Unification of the Law for the International Sale of Goods

von Prof. Dr. *Peter Schlechtriem*

Unification of the Law for the International Sale of Goods. The experience in the Federal Republic of Germany with ULIS and ULFIS and its significance for the interpretation and application of the 1980 Vienna Convention on the International Sale of Goods.

Preliminary remarks

The international unification of law by way of conventions such as CISG or ULIS means the end of one era and the beginning of a new development. In order that the significance of this turning point be properly understood, I must first make a few preliminary remarks.

1. The working method and objectives of Unidroit, the expert committees, the Hague conference and the working groups of UNCITRAL and the Vienna conference, are but one possibility of achieving uniform rules on the international sale of goods. It is based on the premise that a set of rules be worked out which, in the absence of an internationally competent legislative body, will be enacted by as many countries as possible as domestic law emanating from an international source. This leads us to the first question: are there other possibilities of unifying the law of sales which perhaps have been dismissed too quickly?

2. Is the unification reached by CISG only a verbal one, one that is apt to fall apart very soon once the law is applied and interpreted by national courts? I think that this question cannot be dealt with by merely casting an inevitably speculative glance at the future, but that we must draw on experiences made with other international uniform laws. With ULIS and ULFIS, fortunately, we already have such a uniform law on the test bench; in the Federal Republic in particular, where the author of this report was able to evaluate roughly 120 court decisions, a wealth of materials illustrative of the practical and scholarly handling of such uniform sales laws is available for analysis.

To 1: Expecially with respect to international trade, reference is often made to the fact that, in lieu of a unification achieved by international conventions and their enactment by national legislators, a uniformity of rules emerges spontaneously, as transnational law, as lex mercatoria, as trade customs and usages and so forth; such rules, because they are generally observed by the circles concerned, may enjoy a higher degree of legitimacy than a uniform body of law worked out on a purely theoretical basis. According to Langen,[1] »transnational law« apparently is something to be looked for by the judge as a sort of middle road in cases in which several legal systems overlap or affect each other.[2] As a law created by international business itself, the lex mercatoria is frequently praised as the true uniform law,[3] which manifests itself in arbitration awards on international matters, has to an extent been consolidated by clauses like the Incoterms, and is probably essentially an impressive term for internationally respected trade customs. But all these rules that evolved beyond the realm of governmental legislation suffer from the weakness that they may not be enforceable if the parties and courts refuse to observe them.[4] At best, the set of rules, formulas and clauses used in international trade can bring about a certain conformity of laws, but its effectiveness will always depend on party agreements, and it will always be endangered by the strict rules of municipal law.

It does, incidentally, seem quite inappropriate to me to emphasize a contrast between a self-engendered law of international commerce, on the one hand, and uniform law as agreed upon in international conventions, on the other. The drafters of the uniform law can generally be expected to try to incorporate into the codification those rules of international commerce that

1 Cf. especially *Eugen Langen,* Transnationales Recht, Heidelberg 1981; ibid., »Vom IPR zum Transnationalen Handelsrecht«, NJW 1969, 358 – 360; ibid., »Transnationales Handelsrecht«, NJW 1969, 2229 – 2233, following Jessup, Transnational Law, New Haven, 1956.

2 Cf. NJW 1969, 2230: »...trans, that means engaged equally in both national laws, equally present in both of them and determinable by the judge in a kind of purifying procedure, if need be.«
I frankly admit that, in spite of the numerous examples Langen cites as illustrations, I am at a loss to understand his train of thought.

3 Cf. *Goldmann,* Frontiers du Droit et lex mercatoria, Arch. Phil. Dr. 1964, 177; ibid., La lex mercatoria dans les contrats et l'arbitrage internationaux, réalité respective: Clunet 1979, 475; as a summary of the efforts made concerning the lex mercatoria, see the publication in honor of Berthold Goldmann, the founder of the school of lex mercatoria, which appeared in 1983: »Le droit des relations économiques internationales, Etudes offertes à Berthold Goldmann, Litec Droit, Paris 1983.

4 Cf. *Kropholler,* Internationales Einheitsrecht, 1975, p. 123: »An autonomous, non-governmental law of trade would thus require at least tacit approval by the state ... However, one can hardly expect the states to abdicate and to leave regulations up to the interested parties, particularly where legal relations are concerned that affect the interests of the community.«

have developed spontaneously – i.e. without any interference by the state –, and that are recognized by the circles concerned, or at least to allow those rules to be considered international usage. Sec. 9 ULIS as well as sec. 9 CISG are good examples for such an incorporation of genuine, i.e. truly internationally recognized rules of a lex mercatoria. Apart from this, these lex mercatoria rules can at best effectuate a punctual unification of law, and perhaps at some time in the distant future grow into a dense network of uniform, i.e. uniformly interpreted and applied, rules of law. For the foreseeable future, however, they will, as a basis for an internationally uniform law, remain a hope rather than a reality.

I. *Means und Methods of Unification of Sales Law*

1. The history of attempts to find uniform rules for the border-crossing exchange of goods is marked by two fundamentally different approaches. The first is the repeated attempt to standardize the rules of conflict of laws in such a way that an international sale would always be subject to the same – domestic – substantive law, no matter which courts in which country have jurisdiction over the case. With such a solution, at least forum shopping would lose its attractiveness.[5] The path towards a unification of conflicts rules for sales contracts has led, in 1955, to the Hague Convention Concerning the Law Applicable on International Contracts for the Sale of Movable Goods.[6]
The second route leads directly to a unification of substantive sales law. While preparing the Hague Sales Law, however, the controversy over whether a unification of conflicts rules or of substantive law would be the preferable solution revived when the question came up whether or not the Hague

5 Cf. on this two-tier procedure of legal unification *Ernst von Caemmerer*, Rechtsvereinheitlichung und internationales Privatrecht, in: Probleme des europäischen Rechts, Festschrift für Walter Hallstein, 1966, S. 63 – 95 = Gesammelte Schriften I, S. 26 et seq.

6 Passed on the 7th Hague conference of 1951 and in force as of June 15, 1955; the Federal Republic so far has neither signed nor ratified this convention. On Sep. 1, 1964, it became effective for Belgium, Denmark, Finland, France, Italy and Norway; today, it is also valid for Sweden (since Sep. 9, 1964), Niger (since Dec. 19, 1971) and Switzerland (since Oct. 27, 1972). This convention is scheduled to be replaced with a new Conflicts of Laws Convention on the international trade in goods which has been transmitted by the secretariat of the Hague conference to the member states for comment. Cf. Pfund, United States Participation in International Unification of Private Law, IntLawyer 1985, 505, 514 sub D.

Uniform Sales Law should apply only on the basis of preliminary, unified conflicts rules.[7]

As is well known, a decision was taken on the Hague Sales Law against having its application preceded by national or unified conflicts rules; this decision is expressed in art. 2 ULIS, which would hardly be understandable without this background. But the controversy lives on in the question of whether uniform sales law, by virtue of its enactment by the national legislature, has become domestic law and therefore is to be applied as such, or whether the unified law is to be regarded as a truly international law, regardless of the fact that its application has been ordered by the national legislature. The practical import of these divergent approaches lies in the question of how differences in interpretation should be settled. If, in different countries, divergent theories develop around a certain legal rule or term of the uniform sales law, the approach that regards and applies uniform laws as national ones could once again throw up the question, in case of a concrete sales contract between parties in two different contracting states, of whether the uniform law is to be applied as the law of state A (and as interpreted by its courts), or as the law of state B (and as interpreted by *its* courts).[8]

I do not share this point of view. »Even if divergences in interpretation arise in the rulings of the courts of different contracting states, the court concerned with the matter at the time is called upon to decide at its own discretion. The judge has to apply the uniform law as the law of a uniform legal entity and not as the »loi interne« of one of the contracting states. Differing opinion of the courts of other contracting states, however, should induce him to reexamine his own position. They must not give rise to considerations of conflicts of law, because that would be the end of uniformity.«[9]

Art. 7 (1) CISG is designed to preclude such a recourse to conflicts of laws rules (see infra sub III.1a). Taking this view, however, also means making a basic decision on the question of whether and to what extent the courts, in applying the uniform sales law, should also consider court decisions and scholarly opinions of other countries. Such consideration should not be taken on the grounds that, by virtue of the conflict of laws rules, the uniform law is

7 This idea has mainly been developed by *Gutzwiller* in a lecture held before the German Society of International Law in 1955, cf. on this JZ 1955, 351 et seq.; for the history of the Hague Sales Law on this point, see *Ernst von Caemmerer,* Internationales Kaufrecht, Festschrift für Nipperdey 1965, pp. 211 – 228 = Gesammelte Schriften I, p. 79 et seq., 96.

