UNIDROIT 1980
P.C. - Misc. 2
(English only)

Unidroit

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

INFORMAL WORKING GROUP ON THE PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

REPORT ON THE MEETING HELD IN COPENHAGEN ON 31 MARCH AND 1 APRIL 1980

(prepared by the Secretariat of UNIDROIT)

Rome, May 1980

1. On the occasion of the first meeting of the Study Group on the progressive codification of international trade law some of the members of the Group - namely Professor Drobnig of the Max-Planck-Institute of Hamburg, Professor Fontaine of the Centre de droit des obligations of Louvain, Professor Lando of the Institute of European Market Law at the Copenhagen School of Economics, Professor Maskow of the Institut für Rechtsvergleichung of Potsdam-Babelsberg and Professor Rajski of the Institute for Comparative Civil Law of the University of Warsaw - announced their willingness to associate their respective scientific institutions with the initiative undertaken by UNIDROIT for the elaboration of uniform rules on international commercial contracts in general. In order to discuss and, if possible, to finalise a common working programme with respect to the next topics to be dealt with in this framework, the President of the Institute invited the above-mentioned members of the Study Group to attend a first informal meeting in Copenhagen on March 31 and April 1. Unfortunately, neither Professor Maskow nor Professor Rajski were able to accept this invitation, but both of them confirmed their intention to co-operate in the future work according to the criteria which would be agreed upon in Copenhagen.

The meeting took place at the Copenhagen School of Economics - the rooms of which were kindly put at the disposal of the participants by Professor Lando - and was attended by Professor Drobnig, Professor Delvaux (in the absence of Professor Fontaine who at the very last moment was prevented from coming to Copenhagen), Professor Lando and Professor Bonell on behalf of the Secretariat of UNIDROIT.

2. At the beginning of the meeting Professor Bonell expressed to all the participants the gratitude of the President of UNIDROIT for having accepted his invitation and stressed the great importance which the Institute attributed to the fact that so many and prestigious scientific institutions had declared their willingness to cooperate actively with UNIDROIT in its proposed progressive codification of the law of international trade relations.

As a matter of fact, this would not only permit the work which was still to be done in this field to be speeded up, but would also confer on the whole programme for progressive codification the character of a truly world-wide initiative with which, under the auspices of UNIDROIT, representatives of all the political and legal systems would be directly associated. Admittedly, there was still lacking the support of institutions from Common Law countries and the developing countries, but the Institute hoped that, once the envisaged team work would have shown its utility and produced the first results, this gap might be filled. In this respect the Secretariat was already in a position to announce that Professor Tallon had kindly informed the President of the Institute that under his direction the Service de recherches juridiques comparatives was at present studying some specific aspects of the problem of the non-performance of contracts - namely questions relating to exemption clauses, penalty clauses and other clauses providing a conventional liquidation of damages - and that he would therefore be interested in being associated with the work of UNIDROIT.

3. The first item on the agenda concerned the problem of the validity of international commercial contracts in general which, according to the decisions taken by the enlarged Study Group at its first meeting held in Rome in September 1979, should be the object of the next chapter of the Code.

All the participants agreed that the work already carried out by the Institute in the past on this subject could serve as a valid starting point. Admittedly both the draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods as approved by the Governing Council of UNIDROIT in 1972 and the excellent comparative study of the Max-Planck-Institute on which the draft was based, related to contracts of sale only. It should however not be too difficult to revise the provisions of the existing draft so as to render them applicable to commercial contracts in general.

Another point which was raised concerned the necessity of bringing up to date the comparative study, by taking into account not only the latest developments which, with respect to the subject-matter under consideration, might have taken place within the legal systems already examined, but also the law of the socialist countries, in particular of those which have recently adopted special rules for international commercial contracts.

The most delicate question was of course that of whether one should maintain the rather restricted scope of the existing draft or whether the chapter on validity in the future Code should not deal, in addition to the classical hypotheses of invalidity of contracts, i.e. the three defects of consent such as mistake, fraud and duress, also with other issues, such as the illegality, immorality and unfaireness of a contract. In this connection, different views were expressed by the various members of the Group.

Thus, as to the problem of the unfairness of the terms of the contract, two different approaches were discussed: the first was to provide for rules intended to apply only to contracts concluded on the basis of general conditions and standard forms which, because of their unilateral and standardised nature, are in practice most likely to be "unfair", i.e. to the detriment of the adhering party; the second was to deal with the problem of unfair contractual terms in a more general manner and to envisage a provision of the kind of the "unconscionability" clause contained in the American U.C.C., so as also to cover the cases where the terms of the contract have been individually stipulated between the parties. It was finally decided to adopt this latter approach. After all, it was argued, the future Code was intended to apply only to contracts between merchants where the use of general conditions or standard forms was far from being generalised; in addition, as a consequence of the modern techniques followed in the drafting of commercial transactions it would in any event often be rather difficult in practice to establish whether or not one is in the presence of standardised contractual instruments.

