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THE EXPERIENCE OF LATIN AMERICAN STATES

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I. INTRODUCTION OF UNIFORM LAW

1. The scope of uniform law

(a) *Uniform substantive law*

Latin American countries have ratified or acceded to a variety of treaties aimed at the unification of substantive rules of law. It may be of some use to indicate the Latin American countries bound by those treaties and also perhaps the other countries which are bound by those same treaties. This would give a picture of the internal relationships between Latin American countries as well as their external relations. Accordingly reference will be made in particular to the Brussels Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea of 23 September 1910,¹ to the Brussels International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924,² to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929

1. Algeria, Antigua, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Bermuda, Brazil, Canada, Congo, Cyprus, Denmark, Dominica, Dominican Republic, Egypt, Fiji, Finland, France, Gambia, German Democratic Republic, Federal Republic of Germany, Ghana, Gilbert and Ellice, Greece, Grenada, Guyana, Haiti, Hungary, India, Iran, Ireland, Italy, Jamaica, Japan, Malaysia, Malgache Republic, Malta, Mauritius, Mexico, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Sultanate of Oman, Papua New Guinea, Paraguay, Poland, Portugal, Romania, St. Helena, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Singapore, Somalia, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tonga, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Yugoslavia.

2. Algeria, Antigua, Argentina, Ascension, Australia, Bahamas, Barbados, Belgium, Belize, Bermuda, Cameroun, Cayman Islands, Cuba, Cyprus, Denmark, Dominica, Ecuador, Egypt, Fiji, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Grenada, Guyana, Hungary, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kuwait, Lebanon, Malaysia, Malgache Republic, Mauritius, Monaco, Montserrat, Netherlands, Nevis, Nigeria, Norway, Papua New Guinea, Paraguay, Peru, Poland, Portugal, Romania, St. Christopher, St. Helena, St. Lucia, St. Vincent, Senegal, Sierra Leone, Singapore, Solomon Islands, Somalia, Spain, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Trinidad & Tobago, Turkey, Turks and Caicos Islands, United Kingdom, United States of America, Virgin Islands, Yugoslavia, Zaire.

as modified by the Hague Protocol of 28 September 1955,³ to the Paris Convention on Industrial Property, 1883 (reference will be made to the last Act binding each State),⁴ to the Berne Convention for the Protection of Literary and Artistic Works as revised in Brussels, 26 June 1948⁵ and the Universal Copyright Convention as revised at Paris on 27 July 1971,⁶ to the Geneva Universal Copyright Convention of 6 September 1952,⁷ to the Rome Convention

3. Afghanistan, Algeria, Argentina, Australia, Austria, Barbados, Belgium, Benin, Botswana, Brazil, Bulgaria, Burma, Cameroun, Canada, Chile, People's Republic of China, Colombia, Congo, Cuba, Cyprus, Czechoslovakia, Denmark, Ecuador, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Greece, Guatemala, Guinea, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Kuwait, Laos, Lebanon, Lesotho, Liberia, Libyan Arab Republic, Liechtenstein, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Mauritania, Mexico, Monaco, Mongolian People's Republic, Morocco, Nauru, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Sultanate of Oman, Pakistan, Papua New Guinea, Paraguay, Poland, Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Tonga, Tunisia, Turkey, Uganda, Union of Soviet Socialist Republics, United Kingdom, United States of America, Venezuela, Western Samoa, Yugoslavia, Zaire, Zambia.

4. Algeria (Lisbon); Argentina (Lisbon); Australia (London); Austria (Lisbon); Belgium (Lisbon); Benin (Lisbon); Brazil (The Hague); Bulgaria (Stockholm); Burkina Faso (Lisbon); Cameroun (Lisbon); Canada (Stockholm); Central African Republic (Lisbon); Chad (Stockholm); Congo (Lisbon); Cuba (Lisbon); Czechoslovakia (Stockholm); Cyprus (Lisbon); Denmark (Stockholm); Dominican Republic (The Hague); Egypt (London); Finland (Stockholm); France (Lisbon); Gabon (Lisbon); German Democratic Republic (Stockholm); Federal Republic of Germany (Stockholm); Greece (London); Haiti (Lisbon); Holy See (London); Hungary (Stockholm); Iceland (London); Indonesia (London); Iran (Lisbon); Ireland (Stockholm); Israel (Stockholm); Italy (Lisbon); Ivory Coast (Lisbon); Japan (Lisbon); Kenya (Stockholm); Lebanon (London); Liechtenstein (London); Luxembourg (London); Madagascar (Lisbon); Malawi (Stockholm); Malta (Lisbon); Mauritania (Lisbon); Mexico (Lisbon); Monaco (Lisbon); Morocco (Stockholm); Netherlands (London); New Zealand (London); Niger (Lisbon); Nigeria (Lisbon); Norway (Lisbon); Philippines (Lisbon); Poland (The Hague); Portugal (London); Romania (Stockholm); San Marino (London); Senegal (Stockholm); South Africa (Lisbon); Spain (London); Sri Lanka (London); Sweden (Stockholm); Switzerland (Stockholm); Syrian Arab Republic (London); Tanzania (Lisbon); Togo (Lisbon); Trinidad & Tobago (Lisbon); Tunisia (London); Turkey (London); Uganda (Lisbon); Union of Soviet Socialist Republics (Stockholm); United Kingdom (Stockholm); United States of America (Stockholm); Uruguay (Lisbon); Yugoslavia (Lisbon); Zambia (Lisbon); Zimbabwe (Lisbon).

