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CONSIDERATION OF STEPS TO BE TAKEN FOR PROGRESSIVE DEVELOPMENT IN  
THE FIELD OF PRIVATE INTERNATIONAL LAW WITH A PARTICULAR VIEW TO  
PROMOTING INTERNATIONAL TRADE

Note by the Secretariat

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## I. 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 (A/5935) 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:

- (1) International sale of goods
  - (a) Formation of contracts
  - (b) Agency arrangements
  - (c) Exclusive sale arrangements
- (2) Negotiable instruments and banker's commercial credits
- (3) Laws relating to conduct of business activities pertaining to international trade
- (4) Insurance
- (5) Transportation
  - (a) Carriage of goods by sea
  - (b) Carriage of goods by air
  - (c) Carriage of goods by road and rail
  - (d) Carriage of goods by inland waterways
- (6) Industrial property and copyright
- (7) 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.

## II. 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 aegis of the League of Nations and other inter-governmental bodies, including The Hague Conference on Private International Law, the International Institute for the Unification of Private Law, and the Pan American Congress at Havana, 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 (e.g. 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, the 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.

### III. METHODS OF UNIFICATION

7. Three methods have been mainly used to accomplish unification in the field of international trade: (a) uniform or "model" national laws, (b) international conventions, (c) unification 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 Institute for the Unification of Private Law, an inter-governmental body generally known as the Rome Institute, has prepared studies and drafts since 1928.<sup>1/</sup> 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 commissions of the United Nations.

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<sup>1/</sup> See annex I.

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 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 has suggested model laws for the development of natural resources; and the Economic Commission for Europe 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 fulfil 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 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 for uniform law for bills of exchange and promissory notes<sup>2/</sup> and for a uniform law of cheques.<sup>3/</sup> 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.<sup>4/</sup> 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 Pan-American Code of private international law of 1928, the Bustamante Code, which has been adhered to by fifteen American States. This

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<sup>2/</sup> Convention providing for a uniform law for bills of exchange and promissory notes, Geneva, 7 June 1930.

<sup>3/</sup> Convention for a uniform law of cheques, Geneva, 19 March 1931.

<sup>4/</sup> Convention relating to a uniform law on the international sale of goods, The Hague, 1 July 1964.

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.<sup>5/</sup> The Hague Conference on Private International Law, an inter-governmental organization with twenty-three members, has prepared a number of conventions in this field, eleven of which have entered into force.<sup>6/</sup> 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,<sup>7/</sup> the conventions relating to liability in air law<sup>8/</sup> and the conventions on the transport of goods by rail and road.<sup>9/</sup> There are also several conventions relating

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- 5/ Convention containing provisions of private international law in the field of marriage, adoption and guardianship, 1931; Convention on the collection of maintenance claims, 1931; Convention on recognition and enforcement of foreign judgements, 1933; Convention on bankruptcy, 1934; Convention on succession and administration of estates, 1935.
- 6/ Of particular interest are the Convention concerning civil procedure, 17 July 1905; the Convention concerning civil procedure, 1 March 1954; and the Convention on the law applicable to international sales of goods, 15 June 1955.
- 7/ International Convention for the unification of certain rules relating to bills of lading, of 25 August 1924; Convention for the unification of certain rules relating to limitation of liability of owners of sea-going vessels, of 25 August 1924; Convention for the unification of certain rules relating to maritime mortgages and liens, of 10 April 1926.
- 8/ Convention for unification of certain rules relating to international carriage by air, Warsaw, 12 October 1929; Protocol to amend the Warsaw Convention on international carriage by air, The Hague, 28 September 1955; Convention supplementary to the Warsaw Convention, relating to international carriage by air performed by a person other than a contracting carrier, 18 September 1961.
- 9/ International Convention concerning the transport of goods by rail (CIM), Berne, 25 February 1961; Convention on contract for the international carriage of goods by road (CMR), 19 May 1956; Convention for international rail transport of goods (SMGS), 1951 and 1953-55; Convention relating to the international forwarding of goods, Warsaw, 1956.

