HARMONIZATION OF CONTRACT LAW THROUGH INTERNATIONAL TRADE: A NORDIC PERSPECTIVE

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I. INTRODUCTION

A. Harmonization

There are several keys to what can be considered "international contract law," such as international legislative activity concerning

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contractual relations, the contracting parties being habitually resident in different countries or having their places of business in different countries, the contract being concluded in one country and performed in another, the performance taking place in more countries than one, the use of internationally known contract terms, or the choice of the parties to make international rules and principles apply.[1] There is no need to specify this "international contract law" further as it is impossible to draw a clear line between it and "national contract law."[2] International contract law is part of the substantive law of contracts, but to a certain extent different substantive rules and principles might apply to international contracts as compared with domestic contracts.[3] Many similarities to the international law of obligations, including the law of negotiable instruments, guarantees, and so forth, can be found in international contract law, and the ideas presented below would be relevant to the corresponding parts of the law of obligations.

The main purpose of this Article is to answer two questions concerning international contract law: to what extent can the applicable substantive rules and principles be unified, or, more realistically, harmonized, and how can this be achieved. Unification is, to a large extent, a utopian ideal, even within one nation.[4] Harmonization assumes that

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1. *See* PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (International Institute for the Unification of Private Law 1994) [hereinafter UNIDROIT PRINCIPLES].

> The international character of a contract may be defined in a great variety of ways. The solutions adopted in both national and international legislation range from a reference to the place of business or habitual residence of the parties in different countries to the adoption of more general criteria such as the contract having "significant connections with more than one State", "involving a choice between the laws of different States", or "affecting interests of international trade."

Id. at pmbl. cmt. 1. *See also* MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, as adopted by the UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) on June 21, 1985, arts. 1(3) and 1(4) (defining "international").

2. Hannu Honka, *Harmonisering på avtalsrättens område?* [*Harmonization of Contract Law?*], TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND 250-79 (1992) [hereinafter JFT]; HANNU HONKA, *Internationalisering av avtalsrättens rättskällor? Avtalsvillkor, kutymer, avtalsrättsliga principer* [*Internationalization of the Sources of Contract Law? Contract Terms, Customs, Contract Law Principles*], *in* RÄTT, DEMOKRATI, INFORMATION [LAW, DEMOCRACY AND INFORMATION] 132 (Allan Rosas ed., 1993).

3. There are many examples. From a Nordic point of view the Sale of Goods Acts are applied in domestic and Inter-Nordic trade, while legislation based on the United Nations Convention on Contracts for the International Sale of Goods (CISG), 1980, is applied to non-Nordic international sales. *See* 1980 Vienna Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 19 I.L.M. 668 [hereinafter CISG].

4. Perhaps the best example is the situation in the United States. In spite of restatements and uniform codes and the formal acceptance of them by the states, there are differences in the

similar or almost similar rules and principles exist internationally and that their application does not lead to unacceptably varied results.[5]

Harmonization would be a kind of "international rough justice." The reasons for harmonization have to be established first. Even if and when the reasons are established, there is no reason to believe that there is international consensus that they justify the process. For example, not every nation or society finds that the advancement of free world trade is to its advantage. Factual analysis makes it quite clear that several problems are found on the way to harmonization. Most of them have solutions. Finally, the factual approach makes it possible to draw conclusions about the international trend toward harmonization and to hazard some guesses about the future.

B. International Trade as the Raison d'Être *of Harmonization*

Naturally, harmonization both *de lege lata* and *de lege ferenda* is not an end in itself, but is dependent on a valid *raison d'être*. Promoting international trade provides the most obvious reason for harmonizing measures within civil law as a whole, and especially within the laws of obligations and contracts.[6] Expanding trade will probably increase the number of international contracts concluded and especially the economic volume involved, and further necessitate the harmonized handling of contractual disputes. This is no novel basis; the same justification underlay the medieval European *lex mercatoria*.[7] The present-day

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application not only between the courts in those states, but also between federal courts. The federal courts of appeals often follow their own rule.

5. *See* Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699 (1991).

6. *Cf.* Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG,* 69 TUL. L. REV. 1149, 1149 (1995) (citing improved ease of global communication and transportation significant to the creation of international markets);. Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683, 693-95 (1992) (claiming that harmonized codification of state law in the United States is derived from the common national economic market and the high degree of physical mobility of the population).

7. An interesting piece of research on mediaeval *lex mercatoria* is by FREDERIC ROCKWELL SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW (reprint 1989). Sanborn shows that maritime and commercial law, quite naturally in view of communications in times past, were closely interrelated. Harmonized law for commercial men was obviously important. In the Foreword, Sir William Holdsworth cites Gerard de Malynes: "Even as the roundness of the globe of the world is composed of the earth and waters; so the body of the *Lex Mercatoria* is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth." *Id.* at vii (quoting GERARD DE MALYNES, LEX MERCATORIA (3d ed., London 1686)). *Lex mercatoria* was related to freedom of trade. Already the Magna Carta, the

emphasis, however, is clearly new both in geographical terms and in its stress on the efficiency of harmonization.

The World Trade Organization (WTO) and the General Agreement on Tariffs and Trade/General Agreement on Trade in Services (GATT/GATS)[8] cannot implement free world trade in goods and services without affecting contractual relations on an individual level, even if those relations do not directly belong to the interest sphere of the agreements on free trade and services. The WTO system could be called an umbrella with regional trading blocs under it.

International trade involving the European Community (EC) benefits from harmonization because here one deals with a distinctly supranational organization with legislative, judicial and administrative powers.[9] Other regional organizations with the same or lesser aims might also produce similar results through harmonization. These include the

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foundation of English liberties, first issued by King John in June 1215, preserves such a right. Clause 41 states: "All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs." It was only later that mercantilism paved the way for national priorities. But even present-day ideas of harmonized rules go back in time, some maintain, to the Industrial Revolution. Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 184-88 (1994).

8. The structure is rather confusing, because the rules that Members must follow are attached as annexes. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1 LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act]. There are several annexes. One of the annexes is the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 33 I.L.M. 1154 [hereinafter GATT], which is based upon the text of the original General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947]. Another is Annex 1B which is the General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 (1994) [hereinafter GATS]. The Final Act also includes the Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter WTO Agreement]. Originally, the WTO was called the Multilateral Trade Organization [hereinafter MTO], but it was changed on the basis of an agreement reached among the participants in the Uruguay Round negotiations. As an example of the aims involved, reference can be made to one of the preambles in GATS: "[*d*]*esiring* the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;" GATS, Annex 1B pmbl., 33 I.L.M. 48 (1994); *see also* Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?,* 16 MICH. J. INT'L L. 349, 350-51 (1995) ("In their provisional analysis, GATT economists have proposed that the Uruguay Round results on market access will mean substantial world income gains of approximately $235 billion annually and trade gains of $755 billion annually by the year 2002"). GATT allows for regional agreements concerning customs unions and free trade areas, GATT art. XXIV.

9. *See* discussion *infra* Part IV.C.

North American Free Trade Agreement (NAFTA),[10] the Southern Common Market (MERCOSUR),[11] the ASEAN (Association of Southeast Asian Nations) Free Trade Agreement (AFTA),[12] and the Asia-Pacific Economic Cooperation (APEC).[13] Finally, there is the

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10. North American Free Trade Agreement, Dec. 11-17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) and 32 I.L.M. 605 (1993) [hereinafter NAFTA]. NAFTA is a free-trade area where objectives are, according to art. 102, to eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the states involved, to promote conditions of fair competition in the free trade area, and to increase substantially investment opportunities in the territories of the states involved. NAFTA took effect January 1, 1994. NAFTA can be acceded to, the possible next member being Chile. However, the Republican Congress has blocked the Clinton administration efforts in this respect up to this point in time. *Christopher, Who Arrived Here Late Sunday, Met the Presidents of Honduras, Chile*, AGENCE FRANCE PRESSE, Feb. 27, 1996, *available in* LEXIS, Europe Library, ALLNEWS File. For more on NAFTA, see Catherine Curtiss & Kathryn Cameron Atkinson, *United States—Latin American Trade Laws*, 21 N.C.J. INT'L LAW & COM. REG. 111 (1995).

11. The 1991 Asunción Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Uru.-Para., 30 I.L.M. 1041, establishes a Southern Cone Common Market (el Mercado Comun del Sur) [hereinafter MERCOSUR] between Argentina, Brazil, Paraguay, and Uruguay by December 31, 1994, but the factual implementation date is unclear. The Asunción Treaty, 1991, introduces a system which includes four freedoms similar to those of the EC, i.e., the free movement of goods, services, persons and capital. Also, other objects lie within the MERCOSUR system. Several factors make that system weaker than the EC. However, there is a serious effort to improve the MERCOSUR system by creating an institutional structure. This has taken place by the Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, "Protocol of Ouro Petro," in December 1994. The structure is defined in Art. 1 of the Protocol and it does not provide for a common court. There are several combinations of free trade areas and customs unions in Latin America. One example is the Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910 (1969) [hereinafter the Andean Pact]. While NAFTA establishes a free trade area, both MERCOSUR and the Andean Pact establish customs unions and common external tariffs. *See* Marta Haines-Ferrari, *MERCOSUR: A New Model of Latin American Economic Integration?,* 25 CASE W. RES. J. INT'L L. 413 (1993); *see also* Curtiss & Atkinson, *supra* note 10, at 112.

12. AFTA emerged, starting in 1992 with the Singapore Declaration of 1992, Jan. 28, 1992, 31 I.L.M. 498 (1992), as a kind of counteraction to possible EC and NAFTA protectionist policies towards third world countries. There were other reasons too, mainly the need to sustain the economic growth and development of the Member States. The Singapore declaration includes a Framework Agreement on Enhancing Economic Cooperation. The main commitment is to establish AFTA within 15 years. Possibly the main tool is to implement tariff reductions according to a special scheme, but also to attract foreign investment and improve the competitiveness of industry. The Association of Southern Asian Nations Declaration (ASEAN), 6 I.L.M. 1233 (1967), was already formed in 1967 and originally had political aims. The ASEAN Member States are Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei. The ASEAN market is growing fast and it is the third largest for U.S. exports—after Japan and the EC—outside North America. *See* Deborah A. Haas, Comment, *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U.J. INT'L L. & POL'Y 809 (1994).

13. APEC is a loose unit of cooperation with western and Asian approaches involved. It has no treaty-based foundation. There is, nevertheless, a secretariat. APEC derives from the time of the Uruguay round of GATT negotiations, mainly from 1989, and is now based on intergovernmental meetings at different levels. The "summit" levels have been the 1993 Blake

Treaty Establishing the African Economic Community. It provides for the establishment of the Community in six stages over a transitional period not exceeding thirty-four years—a long transitional period.[14] These regional organizations or trading blocs constitute different kinds of cooperation.[15]

The commercial policy of fostering free international trade is the *raison d'être* for harmonizing contract law. This is especially

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Island meeting, the 1994 Jakarta meeting and the 1995 Osaka meeting. APEC is a forum for economic cooperation discussions, but it also has Pacific Basin security questions involved. APEC could develop into an Asia Pacific Economic Community. The Jakarta meeting was attended by Australia, Brunei, Canada, the People's Republic of China, Hong Kong, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, the Philippines, Singapore, Chinese Taipei, Thailand and the United States. Note the attendance of the three "Chinas"—a rare phenomenon of cooperation. The question of trade liberalisation seems to be controversial and such an effort is considered not to be in the interest of East Asian developing countries. *See* David K. Linnan, *Current Developments: APEC Quo Vadis?*, 89 AM. J. INT'L L. 824 (1995). However, with the Osaka meeting it seems to have been established that APEC has to follow the market-driven liberalisation of the trade. The Osaka Action Agenda aims to achieve free and open trade and investment by the year 2010 for the industrialised economies, and by 2020 for the developing economies. APEC is no longer established only for human resources development and infrastructure aspects as emphasized earlier on. To describe the importance of APEC it should be noted that its actions will affect half of the world's population. Chile and Peru are also involved in APEC, *APEC Seeks Early Start on Trade Liberalisation*, REUTER EUR. BUS. REP., Dec. 9, 1995.

14. The Treaty Establishing the African Economic Community, adopted at Abuja, Nigeria, on June 3, 1991, 30 I.L.M. 1241, but not yet in force, creates an organizational framework, including a Court of Justice. It aims to develop a customs union and to liberalize trade, but a number of sectors are left for separate protocols to be negotiated later on, such as agriculture, industry, and transport. The Community is to form an integral part of the OAU (Organization of African Unity). There are, as a matter of fact, several African integration schemes mainly based on a geographical division. Most of these schemes have failed due to, it is maintained, lack of political will. Integration in the whole of Africa will be extremely hard to achieve due to prevailing economic nationalism, deep economic problems, political unrest, racial suspicion, and poverty. *See* Theophilus Fuseini Maranga, *The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community*, 10 HARV. BLACKLETTER J. 105 (1993); *see also* Muna Ndulo, *Harmonisation of Trade Laws in the African Economic Community*, 42 INT'L COMP. L.Q. 101 (1993).

15. For example, there is the Solem Joint declaration between the Council of the European Union and the European Commission, on the one hand, and the MERCOSUR Member States on the other, 1994 O.J. (C 377) 1. Section I states that "the parties share a great interest in a strategy whose final objective is a political and economic inter-regional association. This association would aim towards closer political cooperation, including . . . the progressive and reciprocal liberalization of all trade . . . ." *Id.* at 1. Now there is a cooperation agreement to promote close political, economic, scientific and cultural ties between the EC and its Member States and MERCOSUR and its contracting parties, signed in Madrid, December 15, 1995. Work on constructing a joint free trade zone was started. Also, the U.S. and the EU have a Trans-Atlantic agreement. Giles Teemlett & Luke Hill, *EU, Mercosur Sign Cooperation Accord*, U.P.I., Dec. 15, 1995, *available in* LEXIS, News Library, UPI File. *See also* the Finnish Government pro memoriam U 47 to the 1995 Parliamentary Session.

emphasized in intra-EC trade.[16] Free international trade functions better in a legally harmonized environment than in the opposite situation. Also, harmonization of contract law is presumed to save costs as the "legal picture" is simplified.[17]

It is somewhat paradoxical that there is debate on the introduction of harmonized arbitration rules into APEC.[18] Of all the above-mentioned examples of international organizations and trading blocs concerned with free trade, APEC is perhaps the least formalized. Arbitration concerns the peripheral area of procedure more than harmonized rules on substance. Nevertheless, it is considered to be a viable route to facilitate regional trade and investment within the APEC.[19] Accepting that need, one can *a fortiori* state that substantive rules concerned with international commercial contracts also need exploration.

The advocates of African economic integration have stressed the importance of harmonization of contract law. Muna Ndulo, Advocate of the High Court and Supreme Court of Zambia and Legal Officer in the UN International Trade Law Branch, has said in favor of African economic integration:

> The harmonisation of trade laws and commercial practices is an important ingredient of regional integration, without which meaningful economic integration cannot be achieved. Economic integration needs a legal framework to foster and support it. . . . The existence, in Africa, of widely accepted trade laws and commercial practices would eliminate a number of problems which currently plague intraregional trade. . . . If the parties in an intraregional business transaction come

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16. COMMISSION ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I: PERFORMANCE, NON-PERFORMANCE AND REMEDIES XV-XXI (Ole Lando & Hugh Beale eds., 1995) [hereinafter PRINCIPLES OF EUROPEAN CONTRACT LAW].

17. Christian Joerges, *The Process of European Integration and the 'Denationalization' of Private Law*, *in* NEW DIRECTIONS IN BUSINESS LAW RESEARCH 73, 76 (Børge Dahl & Ruth Nielsen eds., 1996).

18. Melissa Gerardi, Comment, *Jumpstarting APEC in the Race to "Open Regionalism": A Proposal for the Multilateral Adoption of UNCITRAL's Model Law on International Commercial Arbitration*, 15 J. INT. L. & BUS. 668 (1995).

19. The benefits of APEC should the UNCITRAL Model Law on International Commercial Arbitration be adopted are threefold: (1) It serves as evidence that the Asian/Western divide can be bridged, (2) It promotes a harmonization of the regional law of international commercial arbitration and thereby facilitates regional trade and investment, and (3) APEC will retain credibility by producing practical results and enhance the ultimate goal of open regionalism. *Id.* at 683-84.

> from different States and are therefore accustomed to different legal systems, the governing law is going to be unfamiliar to one of the parties. This, in turn may also discourage parties from entering into intraregional trade. The absence of uniform commercial rules makes the outcome of litigation unpredictable and to some extent dependent on the court and place of hearing of the case.[20]

The importance of this statement lies not in the substance, familiar from previous integration processes, but in the realization already, at an early stage of integration in Africa, of how important, in principle, harmonization of trade law is to free trade.[21]

The legal macrolevel must have concrete implications on the microlevel. It is quite another matter to what extent free world trade should expand. International commercial contracts are one important factor in the global economy—with or without trade barriers. But, their importance has been highlighted by world and regional trading arrangements.

C. Other Reasons for Harmonization

More specific rationales for harmonization might exist either independently or in connection with the goal stated above. For example, the conventions concerning carriage of goods and passengers, and carrier liability in case of loss of or damage to goods or delay in their delivery,

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20. Atiyah points out that contracts have lost in importance in economic relations. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT *passim* and specifically ch. 22 (1979). Similar observations concerning the contract being part of an economic chain, but in a different context have been made: The contracting party's liability in damages in case of breach of a commercial contract should be looked at from the point of view that the contract is part of the business activities as a whole, L.E. TAXELL, AVTAL OCH RÄTTSSKYDD [CONTRACT AND INDIVIDUAL LEGAL PROTECTION] 303 (1972). However, contracts still very often establish the starting point for further co-operation between the parties. Should a dispute arise and the parties become involved in resolving it, quite naturally, commercial realities would be the main steering factor, not contract law. The classic example is an insurance company paying out compensation to an economically relevant client even if, according to insurance contract legislation and contract terms, the insurance company would have good possibilities to avoid the liability of payment. There is, however, another dimension. Once the conflict goes further by, for example, the insurance company establishing that the insurance compensation claimed is higher than the economic benefits achieved by maintaining a commercial relationship, legal issues then do become of utmost importance, not only in litigation but also when the parties try to establish their bargaining power in efforts to settle by negotiation. Thus, in many ways, contract law maintains its former position. *Cf.* Erich Schanze, *New Directions in Contract Law Research*, *in* NEW DIRECTIONS IN BUSINESS LAW RESEARCH 64 (Børge Dahl & Ruth Nielsen eds., 1996).

21. Ndulo, *supra* note 14, at 107-08.

documentary liability, and death of passengers and personal injuries have been created not only to enhance business, but also to ensure the fair and reasonable functioning of contractual relations. These conventions seek not only to balance commercial relations, but also to protect potentially weaker parties, especially consumers—in this case, passengers and shippers. The same ideal of protecting weaker parties is expressed in more abstract terms in art. 7(1) of CISG,[22] which emphasizes good faith in international trade.

The importance of international requirements of fairness and reasonableness is not to be minimized in the context of contract law harmonization, especially as the common-law systems have not traditionally emphasized such concepts.[23] One may suspect that national attitudes in this respect vary, making it difficult to reach international solutions not based on fairly far-reaching compromises. The original Hague Rules[24] dealing with carriage of goods by sea provide an example *in extremo*: The system was created to establish a minimum mandatory liability for the carrier mainly in cases of loss of or damage to goods carried; but the result appears, to many commentators, to establish a very favorable position for the carrier, a position which is automatically, i.e. *ex lege*, taken into consideration. Without this compromise it is, however, doubtful whether international agreement would have been reached.[25]

Not only commercial policies and ideals of fairness and reasonableness, but also political and cultural needs function as the basis of harmonization. A typical example is the traditional cooperation between the Nordic countries (Denmark, Finland, Norway, and Sweden) which in certain areas of private law have a harmonized approach to legislation.[26] In another context, politics might instead have hindered harmonization. In this respect the abolition of political hindrances, for example in previously socialist states,[27] advances positive development.

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22. The Convention is of a nonmandatory nature, contrary to the conventions dealing with transport.

23. *See* PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, at xvi-xvii.

24. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 247 (1924).

25. For a short history, see SIR ALAN ABRAHAM MOCATTA ET AL., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING 402 § 20 (18th ed. 1974).

26. *Cf.* Rosett, *supra* note 6, at 684 (posturing that the motivation behind harmonization is political and cultural).

27. *See* René J. David, *The Methods of Unification*, 16 AM. J. COMP. L. 13 (1968), on previous differences. As to law in former socialist states, see Peter B. Maggs, *Unification of Law in Eastern Europe*, 16 AM. J. COMP. L. 107 (1968).