8 This view apparently is shared by *Kropholler,* Internationales Einheitsrecht, 1975, pp. 204 – 212, especially 206: »As an appropriate consequence, Private International Law resumes its rights«.

9 *E.v. Caemmerer,* Rechtsvereinheitlichung und internationales Privatrecht (see note supra 5), p. 77 = 40.

to apply *as* the national law of a given state and as interpreted in this state by the majority opinion of courts and scholars. Court decisions and scholarly views in other contracting states cannot be regarded as anything more than persuasive authority (cf. infra.).

II. *Dangers and risks*

Before examining means of assuring that verbally unified law be interpreted and applied in a uniform manner, it seems sensible to give some thought to the question of when and where the unification is exposed to hazards. The assumption that it is basically a mere matter of uniform interpretation is in my opinion insufficient to cope with the various causes for these dangers. There are three different areas to be distinguished:

1. The rules of the uniform sales law may compete with domestic substantive law, and be pushed aside by applying this domestic substantive law.

2. Certain issues that are not clearly resolved may pose the problem of whether they belong to those matters governed by the Convention, or whether they fall outside of its purview. Only in the case of so-called »internal gaps«, i.e. issues within the scope of the Convention, does the problem arise as to how the Convention can be filled out as uniformly as possible. Whether a given matter is governed by the Convention, however, is of course itself a question of its interpretation in a wider sense.

3. Traditionally, one of the principal sources of danger for unification reached verbally has been seen in the multiplicity of possibilities of construing legal definitions and terms. A differentiation has to be made, however: insofar as specific solutions were intended to be »pre-programmed« by the use of certain terms and phrases, it is an absolute necessity to interpret those terms and phrases uniformly in order to reach the intended goal of identical results for all cases. For example, the words »ships« and »vessels« should be construed in a uniform manner when answering the question of whether they also include pleasure crafts. This cannot hold for so-called »indeterminate legal terms«, which necessarily open up some scope of discretion for the courts, which is why their divergent application should not be regarded as a risk to the unification ideal: a »period of time of reasonable length« need not always

mean the same thing, since the circumstances of each individual case may well justify divergent results of the interpretation of the term »reasonable length«.

(1) *Competing laws:*

The contracting states commit themselves to introducing the uniform law into their own legal system. In the absence of reservation clauses or other exceptions (cf. e.g. art. 90 CISG on the priority accorded to other international agreements), the contracting states are under the obligation not only to enact the uniform law – by ratification, acception, approval or accession –, but also to refrain from applying conflicting domestic law, – in effect to regard it as inapplicable within the sphere covered by the Convention. For the subject matters governed by it, the Convention is lex specialis. This seems to be self-evident, yet in practice, it may lead to difficulties. For in connection with ratification, the states do not pass laws or acts which expressly indicate the domestic law competing with the Convention within its scope, or which expressly order the inapplicability of the competing law in cases where the requisites for applicability of the Convention are fulfilled. Hence, for matters which do not directly pertain to sales law according to domestic characterization, the problem of competing rules can give rise to doubts, or it may even be overlooked. Some examples:

a) Both CISG und ULIS are based on the principle of freedom of form. In the case of the transactions of some office-holders such as mayors or district administrators, however, national legislatures – as in the Federal Republic of Germany, for instance – may pass rules of public law or administrative law according to which all sales contracts concluded by such office-holders must be made out in writing in order to facilitate control by a superior supervising authority. If the mayor of a German community purchases typewriters or office equipment from a Dutch firm, it is an open question whether those special public law rules on the written form are set aside by art. 15 ULIS or art. 11 CISG. In my opinion, this can basically be assumed, since the domestic characterization of a matter as pertaining to private law, administrative law or public law does not preclude its classification as »matter governed by this Convention«, to which the uniform law alone applies.
This example does show, however, how shaky the application of the uniform sales law still is in such cases: the German doctrine of administrative law dictates that such rules that bind mayors and other office-holders to observe certain form requirements when concluding contracts, are classified not just as

formal rules, but also as issues of the power of agency; if such is the case, the mayor has the authority to make such contracts only if they are in writing. Problems of agency, however, do not fall under the Convention. Thus, the decisive question is whether the classification as either a problem of form, which would be governed by the uniform law, or a problem of agency to which domestic law applies, is itself determined by uniform or national law of the lex fori.[10]

The decisive question, therefore, is which issues are »matters governed by this Convention«. »Matters« are those legal issues that in essence fall within the purview of the uniform sales law regardless of their classification and characterization according to national law. Whether a given issue is a matter of sales law or not should be decided on the basis of a characterization detached from any particular national law and committed to the goals formulated in art. 7 (1) CISG. This should not only allow for formal requirements to be classified as such (and not as problems of agency), but should also safeguard the priority of the uniform law even over national special laws for the state and its organizations as buyer or seller.

b) A competing applicability of national legal rules to matters that are governed by the Convention may pose a threat to legal uniformity particularly in those cases where domestic law treats a certain issue as a problem of validity and where the courts accordingly assume that this is one of the issues reserved to national law under art. 4(a) CISG or art. 8(2) ULIS.[11]

10 The case of the German mayor is but the tip of an iceberg of parallel problems: in a number of countries, sales contracts by public authorities are subject to special legal regulations that do not just provide for the form but also for the contents of such contracts – army procurement contracts are an example. In all these cases, the question arises as to whether such special public law rules for sales contracts by the state and its authorities are pushed aside by the uniform sales law – which in this author's view would be the most adequate solution – and whether national courts would really respect the prevalence of uniform law.

11 Examples

1) Under German law, a contract stipulating a performance that is impossible from the onset is void, § 306 BGB. If the sold ship cargo has sunk or been destroyed by fire even before the contract was made, this contract is void, and the seller can at best be held liable for damages (to a limited extent) provided he knew or could not have been unaware of the destruction, and provided also that the buyer had no such knowledge, §§ 306, 307 BGB. Other legal systems also know the phrase »impossibilium nulla obligatio«. One is thus forced to ask whether this is a validity problem which would have to be solved according to national law so that in our example, depending on whether or not national laws rule that objective initial impossibility results in nullity, whether national rules or the uniform law's rules on breach of contract apply. The first question has to be whether we are dealing with a sales law matter governed by the Convention. Initial impossibility is the cause of seller's non-performance; it is included, therefore, in the provisions dealing with the consequences of the sellers failure to perform, cf. art. 49 (1) (b) CISG. Above all, destruction of the goods is an impediment in the meaning of

art. 79 CISG (74 ULIS), no matter when – before or after conclusion of the contract – it occurred. Moreover, the second sentence of article 68 expressly assumes that the sold goods perished before the contract was even made (to the same effect art. 99 cl. 2 ULIS). Thus, initial impossibility undoubtedly is a matter within the purview of the Convention. For the same reasons, German legal writers commenting on ULIS have advocated the unchallenged view that § 306 BGB, although ordering nullity of the contract in such cases, does not apply. (Cf. *von Caemmerer,* AcP 178 (1978), 121 et seq., 127; *Dölle/Stoll*, Art. 74 ULIS, n. 51, 52; on CISG, of. *Schlechtriem,* Einheitliches UN-Kaufrecht, p. 19) The fact that this case has not expressly been dealt with in the uniform sales laws in causing some difficulties because art. 4 only assigns those issues of validity to the scope of the Convention that are »expressly provided for«. On the other hand, art. 7 (2) CISG provides that issues which are not expressly settled in the Convention, »are to be settled in conformity with the general principles on which it is based«. Does this mean there is a conflict between articles 4 and 7 (2)? I think not: the problem of an initial impediment of performance can undoubtedly be solved on the basis of the Convention's rules and their underlying principles. After all, this is a question of a normal case of impairment of performance which provides the buyer with the usual remedies, and which makes the seller liable for damages unless he is excused under art. 79. There can only be a genuine question of validity – which, unless expressly regulated in the Convention, would have to be governed by national law – if the problem of initial impossibility had to be characterized as such in an autonomous charaetcrization detached from the various national laws. Thus, there is the problem of interpreting the term »validity« for which art. 7 (1) CISG orders an autonomous interpretation independent from all national laws.

