A UNIFORM INTERPRETATION OF UNIFORM LAW

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I

One of the most fascinating aspects of comparative law research is that while superficially the law may appear to be unified through a uniform statute, yet the technical terms of that statute will often have different connotations in the different legal systems concerned and the national notions will continue to oppose one another in the interpretation of the terms despite the unification achieved. This is the origin of what the French call "le piège du faux équivalent".[1] The greater the degree of abstractness expressed by the technical term, the more room will there be for such opposition.[2] Considering the treaties aimed at uniform law, it often appears to be inevitable that diverging interpretations will arise unless some method is found of checking and balancing the conflicting notions which underlie them. The uniform laws in both the Scandinavian and the American areas are privileged in this respect. They unify the law of states which were already fairly homogeneous in outlook and legal traditions. The conceptual problem takes on quite a different significance when one considers the worldwide multilateral treaties for uniform law which dominate the law of carriage and communications and which have signatories and adherents widely differing in legal traditions and doctrinal foundations. Here, again, the need for a method of securing a uniform interpretation will correspond to the appreciation of the importance of the divergence.

Sometimes the divergence is considered to be such an important matter that it prompts a supplementary treaty. This was the case when it was found that the Warsaw Convention of 1929,[3] which did not define what it meant by "carrier", was interpreted differently, as to the carrier's identity on purely conceptual grounds,

(*General Note*): Quotations from works in the Swedish language have been translated into English by me. The original authors thus bear no responsibility for any deficiencies in these translations.

[1] Mankiewicz, 2 *Mélanges en l'honneur de Paul Roubier,* Paris 1961, p. 113.

[2] Cf. Guldimann, *Internationales Lufttransportrecht,* Zürich 1965, p. 16, no. 44, with illustrative examples.

[3] Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw October 12, 1929.

in countries which preferred to base his liability to passengers on tort and in countries which preferred to base it on contract. To remedy this situation a diplomatic conference was convened which produced the Guadalajara Convention of 1961 with the main purpose of supplementing the Warsaw Convention on this point.[4]

Sometimes the situation has not matured to the point where it can be coped with through the adoption of additional treaties and the quest for uniformity does not even seem to be paramount when the search begins for interpretative methods. It may happen that the interpreter merely works with the usual instruments by which a situation involving differing laws is taken care of. The traditional rule here is to resort to conflict of laws. There is, in the legal writings on conflict of laws, very little to indicate that this method should not also be applied in the case of diverging interpretations of treaties for uniform law. An outstanding example of such a resort to the conflict of laws will be found in the recent French decision *Hocke* v. *Schubel*.[5] Here the Court of Cassation was faced with diverging French and German interpretations of the international convention for a uniform European law of cheques.[6] The court below had found on conflict-of-laws principles that the German version and interpretation of the uniform law were applicable. Since under French law a court of first instance is entitled to settle independently the contents of applicable foreign law, the Court of Cassation considered that it could not interfere and correct the findings of the court below in this respect, even though the applicable provision had its origin in uniform law common to both France and Germany. Whether or not this solution amounts to a legally sound and practicable proposition—and there is a certain difference of opinion on that—it certainly would seem to be a sad end to a road built to enable resort to conflict-of-laws rules to be avoided.

The approach to uniform law thus has many shades. If the courts of one country have grown to dislike a particular uniform law and its effects, they are of course likely to adopt a restrictive interpretation and bother little about the fact that international uniformity may be diminishing. If, on the other hand, the crea-

[4] Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara September 18, 1961.

[5] *Juris Classeur Périodique* 1963 II 13 376.

[6] Convention Providing a Uniform Law for Cheques, signed at Geneva March 19, 1931.

tion of uniform law really was, and still is, the primary motive of the parties belonging to the treaty, then any method under which a uniform interpretation of the uniform law can be secured must seem preferable to a resort to conflict of laws, particularly in Europe where, unlike America, the conflict of laws as a means of solving legal conflicts is regarded with much suspicion. This situation is particularly likely to arise in areas where international commerce was once able to bring forth a treaty for uniform law but where the worsening of political relations now makes a repetition of that achievement unlikely. International commerce, being thus left to work with the old convention since the political society is not capable of modernizing it, will have a strong interest in a uniform interpretation of the existing convention.

There are, of course, several methods by which a uniform interpretation can be furthered, if not guaranteed. There is the international jurisdiction, such as we know it, from the treaties concerning the navigation on the Rhine. The treaties of 1831 and 1868 both set up an international tribunal to revise the judgments of national courts relating to the application of these treaties.[7] During the last few years there has been much discussion whether it would not be wise to introduce similar tribunals for the uniform interpretation of the modern air law conventions for uniform law.[8] Furthermore, there is the use of a permanent secretariat for supervising the interpretation of uniform law and intermittently organizing diplomatic conferences to cope, *inter alia,*

[7] A Central Commission, set up pursuant to Art. X of Annex 16 B to the Final Act of the Vienna Congress, June 9, 1815 "afin d'établir un contrôle exact sur l'observation du règlement commun" (see 1 *Recueil International des Traités du XIX^e Siècle* 366 ff.) in 1831 received powers "à prononcer en dernier ressort sur les pourvois en appel, portés devant elle" (see Art. 93 of The Act of Mainz of March 31, 1831, cf. Art. 81. For continuation of this jurisdiction, see Art. 45 of The Act of Mannheim of Oct. 17, 1868, cf. Arts. 34, 37). The jurisdiction covered, *inter alia,* civil liability in collision matters. See further van Eysinga, *La Commission Centrale pour la navigation du Rhin,* Leyden 1935, pp. 84 f.