Sometimes even combined practical and legal reasons might dictate harmonization. For example, if there is easily accessible international legal material on solutions to a certain problem, a court or an arbitrator might accept the arguments found in that material, even if not formally bound to do so. Such sporadic use of international law does not, however, create grounds for more than random development.

The traditional view for solving international contractual disputes is formal-procedural. The parties either insert a choice-of-law clause into their contracts, or conflict-of-law rules dictate the applicable law. Basic principles point to the country that has the closest connection to the dispute.[28] The latter very often in practice is the familiar "home" law of the court or the arbitration tribunal, i.e. *lex fori*.[29] However, for the above-mentioned reasons, contract law is developing beyond finding a convenient forum for the parties to embrace harmonization on the substantive level. This development is as important to make note of—even if it is no new phenomenon in internationalism—as the social contract concept so much discussed during recent years has been.[30] Nor is the creation of a protective network of harmonized contract law which gives advantage to the weaker party new. The requirement of fairness in contractual relations is age-old in many legal systems, and this concept has gradually and increasingly been developed and made mandatory; nowadays it especially covers contracts connected with the mass production of goods and services for consumers.[31]

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28. The "closest connection" principle prevails, for example, in the Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1, 19 I.L.M. 1492 (1980) [hereinafter Rome Convention], intended for the EC Member States, art. 4.1.: "To the extent that the law applicable to the contract has not been chosen . . . , the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country." The principle is further specified in art. 4. This principle has a general nature in private international law. However, specific contract types, such as sale, insurance and consumer contracts, dictate further specifications. In the U.S., the core country for conflict of law issues due to its federal basis, the rules and principles are complicated. For further details, see EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS (1992).

29. The place for jurisdiction or arbitration seems to have directed courts and arbitrators in England in cases of no contractual guidance, but for English law the Rome Convention would no more enable such an approach unless that place would be one of the criteria in establishing the closest connection.

30. For one of the main authorities on the social concept, see THOMAS WILHELMSSON, CRITICAL STUDIES IN PRIVATE LAW (1992); *see also* David, *supra* note 27, at 18-22.

31. *See* Thomas Wilhelmsson, *Control of Unfair Contract Terms and Social Values: EC and Nordic Approaches*, *in* EUROPEAN CONSUMER POLICY AFTER MAASTRICHT (Norbert Reich & Geoffrey Woodroffe eds., 1994) [hereinafter Wilhelmsson, *Control*].

Recognizing underlying commercial needs as the main reason for harmonization does not exclude others. On the contrary, there would be interaction of these reasons, as there is in the EC. Once it is established that an entity will function under the principle of free market economy, it is necessary to discuss the limits of such freedom. As the Member States of the EC are industrialized, there is obviously some level of social regulation of contract law, at least in the majority of them.[32] This will, in turn, influence the legislative activities of the EC concerning contract law.[33] Though it is possible, as a rule, for the Member States to introduce more expansive protection than that provided for through EC legislation, social regulation of contract law is to a certain degree harmonized. Thus, the social regulation of contract functions together with basic commercial needs to justify harmonization.

The experience of the EC underscores another factor. Harmonization seems to work well within limited geographical areas with limited substantive legal differences. This fact means that, whatever the need for harmonization, there is much to be done in global terms. Even at this early stage of the discussion, regional harmonization solutions seem more realistic and, thus, more of a priority than uncritical efforts towards global development.[34]

D. Formal Aspects of Harmonization

Once the *raison d'être* has been accepted, the pursuit of a system becomes necessary. There are no global jurisdiction regulations or enforcement possibilities. For the EC Member States, the international competence of courts is regulated by the Brussels Convention.[35] The Lugano Convention is very similar to the Brussels Convention. It applies

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32. Kurt Grönfors writes of the present day rudimentary freedom of contract in the EC states in KURT GRÖNFORS, TOLKNING AV FRAKTAVTAL [INTERPRETATION OF CONTRACTS OF AFFREIGHTMENT] 17-19 (1989).

33. Social contract law is part of EC law, as shown in Part IV.C, and is simultaneously harmonized to a certain degree, although that harmonization is perhaps somewhat nominal due to the possibility, as a rule, for the member states to introduce more expansive protection than that provided for through EC legislation.

34. Criticism of harmonization exists and there are the limits of the possibilities, but this debate is left to Part VIII.

35. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229; for a consolidated and updated version, see 1990 O.J. (C 189) 2, 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention]. The Court of Justice of the European Communities (ECJ) has competence to give rulings on the interpretation of the Brussels Convention, Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, June 3, 1971, 1990 O.J. (C 289) 3, 29 I.L.M. 1439, 1440-41 (1990).

to cases between EC domiciliaries and E.F.T.A. domiciliaries.[36] International enforcement possibilities, as far as the conventions apply, are simultaneously secured. The two conventions show that growing free trade and other freedoms connected thereto will make it necessary to regulate the formal framework aimed at dealing with disputes in an international environment.[37]

For arbitration proceedings the competence or jurisdiction of the appointed tribunal is based on the contract. Enforcement of arbitration awards is globally possible due to the New York Convention.[38] This Convention has an exceptionally wide international acceptance.[39]

Conflict of law issues are also in need of harmonization for the same reasons. Applicable national law has to be found in an international dispute. The previously mentioned Rome Convention[40] is regional and intended for the EC Member States. Another regional arrangement is the Inter-American Convention on the Law Applicable to International Contracts (ICLAIC), 1994.[41] Also, the Hague Convention on the Law

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36. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 620 (1989). The remaining E.F.T.A. members include Iceland, Norway, and Switzerland. Finland and Sweden continue to apply the Lugano Convention until their accession to the Brussels Convention has been completed.

37. On the varied backgrounds of procedural law, see Harald Koch, *Neuordnung der Rechtsfamilien im Prozessrecht. Die Lehre von den Rechtskreisen (Rechtsfamilien) und das deutsche Zivilprozessrecht*, *in* TRANSNATIONALES PROZESSRECHT 119 (Peter Gilles ed., 1995).

38. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

39. There is also the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, *codified as* 9 U.S.C. §§ 301-307, that covers issues similar to those covered by the New York Convention. Arbitration proceedings as such are regulated nationally, but some countries have used as a basis the UNCITRAL Model Law on International Commercial Arbitration, 1985. Canada has adopted the Model Law and Australia, New Zealand, and Hong Kong are strongly considering it. Also, six U.S. States (California, Connecticut, Florida, Georgia, Hawaii, and Texas) have patterned their arbitration legislation after it, but it has not yet been adopted by the United States as a whole. Gerardi, *supra* note 18, at 695 & n.147. The U.S. situation is special, as there is the Federal Arbitration Act 9 U.S.C.A. §§ 1-14 providing for arbitration proceedings in disputes concerning maritime transactions or interstate or international commerce.

40. The Rome Convention is subordinate to any other convention-based rule on applicable law. Rome Convention, *supra* note 28, art. 21; *see* D. LASOK & P.A. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 340-45 (1987). On virtues and defects of the Rome Convention, see H. Matthew Horlacher, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L L. J. 173 (1994).

41. Mar. 17, 1994, 33 I.L.M. 732 (1994). This Convention was adopted by the Fifth Inter-American Specialized Conference on Private International Law of the General Assembly of the Organization of American States (O.A.S.). For further details, see Harold S. Burman, *International Conflict of Laws*, *The 1994 Inter-American Convention on the Law Applicable to International*

Applicable to International Sales of Goods, 1955,[42] is important because sale contracts as a contract type play a major role in international trade.

While international jurisdiction and enforcement rules increase in importance in an environment of free trade, development should take another course in the area of conflict of laws. The role of such issues decreases in relation to the increase of unified or harmonized substantive law.[43] Should this, in fact, not happen, problems result for the real international implementation of substantive rules and principles. The examples below will show the continuous importance of conflict of law rules.[44]

II. INTENSITY OF HARMONIZATION

The intensity of harmonization of contract law both *de lege lata* and *de lege ferenda* depends on several factors, of which the following are essential: harmonization method, procedure for decision-making, contract issue in dispute and type of contract. As a harmonization method, conventions have more effect than harmonization by means of a court decision not based on convention or similar agreement. International standard clauses in contracts also play an important harmonizing role.[45] Whether harmonization is possible outside of convention-based legislation or standard contract clauses is dubious; the present international view of applicable national law would not support harmonization.

Contracts and Trends for the 1990's, VAND. J. TRANSNAT'L L. 367 (1995); *see also* Susie A. Malloy, Note, *The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts*, 19 FORDHAM INT'L L. J. 662 (1995).

42. 510 U.N.T.S. 149, 151 (1964). Since the introduction of the Vienna Sales Convention, it has been thought necessary to replace the 1955 Convention with a new one, the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, 1986. When applicable, it replaces the Hague 1955, but it has essentially the same basis. CLIVE M. SCHMITTHOFF, SCHMITTHOFF'S EXPORT TRADE. THE LAW & PRACTICE OF INTERNATIONAL TRADE 206-07 (9th ed. 1990).

43. *See* Franco Ferrari, *Defining the Sphere of Application of the 1994 "UNIDROIT Principles of International Commercial Contracts,"* 69 TUL. L. REV. 1225, 1226-27 (1995) [hereinafter Ferrari, *UNIDROIT*].

44. On the role of private international law in the development of harmonization see Harald Koch, *Private International Law: A 'Soft' Alternative to the Harmonisation of Private Law?,* 3 EUR. REV. OF PRIVATE L. 329 (1995).

45. There are a number of both inter-governmental and private organizations connected with the preparation of "sources," such as the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the International Institute for the Unification of Private Law (UNIDROIT), the Baltic and International Maritime Council (BIMCO), Comité Maritime International (CMI), etc.

The choice of decision-making procedure has importance too. An arbitrator might find it easier than a judge to respect the need for harmonization, especially in disputes in which the solutions are not based on the application of conventions or some similar source.[46] Self-regulatory mechanisms may sometimes be the best way to ensure harmonization.[47]

Also, the contract issue in dispute might reflect variations in the intensity of harmonization. For example, a dispute concerning the correct interpretation of an international standard contract term would easily be understood as part of an international problem. In contrast, a court might not find it possible to "internationalize" a dispute concerning formation of contract—typically an area of national evaluation, as the reservations made by many states, including the Nordic countries, regarding the application of the Vienna Sales Convention, Part II ("Formation of the Contract") illustrate.[48] However, the division of contract issues into national and international concerns is not clearcut. Formation of contract has developed to include other rules and principles of a more mandatory nature, such as the principle of nondiscrimination on the basis of nationality or on the basis of sex in employment contracts and the rules involving sanctions due to anti-competitive measures. These dimensions call for international harmonization based on international agreements.[49]

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46. National legislation may bind the court to the use of national law. For example, the Finnish Procedure Act ch. 24, § 3(2), requires the application of Finnish law if no evidence is shown concerning the content of applicable foreign substantive law. According to the Finnish Arbitration Act § 31(2), the arbitrators have to apply the law of the state chosen by the parties. Nothing is said of the situation where the parties have not chosen any specific applicable substantive law and presumably the main rule in § 31(1) applies. It stipulates that the arbitrators have to base their decision upon law which basically means some national system. *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 492 (1991). These acts indicate that the arbitrators have more leeway than courts. *See* David, *supra* note 27, at 23-24; REDFERN & HUNTER, *supra*, at 183. In cases of alternative dispute resolution (ADR), suggestions by the conciliator are even less bound by formal aspects than arbitrators. *See* UNCITRAL Conciliation Rules (1980), especially art. 7(2), U.N. GAOR, 35th Sess., Supp. No. 17, U.N. Doc. A/35/17 (1980); *see also* Harald Koch, *Consumer Dispute Resolution—A Plea for the Improvement of Civil Procedure Rules in Germany and European Perspectives*, CONSUMER L.J. 29 (1995).

47. *See infra* Part V.A.1-2.

48. This traditional concept starts from the freedom to conclude or not to conclude contracts.

49. Examples of such can be found in the United Nations Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810, arts. 2 and 23. Art. 23 refers to the right to equal pay for equal work, etc. Further verification is found in the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), art. 7. *See also* the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 14. *See also* the TREATY

A major method of categorizing contracts is according to the obligations and rights of the contracting parties. By identifying these, it is possible to state whether one is dealing with sale of goods, performance of certain services, and so forth. This classic separation is not of utmost importance in the present context, unless, naturally, it is necessary for defining the application of a convention or a similar international source.

Another well-known division lies in emphasizing the status of the parties and the nature of the contract. That division exists due to different legislative needs. One can distinguish commercial contracts from noncommercial ones.[50] In a commercial contract, foreseeability is vital. When a dispute arises, the parties must be able to trust the contract. The way to proceed is to respect international material as one of the criteria for a solution.

In contrast, noncommercial contracts are regulated largely by the notion of protecting the weaker party to the contract; for example, protecting the consumer against a business enterprise.[51] As a matter of fact, the protective approach—the social concerns, if you will—is shown not only by mandatory stipulations in such contracts, but also by legislation enabling authorities, such as national consumer ombudsmen, to intervene and to order that unfavorable standard contract terms not be applied.

ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), 1 C.M.L.R. 573 (1992) arts. 6 & 119, respectively [hereinafter EC TREATY]. Also important in competition law are EC Treaty arts. 85 and 86. Also, there could be both civil law, administrative law and criminal law sanctions. The EC Treaty art. 85 prohibits cartels, and art. 86 prohibits abuse of a dominant position. Any deviation will enable the EC Commission to impose fines of an administrative nature upon the undertaking in question. The main basis is Regulation 17/62: First Regulation implementing Articles 85 and 86 of the Treaty, 1962 O.J. (L 13) 204. Abuse may be constituted by refusal to enter a contract. *See* VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE § 14 (1994). U.S. antitrust law, i.e., the Sherman Act 1890, enables criminal procedure. *See* John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350 (1983).

50. Of course, a hard-and-fast line should not be drawn, as law should reflect the fact that many contracts have characteristics of both types.

51. Thomas Wilhelmsson, Sosiaalinen sopimusoikeus ja Euroopan integraatio [Social Contract Law and European Integration], *in* EUROOPAN INTEGRAATIO JA SOSIAALINEN SOPIMUSOIKEUS [EUROPEAN INTEGRATION AND SOCIAL CONTRACT LAW] 7-146 (THOMAS WILHELMSSON & KATARIINA KAUKONEN EDS., 1993). Wilhelmsson observes first of all the difference in describing the development of contract law and how contract law should be developed. Second, and more importantly, he differentiates between clarifying the changes in contract law thinking, on the one hand, and debating the development of and need for international harmonization of contract law. He also states correctly that the latter has almost completely included the mere aim to enhance international trade. While Wilhelmsson pursues in emphasizing the social contract concept, this article is emphasizing the other, i.e., the needs of international trade.

Outside of the international legislative level, there is, as a rule, no overriding need for harmonization based on international material in noncommercial contracts. National standards for protection will be in the forefront, unless international material would provide the consumer with better protection. Often the contractual aspect is only part of a wider issue, such as the protection of the consumer in a comprehensive manner, including rules on product safety and truth in advertising. Consumer protection needs might prevail internationally should those needs be deemed a priority on a policy level in order to restrict the functioning of the free market; for example, the EC has intervened in issuing a number of contractual consumer protection directives.[52]

The same principles are true for employment contracts. The International Labour Organization (ILO) regulates questions of employment and requires the states having ratified an ILO Convention to take appropriate measures for implementing the aims of the Convention. However, there is no ILO method for efficiently controlling its implementation. Development is influenced by the basic built-in conflict between employers and trade unions, but even this constellation has more connotations within the domestic labor market than outside.[53]

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52. *See infra* Part IV.C and specifically notes 110-112.

53. On the EC level the ordinary control mechanism has to be taken into consideration. Roger R. Blanpain, *Transnational Regulation of the Labor Relations of Multinational Enterprises*, 58 CHI.-KENT L. REV. 909 (1982). Blanpain stated:

> Transnational Labor Relations are only just emerging. Labor relation systems are still mainly national and will for a long time to come, be so. The fact that they will remain national is true even in the context of the European Communities. After twenty-five years of European Communities, the developments are such that we still speak mainly of French, or German, or Italian labor relations.

Id. at 909-10. Blanpain's vision remains true today. This is perhaps proof of the fact that questions relating to consumers and employees contain a strong social factor, creating political tensions difficult to compromise upon. Pure commercial relations, on the other hand, ordinarily take care of themselves. Blanpain also refers to the activities of the Organization for Economic Cooperation and Development (OECD). *Id*. at 910 *passim*. He also includes reference to international collective bargaining—relevant with multinational or transnational companies—and its failures. *Id*. at 912-15.

A Scandinavian example is the Toys 'R' Us Inc. dispute with the Swedish trade union. The latter demanded a collective bargaining "environment" for this multinational corporation and was able through national boycott to pressure its will through. This resulted in the withdrawal of the multinational company from the Danish and Swedish market, but the name "Toys "R" Us" was kept through licensing, *Toys "R" Us Withdraws from Nordic Markets*, REUTER EUR. BUS. REP., Mar. 12, 1996.

See also EC TREATY art. 119 (requiring equal pay for men and women for equal work). There are a number of directives dealing with industrial relations.

Whether it is the EC or the ILO, the protection of the weaker party in a contract is a minimum standard to be achieved through harmonization. Harmonization is to a certain extent accessorial by nature, and it functions more as a social guarantee than primarily as a system applied in individual disputes.[54]

So far it has been shown that commercial contracts are the real target for international harmonization, while noncommercial contracts may have an international legislative basis as part of a wider form of cooperation within international trade and within a social context.

III. LEVELS OF HARMONIZATION

The general view is that conventions are the basis for coherent rules and principles. Conventions lack the efficiency of harmonization, however, for conventions guarantee neither global implementation nor harmonized application in different states. There are at least six alternative methods of harmonization, which one could describe as levels of intensity: (1) legislation, (2) standard contract terms, (3) international customs, (4) international legal principles, (5) court decisions and arbitration awards, and (6) legal guides (guidelines) and legal doctrine. The levels are comparable to ordinary legal sources, but their content and their use can be surprising.[55]

All these enumerated levels presuppose a reference to national substantive law within the framework of which the international element is taken into consideration. However, an additional and exciting alternative, related to international legal principles, surpasses all the previous levels of intensity of harmonization in one respect: It is not anchored in any specific national law. The existence or nonexistence of anational contract law has been much debated; should it be recognized, one may talk about a real *lex mercatoria*.[56]

IV. LEGISLATION

A. General

Conventions constitute one example of the legislative method of harmonization; another type is EC legislation. Of course, the competence

54. *See* Blanpain, *supra* note 53, at 914-20 (concerning labor relations); *see also* Wilhelmsson, *Control*, *supra* note 31, *passim* (concerning consumer protection).

55. *See* David, *supra* note 27, *passim*; *see also* Ferrari, *supra* note 7, at 206-09 (on different sources); *see also* Ndulo, *supra* note 14, at 109-12 (for an African angle).

56. *See infra* Part V.B (dealing with this phenomenon in the present-day context).

for such legislation is also based on a convention (the EC Treaty), but the legislation nevertheless differs from conventions. Factual cooperation at the preparatory stages among states will result in legislative harmonization.[57] Finally, model laws of the previously mentioned type will also to a certain extent improve harmonization even if the result of such models is highly uncertain.

In the following, only contract law conventions and EC contract law are considered. It is necessary to establish which areas of contract law have been the target for harmonization efforts and what kinds of problems EC contract law has presented.

B. Conventions

Certain areas concerning contracts for the carriage of goods and passengers are traditionally harmonized through conventions, as mentioned before.[58] There are the Convention on the Contract for the International Carriage of Goods by Road (CMR),[59] the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules),[60] and the Protocol to Amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (Visby Amendments),[61] the two last-mentioned together forming the Hague-Visby Rules. The latest development is the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules).[62] For passenger transport there is the International Convention on the Unification of Certain Rules Relating to the Carriage of Passengers and their Luggage by Sea (Athens Convention).[63]

Other conventions related to transport are the Convention concerning International Carriage by Rail (COTIF),[64] the Convention for the Unification of Certain Rules Relating to International Air Carriage

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57. In the Nordic countries, for example, the national Contracts Acts and the contractual parts of the respective Maritime Codes are based on cooperation to an extent that it can easily be maintained that harmonization prevails in these areas. The same is true for the sale of goods, Denmark being the last country to reform its national legislation to correspond with the common Nordic approach. Nordic law is often understood as one concept, but it is dangerous to use without first specifying the area of law at issue.

58. *See supra* Part I.D.

