How to Apply Uniform Legal Rules*

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Introduction

In the following, three tentative conclusions on the question "how to apply uniform legal rules" will be presented. Subsequently, instead of proceeding to a comprehensive analysis, some examples will be given. which serve the purpose of demonstrating the plausibility of the prior tentative conclusions.

The first conclusion is well proven rather than only tentative. The proof is due to the seminal treatise of Stefan Vogenauer "*Die Auslegung von Gesetzen in England und auf dem Kontinent*".[1] There, the author has destroyed the myth that English judges have developed approaches to construing and interpreting legal materials, which fundamentally deviate from the methods applied by continental judges. In fact, the only real difference of classical character is the rule that in the context of applying statutes and regulations English judges have traditionally refrained from taking preparatory materials – such as the records of Parliament – into account. However, on the occasion of the British accession to the Brussels Convention the statute implementing the Convention into English law has by express terms made an exception to this rule and has empowered English judges to take into consideration the Official Report of the expert-group entrusted with the elaboration of the Convention and its adaptation to the legal order of new Member States.[2] In the meantime, however, this approach has almost been abandoned. Nowadays, English judges do hardly hesitate to include into their contemplation whatever piece of preparatory work to legislation.

The second conclusion is: Contrary to what is very often insinuated open divergences between courts of different jurisdictions with regard to the application of uniform law are extremely rare. To say the least, they certainly do not occur more frequently than divergencies among national courts in applying domestic law. It is difficult to find any clear example of a court decision deliberately dissenting from an authority of another jurisdiction.

What sometimes can be found, however, is the fact that the courts are deeply rooted in their general approach to legal issues and that consequently they are far from being aware of the fact that judges in other jurisdictions may follow another general approach. Reference will be made to this observation in the context of how to establish jurisdiction under the Brussels I Regulation.

The third conclusion is one, which has the most implications for practice. To foster the proper application of uniform law there are even more auxiliary materials at hand than for dealing with domestic law. This can be demonstrated by the following example: All pieces of secondary European legislation (regulations as well as directives) are preceded by sometimes rather lengthy official considerations, because every single act of European legislation must be accompanied by reasons.[3] In German such reasons are introduced by the formula "*in Erwägung nachstehender Gründe*", hence the legal term "*Erwägungsgründe*". In the English version it is simply stated "*whereas (...) whereas (...) whereas*".

Very often decisions of courts of other jurisdictions are published, which may be of assistance when dealing with uniform law.[4] But what – you may ask in this context – is the legal status of published court decisions of other jurisdictions? According to civil law theory the problem does not even occur, because the doctrine of *stare decisis* is unknown. Previous court decisions, even in case they were rendered by the highest court of the respective country, may be either convincing or not convincing – just as any academic publication may be. In practice, however, even in civil law countries the authority of previous court decisions is very strong, in fact, much stronger than persuasive authorities in common-law systems. Unfortunately, in Germany and France – due to the nationalistic origin of the concept of legislation – foreign court decisions are hardly ever taken into consideration where issues of a general character are to be decided. The practice of the Swiss courts, the Federal Court in particular, is quite different.

What, however, in this context is particularly remarkable is the recent development in England. The English Civil Procedure Rules are continuously supplemented by so-called "*Practice Directions*", issued by the presidents of the High Court's divisions, in particular by the president of the Queen's Bench Division, called Lord Chief Justice. In 2001 the then holder of the office, the well-known Lord *Woolf*, issued a Practice Direction on the "*Citation of Authorities*".[5] A special chapter of these Practice Directions is devoted to "authorities decided in other jurisdictions". It is quite amazing to read:

"Cases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction. At the same time, however, such authority should not be cited without proper consideration of whether it does indeed add to existing body of law.

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1 2001, see in particular summary p. 1295 *et seq*.

2 See Jurisdiction and Judgements Act 1982 sec. 3 (3).

3 See article 253 Treaty Instituting the European Community: "(…) must state the reasons".

4 In view of the CISG the examples given in the UNCITRAL-Digest of case law, *supra* notes 2-10.

5 [2001] 1 WLR p 1001.

In future, therefore any advocate who seeks to cite an authority from another jurisdiction must (...) indicate in respect of each authority what that authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is (...)"

This Practice Direction does not distinguish between domestic and trans-border uniform law because it is not unusual that even in purely domestic cases English courts discuss case law of other jurisdictions of the common law-family. Basically, the common law in its narrow understanding, namely as opposed to statute law, is very close to uniform law of the common law world. The Practice Direction on the citation of authorities, however, equally and indistinctively relates to civil law jurisdictions including authorities not officially available in the English language. Authorities, even from civil law jurisdictions, can be, reiterating the crucial terms, "a valuable source of law" in England and Wales.[6] They are "properly used" in particular if dealing with cross-border uniform law, which is also in force in England.

