks then worked out for our students on the basis of UNCITRAL material. It is important for jurists not only to know UNCITRAL documents, but also to be very familiar with them and to make the greatest practical use of them in the future, for example in Belarus. Finally, we commend the secretariat of UNCITRAL for its report and commentaries on the Hamburg Rules.

JUDGE HOWARD HOLTZMANN
The Hague, Netherlands

I should like to make a personal suggestion for the future work of UNCITRAL in the field of dispute resolution. The project that I suggest would build on UNCITRAL's strength and reputation and success in this area, and would, I believe, enhance the usefulness of the UNCITRAL Arbitration Rules. As we all know, one of the greatest advantages of the UNCITRAL Arbitration Rules is that while they provide detailed guidance as to some parts of the arbitration proceeding, they permit broad flexibility for the arbitrators to conduct other parts of the proceeding in such manner as they consider

appropriate. Now, flexibility is of course desirable at some points in an arbitration, because it permits the arbitral tribunal to tailor procedures to meet the circumstances of particular cases, and also to take into account the expectations of parties who enter the arbitration with different legal and cultural backgrounds. I think particularly of parties who appear before arbitrators who are of different cultural and legal backgrounds. However, when rules are flexible as they must be, parties may be uncertain as to the procedures the arbitrators will adopt. Flexibility can lead to unpredictability, and unpredictability can result in surprise.

How can we prevent arbitration from thus becoming ambushed by arbitrators? The answer may be quite simple. Let us first identify those areas where the UNCITRAL Arbitration Rules permit broad flexibility, and then let us prepare a legal practice guide that would describe one or more procedures that arbitrators successfully use in those parts of the proceedings where the rules permit them to choose the appropriate manner in which to conduct the case. The purpose of such a legal guide would not be to add to the rules or to substitute rigidity for flexibility; the purpose would be to show various ways by which flexibility can be effectively utilized. Let me give you an example of what a practice guide could do. The UNCITRAL Arbitration Rules do not refer specifically to pre-hearing conferences, but they provide flexibility for the arbitral tribunal to hold such pre-hearing conferences. A legal guide could analyse the benefits of pre-hearing conferences, describe the process, and provide a check-list of topics for pre-hearing conferences that arbitrators in particular cases might then consider. Another example is that a legal guide could provide information on methods of presenting evidence in arbitration, a topic that has long been on the agenda of the Commission. The legal guide might also be the appropriate means to describe various procedures that have been found useful in multi-party arbitration, another topic already on the agenda of the Commission.

These are only a few examples of subjects that a practice guide could cover. The guide would serve several useful purposes. First, it could help reduce uncertainty in those areas where the rules permit flexibility. Second, it could help promote uniformity, which is an effective way of removing the possibility of surprise. It could increase what we have heard Professor Szasz call transparency. UNCITRAL has promoted the policy of flexibility. Let us now help parties and arbitrators to utilize that flexibility wisely. UNCITRAL has the experience and the resources, the intellectual resources to undertake this task. I think we can do it successfully; I think it will be helpful not only to users of the UNCITRAL Arbitration Rules, but also to those who use other rules that also permit flexibility.

GUSTAVO CUBEROS GÓMEZ
National University of Colombia, Bogotá

Reference has today been made to what countries expect from the work of UNCITRAL. This reminds me of the words of President John Kennedy: "Ask not what your country can do for you, but what you can do for your country." We are not only talking in the developing world about asking for as many things as possible from UNCITRAL. We are raising questions in the legal sphere relating to rules on such matters as trademarks and patents, bankruptcy and electronic funds transfer; we are also asking UNCITRAL to improve its channels of dissemination, so that it become a source of fellowships for our students in law.

I share all of those concerns, I support all of those needs, but I believe that they are future oriented, I believe that they are not apposite to the present moment of UNCITRAL. Why? Because of many examples that we could cite. In my judgement the most dramatic examples are: the United Nations Convention on Contracts for the International Sale of Goods, which was 20 years in the making between the time the problem was identified and the time the Convention entered into force; and the United Nations Convention on International Bills of Exchange and Promissory Notes, which

has only been ratified by four countries. I think that it is much better for an entity like UNCITRAL and for the world in which we are living if there are two or three or five uniform bodies of rules which are well-known, which are in force, which are actually applied in the world of trade, rather than having 10, 20 or 30 theoretical formulations.

