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DISSEMINATION OF DECISIONS CONCERNING UNCITRAL LEGAL TEXTS
AND UNIFORM INTERPRETATION OF SUCH TEXTS

Note by the Secretariat

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INTRODUCTION

1. At the sixteenth (1983) and seventeenth (1984) sessions of the United Nations Commission on International Trade Law, suggestions were made that means should be explored to disseminate judicial and arbitral decisions concerning legal texts emanating from the work of the Commission. 1/ At the session of the Sixth Committee held during the thirty-ninth session of the General Assembly, a request was also made that the Secretariat submit a paper on this subject to the eighteenth session of the Commission. 2/ Although, as more fully discussed below, it might be premature at this time for the Commission to formulate concrete mechanisms to disseminate decisions relating to UNCITRAL legal texts, this paper is presented in response to the suggestions and request noted above in order to enable the Commission to begin to consider some of the issues involved in this connection, preliminary to its deciding on concrete measures at the appropriate time. This paper also considers possible means for the Commission to promote the uniform interpretation of legal texts emanating from its work.

2. There does not now exist a well-established mechanism for ensuring that parties to commercial transactions, lawyers, arbitral tribunals or courts have access to decisions of foreign courts or of arbitral tribunals relating to UNCITRAL legal texts. In most parts of the world decisions of foreign courts are available, if at all, only to a limited extent; collections of reported decisions by courts of large or even representative numbers of countries are available only in the few major law libraries of the world. Even when collections of decisions from a number of countries are available, with a lack of an indexing or other system to refer to decisions within each collection concerning UNCITRAL legal texts it is extremely difficult to identify and become aware of such decisions. Moreover, the comprehensiveness of collections of reported court decisions varies from country to country. In many countries, a degree of selectivity is employed in choosing cases to be reported; in some countries, only a small number of cases are reported. Court decisions may also be available in other sources, such as legal journals. However, these journals often employ an even greater degree of selectivity with respect to the cases which they cover. Moreover, these sources often contain only summaries of, commentaries upon or references to the court decisions, rather than the decisions in full. 3/ When foreign cases

1/ Report of the United Nations Commission on International Trade Law on the work of its sixteenth session, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17), para. 137; Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 155.

2/ Summary Record of the Fourth Meeting (A/C.6/39/SR.4), para. 28.

3/ Some journals publish complete or edited decisions relating to various international conventions in the field of international trade law, such as the Uniform Law Review, published by the International Institute for the Unification of Private Law (UNIDROIT), the Revue Française de Droit Aérien, published by the Association d'études et de documentation de droit aérien, European Transport Law, and European Commercial Cases, published by the European Law Centre, Ltd.

are available, they are usually available only in their original languages. The availability of arbitral decisions is even less consistent and comprehensive than that of court decisions.

3. It might be considered whether means should be explored to disseminate decisions relating to all UNCITRAL legal texts, or only certain texts. It may be desirable for such decisions to include those relating to the international conventions emanating from the work of the Commission, model laws adopted by the Commission, and the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules. With respect to decisions concerning the provision for a universal unit of account for expressing monetary amounts in international transport and liability conventions, and the alternative provisions for adjustment of the limits of liability in such conventions, adopted by the Commission in 1982, ^{4/} it may be difficult for such decisions to be identified and to be selected for dissemination, inasmuch as they will likely appear as or within decisions concerning the international conventions in which such provisions are contained. Moreover, the desirability of disseminating decisions concerning these provisions may be somewhat less compelling, since such decisions are more likely to involve simply the application of straightforward provisions, rather than the interpretation of the provisions.

I. MEANS OF COLLECTING AND DISSEMINATING DECISIONS

4. The Commission might wish to consider possible courses of action for the dissemination of decisions relating to UNCITRAL legal texts. The first step would be to establish a procedure enabling the UNCITRAL Secretariat to collect the relevant decisions.

5. With respect to judicial decisions, the most efficient approach might be for each State to provide the Secretariat with decisions of courts in that State dealing with UNCITRAL legal texts. The means and forms of reporting judicial decisions vary from country to country, and each State would be in the best position to take the necessary measures to provide the Secretariat with decisions of its own courts. At an appropriate time (e.g. after the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) enters into force), the Commission might recommend that the General Assembly adopt a resolution calling upon States to provide the Secretariat with such decisions. With respect to arbitral decisions, the resolution could also request institutions which administer international commercial arbitration cases, and arbitral tribunals, to transmit to the Secretariat their decisions in cases involving UNCITRAL legal texts, subject to any consent of the parties required under rules governing the arbitration. ^{5/}

^{4/} Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17 (A/37/17), para. 63.

^{5/} Rules of arbitral procedure often provide that decisions in arbitration cases may be made public only with the consent of both parties; see, e.g. UNCITRAL Arbitration Rules, art. 32(5).

