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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

CONTRACTS IN GENERAL

Report of the Secretariat of UNIDROIT
on the 1st Meeting of the Working Committee on the progressive
codification of international trade law
held in Rome on 8 and 9 February 1974

Rome, May 1974

In accordance with the instructions he received from the Governing Council at its 52nd session (in 1973) the President of UNIDROIT set up a small steering committee to orientate future work on unifying the general part of the law of contract within the larger framework of a progressive codification of international trade law.

This Committee met for the first time in Rome at the headquarters of UNIDROIT on 8 and 9 February, 1974. It was composed of Prof. R. David, of the University of Aix/Marseilles; Prof. T. Popescu, of the University of Bucharest; and Prof. C. Schmitthoff, of the University of Kent. Mr. Hauschild was invited as an observer on behalf of the Commission of the European Communities. Prof. Bonell acted as secretary of the Committee. The Secretary General and a Deputy Secretary General of UNIDROIT attended the meeting.

The discussions took as their starting point the questions set out at pages 4-5 of the note prepared by the Secretariat (Etudes L - Doc. 6). The comments raised in relation to each of these questions may be summarised as follows:

Introduction

All the speakers were agreed on the need for and usefulness of unification in this field. Prof. Popescu felt that there was a clear case here for the creation of a new *ius commune* and that uniformity is the only means of removing the growing divergences between national law and international trade.

Prof. Schmitthoff felt that UNIDROIT's aim was both desirable and feasible, although there could be no denying that its realisation would require some years. He considered that the weight of world opinion would welcome such a major piece of international legislation.

As evidence of the usefulness of this project Prof. David pointed to the great number of conflict cases concerned with the law of contract. He added that, while it is true that some legal questions tend to have an exclusively national character, others, like for instance questions associated with the law of contract, could be adopted just as easily by a large number of countries.

Question N° 1:

1. 1. In drawing up the proposed Code of international trade law, is it advisable to take as a basis for comparison only the international legislative work (the Uniform Laws on International Sale; COMECON General Conditions), federal rules (the U.C.C.) and special national rules (Czechoslovakian International Trade Code) at present in force or,
1. 2. while taking account of these instruments, to undertake in addition a comparative study of all the principal national systems, in which case,
1. 3. does the Committee agree to the division into 4 distinct groups (common law systems; civil law systems; the systems of the Socialist States and the systems of the countries of Latin America) suggested in the UNIDROIT document (U.D.P. 1971, Et. L - Doc. 2, p. 21) or would it suggest another approach ?

The Committee in the first place recognised the particular value of the international legislative work which had already been undertaken (the Uniform Laws on International Sale; COMECON General Conditions), federal rules (the Uniform Commercial Code) and special national rules such as the Czechoslovakian International Trade Code.

The Uniform Laws on Sale, which had entered into force, contained a number of general principles of importance for the whole law of contract while the Uniform Commercial Code was seen as providing a valuable basis for comparison not just for the state of American Law in this field but also as an instance of inter-State uniform legislation. It was equally felt that much interesting information on the state of American Law was to be garnered from the Restatement, especially in view of the imminent publication of a second edition of that important work, many changes having occurred in American law since the last edition appeared some thirty years ago, especially in the field of consideration.

The Czechoslovakian International Trade Code would also merit special attention because of its uniqueness among such internationally orientated instruments in treating specifically of the general part of the law of contract. In this connexion it was further pointed out that the German Democratic Republic was on the point of promulgating an international trade code of which due account would also have to be taken.

The Committee nevertheless considered that a general comparative study of the principal legal systems would be of considerable assistance in the preparation of the proposed Code of international trade law. Reference was made in particular to the draft Netherlands Civil Code and to the work

of the United Kingdom Law Commission on a codification of the law of contract as providing recent material which should be the subject of special scrutiny.

As regards the suggestion that the comparative law study might cover 4 distinct groups (the common law systems, civil law systems, the systems of the socialist States and the system of the countries of Latin American), it was felt that such an approach was basically sound but that rigid schematization should not be taken too far.

Re Questions 2.1. and 2.2.:

2. 1. Should the proposed Code of International Trade Law be limited in scope to contracts in general or should it also deal with
2. 2. specific contracts (if so, which ?)

