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EDITOR'S NOTE:

A two-volume work, embodying the results of ten years of research conducted under the auspices of the General Principles of Law Project of the Cornell Law School, was published in 1968. The work, published by Oceana Publications, Inc. (Dobbs Ferry, New York) and by Stevens & Sons (London), is entitled "Formation of Contracts -- A Study of the Common Core of Legal Systems."

The authors of the study are renowned lawyers and law teachers in the United States, Europe, Asia and Australia: Pierre G. Bonassies, Gino Gorla, Hans Leyser, Werner Lorenz, Ian R. Macneil, Karl H. Neumayer, Ishwar C. Saxena, Rudolf B. Schlesinger and W. J. Wagner.

The general editor of the work is Rudolf B. Schlesinger, William Nelson Cromwell Professor of International and Comparative Law at Cornell University Law School. Professor Schlesinger's introduction to the two volumes explains the background and methodology of the pioneering approach to comparative research, used for the first time in the Cornell Project. As that approach is certain to have important ramifications in the whole field of international legal studies, the Journal is proud to reprint this introduction. Following the introduction, the reader will find a list of reviews and review articles, published to date, which discuss the substance and methodology of the work.

The editors thank Professor Schlesinger and the publishers for their permission to reprint the introduction in the Journal.
INTRODUCTION*

Rudolf B. Schlesinger

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*Parts III & IV of the Introduction are not reproduced here. In the text and especially in the footnotes the Introduction contains numerous cross-references. These point to other pages and sections in the book, and not in this Journal.
I THE NATURE OF THE PRESENT STUDY -- A FIRST ORIENTATION

The work presented herewith has grown out of a research project carried on during the last ten years at the Law School of Cornell University. The project was launched with a view to ascertaining, in an important area of the law of contracts, the extent to which there exists common ground, or a common core, among a major portion of the world's legal systems. From the very beginning the over-all aim has been a twofold one: (1) to enhance professional knowledge in the selected area of contract law by finding and formulating the common ground as well as the differences among legal systems, and (2) to test the feasibility of the research method developed and used in the course of the Cornell Project.

This research method, to be analyzed below (under II), should be viewed in the light of the previous state of the art. Much of the comparative research undertaken by legal scholars in the past was severely limited in at least one of several ways: either the number of legal systems taken into consideration was very small, ordinarily restricted to two; or the topic chosen for comparative exploration was too narrow to permit the discovery, within each of the legal systems selected, of the functional and systematic interrelationship among a large number of precepts and concepts. True, there were some previous projects which covered a relatively broad subject and a considerable number of legal systems; but these projects as a rule were limited to the compilation and juxtaposition of the various solutions found, without proceeding to the further step of comparison.

The difference between juxtaposition and true comparison is a crucial one for all those who study legal phenomena observed in more than one legal system. When a study is focused on the style, the sources, the methods or generally the approach of several legal systems, the similarities and dissimilarities often are so obvious to the trained eye that mere juxtaposition becomes an implicit comparison; indeed, mere description of a foreign approach may sometimes imply a comparison with certain elements in the reader's own legal system. But where, as in the present Study, attention is directed, not to fundamental matters of style or approach, but to details of what the French call le fond du droit, then similarities
and dissimilarities between legal systems are apt to be complex and intertwined; thus, even after the solutions offered by the various systems are neatly juxtaposed, their comparison still requires an additional explicit step. This step, it is submitted, involves at the very least the identification and formulation of elements of similarity as well as dissimilarity.¹

The last statement may be a truism; but as applied to the work of legal scholars, the consequences of the truism are not always clearly recognized. The legal solutions to be compared normally are expressed in terms of formulated standards, principles, rules, tendencies and factors. Thus it would seem that the legal scholar, if he wishes to engage in comparison rather than mere juxtaposition, must strive to delineate areas of agreement and disagreement, and to do so in terms of formulated standards, principles, rules, tendencies and factors.² Only in this way is it possible to grasp the common core of the legal systems considered, and clearly to discern the borders beyond which the common core does not extend.³

To serve the practical and academic purposes set forth below (see II(1)), such common core research should be aimed at a whole field (or at least at a substantial, separable part of a field) rather than a single narrow topic. From the inception of

¹Traditionally, comparative legal writings have tended to dwell more heavily on differences than on similarities. There is no justification for such a one-sided approach, even though differences perhaps are more easily discovered and stated than similarities. A sure knowledge of both is required in the light of the purposes to be furthered by comparative legal research (see II (1) below).

²Although, as stated in the text, the end-product of such comparison is apt to be formulated, rather abstractly, in terms of precepts and trends, the process of comparison may have to be initiated by using an inductive (i.e., fact-oriented) method. This point will be discussed infra, in Part II(4) of the present Introduction.

³After some initial wavering, the participants in the Cornell Project gave preference to the term "common core" over other descriptive labels such as "general principles of law recognized by civilized nations." The reasons for this preference are explained in the article by Schlesinger and Bonassies, Le fonds commun des systèmes juridiques—Observations sur un nouveau projet de recherches, 15 REV. INT. DR. COMP. 501, especially at 512-22 (1963).
the Cornell Project it was felt, moreover, that for the same reasons the Study should cover a sufficiently large number of well-selected legal systems so that the ultimate results would have a truly multinational validity and would permit inferences or working hypotheses, subject to verification, even as to legal systems not directly considered (see below at the end of II (3)).

Throughout, the attention of those participating in the Project has been focused on what the law is, and not what it ought to be. The results reached might be of interest to those who in the future will be called upon to codify and perhaps to unify the law of formation of contracts; in a later part of this Introduction (at II(5)(b) below) an attempt will be made briefly to relate some of these results to the Uniform Law on the Formation of Contracts for the International Sale of Goods proposed by the Hague Conference of April 1964. But the present Study itself was never intended to arrive at proposals for legislative reform or unification of existing law. The participants in the Cornell Project were not asked to prepare a treaty text or to draft a statute, uniform or otherwise. They devoted their efforts exclusively to the demarcation of the common core which *de lege lata* exists among legal systems. As in any broad-based discussion of the *lex lata*, however, observable trends and directions of development were noted.

It was clear from the outset that such a research undertaking, aimed at finding and formulating a multinational "common core" in a relatively wide area of the law, would pose almost unprecedented difficulties. A generous grant which the Cornell Law School received from the Ford Foundation made it possible to conduct a first experiment involving this novel type of research.

"Formation of Contracts" was chosen as the subject of this first experiment. The confines of that subject, as understood

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5 The reasons for this choice are discussed *infra*, in Part II (2) of this Introduction.
for purposes of coverage in this Study, are set forth in the Scope Note (pages 71-74 below).

The reader who uses these volumes primarily for the purpose of obtaining information on some aspect of the law of formation of contracts, will wish to turn to the main body of the Study. A quick reading of the hints in Part III of the present Introduction will make it easier for him to find his way through the materials of which the Study consists, and to appreciate the nature and authorship of the various types of materials.

Some readers perhaps will be more interested in common core research as a tool than in the specifics of the law of formation of contracts. In order to enable such readers to derive as much benefit as possible from the experience of the Cornell Project, and in their own future research projects to adopt some of its methods while avoiding the mistakes, an attempt will be made in Part II of the Introduction to explain the way in which the main body of this Study has been developed.

II PROBLEMS OF COMMON CORE RESEARCH ENCOUNTERED IN THIS STUDY*

(1) Purposes to be Served**

Common core research perhaps can be justified in the same terms in which our colleagues in the natural sciences speak of basic research. Quite possibly, the impulses flowing from the new insights gained by such research will become fully apparent only after a considerable body of knowledge has been collected in this way; until then, even the direction of these impulses may not be wholly predictable. As a practical matter, however, it must be conceded that social scientists rarely refer to the notion of basic research, and that in any event they have not yet developed

*Most of the questions treated in this part of the Introduction have been discussed by the author and others in previously published articles. To minimize unnecessary repetition, the discussion which follows will be kept as brief as possible, and references will be provided to the more extensive previous writings.

**For more extensive treatment of this topic see the articles listed in the bibliographical part (Part IV) of this Introduction, under A (1), infra p. 62.
any criteria for the evaluation of such research. In the opinion of most of his peers, it may thus be incumbent upon a legal scholar, as on any other social scientist, to justify his research undertakings by pointing to concrete purposes for which, predictably, the fruits of his efforts may be used.

(a) PURPOSES CONNECTED WITH PROFESSIONAL EDUCATION

Turning to the clearly discernible potential uses of the results of common core research, one must keep in mind, first of all, the future educational needs of the legal profession. The researches conducted or initiated today will provide the materials for the courses to be taken, and the textbooks to be read, by the law students of tomorrow—by students, in other words, who will expect to practice and to serve their clients more than a generation hence. In spite of the dangers of prophecy, the researcher of today thus is forced to reach for his crystal-ball and to conjure up an image, however cloudy, of the environment in which these future clients and their legal advisers will have to operate.

Almost certainly it will not be an environment of general uniformity of laws. In a world moving in the direction of pluralism and tending to affirm the values of diversity and mutual tolerance, we cannot expect monotonous unification of law. No doubt some progress will be made toward coordination and harmonization of legal systems; but their basic diversity will long remain a feature of the legal landscape. At the same time, it is predictable that for the legal practitioner of the future, and for his clients, national frontiers will not have much greater significance than state borders have in the United States today. Routinely, these future lawyers will have to draft contracts and other instruments which, to measure up to the clients' expectations, will have to be effective in any forum, regardless of the vagaries of conflicting choice of law rules. And in a situation in which, because of basic differences among legal systems, the legal instrument drawn by the lawyer does not meet this exacting standard, the clients of the future will at least expect an appropriate warning. These clients—whether they be private individuals or corporations, or public organizations on the local, national, regional, or international level—thus will need lawyers who will have outgrown the parochialism of today. Mere ability to comm-
unicate with colleagues in other lands will no longer be enough. At least in certain fields, the lawyer of the future will have to be truly familiar with a broad spectrum of legal systems.

For the curriculum builders of the future, this will raise thorny problems. They will not wish to sacrifice the thoroughness with which traditionally every law student is introduced into the intricacies of his own legal system. Thus the time to be devoted to the new multinational, supranational and international dimensions of law will continue to be limited. It will remain impossible, in any event, for all but a few exceptional students to become sufficiently acquainted with several legal systems as long as each system must be mastered separately. Thus the law schools wishing to respond to the new needs will have to solve the problem by offering courses which, at least in some of the basic subjects, will offer a synoptic view of the guiding precepts permeating the various legal systems on a regional or world-wide scale. The need for such synoptic or synthesizing courses, to be taught either during or after the period of regular law study, is increasingly felt even today. Interesting experimental attempts, some of them stimulated or influenced by the ongoing work of the Cornell Project,¹ have been made already; but to meet the future needs for a broad-based legal education the effectiveness of which does not end at the national border, a whole new set of tools will have to be developed.

These tools, whatever their form, will have to be based on multilateral comparison and will have to constitute systematic treatments of entire subjects. Scholarly tools of this kind are not unprecedented. Eugen Huber, before he was entrusted with the drafting of the Swiss Civil Code, synthesized the various systems of private law then in effect on Swiss soil into a single treatise. Williston and Corbin fused the contract law of 53 jurisdictions into principles and concepts which, in spite of the divergencies of detail appearing in the footnotes, can be simultaneously and synoptically grasped by the reader. The task

¹To mention but one example, some of the General and National Reports prepared in the course of the present Study are used as teaching materials in Professor Gorla's Comparative Law seminar at the University of Rome.
which Professors Huber, Williston and Corbin performed in the interest of a national legal order, must now be tackled on a multinational scale.

One must realize, of course, that the more diverse the legal systems to be covered, the more difficult it becomes to determine the concepts and principles in terms of which the material can be organized. Only the elements common to the various legal systems under consideration can be used in building the organization and terminology of the future teaching tools. And before any man, or group of men, can undertake to perform the function of Eugen Huber or of Williston on a multinational scale, more knowledge than is presently available must be gathered on the common core of conceptual or functional similarities which will furnish the chapter and section headings of such a work.

What has just been said outlines one of the major purposes of common core research in general and of this Study in particular. Because of their limited coverage (if for no other reason), the volumes presented herewith will not yet fill the demand for a multinational Williston or Restatement of Contracts. The authors' hope is, rather, that with respect to its limited but important topic this Study will present enough specific information on areas of agreement and of disagreement among the legal systems under consideration so that it can serve as a building block to be used in the construction of the multinational teaching tools of the future, and that the method developed in this Project will be found useful in other attempts of a similar nature.

(b) PURPOSES CONNECTED WITH THE DEVELOPMENT OF INTERNATIONAL AND TRANSNATIONAL LAW

(aa) Article 38 (1) (c) of the Statute of the International Court of Justice points to a further area of legal endeavor in which the results of common core research may prove useful. In that provision, which forms an integral part of the Charter of the United Nations, the signatories recorded their belief that there are "general principles of law recognized by civilized nations," and directed that these principles shall be "applied" by the Court in deciding a dispute in accordance with international law.
The fundamental objective of Art. 38 (1) (c) is plain: In cases in which a decision cannot be reached by exclusive reliance on unambiguous treaty provisions or on accepted rules of customary international law, the Court is to draw on the—supposedly vast—reservoir of legal concepts and precepts traditionally utilized in, and shared by, a number of national legal systems. Of the primary sources, or bodies of norms, enumerated in Art. 38, this is the most open-ended. Theoretically, therefore, one might well expect that international judges, especially when dealing with doubtful or novel issues, would make ample use of the "general principles" as prime materials for the building of a systematic body of international law. Reality, however, does not conform to this expectation. Although the Court of International Justice and other international tribunals often have adorned their opinions with references to alleged "general principles," there is virtual unanimity among those learned in public international law that to date the "general principles" have not, as a practical matter, been a truly significant factor in the jurisprudence of international courts.

The difficulties—some fancied, some real—which account for this state of affairs, can be divided into three main categories.

(i) The first, and least serious, of these difficulties is traceable to the fact that courts as well as writers occasionally have paid lip service to alleged "general principles" which upon closer analysis turned out to be meaningless generalities. Such generalities, even though expressed in Latin phrases such as suum cuique or neminem laedit qui suo jure utitur, are as useless in international law as they are in a domestic context. The hap-

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2 See CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, passim (1953).


4 This point is rightly emphasized by Schwarzenberger, Uses and Abuses of "Abuse of Rights" in International Law, 42 TRANSACTIONS OF THE GROTIUS SOCIETY 147, at 150-52 (1956, published 1958).
hazard references to such meaningless phrases that sometimes can be found in opinions of international courts and in writings of publicists, have had only one effect: to bring the "general principles" into disrepute.