5. Argentina, Australia, Austria, Belgium, Benin, Brazil, Burkina Faso, Cameroun, Chile, Congo, Denmark, Fiji, Finland, France, Gabon, Federal Republic of Germany, Grenada, Greece, Holy See, India, Ireland, Israel, Italy, Ivory Coast, Liechtenstein, Luxembourg, Madagascar, Mali, Mauritius, Mexico, Monaco, Morocco, Netherlands, Niger, Norway, Philippines, Portugal, Senegal, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, Uruguay, Yugoslavia, Zaire.

6. Algeria, Argentina, Austria, Benin, Brazil, Burkina Faso, Cameroun, Chile, Congo, France, Gabon, German Democratic Republic, Greece, Holy See, Hungary, India, Ivory Coast, Japan, Luxembourg, Mauritania, Mexico, Niger, Portugal, South Africa, Spain, Sweden, Togo, Yugoslavia.

7. Algeria, Argentina, Australia, Austria, Bahamas, Bangladesh, Belgium, Benin, Bolivia, Brazil, Burkina Faso, Cameroun, Canada, Cape Verde, Chile, People's Republic of China, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Djibuti, Ecuador, Egypt, El Salvador, Equatorial Guinea, Fiji, Finland, France, Gabon, Federal Republic of Germany, Ghana, Guatemala, Guyana, Haiti, Holy See, Honduras, Iceland, India, Iran, Iraq, Ireland, Italy, Jamaica, Jordan,

Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface of 7 October 1952,⁸ to the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974⁹ and to the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.¹⁰ This is not, and probably could not be, an exhaustive list.¹¹ Nevertheless it would seem to permit an overview of a characteristic sample of uniform rules that are of importance in international trade law. Latin American countries are also considering with the greatest interest the Hamburg Rules (1978) and the Vienna Model Law on International Commercial Arbitration (1985).

(b) *Uniform conflict of laws*

In the field of uniform conflict rules regard should be had to the Montevideo Treaties, the Bustamante Code and the Inter-American Special Conferences of Private International Law. The increasing participation of Latin American States in the Hague Conference on Private International Law is also particularly worthy of note.

The Montevideo Treaties of 1889 and 1940 are based mainly on the Savigny conception of uniform conflict rules¹² while the Bustamante Code is inspired by Maricini's neo-statutory theory.¹³

Republic of Korea, Kuwait, Laos, Lebanon, Lesotho, Liechtenstein, Luxembourg, Madagascar, Mali, Mauritius, Mexico, Morocco, Nepal, New Zealand, Nicaragua, Niger, Nigeria, Sultanate of Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Romania, Rwanda, Senegal, Seychelles, Somalia, Spain, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Tonga, Trinidad & Tobago, Tunisia, Turkey, United Arab Emirates, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia, Zaire.

8. Algeria, Argentina, Australia, Belgium, Brazil, Cameroun, Canada, Cuba, Ecuador, Egypt, Gabon, Haiti, Honduras, Iraq, Italy, Luxembourg, Mali, Mauritania, Morocco, Niger, Nigeria, Pakistan, Paraguay, Rwanda, Spain, Sri Lanka, Tunisia.

9. Argentina, Czechoslovakia, Denmark, Dominican Republic, Federal Republic of Germany, Ghana, Norway, Yugoslavia.

10. So far the Convention has been signed by Austria, Chile, China, Czechoslovakia, Denmark, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Hungary, Italy, Lesotho, Netherlands, Norway, Poland, Singapore, Sweden, United States of America, Venezuela and Yugoslavia. At present the Convention has been ratified, approved or acceded to by Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States of America, Yugoslavia and Zambia.

11. *Sources of International Uniform Law*, edited by K. Zweigert and J. Köpholler, vol. I-II and Supplement (Leiden 1971-1973).

12. Goldschmidt, *Droit International Privé Latino-Américain*, *Journal du droit international*, 100 (1973), pp. 65-96. The 1889 Treaties on international civil law; international commercial law; international procedural law; literary and artistic property; patents of invention; trademarks; the practice of learned professions and the Additional Protocol to the Treaties on Private International Law are binding on Argentina, Bolivia, Colombia and Peru. The Treaty on International Penal Law is binding on Argentina, Bolivia, Colombia, Paraguay and Uruguay. The 1940 Treaties are binding on Argentina, Paraguay and Uruguay.

13. Samtleben, *Internationales Privatrecht in Lateinamerika*, vol. I (1979); *Derecho Internacional Privado en América Latina. Teoría y Práctica del Código Bustamante* (Buenos Aires 1983). The

A number of conventions on uniform conflict of laws have been signed in the Inter-American Specialized Conferences on Private International Law. Conventions relating to conflict of laws concerning bills of exchange, promissory notes and invoices,¹⁴ conflict of laws concerning checks,¹⁵ international commercial arbitration, letters rogatory, the taking of evidence abroad and the legal regime of powers of attorney to be used abroad were signed at the Panama Conference of 1975, and to domicile of natural persons in private international law, general rules of private international law,¹⁶ proof of and information on foreign law, execution of preventive measures, extraterritorial validity of foreign judgments and arbitral awards, conflicts of laws concerning commercial companies¹⁷ and conflicts of laws concerning checks¹⁸ at the Montevideo Conference of 1979. Conventions on conflict of laws concerning the adoption of minors, on personality and capacity of juridical persons in private international law, and on jurisdiction in the international sphere for the extraterritorial validity of foreign judgments and an Additional Protocol to the Convention on the Taking of Evidence Abroad¹⁹ were signed at the La Paz Conference of 1984.