It was agreed that the general part of the law of contract would take quite a long time to complete and that only then could specific contracts be dealt with.

The Secretary-General of UNIDROIT pointed out that when the idea of the code was originally conceived, it was intended to construct a general introduction and then to include within this general framework the specific contracts on which uniform provisions had been adopted or drafted. Regarding these specific contracts, it was noted that quite a number of international conventions already regulate a certain number thereof and that these would be very useful foundations when the question of such contracts fell to be considered subsequently.

The Committee agreed that the general part should in any case not be framed in isolation and that in preparing it attention would have to be paid to certain specific contracts because of the relevance of some of the common principles to be found incorporated in the rules on such contracts to the wider class of contracts in general. Professor Schmitthoff added that once the general part is completed it should be connected with the specific studies carried out by UNIDROIT on such matters as transport and sale.

The distinction between civil and commercial contracts was considered to have become so blurred as not to justify being made in the proposed code.

The EEC observer felt that it would be useful to have some rules covering the uncertain area where public law and civil law overlap, namely in distinguishing between the so-called administrative contract and a civil contract. Professor Schmitthoff expressed the view that the whole question of administrative contracts, with States or public corporations involved as parties thereto, should be left until a later stage, in view of the fact that the question of immunity is currently undergoing a period of great change. Whereas absolute immunity persists in the United Kingdom, he pointed out that in the United States a new bill (Bill No. 566) seeks to oblige States to give up their right of absolute immunity when they accept a public loan. He saw considerable changes taking place in this field over the next decade.

Further to the scope of the code and the possibility of it covering both contracts international in character and those with a strictly internal law character, the EEC observer saw no reason why the code should be limited solely to international contracts. On this point Prof. Schmitthoff was of the opinion that UNIDROIT should restrict itself to international contracts which would then in the ordinary run of things have a radiation-like effect on internal law.

On the question of the desirability of defining what is meant by an international contract and, if so, the criteria to be adopted for such a definition, the Committee at once voiced the wide range of problems associated with such a choice.

While the need to elaborate some definition was generally appreciated and Prof. Schmitthoff even ventured the idea of a contract extending over several States as the germ of some future definition, it was generally agreed that the question of the international or non-international character of a contract was too difficult a one to tackle at the very outset of such a scheme and should accordingly be left aside for the time being. Professor Schmitthoff also favoured the idea of the whole code being preceded by a short paragraph dealing with its scope, setting out what exactly is meant by the term "international contract" and thought that this could then be supplemented for each specific type of contract.

With regard to the specific question of agency, he pointed out that whereas in England the agency contract was a special contract, in Germany its regulation was divided between the special and the general parts of the Code. Professor Bonell thought that agency should as to certain aspects be treated in the general part of the code and as to other more specific aspects of its nature in the special part. In this connexion, he pointed to the useful example given by the Czechoslovakian Code which dealt with relationships with third parties in the general part and relationships between principal and agent in the special part.

In conclusion, it was proposed that a list of specific contracts should be prepared by the Secretariat, to be borne in mind when drawing up the general part.

Re Question 2.3.:

2.3. and/or other problems of a general nature such as, for example, the capacity of the parties, conditional agreements, prescription, rules relating to proof, penalty clauses ?

As regards other problems of a general nature which might be considered in the proposed code, it was agreed first of all that the question of the parties' capacity should not be dealt with.

Prof. Schmitthoff pointed out that this was presumed under English law. On the other hand, it was felt that the question of resolute conditions (conditions precedent and subsequent) would have to be dealt with. The Secretary-General of UNIDROIT suggested that, seeing that it was proposed to deal with performance and non-performance in the general part of the code, it would perhaps be appropriate to treat other modes of termination such as novation.

With regard to prescription, it was proposed to take account of the work achieved in this field by UNCITRAL, namely their draft uniform law on the subject.

There was general agreement that questions like mortgages, pledges and liens should be left out of the proposed code.

As to the important question of general conditions, Professor Bonell pointed out that it was one that could be dealt with in connexion with the general problem of interpretation and/or validity.

