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Mr. Akihiko Watanabe, Penn Law School

Dear Mr. Watanabe,

I am impressed by your courage in seeking to apply a difficult and abstract system of analysis -- "game theory" -- to one of the most difficult problems of law, an implied duty to cooperate in contract performance. Your work was impressive in <sup>its</sup> research into "game theory" and also in examining literature and case-law on "duty to cooperate" in English and German law.

I did have difficulty at several places in understanding your line of thought, but I believe this was largely the result of difficulty in crossing the language barrier. (As I have mentioned ~~often~~ frequently in our seminar I deeply respect the valiant efforts you and others, from such a different linguistic base, are making. For this reason I have made a number of suggestions -- not by way of criticism but, instead, to help you make further progress if you decide to pursue the problem further -- as I hope you will. Your study rates an "Excellent", and I congratulate you. With best wishes, John Honnold

**DUTY TO COOPERATE  
UNDER THE CONVENTION  
ON THE INTERNATIONAL SALES OF GOODS**

27

**Uniform Law for International Sales**

**Professor John Honnold**

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<http://www.un.org/untreaty/>

**Senior Writing Paper**

**Spring 1992**

Case Law on Contract Texts  
(CLOUT)

**Akihiko Watanabe**

(KB)

See reverse <sup>side B</sup> ~~for~~ page for  
abbreviations of editing  
suggestions.

Mr. Watanabe -

If you should consider publishing your study in English you may be interested in my editorial suggestions for English style. Following are my usual abbreviations for editing:

W/C = "Word choice", There may be a more suitable word in English

Awk = "Awkward" - usually a construction <sup>(building)</sup> of a sentence that in English may not be clear. Usually a problem of "syntax" - the relations between parts of the sentence.

gr = "grammar" - problem with rules of English grammar.

Cl = problem of clarity

Del? = delete? Word or phrase seems unnecessary, making the text "heavy" and "wordy".

Style? = A different approach may(?) be more effective.

Sp = spelling problem (or typographical error).

#### ABBREVIATIONS

Honnold -- John Honnold, Uniform Law for International Sales under the 1980 Convention, 2d Ed. (1991).  
References are to Section Number in the book.

Unless otherwise indicated, citations and abbreviation in this paper follow the form in Honnold, op cit pp.33 ff.

**Duty To Cooperate  
Under The Convention  
On The International Sale Of Goods**

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Duty To Cooperate  
Under The Convention  
On The International Sale Of Goods

Akihiko Watanabe

"A Sales Transaction may be regarded (at the extremes) either as a duel fought with deadly weapons or as a relationship calling for cooperation and accommodation. The latter, of course, is the attitude of persons engaged in commerce."\*

John Honnold

1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods ("Convention" or "CISG")<sup>1</sup> went into force among Contracting States, January 1, 1988, a year after the deposit of the tenth instrument of adherence. Competent domestic courts which are obliged to apply CISG pursuant <sup>to</sup> to the provision<sup>2</sup> of the Convention are now confronting the precipitate problem: how to interpret and apply<sup>3</sup> the Convention. It is anticipated that domestic courts, which face the interpretation of the general clause<sup>4</sup> while dealing with a case, will become heavily dependent

*Del delete?*  
*and w/e*  
*w/e "basic"?*  
*cl?*

\* Honnold, § 292 at Article 48.

<sup>1</sup> Document A/CONF.97/18, Annex I (O.R. 178-190)

<sup>2</sup> See, especially, Article 1 of CISG.

<sup>3</sup> The Convention has a lead in Article 7(1).

<sup>4</sup> For the nature of the general clause in the context of German Civil Code (BGB), see Zweigert & Kötz, Vol. I, p. 156.

By page 10 the reader begins to understand what you mean by "general clause". But here few would understand.

on scholarly works,<sup>5</sup> especially those of drafters. The topic of this paper is to examine the general concept, the duty to cooperate, that is proposed by one of the main drafters of the Convention.

The statement that the parties to an international sales transaction should perform in accordance with duty to cooperate with each other sounds ethical and is inherently attractive. Professor Honnold, the chief proponent of the concept under CISG, refers to the notion of the cooperation or the duty to cooperate at numerous places in his commentary.<sup>6</sup> As easily predicted, the concept of cooperation or duty to cooperate provoke opposition: it is ambiguous and may be abused inappropriately. However, that is an inevitable course of a general clauses. This paper will hopefully explore the proper domain of the duty to cooperate.

cl?

Del.? (any "abuse" is inappropriate)

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<sup>5</sup> For the importance of scholarly studies concerning the interpretation of the Convention, see Honnold § 92 at Article 7.

<sup>6</sup> Honnold, § 100 (duty to communicate as cooperation), note 38 at § 100 (reference to the suggestion that cooperation was one of the "general principles"), § 292 (tools for cooperation), § 296 (cooperation as the general principle to communicate information needed by the other party), § 296 (cooperation that calls for open lines of communication between the parties), § 323 (enumerating Articles 19(2), 21(2), 32(2) & (3), 48(2), 58(3), 60(a) 65, 71 73(2), 79(4), 85, 86, 87, 88 as provisions which call for cooperation) § 342 (cooperation with the seller), note 2 at § 342 (suggestion that providing needed cooperation is one of the "general principles on which the Convention is based), § 436.4 (underlying premises calling for cooperation in performance).

Style? - As a personal choice, I prefer stating at the beginning that I will "explore" a problem. I.e. - whether there is a duty to cooperate and if so, to examine the scope of this duty.

## 2. Duty to Cooperate in General

### 2.1 Plan of the Study

The main theme of this paper is to prove that the duty to cooperate should be affirmed under CISG but properly be confined within the informational one. It is instructive that professor Honnold, based on his unique view about an international sales with<sup>7</sup> its interrelated<sup>8</sup> or interlocking nature,<sup>9</sup> argues for the importance of cooperation, with a few exceptions,<sup>10</sup> in conjunction with the duty of communication<sup>11</sup> or notice.<sup>12</sup>

The study will proceed as follows: first, the remaining portion of this section will be applied to the description of the duty to cooperate in a concrete factual setting. This will help focus on

Style? -  
illustrate  
possible

<sup>7</sup> Honnold § 323 at Article 54 ("The Convention at many points responds to the fact that consummating an international sale calls for cooperation; each party must take steps that are related to corresponding steps by the other.").

<sup>8</sup> Honnold § 100 at Article 7 ("[T]he consummation of a sales transaction involves interrelated steps.").

<sup>9</sup> Honnold § 342 at Article 60 ("[T]he Convention recogn[izes] the importance of cooperation in carrying out the interlocking steps of international sales transaction."). The concept of this "interrelated" or "interlocking" nature coincides with the notion of "multistage game" in the game theory. See, infra text accompanying note 104.

<sup>10</sup> Honnold § 342 at Article 60 (buyer's obligation to take delivery), § 436.4 at Article 80 (non-reliability of impediment induced by the party himself), etc.

<sup>11</sup> See, Honnold § 100 at Article 7.

<sup>12</sup> Id. The Convention employs various wording to express those requirements; "communication" (Article 65(2)), "to inform" (Article 21(2)), "notice" (Articles 19(2), 26, 39(1), 71(3), 72(2), 79(4), 88(1)), "make known" (Article 48(2)), or even implied (Article 65).

underlying problems. In Section 2, we will examine the ground for the duty in the text of the Convention. Since the duty to cooperate is not referred by name, the contents of Article 7(2), general clause, will be examined and the method of interpretation of the general clause, <sup>on</sup> the "gap-filling" will be explored in this section.