If read correctly, however, Art. 38 (1) (c) does not call for a mere collection of empty generalities. On the contrary, it seeks to bring the results of common core research to bear on the precise issue, whether broad or narrow, presented to the Court in a particular case.\(^5\) It follows that when an area of agreement among a sufficient number of legal systems is found,\(^6\) the relevance of such a finding for the purposes of Art. 38 (1) (c) does not depend on the generality of the language in which it is expressed. If in the light of common core research it is possible to formulate the area of agreement in terms of precise and narrow rules, such formulation, provided it is pertinent to the case at hand, will be especially helpful to an international tribunal. It would hardly be a sensible approach for the International Court of Justice or another international tribunal to disregard the results of pertinent common core research for the sole reason that such results are sufficiently specific to be useful. Both reason and literal meaning (especially of the word "apply") militate against construing Art. 38 as compelling such an impractical approach.\(^7\)

(ii) A second and more genuine difficulty stems from the circumstances that some rules of domestic and especially of private law, even though recognized in a multitude of legal systems, are by their nature inapplicable to disputes among subjects of International Law. Lest one overstate the significance of this point, however, some distinctions must be drawn.

\(^5\)The arguments in support of this conclusion have been stated elsewhere. See Schlesinger and Bonassies, Le fonds commun des systèmes juridiques—Observations sur un nouveau projet de recherches, 15 REV. INT. DR. COMP. 501, especially at 516–20 (1963).


\(^7\)The question what constitutes a sufficient number of legal systems, is extensively discussed in the articles cited in the preceding footnote.

\(^{supra}\)
Principles of procedural law usually can be transferred from the domestic to the international arena with relative ease. Substantive norms of international law, on the other hand, often have to undergo some transformation when they are invoked in the setting of an international dispute; but the additional mental step involved in such transformation may not be of forbidding difficulty.\textsuperscript{8}

As to principles of private law relating to contracts, in particular, it has been said that they cannot be applied to treaties, and that, consequently, a statement of such principles is of no assistance to an international tribunal dealing with treaty problems. As Professor F. A. Mann has shown,\textsuperscript{9} there are two answers to this argument. First of all, there are some principles and rules of the law of contracts which, at least by analogy, can and probably must be applied to treaties. As an example, Mann mentions the requirement, treated in Chapter A-3 of the present Study, of a minimal definiteness of terms.\textsuperscript{10} Secondly, it can be observed that governments and international organizations increasingly tend to enter into treaties, and into other agreements subject to international law, which by their nature are closely analogous to sales, exchanges, loans, leases and other transactions familiar in private and especially in commercial law. As Mann points out, this relatively

\textsuperscript{8}See Ripert, Les règles du droit civil applicables aux rapports internationaux, 44 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL (1933 II) 569, at 581-82.

\textsuperscript{9}See n. 5 supra.

\textsuperscript{10}This is not the place to list all the instances in which contract analogies are helpful in dealing with treaties. For another example, in addition to that mentioned in the text; see Arechaga, Treaty Stipulations in Favor of Third States, 50 AM. J. INT'L L. 338 (1956); SCHLESINGER, COMPARATIVE LAW 25-27 (2d ed. 1959). Further examples are presented in the article (prepared as a contribution to the Cornell Project) by Seidl-Hohenfeldern; General Principles of Law as Applied by the Conciliation Commission Established Under the Peace Treaty with Italy of 1947, 53 AM. J. INT'L L. 853 (1959).

Concerning vices de consentement, see the Draft Articles on the Law of Treaties adopted by the International Law Commission on 18 and 19 July 1966, Arts. 45-49 (UN 18th Gen. Assembly A/CN.4/190, 22 July 1966). These draft provisions, whatever the theories of the draftsmen may have been, in effect draw on the notions of mistake, fraud, and duress as developed in private law. Thus the proposed provisions—especially on the controvertial issue of duress—are more in line with the views of Lauterpacht than with those of the traditionalists. See also Jenks; Hersch Lauterpacht—The Scholar as Prophet, 36 BRIT. YB. INT'L L. 1, at 89-90 (1960, publ. 1961).
recent development is bound to lead international tribunals as well as the negotiators and draftsmen of international agreements and other instruments to rely more heavily on analogies drawn from private law.¹⁰ᵃ

(iii) The real obstacle to the utilization of the resources referred to in Art. 38 (1) (c) is found in the fact that until now the areas of agreement among legal systems have remained insufficiently elucidated by comparative research.¹¹ In the absence of available comparative studies, it is exceedingly difficult for counsel to assemble the necessary data for the ad hoc purposes of a particular case pending before an international tribunal. Occasionally, such attempts have been made;¹² but as a rule the parties are unable to afford the expenses involved, or the effort is believed not to be warranted by the significance of the dispute or of the particular issue. Thus the tribunal is left to its own devices if it seeks to ascertain pertinent "general principles." Under these circumstances, international tribunals can hardly be blamed if they often construct supposed general principles "by combining excellent knowledge of a single domestic legal system with a strong dose of fantasy and wishful thinking."¹³

Once comparative research will have established a body of rules and principles shared by a multitude of legal systems, international tribunals will be able to speak more authoritatively and

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¹⁰ᵃ Mann, op. cit. supra n. 5, at 50, recognizes the practical difficulty of compiling "a treatise or digest which would describe in a comparative fashion everything that could conceivably be of interest to the commercial law of nations." But, he adds, it is feasible and, indeed; imperative to select isolated subjects and to show how far they have received solutions which may be described as common to the representative systems of law and, therefore, as expressive of a general principle.... It may well be that the international lawyer will never be confronted with an actual case upon which such specific studies would have a bearing. But if he is conversant with them, then he will have a better idea of how he should proceed when he is faced with a problem requiring a similar type of investigation.

¹¹ See n. 3 supra. See also Berber, infra n. 13.
¹² See the article by Arechaga, supra n. 10. See also the references to extensive comparative materials (submitted by one of the parties) in the arbitrators' award concerning the dispute between the government of Saudi Arabia and the Arabian American Oil Co. (Aramco), 52 Rev. Civ. Int. Pr. 272 ff. (1963).
¹³ Berber, 1 Lehrbuch des Völkerrechts 70 (1960).
more convincingly when they base their decisions on "general principles." This may engender a more confident attitude on their part in tackling novel problems of international law.

There is another, equally important side of the same coin. From the standpoint of the litigants and of the international community, judicial use of "general principles" has long been suspect because it has been regarded as a mere mask for capricious law-making by judicial fiat. But once such principles are established, independently of a particular litigation, as pre-existing norms discovered through disinterested scholarly research, there will be less reason to fear arbitrary judicial action. Thus it can be expected that concretization of the norms which pursuant to Art. 38 (1) (c) may be applicable to the parties' dispute, in time will encourage a greater degree of reliance on judicial institutions dispensing international law.

It is not claimed, of course, that common core research is a panacea which by itself will lead to a full flowering of the rule of law in international relations. The biggest and thorniest of the problems in this area—especially those related to actual or threatened aggression, and to the present maldistribution of wealth and skills—usually cannot be solved by the mere application of existing law. We label these problems as political rather than legal for the very reason that their peaceful resolution will require the creation, through patient negotiations, of new agreements, programs and institutions. This point, often emphasized by leading scholars, has been stated with particular force by Professor Julius Stone. It does not follow, however, as Professor Stone seems to imply, that "an academic research project in comparative law" can make no contribution at all to the solution of the big problems. Without a basic store of shared notions and principles in the law of transactions and of procedure, it will be most difficult to negotiate, to draft and to implement the instruments that will mark future progress in international relations. An endeavor to add to that basic store; and to enhance

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15 Id. at 440.
the reliability of its components, thus appears to be a necessary concomitant of such progress.

(bb) **International organizations.** In addition to Art. 38 (1) (c), there are many other international instruments—some of them of much greater present-day practical significance than the Statute of the International Court at The Hague—which explicitly refer to the general principles, or a similar multinational body of law, as the solvent of non-local disputes.\(^{15a}\) Bilateral treaties providing for arbitration frequently direct the arbitrators to base their decisions on principles of law to be derived from more than one legal system.

In the last decades, moreover, the practice has grown of inserting similar references into contracts concluded by international organizations.\(^{16}\) Even in the absence of such an express reference, it would seem that the innumerable consensual transactions daily concluded by international organizations normally will not be governed by the national law of a single nation.\(^{17}\) These transactions involve either (a) matters relating to the internal structure of the organization, such as the hiring of staff members,\(^{18}\) or (b) agreements concluded with third parties, not only in mere household matters,\(^{19}\) but also; more importantly, in the performance of the functions of the organization.\(^{20}\) On occasion—perhaps routinely where household matters are involved—the organization expressly or by clear implication submits the

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\(^{15a}\) Concerning the significance of the "general principles" in European Community law (to mention but one example), see GRISOLI, CONTRIBUTO ALLA RICERCA DEI PRINCIPI GENERALI COMUNI AI DIRITTI DEGLI STATI DELLA COMMUNITÀ EUROPEA IN MATERIA DI RESPONSABILITÀ EXTRACONTRATTUALE (1963); Lorenz, General Principles of Law: Their Elaboration in the Court of Justice of the European Communities, 13 AM. J. COMP. L. 1 (1964), with further references.


\(^{18}\) See Jenks, op. cit. supra n. 16, at 25 ff.; especially 51-55.

\(^{19}\) E.g., repair of the office building; purchase of office supplies.

\(^{20}\) E.g., loans, currency sales, and stand-by agreements; research contracts; agreements procuring materials or services to aid developing countries.
transaction to local law, or to some other national law specified in a choice of law clause. But if a legal question arises in connection with a contract not subject to a particular national law, and the question is not clearly answered by the text of the contract or of other applicable instruments or regulations, then there remains only the resort to the general principles of law. This is so whether or not the transaction in question is thought to be governed by public international law. If it is, then the applicability of the general principles follows from Art. 38 (1) (c); and if it is not, the same result is dictated by the organization's freedom from local regulation, and the unavailability of any alternative source of legal rules.

The significance of the "general principles" for the operations of international organizations is by no means limited to cases of actual or potential litigation. In many of their dealings, especially with governments, international organizations cannot, or will not, resort to judicial or arbitral processes in the event of a dispute. More flexible methods, such as consultation, negotiation, and mediation, must then be employed to settle differences of opinion. Experience has shown that in the majority of cases these methods are successful for the very reason that the participants, recognizing the necessity of acting within a framework of legal norms, will not easily disregard a well-founded appeal to common core principles.

(cc) International trade and investment: Principles and rules derived from more than one legal system are of growing importance also in connection with agreements between a government (usually the government of a developing country) and

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21 See Jenks, op. cit. supra n. 16, at 133 ff.; Fawcett, loc. cit. supra n. 17; Käser, Darlehen der europäischen Investitionsbank -- Darlehen der Weltbank, 2 EUROPARÉCHT -- (1967).

22 Rules of customary international law also are applicable in such a case; in most instances, however, the subject matter of transactions concluded by international organizations is such that the traditional body of the law of nations does not supply pertinent substantive rules. See Friedmann, op. cit. supra n. 3, at 282. The statement in the text assumes, of course, that the legal question which has arisen is not answered by the text of a treaty.
a foreign investor or other private party. In negotiating the terms of such a transaction, the parties usually find it possible to agree on some form of arbitration; but agreement on a choice of law clause is less easily reached. The private party will rarely subject itself to the legal system of the sovereign government with which it contracts, perhaps for the reason that the details of that system are difficult to ascertain. The private party may also fear that by virtue of its sovereignty the contracting government may at a future time proceed unilaterally to change its own law. The governmental party, on the other hand, may be unwilling to see the contract governed by the law of another sovereign. Practical experience shows that usually this impasse cannot be overcome except in one of three ways:

(i) by expressly referring to the principles of law shared by all civilized legal systems, or by the legal systems of the parties to the contract;
(ii) by adopting a negative choice of law clause, making it clear that neither side subjects itself to the national law of the other; or
(iii) by silence, i.e., by refraining from the insertion of any choice of law clause.

A clause of type (i) will have to be given effect under the conflict of laws rules of most countries. Under such a clause, the substantive norms to be applied by the arbitrators are de-localized and can be ascertained only by common core research. There is recent authority, moreover, for the proposition that the same result may follow from a negative choice of law clause or even from the absence of any choice of law clause, if the contract

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23 The literature on this subject is copious. For references, see Schlesinger and Günisch, Allgemeine Rechtsgrundsätze als Sachnormen in Schiedsgerichtsverfahren, 26 RABELS ZEITSCHRIFT 4 (1964); Klein, L'Arbitrage international de droit privé, 20 SCHWEIZERISCHES JAHRBÜCHER FÜR INTERNATIONALES RECHT 41 (1963, publ. 1964); Lalive, Contracts Between a State of a State Agency and a Foreign Company, 13 INT'L & COMP. L.Q. 987 (1964); Lalive, Un récent arbitrage suisse entre un organisme d'état et une société privée étrangère, 19 SCHWEIZERISCHES JAHRBÜCHER FÜR INTERNATIONALES RECHT 273 (1962, publ. 1963); Käser, op. cit. supra n. 21.

24 It is necessary, however, to be careful in drafting the clause and in avoiding certain countries or parts of countries as the arbitration forum. See Schlesinger and Günisch, op. cit. supra n. 23, especially at 33-44; Klein, op. cit. supra n. 23, at 55, 60; Schmitthoff, Das neue Recht des Welthandels, 28 RABELS ZEITSCHRIFT 47, at 73 (1964).
as a whole evinces the parties' intention to delocalize or de-nationalize the transaction.25

A somewhat different rule applies where the arbitration proceeding is governed by the recent Convention on the Settlement of Investment Disputes,26 which entered into force on October 14, 1966. Article 42 of the Convention provides that investment disputes are to be decided in accordance with such rules of law as may be agreed by the parties, and in the absence of such agreement in accordance with the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. Complete silence of the contract concerning the choice of law point thus will not lead to delocalization, but to the application of the law of the governmental party. It remains to be seen how the draftsmen of investment contracts will react to this new provision. They can, of course, avoid its application by providing for a form of arbitration not covered by the Convention. Even if they choose to avail themselves of the machinery set up by the Convention, it would seem that they can prevent the dominance of the law of the State party by a clause of type (i) or (ii). Thus it is not impossible that in practice Article 42 will stimulate rather than retard the present tendency to refer the arbitrators to multinational principles of law.

This tendency is not confined to contracts between a governmental and a private party. Even where all of the participants in the transaction are private parties, they may well—and with increasing frequency do—wish to denationalize their contract by a negative choice of law clause or by an express reference to a multinational body of law such as the "general principles." In practice such contract terms ordinarily are, although perhaps they need not be, combined with a provision for arbitration.27

25See the award of the Swiss arbitrator in the case of Sapphire International Petroleum Limited v. National Iranian Oil Co., reported and discussed in the two articles by Lalive, cited supra n. 23.