Professor David suggested that for contracts of adhesion the code should provide special rules of interpretation. In this connexion he cited the example of the Italian Code which in such cases requires signature, although in many cases the party actually signing has little or no option but to sign, so that the protection afforded is really only theoretical. Prof. Schmitthoff wondered how far for the purposes of the code special conditions should override general conditions, a question that would have to be studied later; here he mentioned that there is a COMECON provision that special conditions do override general conditions.

Prof. Schmitthoff proposed that the code should also include some provisions on contracts made in favour of third parties. He also mentioned the question of vis major and pointed to the model under consideration by a committee of the Council of Europe, suggesting that its choice of the term "excuse of performance" may eventually prove to be very forward-looking.

It was felt that consideration could usefully also be given to rules relating to proof in so far as they are substantive rules and not just rules of procedure. In this connexion the EEC observer illustrated some of the difficulties that the Commission had come up against when drafting its directives on sureties, such as when it is provided that the protection afforded by a surety must be backed by some written evidence, what should be the value of this evidence, whether it should constitute a condition of validity or merely a condition as to the proof of the contract? He was for this reason very much in favour of exploring these subjects.

Re Question 3.1. :

3.1. Does it agree, in the context of rules concerning contracts in general, with the sub-division into five sectors (formation of contracts, conditions of validity relating to substance, interpretation, modes of performance, non-performance) or would it suggest some modifications or additions (if so, which)?

The Committee decided to enlarge the five-fold sub-division of the proposed code suggested in the Note of the Secretariat. The sub-division agreed on was as follows: formation of contracts, interpretation, performance, non-performance, damages, conditions of validity, additional matters like other modes of termination of contractual obligations, such as novation, prescription and questions connected with restitution.

In addition, Prof. David expressed his keenness that the code should treat of what French law terms 'l'objet du contrat' and what is generally grouped by English law under 'term of the contract' and he also thought that revision of contracts should also be dealt with under this rubric; he considered that such questions of revision are closely linked with the actual conclusion of the contract. Prof. Schmitthoff, on the other hand, felt that such matters could be conveniently disposed of within the framework of interpretation, adding that this could be very useful for arbitrators who are frequently called upon to revise contracts.

In connexion with the question of 'l'objet du contrat' another difficulty that will have to be resolved was pointed out, namely whether 'l'objet' may be fixed by a third party. It was pointed out that Article 1349

of the Italian Civil Code permits a third party to fix any clause of the contract. Spanish law, on the other hand, had followed the French law in only permitting this in the case of the old Roman law contracts of good faith, such as sale and the company contract.

It was added that the question of illegal contracts and, more particularly, the question of public order will arise in the context of regulating special contracts.

Re Questions 4.1 and 4.2. :

4.1. From the comparative table prepared by the Secretariat of UNIDROIT it would seem that the best chances of succeeding in preparing uniform rules on contracts in general would at present lie in the fields of formation and conditions of validity relating to substance and above all in that of interpretation of contractual terms, while it would seem much more difficult to find common rules and principles in relation to modes of performance and non-performance: does the Committee agree with this analysis or

4.2. does it view the situation differently (if so, in what way?) ?

Professor David saw the problem as essentially a choice between whether to start with the most difficult part or with a less difficult subject. It seemed generally to be agreed that the law relating to the formation of contracts is regulated in more or less similar fashion in most countries, whereas questions concerned with the performance or non-performance of contracts are undoubtedly among the most difficult because of the varying regulations they have inspired in the different legal systems of the world.

Conditions of validity, in addition to being a difficult subject because of the widely-differing regulations it inspires, were felt to be of less importance than the other main subjects and it was considered that they should not be accorded a high priority in the work schedule. It was pointed out by Prof. Schmitthoff that, from a practical point of view, the question of reality of consent only becomes relevant in a case where there is a lack of reality of consent, a situation which, in his opinion, arose in practice but rarely.

While Prof. Schmitthoff pointed to the fact that questions of interpretation and proof are under English law questions of mere procedure and thus raise a considerable danger of collision with national laws, it was generally agreed that they are nevertheless questions of importance which must be dealt with. Prof. David pointed to the pragmatic side of judicial

interpretation whereby in France at least a judge would normally recognise the existence or non-existence of a contract according to whether or not he felt that damages were called for in the particular facts of the case. More specifically, he pointed to the imprecision of the rules currently governing whether or not simple silence could constitute a valid acceptance.

