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Final Provisions of UNCITRAL's International Commercial Law Conventions

When invited as a member of *The International Lawyer's* Board of Editorial Advisors to contribute to the Section's Tribute to Professor Sohn, I accepted out of guilt: I had *not* been a student of his, although I could have been. If law students only knew what later life would bring! As a student at the Harvard Law School in the late 1960s when Professor Sohn was there, I was more interested in "comparative revolutions" than I was in the law of the United Nations (or even human rights). Reading U.N. documents, with their formal "memo-randese" and complex document numbers, was far less exciting than reading analyses of the withering away of capitalist legal forms in revolutionary societies. Little did I know that immediately after graduation I would spend time reading U.N. documents as a legal advisor to the prerevolutionary Ethiopian Ministry of Commerce and Industry, and that twenty years later I would spend most of my research energies analyzing the many U.N. background documents for the United Nations Convention on Contracts for the International Sale of Goods.

Having accepted the invitation, I decided to choose a topic that would explore the importance of apparently unimportant detail and formality. No commentator—and I barely exaggerate—spends much time examining the "Final Provisions" of international conventions. This has been especially true of the recent conventions that I have been studying: the commercial law treaties that emanate from the U.N. Commission on International Trade Law (UNCITRAL), the Hague Conference on Private International Law, and the International Institute for the Unification of Private Law. While the greater part of the text of these

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treaties consists of private law rules addressed to non-States or to State organs engaged in commerce, these final provisions address States in their treaty-making capacity. They deal with housekeeping matters (for example, designating the depositary, prescribing rules for ratification or accession, and providing for the effective date), the authorized reservations, and the relation of the convention to other international agreements. Many of these issues are covered by the Vienna Convention on the Law of Treaties, and one might expect the commercial law treaties to incorporate them.¹

This article examines systematically the final provisions of the international conventions prepared by UNCITRAL. Established in 1966,² the Commission has prepared four conventions over the last two decades: The Convention on the Limitation Period in the International Sale of Goods (1974, as amended by a 1980 Protocol) (Limitation Convention),³ the United Nations Convention on the Carriage of Goods by Sea (1978) (Hamburg Rules),⁴ the United Nations Convention on Contracts for the International Sale of Goods (1980) (Sales Convention),⁵ and the Convention on International Bills of Exchange and International Promissory Notes (1988) (Bills Convention).⁶ The first three conven-

1. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969) [hereinafter Vienna Convention].

2. For an introduction to the U.N. Commission on International Trade Law, see UNCITRAL, THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, U.N. Sales No. E.86.V.8 (1986). The annexes to this volume reproduce the texts of the first three conventions discussed in this article.

3. Convention on the Limitation Period in the International Sale of Goods, U.N. Doc. A/CONF.63/15, *reprinted in* United Nations Conference on Prescription (Limitation) in the International Sale of Goods, OFFICIAL RECORDS 101-05, U.N. Doc. A/CONF.63/16 (1975). A diplomatic conference meeting in New York adopted the final text in 1974, but the 1980 diplomatic conference that adopted the Sales Convention (*see infra* note 5) also adopted a Protocol to the 1974 text to conform the provisions of the two conventions [hereinafter Protocol]. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex II, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, OFFICIAL RECORDS 191-92, U.N. Doc. A/CONF.97/19 (1981) [hereinafter Limitation Convention]. The Protocol itself has "Final Provisions." The convention entered into force on Aug. 1, 1988.

4. United Nations Convention on the Carriage of Goods by Sea, U.N. Doc. A/CONF.89/13, Annex I (1978), *reprinted in* United Nations Conference on the Carriage of Goods by Sea, OFFICIAL RECORDS 148-54, U.N. Doc. A/CONF.89/14 (1981). A diplomatic conference meeting in Hamburg adopted the final text in 1978 [hereinafter Hamburg Rules]. The convention is not yet in force. The conference recommended that the rules be known as the "Hamburg Rules" in tribute to the fact that they would replace the "Hague Rules" adopted in the International Convention for the Unification of Certain Rules relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 305. Final Act, Annex III, in OFFICIAL RECORDS 154.

5. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex I, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, OFFICIAL RECORDS, 178-90 U.N. Doc. A/CONF.97/19 (1981). A diplomatic conference meeting in Vienna adopted the final text in 1980 [hereinafter Sales Convention]. The Convention came into force on January 1, 1988.

6. The Convention on International Bills of Exchange and International Promissory Notes appears in an Annex to U.N. G.A. Res. 43/165 of Dec. 9, 1988, *reprinted in* [1988] XIX UNCITRAL Y.B. 173 [hereinafter Bills Convention]. G.A. Res. 42/153 of Dec. 7, 1987, adopted the procedure of review by the General Assembly. [1987] XVIII UNCITRAL Y.B. 43 (decision to create

tions were adopted at diplomatic conferences convoked by the United Nations General Assembly, and the United Nations has published the official records of these conferences.⁷ Due to budget constraints, the last of these conventions, rather than being adopted at a diplomatic conference, was approved on December 9, 1988, by a resolution of the General Assembly following review of the UNCITRAL draft by the Assembly's Sixth Committee. The United Nations has not yet published a single-volume equivalent of the official records available for the other conventions.⁸

When starting the background research for this article I was curious about whether any of the final provisions had been subject to serious debate. I expected that the Vienna Convention on the Law of Treaties would have a significant influence on the content and wording of these provisions. Indeed, I assumed that most of the clauses were boilerplate, but thought that if they were not they would become so as subsequent UNCITRAL conventions copied earlier ones. Aside from debate over what reservations would be authorized, I did not anticipate overtly political debate. In sum, I had no hypothesis to test; I was driven solely by curiosity about what commentators might miss if they slighted the final provisions. What follows summarizes what I found.

I. Scope of Final Provisions

The conventions do not all package the final provisions in the same way. The Limitation Convention (Parts II-IV) distinguishes between "Implementation," "Declarations and Reservations," and "Final Clauses." The Hamburg Rules (Parts VI and VII) distinguish between "Supplementary Provisions" and "Final Clauses," while the Sales Convention (Part IV), the Protocol to the Limitation Convention, and the Bills Convention (Chapter IX) only have "Final Provisions." However packaged, these provisions have the common trait that they are addressed to the States in their treaty-making capacity. Both the recognition of this common trait and the lack of a need to make the refined classification of the Limitation Convention probably explain the evolution towards the simplification in packaging.

The crucial step in this evolution came between the Limitation Convention and the Hamburg Rules. Of the Limitation Convention's three articles dealing with

a working group within the framework of the Sixth Committee to meet at the beginning of the General Assembly's Forty-Third Session for a maximum of two weeks). See also UNCITRAL's discussion of procedure at its 20th session in 1987. *Id.* at 33, paras. 300-03. The convention is not yet in force.

7. See *supra* notes 3-5 for the official citations to the Official Records.

8. The summary records of the UNCITRAL debates discussing the text of the draft convention appear in the 1986 and 1987 UNCITRAL Yearbooks. The relevant summary record of discussion of the draft final clauses (U.N. Doc. A/CN.9/SR.385) is set out in [1987] XVIII UNCITRAL Y.B. 186-90. Documents of the General Assembly relative to the adoption of the Convention on International Bills of Exchange and International Promissory Notes are reprinted in [1988] XIX UNCITRAL Y.B. 187.

implementation of the convention, the Hamburg Rules omit two and consolidate the third in an article defining when the convention entered into force.⁹ As for reservations, whereas the Limitation Convention allows four reservations and requires six articles to so provide, the Hamburg Rules prohibit reservations in a single article.¹⁰ Consequently, the Hamburg Rules are able to eliminate, without difficulty, the separate two parts of the Limitation Convention dealing with "Implementation" and "Declarations and Reservations," respectively. The Hamburg Rules do include a separate Part VI on "Supplementary Provisions," but Part VI's four articles deal with particular problems associated with prior shipping legislation, and only one of these—article 25 (the relation of the Hamburg Rules to other conventions)—deals with a topic that appears in the final provisions of the other conventions.¹¹ The Sales Convention continues to simplify the presentation of the final provisions by lumping them together in an unclassified final part called "Final Provisions." The Bills Convention adopts, without debate, the same approach.

