THE UNIFICATION OF INTERNATIONAL COMMERCIAL LAW—SALE AND ARBITRATION

By F. P. DONOVAN*

I. SALE OF GOODS

'With the exception of the new Italian Civil Code which follows largely the proposals of this Institute, the national statutes involving sales of goods are strikingly diversified and most of them reflect antiquated economic situations.'[1]

This century has been remarkable for the many demonstrations of the disintegrating force of political and economic nationalism. Though today there are visible certain tendencies in the opposite direction, *e.g.*, Benelux, the European Free Trade Area, even perhaps the more elusive concept of a United Arab Federation or Republic, the legacy of many states, each with its own system of laws and a jealous regard for 'sovereignty', remains.

In a far less publicized fashion, however, a considerable amount of 'unification'[2] has been achieved in the sphere of private law. The various specialized agencies of the United Nations Organization, *e.g.*, the European Economic Commission, are actively engaged on such problems. Other official bodies with solid records of achievement behind them are the Commissions appointed by the Scandinavian governments, and, more recently, the Commission formed by the Benelux Ministers of Justice in 1948.[3] In the private sphere, there are such diverse bodies as the International Law Association, the International Committee of Comparative Law, the International Chamber of Commerce and the International Bar Association.[4] Somewhat in-between these two groups is the International Institute for the Unification of Private Law. This was founded in 1926, for the purpose of 'harmonising and co-ordinating the rules of Private Law of the different States or groups of States, with a view to promoting gradually the adoption of a uniform system of Private Law by the various States'.[5] Originally having a close connection with the League

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[1] Rabel, 'The Draft of a Uniform Law Concerning the Sale of Goods' (1948) *Unidroit* (Annual Publication of the International Institute for the Unification of Private Law, see *infra*) 57.

[2] Perhaps a better term would be 'uniformity'.

[3] The National Conference of Commissioners on Uniform State Laws performs a similar function within the U.S.A.

[4] *Cf.* the draft Uniform Law on the International Sale of Personal Property, prepared by the Inter-American Juridical Committee, described by Kuhn, (1954) 48 *American Journal of International Law* 126.

[5] From the undertaking made by the Italian Government in establishing and maintaining the Institute. Cited in the report of the President of the Institute, Massimo Pilotti, (1948) *Unidroit* 15.

of Nations, the Institute has now established a similar relationship with the United Nations Organization and its specialized agencies. It is an independent body operating under its own Statute. Its General Assembly, composed of representatives of the 40 member states,[6] approves the programme of work of the Institute and appoints the members of the general executive body, the Directing Council. The work of the Institute has included the drafting of Uniform laws (*e.g.*, of Sale, Arbitration, Conclusion of Contracts by Correspondence, Mercantile Agency, Maintenance Obligations, Carriage of Goods by Road and by Inland Waterways, Compulsory Insurance of Motorists, Liability of Innkeepers),[7] active collaboration with other international bodies concerned with the problems of Unification, and the organization of a general Conference in Barcelona in 1956, attended by representatives of all such bodies, public and private.[8] Finally the Institute has built up a splendid library of over 110,000 volumes, one of the best of its kind in Europe.

Methods of Achieving Unification

Too often in the international sphere, discussions on law, and especially the unification aspect thereof, result in little more than expressions of pious hope or resolutions of the vaguest generality. Of particular importance, therefore, is the paper delivered at the 1956 Barcelona Conference by the Secretary-General of the Institute, Dr Matteucci. Drawing on the thirty years' experience of the Institute and assessing its record of achievement, he presented a systematic study of the Methods of the Unification of Law[9]—an essentially practical approach rarely attempted in this area.

He sets out three possible methods of achieving unification:

1. Spontaneous adoption of uniform rules by various States for which these rules are drawn up . . .
2. Imposition effected by a supranational (or federal) authority on which these States have conferred part of their legislative powers . . .
3. By means of reception . . .[10]

For obvious reasons, Dr Matteucci limits this discussion to the first

[6] Though quite a number of member states make annual contributions to the Institute, the Italian Government still bears the greater part of the cost, as well as putting at the disposal of the Institute, the handsome Aldobrandini Palace in Rome.

[7] 'The main object of the Institute is what may, perhaps, be described as *clinical research,* which for our purposes means the investigation of problems created by the existence of legal barriers to intercourse between the nations, and the formulation of proposals for their removal. . . . The Institute, therefore, furnishes a *point d'appui* of the very greatest value in connexion with any movement for the unification of private law. . . .' Gutteridge, (1933) 14 *British Year Book of International Law* 81.

[8] See (1957) *Unidroit* for a full account of the proceedings of the Conference.

[9] *Ibid.,* 3-101.

[10] *Ibid.,* 7. An interesting recent example of this latter method was the adoption by Turkey in 1926 of the Swiss Civil Code.

of these methods, and proceeds to analyse in detail the mechanics of the unification process,

> with its three stages of development: the preliminary stage, or stage of study of the rules to be unified; the stage of preparation and of formulation of the uniform rules; the operative stage or stage of introduction of the uniform rules in the legal systems of the various States, as well as the problem of the appropriate measures to be taken in order to safeguard the uniformity already attained against any later intervention by the national law maker.[11]

Possible Scope of Unification

It is not proposed to consider here in detail Dr Matteucci's analysis of these stages, though his paper must constitute essential reading for anyone engaged in legal work of an international character.

A survey of achievements in the field of unification, both international, 'regional' (*e.g.*, Scandinavia), and national (*e.g.*, United States of America) reveals that there has been no constructive pattern of unification, '*i.e.*, the desire of achieving the unity of the whole legal system and more particularly of achieving unity in the field of the general principles of law'.[12] Unification has been only 'partial and occasional'. States have been prepared to sacrifice their legislative autonomy only to the 'necessary minimum to satisfy the needs deriving from intensified international relationships'.[13] The subject-matters of unification have all had the characteristic of immediate necessity or of immediate utility. The requirements of the United States National Conference of Commissioners on Uniform State Laws, which must be satisfied before a particular topic will be considered, illustrate clearly this limited operation:

1. There should be a plainly obvious reason and demand for a uniform Act on the subject.
2. There should be such an existing demand for the Act as to make its preparation a practical step towards uniformity of state laws. It should be practically certain that the Act when prepared will be accepted by a substantial number of the state legislatures and enacted into law.
3. It should deal with a subject as to which the lack of uniformity will mislead, prejudice, inconvenience, or otherwise adversely affect, the citizens of the States in their activities or dealings in other States or with citizens of other States.[14]

The twin elements of existing demand or interest, caused by inconvenience and expense in everyday affairs, and the consequent probability of achieving an acceptable solution, explain the essentially

[11] *Ibid.*, 7. [12] *Ibid.*, 9. [13] *Ibid.*, 9.
[14] *Handbook of the National Conference of Commissioners on Uniform State Laws*, (1953) Appendix 350 ff.

pragmatic selections of subject-matters for unification. And, of course, the obvious and fruitful field has been—and is—that of Commercial Law.[15] Whatever the temperature on the political front and however restrictive governmental regulations, international trade must continue.

> Swift intercommunication, the facility of frequent intercourse, and the ceaseless interweaving everywhere of the diverse and tenacious threads of commercial enterprise have taught the workers of the Western world, not merely the error of much of their old unreasoning and indiscriminating mistrust of all foreign institutions, but its costliness. They have come to see the gain, both direct and indirect, moral and material, which would ensue if the machinery of these foreign institutions and of their own could be brought into smoother and more harmonious co-operation.[16]

This same pragmatic criterion has been applied by the Institute, for example, in its work on unification. 'As a first subject of unification, the contract on which all international exchanges are based, was selected: the contract of Sale of Goods'—and a draft of a Uniform Law on the International Sale of Goods was prepared. Complementary to this were Uniform Laws on the Conclusion of Contracts by Correspondence and on Mercantile Agency. Ancillary contracts whose chief aim was to implement the Contract of Sale came next, *e.g.*, Contract for the Carriage of Goods by Road and by Inland Waterway, Bills of Exchange and Insurance. And finally, as one means of resolving conflicts arising under the Contract of Sale, a Uniform Law of Commercial Arbitration.

Additional Unifying Factor

Not all the forces working towards a uniformity in international commercial law are scientifically directed or consciously designed for that purpose. Commercial practice itself is such a factor.

> Experience, however, seems to show that commerce is served by a number of standard forms, with newly devised clauses rapidly imitated throughout the world.[17] In the vast domain of sales of goods, differences in stipulations are caused much more often by the natural differences of merchandise sold than by local or national predilection. Insurance, banking, carriage of goods contracts, may be distinguished in analogous

[15] Some examples of International Conventions achieving a measure of uniformity are the Hague Rules (governing Carriage of Goods by Sea), Bills of Exchange (though not adhered to by the U.K. or Australia), Arbitration Awards, International Carriage of Goods by Road, *etc.*

[16] Kennedy L.J. in *Journal of the Society of Comparative Legislation* (1932) xiii (N.S.), 106, cited by Gutteridge (1933) 14 *British Year Book of International Law* 76.