In turn, in Section 3, the method will be reviewed from a comparative perspective, <sup>to</sup> enable us to substantiate the general provision from more diversified <sup>of</sup> perspectives. In Section 4, the informational structure of the cooperation will be examined by utilizing the game-theoretic approach. <sup>consider</sup> In this section, <sup>will also examine</sup> the <sup>may</sup> mechanism of how the duty to cooperate facilitates the consummation of transaction will be explained, <sup>and will examine</sup> ~~Also~~ the role of the common knowledge or common understanding <sup>del</sup> ~~will be examined there~~. This paper concludes this "flight of fancy"<sup>13</sup> with future perspectives of the study.

## 2.2 Example

Following a technique adopted by UNCITRAL,<sup>14</sup> we first turn to a concrete factual example in order to grasp the significance of the problem.

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<sup>13</sup> Honnold § 33.

<sup>14</sup> A role of "factual example" in the legislative process of CISG, see Honnold, § 8. About a relation with "functional comparison of law, see infra note 68 and accompanying text.



**Example:**<sup>15</sup> A Seller, in State A (Contracting State) sold cotton seeds to a Buyer, in State B (also Contracting State), and executed a sales contract under c.i.f. terms. Although the Seller had options to export the goods from several ports, the Seller intended to export the goods from the port in State A where, under a c.i.f. contract,<sup>16</sup> the exporter was obliged to obtain an export license from the government of the State A. The information which was necessary to obtain such a license was within the control of the Buyer. The Buyer failed to provide the information and the Seller could not perform his duty to export. The Buyer brought an action for damages.

no delivery  
delay in  
delivery  
Sag

In a case similar to the factual example above, a court in England acknowledged the defense by the Seller who failed to deliver the goods in time by articulating the duty to cooperate on the side of the Buyer. Under the CISG, whatever Contracting State may be the forum, it seems highly probable that the court will also acknowledge the defense by the Seller, considering the omission of the duty to cooperate, e.g., the duty to provide needed information to the other party, on the side of the Buyer. We must examine how it is possible, in the next step.

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<sup>15</sup> This example is based on English case: Kyprianou v. Textiles, Ltd., infra note 80.

<sup>16</sup> See, International Chamber of Commerce, International Rules for the Interpretation of Trade Terms ("INCOTERMS 1990"), I.C.C. Publication No 460 (1990). The seller's duty under a c.i.f. contract has been defined, in pertinent parts, as follows. The seller must:

- ...  
A.2. Obtain at his own risk and expense any export license or other official authorization and carry out all customs formalities necessary for the exportation of the goods.

...  
(Emphasis added.).  
Under an f.o.b. term, the seller is also required to obtain an export license. FOB, A.2.

### 2.3 Underlying Common Understandings

International trade presupposes that every participant be equipped with some extent of expertise and sophistication concerning the trade practice.<sup>17</sup> Trade practices, which have been established within international circles of traders, provide the "underlying understanding"<sup>18</sup> as the accepted grounds for legal protection of international trade. In other words, as the court in the above cited English case rightly analyzed, in order to impose the duty to provide needed information to the other party, it is essential that "both parties could have known that the information would be required."

This process is described in terms of game theory: prerequisites of the duty to cooperate, in the sense of an informational one, is that the parties come to share the "common knowledge."<sup>19</sup> Follow-

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2 j <sup>17</sup> Honnold § 112 ("[i]n the course of collaborating with an exporter in writing out the understandings that underlie a standard export transactions we both were amazed at the number and scope of basic assumptions that were not mentioned in the detailed documents."

<sup>18</sup> For the term "common understandings," see, Berman, The Law of International Commercial Transactions (Lex Mercatoria), 2 Em. J. of Int'l Dis. Res. 235 (1988).

<sup>19</sup> "Let us say that it is common knowledge in a population P that \_\_\_\_\_ if and only if some state of affairs A holds such that:

(1) Everyone in P has reason to believe that A holds.

(2) A indicates to everyone in P has reason to believe that A holds.

(3) A indicates to everyone in P that \_\_\_\_\_."

(For our purposes, the discussion (3) on higher-order of expectations may be negligible.) See, David Lewis, Convention: A Philosophical Study, p. 56, (Harvard University Press, 1969).

ing the formulation of the state of affairs, for example, that "an export of the goods from a certain country is subject to a license," becomes the common knowledge between the parties, and the common knowledge formulates further common knowledge, "the seller requires information which could be provided by the buyer for the application of an export license."<sup>20</sup> In the latter process indicative standards and background information shared by the parties play a significant role.<sup>21</sup> The latter requirement is satisfied, for example, by the fact that both parties know that they are sophisticated merchants and thus believe they share some inductive standards and background information.<sup>22</sup>

Further questions to what extent the existence of common knowledge justifies the informational duty to cooperate to the other party will be examined below.<sup>23</sup>

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<sup>20</sup> See Lewis, Id., The state of affairs that "an export of the goods from a certain country is subject to a license," will become the common knowledge, in so far as (i) each party has reason to believe that the fact that "an export of the goods from a certain country is subject to a license," holds, and (ii) the fact that "an export of the goods from a certain country is subject to a license," indicates to each party that each party has reason to believe that the fact that "an export of the goods from a certain country is subject to a license," holds.

<sup>21</sup> Id. at 53 ("[s]uppose you and I do have reason to believe we share the same inductive standards and background information, at least nearly enough so that A will indicate the same things to both of us.).

<sup>22</sup> Article 2, which admittedly restricts the sphere of application of CISG objectively, may be reinterpreted that the provision sorts the sophistication of the participants of trade subjectively: It intends to exclude participants who generally lack the trade understandings or the sophistication about trade of "goods." For the usual interpretation, Honnold §§ 49-55.

<sup>23</sup> See, infra text accompanying note 121.

### 3. Duty to Cooperate under CISG

#### 3.1 Assigned Function of CISG

The emphasis on the role of uniform rules for international sales moved from its uniformity to its unity (or self-containment). At the outset of the work toward a unification of international sales law, which first took place in the International Institute for the Unification of Private Law (UNIDROIT),<sup>24</sup> drafters (including the "great Rabel"<sup>25</sup>) sought to "spare the conflict of laws its astonishing quodlibets" and to "substitute a reasonably concise body of clear and simple written rules."<sup>26</sup> The proposed law should provide clear, consistent, and unified rules apart from the domestic sales laws.<sup>27</sup> In so doing the drafters tried to secure "unity" of a uniform sales law.<sup>28</sup>

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<sup>24</sup> The International Institute for the Unification of Private Law (known as "The Rome Institute", or "UNIDROIT") was created in 1926 on the initiative of the Italian government. This Institution has confined its activities to the drafting of rules of substantive law. See, generally, David Unification, pp. 133 ff.

<sup>25</sup> Clive M. Schmitthoff, The Unification or Harmonization of Law by Means of Standard Contract and General Conditions.

<sup>26</sup> Rabel, A Draft of an International Law of Sales, 5 U. Chi. L.R. 543, 544 f. (1938) (emphasis original).

<sup>27</sup> Id. ("This 'code' is, however, based on usage and instances which already prevail in international commerce.") Also see Article 9 of CISG.