to copyright and industrial property.<sup>10/</sup> Conventions have been largely the product of inter-governmental organizations; although in the field of maritime law, they have been prepared by a non-governmental organization, the Comité Maritime International, 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. Unification of practices in international trade, particularly standard contract provisions and general conditions of sale

15. 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 1880's. 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 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

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<sup>10/</sup> Universal Copyright Convention, Geneva, September 1952; International Convention for the protection of performers, producers of phonograms and broadcasting organizations, Rome, 26 October 1961.



for Europe, the International Chamber of Commerce,<sup>11/</sup> the International Law Association,<sup>12/</sup> and the Council for Mutual Economic Aid (Comecon).<sup>13/</sup>

14. The work of the Economic Commission for Europe on general conditions of sale and standard forms of contract merits special attention.<sup>14/</sup> 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 ECE 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

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11/ 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 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;
- (d) Commercial Agency - A Guide for the Drawing Up of Contracts Between Parties Residing in Different Countries.

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

13/ 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.

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

acceptance by trade associations, which are of course free to adapt them entirely or in part.<sup>15/</sup>

The development of international commercial custom and commercial arbitration

15. International commercial custom has exerted a marked influence on the unification of law, developed as it is from the commercial practices, usages and standards which are widely used by all those engaged in particular sectors of international trade. Most of the general conditions and standard forms of contract existing have developed out of some commercial custom. Commercial custom has also been incorporated in some respects into the commercial legislation of many countries, and it is a common feature of legal systems in the interpretation of international contracts that account should be taken of established commercial practices and usages. The dissemination of custom and practice has been undertaken by national and international trade associations, such as the International Chamber of Commerce, which has published the widely used "Uniform Custom and Practice for Commercial Documentary Credits" (1962 Revision) and "Incoterms". Within recent decades the increased use of international commercial arbitration has contributed towards the unification of law and commercial practices. In resorting to international commercial arbitration, the parties to an international commercial transaction often agree upon the law to govern the arbitration and the substance of the disputes settled by this process. By this process the parties avoid a conflict of jurisdictions and of national laws. In certain cases the parties also stipulate that the transaction should be governed by a complete system of uniform law, the terms of general conditions and standard forms of contract, commercial customs and general principles without any recourse to any supplemental national law. Moreover, the personnel used in international commercial arbitration is drawn from many countries and from lists of experienced arbitrators prepared by non-governmental organizations and national associations. In addition, international commercial arbitration in certain sectors of international

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<sup>15/</sup> It is reported that over a million copies of the various versions of the General Conditions for Supply of Plant and Machinery for Export and General Conditions for the Supply of Plant and Machinery for Import and Export have been sold. Benjamin, "ECE General Conditions of Sale and Standard Forms of Contract", 1961 J. of Bus. Law, (London), p. 113.

trade has been localized in a few principal centres. Such institutional international arbitration serves to standardize business transactions, the quality and specifications of goods and delivery terms. This movement towards uniformity has been assisted by the principal international conventions on the law of arbitration and the enforcement of arbitral awards, namely, the European Convention on Commercial Arbitration sponsored by ECE,<sup>16/</sup> the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>17/</sup> the Montevideo Treaty on International Procedural Law of 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.

#### IV. 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;

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<sup>16/</sup> The following States have become parties to the Convention: Austria, Bulgaria, Byelorussian SSR, Czechoslovakia, Federal Republic of Germany, Hungary, Poland, Romania, Ukrainian SSR, USSR 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.

<sup>17/</sup> 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, Syria, Thailand, Ukrainian SSR, USSR, United Arab Republic and United Republic of Tanzania.

(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 world-wide unification;

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

ANNEX I

Drafts prepared by the Rome Institute

(Where two years are listed, the first indicates  
the year work was begun.)

Draft of a uniform law on international sale of goods - 1928; first edition presented to the League of Nations in 1935.

Preliminary draft of a uniform law on international contracts made by correspondence - 1935; 1936.

Preliminary draft on a uniform law on representation in respect of private law on patrimonial questions - 1937; 1950.

Draft of a uniform law on liability of innkeepers - 1932; 1934.

Draft of uniform law on arbitration in private law matters in international relations - 1929; first draft 1934, 1958.