That is why I believe that the work of UNCITRAL is to consolidate and strengthen this very important task that it has already been carrying out to date, rather than thinking of branching out or growing or making the sphere of its activity a little more diffused. But how can we bring about that consolidation in terms of concrete activities rather than growth? Let us recall that we are here representing many Governments, associations, judiciaries or the legal scholarly community. Let me make this basic comment: the essential point and, with all due respect, I think the most important thing is the role of the law-teaching profession, of law professors, because UNCITRAL is creating a set of rules, sponsoring the formation of bodies of rules, and it is up to all of us in our respective countries to disseminate them. But I emphasize the teaching of law because I feel that professors are the conduit to the new generations who will ultimately get rid of this legal Tower of Babel in which we are living today. If we do not reach our Governments or the new generation of lawyers of the twenty-first century, then, as Gerold Herrmann has pointed out, we would be condemning UNCITRAL to a kind of esperanto, an ideal language, but one which nobody speaks.

MARILDA ROSADO DE SA RIBEIRO
Rio de Janeiro, Brazil

As an introduction I must clarify that I am both a professor of international law and a lawyer of the Brazilian State-owned oil company PETROBAS. I felt encouraged to address some words to this audience in my name and on behalf of the four other Brazilian professors who are attending this Congress, after the comments of the Peruvian delegation yesterday and the report by the Secretary of UNCITRAL. I would also like to refer to the speech by Ana Isabel Piaggi de Vanossi of Argentina, whose words I fully endorse.

For us it is a personal and professional accomplishment simply to have been able to attend the conference. We deeply regret not being able to say that our country is a signatory to the important conventions discussed here. We want, however, to contribute concretely to change the situation and promote a better approach on the part of Brazil to the unified legislation. We therefore propose to form in Brazil a group to support the work of UNCITRAL, in line with the suggestions made by Gerold Herrmann today. The group would start as an institute including professors from various universities who are personally motivated like ourselves, and might, at an early stage, congregate businessmen and make strategic alliances with other institutes. We would at a later stage seek the support of government-related agencies.

We think that this decade may bring a different scenario with a better insertion of Brazil and all the developing countries into the system of international trade. I dare quote the example of my own company, PETROBAS, which in the last two decades has proved that developing countries can find in a competitive field like that of energy and oil technological strength that allows it to make joint ventures in an equal position and exchange experiences with major companies throughout the world.

We are, however, in great need of strengthening our expertise in many areas. I would at least mention project financing; and there is also the challenge of forming the MERCOSUR market with Argentina, Uruguay and Paraguay. We hope, therefore, to have UNCITRAL's support in improving the awareness and acceptance in Brazil of the texts of the uniform laws and conventions.

PUTNAM LOWRY
United States of America

At the beginning I wish to apologize if any of my remarks are impolitic and I inadvertently offend anyone. In terms of suggested items for future work, I wish to make four suggestions.

The first is to discuss a regime for developing security interests in using satellites as collateral for obligations. This is an open area; it is of grave concern to some of our clients.

The second item is enforcement of judgements. The United States does not belong to any multilateral conventions on the enforcement of judgements. We think in part this may be due to the hesitation of the United States to join private international law conventions, but we feel that perhaps there is room for improvement in existing works.

Third, consideration should be given to the possible updating of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, especially concerning the enforceability of interim measures awarded by arbitral tribunals.

Fourth, steps should perhaps be taken to build on the work of UNIDROIT concerning factoring. I anticipate that there may be a problem in the granting of security interests in movables regarding the priority of those interests, since the UNIDROIT factoring convention does not address the priority between factors.

I raise a concern about the endorsement of the Incoterms by the International Chamber of Commerce, because they are copyrighted documents. If I have a copy of the Incoterms and make a photocopy and give it to a judge, that puts me in violation of copyright law. Is it appropriate that we endorse a privately copyrighted document unless ICC is willing to allow reasonable reproduction to disseminate it? I understand that ICC has put a great amount into it, and must make some money on it, but that is a philosophical question I pose for consideration.

We must be very wary of politicizing our work in UNCITRAL. UNCITRAL has succeeded for the same reasons that many other agencies have succeeded, because our work is essentially non-political. You can compare the record of UNCTAD with that of UNCITRAL or perhaps the International Telecommunication Union. As agencies become more technical and less political they seem to succeed more. UNCITRAL must catch the excitement of the people, because it is the people who enforce and cause their works to be implemented. In the State of Connecticut where I am just a country lawyer, we now have a part of the general statute entitled "International Law", where the Model Law on International Commercial Arbitration among other works is codified. The Connecticut Bar Association will stand behind UNCITRAL, ready, willing and able to provide any assistance that we can.