II. Adoption of the Final Provisions

Steps for drafting and adoption of the UNCITRAL conventions have followed the same basic pattern. For each project, the U.N. Commission delegated to a Working Group the task of preparing a draft convention for consideration by the Commission at one or more of its annual meetings. In turn, preparation of the initial draft was usually delegated to the UNCITRAL Secretariat. After debating the draft text submitted by the Working Group and after taking into account comments from governments or other international bodies, the Commission approved a draft and recommended to the United Nations General Assembly that it convene a diplomatic conference (or, in the case of the Bills Convention, the General Assembly itself) to adopt an official text. If the General Assembly acquiesced, as it invariably did, the Commission circulated the draft text and supporting documents to governments and interested international organizations for their comments.¹² The subsequent conference considered the circulated doc-

9. The Hamburg Rules omit arts. 31 (federal state article) & 32 (applicable law in jurisdiction where different systems of law might apply) of the Limitation Convention. The Hamburg Rules consolidate the substance of art. 33 (nonapplicability as to prior contracts) of the Limitation Convention with the Hamburg Rules provision on entry into force, art. 30.

10. Limitation Convention, *supra* note 3, arts. 34-40; Hamburg Rules, *supra* note 4, art. 29. The Sales and Bills Conventions pick up some of the Limitation Convention's articles in its "Declarations and Reservations" Part, but the later conventions incorporate these provisions in the general catch all "Final Provisions."

11. Hamburg Rules, *supra* note 4, arts. 23-26. Art. 23 prohibits contractual stipulations that derogate from the Convention's provisions; art. 24 allows the continued application of rules regarding adjustment for general average; and art. 26 defines a "unit of account" to permit adjustment of the prior articles limiting liability (*e.g.*, art. 6).

12. For a more detailed description of the procedure within the Commission, see UNCITRAL, *supra* note 2, at 8-11.

uments and the comments on them in its deliberations. The conference typically divided into two main committees open to all participants, and the reports of these committees were reviewed at plenary sessions. The final text was then opened for signature and ratification or accession.¹³

With respect to adoption of the conventions' final provisions, the Commission played a less important role, and the Secretariat a correspondingly more important role. The U.N. Secretary-General, acting through the Secretariat, prepared the draft of the final provisions at the formal request of the Commission or one of its Working Groups.¹⁴ The Secretariat's drafts reflected considerable caution. They frequently included bracketed material (especially to indicate proposed dates, but sometimes to highlight potentially controversial proposed articles),¹⁵ occasionally set out alternative drafts of more controversial articles,¹⁶ often indicated the provenance of the proposed articles,¹⁷ and included commentary

13. The diplomatic conferences adopted at a plenary session the rules of procedure for that conference. See, e.g., Limitation Convention, *supra* note 3, at xiii.

14. The public record for the Limitation Convention does not state expressly that the Secretariat prepared the text of the final clauses, but does note that the Working Group did not consider them. "In response to the Commission's request, the Working Group completed the final draft of a convention on prescription (limitation), in the field of international sale of goods; the text appears as annex I. . . . The provision of part IV, final clauses, were not considered by the Working Group." *Report of the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods on its third session* para. 8, U.N. Doc. A/CN.9/70 (1971), reprinted in [1972] III UNCITRAL Y.B. 109, 110 [hereinafter *Report of Working Group*]. Note, however, that the Working Group did consider the draft articles on implementation, declarations, and reservations. See *supra* notes 9-10. The first draft of the final provisions was published in an Annex I of the Working Group's report on its third session as part of the draft convention. [1972] III UNCITRAL Y.B. 109, 114.

The record for the other conventions is clearer because the Secretary-General or Secretariat published the draft provisions in separate documents. *Report of the Secretary-General: draft Convention on the Carriage of Goods by Sea; draft provisions concerning implementation, reservations and other final clauses*, U.N. Doc. A/CN.9/115 (1976), reprinted in [1976] VII UNCITRAL Y.B. 299; *Report of the Secretary-General: draft Convention on the International Sale of Goods; draft articles concerning implementation and other final clauses*, U.N. Doc. A/CN.9/135 (1977), reprinted in [1977] VIII UNCITRAL Y.B. 164; *Draft Convention on International Bills of Exchange and International Promissory Notes: draft final clauses: note by the Secretariat*, U.N. Doc. A/CN.9/WG.IV/WP.33 (1987), reprinted in [1987] XVIII UNCITRAL Y.B. 99 [hereinafter *Note by the Secretariat*].

15. See, e.g., draft art. 42 (1) of the Limitation Convention: "The present Convention shall enter into force [six months] after the date of the deposit of the [] instrument of ratification or accession." *Report of Working Group*, *supra* note 14, Annex I, at 114.

For use of brackets to highlight a potentially controversial article, see Bills Convention, *supra* note 6, draft arts. 82, 85, & 87. Note by the Secretariat, *supra* note 14, at 99-100 (relation to other conventions; prohibition of reservations; effective date).

16. See, e.g., draft art. 44 of the Limitation Convention which proposes, with footnotes indicating provenance, Alternative A and Alternative B with respect to a declaration on territorial application. *Report of Working Group*, *supra* note 14, Annex I, at 114. Objections from delegates arguing that the article was a remnant of colonialism ultimately led to deletion of this proposed article. *Summary Record of first meeting of Second Committee*, paras. 55-78, U.N. Doc. A/CONF.63/C.2/SR.1, reprinted in Limitation Convention, *supra* note 3, at 248-49.

17. Footnotes to the draft of the Limitation Convention's final provisions indicate, for example, that they are based on the final clauses of the Vienna Convention on the Law of Treaties and the 1964

explaining the reason for a proposal.¹⁸ The drafts, however, followed no single pattern. The most careful draft was for the Sales Convention: the Secretariat indicated sources in prior conventions and provided ample commentary. The other drafts were not as systematic. The Limitation Convention had footnotes indicating sources, but did not have a complete commentary; the Hamburg Rules had only a few footnotes and no commentary; and the Bills Convention stated summarily that the articles were modelled on the Sales Convention.

With the exception of several persistent issues, neither the Commission's Working Groups¹⁹ nor the Commission itself debated the final provisions at length. The Commission's final report on the Limitation Convention carefully noted that "[t]he following articles were not considered by the Commission and it was agreed that they should be submitted for consideration to the proposed International Conference of Plenipotentiaries."²⁰ With respect to the Hamburg Rules and Sales Convention, the Commission affirmatively decided that the conference of plenipotentiaries was a more appropriate body to review the final provisions.²¹ The Commission, however, debated at greater length the draft final provisions of the Bills Convention, perhaps because of concern about whether

Hague Sales Convention. The footnotes to draft arts. 39-42 (arts. 41-44 of the final text) state, for example, that they are based on arts. 81-84 of the Vienna Convention on the Law of Treaties, while draft arts. 43-45 are based on arts. XII, XIII, and XV of the Hague Convention relating to a Uniform Law on the International Sale of Goods. *Report of Working Group*, *supra* note 14, Annex I, at 114.

18. See, e.g., the comments to the Sales Convention. *Report of the Secretary-General: draft Convention on the International Sale of Goods; draft articles concerning implementation and other final clauses*, U.N. Doc. A/CN.9/135 (1977), reprinted in [1977] VIII UNCITRAL Y.B. 164.

19. In the cases of the Hamburg Rules and Sales Convention, the Working Groups requested that the draft be submitted to the Commission without review by the Working Group; in the case of the Bills Convention, the Commission requested that the Secretariat submit the draft to the Working Group, but there is no record that the Working Group reviewed the draft. See *Report of the Working Group on International Legislation on Shipping on the work of the eighth session*, U.N. Doc. A/CN.9/105 (1975), reprinted in [1975] VI UNCITRAL Y.B. 222, 245 ("The Working Group did not consider draft provisions concerning implementation, declarations and reservations, or final clauses for the draft Convention. It requested the Secretariat to prepare draft articles dealing with these topics for consideration by the Commission at its ninth session."); *Report of the Working Group on the International Sale of Goods on the work of its seventh session*, para. 11, U.N. Doc. A/CN.9/116 (1976), reprinted in [1976] VII UNCITRAL Y.B. 88; *Report of the United Nations Commission on International Trade Law on the work of its nineteenth session*, para. 223, U.N. Doc. A/41/17 (1986), reprinted in [1986] XVII UNCITRAL Y.B. 3, 29.

