

Published in *International Uniform Law in Practice* [ISBN 0-379-20972-1], Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (UNIDROIT), Rome, 7-10 September 1987 at pages 241-244. Reproduced with the permission of Oxford University Press, Inc.

## A PROPOSAL FOR THE ESTABLISHMENT OF A "PERMANENT EDITORIAL BOARD" FOR THE VIENNA SALES CONVENTION

Michael Joachim BONELL

1. The problem of how to avoid divergent interpretations of a uniform law by courts of different countries is one common to unification at both regional and universal level. In the absence of a supranational tribunal with the competence to render binding decisions on the interpretation of the uniform text or of a formal consultation procedure among the various national judicial organs, it is essentially up to each individual judge or arbitrator called upon to interpret the uniform text in a given case, to ensure its uniform application to the widest possible extent.

2. In his report to this Congress, Professor Honnold tells us that as far as the United States Uniform Commercial Code is concerned "an acceptable degree of uniformity in application has been achieved", and this because "tribunals have concluded that interpretations in other states, while not binding, are to be given substantial weight in order to effectuate the legislature's purpose to unify state law" (cf. § 1-102(1)).

3. Also the most recent uniform laws adopted at worldwide level — above all the Vienna Sales Convention — expressly direct judges and arbitrators from the different countries to have regard in their interpretation to their "international character and to the need to promote uniformity in [their] application". Acting as General Rapporteur to the 12th Congress of the International Academy of Comparative Law (Melbourne 18-26 August 1986) on the topic "Methodology to Achieve Uniformity in Applying International Agreements" Professor Honnold stated that "the development of a homogeneous body of law under the Convention depends on channels for the collection and sharing of judicial decisions and bibliographic material so that experience in each country can be evaluated and followed in other jurisdictions".

4. At the above-mentioned Congress of Comparative Law a number of proposals were made as to how best to achieve such a result. There was general agreement on the need for what has been called "an international clearing-house" for the collection and dissemination of experience with the uniform text within the different countries, and the view was expressed that a similar service should

be performed, at least with respect to legal texts emanating from the work of UNCITRAL, by UNCITRAL itself.

5. In a report on the same topic (cf. "Dissemination of decisions concerning UNCITRAL legal texts and uniform interpretation of such texts" — A/CN.9/267 of 21 February 1985) the UNCITRAL Secretariat already indicated a number of possible tasks which it could itself perform in this respect. This is of course not the place to enter into a detailed examination of the various suggestions contained in the report which has yet to be examined by the Commission. I should only like to take the opportunity offered by this Congress to submit to the attention of the participants some suggestions regarding a possible course of action in this connection.

6. There can be no doubt that in respect of instruments such as the Vienna Sales Convention which have been elaborated within UNCITRAL, the Commission itself should ultimately be responsible for promoting their uniform interpretation and application. However, for various reasons — the heavy financial costs being only one of them — neither the Commission itself nor its Secretariat should be entrusted with the actual collection and dissemination of the different national experiences of the Convention. UNCITRAL should rather promote the creation of a sort of "Permanent Editorial Board" similar to that set up by the National Conference of Commissioners on Uniform State Laws for the American Uniform Commercial Code.

The Board should be composed only of representatives of States which have actually ratified the Convention, it being understood that smaller States, particularly those belonging to the same geographical region, may well appoint a common representative. Such a composition of the Board would ensure on the one hand that only those States which have actually ratified the Convention play an active role in its implementation and, on the other, that equal attention be given to each national experience without privileging any country and/or region for political, economic or even purely linguistic reasons.

Each member of the Board should be responsible for gathering judicial decisions and bibliographic material relating to the Convention from his own country or region. The Board as a whole should be concerned with the delicate task of reporting the material thus collected. More precisely it should, first of all, lay down uniform criteria for the manner in which the national caselaw and bibliography has to be submitted (e.g. titles and other key words to be used for the proper classification of the single decisions or writings, structure of the summary of their content, method of citation of the sources, where to find them in the full text etc.). It should then proceed to a comparative analysis of the material collected. The purpose of such a comparison would be to report periodically

to the Commission at its annual sessions on the state of application of the Convention. The reports should evidence in particular the existence or otherwise of uniformity in the interpretation of the individual provisions of the Convention as well as the existence of gaps in the provisions which might come to light in actual court practice.