2) In German law, non-conformity of the goods sold can occasion an error on the part of the buyer with regard to the goods qualities, and this error may, under certain very narrow conditions, constitute sufficient grounds for an avoidance. Since avoidance results in nullity of the contract, the rules on avoidance fall under the validity questions reserved to national law. Does that mean that the buyer, in the case of nonconformity, can avail himself not only of the remedies provided by the uniform law, but also of the rules of national law on avoidance for mistake, which might be more favorable to him? In this case as well, we are undoubtedly dealing with a »matter governed by the Convention«. As a question of validity, it could only be reserved to national law if it were treated as a question of validity everywhere, i.e. in all or at least in the majority of the worlds legal systems. Again, there is a problem of interpretation of the term »validity« in art. 4(a) CISG (and art. 8 cl. 2 ULIS), which must be treated and solved as supra sub 1).

3) Under German law, avoidance can also be declared where there is a mistake regarding essential qualities »of the person«, i.e., for example, the other contracting party, § 119 para. 2 BGB. Such »essential qualities« can generally include the other party's credit rating or his financial capacity. Is this, therefore, a validity question subject to national law? According to the examination procedure employed above, this would first require us to find that the lack of a sufficient credit rating or financial capacity is not among the matters governed by the Convention. Yet, the uniform sales laws do contain provisions allowing one party to suspend his performance if, after conclusion of the contract, it becomes apparent that the other party's ability to perform or his creditworthiness is seriously impaired, art. 71 (1) CISG and art. 73 (1) ULIS. In the discussions at the Vienna conference, it also became clear that in case of a deterioration of the other party's ability to perform, suspension of performance should be applied before more far-reaching remedies, whereas avoidance of the contract should be considered ultima ratio (cf. the discussions in A/Conf. 96/C. 1/SR. 26, p. 6 et sec.). Thus, the mere fact that a deterioration of the other party's financial or production capacities becomes apparent was not in itself to be sufficient grounds to declare the contract avoided. Therefore, in order to preserve the uniformity achieved by the Uniform Law's rules, national rules on mistake may not be applied on the grounds that they result in »nullity« of the contract, and hence can be classified as validity problems under some national laws.

(2) *Gaps:*

As became apparent in fn. 11, sub para. 1, interpretation and gap-filling may well overlap. An extensive interpretation of a term or a rule in the Convention may show that the issue has »expressly« been provided for, whereas a narrower interpretation of the same term or rule may open up a gap which then must be filled on the basis of artt. 7 CISG and 17 ULIS. In many cases, however, there is undoubtedly a gap, i.e. an obvious lack of any uniform law provision at all, so that the issue in question cannot be solved simply by generously interpreting an existing rule in an extensive way.
With regard to the problem of gap-filling on the basis of artt. 7 CISG and 17 ULIS, two steps have to be distinguished:

a) The first step entails establishing whether an internal gap, or in other words a »matter governed by this Convention« is at issue at all. If, on the other hand, there is a regulation problem outside the scope of the Convention, a so-called external gap, domestic law remains applicable. The problem of gap-filling, therefore, is again a problem of defining the precise scope of the Convention. For some of the doubts, the uniform sales laws themselves provide specific exclusions from their scope, for example in artt. 2, 3, 4 und 5 CISG, artt. 5, 6 and 8 ULIS. Beyond that, however, it is hardly possible to avoid all borderline problems by providing for detailed rules stating unambiguously what does and what does not belong to the purview of the uniform sales law. Of course, when answering such a delimitation question that has not been provided for in the Convention itself, the problems of characterization discussed above under para. 1 arise again: the judge ruling on the matter can simply consult his lex fori on the question of whether a certain issue should be characterized as a sales law matter and thus treated according to the Convention by way of gap-filling. It is quite obvious that there will be divergent results on this point in the various legal systems, so that one court may regard a certain issue as a matter of sales law – and thus as a matter governed by the Convention –, whereas another judge may find the specific issue should be classified with a different label according to his domestic law, and he may consequently conclude that it is not a matter of sales law at all. According to this author's view, however, there must be an autonomous answer, i.e. an answer which is independent of the legal concepts of the lex fori, to the question of what is and what is not a sales law matter in specific cases where the regulations of the Convention are mute. Only such an autonomous characterization is in accordance with the principle of art. 7(1) CISG.

Some examples from German case law on ULIS serve to illustrate the problem of the correct classification of legal issues as pertaining either to uniform sales law or to domestic law:

aa) German courts have repeatedly been concerned with cases on ULIS in which the obligation to deliver in connection with other agreements was at issue. A case decided by the German Federal Court of Justice on April 4, 1979[12] was based on the following facts: a German machine manufacturer and an Italian corporation had concluded an exclusive dealership arrangement under which the latter bound itself to distribute the German manufacturer's products in its own name and on its own account in Italy. When a controversy sprang up over some of the deliveries, the problem arose of whether these individual deliveries were subject to the uniform sales law, or whether the law determined on the basis of the conflict-of-laws rules and applicable to the dealership arrangement also applied to the dispute over those individual deliveries, arguably because these deliveries were essentially nothing but a request call within the framework of the dealership contract. The Federal Court of Justice, however, characterized the dealership arrangement as a contract in its own right which had to be differentiated from the legally independent sales contracts concluded in the course of carrying out the dealer arrangement, even if the contents of those individual contracts was to a large extent prescribed by the frame agreement.: »It is in conformity ... with the very objectives of the Uniform Law to include into the scope of this Law, in the interest of a fast and comprehensive unification, all contracts of sale concluded after its entry into force – and that also holds for the individual contracts made within the framework of an exclusive dealership arrangement.« Obviously, the German court, in accordance with the objective as expressed in art. 7(1) CISG, has proceeded quite liberally in their determination of what falls under »matters governed by this Convention«.
If, on the other hand, the dealership contract itself has been breached, we can assume that this is no longer a matter of sales law and that damage claims are subject to the domestic law applicable to the frame agreement.[13]

bb) Yet considerable difficulties may arise in the necessary assignment of some issues to either sales law or another area of law. If parties in a dispute over alleged defects of the goods have agreed to a settlement with a reduction

12 BGH NJW 1979, 1782 = BGHZ 74, 136
13 Cf. LG Marburg of Jan. 19, 1984 (unpublished) on the violation of an exclusive right of distribution.

of price, interest claims for excess of the due date are relinquished, and other agreements are reached,[14] the question may come up as to whether this settlement is subject to ULIS or CISG; this may be relevant to, among other things, the issue of the right place of payment, for an avoidance on account of a failure to perform the obligations of the agreement, or problems of form or consideration. Classification as »matters governed by this Convention« is warranted by the fact that the parties, in this case, only undertook to modify their contract, as expressly provided for in art. 29(1) CISG. On the other hand, it cannot be denied that under certain circumstances, a settlement may amount to a total substitution of the agreement, i.e. basically a new contract. Particularly in cases where claims from other contracts – which are undoubtedly not subject to uniform law – are also included, such a settlement diverges from the original sales contract to such an extent that its continued subjection to uniform law would be inappropriate. In contrast, it may be assumed that the mere reduction of the purchase price should not justify the application of domestic law, but that it should still fall under the uniform sales law. The Oberlandesgericht (Court of Appeals) Hamburg for instance, thus decided in a ULIS case that an agreement to reduce the purchase price was subject to uniform sales law.[15] In this context, the court emphasized the intention of such uniform laws, to promote their internationally uniform application. The Oberlandesgericht Koblenz, on the other hand,[16] has held that a reduction did not fall within the purview of the uniform law, and that, for this reason, not even the rules that had been developed from the uniform law's general principles applied to it. I consider this decision to be contestable.

cc) Every now and then, courts construe the uniform law so narrowly that a certain issue does not seem to be settled by it, which then – and this is the second mistake – simply allows them to apply domestic law to this issue. A ULIS decision by the German Bundesgerichtshof is a good example for how a mistaken interpretation falsely creates a gap, and how this gap is filled by applying domestic rules on top of that. A German leasing firm had purchased from a Dutch manufacturer a machine for potato-processing which was to be delivered directly to the German buyer's customer, i.e. the lessee. When this lessee got into financial difficulties, he refused to accept delivery even before it was due. In connection with the damage claim of the seller – who had, under