20. *Report of the United Nations Commission on International Trade Law on the work of its fifth session*, para. 22, U.N. Doc. A/8717 (1972), reprinted in [1972] III UNCITRAL Y.B. 9, 15.

21. *Report of the United Nations Commission on International Trade Law on the work of its ninth session*, Annex I, *Draft provisions concerning implementation, reservations and other final clauses*, para. 1, U.N. Doc. A/31/17, reprinted in [1976] VII UNCITRAL Y.B. 9, 65 [hereinafter *Report of Commission's ninth session*] (Commission, meeting as a Committee of the Whole, took no action with respect to the final provisions "on the ground that they could best be considered at the conference on plenipotentiaries that will be convened to adopt the convention on the carriage of goods by sea"). See also *Report of the United Nations Commission on International Trade Law on the work of its tenth session*, Annex I, paras. 558-59, U.N. Doc. A/32/17 (1977), reprinted in [1977] VIII UNCITRAL Y.B. 11, 64 (Sales Convention) [hereinafter *Report on Trade Law tenth session*].

there was to be a diplomatic conference to review these provisions.²² The Commission most often debated those draft provisions that dealt with possible reservations and the relation of the draft convention with prior conventions. For each of the conventions, however, the Commission concluded by requesting that the Secretariat revise its draft in the light of Commission debates and circulate the draft with the other documents to governments and interested international organizations.²³ When there had been debate within the Commission, the Secretariat was equally cautious in the preparation of this new draft text. For example, the two alternative formulae proposed to govern when the Hamburg Rules would come into force became six alternatives in the draft that was circulated and then submitted to the diplomatic conference.²⁴ As a consequence, each diplomatic conference convoked by the U.N. General Assembly had before it not only the Secretariat's draft of the final provisions, but also an analysis of the responses of governments and international organizations to the draft convention as a whole. These responses, however, rarely commented on the final provisions.²⁵

In the case of the first three conventions, the diplomatic conference, at the beginning of its deliberations, assigned the final clauses to the second of two committees. At each conference the Second Committee met significantly less often than the First Committee. At the conference on the Sales Convention, for

22. At the 1987 meeting of the Commission, the observer for Venezuela: doubted that the Commission was the proper forum for consideration of the final clauses of an international convention. Such clauses involved issues which were political in nature and should, in his view, be considered by the General Assembly or by a plenipotentiary conference. Since, however, the majority of members appeared to deem it appropriate that the Commission should consider the final clauses in the present instance, his delegation would refrain from raising a formal objection.

Summary Record of the 379th Meeting of UNCITRAL, para. 7, U.N. Doc. A/CN.9/SR.379, reprinted in [1987] XVIII UNCITRAL Y.B. 168 [hereinafter *379th Meeting of UNCITRAL*].

23. See, e.g., *Report of Commission's ninth session*, *supra* note 21, para. 42, at 14 which states: In regard to the draft provisions concerning implementation, reservations, and other final clauses for the draft Convention on the Carriage of Goods by Sea (U.N. Doc. A/CN.9/115), the Commission decided that these draft provisions, as modified by the Secretariat in conformity with the proposals adopted by Committee I, should be circulated, together with the draft Convention, to Governments and interested international organizations for comments and proposals.

24. Text of the *Provisions of the Draft Convention on the Carriage of Goods by Sea Concerning Implementation, Reservations and other Final Clauses prepared by the Secretary-General*, U.N. Doc. A/CONF.89/6 and Add. 1 & 2, reprinted in *Hamburg Rules*, *supra* note 4, at 11, 13-15.

25. In the case of the Sales Convention, the Secretariat's draft final provisions had not reached Governments in time for detailed study and comment. *Analysis of comments and proposals by Governments and international organizations on the draft Convention on Contracts for the International Sale of Goods, and on the draft provisions concerning implementation, reservations and other final clauses prepared by the Secretary-General*, U.N. Doc. A/CONF.97/9 (1980), reprinted in *Sales Convention*, *supra* note 5, at 82 ("Even though [the Secretary-General's report on draft provisions concerning implementation] had not been published at the time comments and proposals were requested, comments were received from several States").

example, the Second Committee met only nine times, while the First Committee met thirty-eight times.²⁶ In general, the Second Committee considered and adopted a proportionately higher number of amendments for the final provisions than for the other articles. By my count, for example, delegates to the conference on the Sales Convention proposed twenty-nine amendments, of which the conference adopted sixteen, rejected eight, sent two to the drafting committee, and permitted the withdrawal of three.²⁷ During the Second Committee's consideration of the final provisions of each convention representatives of the Secretariat played an important role by clarifying points of international treaty practice.²⁸

After the two committees had completed their deliberations on a convention, the conference reviewed the committee reports at plenary meetings, with review of the Second Committee's report following debate on the report of the First Committee. Although under pressure to complete work, each conference adopted a surprising number of amendments to the final provisions. The most dramatic of these last-minute amendments was the addition of article 95 to the Sales Convention to permit States to declare that they would not be bound by article 1(1)(b) and thereby limit the Convention's application.²⁹

III. Content of Final Provisions

The final provisions in these UNCITRAL conventions fall into five categories: "housekeeping" provisions; provisions for the implementation of the conventions; reservations; provisions defining the relation of the conventions to prior and subsequent international agreements; and provisions on revision and amendment of the conventions.

A. HOUSEKEEPING PROVISIONS

Each convention contains provisions informing States where, when, and how to become a party to the convention (Contracting State). These articles designate the depositary; prescribe rules on signature, ratification, and accession; prescribe rules for declarations; designate the effective date; provide procedures for de-

26. Sales Convention, *supra* note 5, at 236-433, 434-80. (The number of meetings that the Second Committee devoted to the Sales Convention is approximately six because the Second Committee also considered the proposed Protocol to the 1974 Limitation Convention at the sixth through ninth meetings.)

27. Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 1, 40 n.86 (N. Galston & H. Smit eds. 1984).

28. See, e.g., the comment by the Executive Secretary of the Conference on the Limitation Convention calling attention to General Assembly resolutions. First meeting of the Second Committee, para. 31, U.N. Doc. A/CONF.63/C.2/SR.1, *reprinted in* Limitation Convention, *supra* note 3, at 247.

29. Eleventh plenary meeting, paras. 78-98, U.N. Doc. A/CONF.63/SR.11, *reprinted in* Sales Convention, *supra* note 5, at 229-30.

nunciation; and conclude with an authentic text and witness clause (the testimony). With minor exceptions, each convention has each of these "housekeeping" provisions.³⁰

Of all the final provisions, these articles are the closest to boilerplate (that is, unbargained-for contract language).³¹ By comparing texts, one can easily trace the evolution of each of the final provisions. The last of the conventions, the Bills Convention, copies almost verbatim the related final provisions from the Sales Convention.³² The Sales Convention, in turn, draws upon the final clauses of both the Hamburg Rules and the Limitation Convention.³³ The Hamburg Rules simplify some of the Limitation Convention's final clauses, while the Limitation Convention itself looks for models to the final clauses in the Vienna Convention on the Law of Treaties and the 1964 Hague Sales Convention.³⁴

At some point in the evolution of each final provision, a conference debated its form and content. Consider, for example, the innocuous article designating the United Nations Secretary-General as the depositary. Articles 42 and 43 of the Limitation Convention cover ratification and accession, respectively. The second sentence in these two articles states "[t]he instruments of [ratification/accession] shall be deposited with the Secretary-General of the United Nations." Article 27 of the Hamburg Rules simplifies this form by stating in a single, separate article that "The Secretary-General of the United Nations is hereby designated as the depositary of this Convention." The reason given by the Secretariat for this change was "that the text before the committee had been drafted in the simplest form possible because the procedures relating to the functions of the depositary were already well-established under the Vienna Convention on the Law of

30. Not all commentators would agree on this list of housekeeping provisions. Mr. Kritzer, for example, omits the entry into force and declarations clauses from his list. A. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 558-60 (1989).

31. B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 90 (1987) defines "boilerplate" as "ready-made or all-purpose language that will fit a variety of contexts." The origin appears to be "syndicated material supplied esp. to weekly newspapers in matrix or plate form." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 247 (1986) (defin. 2 a).

32. "The draft final clauses set forth in this note are modelled on the final provisions of the [Sales Convention]." *Note by the Secretariat*, *supra* note 14, para. 2. The draft did not include the equivalent of Sales Convention, art. 97 (declarations), presumably because the draft did not contemplate that reservations would be permitted. The final text, however, permits one reservation but still does not provide for declarations. Bills Convention, *supra* note 6, art. 88(1).