[8] A review in English of this particular question is offered by Drion in *Journal of Air Law and Commerce,* vol. 19 (1952), pp. 423–42; for French version, see *Revue française de droit aérien* 1953, pp. 299 ff. For the later development of the question in ICAO, see Mankiewicz, 2 *Mélanges Paul Roubier,* p. 144, note 110. For the subsequent treatment of the same problem in ILA, see *Report of the 47th session of the ILA,* pp. 181 ff. A preliminary draft convention on the subject will be found in *Yearbook for Unification of Law 1959,* pp. 350 ff. For a more general perspective on the problem of international tribunals in order to secure a uniform interpretation, see Riese, "Une juridiction supranationale pour l'interprétation du droit unifié", *RIDC* 1961, p. 717; German version, see *Rabels Zeitschrift* 1961, pp. 604 ff.

with such divergences as have arisen. The primary example of this method is found in the European railway conventions. The success experienced by these methods, however, is not of much comfort for the interpretation of those conventions for uniform law which are not thus institutionalized, the "orphan" conventions as the French have called them.[9] In this area, on the other hand, it may be worth while to point to some recent developments which, given certain perhaps somewhat narrow premises, may produce a better solution than the past has done.

II

The method by which a treaty is made binding upon national courts and agencies has a definite relationship to the ways in which it can be interpreted. This relationship is particularly important if we limit our research to one source of diverging interpretations: that of one legal term having different connotations in the various countries belonging to the convention. Every method which introduces materials extraneous to the convention itself here represents a potent threat to uniform interpretation.

Consequently, it is but natural to regard the monistic theory of international obligations as the one best suited to secure a uniform interpretation. As is well known, under this theory the international obligation, as such, becomes binding upon the national courts and agencies. In so far as it avoids reliance on domestic legislation, which always means some sort of reference to the prevailing domestic legal system, it can be said in principle to shut the door on a domestic conceptualism extraneous to the treaty itself. However, even under a highly monistic constitution, such as that of the United States, which says that properly signed and ratified conventions as such are part of the law of the land, the monistic theory can only work in relation to so-called self-executing treaties. All others will require some sort of implementing legislation. In doing so they place themselves in much the same situation as treaties operative under the dualistic theory.

Under the dualistic theory a treaty, like other rules of international law, is applicable in national courts only by virtue of a constitutional, statutory, or customary rule of domestic law. The

[9] Lagarde, *Revue critique de droit international privé* 1964 (vol. 53), p. 246 ("caractère 'orphelin' ").

treaty becomes applicable only after its "transformation" by virtue of a domestic rule of incorporation. As a practical matter, then, implementing national legislation is required. Such an implementation can be arranged in several ways. The three avenues of approach most commonly used will now be pointed out.

The three ways of implementing a treaty are: (a) to redraft the treaty into a statute, (b) to enact a short statute to the effect that the treaty shall apply, and to annex to that statute the treaty in a translated version, and (c) to make the same statute as in (b), but to annex the treaty in its original language.

All three methods have been used in Scandinavian practice. It is not always easy, however, to discover why a particular method has been preferred to the others.

Considering the possibility of redrafting the treaty, it may first be noted in passing that sometimes this alternative does not differ very much from alternative (b). Redrafting in its normal form means editing and rephrasing the treaty language to such an extent as to make it conform closely to what is normal editing and phrasing in a piece of domestic legislation.[1] This means putting the treaty provisions in direct reference to the concepts already prevailing in existing domestic legislation. The domestic body of concepts will then inject itself heavily in the interpretation of the treaty text. When such a complete redrafting is not done, the dangers of such an injection diminish. The Swedish legislators have been well aware of this; and, as a result, when they have wanted, for one reason or another, to insulate the treaty text from this direct reference to the domestic legislation already prevailing, they have chosen to implement the treaty by merely translating its important provisions and promulgating them as a Swedish statute, preceded by a short preamble. This method, which seems fairly close to alternative (b) above, was followed, for example, when Sweden implemented the Hague Convention of July 17, 1905, regulating the effects of marriage,[2] and when Sweden implemented the Brussels Convention of August 25, 1924, relating to bills of lading (also known as the Hague Rules).[3]

[1] For Swedish examples, see *Svensk Författningssamling* 1955 no. 229 relating to aircraft mortgages; 1937 no. 73 and 1960 no. 69, both relating to carriage by air; 1963 no. 138 relating to railway carriage; and 1964 no. 528 relating to the applicable law in case of international sale of movable property.

