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Honnold: Unification of the Law Governing International Sales of Goods

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UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS. Edited by *John Honnold*. Paris: Librairie Dalloz (Distributed by Oceana). 1966. Pp. xxi, 426. \$10.20.

Marshall McLuhan reminds us that the "new electric technology . . . because of its action in extending our central nervous system . . . seems to favor the inclusive and participational spoken word over the specialist written word." Since the subject of this review is plainly a book for specialists, the review is divided into two parts: the first designed to tell the reader enough about its contents in order to enable him to make a reasonably informed guess as to whether he should forsake the "inclusive and participational spoken word" long enough to read the book; the second intended to repair at least some of his ignorance should he succumb to the "new electric technology" instead.

I. THE BOOK

The book is a collection of the papers presented and a record of the discussions held at the Colloquium of the International Association of Legal Science in New York in 1964. The Association operates under UNESCO auspices and, according to its constitution, is devoted to "the development of legal science in the world by means of the study of foreign laws and by the use of comparative methods. The ultimate aim of the Association is to promote mutual acquaint-

ance and understanding among nations." In particular, it has sought to concentrate on "peaceful coexistence of countries of different social systems and on the progress of developing countries" (p. vii). To these ends, it has held a series of colloquia: in Rome in 1958 on a wide range of legal questions arising out of the development of East-West trade; in Helsinki in 1960 on nonperformance of international sales contracts with special attention to problems posed by *force majeure*; in London in 1962 on the sources of the law of international trade with special reference to East-West trade; and, finally, in New York in 1964 on the comparison and possible harmonization of national and regional unifications. The New York colloquium, of which the book under review is a product, examined four sets of provisions intended to govern international contracts of sale: (1) The General Conditions of Delivery of Goods (1958) (Comecon Conditions), which prescribe standard contract terms for international trade among the socialist countries of Eastern Europe that are members of the Council of Mutual Economic Aid; (2) The General Conditions of Sale, or standard contracts drawn up by the United Nations Economic Commission for Europe (ECE Conditions); (3) The Draft Uniform Law on International Sale of Goods (Corporeal Movables) (1956) (ULIS) and the Draft Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables) (1959) (ULFIS), prepared by the International Institute for the Unification of Private Law in Rome and adopted by a Diplomatic Conference at The Hague in April 1964; and (4) the Uniform Commercial Code, now adopted by all of the states of the United States except Louisiana.

The reports fell into two groups. The first consisted of four pairs of papers on four specific substantive problems relating to international sales, each pair consisting of a paper from an Eastern country and one from a Western country. They attempted to establish the solutions to these problems under the four sets of provisions studied, to discover the trends that the problems reveal, to consider which solutions were most favorable to the development of international trade, and to make concrete suggestions for unification or harmonization. The four problems were (1) the formation of the contract [A. Goldstajn (Yugoslavia); G. Lagergren (Sweden)]; (2) the effect of defective performance [V. Knapp and P. Kalensky (Czechoslovakia)*; D. Tallon (France)*]; (3) risk of loss in transit [T. Ionasco and I. Nestor (Rumania)*; C. Schmitthoff (United Kingdom)]; and (4) time limits for claims and actions [H. Trammer (Poland) and E. Harris (Canada)]. The second group explored avenues toward greater harmonization of legal rules governing international trade: the development of standard contracts for added categories of commodities and wider areas of trade [J. Barrera Graf (Mexico); S.

Micheda (Japan)]; the unification of rules on choice of law [G. Eörsi (Hungary); E. von Caemmerer (German Federal Republic)]; and some general problems of unification [A. Rubanov and V. Tschikvadse (USSR)].¹ The volume opens with a general conspectus by John Honnold, of the University of Pennsylvania Law School, who served as General Reporter to the Colloquium and as editor of the volume, and closes with a summary of the discussions prepared by Honnold and Victor Knapp, of Charles University in Prague, who served as Associate General Reporter. It is provided with a serviceable index.²

A comparative exercise relating to international trade might concern itself with any of several major distinctions among legal systems: that between the common-law and the civil-law countries, that between the Eastern and the Western blocs, and that between the developing and the developed areas of the world. The papers touch upon the first of these because one of the four sets of provisions to be compared was the Uniform Commercial Code (a rare American illustration of the proposition that one's law is a more readily exportable commodity when attractively packaged as a code). They touch upon the second not only because another of the four sets was the Comecon Conditions, but also because four of the eight paired papers in the first groups emanated from Eastern European scholars. They touch not at all upon the third, a significant omission, although an understandable one in view of the distinct European flavor of the International Association of Legal Science. Furthermore, they confine themselves to questions of private law and do not deal with those legal barriers to international trade, such as embargoes and tariffs, which have been politically or economically inspired; this, again, is an important but explicable lacuna in view of the desire to find neutral ground for a discussion among delegates from East and West. The papers have the compensating merit of affording a rational treatment by scholars from varying political systems. On the whole they profited greatly from the organization provided by John Honnold as General Reporter and from his insistence that they be directed in a meaningful way to practical problems. The very real benefits of this approach were perhaps even more readily apparent to those who, like the reviewer, had the good fortune to participate in the discussions of the papers at the colloquium. The papers are, as in any such collection, of somewhat uneven quality. The authors of the Soviet contribution, for example, were unable to refrain from recording their displeasure that the Uniform Commercial Code, a "national

1. Most of the papers are in English; those marked with an asterisk are in French.

2. The reviewer finds himself unable to make any dispassionate comment on editorial details except to note that one of his articles is cited variously as being in "110 Colum. L. Rev." (p. 7), "110 U. Pa. L. Rev." (p. 42), and "100 University of Pennsylvania Law Review" (p. 59).

unification," was accorded "equal rights with an act of international character," the Comecon Conditions (p. 346), and from denouncing the "vicious practice" of the United States and other Western countries "of issuing prohibitive lists in their trade with socialist countries" (p. 342). Happily this tone is not characteristic of the papers generally. While the number of those persons who are concerned with the unification and harmonization of the law governing international commercial transactions is not yet legion, anyone with interests in this field can find enough that is of value in this collection to give it at least brief priority over the "new electric technology."

