C. Unification of the law of international trade: note by the Secretariat* 

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INTRODUCTION

1. At the 872nd meeting of the Sixth Committee on 9 November 1965 the representative of Hungary requested the circulation to the Committee of a preliminary survey by the Secretariat, with respect to agenda item 92. The present note is circulated pursuant to that request.

2. The explanatory memorandum of the Permanent Representative of Hungary relating to item 92 states:

"...For the present purposes what is meant by the 'development of private international law' is not so much international agreement on the rules of the conflicts of laws as applied by national courts and arbitral tribunals as rather a unification of private law mainly in the field of international trade (e.g. unification of the law on the international sale of goods or on the formation of contracts)."  

This preliminary survey is therefore limited to the "unification of private law mainly in the field of international trade", and does not deal, at this stage, with other aspects of private international law not connected with international trade.

3. Some examples of topics which are related to the problems of international trade and which therefore come within the scope of the item are the following:

(a) International sale of goods;
(i) Formation of contracts;
(ii) Agency arrangements;
(iii) Exclusive sale arrangements.

(b) Negotiable instruments and banker's commercial credits.

(c) Laws relating to conduct of business activities pertaining to international trade.

(d) Insurance.

(e) Transportation:
(i) Carriage of goods by sea;
(ii) Carriage of goods by air;
(iii) Carriage of goods by road and rail;
(iv) Carriage of goods by inland waterways.

(f) Industrial property and copyright.

(g) Commercial arbitration.

4. The present survey, after a few general comments, briefly outlines methods of unification which have been followed in the past, particularly in matters such as those indicated in the previous paragraph. It concludes with a suggestion as to further preliminary work which it might be desirable to undertake before concrete decisions are taken on the item in question.

I. GENERAL COMMENTS ON THE UNIFICATION OF THE LAW OF INTERNATIONAL TRADE

5. The unification of the law of international trade can be defined as the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction is replaced by a single rule. This process is part of the general movement for the unification of law, especially private law, which began in Europe during the middle decades of the nineteenth century. With regard to international commercial transactions, efforts were intensified after the First World War under the auspices of the League of
Nations and other intergovermental bodies, including the Hague Conference on Private International Law, the International Institute for the Unification of Private Law, and the Sixth International Conference of American States, held at Havana in 1928.

6. The impetus for the unification of law of international trade stems from the difficulties typically faced by those who engage in international commercial transactions as a result of the multiplicity of, and divergencies in, national laws. A single transaction involving multiple legal relationships (for example, a contract of sale, payment provisions, insurance, transportation, etc.) may be subject to divergent rules of different national laws, seldom known in all their particulars to all the parties directly involved. On questions of performance, interpretation and applications, parties require adequate knowledge of the legal conditions governing the performance of the general obligations. In case of litigation, the courts or arbitral tribunals are faced with considerable difficulty in determining the law applicable to the different aspects of an international commercial transaction. Sometimes the parties include in the contract a stipulation concerning the law applicable to the various aspects of the transaction. However, where such a clause is absent, the rules of private international law of the forum are held applicable, and the different national laws can give divergent solutions for the same problem.

II. METHODS OF UNIFICATION

7. There are methods that have been mainly used to accomplish unification in the field of international trade: (a) uniform or “model” national laws, (b) international conventions, (c) uniformization of practices in international trade, particularly standard contract provisions and general conditions of sale. In addition, the development of trade custom and of international commercial arbitration has also contributed to the elimination of divergencies in national law.

A. Uniform and model legislation

8. Projects for the adoption of uniform or model legislation have been undertaken for more than a century, principally within regional groupings and in some instances on a global basis. In some cases, legislation would apply generally to both domestic and international transactions, and in others would apply only to international transactions. The earliest experience of regional groups was that of the Scandinavian countries, which manifested an interest in unification beginning in the middle of the nineteenth century. Another major regional effort was made by the Inter-American Council of Jurists, which sought to develop uniform rules on various subjects relating to trade and transportation. More recently, the Benelux countries have undertaken some projects of unification. The Treaty establishing the European Economic Community contains provisions and procedures for the approximation or harmonization of the domestic legislation of its member States which affect the functioning of the Common Market. On a wider geographical scale, the International Institution for the Unification of Private Law, an intergovernmental body generally known as the Rome Institute, has prepared studies and drafts since 1928 (see annex 1). The preparation of uniform laws in special fields has also been a feature of the work of some specialized agencies, notably the Food and Agriculture Organization of the United Nations and the International Labour Organisation, and of the regional economic commissions of the United Nations.