[2] *Lag 1 juni 1912 om vissa internationella rättsförhållanden rörande äktenskaps rättsverkningar.* Cf. *Kungl. proposition* 1912 no. 58, pp. 11 f.

[3] *Lag 5 juni 1936 i anledning av Sveriges tillträde till 1924 års internationella konvention rörande konossement.* Cf. Grönfors, *Sv.J.T.* 1957, p. 19.

When redrafting is chosen, certain motives are likely to account for the procedure. These are said to be: that Sweden has become obliged by the treaty to change certain domestic statutory rules already in force, that the implementation of the treaty requires penal provisions, or that its implementation makes certain other executive regulation necessary. A further suggestion has been that there should be a tendency to resort to redrafting into statute when the treaty concerns legal matters of great concern to everyday life.[4]

The alternative (b) of a short promulgating text with the treaty annexed to it in a translated version is in Sweden most common in relation to Royal ordinances, but is sometimes used in relation to legislation by Parliament as well.[5] At times the ordinance will even state that the treaty is to be "applied as it reads in its translation into Swedish".[6]

The alternative (c) of enacting a similar promulgating text, but with the treaty annexed in its original version, is also a fairly common device. In Finland, it is used on an extensive scale. The normal Finnish method is to enact a piece of legislation consisting of a single clause stating that the provisions of the treaty shall be observed, the legislation being generally known as "blanket laws". "In the case of blanket legislation, Finnish and Swedish translations are attached to agreements for reference, and only the text in the original language is authentic in official national usage. Blanket legislation can therefore make a foreign-language text legal in Finland."[7] In Sweden, method (c) is a rather uncommon

[4] H. Sundberg, *Lag och traktat, Uppsala Universitets Årsskrift* 1934, *Juridik* 2, Uppsala 1934, p. 46.

[5] The distinction between an Ordinance (*förordning*) and an Act (*lag*) is one of Swedish constitutional law. It may be assumed that the competence as between the King and Parliament to implement treaties corresponds to their respective competence in domestic law matters to enact Ordinances and Acts respectively. Cf. Myrsten, *Sv.J.T.* 1965, p. 288; Eng, *Nordisk Tidskrift for International Ret* 1938, pp. 100 f.; H. Sundberg, *Lag och traktat*, p. 46.

[6] For Swedish examples of alternative (b), see *Svensk Författningssamling* 1958 no. 522 relating to the 1956 Convention on the recovery abroad of maintenance (this being a United Nations Convention five texts of the treaty—Chinese, English, French, Russian and Spanish—are equally authoritative); 1964 no. 57 relating to the International Labor Organization Convention (no. 118) concerning equality of treatment of nationals and non-nationals in social security. Both these treaties are multilateral. The express reliance on the Swedish translation will be found in the implementation of some agreements for the avoidance of double taxation, e.g. *Svensk Författningssamling* 1960 no. 617 (Sweden-Israel) and 1961 no. 38 (Sweden-Ireland).

[7] Autere, *Oikeus Ilmatilan Käyttöön Siviili-Ilmailutarkoituksessa Rauhan Aikana (Rights in Aviation)*. Vammala 1965 (Suomalaisen Lakimiesyhdistyksen Julkaisuja A-Sarja N:o 73), p. 341. Kaira offers the following French translation of

device except perhaps in relation to treaties which are implemented by ordinance.[8] Under the impact of such changes in international organization as the creation of the Common Market and the European Free Trade Association, and the demands on treaty-making which will be made by the normative functions in particular delegated to the organs of the former organization, it is thought in Swedish governmental quarters that this type of implementation will be used more in future. In Denmark, a special variant of method (c) is in common use. This variant means that the Danish Parliament by special enactment authorizes the Government to negotiate and enter into treaties with foreign powers in relation to a certain matter. Such a treaty, once the Government has ratified it, is considered binding in Denmark without more ado. The method is commonly used in relation to, e.g., double-taxation matters.[9]

Of late, a number of voices have been heard in Sweden favouring a better use of the authoritative language of the treaties. Some have felt that reliance on the authoritative language of treaties for uniform law has advantages as a way of securing a uniform interpretation. Thus Mr. Grenander, Director of the Swedish Shipowners' Association, who was mainly concerned with the maritime conventions for uniform law, has advocated that the legislature should use "the method of incorporating the provisions of the conventions into national law, without translating them".[1] I, personally, have stressed the primacy of the original and authoritative

the standard text of such a "loi 'en blanc' ": "Conformément à la résolution de la Chambre des députés, il est stipulé: Les dispositions et prescriptions de traité de ... en tant qu'elles rentrent dans le domaine de la législation, sont mises en vigueur ainsi qu'il en a été convenu. Il sera statué par décret sur l'application détaillée desdites dispositions et prescriptions." Kaira continues: "La Chambre approuve donc la loi 'en blanc' avant la ratification du traité dûment signé. La loi est promulguée dans le Bulletin des lois après que l'échange des ratifications a eu lieu. En même temps est rendu *le décret de mise en vigueur* du traité, par lequel le traité est appliqué aussi pour ses autres parties. Le texte d'un tel décret est du type que voici: 'Après que le traité conclu entre ... a été ratifié et que les actes de ratifications ont été échangés en date du ... il est décrété que ledit traité entre en vigueur ainsi qu'il en a été convenu." See his *Report to the International Congress of Comparative Law,* The Hague, 26 July – 1 August 1937, printed in Annales Academiae Scientiarum Fennicae, B XXXVIII. 9, Helsinki 1938, pp. 61–8, at pp. 65 f. See also Björksten, *F.J.F.T.* 1933, pp. 126 f.; Kaira, *Acta Scandinavica Juris Gentium,* 1936, p. 66.