59. May 19, 1956, 399 U.N.T.S. 189 [hereinafter C.M.R.].

60. Aug. 25, 1924, 120 L.N.T.S. 155, T.S. No. 931, 51 Stat. 233.

61. Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmd. 6944).

62. Mar. 31, 1978, U.N. Doc. A/Conf. 8915, 17 I.L.M. 806 (1978).

63. Dec. 13, 1974, 14 I.L.M. 945 (1975).

64. Convention Concerning International Carriage by Rail, May 9, 1980, 1987 Gr. Brit. T.S. 1 (Cm. 41) [hereinafter COTIF].

(the Warsaw Convention),[65] the Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Hague Protocol),[66] and the Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air.[67] There are also the United Nations Convention on International Multimodal Transport of Goods,[68] and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.[69] The sale of goods is also regulated through the United Nations Convention on Contracts for the International Sale of Goods, the Vienna Sales Convention, or more commonly CISG.[70] The idea of a Sales Convention goes back at least to the 1920s.[71] There are many more conventions, such as the Convention on the Limitation Period in the International Sale of Goods,[72] as amended by the 1980 Protocol,[73] the Convention on Agency in the International Sale of Goods (International Institute for the Unification of Private Law, UNIDROIT),[74] the Convention on International Financial Leasing (UNIDROIT),[75] and the Convention on International Factoring (UNIDROIT).[76]

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65. Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40,105 (1994).

66. Sept. 28, 1955, 478 U.N.T.S. 371.

67. Sept. 25, 1975, 1 CAO Doc. 9148.

68. *Opened for signature* May 24, 1980, U.N. Doc. TD/MT/Conf./16.

69. 30 I.L.M. 1503 (1991).

70. *See supra* note 3; *see also* COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION (C.M. Bianca et al. eds., 1987) for the text of CISG with commentary.

71. Ferrari, *supra* note 7, at 189-95. Subsequently, the Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 (1972) [hereinafter ULIS] and the Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 (1972) [hereinafter ULF] were created in 1964. These were, however, formally ratified by only nine states. *Id.* at 192 & nn.55-56.

72. June 14, 1974, 13 I.L.M. 952 (1974).

73. Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, Apr. 11, 1980, 191 I.L.M. 696.

74. 22 I.L.M. 249 (1983).

75. *Opened for signature* May 28, 1988, 27 I.L.M. 931 (1988), *reprinted in* 1 DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE DRAFT CONVENTIONS ON INTERNATIONAL FACTORING AND INTERNATIONAL FINANCIAL LEASING: ACTS AND PROCEEDINGS 331 (UNIDROIT 1991) [hereinafter Financial Leasing Convention].

76. UNIDROIT Convention on International Factoring, *opened for signature* May 28, 1988, 27 I.L.M. 922 (1988), *reprinted in* 1 DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE DRAFT CONVENTIONS ON INTERNATIONAL FACTORING AND INTERNATIONAL FINANCIAL LEASING: ACTS AND PROCEEDINGS 331, 340 (UNIDROIT 1991) [hereinafter Factoring Convention]. Many previous efforts, such as the 1962 Paris Convention on the Liability of Hotel-Keepers Concerning the Property of their Guests, have not reached particular fame. On the role of the Council of Europe, see Hans Christian Krüger, *The Council of Europe and Unification of Private Law*, 16 AM. J. COMP. L. 127 (1968).

Many conventions have not met with international success, however, in being ratified and applied. For example, the Montreal Protocol, the Multimodal Transport Convention, the Transport Terminal Operator Convention and the Agency Convention are not even in force. The Factoring and Financial Leasing Conventions are in force, but only three ratifications have been needed and only the minimum ratifications have been deposited.[77] The Warsaw and Warsaw-Hague Convention (air carriage) have met with the greatest success. The Hague Rules (sea carriage) would be considered an international success, but a split has taken place due to the Hague-Visby Rules, which are gaining more international application.[78] The Hamburg Rules are in force, but their future is uncertain in international terms and the parties to the Convention at present do not represent vital shipping interests.[79] The road and rail carriage Conventions only really cover Europe, but there is wide formal coverage.[80] CISG now has forty-five signatories, a fair number taking into account the economic power of the parties, such as most of the EC Member States (except for the UK), Australia, Canada, China, Russia, and the U.S.[81] Convention failures indicate that less formal alternatives might have been preferable, especially standard contract terms and guidelines.

One of the more interesting plans for conventions is related to international electronic commerce, an area obviously in need of harmonized international rules.[82] The United Nations Commission on International Trade Law (UNCITRAL) has taken on work in this area with the aim to create a UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication. The

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77. *Implementation of Uniform Law Conventions, Current Events*, 1 UNIFORM L. REV. (REVUE DE DROIT UNIFORME) 134-46 (1996).

78. George F. Chandler III, *After Reaching a Century of the Harter Act: Where Should We Go from Here?* 24 J. MAR. L. & COM. 43 (1993).

79. Egypt is the most significant. Austria, an EC Member State, has also ratified the Hamburg Rules and the matter is pending both in Australia and Canada, but in the two latter countries political winds might change against the Rules.

80. The COTIF, *supra* note 64, for example, involves a number of Arab countries as well.

81. *See* William Tetley, *The Lack of Uniformity and the Very Unfortunate State of Maritime Law in Canada, the United States, the United Kingdom and France*, LLOYD'S MAR. & COM. L.Q. 340-49 (1978).

82. *See* Jeffrey B. Ritter and Judith Y. Gliniecki, *International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms*, 6 HARV. J.L. & TECH. 263 (1993); *see also* Jeffrey B. Ritter, *Defining International Electronic Commerce*, 13 J. INT'L L. & BUS. 3 (1992); Bernard D. Reams, Jr. et al., *Electronic Contracting Law*, EDI AND BUSINESS TRANSACTIONS, (1995-96 ed.); AMELIA H. BOSS AND JEFFREY B. RITTER, ELECTRONIC DATA INTERCHANGE AGREEMENTS, A GUIDE AND SOURCEBOOK (1993).

present work is focused on transport documents, but in the future the rights and responsibilities of the sender and recipient of the data message will be considered.[83]

Even if a convention enters into force, its harmonization effect is often limited. The reasons are obvious. First, not all the conventions are globally accepted, nor are they in need of global acceptance. For example, the CMR in practice covers the European nations. There are hardly overriding reasons to have similar civil liability rules for South American road carriage. The basis for extensive harmonization simply does not exist. On the other hand, carriage by sea or air takes place globally, and the conditions in this respect are quite different.

Second, there is the danger of a deharmonization process. This phenomenon is seen when development dictates reforms of conventions. Reform is, of course, generally necessary sooner or later,[84] but the results of the reform are not necessarily accepted by all the parties to the original convention. This results in a highly fragmented international system with different countries adhering to different versions of the same convention. Both carriage by sea and air have met with deharmonization due to pressure for amendments or new conventions. Carriage by sea is internationally governed not only by the previously mentioned Hague and Hague-Visby Rules, but also by the Hamburg Rules or by mere national legislation.[85]

Several additional problems remain. The most important question is how to ensure harmonization in interpreting convention-based national legislation. The aim of harmonization might be explicitly mentioned in a convention, mainly as a reminder to courts and arbitrators. This type of reminder is found in CISG art. 7(1)[86] and the Rome Convention art. 18.[87] Of course, such a reminder is superfluous; the aim of a convention does not disappear just because it was mentioned, and

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83. Report of the Working Group on Electronic Data Interchange (EDI), U.N. Doc. A/CN.9/421 Mar. 14, 1996.

84. *See* Rosett, *supra* note 6, at 688.

85. *See* Chandler, *supra* note 78.

86. It reads: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." CISG, *supra* note 3, art. 7(1). *See also* Financial Leasing Convention, *supra* note 75, art. 6, and Factoring Convention, *supra* note 76, art. 4. For further details, see Ferrari, *supra* note 7, at 198-202.

87. It reads: "In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application."

such stipulations create nothing that would not have to be taken into account anyway.[88]

Uniform methods of interpretation might be partly regulated in the particular convention. Further, the Vienna Convention on the Law of Treaties contains some rules on interpretation.[89] It stipulates in arts. 31-32 that the text should be taken into consideration[90] and, under certain conditions, the preparatory work of the convention in question.[91] However, the conditions for taking into consideration preparatory work extend beyond stipulations in a convention. For example, in the well-known case *Fothergill v. Monarch Airlines Ltd*.,[92] concerning air carriage and the application of the Warsaw Convention, 1929, and the Hague Protocol, 1955, the House of Lords concluded that preparatory work may be used when that material is public and accessible, and clearly and indisputably points to a definite legislative intention.[93] Naturally, convention interpretation must also take into consideration the aim of the convention itself, even when this cannot directly be established by the text or the preparatory work.[94]

In spite of such enabling rules, the fact remains that whenever the text of a convention leaves margin for interpretation, and it is not possible to supplement it with clear guidelines in applicable preparatory work, the

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88. In 23 EUROPEAN TRANSPORT LAW (ETL) 1988.193 (Oberster Gerichtshof Osterreich, Apr. 27, 1987), the dispute concerned interpretation of the CMR art. 32(2) concerning the suspension of the running of the period of limitation. It was stated by the Court that the Convention could not be interpreted in accordance with the legal conditions prevailing in each State without impeding the goal of achieving to the extent possible a maximum measure of uniformity.

89. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 (1969) [hereinafter Vienna Treaty Convention].

90. In the area of contract law the text of the convention to be interpreted played a decisive role, for example, in Maritime Insurance Co. v. Emery Air Freight Corp., 983 F.2d 437, 1993 AMC 933 (2d Cir. 1993). Some information was omitted from the air waybill contrary to the stipulations in the Warsaw Convention. The omission was commercially irrelevant to the claimant having received damaged goods. The Court could not interpret the Convention "sensibly," but decided in accordance with the text of the Convention that the carrier had lost its right to limitation of liability due to the omission. *Id.* at 439. *See also* 23 ETL 1988.87 (Cour Suprême D'Israel, Oct. 22, 1984).

91. Vienna Treaty Convention, *supra* note 89. According to art. 31, the text shall be given its ordinary meaning including its preamble and annexes. According to art. 32, the preparatory work of the convention is possible as a supplementary means of interpretation if interpretation according to art. 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

92. [1980] 2 Lloyd's Rep. 295 (H.L.).

93. *Id.* at 302, 305, 312, 315; *see also* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 90 (1989).

94. Consideration of the aim of the convention is, for example, established in 18 ETL 1983.89 (Oberlandesgericht Düsseldorf, Mar. 27, 1980) with reference to the *raison d'être* and the specific objects of the CMR.

possibility of national solutions exists. As in a case involving national contract law, the court has to transform an abstract rule or principle to a concrete one for the individual case. In many countries, any precedent of the highest national court would bind the other national courts, but such a principle of binding precedent is not transboundary by nature. The rationale for international harmonization in such a case is the principle of harmonization itself. If there is a consistent line of important international "precedents," the court (or the arbitrator) should respect this.

Should any convention make reference to national law, the role of international material is diminished. For example, the CMR art. 28.1 states that the road carrier shall not be entitled to avail himself of the provisions of the convention or to limit his liability if the damage was caused by willful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to willful misconduct. The same applies to the carrier according to subsection 2 with reference to conduct by agents and servants of the carrier. Willful misconduct may thus be given the meaning it has in national law; the result is a mixture of international and national elements.[95] Unless dictated by convenience factors, such as the risk of achieving no convention at all because of great differences between individual states, this type of approach in a convention has little justification.

C. EC Contract Law

EC Treaty art. 177 grants the Court of Justice of the European Communities (ECJ) the authority to issue preliminary rulings which bind national courts.[96] The general principles established in the EC Treaty and by the ECJ apply to EC contract law as well. Thus, national legislation on contracts may not impinge upon the four freedoms concerning the free movement of goods, services, capital and persons,

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95. This is not to say that in applying national law, influence should not be accepted from similar cases decided elsewhere. However, this aspect becomes clearly weaker due to the convention text itself. In 20 ETL 1985.95 (Bundesgerichtshof, July 14, 1983) there was a reference to national law by treating "serious negligence" as default equivalent to willful misconduct in the CMR. However, it was added that German, Austrian, Swiss, and French jurisprudence treated serious negligence as equivalent to willful misconduct while Belgian jurisprudence did not. Such references indicate that in spite of the possibility of basing the decision on national law, international elements, nevertheless, play a certain role. Another example of explicit reference to national law is found in the CMR art. 32.3 concerning the extension of the period of limitation.

96. *Supra* note 49. There is an inexhaustible amount of literature on the basic concepts of the EC and its law. For one comprehensive example, see T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (1994).

unless allowed by EC law as interpreted by the ECJ.[97] Even if national restrictions are allowed—for example, due to consumer protection needs—the principle of proportionality must be observed by applying the least restrictive means in order to achieve the aims established for the Community.[98]

For example, *Buet v. Ministère Public*[99] involved in part a contractual matter. The French ban on home sales of educational material was found not to be disproportionate because a consumer's EC-based right of cancellation[100] did not constitute sufficient protection against such canvassing.

From the viewpoint of harmonizing contract law, perhaps the greatest interest lies in the role of EC directives, the ordinary, but not unexceptional, method to deal with matters concerning contracts. Established general EC principles apply to directives. For example, directives cannot be in conflict with the EC Treaty and directives are interpreted in accordance with the four freedoms.[101]

Nonimplementation of directives in due time by a Member State nowadays has clear civil law implications. There are three essential cases on the point. The *Marleasing* case[102] establishes a limited horizontal

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97. The long line of ECJ interpretation has one basis in Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 3 C.M.L.R. 494 (1979) (Cassis de Dijon) (concerning restrictions to the free movement of goods).

98. In Case C-126/91, Schutzverband gegen Unwesen i.d. Wirtschaft Yves Rocher, 1993 E.C.R. I-2361, German law prohibited sales offers comparing old and new prices. However, such comparisons were allowed if they were not eye-catching (blickfangmässig herausgestellt). The German Schutzverband prohibited the advertising of some cosmetic products comparing old and new prices. The ECJ found that eye-catching is not the correct criteria for restrictions in this respect, as eye-catching advertising is not necessarily misleading and as comparisons may provide the consumer with useful information. The prohibition was not proportionate to the goals of consumer protection concerns. *See also* Case C-238/89, Pall Corp. v. P.J. Dahlhausen & Co., 1990 E.C.R. I-4827 (concerning the use of the letter "R" in connection with a trademark); *see also* Case C-315/92 Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH, 1994 E.C.R. I-317 (concerning the use of the word "Clinique" in marketing cosmetic products).

99. Case 382/87, 1989 E.C.R. 1235.

100. Council Directive of 20 December 1985 on the Protection of the Consumer in Respect of Contracts Negotiated away from Business Premises, 1985 O.J. (L 372) 31.

101. *See* Case C-47/90 Établissements Delhaize Frères et Compagnie le Lion SA v. Promalvin SA, 1992 E.C.R. I-3669 (concerning the interpretation of a regulation and export restrictions on wine); *see also Pall Corp.*, 1990 E.C.R. I-4827, para. 421.

102. Case C-106-89, Marleasing SA v. La Comercial Internacional de Alimentación SA, 1990 E.C.R. I-4135. Spain had not implemented a directive dealing with some company issues. The ECJ established, as a preliminary ruling to a civil suit in a Spanish court between individuals, that in applying national law the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the directive in order to achieve the result

effect of a directive against a company.[103] However, the horizontal effect is not reached directly by applying the directive, but by interpreting national law in accordance with the directive. Should an individual assert rights on the basis of a directive against state entities, a vertical effect may under certain conditions be established.[104] The *Francovich* case[105] establishes state liability in damages, and also sets forth the requirement to secure proper remedies for an individual.

The *Faccini Dori* case[106] dealt with a dispute in an Italian tribunal between a consumer and a business enterprise, i.e. a dispute between "private" persons. Ms. Faccini Dori, the consumer, had concluded a contract near Milan central railway station for an English-language correspondence course. Later, she relied on the right of renunciation provided for in Council Directive 85/577 EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.[107] Italy had not at the time implemented the directive. According to the ECJ, an individual may not rely on a directive in order to claim a right against another individual and enforce such a right in a national court. Thus, consumers cannot derive from the directive itself a right of cancellation. However, in interpreting national law, the ECJ relied on the *Marleasing* concept. If the results prescribed by the directive cannot be achieved by interpretation of national law by the courts, then, according to the ECJ, the *Francovich* principle of state liability in damages becomes applicable. The *Faccini Dori* case

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pursued by it; *see also* Case C-334/92, Wagner Miret v. Fondo de Garantia Salarial, 1993 E.C.R. I-6911, para. 20.

As a rule no horizontal effect is allowed. *See, e.g.*, Case 152/84, M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Marshall I), 1986 E.C.R. 723, especially paras. 48 and 49.

103. Horizontal effect concerns the relationship between individuals.

104. *See, e.g.*, Case C-103/88, Fratelli Costanzo v. Comune di Milano, 1989 E.C.R. 1839; Marshall I, 1986 E.C.R. at 723; Cases C-6/90 & 9/90 Francovich v. Italy, 2 C.M.L.R. 66 (1993) (concerning the preconditions for direct effect).

105. *Francovich*, 2 C.M.L.R. at 66. Italy had not implemented a directive protecting the rights of employees in the case of insolvency of an employer. Therefore, an employee in Italy lost wages due to the bankruptcy of the employer. Italy had not set up a guarantee fund in accordance with the directive which would have covered the loss. While dismissing the claim on the direct effect of the directive, the ECJ established that the state is liable in damages under three conditions: (1) the result prescribed by the directive should grant rights to individuals, (2) the content of those rights should be identifiable from the terms of the directive itself, and (3) a causal link between the State's breach of its duty and the individual's harm must be established. *Id.* ¶ 40, at 114. All these prerequisites were answered in the affirmative by the court in the concrete case. The securing of a remedy in national courts for the individual was also emphasized.

106. Case C-91/92, Paola Faccini Dori v. Recreb Srl, 1994 E.C.R. I-3325.

107. 1985 O.J. (L 372) 31.

establishes an order of priority between horizontal effect and state liability.[108] Further verification was recently given in *El Corte Inglés SA v. Cristina Blázquez Rivero*, in which the courts clearly stated that directives cannot be the basis for a judicial action by one individual against another.[109]

All these cases concern the problem of implementation of EC law in the Member States. The principles that have been established in them could just as well have been related to a type of dispute other than one in contract. They show that the general principles of EC law are applicable also in relation to contracts. The same phenomenon appeared earlier with reference to the nondiscrimination principle, sanctions due to anti-competitive arrangements and conclusion of contract. It remains to be clarified what other principles make up EC contract law.

The contract legislation of the EC is largely, but not completely, related to consumer protection and to employment questions.[110] Consumer protection legislation from the EC is legislation of the direct type; that is, contract is the basis for the legislation. For example, it includes Council Directive 93/13 EEC of 5 April 1993 on unfair terms in consumer contracts[111] and—as examples of more specific consumer protection efforts—Council Directive 90/314 EEC on package travel, package holidays and package tours,[112] and Directive 94/47 EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers relating to the purchase of the right to use immovable properties on a timeshare basis.[113] Outside consumer

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108. *Paola Faccini Dori*, 1994 E.C.R. at I-3325.

109. Case C-192/94, El Corte Inglés SA v. Cristina Blázquez Rivero, 1996 E.C.R. I-1, ¶ 15, at 5,. The court took a specific standpoint on the status of EC Treaty art. 129(a).

110. Comprehensive coverage is, for example, found in *European Consumer Policy after Maastricht*, *in* JOURNAL OF CONSUMER POLICY (Norbert Reich & Geoffrey Woodroffe eds., 1994), which is a collection of articles published in 1993 and 1994. *See also* VIVIENNE KENDALL, EC CONSUMER LAW (1994).

111. 1993 O.J. (L 95) 29. *See generally* Wilhelmsson, *Control*, *supra* note 31, *passim*.

112. 1990 O.J. (L 158) 59; for further discussion, see Stefano Zunarelli, *Package Travel Contracts: Remarks on the European Community Legislation*, 17 FORDHAM INT'L L.J. 489 (1994).

113. 1994 O.J. (L 280) 83. There is other EC legislation related to consumer contracts: Council Directive 85/577 EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, 1985 O.J. (L 372) 31; Council Directive 87/102 EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, 1987 O.J. (L 42) 48 (amended by 90/88 EEC, 1990 O.J. (L 61) 14); and Council Regulation 295/91 EEC of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, 1991 O.J. (L 36) 5.