[17] A similar conclusion on the unifying effect of standard forms and rules generally agreed on by the commercial world is expressed by Mons. A. Bagge (a former member of the Supreme Court of Sweden, and President of the Arbitration Court of the International Chamber of Commerce) (1948) *Unidroit* 253.

groups under rational rather than local criteria. For this and other reasons, it may be less difficult than appears at first sight to resolve the local attachments most characteristic of the individual groups of contracts.[18]

In Rabel's view, then, 'the concepts of commerce have reached a remarkable degree, though by no means ultimate, of international unity, to which the courts throughout the world have increasingly shown favour. . . . A uniform law in this matter is necessary, not so much to achieve a radical transformation of the law as it is in reality (and not as it appears in the books), but rather simply to make clear the methods needed to achieve a fair distribution of rights and obligations.'[19] He constantly minimizes the many local variations in concept, terminology and remedies. 'Their apparently incompatible features, to a considerable extent, are due to origins in different periods of development rather than to innate national peculiarities. And a great part of the variety stems from legal technicalities rather than from considerations of convenience.'[20] The villain of the piece seems to him the national legal professions. 'Lawyers seem to be intractable as to such traditional axioms connected with forms of procedure and enforcement.'[21]

Commercial practice then has achieved a certain measure of unification. Naturally, from its unsystematic and day-to-day approach, many problems and gaps still remain. But it does appear that in addition to the methods of unification discussed by Dr Matteucci, further difficulties and divergences could be eliminated, not by the enactment or acceptance by Convention of a Uniform Code, but by the increasing standardization and clarification of actual commercial practice. Two steps are necessary here:

(a) The drawing up and acceptance of standard forms for use in all international contracts in specific trades or businesses, and also, general agreement on the interpretation of such forms.
(b) The development, in conjunction with such standard forms, of some recognized uniform system of arbitration and the general enforcement of awards attained thereunder.

The U.N. Economic Commission for Europe is currently engaged on the preparation of such standard forms of contract for use in specific industries and trades with international ramifications, and already has published, for example, its General Conditions for the Export and Import of Sawn Softwood, of Cereals, of Citrus Fruits and for the Supply and Erection of Plant and Machinery for Import and Export.

[18] Rabel, *The Conflict of Laws, a Comparative Study* (1947) ii, 482.
[19] Rabel, 'The Draft of a Uniform Law Concerning the International Sale of Goods' (1948) *Unidroit* 59. (The translation is my own and does not correspond exactly with the 'official' translation.) [20] *Ibid.*, 59. [21] *Ibid.*, 63.

A UNIFORM LAW OF SALE

HISTORY

The Institute's proposed Uniform Law of Sale has a long history. Work commenced on it in 1930, and the first draft was submitted to the League of Nations Council in 1935, when it was approved by a majority of Governments (Great Britain, India, Poland and Yugoslavia alone declaring that the need of such a unification was not felt in their countries). Further work on the Draft was postponed till 1950 and in the following year a revised version was examined at the Conference on Private International Law held at The Hague. Again it received general approval and a Working Commission was appointed by the Conference to consider the Draft in more detail in the light of comments and suggestions made at the Conference. The final draft[22] has now been forwarded to the Dutch Government for submission to a future Conference, after interested nations have submitted their comments.

PROVISIONS OF PROPOSED UNIFORM LAW

It is proposed to offer some comments on the proposed Uniform Law, pointing out similarities and divergences of approach as compared with English (and Australian) Sales law, and also relating its provisions to the Standard Contract Forms devised by the Economic Commission for Europe *(supra)*.

Scope of Operation

At the outset it should be emphasized that the Uniform Law is to apply only to 'international' sales, and two criteria must be satisfied before a sale contract is 'international' in this sense. First, the 'places of business' of the parties, or in default thereof, their 'habitual residences' must be in the territory of different states. Then, *in addition*, either

(a) the contract must imply 'that the goods sold shall be carried, or that when the contract was concluded they had been carried, from the territory of one State to the territory of another', or
(b) the acts of the parties constituting the offer and acceptance have not all been carried out within the territory of the same state, or
(c) delivery of the goods has to be made within the territory of a state other than that within which the acts constituting offer and acceptance were carried out.[23]

[22] An English translation of the text is published in (1958) 7 *International and Comparative Law Quarterly* 3-21.
[23] Art. 2. See also Art. 8 and its problem of when the buyer has 'made known' to the seller that the goods will be resold under a contract governed by this law.

The strictly internal sales law of each country thus remains unaffected. Similarly, it is provided that the Uniform Law need not govern where the sales laws of the two states involved are the same or closely related.[24]

Subject to these limitations, the Uniform Law is intended to replace the municipal laws of the states concerned. Any matters not expressly dealt with by the Uniform Law are to be 'settled according to the general principles on which this law is based'.[25]

The traditional freedom of contract of the parties is preserved in that they may, either expressly or by necessary implication, exclude the operation of the Uniform Law, provided that they indicate the municipal law to be applied to their contract.[26]

Like the English Sale of Goods Act, the Uniform Law only applies to sales of 'goods'. These are not defined as such in the Law, which does however specifically exclude sales of stocks, shares, negotiable instruments, money, registered ships, *etc.*, and also sales made 'by authority of the law or on execution or distress'.[27]

In addition, there are several fundamental limitations on the scope of the Uniform Law. It is restricted to defining the mutual rights and duties of the seller and buyer arising from the contract of sale, and thus does not attempt to deal with the problems of the formation, or even of the essential validity, of the contract of sale itself,[28] nor with the ownership of, or title to, the goods. These questions, therefore, remain to be settled by the conflict rules of the forum.[29]

Concept of Delivery ('Délivrance')

The Uniform Law, ignoring, as has been mentioned, the problem of title, is built up on the concept of 'delivery', as constituting the single most important obligation of the seller. ' "Delivery" of the goods in a specific sense is easily the chief point regarded by merchants and, for legal purposes, the most characteristic feature of any sales contract.'[30]

[24] Art. 3. Under this Article, for example, an appropriate declaration could preserve the substantial uniformity already existing between the U.K. and the different Dominions and Colonies and several of the American States.

[25] Art. 1.

[26] Art. 6. Does this proviso mean that under the Uniform Law, an 'honourable pledge' clause, of the type dealt with in *Rose & Frank v. Compton* [1923] 2 K.B. 261, would be ineffective, since no municipal law is indicated? The Standard Forms drawn up by the Economic Commission for Europe have compulsory arbitration clauses but the law generally selected as being applicable is that of the vendor's country.

[27] Art. 9. *Cf.* Sale of Goods Act (U.K.) s. 62, Goods Act 1958 (Vic.) s. 3.

[28] Art. 12.

[29] Curiously, Art. 19 does appear to deal with one aspect of validity. 'No particular form is required for a contract of sale. It may be proved by means of witnesses.' This provision confuses two separate questions, that of formal validity and that of evidence required, as, for example, under the old s. 4 of the Sale of Goods Act, now amended by the Law Reform (Enforcement of Contracts) Act 1954 (U.K.). Victoria has not yet passed similar legislation.

[30] Rabel, (1948) *Unidroit* 63.

Delivery indicates 'the physical act by which the seller terminates his contractual activity with respect to the goods'.[31] Articles 20 and 21 are devoted to a fixing of this point of time, which does not vary greatly from, for example, section 32 of the English Sale of Goods Act.[32] The basic idea is the 'handing over of goods which conform with the contract',[33] but as Professor Honnold points out 'delivery' is a most inadequate translation of the concept of *'délivrance'*.[34]

Passing of Risk

By thus concentrating on delivery instead of title, the Uniform Law avoids many of the unnecessary complications found in national Sales laws. Such a refocusing of interest was adopted by the framers of the proposed Uniform Commercial Code in the United States.

> The legal consequences [of a sale] are stated [in the Code] as following directly from the contract and action taken under it, without resorting to the idea of when property or title passed, or was to pass, as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence, and to substitute for such abstractions proof of words and actions of a tangible character.

To take but one example. Businessmen are more concerned with knowing the limits of their responsibility for goods than with the exact location of the legal ownership therein. In the Sale of Goods Act this 'passing of the risk' is, as a general rule, coupled however with the passing of the property, thereby causing uncertainty and difficulty. The Uniform Law avoids this by tying the risk to the equally important and relatively concrete notion of delivery.[35]

This whole approach involves a highly desirable conceptual simplification, which might well be considered suitable for internal sales law as well. As early as 1932, Professor Gutteridge wrote, in criticism of the English Sale of Goods Act:

> Moreover, the rule which establishes co-incidence between the passing of property and the passing of the risk in the goods seems to call for

[31] *Ibid.*

[32] Art. 21. 'Where the contract of sale implies the carriage of goods, unless it is provided that delivery is to be effected at the place of destination, delivery shall be deemed to take place when the goods are handed over to the carrier. . . .' But 'where the contract of sale does not imply the carriage of the goods, the seller must, in the absence of any express or implied term or of any usage to the contrary, deliver the goods at the place where he carried on business at the conclusion of the contract, or, in default thereof, at his usual residence. . . .' (Art. 25). This is almost identical with s. 29 (1) of the Sale of Goods Act.