Methods used in preparation of uniform national legislation

9. The procedures followed for the preparation of uniform and model legislation have naturally varied from organization to organization and in accordance with the complexity and technical nature of the subject. In every case, however, three steps may be distinguished. First, there is the selection of a subject deemed appropriate for study and drafting. In some cases, selection of subjects has been made by bodies of legal experts which have been requested by the Governments concerned to consider appropriate projects for unification, while in other cases the topics were chosen by organs concerned with economic or technical matters in the light of problems facing these bodies. In the United Nations, for example, the Economic Commission for Africa (ECA) has initiated projects for the harmonization of industrial, commercial, monetary and fiscal legislation, as well as legislation concerned with transportation within the region; the Economic Commission for Asia and the Far East (ECAFE) has suggested model laws for the development of natural resources; and the Economic Commission for Europe (ECE) has proposed uniform rules in certain transportation matters.

10. A second stage following the selection of subjects is the preparation of a study of the problem. Such studies normally include an analysis of various laws and a consideration of the extent to which these laws fulfill certain economic or other practical ends. It has been observed by the Rome Institute that such preparatory research involves what is described as both a “vertical” study and a “horizontal” study. The vertical study refers to the examination of the national laws, country by country. This is essential to assure accuracy and understanding of each State's laws and to ascertain the economic or political reasons for the law. Such studies have to be undertaken with the co-operation of the national Governments, national institutes or designated correspondents who are specialists in the subject. The “vertical” study is then followed by the “horizontal” study for the purpose of comparing the solutions reached under the various systems and laws, analysing the reasons for the differences and possibly reaching conclusions regarding the possibility of unification. There will, of course, be considerable variation in the amount of work required in the various fields; any attempt to unify subjects firmly embedded in local laws or traditions presents much greater difficulties than unification in branches of law which are relatively new and in the process of formation.

11. The third step is that of drafting. This is normally entrusted to a committee or working group.

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rather than to a single jurist. The question of the composition of such groups presents difficulties particularly when unification on a universal scale is sought and when problems of a technical and commercial character are prominent. It is generally desirable that drafting committees should include experts familiar with the major legal systems in the world. Whether such committees should seek to develop a uniform law on the basis of the lowest common denominator of present law or whether they should seek to create legislation more responsive to the needs is, of course, a major problem that must often be faced. Various attempts have been made to lay down principles for the drafting of such uniform laws and in some instances such principles might serve as useful guidelines to the drafting group.

B. International conventions

12. International conventions have been used in several ways to contribute to unification of law relating to international trade. One technique has been to provide in an international convention for the adoption of an annexed uniform law. This was done, for example, in the Geneva Conventions providing a Uniform Law for Bills of Exchange and Promissory Notes and for a Uniform Law for Cheques. A more recent example is The Hague Convention of 1964, which provided for the adoption of a uniform law on the international sale of goods. Another category of multilateral conventions relevant to unification are those which regulate questions of private international law, in particular issues of choice of law in transactions involving foreign elements. Perhaps the best known such convention is the Code of Private International Law of 1928 (the Bustamante Code) to which fifteen American States have acceded. This comprehensive Code includes rules of choice of law in the fields of civil, commercial, penal and procedural law. Other regional international conventions are those adopted by the Scandinavian countries for the settlement of private international law problems in certain intra-Scandinavian relationships. The Hague Conference on Private International Law, an intergovernmental organization with twenty-three members, has prepared a number of conventions in this field, eleven of which have entered into force. In still a third category are those international agreements which lay down substantive rules of law for private law relationships involving nationals of different countries. Notable examples of such conventions are the Brussels conventions in the field of maritime law, the conventions relating to liability in air law and the conventions on the transport of goods by rail and road. There are also several conventions relating to copyright and industrial property. Conventions have been largely the product of intergovernmental organizations; although in the field of maritime law, they have been prepared by a non-governmental organization, the International Maritime Committee, and later adopted by a diplomatic conference. For the most part, the selection of topics for conventions has been made by organs concerned with substantive questions rather than by bodies of legal experts. Drafts were normally prepared by committees consisting in some cases of experts acting in their individual capacity, and in other cases of governmental representatives. Final adoption of the convention occurred in a governmental body which in some cases was a regional commission, in others a principal organ of the international organization concerned, and in still other instances was a conference of States convened for the purpose.