A fourth conference is expected to be held, probably at Montevideo, in 1989. This would be a commemoration of the Montevideo Treaty of 1889. The agenda of the future conference, which is under preparation, will take account of governmental opinion. *Prima facie*, the themes provisionally included on the agenda seem to indicate an excessively ambitious plan. The Secretary-General of the Organization of American States has included in a preliminary document the following subjects: international contracts, extracontractual liability, international carriage by land, international carriage by sea, international child abduction, maintenance obligations, divorce, personality and capacity of human persons and an additional protocol to the Inter-American Convention on Recognition

The Bustamante Code was ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.

14. Argentina, Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru and Uruguay.

15. Chile, Costa Rica, Ecuador, Panama, Paraguay, Peru, Uruguay.

16. Argentina, Mexico, Peru, Uruguay.

17. Argentina, Guatemala, Mexico, Paraguay, Peru, Uruguay and Venezuela.

18. G. Parra Aranguren, Recent Developments of Conflict of Laws Conventions in Latin America, in: *Collected Courses of The Hague Academy of International Law*, 1979 III, vol. 164, pp. 56-170; J. Samtleben, Die Interamerikanischen Spezialkonferenz für internationales Privatrecht, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 44 (1980), p. 257 *et seq.*

19. D. Operti Badan, La Tercera Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP - III), *Revista Uruguaya de Derecho Procesal*, (1984), No. 2, p. 143 *et seq.*

and Enforcement of Foreign Judgments and Arbitral Awards. Needless to say the implementation of this plan would require immense effort, both in terms of preliminary study and of actual drafting and it would therefore be reasonable to cast some doubt on the advisability and effectiveness of such a lengthy agenda.²⁰

Special mention should be made of the participation of the following Latin American States in The Hague Conference on Private International Law: Argentina, Chile, Mexico, Uruguay and Venezuela. On 8 May 1987 Argentina deposited instruments of accession to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents of 5 October 1961 and to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970. No other instruments of ratification or accession have so far been deposited by Latin American States.

2. Interpretation, determination, integration and application of uniform law

In the interpretation of uniform rules the main purpose of promoting international uniformity should be given serious consideration. In caselaw and practice this aim is nevertheless often disregarded or at least not given adequate weight. Full treatment of the whole caselaw and practice on uniform law in Latin American countries would require an enormous apparatus that would exhaust the resources and powers of a single scholar, but such an exhaustive piece of work should be carried out if a vivid and realistic picture and not merely a summary of general rules is desired. Furthermore such an enquiry is becoming ever more necessary and it is far from being futile.

Sometimes a uniform text must be discretionary and fairly determined in accordance with the circumstances of the case (i.e. the concrete reasonableness standard in Article 25 of the Vienna Sales Convention), with the *lex fori* (Article 21 of the Warsaw/Hague Convention), and with judicial discretion (Article 25, paragraph 1 of the Warsaw/Hague Convention). These references by the uniform rules to the *lex fori* and to discretion may be characterised as conventionally unified conflict rules since the *forum* is fixed by the convention.²¹ This is a good example of the integration of uniform substantive and conflict rules.

20. I openly expressed this concern in a paper delivered at a seminar for Spanish professors of private international law held at the Complutense University of Madrid on 28 March 1987 on the topic "The future of the codification of private international law in Latin America" under the chairmanship of Professor Julio González Campos.

21. A. Boggiano, *Derecho Internacional Privado*, (2nd edition, Depalma, Buenos Aires 1983), vol. I, p. 311.

In some conventions the problem of *lacunae* is not to be confused with a clear decision not to establish any rule at all on a specific point. This is a restriction of the scope of the convention and not an unsettled issue. The case has been contemplated but nevertheless no solution has been adopted in the convention which only unifies *certain* rules and no more.

The difference becomes apparent in Article 7 of the Vienna Sales Convention. Some matters are not governed by the Convention and fall therefore outside its scope of application (Article 7, paragraph 2) but other questions concerning matters governed by the Convention “which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law” (Article 7, paragraph 2). Integration is here achieved first by recourse to the general principles underlying the Convention if they exist, and subsidiarily by reference to the rules of private international law.

As uniform rules are applied in the framework of national judgments and arbitration, the real shape of uniform law is visible only in such jurisdictional contexts. The reality of the extent to which uniform rules constitute uniform law is a matter of caselaw and practice which is to be discovered under the veil of national jurisprudence. In Latin America, I must confess, this is, and probably will continue to be, scarcely ascertainable.

3. Towards a new approach

In *Buchanan & Co. v. Babco Ltd.*²² Lord Denning, when considering the interpretation of an international convention, said: “It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland or Germany. Compensation for loss should be assessed on the same basis, *no matter in which country the claim is brought*”. I cannot resist the temptation of comparing Lord Denning’s last sentence (my own italics) with the celebrated words of Savigny: “Ohne Unterschied, ob in diesem oder jenem Staate das Urteil Gesprochen werde”.²³ The idea is not new. But to put this idea into practice, particularly in Latin American courts, would bring a breath of fresh air into uniform law. Nevertheless, uniformity should be balanced against the modern requirements of flexibility. In Professor Diamond’s words: “The

22. [1977] *Q.B.* 208. But see [1978] *A.C.* 141.

23. *System*, VIII, 27.

inflexibility of many international conventions may be too heavy a price to pay".²⁴ It should be possible, to some extent, to achieve a more flexible functioning of uniform law conventions by way of interpretation so as to achieve the results which the convention intended or may reasonably be presumed to have intended. This would be a new approach for an equitable uniform law.