[33] Art. 20.

[34] 'A Uniform Law for International Sales' (1958) 107 *University of Pennsylvania Law Review* 299, 318.

[35] Art. 109 provides that the risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and of this law.

reconsideration in view of the fact that the question whether a trader bears the risk or not is infinitely more important to him in practice than the passing of the property, and the two concepts have proved to be uneasy bedfellows.[36]

It should be pointed out that this coupling of risk with delivery would not, in the majority of cases under the opposing systems, lead to a different end result, *i.e.*, which party had to bear the loss.[37] But the result would be more readily ascertainable and predictable. So that the party ultimately liable would have little excuse for not having covered himself against such loss by appropriate insurance measures.

This new approach is reflected also in the Standard Contract forms drawn up by the Economic Commission for Europe. The passing of the risk is always referred to specifically and, in general, coincides with 'delivery', *i.e.*, when the goods are placed at the disposal of the purchaser or someone acting on his behalf.[38]

Remedies

In the law of Sale, the most significant differences dividing Anglo-American law from the Civil or Continental, occur in the field of remedies. The solutions of the Uniform Law to these problems are therefore of particular interest.

(a) *Specific Performance*

English and American Courts traditionally take an extremely restrictive view of the availability of this remedy in Sale of Goods cases and, in general, limit it to those cases where the 'normal' remedy of damages would be inadequate or insufficient. A typical example is where the goods in question possess some unique quality of their own, *e.g.*, heirlooms. And always, even where the remedy might otherwise be considered available, it is still within the discretionary powers of the Court. On the Continent no such limitations exist, and Specific Performance, in theory at any rate, is as 'normal' a remedy as damages. Professor Gutteridge, however, cites the evidence of M. Trouiller (for many years President of the *Tribunal de Commerce* of the Seine) before the Committee of the Institute, to the

[36] 'An International Code of the Law of Sale' (1933) 14 *British Year Book of International Law* 75, 80. See also Honnold, *op. cit.*, 318-320.

[37] It involves only a distinction between the 'organisation of a statute' as opposed to 'the law' on a subject. See W. Noel Keyes, 'Towards a Single Law Governing the International Sale of Goods' (1954) 42 *California Law Review* 653. In the same way the actual passing of property does not vary greatly even under municipal sales laws having apparently different governing rules. 'The divergence of viewpoints of the various nations with respect to the transfer of title appears to this writer to be more one of form than of substance . . .' *Ibid.*, 666.

[38] *E.g.*, Form 574A (Supply and Erection of Machinery for Import and Export) cl. 9 (2).

effect 'that it was exceptional, in his experience, to meet with a demand for specific performance of a contract of sale'.[39]

Whether this may be regarded as a general Continental trend in practice or not, the Final Draft of the Uniform Law adopts a view which preserves intact the Anglo-American approach and at the same time imposes a drastic limitation on the Continental theory. Article 27 provides, 'Where the seller fails to perform his duty to deliver the goods . . . the buyer may . . . claim specific performance of the contract, *should this be possible and permitted by the municipal law of the Court in which the action is brought. . . .*' Article 28 goes on, 'Notwithstanding that the municipal law of the Court in which the action is brought recognises the right to demand specific performance, the buyer shall not be entitled to demand such performance where the sale *relates to goods in respect of which it is in accordance with usage to buy replacements*'.[40]

The Economic Commission for Europe Standard Forms make no provision regarding Specific Performance as such. However, upon the vendor's failure to deliver, it is expressly provided that the purchaser, on giving notice in writing within a reasonable time, is entitled to a reduction of the price (unless he has suffered no loss). Such reduction 'shall be to the exclusion of any other remedy'.[41] In other words, the Forms seem to follow normal commercial practice and make a breach of contract for the sale of goods sound in damages, rather than Specific Performance.

(b) *Repudiation*

It is here that a divergence from Anglo-American legal theory is apparent. Under our law, breach of condition normally gives the injured party the immediate right to repudiate,[41a] as well as preserving, somewhat illogically, the right to damages for the breach. And in contracts calling for the shipment of goods, time is usually regarded as being of the essence of the contract.[42] Continental practice does not take such a strict view of timely performance: 'In Continental Europe, where commercial life is paced somewhat less rapid than over here [*Sc.*, United States of America], a delay in delivery often gives rise to a case which may be submitted to arbitration under the civil or commercial code. The judge may allow the buyer to cancel or he may grant to the seller a period of grace.'[43]

[39] *Op. cit.*, 85.

[40] The previous draft (Art. 26) was in somewhat wider form and refused the remedy either where such a usage existed or 'where [the purchase of such goods] can be made without inconvenience or excessive expense'.

[41] See, *e.g.*, General Conditions for Supply of Plant and Machinery for Export, Form 188, Clause 7 (3).

[41a] Subject to the notoriously difficult s. 11 (1) (c) of the English Sale of Goods Act. *Cf.* Goods Act 1958 (Vic.), s. 16 (3).

[42] *Bowes v. Chaleyer* (1923) 32 C.L.R. 159, 160.

[43] Keyes, *op. cit.*, 668.

Rabel expresses a similar sentiment:

> The sellers in continental Western Europe, on their part, are incensed at the idea of treating every ordinary transaction as if it were a highly speculative overseas sale of wheat or rye. In a post-war period full of obstacles to production and trade, they feel less than ever able to cope with absolutely severe time limits. The English system is adapted to English fairness. How would the faculty to cancel any transaction immediately in a declining market be misused by less decent purchasers? And would not the seller, expressly denied deferment in delivery by the law, counter on the ground of exoneration by accidental impossibility and so unleash litigation after all?[44]

One result of this greater lenience for the seller is that most Continental legal systems require some further act by the buyer before he can regard the contract as avoided. Gutteridge refers to this general requirement as 'interpellation'[45] and its usual form is an additional demand (either formal or informal) for performance by the buyer.

The Uniform Law seems to attempt a compromise between these conflicting views but, in the opinion of this writer, the sections concerned are imprecisely drafted and represent the least successful part of the law. Article 27 sets out the general position that on failure by the seller to deliver in accordance with the contract the buyer may (as provided in subsequent Articles) either claim Specific Performance *(supra)* or 'should the present law not provide that it is *ipso facto* avoided, avoid the contract by formal declaration. . . . In no event shall the seller be entitled to obtain a period of grace from the Court.' (The buyer shall also be entitled to damages in the cases provided for in the following Articles.)

Presumably, therefore, the general rule is that any breach in the duty to deliver enables the buyer to repudiate by *formal* declaration. Article 29 contains a specific rule as to time of delivery. 'Where failure to deliver the goods at the time fixed amounts to a fundamental breach of the contract, the buyer may [either demand specific performance . . . or] declare the contract void. He must inform the seller of his decision without undue delay; otherwise the contract shall *ipso facto* be avoided.' So far the position is not unlike English law. However, Article 31 indicates that, for the purposes of Articles 29 and 30, time will not always be of the essence. 'A failure to deliver the goods at the time fixed shall always amount to a fundamental breach of the contract *whenever the goods concerned are dealt with on a market available to the seller.* Where the contract of sale was concluded on an Exchange, failure to deliver at the time

[44] 'The Hague Conference on the Unification of Sales Law' (1952) 1 *American Journal of Comparative Law* 58, 65.
[45] *Op. cit.*, 86.

fixed shall avoid the contract *ipso facto* according to the usage of the Exchange.'

Otherwise, Article 15 offers a general definition of 'fundamental breach': 'A breach of the contract shall be deemed to be fundamental whenever the party knew or ought to have known, at the time the contract was made, that the other party would not have contracted had he foreseen that such breach would occur.'

The general result intended here would seem to be identical with that of English law, since 'fundamental breach' may be equated with 'condition'. Apparently also, a fundamental breach of contract enables the injured party to repudiate. So, too, where time can be shown to be of the essence, untimely delivery avoids the contract. One difference in practice would be that, apart from cases covered by Article 31, the onus on the buyer may be greater than under English law since, presumably, the mere fixing of a delivery date does not automatically make time of the essence. To this extent, the greater leniency of Continental law towards the seller is recognized.