33. The Secretariat indicates the sources of the draft final clauses in footnotes to the draft text submitted to the Sales Conference. *Draft Convention on Contracts for the International Sale of Goods: Draft Articles Concerning Implementation, Declarations, Reservations and Other Clauses*, U.N. Doc. A/CONF.97/6 (1979), reprinted in Sales Convention, *supra* note 5, at 66-70.

34. Footnotes to the draft text submitted to the Limitation Conference indicate that the drafters looked to arts. 81-84 of the Vienna Convention on the Law of Treaties and arts. XII, XIII, and XV of the Hague Convention relating to a Uniform Law on the International Sale of Goods. *Text of the Draft Convention on Prescription (Limitation) in the International Sale of Goods* arts. 39-46, U.N. Doc. A/CONF.63/4 (1974), reprinted in Limitation Convention, *supra* note 3, at 4, 9-10.

Treaties.”³⁵ Article 89 of the Sales Convention and article 85 of the Bills Convention adopt the Hamburg Rules formulation with the drafting refinement that “for this Convention” is substituted for “of this Convention.”

While the Limitation and Hamburg conferences did not discuss these changes in language, there was debate at the conferences about whether the conventions should spell out the duties of the depositary. The original draft submitted to the Limitation conference included an article requiring the Secretary-General to give Contracting Parties notices received pursuant to other articles. The conference rejected the article because it was not exhaustive and might therefore be read to be restrictive, and because a depositary's functions were spelled out in the Vienna Convention on the Law of Treaties.³⁶ At the Hamburg conference the Indian delegate objected that the draft article was incomplete without a description of the functions of the depositary, and, together with the Ecuadorian delegate, he proposed the addition of the clause “and he shall discharge all the functions of a depositary” to make clear that the functions of a depositary as spelled out in article 77 of the Vienna Convention on the Law of Treaties were vested exclusively in the Secretary-General. After numerous comments, the Second Committee rejected the Indian-Ecuadorian proposal as unnecessary and not an improvement on the draft text.³⁷

Similar examples can be given from the evolution of the other housekeeping provisions. In some cases subsequent changes added a gloss, rather than simplifying the text used as a model. When introducing a new subarticle (3) to article 93 (federal state clause) of the Sales Convention, for example, the Canadian delegate noted that the new paragraph clarified the term “Contracting State” when used in the context of the federal state clause and therefore improved the Limitation Convention article used as a model.³⁸

Debate on these housekeeping provisions was relatively benign. The principal exception was the politically charged debate on when the Hamburg Rules should come into force. For each convention there was debate about how many States must become a party before the convention would come into force, but debate was about the number of States rather than the formula itself. For the Hamburg

35. First meeting of the Second Committee, para. 19, U.N. Doc. A/CONF.89/C.2/SR.1, *reprinted in* Hamburg Rules, *supra* note 4, at 373.

36. First meeting of the Second Committee, paras. 79-83, U.N. Doc. A/CONF.63/C.2/SR.1, *reprinted in* Limitation Convention, *supra* note 3, at 249. The U.K. delegate noted very carefully, however, that the Vienna Convention was not yet in force. *Id.* para. 82.

37. First meeting of the Second Committee, para. 17, U.N. Doc. A/CONF.89/C.2/SR.1 and second meeting of the Second Committee, paras. 7-24, U.N. Doc. A/CONF.89/C.2/SR.2, *reprinted in* Hamburg Rules, *supra* note 4, at 373, 375-76. In the course of debate the Chairman, Mr. Popov of Bulgaria, “wondered whether the Conference had the right to inform the Secretary-General that he must perform the functions of a depositary and to tell him what those functions were. The Secretary-General could surely be assumed to know what functions he was expected to perform as depositary.” *Id.* para. 9.

38. Third meeting of the Second Committee, para. 25, U.N. Doc. A/CONF.97/C.2/SR.3, *reprinted in* Sales Convention, *supra* note 5, at 445. For unexplained reasons, the Bills Convention omits this gloss in art. 87.

Rules, however, the Secretariat and UNCITRAL presented the conference with six alternatives, some of which included complex formulae taken from prior shipping conventions to ensure that the convention would not come into effect without the participation of at least some States with large merchant fleets.³⁹ Proponents of an alternative that would make entry into force dependent only on the number of Contracting States spoke of the need to ensure that carrier nations would not have a veto power over the coming into force of the convention.⁴⁰ Calling attention to the recent General Assembly resolution on the Establishment of a New International Economic Order, the Indian delegate suggested that a formula based on the size of a Contracting State's merchant fleet would undercut the convention's attempt to "strike an equitable balance between the interests of shippers and of carriers."⁴¹ The conference ultimately adopted the simpler formula requiring only a specified number of Contracting States, but made that number twenty rather than ten, the figure used in the other conventions.⁴²

B. IMPLEMENTATION⁴³

With the exception of a "federal State" clause, the conventions do not state what steps a Contracting State must take in order to bring the conventions into force within their territory. The draft Limitation Convention included an article to this effect, but the diplomatic conference voted to delete the article as superfluous because the international law principle of *pacta sunt servanda* requires Contracting States to ensure that a treaty is observed.⁴⁴ None of the other conventions returns to this earlier draft.

39. Report of the Second Committee, paras. 29-35, U.N. Doc. A/CONF.89/11, reprinted in Hamburg Rules, *supra* note 4, at 125, 128-31. Two of the six alternatives defined the relation of the Hamburg Rules to the existing Hague Rules.

40. Fourth meeting of the Second Committee, para. 1, U.N. Doc. A/CONF.89/C.2/SR.4, reprinted in Hamburg Rules, *supra* note 4, at 380 (remark of Indonesian delegate).

41. *Id.* para. 10, at 381.

42. Hamburg Rules, *supra* note 4, art. 30(1). See eleventh meeting of the Second Committee, para. 49, U.N. Doc. A/CONF.89/C.2/SR.11, reprinted in *id.* at 404.

43. Part II of the Limitation Convention includes three articles under the rubric "Implementation": a federal state clause discussed in the text *infra*; an article on the applicable law in federal and non-unitary States with more than one system of law; and an article on what contracts will be governed by the convention. Limitation Convention, *supra* note 3, arts. 31-33. The United States proposed the second of these articles, art. 32, which reads: "Where in this Convention reference is made to the law of a State in which different systems of law apply, such reference shall be construed to mean the law of the particular legal system concerned." See Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First-Born*, 23 AM. J. COMP. L. 337, 351 (1975) ("While this direction is not particularly clear, it has the merit of recognizing the problem and of indicating the proper approach towards its solution"). This article has disappeared without a trace and without explanation.

44. Text of the Draft Convention on Prescription (Limitation) in the International Sale of Goods, art. 30, U.N. Doc. A/CONF.63/4, reprinted in Limitation Convention, *supra* note 3, at 4, 8:

[Implementing Legislation]

[Subject to the provisions of article 31, each Contracting State shall take such steps as may be necessary under its constitution or law to give the provisions of Part I of this

A recurring issue has been how to implement the conventions within federal States whose constitutions limit the authority of the federal government with respect to the subject matter covered by the conventions. Canada, as the State most concerned, has been the principal proponent of a "federal State" clause. At the Limitation conference the Canadian delegate noted that:

under the Canadian Constitution, which conferred upon the provinces exclusive power to legislate in private and commercial matters, the federal Parliament could not pass laws directly on such matters as prescription. However, only Canada as a sovereign State had access to international forums and could participate in international treaties. Canada wanted a uniform law on the subject and did not wish to have any special privilege.⁴⁵

When presenting his delegation's proposed text of the federal State clause, the Canadian delegate stressed that the proposal was "patterned closely on similar clauses in existing conventions and therefore should not raise too many difficulties."⁴⁶

The text proposed by Canada became article 31 of the Limitation Convention:

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. This declaration shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

Article 31 has served as the model for similar provisions in the Sales and Bills Conventions.

Convention the force of law not later than the date of the entry into force of this Convention in respect of that State.]

First meeting of the Second Committee, paras. 5-13, U.N. Doc. A/CONF.63/C.2/SR.1, *reprinted in id.* at 245 (art. 30 deleted).