14 Cf. LG Marburg, May 24, 1984 (unpublished)
15 Judgment of March 3, 1982, RIW/AWD 1982, 435 et seq.
16 Unpublished decision of March 1, 1985

art. 76 ULIS, declared the contract avoided for anticipatory breach – the responsibility of the buyer for the lessee's refusal to accept was at issue. Thus, the question was whether the conduct of a third party can be imputed to a contracting party – a question which, as is clearly shown by art. 79 CISG, undoubtedly belongs to the matters governed by the Convention. Applying ULIS, art. 74 should have provided the yardstick for an analysis of the buyer's responsibility for his customer's refusal to accept. The Bundesgerichtshof, in contrast, simply took recourse to a German Civil Code rule which concerns the responsibility for persons employed by someone to perform his obligation.[17] The court held that the lessee was a person employed in the fulfilment of the buyer's obligation to accept delivery, and that the buyer, therefore, had to take responsibility for his lessee's (customer's) conduct.[18] I consider this reasoning wrong, even though the same result would have been reached had the court applied CISG or ULIS.

b) If at the first step, a matter of sales law has been ascertained, the second step has to comply with art. 7(2) CISG or art. 17 ULIS. The question is whether the unresolved sales-law issue can be settled in conformity with the general principles on which the Convention is based. Only if this is not the case can recourse be had to domestic law for these sales-law matters. It is quite obvious that the establishment of general principles to supplement the Convention is subject to almost the same risks as a direct recourse to rules of conflicts of laws. At least in the initial stage of the Convention's application, before such general principles have been worked out and confirmed by the prevailing academic opinion, the courts will in many cases, consciously or unconsciously, revert to their own legal concepts, i.e. rules of their own legal system, in order to find such principles. The question of whether and how this can be prevented, will have to be discussed later (infra III.2).
In the following, I would like to give but two examples of rulings of German courts under ULIS.

aa) *Restitution:*

In both uniform sales laws – in ULIS und in CISG –, there are gaps in the provisions concerning the consequences of avoidance. One searches in vain for a regulation of a case in which the goods to be returned have been

17 § 278 BGB: »The debtor is responsible for the faults of his legal representative and of persons employed in carrying out the debtor's obligations to the same extent as for his own faults. § 276 para. 2 does not apply«.
18 Judgment BGH of March 14, 1984, NJW, 1984, 2034 – 2036.

damaged or destroyed after avoidance of the contract. It is also unclear where the goods are to be returned or the price refunded, and who is to bear the costs and the risks of transportation. The issue of the proper place of repayment of the price has, however, been the subject of a decision on ULIS by the Bundesgerichtshof.[19]

In accordance with the examination procedure suggested above, we must first ask whether there is an internal gap, i.e. a matter governed by the Convention.[20]

Even the Bundesgerichtshof, without much hesitation, assumed this to be a matter of uniform sales law, i.e. one which has not expressly been settled but can be solved with the aid of general principles on the basis of art. 17 ULIS. The second step, therefore, called for the development of general principles from which rules can be deduced on such uncertain consequences of avoidance. Cases, for instance, in which the goods cannot be returned at all or at least not undamaged, may be judged in accordance with art. 74 ULIS and art. 79 CISG, dictating that the buyer obligated to return the goods is generally liable for damages unless he is excused under those provisions. An even more intricate question is that of the proper place at which the obligations to redeliver or repay must be performed. In principle, one might think of setting up a sort of reverse rule which would correspond to the obligations before avoidance, thus applying art. 57(1) CISG or art. 59(1) ULIS to the obligation of refunding the price. In this case, art. 23 ULIS or art. 31 CISG could be consulted for problems connected with the return of the goods, and art. 96 – 101 ULIS, 66 – 70 CISG for those connected with the bearing of the risk. It follows that, provided the goods have been shipped in an orderly manner, the buyer could reclaim the purchase price even if the goods have been destroyed or damaged in transit. Another principle that might be inferred from the context of the Convention's rules is that the costs resulting from the return of the goods or the repayment of the price generally have to be borne by the party whose breach of the contract occasioned its avoidance, and who cannot excuse himself under art. 74 ULIS or art. 79

19 Judgment of Oct. 22, 1980, BGHZ 78, 257 et. seq. = IPRax 1981, 129 et seq.

20 This can be justified, because both ULIS, in articles 78 – 82, and CISG, in articles 81 – 84, lay out rules on the effects of avoidance that at least takes care of the most important issue – the obligation to make restitution to the other party, art. 78(2) ULIS, art. 81(2) CISG; apparently, both laws also regard as matters governed by the Convention defaults of restitution after avoidance, since the situation where the seller is in arrears with the refund of the price has also expressly been dealt with in art. 81 ULIS, art. 84(1) CISG. Cf. also art. 81(2) (b) ULIS where the case is considered although not settled in detail, in which the buyer is unable to return the goods.

CISG; in this case, the costs of restitution are a foreseeable part of the damage for which the party in breach is liable.

The described pattern for restitution with a reversed seller/buyer relationship has indeed been espoused by some German scholars writing on ULIS.[21] With regard to the proper place of refunding the price, however, the Bundesgerichtshof has read into ULIS a different general principle: according to this opinion, the Uniform Law of Sales states a priority of the seller's place of business, since in the usual case of a sale involving carriage of the goods, the seller's place of business or residence is the proper place for both the payment of the price (art. 59(1) ULIS) and the seller's duty to deliver, art. 19(2) ULIS. It is especially a principle of ULIS that a claim for damages be honoured at the place where the party would have had to fulfil its corresponding contractual obligation, so that the seller is obliged to come up with damage payments at his place of business. »In conclusion, it seems logical to fill the gap in such a way that the seller must refund the purchase price at the same place where payment had to be made to him – and that is ordinarily his place of business«. I consider this decision to be materially wrong, since it compels the buyer, no matter what circumstances have caused the contract's avoidance, to go and pick up the sum at the seller's place at his own risk and expense.[22]

Even worse is the necessary consequence of a consistent application of the Bundesgerichtshof's decision that the buyer might even be required to bring the defective goods – which entitled him to declare the contract avoided – back to the seller before he can even demand a simultaneous refund of the price. On the other hand, the duties of a buyer who has rejected the goods, and their limitations, as laid down in artt. 92 – 95 ULIS, 86 – 88 CISG, are evidence against such an obligation to send the goods back. According to these rules, the buyer is under an obligation only to preserve the goods, if need be to deposit them in a warehouse or, if they are subject to rapid deterioration, to sell them – but *not* to send them back to the seller.

The issue of how to fill the gaps in the provisions on the consequences of avoidance, and the likelihood of diverging views on the principles of the Convention demonstrate the risks that this method of filling gaps is subject to; depending on one's point of view, one may read quite varying principles into

21 Cf. *Mertens/Rehbinder,* Internationales Kaufrecht, EKG Art. 78 note 6; *Dölle/Weitnauer,* EKG Art. 78 note 6.

22 Cf. my criticism of this judgment in IPRax 1981, 113 et seq.: the decision can only be explained in view of the desire to locate the place of jurisdiction – which, under the European Convention on Jurisdiction and Execution, is attached to the place of performance – not at the place of the creditor but of the debtor, in order to protect the debtor from having to litigate in another country at the creditors place of business.

the Convention; in a specific case, the courts may choose for or establish a certain principle only because it is expedient for an equitable solution for the specific case.[23]

bb) The uniform sales laws do not settle the question of which currency outstanding obligations have to be paid in. If the parties neglected to establish the currency in which they wanted debts, in particular the purchase price to be paid, this does, in my view, still not constitute a sales law matter or a corresponding gap in the Convention. In Germany, however, the Oberlandesgericht (Court of Appeals) Koblenz on one occasion decided to the contrary in an unpublished judgment of Jan. 1, 1983. According to this opinion, the currency issue is, in fact, a matter of sales law, so that the corresponding gap must be filled not with domestic law but with recourse to the general principles underlying ULIS. The Court then deduced that Art. 59 ULIS as a matter of principle stipulated payment at the seller's place of business. Hence it followed that the purchase price had to be settled in the seller's currency.[24]