[8] Myrsten, *Sv.J.T.* 1965, p. 291.

[9] Sørensen, *Juristen* 1964, pp. 253 ff., cf. Foighel, *Juristen* 1964, pp. 154 ff.— A similar authorization with much the same results sometimes takes place in Norway also, see Andenaes, *Statsforfatningen i Norge,* 3rd ed. Oslo 1962, p. 238.

[1] *Liber Amicorum Algot Bagge,* Stockholm 1956, p. 88.

French text and its French meaning of the Warsaw Convention of 1929 relating to carriage by air.[2] There also seem to be practical advantages in drafting connected with reliance on the authentic text. Mr. Myrsten, whose experience is mainly with the Swedish Foreign Office, has objected to the redrafting method on the grounds that it often "undoubtedly means violating the text which Sweden has undertaken to apply as an international obligation"[3] and furthermore the work done in redrafting often seems superfluous when the treaty is such that in any form it will hardly ever be invoked before a Swedish court or governmental agency. He proceeds to say that "the difficulties now described will for the most part be avoided by using the hitherto rather uncommon method of making the original treaty text, if necessary accompanied by a Swedish translation, directly applicable in Sweden".[4]

[2] *Air Charter—A Study in Legal Development,* Stockholm 1961, pp. 243–9. Cf. Mateesco Matte, *Traité de droit aérien-airnautique,* 2nd ed. Paris 1964, p. 382. — On this point I have recently received the support of Guldimann (*Internationales Lufttransportrecht,* p. 16, no. 44). I should like to point out here that unfortunately my Scandinavian critics, starting with Grönfors in *Arkiv for Luftrett,* vol. 2, p. 45, have failed to note the conceptual framework within which my thesis was advanced to apply (see p. 243 delimiting the interpretation concerned), and the importance of Art. 36 of the Warsaw Convention, as well as my refusal to let the thesis guide beyond what is natural and reasonable for a harmonizing interpretation (see p. 249). Foreign readers such as Sand (*Choice of Law in Contracts of International Carriage by Air,* thesis, Montreal 1962, p. 21) and Guldimann apparently have had no difficulty in getting a correct picture of my harmonizing, French-based method of interpretation.

[3] Perhaps it is proper here to recall an opinion, prevailing in the business community, which was stated by the Swedish Maritime Law Commission of 1933 as one of the primary reasons why the Commission had avoided redrafting when working on the implementation of the Hague Rules on bills of lading. In the rather blunt language of the Commission a close translation was preferable so "that no doubts should be permitted to arise as to whether the Swedish merchant fleet does in fact sail under the bills of lading convention". The Commission admits that this fear of such doubts "perhaps is not altogether unfounded". See *S.O.U.* 1936: 17, pp. 40 f.

[4] Myrsten, *Sv.J.T.* 1965, pp. 288 f., 291.—In *Sv.J.T.* 1965, pp. 600 ff., Mr. Sidenbladh takes issue with Myrsten on this point, regretting his suggestion about wider adoption of the original language of the treaties, and making a plea for the redrafting technique. Sidenbladh—a Swedish negotiator at diplomatic conferences as well as a government draftsman of implementing legislation—bases his plea on the particular ability of the government draftsman who is among, or works in close contact with, the conference people producing the basic treaty. This ability helps him to grasp the intent of the conference and hence makes him better equipped to interpret treaty provisions than are courts and even legal scholars. Many views may, of course, be taken of Mr. Sidenbladh's claims on behalf of government draftsmen. However, almost simultaneously Mr. Hoel published an article in *Arkiv for Luftrett* (vol. 2, pp. 341–51) showing some serious shortcomings in the pan-Scandinavian text of the Acts implementing the Hague Protocol, 1955 (see *infra* page 230 and note 1), a text which had Mr. Sidenbladh himself as one of its principal draftsmen. Following the English text

It is interesting to note how these opinions link up with some recent developments in England in the corresponding field. These developments all centre on Mr. Justice Devlin's judgment in *Pyrene* v. *Scindia Navigation Co.*[5] dealing with the interpretation of the English Carriage of Goods by Sea Act, 1924.

The Carriage of Goods by Sea Act, 1924 (like, incidentally, the Carriage by Air Act, 1932, to which I will return) is drafted on the pattern of type (b) above. It annexes a translation of the basic treaty to a short promulgating enactment.[6] What Devlin did in the *Pyrene Case* was to rely on the authoritative French text of the original treaty. The only argument invoked in favour of this way of reading a British statute was the text of the preamble to the statute which refers to the international conference work which drafted the Hague Rules—i.e. the Rules reproduced in the Brussels Convention of 1924—and continues that "it is expedient that the said Rules as ... set out with modifications in the Schedule to this Act ... should ... be given the force of law".