27See Schlesinger and Gündisch, loc. cit. supra n: 23, where further references can be found.
In the absence of any choice of law clause, an issue arising in connection with a purely private contract traditionally is regarded as governed by the law of a single country; to be selected in accordance with the forum's conflict of laws rules. Even this seemingly trite statement, however, requires considerable qualification in the light of recent developments. More and more frequently the parties to international transactions utilize standard forms or standard conditions drafted by multinational organizations and specifically devised for the needs of international trade. If in addition the parties have provided for arbitration in the event of a dispute, the arbitrators may well infer that according to the intention of the parties the contract is to be governed by multinational principles rather than by any local law the selection of which would depend on the vagaries of notoriously controversial conflict of laws rules.28

This modern trend away from the play of unpredictable rules of private international law, and toward adoption of multinational substantive norms, has received strong support in the recent Hague Conventions relating to Uniform Laws on the international sale of goods and on the formation of contracts for such sales.29 These Uniform Laws expressly exclude rules of private international law "for the purpose of the application of the present Law."30


29 See infra, Part II (5) (b) of this Introduction.

30 Art. 2 of the Sales Law; Art. 1 subd. 9 of the Formation of Contracts Law. The draftsmen of these provisions no doubt were influenced by the fact that the pertinent conflicts rules are unpredictable and highly controversial. For penetrating discussions see Ferid, Zum Abschluss von Auslandsverträgen -- Eine International-Privatrechtliche Untersuchung der Vorkonsensaulen Vertragselemente (1953); Lorenz, Konsensprobleme bei international-schuldrechtlichen Distanzverträgen, 159 ARCH. CIV. PR. 193 (1960).

Concerning the Hague Convention of 1955 on the Law Applicable to International Sales of Goods (ratified by seven European nations), and the impact of this attempted unification of conflicts rules upon the 1964 Conventions which seek to bring about a uniform substantive law, see Nadelmann, The Uniform Law on the International Sale of Goods: A Conflict of Laws Embroglio, 74 YALE L.J. 449 (1965); Zweigert and Drobnig, Einheitliches Kaufgesetz und inter-
Gaps in the Uniform Laws are to be filled, not by reference to any local law, but "in conformity with the general principles on which the present Law is based." These general principles can be found only by comparative research. As the provisions of the Uniform Formation of Contracts Law are rather terse, the courts of the countries adopting the Law will frequently have to fall back on "general principles" to be ascertained in this manner. It is hoped that the present Study may prove helpful in such cases.

(c) PURPOSES CONNECTED WITH THE DEVELOPMENT OF NATIONAL LEGAL SYSTEMS

Even for the solution of purely domestic problems, an examination of the common core of legal systems may be of importance. Written and unwritten rules in force in many countries expressly refer to the general principles of law as a primary or subsidiary source of law. A reference of this kind can be of particular significance. Written and unwritten rules in force in many countries expressly refer to the general principles of law as a primary or subsidiary source of law. A reference of this kind can be of particular signif-

{nationales Privatrecht, 29 RABELS ZEITSCHRIFT 146 (1965). It should be noted that the 1955 Convention in its Art. 2 (3) contains an express (though not very satisfactory) provision on choice of law problems arising in cases where the very formation of a sales contract is in dispute.

31 Sales Law, Art. 17. The Formation of Contracts Law does not contain such a provision; but being in pari materia with the Sales Law, it must be construed as implying the same principle. See von Caemmerer, Die Haager Konferenz über die Vereinheitlichung des Kaufrechts vom 2. bis 25. April 1964 — Die Ergebnisse der Konferenz hinsichtlich der Vereinheitlichung des Rechts des Abschlusses von Kaufverträgen, 29 RABELS ZEITSCHRIFT 101, at 111-12 (1965).

32 Von Caemmerer, loc. cit. supra n.31, points out that the relevant general principles can be derived only "from the Law itself and from its foundations in comparative law."

33 Many code provisions to this effect (but differing from each other in their wording), are cited by CHENG, op. cit. supra n. 2, at 400-08. See also SCHLESINGER, COMPARATIVE LAW 158-59, 195, 317-18 (2d ed. 1959).

In the 19th Century, such code provisions often were interpreted as referring exclusively to general principles underlying the national legal order. Today, however, there is a growing tendency to take a broader view and to construe provisions of this kind as authorizing the court, in doubtful cases, to seek guidance by studying the pertinent solutions to be found in other legal systems. See Schlesinger, The Nature of General Principles of Law, in RAPPORTS GENERAUX AU VIE CONGRES INTERNATIONAL DE DROIT COMPARE 235, at 263 (pub. 1964 by Centre Interuniversitaire de Droit Compare under the direction of Professor Limpens)."
icance in a new country faced with the task of creating its own system of law. The judges and legislators of such a country may be disinclined to follow the model of a single-older nation; but they will always try to inform themselves of the multinational common core of civilized law—provided materials for the study of this common core are available.  

(2) Choice of Subject

It was in the light of the manifold purposes listed above that the subject of the first pioneer effort of common core research had to be selected. This was no easy task; and before a final choice was made by those in charge of the Cornell Project, the expert advice of outside consultants was sought. Almost unanimously, they agreed that the first research effort of this kind should be devoted to a portion of the law of consensual obligations. In support of this view, they pointed to the universality, in the modern world, both of the notion of contract and of its every-day practical use in international as well as


1 For the purpose of discussing the scope and method of the projected research undertaking, a three-day conference was held at the Cornell Law School in September 1957. The conference was attended by legal scholars representing a wide range of fields as well as countries. In addition to members of the Cornell law faculty, the participants (listed with their affiliations as of that time) included Dr. Vera Bolgar, Executive Secretary of the American Journal of Comparative Law; Professor F. de Sola Canizares, Dean of the International Faculty of Comparative Law; Luxembourg, and Director of the Institute of Comparative Law, Barcelona, Spain; Dr. Chandra P. Gupta, University of Delhi Law School, India; Dr. Kurt Lipstein, Cambridge University, England; Professor Hans Rupp, University of Tübingen (and a member of the Federal Constitutional Court), Germany; Professor Giuseppe Treves, University of Trieste, Italy; Dr. Uri Yadin, Deputy Attorney General, Israel.

The conference dealt with a wide range of questions, such as choice of subject; number and selection of legal systems to be represented; number and qualifications of participants in the projected seminar sessions; preparation, duration and operation of these sessions. The views expressed, although not always unanimous, were most helpful; but the responsibility for the decisions ultimately made must, of course, be borne exclusively by the Cornell Project, and especially by the author of this Introduction.
domestic transactions.²

Within the area of contract law, every topic is important, and any choice among such topics will have its critics as well as its supporters. The selection of Formation of Contracts as the first subject of study by the Cornell Project was prompted by a number of considerations: In launching a project of such novelty and difficulty, it seemed wise to start with a topic to which the system-builders everywhere almost unanimously have assigned an initiatory, separate, and well-defined place: Another, and perhaps more decisive, factor in the selection was the great practical importance of the subject, highlighted inter alia by the strenuous (and still continuing) attempts which have been made during the last three decades to unify the pertinent rules insofar as they relate to international sales of goods.

In other areas of the law of consensual obligations, problems arising from the diversity of national laws very often can be avoided or neutralized by formulated customs, standard contracts and other forms of international commercial practice. But these devices normally operate by furnishing certain contract terms; and such terms can become effective only after a contract has been concluded. When the very formation of the contract is at issue, one faces "the intrinsic difficulty of solving problems of making a contract in the contract itself."³

It might be argued that some of the legal problems involved in the formation of a contract can be avoided by certain stipulations in the offer, and that international traders thus can neutralize the pertinent rules of diverse national laws by inserting standardized stipulations of this kind into their offers. The

²Perhaps it is not even necessary to limit the statement in the text exclusively to the modern world; it may apply to any society in which small economic units based on family, tribe or feudal coherence are no longer self-sufficient. Cf. ⁴ BEAUCHET, HISTOIRE DU DROIT PRIVE DE LA REPUBLIQUE ATHENIENNE 3 (1897).

³Honnold, The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70, at 77 (Schmitthoff, ed., 1964). On the basis of practical experience gathered at the Institut für Rechtsvergleichung of the University of Munich, the same point was emphasized by FERID, ZUM ABSCHLUSS VON AUSLANDSVERTRÄGEN -- EINEN INTERNATIONALEN PRIVATRECHTLICHEN UNTERSUCHUNG DER VORKONSENSUALEN VERTRAGSELEMENTE 5-8 (1953).
present Study, it is true, shows that in all legal systems under consideration many of the rules of law pertaining to offer and acceptance are in the category of ius dispositivum, i.e., that they yield to a clearly expressed intention of the offeror. It would be erroneous, however, to conclude that this greatly detracts from the practical importance of the pertinent rules of law as a subject of comparative study. This for several reasons: First, the offeror's power to control the negotiations by a stipulation in the offer is always derived from applicable law; only those stipulations can be confidently used in international trade which are shown by comparative research to be effective in all legal systems. Secondly, it is clear that there are certain rules relating to the formation of contracts which at least in some legal systems are resistant to any stipulation in the offer; e.g., the common law rule making certain offers revocable in spite of an express stipulation of irrevocability. 4 Thirdly, and most importantly, we are taught by experience that while standardized contract clauses are increasingly recommended by international organizations, and used by international traders, to solve problems of performance and remedies, the same organizations seem to be more reluctant to propose standard stipulations which by incorporation into the offer would change the regular play of the rules relating to offer and acceptance: 5 This is true even in those branches of business in which standardized contract forms are widely used for purposes of international trade. 6

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5 One reason for this may lie in the difficulty of drafting clauses for standard offers that would fit a multitude of bargaining situations. E.g., problems of variance between offer and acceptance theoretically could be solved by a standard stipulation in the offer, strictly prescribing a specified wording for the acceptance. Such a stipulation, if unambiguous, would be given effect in all legal systems considered in this Study (see infra, General Report on B-2, n. 2); but as a practical matter it is clear that in many situations a clause of this kind would not serve the parties well, and that even the offeror often might find its use not to be in his interest.

6 See Honnold, A Comparison of National and Regional Unifications of the Law of Sales and Avenues Toward Their Harmonization: Prospects and Problems, in UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS 3, 7 (Honnold, ed.; 1966); see also the round-table discussion, id. at 366-72, and Farnsworth, loc. cit.
It must be remembered, also, that questions of law relating to the formation of a contract cannot always be resolved or avoided by the device of arbitration. When the parties foresee the possibility of any kind of dispute in connection with an unquestionably concluded contract, they can relegate the otherwise applicable rules of substantive law (even the mandatory ones) to relative insignificance by providing for arbitration and by anchoring the arbitration proceedings in a legal system which does not hold the arbitrators to strict observance of a particular set of substantive rules. But when the formation of the contract is questioned, in that event the arbitration device may lose much of its effectiveness; unless the agreement to arbitrate is contained in a Rahmenvertrag or other independent contract, it is likely that any doubt raised as to the formation of the main contract will extend to the very existence of the arbitration agreement, thus affecting the power of the arbitrators to resolve the dispute, and corroding the practical value of any award they might render against a defaulting defendant.

It follows that in the area of formation of contracts the legal rules embodied in diverse legal systems are much less likely to be displaced by the parties' autonomous arrangements than in other areas of contract law. Thus, it is submitted, the practical significance of those rules and the need for their comparative study are particularly great in this area.

This will remain true even in the event of widespread adoption of the Hague Conventions relating to Uniform Laws on the international sale of goods and on the formation of contracts for such sales. Many types of contracts are not covered by these Laws. Where it applies, the Uniform Formation of Contracts Law lays down only a relatively small number of rules; the remaining gaps, as has been pointed out above, are intended to be filled by resort to general principles to be found by comparative research. Thus, within as well as without the domain of the Uniform Law, it would seem that an assured knowledge of the extent and the limits of the common core of legal systems is needed by those who have to counsel international traders on problems involving the formation of contracts.

7Cf. Schlesinger and Gündisch; Allgemeine Rechtsgrundsätze als Sachnormen in Schiedsgerichtsverfahren, 28 RABELS ZEITSCHRIFT 71.
(3) **Choice of Legal Systems and Participants**

(a) **GENERAL CONSIDERATIONS**

One of the crucial decisions that had to be faced by the Cornell Project, as by any other research undertaking in the field of comparative law, was the choice of the legal systems to be considered. The theories which guided the actual selections were expounded in an article published elsewhere: For the sake of avoiding repetition, reference is made to that article. What is said there, will without further amplification make clear the reasons for most of the selections and omissions reflected in this Study. The remarks which follow will be limited; therefore, to a few instances in which the treatment of a given legal system or group of systems calls for additional explanation.

A word should be said, perhaps, about the reasons for the selection of the South African system: It was felt that as one of the few uncodified civil law systems still in existence, and also as an essentially civilian system that has absorbed powerful common law influences, the private law of South Africa might be of particular interest to the comparativist. This system of private law, and especially of contract law, has not been affected by the controversial apartheid measures which the present rulers of South Africa have seen fit to adopt. In addition, the fact that one of the authors of the reports on English and Commonwealth law, although not a South African lawyer, had the necessary civil law background to cover South Africa along with a number of common law countries, supplied a practical inducement.

Some comment is called for, also, to explain the non-consideration of the legal systems of Spanish and Portuguese tongue. In this regard, the Project was struck by events beyond the planners' control. A noted legal scholar, intimately familiar both with Spanish law and with the legal systems of several Latin American countries, had been invited to participate in the Project, and had

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accepted the invitation. Shortly before the beginning of the first session, at a time when it was too late to replace him; he had to cancel his previous commitment for medical and family reasons. In this instance, the theoretical criteria recited in the above-mentioned article were overcome by human and accidental factors.

In less drastic fashion, such factors also affected the extent to which it was possible to cover Islamic law and Egyptian law. One of the decisions made rather early in the process of planning the Cornell Project was to include several legal systems of developing countries. It may be true that in the area of contract law a comparison of the world's legal systems largely comes down to what the late Professor Ascarelli used to call a dialogue between common law and civil law. Even a plant of European origin, however, sometimes may absorb different nutrients and may display new variations if it is grown in non-European soil. For this reason it appeared desirable to include at least one common-law-influenced and one civil-law-influenced system of a developing country among the legal systems to be thoroughly considered. The choice fell on India, which in turn has influenced other legal systems in Asia and Africa; and on Egypt, which by its Civil Code of 1949 has set a standard for a number of Arab nations. In addition, it was planned to consider Islamic law because of its general importance as a legal system and its continuing influence in some parts of the Middle East and of North and East Africa (even though it was recognized that insofar as contract law is concerned, such influence is no longer a strong one except in a very small number of countries). An Egyptian scholar, familiar with Islamic and with modern Egyptian law, participated in all of the sessions of the Cornell Project except the last; and prepared individual

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9 It is hoped, however, that in the future the results reached in this Study will be checked against the law in force in some of the countries of the Iberian peninsula and of Latin America. See infra, text at nn. 34-35. This process of checking should not prove too difficult, especially in view of the fact that the seminal code systems of the civil law world, which have exercised considerable influence in Spain and Latin America, have been considered in the present Study.
reports on both systems. These reports are available in the Cornell law library.\textsuperscript{10} To a large extent, it was possible to consider these individual reports in preparing the General Reports. Not infrequently, this is indicated by footnote references in the latter reports. But the individual reports on Egyptian and Islamic law are not included in the present publication, because the reporter, due to his appointment to high government office in his own country, was unable to participate in the final process of revision\textsuperscript{11} of all of the individual reports.