III. *Interpretation of terms and phrases*

The greatest threat to the uniform application of the uniform sales law lies in the possibility that the Convention's terms and phrases may be construed divergently – a threat that Art. 7(1) CISG attempts to avert. It is true, however, that as was already touched upon supra II 2 b, the boundaries between interpretation and gap-filling are fluid. To construe a term narrowly may mean to open up a gap in the Convention, while a broad interpretation of a certain legal term would encompass the case in question. The guidelines for

23 As in the Federal Court's case the »correct« decision of the jurisdictional issue.

24 I am of the opinion that this reasoning is erroneous: even if one were to assume that the currency question is a matter of sales law, the general principles on the place of payment would still not warrant the conclusion that payment always has to be effected in the currency of that place. Of course, interpretation of the statements of the parties under art. 8(2) CISG will in most cases permit the inference that payment in the currency of the place of payment has been agreed upon. Thus, it is not a matter of interpreting ULIS or CISG but of construing tacit party intentions. Cf. *Dölle/von Caemmerer,* art. 57 at 1: The place of payment may give a clue as to the intentions of the parties. For this reason, it can be presumed that payment must be made in the currency valid in the seller's country, insofar as art. 59(1) ULIS prescribes payment at the seller's place.‹

the filling of gaps – »in conformity with the general principles on which it (i.e. the Convention) is based« – must, therefore, of necessity be applied in the interpretation of terms and phrases as well.

1. *Methods of interpretation*

When interpreting international uniform law, wherever a certain word, term or phrase is amenable to various understandings, the issue of the »correct« interpretation comes up. As is shown by numerous court decisions dealing with international uniform law in Germany and Europe, we must again distinguish several levels.

a) The first question to be settled is whether interpretation is to be done »autonomously«, or whether legal terms etc. should be applied as interpreted in a certain internal (domestic) law. A good example for the coexistence of both theories – interpretation autonomous to the Convention or interpretation in the light of domestic law – is offered by the understanding of the European »Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters« of September 27, 1969.[25] Although the prevailing opinion on this international convention seems to be that an autonomous and independent interpretation of a given term has priority,[26] there are nonetheless a number of decisions where, for the purpose of construing a certain term, the courts fell back upon internal substantive law found by consulting the rules of private international law.[27] One of the views advocated is, for instance, that

25 For both theories, cf. the judgments of the European Court of Justice, Oct. 6, 1976, 12/76, *Tessili/Dunlop,* Coll. 1976, 1485: »The Convention frequently uses expressions and terms from the fields of Civil, Commercial and Civil Procedure Law whose meaning may differ in the several member states. Consequently, the question arises as to whether these expressions and terms must be seen as autonomous – and thus common to all member states –, or as reference to the substantive provisions of that law which is applicable on the basis of the conflict-of-laws rules of the court at first concerned with the matter.«

26 Cf. the comment of general attorney Capotorti in the case ECJ 6/21/1978 – 150/77, *Bertrand/Ott; Basedow*, in: Handbuch des internationalen Zivilverfahrensrechts, vol. 1, 1982, p. 123 et seq.; even more far-reaching *Spellenberg,* Europarecht 1980, 340 et seq.: The EEC-Convention must always be interpreted autonomously.

27 Cf., for instance, on the term »place of performance« the above-cited decision ECJ 10/6/1976 – 12/76, *Tessili/Dunlop,* Coll. 1976, 1485: »None of these two alternatives should automatically enjoy priority to the exclusion of the other, since one can take an appropriate decision only separately for each of the convention's provisions; in doing so, however, it must be made sure the Convention is given full effectiveness in view of the goals of art. 220 of the European Community Treaty.« Cf. also *Kropholler,* Europäisches Zivilprozeßrecht, Kommentar zum EuGVÜ, Introduction p. 18.

the question whether the goods are movables or immovables should be answered in accordance with the lex rei sitae (law of the place where the things are situated).[28]

The same question can also come up within the context of ULIS or CISG. Suppose inventory and stocked goods are sold in connection with the sale of a piece of land, the site of a manufacturing plant. Shall the lex rei sitae decide on whether inventory and stocks are mere »accessories« to the real estate, thus an integral part of it, so that the sale would only be one of real estate, or do the land and the movables have to be treated separately so that the movable goods themselves could possibly, as a sale of goods, fall under CISG or ULIS? Or is it up to CISG/ULIS to decide autonomously whether or not there is, in this situation, a sale of goods with respect to the movable items, independently of lex rei sitae and its law of property?

Within the purview of ULIS, this question – to the extent that it has been recognized and formulated as such at all – has clearly been answered in favor of an autonomous interpretation by the German Bundesgerichtshof: in a decision of March 28, 1979,[29] the meaning of the words »...exclusion may be express or implied« in art. 3 cl. 2 ULIS was at issue (a problem which is less likely to arise under the more precise wording of Art. 6 CISG). The Court reasoned as follows: »The (uniform) law does not define in detail which requirements must be met by such an exclusion. (Cf. on the legislative history and the German delegation's attitude during the deliberations on the Hague Sales Law Conventions, Dölle/Herber, art. 3 at 3; Stötter, Internationales Einheitskaufrecht, art. 3 ULIS at 2a, c; as well as the Memorandum on the Hague Sales Law Convention of July 1, 1964, BT-Dr. 7/115 p. 55, reproduced there). Previous scholarly writings seem to be of the unanimous opinion that the relevant standards for this cannot be taken from the (non-unified) domestic law applicable in the particular case, but must be developed on the basis of the uniform law...«. Among other reasons, the Bundesgerichtshof was motivated by »the Convention's objective ... to unify international sales transactions as rapidly and as comprehensively as possible«, thus by an objective of legal policy which has now expressly been laid down in art. 7 (1) CISG.

In accordance with this provision, interpretation must also be carried out autonomously in the case of CISG, even though it is not quite as clear-cut in this respect as ULIS which, by excluding the rules of private international law in art. 2, also excluded any recourse to national law (to be found on the basis

28 *Kropholler,* op. cit., art. 16 at 11
29 BGHZ 74, 193 = NJW 1979, 1779

of conflict-of-laws rules) where the interpretation of terms and phrases is concerned. The question is *not* whether, in the particular case, CISG is applicable *as* German, American or Austrian law, and whether, therefore, its terms must be interpreted according to American, Austrian or German law. The same must also be true where CISG is applicable because of art. 1(1) (b). Art. 7 (1) CISG is to be applied concomitantly, constituting a guideline for interpretation which must in no way be influenced by the internal law of the contracting state to whose legal system the conflict-of-laws rules referred.
The Bundesgerichtshof has professed its adherence to the autonomous method of interpreting uniform law not only in regard to ULIS, but even more firmly and frequently, in applying other Conventions. A good example is the decision on a case involving art. 12(3) of the Warsaw Convention of International Air Transportation in which the Court says: »The purpose of unifying substantive law is to obviate the conflict-of-laws issue of the applicable law and to spare the parties concerned the application of foreign law. It is in conformity with this purpose to interpret and, if necessary, to supplement such conventions by themselves, i.e. on their own basis. The principles generally recognized for the interpretation of private law apply (...). Thus, any interpretation must, it is true, start out from the wording, but it must also show due regard to the logical and systematic context of a provision and, above all, to its purposes and underlying policies, particularly where the legislative history offers no help. In doing so, of course, one must take care not to adopt domestic legal concepts without closer inspection as this might endanger the objective of unification. Rather, interpretation must always bear in mind the very purposes of the uniform law itself and its objective of being applied in all contracting states as steadily and as uniformly as possible.[30]

b) German scholars traditionally distinguish between four classical methods of construction for which there is no binding order of priority, and which can also be useful for the interpretation of uniform law.[31] The distinction is between verbal, systematic, historical and teleological interpretation.[32] As far as grammar and wording are concerned, one must take into account the several versions in the different languages, as uniform international law is drafted multilingually. Consideration of the multilingual character of the Convention may, however, cause additional difficulties, at least where there are divergen-

30 Judgment of March 19, 1976, NJW 1976, 1583
31 Cf. *Kropholler,* Internationales Einheitsrecht, § 19 II, p. 216 et seq.; on the European Convention on Jurisdiction and Enforcement of Judgments, see Basedow op. cit. (note 4 supra), p. 125 et seq.
32 cf. also the Federal Court case BGH of March 19, 1976, supra note 30

ces in contents between the various language texts. Simply to presume the existence of a uniform meaning, as the Law of Nations would have us,[33] is of no help, and would at best lead us to the narrowest possible meaning, the one common to all versions, and at the same time induce us to neglect any clear and precise meaning the wording might have in another language.