Of course it must be admitted, that Lord Woolf did not intend to confer to any foreign court decision the status of binding precedent. The meaning of what he calls a "valuable source" of law is probably very close to what the Americans call a "persuasive authority" – as opposed to a decision enjoying the status of *stare decisis*. A Californian decision, for example, even of the highest court of that state, has only "persuasive authority" in New York. Unfortunately, so far no legal scholar, let alone any court, has made an attempt to explain the necessary components of persuasiveness for an authority to become a persuasive authority. The leading introduction to the law and legal system of the United States[7] tells us:

"If a court is not obliged to follow these precedents established in earlier cases but may do so if it is persuaded by the reasoning used, the procedural effect is only persuasive".[8]

In Black's law dictionary[9] it is merely/at least specified that a persuasive precedent is a precedent that is entitled to respect and careful consideration. In a rather time honoured decision the United States Supreme Court was confronted with a ruling of the House of Lords concerning the interpretation of a pre-printed provision in a marine insurance policy,[10] presumably governed by English law. The holding of the Supreme Court was:

"*While uniformity of decisions here and in England in the interpretation and enforcement of marine insurance contracts is desirable, American courts are not bound to follow the House of Lords' decisions automatically. The practice is no more than to accord respect to established doctrine in English maritime law".*

Therefore, these introductory remarks can be concluded by stating the following: In matters involving trans-border uniform law court decisions of other jurisdictions are considered as additional auxiliary material for interpretation. They are entitled to respect and careful consideration to the same degree that non-binding domestic court decisions enjoy.

All this may be demonstrated, first, with regard to primary European law, and then, secondly, with regard to secondary European law and, thirdly, with a view to the Vienna Convention on the International Sale of Goods.

I. Primary European Law: The Treaty Establishing the European Community

1. The Preliminary Ruling Device and its Practical Limitations

It is hardly worth mentioning that the Preliminary Ruling System of Article 234 is intended to safeguard the uniform application of the basic treaty of the European Community. Without any doubt the device has been successful – even though the decisions of the Court of Justice do not enjoy the quality of binding precedents.[11] Nonetheless, a closer analysis reveals that at some occasions national courts proceed to do what common lawyers would call distinguishing binding precedents. Here is a striking example: The – simplified – facts[12] are as follows: In the Eco Swiss ruling[13] the Belgian Cour de Cassation had to deal with an application to set aside an arbitral award. The applicant made the point that the licence agreement underlying the award was null and void under Article 81 of the Treaty Establishing the European Community and, hence, the award would infringe Belgian public policy. This point however has for the first time been raised in the court proceedings, whereas it had never even been mentioned in the previous arbitration proceedings. The *Hoge Raad* submitted very complicated questions to the Court of Justice. The latter's ruling, however, was very clear:

"*Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with prohibition laid down in Article 85 of the Treaty (now article 81 EC). That provision constitutes a fundamental provision, which is essential for the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market. Also, Community law requires that questions concern-*

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6 The impact of these Practice Directions can hardly be overestimated notwithstanding the fact that the immediate objective of the instrument was to reduce the volume of useless citation, see *Walker & Walker's* English legal system, *Richard Ward/Armakda Wragg*, 9th ed [2005] 87.

7 *William Burnham* 4th ed. [2006] St. Paul Minn. pp 38 *et seq.*; *Cohen/Berring* How to find the law [2003] 8th ed. St. Paul Minn. p 5 according to which the persuasiveness depends "on the reputation of that court and on the quality of the particular opinion involved".

8 Similarly, for England no better than a merely tautological explanation is offered, see *Walker & Walker* op. cit. pp 85 *et seq.*

9 St. Pauls Minn. 1999.

10 Judgement of 27 November 1950, US 340, 54.

11 For a closer discussion of this proposition see *Schlosser* Studia in Honorem Janós Nemeth [2003] Budapest, p 778, 971. Conf. *Heß* 108 ZZP [1995] 59, 77 referring to the final conclusion of Advocat General *Reischl* in case 66/80 "International Chemical Corporation", ECR 1981, 1191, 1277 *et seq.*

12 The application was rather a preliminary step for intended proceedings to challenge the arbitral award.

13 *Eco Swiss China Time Ltd. v. Benetton International* [1999] I ECR 3055.

ing the interpretation of the prohibition laid down in Article 85 should be open to examination by national courts when they are asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling".