II. "PRINCIPLED" UNIFORM LAW

1. The Vienna Sales Convention

(a) *Flexible uniform law*

The Vienna uniform rules are based on underlying general principles which, although not expressly stated in the rules, are nevertheless a part of the Vienna uniform law. The rules are often expressed in an open texture natural language which requires the exercise of a degree of discretion in assessing the particular circumstances of each case and observable general trends. The flexibility of the rules allows development of an equitable caselaw, and it is apparent that the Vienna Convention is far from being just a long list of established and rigid rules. It is itself, if I may say so, a flexible developing international instrument for doing justice.

(b) *Interpretation*

Important aspects of international sales are settled by determined criteria established by the rules of the Convention. It is relevant in this respect to ascertain the proper significance of such defined or delineated solutions. Naturally the international character of the Convention and the need to promote its uniform application and good faith in international trade must be considered (Article 7, paragraph 1). To meet this goal "the family history of the Convention is rich and revealing".²⁵ The ordinary meaning to be given to the terms of the rules in their context is to be discovered by considering the *travaux préparatoires* and by having due regard to the object and purpose of the Convention (Articles 31 and 32 of the Vienna Convention on the Law of Treaties). Thus, the broad

24. A.L. Diamond, Conventions and their Revision, in: *Unification and Comparative Law in Theory and Practice. Contributions in honour of Jean Georges Sauveplanne* (1984), p. 60.

25. J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer, Deventer), p. 115.

objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order should be borne in mind in conformity with the first sentence of the Preamble to the 1980 Convention. Those objectives are to be considered in the light of the development of international trade on the basis of equality and mutual benefit with a view to removing legal barriers in international trade and to promoting its development (Preamble).

(c) "Open texture of language"

The rules of the Convention extensively use a broad "open texture language" (Hart). Words have a penumbra of uncertainty which must be settled by a judicious determination. The use of general standards is due to the lack of human foreknowledge of all the possible combinations of circumstances which the future realities of international sales may bring about. The determination of a fundamental breach under Article 25, a material alteration of the terms of the offer under Article 19, paragraphs 2 and 3, a place of business of the parties and its closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties under Articles 2, paragraph 2 and 10(a) are, among many others, examples of general terms or standards that clearly demonstrate the impossibility of anticipating all circumstances and therefore a relative uncertainty of aim. This leads to the need for a further exercise of discretion and choice in the determination of general standards in particular circumstances. The need for such determination should be highlighted and not disguised as it is an important factor which gives the Convention the possibility to come to terms with the changing face of international trade. There is merit in this.

(d) General principles on which the Convention is based

The "principled" conception of the Vienna sales law permits the determination of questions which are not expressly settled in the Convention in conformity with the general principles on which it is based (Article 7, paragraph 2). This "principled" view of the Convention was extremely controversial.²⁶ There is indeed a risk of excessive reliance on the *lex fori* and on domestic conceptions of

26. A. Boggiano, La Convención de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderías (en el ámbito del derecho internacional privado argentino), in: A. Boggiano, *Derecho Internacional Privado, op. cit.*, vol. II, p. 738.

the law of contract. Nevertheless, matters governed by the Convention are to be settled not only in accordance with its express rules but also with the principles underlying it. I would venture to present an overview of what appear to be the main principles of the Convention.

Party autonomy is a main principle of the Convention (Article 6). It is a principle of substantive autonomy in international contracts which has particular significance. The parties may derogate from mandatory provisions of any domestic sales law connected with the international contract. Only the mandatory rules of the private international law of the forum and perhaps also those of a country closely connected with the international contract are binding.²⁷ This principle of party autonomy must be accommodated to the principle of equality and mutual benefit which presupposes an equitable balance of the mutual interests of the seller and the buyer along the lines of the aims expressed in the Preamble to the Vienna Convention. Both, in turn, must conform with the principle of good faith in international trade. This is a principle both of interpretation and of integration. I have discussed the general interplay of these principles elsewhere.²⁸ They are capable of providing a potential source for the development of the Vienna sales law. The principle of fairness of exchange or mutual advantage should further develop the balance between the obligations of the seller and the buyer implied by the Convention. The principle of good faith should give effect to any reasonable reliance on a declaration, conduct or significant silence, thus permitting the development of a more specific principle of responsibility which underlies several rules of the Convention, for example Article 16, paragraph 2(b), Article 29, paragraph 2 and Article 47 among others.²⁹ This principle is of great importance in the formation of the contract (Article 19).

(e) The Vienna Sales Law and the future Argentine Uniform Code on Civil and Commercial Law

In an important decision of the Court of Appeals of the City of Buenos Aires an *obiter dictum* refers to the Vienna Convention (Article 19, paragraph 3), which had not at that time been ratified by Argentina, in order to support

27. A. Boggiano, *op. cit.*, *supra* (note 26), pp. 699-713 and p. 741; *idem*, International Standard Contracts. A Comparative Study, in: *Collected Courses of The Hague Academy of International Law*, 1981 I, vol. 170, pp. 48-52; *idem*, International Contracts in Argentina, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 47 (1983), pp. 438-440.

28. International Standard Contracts, *op. cit.*, (note 27), p. 82.

29. Honnold, *op. cit.*, p. 99.

the relevance of the place of payment as a material element and term of an international sales contract.³⁰

A remarkable reception of the Vienna uniform rules is to be found in the quite recent Argentine draft Uniform Code on Civil and Commercial Law which has been submitted to Parliament. This draft in essence takes over the Vienna uniform rules on the formation of the contract. Obviously the rules thus received are intended to apply to domestic contracts only. I think this is an impressive example of the adaptation of the Vienna rules to domestic transactions as a model law.

