V. SUGGESTIONS FOR FUTURE UNIFICATION TECHNIQUES*

A. Progressive codification of the law of international trade: note by the secretariat of the International Institute for the Unification of Private Law (UNIDROIT)**

The International Institute for the Unification of Private Law — UNIDROIT — which has a responsible role to play in the unification of private law in view of its institutional aims, which are universal in scope, of the composition of its membership, representing the principal legal systems of the world, and of its experience of over forty years, is undertaking a study of the progressive codification of international trade law as part of its programme of work.

In view of the interest taken by the United Nations in the unification and codification of international trade law, the secretariat of UNIDROIT has the honour to submit to the United Nations Commission on International Trade Law (UNCITRAL) a report outlining the salient features of the study and stating the reasons for the proposals made therein.

1. International trade is one of the most important factors in economic development and as such, a means of promoting understanding and peace among peoples. Consequently, all States are interested in its development.

The development of international trade must be rapid, confident, sure and certain, and only law can offer these guarantees. Those involved in international trade will act much more confidently if they know in advance what the legal status of the instruments they wish to conclude will be, particularly if they know that they have the same possibilities of securing respect for their rights as under their own legal system.

However, at the present time, trade transactions which have attained an unprecedented volume, intensity, variety and speed, are governed by a multitude of national laws, each of which constitutes an obstacle to the development of international trade.

2. Several methods might be employed to overcome these obstacles.

First, it should be noted that businessmen, with their keen awareness of the interests they have in common, while taking advantage of the general principle of the freedom of contract, have evolved a set of rules for certain international trade operations. These rules, contained in standard contracts and general conditions, or expressed in formulae or clauses hallowed by long practice, are beginning to constitute a kind of charter for the regulation of international trade, so that each contract will be covered by a single legal régime which will be known and understood by each of the parties and will ensure a minimum of security for the transactions involved.

In their own way and using their own techniques, businessmen have established norms for the most urgent transactions in order to guarantee the indispensable certainty of the law, by the very simple method of establishing in advance what law is applicable to certain situations and certain relationships in international economic life. The regulations thus established to meet practical needs are effectively applied by almost all businessmen in all countries, both in the East and in the West. To a large extent, their application is also ensured by arbitration institutions.

Hence, when it was found that international economic relations did not fit satisfactorily into a national legal framework, international practice set about establishing uniform norms designed, parallel with national law, to promote international trade as much as possible and in certain particular fields.

3. However, it should be noted that standard contracts, general conditions and formulae or clauses established in practice cannot, and will never be able to cover all the legal relationships in international trade, or all the aspects of the problems which could arise. That is why general conditions either allow the contracting parties to introduce amendments (see the general conditions drawn up by the ECE), or establish the applicability of the municipal law of one of the parties (see the general conditions of sale adopted by the COMECON countries). In domestic trade, national trade law and the general principles of municipal law fill any gaps which may arise. Thus, there is an obvious need for international trade to be based on certain fundamental principles which can be applied to any situation which is not foreseen (in contracts or international conventions pertaining to them), and which can be used for the interpretation of contractual provisions without the necessity of having recourse to the municipal law of the parties concerned.

The Uniform Law on the International Sale of Goods (ULIS) thus includes a special article — article 17 — which provides that questions concerning matters governed by the Uniform Law which are not expressly settled therein shall be settled in conformity with the general principles on which the law is based. But this

* For action by the Commission with respect to this subject, see part two, section III, A, report of the Commission on the work of its third session (1970), paragraphs 212–218.

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elliptical reference to general principles has not proved fully satisfactorily and has given rise to much discussion: hence the need to establish certain fundamental principles to cover all the legal relationships of a contractual nature arising within the framework of international trade.

4. In other words, international trade also needs its own ordinary law with its own particular role and full range of functions.