In cases where time is not shown to be of the essence, the solution afforded by the Uniform Law seems in accord with usual commercial practice. Article 30 sets out the procedure in detail:

> Where failure to deliver the goods at the time fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to claim specific performance. . . . The buyer may, however, inform the seller of a new time for delivery, thereby allowing the seller a further period of time of reasonable duration, stating that after that time he will refuse to accept the goods. If the period of time thus fixed by the buyer is not of reasonable duration, the seller may, without undue delay, notify the buyer that he will only deliver at the expiration of a period of time which he himself may fix provided that it is reasonable, in the absence of such notification the seller shall be deemed to have accepted the period fixed by the buyer. Should the goods not have been delivered by the seller at the expiration of the further period, the contract shall *ipso facto* be avoided.[46]

(c) *Damages*

The solution adopted by the Uniform Law will not appear unfamiliar to Anglo-American courts. In the first place, a distinction is drawn between cases where the contract has been avoided and those where it remains in force. It is suggested, however, that the distinction serves little practical purpose since the basic principles for the assessment of damages in either case appear the same. Article 96 (dealing with cases of avoidance) states that 'Where there is a current price for the goods, damages shall be equal to the difference

[46] Art. 24, referring to delivery within a 'reasonable time', adds 'regard having been had to the nature of the goods and to the circumstances'.

between the price fixed by the contract and the current price prevailing at the date on which the right to declare the contract void could have been exercised. . . .'[47] This point of time may not always coincide with breach (see *supra).*

Article 94 amounts virtually to an adoption of the rule in *Hadley v. Baxendale.*[48] 'Where the contract has not been avoided, damages shall consist of the loss actually suffered and the loss of profit; provided that they shall not be in excess of the loss or damage resulting from those events that the party liable in damages knew or was bound to take into consideration at the time of the conclusion of the contract. . . .' A similar limit can apply to cases under Articles 96 and 97 (where the contract is avoided).[49]

In all cases Article 101 imposes a duty on the party injured to adopt all reasonable measures to mitigate the loss which has occurred provided this can be done without appreciable inconvenience or expense.[50]

These principles of assessment are paralleled in the Economic Commission for Europe Standard Forms. Clause 11, for example, of the General Conditions for Supply of Plant and Machinery provides:

(1) Where either party is liable in damages to the other, these shall not exceed the damage which the party in default could reasonably have foreseen at the time of the formation of the Contract.

(2) The party who sets up a breach of contract shall be under a duty to mitigate the loss which has occurred provided that he can do so without unreasonable inconvenience or cost.

(d) *Conditions and Warranties*

This distinction, and the provisions relevant thereto, represent the most complex and, to some extent, antiquated part of the English legislation. It may afford a measure of consolation that the sections of the Uniform Law dealing with the 'conformity' of the goods (and associated provisions) are likewise not entirely satisfactory. Article 40 sets out the circumstances in which goods delivered shall be

[47] *Cf.* English Sale of Goods Act ss. 50-51. The 'current price . . . shall be that prevailing in the market normally used by that buyer in the ordinary course of his business for the purchase of goods of the kind to which the contract relates' (Art. 96).

[48] (1854) 9 Exch. 341 especially as restated in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 K.B. 528. 'The most striking practical gain has been derived from the common law doctrine of damages. General damages as the regular and minimum award, and special damages if the defaulting party had to contemplate the respective damage in contracting, as well as many particulars of this subject agree with American practice—though of course not its terminology—and disagree with specific foreign provisions.' Rabel, (1952) 1 *American Journal of Comparative Law* 63.

[49] Art. 98. 'The amount of damages fixed [under Arts. 96 and 97] may be increased to that of the total damage suffered or of the profit lost if the party who suffered the loss or damage can prove that, at the time the contract was concluded, the other party knew or ought to have known of the events to which such loss or damage is due.'

[50] *Cf.* the similar statement of principle by Haldane L.C. in *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rlys. Co.* [1912] A.C. 673, 689.

considered not to be in conformity with the contract. They include cases where the seller has delivered goods . . .

(2) which are not those to which the contract relates, or goods of a different kind
(3) . . . which do not possess the qualities necessary for their ordinary or commercial use . . .
(4) . . . which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract
(5) . . . which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.

These 'warranties' of quality are wider in scope than the corresponding English provisions.[51] The 'Sale by description' idea is incorporated only implicitly perhaps in (2) and (5); the element of reliance on the seller's skill and judgment and the requirement that the sale be in the course of the seller's ordinary business, *etc.*, are omitted. The burden placed on the seller might seem inordinately heavy. But the Article adds a proviso: 'No excess or deficiency in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not *material to the interests of the buyer,* or where it is permitted by usage.' Moreover, by Article 45, if the seller can prove that at the time of the conclusion of the contract the buyer knew or ought to have known of the lack of conformity under sub-sections (3), (4) and (5), *supra,* he shall not be liable for defects.[52]

Conformity is to be tested as at the time of the passing of the risk (Article 44). This appears to raise as many difficulties as section 11 (1) (c) of the Sale of Goods Act. Under Article 109, as indicated, the risk normally passes when delivery of the goods is effected in accordance with the provisions of the contract.

Yet inspection (an obligation imposed on the buyer) does not take place at the delivery point, but at the place of destination (Article 47). The draft attempts to cover this gap by the proviso to Article 44: 'Where, because of a declaration of avoidance of the contract or of a demand for other goods to be substituted, risk does not pass, the conformity of the goods with the contract shall be determined by their conditions at the time when risk would have passed had they been in conformity with the contract.' The circularity is apparent, even without taking into account the latter part of Article 109 'Where goods which do not conform with the contract are handed over to the buyer . . . the risk shall pass to the buyer if he

[51] Sale of Goods Act (U.K.) ss. 13, 14, 15. The words of Art. 40 (5) 'provide a basis for a unified, powerful and realistic approach to a solution to the most pervasive problem of sales law'. Honnold, *op. cit.*, 314-315.

[52] *Cf.* proviso to s. 14 (2) of Sale of Goods Act. However, this protection is not available to the seller where he has misrepresented qualities which do not exist or, in bad faith, has failed to reveal the lack of conformity.

has neither declared the contract void nor demanded a replacement of the goods'. Supposing goods perish between the delivery and arrival without fault of either buyer or seller—and suppose, for example, the insurance policy, if any, does not cover the particular peril causing the loss.

A further limitation on the apparently onerous burden placed on the seller is provided by section 48. 'The buyer shall be deprived of the right to rely on the lack of conformity of the goods if he does not notify the seller of this without undue delay from the moment he discovered it or ought to have discovered it.'

Effect of non-conformity

If the non-conformity is not such as to amount to a fundamental breach, the seller may have a further period in which to complete delivery or repair any defect, provided such repairs cause the buyer neither appreciable inconvenience nor expense (Article 53). Otherwise the buyer has a choice of remedies. He may either

(i) declare the contract void and claim damages;
(ii) 'reduce the price by an amount corresponding to the diminution which the lack of conformity has caused in the value of the goods as of the time of the conclusion of the contract, without prejudice to any claim to damages . . .';
(iii) demand compensation by way of damages (Article 50). Article 51 also preserves the possibility of Specific Performance for non-conformity.

(e) *Frustration*

Here again the solution adopted would have a familiar ring to English lawyers. 'The formulation of accidental events excusing a debtor, inspired by the succession of English cases, although it was influenced by German generalisations and amounts to a cautious "*clausula rebus sic stantibus*", has been expressly approved.'[53] One can see in Article 85,[54] an incorporation of both of the standard theories of English law as to the basis of the doctrine of frustration,

[53] Rabel, 'The Hague Conference on the Unification of Sales Law' (1952) 1 *American Journal of Comparative Law* 63.

[54] 'Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to an obstacle which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to contemplate or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to the intention usually prevailing among persons of the condition of the parties placed in an identical situation.

'Where the obstacle is such as to cause only a temporary exemption, such exemption shall be deemed permanent whenever, on account of the delay in performance, its execution would be so radically transformed as to become the performance of an obligation quite other than that contemplated by the contract.'

namely, the 'implied term' theory, resting on the presumed common intention of the parties, and the 'disappearance of the foundation of the contract' theory,[55] though apparently this latter test only applies to cases of 'temporary' obstacles to performance.

Admittedly many problems remain to be resolved under the Uniform Law. But the drafters have adhered faithfully to their aim of providing a sound and practicable code to govern international commercial transactions. Keyes' whole thesis[56] is the general similarity of the fundamental notions of the Uniform Law and of Anglo-American Sales Law, especially with regard to the proposed Uniform Commercial Code, now adopted in Pennsylvania, Massachusetts and Kentucky. As can be seen on reflection, also, many of the rules and practical results under the Uniform Law approach closely English Sales law and practice. It is suggested, therefore, that the Uniform Law cannot be ignored and that further consideration should be given to its general adoption. As indicated above, the already existing uniformity of sales law among Commonwealth countries based on the 1893 pattern would not be unduly prejudiced.

> If the Anglo-American countries turn a deaf ear to the present demand on the Continent for uniformity of sales law, there may be a danger that the other nations will solve the problem in their own way without any regard to the rules of the Sale of Goods Act or the Uniform Law of Sale. The day is past when Great Britain as a creditor nation was in a position to impose English law on its foreign customers, and a continued policy of legal isolation is one which may possibly have unexpected and untoward consequences. There is an old adage that he 'who will not when he may' runs the risk of being deprived of another opportunity.[57]

But, in any event, as it is hoped has been demonstrated here, adoption of the proposed Uniform Law would not call for any violent upheaval in English legal tradition or commercial practice. As Honnold puts it 'The world market for goods needs the support of a unified legal framework. The project for a Uniform Law for International Sales represents an important step towards that goal; it deserves the support of countries with a stake in international commerce'.[58] The moral, for a country in Australia's position, is clear.