A significant change, *inter alia*, is the abandoning of the mirror rules of Article 1152 of the Civil Code. The new proposed Article 1151 is taken over from Article 19, paragraph 2 of the Vienna Convention, although it would have been preferable to retain the Vienna text in the Argentine drafting. However, the principle that only substantial modifications in the offer made by the offeree constitutes a counter-offer is admitted. Any modifications introduced by the offeree are deemed to be accepted by the offeror if he fails to reject the modifications without delay.³¹

(f) *Rules of private international law*

An unsuccessful attempt was made at the 1980 Vienna Conference which adopted the Sales Convention to incorporate uniform conflict of laws rules in the Convention itself,³² the present writer having argued in favour of leaving this work to the Hague Conference on Private International Law.³³

2. The 1986 Convention on the law applicable to sales

The Convention on the Law Applicable to Contracts for the International Sale of Goods of 22 December 1986 is based on a "principled" conflict of laws conception. The main principle is party autonomy to select the law applicable. Judges are not allowed to disregard the chosen law simply because this has no

30. National Commercial Court of Appeals, plenary judgment of 2 August 1982 *in re: García, Adolfo y otra v. Smafa S.A., El Derecho*, vol. 100, p. 285 and *La Ley* of 24.8.1982; A. Boggiano, Lugar de pago de las obligaciones internacionales en moneda extranjera, *Revista del Derecho Comercial y de las Obligaciones*, (1985), Nos. 103/104, pp. 29-62, at p. 36.

31. Chamber of Deputies of the Nation, Special Commission for the Unification of Civil and Commercial Law.

32. A. Boggiano, *Derecho Internacional Privado*, *op. cit.*, vol. 2, p. 747 *et seq.* and references to the Conference documents cited therein.

33. *Ibid.*, p. 748 and references.

objectively close connection with the contract. The choice may be limited to a part of the contract (Article 7, paragraph 1). If therefore the parties can partially exclude the application of the law objectively selected in the Convention by a special and limited choice of another law applicable to a part of the contract, they can also achieve the same result by incorporating substantive clauses derogating from the mandatory rules of the law objectively selected by the Convention.³⁴

The fundamental principle of proximity is precisely laid down in Article 8, paragraphs 1 and 2. By way of exception, the principle of the "manifestly more closely connected" law is introduced in an escape clause in Article 8, paragraph 3.

The escape clause does not apply if, at the time of the conclusion of the contract, the seller and the buyer have their places of business in States which will not apply that clause (Article 8, paragraph 4).

The escape clause does not apply in respect of issues regulated by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) where, at the time of the conclusion of the contract, the seller and the buyer have their places of business in different States both of which are Parties to the Vienna Convention (Article 8, paragraph 5). The application of the substantive uniform law (Vienna 1980) is a substantive law reason for excluding The Hague escape clause, i.e. the main principle of objective localisation. Principles and rules are part of the Hague flexible conflict of laws on sales.

Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Guatemala, Haiti, Honduras, the United Mexican States, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela took part in the 1985 Diplomatic Conference at The Hague.

Argentina is proceeding in the direction of acceding to the Convention, while information suggests that Uruguay, Venezuela and Mexico are also contemplating accession.

The Vienna and The Hague Conventions are to be regarded as complementary uniform laws on international sales and as establishing a flexible "principled" law.³⁵

34. On substantive autonomy see *supra* note 27.

35. P. Lagarde, Le principe de proximité dans le droit international privé contemporain. Cours général de droit international privé, in: *Recueil des Cours de l'Académie de Droit International*, 1986 I, vol. 196, pp. 13-237; Y. Loussouarn, La Convention de La Haye d'octobre 1985 sur la loi applicable aux contrats de vente internationale des marchandises, *Revue critique de droit international privé*, 75 (1986), p. 271; S. Lebedev, A. Martynov, The New Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, *Foreign Trade* (published by the USSR Ministry of Foreign Trade), 1 (1987), p. 43.

III. LANDMARKS IN UNIFORM CASELAW

1. Application of the Warsaw/Hague Convention

(a) Notice of "damage" and notice of "loss"

For some time the Argentine courts extended the concept of "damage" (*avarie*) to cover any "loss".³⁶ In comparative caselaw a restrictive concept of "damage" excluding any "loss of cargo" was apparently widely established.³⁷

(b) *La Agrícola, Cia de Seguros S.A. v. Lan-Chile* compared with *Fothergill v. Monarch Airlines*

The Argentine National Supreme Court recently held that when the Convention refers to "damage" as a concept different from that of "loss", the former covers the lack of any object contained in the unit of cargo, as such a situation implies damage to or failure of the package in which it was carried. When there has been no delivery of a unit or package in a cargo containing a number of such units or packages, such partial loss may not be assimilated to damage if it is not a case covered by Article 13, paragraph 3 of the Convention.³⁸ This distinction was much criticised by the *doctrine*.³⁹ In his dissenting judgment Judge Petracchi considered that Article 13, paragraph 3 covers only "total loss".

The principle under which notice is required is intended to give the carrier reasonable, i.e. prompt, notice of damage so as to permit him to adduce evidence and to pay prompt compensation. It is reasonable that this principle should be applied by analogy to partial loss as well as to damage and this *ratio legis* is not applicable to the case of total loss of the goods.

The House of Lords considered the same problem in *Fothergill v. Monarch Airlines*. A passenger failed to give notice of the loss of part of the contents of a bag. The judgments of Mr Justice Kerr and of the Court of Appeal that notice was not required in such a case were reversed by the House of Lords which

36. Federal Court of Appeals of the City of Buenos Aires, 14.3.1967, in re: *Gebruder de Gossler v. Aerolíneas Argentinas*, *El Derecho*, vol. 20, p. 303; *idem*, 19.5.1972, in re: *Universo Coop de Seguros v. Pan Am*, case No. 1377; *idem*, 30. 12.1975, in re: *Tandilense v. Pan Am*, case No. 4286; *idem*, 27.7.1976, in re: *Minetto v. Swissair*, case No. 4397; *idem*, 12.8.1977, *Atlantis Cia. Gral. de Seguros S.A. v. Aerolíneas Argentinas*, *El Derecho*, vol. 80, p. 495.