German courts consider the original text of a convention in their various languages where doubts of interpretation are to be dispelled as a matter of course and there are a number of decisions involving international conventions where the courts have proceeded accordingly. To be sure, the result has sometimes been that contradictions between the several languages were uncovered which could not be removed simply by having recourse to the linguistic meaning in one version alone; in the end, it remained crucial to bring all interpretation into line with the Convention's basic objective to reach uniformity.[34]

The »systematic« approach to interpretation may also be of some importance within the uniform sales law. In my view, the term »documents controlling their disposition« in art. 58 (1) CISG, for instance, must be read in the light of

33 Cf. Art. 33 III of the Vienna Conventiona on International Treaties of May 23, 1969, Int.Leg.Mat. 8 (1969), 679.

34 Cf., e.g., the Federal Court of Justice case of July, 14, 1983, RIW 1984, 153, on Art. 29 CMR (Convention relative au contrat de transport international de marchandises par route – Convention on the Contract for the International Carriage of Goods by Road), where the carrier's liability depended on how the words »wilful misconduct« in the English version and »faute...qui...est consideré comme equivalent au dol« in the French version were construed. After exhaustive consideration of foreign cases and analyses, the court came to the conclusion that in view of the wording ambiguities, regard should be had to »the Convention's legislative history as well as to its underlying policy and objective; in doing so, one must take care not to borrow domestic legal concepts without closer inspection as this might endanger the intended unification«. Cf. also Federal Court of June 16, 1982, BGHZ 84, 339 et seq. on Art. 28 (1) of the Warsaw Convention on the carrier's liability in international air traffic of October 12, 1929, where the unclear meaning of the term »place of business« (»etablissement«) was at issue. After carefully analyzing the opinions of American and French courts as well as scholarly comments from a variety of countries, the Federal Court finally laid down the following order on interpretation (p. 343): »In view of the existing ambiguities, the wording alone cannot be of overriding importance, even if, in the interest of a uniform application by the contracting states concerned, it must be considered of greater significance for the interpretation of international conventions. In addition, legislative history, the logical-systematic context as well as, above all, the objectives and legislative policies must be taken into consideration; such conventions must be interpreted and, if necessary, supplemented on the basis of themselves; domestic legal concepts must not be adopted without closer inspection as this might endanger the intended unification.«

Numerous volumes could be filled with similar decisions on uniform law created by international conventions; all of these decisions attempt to find a solution by analyzing the wording with regard to the several original languages, and to the way ambiguous terms have been interpreted by scholars and courts of other countries; if that is of no avail, they finally consider legislative history and the purposes and policies of the regulation, that is its objective »unification of the law«.

art. 30 and 34 CISG.[35] In a ULIS case decided by the Court of Appeals Stuttgart on May 26, 1978,[36] one of the issues was the required place of payment for services rendered on sold machinery. Interpreting art. 6 ULIS (= art. 3(1) CISG), the Court of Appeals assumed that the obligation to pay for installation services was connected with the supply contract. The court held that, consequently according to art. 6 ULIS, such obligations are also subject to the uniform sales law. This being the case, the place of payment for the services was the same as the place of payment of the purchase price under art. 59 ULIS.

The historical interpretation – i.e. the consideration of motives and evaluations of the drafters of a law – is of considerable importance to German scholars and courts even where international uniform law is concerned. It should be noted that even writers from England who traditionally refuse to consider legislative motives and materials in connection with uniform law, have supported a somewhat more liberal attitude on ULIS: »The reports of an international conference are not necessarily subject to the same rigid exclusion, since other and different considerations, in particular the factor of international unification, apply«.[37]

In Germany it is common practice for scholars to take legislative materials and preparatory works into consideration for the purposes of interpretation of uniform law; even the courts look at such travaux preparatoires, at least to the extent that they are easily accessible, such as when they are brought forward by attorneys or made accessible by scholarly literature which German courts generally heed very carefully.[38]

When consideration of legislative history is given such close attention, a matter of course in Germany, it is clear that in the case of a uniform law, a great importance must be attached to the origin of certain rules and how they are understood and interpreted there. A good example is the Hadley v. Baxendale rule on the limitation of damages, the essence of which has been incorporated into ULIS and CISG. The late scholar, Detlef König, scrupulously described the history of this rule in a widely read article in 1965 which thus became accessible to German lawyers responsible for the application of

35 Cf. the Secretariat's report, p. 139 footn. 4 and the present author's remarks in »Einheitliches UN-Kaufrecht«, p. 74, fn. 327.

36 RIW/AWD 1978, 545 et seq.

37 *Graveson/Cohn/Graveson,* The Uniform Laws on International Sales Act 1967, A Commentary. London, Butterworths, 1968, p. 3 et seq., 6.

38 Cf. the Federal Court cases BGH 3/28/1979, BGHZ 74, 193 = NJW 1979, 1779, supra at note 29, as well as the decisions on the Warsaw Convention and the CMR, cited supra at note 30 and note 34.

ULIS.[39] This analysis then served as the foundation for Weitnauer's comments on the damage provisions in the great commentary on ULIS by Dölle.[40] By way of this commentary, the basis of the limitation-of-damages rule and its interpretation in Anglo-American law have become accessible for German jurisprudence, as, for example, in a decision by the Bundesgerichtshof of Oct. 24, 1979.[41]

To consider the national origin of a certain rule does, of course, not mean to construe uniform law as being just another type of domestic law, determined by the rules of conflict of laws. This has already been refuted (supra I.1.). National origin is but one out of several criteria which may be useful in ascertaining a rule's meaning, and has to be put in perspective if other means of interpretations outweigh this aspect, or if consideration of the national origin would pose a risk to uniformity.

The most important method of interpretation in German law is the so-called »teleological« approach, i.e. an interpretation in accordance with the purposes and policies of a certain rule. The principal and preponderant purpose of the uniform sales law is to reach unification. The particular relevance of this objective for the uniform law's interpretation is stressed again and again in judgments by the Bundesgerichtshof, (cf supra, notes 28, 30, 34). Consequently, the Bundesgerichtshof has expressly declined to interpret the provisions of ULIS »contrary to its purpose and intention of achieving unification«.[42] The cited case demonstrates how strongly the judges of the Bundesgerichtshof feel committed to the unification of law and its foundations. In this case, an American corporation domiciled in New York brought an action against a German company for recovery of the purchase price and damages for non-conformity of the goods delivered. The sales contract had, on the part of the American buyer, been entered into by its Dutch branch office. Thus, the application of ULIS depended on whether »place of business« within the meaning of art. 1(1) ULIS only referred to the company headquarters in New York – in which case ULIS would have been inapplicable – or whether it comprised the branch office which had made the contract, and which was

39 *König,* Voraussehbarkeit des Schadens als Grenze vertraglicher Haftung – zu Artt. 82, 86, 87 EKG –, in: Das Haager Einheitliche Kaufgesetz und das Deutsche Schuldrecht, Kolloquium zum 65. Geburtstag von Ernst von Caemmerer, 1983, p. 75 et seq.

40 Cf. *Dölle,* Kommentar zum Einheitlichen Kaufrecht, 1976, vor artt. 82 – 89, at 53 et seq., pp. 543 et seq., as well as at 38, p. 537, where König is given credit for the following explanations.

41 BGH WM 1980, 36, 37

42 BGH of June 2, 1982, LM Nr. 6 on ULIS = IPRax 1983, 228 et seq., 229 = RIW/AWD 1982, 594 et seq., 595

located in the Netherlands, a contracting state. The Bundesgerichtshof, after taking into consideration German and English legal literature, focused on the crucial question of which one of the buyer's two places of business was contemplated by the parties when the contract was made. In this context, the Court first discarded the view according to which the uniform law would not apply at all where there are several places of business. To interpret the law in such a way would mean that a great number of sales contracts concluded with branch offices of multinational companies would not be subject to uniform sales law. For the sake of argument, the Court even cited art. 10(a) CISG (cited as art. 9(a) UNCITRAL draft), a provison not even in force in Germany, but which the Court nonetheless thought contained a solution beneficial to the aims of unification.
There can be no doubt that, once the Vienna Sales Law Convention is ratified by the Federal Republic, the German Bundesgerichtshof will attach overriding importance to the idea of preserving the uniformity reached on paper, and apply art. 7 (1) CISG accordingly.