It was felt that uniform rules on interpretation would be extremely valuable for arbitrators and, in favour of following formation with interpretation, it was pointed out that the one follows from the other quite logically. Moreover, in favour of placing it before performance and non-performance, it was agreed that it should be easier to reach a consensus on interpretation than on the vaster and more complex subjects of performance and non-performance. The chapter on interpretation should, in Professor David's opinion, clarify the principle of good faith. He indicated that English law was witnessing increasingly common resort to principles of good faith as an element in the assessment of damages. He felt that in international contractual relationships there was a general need for a much stricter and more certain régime than under national law and that any provisions in the code on good faith should be equally strict in their terms. Prof. David mentioned that the UCC has a provision on good faith too and felt that the future international code would have to have such a provision in the interests of international commercial certainty.

Prof. Schmitthoff thought that the chapter on formation should be preceded by a few general definitions. In addition to a definition of what is meant by an international contract, discussed earlier, this would include definitions of good faith and public order ("ordre public"). It was considered that such a scheme was preferable to dealing with these matters under interpretation. The detailed questions raised by good faith and public order would then be dealt with later.

Re Questions 5.1 and 5.2. :

- 5.1. As regards the proposed uniform rules on formation and conditions of validity relating to the substance of contracts in general, does the Committee consider it possible simply to take over the rules contained in the UNIDROIT Uniform Laws on Formation and Validity of contracts of sale of movables (cf. the conclusions along those lines set out in U.D.P. 1972, Et. L - Doc. 3) or
- 5.2. is it of the opinion that, while these two uniform laws on sale may be valuable for reference during the working out of the future rules on contracts in general, other principles and rules of positive law should be considered (if so, which ?) ?

The Committee, while recognising that, as legislation strictly designed to regulate questions arising out of sale contracts, the Uniform Law on the Formation of Contracts for the International Sale of Goods and the UNIDROIT draft on the Validity of Contracts for the International Sale of Goods could not simply be taken over for the purposes of the proposed code but would require amendment, nevertheless agreed that these should form the groundwork for the chapters to deal respectively with formation and conditions of validity in the proposed code of international trade. For this reason it commended the Popescu draft on formation, based as it was, with slight modifications, on the Uniform Law on Formation promulgated at the Hague in 1964, and agreed that the proposed chapter on formation should be based on this draft (U.D.P. 1972 - Etudes L - Doc. 3). It agreed, however with Prof. David that prior to its being circulated (see below, sub questions 8.1, 8.2, 8.3, 8.4) it should first be modified and harmonised along with the Conditions of Validity draft with a view to redistributing certain articles of these two texts under the proposed chapter on interpretation, namely Articles 3 and 4 of the Conditions of Validity draft and Article 12 of the Popescu draft. With these reservations, the Committee also agreed to the Conditions of Validity draft being used as the basis of the proposed future chapter on the conditions of validity of contracts in general.

Whilst agreeing on the usefulness of these two uniform laws in framing the proposed code the Committee did not regard this as precluding them from considering them as merely two of the many available elements of information on the subjects to be considered (see Questions 1.1, 1.2 and 1.3 above).

Re Questions 6.1 and 6.2. :

- 6.1. Does the Committee consider it possible to proceed to the unification of the principles and rules relating to non-performance of contracts, without first working out rules concerning interpretation and the modes of performance, or
- 6.2. is it of the opinion that methodological considerations require that these two problems be considered first (cf. in this sense U.D.P. 1973 - Et. L - Doc. 4) ?

The Committee felt that for reasons already discussed it was advisable to treat formation and interpretation first and only then to tackle the more difficult questions associated with modes of performance and non-performance. It felt that it was logical to deal with performance before moving on to non-performance, for the systematic reasons already set forth in the report prepared by the Secretariat on the expediency of drafting uniform rules on the non-performance of contracts (U.D.P. 1973 - Etudes L - Doc. 4, see p. 2).