There are also recommendations and proposals, for example: Commission Recommendation 87/598 EEC of 8 December 1987 on a European Code of Conduct relating to electronic payment (Relations between financial institutions, traders and service establishments, and consumers), 1987

protection, very little in terms of contract law of the direct type has been achieved.[114] Legislation of the indirect type—that is, the main goal of the legislation is something other than contract, but contractual elements are of relevance as accessories—is more common. Examples of indirect contractual legislation begin conveniently with the EC Treaty itself, art. 85. The aim of the provision is to prevent unsound competitive practices, such as cartels. Contract is also implicated in art. 85, which declares automatically void any contract which is prohibited. Even if the main aim is to prevent unsound competitive practices, there is a need to establish that contracts involving prohibited competitive arrangements cannot be given applicability. From such indirect contractual legislation further questions may arise: If proceedings in court are instituted, how is voidness established? Is the whole contract void or only the part which conflicts with art. 85? How are damages established?[115] The only harmonized substantive rule is the concept that the contract is automatically void. The rest is decided according to applicable national law.[116] According to the EC Treaty art. 85(3) the Commission is entitled

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O.J. (L 365) 72; Commission Recommendation 88/590 EEC of 17 November 1988 concerning payment systems, and in particular the relationship between cardholder and card issuer, 1988 O.J. (L 317) 55; Commission Recommendation 92/295 EEC of 7 April 1992 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling), 1992 O.J. (L 156) 21; a proposed Directive No. 19/95 of 29 June 1995 on the protection of consumers in respect of distance contracts, 1995 O.J. (C 288) 1); and Commission Proposal for a Council Directive on the liability of suppliers of services, 1991 O.J. (C 12) 8. The last-mentioned proposal is subject to Commission communication (June 1994) to the Council and Parliament on new directions on the liability of suppliers of services which implies withdrawal of the proposal, EUR. PARL. DOC. COM (94) 260 final. KENDALL, *supra* note 110, at 84. The proposal will thus not have any follow-up. The withdrawal was due to too many controversies on the scope of services to be covered and the basis of the supplier's liability. Employment questions are not dealt with here.

114. What has been achieved in this area is Council Directive 86/653 EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, 1986 O.J. (L 382) 17.

There is also an old proposal partly related to consumers concerning insurance contracts, Commission Proposal of 28 July 1979 for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts, 1979 O.J. (C 190) 2 and its amendment 1980 O.J. (C 355) 30. The proposal has obviously died a natural death through old age. SOU (Swedish Public Reports) 1989:88 95 and 153.

However, specific areas of insurance may regulate contractual issues, see the following footnotes. Specific insurance stipulations are also found in Second Council Directive 84/5 EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, 1980 O.J. (L 8) 17.

115. Procedural problems arise too. The Brussels and Lugano Conventions establish primarily the jurisdiction question and there are rules on applicable law, but who, for example, is entitled to sue and who shall be sued?

116. This mixture is familiar with conventions. *See infra* Part IV.D. The EC dimension is, however, slightly different, as the ECJ has established a number of times that proper national remedies must lie in case of proceedings at court. This is further elaborated in KORAH, *supra* note

to grant block and individual exemptions to the requirements in art. 85. Thus, contractual arrangements, even if as a rule automatically void, may fall under the exemption and be considered valid. For example, block exemptions exist for price fixing agreements in liner conference services at sea[117] and for certain franchise agreements.[118]

There are also more specific examples of indirect legislation, such as Council Directive 92/96 EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, amending Directives 79/267 EEC and 90/629 EEC (third life assurance Directive).[119] This directive comprises stipulations on the establishment of business, but in art. 31 reference is made to Annex II which sets up duties of disclosure both for the assurer and the assured who enter into a life assurance contract. The duty of disclosure during the contract period is also regulated. In Council Directive 93/22 EEC of 10 May 1993 on investment services in the securities field, there are also rules on the establishment of business,[120] but art. 11 requires the Member States to draw up rules of conduct to be applied in dealing with clients. The investment company shall make "adequate disclosure of relevant material information in its dealings with its clients" and it shall try "to avoid conflicts of interests and, when they cannot be avoided, ensures that its clients are fairly treated. . . ."[121] While the first example includes a fairly detailed list of points of disclosure, the latter is a very abstract approach; it is more a program declaration for the Member States to act upon than a rule directly to be applied.[122] Indirect contract

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49, at 131-36. Similar problems exist should an undertaking misuse its dominant position as established in EC Treaty art. 86. There are separate rules for the implementation of administrative sanctions should a breach of the EC Treaty arts. 85 or 86 be found. The main source is Regulation 17/62, First Regulation implementing articles 85 and 86 of the Treaty, 1962 O.J. (L 13) 204. Also, EEC, Regulation No. 27 of the Commission, First Regulation implementing Council Regulation 17 of 6 Feb. 1962, O.J. (L 35) 1118.

117. Council Regulation 4056/86 EEC of 22 December 1986 laying down detailed rules for the application of articles 85 and 86 of the Treaty to maritime transport, 1986 O.J. (L 378) 4; *see also* HANNU HONKA, EUROPEAN UNION SHIPPING POLICIES, UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 127-51 (William A. Lovett ed., 1996); *see generally* HANNU HONKA, EC COMPETITION LAW ON MULTIMODAL TRANSPORT—RECENT DEVELOPMENT, ESSAYS IN HONOUR OF PROFESSOR JAN RAMBERG (forthcoming 1997).

118. Commission Regulation 4087/88 EEC of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements, 1988 O.J. (L 359) 46; *see also* VALENTINE KORAH, FRANCHISING AND THE EEC COMPETITION RULES REGULATION 4087/88 (1989).

119. 1992 O.J. (L 360) 1.

120. 1993 O.J. (L 141) 27.

121. *Id.* at 37.

122. Further examples are: Council Directive 92/49 EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other

legislation is, in a way, a specific, but hidden EC contract law, in which contractual matters are only one part of a larger concept that needs regulating.

EC contract legislation is not comprehensive. It lacks a deductive method; the EC legislators did not draw up a general system and content of contract law to be applied in individual cases and to be deviated from in specific situations. General contract law codes are lacking in many Member States—for example, in Sweden and Finland—but there is, nevertheless, a comprehensive order either with the aid of Sale of Goods Acts *ex analogia* or of established general contract law principles. Such aids have been nonexistent so far at the EC level.

Nor does the EC system have an inductive nature, enabling courts to draw general conclusions from individual situations, except to a limited extent where the ECJ has been active. The ECJ is itself of great importance, as the ruling in any given case aims to take into consideration more extensive perspectives than the pending case itself.[123] Preliminary rulings exist on a constitutional level as mentioned in the cases discussed above.[124] Outside the constitutional level, there are few of them on the interpretation of EC contract law.[125]

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than life assurance and amending Directives 73/239 EEC and 88/357 EEC (third nonlife insurance Directive), 1992 O.J. (L 228) 1; Council Directive 87/344 EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, 1987 O.J. (L 185) 77; and Council Directive 77/92 EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex. ISIC Group 630) and, in particular, transitional measures in respect of those activities, 1977 O.J. (L 26) 14.

123. The *acte clair* institution is of importance. A national court may refrain from referring the case for a preliminary ruling to the ECJ should the question already have been decided by the latter or should the reply to the request for interpretation be clear. *See, e.g.*, Case 283/81 Srl Cilfit and Lanificio di Gavardo SpA v. Ministry of Health (CILFIT), 1982 E.C.R. 3415.

124. *See generally* Case C-106-89 Marleasing SA v. La Comercial Internacional de Alimentación SA, 1990 E.C.R. I-4135; Cases C-6/90 & 9/90 Francovich v. Italy, 2 C.M.L.R. 66 (1993); Case C-91/92, Paola Faccini Dori v. Recreb Srl, 1994 E.C.R. at I-3325.

125. One example is Case C-45/96, Bayerische Hypotheken- und Wechselbank AG v. Edgar Dietzinger, 1996 O.J. (C 95) 13, in which the Bundesgerichtshof referred the case for a preliminary ruling concerning the applicability of Council Directive 85/577 ECC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. The basic contract was that of suretyship concluded between a financial institution and a natural person who was not acting in that connection in the course of his trade or profession. The suretyship contract aimed to secure a claim by the financial institution against a third party in respect of a loan. The ruling is not published, but the reference shows the problem. Contractual disputes may have procedural problems which are resolved by interpreting the Brussels or Lugano Conventions. For example, Case C-318/93, Wolfgang Brenner v. Dean Witter Reynolds, Inc., 1994 E.C.R. I-4275 and Case C-89/91 Shearson Lehmann Hutton v. TVB Treuhandgesellschaft für Vermögens-verwaltung, 1993 E.C.R. I-139.

Moreover, in interpretations of indirect legislation, the contractual elements are narrowly construed. In a contract dispute this principle creates a gap; international and national elements are mixed in the same case.

Due to emphasis on sectoral policies in the EC, contract law becomes a by-product. For example, when EC legislators concentrate on consumer protection, contractual issues become merely one aspect in the whole protective system, and will be taken into consideration when and to the extent that the need arises. In this case no one expects the EC legislator to pay decisive attention to general contract law. The problem has arisen due to the administrative organization of the EC, and especially the Commission.

The lack of comprehensive contract law has been noted, and the European Parliament has shown special ambitions in this respect by, in 1994, issuing a Resolution on harmonization not only of contract law but all of private law.[126] However, the need for EC contract law principles was realized much earlier.[127] In the 1994 Resolution, the European Parliament called on the Commission for work to be commenced on a Common European Code of Private Law. At the same time, the Parliament considered global harmonization; it suggested that the Union could promote harmonization and standardization at world or European level within organizations such as UNIDROIT, UNCITRAL and the Council of Europe. The status of the proposed European code is unclear. It sounds utopian, but on closer examination, perhaps it is not. It depends on what is expected: creation of a code, or of something less, such as documentation of general principles; and a true application of such a code or principles by the Member State legislatures and/or courts and arbitrators. At present, the work is not completed on the Harmonization Resolution. It also lacks any legislative basis.[128]

Real harmonization of contract law by means of legislation remains embryonic. However, the basic question may be asked whether any harmonization by the EC using ordinary legislative methods is needed. A number of commercial contracts are regulated by conventions[129] and EC Member States have ratified many of the

126. Resolution on the harmonization of certain sectors of the private law of the Member States, 1994 O.J. (C 205) 518. A previous Resolution was issued in 1989 O.J. (C 158) 401.

127. It seems that the first initiatives were launched as early as 1974 with continuous development thereafter, PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, Preface.

128. *See infra* Part V.A-B.

129. *See supra* Part IV.B.

conventions. The EC's role is therefore decreased by a higher order of international cooperation; no further activity by the EC may be necessary. EC consumer protection legislation has the character of minimum requirements. This means that any Member State may legislate more efficient and higher protection of consumers than that provided by the EC up to the general EC limit of maintaining the four freedoms. In consumer legislation, giving priority to setting minimum standards seems to suffice without there being any overriding need to emphasize real harmonization, for example, by setting both minimum and maximum standards, which would create political problems.

On the other hand, EC law clearly puts restrictions on national possibilities to legislate. For example, consumer contracts cannot be regulated so strictly that they would restrict the four freedoms in a disproportionate fashion. In the application of existing EC-based legislation, harmonization of the minimum standards has a specific guarantee in the role of ECJ and its authoritative influence through the preliminary ruling system. This is shown in two tiers, implementation and interpretation. Implementation requires consideration of EC "constitutional" law with rules on horizontal effect and state liability in mind, while interpretation relies on the transnational competence of the ECJ.

Thus, the sectoral policies of the EC mean that true harmonization plays a secondary role to the establishment of standards. The harmonizing role of the ECJ is restricted, but in its supervisory role, it can produce harmony should national protection become disproportionate.

D. Gaps

When a gap in the internationally based legislation exists, there are two ways to reach a solution. The dispute is either retained in its international environment, or the court or the arbitrator simply goes to applicable national substantive law and finds the solution there.

The problem is different from that produced by a conflict in the source material.[130] Conceivably, that in cases of gaps the courts and arbitrators would find it easier to fill the lacunae by way of national law. But the gap-filling problem is related not only to contractual disputes, but also to a more general policy of harmonization. CISG, for example, aims

130. *See infra* Part VI.

to keep the gap-filling on an international level as far as it is reasonably possible. According to CISG art. 7(2) "Questions concerning matters governed by this 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."

Within the context of CISG this is a clear indication that courts should not automatically revert to national law should CISG itself not provide a basis for a solution. The rule applies only within the Convention itself. Its usefulness may be found in disputes that, for example, concern reliance on representations, duty to communicate information and mitigation of damages.[131] The rule's inclusion of the secondary national element—based on the rules of private international law—along with the primary international element results in an unsuitable and unnecessary mixture. CISG was, at the preparatory stage, more ambitious, the secondary element not having been included; but this would have become an insurmountable obstacle for reasonable consensus concerning the convention text. Therefore, a less ambitious solution found its way into the final version.[132] Thus, it is also possible that convention gap-filling results in applying national law.

For example, in ETL 1983.32 Bundesgerichtshof,[133] the road carrier had promised to deliver the goods to the consignee only against payment in cash on delivery in accordance with the CMR art. 21. The carrier accepted a check, but it was not honored. The court established that the CMR art. 21 did not specify whether the carrier complied with his obligation of cash on delivery by accepting either a check or payment in cash.[134] The problem had to be resolved according to applicable

131. *See* HONNOLD, *supra* note 93, at 96; *see also* ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 108-19 (1989).

132. HONNOLD, *supra* note 93, at 21, 96; *see also* PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, art. 1.104(2) (also providing a two-tier system, but there is no explanation as to why this was preferred to the one-tier system. Presumably there were reasons to follow CISG). On the other hand, the preferred method is found in the UNIDROIT PRINCIPLES. "Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles." UNIDROIT PRINCIPLES, *supra* note 1, art. 1.6(2). No reference to private international law is made.

133. 18 ETL 1983.32 (Bundesgerichtshof, Feb. 10, 1982).

134. *Id.* at 37-42.

national law.[135] In German law, accepting a check was insufficient to satisfy the obligation of cash on delivery.[136]

The defendant road carrier in *Shell Chemicals UK Ltd. v. P & O Roadtanks Ltd.*[137] alleged that an interpretive gap existed. As the CMR did not explicitly establish liability rules that would have covered the circumstances in the case under which the goods were damaged, the defendant maintained that it had no liability. The Court did not accept the defendant's position, holding that no such gap existed. There was no proof, as Saville, J., opined, "that those who framed the Convention intended to set up a code which exhaustively covered all the rights and obligations that could arise out of the carriage of goods by road or contracts for such carriage."[138]

The interest of the check case does not lie in its result, but in the arguments used to reach it, as they do not correspond with the idea of maintaining the international environment of harmonization. The *Shell* case shows the clear limit to the negative effect of gaps in a convention: *E contrario* conclusions are to be used with utmost care. To fill such gaps, courts should revert to the two main alternatives mentioned previously, i.e., the maintenance of the international setting or use of a purely national-based solution.

The EC, with its specific judicial system, creates a further problem, when different Member States fill gaps in EC legislation inconsistently. The above-mentioned Council Directive 90/314 EEC on package travel, package holidays and package tours provides an example. It regulates a number of things, including certain aspects of damages. However, the Directive does not state clearly what *types* of damages are compensable to a consumer. The Finnish Government Bill[139] introducing the Directive, and consequently the final Package Holiday Act, duplicate the system of the Directive. According to the Act section 23, compensable damage may consist of personal injuries, damage to property or economic loss. The Government Bill's purpose statement excludes compensation for discomfort or loss of the enjoyment value of the holiday due to the organizer's breach of contract.[140] The Finnish and

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135. *Id.*

136. *Cf.* 23 ETL 1988.493 (Rechtbank van Koophandel te Leuven Apr. 5, 1982) (dealing with the meaning of "ordinary law" in applying the CMR).

137. [1993] 1 Lloyd's Rep. 114 (Q.B.).

138. *Id.* at 116.

139. Government Bill 237 to the 1992 Finnish Parliamentary Session.

140. *Id.* at 27.

Swedish legal systems accept that Government Bills are important sources for interpreting legislation. Should the Finnish Act based on the above-mentioned Directive be applied in a dispute involving the organizer's breach of contract, it would be very probable that the court would dismiss a claim in damages for discomfort or for loss of enjoyment.[141] On the other hand, Danish and Norwegian law—based on the same Directive—do allow for the possibility to cover discomfort and loss of enjoyment if deemed reasonable.[142] Thus, already within the Nordic family, differences have arisen due to the Directive's silence on this essential question.

The imagined result in the Finnish court can be juxtaposed with an Australian case concerning a claim which arose from an interrupted luxury cruise.[143] In *Dillon v. Baltic Shipping Co.* (the MIKHAIL LERMONTOV),[144] the cruise ship MIKHAIL LERMONTOV struck a shoal off Cape Jackson on the north-eastern tip of the South Island of New Zealand in February 1986. She was holed and eventually sank. Several issues were at stake in the case brought by 123 passengers. One of the claims in damages was based on disappointment and distress at the loss of entertainment.

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141. *See* Finnish Supreme Court Reports 1990:74 for another situation where the influence of the Directive might be extinct, concerning incorporation of standard contract terms in a holiday (flight) contract.

142. *See* Danish Commission Report 1240/1992, 194; Danish Bill concerning package holiday legislation 281 (1992-93) 18; Norwegian Commission Report (1993) 79; Norwegian Bill concerning package holiday legislation 35 (1994-95) 49. In addition to the "reasonable" test, it seems that essential discomfort is required. For a further analysis of the Nordic situation, see GUDMUNDUR SIGURDSSON, PAKKEREISEKONTRAKTER. EF'S PAKKEREISEDIREKTIV OG DEN NORDISKE LOVGIVNINGEN [PACKAGE TRAVEL CONTRACTS THE EC'S PACKAGE TRAVEL DIRECTIVE AND NORDIC LEGISLATION] 300 (1996); KURT GRÖNFORS, SJÖLAGENS BESTÄMMELSER OM PASSAGERARBE-FORDRAN [THE RULES ON PASSENGER TRANSPORT IN THE MARITIME CODE] 85, 98-101 (1987) (where discomfort is not further discussed).

143. In the discussion, specific international and national rules related to carriage of passengers are omitted in order to concentrate on the general issue of damage. First of all, there is the Athens Convention, *supra* note 63. According to art. 4, the carrier shall be liable for the damage suffered as a result of the death of, or personal injury to, a passenger and the loss of or damage to his luggage. National codifications in the Nordic countries follow the same definition, for example, the Finnish Maritime Code ch. 15, § 11. Council Directive of 13 June 1990 on package travel, package holidays, and package tours (90/314 EEC), 1990 O.J. (L 158) 59, states the following: "In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services." *Id.* at 62. However, nothing is said about gaps in the Directive and probably they can be filled at national will. Australian principles on breach of contract are similar to those in England, the latter being part of a member state of the EC.

144. (1993) 111 A.L.R. 289.

The Australian High Court judgment is interesting not only for dealing with the question of compensable damage, but also for clarifying the history underlying the problem. The court makes references to both English and American cases. The main arguments are found in the judgment of Chief Justice Mason. The Chief Justice used a number of arguments in favor of the claim. One of them is the following:

> . . . as a matter of ordinary experience, it is evident that, while the innocent party to a contract will generally be disappointed if the defendant does not perform the contract, the innocent party's disappointment and distress are seldom so significant as to attract an award of damages on that score. For that reason, if for no other, it is preferable to adopt the rule that damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation. In cases falling within the last-mentioned category, the damages flow directly from the breach of contract, the promise being to provide enjoyment, relaxation or freedom from molestation. In these situations the court is not driven to invoke notions such as "reasonably foreseeable" or "within the reasonable contemplation of the parties" because the breach results in a failure to provide the promised benefits. In my view, this approach to the problem is to be preferred to the artificial expedient of saying that damages of the kind under consideration will be awarded for breaches of non-commercial contracts but not for breaches of commercial contracts. That expedient requires a distinction to be drawn between commercial and non-commercial contracts; that distinction is by no means easy to draw and, in any event, it is not a distinction which should necessarily be decisive in determining whether such damages are available or not.[145]

The pleasure cruise character of the contract involved enjoyment and relaxation. There was entitlement for an award of damages for disappointment and distress and physical inconvenience flowing from

145. *Id.* at 305.

breach of contract.[146] The *Dillon* case shows that, from the point of view of both consumer protection and commerce, formerly unrecognized types of damages are justified if they can be related to the very object of the contract.[147] Admittedly, this type of compensation may require explicit legislation in some legal systems.[148] In the Finnish Government Bill concerning package holidays, awarding compensation for losses such as discomfort is not even discussed. The differences in national law mean that in spite of coordinating measures by conventions, EC legislation or similar measures, lacunae in that legislation may easily lead to national variations in results. The question of damages is vital in an EC-based coordination of package holiday legislation. The above-mentioned Directive is not far-reaching enough, because an essential element needed to establish the limit of protection for the consumer is missing.[149] The solution, for a court, is to ignore mere national standards and lift the case to an international level, because the national legislation clearly derives from an international directive. This is a difficult task, due to national traditions concerning the hierarchy of legal sources.[150] As the contract is noncommerical, the intensity of international influence is not particularly strong.[151] However, when consumer protection is increased by international harmonization, the argument in its favor is strong.