2. *The establishment of general principles for the purposes of gap-filling*

In German domestic law, there is an indeterminable amount of publications dealing with the question of the proper methods of gap-filling. There are fundamental and acute analyses of even more specific issues of gap-filling in uniform law.[43] The general principles of law underlying the uniform sales laws hardly ever take concrete shape in individual provisions. An example of the contrary is the principle of freedom from any formal requirements which has been expressed in art. 15 ULIS and Art. 11 CISG.
Apart from that, it is a most risky enterprise to attempt to establish general principles of law, since the judge called upon to interpret and apply the law will always be tempted to use the solution that he thinks should be preferred as a guideline for the formulation of general principles.[44]
This is also a context in which differences in the way uniform laws are created have consequences: where a codification is largely the work of one man or a

43 Cf., above all, *Wahl,* in: Dölle, art. 17 at 50 et seq.; *Kropholler,* Internationales Einheitsrecht, pp. 258 – 304, above all 298 – 301; *Dölle,* Bemerkungen zu Art. 17 des Einheitsgesetzes über den internationalen Kauf beweglicher körperlicher Gegenstände, in: Festschrift Ficker (1967), 138 – 151.

44 Cf. *Eörsi,* General Provisions, in: International Sales, The United Nations Convention on Contracts for the International Sale of Goods, ed. by *Nina M. Galston* and *Hans Smit,* 1984, § 2.04, p. 2 – 12.

small team of lawyers with concurring ideas, its individual rules are more likely to be based on general and recognizable principles than in the case of uniform laws that have been worked out by a great number of lawyers with the most diverse views. In those cases, agreement on any given issue often required arriving at a compromise which necessarily left many fundamental questions, including the decision on the pertinent principles, unanswered.[45] There is, therefore, every reason to fear that »general principles of law« will have to be »discovered« and »fabricated« ex post facto (subsequently), and it is an open question whether the guideline of art. 7(1) CISG will be strong enough to prevent views from going into different directions. The Bundesgerichtshof's decision on the issue of the required place of refund of the purchase price after avoidance of the contract, which was reported and criticized above, demonstrates that even within one national legal system, the most diverse general principles may be »discovered« and read into a uniform law. In order to preclude such differences, particularly in the case of a new uniform law such as CISG which is still incipient, I think it is imperative that scholarly analysis should try to uncover and discuss as many gaps as possible, and to reach, to the greatest possible extent, consensus on the principles that govern the filling of these gaps. This process has only just begun, and the goal of reaching a generally accepted consensus on the pertinent principles is inevitably still a long way off. As in Ernst Rabel's preliminary works in preparation of the first draft of ULIS, it might be helpful to compile, on a comparative basis, the points in which the world's most influential legal systems – those that have patronized the creation of uniform law – agree or are at least so similar as to allow for the derivation of common principles.[46] To be sure, the principles found through this comparative process must be incorporated somewhere in the Convention itself; in any event, the last clause of art. 7(2) CISG prohibits freely complementing the Convention on the basis of comparative analysis alone. The domestic judge, for that matter, can generally not be expected to develop general principles through comparative study anyway.[47] This is one of the reasons why legal scholars must take a special responsibility for such uniform law.

45 Such fundamental preliminary decisions are most likely to be taken in those cases where a certain rule is definitely not wanted, such as the ipso facto avoidance of a contract – which played an important part in ULIS –, or the use made of the central term »delivery« for a range of different individual problems.

46 Cf. *Kropholler*, op. cit., p. 299 et seq.

47 Cf. *Kropholler*, op. cit. at p. 301: »... a task ... that could hardly present more difficulties, and in comparison to which the correct application of only one foreign substantive law seems rather easy.

b) One of the general principles that make it possible not only to interpret the Convention but also to fill its gaps – provided it is a matter governed by this Convention –, is, in my view, the formula contained in art. 7(1) CISG, »to promote good faith in international trade«. The history of the »good faith« principle within the context of CISG has been rather eventful,[48] yet an »activation« of this principle for the purposes of interpretation and gap-filling may hope to be espoused not just by scholars,[49] but also by those courts which are familiar with it from their own domestic laws. A distinction must be made, it is true, between interpretation and gap-filling of the Convention, on the one hand, and the correction or modification of party agreements to be read and construed as required by the good faith principle, on the other. In practice, however, it will often be difficult to draw this line, as is demonstrated by a case involving art. 17 ULIS which was decided by the Court of Appeals Düsseldorf:[50] a German firm had purchased from an Italian food manufacturer large quantities of so-called »surprise eggs« (eggs made of chocolate and containing little toys). The buyer had, among other things, complained of the non-conformity of the goods. At about the same time the German buyer sent off a written reservation with respect to this non-conformity, a basic agreement settling other points of controversy was entered into with the supplier which was extremely favorable to the buyer, but which the supplier would not have consented to had he known of the »reservations« concerning the (alleged) non-conformity. Appraising the conduct of the parties, the court held that the seller could only have understood the conclusion of the agreement proposed by the buyer as simultaneously dropping any complaints about non-conformity, for otherwise the seller would not have been prepared to conclude the agreement. Having established these circumstantial facts, the court charged the German buyer with having violated the principles of good faith when he subsequently took up the alleged non-conformity again: »The principles of good faith also govern those transactions subject to the Uniform Law of the International Sale of Movable Goods; for they are an essential element of all modern sales laws (cf. Dölle, art. 17 ULIS at 55 – 57)«.

48 *Cf. Eörsi,* General Provisons, in: International Sales. The United Nations Convention on Contracts for the International Sale of Goods, ed. by *Nina M. Galston* and *Hans Smit,* 1984, 2 – 6, 7, 8.

49 To that effect *Eörsi,* op. cit., and the present author in: Einheitliches Kaufrecht, p. 25.

50 Judgment of Jan. 20, 1983, file number VI U 206/77 unpublished)

IV. *How can uniformity in interpretation and gap-filling be preserved on an international level?*

The methods of interpretation described above (supra III.1), particularly the consideration of legislative materials and the paramount importance of the requirement to preserve the uniformity reached, do not rule out the possibility that divergent views on the proper interpretation of individual terms or on the right way of filling gaps in »matters governed by this Convention« might affect judicial decisions, thus giving rise to a divergence in interpretation by the courts of the various contracting states and encouraging forum-shopping. Are there ways to forestall such a development?

1) Of course, the objective of preserving legal uniformity in interpretation and in the establishment of general principles as guidelines for gap-filling would best be served by an international court which would be called upon to decide, as the highest appeals court, on issues of interpretation and gap-filling. Such a court could be modelled after the supranational European Court of Justice which is entrusted with enforcing European Community law in the interpretation and application of the EEC Treaty, and which has even acquired a corresponding competence in those matters of civil law for which unification has been reached within the Community; a good example is the interpretation of the European Convention on Jurisdiction and the Enforcement of Judgments that has repeatedly been cited above.[51]
Regardless of how individual questions would be settled – such as whether presentation to the Court in case of doubts of interpretation should be mandatory or optional, or to what extent the decisions of this court should be binding –, such an international court could be extraordinarily helpful in preserving uniformity in interpretation and gap-filling. As far as the uniform sales law is concerned, however, it is very unlikely that such a court will be created within the foreseeable future or that an existing international court might be assigned a corresponding authority by virtue of an international treaty by the contracting states of CISG. Such a theoretical possibility, which is currently pure speculation, need not be discussed in the present context.