In its reasoning the court adds:[14]

"In the circumstances of the present case(...).Community Law requires that questions concerning the interpretation of the prohibition laid down in Article 85 (1) of the Treaty should be open to examination by national courts when asked to determine the validity of an arbitration award (...)"

Six years later, in the famous Thalès decision, the Cour d'appel de Paris was confronted with a very much comparable issue, in the context of the delicate matter of manufacturing military missiles.[15] The court did neither set aside the award nor did it submit the crucial issue to a preliminary ruling of the Court of Justice. Among many other explanations the court stated that, even in case any disregard of Article 85 of the Treaty of Rome (now Article 81 EC) had occurred, it would not have amounted to a manifest disregard and only a manifest disregard would constitute a violation of French public policy. In this context the court in a very detailed way points out the fact that both during the negotiation phase as well as during the arbitral proceedings both parties were assisted by eminent lawyers and that neither the arbitrators nor the Court of International Arbitration of the ICC had even the mere suspicion the licence contract could infringe European competition law. Hence – such was the distinction drawn by the Court – the disregard of European competition law, if any should have occurred, could not have been "manifest". Here is an attempt to translate the crucial words of the critical parts of the French text into understandable English:

"In the absence of fraud or, as has been pointed out, manifest violation the judge called upon to set aside proceedings should not undertake to control the proper application of the competition rules to the contract in dispute and an order setting aside should not be granted simply (...) because the arbitrators did not on their own motion raise the issue of community legislation on competition. The pretended violation of a "loi de police" does not justify any restriction of the procedural rule disallowing any révision au fond. Otherwise the final character of the arbitrators' findings on the merits would be jeopardized".[16]

2. Official Communications of the Commission

The foregoing remarks on the uniform application of primary European law should not be terminated without drawing the attention to a very effective strategy for achieving uniform application. The Commission has assumed the authority to publish so-called "notices" on the proper interpretation of the treaties of Rome Maastricht, Amsterdam and Nice.[17] The most important of these notices is the notice of 2001 "on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 81 (1) of the Treaty".[18] The notice goes back to the Court's fundamental ruling that only "appreciable restrictions" of competition are prohibited.[19] The Commission states in view of authorized dealer contracts:

"Agreements between undertakings which affect trade between Member States do not appreciably restrict competition (...) if the market share held by each of the parties to the agreement does not exceed 15 percent on any of the relevant markets affected by the agreement where the agreement is made between undertakings which are not competitors(...)"

The underlying claim of the Commission to the highly authoritative character of its statement is best enlightened by the following sentence:[20]

"Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81".

What, in this context, is the meaning of the term "guidance"?

It is much more than persuasive authority, because the Commission does not even make an attempt to provide any reasons for the threshold figure of 15 percent. It simply assumes the authority to make the proposition and, in fact, all the practicing lawyers rely on it.

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14 No. 40.

15 Judgement of 18 November 2004, *SA Thalès Air Défence c/ GIE Euromissile*, Revue de L'arbitrage 2005, 751.

16 «Considérant que la violation de l'ordre public international au sens de l'article 1502-5° du NCPC doit être flagrante, effective et concrète, que le juge de l'annulation peut certes, dans le cadre de ses pouvoirs de nature disciplinaire, porter une appréciation en droit et en fait sur les éléments qui sont dans la sentence déférée à son contrôle, mais pas statuer au fond sur un litige complexe qui n'a jamais encore été ni plaidé, ni jugé devant un arbitre concernant la simple éventualité de l'illicéité de certaines stipulations contractuelles» ;

«Qu'il n'y a aucune raison de permettre à la société Thalès de bénéficier des lacunes, volontaires ou non, dans la défense de ses intérêts devant les arbitres, soit qu'elle ait estimé à l'époque vraisemblable ou acquise la compatibilité des clauses contractuelles litigieuses avec les règles du droit communautaire de la concurrence, ou, tout au contraire, voulu échapper aux sanctions de la Commission, dans tous les cas afin de réserver ses arguments au stade du procès en annulation de la sentence qui la condamne» ;

«Considérant qu'en définitive, le juge de l'annulation ne saurait, sous peine de remettre en cause le caractère final de la détermination des arbitres sur le fond du procès, la violation alléguée d'une loi de police n'autorisant aucune atteinte à la règle procédurale de l'interdiction d'une révision au fond, effectuer en l'absence de fraude ou, comme il a été dit, de violation manifeste, un examen de l'application des règles de la concurrence au contrat litigieux, aucune annulation n'étant d'ailleurs encourue simplement parce que les arbitres ainsi, que le soutient la société Thalès, n'ont pas soulevé d'office les questions du droit communautaire de la concurrence; que la Cour de justice des Communautés européennes reconnaît elle-même dans son arrêt Eco Swiss le caractère limité du contrôle des sentences, le droit communautaire devant seulement bénéficier, aux termes d'une analyse qui met en balance la nécessité de son application avec les principes de la sécurité juridique et le respect des règles fondamentales de l'arbitrage, de la même attention et protection que les règles impératives de droit d'origine nationale».