I wish to make a closing comment on the analogy to the fire department. You say that the fire department does not advertise. That is not strictly true. They have fire callboxes on the corner, they use the telephone, they advertise on the inside cover. When they have a commercial law problem, people in the Bar Association know that they can call me. We must do the same kind of thing. We will not advertise in the same way that commercial businesses do, but we should make our presence known, and the Connecticut Bar has volunteered and will continue to volunteer to provide legal support services for countries that cannot afford them on their own.

PAULIN EDOUEDOU
Gabon

Thank you, Mr. Chairman. First of all, I would like to join in the remarks of a recent speaker who mentioned the developing countries as they relate to the process of the unification of international law. My delegation learned a great deal from this Congress. Among those pieces of knowledge one particularly caught our attention, that is, the word "unification". As you know, unification means to unite, to bring together. In our context, that of international law, to bring together means the same as harmonize. Now a question may arise: What can we do to harmonize international trade law, considering all the regions of the world, all the States of the world, or at least a majority of States? We have to harmonize trade law with the participation of all the actors in the international community, including States, international organizations, regional organizations and even subregional ones which are pursuing that goal.

It is quite clear that all States, at least the majority of the Member States of the United Nations, must participate actively in the building of legal instruments which are to govern the various trade areas at the global level. The weak position of numerous States, especially in Africa, seems none the less to be incompatible with the two fundamental concerns which UNCITRAL now has, namely harmonization of international trade law and protection of and assistance to the least developed countries. As mentioned by the Secretary-General in his opening address, "More than ever before, clarity and homogeneity are essential attributes of law, the purpose of which, at least in our conception of it, is to protect and assist the weak. That's how we conceive of the law." From that statement, it seems clear that UNCITRAL cannot validly harmonize international trade law without bearing in mind the view of that category of States with a difficult economic situation. A contrary step might have numerous harmful consequences, including the reticence of States to ratify the texts coming out of UNCITRAL, ratifications with reservations and difficulties in the implementation of texts.

Many reasons underlie the weak participation of some States in the work of UNCITRAL. Let me state the most important of those reasons in order to take a look at possible solutions. I shall limit myself to saying things succinctly. First, there is the absence of information. That is a hindrance. We think that despite efforts made by UNCITRAL in this area, information does not get around much in the developing countries. There also is the lack of training. Many economic operators, many politicians and many professional people are unaware of exactly what the role is of international bodies such as UNCITRAL is. The same is true for conventions which emerge from UNCITRAL. We have also felt that there is, despite the efforts made, insufficient assistance. To be sure, assistance is linked to means; none the less there is insufficient assistance. As a solution, we would therefore envisage the extension of the scope of information by informing States not only through their diplomatic missions, but also directly through their ministries or by other means.

UNCITRAL should therefore also be an information service, an information service which would contribute to better dissemination of information and its centralization. We think that information should be ensured a privileged status. The efforts so far are laudable, and they should continue through intensifying the number of seminars and training courses in the developing countries.

We envisage UNCITRAL's further involvement in training through seminars and colloquiums. We also envisage UNCITRAL assistance to developing countries in the introduction and implementation of legal trade instruments, which remain insufficient in many developing countries.

PROFESSOR FERNÁN NUÑEZ PINEDA
Honduras

It is very difficult at times to participate at the end of a meeting as virtually everything has been said. Nevertheless, by way of introduction, I am a secretary of the Central American Commission on Trade Law and department head at the University of Honduras.

I am concerned that there is talk of developed, developing and less developed countries in this Congress. My question is, what levels are we talking about? With less developed intelligence or more developed intelligence? I have a suggestion to make. At the next Congress we should take into account the participation of the countries of Central America and the Caribbean basin, because if we talk about less developed countries that would include us. The irony of the concept, however, is that few developed countries have ratified the relevant international conventions, whereas the less developed countries that have done so are more numerous.

ABRAHAM MONTES DE OCA
Mexico

Very briefly I should like to recall that this Congress represents a contribution of UNCITRAL to the activities of the United Nations Decade of International Law, and that, as the first global forum of its kind, it is particularly appropriate to the Decade. I have two proposals. First, in my capacity as a member of the Mexican National Committee for the Decade, let me invite all those present, when you return to your capitals, to offer your services to promote the creation of national committees for international law. To date, the number of national committees set up for the Decade is unfortunately very small; only three countries have done so. Such bodies would be highly advisable and appropriate, since they provide a forum within which one can reach out very far in terms of knowledge of international trade law. In that connection, I note that among the Mexican members of UNCITRAL is Professor Abascal Zamora, who is one of the path-breaking disseminators of international trade law in Mexico.