45. Fourth meeting of the Second Committee, para. 2, U.N. Doc. A/CONF.63/C.2/SR.4, *reprinted in* Limitation Convention, *supra* note 3, at 251. See Leal, *Federal State Clauses and the Conventions of the Hague Conference on Private International Law*, 8 DALHOUSIE L.J. 257 (1984).

46. Second meeting of the Second Committee, para. 8, U.N. Doc. A/CONF.63/C.2/SR.2, *reprinted in* Limitation Convention, *supra* note 3, at 250. (The Canadian delegate later cited as precedents some Hague Conventions. Tenth plenary meeting, para. 2, U.N. Doc. A/CONF.63/SR.10, *reprinted in* Limitation Convention, *supra* note 3, at 130.) At the fourth meeting of the Second Committee, the Canadian delegate noted:

Although the amendment was closely patterned on similar provisions in earlier conventions, two changes had been introduced. One was the addition of the third paragraph, the purpose of which was to clarify the situation that would apply in the case of States under whose Constitution the central Government had power to legislate on all matters. The purpose of the second change was to make it clear that the different systems of law applicable in the various territorial units must be based on the Constitution of the federal State.

Fourth meeting of the Second Committee, para. 4, U.N. Doc. A/CONF.63/C.2/SR.2, *reprinted in* Limitation Convention, *supra* note 3, at 251.

Initial debate over this article was heated. At the Limitation conference the U.S.S.R. delegate urged its deletion:

While any State might have its own specific problems connected with domestic legislation, all States acceding to an international treaty must nevertheless ensure observance of the treaty on an equal basis. The proposed article would lead to the granting of a privileged position to federal States, as opposed to unitary States, which would be contrary to the principle of the sovereign equality of States.⁴⁷

The delegate later argued that the Canadian draft text was inconsistent with article 29 of the Vienna Convention on the Law of Treaties, which makes treaties applicable to the entire territory of Contracting States.⁴⁸ The Czechoslovak delegate objected that the broadly-drafted text was a reversion to objectionable clauses providing for colonial territories that the conference had already rejected,⁴⁹ while the Indian delegate suggested that the proposal might lead to intervention into the internal affairs of other States.⁵⁰

Despite these objections, the Second Committee at the Limitation conference adopted the Canadian proposal by fifteen votes to eleven, with two abstentions,⁵¹ and the conference itself adopted the text by twenty-three votes to ten, with one abstention.⁵² At the time of the latter vote, the Australian delegate stated that his delegation "regarded the clause as being inappropriately drafted and not to be taken as a model for future conventions."⁵³

Despite Australian concerns, article 31 of the Limitation Convention is the model for similar articles in the Sales and Bills Conventions.⁵⁴ The Secretariat submitted two draft alternatives to the Sales conference, one modelled on article

47. First meeting of the Second Committee, para. 14, U.N. Doc. A/CONF.63/C.2/SR.1, *reprinted in* Limitation Convention, *supra* note 3, at 245. *See also id.* para. 23, at 246.

48. Fourth meeting of the Second Committee, para. 10, U.N. Doc. A/CONF.63/C.2/SR.4, *reprinted in* Limitation Convention, *supra* note 3, at 252. The U.K. delegate responded to the U.S.S.R. delegate by noting that art. 29 of the Vienna Convention itself provided that its rule did not apply if a treaty provided otherwise. *Id.* para. 15.

49. *Id.* para. 6, at 251. The conference rejected draft art. 44 [Declaration on territorial application], which made the convention applicable, in one alternative, to "all or any of the territories for whose international relations it is responsible," or, in the other alternative, to "all non-metropolitan territories for the international relations of which any Party is responsible." *Text of the Draft Convention on Prescription (Limitation) in the International Sale of Goods*, U.N. Doc. A/CONF.63/4 (1974), *reprinted in* Limitation Convention, *supra* note 10. The Second Committee rejected the draft article at its first meeting. First meeting of the Second Committee, paras. 55-78, U.N. Doc. A/CONF.63/C.2/SR.1, *reprinted in* Limitation Convention, *supra* note 3, at 248-49.

50. Fourth meeting of the Second Committee, para. 20, *reprinted in* Limitation Convention, *supra* note 3, at 252.

51. *Id.* para. 38, at 253.

52. Tenth plenary meeting, para. 5, U.N. Doc. A/CONF.63/SR.10, *reprinted in* Limitation Convention, *supra* note 3, at 130.

53. Ninth plenary meeting, para. 53, U.N. Doc. A/CONF.63/SR.9, *reprinted in* Limitation Convention, *supra* note 3, at 129.

54. Presumably because maritime matters fall within the Canadian federal government's authority, Canada did not press for retention of the draft federal state clause in the Hamburg Rules. Seventh meeting of the Second Committee, para. 3, U.N. Doc. A/CONF.89/C.2/SR.7, *reprinted in* Hamburg Rules, *supra* note 4, at 390.

31 and the other on article 11 of the Convention on the Recovery Abroad of Maintenance.⁵⁵ Canada favored the former alternative, while Australia favored the latter alternative, which merely required a federal government to recommend favorable action to federal units that had competence to act on the subject matter of the convention and to inform the depositary about the status of the convention in the different federal units. The Second Committee appointed the two delegations to a working group, and the group ultimately endorsed the Canadian proposal, with an additional paragraph to fill a gap in the original text. The Sales conference adopted this proposal both for the Sales Convention and for the Protocol amending the Limitation Convention.⁵⁶ The Bills Convention, on the other hand, omitted without discussion the paragraph introduced in the Sales Convention.⁵⁷

C. RESERVATIONS

Each of the four conventions prohibits Contracting States from making reservations other than those specifically authorized by the convention itself. The Hamburg Rules prohibit reservations altogether; the Bills Convention allows only one; the Limitation and Sales Conventions permit four each—or five each, if one also counts the federal State clause as a reservation.⁵⁸

The decision to prohibit reservations other than those specifically authorized was not uncontroversial. The Limitation conference first adopted a motion to delete the proposed prohibition, but then reversed itself.⁵⁹ The motion was made by a delegate from the U.S.S.R. on the ground that article 19 of the Vienna Convention on the Law of Treaties adequately dealt with the matter by prohibiting reservations incompatible with the object and purpose of a convention.⁶⁰ In

55. Convention on the Recovery Abroad of Maintenance, June 20, 1956, art. 11, 268 U.N.T.S. 3. *Report on Trade Law*, tenth session, *supra* note 21, Annex I, para. 560, at 65: "The Committee also recommends that the Commission request the secretariat to invite federal and non-unitary States to indicate their views on the desirability of a federal State clause in the Convention on the International Sale of Goods. The representative of Australia indicated his reservation on this point." The report does not indicate the ground for the Australian reservation.

56. Sales Convention, *supra* note 5, art. 93; Protocol, *supra* note 3, art. III. The stated reason for the addition of the new paragraph was that:

in the absence of a provision such as that contained in the proposed new paragraph, article 1(1)(a), could cause the Convention to apply to a contract between a party in a unitary Contracting State and a party in a territorial unit of a federal Contracting State, even though the Convention did not extend to that unit.

Third meeting of the Second Committee, para. 25, U.N. Doc. A/CONF.97/C.2/SR.3, *reprinted in* Sales Convention, *supra* note 5, at 445.

57. Bills Convention, *supra* note 6, art. 87.

58. Limitation Convention, *supra* note 3, art. 39; Hamburg Rules, *supra* note 4, art. 29; Sales Convention, *supra* note 5, art. 98; Bills Convention, *supra* note 6, art. 88.

59. Tenth plenary meeting, paras. 34-56, U.N. Doc. A/CONF.63/SR.10, *reprinted in* Limitation Convention, *supra* note 3, at 132-34.

60. *Id.* para. 43. Art. 19 of the Vienna Convention provides:

response it was pointed out that it would be very difficult for business enterprises to ascertain what reservations were in effect in any particular country, and that the proposal might permit States to adopt reservations expressly rejected by the conference.⁶¹ At the Hamburg conference there was little opposition to the prohibition of reservations because to allow reservations might undermine the delicate compromise between the shipping and carrier States represented by the substantive rules of the convention.⁶² With less debate, the Sales conference adopted the prohibition because to allow reservations would undermine uniformity and create uncertainty.⁶³ A similar prohibition in the draft Bills Convention, however, ran into trouble in the UNCITRAL deliberations on the ground that States should not be limited as to the reservations they might wish to make.⁶⁴ Again, the argument that business enterprises would face severe difficulties in the absence of a prohibition carried the day.⁶⁵

As one would expect, and the conference records bear out, the conventions only permit reservations with respect to issues that could not be resolved by debate. Some reservations relate to a convention's sphere of application, while others preserve particular doctrines or institutions strongly desired by particular

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Vienna Convention, *supra* note 1, art. 19.