In the perspective of the Swedish discussion this seems to be a mere corroboration of the proposition that alternative (b) permits of interpretations independent of the domestic law settings to a greater extent than does alternative (a) (redrafting). There was nothing revolutionary about this, however. This rule had been already made clear in the interpretation of the Carriage by Air Act, 1932. In *Grein* v. *Imperial Airways*[7] it had been expressed in various ways that not the domestic legislation but the treaty itself was the source of interpretation. Lord Justice Greer said that "if there be any doubt or ambiguity in the language used, the statute should be so interpreted as to carry out the express

(which text probably best displays the intent emerging in the previous drafts of the treaty), the author, Mr. Hoel, makes it evident that the cumulative requirements in Art. 8-c of the Warsaw Convention, as Amended (Art. VI of the Protocol), have but a single counterpart in the Scandinavian formula. Granted that the cumulative requirements do not come out so well in the French text, which governs in case of any discrepancy between the several authentic texts, it would seem that the Scandinavian translation does not even satisfactorily reproduce the French text.

[5] (1954) 2 All England Law Reports 158 (Queen's Bench Division).

[6] In the case of the Carriage of Goods by Sea Act, 1924, however, it is well to be aware that the translation there annexed, in fact, is not of the treaty itself, but of a preliminary draft proposed in 1923. This, however, matters little in the respect now discussed; it certainly does not detract from the conclusions. Cf. Scrutton, *Charterparties and Bills of Lading*, 17th ed., London 1964, pp. 394, 498.

[7] (1937) 1 K.B. 50, 66 f.

and implied provisions of the Convention", and Lord Justice Greene stressed that the creation of uniform law was one of the main purposes of the treaty and considered it "essential to approach it with a proper appreciation of this circumstance in mind". What was revolutionary in Devlin's approach was rather that he relied on a text that was not even in the statute which he was interpreting, but which was controlling as to what England was obliged internationally to do.[8] Again, to rely on an authoritative French treaty text in an English court was not revolutionary; it had been done quite recently by the House of Lords in *Parke, Davis & Co.* v. *Comptroller General of Patents*.[9] What was new in Devlin's approach was that he resorted to the French text when the statute only contained a translation of it into English.

Mr. Justice Devlin's judgment proved to have far-reaching consequences when the task of implementing the recent air law conventions for uniform law was undertaken in England. It was felt that, if the courts were free to rely on the authoritative, albeit foreign-language version of the text in their interpretation of the domestic version of a uniform law, then it was also incumbent upon the legislature to see to it that this foreign text was annexed to the implementing statute. The first result of this thinking showed in the method adopted to implement the Hague Protocol of 1955,[1] which revises the Warsaw Convention. When the Warsaw Convention, as amended by the Protocol, was to be implemented in the United Kingdom, Mr. Justice Devlin's *Pyrene* judgment was aired.[2] Since the final provisions of the Protocol stipulate that "in case of any inconsistency, the text in the French language, in which language the Convention was drawn up, shall prevail", the *Pyrene* decision was thought to render it desirable that the Carriage by Air Act, 1961, should be enacted with the French text annexed as a schedule to the Act. This was a much noted feature of the legislation and prompted remarks in Parliament that it was the

[8] Of course, as has been noted (Scrutton, *Charterparties and Bills of Lading*, 17th ed., p. 498), the application of the reasoning of the court in the case is questionable owing to the particular circumstances in England surrounding the enactment of the Carriage of Goods by Sea Act, but as a general proposition the reasoning itself appears to be fully acceptable.

[9] (1954) 1 All England Law Reports 671 (House of Lords).

[1] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, signed at The Hague, September 28, 1955.

[2] See 635 H.C. Deb., col. 1144 (Feb. 24, 1961); 638 H.C. Deb., col. 1610 (Apr. 21, 1961).

first time since 1484 that an English statute had been promulgated in French.[3] Under attack, the drafting of the Bill was defended by reference to the aforementioned final provision of the Protocol designating the French version as the authoritative one.[4]

When later the Guadalajara Convention[5] was to be implemented in England, the method now discussed was regarded as a precedent.[6] Since the Guadalajara Convention also contained a final provision to the effect that the French text should prevail, the very same formula as that used in the Hague Protocol, the French text was also annexed to the implementing English legislation, i.e. the Carriage by Air (Supplementary Provisions) Act, 1962.

Some English authors consider this a most important innovation in the interpretation of statutes. "This is believed to be the first instance of an English statute in modern French" say Kerr and Evans,[7] and add that the innovation "may well give rise to novel problems of interpretation". Cheng notes that it "will no doubt be watched with interest by all concerned ... how this legislative innovation will fare before English courts".[8] In my opinion, however, these remarks seem somewhat exaggerated, since in the *Pyrene Case* the court was the true innovator. What the legislature did was only to follow the lead thus offered by the judiciary.

