UNIFORM INTERPRETATION OF UNIFORM PRIVATE LAW CONVENTIONS: ON TREATY LAW, GLOBAL JURISPRUDENCE AND PROCEDURAL SAFEGUARDS

JÜRGEN BASEDOW*

I. ON INTERNATIONAL LEGAL UNIFICATION BY CONVENTIONS

Ever since the second half of the nineteenth century, international conventions have established uniform law at a universal scale. They are a legal response to globalisation, i.e., to the accelerated increase in cross-border movements of people, goods, services, and capital, and to the resulting growth in interconnectedness of countries across the globe. They cover various sectors of life: intellectual property, the carriage of goods and passengers, private international law, issues of general commercial law such as the sale of goods, payments and security interests or arbitration, but also international wills,

* Professor Dr. Dr. h. c. mult. *Jürgen Basedow*, LL.M. (Harvard Univ.), Emeritus Director of the Max Planck Institute for Comparative and International Private Law and Professor of Law at the University of Hamburg, Germany; Member of the *Institut de Droit international*.

the protection of cultural property, and minimum standards of labour law. The conventions adopt the technical form of treaties governed by public international law. This may give rise to problems, since treaty law has mainly developed with regards to relations between states whereas uniform law conventions focus on private relations. While most treaties are applied by government agencies of the contracting states, uniform law conventions are applied by independent municipal courts which are, thus, responsible for the performance of the obligations incurred by the contracting states.[1]

Some conventions, such as the Convention on the International Sale of Goods (CISG)[2] or the Montreal Air Transport Convention,[3] are self-executing; others require the contracting states to adopt implementing legislation for some or all of their provisions; and there are further instruments which leave doubts concerning this question.[4] Where a uniform law convention as such is self-executing, a contracting state may nevertheless decide to ensure its effect in the internal legal order through appropriate implementing legislation. This is the technique generally applied in the United Kingdom

1. This observation induced the English House of Lords to take account of the *travaux péparatoires* of international uniform law conventions; *see* Fothergill v. Monarch Airlines [1981] AC 251 (HL) 283C (Lord Diplock), 290B (Lord Scarman) (appeal taken from Eng. & Wales).

2. U. N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter CISG]. The United States is a party to that Convention; on its self-executing character, *see, e.g.*, Delchi Carrier Spa v. Rotorex Corp., 71 F.3d 1024, 1027 (2d Cir. 1995) ("the instant matter is governed by the CISG . . . , a self-executing agreement between the United States and other signatories . . . .").

3. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 37 Stat. 1658, 2242 U.N.T.S. 350 [hereinafter Montreal Convention]. The United States is a party to this Convention; on its self-executing character, *see, e.g.*, Byrd v. Comair, Inc. (*In re* Air Crash at Lexington, Ky.), 501 F.Supp. 2d 902, 907 (E.D. Ky. 2007) ("The Montreal Convention is self-executing and creates a private right of action in U.S. courts.") (internal citations omitted).

4. *See, e.g.*, Rochelle Cooper Dreyfuss, *Self-executing international intellectual property obligations?*, in Intellectual Property Ordering Beyond Borders 311, 319 *et seq.* (Henning Grosse Ruse-Kahn, Axel Metzger, eds., 2022) (analyzing the self-executing nature of a variety of international conventions).

and some other common law jurisdictions.[5] The United States takes a selective approach: while self-executing conventions are given effect as the "supreme law of the land,"[6] special legislation has, for example, been adopted for the Hague Rules on Bills of Lading[7] and the Berne Copyright Convention.[8] The situation is similar in civil law jurisdictions: As a matter of principle, German courts apply self-executing conventions as such.[9] However, the 1980 Rome Convention on the Law Applicable to Contractual Obligations was implemented by internal legislation that codified private international law in 1986.[10]

What uniform law conventions have in common is the preparation by comparative law studies conducted prior to their adoption; states are unlikely to ratify or accede to an international agreement that does not accommodate the existing

5. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 152 *et seq.* (2000) (referencing treaties in the United Kingdom that states have decided to implement through legislation); Stephen Neff, *United Kingdom*, *in* LAW AND DOMESTIC LEGAL SYSTEMS – INCORPORATION, TRANSFORMATION AND PERSUASION 622 (Dinah Shelton ed., 2011) (presenting the United Kingdom's treatment of incorporating foreign treaties).

6. *See* U.S. CONST. art. VI, § 2.

7. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 24, 1924, 51 Stat. 233, 120 L.N.T.S. 155. [hereinafter Hague Rules].

8. *See* Berne Copyright Implementation Act of 1988, Pub.L. No. 100-568, 102 Stat. 2853 (1988) (reflecting implementation of the treaty); *see id.* § 2, (Congressional Declaration providing the Berne Copyright Convention is not self-executing and only binds the U.S. because of the implementing legislation).

9. *See* the general guideline established by the Bundesgerichtshof [BGH] [Federal Court of Justice] May 23, 1955, 17 Entscheidungen Des Bundesgerichtshofes in Zivilsachen [BGHZ] 303, 313 (Ger.); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 25, 1999, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (I ZR 118/96), 1000, 1005 for the Berne Copyright Convention; Joachim Bornkamm, *The German Supreme Court: An Actor in the Global Conversation of High Courts*, 39 TEX. INT. L. J. 415, 419 (2004) (discussing German treatment of incorporations of treaties).

10. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1. On the implementation by special statute see the government proposal: Entwurf eines Gesetzes zu dem Übereinkommen vom 19. Juni 1980 über das auf vertragliche Schuldverh. . .ltnisse anzuwendende Recht, BT-Drs. 10/503, Oct. 20, 1983, at 5. The Convention is now superseded by Regulation 593/2008 of the European Parliament and of the Council, June 17, 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177) 6.

divergences of national laws, suggesting a viable compromise.[11] Decades of comparative investigations passed before the unification of sales law could succeed.[12] Comparative expertise is particularly necessary, where a *cooperation convention* provides for mechanisms of communication between authorities and/or courts of contracting states in order to achieve its purpose. An early example is the Paris Patent Convention which protects an inventor for twelve months after the first filing in a contracting state against competing filings in other contracting states.[13] The rule could only be adopted after a comparative assessment of the national filing procedures and with a common understanding of what a patent is. Such a comparative background is of equal significance in relation to various conventions of the Hague Conference on Private International Law.

Unification is not yet achieved when a final text has been approved by a diplomatic conference. A common text in the hands of lawyers and judges, educated and trained in very different systems and sometimes serving different interests, is no more than a basis for and promise of future uniform law in action. The struggle for legal unification goes on when the new instrument is interpreted and applied by courts and legal practitioners in the various contracting states. Linda Silberman has *inter alia* elaborated on the difficulties of the concepts of habitual residence and custody rights that determine the cooperation of contracting states of the Hague Abduction Convention.[14]

---

11. *See* René David, *The International Unification of Private Law, in* II International Encyclopedia of Comparative Law, ch. 5, § 220 (1969/1970) (presenting comparative private law regimes); Jan Kropholler, Internationales Einheitsrecht 30 (1975) (examining how comparative law studies facilitate the codification of international law).