61. See, e.g., tenth plenary meeting, para. 51 *reprinted in* Limitation Convention, *supra* note 3. "States would in practice to some extent be able to make the reservations they wished, including those which they had proposed to the Conference and which had been rejected by vote. . . . [A]rticle 39 was essential for both businessmen and lawyers because it was unfair to expect them to spend time and money finding out whether and on what terms a particular State was a party to the Convention." *Id.* para. 53.

62. See generally *Summary Records of 37th meeting of the First Committee*, paras. 12-30, U.N. Doc. A/CONF.89/C.1/SR.37, *reprinted in* Hamburg Rules, *supra* note 4, at 367-68. See, e.g., *id.* para. 25 ("the very purpose of the Convention, which was to codify international law in the matter and to introduce uniformity, would be undermined").

63. See generally sixth meeting of the Second Committee, paras. 9-22, U.N. Doc. A/CONF.97/C.2/SR.6, *reprinted in* Sales Convention, *supra* note 5, at 458-59. See, e.g., *id.* para. 9 ("[I]t was important not to allow reservations to be made to the Convention since they would weaken it and give rise to uncertainty. . . . [T]he lack of any provision that no other reservations were permissible would enable a State to make a reservation to any article as it saw fit.").

64. See generally 379th Meeting of UNCITRAL, *supra* note 22, paras. 11-39, at 169-70. For example, Venezuelan observer and the Iraqi delegate commented that the prohibitions "should be deleted in order to allow States to consider such reservations as they might wish to enter," and that they "should be deleted in order to allow member States to express relevant reservations according to their national legislation." *Id.* paras. 23 & 27, respectively.

65. Bills Convention, *supra* note 6, art. 88(2). See, e.g., *id.* para. 31(f) (comment of the Finnish delegate, that "from the point of view of the practice of private law as covered by the Convention, it would be almost impossible for those dealing in instruments to keep track, at all stages, of all the reservations that could be made").

delegations. Among the former reservations are the Sales Convention's article that permits a Contracting State to declare that it will not be bound by article 1(1)(b) of the convention⁶⁶ and the Bills Convention article that authorizes a Contracting State to apply the convention only when the place where the bill is made and the place of payment are situated in Contracting States.⁶⁷ Examples of reservations preserving particular doctrines include the Limitation Convention's article that authorizes a Contracting State to exclude "actions for annulment" from the convention's scope⁶⁸ and the Sales Convention's provision permitting a Contracting State to declare that it will not be bound by the convention's provisions dispensing with formal requirements.⁶⁹ Unless one also counts the federal State clause as a reservation, only one reservation appears in the same form in more than one convention: both the Limitation and Sales Conventions authorize Contracting States that have closely related legal systems to exclude application of the conventions to contracts between enterprises situated in these States.⁷⁰

D. RELATION TO PRIOR AND SUBSEQUENT INTERNATIONAL AGREEMENTS

The most consistently difficult issue addressed in each convention is its relation to prior and subsequent conventions. The new conventions replace or complement prior conventions dealing with the same subject matter. To the extent they are intended to replace these earlier conventions, the new conventions must deal with the transition to the new regime. In any event, the new conventions usually attempt to define their relation to other existing conventions, to amend-

66. Sales Convention, *supra* note 5, art. 95. Art. 1(1)(b) makes the Sales Convention applicable "when the rules of private international law lead to the application of the law of a Contracting State."

67. Bills Convention, *supra* note 6, art. 88(1). Art. 2(1) provides that only one of the two places must be situated in a Contracting State.

68. Limitation Convention, *supra* note 3, art. 35. As explained in the official commentary, some legal systems require that the nullity of a contract be determined by an initial "action for annulment." *Commentary on the Convention on the Limitation Period in the International Sale of Goods*, A/CONF.63/17, reprinted in [1979] X UNCITRAL Y.B.145, 171.

69. Sales Convention, *supra* note 5, arts. 12, 96. Eighth meeting of the First Committee, paras. 9-66, U.N. Doc. A/CONF.97/C.1/SR.8, reprinted in Sales Convention, *supra* note 5, at 271-75; Third meeting of the Second Committee, paras. 1-23, U.N. Doc. A/CONF.97/C.2/SR.3, reprinted in Sales Convention, *supra* note 5, at 443-45. During the UNCITRAL deliberations representatives of planned economies, such as the U.S.S.R., insisted on this reservation because of their domestic rules requiring formalities as a way to control economic planning. *Report of the United Nations Commission on International Trade Law on the work of its eleventh session*, Annex I, paras. 17-27, 195-96, U.N. Doc. A/33/17, reprinted in [1978] IX UNCITRAL Y.B. 11, 31, 33, 45; *Report on Trade Law*, tenth session, *supra* note 21, Annex I, paras. 115-134, at 11, 25, 33-34.

70. Limitation Convention, *supra* note 3, art. 34, as amended by art. IV of the 1980 Protocol; Sales Convention, *supra* note 5, art. 94.

ments to these conventions, to projected conventions, and to subsequent conventions generally.

The most technically complex and politically sensitive of these problems is to define the new convention's relation to predecessor conventions. Both the Hamburg Rules⁷¹ and the Sales Convention⁷² are intended to replace prior conventions altogether, while the Bills Convention is to coexist with several different uniform substantive law and conflict of laws regimes.⁷³ Although the Limitation Convention had no predecessor, its drafters had to wrestle with whether to adopt the definition of "contracts of international sale of goods" found in earlier sales conventions.

Solutions are not uniform. Article 31 of the Hamburg Rules requires Contracting States to denounce the 1924 Hague Rules, but, after intensive debate, the conference added a proviso that allows a Contracting State to defer the denunciation for a maximum period of five years.⁷⁴ The Sales Convention also requires Contracting States to denounce the 1964 Hague Sales Conventions, but does not allow a Contracting State to defer the denunciation.⁷⁵ As an interim measure, the Limitation Convention also authorized a Contracting State that was a party to an earlier sales convention to substitute the earlier convention's definition of "contracts of international sale of goods" for the definition in the Limitation Convention until the earlier convention was superseded.⁷⁶

Faced with the more difficult problem of having to coexist with both a broader substantive uniform law convention and several conflict of laws conventions, the Bills Convention allows the parties to these other conventions to determine the relation of these existing conventions to the new convention.⁷⁷ During the UNCITRAL debates on the draft Bills Convention the Japanese

71. The Hamburg Rules will replace the Hague Rules, as amended. *See supra* note 4.

72. The Sales Convention will replace the 1964 Hague Sales Conventions. Convention relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (1972); Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169 (1972) [hereinafter *Hague Sales Formation Convention*].

73. Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 257; Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 379; Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices, 1975, *reprinted in* 14 I.L.M. 332 (1975) [hereinafter *Panama Conflicts Convention*].

74. Hamburg Rules, *supra* note 4, art. 31(4).

75. Sales Convention, *supra* note 5, art. 99(3)-(6). Subart. (6) directs the depositary to consult with the Government of the Netherlands to ensure that the Sales Convention will come into force when the denunciation becomes effective.

76. Limitation Convention, *supra* note 3, art. 38. By its own terms, art. 38 no longer has any effect now that the Sales Convention has come into force. *Id.* art. 38(2).

77. *See Report of the United Nations Commission on International Trade Law on the work of its twentieth session*, para. 222, U.N. Doc. A/42/17 (1987), *reprinted in* [1987] XVIII UNCITRAL Y.B. 3, 26 [hereinafter *Report on Trade Law twentieth session*] ("It was generally agreed that the problem could be solved only by an agreement among the parties to the Geneva and Panama Conventions that those Conventions were not to apply to instruments drawn or made in accordance with the UNCITRAL Convention").

delegate suggested that article 30 of the Vienna Convention on the Law of Treaties would resolve any conflict.⁷⁸ The suggestion elicited no support. According to the French delegate: "[T]he provision in question was more suitable for Judges of the International Court of Justice at The Hague than for the judges of domestic commercial courts. It was essential to regulate the matter by means of a clear provision, drafted in precise and habitual terms."⁷⁹

In addition to dealing directly with these earlier conventions, the Limitation and Sales Conventions adopt a more general formula. Article 37 of the Limitation Convention provides: "This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention."⁸⁰ The

For comments on the relation of the Panama Conflicts Convention, *supra* note 73, and the Bills Convention, *supra* note 6, see the comments of the Uruguay delegate at the 1988 meeting of the Sixth Committee. *Summary record of the tenth meeting of the Sixth Committee*, paras. 38-41, U.N. Doc. A/C.6/43/SR.10 (1988), reprinted in [1988] XIX UNCITRAL Y.B. 212.