17 The extensive analysis of *Adams*, „Die Mitteilungen der Kommission: Verwaltungsvorschriften des europäischen Gemeinschaftsrechts?" [1999] 157 *et seq.* reveals the existence of no less than 58 Notices of the Commission purporting to give guidance for applying the Treaty.

18 OJC 368 22/12/2001 pp 13-15.

19 ECJ 6 May 1971 – C-1/71 – *Société anonyme Cadillon v Firma Höss, Maschinenbau KG* [1971] ECR 351.

20 Para. 4.3. For a thorough and broad analysis of the legal phenomenon see my essay „Bürger- begünstigende zivilrechtliche Auswirkungen von Verwaltungsvorschriften deutscher und europäischer Behörden", FS (Liber amicorum) *Canaris* [Munich 2007] pp 1331 et seq.

II. Secondary Legislation of the European Community

Now going on to secondary European legislation two observations can be made. The first is the existence of common declarations of European authorities participating in the community's legislation process. The second is the nearly complete absence of openly reflected divergences in case law.

1. Common Declarations of European Authorities Participating in the Communities Legislation Process

In the introductory remarks it was already referred to various particular auxiliary materials available for the interpretation of secondary European law. The significance of official declarations of authorities participating in the law making process concerning secondary European law is comparable to the impact the notices of the Commission have on primary European law mentioned above. The most usual form are declarations of the enacting authority "recorded in the minutes" of the respective meeting. According to the Court of Justice[21] the legal status of such a declaration is the following:

"*Although a declaration recorded in the minutes of the meeting of the Council on the occasion of the adoption of a provision of secondary legislation cannot be used for the purpose of interpreting that provision. Where no reference is made in the wording thereof to the content of the declaration, that declaration may be taken into consideration in so far as it serves to clarify a general concept used in the provision in question*".

The judgement dealt with a declaration of the Council clarifying its own Directive in respect of the marketing of medical products. The point was whether a new product is similar to a product already in the market. The court plainly adhered to the Council's declaration by stating:

"*[The Directive]" concerning medical products (...) allows an abridged procedure to be used for the issue of authorizations to place medical products on the market where the product for which such authorization is sought is essentially similar to a product which has been authorized within the Community, in accordance with the Community provisions in force, not less than six or ten years and if marketed in the Member State for which the application is made.* ***That provision must be interpreted to the effect that a medical product is essentially similar to an original medical product where it satisfies the criteria set out in the minutes of the meeting of the Council at which [the Directive] was adopted(...)***".

In the field of cooperation in civil judicial matters two similarly remarkable common declarations of such kind exist. One of them stems from the Council itself and states that the Evidence Regulation is not applicable in case of "pre-trial discovery including fishing expeditions".[22]

The second example is of paramount practical impact. It is a declaration relating to a prerequisite for establishing jurisdiction in litigation with a consumer. It is a common declaration of the Commission and the Council, but without any previous participation of the European Parliament. Among other things it deals with jurisdictional privileges of consumers and, in particular, with the issue of whether the consumer can sue his business partner in the courts of his own residence if he had access to the business partner's website. The English translation of the crucial part of the German text reads:

"*The Council and the Commission emphasize that the accessibility of a website alone is not enough to make Article 15 applicable. It is rather a prerequisite for establishing jurisdiction that the website solicits the consumer to enter into contracts by way of a distance sale and that, in fact, a contract by means of distance sale of whatever kind has been entered into*".

2. The Nearly Entire Absence of Open Divergencies in Applying Regulations in the Field of Judicial Cooperation in Civil Matters

The second subparagraph in this chapter dealing with secondary European law is devoted to the nearly entire absence of open divergences in applying regulations in that field. Thus, it is time for a look back at the first tentative conclusion proposed in the introductory remarks. It is quite obvious that there is hardly any leeway for open divergences in applying secondary European law, because the court subsequently confronted with the same legal issue should submit it to the Court of Justice if it is of the opinion that the issue was ill-treated by the court which has already taken a decision on it.