III

Until now, reliance on the authoritative treaty text has been taken as a fact without any search into the implications that may go with it. It seems possible, however, that this reliance may at times have important implications when conflicting notions oppose each other in the interpretation of a uniform law text. It may be worth while to look into some of these implications.

In the past there have been several examples of how the interpretation of a term in a treaty has come to mean resort to the legal meaning attributed to this term in a foreign legal system. In this way the foreign legal system has achieved, as it were, the

[3] 231 H.L. Deb., col. 140–141 (May 9, 1961).
[4] 635 H.C. Deb., col. 1144 (Feb. 24, 1961); 638 H.C. Deb., col. 1610 (Apr. 21, 1961); 231 H.L. Deb., col. 140 (May 9, 1961).
[5] See *supra*, p. 222, footnote 4.
[6] 656 H.C. Deb., col. 721 (March 23, 1962).
[7] (Editors of) McNair, *The Law of the Air*, London 1964, 3rd ed., p. 227.
[8] *The Solicitor*, 1963, p. 285.

importance of a secondary source of law in the interpretation of the treaty. I will here dwell on two examples of this phenomenon.

It has been said, in reference to the Swedish uniform law reproducing the rules of the Brussels Convention of 1924 so as to make ratification possible, that this act "is coloured by Anglo-American legal traditions and concepts to such an extent that it cannot be correctly understood except with this in mind".[9] But if the Hague Rules Act cannot be understood except in its Anglo-American context, that would seem to mean that one must ascribe to the crucial words in the Act the meaning which they have in the Anglo-American legal system in order to make sense of the text. If this is done, one would indeed seem to be relying on the legal meaning of the terms of the uniform law in their original, albeit not authoritative language.

Again, when framing the great treaties which have recently created the nucleus of a European administration and of a European administrative law, i.e. the Treaty Establishing the European Coal and Steel Community, 1951, and the Treaty Establishing the European Economic Community, 1957, the drafters relied to a very great extent upon French administrative law. This model of the drafters has so impressed various observers that they have voiced the opinion that "French administrative law can in many instances serve as a valuable secondary source of law in interpreting treaty provisions having their established French counterpart".[1]

Those two examples evidence the possibility of relying, in the interpretation of a treaty term, on its legal meaning in a foreign legal system. The justification for this reliance in the examples chosen is not always easy to ascertain. It certainly is not because

[9] Grönfors, *Arkiv for Luftrett*, vol. 2, p. 49. Most authors concur about the impact of the "Anglo-Saxons"; see, e.g., Schmidt, in Grönfors *et al.*, *Huvudlinjer i svensk frakträtt*, 1st ed., Lund 1955, p. 29; Stödter, *Geschichte der Konnossementsklauseln*, Hamburg 1953, pp. 96 f.; Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading*, New Orleans 1962, p. 33. In Belgium the courts even quote the Convention as translated into English rather than in its authoritative French version, see Malaurie, "Le droit français et la diversité des langues", *Clunet* 1965, p. 573, note 31, with reference to decisions by the Commercial Court in Antwerp on June 22, 1961, and July 13, 1961, and by the Court of Appeal of Brussels on April 6, 1962, and May 3, 1962 (in Uniform Law Cases 1963, pp. 179, 181, 183 and 190). It may be noted that the English themselves appear to assume in the interpretation of the Carriage of Goods by Sea Act, 1924, that there is identity of meaning and continuity of development between this Act and the English law in general; see Mann, (1946) 62 *Law Quarterly Review* 282.

[1] Buergenthal, (1961) 10 *American Journal of Comparative Law* 228 note 7; cf. Sinclair, (1963) 12 *International & Comparative Law Quarterly* 519.

the foreign legal system concerned represents the authoritative language of the treaty that this reliance is felt to be justified. In fact, the authoritative language of the Brussels Convention is French, not English. And, so far as the two European treaties mentioned above are concerned, they do not have one authoritative language, but four: "les quatre textes faisant également foi" (Art. 248 of the Common Market Treaty). One may, however, venture the guess that the advocates of the English or French legal meaning here rely on a presumed intent of the diplomatic conference which produced the treaty that the concepts of these legal systems were meant to govern. Another guess would be, assuming that there are people who take a critical view of the resort to a usually fictional legislative intent,[2] and others who want to be more practical than theoretical, that these people find the reliance on the foreign meaning justified by the mere fact that it puts the language of the treaty to its fullest possible use. The latter case is particularly likely to exist in the situation outlined on page 223 above.