[55] See Cheshire & Fifoot, *Law of Contract* (4th ed. 1956) 459-460.
[56] (1954) 42 *California Law Review* 653.
[57] Gutteridge, *op. cit.*, 88.
Though this is not the view of Jacobson, 'International Sale of Goods' (1954) 3 *International and Comparative Law Quarterly* 659, 662, who considers that 'a Uniform Law of Sales is impracticable. Although desirable, it is "pure theory which has no relation to realities".' He seems more hopeful of success in achieving agreement on the rules of Conflict of Laws.
[58] *Op. cit.*, 328. He goes on to add: 'Certainly the United States cannot maintain its pretensions to leadership in world trade and in the international community and at the same time rest in ignorance and lethargy with respect to such constructive work.'

II. ARBITRATION

It is in the field of International Commercial Arbitration that greater adjustments may have to be made by Anglo-American law if any uniformity is to be achieved. The history of the search for uniformity in this area provides a splendid example of collaboration and co-operation by the many bodies interested in the problem.

The League of Nations succeeded in having ratified in 1923 the Protocol on Arbitration Clauses and, in 1927, a Convention which established the rules for the recognition and execution of foreign arbitration awards. But as will be seen later, these agreements were of limited operation and covered only the end result of arbitration and not the process itself, except in a few general respects. In 1929 the Institute for the Unification of Private Law commenced work on a code for a uniform arbitral procedure. As in the case of the Law of Sale, the war caused a long interruption. Then in 1945 the International Chamber of Commerce invited the Institute, the International Law Association, the London Court of Arbitration, the American Arbitration Association and corresponding Russian bodies, to collaborate on the work of unification in this area. As a result, an International Committee on Commercial Arbitration was established. Finally, in 1954, the United Nations Organization entered the field when the Economic and Social Council set up a committee of experts to study questions of commercial arbitration. Among other things, the proposed Uniform Code of the Institute was studied. Later, the Institute made a survey of the various national rules relating to commercial arbitration. Following this preliminary survey, the Working Group on Arbitration of the Committee on the Development of Trade [Economic Commission for Europe] prepared an elaborate and complex Handbook containing particulars of the composition and functioning of the main national and international institutions in Europe (including England) and the United States of America, active in the field of commercial arbitration.

The draft Handbook illustrates the immense amount of painstaking 'field-work' necessary before any attempt can be made at achieving uniformity. It commences with an analysis of the practical matters that have to be settled in any arbitration proceedings, *e.g.*, the actual making of an international arbitration agreement, access to the Tribunal selected, number of arbitrators, procedure, hearing, security for costs, fees and costs, penalties, *etc.* Then the Handbook sets out the possible solutions to each of these problems combined in each case with a list of the institutions which have adopted that particular solution. The second and third parts of the Handbook, on the other hand, analyse in turn each individual institution or organization in terms of the same general problems and give the

specific solutions adopted by that body. The result, of course, is an almost limitless series of combinations which illustrate the obstacles to be surmounted in achieving any kind of uniformity. It is quite clear that no single solution, even to the simplest practical problem, commands universal respect. The moral must surely be that uniformity cannot be achieved by any piecemeal selection of particular solutions by majority vote. The only possibility would seem to be the elaboration of a systematic, scientific view or philosophy of arbitration and adopting solutions compatible therewith. But this would call for agreement on certain basic issues where, at present, there are fundamental conflicts of opinion between Anglo-American and Continental law. Some of these broader issues are objections to the jurisdiction of the Tribunal and to the competence of the arbitrator (and whether he can decide this issue at all, or finally), the applicable law, and the relationship between the arbitration process and the ordinary courts—whether the jurisdiction of the courts is affected (and if so, to what extent) by arbitration agreements, whether (and again, if so, to what extent) awards are to be subject to review by those courts. Enforcement also creates many problems of its own in relation to foreign awards.

It is evident that in this area also there are two broad possible lines of development—what might be termed the 'public' and the 'private' approaches. The former includes both the search for a general Uniform Law of International Commercial Arbitration and the concluding of multilateral or bilateral Conventions with a view to achieving a measure of uniformity of law and practice on specific topics in the states concerned. In this connection, the need for modifications to the Geneva agreements of 1923 and 1927 has been felt for some time. This resulted in the calling by the United Nations of a World Conference on Arbitration in New York[59] in May-June 1958 at which a new Convention was adopted. (The modifications introduced by this Convention are discussed in detail below.)

The report of the Working Group cited above highlights the difficulties in the way of a Uniform Law of Arbitration. However, after studying the various solutions found in practice, the Group did make some broad suggestions as to certain possible uniform rules. These are of interest to Australia because in a time of unparalleled economic expansion and consequent increase in international commercial contacts, our commercial Arbitration law remains relatively undeveloped —and certainly unexplored.

It will be convenient to refer, along with these general suggestions of the Working Group, to some of the typical arbitration clauses found in international Contracts. But it will be seen that this 'private'

[59] Australia was represented at the Conference by Mr A. P. Renouf.

line of development does not afford any great possibility of uniformity emerging, for example, through the use of standardized forms, since the many different bodies active in the arbitral field (and on whom the parties confer jurisdiction) rather jealously preserve their own methods, principles and procedures.

Ouster of Jurisdiction of National Courts

The general common law principle is that the jurisdiction of the Courts cannot be ousted by private agreement, whether containing a 'foreign' element or not. However, under the Arbitration Act (U.K.) 1950, section 4 (1),[60] the Courts may, in their discretion, stay proceedings brought in relation to a contract containing an arbitration clause, unless satisfied that there is good reason why the stay should not be granted. This same principle is applicable to agreements nominating a foreign court or arbitral tribunal, provided of course that the agreement in question satisfies the definition of arbitration agreement in the Act.[61]

'Where there is a written agreement to submit a dispute to the decision of a foreign court, an action in the English Courts will be stayed in the absence of good reason to the contrary. This power . . . is probably better regarded as an exercise of the court's inherent power to stay proceedings that are in abuse of its process.'[62] In fact, Russell goes on 'Where there is a submission to a foreign arbitral tribunal the case for a stay may well be stronger than if there were a domestic arbitration agreement, quite apart from the effect of section 4 (2)'[63] (of Arbitration Act, 1950).

In the same way, '*Scott v. Avery*'[64] clauses making arbitration a condition precedent to legal action are normally enforced, though, even here, the Courts retain a discretion to declare such clauses ineffective.[65] Another problem concerns the time at which this plea 'as to the jurisdiction' of the Court must be made. To this the English answer is clear. It must be made at any time after appearance but before delivery of the pleadings or the taking of any other step in the proceedings.[66]

The general Common Law position as set out above is modified in England in relation to 'foreign' Arbitration agreements covered

[60] *Cf.* Arbitration Act (Victoria) 1928, s. 5 which requires the extra element of readiness on the part of an applicant for stay 'to do all things necessary to the proper conduct of the arbitration'.

[61] *Cf.* 'submission' under s. 3 of Victorian Act.

[62] *Russell on Arbitration* (16th ed.) 75 and cases there cited.

[63] *Ibid.*, 76.

[64] So called after the case in which such a clause was discussed. *Scott v. Avery* (1856) 5 H.L. Cas. 811.

[65] English Arbitration Act 1950, s. 25 (4). See also s. 27, dealing with cases where the agreement contains a time limit outside which claims are to be barred.

[66] Arbitration Act 1950, s. 4. *Cf.* Victorian Act s. 5.

by the Geneva Protocol (1923) and Convention (1927) *(infra)*. But as neither Australia nor the states is a party to those agreements,[67] the Common Law position remains, except as altered by the various State Arbitration Acts.[68]

In respect of this problem, the Working Group on Arbitration offered a solution similar to the English.

> If the difficulties arising for parties to an international contract from differences between national laws on this point are compared with the actual extent of the differences it seems that a uniform solution might be obtained at the international level. In reality, even in countries where incompetence (of the Courts) seems to be considered absolute, it is nevertheless admitted that the parties to an arbitration clause may waive that clause on condition that they expressly agree to do so in Court. . . .
>
> The only difference between this procedure and that prevailing in most of the countries whose laws allow of relative incompetence is that in one case the waiver must be explicit, while in the other it may be tacit and deduced by the judge from the fact that the respondent did not plead the court's incompetence before filing the statement of claim. In these circumstances, it may perhaps be considered that the latter solution, which requires that, in order to be valid, the plea as to jurisdiction must be entered *in limine litis* should be accepted by all countries.[69]

The best method of adopting this solution, it is suggested, would be by intergovernmental agreement on arbitration.[70]

Enforcement of Awards

Section 13 of the Victorian Arbitration Act, 1928 (which is the equivalent of the present section 26 in the English Act),[71] provides: 'An award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.' *Prima facie,* this refers to domestic awards, but as Russell observes: '. . . there would seem to be no reason why an award upon an arbitration conducted abroad, or founded upon a submission governed by a foreign law, should not be enforceable under section 26 in the same manner as an award having no foreign element. The course usually taken, however, is to sue upon the award.'[72] In the same way, sums due under a valid foreign award may be sued for in an action upon the contract constituted by the submission. It will

[67] However, as indicated above, Australia was represented at the 1958 Conference and the question is currently under consideration by Commonwealth and State Governments.