It is clear that customary law, left to the hazards of private contract practice could not constitute the ordinary law of international trade. The latter can only derive from an understanding among States, for only thus will international trade obtain the legal framework it requires. Furthermore, it should be noted that States are becoming more and more interested in the regulation of international trade. In fact, by providing those involved in foreign trade with the security needed for their protection, international trade law contributes, *ipso facto*, to the defence of the national economy. This to a large extent explains why the increasing emphasis on State regulation of foreign trade in the countries of both East and West.

International trade is also a matter of particular concern to the developing countries, and its uniform regulation would be a highly important factor in their progress.

Finally, since international trade is one of the most important factors in economic development and at the same time a tool for the furtherance of understanding and peace, its regulation is also of concern to the international community. For that reason the United Nations, one of whose purposes is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character" (Charter of the United Nations, Article 3), gave the General Assembly the task of initiating studies and making recommendations for the purpose of encouraging the progressive development of international law and its codification (Article 13, paragraph 1 (*a*)). Such action is entirely within the scope and competence of the United Nations itself under the terms of Chapters IX and X of its Charter.

The United Nations Conference on Trade and Development (UNCTAD), is particularly concerned with the question of promoting the establishment of rules that will further international trade. The same considerations prompted the establishment of the United Nations Commission on International Trade Law (UNCITRAL), whose purpose is "the promotion of the progressive harmonization and unification of the law of international trade".

5. The unification of international trade law might initially be viewed as unification of conflict rules. However, unification of those rules would hardly solve most of the difficulties stemming from the diversity in municipal trade law.

Although private international law makes it possible to determine which law applies to a given legal relationship, it does not, even when unified, afford absolute certainty regarding the content of that law which, in any case, might establish the applicability of another law, of another country, with all the difficulties that would imply. Furthermore, the unification of conflict rules could become inoperative as a result of the indiscriminate use of the plea of public policy. Finally, doubts might arise because of the diversity of qualifications and interpretations in each legal system.

It therefore follows that the unification of conflict rules represents an attempt to settle a problem of *international* trade by applying municipal law, thus discounting any distinctive features which international relations may have and which no domestic law exactly suits. That is why, in recent doctrine, there has been speculation as to which municipal law is capable of satisfactorily regulating the international sale of goods, which is not a domestic sale merely complicated by a foreign element, but rather an original contract entailing its own stipulations.[1]

6. The unification of substantive law therefore remains the only way in which the obstacles stemming from the diversity in municipal law can be overcome and a general body of international trade law can be provided.

In order better to understand the need to unify international trade law, however, one should bear in mind that international trade, with its economic, social and technical ramifications, its needs and requirements, was formed and developed in an international setting, so that the instruments in which it is reflected inevitably extend beyond the bounds of any municipal legal system and call for rules in keeping with their characteristics and purposes. International economic law has an inherent tendency to transcend States. By their very nature, legal relationships established within the context of international trade require a type of regulation that is altogether different from the regulation of domestic legal relationships. The very fact that the legal relationships of international trade are international in character puts them outside the jurisdiction of municipal law and makes them governable by a law removed from any national contingency, that is, *an ordinary law of international trade*, which alone can provide the legal framework which international trade needs in order to develop.

The unification achieved so far in order to meet the most urgent needs of international economic life — in the field of transport, for example — has been partial and fragmentary, and it soon became apparent that such a method had shortcomings as regards the application and interpretation of the individual provisions thus adopted. Since the basic principles of international trade law had not been generally regulated, it became necessary to fill the gaps which still remained by drawing on the basic principles of some municipal law, and it was not always easy to determine which one in advance.

The method adopted by UNIDROIT, which has been accepted by other organizations concerned with the unification of law and, very recently, by the United Nations Commission on International Trade Law, was the on-

[1] *Le droit commercial international*, by Yvon Loussouarn and Jean-Denis Bredin, (Sirey, 1969), p. 9.

ly method possible during the first phase of unification. At that time there was still a very distinct divergency between the legislative technique employed in the civil law countries and that employed in the common law countries. A unification process entailing codification, even if confined to commercial transactions, would have been bound to fail. It was therefore necessary to try to draw up texts of limited scope which most countries would be likely to accept and to avoid, as far as possible, any consideration of the general principles governing the various legal systems. The definition and interpretation of certain basic concepts was left to the national legislators and judges. The process of unification by sectors has, to some extent, been successful, especially in fields that are intrinsically international in scope, such as air and sea transport, arbitration and cultural property. But like anything built on a shaky foundation, it has proved to have serious weaknesses: contradictory provisions, divergent interpretations due to the lack of commonly held general principles, overlapping and duplication.[2]

This method, however, is far from affording international trade law the opportunity to produce satisfactory solutions to specific problems. Consequently, international trade now, as much as ever, needs a real *jus commune mercatorum*, a material law that can govern international relations.