C. Uniformation of practices in international trade, particularly standard contract provisions and general conditions of sale

13. Apart from model or uniform legislation and international conventions, one may seek to reduce the complications inherent in the application of different national laws to transactions of international trade by the use of standard forms of contract and general conditions of sale. These have been in use in almost every aspect of world trade and particularly in certain lines of commodity trade since they were introduced by the London Commercial Trade Association in the 1880s. They are normally drawn up by trade associations in the various countries and have been extended by contacts between these associations on a national, regional

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or single-line-of-trade basis. In recent years a special effort has been made towards the unification of rules and practices in the field of international trade, especially by such organizations as the United Nations Economic Commission for Europe, the International Chamber of Commerce,12 the International Law Association,13 and the Council for Mutual Economic Aid (Comecon).14

14. The work of ECE on general conditions of sale and standard forms of contract merits special attention.15 All projects in this field have been undertaken at the specific request of member Governments, normally prompted by trade associations in their respective countries. If the project is generally supported, an ad hoc working party is set up for the subject in question. These working parties are generally composed of members representing interested States from among both importing and exporting countries in respect of the particular commodity or trade. Prior to the first meeting of each working group, the secretariat of ECE prepares a comparative analysis of general conditions and standard forms of contract in use by trade associations in various countries, the information being provided by Governments and business circles. Thereafter, the secretariat prepares drafts at the request of the working party and collates the comments of Governments and trade associations. After a series of revisions and modifications necessitated by comments from member Governments and discussions within the working party, agreement is reached on an instrument which is then published by ECE for general distribution. These instruments elaborated by ECE have a purely optional status. Their use has depended upon voluntary acceptance by trade associations, which are of course free to adapt them entirely or in part.16

12 Especially its publication of:
(a) Incoterms — definitions of commercial terms, 1936, 1952;
(b) Rules of Conciliation and Arbitration (1955);
(c) Uniform Customs and Practices for Commercial Documentary Credits (1962 revision) with the following complementary documents: Standard forms for the opening of documentary credits, uniform rules for the collection of commercial paper, simplification of international payment orders;

13 For example, York-Antwerp Rules, 1950, on the adjustment of general average.

14 General Conditions of Delivery of Goods between Foreign Trade Organizations of Member Countries of the Comecon, 1958. Under a multilateral agreement in force since 31 January 1958, among the members of the Council for Mutual Economic Aid, the provisions of the General Conditions of Delivery are binding on all foreign trade enterprises and other organs which include contracts of the sale of goods in foreign trade.

15 For a list of general conditions of sale and standard forms of contract prepared under the auspices of the ECE, see annex II.

16 It is reported that over a million copies of the various versions of the General Conditions for the Supply of Plant and Machinery for Export and General Conditions for the Supply and Erection of Plant and Machinery for Import have been sold. P. Benjamín, "The ECE General Conditions of Sale and Standard Forms of Contract", Journal of Business Law (London, Stevens and Sons Ltd., 1961), p. 113.

17 The following States have become parties to the Convention: Austria, Bulgaria, Byelorussian SSR, Czechoslovakia, Federal Republic of Germany, Hungary, Poland, Romania, Ukrainian SSR, Union of Soviet Socialist Republics and Yugoslavia. A provision of the Convention makes it possible for the accession of non-European Members of the United Nations and as of this date Cuba and Upper Volta have become parties.

18 The following States have become parties to the Convention: Austria, Bulgaria, Byelorussian SSR, Cambodia, Central African Republic, Ceylon, Czechoslovakia, Ecuador, Federal Republic of Germany, Malaysia, Poland, Romania, Switzerland, Thailand, Ukrainian SSR, Union of Soviet Socialist Republics, United Arab Republic and United Republic of Tanzania.
of International Procedural Law, signed at Montevideo in 1940, and bilateral agreements between interested States. The European Economic Commission has also prepared a handbook of national and international institutions active in international commercial arbitration and a table of bilateral conventions relating to the enforcement of arbitral awards and organization of commercial arbitration procedures and the Arbitration Rules of ECE. The Economic Commission for Asia and the Far East has also been engaged in activities designed to interest Governments and business associations in its region in the development of arbitration facilities and has established a United Nations Centre for the Promotion of Commercial Arbitration within the secretariat of ECAFE working with the assistance of the Office of Legal Affairs.

III. CONCLUSION

16. In the light of the report given above, it would seem useful to have a comprehensive, expert survey on this subject before decisions are taken by the General Assembly. Such a survey would:

(a) Review the work in the field of unification or harmonization of the law of international trade;

(b) Analyse the methods and approaches suitable for the unification or harmonization of the various topics, including the question whether particular topics are more suitable for regional, interregional or worldwide unification;

(c) Consider the future role of the United Nations and of other agencies in this field.

ANNEXES

I. Drafts prepared by the International Institute for the Unification of Private Law

[Annex not reproduced]

II. General conditions of sale drawn up under the auspices of the Economic Commission for Europe

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