12. *See* 1 and 2 Ernst Rabel, Das Recht des Warenkaufs (1936, 1958) (referring to the beginning of the unification of sales law that started after World War I).

13. Paris Convention for the Protection of Industrial Property, art.4(C)(1)–(3), Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

14. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. 11670, [hereinafter the Abduction Convention]; available at: https://perma.cc/KR5E-D7EX [last accessed 14 August 2023]; Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence (Brigitte M. Bodenheimer Memorial Lecture on the Family),* 38 U.C. Davis L. Rev. 1049, 1063–1068 (2005) (examining how national courts have grappled with implementing the concepts of habitual residence and custody rights in light of the Convention's ambiguity as to the former's definition).

Her work has made clear that the quest for uniform interpretation of international instruments is a permanent task of legal scholars. This Essay, dedicated to her in long standing appreciation and respect, is intended to shed light on those aspects of that task which reach out beyond the limits of a single convention.

The aim of uniform interpretation is pursued in a framework consisting of rules of treaty law (*infra* II.) and of comparative enquiries into the practice of other contracting states which search for what Linda Silberman has designated as global jurisprudence[15] (*infra* III.). Where that search for a common understanding remains unsuccessful—which cannot be excluded—the divergences of interpretation are sometimes perceived as a conflict of laws requiring application of choice of law rules (*infra* IV.). Procedural mechanisms which help maintain and restore the uniformity of the law at the national level are less current in international uniform law, but are progressively accepted in this area of the law as an ultimate safeguard of uniform application as well (*infra* V.).

II. Treaty Law

A. *The Vienna Convention on the Law of Treaties*

a) The codification and its scope. – The Law on Treaties has in major parts been codified by the Vienna Convention on the Law of Treaties.[16] Its direct application is, however, limited by several factors. It is not in force for all states; major countries such as France, Russia, and the United States have not approved this instrument. Moreover, the scope of the Vienna Convention is confined to agreements made between states that exclude its application to treaty obligations incurred by international organisations such as the European Union (although the EU is a party to several uniform law instruments, for example the Montreal Air Transport Convention).[17] A further limitation relates to the application in time: in accordance with its Article 4,

15. Linda J. Silberman, *United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence*, 9 J. Comp. L. 49 (2014).

16. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, [hereinafter VCLT].

17. Council Decision 2001/539, 2001 O.J. (L 194/38) (EC) on the conclusion by the European Community on the Montreal Convention.

the Convention applies only to treaties concluded after its entry into force.[18]

The incomplete approval and the limitation of its scope could in theory be a source of a number of legal problems which, however, have not actually arisen in the case law of international tribunals and national courts. Over time, the Vienna Convention has developed into a generally recognised and stable legal framework for international agreements of all kinds, including uniform law conventions. Its provisions are often cited as expressions of pre-existing customary international law which, in accordance with the Preamble, will continue to govern and is equally applicable where the Vienna Convention does not apply.[19]

b) Reflection of customary law. – The recognition as a reflection of customary international law applies in particular to the provisions of Articles 31–33 on the interpretation of international agreements. As early as 1973, the International Court of Justice referred to the customary rules of interpretation "reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties";[20] this occurred in a case involving Iceland, which never acceded to the Vienna Convention. Further judgments have confirmed this view.[21] Likewise, the Appellate Body of the World Trade Organization which has to "clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law"[22] has held that "panels examining claims under the Anti-Dumping

18. VCLT, *supra* note 16.

19. VCLT, *supra* note 16, pmbl. § 8, art. 4.

20. Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, 1994 I.C.J. Rep. ¶ 41 at 6.

21. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, Judgment, 2021 I.C.J. Rep., ¶ 75, at 71; *see also* Sophia Miller, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), The ICJ Limits the Applicability of the International Convention on the Elimination of Racial Discrimination,* 30 Tul. J. Int'l & Comp. L. 449, 451. (2022) (citing the Court's point that neither Qatar nor the United Arab Emirates are signatories of the Vienna Convention, which postdates the Convention on the Elimination of Discrimination Against Women).

22. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

Agreement[23] are . . . required to apply the customary rules of treaty interpretation codified in Articles 31 and 32 of the Vienna Convention [which] are to be followed in a holistic fashion."[24]

It is noteworthy that countries which have not adhered to the Vienna Convention equally acknowledge that its provisions reproduce and clarify existing rules of customary law to a large extent. This is evidenced, *inter alia,* by statements to be found in the United States, which is not a party to the Vienna Convention. Accordingly, the Restatement Fourth of Foreign Relations Law of the United States explicitly provides:[25] "Although the United States is not a party to the Convention, it accepts that the Convention generally reflects international practice concerning treaties and that many of its provisions are binding as a matter of customary international law." Several circuit courts have referred to Articles 31–33 of the Vienna Convention with regards to the interpretation of uniform law conventions.[26]

Even more surprising are perhaps the views of French courts. Of the votes cast at the adoption of the Vienna Convention in 1969, the French vote was the only rejection, and in 2002, the French *Conseil d'État* again advised against ratification.[27] Nevertheless, the French *Cour de cassation* repeatedly referred to the Vienna Convention when applying uniform law conventions.[28] It goes

23. *Id.* Annex 1A published in 1868 U.N.T.S. 201 (the agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is part of DSU).

24. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology,* ¶ 268 *et seq.*, WTO Doc. WT/DS 350/AB/R (adopted Feb. 4, 2009).

25. *See* Restatement (Fourth) of the Foreign Relations Law of the United States §§ 301–313, 401–464, 481–490 (Am. L. Inst. 2018) [hereinafter Fourth Restatement] (§ 306 Note 1 specifically concerns treaty interpretation).

26. *See, e.g.*, Pliego v. Hayes, 843 F. 3d 226, 232–233 (6th Cir. 2016); Bank of N.Y. v. Yugo Import, 745 F. 3d 599, 609 *et seq.* (2nd Cir. 2014); Fujitsu v. Federal Express, 247 F. 3d 423, 433 (2nd Cir. 2001).

27. *See* Hélène Ruiz Fabri, *La France et la Convention de Vienne sur le droit des traités: Éléments de réflexion pour une éventuelle ratification*, *in* La France et le droit international 137, 138 *et seq.* (Gérard Cahin, Florence Poirat & Sandra Szurek, eds., 2007).

28. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., March 28, 2018, Bull. civ. I, No. 16-16.568 (Fr.) (concerning the interpretation of the Energy Charter Treaty in accordance with Article 31 of the Vienna Convention); *see also* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 13, 2019, Bull. civ. I, No. 17-25.851 (Fr.) (concerning the interpretation of a bilateral investment treaty between Spain and Venezuela in the light of Article 31 of the Vienna Convention).

without saying that the courts of contracting states of the Vienna Convention also refer to this instrument.

c) Significance for uniform law conventions. – Initially, commentators of uniform private law conventions rejected the significance of the Vienna Convention for their respective subject as a matter of principle[29] or wanted to confine it to those provisions of a uniform law convention which set forth the obligations incurred by the contracting states as against each other; they considered the Vienna Convention as not pertinent to the rules relating to the mutual obligations of private parties.[30]

This view is not supported by precedent and is not adequate. The contracting states promise to implement the content of a uniform law instrument in their municipal law; this task lies in the hands of legislation and the courts. The content of that obligation must be specified by the interpretation of that instrument. The rights and obligations of the private parties under the instrument follow from the obligations accepted by the contracting states under public international law. It follows that the methodological guidelines for the interpretation of conventions laid down in Articles 31–33 of the Vienna Convention are not only relevant for the "final provisions" or "general provisions" of an instrument but to the interpretation of the whole convention.[31]

B. *Objective and Methods of Interpretation*

a) Objective. – The interpretation of a convention aims at "giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the

29. *See, e.g.*, Rolf Herber, *CISG art. 7 ¶ 12, in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (CISG) (Ernst von Caemmerer & Peter Schlechtriem, eds., 1990); Gert Reinhart, *CISG art. 7, ¶ 8, in* UN-KAUFRECHT, (1991).

30. *See, e.g.*, JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 134, 135 ¶ 103 (1982).

31. *See* FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW – CISG IN A NUTSHELL 22 (3rd ed. 2022) (applying the VCTL's methodology of interpretation to the CISG); *see* Jürgen Basedow, *Uniform Private Law Conventions and the Law of Treaties*, 11 UNIFORM L. REV. 731, 741 *et seq.* (2006) (providing further references on the methodology provided for in VCTL art. 31–34).

light of the surrounding circumstances."[32] This seems to refer to the historic intentions of the states involved in the preparation of a treaty at the time of its conclusion. Identifying those intentions has been held by the International Court of Justice to be a "primary necessity," but the Court has at the same time explicitly stated that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[33] The Vienna Convention does not decide on whether interpreters have to search for historic intentions or for a meaning that copes with current problems. While the reference in Article 31(3)(b) to subsequent practice suggests the latter, Article 32 appears to point to the past. Legal scholars have argued in both directions.[34]

With regards to uniform law conventions, there can hardly be any doubt that their interpretation must be open, over time, for modifications in response to changes of the technical, economic, and social circumstances surrounding its adoption and application. This need can be illustrated by two examples. Several provisions of the CISG refer to the time when a declaration made by one party "reaches" the other party.[35] The CISG was adopted prior to the emergence of e-commerce and e-mails; said provisions describe the formation of contracts by an exchange of letters and only exceptionally refer to "instantaneous communication."[36] In the era of digital communication, those provisions will need a wide interpretation that may e.g., in the circumstances of the case, also embrace the deposit of an unchecked e-mail on the addressee's server.

---

32. Oliver Dörr, Art. 31, ¶ 3 in 2 Vienna Convention on the Law of Treaties – A Commentary (Oliver Dörr & Kirsten Schmalenbach, eds., 2018) (citing Arnold Duncan MacNair, The Law of Treaties 365 (1961)) [hereinafter Dörr & Schmalenbach].

33. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 1971, ¶ 53, at 16.

34. Urs Peter Gruber, Methoden des Internationalen Einheitsrechts 102–108 (2004), with further references.

35. *See* CISG, *supra* note 2, art. 15 *et seq.* (stating that an offer becomes effective upon reaching the offeree and that withdrawal of an offer, even if the offer is irrevocable, is effective if it reaches the offeree simultaneous to the offer).

36. *See* CISG, *supra* note 2, art. 20(1) (regulating the window of time in which an acceptance to an offer made via telegram may be valid).

A second example relates to the Hague Rules on Bills of Lading of 1924.[37] Under the Rules, the carrier's liability for loss of or damage to the goods is limited to an amount of "100 pounds sterling per package or unit".[38] This Rule depicts the transport operations common up to the 1920s, when goods were still packed in packages that could be handled by one or more workers; it no longer corresponds to the use of twenty-foot or forty-foot containers that serve to store unpacked goods. While more recent instruments have therefore replaced the per-package limitation by a limitation related to the weight of the goods,[39] they have not been ratified by some contracting states such as the United States, which abides by the original Hague Rules; US courts therefore have to struggle with the question of whether the term "package" can apply to a forty-foot container.[40] A more liberal approach to the interpretation of the international convention is required lest the instrument petrifies.

b) Literal interpretation of texts authenticated in several languages. – Article 31 VCLT provides for a triad of interpretive methods which focus on the text, the context, and the purpose of a provision. The textual or literal interpretation is well known in internal law. But international conventions, which are usually authenticated in several languages raise additional problems, since the ordinary meaning of the terms used in the various language versions is not always the same.[41] The presumption laid down in Article 33(3) VCLT that the terms of the Treaty have the same meaning in each authentic text helps to put interpreters on alert: Even if a term used in one of the authentic languages has a clear meaning, other language versions might give rise to second thoughts.

Where a difference in meaning emerges and cannot be removed by way of interpretation, the relevant meaning has to be assessed in the light of the object and purpose of the treaty,

37. Hague Rules, *supra* note 7.

38. Hague Rules, *supra* note 7, art. 4(5).

39. *See* the survey in WILLIAM TETLEY, INTERNATIONAL MARITIME AND ADMIRALTY LAW 86 *et seq.* (2002).

40. On the rules of interpretation developed in this respect, see the survey in THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW 584–589 (6th ed. 2019).

41. For an example of how the ordinary meaning of treaty terms may differ across languages, see Art. 3(2) of the CISG in its English and French versions.

per Article 33(4) VCLT. A realistic appraisal of the linguistic capacities of lawyers and judges involved in a dispute suggests that the identification of the object and purpose is the prevailing task anyway. This is certainly the case where a convention, such as the CISG, is authenticated in six languages, all of which belong to different families of languages (Arabic, Chinese, English, French, Russian, Spanish).

c) Contextual interpretation. – The Vienna Convention, including its provisions on the interpretation of treaties, does not constitute a complete body of rules. The International Law Commission which prepared the Vienna Convention did not elaborate a detailed code of interpretation but confined itself to some fundamental rules.[42] Further rules of interpretation may be included in individual conventions or be developed in legal practice. This may also become important for the contextual or systematic interpretation although Article 31(2) VCLT provides for a long list of factors which may be taken into account: the preamble; annexes; protocols; unilateral declarations accepted by the other parties; the subsequent application practice; other relevant rules of international law.