[68] *E.g.*, Victorian Arbitration Act 1928, s. 5. See also *Wilson v. Compagnie des Messageries Maritimes* (1956) 94 C.L.R. 577 where s. 9 (2) of the Sea Carriage of Goods Act 1926 was considered to have the effect of invalidating such a submission to foreign arbitration.

[69] U.N.O. Papers TRADE/WPI/18, 4-5.

[70] It seems a pity, therefore, that this point was not dealt with by the 1958 Convention.

[71] *Cf.* s. 14 of the N.S.W. Act.

[72] *Op. cit.*, (16th ed.) 280.

be seen that this right of enforcement also lies in the discretion of the Court. Moreover, the foreign award must be based on a 'submission' satisfying the definition in the Act,[73] and its validity must not be in any way doubtful. It must also be 'final'.[73a]

Such briefly represents the general position in Australian states with regard to the enforcement of foreign awards. The English Act of 1950 (incorporating the two international Conventions) modifies this position so far as awards made in territories to which Part II applies. By section 36, foreign awards which satisfy the required conditions are enforceable in the same manner as domestic awards under section 26 of the Act.

Present Australian Position

(a) *Direct Enforcement*

No such statute has been introduced in Australia, but the original position has been modified (and complicated) by the combined operation of federal and state legislation. At the federal level, the Service and Execution of Process Act, 1901-1950, provides for the direct enforcement in any state or part of the Commonwealth of judgments obtained in any other state or part of the Commonwealth (Part IV of Act). However, in section 3 (g) 'judgment' is defined as including 'any judgment decree rule or order given or made by a Court in any suit whereby any sum of money is made payable or any person is required to do or not to do any act or thing other than the payment of money'. 'Court' also 'includes any Judge or Justice of the Peace acting judicially' (section 3 (c)). In view of this rather technical connotation, it would seem that arbitration awards would not come directly within the enforcement provisions. Whether it may be included indirectly is considered below.

At the state level, we find a number of direct enforcement statutes, modelled on the Administration of Justice Act, 1920 (United Kingdom).[74]

In Victoria, this commenced as the Judgments Reciprocity Act, 1925, which was repealed and incorporated in the Supreme Court Act, 1928, Division 12. The general scheme, as set out in sections 180-181, enables the Governor-in-Council by proclamation to declare certain 'of His Majesty's dominions' to be reciprocating states if he

[73] The Victorian Act defines 'submission' in terms of the older English Act of 1889, s. 27 (as does the N.S.W. Act).

[73a] See the decision in *Union Nationale, etc. v. Robert Catterall & Co. Ltd* [1959] 2 W.L.R. 532.

[74] See the Administration of Justice Act 1924 (New South Wales); Reciprocal Enforcement of Judgments Act 1927 (Queensland); Administration of Justice Act 1921-1926 (South Australia); Reciprocal Enforcement of Judgments Act 1921 (Western Australia). Australian states have not yet adopted legislation corresponding to the Foreign Judgments (Reciprocal Enforcement) Act 1933 (United Kingdom).

is satisfied that the legislatures of such states have made similar provisions for the enforcement of Victorian judgments. Judgments of superior courts in such states may in the discretion of the Victorian Supreme Court be registered therein. Section 181 (2) lays down rules which must be satisfied before the application to register is granted. In this Act (section 179) 'Reciprocating State' means any part of His Majesty's dominions *outside the United Kingdom and the Commonwealth of Australia* (italics supplied). In the same way in section 180 the Governor-in-Council can only make declarations in respect of parts of His Majesty's dominions *outside Great Britain and Northern Ireland and the Commonwealth of Australia.* The N.S.W. Administration of Justice Act is even more specific. 'Nothing in this section shall authorise the Governor to declare that this Part of this Act shall apply with respect to—(a) any part of His Majesty's dominions within the Commonwealth of Australia.' (section 4 (6)).

It should further be noted that 'judgments' is defined in wide terms as including 'an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made or in Victoria (as the case may be) become enforceable in the same manner as a judgment given by a superior court in that place or by the Supreme Court (as the case may be)' (section 179).

It would seem, therefore, that a *lacuna* existed in relation to the direct enforcement of arbitration awards obtained in sister states of the Commonwealth of Australia.

It was obviously with this in mind that the Victorian Parliament in 1932 passed the Judgments (Reciprocity) Act. Its method is tortuous and complicated:

> 2. So far only as relates to any award—
>   (a) referred to in the interpretation of 'judgment' in section one hundred and seventy-nine of the Principal Act; and
>   (b) to the enforcement in Victoria of which the Commonwealth Act known as the Service and Execution of Process Act 1901-1931 or any amendment thereof or any other Act of the Parliament of the Commonwealth for the time being in force does not apply—
>
> Division twelve of Part VIII, of the Principal Act,[75] shall be read and construed and take effect as if in sections one hundred and seventy-nine and one hundred and eighty of the Principal Act the words 'and the Commonwealth of Australia' and the words '(not including the Commonwealth of Australia)' were repealed.

The result is that awards obtained in other states of Australia may be enforced directly, if the Governor-in-Council has made a Proclamation in respect thereof. But curiously, either through oversight or in the mistaken belief that this Act, like the Commonwealth

[75] Supreme Court Act 1928.

Service and Execution of Process Act, was self-executing, no such Proclamations have been made.

The legislation of the other states remains (in this respect) in the original form, so that the only possibility of enforcement must be an indirect one under the Service and Execution of Process Act.

(b) *Indirect Enforcement*

The Victorian Arbitration Act 1928, section 13, provides that 'An award or a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect'.[76] This is an exact copy of the old English Arbitration Act of 1889, section 12. It has been held[77] that that section did not give the Court power to direct judgment to be entered in accordance with the award. 'It does not seem to me that the words of section 12 have the same effect as the words of the section which deals with the case of a reference of an action for trial under an order of the Court [*cf.* Victorian Arbitration Act, sections 14-17]. . . . All that is done by s. 12 is to give to the successful party under the award the right to enforce it *as if it were a judgment*'[78] (italics supplied). 'It [section 12] gives no power to turn such an award into a judgment. It gives to the award the same status as a judgment for the purpose of enforcement, but it leaves it what it was before, *viz.*, an award.'[79] It was to overcome this type of ruling that section 26 of the Arbitration Act 1950, contains the additional clause 'and where leave is so given, judgment may be entered in terms of the award'—an amendment which has not been copied in the Australian states.

The result would seem to be that even allowing for domestic provisions for the internal enforcement of awards, they do not become 'judgments' within the terms of the Service and Execution of Process Act. Hence there is no possibility of indirect enforcement under this legislation.

It is considered that the State and Territorial Laws and Records Recognition Act 1901-1950, does not advance the matter further. In that Act, 'Court' is defined so as to include 'all Arbitrators under any Act, State Act or Ordinance of a Territory'. It is doubtful whether this would cover the case of an ordinary commercial arbitrator who is rather acting under the contract. But in any event, the full faith and credit provision extends only to 'All public acts records and judicial proceedings of any State or Territory. . . .' (section 18). Arbitration awards, before entry of judgment thereon, would not

[76] *Cf.* N.S.W. Act 1902, s. 14.
[77] *In re a Bankruptcy Notice* (1907) 1 K.B. 478. See also *Russell on Arbitration and Award* (10th ed. 1919), 260.
[78] [1907] 1 K.B. 478, *per* Vaughan Williams L.J. 481.
[79] [1907] 1 K.B. 478, *per* Fletcher-Moulton L.J. 482.

seem to fall within these words. This, apparently, is the current American judicial view also, though it has been subject to criticism.[80]

So that a curious gap in our direct enforcement machinery remains in respect of awards made in other states.

Of course, section 13 of the Victorian Arbitration Act is not confined to domestic awards. So, presumably, the successful party could apply for leave to enforce a 'foreign' award under this section.[81] Or else he might bring a separate legal action on the foreign award.[82] Both these actions are subject to certain limitations, not all of which would be applicable under a direct enforcement statute.[83]

In respect of enforcement of 'foreign' awards generally, therefore, Australian states could well consider now taking the two advance steps of bringing their legislation into line with the current United Kingdom Act and also of adopting the reciprocal provisions in the new Convention.

Decision as to Arbitrator's Competence

This is a closely allied question on which national solutions differ, in particular, as to the right of the parties to confer on the arbitrator by their agreement the power to make a *final* decision as to his own competence. The original suggestion of the Working Group[84] was that the arbitrator should be allowed the last word on his own competence (only, of course, if the parties expressly conferred this right on him).

However, the results of a questionnaire sent out to various countries raised doubts as to the validity of such clauses under national laws.[85] An analysis of the rules of different arbitral institutions revealed

[80] 'The effect of the full faith and credit clause on unreduced awards (*i.e.*, awards not "reduced" to judgment) is uncertain. One analysis is that, since an award forms the basis of a common law cause of action, it should be treated similarly to other causes of action based upon the statutes or common law of a sister State. Several commentators have attempted to equate awards with judgments but this approach has not received judicial approval.' (1956) 56 *Columbia Law Review* 913; see also (1929) 38 *Yale Law Journal* 617, (1958) 13 *Arbitration Journal* 91.

