ERIK SUY*

Achievements of the United Nations Commission on International Trade Law

I have been invited to speak on the subject of "International Disputes Settlement" which, in your program, is presented with the rather optimistic sounding question whether we are closer to a rule of law for policing fair trade. I have gladly accepted this invitation for essentially two reasons. Firstly, it is a great honor for me to participate at this important gathering of lawyers. Secondly, the topic of dispute settlement provides me with the opportunity to report to you on the work of a particular organ of the United Nations which has been primarily involved in that field and will certainly continue to make valuable contributions in the next decade.

I am referring to UNCITRAL, the United Nations Commission on International Trade Law. This commission was established in 1966 by resolution of the General Assembly with the general mandate of promoting the progressive harmonization and unification of the law of international trade.

The creation of UNCITRAL and its vital existence should be seen against the background of a rapidly changing world scene after the second World War. While the pre-war era was characterized by a virtual international trade monopoly of large trading blocs with largely uniform standards and practices, the post-war era witnessed the dissolution of these blocs, most of them colonial empires. As we all know, some new trade alliances have been formed, and a vast number of states have gained independence during the last thirty years. For these and many other reasons, a totally different scene has emerged.

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*Prof. Suy is Under Secretary-General for Legal Affairs and The Legal Counsel of the United Nations.

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Lawyers and businessmen engaged in international trade now must reckon with many more foreign legal systems than before. The wide disparities between the laws may adversely affect their dealings and give rise to disputes although, of course, other factors may be more important; for example, tariff and non-tariff barriers. Efforts to minimize the disparities by harmonizing the different national laws were usually undertaken on a regional level or by a particular group of countries whose interests do not necessarily coincide with those of the others, in particular the developing countries. Furthermore, the phenomenal growth of world trade has been accompanied by changing trade patterns and by increasingly complex and sophisticated techniques of contracting and financing. Not all domestic legal systems are capable of adequately regulating these modern features. Generally speaking, national legislation has not normally been drafted with the particular issues of international trade in mind. In this respect, not only developing countries may benefit from what one might call "legal development aid."

In response to these circumstances and needs, UNCITRAL has prepared universally acceptable legal instruments, often based on a review and revision of existing legal rules, taking into account modern trade practices. The acceptability of proposed uniform rules is enhanced by the truly worldwide participation in the preparatory work: UNCITRAL consists of thirty-six states, representing the various geographic regions and the principal economic and legal systems of the world. In the delegations, one finds government representatives together with practitioners and experts in the particular field of law. UNCITRAL has always drawn on the expertise and practical know-how of the businessmen and lawyers whom it is ultimately to serve. It has cooperated with interested nongovernmental organizations such as the International Chamber of Commerce (ICC),[1] the International Council for Commercial Arbitration (ICCA) and the American Arbitration Association (AAA).[2]

In this connection, we welcome that the Section of Corporation, Banking and Business Law of the American Bar Association (ABA) has established a Committee on Cooperation with UNCITRAL which has been most helpful in several of our projects. To mention but one instance of such useful assistance, we are very grateful for having received an invaluable collection of contract provisions and clauses which, while being kept confidential, are of great help to UNCITRAL and its Secretariat in preparing model clauses or standard forms. Such cooperation is essential since unification in international trade law cannot be undertaken in a useful and successful manner without knowing exactly the conditions and needs of today's commercial practice.

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[1] 38 Cours Albert 1er; 75008 Paris, France.

[2] 140 W. 51st St.; New York, New York 10020. Many publications of the ICCA are available from the AAA.

To a large extent, UNCITRAL's work has been devoted to matters of substantive law such as sale of goods, maritime transport and international payments, which I shall briefly report on later. But it has also responded to the very human fact that in international commercial relationships, with considerable economic interests at stake, parties may find themselves entangled in a dispute. Since there are various reasons for parties to attempt settlement of the dispute outside the court system, UNCITRAL has prepared procedural rules for out-of-court settlements and has on its agenda further items relating to the resolution of disputes.

Let me start with the most recent achievement. In July 1980, UNCITRAL adopted at its annual session in New York the so-called UNCITRAL Conciliation Rules. These rules are designed to assist parties in their endeavors to amicably settle a dispute between them with the help of an impartial and independent conciliator. This project had been taken up by the Commission only two years ago, following a proposal by the United States delegation. Since then, Howard Holtzmann, the chairman of the ABA's Committee on Commercial Arbitration, has been very actively and ably involved in the drafting of these rules. We are indebted to him for his contribution and his willingness to share with us his experience in international conciliation proceedings.