(b) SOCIALIST LEGAL SYSTEMS

A special and difficult problem had to be faced with respect to the socialist legal systems: Scholars from socialist countries have tended, at least in the past, to deny the comparability of socialist and "bourgeois" solutions in most fields of law, including that of contracts.\textsuperscript{12} Western scholars, though not subscribing to the ideological premises underlying this view of their socialist colleagues, have to admit that there is a question of comparability which requires serious examination.\textsuperscript{13} To conduct such an examination a limine, and to make a final decision as to the inclusion or exclusion of the socialist legal systems at the threshold of the work undertaken by the Cornell Project, would have been a rash and dangerous procedure, especially in view of the rapid changes in pertinent rules and practices that were in progress in socialist countries at that time. It was decided, therefore, to study the "contract" law of several socialist

\textsuperscript{10} See Acknowledgments, infra. On the general nature and the sources of Islamic law, and the position of contract law within the system, see also Abdel-Wahab, Meaning and Structure of Law in Islam, 16 VANDERBILT L. REV. 115 (1962); Habachy, Property, Right and Contract in Muslim Law, 62 COLUM. L. REV. 450, 458 ff. (1962).

\textsuperscript{11} See infra, Part II (4) (b) of this Introduction.

\textsuperscript{12} The views of socialist scholars are discussed by Hazard, Socialist Law and The International Encyclopedia, 79 HARV. L. REV. 278 (1965) and by Loeber, Rechtsvergleichung zwischen Ländern mit verschiedener Wirtschaftsordnung, 26 RABELS'ZEITSCHRIFT 201 (1961). See also Knapp, loc. cit., infra n. 20.

\textsuperscript{13} In addition to the articles cited in the preceding footnote, which contain further references, see DAVID and GRASMANN, EINFUHRUNG IN DIE GROSSEN RECHTSSYSTEME DER GEGENWART 270-77 (1966); Schlesinger, op. cit. supra n. 8; at 68-70.
nations for the very purpose of determining comparability. In other words, the question of comparability was to be determined after, and not before, an attempt to compare.

Of the socialist systems, Polish law was more fully considered than the law of the other countries of eastern and southeastern Europe treated in the "Communist Legal Systems Annotations." In addition, considerable work was done on the East German "Vertragssystem," a statutory scheme which displays exceptional thoroughness in regulating the contracts between "enterprises belonging to the People." Memoranda written on this subject by Dr. Ulrich Drobnig and by Professor Werner Lorenz are on file in the Cornell law library; although still of considerable interest, they are not included in the present publication because in matters of detail they have been rendered obsolete by recent legislation.

In addition to the Project participants' own research—which, being substantially limited to the subject of formation of contracts, perhaps was too limited in scope to serve as the sole basis for resolving the issue of comparability—other resources were used. Much benefit was derived from the growing literature on the subject, from consultation with experts in the United States, and from manifold personal contacts with socialist scholars. On the difference drawn in this Study between "Reports" and "Annotations" see infra.


For references see the articles by Hazard and Loeber, cited supra n. 12. See also Drobnig, "Das "Privatrecht" der Staatswirtschaft in der Ostzone, 152 ARCH. OIV; PR; 542 (1953); Pleyer, Vertrag und Wirtschaftsordnung, 1963 JZ 233.

Most of the literature is limited to a discussion of one or more of the socialist systems in Europe; on the points relevant to the present Study, however, the position (in the early 1960's) does not seem to have been radically different in Communist China. See Pfeffer, The Institution of Contracts in the Chinese People's Republic, 4 HARV. INT'L L. CLUB J. 1 ff.; 27-28; 45-47 (1962); Hsiao, The Role of Economic Contracts in Communist China, 53 CALIF. L. REV. 1029 (1965). But see Cohen, Chinese Mediation on the Eve of Modernization, 54 CALIF. L. REV. 1200; at 1203-04 (1966), where attention is called to certain procedural differences.

A memorandum surveying the law of formation of "contracts" in socialist countries was prepared for the Project by Dr. Kazimierz Grzybowski and Dr. George Torzsay-Biber.

The author of this Introduction attended the July 1961 roundtable discussion (at Trier, Germany), sponsored by the International
In all of the socialist systems there are provisions, ordinarily found in the civil code, which deal with contracts among individual citizens. These or similar provisions usually are applicable, also, to transactions between an individual citizen, on the one hand, and a socialist enterprise on the other. In many respects, and certainly as to the formation of contracts, these code provisions are not only comparable but remarkably similar to those found in the codes of western civil law countries.

The problem of comparability of socialist and so-called capitalist contract law becomes more difficult, however, if with regard to the socialist legal systems one takes into consideration not only the contracts of the type just mentioned, but also the economically more important plan-fulfilling contracts among socialist enterprises. For purposes of discussion, the argument against comparability may be stated in the following over-simplified form: (i) In a socialist economy, contracts governed by the civil code or by similar provisions of private law are of practical importance only within a strictly limited sphere of economic activities. (ii) The important transactions are those concluded among socialist enterprises in fulfillment of a Plan, and such transactions are not comparable to private contracts of the traditional type. Hence it follows (iii) that what is comparable in this area is relatively unimportant, and what is important is not comparable. 19

Closer examination shows, however, that this argument is based on unwarranted generalizations. In the first place, the various "socialist" systems differ from each other in their

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Association of Legal Science and chaired by Professor Josef Esser, which dealt with the question of comparability of legal institutions, especially in the fields of property and contract, as between countries having radically different economic structures. See 10 Am. J. Comp. L. 508 (1961). Professor W. J. Wagner participated in the Colloquium on National and Regional Unifications of the Law of Sales, also arranged by the International Association of Legal Science, which was held in New York in September 1964 (see Honnold, op. cit. supra n. 6). All of the participants in the Cornell Project, moreover, had an opportunity in the course of one of the Ithaca sessions for an informal exchange of views and information with Professor Adam Szpunar, Rector of the University of Lodz.

19 For a more elaborate statement of the question (without an attempt to answer it), see Schlesinger, op. cit. supra n. 8, at 68-70.
treatment of contracts between socialist enterprises. As to the Yugoslav system, for instance, it may well be doubted whether anybody today would still put forward the argument outlined above. Even with respect to the countries which adhere to a more conservative reading of socialist doctrine, it appears that neither part (i) nor part (ii) of the argument can be maintained without serious qualifications throwing doubt on the soundness of the conclusion.

(i) The scope left for contracts between private citizens depends, in each country, on the permitted (and not always negligible) extent of the private sector. More importantly, even though a state enterprise or a cooperative may be one of the parties to the contract, many transactions occurring in the distribution of goods and services are basically governed by provisions of the civil code and enforced by ordinary civil courts. This is generally true on the retail level, and in some socialist countries, where agriculture has not been collectivized; even with respect to the wholesale distribution of a large portion of agricultural products.

Moreover, all foreign trade transactions of socialist enterprises, whether concluded with similar enterprises in other socialist nations or with private trading partners in free-enterprise countries, are subject to legal rules deliberately patterned after traditional western models. This is so even in Czechoslovakia.

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21 The arguments against comparability can be and have been, put most strongly from the standpoint of the legal system of Czechoslovakia. See Knapp, Verträge im tschechoslowakischen Recht, 27 RABELS ZEITSCHRIFT 495 (1963). In that country, the traditional system of the law of obligations has been somewhat modified even in the area governed by the civil code (i.e., the new CIVIL CODE of 1964). See Knapp, Das neue tschechoslowakische Zivilgesetzbuch, 6 ZFRV 19 (1965).


24 See Kalensky, Die Grundzüge des tschechoslowakischen Gesetzes über den internationalen Handel, 30 RABELS ZEITSCHRIFT 296 (see especially at 301 and, with respect to formation of contracts, at 308, 313-15) (1966).
a country which in regard to domestic transactions has attempted largely to exclude the ordinary principles of private contract law from the field of "contracts" between planned economy units, and to subject "contracts" of the latter type to a separate and independent regulatory scheme. 24

It is thus clear that in most socialist legal systems the rules of traditional contract law, whether embodied in the civil code or in other enactments, are unquestionably operative in important segments of the economy; and for this reason alone cannot be disregarded as being devoid of practical significance.

(ii) Turning to transactions between planned economy units, one is struck, first of all, by the fact that scholars in the socialist world are not in agreement concerning the nature of these "contracts." Their nature, indeed, has been the subject of a famous controversy among socialist experts. The central issue in that controversy has been whether such transactions are truly contracts, and whether—to the extent compatible with pertinent special regulations and with the applicable Plan—they are to be governed by the relevant provisions of the civil code. In the Soviet Union the question was regarded as so basic that the answer came, under rather dramatic circumstances, in the form of a decision rendered on the highest political level: 25 The decision was to the effect that plan-fulfilling transactions between socialist enterprises are true contracts in the traditional legal sense, and subject to the provisions of the civil code. In the great majority, though not in all, of the other socialist legal systems the controversy was resolved in the same sense.

The fact remains, nevertheless, that contracts between planned economy units are essentially instruments for fulfilling a Plan. This is bound to affect, inter alia, the process of formation of such contracts. The Plan ordinarily spells out many of the terms of the individual contracts to be concluded in the course of its implementation, and often the Plan imposes upon the parties a duty

24 See Knapp, loc. cit. supra n. 20. This is now a minority position within the socialist camp. See infra; text following n. 25.

to contract. To the extent that such Kontrahierungszwang\textsuperscript{25a} exists, it is clear that the traditional rules of offer and acceptance, many of which protect the parties' freedom in devising negotiating moves, must in part become inapplicable. Some of the usual rules (e.g., that in general silence is not acceptance; or that a qualified acceptance normally does not bring about a contract) indeed are invariably altered or displaced by special provisions insofar as there is Kontrahierungszwang; and the parties' consensus may be rendered unnecessary in such a case by an Arbitrazh decision issued in a "pre-contract dispute" proceeding.\textsuperscript{26}

Thus, insofar as the process of its formation is concerned, a transaction concluded as the result of Kontrahierungszwang is hardly comparable to a contract freely entered into by the parties, even though some of the applicable rules (e.g., with respect to counter-offers, Gen. Rept. on B-5, n. 12) remain similar to the traditional ones. It may be true that in non-socialist systems, also, there are instances of Kontrahierungszwang, and that in the recent past these instances have been growing in number and importance.\textsuperscript{27} It might be arguable, therefore; that with respect to the use of Kontrahierungszwang the difference between socialist and non-socialist systems is one of degree only: The difference, nevertheless, remains an important one, affecting not only business practices but also, at least indirectly, the daily lives of millions of consumers.

On the other hand, it must be remembered that even under a socialist system not all Plans are alike. To a rapidly increasing extent, planned economy units in most of the socialist countries are left free by the applicable Plan, and indeed are encouraged, to display initiative and to enter into contracts unaffected by

\textsuperscript{25a} For the sake of brevity, this well-known German term (meaning compulsion to contract) will be used in the discussion which follows.

\textsuperscript{26} See Loeber, Plan and Contract Performance in Soviet Law, 1964 U. ILL. L.F. 128, 141 ff.; Pleyer, loc. cit; supra n. 16.

Kontrahierungszwang. \[^{28}\] The formation of such free contracts is subject to the traditional rules; usually embodied in the civil code. On particular points, there may be special rules for contracts (even free contracts) between socialist enterprises; but this is no more remarkable than the occasional existence, in non-socialist legal systems, of special provisions by which some of the ordinary rules governing "civil" contracts are modified with reference to commercial transactions.

Thus it can be said that in relation to the vast and growing body of transactions that are free from Kontrahierungszwang, the planned economy units of socialist countries conclude their contracts under rules which are similar to, and often identical with, the traditional rules of offer and acceptance.

It has been argued that this similarity exists only on the technical level, and that from a functional point of view a contract between two socialist enterprises; both working toward a common goal defined by the public interest and concretized in the Plan, cannot be compared with an arms-length transaction of two private parties each of whom pursues his own selfish interest by seeking maximum individual profit. Closer analysis, however, shows that this argument, whatever its theoretical merits, is not borne out by the facts of business life: In the modern world, socialist as well as non-socialist, business transactions usually are negotiated and concluded by the managers rather than the owners of the contracting corporations. The principal motive of the manager, socialist of non-socialist, is to maximize the success of his enterprise—a success which in socialist as well as non-socialist systems is largely measured by an annual accounting (whether such accounting be in terms of Plan fulfillment or of profit and loss). True, the managers in socialist countries are incessantly admonished to refrain from "enterprise egotism"

\[^{28}\] See Some Comments on the Polish Legal System, infra p. 315 & n. 9, and Some Comments on the Legal Systems of Communist Countries, infra pp. 216, 222; Loeber, loc. cit. supra n. 26. Predictions for the future are hazardous; but at present (April 1967) the trend mentioned in the text is strong: If it continues, future Plans in most of the countries in question may make only limited, and perhaps exceptional; use of Kontrahierungszwang.
and to put the public good before the success of their enterprise. But the very fact that these constant admonitions are necessary, seems to prove that such appeals to the managers' public spirit have only an intermittent effect—an effect easily matched by capitalist managers' growing awareness of public duties and public opinion.

Even in socialist theory, moreover, it is recognized that material incentives are crucial, and that a planned economy unit, therefore, operates not only in the public interest, but also in its own self-interest. The unit's accomplishment during a given fiscal period, strongly affected by contracts concluded with other socialist enterprises and determined by an intricate system of accounting, has a distinct influence upon the income and the fringe benefits of the workers as well as the managers. The basic configuration of interests and desires, in response to which the classical rules of offer and acceptance have been developed, thus is not radically different when—in the absence of Kontrahierungszwang—two socialist enterprises deal with each other. From a functional as well as a technical point of view

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29 See, e.g., Pleyer, op. cit. supra n. 16, at 234.


31 Occasionally it has been argued that because of the strong admixture of public law elements the contracts between socialist enterprises should be compared to government contracts rather than ordinary private contracts: The argument, however, is not convincing. It overlooks that when two planned economy units contract with each other, they do so on a basis of complete equality, each party representing the same amalgam of public and selfish interests. Such a contract is hardly comparable to a transaction between two parties so inherently different from each other as the government and a private firm in a capitalist country. A somewhat closer analogy might be presented by the contracts between two government agencies or two public corporations which occasionally occur even in non-socialist systems (e.g., the so-called Project Orders and Economy Act Orders in the United States, see NAVY CONTRACT LAW §§4.24 and 4.25 (2d ed. 1959)); but these are too exceptional to be used as a functional counterpart of contracts between planned economy units. In most important respects, moreover, such intra-governmental deals are apt to be governed by ordinary contract law (ibid.)
it would seem justifiable; therefore, to suggest that the relevant rules found in the contract law of socialist countries are comparable to their western counterparts even insofar as they apply to (non-compulsory) contracts between socialist enterprises.