78. *Summary Records of 378th meeting of UNCITRAL*, paras. 17-19 U.N. Doc. A/CN.9/SR.378, reprinted in [1987] XVIII UNCITRAL Y.B. 166 [hereinafter *378th Meeting of UNCITRAL*]. Art. 30 of the Vienna Convention on the Law of Treaties provides:

Art. 30. *Application of successive treaties relating to the same subject-matter*

1. Subject to art. 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty. Relying on subart. 4, the Japanese delegate proposed the following solution:

If, for example, State A and State B were parties to both the new UNCITRAL Convention and the Geneva Conventions, State C was a party only to the new UNCITRAL Convention and State D only to the Geneva Conventions, then, as between State A and State B, the UNCITRAL Convention would be applied predominantly and the Geneva Conventions only to the extent that their provisions were compatible with those of the UNCITRAL Convention; as between State A and State C, only the new UNCITRAL Convention would be applied; and as between State A and State D only the Geneva Conventions would be applied.

378th Meeting of UNCITRAL, *supra* note 78, para. 18, at 166.

79. *378th Meeting of UNCITRAL*, *supra* note 78, para. 26, at 167.

80. Limitation Convention, *supra* note 3, art. 37. Art. V of the 1980 Protocol, *supra* note 3, deletes the 1974 text and substitutes verbatim the language adopted in the Sales Convention: "This

substance of the text can be traced to a suggestion by the U.S.S.R., which was apparently concerned about the relation between the proposed convention and the General Conditions of Delivery of Goods adopted by the Council for Mutual Economic Assistance.⁸¹ With slight amendments to the wording and punctuation, the Sales Convention adopts this formula,⁸² but neither of the other conventions does so in such general terms. Using virtually the same language, the draft Bills Convention provided that it *shall prevail* over prior and subsequent conventions, but, as noted above, the U.N. Commission decided to leave the issue to States that are parties to the earlier conventions, and it therefore deleted the draft article.⁸³ This decision means, of course, that there is no provision in the Bills Convention with respect to future international agreements.

The Hamburg Rules do not adopt a general formula, but article 25 of the Rules does identify laws, either specifically (for example, the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage) or generally (for example, conventions or national law relating to the limitation of liability of owners of seagoing ships), that the new convention is not intended to replace.⁸⁴ Although only article 25(5) of the Hamburg Rules explicitly recognizes that subsequent amendments to a specific class of existing conventions will also prevail over the Hamburg Rules,⁸⁵ this same principle is implicit in the previous subarticles, which can be read as designations of issues not governed by the Hamburg Rules.⁸⁶

Article 25(5) of the Hamburg Rules itself has a politically charged history. It was originally proposed as a separate article that would make the Hamburg Rules

Convention shall not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the seller and buyer have their places of business in States parties to such agreement."

81. *Analysis of replies to the questionnaire, and comments made at the fourth session of the Commission by Governments, on the length of the prescriptive period and related matters: report of the Secretary-General*, § 14, para. 65 & n.6, U.N. Doc. A/CN.9/70/Add.2, reprinted in [1972] III UNCITRAL Y.B. 96, 97 & 108.

82. Sales Convention, *supra* note 5, art. 90. The principal amendment to the Limitation Convention text is to substitute "any international agreement" for "convention." See second meeting of the Second Committee, paras. 21-31, U.N. Doc. A/CONF.97/C.2/SR.2, reprinted in Sales Convention, *supra* note 5, at 439-40.

83. *Note by the Secretariat*, *supra* note 14, art. 82, at 99. For the UNCITRAL disposition of this draft article, see *Report on Trade Law*, *supra* note 77, paras. 219-222, at 25-26; 378th Meeting of UNCITRAL, *supra* note 78, paras. 1-37, and 379th Meeting of UNCITRAL, *supra* note 22, paras. 1-9. See also *supra* note 80.

84. Hamburg Rules, *supra* note 4, art. 25.

85. *Id.* art. 25(5) provides:

Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision shall also apply to any subsequent revision or amendment of such international convention.

86. *Id.*

subject to *both* prior and subsequent multimodal conventions.⁸⁷ The issue became acute because the First Committee adopted a definition of "contract of carriage by sea" that made the convention applicable to multimodal transport "only insofar as it relates to the carriage by sea."⁸⁸ By article 25(5) the conference accepted the need to define the relation of the Hamburg Rules to existing conventions. As to conventions that might be concluded in the future, however, delegates from Third World nations objected on the ground that the proposal was an attempt to undermine the results of the Hamburg Rules. As the Philippines delegate is reported to have stated:

To prejudice the application of a future independent convention was unsound, a legal contortion. He thought that the real reason behind the proposals by the supporters of the inclusion of the article—Federal Republic of Germany, France, Japan and Norway, among other developed countries—was that they would prefer to be governed by the future multimodal convention as a means of reducing the impact of the Hamburg Convention which was being brought into existence in order to remove the inequities of the 1924 Brussels Convention.⁸⁹

After disentangling existing from future conventions, however, the Second Committee ultimately decided, with little opposition, to omit any reference to future multimodal conventions.⁹⁰

E. REVISION AND AMENDMENT

Only the Hamburg Rules provide explicitly for revision and amendment of the rules. Article 32 of that convention provides:

Article 32. *Revisions and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

87. The draft text submitted to the Hague conference includes three alternatives. Text of the Provisions of the Draft Convention on the Carriage of Goods by Sea Concerning Implementation, Reservations and Other Final Clauses Prepared by the Secretary-General, art. [] *Multimodal Transport*, U.N. Doc. A/CONF.89/6 and Add. 1 and 2, *reprinted in* Hamburg Rules, *supra* note 11, 15. The Second Committee considered the alternatives and additional amendments at its seventh through tenth meetings. *Report of the Second Committee*, paras. 40-42, U.N. Doc. A/CONF.89/11, *reprinted in* Hamburg Rules, *supra* note 4, at 125, 131-32. The conference discussed the resulting draft text at its ninth plenary meeting. Ninth plenary meeting, paras. 1-24, U.N. Doc. A/CONF.89/SR.9, *reprinted in* Hamburg Rules, *supra* note 4, at 183-84. The conference approved the draft text but transferred it to art. 25 as a subarticle. At the time of these debates in 1978, UNCTAD was at work on a multimodal convention, which a diplomatic conference adopted in 1980. United Nations Convention on International Multimodal Transport of Goods, U.N. Doc. TD/MT/CONF/17 (1980).

88. Hamburg Rules, *supra* note 4, art. 1(6); *Report of the First Committee*, art. 1(5), U.N. Doc. A/CONF.89/10, *reprinted in* Hamburg Rules, *supra* note 4, at 70, 71-74.

89. Eighth meeting of the Second Committee, para. 14, U.N. Doc. A/CONF.89/C.2/SR.8, *reprinted in* Hamburg Rules, *supra* note 4, at 395.

90. Ninth meeting of the Second Committee, para. 33, U.N. Doc. A/CONF.89/C.2/SR.9, *reprinted in* Hamburg Rules, *supra* note 4, at 398.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.⁹¹

In addition, article 33 provides a separate, complex mechanism for revising the limitation amounts set out in the substantive article that defines limits of liability.⁹²

Although the Secretariat had not included an article on revision and amendment among the final clauses it had drafted, four delegations to the conference on the Hamburg Rules submitted draft articles addressing the issue.⁹³ The most controversial of these proposals was the requirement suggested by the Norwegian and German Democratic Republic delegates that a large number (for example, two-thirds) of the Contracting States adopt an amendment before it would come into force, but once it did come into force the unamended Convention would cease to have effect. The U.S.S.R. delegate objected that it was for the future conference to decide procedures for amendment and to define the relation between the amendment and the convention.⁹⁴ While agreeing with this principle of respect for State sovereignty, the French delegate also noted the practical difficulty faced by States that might not approve the amendments, but wanted to remain parties to the unamended convention.⁹⁵ These arguments carried the day, and the proponents withdrew their draft proposals on these points. The Second Committee did, however, adopt the proposal that ultimately became article 32, and, although a substitute proposal that would have allowed any Contracting State to initiate consideration of review was submitted to the plenary, the conference made no changes.⁹⁶

Rather surprisingly, given that the 1964 Hague Sales Conventions expressly provide for revision⁹⁷ and given the interest expressed at the Hamburg confer-

91. Hamburg Rules, *supra* note 4, art. 32.

92. *Id.* arts. 6, 26, & 33.