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146. *Id.* The case is commented on by Stuart Heatherington, LLOYD'S MAR. COM. L.Q. 289-91 (1993).

147. There is a similar judgment in English law, *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233 (1972). In dealing with compensation in connection with package holidays Sigurdsson refers to a Danish case U 1990:616 Danish Supreme Court. However, this case is not comparable with the problem at issue, as the claim was based on tort and the damage had arisen in an employment contract situation, SIGURDSSON, *supra* note 142, at 302.

148. This seems to be the presumption in Danish, Dutch, German, Greek and Italian law. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, at 198-99.

149. This is not saying that discomfort or loss of enjoyment should be a recoverable type of damage due to breach of contract, but merely that the solution reached may be based on other than pure national evaluations.

150. *Cf.* Bickel v. Korean Air Lines Co., 83 F.3d 127, 1996 AMC 1541 (6th Cir. 1996). In this case there was a claim on nonpecuniary losses due to a KAL airliner having been struck by Soviet fighter plane missiles in 1983. The convention-based liability rules concerning carriage of passengers by air stated (Warsaw Convention art. 17 and art. 24(2)) only that, for example, recoverable damages could be assessed without prejudice to the Convention. The United States was party to the Convention. Federal conflict of law rules led the court to decide that U.S. (substantive) law was applicable. *Id.* at 131. This, in turn, led to the application of the Death on the High Seas Act (DOHSA) 46 U.S.C.A. § 761. *Id.* at 132. DOHSA only allows for pecuniary damages. The claimants could not recover for loss of society, survivor's grief, and pain and suffering. In the concrete case the carrier's right to limitation of liability had been lifted due to willful misconduct. *See also* Zicherman v. Korean Air Lines Co., 116 S. Ct. 629, 1996 AMC 319 (1996).

151. *See supra* Part II.

It is very difficult to clarify the criteria according to which one or the other alternative—international or national solution—is acceptable. The convention in question might intentionally have restricted the use of international solutions, but it is also possible that it was impossible for the convention to foresee all different types of disputes arising in the future. In this case, CISG art. 7(2), shorn of the secondary reference to private international law, could provide a solution. What is the consequence of having decided to apply "international solutions"? This is the point at which an anational law, the true modern *lex mercatoria*, steps in—i.e., general international principles of contract law.[152]

V. OTHER LEVELS OF HARMONIZATION THAN LEGISLATION

It is impossible to dwell upon all details under this heading. In the following, the effect of internationally standardized contract terms is discussed. Finally, *lex mercatoria* and a new development related to it are taken up.

A. Contract Terms

1. Individual Terms

Individual terms obviously do not create any substantial harmonizing effect. There seems to be nothing to add to this. Solutions must be reached should a dispute arise, and in that context there is the possibility of creating rules and principles on how to interpret contract terms, or rather, contractual situations. CISG includes some "advice" on the general level found in arts. 8-9, but further rules are also found for specific situations such as art. 35(2)(b)-(c). The general rules on interpretation deal with such matters as the relevance of the statements by the contracting parties and usages established between themselves.[153] The UNIDROIT Principles art. 4.1-4.8 also include rules on interpretation of contracts. In many ways they are similar to those found in art. 8 of CISG.[154]

152. *See infra* Part V.B (for recent interesting developments in this area).

153. HONNOLD, *supra* note 93, § 104-106, and KRITZER, *supra* note 131, at 121-25.

154. See Garro, *supra* note 6, at 1170-72, for a comparison between the rules of interpretation in CISG and the UNIDROIT Principles.

2. Effect of Standard Contract Terms

There is a great number of internationally standardized forms. The International Chamber of Commerce (ICC) has issued INCOTERMS, the latest edition from 1990, along with rules of interpretation, governing certain aspects in the contract for the international sale of goods.[155] In 1993, the ICC renewed the standard terms for banker's documentary credits, called Uniform Customs and Practice for Documentary Credits (UCP 500).[156] The previous edition, UCP 400, was commonly used in more than 160 countries—a result in numbers very rarely achieved by conventions.[157] The ICC is soon to launch the ICC Model International Sales Contract concerning manufactured goods intended for resale. It combines with the use of INCOTERMS 1990. The model contract is planned in a way which alllows for riders and addenda. As it concerns a further refinement of contractual issues, there is some probability that the standard form will be the basis for a number of international commercial transactions. Further, the Baltic and International Maritime Council (BIMCO) has for a long time done impressive work producing standard contracts within shipping for international use, cooperating with other organizations.[158] Clarifying guidelines are in some instances of great help. However, uncertainty exists if they are not explicitly incorporated into the individual contract by proper reference. They might be in need of adjustment in accordance with evolving court practice.[159]

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155. JAN RAMBERG, GUIDE TO INCOTERMS 1990 (1991). The status of rules of interpretation means that the parties have to make a reference to INCOTERMS in order to make them the basis for interpretation of contract terms, unless they function as an international custom of the trade or the parties have implicitly intended to apply them. Ramberg recommends an explicit reference and mentions as an example the situation in the United States where U.C.C. refers to the 1941 American Foreign Trade Definitions. A mere reference "Incoterms 1990" seems to suffice. *Id*. at 13. *See also* ROY GOODE, GUIDE TO THE ICC UNIFORM RULES FOR DEMAND GUARANTEES (1995).

156. UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDTIS (ICC 1993 Revision) (UCP 500).

157. *See generally* PAUL TODD, BILLS OF LADING AND BANKERS' DOCUMENTARY CREDITS (1990) (for further details on the previous application of Uniform Customs and Practice for Documentary Credits (UCP 400)).

158. Also CMI deals partly with contract terms and with the creation of guidelines of interpretation. There are rules for sea waybills and electronic bills of lading.

159. One case of importance in this respect is Seacrystal Shipping Ltd. v. Bulk Transport Group Shipping Co. Ltd. (the *KYZIKOS*) [1989] 1 Lloyd's Rep. 1 (H.L.). The court had to interpret a so-called laytime clause in the voyage charter-party "whether in berth or not" (WIBON) and came to the conclusion that the ship had no right to start counting laytime due to her being unable to reach the berth because of fog. *Id.* at 8. The clause referred only to congestion at the berth (nonavailability of berth). BIMCO had issued a collection of interpretative rules on laytime clauses

In some cases the failure of convention work might end in efforts to harmonize by way of contract terms. This has happened in UNCTAD/ICC Rules on Multimodal Transport Documents,[160] as the United Nations Convention on International Multimodal Transport of Goods has not met with international success.[161] Or, an inter-governmental agency might have been active, such as the United Nations Economic Commission for Europe (ECE) concerning sale and delivery of machinery.[162]

It has also been necessary to resolve whether electronic movements of information concerning carriage of goods function in the same fashion as the traditional presentation of a (physical) transport document (bill of lading) in order for the consignee to receive delivery of the goods.[163] Any standard contract term in international use is interpreted by courts and arbitrators in the light of its international background, even if national substantive law governs the dispute.

A clear example is ETL 1992.350 Bundesgerichtshof.[164] The Court had to interpret the following indemnity clause: "Indemnity for non-performance of this Charterparty, proved damages, not exceeding estimated amount of freight."[165] German law was applicable. However, the Court stated that the clause had to be interpreted according to English law for the following reasons:

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in 1980. CHARTERPARTY LAYTIME DEFINITIONS 1980, Baltic and International Maritime Conference (BIMCO Dec. 1980). Definition 26 stated of the above-mentioned clause: ". . . if the location named for loading/discharging is a berth and if the berth is not immediately accessible to the ship a notice of readiness can be given when the ship has arrived at the port in which the berth is situated." The Court in the *KYZIKOS* case was not formally bound by the Definitions as there was no reference to them. However, in the next version "VOYAGE CHARTERPARTY LAYTIME INTERPRETATION RULES 1993," (Voylayrules 93), BIMCO had changed the description of the clause, now definition 22: ". . . if no loading or discharging berth is available on her arrival the vessel, on reaching any usual waiting-place at or off the port, shall be entitled to tender notice of readiness . . . ." The change from "accessible" to "available" means that there are fewer occasions when notice can be tendered. There is not much doubt that the change came about partly due to the much debated judgment in the *KYZIKOS* case.

160. UNCTAD/I.C.C. Rules for Multimodal Transport Documents, I.C.C. Publication No. 481 (1980).

161. The reasons for cooperation between the ICC and UNCTAD are found in UNCTAD Doc. 117, July 9, 1991, stating, for example, "Pending the entry into force of the Multimodal Transport Convention, ..."

162. For several alternatives, see SCHMITTHOFF, *supra* note 42, at 73-76.

163. The major presentations in this respect are clearly KURT GRÖNFORS, CARGO KEY RECEIPT AND TRANSPORT DOCUMENT REPLACEMENT (1982), and KURT GRÖNFORS, TOWARDS SEA WAYBILLS AND ELECTRONIC DOCUMENTS (1991). *See also* references in footnote 83.

164. 17 ETL 1992.350 (Bundesgerichtshof Dec. 2, 1991).

165. *Id.* at 352.

> Der Umstand, dass sie . . . in englischer Sprache abgefasst ist, besagt . . . nichts darüber, dass englisches Recht anzuwenden wäre. Damit ist indessen nicht entschieden, dass diese englischsprachige Klausel auch nach deutschem Rechtsverständnis zu interpretieren wäre. . . . Die englischsprachige Vertragsformulare, die nicht etwa übersetzungen deutscher Texte sind, enthalten zahlreiche dem angelsächsischen Rechtsdenken angehörende Begriffe, die für jeden nach den jeweiligen Formularen geschlossenen Frachtvertrag gelten sollen, mag er im Einzelfall dem englischen oder einem anderen Recht unterstellt sein. Dies erfordert, dass derartige fremdsprachige Begriffe und Vertragsklauseln grundsätzlich nach dem Rechtsverständnis des Landes interpretiert werden, in dem sie entwickelt worden sind. [The fact that [the clause] is written in the English-language does not mean that English law is applicable. With that, however, it is not determined that these English-language clauses should be interpreted according to German law. The English-language contract forms, which are not really translations of the German texts, contain numerous Anglo-Saxon legal concepts which control every respective form freight contract regardless of the legal system in which the contract is set. It follows that such foreign-language concepts and contract clauses should therefore naturally be interpreted according to the legal norms of the country in which they were first developed.][166]

In any case governed by national substantive law, the problem, as with convention interpretation, is to what extent international sources must prevail.[167] This is a question of both principle and practice. One cannot expect a Swedish judge to study court practice in the other, say, thirty-five countries which have ratified the convention in question. The problem of the scope of sources has even greater impact on the interpretation of standard contract terms.

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166. *Id.* at 354 (editor's translation). *Cf.* Nordic Maritime Cases (NMC) 1983.309 for a Norwegian arbitration award with the same basic problem.

167. In *Fothergill v. Monarch Airline Ltd.*, [1980] 2 Lloyd's Rep. 295 (H.L.), the House of Lords referred to legal doctrine from several countries in order to find a solution in the interpretation of the Warsaw Convention.

NMC 1990.481 Finnish Arbitration award provides an example.[168] The wording in the charter-party in connection with the voyage charterer's duty to pay freight was "without discount."[169] Does this mean that discount, such as cash discount, will not be permitted, or does it mean that counterclaims by the charterer cannot be deducted from freight? The latter is the more usual interpretation. There were different interpretations in different jurisdictions. Finnish law was formally applicable. The reply might be dependent on how wide the source study has been. Once conflict in source material is found, the solution might be reached according to the methodology discussed in Part VI. In the above-mentioned arbitration case this was the starting point. The sole arbitrator concluded that discounts were not permitted, that interpretation being the closest to the charter-party text.[170]

The practical difficulties raised by the scope of sources requires that the legal practitioners, assisting the parties at any level of a dispute, function as important providers of information and thus enlighten the judge or the arbitrator. The legal profession will be faced with a growing demand for acquiring efficient international information sources. Uncertainties of contract interpretation might arise which are not clarified by courts or arbitrators, but by the trade itself, which attempts to maintain the harmonizing aim of international standard terms. The UCP 500 is a case in point.[171]

UCP 500 includes some very detailed preconditions for transport documents to be accepted by bankers who issue documentary credits. The requirements concerning the marine/ocean bill of lading are enumerated in art. 23. According to art. 23(a)(iii), the bill of lading shall indicate "the port of loading and the port of discharge stipulated in the Credit, notwithstanding that it: (a) indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge." Before UCP 500 entered into force (January 1, 1994), it was common practice, in cases of transshipment of goods, for liner agents involved in deep sea and feeder traffic to mark the first feeder port of loading as the port of receipt, and the port where the goods were shipped for the deep sea leg as the port of loading. However,

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168. [Editorial Note: In the NMC series, it is accepted procedure that arbitration awards are published without the name of the parties and the ships. In fact, arbitration awards in Nordic countries are only made public if parties consent.]

169. *Id.* at 496.

170. *Id.* at 496-97.

171. UCP 500, *supra* note 156.

if the credit indicated the feeder port of loading as the port of loading, the Scandinavian banks suspected that this was not in accordance with the proper interpretation of UCP 500. The banks made an inquiry of the ICC Banking Commission's Group of Experts on Documentary Credits, which gave its opinion in 1995.[172] It stated that when the Credit calls for shipment from a certain port of loading, that port must be mentioned as the port of loading in the bill of lading.[173] The opinion is clearly based on textual interpretation of UCP 500. It led the Scandinavian banks involved in the query to issue information according to which the old routine could no longer be accepted.

Such self-regulation by the trade leads to a harmonized position, but it might create other problems. If, for example, consolidated goods are carried by road to the deep sea loading port, the shipper may not receive a transport document in correspondence with the Credit. Also, the carrier or his agent might refuse to change his customary practice concerning the way the place of receipt information has been used in the bill of lading. It is submitted that the proper solution is the following: The Credit takes alternative modes of transport into consideration. The carrier has a duty according to the contract of carriage to enable the shipper to use the bill in its ordinary commercial context. The bill of lading, if possible, must correspond with the requirements of the Credit as put forward by the shipper. In any case, the fundamental issue is that not all standard contract terms are clarified by the ordinary legal channels of judgment or arbitration award. Instead, a self-regulatory body is necessary to achieve harmonization.

The very fact, however, that standard contract terms are in wide international use promotes harmonization in two ways. First, the standard text often does not leave room for interpretation. Second, the text may be supported by a sophisticated self-regulatory system, such as adopted guidelines. In many ways a highly developed self-regulatory system is a better guarantee of harmonization than conventions. On the other hand, self-regulation is not applicable should there be a conflict of principles, as mentioned earlier.[174]

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172. Letter from the Chairman of the Group of Experts on Documentary Credits, Sept. 14, 1995 (addressed to Den Danske Bank), Document 470/GE.44.

173. *Id.*

174. *See supra* pp.42-43.

3. Gaps

For international contract disputes where neither conventions (or convention-based national laws) nor contract terms are applied—the situation of a complete gap—several problems may arise. First, it is necessary to show how a situation in an international contract dispute may arise and present a complete gap as the term is used in this context. The above-mentioned Finnish arbitration award may be used as an example.[175] Even if the contract had been concluded between two Finnish companies, the chartering was based on a charter-party having originated in France, but written in English, and the voyages were from one country to another. These factors would suffice to make the dispute international.

In NMC 1990.481 Finnish arbitration award[176] a ship was chartered to make four voyages from Lake Saimaa in Finland to ports in France. On her last approach voyage to Lake Saimaa, the time chartered owner declared that ice prevented the ship from entering the lake area. He suggested a substitute port to which the voyage charterer agreed, but with notice that there was a claim in damages due to breach of contract by the owner. The charterer deducted the claim in damages from the freight. In the proceedings, dealing with a number of arguments, the owner maintained that no such deduction was allowed.[177] Finnish law was applicable. The sole arbitrator, after having decided that the owner was liable due to breach of contract, was of the opinion that there were conflicting international approaches as to whether such a deduction was allowed or not.[178] It was definitely not allowed under the freight rule in English law.[179]

The arbitrator found a solution which was not bound to one single national law. He determined that it was of utmost commercial important to secure, in a reasonable fashion, ordinary monetary flow in the chartering operations and not to break that flow unnecessarily. This was found to be a common expectation in the chartering business.[180] There was also a need to prevent any possible speculation with the freight sum,

175. NMC 1990.481, *supra* note 168.

176. *Id.* at 481-83.

177. *Id.* at 484-85.

178. *Id.* at 497-98.

179. Verification can be found in *Colonial Bank v. European Grain & Shipping Ltd.* (the *DOMINIQUE*) [1989] 1 Lloyd's Rep. 431 (H.L)., even if pressure to change the law was brought on by the Court of Appeal, [1988] 1 Lloyd's Rep. 215.

180. NMC 1990.481, *supra* note 168, at 498-99.

not an uncommon occurrence in the international chartering market.[181] As a result of these needs, the charterer was required to show the basis and the amount of his claim to the owner, so that the latter could be assured that the deduction made had been correct.[182]

Such arguments are not particularly far from set-off principles. However, they take into consideration the specific commercial expectations that generally prevail between the contracting parties, and in that very commercial sector of the chartering business as a whole. Operating on arguments from commercial expectations is similar to interpreting convention texts and standard contract terms. The difference is that in the former situation there is no textual basis, while the opposite is true for conventions and standard contract terms.[183]

B. International Principles of Contract Law—Lex Mercatoria

Lex mercatoria does not derive its authority from formal legislative activities, such as conventions, but rather from acceptance of the need for a basic international order in contract law. It includes general principles of contract law. Accepting the existence of such principles implies that national law has not even been intended to cover disputes of international nature, and that now, with the development of international contract law, it is possible *de lege lata* to establish an independent order for international contract law. Conceptually it is difficult to see the difference between basing this notion on true *lex mercatoria* or on the novel concept that an international part exists within national contract law. The result seems to be the same. A comparison can be made to procedural law and jurisdiction. National jurisdiction rules establish the national competence of the court (national jurisdiction). However, such procedural rules are not comprehensive. On the contrary, the international competence of the court (international jurisdiction) has now been established in Europe by the above-mentioned Brussels and Lugano Conventions. The very enactment of those conventions proves the case for separation between national and international elements of law in different areas. Also, especially in the U.S., where the prospect of gaining substantial damages under U.S. substantive federal or state law creates external pressure to institute proceedings, the doctrine of *forum non conveniens* has solid roots. Even

181. *Id.* at 497.
182. *Id.*
183. *See infra* Part V.B (dealing with supplementation of principles of contract law).

if it was initially created for interstate jurisdictional use, it now clearly functions as a bumper against this external pressure. In spite of a lack of federal and sometimes of state legislation on point, courts have found it to be a useful method of dismissing cases of an international nature.[184] It is possible to use the doctrine as a general principle of procedural law connected with litigation of an international nature, even if it must be remembered that the doctrine is not accepted in every jurisdiction.

Some indications of the approval of *lex mercatoria* as a national law are found in the UNCITRAL Model Law on International Commercial Arbitration, 1985 art. 28 (3). The parties may use as the applicable substantive law what is fair and reasonable (the *ex aequo et bono*-principle).[185] Some national legislation utilizes a similar approach for arbitration proceedings.[186] There is a clear possibility for arbitrators to apply *lex mercatoria*. This trend is almost revolutionary, as contract clauses adopting the anational *lex mercatoria* previously have in many cases been considered to be invalid.[187] Now, clearly another opinion prevails internationally.[188]

The greatest weakness and problem of *lex mercatoria* is that there have been no definite established sets of principles that could be

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184. HANNU HONKA, PUNITIVE DAMAGES IN THE UNITED STATES. INTERNATIONAL ASPECTS WITH SPECIAL REFERENCE TO ADMIRALTY. THE JURISDICTION QUESTION ch. 4.3 (1995) [hereinafter HONKA, PUNITIVE].