My second proposal is one that I transmit to you from the Mexican committee to UNCITRAL. It is that UNCITRAL be requested to study the advisability of formulating a university curriculum for the teaching of international trade law, which might be offered to universities in interested countries.

MARGARET KENT
United States of America

The future work of UNCITRAL in promoting wider awareness and acceptance of uniform legal texts should recognize and address relationships between commercial law and the taxation of commercial endeavours. Commercial law affects tax law. I will just mention a few instances that reflect the interrelationship.

First, in the United States, title passage is a triggering event that causes taxation to be imposed. Thus, there is a reliance on Incoterms, but an artificial structuring of transactions can be planned. Second, enterprises can currently structure the sale of goods to affiliate companies and other jurisdictions in order to shift income to the most favourable tax jurisdiction, thus siphoning funds from countries that should be receiving tax income. Third, the paucity of background records in the electronic transfer of funds especially to or from tax-haven jurisdictions creates an easy opportunity for flight capital, hiding assets in bankruptcy or divorce proceedings and most obviously tax evasion on the part of customers of some international banks. Uniform tax rules could redress these abuses by providing for the reporting of transactions to taxing authorities. UNCITRAL should solicit

participants in this Congress to further participate in the conference that addresses tax issues and commercial issues in tandem.

PROFESSOR MANUEL OLIVENCIA RUIZ
University of Sevilla, Spain

Let me express a conclusion that can be drawn from this very interesting Congress by using the metaphor of the cook and the soup. I think that in UNCITRAL we have a great many very good cooks who have prepared a few very fine dishes, but as yet few are eating them. Therefore, our satisfaction should be limited, satisfaction about the work we have done, but limited because our goal of unification is still very remote. I therefore think that we must consolidate our work, as Professor Adriana Gomez pointed out, and that consolidation of our work means to make it known. It means to teach it in the educational sense, but also in the sense of showing it, demonstrating it to interested circles as well, not only in legal journals, but also through the economic currents that are most closely related to our work. The delegation of Spain intends, for example, to devote one issue of the *Revista de derecho mercantil* (review on trade law), published at Madrid, to the twenty-fifth anniversary commemoration of UNCITRAL and to this Congress.

As to future work, my delegation would like to emphasize complementary topics more than any new topics. We have addressed, and I think we have done so ably, material or physical rights. I think that we need now to protect the exercise of those rights, to make them effective in practice. I know UNCITRAL's reservations about procedural problems, but I think that ensuring the exercise of those rights would be essential.

Another subject is bankruptcy law. I understand its complexity and the reservations about it, but its vital international importance is such that we should at least identify and define a few areas of particular importance, so that bankruptcy law can truly have an international impact.

MR. SAGOVINIA

I wish to make two suggestions. The first is that, following up a proposal from France which has been pending for the last four years, United Nations conventions may include a provision that if the parties to a contract of international trade so stipulate, then the law of the conventions would apply and supersede the law of the respective nation of jurisdiction over the cases. This would not affect the so-called right of self-determination, which is one of the major criticisms of such a concept.

Second, the future would require that when we talk of a global economy and the clash of economic interests of various economies in international trade, then we must make legal provision that no nation which is not involved in the contract between two countries would impose sanctions and adversely affect the conduct of the transactions. If a law failed to take into account such matters, its acceptability at the international level would be seriously jeopardized.

Notes

[1]R. David et al., eds., *International Encyclopedia of Comparative Law*, vol. II, chap. 5 (Tübingen, Mohr, 1971), pp. 24 and 25.

[2]Ibid., pp. 33 and 34.

[3]E. A. Farnsworth, "UNCITRAL - Why? What? How? When?", *American Journal of Comparative Law*, vol. 20 (Berkeley, 1972), p. 322.

[4]R. David et al., eds., op. cit., vol. II, chap. 5, p. 26.

VII. Closing address

CARL-AUGUST FLEISCHHAUER
Under Secretary-General for Legal Affairs, Legal Counsel, United Nations

It is my privilege to deliver the closing remarks at this first Congress organized by UNCITRAL. It gives me particular pleasure given the importance of the Congress and its theme for the development of international trade law in the new world order - an order which demands increased international trade and commerce if the challenges of development are to be met and the goal of reducing poverty in the world is to be achieved. My pleasure is increased by the fact that the Congress has been held in conjunction with the twenty-fifth session of UNCITRAL, and is therefore a celebration of the twenty-fifth anniversary of the birth of UNCITRAL - an organization which has become the centre of gravity for international trade law unification.