(c) SYSTEMS NOT FULLY COVERED

The number of legal systems fully covered in the present Study is not inconsiderable; but, of course, it is limited. The question thus arises whether and to what extent the results reached can be said to have a measure of validity with reference to systems not fully covered. The answer, stated more extensively elsewhere, is predicated on the fact that so far as the law of contracts is concerned, almost every legal system in the world is more or less closely related to one or several of the systems fully covered in this Study. Thus, while no claim is made that the findings embodied in the General Reports are wholly accurate with respect to any legal system other than those fully covered, it is reasonable to ascribe to these findings (and to the supporting data in the relevant individual report or reports) the quality of informed conjectures or at least of working hypotheses in regard to such other systems.

Such conjectures or hypotheses can ripen into reliable knowledge only when they have been re-checked against the law of a particular country. In the course of the Cornell Project, an attempt has been made to gain some experience regarding this process of rechecking. As is more fully explained below, the Italian, Polish and Australian-Canadian-New Zealand "Annotations" on some of the General Reports in Chapter A (Offer) are the product of such subsequent re-checking. In addition, after the work on

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32 For further discussion of the extent to which socialist legal systems have been considered in this Study; and of the problems of comparability encountered in this connection, see Some Comments on the Polish Legal System; infra pp. 312-15 and Some Comments on the Legal Systems of Communist Countries, infra p. 216.

33 Schlesinger, op. cit. supra n. 8, at 70-72.

34 On the distinction made in this Study between "Reports" and "Annotations," see infra, Part III (1) of the present Introduction. See also Some Comments on the Italian Legal System, infra pp. 298-99.
the General Reports had been completed, a number of them were most helpfully annotated, from the standpoint of the Greek legal system, by Professor Constantine J. Simantiras of the University of Thessaloniki.\footnote{It is hoped that these Greek Annotations, which are on file in the Cornell law library, will be published at a later date.} In all of these instances it has been found that the effort involved in such re-checking, while by no means negligible, is relatively minor compared to the task of evolving the General Reports in the first place.\footnote{Such re-checking should be particularly interesting with respect to the Scandinavian systems, which present original solutions on some of the controversial problems in this area (and which, but for budgetary limitations, would have been covered in the course of the present Study).} As far as the results are concerned, the re-checking experiments almost invariably have borne out the statements in the General Reports, including those which embody a finding of unanimity on a given point.

(4) Methods of Research

Whoever undertakes multilateral comparative research must adjust his methods to a fundamental and unalterable fact: that no single human being, however learned, possesses enough knowledge of diverse legal systems to assemble and correctly to understand all of the theoretical and practical information on national laws which forms the necessary raw material for comparison. Teamwork of a number of lawyers, each of whom must be thoroughly familiar with doctrine and practice in one or more of the legal systems chosen, thus seems to be indispensable.

It follows that the first step, after determination of the field of study and of the legal systems to be considered, must be the selection of the members of the team. Once this is accomplished, the actual research effort can begin. In the operation of the Cornell Project, this effort was divided into four successive stages:

(a) In order to elicit from each participating scholar the necessary mass of detailed information on the legal system or systems covered by him, and to make sure that all participants always addressed themselves to the same issue, the project director had to prepare and circulate a memorandum setting forth the ques-
tions to be answered. This memorandum, which was divided and subdivided into a number of units, was called the Working Paper.

(b) In response to the Working Paper, every participant prepared one or more national reports referred to as Individual Reports.

(c) After the individual reports had been exchanged and studied by all, they were orally discussed and whenever necessary, supplemented in the light of such discussion.

(d) Growing out of this discussion, but constituting a separable part of it, an intensive effort was made to formulate in General Reports the emerging areas of agreement and of disagreement among legal systems.

What follows is an attempt briefly to describe each of these four stages.¹

(a) THE WORKING PAPER

The purpose of the Working Paper made it necessary to string together a large number of questions. Every question was in effect an inquiry directed to each of the participating scholars, asking him with reference to a specific point to state the position of the legal system or systems covered by him. It was clear from the outset that these questions had to be formulated in such a way that our colleague from India would understand them in the same way as our colleague from Italy. If the questions had been asked in abstract legal terms, each participant might have read particular notions of his own legal system into such terms, and the result would have been the complete lack of a common focus. It was decided, therefore, to ask the questions in factual terms.

Each unit of the Working Paper consisted of a series of fact situations, usually taken from reported cases; connected perhaps

¹ For a more detailed discussion of the methodological questions which are only briefly touched upon in this Introduction, see Schlesinger, The Common Core of Legal Systems—an Emerging Subject of Comparative Study, in the volume TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW—LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 65 ff., esp. 72-79 (1961); Schlesinger and Bonassies, Le fonds commun des systèmes juridiques, 15 REVUE INTERNATIONALE DE DROIT COMPARÉ 501 (1963).
by some comments and brief clarifying questions. Because of the enormous wealth of case material to be found in the United States, many of the fact situations were taken from American cases; but cases from other countries, especially from England and Germany, were used as well.\(^2\)

The participants were instructed to regard each of these fact situations as an inquiry seeking to elicit an answer to the following questions: How would the legal system or systems covered by you react to this fact situation? Would the court hold in favor of the plaintiff or the defendant? If for the plaintiff, what would be the kind and measure of relief awarded to him? What are the authorities supporting your conclusion, and what is its doctrinal basis?

The method of using fact situations as the initial focus of legal comparison—briefly called the factual method—has been discussed in more detail elsewhere.\(^3\) In the course of the Cornell Project, the method served its purpose well: it is fair to say that not a single instance occurred in which the participants were unsure or in disagreement as to the issue to be addressed. They often questioned each other's arguments or conclusions; but their discussion, whether or not they agreed on the answer to a given question, was always focused on the same question.

The factual method, however, is not a panacea for all of the problems of comparative research. In using it, one must keep in mind that there are several kinds of "facts." As long as one deals with factual events of the natural or physical world, it is reasonable to assume that several such events, even though they have occurred in different places, are similar to each other if ordinary language describes them in similar terms; but one cannot necessarily indulge in the same assumption if the "facts" consist

\(^2\) The preference for common law and German cases was not entirely accidental. In some of the non-German-speaking civil law countries, e.g., France and Italy, the decisions of the highest courts are not always reported in such a manner that the facts—the most important ingredient of the decision for the purpose at hand—are not clearly stated. See infra Some Comments on the Italian Legal System. See also SCHLESINGER, COMPARATIVE LAW 316 (2d ed. 1959).

\(^3\) See Schlesinger, loc. cit. supra n. 1.
wholly or in part of institutional elements; i.e., of elements differently formed by the history; the mores; the ethics and--indeed--by the laws of different communities: To base comparative legal research on the assumption of similarity; or even of comparability, of such institutional facts; often involves the danger of self-deception and circular reasoning: This danger is particularly acute in the area of public law; where virtually all of the "facts" are of the institutional kind and heavily colored by the social and political peculiarities of different systems and communities.  

In many of the private law fields, however, one normally expects that institutional as well as physical facts occurring in different parts of the world can be compared without distorting the words expressing such facts: This is particularly true in the law of contracts: At every step of the work conducted by the Cornell Project, the participants cross-examined each other concerning business practices and other factual elements of the transactions under discussion. Certain national or regional differences in business practices were found; and sometimes noted in individual or general reports. Differences in the law of procedure and of evidence also have to be watched if one wishes to be sure that the facts reported; e.g.; in an English case and "the same" facts found by an Austrian court are truly comparable. But in spite of constant attention to such dangers, and of the group's generally skeptical attitude toward the comparability of

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4 See Mosler, Introduction to the volume VERFASSUNGSGERICHTS-BARKEIT IN DER GEGENWART (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 36), at XVII-XVIII (1962); Strebel, Introduction to the colloquium STAAT UND PRIVATEIGENTUM (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 34), at 3 (1960).

5 E.g., regarding the practice of sellers, in some (but apparently not all) countries, of authorizing their traveling salesmen only to solicit but never to make offers: See B-4. Note was taken, also, of attempts at international or regional unification of relevant business practices; such as the ECE and COMECON conditions.

Sometimes it was noted (e.g.; with respect to letters of confirmation, see B-5, subd. II E(3)) that a certain fact situation, while occurring in all legal systems under consideration, had given rise to much more reported litigation in some systems than in others. An attempt was made; but not always with success, to find the reasons explaining this phenomenon.
institutional facts, virtually all of the numerous fact situations collected in the Working Paper and later added in the course of discussion were found to pass the test: truly similar fact situations have occurred, or could easily occur, in all of the legal systems under consideration. Thus it can be stated with some assurance that the factual method—though it might be exposed to more severe strains when used in comparative research on other subjects—has proved workable in the area of this particular project. Indeed, in the present state of the art, the factual approach may well be indispensable if multilateral comparison is to lead to a detailed and accurate statement of areas of agreement and of disagreement.

The Working Paper was, of course, broken down into units and sub-units, but with the express understanding that the organization thus proposed would not be binding on the group. In the course of the later discussions, and in the light of new insights gained by comparison of the solutions found in various legal systems, the participants actually proceeded to change the original organization in a few places. On the whole, however, the organization of the Working Paper met with approval.

The organization of the present Study reflects that of the Working Paper, as subsequently (and unanimously) modified by the participants.

After having served its purpose of eliciting responses having a common focus, and of tentatively suggesting the units and sequence of discussion, the Working Paper became functus officio. It was decided, therefore, not to publish it. But most of the reported cases which furnished the fact situations presented in the Working Paper, are clearly identified in the present Study, in each instance in the national report covering the legal system from which the particular case was taken. In other words, an American Working-Paper case is identified; at the appropriate

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6 Cum grano salis, the statement in the text is supportable even with respect to the socialist systems; but there are some fact situations which do not easily occur under such a system: e.g., private auctions (A-2) or assignments of offers (B-1). Generally, as to the particular problems of comparability arising with respect to the socialist systems; see supra, Part II(3)(b) of this Introduction.
place, in the American Report, a German Working-Paper case in the Austrian-German-Swiss Report; etc. In this way the reader has an opportunity, if he wishes, to ascertain what fact situations were used as the principal starting points for discussion and comparison.

(b) INDIVIDUAL REPORTS

The participants' responses, divided into the same units and sub-units as the Working-Paper, took the form of Individual Reports, sometimes referred to as National Reports. In their original form, these Individual Reports usually consisted of two parts. Within each unit, the reporter (i) showed how the legal system or systems covered by him would react to the various fact situations posed in the pertinent unit of the Working-Paper. Leading up to this discussion of fact situations; or following it, each individual reporter also set forth (ii) the doctrinal framework within which the problems inherent in the fact situations would be solved in the country or countries in question. Such an examination of the "theories," by the use of which the various legal systems solve the problem at hand, is not rendered unnecessary by the factual approach. To initiate the discussion by concentrating on a fact situation, has the advantage of making sure that all participants address themselves to the same question. But in order correctly to understand the respective answers given by the various legal systems, and the ramifications to which these answers may lead in somewhat different but related fact situations, one must become familiar with the classificatory scheme, the concepts and techniques in terms of which each system has developed its answer.  

Through the process of discussion and drafting described below, comparison of the Individual Reports led to the formulation of General Reports. These General Reports could not have been written if a common focus had not been initially established by the use of the factual method. But as the work progressed, and the dis--

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For further discussion of the importance of examining "theories" in the course of a comparison based on the factual approach, see Schlesinger, op. cit: supra n. 1, at 77.
cussion, branching out from the fact situations initially chosen, proceeded to cover more ground in increasingly systematic fashion, it became possible to formulate the General Reports on a higher level of abstraction, and to delineate areas of agreement and of disagreement among legal systems in terms of rules, principles and trends. The Individual Reports, originally prepared in response to the more limited inquiries contained in the Working Paper, thus had to be revised, and sometimes re-organized, in order to make them responsive to, and supportive of, the General Reports. These revised Individual Reports, and not the original ones, are published in the present Study. In the process of revision, the Individual Reports (with very few exceptions, specially indicated by footnotes) were coordinated with the General Reports. Thus, if the reader becomes interested in a statement appearing in subdivision A I (3) (b) (iii) of a given General Report, and he wishes to familiarize himself with the position which, e.g., French law takes on the point, he will normally be able to find the answer and the relevant French authorities in the corresponding subdivision of the French Report.

This two-step method, which involved the preparation first of Individual Reports in response to the Working Paper, and later of revised Individual Reports keyed to the General Reports, imposed a heavy burden on the participants. Those who organize future research undertakings of a similar nature, no doubt will ask themselves whether there is a way of avoiding this double effort. Perhaps there is, depending on the degree of refinement with which the original Working Paper or its equivalent is prepared. It is submitted, however, that an overly ambitious attempt to anticipate in the Working Paper the coverage and systematicity of the final product, although saving some subsequent labor, may also have the disadvantage of forcing the participants' responses, i.e., their individual reports; into a rigidly pre-conceived and hence possibly faulty mold.

(c) ORAL DISCUSSION

Three times—in 1960, 1961 and 1964—the participants met in Ithaca for intensive working sessions; each of which lasted between two and four months. Some of the participants attended

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8 There was also a one-week planning session at Aix-en-Provence in the summer of 1963.
all three sessions, others only one or two.9

During the sessions, the participants met very frequently, sometimes daily, for round-table discussions. Occasionally there were exchanges of views on general problems of method and organization; at most of the meetings, however, the units and subunits of the Working Paper, and of the Individual Reports, were taken up one by one. During the first session in 1960, the discussion of each unit began with a presentation in which every participant, seriatim, summarized and explained his Individual Report. This was followed, in each case, by discussion of that particular Report and cross-examination of the reporter. Only after this process was completed with respect to all Individual Reports, did the participants turn to actual comparison. The chairman then attempted, at first orally, to formulate certain areas of agreement and of disagreement, between legal systems. At that point, one of the participants was named as general reporter for the particular unit. Using the oral summary of the chairman as his starting point, the general reporter prepared a first draft which he submitted at the next meeting. Invariably, a number of successive drafts, each in turn discussed and criticized by the group, turned out to be necessary before consensus was reached on a General Report.

In the later sessions, it was found possible to speed up the processes of discussion. This was accomplished by sending out the relevant parts of the Working Paper so early that the Individual Reports could be completed and circularized among all participants at least a month before the beginning of the session. Thus each member of the group had time to familiarize himself with the other participants' Individual Reports before the opening of the session, and it became unnecessary for each reporter orally to present his reports. It was not intended, of course, to give up the benefit of thorough cross-examination of each individual

9 Illness and other accidents played some part in this. More importantly, since participation in these sessions offered a unique opportunity for a comparative study not only of the law of contracts but also of the style, the sources and methods of other legal systems, it was thought desirable to make such opportunity available to a somewhat larger group than could be formed by the participants in a single session.
reporter. It was still necessary to make sure that the information contained in each Individual Report was clear and complete, and correctly understood by all. But in order to expedite this process of cross-examination, the chairman appointed the general reporter for each unit some time before that unit was taken up for discussion. The participant thus appointed made it his business, insofar as that specific unit was concerned, to study all Individual Reports with a particularly critical eye. Thus, when "his" unit was reached for discussion, the general reporter was prepared, without preventing the chairman and other members of the group from raising additional questions, to play the leading role in eliciting clarifications from all of the individual reporters.