<sup>28</sup> Rabel explained, "Where a case is not expressly covered, the text is not to be supplemented by the national laws—which would at once destroy unity—but to be construed according to the principles consonant with its spirit." See Rabel, The Hague Conference on the Unification of Sales Law, 1 Am. J. Comp. L. 58, 60 (1952).

The next generation began to focus on the "unity" of rules for international sales. Notwithstanding the absence of a world forum, it is argued that integrality may be achieved through the uniform interpretation.<sup>29</sup> CISG is expected to bring the independent system to law concerning the international sales of goods separate from domestic rules. Thus, when a specific provision relevant to the problem within the purported realm of the Convention does not exist, the assumption of the unity encourages the gap-filling.<sup>30</sup>

However, there is another way for the duty to cooperate. If proper stipulation can not be found in an express agreement between two parties, an implied term which the parties would have agreed upon, such as the duty to cooperate, may be supplemented as an implied term. We will examine the inappropriateness of this approach.<sup>31</sup>

<sup>29</sup> John Honnold, The United States Uniform Commercial Code: Interpretation by the Courts of the States of the Union, in UNIDROIT: International Uniform Law in Practice, 181, 182 (stating that in spite of the independence in applying uniform state laws, an acceptable degree of uniformity in application has been achieved.). Also see, Michael Joachim Bonnel, A Proposal for the Establishment of a "Permanent Editorial Board" for the Vienna Sales Convention, in UNIDROIT: International Uniform Law in Practice, 241, 242 (proposes an establishment of "Permanent Editorial Board" similar to one for Uniform Commercial Code.).

<sup>30</sup> See, Article 7 of CISG.

<sup>31</sup> See infra note 67 and 145, and accompanying texts.

w/c? "achieve"

### 3.2 Article 7 and General Principle of Law

To secure the unity or self-containment,<sup>32</sup> the "code" must be able to address and solve all possible problems that will arise "concerning matters governed by the Convention." CISG expresses the self-containment to a significant extent by allowing the gap-filling in Article 7.<sup>33</sup> Although Article 17 of ULIS,<sup>34</sup> the predecessor of Article 7 of CISG, provided the forum with a wide range of discretion to fill the gap based on the "general principles, the present Article 7, confronting the disputes between proponents and opponents, makes a subtle balance in respect to such "general principles" which would fill the gaps. The problem to what extent the gaps could be filled based on the Article is, to a

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<sup>32</sup> This self-containment (or "Lückenlosigkeit" in German) of the code is a basic implied underpinning in the civil law system.

<sup>33</sup> Article 7 of CISG provides:

- (1) In the interpretation of this Convention, regards is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principle, in conformity with the law applicable by virtue of the rules of private international law.

<sup>34</sup> Article 17 of ULIS provides:

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.

considerable degree, still open to question.<sup>35</sup>

At this point, for the purpose of our problem, it is sufficient that the concept of duty to cooperate is not equivalent to specific substantive rules and, therefore, it is erroneous to simply judge the "absence of such principles" and settle the problem "in conformity with the [domestic] law applicable by virtue of the rules of private international law."

### 3.3 Proposed Duties to Cooperate

#### 3.3.1 Duty to Communicate

Although we might imagine a variety of "cooperation" or "duties of cooperate" responding to every stages of performances of a sales transaction<sup>36</sup> as in old-fashioned ballroom dancing,<sup>37</sup> we may first distinguish two kinds of duties to cooperate: informational duty to cooperate,<sup>38</sup> and other non-informational duties to coope-

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<sup>35</sup> See, Honnold § 96.

<sup>36</sup> Honnold § 323 ("[t]he Convention at many points responds to the fact that consummating an international sale calls for cooperation: each party must take steps that are related to corresponding steps by the other.").

<sup>37</sup> Id., note 1. (analogize those inter-related steps to old-fashioned ballroom dancing, "they may be, albeit the absence of its aroma, understood as multi-stage decision process in terms of mathematical programming.").

<sup>38</sup> The term "informational duty to cooperate" may be defined as the duty to convey the information, which reduces the uncertainty of the other party in respect to the performance of the contract, to the party. For the formal definition of "information," see infra note 140 and accompanying text.

CL? Who are you  
quoting? Not  
me, I think  
though the id. ref  
suggests

rate.<sup>39</sup> We will primarily focus on the former.

The party to the contract may be required to transmit to the other party information which could facilitate progress of the performance of the contract by designating the next "steps" toward consummation of the contract. This kind of transmission of information may be named "communication," since by that transmission, contract will be evolved to the end product by enhancing the common knowledge.

The duty to cooperate in that meaning may include,<sup>40</sup> for example: the buyer is required to notify the seller of defects in the goods so that the seller can test the goods to ascertain whether they are defective and take necessary steps to cure the defects.<sup>41</sup> The buyer must respond as to whether he will accept late performance.<sup>42</sup> The buyer is required to respond to a request for missing specifications for the goods.<sup>43</sup> The communication opens the path toward the consummation of the contract. The buyer will be required to notify the place or means of transportation to the seller: Under a f.o.b. term<sup>44</sup>, the buyer must name the vessel

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<sup>39</sup> The term "non-informational duty to cooperate" is used to include all acts which purportedly facilitate the consummation of the contract but do not transfer information. Whether or not CISG emphasize the non-informational duty to cooperate is questionable.

<sup>40</sup> Honnold § 100 at Article 7.

<sup>41</sup> Article 39(1) of CISG.

<sup>42</sup> Article 48(2) of CISG.

<sup>43</sup> Article 65 of CISG.

<sup>44</sup> INCOTERMS 1990, B.4., A.4., etc.



by which the seller should deliver the goods on board, have personnel on hand to receive the goods, and make the arrangement for carriage.<sup>45</sup>

*Mr. W - I think this is a very helpful distinction!*

### 3.3.2 Duty of Notice

CISG requires, in many occasions, the party to the contract to transmit information which does not necessarily facilitates the consummation of the contract, although the information might avoid the waste of resources, which might be detrimental to the party, otherwise avoidable or reducible. We may name this kind of duty as duty of notice compared with duty to communicate.

It may include the following:<sup>46</sup> An offeror is required to draw the offeree's attention to modification in an offeree's acceptance to which the offeror objects.<sup>47</sup> The party is required to notify the other party, if a party wants to suspend performance based on the impending failure of counterperformance<sup>48</sup> or supervening impediment.<sup>49</sup> A party intending to resell goods, of which the other party has failed to take possession, is required to give reasonable notice of the intent to the other party.<sup>50</sup>

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<sup>45</sup> See Article 60(a) of CISG.

<sup>46</sup> Honnold § 100 at Article 7.

<sup>47</sup> Article 19(2) of CISG.

<sup>48</sup> Articles 71(3) and 72(2) of CISG.

<sup>49</sup> Article 79(4) of CISG.

<sup>50</sup> Article 88(1) of CISG.

### 3.3.3 Other Duties to Cooperates

It is conceivable that the parties to the contract are subject to other duties to act cooperatively other than only to supply needed information. It is argued that: if one party forces the other party into technical breach of contract by his conduct, the former will not be allowed to sue for damages because he contravened the duty to cooperate.<sup>51</sup> However, those cases may be disposed of without resorting to the notion of "duty to cooperate."<sup>52</sup> Contrary to the belief, emphasis on the "duty to cooperate actively" would be more problematic. There is no reason that the party who deviates from his contractual duty should be penalized twice, due to the fact that he, by defaulting his contractual duty, failed to cooperate with the other party.