Hence, it is not astonishing, that there is only one single issue where the supreme courts of Member States passed divergent rulings. The German Federal Court decided that a prior lawsuit for a negative declaration of liability does not hinder a subsequent action for damages, if jurisdiction for both actions is sought under Article 31 of the Convention concerning the Transport of Goods by Rail (CIM).[23] The Austrian Supreme Court was of the opposite view.[24]

As everybody knows, in the field of judicial cooperation not every court is entitled to submit issues for a preliminary ruling of the Court of Justice[25] nor have all courts been so entitled during the period when the Brussels Convention was still in force.[26] Despite this limitation it is noteworthy that it is very difficult to find a single pair of divergent decisions of courts of two Member States, let alone an example of a deliberate dissent. In this respect reference can be made to the second tentative conclusion such as stated in the introductory remarks. With regard to the Lugano Convention the courts are not entitled to submit issues to the European Court of Justice. Yet, as the Swiss Federal Court has demonstrated, even the courts of Member States to the Lugano Convention normally follow

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21 ECJ 3 December 1998 – C-368/96 – *The Queen v The Licensing Authority established by the Medicines Act 1968* (acting by The Medicines Control Agency), ex parte Generics (UK) Ltd, The Wellcome Foundation Ltd and Glaxo Operations UK Ltd and Others [1998] ECR I-7967.

22 Reference to such declaration is made by *Rauscher/von Hein* Europäisches Zivilprozessrecht 2nd ed. [Munich 2007] Article 1 Evidence Regulation No. 42.

23 Federal Court of Justice, Judgement of 20 November 2003, IPRax 2006, 257 = Unalex DE-15.

24 Europäisches Transportrecht 2006, 501.

25 Article 68 Treaty Establishing the European Community.

26 Luxemburg Protocol of 27 December 1968.

the comparable case law of the European Court of Justice.[27] The only clear example of divergent court rulings in the field of judicial issues in civil and commercial matters relates to the concept of "claims so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements (...)" (in article 6 No. 1 Jurisdiction Regulation). In a side remark the Court of Justice had stated:[28]

"*(...) two claims in one action for compensation directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict, cannot be regarded as connected".*

The German Federal Court adhered slavishly to that statement,[29] whereas an English[30] and an Irish Court[31] did not agree. In the latter case the travel agency and the Austrian hotel, which the tourist and claimant in the lawsuit, was accommodated at, were sued together. In such a context it would really have been awkward to question the connection of the claims.

What, however, is really noteworthy is that none of the two courts did dare to openly deviate from the Court of Justice's ruling even though the latter was not a binding precedent. The courts rather avoided such deviations by very artificial distinctions.

Leaving aside the exceptional cases it appears, that courts do take divergent approaches more frequently, but are unaware of this fact due to deeply routed general legal concepts, which they are accustomed to.

This phenomenon may be demonstrated by case law on the issue of the standard of persuasion required for founding jurisdiction. In the Stolzenberg litigation the main defendant had given up his residence in London when he became aware that the purported victims of his managing activities were about to institute proceedings there. The crucial point was, whether the residence was still maintained at the point of time the writ was issued. The House of Lords in this respect held that a "good arguable case" would be sufficient.[32] In contrast, continental courts require – to express it in terms of English law – a persuasion "beyond reasonable doubt". In cases such as for tortuous or contractual liability, where the same elements of fact are crucial both for establishing jurisdiction and for the substance of the matter, German courts found jurisdiction on no more than sufficiently substantiated assertions of the claimant.[33] By contrast, the Irish court in the case just mentioned was particularly mindful to find a reasonable balance of interests for establishing jurisdiction in cases, where a second person is sued, which is not domiciled within the jurisdiction. The damage was a fatal accident during a rafting trip in Austria. The court decided that it

"(...) *must also enquire as to the plausibility of such a claim in a prima facie fashion".*

Having in mind the substance of the matter, namely a breech of contract by the Irish travel agency, the court repeats:

"It is not sufficient, therefore, merely to assert the possibility of a breech of an implied obligation but the plaintiff must satisfy the court on facts deposed to concerning the circumstances out of which the claims arise that there are in fact grounds for alleging breach by the Irish domiciled company which could have contributed to the plaintiff's injuries."

It concluded that it must be plausibly established that the Irish travel agency was negligent in booking rafting facilities without making sure that every reasonable care in organising the event was safeguarded.

It is clear that in such a legal system it is much more difficult to establish jurisdiction with regard to a second defendant than it is in a civil law legal system. This approach in practice of course is manageable due to the common law device of affidavits. And it should not be overlooked that German courts require a very high degree of substantiation of the asserted facts on which jurisdiction is based.[34] This to some degree counterbalances the requirement of plausibility.