37. Miller, *Liability in International Air Transport*, p. 171; O. Kahn-Freund, *The Law of Carriage by Inland Transport*, (4th edition, London 1965), p. 767.

38. National Supreme Court of Justice, case L-268 XIX, 6.12.1984, in re: *La Agrícola, Compañía de Seguros v. Lan Chile*, *Fallos*, t. 306, vol. 2, pp. 1861-1872 dissenting judgment of Judge Petracchi.

39. E.T. Cosentino, *Régimen Jurídico del Transportador Aéreo* (Buenos Aires 1986), p. 263.

ruled that the word “damage” should be given a broad meaning in the context of the Convention. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.)* [1978] A.C. 141, 152 in a manner “unconstrained by technical rules of English Law, or by English legal precedent, but on broad principles of general acceptance”. The House of Lords conceded that “damage” in the context of the Warsaw/Hague Convention should be interpreted in accordance with the purpose of the Convention in seeking uniformity. The “normal” meaning was narrow, the “conventional” one broader.

Why choose the broad meaning rather than the narrow? In *Buchanan & Co. v. Babco Ltd.*, Lord Salmon was sensitive to what “reason and justice seem to demand”. In the cases under comparison, reason and justice seem to demand the giving of notice in the particular circumstances of carriage by air.

(c) *La Agrícola Cia. de Seguros S.A. v. Aerolíneas Argentinas*

The Argentine National Supreme Court of Justice departed from previous caselaw according to which the starting point of the period contemplated by Article 26 of the Warsaw/Hague Convention was that of delivery of the goods to the customs warehouse with notice to the consignee. The Supreme Court in *La Agrícola Cia. de Seguros S.A. v. Aerolíneas Argentinas* reversed the decision of the Court of Appeals based on that interpretation. The Supreme Court had considered that unloading in a customs warehouse does not, according to the customs regulations, imply that goods may be immediately taken out of the customs warehouse by the consignee, a previously issued warehouse customs authorisation being necessary to that end. This distinguishes the time of unloading from the time of taking delivery of the goods. The Supreme Court held that examination of goods does not constitute taking delivery of them. The distinction is in accordance with Article 13 of the Convention under which the delivery of the air consignment does not differ from taking delivery of the goods. The Court regards the function of notice of damage as a means of rebutting the presumption of conformity.⁴⁰ In his dissenting judgment Judge Petracchi stressed that the liability of the air carrier is restricted to the time during which the goods are under his care. This is the principle underlying Article 18 of the Convention and also Article 140 of the Argentine Air Code. The consignee is obliged to take reasonable steps to examine the goods while they are in the customs warehouse,

40. *Fallos*, t. 306, vol. 2, p. 1812, case L-221 XIX, 4.12.1984.

an examination which the Argentine Customs Code allows. Since the consignee is allowed to examine the goods, justice demands his compliance with the time limits fixed by the Convention for the exercise of his rights. The dissenting judgment also relied on the *travaux préparatoires* which indicate the correct solution that taking delivery of goods amounts to the receiving of the air consignment note. It is from this time that the period for the consignee to give notice of damage begins.⁴¹

The decision of the Supreme Court apparently deviates from the standard international construction of the Warsaw/Hague Convention and I am unaware of any similar caselaw in other Latin American countries.

(d) *The crisis of uniform compensation*

A breach in the uniform compensation system has resulted from “the erosion of the International Gold Standard”. The decisions of national courts are critical regarding the limitation of the carrier’s liability. Thus the limitation principle is highly controversial. The Italian Constitutional Court has held that the principle of limitation is in conflict with that of non-discrimination as land transport is governed by the principle of *restitutio in integrum*.⁴²

Argentine caselaw applies the gold price in the free market of exchange. The Court of Appeals has held that the interpretation of Article 22 should be in conformity with the principle whereby the limit of liability established should be related as closely as possible to the real value of gold.⁴³ The Federal Court of Appeals of Brazil has applied the official value of gold.⁴⁴ The Supreme Court of the United States in *re Trans World Airlines, Inc. v. Franklin Mint Corp. et al.* of 17 April 1984 has held that since conversion into “any national currency” of the limitation of the liability of the carrier as fixed under the Convention is permitted under Article 22, paragraph 4 of the Convention, United States courts are bound to respect the arrangement whereby authority to make such conversion has in their country been delegated by Congress to the Executive Branch, unless the properly delegated authority is exercised in a manner inconsistent with domestic law and the Convention. In the case at bar the United States Civil Aeronautics Board’s decision to continue using a gold conversion rate of

41. *Ibid.*, pp. 1815-1819.

42. *Annals of Air and Space Law*, 5 (1980), p. 670, *Coccia v. Turkish Airlines*, Tribunale civile of Rome 20.1.1979.

43. Federal Court of Appeals, Civil and Commercial Chamber No. 2, case 4522-76, *in re: Floren- cia y Cía. Argentina de Seguros v. VARIG S.A.*

44. *Companhia de Seguros Maritimos v. VARIG*, Federal Court, 3 (1975).