It is true that conciliation is, at present, in some regions of the world more often resorted to than in others and that some businessmen may see no reason why court litigation or arbitration should adversely affect their business relationships. But the members of the Commission felt that conciliation could be considered as a viable alternative to arbitration. UNCITRAL, therefore, prepared worldwide acceptable rules for those parties who might prefer, if I may use this comparison, the "marriage counselor" to the "divorce judge."

In order to emphasize the contrast to arbitration, the rules are based on a liberal, voluntary concept of conciliation. The freedom of each party relates, in particular, to the commencement and to the termination of the proceedings. The rules set forth certain guidelines for the conduct of the proceedings and contain innovative provisions on the relationship between conciliation and other proceedings. For example, it is envisaged that the conciliator shall not be presented as a witness or act as counsel or representative in other proceedings concerning the same dispute and that certain information shall not be relied on in subsequent proceedings. The purpose of that is to increase the chances of an amicable settlement since a party would be unwilling to "open up" or to "let down his hair" if he must fear that his openness would later be turned against him.

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[3]U.N.Doc.A/35/17(1980).

Of course, in a variety of contexts, parties might not even attempt an amicable settlement but might immediately resort to proceedings under which the dispute would be settled by a binding decision. In such a case, they may very well benefit from another achievement of UNCITRAL which has had a remarkable success.

In 1976, the Commission adopted the UNCITRAL Arbitration Rules[4] which had been drafted in consultation with leading arbitration experts from various states, including Howard Holtzmann from the United States. These rules are optional in that it depends on the parties to a contract whether they wish to settle a dispute relating to their contract by arbitration in accordance with the rules. This may be done by a clause in the contract or by separate agreement before or after a dispute has arisen.

The rules are designed for worldwide use in "ad hoc arbitration," although we shall see in a minute that they are, in practice, also applied in institutional arbitration. Accordingly, the rules provide in a limited number of instances for the assistance by a third party when the parties cannot agree, for example, on the appointment of an arbitrator. For such cases, the parties may designate an arbitral or other institution or an individual as "appointing authority," the functions of whom are spelled out in the rules.

Beyond that, the rules regulate in a modern and practical fashion the commencement of arbitration, the appointment and challenge of arbitrators, and, in particular, the intricacies of the arbitration proceedings. Detailed provisions govern the presentation of evidence and oral argument, the exchange of written pleadings and hearings, the place of arbitration, languages to be used, the competence of the tribunal to decide on its own jurisdiction, interim measures and default proceedings. Other provisions concern the award and the law applicable to the substance of the dispute. The arbitrators must apply the law chosen by the parties; otherwise, the arbitrators apply the law determined by the conflict of laws rules they deem applicable. The arbitrators may decide the matter *ex aequo et bono* only if the parties have expressly authorized them to do so and if the law applicable to the arbitral procedure permits such arbitration. In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction.

The General Assembly recommended in 1976 the worldwide use of these rules which, since then, have been accepted in countries with different legal, social and economic systems. As concerns the United States, the rules have been included in the model arbitration clause prepared by the American Arbitration Association and the U.S.S.R. Chamber of Commerce for optional use in contracts between American firms and Soviet Foreign Trade Organizations.[5] They are also listed in the recently concluded trade agreement between the United States and China.[6] The Inter-American Commercial Arbitration

[4]U.N.Doc.Sales No.E.77.V.6(1977).
[5]Contact the AAA, note 2 *supra*.
[6]18 INT'L LEGAL MATS. 1041 (1979).

Commission[7] has substantially adopted the rules as its own institutional rules. The same is true with regard to two new Regional Arbitration Centres in Kuala Lumpur (Malaysia) and Cairo (Egypt) established under the auspices of the Asian-African Legal Consultative Committee.[8]

In addition, various arbitration centers have declared that they are prepared to administer arbitrations under the UNCITRAL Arbitration Rules. Most prominent among these is the American Arbitration Association, which has recently published special administrative rules for such cases. The increasing use of the rules in administered arbitration has prompted UNCITRAL to consider whether it should issue guidelines for administering arbitrations under the UNCITRAL Rules. It is to be expected that UNCITRAL, at its next session, will adopt such recommendations in order to encourage arbitral and other institutions to offer their services in this context and to prevent disparity in the administrative rules.