6. The second step would be to devise a means to maximize the worldwide availability of the decisions collected. The following is one possible means by which this might be done. The Secretariat would choose decisions to be disseminated. A degree of selectivity might have to be employed in this regard, particularly if court or arbitral decisions were to become numerous. Decisions supplied to the Secretariat in one of the six official languages of the United Nations would be issued in some form as documents of the Commission for general distribution (under the A/CN.9/... symbol), in all official languages of the United Nations. In some cases the complete decisions might be issued; in other cases it might be necessary for the Secretariat to edit or summarize decisions or portions thereof. These documents would be distributed through the usual channels to all governments, as well as to United Nations depository libraries and other recipients worldwide. Each volume of the UNCITRAL Yearbook would contain the decisions which had been issued as UNCITRAL documents over the course of the relevant year. In addition, references could be made to other decisions relating to UNCITRAL legal texts which had been obtained by the Secretariat.

7. The dissemination of decisions relating to UNCITRAL legal texts could have financial implications, depending upon the amount of time which the Secretariat would have to spend in processing the decisions for issuance as Commission documents, as well as the costs of translating, printing and distributing such documents. If the decisions are not numerous, it might be possible for such costs to be accommodated in the regular budget of the Commission. The Commission may wish to decide upon the concrete procedure for disseminating decisions relating to UNCITRAL legal texts when one or more of the conventions elaborated by the Commission enter into force and the Secretariat begins to receive decisions relating to such texts. At that point, it would be possible to assess more accurately the extent of the financial implications involved.

II. MEANS OF PROMOTING UNIFORM INTERPRETATION OF UNCITRAL LEGAL TEXTS

8. Uniformity in the interpretation of legal texts designed to achieve uniformity of law is a desirable objective. The widespread distribution of decisions concerning UNCITRAL legal texts could itself promote a measure of uniformity in the interpretation of such texts. Such decisions could be taken into consideration by parties in planning and executing their commercial transactions, as well as by lawyers, courts and arbitral tribunals in dealing with disputes arising from such transactions. The extent to which courts will take into account decisions of foreign courts varies, and depends on a number of factors. However, courts are often more apt to take into account foreign decisions relating to legal texts which are intended to achieve international uniformity of law than other decisions. The incentive to take into account foreign decisions could be even greater with respect to decisions relating to the conventions elaborated by the Commission, each of which specifically provides that in the interpretation of the convention, regard is to be had to its international character and to the need to promote uniformity. 6/

6/ See Convention on the Limitation Period in the International Sale of Goods (New York, 1974), U.N. Doc. A/CONF.63/15, art. 7; United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), U.N. Doc. A/CONF.89/13, Annex I, art. 3; United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), U.N. Doc. A/CONF.97/18, Annex I, art. 7(1).

9. Consideration might also be given to the question of whether the Commission might play a more direct role in promoting the uniform interpretation of UNCITRAL legal texts. The suitability of various roles is discussed below.

10. Resolving conflicting interpretations in court or arbitral decisions:

Under this possibility, the Commission would consider conflicts in the interpretation of UNCITRAL legal texts by courts or arbitral tribunals and would express its opinion as to the proper interpretation of the texts. This approach might be found to be unsuitable with respect to conventions elaborated by the Commission and model laws adopted by it. Such legal texts are incorporated into the national laws of the States adhering to the conventions or implementing the model laws. This approach would therefore involve the Commission in intervening in interpretations by courts of their own national laws when the competence to do so has not been granted to the Commission by the States parties to or adopting the texts concerned. In addition, in the case of conventions which have been adopted in final form by forums other than the Commission itself (i.e. by conferences of plenipotentiaries), the Commission would become involved in interpreting texts which it had not even adopted in final form. Moreover, an interpretation of a legal provision is very often made within the particular factual context of the case in which the interpretation is rendered. Therefore, the task of resolving two conflicting interpretations would in many cases require a detailed review of the cases within which the interpretations were rendered. The performance of such a task by the Commission would make it very similar to an "international court of appeal". It might be considered more suitable, however, for the Commission to resolve conflicting interpretations of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, since many of the objections to the performance of such a function with respect to conventions and model laws would not apply to the resolution of conflicting interpretations of these Rules.

11. Responding to questions referred to the Commission in the context of a dispute: Under this possibility, the Commission would render interpretations of UNCITRAL legal texts at the request of a court or arbitral tribunal or of one or both of the parties to a dispute. Many of the factors referred to in the previous paragraph may be relevant to the question of whether such an approach is suitable. It may also be relevant to consider that, if the interpretations were to be rendered by the Commission as a whole at its annual sessions, the resolution of the disputes could be delayed for substantial periods of time until such interpretations were rendered. In addition, it may be considered that in order for such a function to be exercised effectively by the Commission, the parties to the dispute should be entitled to present their views to the Commission on the question referred to it.

12. Responding to abstract questions of interpretation addressed to the Commission: Under this possibility, the Commission would respond to abstract questions of interpretation, arising from UNCITRAL legal texts, addressed to the Commission by parties to a commercial transaction or by other interested persons. Such questions are those which do not arise in the context of a dispute (although dealing with such questions may affect concrete disputes). The circumstances discussed in paragraph 10, above, may also make this approach unsuitable with respect to abstract questions of interpretation of conventions elaborated by the Commission and model laws adopted by it.