Whether or not the Board should be entrusted with the additional task of rendering — in the form of non-binding advice — interpretations of the Convention either at the request of a court or of one of the parties to a dispute or in responding to questions raised in an abstract and general manner is a question better left open for the time being: a definite answer would obviously very much depend, apart from anything else, on how efficiently the Board would perform its primary duties of collecting and reporting national experience.

One last word regarding the dissemination of the documentation as a whole. The periodical reports of the Board to the Commission on the status of interpretation of the Convention should certainly be published as official documents of the Commission and should as such be distributed in the six official languages of the United Nations through the usual channels to all Governments, as well as to the United Nations depository libraries and other United Nations documentation services. On the contrary, a different solution would have to be worked out for the dissemination of the background material collected by the Board relating to the different national experiences. Indeed, the United Nations can hardly be expected to issue such material on a regular basis in all six official languages. Moreover the usual channels of distribution would in any event be inadequate, since only rarely do they reach those most interested in the material in question, namely judges, arbitrators and practising lawyers. Probably, the best solution would be the dissemination of the material by commercial publications. In other words, publishers in the different parts of the world should be free to use the material collected by the Board and to reproduce it in any or all of the six official languages, or in translation into any non-official language. This would have the advantage of making it possible to distribute the same material in the various parts of the world in different language versions, thereby also facilitating its consultation by judges, arbitrators and practising lawyers in those countries where the Convention has been adopted and is in practice applied in a language version different from the six official ones.

7. It goes without saying that the proposal made here for the creation by UNCITRAL of a Permanent Editorial Board for the Vienna Sales Convention could well be extended also to other international organisations. In other words, similar bodies could also be set up by those organisations for the collection and dissemination of experience with the uniform laws elaborated under their auspices.

This is the case, in particular, with Unidroit which, after all, has the great merit of having been the first organisation to draw attention to the importance of ensuring a uniform interpretation of uniform law by convening two Meetings — one in 1959 and the other in 1963 — specifically devoted to this topic (for the Acts and Proceedings of the Meetings, see Unidroit, *Unification of Law, Yearbook 1959*, Rome 1960, p. 5 *et seq.*, and Unidroit, *Unification of Law, Yearbook 1963*, Rome 1964, p. 17 *et seq.*). The Institute has moreover been asked to perform a function similar to that of the proposed Editorial Board. More precisely, at the Diplomatic Conference for the adoption of ULIS and ULFC at The Hague in 1964, a final resolution was passed according to which:

“Each Contracting State shall use its best endeavours to assist the International Institute for the Unification of Private Law in compiling each year a list of the judicial and arbitral decisions of major importance relating to the interpretation and application of the Uniform Law on the International Sale of Goods as well as the Uniform Law on the Formation of Contracts for the International Sale of Goods, which are issued in that State and to promote the diffusion of such compilation. Each Contracting State is recommended to send to the International Institute for the Unification of Private Law the necessary information in the French or English languages, in the form indicated by the International Institute for the Unification of Private Law. In this compilation there shall be a short summary of the content of each decision and a reference to the source where the decision is to be found. This material shall serve as a basis for a series of reports in the French and English languages, which the Conference recommends to the International Institute for the Unification of Private Law to publish each year and to distribute to each State which is party to, as the case may be, the Convention relating to the Uniform Law on the International Sale of Goods or the Convention relating to the Uniform Law on the Formation of Contracts for the International Sale of Goods.” (See *Records and Documents of the Conference*, I, (The Hague 1966), p. 330).

It is my firm conviction that the substantial failure of the Resolution was due mainly to two reasons: on the one hand, the task of collecting the relevant material of the various countries was entrusted to the Contracting States generally, i.e. without any further indication of who within each State should be responsible vis-à-vis the Institute for the actual performance of this task; on the other hand, the Resolution envisaged an involvement of the Institute as such, thus obliging the latter to commit to the task of reporting the development in practice of the two Uniform Laws the resources also of those States which had not adopted them. The proposal for the creation of a special Editorial Board with the composition and the functions described above would have the advantage of avoiding both of those shortcomings.