In the last session, the procedure was further streamlined by authorizing each general reporter to seek clarifications from other individual reporters by way of informal man-to-man conversations, and to do so before the beginning of the first formal round-table meeting devoted to "his" particular unit. The general reporter, moreover, was encouraged to prepare a first preliminary draft of the General Report at an early moment; again before the first round-table meeting dealing with the unit assigned to him. At the meeting, the discussion thus immediately concentrated on the formulation of areas of agreement and of disagreement, even though it was still necessary, in the process of such formulation, occasionally to seek further clarification of the position taken on a difficult point by one or the other of the legal systems under consideration. This short-cut saved a great deal of time, compared to the more cumbersome methods of discussion used during the first session. One may doubt, however, whether the accelerated procedure would have worked equally well if the participants had not previously become familiar with the cooperative processes by which the General Reports had to be evolved.

(d) GENERAL REPORTS

The most significant fact concerning the General Reports is that they were unanimously adopted. That in order to attain such unanimity, a great deal of time had to be consumed in discussion and re-drafting, cannot be denied. It is fair to say, on the other hand, that these unanimously adopted General Reports are
considerably more accurate and more refined than the product of a single individual, prepared under his sole responsibility, could ever be expected to be. This was clearly proved by the experience of the Cornell Project. Time after time, one of the eminent scholars participating in the Project, asked to act as general reporter in reference to a given unit, walked into the meeting room with a draft General Report, exuding confidence that on the basis of the Individual Reports and of his preliminary conversations with other individual participants, he had fully and accurately stated the areas of agreement and of disagreement. But, alas, three or four hours later he left the battlefield with his confidence considerably shaken; realizing that both in organization and in formulation his draft contained mistakes which in the course of the meeting—always with courtesy and good humor, but also with firmness—were pointed out to him by those who, of course, were his superiors in their knowledge and understanding of legal systems other than his own. In this manner, each General Report went through a considerable number of drafts and re-drafts until it was finally endorsed by all.\(^{10}\)

The task of reaching a consensus on points which often turned out to be intricate and dependent on fine shades of meaning, was of course rendered more difficult by the fact that for the majority of the participants the language used in the drafts and the discussions was not their native tongue. To be sure, all of the participants were able to express themselves fluently in English, both orally and in writing. Nevertheless, a residue of linguistic difficulty was occasionally felt. In order to overcome this, the chairman sometimes appointed a drafting sub-committee, one member of which was a participant from an English-speaking country. Moreover, after the work of the group was completed, the chairman (in his capacity as General Editor) was authorized to make editorial changes in the General Reports as well as in the Individual Reports.

The factual approach employed in the initial stages of

\(^{10}\) It is submitted that the experience thus gained throws considerable doubt on the accuracy of the results reached through any method of multilateral comparison which relies on a single general reporter not having the benefit of a true give-and-take with representatives of all legal systems under consideration.
comparison had the effect that areas of agreement and of disagreement were discerned inductively rather than deductively.\(^\text{11}\) In this way, specific observations were made before any attempt to develop generalizations, and a tendency toward specificity was built into the working method of the group. This tendency persisted when the stage of formulating the General Reports was finally reached; the aim was to formulate areas of agreement and of disagreement with as much specificity as the subject of each Report would permit.\(^\text{12}\)

It is submitted that the objective of maximum specificity (though it may not have been attained in all parts of the present Study) is of great importance in an endeavor of this kind. Only findings stated with at least a reasonable degree of specificity can be helpful to those who may have occasion, for whatever purpose to utilize the results of common core research.\(^\text{13}\)

Needless to say, no attempt was made in the preparation and formulation of the General Reports to emphasize areas of agreement more strongly than areas of disagreement. From the beginning, it had been the declared policy of the Project that the whole Study be conducted \textit{sine ira et studio}, without any preconceived notions as to the extent of the "common core," and this

\(^{11}\)\textit{For a discussion of the relative merits of the inductive and the deductive approach in multilateral comparative research, see Schlesinger, op. cit. supra n. 1, at 78-79.}

\(^{12}\)\textit{As is emphasized in the Scope Note preceding the General Reports, infra, it has always been thought necessary, in the preparation of the present Study, that the process of negotiation leading up to the conclusion of a contract be viewed as a whole. Indeed, an awareness of the functional interconnections among all of the rules and principles governing this entire process seems indispensable for a proper understanding of the subject. It is no doubt desirable (and has been attempted in the General Reports) to spell out such interconnections not only by way of cross-references but also in terms of general observations and explanations. This does not mean, however, that one has to give up the aim of specificity in the statement of particular rules.}

\(^{13}\)\textit{This, it is believed, is true with respect to all of the purposes for which the results of such research are likely to be used. That specificity is desirable even insofar as findings may be used to ascertain some of the "general principles of law recognized by civilized nations," has been pointed out supra, Part II(1)(b)(aa) of this Introduction.}
policy was unwaveringly adhered to by all participants. As the work progressed, it became abundantly clear that areas of agreement and of disagreement are interlaced, often in subtle ways, and that it is quite impossible accurately to formulate an area of agreement without staking out its limits and thus demarcating an actual or potential area of disagreement. A negative finding—i.e., a finding of genuine disagreement among legal systems—is no less valuable than a finding of agreement. Unless alerted to the existence and extent of areas of disagreement, a lawyer or a judge often lightly assumes that a given principle of his own legal system is so "fundamental" that it must be recognized by other systems as well. Such an assumption, if unwarranted, can lead to misunderstandings, frustrated expectations, and grievous errors in decisions. Thus, for the sake of obviating such unwarranted and dangerous assumptions, there is merit in a purely negative finding. Once the disagreement is clearly understood, and seen in the context of related areas of agreement, the first step towards solution of any difficulties resulting from such disagreement will have been taken.

In line with the factual approach initially taken, an effort was made throughout the General Reports to formulate areas of agreement and of disagreement in terms of the actual solutions or results reached by the various legal systems, rather than in terms of mere verbal consonances or dissonances. In a number of instances it was discovered that surface disagreement between legal systems, reflected in diametrically opposite "rules," disappeared to a large extent when it was considered that each of the systems in question had engrafted "exceptions" upon its "rule." In certain situations, the same result might be reached by some legal systems under their "rule," and in other systems under one of their "exceptions."1

On the other hand, it was found occasionally that real differences were concealed behind a facade of verbal consonance. Even though the same "rule" is adhered to in all legal systems,

14 See, e.g., Fr. Rept. on B-7, §III. For examples of other, somewhat more complex ways in which areas of agreement sometimes are hidden by surface dissimilarities, see infra Part II(5)(a) of this Introduction.
it may turn out that in certain fact situations the actual results differ, either because of exceptions which are not common to all legal systems, or because of the interplay, in some legal systems, between the seemingly universal "rule" and other norms or practices. For an example, see General Report on B-3, n. 2.

In order to draw the line between areas of agreement and of disagreement in terms of actual results reached by the various legal systems, it was sometimes necessary to resort to novel distinctions and to categorize fact situations in a manner which would be regarded as unorthodox in most or perhaps all of the systems under consideration. Even where such new categories were employed, however, it was possible in most instances to avoid the use of unaccustomed terminology. It turned out that, at least in the area of contract law, the traditional language of lawyers is sufficiently rich and flexible so that even novel categories and distinctions could be explained in terms of that language. Of course, when traditional terms were used which do not have the same meaning in all legal systems under consideration (e.g., "unilateral contract"), it was made clear contextually in which of the possible meanings the term was employed. In the few instances in which new terms were coined, or words were used in a sense other than the ordinary one, definitions or explanations were given.

(5) Some Observations on the Results Reached

To judge the findings embodied in the General Reports and presented herewith will be for the reader. Only a few general, and somewhat haphazard, observations will be ventured here.

(a) Novelty of Findings

After the completion of their work, the participants in the Cornell Project asked themselves the agonizing question often prompted by social science research: did we merely demonstrate the obvious?

As to the over-all picture emerging from this Study, it might be said that it bears out previous expectations only in part. On the one hand, speaking in rough quantitative terms, one can assert that the areas of agreement are larger than those of disagreement—a finding which probably was expected by most of the
experts in the field. On the other hand, it turned out that the areas of agreement and of disagreement cannot be laid out and demarcated in the simple terms used in earlier comparative discussions, but that these areas are intertwined in subtler and more complex ways than had been surmised.¹⁴a

Turning from the broad-over-all picture to the specific findings, again one observes a mixture of the expected and the unexpected.

Clearly, in many instances the results reached were the ones which an experienced international practitioner would have anticipated. But there were findings that will come as a surprise to many, and that in several instances were unexpected by the majority of the participants themselves.

In numerous instances, the General Reports show that by comparing actual results an area of agreement among legal systems could be found where none was suspected, or that a known area of agreement in reality was larger than had been surmised. To the superficial observer it would appear, for example, that there is a wide area of disagreement between those legal systems in which offers are normally irrevocable, and the other systems in which

¹⁴a The principal reason for this, it is submitted, lies in the complexity of the historical forces which have shaped the law of contracts in the various legal systems. The crazy-quilt pattern of the common core of those systems perhaps becomes less surprising if one considers the influences, always differing in degree and in mixture from country to country, which have contributed to the development (and to the limits) of the common core. Even the most superficial list of such contributing factors would have to include:

(a) The complex interaction between the germinal systems, to wit Roman law, common law, canon law, the law merchant, the school of "natural law," and the teachings of the Pandectists;

(b) overseas migrations of European and European-derived systems (both of the common law and the civil law type);

(c) borrowing (voluntary or otherwise) of entire systems or parts of systems; and

(d) eclectic borrowing of particular solutions (such as borrowings from the former Polish Code of Obligations in the Egyptian Civil Code, or Field Code influences on the Indian Contract Act).

The complex operation of these multiple factors is illustrated in many of the Individual Reports.
offers are normally revocable. Long before the initiation of the present Study, it had been pointed out by Nussbaum and others that this area of disagreement is considerably narrowed if one takes into consideration not only the rules concerning revocability but also the related rules dealing with the time when the acceptance becomes effective. In the course of the Cornell Project it was found that in terms of the actual results reached in concrete situations the area of disagreement becomes even less significant if one considers not only the two sets of rules dealing with revocability and time of effectiveness of the acceptance, but also a host of other rules and doctrines—some of them not limited to the law of contracts—which often impinge on the pertinent fact situations. See General Report on A-12, §III, and General Report on B-9, subd. III B (2). To mention but one further example: the supposed contrast between common law and civil law systems caused by the peculiar common law doctrine of unilateral contracts was found, upon closer inspection, to produce only minor differences in actual results. See General Report on B-6.

On the other hand, throughout the General Reports, one finds that there is occasional unexpected disagreement on matters of detail, although all legal systems pronounce the same well-known general rule. In some instances, even the seasoned comparativists participating in the Project were frankly surprised when they discovered that one or more legal systems registered a dissent from a proposition which many had taken for granted. For example, the possibility that an undeclared revocation, which has never come to the knowledge of the offeree, might effectively destroy the offer in a modern legal system (see General Report on A-11, subs. III B), had not occurred to most of the participants until they read the French Report.14b

An element of the unexpected is noticeable, also, in many of the Individual Reports. Basically, these reports are memoranda on certain aspects of a given legal system, prepared by experts who were familiar with that system, and in most instances brought up in it. Under these circumstances, one might expect the Indi-

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14b The mere suggestion of a solution which in effect would correspond to the French rule on this point was called "monstrous" by Mr. Justice Holmes. See Amer. Rept. on A-12, subs. II A.
vidual Reports to be similar in approach to non-comparative monographs or articles, or chapters of treatises, and to duplicate what other authors in the particular country have said on the subject at hand. In reality, it is submitted, many of the Individual Reports have a very different character. An ordinary monograph, article or treatise, prepared by a local author for local consumption, answers only those questions which on the basis of local tradition and experience occur to that particular author. The Individual Reports prepared for the Cornell Project, on the other hand, constituted the responses, as it were, to questions asked from the outside. Whether suggested by the fact situations in the original Working Paper, or reflecting new points brought up in the oral discussions, the questions to be answered in the revised Individual Reports frequently had been framed, at least in part, in the light of the thinking and the experience of countries other than the respondent's. In a number of instances it turned out that a given question had not previously occurred to anybody, or at least had never been asked in the same systematic context, in the respondent's country. Thus faced with a (to him) novel question, an individual reporter often found himself compelled to take a fresh look at the statutory and decisional law of his own legal system, with results which occasionally will strike the readers in his home country as distinctly unorthodox.

(b) SIGNIFICANCE OF THE FINDINGS IN THE LIGHT OF THE 1964 HAGUE CONVENTION

The Diplomatic Conference which was held at The Hague in April 1964, resulted in the formulation of two proposed international conventions. The first of these conventions embodies a Uniform Law on the International Sale of Goods, the second a Uniform Law on the Formation of Contracts for the International Sale of Goods.\(^\text{15}\) In the present context, interest is primarily centered on the proposed Uniform Formation of Contracts Law; for

\(^{15}\)For the text of both conventions, see SOME COMPARATIVE ASPECTS OF THE LAW RELATING TO SALE OF GOODS (Int'l & Comp. L.Q., Supplemental Publication No. 9 [1964]) 60 ff.; 13 AM. J. COMP. L. 451 (1965); 30 LAW & CONTEMPORARY PROBLEMS 326 (1965); 54 REVUE DE DROIT INTERNATIONAL PRIVÉ 205 (1965); 29 RABELS ZEITSCHRIFT 166 ff. (1965).
the sake of brevity, it will hereafter be referred to as Uniform Law. As of January 1967, the Convention embodying this Uniform Law had been signed by twelve nations: but as of the same date no ratifications had been deposited, and no country had acceded to the Convention. On the assumption, however, that by the coming into force of the Convention; or perhaps by voluntary adoption, the Uniform Law will become incorporated into the legislation of some countries, the question may be asked whether and in what way the provisions of the Uniform Law and the findings presented in this Study bear upon each other.

The first point that should be noted in this connection is the limited coverage of the Uniform Law. It applies only in situations in which the contemplated or alleged contract is a contract of sale, while the present Study deals with the formation of contracts of all kinds. The scope of the Uniform Law is further restricted to the sale of goods; moreover, the sale of investment securities, negotiable instruments, ships, aircraft and electricity is expressly exempted from its coverage. Furthermore, the Uniform Law applies only if the contemplated sale of

15a The English text of the Uniform Law (but not the Convention to which it is annexed) is reproduced as an Appendix at the very end of this Study.

16 Belgium, France, the Federal Republic of Germany, Greece, Hungary, Israel, Italy, Luxembourg, Netherlands; San Marino, the United Kingdom and Vatican City. Richard D. Kearney, Esquire, Deputy Legal Adviser, U. S. Department of State, was kind enough to give this information to the author in a letter dated January 27, 1967.