To sum up: It is easy to propose that court decisions of the Member States should be published in Europe-wide understandable language. This is in particular valid for decisions of courts not entitled to submit to the Court of Justice issues for a preliminary ruling. But what appears to be even more important is to accompany the publication by comments of experts, competent in the field of comparative law, who explain the underlying tacit structures of the respective legal system, which remain unmentioned but are necessary to understand the approach the court has taken.

III. The Vienna Convention on Contracts for the International Sale of Goods

1. Again: The Nearly Complete Absence of openly Diverging Rulings of Courts of two or more Jurisdictions

The second tentative conclusion of the foregoing introductory remarks is further corroborated by the analysis of case law dealing with the CISG. More than 1600 court decisions applying the Vienna Convention have been collected so far.[35] Nonetheless, divergent interpretations by courts of two jurisdictions are nearly entirely lacking. Some legal writers sometimes refer to pretended divergences, mostly by indicating the pretended divergence with "contra". A closer look at

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27 See for example BGE/ATF 124 III 382 – concerning the concept of "civil and commercial matters".

28 ECJ 27 October 1988 – C-51/97 – *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] ECR 6511, para. 50.

29 Judgement of 23 October 2001 XI BB 2002, 170 ZR 83/01.

30 *Andrew Wier Shipping Ltd. v. Wartsila UK Ltd.*, High Court, Judgement of 11 June 2004 Unalex-UK 99.

31 *Daly v. Irish Group Travel Ltd. a.o.* Judgement of 16 May 2003 Unalex IE-12.

32 *Canada Trust Co. v. Stolzenberg* No. 2 [2000] 4 All E.R. 481, 490 HL.

33 Federal Court Judgement of 24 September 1986 – VIII ZR 320/85 NJW 1987, 592; Federal Supreme Court, Judgement of 13 October 2004 I ZR 163/02 RIW 2005, 465.

34 For a remarkable/striking example see: Higher Regional Court (OLG) Koblenz RIW 2006, 311. In the context of article 15 (1), it must be specified in detail, why the defendant should be the co-contracting partner.

35 *Witz* JDI (Clunet) 2006, 2, 9.

the cases, however, almost always reveals that no such divergence exists. It is difficult to find an example of diverging case law. Probably this situation is influenced by the fact that courts sometimes really treat foreign court rulings as strong persuasive precedents. In one case a federal district court in Louisiana[36] dealt with a decision of the German Federal Court just as it would have done in respect of a sister state court ruling.[37] Apart from some uncertainties how to specify the deadline under Article 39 CISG on the "reasonable" time the purchaser is allowed to give notice to the seller of the lack of conformity,[38] the two examples found were the following ones:

a) Sometimes the courts were confronted with public law statutes or regulations concerning some requirements for the resale in the purchaser's country. The German Federal Court[39] decided that, absent any stipulation to the contrary, the seller is not bound to comply with such requirements. By contrast, the French *Cour d'appel de Grenoble*[40] ruled that the seller must print the country of origin on the packaging, if this is a prerequisite for the lawful marketing in the country of the purchaser.

In this context it is worth mentioning that a US Federal District Court in Louisiana[41] confirmed an arbitral award ordering the German seller to pay damages because the goods delivered did not comply with the US safety standard. The defendant had brought forward that the award was given in "manifest disregard of the law", namely the CISG. The court, however, pointed to the detailed reasoning of the arbitrators who treated the ruling of the German Federal Court as quasi-case law and explained that – and why – the arbitrators have precisely and correctly applied one of the exceptions recognized by the German Federal Court.

b) The second example relates to the currency of the payments to be made under the contract. Two courts decided that the solution is implied in the Convention, namely the legal currency at the place of performance is decisive.[42] Others say, that the law applicable to the contractual relationship according to conflict of law principles governs – yet they reached the same conclusion.[43] Italian law was applicable and absent any stipulation to the contrary payment had to be made in Italian Lira.