However, a context-related interpretive method that is not explicitly addressed in Article 31(2) is the inter-conventional interpretation. The context of an instrument's provision is not necessarily confined to that instrument and may also include comparable provisions in related conventions.[43] The adequacy of such an inter-conventional interpretation emerges, for example, from the comparison of some modern conventions on the carriage of goods and passengers. They often provide for a limitation of the carrier's liability; by way of exception the carrier loses this benefit "if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably

42. Dörr, *art. 31, ¶ 2 in* Dörr & Schmalenbach, *supra* note 32.

43. For a thorough study on this issue see Franco Ferrari, *I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e la necessità di un'interpretazione interconvenzionale,* 36 Riv. Dir. Int. Priv. Proc. 669–688 (2000); Gruber, *supra* note 34, at 157–163; Marco Torsello, Common features of uniform commercial law conventions – a comparative study beyond the 1980 uniform sales law 165, 277 (2004).

result."[44] Analogous provisions can be found in other liability instruments, for example, in the Convention on Limitation of Liability for Maritime Claims,[45] in the Montreal Air Transport Convention,[46] and in the European Railway Convention.[47] All these provisions have a common root: the 1955 Hague Protocol amending the Warsaw Convention on Air Transport of 1929.[48] The Protocol's amendment of Article 25 put an end to the previous recourse to national concepts of particularly serious culpability. The various corresponding provisions differ in detail but are all inspired by the intention to establish rules on the removal of liability limits that are independent from national concepts of fault, gross negligence, actual and conditional intent etc. When it comes to the application of one of these instruments, that intent can only be preserved and respected by an inter-conventional interpretation.

d) Historical interpretation. – During the preparation of the Vienna Convention, the "residual" character of this instrument has often been highlighted.[49] It leaves room for specific rules of interpretation in, and with respect to, particular conventions, even where they derogate from Articles 31–33 VCLT.[50] With

---

44. Hague Rules, *supra* note 7, art. 4(5)(e) (amended by Article 2 of the Protocol to amend the international convention for the unification of certain rules of law relating to bills of lading, signed at Brussels on 25 August 1924, 1412 U.N.T.S 128).

45. Convention on Limitation of Liability for Maritime Claims art. 4, Nov. 19, 1976, 1456 U.N.T.S. 221.

46. Montreal Convention, *supra* note 3, art. 22(5).

47. Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), art. 36, Appendix B to the Convention Concerning International Carriage by Rail, May 9, 1980 (as modified by the Protocol), June 3, 1999, 2828 U.N.T.S. 47 [hereinafter COTIF]. For a consolidated version of COTIF, see the website of the Intergovernmental Organisation for International Carriage by Rail (OTIF), https://perma.cc/LVU4-8ZFK.

48. Convention for the Unification of Certain Rules Relating to International Carriage by Air, art. 25, Oct. 12, 1929, 137 L.N.T.S. 11 (as amended by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 372). *See* Duygu Damar, Wilful Misconduct in International Transport Law 78 *et seq.* (2011) (arguing that modification of Article 25 was a response to dissatisfaction caused by the liability limits set by the Warsaw Convention).

49. *See* Kristen Schmalenbach, *art. 1, ¶ 2 in* Dörr & Schmalenbach, *supra* note 32.

50. See the discussion in Stefania Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme*, 26 Studi e pubblicazioni della rivista di diritto internazionale privato e processuale 220-224 (1986).

regards to uniform law instruments, this is important for the understanding of Article 32 of the VCLT. The provision awards a subsidiary or supplementary role to the historic interpretation which appears to be exclusively permitted where the other approaches to interpretation lead to results that are "ambiguous" or "obscure" or "manifestly absurd" or "unreasonable." Even in that situation, recourse to the preparatory work is not required, but "may" be had.

The reduced significance of *travaux préparatoires* has a long history in international law.[51] It is telling that the legislative materials of the EEC Treaty of 1957[52] were kept in the archives of the participating governments; selected documents were published only decades later.[53] Especially in the 1960s, when the Vienna Convention was drafted, an additional argument against the historical interpretation may have related to the ongoing process of decolonisation: The newly independent states could hardly be expected to take account of treaty negotiations conducted by colonial powers before their independence and without their consent.

Either way, Article 32 VCLT can hardly be reconciled with treaty practices in the field of uniform law. Linda Silberman has pointed to the conflicting tradition of the Hague Conference on Private International Law: The organisation not only publishes the *travaux préparatoires* in volumes of Acts and Documents or on its website, but also charges scholars participating in the preparatory work with the drafting of semi-official reports summarising and commenting on the new instrument.[54] The situation is similar in other areas: while the early comments on CISG heavily relied on documents drafted in the phase of preparation, the weight of the preparatory works gradually seems to decrease more recently. The growing body of case law applying the CISG is more up-to-date. But the truncated provision of Article 78 of the CISG that provides for an entitlement to

51. Dörr, *art. 32, ¶ 6 et seq.*, *in* Dörr & Schmalenbach, *supra* note 32.

52. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 14 [hereinafter Treaty of Rome].

53. *See* 1–3 Dokumente zum Europäischen Recht (Reiner Schulze & Thomas Hoeren eds., 1999, 2000) (identifying published legislative documents related to the Treaty of Rome).

54. *See* Silberman, *supra* note 14, at 1060, 1082 (advising courts to make use of the *travaux préparatoires*).

interest without determining the interest rate still requires a historical analysis to be understood.[55]

To sum up these comments on treaty law it can be said that the provisions of the Vienna Convention on interpretation are suitable guidelines that help to clarify the meaning of uniform law conventions. They exhibit some gaps, however, and need some adjustments which take account of the fact that uniform law conventions are mainly applied by municipal courts and not by the executive branch of the government. Governments may avail themselves of the hierarchy of the executive to instruct a subordinate authority with regards to the meaning of a treaty which they have approved on the international plane. They have no such authorization vis-à-vis independent courts that need additional input to bring the application practice in line with the international commitments made by the state.

III. Global Jurisprudence and Comparative Law

The Vienna Convention does not mention the objective of a uniform interpretation of treaties in the various contracting states. It omitted this point because it was considered to be redundant, given the nature of international treaties. It follows from the very nature of an agreement on legal unification that the harmony of the internal legal order of a state with that country's international commitment under a uniform law convention

> cannot be constituted by the simple implementation of a norm, but consists more specifically in permitting that norm to produce its effects in the state and to be applied by the subjects of that order. These effects can only be identical in all states . . . Consequently, the internal order has to ensure the uniform application of the norm of international origin to the effect that the equality of rights and obligations of the contracting states be ensured.[56]

Thus, the need for uniform application is derived from the idea of equal mutual commitments of the contracting states

55. *See* Ferrari & Torsello, *supra* note 31, at 440 ("[O]ne of the most debated issues during the Vienna diplomatic conference . . . "); *see also* Barry Nicholas, *Art 78: Interest, in* Commentary on the International Sales Law 568–70 *et seq.* (C. Massimo Bianca & Michael Bonell, eds., 1987).