The UNCITRAL Arbitration Rules are not embodied in a convention or uniform statute but are drafted in the form of model rules to be incorporated into contracts. Thus, they are subject to the mandatory provisions of the applicable law. As the UNCITRAL Secretariat has found out in preliminary studies, there are wide disparities between existing laws on arbitral procedure. These laws are often outdated and in need of revision. Also, they are normally geared to domestic arbitration alone and rarely take into account the specific features of international commercial arbitration.

UNCITRAL has, therefore, requested its Secretariat to prepare an analytical compilation of these laws and to draft a model law on arbitral procedure. Such law would be designed specifically for international cases and, for example, would lessen the impact of a basically domestic law which may be connected with the case at hand by the mere choice of the place of arbitration. The arbitration site, in turn, may have been chosen because of the pleasant climate, excellent hotels or the neutrality of a given state. Yet, as one arbitrator once put it, the mere fact that a country was not engaged in a war for four hundred years does not necessarily make its law more suitable or relevant to the international case arbitrated within its borders.

A uniform law on arbitral procedure, if widely accepted, would well complete the set of United Nations instruments which facilitate the settlement of disputes arising in international commercial relationships. It would support and enhance the usefulness of the UNCITRAL Arbitration Rules, and it would supplement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[9] which was concluded at New York

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[7]1819 H St. N.W., Rm. 310, Washington, D.C. 20006.

[8]27 Ring Rd., Lajpat Nagar-IV, New Delhi 110024, India.

[9]United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (in force for the United States Dec. 29, 1970), 21 U.S.T. 2517, T.I.A.S. No. 6997.

in 1958. This New York Convention, which is adhered to by fifty-six countries, ensures easy enforcement of arbitral awards. This is of particular importance since the best arbitral award has not much value if one cannot enforce it abroad.

As Professor Pieter Sanders reported at the 100th anniversary meeting of the ABA,[10] the New York Convention has worked remarkably well. A survey of court decisions revealed that there are few difficulties in the interpretation and application of the New York Convention. Thus, there is no need for a revision of that Convention. It is thought that most of these difficulties can be overcome by constant review and exchange of information and by clarifying provisions in the above-mentioned model law on arbitral procedure. We appreciate the fact that American courts have shown a very liberal and open attitude in favor of the spirit of the New York Convention, and we hope that this example will be followed by other countries.

Now I have discussed at some length the United Nations contributions to the resolution of disputes. Naturally, it is preferable not to have a dispute in the first place. Some people allege that the harmonization or unification of substantive laws can do just that, that is, prevent disputes. While this may be so in some instances, I do not believe that there will be a considerable decrease in disputes and in work for the lawyers involved in international transactions. What unification can do, however, is to facilitate the negotiations and the implementation of contracts and to set widely acceptable standards which will help to minimize uncertainty and possible surprise in the foreign law and to promote fairness in international trade. Thus, I would like to briefly inform you about the work of UNCITRAL in substantive law matters such as sale of goods, maritime law and international payments.

In the field of sales law, the work has resulted in two conventions. By far the more important one was recently concluded at Vienna. In April 1980, a conference of plenipotentiaries adopted the United Nations Convention on Contracts for the International Sale of Goods.[11] The conference also adopted, for the sake of consistency, a protocol amending the Convention on the Limitation Period in the International Sale of Goods[12] which had been concluded already in 1974 at New York.

Both conventions are based on, and are essentially identical to, the draft texts that had been elaborated and approved by UNCITRAL and its special working group. The Convention on Sales Contracts should be seen as the culmination of unification efforts which date much further back than the

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[10] 13 INT'L LAW. 269 (1979).

[11] U.N.Doc.A/CONF.97/18 [hereinafter referred to as the Convention on Sales Contracts].

[12] *Id.*

lifespan of UNCITRAL. It started fifty years ago, when UNIDROIT, the International Institute for the Unification of Private Law, set up a special commission to draft a uniform law. Eventually, a conference convened at The Hague in 1964 adopted two uniform laws on international sales of goods, with one regulating the specific subject of formation of contracts.[13]

One may ask now why UNCITRAL stepped in and reopened consideration of a final text only a few years after its adoption. The main motive was a certain discontent in various circles due to the fact that the preparation of these uniform laws was essentially carried out by Western Europeans and that the texts primarily embodied civil law concepts. Also, the particular needs of coastal states had not been taken into account. It was further felt that the texts were too detailed and too complex to be workable and uniformly applied in different jurisdictions.

The work of UNCITRAL in the sales law area, thus, was to review and to revise existing uniform rules, taking into account the interests of all parts of the world and the characteristics of all major legal systems. The various regions and economic and legal systems were represented at the Vienna Conference by delegations from more than sixty states. The new Convention, in effect, combines both of the 1964 uniform laws and is not only shorter but, according to most experts, is also more clear and more apt to be applied easily and in a uniform manner.