2. The Narrow Minded Distance to Domestic Case Law

This leads to the very last issue. Many scholars of private international law direct the major part of their working capacity to the Vienna Convention. They have developed the eagerness to describe the object of their endeavour in terms of indicating the high distinction, which should in no respect be tainted by taking recourse to "domestic" materials. Unfortunately, this mentality has lead to overemphasizing the impact and the peculiarity of the Vienna Convention in particular and of uniform law in general. This development strikes the mind in two respects.

a) Sometimes the courts and other legal scholars are blamed for not having made clear that they argue – or should have argued – on the basis of the Vienna Convention. Very recently, an article has been published under the heading of "die Beweislastverteilung im UN-Kaufrecht im Spiegel der aktuellen weltweiten Rechtsprechung.[44] The author is very critical with the courts' rulings all over the world because the courts had made up their minds on burden of proof issues without indicating from which body of law they have drawn their solution. Not in a single case, however, he dared to say that in fact the issue of the burden of proof was finally wrongly decided. His reproach is rather limited to saying that the courts were wrong in taking recourse to domestic principles or – at the least – that they did not make it clear that by implication they applied the Vienna Convention. The approach of the author, however, is tantamount to overestimating the impact of the Vienna Convention. The general principles governing the burden of proof are not an off-spring of any specific piece of national legislation. Instead they are uniform principles, acknowledged throughout the world, very much alike a common law of the world. In a Canadian judgement[45] the court had stated:

"The burden of proving an accord and satisfaction [by him] is on the seller. The burden is on [the buyer] to proof its damages".

A judge has better things to do than contemplating whether such a legal banality is to be derived from uniform legislation, from domestic legislation or from the common heritage of legal civilisation. One of the most frequent disputes under the Vienna Convention relates to the issue whether the goods delivered to the purchaser "conforming with the contract" (Art. 35) or in other terms whether they were at the very moment of delivery defective or not. It is self-evident that after having taken over the goods it is for the purchaser to prove its assertion of defectiveness.[46] No legal system has consciously developed an opposite rule.[47] In such a context it would be ridicu-

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36 *Medical Marketing International Inc. v. Internazionale Medico Scientifica SRL* 1999 WL 311945 (E.DLa. 17 May 1999). www.cisgw3.law.pace.edu/cases/990517u1.

37 Rightly emphasized by *Schlechtriem* in IPRax 1999, 388.

38 German Federal Supreme Court (BGH), Judgement of 8 March 1995 VIII ZR 159/94 RIW 1995, 595 – „Grober Mittelwert von einem Monat" framed as a very generous assumption; conf. OLG Stuttgart Judgement of 21 August 1995, 5 U 195/94, RIW 1995, 943; Austrian OGH JBl 1999-314 – 14 days.

39 Judgement of 8 May 1995, VIII ZR 195/94 BGHZ 129, 75 *et seq.* = IPRax 1996, 29; judgement of 2 March 2005 Jurist. Zeitung 2005, 844; Austrian Federal Supreme Court (OGH) judgement of 13 April 2000 2 Ob 100/00 w, www.ris.bka.gv.at [2000] ZfRV 231; judgement of 27 February 2003 www.CISG-online.ch No. 794.

40 13 September 1995 Rev. crit. 1996, 666.

41 17 May 1999, see *supra* note 36.

42 Kammergericht (Berlin) Judgement of 24 January 1994, 2 U 7418/92 RIW 1994, 683.

43 Kantonsgericht Wallis Judgement of 32 1998 SZIER 1999, 192; Kantonsgericht Wallis www.cisg-online.ch Judgement of 27 May 2005.

44 *Tobias Malte Müller* RIW 2007, 673 – translated: the burden of proof in the United Nation sales of goods convention mirrored by recent case law worldwide.

45 Ontario court (general division) Judgement of 16 December 1998 – www.cisg-online.ch.

46 Commercial Court (Handelsgericht) Zürich 9 September 1993 SZIER 1995, 2 = CLOUT No. 97; Higher Regional Court (OLG) Innsbruck 1 July 1994 CLOUT No.107.

47 Contra in a short remark, however, without giving any reason: Rechtsbank van Koophandel Kortijk 6 October 1997 Wondersfil s.r.l. V. Depraetere Ind. UNCITRAL digest of case law. The ruling of the Cour

lous to expect judges to give explanations that this rule is derived from the Vienna Convention rather than from any other source.

But why then, should we not go one step further and encourage judges to take recourse to case law of national courts applying general principles of the burden of proof to specific sets of facts?

b) This leads directly to the ultimate remark. The enthusiasts of the Vienna Convention have developed the belief that the object of their admiration would be fundamentally tainted if in whatever respect recourse is made to any domestic legal material, statutory enactments or case law. According to them, the so-called "autonomous status" of the Convention would otherwise be jeopardized. It is said: As far as ever possible recourse to national law should be avoided.[48] In two of the American federal appellate jurisdictions the judges made the following point:[49]

Cases interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions of the CISG can also be helpful in interpreting the convention.

Both courts were heavily blamed for this approach.[50] These reproaches, however, are themselves narrow-minded.