56. *See* Bariatti, *supra* note 50, at 68, 69 (author's translation from Italian).

under international law. The same result flows from the policies pursued by the contracting states at the stage of legal unification: the time and work invested in the preparation of a uniform law convention would be in vain if the efforts for unification came to an end with the conclusion of the treaty and were not continued at the stage of application. From this perspective, scholars have advocated for an "autonomous" interpretation that is detached from the legal order of the individual states and must be uniform for the countries involved.[57]

From the 1970s onwards, upper courts in several countries have also advocated for an interpretation of uniform law conventions that is detached from the principles and concepts of national law. Thus, the Belgian Court of cassation pointed out "that it would be futile to elaborate a convention designed to establish an international statute if the courts of each state interpreted it in line with the concepts of their own law."[58] Courts have offered other dicta of this kind as well.[59] In the present context, opinions of the U.S. Supreme Court are noteworthy since the Court has highlighted that "in interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight."[60] The Court had to deal with the question of whether the right of a father not endowed with the custody of his child to restrict the removal of that child from the country without his consent (a *ne exeat* right) was a custody right within the meaning of the Abduction Convention. This was affirmed by the majority of the Court, which cited judgments from various foreign countries in its support.[61] The minority criticised the analysis of the foreign precedents and considered that

57. *See* David, *supra* note 11, §§ 262, 266 (stating that judges should detach themselves from their national system of law and consider the uniform law); KROPHOLLER, *supra* note 11, at 265; GRUBER, *supra* note 34, at 80 et seq.; TORSELLO, *supra* note 43, at 157 *et seq.*

58. Cass. [Court de Cassation] Jan. 27, 1977, PAS. 1977, p.574, 582 (Belg.) (author's translation).

59. *See* the survey in Jürgen Basedow, *International Economic Law and Commercial Contracts: Promoting Cross-Border Trade by Uniform Law Conventions*, 23 UNIFORM L. REV. 1, 6 (2018) (discussing similar dicta from courts in Germany and England, in addition to Belgium).

60. *See* Abbott v. Abbott, 560 U.S. 1, 16 (2010) (citing previous authorities and pointing out that the principle applies with special force to the Hague Abduction Convention, for Congress has directed that "uniform international interpretation of the Convention" is part of the Convention's framework).

61. *Id.*

"there is no present uniformity sufficiently substantial to justify departing from our independent judgment on the convention's text and purpose . . . ."[62] It is noteworthy that the minority did not reject the quest for a uniform interpretation as such but preferred an interpretation of the term "custody rights," that was clearly inspired by a national understanding, a fact that Linda Silberman denounced as "parochial."[63] She analyzed the course of argument of *Abbott* and two other decisions handed down in view of what she called a global jurisprudence.

Since the late 1970s, we find more and more international instruments which explicitly lay down the objective of a uniform and autonomous interpretation of uniform law conventions. Article 7(1) of the CISG of 1980 points out that "in the interpretation of this convention regard is to be had to its international character and to the need to promote uniformity in its application." Such provisions have become a standard of modern-treaty making.[64] While they may be considered redundant since they only state the obvious, they are helpful for the national courts in charge of their application, reminding them of the need to broaden the interpretive analysis. However, calling for a uniform and autonomous interpretation is easier than implementing it. It is clear that "the need to promote uniformity in [the] application" requires courts to look for the application of the same instrument by courts of other contracting states, and courts in many countries are actually willing to do that. The UNCITRAL digest of case law on CISG gives evidence

62. *Id.* at 46.

63. Silberman, *supra* note 15, at 54.

64. *See* U.N. Convention on the Carriage of Goods by Sea art. 3, March 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules]; U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea art. 2, Dec. 11, 2008, U.N. Doc. A/Res/63/122 (not yet printed in U.N.T.S); COTIF, *supra* note 47, art. 8(1); UNIDROIT Convention on International Factoring art. 4, May 28, 1988, 2323 U.N.T.S. 373; UNIDROIT Convention on International Financial Leasing art. 6, May 28, 1988, 2321 U.N.T.S. 195; U.N. Convention on Independent Guarantees and Stand-By Letters of Credit art. 5, Dec. 11, 1995, 2169 U.N.T.S. 163; Convention on International Interests in Mobile Equipment art. 5, Nov. 16, 2001, 2307 U.N.T.S. 285; Convention on Choice of Court Agreements art. 23, June 30, 2005, https://perma.cc/8TUT-787V; Protocol on the Law Applicable to Maintenance Obligations art. 20, Nov. 23, 2007, https://perma.cc/8TUT-787V; Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 20, July 2, 2019, https://perma.cc/8TUT-787V.

of several dozens of judgments from all over the world which have in fact cited decisions rendered by foreign courts.[65]

The U.S. Supreme Court judgment in *Abbott* has also made clear that it is difficult to analyse foreign judgments which can often only be understood against the backdrop of the legal system of origin. It is often not sufficient to look at the statements made by the foreign court as such and to pick what appears to be a clear assertion concerning the uniform law convention at issue. It is not uncommon that the wording of a foreign decision is influenced by the procedural context, by legal provisions surrounding the conventions, and by the facts of the case. Moreover, supreme court decisions in some countries are very short. In states following the French system of cassation, the supreme court rulings only contain minimal reasoning on why the lower courts' decisions were quashed or accepted. Even where translations of such judgments are submitted to a court, unambiguous conclusions are frequently impossible to reach. Nevertheless, the objective of a uniform interpretation helps to open up the minds of judges and to approximate case law over time.

The search for foreign precedents is not a matter of comparative law strictly speaking since judgments from various foreign countries concern one and the same instrument which is at the same time part of domestic law and of international law. The court is looking for such decisions in order to get some international inspiration for the decision it has to take. It is not interested in the particular features of the law of the foreign contracting state where a judgment on a uniform law convention originates. However, the judge must understand the embeddedness of the foreign judgment in the foreign court system, the particular features of the procedure, and neighboring institutions of substantive law in order to draw the proper conclusions from the foreign decision. The quest for a global jurisprudence therefore requires the spirit of comparatists although it is not a comparative law enquiry strictly speaking. But this is perhaps a semantic question.

65. UNCITRAL Digest of Case law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 ed. UNCITRAL DIGEST at 42; FOURTH RESTATEMENT, *supra* note 25.

IV. Divergent Interpretation—Conflict of Laws?

As pointed out above, comparative enquiries are suited to promote a global jurisprudence and a harmonious interpretation of uniform law conventions, but they do not ensure uniform results. Courts of different contracting states may take notice of, but may not understand, or not be convinced by each other's judgments. Their attitudes may even be consolidated by subsequent decisions over time. Where this happens, a situation emerges that is similar to a conflict of laws. One might therefore think of applying choice of law rules in order to select the national interpretation that is most appropriate in the circumstances of the case, regardless of which conflicts method is pursued. Two examples illustrate the opposed positions on this issue.