II. SOME THOUGHTS FROM THE BOOK

Perhaps the authors of the Soviet contribution have a point in denouncing the Uniform Commercial Code as a lowly "national unification." But the adherence of the Eastern bloc to the Comecon Conditions can scarcely be held out as an ideal example of voluntary unification by nations free politically to exhibit traditional parochialism in matters involving law. And the ULIS and ULIFS, the only true attempts at international statutory unification studied, have compiled no distinguished list of adoptions since they were approved at The Hague in 1964. If the number of those concerned with this aspect of unification and harmonization is not legion, neither have they moved any notable mountains. In view of this, Clive Schmitt-hoff's suggestion that the "international business world" should insist on "a global code of international sales law" (p. 197) has an air of fantasy. What concrete hope and practical advice does this book hold out for future unification and harmonization? To the reviewer it seems to lie, as he has pointed out elsewhere,³ in the direction of the standard form contract.

Although standard form contracts have long been used in international as well as domestic commerce, the ECE Conditions have established a new and promising pattern:

Each document has been the product of a group of experts representing most of the European nations on both sides of the Iron Curtain and speaking for the interests of both sellers and buyers in the trade or industry involved. The eventual use of the conditions, however, is a matter for contracting parties to decide for themselves. The ECE conditions have met with acceptance for several reasons: they are specially designed to give definitive answers to those questions which might be answered differently under different legal systems; they avoid the overreaching found in many form contracts of both sellers and buyers; and once they become familiar through use, they avoid the need for detailed examination of fine print and facilitate comparison of offers.⁴

3. 110 U. PA. L. REV. 305 (1962).

4. *Id.* at 309-10.

Henryk Trammer makes the point that since standard form contracts can only take the place of provisions considered as *jus dispositivum* and not those considered as *jus cogens*, the latter mark the limits of effective use of such contracts (p. 225). Fortunately, it is relatively seldom that the *jus cogens* impinges on attempts to draft standard forms. A useful first step would be to identify this small number of instances and to attempt to eliminate them. A simple example taken from close to home is section 2-205 of the Uniform Commercial Code, which deals with firm offers and which is *jus cogens*. Shinichiro Michida characterizes as "remarkable" the requirement of this section that if a term making the offer irrevocable is on a form supplied by the offeree, it must be separately signed by the offeror (pp. 7, 270-71, 367). Could not this section be amended to eliminate this requirement in international sales, at least where the term is contained in a form such as one of the ECE Conditions, which is not likely to surprise the offeree? The two papers on time limits for claims and actions suggest that this is also an area in which remedial legislation may be desirable. But the total change in existing law required would be small in order to give reasonable rein to the draftsmen of standard form contracts for international use.

A second step would be a study of the present ECE Conditions, along with other comparable terms, with a view to finding a common core of fundamental provisions not dependent upon the commodity involved (pp. 396-98). One great advantage of the ECE Conditions is that they have been drafted to meet actual problems by men who are experts in the particular trade concerned; a concomitant disadvantage is that since they were formulated at different times by different groups of experts, the variations among them are not always explicable on rational grounds (pp. 5, 41-42). This second step might include the implementation of a suggestion by Denis Tallon that work be done to secure agreement on the meaning of essential terms so that the parties would at least have available a common language (pp. 17, 139), a point that is echoed by Gyula Eörsi (p. 294). Although Tallon himself warns of the difficulty of disentangling language from the substance of law itself (p. 140), Honnold underlines that this difficulty can be minimized by the use of "language relating to events in commercial transactions, rather than artificial legal idioms" (p. 379). Illustrative of what can be done on at least a limited scale are the Incoterms-1953, definitions of trade terms (such as C.I.F.) promulgated by the International Chamber of Commerce in Paris.

A third step would then involve the use of this core of fundamental provisions and these definitions of essential terms as the basis from which to expand the use of standard forms, to cover both additional types of goods and further geographical areas, a step favored

by both Jorge Barrera Graf (pp. 240-41) and Shinichiro Micheda (pp. 263-64). As Graf points out, the ECE Conditions "have not found application in inter-American traffic, nor in trade between our Latin American nations [and] European countries," nor "have organizations such as LAFTA and the Central American Treaty for Economic Integration adopted these models" (p. 237), although there is "marked interest in the knowledge and availability of standard forms, and at the Montevideo in 1963, the international tendency to adopt standard contracts was favorably received" (p. 240).⁵ To be sure, reciprocal trade among the Latin American nations is not great (p. 238), and standardization of contract forms for trade between an area such as Latin America and the United States poses problems different from those that faced the draftsmen of the ECE Conditions for European trade since typically "manufactured goods go south and raw material comes north" (p. 398) so that the seller's and buyer's interests in any particular commodity tend to be identified with national interests. Nevertheless, if the special problems of East-West trade could be solved by the ECE draftsmen, those of Western Hemisphere trade should not be insurmountable.

As a fourth step, the experience with standard forms should be carefully studied to suggest areas in which there is, in fact, sufficient agreement in international commercial practice to warrant the promulgation of legislation.⁶ With a background of practical accomplishment through agreement on standard forms and more especially on a common core of fundamental provisions, including the meaning of essential terms, the path to unification by national legislation would be far clearer than it is today, and Schmitthoff's goal of "a global code of international sales law" might become attainable.

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5. See also p. 30.

6. Cf. p. 43.