As long as the second book of the German BGB on obligations was not modernized it was clear for the Federal Court that German concepts, such as "defects of the goods sold" or "express warranties" ("zugesicherte Eigenschaften"), could not be of any guidance for the interpretation of the Vienna Convention.[51] Comparable statements had been made by Swiss courts in respect of Swiss law.[52] The modernized German law on obligations, however, has strongly been influenced by the Vienna Convention. Therefore, it is hardly intelligible that case law dealing with domestic legislation should be worthless in respect of the Vienna Convention. Nobody would dare to make the inverse proposition: namely that case law dealing with the Vienna Convention would be worthless in view of domestic legislation. Many other legal enactments, including the European Directive on Sales to Consumers[53] were drafted in the light of the Vienna Convention.[54] The Vienna Convention itself is the fruit of thorough and long-lasting studies in comparative law. What Lord Woolf had figured out in his Practice Directions could be rephrased to become a valuable guidance also in this context:

"Cases decided on the basis of domestic law on sales, can, if properly used, be a valuable source of law in implementing the Vienna Convention and vice-versa".

To give an example: The German provision corresponding to Article 35 of the Vienna Convention specifies (§ 434 par 2 BGB):

"The sold object is similarly defective if the agreed upon installation works of the seller were defective".

Commentators, even of German origin agree that the Vienna Convention must be interpreted accordingly.[55] They, however, timidly avoid indicating that such an interpretation is corroborated by express terms of national legislation based on the Vienna Convention. On the other hand, under German law the lack of proper packaging is tantamount to the defectiveness of the goods, although German law does not provide a specific rule to this result.[56] Why should interpreters of the German BGB not point to the Vienna Convention where this point is settled due to an explicit provision (Article 34 par. 1).

A few weeks ago, the House of Lords was to give a ruling of principle regarding a provision of the English Arbitration Act 1996 which is to a high degree based on the UNCITRAL Model Law in International Arbitration,[57] hence on something very much akin to uniform law. Their Lordships did not hesitate to take a 35 years old decision of the German Federal Court for their primary persuasive authority[58] even though the latter was given within the framework of the then time honoured tenth book of the German ZPO.[59] Persuasive authorities can be found everywhere!

Hence a final statement: The autonomy of international uniform law in relation to domestic law is an issue of mutual fertilization rather than a matter of reciprocal segregation.

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d'appel de Grenoble, CLOUT No. 205, should not be misconceived. The purchased refrigerating machinery broke down soon after delivery. This in itself was taken for defective delivery. The remark of the court regarding the burden of proof (seller) was made in view of assertions that the buyer must have acted incorrectly.

48 *Staudinger/Magnus*, CISG-Neubearbeitung [2005], Article 7 No. 12.

49 *Schmitts-Werke GmbH v. Rockland Ind.* Judgement of 21 June 2002, 4th cir. www.cisgw3.law.pace.edu; *Delchi Carrier S.p.A. v. Rotorex Corp.* 71 F. 3d 1024, 1027.

50 *(Larry A.) Di Matteo et al.* 34 North Western Journal of International Law & Business, Winter 2004, pp. 299 *et seq.*; *Ferrari* in draft-UNCITRAL digest and beyond cases [Munich 2004] 143. These reproaches, however, are in itself narrow minded. As long as the second book of the German BGB on obligations was not modernized it was clear for the Federal Court that German concepts such as "defects of the resold" or "express warranties" ("zugesicherte Eigenschaften") could not be of any guidance for interpreting the Vienna convention.

51 Judgement of 3 April 1996 VIII ZR 51/95 NJW 1996, 2364, 2365; BGH Judgement of 24 March 1999 VIII ZR 121/98 RIW 1999, 617 *et seq.*

52 Commercial Court (Handelsgericht) Aargau Judgement of 11 June 1999 [2000] SZIER pp 117 *et seq.*; Regional Court (Bezirksgericht) Laufen Judgement of 7 May 1993 [1995] SZIER pp 227 et seq.

53 Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999, L 171 of 7 July 1999).

54 For detailed references see *Witz* [2006] JDI (Clunet) 2, 9.

55 *Staudinger/Magnus* loc. cit. Article 35 No. 19.

56 Cf. *Staudinger/Matusche-Beckmann* [ed. 2004] para. 434 No. 181 with references to case law.

57 *Premium Nafta Products Ltd. a.o. v. Fili Shipping Comp. Ltd. a.o.* [2007] UKHL 40.

58 The term "persuasive Authority", however, has not been used.

59 Official Reports of the Federal Court t. 53, 308 = NJW 1970, 1076. English Translation: 6 Arbitration International [1970] 79.