A. *Geneva Convention on Bills of Exchange*

The first example relates to the 1930 Geneva Convention on Bills of Exchange.[66] This instrument was adopted under the auspices of the League of Nations and is in force for about 25 states, mainly civil law jurisdictions. It establishes a uniform law on bills of exchange that is annexed to the trunk Convention. The contracting states are required to implement that uniform law in their municipal laws under Article 1 of the trunk Convention. In the 1950s and 1960s, the French and German supreme courts disagreed on the interpretation of Article 31(4); according to that provision, an *"aval",* i.e., a bill surety or guarantee, that does not specify on whose account it is given is deemed to be given for the drawer of the bill. Both within France and Germany, the lower courts took divergent views on the nature of that presumption until the issue was finally decided by the respective supreme courts. While the French *Cour de cassation* considered the presumption irrebuttable,[67] the German *Bundesgerichtshof* allowed counterevidence.[68]

---

66. Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7 1930, 143 L.N.T.S. 257.

67. Cour de cassation [Cass.] [supreme court for judicial matters] ch. réuns., March 8, 1960, bull. civ.No. 37-11.088 (Fr.)

68. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 15, 1956, Neue Juristische Wochenschrift [NJW] 2455 (1957) (Ger). On this debate, see Ernst E. Hirsch, *Einheitliches Wechselgesetz oder einheitliches Wechselrecht?* Neue Juristische Wochenschrift [NJW] 1089–94 (1961).

When a bill drawn by a drawer in Paris was accepted by a drawee in the Saar region in Germany and signed without further specification by the defendant, another German domiciled in Cologne, the Court of Appeals of Saarbrücken/Germany considered this additional signature as an *"aval"* under Article 31(4) of the 1930 Geneva Convention. In light of the divergent interpretations of this provision mentioned above it felt compelled to determine the relevant national version of Article 31(4) that governed in accordance with the pertinent choice of law rules, and applied the French interpretation.[69] In those years, the judgment inspired much opposition;[70] however, it has also been accepted based on the argument that a realistic view had to accept that legal unification had failed where divergent interpretations had been consolidated.[71]

B. *The European Road Transport Convention CMR*

The second example is more recent and concerns a judgment of the Swedish Supreme Court, *Högsta Domstolen,* on the 1956 Convention on International Carriage of Goods by Road (CMR).[72] That instrument was prepared by UNIDROIT and finalized by the Economic Commission for Europe of the United Nations (UNECE). It is in force for almost sixty states, in the European Union and far beyond in Eastern Europe, North Africa, the Middle East, and Central Asia. It determines the carrier's liability vis-à-vis the shipper for loss of and damage to the goods by mandatory rules. That liability is limited to the value of the goods established at the place where the carrier accepts the goods for transportation (not at the place of destination); the compensation thus does not cover consequential damage. There is a further monetary cap on liability, calculated in accordance with the weight of the goods. Under

69. OLG Saarbrücken 10 January 1962, *summarized* in 2 INTERNATIONALE RECHTSPRECHUNG ZUM GENFER EINHEITLICHEN WECHSEL- UND SCHECKRECHT 169 (Ernst von Caemmerer ed., 1967).

70. David, *supra* note 11, § 270; Ernst von Caemmerer, *Rechtsvereinheitlichung und internationales Privatrecht, in* PROBLEME DES EUROPÄISCHEN RECHTS – FESTSCHRIFT FÜR WALTER HALLSTEIN ZU SEINEM 87. (Ernst von Caemmerer et al. eds., 1966).

71. *See* KROPHOLLER, *supra* note 11, at 204–12.

72. Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189. [hereinafter CMR].

Article 23(4), the carrier shall refund, in addition and "in full", "carriage charges, customs duties and other charges incurred in respect of the carriage of the goods."

A Dutch trader had charged a Dutch carrier with a shipment of cigarettes by truck from the Netherlands to Malmö, Sweden. During an interim storage in the port of Helsingborg, Sweden, the cigarettes were stolen. The damages for the loss, which were capped by the CMR, were undisputed between the parties: about 20,000 €. However, the trader had to pay excise duties in Sweden, since the cigarettes had already entered Swedish territory; that amount was much higher: about 135,000 €. Could he claim the full refund of that sum as "charges incurred in respect of the carriage" from the carrier under Article 23(4) CMR? The interpretation of this provision and, in particular, the classification of excises have kept the courts of contracting states of the CMR busy ever since the 1970s. In an early decision, the English House of Lords held that the wording of Article 23(4) CMR in both English and French is broad enough ("loosely drafted") to cover excises on whisky.[73] Courts of continental European countries such as the *Bundesgerichtshof* in Germany excluded excises from the carrier's duty under Article 23(4) CMR; they relied on the purpose of the CMR to limit the carrier's liability and, thereby, to predict its exposure to risk and to facilitate the calculation of insurance.[74]

The Swedish courts had to face this divergence. They were confronted by the argument that they should first decide on the law applicable to the contract of carriage in question; this should be done under the Rome-I Regulation of the European Union.[75]

---

73. James Buchanan v. Babco Forwarding [1978] AC 141 (HL) 154 (Lord Wilberforce), 157 (Viscount Dilhorne), 161 (Lord Salmon) (appeal taken from Eng.).

74. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10 2009, Neue Juristische Wochenschrift [NJW] 1816, 1818 (2010) (Ger.). For a detailed survey over the case law of several European countries, see Malcom Clarke, International Carriage of Goods by Road: CMR 303–307 (6th ed. 2014).

75. *See* Regulation (EC) No 593/2008, of the European Parliament and of the Council of 17 June 2008 On The Law Applicable to Contractual Obligations (Rome I), 2008 *O.J. (L 177) 6, 6–16 (superseding the* Convention, *supra* note 10).

Högsta Domstolen rejected this approach.[76] It held that Article 1 of the CMR, which determines the scope of the Convention, can be considered a unilateral conflicts rule, the application of which is not affected by the Rome-I Regulation under its Article 25, which states: "This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations."[77] The Court continued with an outline of the rules on the interpretation of uniform law conventions which shall not be understood from the perspective of national law,[78] referred in an exemplary way to the interpretation of Article 23(4) CMR in the case law of several other European countries[79] and finally chose the narrow interpretation which it held to follow from the above-mentioned purpose of the CMR.[80]

C. *Appraisal*

While the precedence of the uniform law instrument deserves approval, the reference to Article 25 Rome I is somewhat dubious. That provision gives priority only to conventions agreed *prior* to the Rome-I Regulation of 2008. Would Rome-I—and choice of law in general—thus prevail over uniform law conventions concluded *after* 2008? The Swedish court itself would probably reject such a result. At the outset, the judgment points out that conventions on uniform substantive law aim at avoiding recourse to the choice of law provisions of the contracting states.[81] That is true regardless of the time, when the agreement was finalized, and whether this happened prior or subsequent to the promulgation of Rome I.

---

76. Högsta Domstolen [HD] [Supreme Court] 2022-06-14, Mål nr. T-3379-21 (*Cigarettpunktskatten*) (Swed.) https://perma.cc/488P-FK77. For a summary in English see Erik Sinander, *Swedish Supreme Court: CMR takes precedence over the Rome I Regulation* with a comment by Pietro Franzina, https://perma.cc/Y944-DYTJ. For a German translation of parts of the decision with an annotation see Jürgen Basedow, *Divergierende Auslegung einheitsrechtlicher Konventionen (CMR)– ein Fall für das Kollisionsrecht?* ZEuP (forthcoming 2023).