During the past twenty-five years much has been achieved by UNCITRAL and the other formulating agencies in developing uniform law texts in the field of international trade law. It was therefore appropriate that it was decided at the twenty-fourth session of UNCITRAL that an opportunity should be given to examine the current state of the unification of the laws and the rules governing world commerce.

Over the past five days, distinguished participants, you have considered many issues involved in the formulation and development of international trade law. Among others you have discussed the various aspects of the process and value of unification of trade law, the practical aspects and recent developments concerning the many legal texts of universal design and relevance in the fields of sale of goods, supply of services, international payments, electronic data interchange, transport by sea and other modes of transport and dispute settlement. You have heard the views of the end-users as to their practical needs and concerns as regards the existing uniform texts and any future texts that might be developed, and you have heard the particular views of developing countries as regards their aspirations and priorities with regard to work that could be done in the area of unification of international trade law.

In addition, you have considered other aspects of the process of unification such as the promotion of uniform texts, an aspect which has, perhaps, been somewhat neglected in the past, but about which, as demonstrated in the discussions here, there seems to be a growing awareness, not only within the formulating agencies responsible for the preparation of uniform legal texts, but also within government circles and among practitioners and other users of uniform texts. You have also discussed possible topics for future work which could form part of the programme of unification for both UNCITRAL and other formulating agencies. It clearly transpired that unification of commercial law is desirable and important, and that it is responding to the practical needs of international trade and commerce.

As the purpose of the Congress has been to provide a panoramic view of many areas of international commercial law, it was often not possible to discuss in detail the many interesting issues, views and suggestions that we heard during this week. I am confident that they will bear fruit - like seeds planted in fertile soil - by sparking off in-depth discussions in many forums, and stimulate further exploration and evaluation in future research, teaching and writing.

I am equally confident that UNCITRAL and other formulating agencies will draw considerable guidance from the wealth of information and analysis provided in the deliberations of this Congress. The many insights offered by the great number of experts will no doubt prove extremely useful in identifying suitable topics that are ripe for future unification efforts, and thereby help in setting the agenda for unification in the twenty-first century. The information and analysis will prove useful also in evaluating existing texts that have been elaborated by UNCITRAL and other formulating agencies, as well as in evolving strategies for dealing with the important concerns that have been raised here. The discussions will also be of assistance in developing ways and means of promoting uniform texts. They have underscored the importance of UNCITRAL's task of coordination and will be useful in working out modalities for developing closer cooperation among the various formulating agencies working in the field of international trade law in order to enhance the work of unification.

The need to draw on the experience of the past twenty-five years has, perhaps, never been greater than now, given the new world order, which I referred to earlier, in which international trade law is destined to play an even greater role than it has hitherto played in international trade and world commerce.

The great number of excellent insights that we have been offered in the course of the past five days on the subject of uniform law in practice and in theory could not have been possible but for the excellent papers presented by the various eminent jurists on international trade law who spoke at this Congress on the various topics assigned to them and by the equally excellent contributions made by the various experts who spoke as voices of international practice during the Congress. To them all, I extend my sincere congratulations and gratitude for a job well done.

Many other people have contributed to the success of this Congress. A debt of gratitude is owed to the Chairpersons of the various working sessions, who combined the necessary degree of firmness with an understanding of the desire of so many of you to take the floor. However, the success and the whole atmosphere of any congress depends on the quality and participation of all the participants as a whole. The quality of the participants in this Congress has been truly very impressive both in terms of the participants' knowledge of the field of international trade law, and in terms of the coverage of the regions of the world represented at the Congress. The Congress has been attended by over 600 lawyers from all regions of the world. This is of great satisfaction to UNCITRAL. A Congress such as this one gives a chance to meet old friends, some of whom have been with UNCITRAL since its formation twenty-five years ago, and, just as pleasurable, to make new ones. These friendships established at a forum such as this one contribute in no small way to the work on unification of trade law by increasing the understanding of different views and interests.

I hope that all of you will take away from this Congress recollections of many memorable papers, communications, presentations and ideas. Before concluding my remarks, I would like to thank all those staff members in Vienna and New York who have helped to make the Congress the great success that it has been. I know all of them have done their utmost to ensure the success of the Congress.

In conclusion, may I, on behalf of the United Nations and on my own behalf, wish you all a safe return to your homes and, if you are remaining in New York, an enjoyable stay. I have the honour to declare this UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century closed.