With respect to illegality and immorality, some of the members of the Group, while admitting the great importance which these two particular aspects of the general problem of the validity of contracts have in the practice of international trade, nevertheless expressed the opinion that the future Code should refrain from dealing with them, it being almost impossible to reconcile the different principles and rules at present adopted on this point by the various national laws. On the contrary, the other members felt that the absence of any provision in this respect would deprive the Code of much of its practical utility and that at least an attempt should be made in order to see if and to what extent these extremely important and delicate topics could be taken into account. In particular, as to the problem of immorality, it would of course be unrealistic to think of the possibility of providing for a detailed and exhaustive regulation of all the various cases of contracts contra bonos mores : instead of that one could envisage a kind of provision which, after having laid down in general terms the duty of the parties to observe in their dealings the basic principles of morality, would contain a non-exhaustive list of the most relevant cases of immoral contractual terms (e.g. bribery agreements; discrimination clauses etc.). One of the participants suggested dealing in this context also with the problem - particularly relevent in relationships between merchants - of the possible abuse by the stronger party of his dominant position on the respective market or in the respective trade sector, and a solution could be found along the lines set out by Article 86 of the EEC Treaty; while recognising the necessity of providing a rule on this point the majority of the Group was however of the opinion that the right place for it was Article 11 of the existing UNIDROIT draft on validity, which at present confers upon a party the right to avoid the contract "when he has been led to conclude the contract by an unjustifiable, imminent and serious threat", but which, adequately redrafted, could also cover the case of abuse of a dominant position.

Quite a different approach should be followed with respect to the problem of illegality. As the political, social and economic considerations which lead States to interfere with the parties' autonomy by means of either specific statutory prohibitions or the general principles of public policy still vary considerably, any substantive rule stating even only in general terms the invalidity of contracts which violate such prohibitions or principles would be of no practical interest. It was therefore felt that the only realistic way to deal with this problem would be to try and find a solution from the conflict of laws angle, i.e. to lay down in the Code one or more basic criteria for the determination of the relevance of the various national provisions which in a given case may affect the validity of the contract. Such an approach would be all the more opportune, as recent developments in the field of private international law show that there is now a growing tendency no longer to apply to international contracts only the mandatory rules of one national law (e.g. the proper law of the contract), but to take into account to a certain extent the relevant provisions of all the States with which the contract under consideration has a significant connection.

The Group finally discussed the question of which of its members should be entrusted with the preparatory studies and the drafting of the additional rules contemplated on the validity of contracts to be included in the present draft. In this connection Professor Drobnig and Professor Lando declared their willingness to undertake this task as far as the questions of unfairness, immorality and undue influence were concerned, while Professor Maskow was asked to deal with the remaining problem of illegality. It was agreed that the whole task should be accomplished within the current year so as to enable the Secretariat, at the beginning of next year, to send out for comments the new version of the draft uniform rules on validity; once the replies from the different scientific institutions and other interested organisations had been received, the Secretariat could, in conformity with the procedure followed with respect to the first two chapters of the Code, submit the new chapter on validity to the enlarged Study Group.

4. The next item on the agenda concerned the work to be carried out in common with respect to the non-performance of contracts in general.

It was generally felt that the problem of non-performance should in any event be dealt with in close connection with that of performance. In other words, only after having laid down the basic principles concerning time, place and manner of performance by the parties of their respective contractual obligations, would it be possible to commence the study on the rules to be adopted with regard to the various questions relating to non-performance.

Another question of a preliminary character which was raised concerned the necessity of determining in advance the types of contracts to which the proposed chapters on performance and non-performance as well as the other chapters of Part I of the future Code would apply. Two alternative solutions could be envisaged: to exclude from the scope of this general part of the Code all the specific kinds of contracts (sale; contracts of carriage by sea, by air or land; etc.) which are already the subject of international conventions and uniform laws; or to consider Part I of the Code in principle applicable to all kinds of commercial contracts and therefore to draft the respective rules in such a way as to meet the needs of both the contracts already governed by international legislation and those which on the contrary still lack uniform regulation. The Group clearly expressed its preference for this latter solution , it being understood that the draftsmen of the future Code should not only extract from the various existing conventions and uniform laws the basic principles and rules laid down therein with respect to specific types of contracts, in order to see to what extent they may be transplanted on a more general level and consequently rendered applicable to other types of contracts, but also try to provide for a solution for those aspects and problems which in the same conventions and uniform laws have been left open or in any event not settled in an exhaustive manner. At the

same time it was however decided for obvious reasons to leave outside the scope of the Code contracts of partenership, companies, employment and the different professional services. A tentative list of contracts which fall within the sphere of application of the Code and of the possible pecularities of which one should take account whilst drafting Part I could read as follows: sale, lease, leasing, bailment, contracts for the creation of a security interest; contracts for work; suretyship and guarantee, insurance; loans and credits, letters of credit, factoring, other bank services; bills of exchange and promissory notes; the various modes of transport; agency (commission agency, forwarding agency, factors, commercial agency, brokerage); distributorship and franchising, travel agency; other commercial services (e.g. marketing); engineering and other technical assistance; licensing concessions, assignments of other intangible property.