17 The Hague Conference of April, 1964, had been attended, and its Final Act (see the first of the publications listed in n. 15 supra) had been signed, by representatives of a considerably larger number of nations.

18 See supra n. 16. According to its Article VIII, the Convention "shall come into force six months from the date of the deposit of the fifth instrument of ratification or accession." There is no time limit for ratification or accession. In respect of a state that ratifies or accedes to the Convention after it comes into force, Article VIII provides that the Convention shall become effective six months after the date of the deposit of its instrument of ratification or accession.

18 The practical significance of ratification or accession may vary from signatory to signatory, as the Convention permits far-reaching reservations. See Articles II and III of the Convention. See also Article I, paragraph 3 of the Convention, in conjunction with Article V of the Sales Convention.
goods is an international sale, as defined in its Art. 1. Any signatory may, in addition, by way of reservations place further restrictions upon the scope of the Uniform Law's applicability. Thus it is clear that even in the unlikely event of universal adoption of the Uniform Law, its provisions would apply only to a relatively small segment of all contractual transactions.

Within the ambit of its limited scope the Uniform Law, it is submitted, may well have the effect of enhancing rather than reducing the need for data compiled by comparative research. This becomes apparent when one considers (aa) the problem of gaps in the Uniform Law, (bb) the methods that may be employed for its interpretation, and (cc) the treatment of usages in the Uniform Law.

(aa) The Uniform Law does not deal with problems of essential validity or of vices de consentement. Like the present Study, it addresses itself to the mechanics (or, as a civilian might say, the external manifestations) of consenting to a contract. Even within this specific topic of Formation of Contracts, however, the Uniform Law leaves a number of issues completely or virtually

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19 If a signatory adopts both the Uniform Sales Law and the Uniform Formation of Contracts Law, the definition of international sales will be taken from Art. 1 of the Sales Law. See Annex II, Art. 1 of the Formation of Contracts Convention.

20 See supra n. 18. Concerning the intricate problems, especially conflict of laws problems, which may arise from the use or non-use of such reservations see the articles cited supra p. 16; see also Nadelmann, The Conflicts Problems of the Uniform Law on the International Sale of Goods, 14 AM. J. COMP. L. 236 (1965), where further references can be found.

Only some examples can be mentioned here. The Uniform Law in no way refers to the problem of assignment of offers (see infra, General Report and Individual Reports on B-1), even though the concept of "offer" in Art. 4 may be broad enough to include an offer contained in an option. More importantly, there is no express provision dealing with the problem of the countless contracts concluded without ascertainable sequence of offer and acceptance (see infra, General Report and Individual Reports on C-1). In dealing with the requirement of definiteness of the offer (see infra, General Report and Individual Reports on A-3), the Uniform Law (Art. 4) employs such general terms that, as has been said by an eminent expert, "it is, of course, necessary to make comparative investigations" of the various approaches to the problem in order to resolve doubtful cases, especially cases involving open price terms.21a The problems which arise when a writing or other formality contemplated by the parties fails to come into existence (see infra, General Report and Individual Reports on C-2), are only tangentially recognized in the Uniform Law.22 It has been argued, moreover, that the subject of offers to the public (see infra, General Report and Individual Reports on A-7) is not covered by the Uniform Law.23

21a Lagergren, op. cit. supra n. 21, at 57.
22 The only provisions of the Uniform Law having a bearing on these problems seem to be Art. 2, which deals broadly with usages and party autonomy, and Art. 4, which requires that an offer show the offeror's intention to be bound; but neither of these provisions supplies sufficient criteria for determining whether and under what circumstances a formality contemplated by the parties should be regarded as constitutive.
On the other hand, the Uniform Law in Art. 3 makes it clear that neither the offer nor the acceptance is subject to a statute of frauds or other form requirement imposed by law. The present Study does not deal with form requirements imposed by law (see Scope Note, infra). This, it would seem, is the only topic covered in the Uniform Law but not in the present Study.
23 See von Caemmerer, op. cit. supra n. 21, at 118-19. The question is controversial. Schmidt, op. cit. supra n. 21, at 6-9, mentions a Report by Professor Hellner which apparently takes the view that proposals addressed to the public are treated in Art. 4, and that under the rule laid down in that provision such proposals cannot constitute offers. Quaere whether Professor Hellner's view can be squared with the provision of Art. 2, which seems to indicate that the proponent is the master of his
The draftsmen of the Uniform Law, who deliberately refrained from burdening the Law with too much detail, probably were aware of the existence of such gaps in their text. Recognizing that the task of gap-filling would fall to the courts, the draftsmen expressly—though negatively—alluded to the sources to which the courts will have to resort for this purpose. As has been noted in Part II (1) (b) (cc) of this Introduction, the Uniform Law contains a provision excluding rules of private international law "for the purpose of the application of the present Law." Thus it is perfectly clear that the gaps may not be filled by the application of a single local law selected pursuant to the rules of private international law. What is less clear, is what source or sources of law may, or indeed should, be utilized for the purpose. It is submitted that the answer to this question may to some extent depend on whether one speaks in theoretical or practical terms. In theory, one can easily agree with the view of Professor von Caemmerer, one of the leading participants in the Hague Conference, that gaps in the provisions of the Uniform Law must be filled, with due regard for the purposes and spirit of proposal, and thus can give such proposal (including a proposal addressed to the public) the character of an offer if he so desires and if he sufficiently expresses his desire? In Professor Schmidt's opinion, the whole problem is a difficult one; he fears that courts in different countries may well arrive at different solutions. See also n. 24 infra.

Occasionally it may be doubtful whether one deals with a "gap" (which must be filled without reference to rules of private international law), or whether the point in question is so completely outside of the scope of "the present Law" that even the provision excluding rules of private international law cannot apply (in which case the governing law would have to be ascertained by the application of ordinary conflicts rules). With reference, e.g., to the problem of public offers (supra n. 23), it has been suggested that the problem "is left outside the scope of the Convention and must, therefore, be decided ... in conformity with the provisions of the proper law." Lagergren, op. cit. supra n. 21, at 57. Quaere, however, whether this particular problem, insofar as it relates to contemplated sales of goods, is really more than a gap problem within the general ambit of "the present Law," especially in view of the breadth of Art. 2?

Questions of vices de consentement, or questions relating to transactions not involving the sale of goods, are clearly outside the scope of the Uniform Law; hence they continue to be governed by the law of the country to which (taking proper account of the parties' intentions) the forum's conflicts rules may refer.
the Law, by falling back on its "bases in comparative law."25 Whether or not one adopts this particular formula, it seems plain that the express provision of the Uniform Law prohibiting resort to a single local law compels a comparative approach whenever gaps in the text of the Uniform Law have to be filled.

In practice it may turn out that courts will use a different and more simple-minded method when they are faced with gaps in the Uniform Law. In such a case, a court may well fall back on its own local law, especially when it has received no adequate help from counsel (or from institutes of comparative law, where such institutes exist) in assembling information on the relevant law of other countries.26 Thus the same gap may be filled in different ways by courts sitting in different countries. To the extent that this happens, the Uniform Law will have failed to bring about uniformity, and the legal advisers of international traders will be confronted with the same diversity of national laws as exists today.

Thus it is clear that, whatever approach is taken, the gaps in the Uniform Law will confront the legal practitioner, either as advocate or as counsel, with problems calling from comparative research.

(bb) The resources of comparative law will be required, also, for the interpretation of the positive provisions of the Uniform Law. As has been mentioned, the Uniform Law is tersely drawn; matters of detail are not always spelled out, so that questions of interpretation are bound to arise.

The specific provisions of the Uniform Law cannot be understood, and hence cannot be intelligently interpreted, without regard to their historical and intellectual origins. These ori-

25 Von Caemmerer, op. cit. supra n. 21, at 112. The Uniform Sales Law contains a provision (Art. 17) to the effect that "Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based." At least in those countries in which both Uniform Laws are adopted, it may be expected that this provision will be analogously applied in the context of the Uniform Formation of Contracts Law, even though the latter Law does not contain an express provision to the same effect. See von Caemmerer, id. at 111.

26 See Schmidt, loc. cit. supra n. 21.
gins vary from provision to provision. Even an eclectic and super-
ficial survey (and no more than that is intended to be submitted here) discloses at least four different categories:

(i) There are several provisions which, as shown by the present Study, reflect a consensus among legal systems; and merely seek to codify the essence of such consensus. As examples, one might mention Art. 2, para. 2, which declares invalid a term of the offer stipulating that silence shall amount to acceptance, and the provision in Art. 5, para. 1, which confirms the rule that an offer does not become effective if its withdrawal is communicated to the offeree before or at the same time as the offer. As these provisions have been born of consensus, it would seem that in doubtful or borderline cases their interpretation will require careful examination of the extent of such consensus.

(ii) At the opposite extreme, one finds a small number of provisions in the Uniform Law which seem to have no exact precursor in any national system, but—perhaps for the purpose of effecting a compromise among conflicting national solutions—were independently fashioned by the draftsmen. The example which most readily comes to mind is the provision in Art. 5, para. 2, pursuant to which a normally revocable offer cannot be revoked if the revocation "is not made in good faith or in conformity with fair dealing." This provision has been criticized as too vague, and fear has been expressed that it will be differently interpreted by courts in different countries. 27

(iii) In a number of instances, the draftsmen of the Uniform Law have made a conscious choice between conflicting solutions reflected in diverse national systems. To mention but one example, Art. 11 provides that normally the formation of the contract "is not affected by the death of one of the parties or by

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A novel solution is presented, also, by Art. 7, para. 2, dealing with qualified acceptances. Here the Uniform Law introduces a rule quite opposed to traditional thinking: Although the provision may have been influenced in some way by Scandinavian and American solutions, it differs both from the pertinent section of the Uniform Scandinavian Contract Act and from §2-207 of the American Uniform Commercial Code. See Schmidt, id. at 23-25; Honnold, op. cit. supra n. 21, at 10-11; Lagergren, op. cit. supra n. 21, at 68-69.
his becoming incapable of contracting before acceptance." Insofar as revocable offers are concerned, this is consistent with some but contrary to other national laws. See infra, General Report on A-13, subs. II B. In interpreting such a provision, the courts will have to take note of commentaries and judicial precedents in those countries whose position has been adopted.

(iv) Occasionally a compromise between conflicting national positions has been effected; not by free invention of an intermediate solution (see supra, under (ii)), but by conflation of elements taken from different systems. An illustration is furnished by Art. 5, para. 4, one of the most interesting provisions of the Uniform Law, which renders ineffective a revocation reaching the offeree after he has dispatched his acceptance or (in a proper case) his performance. This must be read together with Arts. 6 and 12, which provide that in general an acceptance becomes effective only when it is received by the offeror. A correct understanding of these provisions can be achieved only if one keeps in mind that here the draftsmen have combined elements taken in part from the civil law systems adhering to the theory of "reception," and in part from the "mailbox" doctrine of the common law.28 Read together, the provisions rather clearly indicate that (1) for the purpose of determining the timeliness and effectiveness of a revocation of the offer; the time of dispatch of the acceptance shall be decisive, but that (2) for all other purposes, including the purpose of allocating the risk of loss or delay of the declaration of acceptance; the effectiveness of the acceptance depends on its having reached the offeror.29

Among European commentators, there is controversy on the point just mentioned;30 but there is agreement that provisions such as Art. 5, para. 4, and Arts. 6 and 12, which embody a composite solution derived from several different legal systems, can be correctly interpreted only if full use is made of the armory of comparative law.

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28 See von Caemmerer, op. cit. supra n. 21, at 122.
29 For somewhat similar suggestions (in the context of American law) see Macneil, Time of Acceptance: Too Many Problems for a Single Rule, 112 U. PA. L. REV. 947 (1964); a slightly revised version of this article appears infra as Appendix to the American Report on B-9.
30 Von Caemmerer, op. cit. supra n. 21, at 122, supports the
(cc) According to Art. 2, para. 1, the substantive provisions of the Uniform Law are inapplicable "to the extent that it appears from... usage that other rules apply." Usage thus has overriding significance in the statutory scheme. Article 13 defines usage as "any practice or method of dealing which reasonable persons, in the same situation as the parties, usually consider to be applicable to the formation of their contract." It has been suggested that a rule of law, e.g., of decisional law, existing both in the country of the seller and the country of the buyer, may be regarded as constituting, or giving rise to, a practice which must be recognized as a usage. If this suggestion, which seems eminently sound, is adopted by the courts, almost any provision of the Uniform Law could be overridden by a showing that a different rule, prevailing in the countries of both parties, has created or recognized a "practice...which reasonable persons, in the same situation as the parties, usually consider to be applicable to the formation of their contract." This supplies an additional reason why comparative legal data—in this instance, data normally limited to the countries of the parties—remain of crucial significance under the regime of the Uniform Law.

If the Convention embodying the Uniform Law enters into force, and after it has been in force for three years, any Contracting State, with the concurrence of at least one-quarter of the other Contracting States, will have the right to demand the convening of a conference for the purpose of revising the Convention or the Uniform Law. Unification of the law of international sales in thus recognized as a continuing task. At the same time, private and

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31 Von Caemmerer, op. cit. supra n. 21, at 126, makes the suggestion in the limited context of the "practice" of treating letters of confirmation as approved if the recipient does not promptly object. There is no reason, however, why other "practices" created or recognized by decisional or statutory law in the countries of the parties should not equally qualify as usages within the meaning of Art. 13.

official international organizations undoubtedly will carry on their work of drafting and refining standard forms and conditions for many branches of trade.\textsuperscript{32a} It is the hope of the authors that the present Study will make a contribution, however modest, to this constant and important process of facilitating trade by measures of unification, of harmonization, and of mutual education.

(c) GENERAL OBSERVATIONS ON COMPARISON OF LEGAL SYSTEMS

The concrete findings presented in these volumes are strictly limited to the subject of Formation of Contracts; but as in many large-scale comparative studies, the unarticulated by-products of the work process may be at least as significant as the contribution made in the area of the specified subject matter. In the intensive and prolonged round-table discussions at Ithaca, each participant had a truly unique opportunity to probe into, and to get a new understanding of, the inner workings of several legal systems other than his own. At the same time, all participants helped in developing, and became fully conversant with, the methods of comparison described above. It is already apparent that some of the participants—in their capacities as deans, directors of institutes, or individual law teachers—are translating the Cornell Project's factual approach into novel methods of teaching comparative law. The impetus of the group's common experience is carried, also, into individual research projects, dealing with problems of national,\textsuperscript{33} regional or international range.\textsuperscript{34}

Professor Bonassies has eloquently testified to the "subjective" advantages which each member of the team derived from the process of mutual education inherent in the project.\textsuperscript{35} There

\textsuperscript{32a}See Honnold, \textit{loc. cit. supra} n. 21.