77. Högsta Domstolen, *supra* note 72, ¶¶ 16, 19.

78. *Id.* ¶ 26 *et seq.*

79. *Id.* ¶¶ 33–36.

80. *Id.* ¶ 41 *et seq.*

81. *Id.* ¶ 13.

The real reason for the non-application of Rome I is that in accordance with its Article 1(1), this Regulation only applies "in situations involving a conflict of laws" and that such a conflict of laws is absent where an international convention unifies the national substantive laws within its own scope of application. That is a general principle that was pointedly formulated by Zweigert and Drobnig decades ago in the context of the unification of sales law: *"Kein Kollisionsrecht ohne Rechtskollision"* (There are no conflict-of-law rules without conflicting laws).[82]

The categories of choice-of-law rules and uniform substantive law are distinct instruments to deal with cross-border cases. In the field of uniform substantive law, choice-of-law rules should be applied only where they are explicitly referred to, as it is for example the case in Article 1(1)(b) CISG. It should be taken into account that choice-of-law rules cannot fulfill the parties' expectations of legal certainty where they are applied only to small islands of divergent national interpretations as a second-best solution. Where the interpretations constantly diverge, it is certainly realistic to acknowledge the failure of legal unification. However, courts should continue to struggle for convergent interpretations instead of taking the disintegration of uniform law for unalterable. What is needed for this struggle are procedural and institutional instruments.

V. Procedural Instruments

From the early days onwards, the drafters of uniform law conventions took account of the risk of divergent interpretation. As remedies, they initially provided for amendment mechanisms[83] and, in the case of the European Railway Convention, for the first time conferred the right to decide on disputes between rail carriers on the Central Office established in Berne.[84] That dispute settlement procedure was, however, not

82. Konrad Zweigert, Ulrich Drobnig, *Einheitliches Kaufgesetz und Internationales Privatrecht*, 29 The Rabel Journal of Compartive and International Private Law 146, 147 (1965).

83. *See* Paris Convention, *supra* note 13, art. 14; Berne Convention for the Protection of Literary and Artistic Works, art. 27, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986), 1161 U.N.T.S. 3, revised at Paris, July 24, 1971, https://perma.cc/9ZV2-CKAJ [hereinafter Berne Convention].

84. International Convention on the Carriage of Goods by Rail, art. 57(1) no. 3, Oct. 14, 1890, French and German versions in Reichsgesetzblatt (RGBl.)

available for shippers or consignees who filed claims against a rail carrier. But in those days of legal positivism, there was still a strong belief that the correct interpretation of statutory law and precedent would generate the single accurate interpretation of a text over time. This belief vanished, and the need for the authority of an international tribunal became clear.

A. *International Tribunals*

When the Permanent Court of International Justice, the predecessor of the present International Court of Justice, was established after World War I it received jurisdiction to interpret conventions concluded under the aegis of the International Labour Organization.[85] Some years later, a special Protocol provided that the "old" Hague Conventions agreed to before World War I could be submitted to the Permanent Court of Justice for interpretation as well.[86] At present, the International Court of Justice is also empowered to interpret the Berne Copyright Convention[87] and the European Road Transport Convention (CMR).[88] However, apart from a judgment on the Hague Guardianship Convention of 1902,[89] the international courts had little opportunity to contribute to the interpretation of uniform law conventions. One can only speculate as to the grounds for this: while there are a number of divergent interpretations,[90] private parties have no standing before the International Court of Justice. Since the access to that court is confined to states, private parties who complain of a

85. Treaty of Peace with Germany (Treaty of Versailles), art. 423, June 28, 1919, 2 Bevans 43, 252 (1969).

86. Protocole pour reconnaître à la Cour Permanente de Justice Internationale la competénce d'interpréter les Conventions de La Haye de droit international privé [Protocol on the jurisdiction of the Permanent Court of International Justice] March 27, 1931, https://perma.cc/8TUT-787V.

87. *See* Berne Convention, *supra* note 83, art. 33 (the provision was adopted as Article 27*bis* in the revision agreed at Brussels on June 26, 1948).

88. CMR, *supra* note 72, art. 47.

89. *See* Application of the Convention of 1902 Governing the Guardianship of Infant (Neth. v. Swed.), Judgment, 1958 I.C.J. Rep. 55 (Nov. 28) (holding that the Convention of 1902 did not "give[]rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden.").

90. *See also* Bariatti, *supra* note 50, at 122 *et seq.*

misapplication of an international convention by a municipal court will thus have to induce a national government to file an action in the International Court of Justice. Governments may not be inclined to go to court for several reasons; they have limited resources and generally prefer negotiations to litigation. Moreover, private parties might not be convinced that the judges of the International Court of Justice who are eminent experts in public international law are sufficiently familiar with the intricacies of private legal relations.

The situation appears to differ in the case of the Appellate Body of the World Trade Organization. Under Article 6 of the Dispute Settlement Understanding (DSU) attached to the WTO Agreement,[91] a party to that Agreement may apply for the establishment of a panel to report on its trade dispute with another party; the composition of the panels differs from case to case. According to Article 17 of the DSU there is, in addition, a standing Appellate Body to hear appeals from panel cases; such appeals are limited to questions of law, i.e. the law of the WTO Agreement and any other covered agreement.[92] This includes the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[93] TRIPS is of immediate relevance for private relations and litigation dealing with patents, copyright, trademarks etc. The DSU panels and the Appellate Body of the WTO have repeatedly interpreted provisions of TRIPS. Since TRIPS provides for the incorporation of the Berne Copyright Convention[94] and refers to the Paris Convention on industrial property in other provisions,[95] the DSU has also brought about a body of international jurisprudence relevant for these instruments.[96]

The more frequent use of this mechanism appears to contradict the speculative considerations above since the dispute settlement under the DSU—just like litigation before the

91. DSU, *supra* note 22, art. 6.

92. *Id.* art. 17(6), appendix 1.

93. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

94. *Id.* art. 9.

95. *See, e.g.*, *id.* art. 2(1), 15(2), 16(2), 16(3) (referring to the Paris Convention, *supra* note 13).

96. For a detailed survey, see the WTO Analytical Index: Guide to WTO Law and Practice, World Trade Organisation (WTO), https://perma.cc/HTL2-VGDJ.