Draft of a convention for the enforcement abroad of maintenance obligations - 1929; 1938, revised 1949.

Draft for uniform rules applicable to international loans - 1931; 1937.

Draft uniform law on civil liability of motorists and draft uniform provisions on compulsory insurance of motorists - 1934; 1937.

Draft convention on contract for the international transport of goods - 1952 (in collaboration with the International Chamber of Commerce and International Road Union).

Draft uniform law on formation of international contract of sale of goods - 1958.

Draft convention providing a uniform law on the contract of commission on the international sale or purchase of goods - 1935; 1960.

Draft convention providing a uniform law on agency in private law relations of an international character - 1935, resumed 1946; 1961.

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Sources: Yearbooks of the International Institute for the Unification of Private Law, 1947-1952, 1957, 1958, 1959, 1960, 1961, 1962.

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## ANNEX II

### GENERAL CONDITIONS OF SALE DRAWN UP UNDER THE AUSPICES OF THE ECONOMIC COMMISSION FOR EUROPE

	<u>Document No.</u>	<u>United Nations Sales No.</u>
General Conditions for the Supply of Plant and Machinery for Export No. 188	ME/188/bis/53	
Commentary on the General Conditions for the Supply of Plant and Machinery for Export No. 188	(E/ECE/169 (E/ECE/IM/WP.5/9	
General Conditions for the Supply and Erection of Plant and Machinery for Import and Export No. 188A	ME/188A	1957.II.E/Min.3
General Conditions for the Supply of Plant and Machinery for Export No. 574	ME/574/55	
Commentary on the General Conditions for the Supply of Plant and Machinery for Export No. 574	(E/ECE/220 (E/ECE/IM/WP.5/16	
General Conditions for the Supply and Erection of Plant and Machinery for Import and Export No. 574A		1957.II.E/Min.4
General Conditions of Sale for the Import and Export of Durable Consumer Goods and of other Engineering Stock Articles No. 730	E/ECE/IM/WP.5/32	61.II.E/Min.12
Commentary on the General Conditions of Sale for the Import and Export of Durable Consumer Goods and of other Engineering Stock Articles No. 730	(E/ECE/426 (E/ECE/IM/WP.5/33	62.II.E/Min.29
General Conditions for the Export and Import of Sawn Softwood No. 410	ME/410/56	
General Conditions for the Export and Import of Hardwood Logs and Sawn Hard- wood from the Temperate Zone No. 420	TIM/163 TIM/WP.1/17/Rev.1	62.II.E/Min.29
General Conditions for the Export and Import of Solid Fuels	COAL/131 COAL/Cond.Sales/16	59.II.E/Min.1

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	<u>Document No.</u>	<u>United Nations Sales No.</u>
General Conditions for the International Sale of Citrus Fruit No. 312	(AGRI/136 (AGRI/WP.3/14	58.II.E/Min.12
Contracts for the Sale of Cereals (CIF Maritime)		1957.II.E/Min.21 (and corrigenda)
Final Version of the Contracts for the Sale of Cereals 5A and 5B (FOB Maritime - and corrigenda)	(AGRI/141 (AGRI/WP.4/32/Rev.1	1957.II.E/Min.21 (Parts 5A + 5b)
Final Version of the Contracts for the Sale of Cereals 6A and 6B (Consignment by rail in complete wagon loads)	(AGRI/179 (AGRI/WP.4/45/Rev.1	1957.II.E/min.21 (Parts 6A + 6B)
Final Version of the Contracts for the Sale of Cereals 7A + 7B (CIF Inland Waterway) and 8A + 8B (FOB Inland Waterway)	(AGRI/198 (AGRI/WP.4/50/Rev.1	62.II.E/Min.30 (Parts 7A to 8B)
General Conditions for International Furniture Removal	TRANS/263	62.II.E/Min.15
General Conditions for the erection of plant and machinery abroad No. 188D	E/ECE/IM/WP.5/41	63.II.E/Min.21
General Conditions for the erection of plant and machinery abroad No. 574D	E/ECE/IM/WP.5/42	63.II.E/Min.22

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