Assuming that reliance on the foreign meaning which the legislature had in mind is permissible, it appears to follow that the inclination so to rely on that foreign legal meaning is somehow related to the authority of the mythical legislative intent. With diminishing authority, will not this inclination diminish too? The answer would seem to be "yes", but this answer by itself does not mean that all resort to a foreign legal meaning is cut off. Such resort would seem to be implicit in the very fact that the treaty is created in one foreign and authoritative language and that the terms of the treaty will often have a fixed meaning in the legal system in which that language prevails. Resort to that meaning means that the fullest possible use is made of the treaty language, and this argument would seem to be just as persuasive in this connection as it was in the case previously discussed. In fact, this is a solution pretty close to the one which has been made to work in relation to the loan agreements of the World Bank. In the absence of any municipal law applicable to these agreements, an application not permitted under section 7.01 of the Constitution of the World Bank, the loan agreement with this international body itself must furnish the tools for its interpreta-

[2] Cf. my note in *Scandinavian Studies in Law* 1963, p. 146, note 2.—A very extensive discussion of this problem is offered in the present volume by Strömholm (pp. 173 ff.) *supra*.

tion. It is then "understood that loan agreements being formulated in English, the usages and the normal meaning of terms as prevail in Commonwealth countries and the U.S.A. would in case of need be considered as the basis for interpretation", that is to say, the solution "takes advantage of the municipal law (the Anglo-American system) but at the same time relegates it to a subsidiary and purely interpretive function without allowing it to be the proper law of the contract".[2a] Consequently, if a treaty, for instance, uses the French word "retard" (delay), a term which has very different connotations in different legal systems, and there is no indication that the drafters ever thought about which meaning to attribute to this term, it seems reasonable, in order to secure a uniform interpretation when a conflict arises, that the interpreter should adopt the legal meaning which this term has in its original language, that is to say in the legal system where that language prevails, namely French law.[3] If the legal meaning in the authoritative language thus achieves importance, then it can be seen how much more helpful the device of having one, authoritative text of the multilateral treaty is in securing a uniform interpretation than is the practice of having such treaties made in a number of authoritative languages. This practice was introduced on a more general level when the United Nations and related bodies, which for reasons of national prestige were multilingual, started to sponsor conventions for uniform law.[4]

[2a] Alexandrowicz, *World Economic Agencies, Law and Practice,* London 1962, p. 211.

[3] In isolated cases, perhaps, the method will fail simply because the legal-technical meaning in the authoritative language of the term in question is very unnatural and most eccentric from an international point of view. Example of such a meaning would perhaps be the one of the Swedish term "dröjsmål" (*mora*), i.e. delay, which much to the surprise of foreigners includes most cases of non-performance. See my work on *Air Charter,* pp. 406 ff. Now Swedish rather seldom achieves the status of an authoritative treaty language. A better example, therefore, may be the French decision in *Etat français* v. *Monmousseau* (Dalloz Jurisprudence 1948, p. 416) which concerned the interpretation of the term "immeubles" in Art. 55 of the Convention relative to the Rules of Land Warfare, 1907. Pursuant to Code Civil Art. 524, even tuns for fermenting wines were "immeubles par destination, quand ils ont été placés par le propriétaire pour le service et l'exploitation du fonds". The court refused to apply this doctrine to the interpretation of Art. 55 and preferred to assume that the Convention "prend ces mots dans le sens usuel . . . qui est celui de la conception commune de la division des biens en immeubles par nature et en meubles par nature".

[4] Cf. the chapter on "Danger of Multiple Authenticity in International Engagements", in Ostrower, *Language, Law and Diplomacy,* Philadelphia 1965, vol. 1, pp. 479–92.

IV

In evaluating the merits and demerits of this method in treaty interpretation several features must be kept in mind.

First of all one may wonder how this device is to be brought into practical application. How is the local judge to familiarize himself with a foreign legal system to the extent necessary to apply the principle of resort to the foreign legal meaning? This is the kind of criticism which at times has been levelled against method (c), referred to above, in its practical application in Finland and Denmark.[5] However, one may note that the difficulty in question is not peculiar to this method of treaty interpretation. It arises in relation to any application of uncodified international law as well. As has been pointed out by Professor Sørensen in Denmark,[6] "it is no unknown phenomenon that a legal provision refers to a rule of public international law as such, whether written or unwritten, without presupposing any Danish publication of its contents". Thus, "rules of public international law, both customary and treaty rules, can be introduced into Danish law without any publication". Without going into such technicalities as securing advisory opinions from the ministry of foreign affairs or leaving the proof of foreign law entirely to the litigants, one can safely say that, so far, the problem now discussed has not proved to be very serious in practice. There is no reason to assume that it would become more difficult in respect of treaty interpretation, particularly if legal scholars devoted some attention to the interpretative problem and endeavoured to disseminate some understanding of the pertinent foreign legal system on the selected points.

Two more special points of criticism merit some attention, namely the intertemporal and the interlocal problem.

By the intertemporal problem is meant the fact that the national law may develop during the lifetime of a convention: on which law are you going to rely, the present law or "a law 'frozen' in 1929" as Sand put it in reference to the Warsaw Convention?[7]

[5] Kaira, *Valtiosopimusten tekemisestä ja voimaansaattamisesta Suomen okeuden mukaan,* Helsinki 1932, pp. 348 f., Poul Andersen, *Dansk Statsforfatningsret*, Copenhagen 1954, p. 487.

[6] Sørensen, *Juristen* 1964, p. 255, col. 2.

[7] Sand, *op. cit.*, p. 23.