185. UNCITRAL Model Law on International Commercial Arbitration, *supra* note 1. Art. 28(3) states: "The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so." The same principle is found in the European Convention on International Commercial Arbitration (United Nations Economic Commission for Europe), Apr. 21, 1961, 484 U.N.T.S. 364, *reprinted in* ARBITRATION LAW IN EUROPE (ICC SERVICES 1981). *See also* Agreement Relating to the Application of the European Convention on International Commercial Arbitration, Dec. 17, 1962, 523 U.N.T.S. 94 (prepared by the Council of Europe). REDFERN & HUNTER, *supra* note 46, at 36, 121, 183 and 520 (concerning *ex aequo et bono* or *amiable compositeur*).

186. Finland Arbitration Act § 31(3), France Code of Civil Procedure, N.C.P.C. art. 1496, Holland Civil Procedure Code art. 1054. It is even possible that the national legislator refers to the international order as substantive law, such as China's Statute of March 21, 1985, on Transnational Economic Contracts art. 5(3), which "refers to the general principles of transnational commerce as the applicable law, absent choice of law." Ferrari, *supra* note 7, at 185-86. Cited as a provision which is considered as a reference to *lex mercatoria*. *Id.* at 188 & n.28.

187. *See* Ferrari, *UNIDROIT*, *supra* note 43, at 1230-32 (including further references to the invalidity question); REDFERN & HUNTER, *supra* note 46, at 36, 117, and 183.

188. On the other hand, some ICC arbitral awards in which *lex mercatoria* have been directly applied without any reference in a contract clause. Ferrari, *UNIDROIT*, *supra* note 43, at 1231 n.42. This indicates that the position has been internationally unclear at least so far. *See also* REDFERN & HUNTER, *supra* note 46, at 118.

applied.[189] Such a situation, however, functions as an impetus for creating internationally valid legal principles concerning international contracts, perhaps a kind of collection of restatements or uniform codes as found in U.S. law.[190] However, the U.S. restatement system derives its strength from realities; it is mainly a compilation of "average case law" or the common law in the several states of the U.S. Any international achievement would lack a legal-cultural background of a similar kind.[191] The aims, though, are the same: to harmonize and clarify substantive law.

In the U.S., both the *Restatement of the Law Contracts*, 1932, and the *Restatement of the Law Contracts* (2d) (*Restatement Second*), 1981, have the above-mentioned basis. The *Restatements* are prepared and published by a private organization, the American Law Institute.[192] Even if the *Restatement Second* does not have the force of law, it has "highly persuasive authority."[193] The nature of the *Restatement* is best described by quoting parts of the Introduction to the First:

> The vast and ever increasing volume of the decisions of the courts establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable has resulted in ever increasing uncertainty in the law. The American Law Institute was formed in the belief that in order to clarify and simplify the law and to render it more certain, the first step must be the

189. The problems of *lex mercatoria* are, for example, found in HONKA, *supra* note 2, *passim*; *see also* Harold J. Berman & Felix J. Dasser, THE "NEW" LAW MERCHANT AND THE "OLD": SOURCES, CONTENT AND LEGITIMACY *in* LEX MERCATORIA AND ARBITRATION 21-36 (Thomas E. Carbonneau ed., 1990); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985); Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, *in* LIBER AMICORUM FOR THE RT.HON. LORD WILBERFORCE 149-83 (Maarten Bos & Ian Brownlie eds., 1987); *see also* Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 1 (1980).

190. There are several restatements. Rosett, *supra* note 6, at 689-93. There is also a collection of uniform codes as basis for state legislation, such as the Uniform Commercial Code (U.C.C.). The U.C.C. Article 2 deals with the sale of goods. The basics are explained in JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (4th ed. 1995) (author's citations are to the 3d ed. 1988). There are also model laws in the United States such as the Model Penal Code. Rosett, *supra* note 6, at 689-91.

191. Rosett, *supra* note 6, at 690-91. *See* Ferrari, *UNIDROIT*, *supra* note 43, at 1229 & nn.27-29. This has been expressed for Europe in, Ole Lando, *Principles of European Contract Law: An Alternative to or Precursor of European Legislation?*, 40 AM. J. COMP. L. 573, 578-84 (1992) [hereinafter Lando, *European*].

192. RESTATEMENT (SECOND) OF CONTRACTS (1981) [hereinafter RESTATEMENT SECOND]; *see, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 13-15 (1987).

193. CALAMARI & PERILLO, *supra* note 192, at 13.

> preparation of an orderly restatement of the common law, including in that term not only the law developed solely by judicial decision but also the law which has grown from the application by the courts of generally and long adopted statutes.[194]

And:

> The function of the courts is to decide the controversies brought before them. The function of the Institute is to state clearly and precisely in the light of the decisions the principles and rules of the common law.
>
> The sections of the Restatement express the result of a careful analysis of the subject and a thorough examination and discussion of pertinent cases—often very numerous and sometimes conflicting. The accuracy of the statements of law made rests on the authority of the Institute. They may be regarded both as the product of expert opinion and as the expression of the law by the legal profession.[195]

The other essential harmonizing factor for the federal United States is the Uniform Commercial Code (U.C.C.) drafted in 1952, and later revised.[196] The U.C.C. has been prepared and published jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

The origins of the U.C.C. show that the preparation started in the 1930s, ending in the first versions in 1940 and 1941, headed by Karl L. Llewellyn.[197] Llewellyn belonged to the school of legal realists which had as its aim to create law which was as realistic and pragmatic as possible. Llewellyn's idea is perhaps best expressed by stating that realistic jurisprudence would "set goals, pass laws to reach these goals, and then monitor the success of the legislation."[198] From this school emerged the Roosevelt policies of the time, i.e. the concept of New Deal. That, in turn, meant that the U.C.C. originated in a certain social concept,

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194. RESTATEMENT OF THE LAW OF CONTRACTS viii-ix (1932).

195. *Id.* at xi-xii. The *Restatement Second* has no similar clarifying introduction.

196. The official texts have been published after adjustments in 1952, 1957, 1958, 1962, 1972, and 1978 and is currently being revised again.

197. A detailed study has been made by Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995). A short history is found in WHITE & SUMMERS, *supra* note 190, at 1.

198. Kamp, *supra* note 197, at 333.

connected with corrective needs after the Great Depression, even if perhaps it does not seem to have been particularly ambitious when looked at with present day Nordic eyes. But this is mere hindsight, and should not take anything away from what was of great importance to the original preparation of the first U.C.C. Thus, commercial law existed in Llewellyn's view to increase the natural flow of commerce. Flexibility of rules was necessary—*e contrario* formalism was rejected. An example is U.C.C. 2-602: "Rejection of goods must be within a reasonable time after their delivery or tender." Flexibility, in turn, resulted from the change in American society at that time to mass production as the cure for nonproductive practices. The old legal regimes were also unable to protect individuals. That weakness had to be cured too, meaning improved protection of the weaker party.[199] Perhaps legal realism, to the extent it safeguards the concept of a dynamic society, would still be a sound ideology for commercial law. The problem with legal realism is the lack of idealism; it really seems to have been, at least to Llewellyn, a fact-finding mission with no moral "thoughts."[200] There are further oddities to it, such as the combination of anthropology and commercial law. What Llewellyn's ideas show is that commercial law and the sale of goods are part of a wide macrolevel question of policy analogous to international contract law and its relation to international trading arrangements.

There are nine articles in the U.C.C.: Article 2 covers the sale of goods, and Article 9, secured transactions and the assignment of certain contractual rights. *Restatement Second* has taken into consideration the rules in the U.C.C. Article 2, meaning that some internal harmonization between the two systems has taken place.[201] The fact that most of the commercial sector is included in the U.C.C. shows how important it has been for a federal system to create a unified legal basis for commercial transactions even when state law is applied to disputes.[202] The U.C.C. has in formal terms been a success, as all states have implemented it with the exception of Louisiana, which applies only certain parts. The U.C.C.

199. The immediate cure was to extend the warranty protection.

200. Kamp, *supra* note 197, at 343-45.

201. RESTATEMENT SECOND, Foreword, VIII. *Restatement Second* and the U.C.C. have together been called a pillar of neoclassical contract law; *see also* Richard E. Speidel, *The Revision of U.C.C. Article 2, Sales in the Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 J. INT'L L. & BUS. 165 (1995).

202. Application of state law is the ordinary presumption and outside federal intervention through federal legislation of federal substantive law is rarely applied. It may be applied as common law, for example, if there is a "federal interest" in the case. HONKA, PUNITIVE, *supra* note 184, ch. 2.4.

is nevertheless not a codification in the civil law sense.[203] The primary aim of the U.C.C. is noted in 1-102:

> (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
> (2) Underlying purposes and policies of this Act are
> (a) to simplify, clarify and modernize the law governing commercial transactions;
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
> (c) to make uniform the law among the various jurisdictions.

The U.C.C. is based on the idea of freedom of contract, but restrained by the balancing factors of the standard of good faith, the use of standard terms and meanings, and the applicability of usage of trade. As the first U.C.C. was adopted in the early 1950s, it was politically impossible to abandon the principle of individual bargaining rights; hence the camouflage of freedom of contract was adopted.[204]

There are conflicting views as to the harmonizing effect of the U.C.C.[205] On closer examination the problems with its method become clear. First, state-based amendments are numerous, and modifications do take place state by state, even if this is not a great problem as far as the contractual parts of the U.C.C. are concerned.[206] Second, as there are a number of open-ended references to reasonable solutions or inexact descriptions, local courts will find varying solutions as to what those formulations mean without there being judicial control with harmonizing effect in federal terms.[207] This is a manifestation of the previously mentioned "rough justice"; similar basic outlines are established covering different jurisdictions, but any further harmonization becomes uncertain.

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203. Peter Winship, *Is the UCC Dead, or Alive and Well? International Perspectives: As the World Turns: Revisiting Rudolf Schlesinger's Study of the Uniform Commercial Code "In the Light of Comparative Law,"* 29 LOY. L.A.L. REV. 1143, 1148 & n.24 (1996).

204. Kamp, *supra* note 197, at 395.

205. WHITE & SUMMERS, *supra* note 190, at 20-21.

206. *See* CALAMARI & PERILLO, *supra* note 192, at 15; Rosett, *supra* note 6, at 690-91. *See generally* FREDERICK G. KEMPIN, JR., HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW 108 (1990).

207. The federal Supreme Court of the United States may interfere with state law if the law or the court decision is federally unconstitutional and in some other cases, 28 U.S.C.A. § 1257. *See generally* DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 3-6 (1990).

Even when there is textual precision, variations in application have nevertheless arisen.[208]

The U.C.C. is not immune to international influence—as shown already from its origins. The proposal to revise U.C.C. Article 2 derives partly from the influence of CISG, the U.S. having ratified it.[209] There is clear interaction, as CISG was influenced by the U.C.C., even if the two systems are by no means identical.[210] Technically, the relationship between the U.C.C.-based state law and CISG is the preemptive effect of the latter. This is due to federal ratification of CISG. The U.C.C. Article 2 has, in international settings, a subordinate position.[211] However, there are no further specified rules as to the coordination of CISG and the U.C.C. The debate in connection with the revision emphasizes the need for horizontal harmonization (international-domestic). The real implication is that domestic law does not and cannot exist independently, outside international influence. It has been realized that the proper coordination of these two sets of laws is necessary.[212] Such realization is nothing new—where has national law ever developed on a purely national basis?—but the problem has reemerged, especially in view of sales law in the U.S. A conclusive argument is that there is no reason to maintain a clear-cut borderline between international and national legal sources. The exact line must be subject to certain discretion, and in an optimal case, that line could disappear.[213] For example, in this light it is difficult to understand why the Nordic countries towards the end of the 1980s established different systems for international sales, on the one hand, and domestic and Nordic sales, on the other, since the latter has implemented most of the rules of the first. Any idea of consumer protection would be treated separately, a fitting separation, as CISG is nonmandatory and not meant for consumer protection. The differences between CISG and the Nordic system may in some cases be substantial,

208. *See* WHITE & SUMMERS, *supra* note 190, at 21.

209. *See* Speidel, *supra* note 201, *passim*; *see also* Winship, *supra* note 203, at 1145-46. The U.S. may have ratified CISG because it was influenced by the U.C.C. and also because the original U.C.C. was a creation of Llewellyn, who in fact introduced a number of European ideas into it.

210. *See* Franco Ferrari, *The Relationship between the* U.C.C. *and the CISG and the Construction of Uniform Law,* 29 LOY. L.A. L. REV. 1021 (1996) [hereinafter Ferrari, *Uniform*]. *See also* KRITZER, *supra* note 131, at 11 (for a clarifying comparative approach).

211. *See* Speidel, *supra* note 201, at 166.

212. *See* Ferrari, *UNIDROIT, supra* note 43, at 1235-37.

213. *See* Rosett, *supra* note 6, at 687-88.

for example, when it comes to the seller's liability in damages due to the seller having delivered defective goods.[214]

The U.C.C. was originally not limited to the same type of factual background as the *Restatement*, but over the years, and with some adjustment of the text, it has become obvious that previous experiences, both through case law and other sources, exercise an influence in the chain of development.

When dealing with the international verification and documentation of *lex mercatoria*, similar observations can be made. However, there is a risk that a similar kind of *lex mercatoria* in the international environment, which is not as constrained as a state in a federal system, will remain nothing other than a compromise of different national systems, a kind of legal Esperanto. The lack of proper legal-cultural ties creates a situation whereby an impressive collection of logical rules, theoretically acceptable in all the jurisdictions involved, is achieved, but it is applied by no one or applied sporadically. Commercial needs of foreseeability are hardly satisfied. It therefore becomes important for the international community to weigh the measures which will ensure a better fate for harmonization than this. At least a semi-official position is needed, whatever the details on how to create such an arrangement are.

Any effort to create a documented international order of contract law may start with notions similar to those found in the U.S. uniform code system. National legislation implements the order *in extenso* or less so. The same international order may also reflect applicable international contract law principles. That type of "restatement effect," however, would obviously be very weak, even if a decision-maker would sporadically apply them in a case. The international order may also receive increased strength by the choice of the contracting parties, either through the incorporation of them into the contract, or through allowing the arbitrator to decide the case *ex aequo et bono*. The cumulative effect

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214. According to CISG art. 45(1)(b) and art. 79, the seller is liable in damages due to him having delivered nonconforming goods, unless he proves that the exemption of "circumstances beyond his control" as specified in the Convention applies. In the Nordic system as specified, for example, in the Finnish Sale of Goods Act § 40, the same rule applies only in respect of the buyer's so-called direct losses. The seller is always liable for the buyer's losses, including so-called indirect losses such as loss of profit, either when the seller in this respect has been at fault or when the seller has given a warranty and the goods did not conform with the warranty at the time of the conclusion of the sale. The concept of "warranty" is interpreted in an extensive fashion as found in Finnish Government Bill 93 (1986), Parliamentary Session 88-89.

of such alternatives means that any effort to create an international order—a new *lex mercatoria*—would be well-motivated.[215]

So far, there are two developments of importance which are partly interrelated. UNIDROIT published, in 1994, *Principles of International Commercial Contracts* (UNIDROIT Principles)[216] and in 1995, *Principles of European Contract Law* was published.[217] The latter only contain parts of contract law and further parts are expected. The fact that such principles have been agreed upon, providing international coverage for commercial contracts and intra-EC coverage for contract law in general, proves that there is a positive and constructive possibility for different legal regimes to find an optimal compromise. But, do the principles reflect what already exists in international terms, i.e., are they written verification of *de lege lata*, or are they seen as a set of aspirational rules that should be the law? As international contract law principles clearly have been at an undeveloped stage, the difference is perhaps not a pragmatic problem. It is possible to venture to say that the "codified" Principles may be applied as *de lege lata* by the decision-maker.[218] At least for the UNIDROIT Principles both existing law and "innovations" are mixed.[219]

Voluntary application of the UNIDROIT Principles cannot be expected to occur automatically, but the creators of those Principles have been far-sighted in setting out a preamble which states when the Principles are applicable. It is not a surprise that, for example, incorporation of the Principles into an individual contract makes them applicable, but the preamble is wider than that. It states the following:

> These Principles set forth general rules for international commercial contracts.

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215. M.J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles of International Commercial Contracts*, 40 Am. J. Comp. L. 617, 625-32 (1992) gives four main areas where the UNIDROIT Principles can be applied: (1) a model for the national and international legislators, (2) a means of interpreting and supplementing existing international instruments, (3) a guide for drafting contracts, and (4) the Principles as rules of law governing the contract. For an interesting comparative approach, see Joachim Zekoll, *Kant and Comparative Law—Some Reflections on a Reform Effort*, 70 TUL. L. REV. 2719 (1996) (discussing the reluctance of U.S. lawyers to embrace "international influence" and the reasons for this, and also the achievements of comparative law).

216. UNIDROIT PRINCIPLES, *supra* note 1. For background information, see generally Bonell, *supra* note 215, *passim*.

217. PRINCIPLES OF EUROPEAN CONTRACT, *supra* note 16. *See generally* Lando, *European*, *supra* note 191; TOWARDS A EUROPEAN CIVIL CODE chs. 1-13 (A.S. Hartkamp et al. eds., 1994).

218. There are more problems when codification starts from court precedents as is the case in the U.S. Restatement system. Rosett, *supra* note 6, at 693.

219. Bonell, *supra* note 215, at 623-32.

> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by "general principles of law," the "lex mercatoria" or the like.
>
> They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may serve as a model for national and international legislators.[220]

There is, in addition to the applicability rules, an explicit recommendation directed towards legislators to take the Principles into account whenever possible.[221]

The second paragraph combines with the *ex aequo et bono* clause in a contract, giving the arbitrator the possibility to apply the Principles. Even if such a contract clause is missing, the Principles establish that they may be applied when applicable law does not resolve the case. In the latter case, the commentary to the Principles admits that application in this way is the last resort. However, as the comments suggest, this route might, in an international dispute, be preferable to that of the *lex fori* as the last resort.[222]

The Principles of European Contract Law, art 1.101 (Application of the Principles), apply much along the same lines as the UNIDROIT Principles. However, in addition to emphasizing contract law in the European Communities, art. 1.101(3)(b) states that they may be applied "when the parties have not chosen any system or rules of law to govern their contract." This would require a slightly more extensive scope of application than in the case of the UNIDROIT Principles, as there is no requirement of an explicit *ex aequo et bono* clause in the contract. This formulation aims to push the dispute to an anational level. It has been stated that the "justification for such application is the comparative preparation and international discussion which is reflected by the Principles. For the adjudication of an international contract the Principles

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220. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.

221. *Id.*

222. *Id.* On application, see Bonell, *supra* note 215, at 620-32; *see also* Ferrari, *UNIDROIT*, *supra* note 43, at 1232-33 & n.49 (showing how different national systems resort to *lex fori)*.

may furnish a more appropriate basis than any system of national contract law."[223]

The UNIDROIT Principles cover practically all aspects of contract,[224] i.e., the freedom of contract, the binding character of contract, formation, validity, interpretation, content, performance and nonperformance. The last-mentioned category includes right to performance, termination and damages. The Principles of European Contract Law are, as has been said, so far not quite as extensive.

There are several interesting solutions in the two sets of the "codified" Principles which cannot all be dealt with in this context. The following section takes up four examples of obvious difficult harmonization: validity of contract, the promisor's type of obligation, specific performance and causality. The two first mentioned are only taken up as part of the UNIDROIT Principles.

The UNIDROIT Principles cover validity of contract in Chapter 3. However, this is a difficult question for an international solution, as validity is closely connected to national views on public policy. The UNIDROIT Principles admittedly recognize the problem, but any harmonization in this field is bound to meet with difficulties.[225]

The UNIDROIT Principles art. 5.4 separates obligations according to (a) the obligation to exert best efforts and (b) the obligation to achieve a specific result.[226] This is a continental interpretation which has been systematically introduced long since in Sweden, as well as the other Nordic countries.[227] The stipulation shows that one system has to be preferred to another without there being room for compromise within it.

The last two examples deal with coordinating civil law and common law.[228] According to the UNIDROIT Principles art. 7.2.2, specific performance of a nonmonetary obligation is, as a rule, allowed. There are a number of exceptions, such as the performance being

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223. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, art. 1.101 cmt. D.

224. *See* Garro, *supra* note 6, at 1160-88 (describing the differences and commonalities between the UNIDROIT PRINCIPLES and CISG).

225. *Cf.* Garro, *supra* note 6, at 1159, 1172-77 (comparing how validity is handled by the UNIDROIT PRINCIPLES and CISG).

226. The division between *obligations de moyens* and *obligations de résultat* seems to have French origins, 5 RENÉ DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL § 237 (1923); Garro *supra* note 6, at 1177-78 & nn.135-38; Denis Tallon, *Damages, Exemption Clauses, and Penalties*, 40 AM. J. COMP. L. 675, 677 (1992).