So far as certain foreign awards are concerned the position is met in the U.S.A. by the bilateral Treaties of Friendship, Commerce and Navigation signed with 13 countries. 'Awards rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy.'

[81] See *Russell on Arbitration* (15th ed. 1952), 260.

[82] *Ibid.*, 261-262. See also *Norske Atlas Insurance Co. Ltd v. London General Insurance Co.* (1927) 43 T.L.R. 541.

[83] Russell, *op. cit.*, (16th ed.) 269-270, 280.

[84] TRADE/WPI/21, paras. 35-37.

[85] Austria, Italy and the United Kingdom stated that, under their laws, a clause empowering the arbitrator to make a final decision on his own competence would be null and void. In Belgium, such a clause would be contrary to public policy; in the Netherlands, unconstitutional. Bulgaria, the Federal Republic of Germany, Rumania, and, to some extent, Sweden, permitted clauses of this nature. TRADE/WPI/18, paras. 53-54.

that in only thirteen institutions was express provision made for deciding the question of the arbitrator's jurisdiction, either by the institution itself and/or by the arbitrators.[86] The effect of such a decision on jurisdiction is dealt with only by the Rules of two institutions. The Rules of the Court of Foreign Trade Arbitration of the Yugoslav Chamber of Commerce provide that the decision on jurisdiction is final. By way of contrast, in the other case (the Arbitral Tribunal of the Association of Grain Traders at the Hamburg Exchange) 'the decision is final only where it is that the arbitrators *lack* jurisdiction. Where the jurisdiction is sustained, a right of appeal lies to the ordinary law Courts'.[87]

As a result of these further investigations, a modified position is taken by the Working Group and by the Secretariat. The Working Group refer to the French procedure whereby intervention of the Courts is barred 'both before and during the arbitration proceedings, prior to the rendering of the award'.[88] The recommendation of the Secretariat is to the same effect.

> In view of the discussions of the last session, it is arguable that a disposition enabling the arbitrators or the arbitral institution to determine whether or no the arbitrators have jurisdiction might possibly form the basis of a uniform acceptable solution, on condition that it did not provide that the decision or jurisdiction should be regarded as final. Similarly, it can be queried whether there is any objection in providing that an arbitrator is not obliged to stop the proceedings but can continue to hear the dispute when his jurisdiction has been challenged and he himself decides that the objection is invalid.[89]

This bears a striking resemblance to English practice as set out by Devlin J. in a recent case.[90]

> It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the

[86] An example of a combined decision is found in the Rules of the International Chamber of Commerce: 'If one of the parties raises one or more pleas as to the existence or validity of the arbitration clause, and the Court of Arbitration has satisfied itself of the *prima facie* existence of such a clause the Court may, without prejudice to the admissibility or the merits of such pleas, order that the arbitration shall proceed. In this case any decision as to the arbitrator's jurisdiction shall be with the arbitrator himself.

[87] TRADE/WPI/22, para. 11.

[88] TRADE/WPI/18, paras. 50-51.

[89] TRADE/WPI/22, para. 14.

[90] *Christopher Brown Ltd v. Genossenschaft Oesterreich* [1954] 1 Q.B. 8, 12-13.

> parties—because that they cannot do—but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties. That is plain, I think, from the burden that is put upon a plaintiff who is suing upon an award. He is obliged to prove not only the making of the award, but also that the arbitrators had jurisdiction to make the award. The principle *omnia praesumuntur rite esse acta* does not apply to proceedings of arbitration tribunals or, indeed, to the proceedings of inferior tribunals of any sort. There is no presumption that merely because an award has been made it is a valid award. It has to be proved by the party who sues upon it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively.

But, of course, no decision of an arbitrator as to his own competence or jurisdiction can ever be regarded as final and Russell makes the further point that 'it can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled'.[91]

Organization of Arbitration

Many problems arise when important organizational or procedural matters *(e.g.,* time and place of meeting, appointment of arbitrators, rules of procedure, *etc.)* are not settled by the arbitration clause, or the parties are unable to reach agreement. Many associations and institutions have their own particular rules governing these matters and their standard contract forms provide accordingly. For example, clause 13 (1) of the General Conditions for the supply of Plant and Machinery [Economic Commission for Europe Form 188] provides: 'Any dispute arising out of the contract shall be finally settled, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those rules.' Other forms merely state 'The procedure shall be such as may be agreed between the parties'. (Form 574, clause 13 (1).)

The Working Group sent to the different governments a questionnaire as to what the laws of their respective countries provided in the absence of any clause in the contract governing the appointment of arbitrators and the place of hearing. The answers evidenced the difficulties and confusion caused by such failure.

[91] *Op. cit.*, (16th ed.) 46.

In Belgium and Denmark, in particular, an arbitration clause containing no indication of the procedure to be followed in appointing arbitrators might be considered inoperative. In other countries, though it is possible to ask the competent Court to appoint arbitrators, it still has to be decided which court is competent in international relations, and this raises one of the most controversial questions of private international law.[92]

The Working Group therefore recommended the provision, at the international level, of a procedure for appointing arbitrators applicable in cases where the parties to an international contract have not specified this procedure in the contract.[93]

So far as actual rules of procedure are concerned, 'in approximately one half of the institutions whose Rules or Statutes are analysed [by the Working Group] there will be found a proviso whereby the arbitrator . . . is allowed to determine the procedure in so far as it is not laid down therein'.[94] In others it is the exact opposite, namely 'that the procedure is to be governed by the law of the country of the arbitral institution in so far as it is not laid down in the respective Rules or Statutes'.[95] In some seven institutions, '. . . there will be found a combination of both the above solutions in the form of a proviso whereby recourse to the law of procedure of the country of the arbitral institute is made solely where the arbitrator . . . has not determined the procedure'.[96] On the other hand, the Rules of the International Chamber of Commerce stipulate that where no provision is made in the Rules, the 'proceedings shall be governed by the law of procedure chosen by the parties or, failing such choice, by the law of the *country in which the arbitrator holds the proceedings*'.[97]

The Working Group, by way of a uniform solution recommended a combination '. . . where no provision is made under the Rules, the procedure should be governed either by the law of procedure chosen by the parties, or failing such choice the procedure should be governed either by the procedure chosen by the arbitrators, or in the absence of such choice, by the law of procedure of the country where the arbitration takes place'.[98]

The Applicable Law

This topic raises some of the most difficult problems in Private International Law. The concrete problem for present purposes con-

[92] TRADE/WPI/18, paras. 15-17.

[93] *Cf.* English Arbitration Act, s. 6: 'Unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator.' Ss. 7-9 contain provisions governing the appointment of subsequent arbitrators. S. 10 gives the Court power to appoint an arbitrator if the parties fail to agree.

[94] TRADE/WPI/22, para. 48.

[95] *Ibid.*, para. 49.

[96] *Ibid.*, para. 50, including the Bradford Chamber of Commerce, British Wool Federation, Lloyd's standard form of salvage agreement, the Rubber Trade Association of London, *etc.*

[97] *Ibid.*, para. 51.

[98] *Ibid.*, para. 53.

cerns the validity of provisions in an arbitration agreement purporting to free the arbitrator 'from the categorical rules of a specific national law by referring him to the terms of the contract, to generally-recognized commercial practice, and possibly also, failing these two sources of law, to considerations of common sense and natural justice'.[99] Such clauses would seem to be valid in the majority of countries, subject, of course, almost invariably to public policy considerations.[1]

Once again English law presents a sharp contrast. In respect of contracts governed by English law, such a clause would be regarded as of no effect by an English Court. If, however, the contract is regarded by the Court as governed by some foreign law, then the validity of the clause would be determined by the latter law. The Working Group tended to minimize these differences and regarded a uniform solution as easily obtainable. They suggest a clause along the following lines (to be inserted in the general conditions of sale or in the contract itself or in the statutes of arbitral institutions to which the parties refer for a settlement of their disputes).

> It would first of all establish the principle that the personal law of each of the parties will apply to the question of his capacity to make contracts. The arbitrator would then be asked to apply in other respects the provisions of the contract and commercial practice, all rules of national laws, apart from those concerning capacity, being disregarded.[2]

If, despite all precautions, such a clause is held incompatible with the principles of English law, two alternatives are suggested:

> (1) the law to be applied by the arbitrator in the absence of contractual provisions should be specified in the general conditions of sale or in contracts liable to be governed by English law, or (2) an intergovernmental agreement should be drawn up expressly authorizing the parties to an international contract to empower the arbitrator to base his decisions on the provisions of their contract and on commercial practice, resort to any national legal system whatsoever being excluded.[3]

The Standard Forms (of the Economic Commission for Europe, *supra)* in general prescribe that the contract shall be governed by the law of the vendor's country.[4]

[99] TRADE/WPI/18, para. 59. See also TRADE/WPI/22, para. 110 ff.