2) German courts are not bound to precedent decisions by other courts. Not even the Bundesgerichtshof's judgments have binding authority over lower courts; only within the bounds of a pending litigation are the inferior courts bound by the relevant legal opinion of the Federal Court of Justice, the court

of highest appeals, sec. 565 (2) German Code of Civil Procedure (ZPO).[51] Lower courts frequently heed the Bundesgerichtshof's views all the same, if only because the Bundesgerichtshof can be assumed to reconfirm its interpretation of the law should the defeated party bring its case before it. Even judgments of other courts of either the same or a lower status as the Bundesgerichtshof are given some attention, provided their arguments on the issue are considered important and convincing. It may be said that court decisions generally enjoy persuasive authority – in much the same way as scholarly opinions published in commentaries, textbooks, monographs and essays. Particularly in those areas of law where the development is still in a state of flux, or where the courts have not yet established a firm conviction, do judicial opinions often contain a profound and thorough discussion of views that have been expressed by legal scholars on questions of interpretation or gap-filling. In a case involving uniform law, it would also seem appropriate to include foreign decisions and foreign scholarly comments in such a discussion.

To be sure, the readiness and also the technical possibilities of taking foreign court opinions into consideration are not on the same level in the various countries. A truly exemplary attitude on the use of legal comparison as a means of finding the law is displayed by Switzerland.[53] Also in Germany, however, one can perceive a great readiness to consider and employ foreign decisions for the purposes of interpreting uniform law. The central problem that German courts are facing in considering foreign decisions on uniform law or a foreign majority opinion which may have developed on certain questions of interpretation, is, in my view, a problem of information – i.e. the problem of accessibility of foreign decisions and scholarly analyses. To the extent that they are accessible to German courts, they may safely be assumed to go down

51 Cf. on the European Court of Justice *Herrmann,* in: Handbuch des internationalen Zivilverfahrensrechts, vol. 1, 1982, pp. 9 et seq.. The European Court's authority to interpret the uniform law created by the member states through international treaties was not granted directly by the EEC Treaty, but by specific protocols which expressly endow the Court with this authority. Cf. *Herrmann,* op. cit., at 46 et seq., in particular 47 on the European Convention on Jurisdiction and the Enforcement of Judgments.

52 On the lack of a binding authority of precedents in other cases, cf. *Jauernig,* Zivilprozeßrecht, 19. Aufl. 1981, § 8.2.

53 Cf. on the following *Meier-Hayoz,* Berner Kommentar, 1982, art. 1, at 360 et seq., particularly at 380: »The importance of legal comparison is even increased in the cosmopolitan areas of law par excellence, namely internationally unified subject matters. In their context, foreign doctrine and practice enjoy almost the same influence as their domestic counterparts; it must be added that Swiss jurisprudence, which is particularly receptive to foreign or international law, is nothing short of exemplary.« Cf. also at 389 on the consideration given to foreign judicial practice and doctrine by the Swiss Supreme Federal Court.

in the decision-making process and thus to affect interpretation and gap-filling in uniform law; in any event, German judges can be expected to discuss them carefully and in depth, even if they do not happen to share the views expressed by their foreign colleagues. This should at least hold true for the higher courts such as the Courts of Appeals and the Bundesgerichtshof, the latter, of course, having in its system of clerks better facilities to compile information on foreign law than the lower courts.
In short, information is crucial for an adequate consideration of foreign case material and scholarly opinions; therefore, I would like to conclude my paper with a glance at the means of procuring the requisite information.

a) The usual means of access to foreign decisions and scholarly views is through German legal literature, in which the views of foreign courts and scholars are analyzed and thus made available to our courts. In this regard, comparative monographs, law review articles and lengthy commentaries are pre-eminent in the dissemination of information. As an example related to the uniform sales laws, I should like to mention Dölle's outstanding commentary, with its comprehensive comparative analysis of the provisions of ULIS and ULFIS.[54] For some uniform laws, special law reports are being published or prepared which make the court decisions rendered in the various contracting states accessible in German language and thus usable to German courts.[55]

b) A particularly significant influence must also be attributed to leading court personalities – judges who dispose of an outstanding knowledge of foreign legal systems and certain uniform laws, and who can avail themselves of this knowledge in their decision-making.[56]

c) In Germany, judges can acquire information on new areas of law through the so-called »Judges-Academy« in Trier, an institution which is jointly

54 *Dölle,* Kommentar zum Einheitlichen Kaufrecht, Munich 1976.

55 Cf., for example, the case digest on the Geneva Uniform Law on Bills of Exchange and Negotiable Instruments, published by *Ernst von Caemmerer,* of which three volumes have appeared so far. For ULIS and ULFIS, a comparable case digest is in preparation by the present author.

56 Cf. the articles of the Federal Justice *Rudolf Liesecke* on »The Recent International Jurisprudence on the Uniform Law on Bills of Exchange and Negotiable Instruments according to the Geneva Conventions of 1930 and 1931«, WM 1966, 202 et seq., as well as »The Recent Jurisprudence, Preponderantly That of the Federal Court of Justice, on the Law on Bills of Exchange and Negotiable Instruments«, WM 1967, 330 et seq.; on sales law, cf. the article by the late Federal Justice *Hiddemann,* »The Bundesgerichtshof's decisions on the Law of Sales«, in: Wertpapiermitteilungen Sonderbeilage 5/1982; particularly on uniform sales law see pp. 10 et seq.

sponsored by the Federal Government and the »Länder« (states), and which serves, on a supraregional basis, to widen the knowledge of prosecutors and judges from all branches of the judiciary. It organizes more than 45 Supplementary Educational Conferences per year. These conferences have repeatedly included discussions of the uniform sales law; thus, those judges who are concerned with commercial law and international sales contracts, have been given the opportunity to familiarize themselves with uniform law as well as the relevant scholarly findings and the opinions of foreign courts.

d) A considerable importance for the dissemination of knowledge on international uniform law must, of course, be attributed to the educational programs offered by Law Schools. Unfortunately, international uniform law has not yet gained an independent position within law school curricula. Uniform sales law is partly taught as part of the general courses on contracts, partly, however, in special courses specifically dealing with conflict of laws and comparative law.

Summary

The unification of the law of sales can only be achieved internationally by conventions, at which as many states as possible commit themselves to the enactment of uniform law worked out by their representatives and by independent experts.

1. The unification of the law of sales should be unification of substantive law and not merely unification of the rules of conflict of laws for sales contracts. International private law has no place within the scope of the unified law of sales. This means that conflict of laws even remains inapplicable when the unified substantive law of sales is interpreted divergently in the various states.
The unification of law achieved by uniform laws such as ULIS and CISG is endangered by three risks in particular:
a) Uniform law can be endangered by competing national substantive law which is not characterized as law of sales by the lex fori and is therefore applied as a matter of course.
b) With respect to certain issues, which have not explicitly and unambiguously been settled in the Uniform Law, the question may be unresolved as to whether they belong to matters of sales law, in which case an internal gap is at issue, or they should be treated as an external gap by recourse to national law. Only after it has been established that the question is one of an internal gap,

can a solution based on the general principles of unified law of sales be attempted; this can of course lead to considerable difficulties from case to case.
c) A third danger for the uniform application of uniform law of sales lies in the possibility of divergent interpretation of its terms and concepts. Divergent interpretations cannot be completely avoided, though the danger of divergent interpretations could be minimalized through dissemination of information on the treatment of uniform law of sales in the various contract states. It is of particular importance that the courts and academic writers remain committed to the goal of creating and maintaining uniform law in their interpretation of uniform law of sales.

2a) The interpretation of uniform law must be carried out »autonomously«, i.e. without recourse to the interpretation of comparable terms and concepts in the lex fori. The opinions of the German courts offer many examples that this maxim is being observed.
b) In the interpretation of the uniform law of sales, just as in the interpretation of domestic law, the grammatical/verbal, the systematic, the historical and the teleological methods are distinguished, although there is no given priority among these methods. In the grammatical/verbal method, it is a matter of course that the various languages of the contract be considered. When applying the historic method of interpretation, German courts also consider the background or the origin of the respective provisions in the unified law of sales, insofar as they are accessible or are made accessible. The most important method of interpretation is naturally the teleological method. Among the purposes and policies which direct interpretation, the achievement and the preservation of unification is of preeminent significance.

3. The preservation of the verbally achieved unification of law is, as long as there is no international court of law with an according jurisdiction, primarily a problem of information. Multilingual collections of opinions, academic articles and other media should be used to convey how legal experts in other contract states understand and interpret terms and concepts of the uniform law. Art. 7(1) CISG, for example, can rule that in the interest of uniform interpretation and application of uniform law, foreign opinions be considered as possessing persuasive authority.