As to the methodology to be followed in the preparatory work to be carried out before beginning to draft the two chapters on performance and non-performance, the Group unanimously rejected the idea of preparing a series of national reports: after all, it was argued, although the principles adopted by the various national laws should not be disregarded in view of the fact that the future Code is intended to provide a sort of model regulation for international commercial contracts, its provisions should rather be based on current trade practice as reflected in international conventions or in instruments of a purely private character such as general conditions, standard forms of contract, guidelines, etc.

But if for these reasons a division of work based on criteria of a purely geographical nature would be inopportune, there still remainded the problem of the systematic order in which the preparatory studies should be carried out.

In this respect the Secretariat had submitted to the members of the Group a Memorandum (UNIDROIT 1980 - P.C. - Misc. 1) containing some suggestions as to a possible plan of work, which may be summarised as follows: the first task should be the definition of the objective characteristics of the different cases of non-performance (delay; defective performance; non-performance in the narrow sense), in order to see if and to what extent they might be treated in a unitary way or on the contrary need different provisions; the next problem to be dealt with should be that of so-called contractual liability, i.e. the conditions under which a party is to be held liable for the above-mentioned circumstances and to what extent he may exclude or limit his liability; finally one should consider the remedies available to the innocent party in cases of non-performance in the objective sense by the other party, i.e. the right to ask for specific performance or at least for repair of the defects; reduction of the price; the rescission of the contract; damages.

While some of the members were of the opinion that, subject of course to further clarification, the suggested scheme could serve as a useful basis for the determination of the plan of work, others proposed inverting the order of the different aspects and dealing first with the remedies and only subsequently with the conditions or characteristics of the various cases of non-performance. In support of this latter proposal it was pointed out that in practice a party to a contract is first of all interested in knowing the kinds of remedies on which he may rely in the case of non-performance by the other party, and that in this respect the problem of damages is doubtless the most important and delicate one; it was further argued that, as a consequence of the decision taken at an earlier stage that the envisaged rules on non-performance should in principle be applicable to all the different kinds of commercial contracts, any attempt to define in a general manner the characteristics of the various cases of

non-performance could in any event hardly be achieved. The various kinds of breach for the various types of specific contracts differ and may be difficult to treat coherently. The remedies, however, are fewer than the breaches and are therefore more apt for a coherent description. Further, only in the light of available remedies, will it be possible to fix which breaches should be recognised. The same members therefore suggested organising the preparatory work to be carried out in the field of performance and non-performance in the following way: a first study should deal with the topics of performance and specific performance; a second study with those of rescission and damages; a third with that of the other remedies.

As to the question of which of the members of the Group should be entrusted with this task Professor Delvaux, speaking also on behalf of Professor Fontaine, announced that the Centre de droit des obligations of Louvain was prepared to take up one of the topics; the same was true with respect to Professor Maskow who had informed the Secretariat that his Institute in Potsdam would be glad to participate in the work on non-performance, possibly in cooperation with Professor Rajski of Warsaw University. As regards the offer of cooperation by Professor Tallon the Group expressed the hope that he and his colleagues of the Service de recherches juridiques comparatives would be prepared to deal with the problem of exemption clauses, penalty clauses and liquidated damages clauses. In carrying out their respective tasks the members of the Group should however respect the nature of a truly "joint venture" which characterises the whole project promoted by UNIDROIT. In other words, it was agreed that not only each of the participants should be prepared to provide the others with all the informations they might request, but also that the results of each individual study should be discussed and examined by the Group as a whole so as to permit effective coordination among them. Whilst stressing once again the appreciation of UNIDROIT for the assistance it might get from

the above-mentioned members of the Group and expressing the hope that Professor Drobnig and Professor Lando would also consider contributing to the preparatory work on performance and non-performance, Professor Bonell declared that in order to provide all the members with the necessary material the Secretariat would as soon as possible prepare a collection of the existing international conventions and uniform laws dealing with the topics under considerations as well as the most relevant general conditions and standard forms. In the meantime, the report on the Copenhagen meeting would be sent to all the members of the Group in order to allow also those who were absent to submit, if necessary, any observations or comments on the outcome of the discussions which had taken place in Copenhagen.