227. *See* KNUT RODHE, OBLIGATIONSRÄTT (THE LAW OF OBLIGATIONS) 20 (1956).

228. *See* PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, at xvi-xvii.

unreasonably burdensome or expensive, the party entitled to performance being reasonably able to obtain performance from another source, and performance being of an exclusively personal character.[229] This approach more strongly accepts the civil law approach than CISG. According to the latter's art. 28, "a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention."[230] As specific performance in the sale of goods is definitely easier than specific performance of services, the approach of the UNIDROIT Principles is considerably more remarkable, as it covers all types of commercial contracts.

On the question of specific performance, the Principles of European Contract Law art. 4.102 in substance corresponds with the rule in the UNIDROIT Principles, even if the exact wording is not the same.[231] The difference between civil and common law is mainly one of principle. In practice, specific performance would rarely be claimed, even when possible, as its enforcement against the will of the party in breach would be inefficient, at least time-wise.

The last example is related to damages caused by breach of contract. How is compensable damage decided in view of causality? There are three main theories. First, there is the rule that the chain of events and the damage must have been foreseeable at the time of breach of the contract. This is the adequate causation doctrine and it is often applied in Scandinavian and German law.[232] Second, English law applies the doctrine well known to all contract lawyers, i.e., the one established in *Hadley v. Baxendale*[233] as developed by further case law. The damage is compensable if it arose under circumstances "as may fairly and reasonably be considered either arising naturally, i.e.,

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229. UNIDROIT PRINCIPLES, *supra* note 1, at 172-75. It relates to obligations of carriage of goods by sea. The example uses the hypothesis that specific performance is a natural remedy concerning this contract type. This is by no means so. One of the persistent debates in Scandinavia has been whether specific performance in contracts of carriage of goods by sea or in chartering contracts is at all possible *de lege lata*. It is not "unreasonable burden" that excludes this remedy, but other grounds. The basic discussion is found in Erling Selvig, *Om dom på naturaloppfyllelse*, SAERLIG I BEFRAKTNINGSFORHOLD [ON JUDGMENT ON SPECIFIC PERFORMANCE, ESPECIALLY IN CHARTERING], 5 ARKIV FOR SJORET [ARCHIVES ON MARITIME LAW] 553-600 (1964). There is more legal material of latter years where the question is shown not to be that clear-cut.

230. *See also* CISG, *supra* note 3, arts. 46 and 62. HONNOLD, *supra* note 93, at 195-99; Garro, *supra* note 6, at 1164, 1185-86; KRITZER, *supra* note 131, at 213-20.

231. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, at 155-64.

232. *See* RODHE, *supra* note 227, at 544; *see also* G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT 137 (1988).

233. (1854) 156 Eng. Rep. 145 (Ex. D).

according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[234] A somewhat similar view appears in CISG art. 74. Third, like the first, also known in Scandinavia, there is the principle of "normal compensation," i.e., the compensation covers what is the normal consequence of the contract and the breach of it.[235]

The UNIDROIT Principles art. 7.4.4 follows what has been established in CISG.[236] This means that the well-known Scandinavian discretion to refer to circumstances during the breach of contract is replaced in the Principles by emphasizing circumstances at the time the contract was concluded. In certain ways, the nonperforming party potentially knows less of future harm at the time of the conclusion of the contract than at the time the breach was committed. It is submitted that the solution is not altogether optimal, as it seems to protect the party in breach to an unnecessary extent. A more flexible rule would have been preferable, even if the opposite is maintained in the comments on the Principles.[237] On the other hand, the causality rule is closely connected to rules on liability in damages. The *Hadley v. Baxendale* solution lies, in truth, in the application of the principle of strict liability in breach of contract.[238] In addition, the adequate causation doctrine has its connection with the fault principle.[239]

The Principles of European Contract Law introduce a solution of their own. Art. 4.503 starts with a similar approach to that of CISG and the UNIDROIT Principles, as stated above. However, it explicitly adds that such a foreseeability test is unnecessary if the nonperformance was intentional or grossly negligent.[240] There is a "penal aspect" to the foreseeability test which is not further explained in the comments. Contractual remedies of the penal kind sound old-fashioned, and they

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234. *Id.* at 151.

235. This principle is not a novelty, JUL. LASSEN, HAANDBOG I OBLIGATIONSRETTEN. ALMINDELIG DEL, 1917-20 [HANDBOOK IN THE LAW OF OBLIGATIONS. GENERAL PART] (3d ed.). Internationally it has been used in connection with contracts of carriage, ERLING SELVIG, ERSTATNINGSBEREGNINGEN VED LASTSKADER [THE CALCULATION OF DAMAGES IN DAMAGE TO GOODS], *in* HANDELSHÖGSKOLANS I GÖTEBORG SKRIFTER 1962:2, *passim*.

236. UNIDROIT PRINCIPLES, *supra* note 1, at 200; *see also* Tallon, *supra* note 226, at 679; U.C.C. at 2-714 and 2-715; Kritzer, *supra* note 131, at 473-82.

237. UNIDROIT PRINCIPLES, *supra* note 1, at 200-01. This is related to the fact that the Principles only cover the nature or type of the harm, but not its extent.

238. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, at 203.

239. *See* Treitel, *supra* note 232, at 137.

240. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, at 202-03.

should not play such a major part once the basis for contractual liability in damages has been established. Penal approaches were used in nineteenth-century Prussian and Austrian laws. The BGB departed from such remedies, and, as a matter of fact, the principle of calculating the damages as the difference between factual and hypothetical events was in reaction against the grading of damages in accordance with the behavior of the party in breach.[241]

The importance of the examples lies in the fact that in basically different traditional approaches to contract law, it has nevertheless been possible to find formulations satisfying representatives and experts from different legal regimes. The fact that there are substantive differences in the details in the three major "codifications," i.e., CISG, the UNIDROIT Principles and the Principles of European Contract Law, is a concrete reminder that international compromises are, on the other hand, a delicate matter. There is proof that true international contract law is possible in theory. The next problem is whether it can be applied.[242] To the extent it is, the level of anational law is reached.[243] Surely it is helped by the above-mentioned general principles. Without them, it is questionable to what extent, for example, courts and arbitrators would have felt comfortable in establishing any single one of them. This is especially true considering that courts and arbitrators are unable, in any single case before them, to create a comprehensive framework of international contract law.[244] It is then interesting to test whether the "codified" principles provide an answer to international contract disputes. The examples will show problems rather than possibilities to apply them directly.

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241. This is clearly shown by Jan Hellner, *Beräkning och begränsning av skadestånd vid köp* [*Calculation and Limitation of Damages in the Sale of Goods*], TIDSKRIFT FOR RETTSVITENSKAP (TfR) [PERIODICAL FOR LEGAL SCIENCE] 290-344 (1966). New Nordic Sale of Goods Acts do establish a difference according to behavior and this has been severely criticized. No specified explanation for the deviation from CISG has been given.

242. *See* Garro, *supra* note 6, at 1151-52.

243. There are always situations that fall outside the scope of comprehensive international "codified" principles. Those lacunae are perhaps supplemented with national law. This is maintained in PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, at 41. However, as found in Garro, *supra* note 6, at 1151-52, this is not a preferable solution.

244. David, *supra* note 27, does not take this factor into account. He merely requires that "judges and lawyers in the different countries must search together, . . . , for solutions which appear best to serve the ends of justice and the development of international commerce." *Id.* at 26. But one may question how such "togetherness" will be achieved and how it will develop into comprehensive, not merely individual, rules where conventions or contract terms give no clear answer. *See* Garro, *supra* note 6, *passim*.

First, there is the case of the package holiday. The Principles of European Contract Law art. 4.501(2)(a) merely states that the loss for which damages are recoverable includes "non-pecuniary loss."[245] Under such circumstances there is not much advice to be found from the text. However, the guidelines to the latter include an illustration which is directly on the point.

> Illustration 7: A books a package holiday from B, a travel organisation. The package includes a week in what is described as spacious accommodation in a luxury hotel with excellent cuisine. In fact, the bedroom is cramped and dirty and the food is appalling. A is entitled to recover damages for the inconvenience and loss of enjoyment he has suffered.[246]

The Principles of European Contract law do not create such a right automatically, but it is rather subject to the discretion of the judge. The package holiday question would find a solution in applying the "codified" principles. With reference, for example, to Finland, it would be highly probable that the motivations in the Finnish Government Bill, a source considered to be important, would prevail. Even though an international solution exists, it might not be applied, as it would too clearly be in conflict with the principle of binding legal sources in national law.

The above-mentioned road carriage case[247] dealing with payment by check for the handing over of the goods by the road carrier can again be mentioned. The court was criticized because it had supplemented the CMR with national law. Supplementing with the UNIDROIT Principles or with the Principles of European Contract Law would be a possibility. The UNIDROIT Principles art. 6.1.7. deals with the issue. Paragraph (1) allows payment used in the ordinary course of business at the place for payment. Paragraph (2) states the following: "However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured."[248]

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245. The UNIDROIT Principles emphasize the aggrieved party's right to full compensation and do allow for nonpecuniary compensation. UNIDROIT PRINCIPLES, *supra* note 1, art. 7.4.2.(2). However, these Principles are applied to commercial contracts and would perhaps not directly apply to consumer contracts.

246. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, art. 4.501(2)(a) cmt. E.

247. 18 ETL 1983.32 (Bundesgerichthof, Feb. 10, 1982).

248. *Cf.* Garro, *supra* note 6, at 1157 n.28.

A very similar regulation is found in the Principles of European Contract Law art. 2.110(2): "A creditor who, pursuant to the contract or voluntarily, accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The creditor may not enforce the original obligation to pay unless the order or promise is not honoured."

At first glance, it would seem that the result in the road carriage case would have been the same, whichever set of principles were applied. However, this conclusion is questionable. Both the above-cited articles deal merely with efficiency or validity of payment. The road carrier's liability was based on something different, i.e., on the fact that he had delivered the goods, but collected "no cash" on behalf of the sender. The above-mentioned principles are not directly applicable. Indirectly, they seem to show that payment by check leaves the validity of the payment pending. This would indicate that a road carrier is entitled to consider payment by check as cash. Should the check not be honored, the only result is that payment has not validly taken place, but the risk of that falls upon the sender, not upon the road carrier. Whether this is the correct interpretation is questionable, but the discussion shows that the "codified" principles do not necessarily provide an answer to problems concerning specific types of contract. The answer remains outside the "codified" principles.[249]

The above-mentioned ice hindrance case concerning the voyage charterer's right to deduct damages from freight raises the question whether the UNIDROIT Principles or the Principles of European Contract Law would have been to any avail in deciding the right for the voyage charterer to such deduction. Withholding performance is regulated as a remedy in both.

The UNIDROIT Principles art. 7.1.3 states in paragraph (1) that in simultaneous performance, "either party may withhold performance until the other party tenders its performance." Paragraph (2) states: "Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed."

The Principles of European Contract Law art. 4.201 introduces a more flexible regulation. Paragraph (1) states: "A party who is to perform simultaneously with or after the other party may withhold

249. *Supra* Part V.A.2. This is even more obvious should the principles have to supplement the above-mentioned *KYZIKOS* problem which is totally specific to voyage chartering.

performance until the other has tendered performance or has performed. The first party may withhold the whole of his performance or a part of it as may be reasonable in the circumstances." Quite clearly, the latter is more realistic than the UNIDROIT alternative, as a party should not be allowed to withhold his whole performance when the other has performed, even if only partially.

But withholding the payment of freight was no longer relevant, as the charterer's claim was related to damages incurred. The solution of merely pressuring the owner to perform was over. The elementary question was the right to set-off. There are no clear guidelines to the problem in either set of the "codified" principles.[250] Even if there had been, the arguments used by the sole arbitrator were so closely connected to the chartering market that general principles of contract law would have been of little help, as they would have been unable to deal with circumstances which are very specific for the type of contract in question.[251]

Perhaps the problem is that both sets of codified principles have derived too much influence from CISG. Contract of sale is quite naturally a major factor in the problem, but other types of contracts display problems not revealed in the context of sales.[252]

These examples are not provided to show that the "codified" principles would be unnecessary; quite the contrary, they emphasize that no international or national method of "codification" is sufficient to give response to all disputes.[253] Consequently, depending on how modern *lex*

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250. The indices show no answer in looking for "set-off." In Nordic law, this is considered a remedy due to breach of contract under the general heading of contractual self-help. One of the major and most influential works on Nordic contract law clearly shows the acceptance of this systematic approach, TAXELL, *supra* note 20, at 237-45.

251. In this kind of setting applicable law seems less important, unless it connects with something similar to the English freight rule. However, set-off in private international law may cause problems, R.I.V.F. BERTRAMS, SET-OFF IN PRIVATE INTERNATIONAL LAW, COMPARABILITY AND EVALUATION, ESSAYS ON COMPARATIVE LAW, PRIVATE INTERNATIONAL LAW AND INTERNATIONAL COMMERCIAL ARBITRATION IN HONOUR OF DIMITRA KOKKINI-IATRIDOU 153 (K. Boele-Woelki ed., 1994).

252. *See* Garro, *supra* note 6, *passim* (showing the connection between CISG and the UNIDROIT Principles). Garro refers to the suitability of the UNIDROIT Principles to carriage by sea or air, marine or air insurance contracts, or international banking transactions. As the arguments in the text above show, there is reason to maintain a more clearly nuanced analysis as to the applicability of the Principles than the one expressed by Garro; *see also* Bonell, *supra* note 215, at 622-25 (showing that many different types of sources have influenced the final version of the UNIDROIT Principles).

253. *See* Garro, *supra* note 6, at 1152-54, who seems to accept the applicability of the UNIDROIT Principles without specific problems.

mercatoria is defined, neither the UNIDROIT Principles nor the Principles of European Contract Law can be described as synonymous with *lex mercatoria*. They undoubtedly will form the essential core, but one to which any decision-maker must be prepared to add relevant legal arguments ending in a further refinement of the modern *lex mercatoria*.[254] This is why it is necessary to reiterate specifically the importance of maintaining the international standard of contractual dispute resolution in order to find legally valid arguments in spite of the fact that ordinary international sources would not resolve the problem. Whether one accepts the "codified" principles or not, in the end, as far as commercial contracts are concerned, there must be one abstract principle which, however, is less abstract than the requirement of fairness and reasonableness.[255] In gap-filling situations where neither conventions nor contract terms give an answer, the solution reached must ensure that there is no unreasonable deviation from the expectations of the market to which the dispute belongs.

Apart from the problems of the above-mentioned kind, the "codified" principles ensure the international setting for an international contractual dispute better than their absence does.[256]

VI. CONFLICT IN SOURCE MATERIAL

In legislation and contract terms, the first phase in dealing with gaps is the probable adoption of general principles of contract law. This channels the debate back to what already has been dealt with in Parts IV.D, V.A.3, and V.B above. Thus, only the situation in which there is conflict in source material is taken up here. If there is conflict between sources of clearly different categories, such as conflict between convention text as interpreted in court, and arbitration practice and general principles of contract law, the former would obviously prevail. Conflict in reality exists when the sources to be used belong to the same category, such as differing court judgments concerning the same convention text or standard contract term. The additional condition for conflict is that the scope of sources has been limited in a way which creates this conflict. Should the selected material not exhibit this characteristic, one then deals with gap-filling. Two alternatives shown

254. *See* Ferrari, *UNIDROIT*, *supra* note 43, at 1230 n.36.

255. This abstract requirement is included in the UNIDROIT PRINCIPLES, *supra* note 1, art. 1.7 (good faith and fair dealing) and the PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16, art. 1.106 (good faith and fair dealing) and 1.108 (reasonableness).

256. *See* Garro, *supra* note 6, at 1152-54 (emphasizing also consistency and fairness).

through examples are dealt with: Conflicting material concerning conventions, and standard terms.

According to the CMR art. 32.1, the period of limitation for an action arising out of a contract of carriage is one year.[257] In certain specified situations the time is three years. The point in time from which the period starts to run is also specified. According to art. 32.2, a written claim to the carrier suspends the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto. A renewed written claim causes no further suspension of time.

Neither the French nor the English text of the CMR clarifies what kind of a written claim is needed to fulfill the requirements of the suspension of the period of limitation. Certainly it is not the same as notice by the consignee due to damage to the goods in art. 30. Otherwise, the CMR would either identify such notice as being the intended written claim, or stipulate the notice to suspend the period of limitation directly.

Available court decisions show differences in the interpretation of the wording "written claim." In *I.C.I. v. Mat Transport Ltd.*,[258] goods had been damaged during carriage by road. The consignee sent the following letter: "We refer to our telephone conversation of 6 October 1982 in which you advised the trailer carrying the above orders was involved in an accident en route to customers . . . . In the meantime as principal haulier we must hold you responsible for any losses we incur."[259] The letter included some further details of the accident. The Court considered this to be a written claim for purposes of the suspension of the period of limitation. No documents attached to the written claim were required nor any declaration of the damage.[260]

Another court imposed a stricter requirement. In *Hof van Beroep te Gent*,[261] the written claim had to fulfill the following requirements:

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257. Conflicts are also shown in 20 ETL 1985.95 (Bundesgerichtshof July 14, 1983). The CMR art. 29 on the concept of "willful misconduct" has a somewhat different meaning in different jurisdictions and the court had to "choose." The same concept had to be given meaning in 18 ETL 1983.826 (Federal Court of Canada Oct. 22, 1981), but from another angle and in light of the Warsaw Convention and the Hague Protocol art. 25.

258. [1987] 1 Lloyd's Rep. 354 (Q.B.).

259. *Id.* at 356.

260. *Id.* at 360-61. This is supported by Moto Vespa v. MAT [1979] 1 Lloyd's Rep. 175 (Q.B.). *See also* D.J. HILL AND A.D. MESSENT, CMR: CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD 244 (1995). *But see* Malcolm A. Clarke, INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR 71 (1982) (referencing to a Belgian and to an English case and indicating a preference for the requirement of further details in connection with the written claim).

261. 22 ETL 1987.421 (Hof van Beroep te Gent June 25, 1986).

"In order to meet the requirements of art. 32.2 CMR, it suffices that the consignee . . . has given an as accurate as possible description of the nature and the content of the damage, as well as the legal grounds on which he bases his claim, together with a clear formal notice."[262]

In general terms, two major alternatives are available: (1) a written claim, including a general idea of the damage and reference to the carrier, the consignment note and the carriage, the written claim having no documents attached to it; (2) a documentary presentation of the whole conflict, including further details on the claim and the damage, and also attached documents including the consignment note, and possible surveys.

Should a decision have to be reached in a jurisdiction applying substantive law not dependent on previous national precedents or ordinary national sources, the court would have to either choose between the two basic alternatives as used in other jurisdictions, or find a solution of its own. An existing conflict in international material makes it easier to reach an independent decision than where there are court decisions applying the same alternative.

Though a detailed analysis is not possible in this context, one suggestion for a solution in case of conflict in international material concerning the interpretation of substantive law is to supplement the arguments with "common sense" criteria. As the carrier only needs to reject the claim by notification in writing and return the documents attached to the written claim, there exists a very uncomplicated way of recommencing the period of limitation. The carrier need not provide a basis for rejection. Additionally, the claimant has no renewed possibility of suspending the period of limitation. There is a realistic possibility in road carriage that the consignee, often a small business enterprise, has no company-organized specialization in the specific questions of the above-mentioned kind. Thus, the above-mentioned alternative (1) appears the correct solution. The small interpretative advantage gained by choosing the solution suggested would not simultaneously impede the carrier's position, as he has the possibility of immediately rejecting the claim without specified grounds. Finally, by the acceptance of solution (1), there is no unreasonable deviation from the expectations of the road carriage market. The latter principle is exactly the same as that mentioned in the gap-filling process.

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262. *Id.* at 421.

Harmonization is naturally not reached by such methods, but as the "common sense" criteria applied are based on the Convention itself, similar criteria could be used in any jurisdiction. The criteria are viable *de lege lata*. Convention-based common sense criteria might, in the best of cases, lead to a gradual correction of any international differences in interpretation.

In EC-based legislation, to the extent it contains real harmonization, similar problems would not arise due to the harmonizing effect of the decision-making mechanism and the role of the ECJ. Judicial control of an international kind is the best alternative to ensure harmonization.

In interpreting contract terms, similar aspects come to mind. However, the general aim of the contract in view of all its terms might not be of great help. Nordic debate has been active in recent years concerning maritime contracts in which the international element is built-in.