On the other hand, the obstacles which originally stood in the way of codification have diminished in recent years. The gap between the common law countries and the civil law countries is no longer insurmountable. As the work programmes of the Law Commissions for England and Scotland show, the United Kingdom has made progress in codification, and the United States set a precedent in this connexion when it established its Uniform Commercial Code.

Another important step in the process of unification by codification was the adoption by Czechoslovakia of its International Trade Code on 18 December 1963. This Code, which is in line with the system of unification employed by UNIDROIT in its draft on the international sale of goods and other matters confined to the sphere of international relations is notably in advance of the other attempts at unification made so far since it constitutes an organic body of rules applicable to international relations. These rules, which are preceded by a definition of the criteria used in classifying the relations concerned, are governed by common provisions relating to the subjects and objects of legal relationships, the concept of legal instruments and the conditions in which such instruments are valid.

The time has come, therefore, to proceed beyond the stage of partial and fragmentary unification and undertake the systematic codification of at least the basic principles of the law of international trade. This would lay the foundations for any subsequent regulation of the major legal institutions pertaining to this law, including those which have already been unified.

[2] This situation led the Council of Europe to establish as a subsidiary organ of its Committee on Legal Co-operation, a sub-committee on fundamental legal concepts which has undertaken some important research and reconciliation work in this regard.

7. The importance to economic development of codifying the laws of international trade and the deep interest shown by the United Nations in the unification and codification of that law justify a bold advance to more ambitious schemes and an attempt at the progressive codification of international trade law by more up-to-date methods and on a wider scale.

The problems of methodology have already been subjected to an initial, and extremely probing scrutiny at the Fourth Meeting of Organizations concerned with the Unification of Law. We need therefore only refer the reader to the reports discussed at that meeting and to the official records, published in the UNIDROIT yearbook (1967-1968 Yearbook, vol II, 4 ed. UNIDROIT, Rome, 1969).

As for the scope of the task, we should point out that whenever the question of drawing up a contract arises, it also becomes necessary to devise a general set of rules relating to the basic principles which obtain wherever there is a lacuna in the special provisions of wherein the clauses of the contract need to be interpreted in the light of general principles. That is why the codification of the law of international trade should begin with a general section on obligations (which could be limited to contractual obligations alone).

There should also be a special provision specifying the *purpose* of codification, which is to develop international trade on a secure basis that would be afforded by uniform rules of substantive law. Such a provision (which is to be found in the Uniform Commercial Code drawn up by the American Law Institute and the National Conference of Commissioners on Uniform State Law, and also in the Czechoslovak Act No. 101 of 4 December 1963 on legal relationships in international trade relations) could even prove extremely useful for the interpretation of various codification provisions and of contract clauses.

As regards *interpretation*, we should point to the difficulties which have arisen in practice because certain legal institutions (such as the trust system) are found in some legal systems but not in others, and because some legal institutions are common to all or at least to most municipal laws although their content is interpreted in quite different ways. It may be recalled that controversies arose over the intetrpretation of article 25 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929. There are many other examples which could be given.

At the Second Meeting of Organizations concerned with the Unification of Law, many participants commented on the difficulties caused by differing interpretations of some very common concepts, such as "*faute*", "*bona fides*", "*force majeure*", "*causa*" and "equity". In their statements, they stressed that differences of interpretation could prejudice the certainty of law. The Third Meeting of Organizations concerned with the Unification of Law was thus devoted exclusively to disparities in the interpretation of uniform law.