13. However, the approach might warrant further consideration with respect to abstract questions of interpretation arising from the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules. Such legal texts have been adopted by the Commission itself, and do not constitute part of the national law of States. An analogy might be found in the procedures employed by the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC), which issues interpretations of the Uniform Customs and Practice for Documentary Credits in response to abstract questions of principle addressed to that Commission by banks and other interested entities or persons. This function is not exercised if the question of interpretation arises in connection with a dispute. The decisions issued by the Commission on Banking Technique and Practice have been published in booklets made available to the general public. If a similar undertaking by the Commission with respect to the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules were thought to merit further exploration, a number of questions would have to be considered, such as whether requests for interpretation should be initially considered by a working group or by another small group of Commission members, the exact terms of reference and procedures to be followed in connection with the exercise of such a function, and the costs of engaging in such a procedure.

14. Certain "supra-national" institutions have been given competence to render interpretations of conventions and laws designed to achieve uniformity of law. For example, national courts of States members of the European Economic Community may (and, in the case of courts of final recourse, must) call upon the European Court of Justice to interpret the provisions of the Treaty of Rome setting up the Community. ^{7/} In addition, the Benelux countries have established a Benelux Court of Justice which has jurisdiction to render interpretations of uniform laws adopted by those three countries. ^{8/} Also, the Articles of Agreement of the International Monetary Fund provide that questions of interpretation of the provisions of the Agreement between Fund members or between a member and the Fund shall be submitted to the Executive Directors of the Fund for their decision. A decision issued by the Executive Directors may then be referred to the Board of Governors of the Fund. ^{9/} However, an essential feature of all of these procedures is that in each case competence is given to the body authorized to interpret the legal text in question by the States which are parties to or which have adopted the text. These procedures may therefore not be viewed as precedents for the assumption by the Commission of competence to interpret legal texts which have been incorporated into the national law of States.

15. In view of the foregoing discussion, the Commission might consider the following to be an appropriate mechanism for dealing with problems concerning the uniform interpretation of UNCITRAL legal texts. In addition to disseminating decisions concerning UNCITRAL legal texts (see paragraph 6, above), the Commission could request its Secretariat also to monitor judicial

^{7/} Treaty establishing the European Economic Community (Rome, 1957), art. 177.

^{8/} Rodière, Introduction au Droit Comparé (1979), p. 132.

^{9/} Articles of Agreement of the International Monetary Fund, art. XVIII.

and arbitral decisions relating to the interpretation of such texts, and to report to the Commission on the status of the interpretation of such texts as circumstances warrant. In pointing out conflicts in the interpretation of provisions of UNCITRAL texts, as well as gaps in such provisions which come to light, the issuance of such reports could itself assist in promoting the uniform interpretation of such texts. Moreover, in the light of these reports, the Commission could consider steps to be taken to deal with such conflicting interpretations or gaps. The nature of such steps would vary with the circumstances, including the nature of the legal texts concerned. For example, with respect to conflicts in the interpretation of provisions of the UNCITRAL Arbitration Rules or the UNCITRAL Conciliation Rules, the Commission might decide to express its opinion as to the correct interpretation of the provisions in question (see paragraph 10, above). With respect to these or other UNCITRAL legal texts, the Commission might even as a last resort decide that the text should be amended so as to resolve the conflict in interpretation or the ambiguity. In the case of a text which has been adopted in its final form by the Commission, the Commission could amend the text itself. On the other hand, in the case of a convention elaborated by UNCITRAL, but which has been adopted in final form by a diplomatic conference, the Commission might decide to recommend that procedures be instituted to amend the convention. In some cases, the Commission might consider that a new legal text is needed. ^{10/} The Commission might wish to consider the concrete steps to be taken to deal with problems concerning the uniform interpretation of an UNCITRAL legal text at the time when it considers a report submitted to it by its Secretariat pointing out specific problems.

CONCLUSIONS

16. At an appropriate time, perhaps after the entry into force of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), the Commission may wish to consider establishing a means of collecting and disseminating court and arbitral decisions relating to international conventions elaborated by the Commission, model laws adopted by the Commission, and the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, as described in paragraphs 4 to 6, above. In addition, the Commission may wish to consider following the measures discussed in paragraph 15, above, to promote the uniform interpretation of these legal texts, as well as the measures discussed in paragraphs 10 and 13 to promote the uniform interpretation of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules.

^{10/} It may be recalled in this connection that the Secretariat submitted to the twelfth session (1979) of the Commission a study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (A/CN.9/168). This study noted certain problems with respect to the interpretation and application of the Convention, but concluded that despite such problems, the Convention had satisfactorily met the general purpose for which it was adopted, and that an amendment of the Convention was not then necessary. On the other hand, the Secretariat recommended that certain other steps be taken to eliminate certain problems areas and to facilitate the application of the Convention (A/CN.9/168, para. 50; see, also, the note by the Secretariat on the subject, A/CN.9/169). These steps resulted in the work by the Commission towards the preparation of a model law on international commercial arbitration.