One of the debated cases is NMC 1983.309 Norwegian arbitration award.[263] A ship was time-chartered on the basis of a standard time charter contract (Texacotime 2). The arbitration was changed in the standard clause from London to Oslo; Norwegian law was therefore applicable. On a voyage, the ship suffered a breakdown in her machinery, but she was able to reach the port of destination with the help of towage. The time charterer maintained the right to consider the ship off-hire for the entire time of breakdown, while the owner maintained that the ship was off-hire only to the extent that time actually had been lost.[264] The Norwegian Maritime Code in force at the time followed the latter alternative.[265] However, the majority of the arbitrators decided that Norwegian law concerning the interpretation of contracts should be applied, but that that law also included taking into consideration the international background of the charter-party.[266] As the standard contract had been created with English law in mind, it was probable that the intention of the creators of the standard terms had been to show that the first-mentioned alternative had to be the basis for interpretation. The very same formulation had been interpreted in accordance with the time

263. The "Arica" case. *See* Editorial Note, *supra* note 168.
264. *Id.* at 312-19.
265. *Id.* at 316, 320, 324.
266. *Id.* at 321-22.

charterer's view in a previous English case.[267] Thus, the time charterer's view prevailed. An arbitrator in the minority stated that the unclear formulation had to be supplemented with the stipulations found in the Norwegian Maritime Code, leading that arbitrator to accept the owner's point of view.

There were two basic principles involved in this case. Should one place the interpretation process in an international environment, or should one be content with mere applicable national law? The former solution guarantees a better harmonization than the latter and is therefore preferable, considering the international background of the standard contract, but it does not comport with the arguments used by the majority in this case. There is no need to create a fictive intention of somebody unknown, as the same result can be achieved by adopting the aim of harmonization. Such an approach also satisfies, on the whole, the reasonable expectations of the contracting parties and the trade in question. Again, the thesis is the same; there is no unreasonable deviation from the expectations of the chartering market. Thus, it has also been established that any national substantive law may have two different elements involved: the international and the domestic. The international part might just as well be directly applicable anational law.

VII. GUARANTEES OF HARMONIZATION

In spite of the number of methods to harmonize and the principles to be taken into account in achieving this accepted goal, there is, of course, no guarantee that national courts, or even arbitrators for that matter, will consider themselves bound ethically and professionally to follow up the aim of harmonization without at least some limitations. Any judge or arbitrator experienced in contractual disputes with international dimensions will find some difficulties in a situation where applicable domestic law clearly gives a solution, but the applicable substantive rule or principle in an international setting is uncertain. This would lead to the preference for national law.

Some advantage can be taken of the fact that CISG includes a specific type of binding rules on interpretation of conventions, but it is in no way comprehensive. It also establishes some principles.

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267. There is further clarification after the Norwegian arbitration award in *Navigas International Ltd. v. Trans-Offshore, Inc.* (the *BRIDGESTONE MARU NO. 3*) [1985] 2 Lloyd's Rep. 62, 84 (Q.B.) (concerning a formulation in Shelltime 3).

The different methods of harmonization concerning contract law do not include supervisory organs, such as supranational courts, tribunals, or other forms of dispute settlement, of course, with the important exception of the EC and its own law. Otherwise arrangements similar to those found in the United Nations Convention on the Law of the Sea (UNLOSC),[268] and in the Agreement Establishing the World Trade Organization (WTO), are unfamiliar.[269] Outside conventions, there are some self-regulatory efforts by the market itself, and, in practice, in certain areas courts and arbitrators do adjust themselves to the international environment in which the dispute in question exists.

Even if not guaranteed, harmonization can be enhanced by efficient information flow of legal material. The focal point is to see "what others have already done."[270] There is nothing new in this compared with a purely domestic situation. As an effort to enhance harmonization, UNCITRAL has created a report system, Case Law on UNCITRAL Texts, better known as CLOUT.[271] CLOUT is a compilation of abstracts and "forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that have emanated from the work of the United Nations Commission on International Trade Law."[272] CLOUT is different from national reporters because it contains only abstracts and covers court decisions and arbitration awards from all the countries bound by any UNCITRAL convention or applying any UNCITRAL model law. However, in connection with every case, it contains further references to national reporters and periodicals. As a comparison, a more informative reporter system is the Nordic Maritime Cases series published since 1900. It contains reports of cases *in toto* from all the Nordic countries, provided that the cases are reported.

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268. UNCLOS, Oct. 10, 1982, 21 I.L.M. 1261, 1983, art. 287, refers to the International Tribunal for the Law of the Sea established in accordance with Annex VI and other means of settlement of disputes. UNLOSC shows to what extent these means of settlements have a binding force.

269. According to the WTO Agreement, *supra* note 8, art. IV.3, the General Council shall convene to discharge the responsibilities of the Dispute Settlement Body. Further rules are found in Annex 2 of the Agreement, entitled Understanding on Rules and Procedures Governing the Settlement of Disputes. These international arrangements involving states maintain a harmonized system of the law. *See also* Ferrari, *supra* note 7, at 205 n.118 (concerning the nonacceptance of an international tribunal related to international sales).

270. Ferrari, *Uniform, supra* note 210, at 1027 & 1028 n.37.

271. UNIDROIT also has a case report system, UNIFORM L. REV., *supra* note 77. *See* Honnold, *supra* note 93, at 93; *see also* Ferrari, *supra* note 7, at 204-06.

272. This citation is included in every issue of CLOUT.

In practice, one essential part of the CLOUT system is material to the interpretation of CISG. In order to give a more enlightened picture of the possible effect of CLOUT, one case provides an example. In CLOUT (7 June 1996) Case 123, the German Supreme Court (Bundesgerichtshof) confirmed the decision of the Oberlandesgericht Frankfurt a.M.[273] The court held that a Swiss seller, who delivered to the German buyer New Zealand mussels containing a cadmium concentration exceeding the limit recommended by the German health authority was not in breach of contract. The cadmium concentration itself constituted, in the court's opinion, no lack of conformity, since the mussels were edible.[274] Furthermore, the Supreme Court held that art. 35(2)(a) and (b) CISG do not place an obligation on the seller to supply goods that conform to all statutory or other public provisions in force in the import State unless the same provisions exist in the export State as well, or the buyer informed the seller about such provisions, relying on the seller's expert knowledge, or the seller had knowledge of the provisions due to special circumstances.[275]

The case referred to touches upon one of the central questions in the sale of goods. When are goods in conformity with the contract or, rather, the contractual relation? Especially when the contract is silent on specifications concerning the goods, the court might meet with difficulties in deciding the issue. It has commonly been debated to what extent administrative rules and regulations exercise an influence in deciding a dispute in contract. As a comparison, in maritime transport it is provided either by explicit legislation or as an implied contract term that the contracted vessel must be seaworthy.[276] There are a great number of administrative regulations setting the seaworthiness standard. These regulations are generally accepted as part of the criteria used to

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273. Entscheidungen des Bundesgerichtshofes in Zivilsachen [Decisions of the German Civil Court], 129 BGHZ 75 (1996) (i.S.H. v. M.S.A., Mar. 8, 1995).

274. *Id.* at 78-79.

275. *Id.* at 79. CISG, *supra* note 3, art. 35(2)(a) and (b):

> Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.

Cf. U.C.C. 2-314(2)(c) and KRITZER, *supra* note 131, at 282-83.

276. *See,e.g.*, Finnish Maritime Code ch. 13, § 12, and ch. 14, §§ 7, 52.

determine the contractual seaworthiness issue.[277] The same applies to defining dangerous goods shipped by an exporter. There are some special rules for the contracting shipper delivering such goods for shipment, but the concept of "dangerous" would usually not be defined in civil law.[278] In the above-mentioned case, the same question is vital as the basis for a decision on conformity or nonconformity to the definition. The difference between the German case and the examples on maritime contracts is that the first-mentioned had to consider the influence of national administrative rules, while the debate in the latter mainly concerns internationally accepted administrative rules. Whether the solution found in the German case is correct must be questioned.

CLOUT only gives the outline of the case. For the case to exert real influence the proper reporter should be studied. Further, the case is intriguing, because the abstract expresses the German Supreme Court's view that administrative regulations existing only in the import country do not suffice to establish nonconformity.[279] The starting point, however, should be that, as the product is in "commercial existence" in the import country, the corresponding administrative regulations in that country should be given decisive influence. Should Nordic concepts on defective goods have been applied—the fact that, for example, health authorities would restrict the marketing—would have created a defect in legal terms even if the goods could have physically been consumed. The type of defect, in Nordic language, goes under the name of "rådighetsfel," which is translated as "administrative defect."[280]

Another conclusion than the one reached by the German Supreme Court could easily be reached elsewhere, and the information of the judgment would not be to much avail in that decision-making process. Hopefully, this shows that harmonization is not achieved even if the same text of the same convention would provide the basis for the decision-

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277. *See* HANNU HONKA, FARTYGETS SKICK OCH EGENSKAPER. EN BEFRAKTNINGSRÄTTSLIG STUDIE (THE CONDITION AND CHARACTERISTICS OF THE SHIP. A STUDY IN CHARTERING LAW) ch. 7.4.3 (1989).

278. For example, the Finnish Maritime Code, ch. 13, § 7, on shipper's duties does not define "dangerous goods." The Government Bill 62 for the 1994 Parliamentary Session, 35, refers to the influence of the International Maritime Dangerous Goods Code (IMDG Code).

279. 129 BGHZ at 79.

280. The first to launch this concept was LENNART VAHLÉN, FORMKRAVET VID FASTIGHETSKÖP. SÄRSKILT DESS INVERKAN PÅ REGLER OM FÖRUTSÄTTNINGAR OCH FEL (THE REQUIREMENT OF FORM IN THE SALE OF REAL ESTATE. ESPECIALLY ITS INFLUENCE ON RULES CONCERNING PRECONDITIONS AND DEFECTS) (1951). For the sale of goods this has also been accepted as illuminated by Leif Sevon, *Om rådighetsfel vid köp av lös egendom (On Administrative Defects in the Sale of Goods*), JFT 110, *passim* (1986).

making. CLOUT would only operate as a source of information. It would not create inherent rights strong enough to improve substantially the harmonization effect.[281]

VIII. CONCLUSIONS

From the outlines above, it is clear that international contract law is, as always, under development. It is quite clear that globalization, or rather, further internationalization of contract law sooner or later crosses the line from legal-political arguments to real applicability, from hopes and ideals to reality.[282] The same development seems to have taken place within the U.S. federal system.[283] Should one want to reverse the trend, the opposition must be directed towards another level of the integration process.[284] There seems to be a dependency of international contract law on the basic political development in free world trade in goods, services and capital, or international trade within trading blocs. If the original hypothesis that the need for harmonization of contract law derives its justification from international trade is found unacceptable, there is room for others, such as those deriving national legal regimes from their cultural background and finding that they advance the cause of the national state as a sovereign entity, but this is not achieved by connecting it merely to contract law.

Criticism of the international order of the kind dealt with above can be found, but it should be remembered that much depends on the approach, i.e., what factors one wants to emphasize.

René David, one of the well-known supporters of unification, has put his approach in the following basic terms:

> Many skeptical or pessimistic scholars regard international unification of law as unobtainable. They view it as an illusion; it does not exist, nor will there ever be anything but national laws, established by the unilateral will of those who govern each state. Detached

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281. Case reports can be complemented with legal doctrine and doctrinal information, such as REVIEW OF THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS (CISG) (Cornell Int'l L.J. ed., 1995).

282. *See* Alan D. Rose, *The Challenges for Uniform Law in the Twenty-First Century*, I UNIFORM L. REV. 9, *passim* (1996).

283. Rosett, *supra* note 6, at 685-87. "Our commerce, our legal profession, and our people are so knit together that it is hard to imagine that any state might fundamentally revise its civil and commercial law without taking into account the impact of those changes on the other states." *Id.* at 687.

284. *See id.* at 693-95 on U.S. development.

> consideration of the prevailing situation does not justify this pessimism. To be sure, much remains to be done, and the present situation is far from satisfactory. Nevertheless, substantial changes have occurred, in fact as well as in attitudes, since the last century when legal nationalism had free rein. From our point of view the illusion is not the international unification of the law. On the contrary, it is the refusal to contemplate unification and the desire to preserve law as strictly an instrument of state power and thus as divided among the states; . . . . Let jurists continue in their routine opposition to international unification of law; nevertheless, that unification will occur without and despite them, just as the ius gentium developed in Rome without the pontiffs, and as equity developed in England without the common-law lawyers. Today the problem is not *whether* international unification of law will be achieved; it is *how* it can be achieved.[285]

David wrote this in 1968, long before international trade had been given its statutory framework through organizations such as the WTO and the present day EU. The words of David are perhaps somewhat overenthusiastic about both the depth and scope of unification. Not even in contract law do facts and legal sources show that such a status would without exception have been achieved or even be achievable in the very near future, i.e., at least thirty years after David's comments.

One of the critics of harmonization is Martin Boodman.[286] He claims that harmonization is a myth and that its concepts are too vague. As Western legal systems share an intellectual and jurisprudential tradition, he believes, Western jurists think alike.[287] Thus any nonspecific harmonization is redundant.[288] The common way of thinking is also redundant due to the vagueness of the concept of harmonization. However, Boodman's basic argument is that "justification cannot be found in any attribute of harmonization."[289] Whether this is true can certainly be debated. Boodman takes up the situation in Canada concerning personal property security laws as an

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285. David, *supra* note 27, at 14 (emphasis in original).
286. Boodman, *supra* note 5.
287. *Id.* at 707.
288. *Id.*
289. *Id.* at 708.

example of the harmonization myth,[290] and in this context he mentions that the reason for harmonization usually is economic efficiency.[291] However, he does not accept it as the justification for harmonization.[292]

What then is the conclusion about the real status of harmonization, and what is its future in international contract law? Reality tends not to favor extreme solutions of the type suggested by David and Boodman, and this area is no exception.

The conventions mentioned above are to a large degree either not in force, or they are applied by a small number of states, or they have resulted in a further state of deharmonization due to frequent amendments adopted by only some of the Parties to the Convention. The genuinely positive development, however, is CISG and its wide acceptance and large applicability. Regulation of contracts connected with international services is still undeveloped, as are many other areas of contract law. However, for the time being, it seems that conventions are hard to achieve and adjust by wide enough support, and that a search for more flexible alternatives is a more sensible option.

Therefore, the next step seems to be international but regionally limited solutions to contract law problems in the wide sense, not intending to minimize the importance of conventions. Out of the international trading arrangements mentioned in Section 1.1, only the WTO, the EC and NAFTA seem to have real impact. Further evidence is found only for the EC. The EC has by now certain historical depth, a set organization, and positive development both as far as membership and substance are concerned—Maastricht, for example, was no minor achievement. The EC's administrative and judicial control is reasonably impressive. The ECJ, especially, is of utmost importance, because it seems to guarantee the legalistic functioning of the whole organization. A great number of basic rules for free trade are already systematized. All in all, there is consistency in the EC, not forgetting all the problems that exist too. Such a framework will enable contract law to develop in international terms within the trading bloc rather than globally, or within less developed forms of trading cooperation.[293] The *raison d'être* for

290. *Id.* at 708-23.

291. *Id.* at 712-13.

292. Boodman, *supra* note 5, at 713.

293. *See* Lando, *European*, *supra* note 191, at 576-84 (discussing the need to create a Uniform European Code of Obligations and the specific problems such an undertaking may meet). *But see* PETER SCHLECHTRIEM, UNIFORM SALES LAW, THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1986) (concerning the Sales Convention preparation):

harmonization of contract law exists within the bloc. To this can be added certain industrialized countries and important trading partners, such as the U.S., Australia, Canada and Japan and a few others—perhaps an OECD aspect. It is conceivable that in this enlarged area some further developed form of international contract law can be found. Since the U.S. has joined CISG, there has been an increase in interest in the international aspects of contract law in U.S. jurisprudence.

Organizations such as MERCOSUR, APEC and the future African Economic Community are still too much in their initial stages—due to several reasons, mainly the economic problems and lack of wealth in the Member States—to have the strength to create and develop, in the best of cases, anything more than the basics of cooperation. Nor will they at that stage influence any additional initiatives relevant to creating harmonized contract law.

This takes nothing away from impressive efforts elsewhere. The UNIDROIT Principles will be no less applied due to the circumstances dealt with above, but in global terms their role will be perhaps of a somewhat sporadic nature in terms of applicability. As far as the Principles of European Contract Law are concerned, there seems to be an interesting future for them, as the EC does have the requisite setting.

However, there are many uncertainties. Especially the status and content of general principles of international contract law need clarification. One method arguably exists for both sets of "codified" principles. The international legislator has the possibility to refer to such principles in future conventions (or in national legislation). Principles transform to "hard" law by incorporation, much in the same way as standard terms are incorporated in contracts by reference. There are advantages in the fact that applicable rules may be changed without having to change the convention. This decreases the risk of deharmonization. To what extent political preparedness exists to accept

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> [T]he experiences gathered during the work of UNCITRAL and the deliberations at the Vienna Conference have shown that the greatest obstacles to unification do not lie between states with different social and economic systems, but rather between countries of Western Europe, where each holds convictions, rooted in centuries of legal tradition, about the superiority of its own solutions. Without the persuasive power of large majorities that, in Vienna, helped to surmount these barriers, it is to be feared that the profound differences could only be overcome through compromise on the basis of the lowest common denominator.

Id. at 115-16. The *Principles of European Contract Law* show that Schlechtriem's fears in 1986 might have been somewhat overemphasized.

such transformations in the area of contract law is quite another matter. In other areas this, however, is becoming a well-known method.

In comparison, international safety requirements in shipping are created by the International Maritime Organization (IMO), which has an inter-governmental nature. Due to the fact that technical safety standards often develop quickly, the main safety convention, the International Convention for the Safety of Life at Sea (SOLAS Convention),[294] includes a procedure of tacit acceptance of Convention amendments by the Member States. But lately, even this system has been considered inapt to show enough flexibility. One of the latest amendments to the SOLAS Convention[295] references certain safety management standards involving the shipping company's land organization in safety work. The safety management standards are found in a separate set of rules, the International Safety Management Code (the ISM Code). According to the ISM Code art. 1.2.3.2, one objective for the safety management system is to ensure "that applicable codes, guidelines and standards recommended by the Organization [the IMO] Administrations, classification societies and maritime industry organizations are taken into account."[296] If "soft law" is to be accepted in the public administration of shipping operations, it is not an impossible proposition that the same would prevail in individual legal relations.

The EC will sooner or later have to react to general contract law questions. This hopefully became clear in Parts IV.C, IV.D and V.B. Whether it will be through the referenced methods or via another method remains to be seen. Any type of acceptance that is reminiscent of the U.S. system of uniform codes and/or restatements runs the political risk of accusations of EC federalism overstepping its boundaries.

Bypassing legislation altogether is another idea if real applicability, and not just creations of new rules, is the goal. Development of standard contract terms in the context of international commerce should never be forgotten. The first step is to achieve terms that are internationally valid, i.e., that are created by well-known organizations in a balanced way, and also perhaps accepted and promoted

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294. International Convention for Safety of Life at Sea, *opened for signature* Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700.

295. Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, Feb. 17, 1978, T.I.A.S. No. 10009, 17 I.L.M. 579 (entered into force May 1, 1981).

296. International Safety Management Code (ISM) art. 1.2.3.2. Further background in legal terms is found in HANNU HONKA, QUESTIONS ON MARITIME SAFETY AND LIABILITY, ESPECIALLY IN VIEW OF THE ESTONIA DISASTER, ESSAYS IN HONOUR OF HUGO TIBERG 351, 364 (1996).

by an inter-governmental agency. The second threshold is that the parties accept a set of standard contract terms in their individual contract. Once these circumstances prevail, internationally based solutions to any dispute easily become possible without there ever having been a need to be involved in the complicated procedures of the "international legislature."

Short-term and long-term development of international contract law is, in certain ways, at a turning point, again. Many a writer has expressed the same hope in the decades past. However, the creation of the UNIDROIT Principles and the Principles of European Contract Law will undoubtedly assist any decision-maker having the will and the ability to resolve an international contractual dispute in the proper international environment. No claim can be made that such a decision is not *de lege lata*.[297] And even if not perhaps lavishly applied globally, the Principles are—in reality—a step towards the understanding of the influence of the international element in contract law.

297. Michael J. Bonell, *International Uniform Law in Practice—Or Where the Real Trouble Begins*, 38 AM. J. COMP. L. 865 (1990) states that the general principles as "codified" are the starting point—not the end. Legal educational doctrine will function as an important channel, as shown, for example, in Sweden. JAN RAMBERG, ALLMÄN AVTALSRÄTT (CONTRACT LAW) (1996) (stressing the "new" international element in contract law).