93. *Report of the Second Committee*, para. 53, U.N. Doc. A/CONF.89/11, *reprinted in* Hamburg Rules, *supra* note 4, at 133. The Second Committee considered these proposals at its eleventh meeting. Eleventh meeting of the Second Committee, paras. 51-97, U.N. Doc. A/CONF.89/C.2/11, *reprinted in* Hamburg Rules, *supra* note 4, at 404-08 [hereinafter Eleventh Meeting].

94. Eleventh Meeting, *supra* note 93, para. 59.

95. *Id.* para. 62.

96. Ninth plenary meeting, paras. 43-58, U.N. Doc. A/CONF.89/SR.9, *reprinted in* Hamburg Rules, *supra* note 4, at 186-87. The proposal for substitute articles was submitted by Bangladesh, India, Kenya, Mauritius, Pakistan, Syrian Arab Republic, Uganda, and United Republic of Tanzania. U.N. Doc. A/CONF.89/L.2, *reprinted in* Hamburg Rules, *supra* note 4, at 143.

97. Art. XIV of the 1964 Hague Sales Convention, *supra* note 72, at 115-17 provides in part:

1. After the present Convention has been in force three years, any Contracting State may, by a notification addressed to the Government of the Netherlands, request the convening of a conference for the purpose of revising the Convention or its Annex. Notice of this request shall be given to all Contracting States by the Government of the Netherlands, which shall convene a conference for the purpose of such revision if, within a period of six months from the date of such notice, at least one quarter of the Contracting States notify the said Government of their agreement with the request.

ence, the UNCITRAL deliberations with respect to the Limitation and Sales Conventions do not address the issue of revision specifically. As noted above, however, each of these latter conventions does include an article that states that the convention will not prevail over international agreements that are subsequently entered into covering the same subject matter.⁹⁸ It would seem,⁹⁹ therefore, that Contracting States may modify these conventions by protocols adopted following internationally recognized procedures and with the consequences dictated by international law.¹⁰⁰ Regional arrangements or commodity agreements may also derogate from these conventions.

This procedure was followed without objection when the U.N. General Assembly charged the Sales conference to consider also a draft protocol to conform the Limitation Convention to the Sales Convention.¹⁰¹ The protocol adopted at this 1980 conference not only amends the final provisions of the 1974 text to conform with the Sales Convention,¹⁰² but also includes its own final provisions.¹⁰³ Articles X and XI of the protocol state that, unless it declares otherwise, a State that becomes a party to the convention after the protocol comes into force is a party to the convention as amended, but that it will be a party to the unamended convention as to Contracting States that do not agree to the amendment. By defining the relation of the amended convention with the unamended text, the protocol satisfies objections made at the Hamburg conference and establishes a precedent for future revisions.

IV. Conclusions

Neither the procedures for adoption of the final provisions of the UNCITRAL conventions nor the contents of these articles are perfunctory. For all the conventions the U.N. Commission delegated to the Secretariat the task of drafting

See art. XII of the Hague Sales Formation Convention, *supra* note 72. These articles, however, have not been used because the creation of UNCITRAL has made the revision process they envisage of little practical importance. See also Evans, *Article 90*, para. 3.2, in *COMMENTARY ON THE INTERNATIONAL SALES LAW* 638 (C. Bianca & M. Bonell eds. 1987) ('the [Sales] Convention contains no provision regarding its possible revision, wisely perhaps in view of the unhappy fate reserved to the revision clauses contained in the 1964 Hague Conventions').

98. See *supra* notes 82-84 and accompanying text.

99. Evans, *supra* note 97, at 636.

100. See Vienna Convention, *supra* note 1, arts. 39-41. Art. 40(4) states that the amending agreement binds Contracting States only if they agree to the amendment, while art. 40(5) provides that a State that becomes a party to the convention after the amendment comes into force is deemed to be a party to the amended convention except that it is deemed to be a party to the unamended convention with respect to Contracting States that have not agreed to the amendment.

101. G.A. Res. 33/93, para. 3, U.N. Doc. A/CONF.97/1 (1978), *reprinted in* Sales Convention, *supra* note 5, at xiii.

102. For example, art. V of the Protocol, *supra* note 3, modifies art. 37 of the 1974 text. See *supra* note 80.

103. Protocol, *supra* note 3, arts. VII-XIV. Following the classification adopted in this essay, these final provisions include housekeeping rules (arts. VII-IX, XIII, XIV), an authorized reservation (art. XII), and rules defining the relation between the Protocol and the earlier convention (arts. X, XI).

most, if not all, of the final provisions. After some hesitation with the Limitation Convention, the U.N. Commission decided that with respect to these articles it should defer to the diplomatic conference to be convened. Each conference assigned review of these articles to its Second Committee, where recorded debate subjected most provisions to careful scrutiny. This pattern was broken, however, when the U.N. Commission decided not to convene a special conference to consider the draft Bills Convention. There are no recorded debates with respect to the final provisions in the U.N. General Assembly or the Sixth Committee, and it was necessarily the U.N. Commission that reviewed the draft articles. If this procedure is adopted for subsequent conventions, it may mean that review of these final provisions will be less intensive. Fewer States may be represented at UNCITRAL meetings, and these representatives may be more conversant with the substantive private international law articles than with the public law final clauses.¹⁰⁴

While procedures may become less settled, however, there appears to be a growing consensus on the content of these final provisions. As a consequence, intensive review of these provisions may be less necessary. Certainly, agreement on the content of most housekeeping provisions, such as articles prescribing rules for ratification or accession, appears to have been reached. There also seems to be agreement on the appropriate formulation of a federal State clause and on the need to prohibit reservations other than those expressly agreed upon in the convention.

More problematic are the relations between the new convention and prior or subsequent international agreements. While the Limitation and Sales Conventions adopt a general formula disclaiming priority over these earlier or later texts, debate at the Hamburg conference suggests that the formula may not be acceptable if it is perceived as a threat to compromises reached in the convention before the conference. Nor is there agreement on the need to address specifically the issue of revision and amendment of the convention. Reluctance to tie the hands of States at future conferences is the principal justification for omitting provisions dealing with revision. Yet the successful revision of the Limitation Convention at the 1980 Sales conference provides a procedural and substantive precedent for future revisions.

Many of these issues are also covered by the Vienna Convention on the Law of Treaties. Reference to the Vienna Convention has been most persuasive with respect to housekeeping matters. Given the detail of the Vienna Convention's restatement of the functions of the depositary, for example, it was successfully

104. Thirty-six States are members of UNCITRAL. Representatives of non-member States would be "observers" only. While the Commission might give these representatives the floor and while most issues are resolved without a formal vote, it may be more difficult to obtain financing to attend a non-diplomatic conference as an observer. Moreover, it may be less likely at an UNCITRAL meeting than at a diplomatic conference that persons knowledgeable about public international law will be members of the delegations.

argued that the UNCITRAL conventions need not provide similar detail. But citation to the Vienna Convention has not always been dispositive. On the question of whether the UNCITRAL conventions should expressly prohibit further reservations, the pragmatic argument prevailed that business enterprises need more guidance than provided by the Vienna Convention's general prohibition of reservations incompatible with the object and purpose of a convention. Similarly, when it was suggested that article 30 of the Vienna Convention resolved a complex issue with respect to the relation between the Bills Convention and prior conventions, one delegate commented that "the provision in question was more suitable for Judges of the International Court of Justice at The Hague than for the judges of domestic commercial courts." The Vienna Convention on the Law of Treaties, in other words, is considered supplementary, filling in details when the UNCITRAL commercial law conventions are silent.