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<sup>51</sup> Honnold § 436.4 at Article 80 (citing Professor Farnsworth's statement that "[t]he making of a contract necessarily implies an expectation of performance; action by one party to prevent performance by the other is clearly inconsistent with their mutual expectation.").

<sup>52</sup> Articles 54, 60 of CISG, etc.

### 3.4 Method for Gap-Filling

#### 3.4.1 Comparative Approach

Comparative approach<sup>53</sup> could be a promising method for gap-filling.<sup>54</sup> Concerning the specific substantive rules, since CISG itself is the product of comprehensive comparative works over principal legal systems in the world,<sup>55</sup> it is argued that the comparative approach makes only a few contributions.<sup>56</sup> Practical difficulty of comparison of law may discourage the use in respect to interpretation and application of CISG.<sup>57</sup> However, the usefulness of comparative approach to, especially, a general clause, is recognized.<sup>58</sup> The duty to cooperate differs from the

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<sup>53</sup> The duty to cooperate with the other party is acknowledged in (former) German Democratic Republic, Canada & Quebec, Italy. See, Honnold, Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice, Schlechtriem ed. Einheitliches Kaufrecht und nationales Obligationrecht, 115, 139 (1987).

<sup>54</sup> Honnold § 102 ("a generous response to the invitation of Article 7(2) to develop the Convention through the "general principles on which it is based" is necessary to achieve the mandate of Article 7(1) to interpret the Convention with regard to "the need to promote uniformity in its application."). (emphasis original)

<sup>55</sup> Ernst Rabel, Das Recht des Warenkaufs. 2 Bnd.

<sup>56</sup> vC-S Kommentar, Rdn 26. ("Die rechtsvergleichung kann bei der Auslegung und Anwendung des CISG nur beschränkt von Nutzen sein"). ✓

<sup>57</sup> Id.

<sup>58</sup> "Die Rechtsvergleichung kann jedoch dazu beitragen, die gemeinsame Bedeutung eines Begriffe in den Vertragsstaaten aufzuhellen: dies hat besondere Bedeutung bei Generalklauseln, etwa dem Grundsatz vom Treu und Glauben, deren Tragweite von den Gerichten auf der Grundlage der gemeinsamen Anschauungen abgesteckt werden muß." Id.

usual substantive rules such as the seller's duty to deliver the goods, the buyer's duty to pay the price, etc.<sup>59</sup>. We can compare legal outcome, disregarding the "label,"<sup>60</sup> concerning the similar factual situations "governed by this Convention which are not expressly settled in it."<sup>61</sup> We will try to explore this task by means of a functional comparison of laws.<sup>62</sup>

### 3.4.2 Law and Economic Approach

Law and Economics (or economic analysis of law)<sup>63</sup> suggests different approaches to the gap-filling by finding the default rules which fill the gaps in incomplete contracts. One scholar proposed that default rules should economize on transaction costs by supplying standard contract terms that the parties would otherwise have to adopt by express agreement.<sup>64</sup> Other scholars

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<sup>59</sup> Id. (arguing that comparative law can contribute to the interpretation of general clause as "Treu und Glauben" by delineating the common meaning of the concept shared by Contracting States).

<sup>60</sup> For the concept of "label," see Honnold § 72 at Article 5.

<sup>61</sup> John O. Honnold, Uniform Words and Uniform Application. The 1980 Sales Convention and International Judicial Practice, in Einheitliches Kaufrecht und Nationales Obligationrecht (Peter Schlechtriem ed.) 115, 139 (1987) (citing the national reports from former GRR (Professor Maskow), Canada & Quebec (Professor Samson), Italy (Professor Bonnel) to the effect that they have the concept of "the duty to cooperate with the other party" in domestic system).

<sup>62</sup> See, *infra* text accompanying note 68.

<sup>63</sup> This portion draws on Ayres, Ian and Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L. J. 87 (1989).

<sup>64</sup> Richard Posner, Economic Analysis of Law 81 (3rd ed. 1986).

proposed that the default rules should provide all the parties with the type of contract that they would have agreed to if they had had the time and money to bargain over all aspects of their deal.<sup>65</sup> These are called "would have wanted" theories.<sup>66</sup> Duty to cooperate does not relate to substantive rules of contract law, but rather it only intends to police the flow of information. Informational obstacles may not be foreseeable.<sup>67</sup> The default rule for the duty to cooperate would be that they should provide the other party (the to-be-informed-party) with the needed information that the party (the to-be-informing party) should have known to supply based on the knowledge at each stage of performance rather than the conclusion of contract.

Very  
clear  
and  
good

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<sup>65</sup> Baird, Douglas and Thomas Baird, Fraudulent Conveyance Law and Its proper Domain, 38 Vand. L. Rev. 829 (1985).

<sup>66</sup> Ayres & Gertner, supra note 63 at 90. Those approaches are essentially identical to "implied term approach" taken in English courts in respect to the duty to cooperate. See, Burrow, infra note 76.

<sup>67</sup> See, Professor Honnold's comments. "Even when there is time to prepare detailed documents, an attempt to anticipate and solve all conceivable problems may generate disagreements and prevent the making of the contract." Honnold § 112.

#### 4. Comparative Law

##### 4.1 Functional Comparison of Law

Zweigert & Kötz rightly noted that "[t]he basic methodological principle of all comparative law is that of functionality."<sup>68</sup> To obtain meaningful results through comparison of law, we must compare legal phenomena which fulfill the same functionality.<sup>69</sup> *gr?*

Namely we must trace the following steps: (1) first, we must identify the legal problem which needs comparison. (2) Second, we must penetrate through the "label"<sup>70</sup> of legal reasoning into a factual situation.<sup>71</sup> In order to penetrate the label, we must employ "purely functional terms"<sup>72</sup> e.g., value-neutral, ordinary-

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<sup>68</sup> Zweigert & Kötz Vol. 1, § 3, The Method of Comparative Law, p. 31 (Emphasis original).

<sup>69</sup> Embraced under the title of "functional approach to comparative law," civil law and common law lawyers understand fairly identical functional procedure for comparison of law. See, Collins, Methods and Aims of Comparative Contract Law (proposing the "new method" and specific research "steps" similar to the text above), 11 Ox. J. of Leg. Std. 396.

<sup>70</sup> See, Honnold, The United States Uniform Commercial Code: Interpretation by the Courts of the States of the Union (discussing how to penetrate the "label" of law), in UNIDROIT, International Uniform Law in Practice, 181, 185 f. This term "label" corresponds to "juristische Konstruktion" of German jurisprudence.

*SP* <sup>71</sup> An example: assume seller wants to be protected against buyer's creditors in respect to sold goods which are anticipated to be resold or processed. German law provides lenient protection with the seller under the label of "Verlägertes Eigentumsvorbehalt" which reaches cash proceeds and surrogate (processed goods). French law gives the identical remedy to a conditional seller in a form of "la action directe." Japanese law treats this problem under a title of "surrogation rights" and gives a seller only a restricted protection.