For this reason, the general section of the proposed codification should contain not only rules concerning in-

terpretation, but also definitions or classifications of certain concepts (such as those provided in the Uniform Commercial Code or those which some organizations are in the process of drawing up) without, however, turning the code into something akin to a dictionary.

As to the *object* of codification it is suggested that the latter should be restricted to the legal relationships arising in international trade relations. One could even provide a definition of those *international relations*, as has been done in some international conventions (for instance most of the conventions dealing with transport; article 1 of the Uniform Law on the International Sale of Goods (Corporeal Movables); and article 1 of the Czechoslovak Act No. 101/1963 which specifies "the relationships arising in international trade relations"). Suitable formulas must be found, however, to take account of possible connexions between the concept of "international relationship" and that of "legal relationship with a foreign element".

The basic principles presented in the introduction to the proposed codification should be followed by a general section on *obligations* (sources, effects, extinction, the transfer of claims, evidence, and so on).

The progressive codification of international trade law will unquestionably be a large scale operation, spanning a long period of time and fraught with considerable difficulties. It would be unthinkable, however, either to allow international trade to continue to be governed by a host of national laws, since that places it in an impossible position, or to leave all the legal problems arising in international trade to be solved simply by practice. The conclusion which emerges from the foregoing observations is that the progressive codification of international trade law must be undertaken without delay.

This proposal, which might at first sight seem overambitious, is feasible in UNIDROIT's opinion, provided that certain conditions are met.

First of all, the codification should be gradual. The object is not to prepare a code of international trade law overnight, but rather to prepare an outline of an ideal code, examining all the subjects which should be covered. The task would be facilitated by using the Czechoslovak code as a model and also to some extent the Uniform Commercial Code of the United States of America. The uniform laws which have already been drawn up or are in the process of elaboration should be included in this Code as special chapters. They should therefore be studied and, where appropriate, revised and harmonized in the light of these new requirements.

At the practical level, UNIDROIT is studying the possibility of formulating a general, organic unification plan.

Once this over-all plan has been devised, the first task will be to prepare a draft for the general section containing the basic principles which will form the foundations and the framework of the unification. The drafts relating to special subjects, including those which have been prepared or are in preparation, should be harmonized to tally with the basic principles in the general section. Thus, codification will gradually grow within the framework of uniform general principles until it covers the whole field assigned to it.

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UNIDROIT took the initiative of arranging the four Meetings of Organizations Concerned with the Unification of Law previously referred to in this report. The discussions held on each of those occasions clearly pointed to the usefulness of regular meetings of the representatives of organizations contributing in some way to the unification of law, so that they can pool their experience, impart information about their individual programmes of action, air any problems of methodology they may have encountered and study some topics of common interest more closely.

As it is essential to start on the progressive codification of international trade law without delay, there is no alternative but to harness all the energies of all those who are willing to participate in this great scientific work if the end is to be attained. The best use must be made of all the experience acquired in the field by all the organizations concerned with the unification of trade law and by all those who, in one way or another, might assist in the task.

In this spirit UNIDROIT, which has already conducted a preliminary survey of the main problems likely to arise in the progressive codification of international trade law, has the honour to call the attention of the United Nations Commission on International Trade Law to this question. UNCITRAL's encouragement, support and co-operation would be an essential element in the accomplishment of a task whose successful outcome would do much to promote the development of international trade in the general interests of economic development and peace.

B. Draft basic convention establishing a common body of international trade law: proposal by the French delegation*

1. In the existing circumstances, international trade relations are customarily governed by municipal legislation, as though they were a matter of domestic legal relations. Only exceptionally have certain States agreed that such legal relations, which are international in character, should be governed by the municipal legislation of a given country (unification of rules governing conflicts) or should be subject to a particular régime (unification of substantive rules).

The very fact that UNCITRAL was established shows that this is an unsatisfactory situation. The results obtained in the matter of the unification of rules governing conflicts and of substantive rules are not such as to meet the needs of international trade.

* UNCITRAL/III/CRP/3.