\$42,22 per oz. after the repeal in 1978 of the legislation that had set an official price for gold, the Par Value Modification Act, was consistent with domestic law and with the Convention itself, construed in the light of its purposes, the understanding of the signatories, and its international implementation since 1929.⁴⁵ A most illuminating dissenting judgment by Justice Stevens held that the Court considered that “the Convention’s framers chose an international, not a parochial, standard, free from the control of any one country” and, inexplicably, the Court then proceeded to ignore the standard laid down by the Convention.⁴⁶

2. Application of the Brussels Convention on Bills of Lading

(a) *Paramount clause*

Argentine courts have upheld the paramount clause whereby the rules of the Brussels Convention of 1924 were incorporated in a bill of lading relating to a cargo carried from Leningrad, although the Soviet Union is not a Party to that Convention.⁴⁷

(b) *Reservation clause*

The validity of a reservation clause is upheld if reasonable. Its reasonableness is tested according to the circumstances of the case.⁴⁸

3. Application of the Paris Convention on Industrial Property

A major problem arises in relation to the forfeiture of patents. The Paris Convention permits domestic legislation on the concession of compulsory licenses in order to prevent abuses in the exercise of exclusive rights granted by a patent. The forfeiture of the patent will only be admitted in cases where concession of compulsory licences would not be sufficient to prevent such abuses (Article 5A of the Paris Convention).

In Argentina there have been decisions to the effect that since the concession of compulsory licences has not been introduced into domestic law, the forfeiture of the patent regulated in Argentine domestic law (Article 47, Law 111)

45. *Unidroit, Revue de droit uniforme - Uniform Law Review*, (1984), II, p. 352.

46. *Ibid.*, p. 377.

47. Federal Court of Appeals, 3.10.1974, *in re: Ganadera Argentina Cía de Seguros v. Capitan y/o propietario y/o armador del buque Atkarsk, La Ley* (1975-B), p. 671 with commentary by Ray.

48. *Ibid.*, A. Boggiano, *Derecho Internacional Privado, op. cit.*, vol. 2, p. 905.

continues to be in force.⁴⁹

This caselaw is nothing else but a disguised derogation from the Convention; but covert tools are never reliable. The Convention clearly requires the introduction of compulsory licences in domestic law as a condition for establishing forfeiture of patents for non-use, and only after such licences prove to be an inadequate remedy concerning the particular patents involved. This is the ordinary meaning to be given to the terms of the Paris Convention in the light of its object and purpose which is to avoid the forfeiture of a patent merely by lapse of time. This main purpose should not be frustrated by interpretations designed to defeat it.

4. The object and purpose of uniform law Conventions

It must be emphasized that a uniform law Convention "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" (Vienna Convention on the Law of Treaties 1969, Article 31). The specific principles of each Convention should therefore be carefully sought in order *to confirm* this meaning. Recourse may be had to preparatory work and the circumstances of the conclusion of a convention, and also *to determine* the meaning when interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable (Article 32 of the 1969 Vienna Convention).

The unification of rules is an object in itself. Furthermore, the particular principles on which the uniform rules are based calls for a specific investigation. Consideration should be given to *travaux préparatoires*. Scholarly writing interpreting the original French text of the Warsaw Convention of 1929 was given decisive importance by Lord Fraser of Tullybelton in *Fothergill v. Monarch Airlines* as the Act of Parliament implementing the Convention provided that the original text should prevail.

Nevertheless, when there are several languages, all of which are original and

49. Federal Court of Appeals, Civil and Commercial Chamber No. 2, 18.3.1977, *in re: Jimkers & Co. GmbH v. Fanal S.A.*, *El Derecho*, vol. 82, p. 345; *idem*, 22.9.78, *in re: Merck & Co. Inc. v. Laboratorios Beta S.A.I.C.A.*, *Revista de Derecho Industrial*, (1979), p. 97; *idem*, 3.11.78, *in re: V.C.A. Corporation v. Plástica FM S.R.L.*, *Revista de Derecho Industrial*, (1979), p. 391. C.M. Correa, El patentamiento internacional y la explotación obligatoria de las patentes de invención. Análisis de la Ley Argentina, *La Ley*, (1976-B), p. 512; E. O'Farrell, S.F. Faerman, La obligación de explotar en nuestra legislación de Patentes, *Derechos Intelectuales*, (1986), p. 57 expressing an opinion against this *jurisprudence*.

official, "the ordinary meaning" of terms may not be ascertained by looking at one language version only. Experience shows that it is difficult for drafting committees to achieve a uniform meaning expressed in different languages. Inconsistency between different original languages can perhaps be solved by recourse to the preparatory work but the prevailing understanding of the representatives at a Conference is also of importance, unlike that of peremptory statements by isolated delegates. As Lord Diplock put it in the *Fothergill* case, "Machiavellism is not extinct at international conferences". The main purpose of a Convention may also cast light on ambiguous or obscure terms.

5. The international standard of fairness: *Roberto Kahn v. Aerolíneas Argentinas*

In *Roberto Kahn v. Aerolíneas Argentinas*⁵⁰ the Court did not apply the Warsaw/Hague Convention because a return trip between Buenos Aires and Asunción (Paraguay) was connected solely with Argentine law. The Court furthermore considered the Convention applicable only in cases where different substantive national laws actually presented a true conflict. As in this case only Argentine law was held to be applicable the Convention was deemed not to apply. Not only did the court not apply Article 1 of the Convention, it also disregarded the fact that the Convention purports to unify certain rules whatever their content may be. Uniform law is also intended to provide a specific substantive law which is applicable notwithstanding the possible conflicts between it and the substantive rules of domestic laws. The Convention is also applicable when the domestic laws connected with the contract have the same content. The provision of a substantive standard of liability is one of the main aims of the Convention. Unification is not its only object, but the special content of the unified law also. The international standard of fairness must be a guide to interpretation as it is a fundamental purpose of the Convention.