<sup>72</sup> UNCITRAL Secretariat adopted "pivotal factual examples" to overcome unnecessary confusion caused by different legal traditions (continued...)

life descriptions which must be stated without any reference to the concepts of one's own legal system.<sup>73</sup> (3) Third, then we will try to find the rules which govern a functionally equivalent factual situation which is distilled by the preceding step. Through those procedure we will conclude that "the legal system of every society faces essentially the same problems, and solves these problems through quite different means though very often with similar results."<sup>74</sup> (4) If there is a difference in a "result," we will proceed with the study of social cultures, traditions, etc., which might be beyond the sphere of legal matters.<sup>75</sup>

*CP??*  
*Style?* *But we state*  
~~Now we~~ first turn to the "state of origin" of the concept of "duty to cooperate"

*Will you really do this?*

<sup>72</sup> (...continued)  
and notions, when they encountered disagreement among participating nations. Honnold § 8. This functional comparison of law is a reverse engineering of "pivotal-factual-examples-approach."

<sup>73</sup> Zweigert & Kötz, supra note 4.

<sup>74</sup> Id. ("In the field of private law some eighty percent of all cases come out alike, irrespective of whether they come up in a court in the United States, in Canada, in France, in Argentina or in Japan.") Also see, Rheinstein, Comparative Law—Its Functions, Method and Usages, 22 Ark. L. Rev. 415, 421 (1968). Considering that Professor Rheinstein's primary academic interests were posed on domestic (family) law, the rate of "similarity" will rise considerably more than 80% in the field of commercial transaction.

<sup>75</sup> One example of interest: assume that the defendant has intentionally infringed and exploited on other person's rights and gained extraordinary profits attributable to his skills. Generally the plaintiff would be entitled to whole profits obtained by the defendant although "label" may be deferent from country to country (German law: Geschäftsführung ohne Vertrag; Common Law countries: waiver of torts, etc.). See, generally, 2 Zweigert & Kötz § 15 (Unjust Enrichment). Japanese law, however, permits the defendant to retain the profit excess of an ordinary profit. This difference is, it is explained, based on a "sense of justice."

*CP??*  
*where?*

#### 4.2 English Law

It is conceivable that the parties to the contract are subject to various duties to act cooperatively<sup>76</sup> and, as a matter of fact, English courts have long recognized the concept of "duty to cooperate" as a general rule.<sup>77</sup> Especially in the context of international trade, the notion of "duty of parties reasonably to co-operate"<sup>78</sup> has played a significant role in the case law.<sup>79</sup>

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<sup>76</sup> For various functionally different "duties to cooperate" under English case law, see, J. F. Burrows, Contractual Co-operation and the Implied Term, 81 Mod. L. Rev. 390 (1968). He typified as follows:

##### **Interference with Enjoyment of Subject-Matter**

A contracts B to transfer A's business to B. A is required to cooperate and must refrain from engaging the competitive business in order not to substantially detract from B's enjoyment of a benefit of the transaction.

Id. p. 390.

##### **Interference with Performance of Promise**

A entered into a contract with B. A forces B into technical breach of contract by his conduct. A will not be allowed to sue for damages because A contravened the duty to cooperate.

Id. p. 396.

<sup>77</sup> Andrew J. Beteson, The Duty to Co-operate, 1960 J. Bus. L. 187 ("[P]erformance of a contract necessarily involves co-operation and therefore there is not merely nothing new in the proposition but also that it is the oldest and most fundamental obligation in law.").

<sup>78</sup> Schmitthoff, Schmitthoff's Export Trade, pp. 189 ff. (discussing the duty to cooperate under the framework of frustration of contract).

<sup>79</sup> See, for example, Benjamin, Benjamin's Sales of Goods § 599 (discussing the duty to cooperate in relation to the delivery conditional on buyer's act).



For a functionally relevant cases, English courts articulated the following rules:

[1] Duty to Supply Information

A (seller) sold cotton seeds to B (buyer) and executed a sales contract under c.i.f. terms. Although A had options to export the goods from several ports, A intended to export the goods from the port in State X where, under a c.i.f. contract, the exporter was obliged to obtain an export license from the government of the State X. The information which was necessary to obtain such a license was within the control of B. B failed to provide the information and A could not perform his duty to export within the stipulated term. B brought an action for damages alleging that A could have exported the goods from other ports. The contract between A and B did not prescribe the duty to provide the information.

In the case above,<sup>80</sup> a court in England acknowledged the defense by the Seller who failed to deliver the goods in time by articulating the duty to cooperate on the side of the Buyer and held:

"[I]t clearly was the duty of the buyers to co-operate with the seller in this case: it was their duty to supply the information to enable the export license which both party knew would be required to be obtained. They did not do it, and they dealt with the matter, not by saying, as they might have done, 'We cannot get the information: therefore ship from another port,' but by keeping the matter alive in the way in which the special case set out, and finally, sending the necessary information when it was too late for the seller to ship." (emphasis added)<sup>81</sup>

It was also held that a buyer who, under an f.o.b. contract bore a

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<sup>80</sup> This example is based on Kyprianou v. Textiles, Ltd., [1958] 2 Lloyd's List L. Rep. 60.

<sup>81</sup> See, Kyprianou, supra note 6, at 64 (per Goddard, C.J.). Interestingly, the Chief Judge adopted the approach which may be understood in terms of "common knowledge" and "interdependent decision" from game-theoretic approach. See supra note 19 and accompanying text.

obligation to obtain an export license, was required to supply the seller with needed information.<sup>82</sup>

On the other hand, English courts, on two occasions, referred to the duty to inquire, e.g., make available needed information supplied from the other party and clarify the situation.

## [2] Duty to Inquire

A sold to B oil tanks and B promised to make the price paid by B's shipping agent C when the goods were delivered to C. C misunderstood the stipulation and, when the goods were tendered to C, C refused to pay. According to A's complaint, B removed the misunderstanding with C and instructed C to pay against the delivery of the goods. B, however, did not notify A of this fact. A did not approach C again on the matter and sued B for breach of contract.

In this case,<sup>83</sup> the court held that by instructing his agent, B had done all that was legally required to do to make the contract effective and exhausted the duty of co-operation by the side of B.<sup>84</sup>

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<sup>82</sup> A.V. Pound, Ltd. v. M.W. Hardy, Inc., [1956] A.C. 588 (although in obiter dictum, "assuming the obligation [to obtain an export license in an f.o.b. contract] to be with the seller, the buyer must co-operate by telling him the destination of the goods").

<sup>83</sup> Mona Oil Equipment & Supply Co. Ltd. v. Rhodesia Railways, Ltd., [1949] 2 All E. L. R. 1014.

<sup>84</sup> The following case, however, reached a different result.

A sold to B several units of frozen food "X" which was stored with an independent warehouse C. B was entitled to draw the food from C as and when needed. B applied for the delivery of goods X to C but C refused because C only stored good "Y." B sued A for the damages on the ground that A repudiates the contract (committed an anticipatory breach contract).

The court held that B ought to have got in touch with A and cleared the situation. and, not using the term "duty to cooperate," that if there had been a word spoken by B to A, a call at A's office or a  
(continued...)

*Have you made clear the ways in which the settings are functionally equivalent?*

In conclusion, English courts have developed the notion of a duty to cooperate in functionally equivalent settings.<sup>85</sup>

#### 4.2.1 American Law

It is argued, as in England, that a person entering a contract comes under a "constructive condition of cooperation"<sup>86</sup> and this constructive condition is induced from the general principle of good faith<sup>87</sup> and fair dealing.<sup>88</sup> Thus, the covenant to cooperate with the other party is implied in the contract.<sup>89</sup> Although discussion about the duty to cooperate is centered in the context of construction cases,<sup>90</sup> U.S. law recognizes the various

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<sup>84</sup>(...continued)  
telephone message, "the mistake would have been put right at once."  
It was decided that B should have born the duty to cooperate. Peter Dumenil & Co. Ltd. v. James Ruddin Ltd., [1952] 1 W.L.R. 815.