[1] 'At first sight it would appear that the various provisions to be found in the Handbook as to what law must be applied by the arbitrators, are provisions of such diversity that they rule out any hope of achieving a uniformly acceptable solution. However on a closer examination of the Rules or Statutes it will be seen that two solutions, of which there are several variants, predominate. Under the first, the arbitrators apply a given system of national law, including its provisions on the conflict of laws. Under the second, the arbitrators are either entirely or partially dispensed from applying a national law.' TRADE/WPI/22, para. 110.

[2] TRADE/WPI/18, para. 67.

[3] *Ibid.*, para. 69.

[4] *E.g.*, Form 188, cl. 13 (2); Form 574, cl. 13 (2). See TRADE/WPI/22, para. 112, where the Secretariat refers to another solution: 'It would be specified in an intergovernmental Convention on arbitration, or in model

It does not seem that the English rule should prove an insurmountable difficulty. In general, English Courts give the parties a wide freedom in their choosing of the 'proper law' of the contract. Provided the choice is '*bona fide* and legal', not capricious, eccentric or absurd, and not contrary to 'public policy' the nomination of a particular national law will be upheld. In which case, choice of a law which regarded as valid clauses of the type here considered, would achieve the intention of the parties, even for a contract having English elements and coming before an English Court.[5]

1958 CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

This Convention, signed at New York in June 1958, is intended to replace the Geneva Protocol of 1923 and the Convention of 1927. By Article VII clause 2 these agreements 'shall cease to have effect between contracting States on their becoming bound and to the extent that they become bound, by this Convention'. But it is apparent that the new Convention marks a very slight real advance. It is little more than a consolidating act and makes no attempt to solve many of the difficulties referred to by the Working Group *(supra)*.

Scope of Convention

The 1923 Protocol extended recognition to arbitration agreements relating to 'differences between parties, subject *respectively to the jurisdiction of different Contracting States'*.[6] Article I of the 1927 Convention enabled enforcement of awards (under agreements covered by the Protocol) made in the territory of one of the Contracting Parties and between persons subject to the jurisdiction of one of the Contracting Parties.[7]

The new Convention adopts the suggestion of the Working Group that the scope of recognition be extended.[8]

Article I (1) states in the broadest possible terms 'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or not. . . .' In other words, there is no longer any limitation based on nationality

Rules, that the applicable law (that term being conceived in the broadest sense and covering the contract, commercial practice and the national law) would be freely determined by the parties in their contracts, and that, where the parties failed to specify the applicable law the arbitrator would decide upon the basis of the contract, commercial practice and the national law applicable under the rule of conflict deemed by him to be applicable to the case. . . .'

[5] See, *e.g.*, Dicey, *Conflict of Laws* (7th ed. 1958) 718, 725-727. Russell, *op. cit.*, (16th ed.) 33.

[6] Cited in Russell, *op. cit.*, (16th ed.) 362.

[7] *Ibid.*, 364.

[8] TRADE/WPI/18, para. 6.

or domicile or residence of the parties. Nor must the original award even have been made in one of the Contracting States. However, under Article I clause 3, a ratifying state 'may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State'. In the absence of such a declaration, presumably a signatory state binds itself to recognize arbitration agreements (as defined) and to enforce arbitral awards (to the extent set out in the Convention) wherever, and between whomever, made.

The Protocol of 1923 only applied to agreements to submit to arbitration 'differences arising in connection with contracts relating to commercial matters or to any other matter capable of settlement by arbitration'.[9] A state reserved the right to limit the obligation of recognition to matters considered as commercial under its national law. This right is preserved under the new Convention, with what is probably only a verbal re-arrangement.[10]

The definition of an arbitration agreement remains virtually unaltered. 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.'[11]

Stay of Proceedings

Article II (3) reproduces generally Article 4 of the 1923 Protocol making the granting of a stay imperative where the Convention applies:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall,* at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[12]

The English Act, 1950, section 4 (2) prescribes certain additional limitations in that the request or application must come 'after appearance and before delivering any pleadings or taking any other step in the proceedings . . .'[13] Similar provisions apply in the Australian

[9] Russell, *op. cit.,* (16th ed.) 362.

[10] Art. I, 3. 'It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.'

[11] Art. II (1). *Cf.* English Act, s. 32, cited in Russell, (16th ed.) 357.

[12] The Convention has failed to adopt the recommendations of the Working Group, *supra.* See also s. 24 (3). But this does not apply to cases governed by s. 4 (2). *Radio Publicity (Universal) v. Compagnie Luxembourgeoise* [1936] 2 All E.R. 721, 729.

[13] Russell, *op. cit.,* (16th ed.) 68-70, 345.

states,[14] but they have not been adopted in the Convention.

The evidentiary requirements for recognition and enforcement of awards remain generally similar to those under the former Convention. The party applying for such recognition and enforcement must supply: '(a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement . . . or a duly certified copy thereof'. (Article IV (1).)[15]

The conditions for enforceability are set out in Article V which involves some curious departures in onus of proof. The 1927 Convention divided these conditions into two general classes. (1) *Positive.* Under Article I, awards were to be enforced if certain requirements were satisfied, so that, presumably, the onus of proof was on the applicant for enforcement.[16] (2) *Negative.* Then by Article II,[17] enforcement shall be refused if the Court is satisfied that certain negative conditions apply—*i.e.*, onus here is presumably on the respondent or person resisting enforcement.

Also, by Article III.

> If the party against whom an award has been made proves that, under the law governing the arbitration procedure, there is a ground other than the grounds referred to in Art. I (a) and (c) or Art. II (b) and (c), [*supra*], entitling him to contest the validity of the award in a Court of Law, the Court *may*, if it thinks fit, either refuse recognition and enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

This scheme is followed in the English Act, 1950, in sections 36-38. Clearly, by section 38, the applicant must produce evidence showing that I (a), (c) and (d) *(supra)* are satisfied. I (b) and (e) are dealt with by section 37. The remainder of section 37 sections (2) and (3) mirror the corresponding provisions of the old Convention.

[14] *E.g.*, Victorian Act s. 5.

[15] Some vagueness still remains. If the award or agreement is in a foreign language, the applicant must produce a translation. 'The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.' Art. IV, 2.

[16] These requirements included:

'Art. I (a) Award was made under an arbitration agreement valid under the law applicable thereto.
(b) Subject matter of the award was capable of settlement by arbitration in the country where enforcement is sought.
(c) Award was made by Tribunal agreed on by the parties and in conformity with the law governing the arbitration procedure.
(d) The award has become final in the country where made.
(e) Recognition or enforcement is not contrary to public policy or to the principles of law of the country in which enforcement is sought.'

[17] 'Art. II (a) That the award has been annulled in the country where made.
(b) Insufficient notice was given the respondent or, being under some legal incapacity, he was not properly represented.
(c) That the award does not deal with differences contemplated by or falling within the terms of the submission or that it contains decisions on matters going beyond the scope of the submission to arbitration.'

The new Convention appears to place most of the onus on the respondent.

> Recognition of the award *may* be refused, at the request of the party against whom it is invoked, only if *that party* furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) the parties to the agreement . . . were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon under the law of the country where the award was made.
>
> [Does this mean the proof of incapacity must relate to *both* parties? Also, the sub-section involves a change of principle in that the 'residuary' law controlling validity is now to be that of the country where the award was made and not, as formerly, 'the law applicable thereto', *i.e.* what we would call the 'proper law' of the agreement.][18]
>
> (b) Corresponds with II (b), *supra,* with slight modification.
>
> (c) Corresponds with II (c), *supra,* with the addition of a severability clause.
>
> (d) Corresponds with I (c), *supra,* except of course that it is now cast in negative form.
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.

Article V (2) then provides that recognition and enforcement may be refused if the Court is satisfied in the following respects (again, presumably, the onus is cast on respondent):

(i) Corresponds with I (b), *supra.*

(ii) Corresponds with I (e), *supra.*

Article VI involves a further departure from the term of Article III of the old Convention, in that the person resisting enforcement of the award must already have made application to have the award set aside in the country where made. If the other party so applies he can also be compelled to give suitable security.

It can be seen that the general effect of all these changes is to strengthen the award as such, since it will be presumed valid and so enforced unless the Court is satisfied to the contrary by the respondent.

Of interest also to Australia is Article XI which contains the regular type of 'Federal' clause under which the Commonwealth Government becomes bound to bring to the notice of the State Governments, with a favourable recommendation, such of the articles as come within the legislative jurisdiction of the states.

Enactment by the states of legislation to give effect to the Con-

[18] See Russell, *op. cit.,* (16th ed.) 295.

vention would not, it is suggested, involve radical departures from current practice. Some difficulties might be caused in Australia by provisions such as those in the Sea Carriage of Goods Act *(supra)*, but these provisions are wrong in principle and should be abandoned. That no radical departure is called for, is really a commentary on the new Convention and demonstrates how short a step forward it represents towards a Uniform Law of Commercial Arbitration. In any event, adoption within Australia of legislation along these lines would represent a progressive development in our system of commercial arbitration.[19]

[19] The writer wishes to express his thanks to the Council of the Institute for the Unification of Private Law and in particular to the Secretary-General, Dr Mario Matteucci, for having made it possible for him to do much of the research involved in this article at the Headquarters of the Institute in Rome.