\textsuperscript{33}See Gorla, \textit{Lo studio interno e comparativo della giurisprudenza e i suoi presupposti: le raccolte e le tecniche per la interpretazione delle sentenze}, 87 \textit{Foro Italiano}, Part V, pp. 73 ff. (1964); see also Gorla, "Ratio decidendi." principio di diritto (e "obiter dictum").—\textit{A proposito di alcune sentenze in tema di revoca dell'offerta contrattuale}, \textit{id.} at 90 ff.

\textsuperscript{34}See, e.g., Lorenz, \textit{General Principles of Law: Their Elaboration in the Court of Justice of the European Communities}, 13 \textit{Am. J. Comp. L.} 1 (1964); Longo, \textit{Diritti dell'Europa Continentale e Common Law—Nuove prospettive di ravvicinamento}, 5 \textit{Rivista di Diritto Europeo} 303 (1965).

\textsuperscript{35}See his part of the article by Schlesinger and Bonassies, \textit{Le fonds commun des systèmes juridiques—Observations sur un nouveau projet de recherches}, 15 \textit{Revue Internationale de Droit Comparé} 501. at 598-40 (1965).
is no doubt that every participant came away from the Ithaca sessions with new ideas regarding his own legal system as well as the methods and objectives of Comparative Law. Apart from what is embodied in the General Reports, however, the thoughts stimulated in the mind of each individual participant, and the conclusions reached by him as a result of the experience, are purely personal and not necessarily shared by all of his colleagues. Insofar as the author of the present Introduction is concerned, the work on the Project has led to reflections on a number of general problems which are unconnected, or only indirectly connected, with the law of Formation of Contracts. The following remarks are an attempt, in tentative and abbreviated form, to spell out a few of these reflections, dealing with (aa) some of the differences between the legal systems under consideration, with respect to their sources and methods, and (bb) the process of comparison itself.

(aa) "Codified" vs. "uncodified" systems. As every part of a legal system is apt to reflect some of that system's general features, it is inevitable that a detailed comparative study of a specific legal topic will make it possible, at least as a by-product, to engage in some comparison between the various legal systems with respect to their methods and sources. Those who prepared the present Study, although dealing with a specific and clearly defined subject, at every step were able to observe, and tempted to compare, intriguing and often subtle differences in style that exist among the legal systems under consideration. Only a few of these stylistic points can be touched upon here, by way of a brief comment on elements of strength and weakness exhibited by "codified" and "uncodified" legal systems.

The first point to be stressed in this connection is that in the literature on comparative law the words "codification" and "codified" are almost invariably used too broadly, by being applied to a whole legal system. To say that an entire system is "codified" or "uncodified," may be meaningful as indicating a general way of thinking; but it can be misleading when one deals

36 The author hopes to elaborate these somewhat disjointed observations in future writings.

37 Concerning the related point—that no part of a legal system can be correctly understood without some knowledge of its general features—see infra under (bb).
with a particular topic or area of the law. There is no highly developed legal system in existence today which is either wholly codified or wholly uncodified. In dealing with a particular subject, therefore, one must inquire whether and to what extent a given legal system has resorted to codification with respect to that subject.

Concerning the formation of contracts, the line between codified and uncodified legal systems cannot be drawn in the simple terms of the traditional dichotomy between civil law and common law. In France, a "civil law" country, there are practically no code provisions dealing with offer and acceptance; thus the pertinent rules and principles had to be developed by the courts and legal writers. In the United States, on the other hand, in spite of its "common law" tradition, a substantial segment of the law of contracts today is cast in the form of provisions of the Uniform Commercial Code and of other statutes; and in the "common law" system of India the basic rules on the subject are comprehensively (though not exhaustively) and rather systematically laid out in the Indian Contract Act.

A comparison between codified and case law systems shows that both have their strong points, and that either system can be perfectly workable. Well-drafted code provisions, such as the German or Italian provisions dealing with formation of contracts, offer the advantage that they provide clear and authoritative answers at least for those problems which arise most frequently. Of course, no draftsman of a code can foresee all possible fact situations; but even in situations with which the code does not deal directly, the code provisions may supply convenient starting points for the reasoning of judges and legal scholars.

Another clear advantage of carefully prepared codes is their relative wealth of gap-filling provisions (rules of ius dispositivum). This can be of great significance in connection with the question, among others, whether a proposal or an agreement meets the requirement of definiteness. See the Individual Reports on A-3, §III.

The draftsmen of codes tend to climb to higher levels of abstraction than judicial law-makers. This was rather strikingly
illustrated in the work on the Cornell Project. It was found that some of the codes of the civil law world (which, for this purpose includes the socialist world) deal with a number of the important problems in this area by way of provisions of the highest degree of generality. For instance, the question of whether and how an offer, an acceptance or a revocation must be communicated to the other party, will be treated in those systems, not under the headings of "offer" or "acceptance" or "revocation," but under the heading of "jural act" or "declaration of will." This technique of abstraction, traceable to the General Part of the German Civil Code and its Pandectist forefathers, affects not only the process of looking up the law, but also the results reached: By speaking in terms of such generality, the codifier is apt to paint with a wide brush, e.g., to make the same rules applicable to the communication of offers, of acceptances and of revocations. This has the advantage that many questions are expressly answered by a single provision, and that instances of the casus omissus are reduced in number. On the other hand, the multiple solutions thus mechanically fashioned at a single stroke may not be the best ones. To this observer it seems very doubtful, for example, whether it is desirable to resolve all questions of communication in the same way regardless of whether one deals with the communication of offers, of acceptances or of revocations. The legal systems which do not employ code provisions abstractly dealing with the communication of "declarations of will" may be able to work out subtler and more discriminating solutions.

While a well-drafted code undoubtedly enhances certainty and predictability of the law, the present Study also shows that a workable system of law concerning formation of contracts can be built up by judicial decisions, provided the decisions are adequately reported, sufficiently numerous to cover the more important aspects of the subject, and followed with reasonable regularity. Implacable application of the doctrine of stare decisis may, of course, create certain rigidities; but rigidity can arise also from a code provision which unambiguously lays down an unjust or antiquated rule. In the United States, moreover, the doctrine of stare decisis has never been an inflexible one. Even in England, where the House of Lords in 1898 adopted a completely rigid version of the doctrine, such rigidity has now
been replaced by a somewhat less absolute approach.

Workable results may be attained also by various combinations of code and case methods. A "codified" version of what originally was the English common law of contracts, has on the whole produced satisfactory results in India. Neither the statutory form of the law nor the doctrine of stare decisis has prevented the Indian courts from slowly adjusting the rules to the conditions of their country. Further evolutionary changes, not of a drastic nature and probably to be brought about by statutory amendment, seem to be in prospect. In the United States, the State of New York pioneered in injecting a number of statutory elements into the common law of contracts. In almost all states, contracts for the sale of goods today are largely governed by the Uniform Commercial Code, while most other contracts are still essentially subject to the common law. The common law no doubt will influence the interpretation of the relevant provisions of the UCC; conversely, the innovations of the UCC may well lead the courts to analogous solutions in cases not directly governed by the Code. Nobody anticipates much difficulty in this respect. The first Tentative Draft of the pertinent provisions of the Restatement Second shows that systematicity does not necessarily suffer on account of this duality of sources, and in the end such duality may turn out to be an element of strength.

The conclusion to be derived from the foregoing observations appears to be that insofar as the law of formation of contracts is concerned, a system may flourish by using the method of codification, or by relying on a method of authoritative and adequately reported case law, or by combining these methods in various ways.

The only kind of method that seems to lead legal systems into trouble is one that resorts neither to codification nor to the development of an authoritative body of adequately reported judicial decisions. France, as has been mentioned, has not codified its law with respect to formation of contracts. French judicial decisions, and especially the decisions of the Cour de Cassation, are reported in such a way that the reader of the reports is not reliably informed either of the facts of the case or of the reasoning of the Court. Perhaps partly as a result of their semi-
secret nature, the decisions of the Cour de Cassation have not attained the same authoritative status which in practice is the hallmark of the decisions of courts of last resort in some of the other civil law countries and in all of the common law systems. As is shown by the French Reports appearing in these volumes, the Cour de Cassation itself has been vacillating in its "jurisprudence" on a number of important points, and the lower courts often refuse to follow the leadership of the Cour de Cassation, especially when prominent academic voices oppose the latest solution announced by the highest court. The result; as can be gathered from the painstaking analyses contained in the French Reports, is that in this area the French legal system has suffered some loss of certainty and predictability, even with respect to basic issues which in other civil law systems as well as in common law systems have been authoritatively resolved: If any lesson is to be drawn from this observation, it is not at all limited to France, and relates more to general problems of legal method than to the specifics of formation of contracts.

(bb) Concerning the process of comparison; many observations of a general nature have been incorporated into the description of the Project's own methods (supra; Part II (4) of this Introduction). These observations will not be repeated here. The few comments which follow will deal only with some of the hurdles which actually or supposedly tend to impede the comparative process.

When data taken from several legal systems are sought to be compared, the first difficulty arises from the fact that the person asked to do the comparing—whether he be the author or the reader—is unable correctly to understand and to appraise the data relating to legal systems with the methods and organization of which he is unfamiliar. Citations of judicial decisions, for example, are apt to convey a little meaning, or perhaps an inaccurate meaning, to such a person unless he knows exactly how such decisions are reported in the country in question (whether, in particular, the reports fully state the facts and the reasoning of the Court), and what force they have as precedents. The well-known generalities, usually phrased in terms of differences between "common law" and "civil law," are not helpful,

38 See Gorla, loc: cit; supra n: 33.
because the common law systems, and even more the civil law systems, show very substantial differences within the group.\textsuperscript{39} The participants in the Cornell Project found it valuable; and indeed indispensable, to educate each other on the history, the sources, the classificatory scheme and other general features of the legal systems under consideration; and to do so at an early stage of the proceedings. By the same token, in order to enable the reader of these volumes to evaluate the citations of authorities as well as the textual statements in their Individual Reports; the reporters thought it necessary briefly to set forth the same kind of information in the "Introductions" to each set of national reports (infra pp. 193-323).

A related difficulty, experienced in almost every session of the Cornell Project and referred to in many of the General Reports, stems from the interplay between substantive and adjective law.\textsuperscript{40} In making comparisons between substantive rules applicable to certain "fact" situations, one must not forget that some "facts" may be provable in the courts of one country but perhaps not in the courts of another. Even more important, at least in the context of formation of contracts; is a realization that the line between questions of law and questions of fact (i) is differently drawn and (ii) has different significance in various legal systems. In general, it seems that the civil law systems; which never employ a jury in civil cases and normally permit a complete re-hearing on the facts before an intermediate appellate court, tend to treat as factual many issues which in the view of the common law would be issues of law, to be determined by the trial judge rather than the jury and reviewable in all appellate courts, including courts of last resort.\textsuperscript{41} This tendency to factualize issues, especially those relating to the meaning of documents and generally to the "intention of the parties," appears to be

\textsuperscript{39}See SCHLESINGER, COMPARATIVE LAW 316-17 (2d ed. 1959).

\textsuperscript{40}Although legal systems differ on this point of classification, the term "adjective law" is here used as including the law of evidence.

\textsuperscript{41}See SCHLESINGER, op cit. supra n: 39; at 229, 314.
particularly strong in France.

Where legal systems thus diverge from each other in their treatment of the law-fact dichotomy, the comparativist may be exposed to a booby trap. If, for instance, he finds that on the same facts the New York Court of Appeals and the French Cour de Cassation have reached the same result, he may be tempted to exclaim that the New York rule and French rule are identical, but he is proved wrong if upon closer inspection it turns out that the New York court laid down a rule of law, while the Cour de Cassation merely refused to disturb a factual finding, implying that a contrary finding—that may be made by the "judges of the facts" in the next case—will remain equally undisturbed. As the General Reports show, the participants in the present Study were on their guard against this particular booby-trap; it is not claimed, however, that they succeeded in avoiding it each and every time.

Mention should be made, on the other hand, of a supposed hurdle on the path to comparison which in the work of the Cornell Project caused less difficulty than might have been anticipated. As is well known, the legal systems considered in this Study differ quite radically from each other in the way in which they organize the field of contract law. Some of the civil-law systems draw a systematic distinction between "civil" and "commercial" contracts; others do not. The civil-law countries, moreover, normally divide the law of contracts into a general and a special part, the latter dealing with particular types of contracts.42 In common law systems, on the other hand, there is no separate "commercial law,"43 and as a rule no "special part" clearly separated from

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42 In some of the civil law systems, the rules applicable to contracts must be looked for on three levels of abstraction. In addition to the general and special rules of contract law, there is a third set of rules, even more abstract than the "general" contract rules, dealing with "jural acts" and "declarations of will." Concerning the effect of these last-mentioned, super-abstract rules, see supra, text under (aa).

the general law of contracts; but by way of a dividing line which cuts across the two civil law distinctions just mentioned, most common law jurisdictions subject contracts for the sale of goods to comprehensive statutory regulation. Frequently, special statutes also modify the common law with respect to other particular types of contracts, such as insurance contracts. In the socialist systems, as has been pointed out above, yet another scheme of organization has been adopted; and the dividing lines there used differ from those of both the civil and the common law.

To overcome the problems posed by these differences in organization and classification, did not prove overly difficult. The factual approach, it turned out, cut right through the conceptual cubicles in which each legal system stores its law of contracts, and made it possible to proceed immediately to the matching of the results reached by the various legal systems.

Having thus freed itself of the shackles of existing classificatory systems, the group had to develop its own scheme of organization and of classification. When at a later stage of its work it was faced with the task of formulating the General Reports. This was a most difficult job; but the difficulty was not insuperable, because at that stage the instances of agreement and

\[44\text{See supra Part II (4) of this Introduction.}\]

\[45\text{One problem of this kind that proved somewhat thorny, arose in connection with options. The common law systems and some of the civil law systems have developed general rules on the subject. Other civil law systems, however, rely in part on detailed special rules concerning particular types of options or of similar rights, such as the right or pre-emption or of re-purchase; and often encounter doubtful and controversial questions as to whether these special rules should be analogically extended to other kinds of options. Although the point may not be of cardinal importance with respect to formation of contracts, it had to be clearly understood by all before any general statements dealing with options could be made, and it turned out that to overcome this particular classificatory difference was a somewhat time-consuming process. It would have been even more time-consuming if the group had not had the benefit of the clear analysis presented by Lorenz, Vorzugsschutz beim Vertragsabschluss, in Festschrift für Hans Dölle 103 ff. (1963).}\]
of disagreement among legal systems were already known, and the question was only one of fashioning a suitable mold into which to pour these known data: 'An existing mold was used; perhaps by way of whoosing one of several divergent ones; whenever it was possible to do so without causing inaccuracies or misunderstandings. But when it seemed necessary, the group did not hesitate to devise new categories,'\textsuperscript{46} thus building some new elements into a systematic structure largely consisting of familiar components.

\textsuperscript{46} For an example, see Gen. Rept. on A-ll; \textsection III: Concerning the use of new terms, see supra, at the end of Part II(4)(d) of this Introduction.
LIST OF REVIEWS AND REVIEW ARTICLES
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*The other authors are:
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