<sup>85</sup> English courts are said to adopt the "necessity for business efficacy" standard in relation to the duty to cooperate "actively." This standard has been criticized but a fair portion of the cases where the duty to cooperate "actively" is admitted by the courts relate to our "informational" duty. Burrows, supra note 76 at 408.

<sup>86</sup> See, for example, Patterson, Constructive Conditions in Contract, 42 Colum. L. Rev. 903 (1942).

<sup>87</sup> U.C.C. §§ 1-203, 2-102(1)(b). See Honnold, Law of Sales and Sales Financing, p. 31.

<sup>88</sup> Restatement (Second) Contract § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

<sup>89</sup> Farnsworth, Contract § 7.15.

<sup>90</sup> Farnsworth & Young, p. 771.

types of duties to cooperate.<sup>91</sup>

In relation to sales law functionally relevant to our factual setting, the following illustration is given:

A contracts with B to manufacture and deliver 100,000 plastic containers for a price of \$100,000. The color of the containers is to be selected by B from among those specified in the contract. B delays in making his selection for an unreasonable time, holding up their manufacture and causing A loss. B's delay is a breach. His duty of good faith and fair dealing (§ 205) includes a duty to make his selection within a reasonable time.<sup>92</sup>

Although this illustration deals with the case for informational duty, if a case similar to the above occurs under U.C.C. or the Convention, it would fall within the realm of U.C.C. § 2-311<sup>93</sup> or of Article 65 of the Convention, respectively.

On balance, in the jurisprudence of the United States, the notion of the duty to cooperate is generically recognized, but in respect to our problem, the treatment of the informational duty to cooperate is not necessarily clear except in a comparatively easily

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<sup>91</sup> [1] **Interference with Subject-Matter Type:** Kirke La Salle Co. v. Paul Armstrong Co., 188 N.E. 163 (1933) ("In every contract there is an implied covenant that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.") Also in the context of assignor's liability, Lonsdale v. Chesterfield, 662 P.2d 385 (1983) (stating that [t]here is an implied covenant of good faith and fair dealing, ... a covenant or implied obligation by each party to cooperate with the other so that [each] may obtain full benefit of performance.). See, Restatement (Second) Contract § 333. [ii] **Interference with Performance Type** is also recognized.

<sup>92</sup> Restatement (Second) Contract § 235, Illustration 3, which is based on Kehm Corp. v. United States, 93 F.Supp 620 (Ct. CI. 1950) (cited in Farnsworth & Young, supra note 90 at 771).

<sup>93</sup> U.C.C. § 2-311 refers to "cooperation respecting performance."

typifiable case.

#### 4.3 German Law

We can easily find a literal German word corresponding to "cooperation: "Mittwirkungspflicht" within the realm of the German version of a good faith clause.<sup>94</sup> In German contract law, the outstanding characteristic is the tendency to expand, with respect to the contents,<sup>95</sup> the period<sup>96</sup> as well as the privity,<sup>97</sup> the contractual obligation to, traditionally conceived, non-contractual relations. Once parties conclude a contract, they enter into a comprehensive obligational relation ("Schuldverhältnis") and bear various side obligations (Nebenpflichten) as a matter of law. Functionally, a "Treu und Glauben" clause plays a role in concret-

*This seems to refer to an express clause in a contract, do you mean that?*  
*CB*  
*W/K*  
*W/K?*

<sup>94</sup> "Treu und Glauben" is synonymous to "good faith" or "fair dealing." Paragraph 242 of BGB provides that "The obligor is required to realize its performance in the way good faith demands it with the view of trade ethic." See, generally, Palandt Anm 1 zu § 242).

<sup>95</sup> Besides the main obligation ("Hauptpflicht") (e.g., the seller's obligation to deliver the goods and the buyer's obligation to pay the price, U.C.C. § 2-301.), the duty to adequately pack the goods was gap-filled as a side obligation. See Palandt, supra note 93 Anm 3 B aa zu § 242 and a cited case ("Der Verkäufer muß ordnungsmäßig verpacken," NJW-RR 86, 97).

<sup>96</sup> Contractual obligation to protect the other party is extended before the conclusion of the contract. Doctrine of "culpa contrahendo," which was introduced by Jehring, is now merged into a contractual "Schutzpflicht." See, Palandt, supra note 93, Anm 3 A d zu § 242.

<sup>97</sup> Parties to a contract might be held accountable for a person damaged who is not in privity. If, for example, a supplier of fuel oil for home use failed to deliver the proper one and it explodes, a visitor will sue for damages to a supplier based on contractual obligation.

izing <sup>98</sup> specific side obligations and gives birth to concepts such as duty to cooperation and duty to disclose

In German law, parties to a contract might be held subject to informational duty to cooperate, based especially on the duty to disclose ("Aufklärungspflicht") and the duty to inquire ("Auskunftspflicht"), induced from the good faith clause.<sup>99</sup>

#### 4.3.1 Japanese Law

Some Japanese scholars introduced German discussion on "Treu und Glauben" and incorporated it into Japanese jurisprudence.<sup>100</sup> Although, it seems probable that Japanese scholars would argue for the duty to cooperate, it still remains unclear whether it would exert an influence over the court's practice.<sup>101</sup>

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<sup>98</sup> This function is named "Konkretisierungsfunktion." See, Palandt, *supra* note 93, Anm 1 e zu § 242.

<sup>99</sup> In general, "Parties have to avoid everything which could endanger the performance of contract." "Obligor and obligee are obliged to perform contractual duty and avoid an act which could hinder contractual object in cooperation with each other." Palandt, *supra* note 93, 3 B a and b zu § 242.

<sup>100</sup> Since Japan adopted its civil code primarily from Germany, its jurisprudence has been under the strong influence of German scholarly works. For the "reception," see Zweigert & Kötz, *supra* note 4, vol. 1, p. 16. Japanese version of BGB § 242 is its § 1-1 of Civil Code which provides that "[t]he performance of the duty shall be made pursuant to good faith."

<sup>101</sup> Probably, the term "duty to cooperate" would be translated into Kyoryoku-gimu in Japanese, the word sounds strange at least in the legal world.

## 5. Game-Theoretic Approach

### 5.1 General

Although game theory is developing rapidly and increasing its sophistication dramatically,<sup>102</sup> <sup>its</sup> the influence on the law study is still limited.<sup>103</sup> For the purpose of this paper, only <sup>an</sup> elementary <sup>tools</sup> ~~tolls~~ are needed. In order to introduce the necessary technical terms without difficulty, we will use the concrete setting as example.

#### Example

A seller, X sold goods to a buyer, Y, and executed a sales contract. X will or will not deliver the goods and Y will or will not pay the price.

<sup>w/c</sup> <sup>en?</sup> At this sales transaction ("game"), X and Y are called "players."<sup>104</sup> X has two options: to deliver the goods or not. A decision to deliver the goods is called an "action."<sup>105</sup> In each game, the order when the actions are available is specified by the nature of the game. Assume that, If X and Y choose an action to deliver the goods and pay the price respectively, X will receive

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<sup>102</sup> See, for example, a standard textbook: Fudenberg, Drew & Jean Tirole, *Game Theory* (The MIT Press 1991).