6. The doctrine of precedent in Uniform Law

Turning once more to the *Fothergill* case, a majority of the opinions expressed in the House of Lords suggests that preponderant precedents in another Contracting State should be given great weight. In some Latin American countries the decisions of even the Supreme Court are not binding. They are accorded

50. Federal Court of Appeals, 25.5.1965, *El Derecho*, vol. 25, p. 141 with commentary by W. Goldschmidt. See also *op. cit.*, (note 27), *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, p. 458.

the persuasive force of their reasoning. As Professor Honnold has pointed out: "the opinions did not consider whether attention should be given to the *probability* that other courts would follow such decisions".⁵¹ In some Latin American countries caselaw has in practice predictive value. After alluding to the unifying aim of the Warsaw Convention, Lord Scarman went on to say:

"It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting states. The mischief of any other view is illustrated by the instant case. To deny them this assistance would be a damaging blow to the unification of the rules which was the object of signing and then enacting the Convention. Moreover the ability of our judges to fulfil the purpose of the enactment would be restricted, and the persuasive authority of their judgments in the jurisdictions of the other contracting states would be diminished".

This leads me to the following question.

7. Do contradictory precedents create a conflict of laws problem?

Professor Lagarde has already answered this question.⁵² As the same case may often be brought before *fora* in different States, divergent application of the same uniform rules may be an invitation to *forum shopping*. Therefore a Convention on uniform *rules* does not necessarily achieve uniform *law*. But once a court has accepted jurisdiction in a given case, how can it take into account foreign precedent even with regard only to the interpretation of the same uniform rules? Under what authority may a domestic court refer to foreign precedents? Apparently, there is no room here for the *foreign court theory* since there is no conflict rule which allows any excursion into the field of foreign or comparative law.

I would venture to suggest that the very nature and purpose of international uniform rules call for regard being had to, and comparison made with, foreign precedents. Otherwise, interpretation of uniform rules with regard "to the need to promote uniformity in its application" (Article 7 of the 1980 Vienna Convention) would be scarcely possible, if at all.

But then, which foreign precedents are to be compared? All of them? It would be quite intolerable to make any, even disguised, discrimination as to the

51. *Op. cit.*, (note 25), p. 92, at p. 120.

52. P. Lagarde, Les interprétations divergentes d'une loi uniforme donnent-elles lieu à un conflit de lois? *Revue critique de droit international privé*, (1964), p. 235.

national provenance of precedents. Nevertheless foreign decisions should be tested as to the persuasive force of the underlying reasoning.

I suggest that there is an implied substantive rule in our conventions allowing reference to foreign precedent and further comparison by domestic courts. Comparative research could be restricted to those States with which the case has a significant connection although I doubt the value of this restriction.

8. Scholarly writing and a new comparative approach to developing uniform law in Latin America

The reporting of decisions should be much improved in some Latin American countries. Comparative research of precedents is far from being an easy task, although it must be performed. Libraries are of little value for this purpose, at least those in Latin America. Nonetheless the work must not be left undone. What steps would I propose taking first? Let us begin with scholarly writing on uniform law in Latin American countries. I fear there is at present not much discussion of cases and decisions, although there are learned commentaries on general rules whose persuasive effect "depends upon the cogency of their reasoning". Research into reported and unreported cases should be interrelated with purely general commentaries on rules. Communication of decisions and interchange of views on these decisions would be the basis for a new comparative uniform caselaw in Latin America. Furthermore, I would suggest a case method for teaching uniform law. Schools of law should give great weight to the decisions of the courts, although hypothetical cases should also be considered. This is what I am attempting in Buenos Aires, in particular with respect to the United Nations Convention on Contracts for the International Sale of Goods.

Centralisation could help considerably, maybe in Latin America through Unidroit. I remember Lord Denning in his library.⁵³ It all comes back to me now and I would repeat:

"Give us the tools, and we will finish the job."

IV. CONCLUSION

"Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case".

53. Denning, *Landmarks in the Law* (London 1984), p. 369.

Uniform law requires uniform caselaw, a new common law. A foreign decision on uniform law should not be regarded as a decision applying foreign law and therefore as purely a question of fact. Is there any difference between uniform law as it is in fact applied by the courts of a country and uniform law as it should have been applied? If not, the problem arises as to how to use foreign judicial precedents on uniform law, which as a matter of principle have no binding effect although the persuasiveness of the reasoning could be relevant. Equally, dissenting opinions may exert a powerful influence. A domestic court should take into account foreign precedent not as if it were the expression of the supreme court, but as if it were of the same level as other foreign courts. It must form its own judgment in the face of conflicting precedent. Regard should be had to academic writings, *obiter dicta* and *decisions* in previous cases, and the probability considered that other courts will follow such decisions. This would be extraordinarily illuminating. Nevertheless, as Lord Wilberforce prudently stated in *Buchanan v. Babco* "To base our interpretation of this Convention on some assumed, and unproved, interpretation which other courts are to be supposed likely to adopt is speculative as well as masochistic". A court should take into account all available foreign precedents and academic writings in a comparative and *critical* manner. Foreign precedents would not be precedents of a *foreign* law but of *uniform* law. The intergrowth of "uniform" caselaw would then be a most valuable reality on which to rely. To put it in the words of Lord Scarman's powerful statement: "Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case, a course of action by no means unfamiliar to common law judges" ([1980] 2 *All E.R.* 696, 715). I hope that this course of action will become more and more familiar and that by following it uniform law will continue to develop.