International Court of Justice—is only available for states and not for private parties. However, the values at stake in intellectual property litigation are often high and such disputes frequently relate to plenty of similar cases involving the broader economic interest of whole business sectors relevant for the public interest of the State members of the WTO. Moreover, the composition of the panels occurs *ad hoc* and permits the inclusion of panelists of special experience, a fact which may instill a certain confidence in a treatment of the dispute by adept persons.[97]

In a regional context, the Court of Justice of the European Union can be expected to have a considerable impact on the interpretation of uniform law conventions, although limited to the territory of its member states. The European Union is a member of the Hague Conference on Private International Law and has already become a party to some of its conventions as well as some of its instruments sponsored by other organizations. Since the Union has acceded to them, they are integral parts of the law of the Union.[98] As a consequence, national courts of the member States that deal with such conventions may or, in the case of courts of final resort, shall submit preliminary questions concerning their interpretation to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union (TFEU).[99]

This type of procedure triggers a kind of dialogue between the national courts and the European Court of Justice; the latter does not decide the case but interprets the abstract questions submitted by national judges; it is thereafter up to the referring court to pronounce the final ruling. Hundreds of cases are decided in this type of procedure every year. Since

97. DSU, *supra* note 22, art. 2, 6, 8(1).

98. *See, e.g.*, Case C-344/04, The Queen ex parte IATA v. Department of Transportation, 2006 CJEU ECLI:EU:C:2006:10, at ¶ 36 (Oct. 1, 2006) (referring to Montreal Convention); Case C-300/98, Parfums Christian Dior v. TUK Consultancy, 2000 CJEU ECLI:EU:C:2000:688, at ¶ 33 (Dec. 14, 2000) (referring to TRIPS); CJEU 14 July 2022, Case C-500/20, ÖBB Infrastruktur ./. Lokomotion Gesellschaft für Schienentraktion, 2022 CJEU ECLI:EU:C:2022:563, at ¶ 39. (Feb. 3, 2022) (referring to European Railway Convention (COTIF)).

99. Treaty on the Functioning of the European Union, art. 267, March 25, 1957, 2016 O.J. (C 202/47). *See* Jürgen Basedow, EU Private Law 540, 563 (providing further details on the European Court of Justice as an institution generally and on the Court's referral procedure specifically).

they are published in many languages, lawyers in countries beyond the European Union are likely to take notice of them and have recourse to them, aiming at a uniform interpretation of the instrument at issue. Some of the rulings relate to international treaties of a universal dimension such as the Montreal Convention, ruling, for example, on the concept of "accident" or the notion of "damage."[100]

B. *Non-Binding Mechanisms—"Soft" Harmonization*

In the absence of decisions of international tribunals, the interpretation of uniform law conventions is usually in the hands of the national judiciaries; the supreme courts of the contracting states have the final say—the risk of divergent interpretation is real. In these areas, the development of common views—a global jurisprudence—requires an international exchange of information and a discourse aiming at harmonising national practice. This has traditionally been viewed as a task of legal scholars; numerous specialized publications and journals such as the *Uniform Law Review* or *European Transport Law* witness their activities. However, the capacity of individual scholars to research foreign court decisions is limited. It can be extended by cooperation in international groups of scholars. An example is the CISG Advisory Council, a private initiative of scholars from about a dozen countries who meet from time to time, discuss opinions on specific aspects of the CISG, draft papers summarizing those discussions, publish them on a separate website and collect reactions of courts and arbitration awards.[101]

The maintenance and promotion of uniformity at the post-convention stage is also increasingly perceived as an assignment of the international organizations which sponsored the adoption of the conventions in question and which often help to attract further ratifications and accessions in the capitals of potential contracting states. They should consider it their task

100. *See, e.g.*, Case C-63/09, Walz v. Clickair, 2010 CJEU ECLI:EU:C:2010:251 (May 6, 2010) (discussing the concept of damage within the meaning of Article 22(2) of the Montreal Convention); Case C-532/18 Niki Luftfahrt, 2019 CJEU ECLI:EU:C:2019:1127 (Dec 19, 2019) (discussing the concept of accident as used in Article 17(1) of the Montreal Convention).

101. CISG Advisory Council, https://perma.cc/YUC4-Y9SM.

to bring about a harmonized interpretation and application of the text in all participating countries. Under the heading of post-convention services, this is already now put into effect by some organizations. As described by Linda Silberman, it is for, example, the Hague Conference which convenes regular meetings of commissions charged with reports dealing on the practice of courts and authorities under the Hague Abduction Convention.[102]

In a similar vein, the worldwide application of CISG is echoed by the digest of case law from all over the globe put together by UNCITRAL.[103] To a large extent, the Digest is based on contributions made by scholars from many countries. However, the Digest and other UNCITRAL activities are limited to the *collection of information* on national court practice and arbitrations and on an *analytical summary* of the collected data. UNCITRAL neither recommends solutions for future disputes nor does it charge groups of experts with the elaboration of advice. The above-mentioned CISG Advisory Council fills a lacuna that is left open by UNCITRAL. Such gaps also exist in the work of other law-making organizations. In some cases, they are due to the unwillingness of national governments of contracting states to bestow additional functions on the international organizations in question which might reduce the influence of the national judiciaries. In other cases, the member states of an organization simply do not want to award the funds needed for such post-convention work to the organization at issue.

This attitude is to be deplored; both arguments are unconvincing. A national supreme court does not lose control when an international body or expert group recommends a certain interpretation of a treaty; such a recommendation is not binding, but it will often be appreciated by courts and counsel as advice given by specialized professionals. Further, the investment needed for the negotiations on a uniform law instrument are devalued if uniformity falls apart at the stage of application of the convention. Legal unification is not finished with the adoption of a common text; it is a permanent, ongoing task. The mission to promote law-making treaties is in itself incomplete if it is not accompanied by the responsibility for

102. Silberman, *supra* note 14, at 1082–83.
103. UNCITRAL Digest, *supra* note 65.

maintaining the uniformity at the stage of the implementation of the agreed text in the national jurisdictions and its application in legal practice.

VI. Conclusion

Uniform law conventions play a role of growing significance in the legal systems of many countries. They result from a mix of interests involved and an interaction of different legal disciplines: Treaty law as part of public international law is essentially inspired by governmental interests and handled by governments whereas uniform private law conventions are mainly applied by municipal courts and address the rights and obligations of private parties. Comparative law is the basis of legal unification; it tends to highlight differences between the national legal systems whereas uniform law is meant to overcome those differences. Private international law results from these very differences. It acknowledges their existence and aims at accommodating them by rules on jurisdiction, choice of law, the recognition and enforcement of foreign judgements and the cooperation with foreign authorities and courts; uniform law tends to transform that diversity and to replace it by a legal environment that displays more consistency.

Legal uniformity is not achieved when a convention is ultimately approved and implemented in the legislation of the various contracting states. The proof of uniformity is the interpretation and application of the instrument's rules. It can only succeed where the experience of foreign contracting states is taken into account. While foreign precedents will never be binding, they should be allowed to provide guidance lest the goal of uniformity be sacrificed at the stage of application. Where they are disregarded, situations similar to a conflict of laws seem to occur but there is no room for the application of choice of law rules. Courts advocating divergent interpretations induce the work of scholars and of sponsoring international organizations directed towards a return to a uniform interpretation. The task of a permanent stewardship of an international convention is incumbent on the organizations which have prepared and promoted the uniform text.