<sup>103</sup> Ian Ayres, *Playing Games with the Law*, 42 Stan. L. Rev. 1201 (1990) ("[s]o far, however, the advances of game theory have been slower to diffuse into legal reasoning than other economic contribution").

<sup>104</sup> Rasmusen, *Game and Information: An Introduction to Game Theory* (Basil Blackwell, 1989), p. 22 ("The players are the individuals who make decision. Each player's goal <sup>is</sup> to maximize his utility by choice of actions.").

<sup>105</sup> Id.

*not clear from text. Don't rely on footnote for clarity*  
a satisfaction, in terms of money, say \$10,000.,<sup>106</sup> the utility that they receive is called a "payoff."<sup>107</sup>

## 5.2 Coordination Problem

"[C]onsummating an international sale calls for cooperation; each party must take steps that are related to corresponding steps by the other."

*Gr. 10/10*  
The statement above, which is drawn from Professor Honnold,<sup>108</sup> interestingly coincides with various game-theoretic ideas. Game theory, especially which deals with non-zero-sum game,<sup>109</sup> concerns with the interdependent decision process.<sup>110</sup> Games, where each player's action proceeds step by step corresponding to the other party's action, are called "multistage game."<sup>111</sup> Those "interrelated corresponding steps" are clearly presented by the *w/c 3*

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<sup>106</sup> This satisfaction is derived from the difference the price and the subjective estimation of the goods. Assume that X evaluates the goods \$100,000. and the negotiated price is \$90,000., X will gain a satisfaction \$10,000. See, Polinsky, A. Mitchell, An Introduction to Law and Economics (2d ed. Little, Brown and Company 1989).

<sup>107</sup> Rasmusen, supra note 104 at 24.

<sup>108</sup> Honnold § 323 at Article 54.

<sup>109</sup> Rasmusen, supra note 104 at 32. ("A zero-sum game is a game in which the sum of the payoffs of all the players is zero whatever actions they choose. A game which is not zero-sum is non-zero-sum.").

<sup>110</sup> Schelling, Thomas C., Strategy of Conflicts (1980 ed, Harvard University Press, 1980), p. 83 ("These are "games" in which, though the element of conflicts provides the dramatic interest, mutual dependence is part of the logical structure and demands some kind of collaboration or mutual accommodation.").

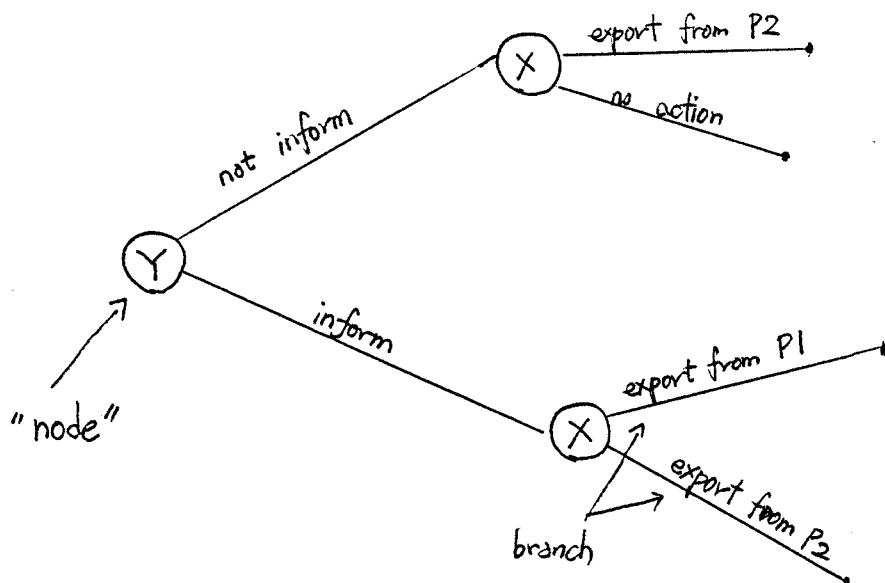
<sup>111</sup> See, for example, Myerson, Roger B., Game Theory: Analysis of Conflict (Harvard University Press 1991), p. 296.



CL??  
extensive form.<sup>112</sup>

**Example**

A Seller, X, sold the goods to a Buyer, Y and executed a sales contract. X has options to export the goods from two ports, P1 and P2. If X chooses to export the goods from port P1, X is obliged to obtain an export license. Only Y can provide the needed information for the export license with X.



A point in the game at which some player takes an action is called a "node."<sup>113</sup> One action in a player's set of action at a particular node is called a "branch."<sup>114</sup> The extensive form (or game tree) consists of a configuration of nodes and branches.<sup>115</sup>

The word "cooperation" in the passage above corresponds to "coordination" in terms of the game theory. Let us introduce the following simple coordination problem.

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<sup>112</sup> Rasmusen, supra note 104 at 46.

<sup>113</sup> Id. at 45.

<sup>114</sup> Id.

<sup>115</sup> Id. at 46.

**Example**

Suppose that a seller, X and a buyer, Y executed a sales contract and agreed upon that X will load the goods to a ship which will be chartered by Y, at a port where the ship will arrive. *or Sp*

If the parties want to "consummate" the sales contract, each party, X and Y, should not only know a name of the ship and arriving port but also know that X knows that Y knows X knows the name of the ship and the port.... The knowledge which is required to coordinate the action of the players is called "Common Knowledge."<sup>116</sup> Trade terms and trade usage enhance and provide the ground to establish the Common Knowledge between the parties in the specific transaction.<sup>117</sup>

Professor Honnold conceives an international sales as multistage game with Common Knowledge.

5.3 Substantive Rule and Duty to Cooperate

**Example**

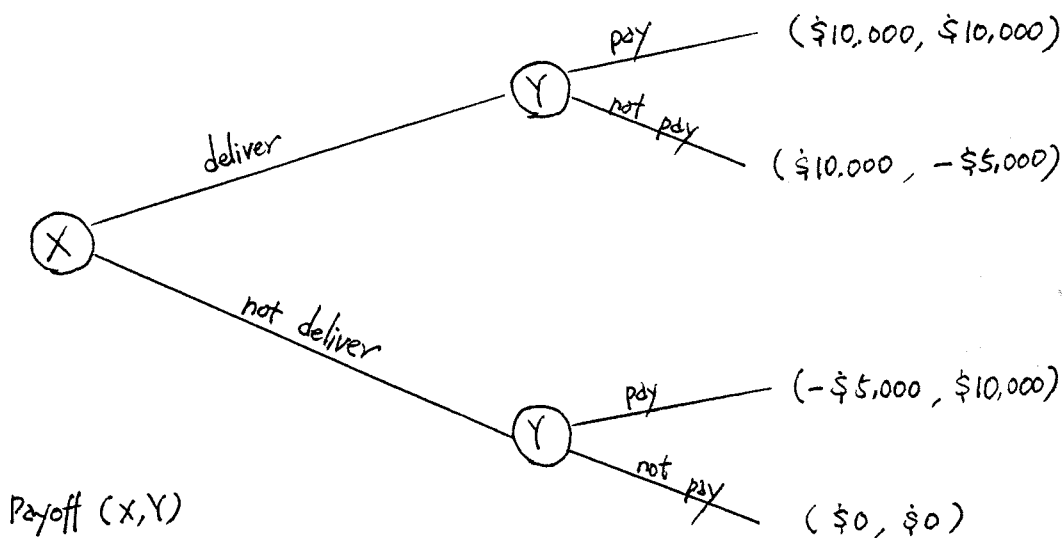
A seller, X sold goods to a buyer, Y and executed a sales contract. X will or will not deliver the goods and Y will or will not pay the price. If X chooses to deliver the goods and Y chooses to pay the price, payoffs of X and Y are \$10,000. respectively. If X choose not to deliver the goods, X's payoff is -\$5,000. and Y's payoff is \$10,000. If Y chooses not to pay the price, Y's payoff is -\$5,000 and X's payoff is \$10,000.