The first part of the April 1980 Convention regulates the sphere of application and contains general provisions applicable to the entire Convention. The second part regulates the formation of contracts with provisions, for example, on the minimum content of an offer, the time at which it becomes effective, the conditions under which it may be revoked and the requirements for conclusion of the contract by acceptance. The third part sets forth the obligations of the seller and the buyer as well as their respective remedies in case of breach of contract by the other party. Here, the Convention adopts, with certain modifications, the common law concept of "fundamental breach." The fourth part contains final clauses concerning implementation, ratification, accession and reservations to the Convention.

The next subject area to be considered, maritime transport, provides another illustration of UNCITRAL's achievements in reviewing and revising existing rules on a global level. Maritime transport has been governed for more than fifty years by the so-called Hague Rules embodied in the Brussels Convention of 1924. Following a request and initial preparatory work by the United Nations Conference on Trade and Development (UNCTAD), a working group of UNCITRAL drafted a new convention, taking into account the

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[13]The 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, and the annexed Uniform Law (ULF) appears in the REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW, vol.1 (United Nations Publication, Sales No. E.71.V.3), ch. 1, § 1.

interests of all parties concerned, modern technical developments and legal changes in the law on other modes of transport. It regulates the liability of the carrier for loss, damage or delay in the delivery of the goods and contains modern rules on bills of lading. The draft text was considered at a conference, convened at Hamburg (West Germany) in 1978, which drew up the United Nations Convention on the Carriage of Goods by Sea.[14]

The new Convention, known as the Hamburg Rules and intended to replace the Brussels Convention, seeks to remove uncertainties and ambiguities under the old legal regime, to establish a more balanced allocation of the risk of carriage between the cargo owner and the carrier, and to respond to the technological developments that have taken place in maritime transport since the adoption of the 1924 Convention, e.g. containerization. As to the balance of interests and the difficult negotiations at the Conference, this was not simply a matter of South versus North, of the developing world against the industrialized countries. The attitude of states depended rather on whether they were representing carriers or cargo owners more and on how they assessed the economic consequences of the liability rules. To say it in the words of the president of the Conference on the Law of the Sea: "The seabed makes strange bedfellows."

The third classic subject of UNCITRAL's work is the area of international payments. Here, the Commission has been involved in a variety of topics. For example, it has assisted the International Chamber of Commerce in its 1974 revision of the Uniform Customs and Practice for Documentary Credits. UNCITRAL's recommendation of their use certainly enhances their global applicability. Similar cooperation is being carried out in regard to contract guarantees and standby letters of credit.

The most important subject in the area of international payments is certainly the field of negotiable instruments. A special UNCITRAL Working Group has elaborated a draft convention on international bills of exchange and international promissory notes. It is now preparing a similar convention relating to international checks. The purpose of both conventions is to overcome the wide disparities between the existing two major systems, that is the Geneva Uniform Laws followed mainly in civil law countries and the rules of the Anglo-American common law system.

All these conventions and uniform rules can achieve their beneficial goal of unification only if they are widely accepted. I should, therefore, like to appeal to you to exert the influence of the ABA in favor of ratification or accession to these conventions by the United States of America. May I thank you in advance for your efforts.

Due to the limited time available, I cannot discuss with you other items of the work of UNCITRAL, such as the important work now being undertaken on legal aspects of a new international economic order. But if any one of you

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[14]U.N.Doc.A/CONF.89/13.

would like further information, please feel free to ask me, even after this afternoon's meeting. There is also present a member of the UNCITRAL Secretariat, Mr. Herrmann, who would certainly be glad to provide additional information.

Well, you might have gotten the impression that I have praised too much the highly constructive work of UNCITRAL in the field of international disputes settlement and other areas. Let me, therefore, quote what was written in 1975 in the American Bar Association Journal, and with this quote I shall conclude:

> The caliber of work by UNCITRAL remains at an impressive level, and its productivity continues to compare favorably to comparable domestic efforts at harmonization and unification within the inherently simpler universe of the United States. It functions in an exemplary manner with professional concerns and the desire to cooperate towards the common goal of removing legal impediments to the growth and development of trade cutting across political and economic lines. As one young lawyer from Africa remarked about UNCITRAL, "It may not be terribly dramatic, but it is exciting to see at least one body functioning the way I had hoped the whole system would."[15]

[15] 61 A.B.A.J. 502 (1975).