On the question of damages, recognised by all to be the question of paramount importance in the event of non-performance, the attention of the Committee was drawn to the work already realised on the assessment of damages for injury to the person by the Council of Europe. Prof. David felt that so vital is this question to the whole issue of non-performance and the feasibility of any unification of the law of contract on an international scale and so diverse are the various national rules governing the assessment of damages that a certain priority should be attached to this subject. He wondered whether there might be a case for setting up a small committee to examine more closely the whole question of the assessment of damages in general. Prof. Schmitthoff wondered whether the importance of this question did not lie rather in the context of consumer protection in particular and private contracts in general rather than in the context of international contracts. Prof. David replied that it was always a difficult problem in whatever context to assess the just solution in the light of the damage that had been suffered and the element of foreseeability of such damage that must always be taken into account, since these are matters which vary according to the different contract. For this reason, appreciating the special importance attaching to the question of damages, the said question was added to the list of subjects to be examined with a view to drafting the proposed code, it being placed in order after non-performance.

Re Questions 7.1 and 7.2. :

7. 1. As regards the specific problem of non-performance of contracts, does the Committee consider that the corresponding comparative study should conform with the indication set out in U.D.P. 1973 - Et. L - Doc. 4, p. 13
or
7. 2. would it propose a different work plan (if so, which ?) ?

The Committee considered that the best work plan for tackling the question of non-performance should consist in, first, determining what are the objective characteristics of the various types of non-performance, such as delay, then secondly the circumstances in which the party who ought to have performed the terms of his contractual obligations but failed to perform them should be held liable. Thirdly, if the party is held liable, the consequences of this liability must then be determined and finally the effect of all elements on the contractual position of the other party should be assessed. This decision was therefore in conformity with the scheme suggested in the aforementioned report of the Secretariat (U.D.P. 1973 - Etudes L - Doc. 4, see p. 13).

In this connexion, it was suggested that the questions of unjust enrichment and restitution could perhaps be dealt with under the fourth and final step of the plan suggested above for non-performance. Prof. Schmitthoff, however, was against such a plan, noting that the question of unjust enrichment was treated separately in the German BGB and that the question of quasi-contract was always given separate treatment in English law. Whilst agreeing that the natural, systematic links between performance and non-performance were such as to militate in favour of taking them together, one after the other, he was convinced, for the above-mentioned reasons, that unjust enrichment and restitution should be treated separately under a chapter on quasi-contract.

Re Questions 8.1, 8.2, 8.3, 8.4. :

8. 1. In the light of the answers to the preceding questions, what work programme would the Committee propose for the future ? In particular
8. 2. in what order should the problems be dealt with;
8. 3. what methods should be followed;
8. 4. what does the Committee consider to be the minimum time in which the work could be completed ?

The Committee agreed that in starting its work on the subject of formation, the first step to be taken should be for the Secretariat to circulate to qualified institutions and personalities a revised version of the Popescu draft (see Question 5 above) together with a questionnaire prepared by the Secretariat, designed to discover to what extent the above-mentioned draft could prove acceptable as a future uniform law governing the formation of international contracts in general and to elicit suggestions for modifying or completing it. In deciding upon this procedure, the Committee requested the Secretariat to ensure, when drafting the questionnaire, that the exercise was not to be understood as in any way indicating the need for a revision of the 1964 Convention on Formation of International Sale Contracts.

As regards the qualified institutions and personalities to which the questionnaire should be sent, special reference was made to COMECON, to the Institut für ausländisches Recht u. Rechtsvergleichung (Potsdam-Babelsberg) and the Belgrade Institute of Comparative Law for the Socialist systems, to Prof. Barrera Graf and the Comparative Law Institute of the University of Caracas in respect of the countries of Latin America and to Prof. Schlesinger for any updating of his own work on Formation of contracts. The Committee also felt that recourse should be had to the Commonwealth Institute section of the British Institute of International and Comparative Law, for the countries of the Commonwealth, and that the London Institute of Advanced Legal Research should be approached to suggest someone who would be able to assist with the African countries; in addition, the Indian Law Institute was suggested for the Indian sub-continent. Use would also be made of the Institute's wide network of correspondents. Prof. David was anxious that this inquiry should seek above all to interest the developing countries because of the large number of nuances to be discovered in their legal systems.