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<sup>116</sup> For the recursive definition, see Fundenberg & Tirole supra note 102 at 541.

<sup>117</sup> For an example of a "recursive method" adopted to enhance the Common Knowledge, see Article 1 of Uniform Customs and Practice for Documentary Credit (ICC No.400) ("They shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs and practice for Documentary Credits, 1983 version, ICC Publication No.400.")

The extensive form of this question with payoffs is as follows:



CISG provides various substantive rules: fundamental breach of contract,<sup>118</sup> remedies for breach of contract by the seller,<sup>119</sup> remedies for breach of contract by the buyer,<sup>120</sup> and damages provisions.<sup>121</sup> From the perspective of game theory, these substantive rules provides the each values of payoffs. If the duty to cooperate is a substantive rule, it will change the value of payoff assigned by the substantive rules of CISG itself. This would endanger the uniformity of CISG and should be avoided. *w/c*

#### Example

A seller, X sold goods to a buyer, Y and executed a sales contract. Y inflicted on X by preventing X's delivery of the goods. Can X recover damages from Y?<sup>122</sup>

<sup>118</sup> Article 25 of CISG. See, Honnold § 181 ff.

<sup>119</sup> Articles 45-52 of CISG. See, Honnold § 272 ff.

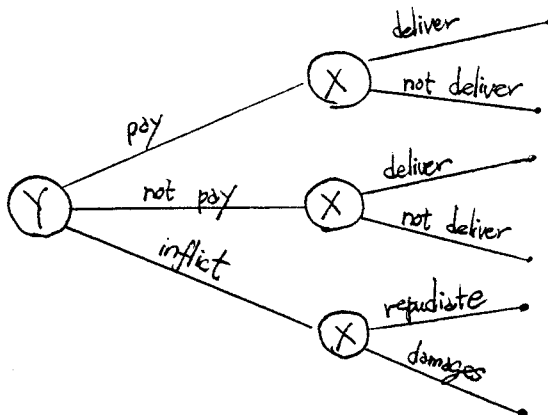
<sup>120</sup> Articles 61-65 of CISG. See, Honnold § 344 ff.

<sup>121</sup> Articles 74-77 of CISG. See, Honnold § 403 ff.

<sup>122</sup> See, Honnold § 436.4 (discussing the non-informational duty to cooperate).

*(B) CL? Have you explained this technical term?*

The extensive form of this question should be as follows:



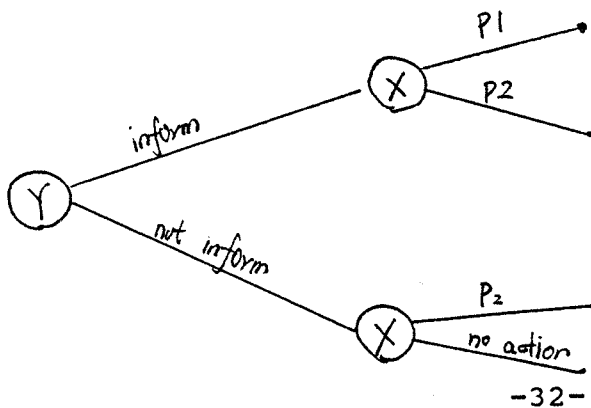
Y's default is not restricted to an omission (not to pay) but extended to a positive action (do wrong). The order of the game is not specified ex ante in this case. As shown above, in this case, we do not need the notion of the "duty to cooperate."

### 5.3 Informational Duty to Cooperate

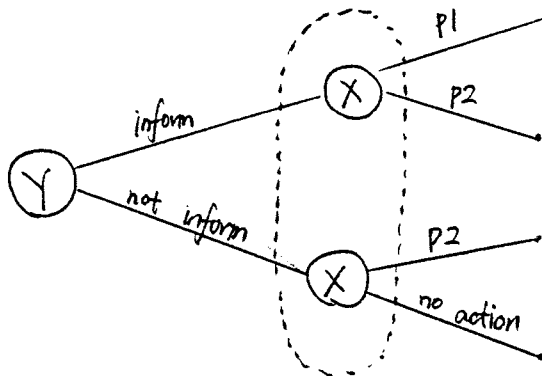
#### **Example**

A Seller, X, sold the goods to a Buyer, Y, and executed a sales contract under c.i.f. terms. Although X has options to export the goods from two ports, P1 and P2, X intends to export the goods from the port P1 where the exporter is obliged to obtain an export license from the government. The information which was necessary to obtain such a license was within the control of Y. Y fails to provide the information and X cannot perform his duty to export. The Buyer brought an action for damages.

The extensive form of this question is as follows:



According to the standard presentation, the area circled by the dotted line means that the game has reached some node within the information set defined by the dotted line but the player does not know the exact node reached.<sup>123</sup>



*This is a clear way to explain the system*

Informational duty to cooperate requires a party to help remove the dotted line but does not change the payoff of the game.

## 7. Conclusion and Perspective

This paper tries to present several propositions concerning the duty to cooperate: the duty is not an equivalent to substantive rules. The duty should be restricted within the realm of informational duty: a duty to supply information and duty to inquire. The duty should not be used as a sword but only as a shield: the party inflicted by the failure to supply needed information on the side of the other party may employ his failure as a defense, but damages based on the omission of the duty should not be allowed.

The task to delineate the scope of the duty to cooperate in a

<sup>123</sup> Rasmusen, supra note 104 at 42.

*delete?  
(doesn't  
the  
next  
sentence  
do the  
job?)*

*del?*

*See my note  
p. 31 at B*

simple situations

concrete setting is a difficult one. This paper tries to show the possibility of an application of game-theoretic approaches in an elementary stage. On the other hand, the role of "underlying common understanding" is not fully examined. The duty to cooperate is inferred<sup>124</sup> on the body of the common understanding.<sup>125</sup> As Professor Honnold referred to the work by Wittgenstein in a classroom in connection with trade usages, even to understand practical matters, such as international sales, we must be prepared to accept ways of thinking in other fields of science. It is clear that this study is still incomplete.

clear  
w/k from

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<sup>124</sup> "Inference" is defined as the process of deriving new information from old information. The knowledge of an seasoned expert of trade can be obtained and transformed into a system of computer programming with a data base (Expert System). See, for example, Davis, Representation of Commonsense Knowledge (1990).

<sup>125</sup> "Knowledge" is defined as the composition of object-level information. AI scientists proved that "commonsense knowledge" plays an astonishingly important role in human behavior and endeavor to "acquire" the knowledge for the construction of an "expert system." For "knowledge acquisition," see Barr & Feigenbaum, The Handbook of Artificial Intelligence, Vol 1., p. 143 ff.

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