Evidently, however, this problem is not peculiar to treaty interpretation. It arises in national law as well. Why should one, in relation to the aging international convention, be referred back to its date of origin, while in relation to the aging national statute one is allowed to adapt it to the currents of legal development? Anyway, in relation to the international convention there would scarcely seem to be any practical problem. This is at least suggested by the examples already given of a successful use of a foreign legal system as a secondary source of law. In fact, the evolution in these conceptual matters is probably too slow to generate any practical problems.

By the interlocal problem is meant the fact that the official language of the convention is used in several countries with somewhat differing legal systems,[8] and hence is used with somewhat differing meanings in these systems: on which meaning are you going to rely?[9] The answer would be that resort can be had only to what is common to the legal vocabulary in use in the different systems. As expressed by Guldimann in relation to the Warsaw Convention, the interpretation should be based on "die Anwendung des Begriffskerns, der den Rechtsordnungen französischer Zunge gemeinsam ist".[1] Should there be no conceptual nucleus common to the different national systems, the device will simply be of no help.

It is, of course, by now evident that this method of treaty interpretation is no cure-all; it is simply a way to supplement the arsenal of methods for securing a uniform interpretation. It offers no help when the treaty has more than one authoritative language. It offers no help when the authoritative language prevails in several legal systems which do not concur upon the meaning of the crucial term and which are all represented among the states belonging to the convention. It probably cannot stand a direct confrontation with the intent of the contracting states if such an intent can be established. Therefore the method has its best chance in relation to treaties which for one reason or another cannot rely on legislative intent in their interpretation. Examples of such treaties are: first, aging ones where the intentions of the drafters are not related to present-day conditions; secondly, treat-

[8] Examples: French text in force in Belgium, France and French-speaking parts of Switzerland, English text in force in Illinois, United States, and England (Cheng's example).

[9] Cheng, *The Solicitor*, 1963, p. 285; Sand, *op. cit.*, p. 23.

[1] *Internationales Lufttransportrecht*, p. 16.

ies which achieve application by the state adhering to them rather than participating in their drafting; thirdly, treaties made by drafters who were not very communicative about their intentions. In this respect one should not overlook certain difficulties. Some drafters were perhaps not able to be communicative: their declarations at the conferences "émanent de délégués peu familiarisés avec le langage juridique des pays dont le vocabulaire leur est imposé s'ils n'aiment mieux se servir de leur langue maternelle, sauf à s'exposer, dans ce cas, aux risques d'une traduction obligatoirement faite dans les . . . langues admises".[2] "[L']expérience des conférences montre combien est périlleuse la transposition, dans la langue juridique d'un pays, de la sténographie d'exposés abstraits, généralement improvisés en séance, surgissant d'une manière déconcernante au milieu des débats et n'ayant souvent avec la discussion en cours qu'un rapport très éloigné, parfois même difficile à saisir."[3] For these reasons it is perhaps wise to accord to legislative intent a somewhat lesser role than we in the Scandinavian countries are prone to give it. Other reasons argue for the same conclusion and further broaden the area for the method of treaty interpretation here advocated. Resort to preparatory works and a more or less fictional legislative intent, perhaps evidenced only by the reports of a delegate returning from the diplomatic conference, has a petrifying effect on interpretation efforts which will be increasingly felt as the years go by. For this reason, it is dangerous to adopt the view, recently voiced in a Canadian opinion, that "it is the function of the Legislature and not a Court to achieve any uniformity which the nations concerned may desire".[4] Only the courts have the ability, at least under the "orphan" conventions, to keep in touch with the general evolution in the business covered by the convention and in the interpretation of the convention itself. The courts can secure the uniform interpretation by admitting decisions in other jurisdictions relating to the same treaty for uniform law to have persuasive authority. It is, of course, difficult to say exactly how much impact a foreign case will have in litigation. In many countries courts at least quote foreign cases. Presumably one may conclude from

[2] Bouteron, "L'unification du droit relatif au chèque et le vocabulaire du droit uniforme, Introduction à l'étude du droit comparé", *Recueil d'Etudes en l'honneur d'Edouard Lambert*, vol. 4, Paris 1938, § 129, pp. 835–43, at 837 f.

[3] *Ibid.*

[4] *The Gloucester No. 26*, 1964 2 Lloyd's L. Rep., p. 554, at 563.

such practice that the foreign cases have some impact[5] on the reasoning of the courts. Consequently, when the courts resort to the legal meaning in the authoritative language of the treaty, one may hope that the mutual exchange of ideas among them will contribute to the uniform interpretation of the uniform law, even should the treaty have grown somewhat obsolete much faster than was anticipated at its creation.

[5] e.g. *Black Sea* v. *SAS,* 1965 ZfLW 338, at 340; *Jaucquet* v. *Sabena,* 1951 14 RGA 160, at 171—the first a Swiss case, the second a Belgian one, both referring to American decisions; *Garcia* v. *Pan American,* 1945 USAvR 39, at 43, this being an American case referring to an English decision; *Montagu* v. *Swissair,* 1965 2 Lloyd's L. Rep. 363 at 373, an English case referring to an American one.