



UNIDROIT 1982
Study L - Doc. 21
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

PART I

THE LAW OF INTERNATIONAL CONTRACTS IN GENERAL

Chapter 3 : THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS
(Section 2 : Public Prohibitions and Permission Requirements)

(Text and Explanatory Report prepared by Dr. M. Andrae and Prof. Maskow of the Institut für ausländisches Recht und Rechtsvergleichung, Potsdam-Babelsberg, and modified following the discussions at the meeting of the UNIDROIT Informal Working Group held in Hamburg, 23-25 February, 1981)

Rome, February 1982

Chapter 3

THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS

Section 2 : Public Prohibitions and Permission Requirements

Article 1: Definitions

1. Public prohibitions and public permission requirements in accordance with this paragraph are only those which result from generally accessible provisions of law, and they shall be applied in accordance with the law of the State that issued them, irrespective of the law which is applied to the rest of the contract.

2. Public prohibitions in accordance with this paragraph are those in respect of which, according to the law of the State establishing this prohibition, nullity of the contract or of the corresponding term of the contract, is provided as the legal consequence of non-observance.

3. Public permission requirements in accordance with this paragraph are those in respect of which, according to the law of the State establishing this permission requirement, ineffectiveness of the contract or, of the corresponding term of the contract, is provided as the legal consequence of the absence of this permission.

Article 2: Prohibitions

A contract is null

- (a) if it is prohibited in accordance with the law in force in at least one State where a party to the contract has his place of business, or also
- (b) if it is prohibited according to the law in force in an other State, provided that the contract has a significant connection with this law.

Article 3: Permissions

1. A contract is ineffective except as provided in paragraphs 3-6 of this article if

- (a) it requires permission in accordance with the law of at least one State where a party to the contract has his place of business, or
- (b) it requires permission according to the law of another State provided that the contract has a significant connection with this law,

and permission has not yet been granted under sub-paragraphs a) and b).

2. A contract which according to paragraph 1 is ineffective becomes effective after the last permission, the absence of which gave rise to its ineffectiveness, has been granted, unless the parties have otherwise agreed or another date is indicated in the permission.

3. Unless otherwise provided, the party whose place of business is situated in the State that requires the permission shall seek to obtain such permission. If permission is required by the law of a State in which none of the parties has his place of business, the party who has to perform the act for which permission is required must seek to obtain permission.

4. The party required to seek to obtain permission shall do so without undue delay and with the diligence due in trade, he shall bear any expenses entailed and inform the other party of receipt or final refusal of permission without undue delay.

5. If the other party has not been informed of the receipt of permission by the party who had to seek to obtain the permission, the latter cannot rely on the effectiveness of the contract in relation to the former party.

6. If the party required to obtain the permission does not do so within an agreed period or within an extended period fixed by the other party or, where no period had been agreed, within / 6 / months from the formation of the contract, the other party is entitled to withdraw from the contract. The same applies if the latter party has not been informed by the other party of the receipt of permission within such period. The party required to obtain the permission may likewise withdraw from the contract if notwithstanding the fact that he sought without undue delay and with the care customary in trade to obtain the permission he failed to do so within the agreed period, or the extended period or, where no period has been agreed, within / 6 / months from the formation of the contract.

Article 4 : Party with more than one place of business

A party with more than one places of business may not rely on any prohibition or permission requirement mentioned in article 2 paragraph (a) and article 3 paragraph 1 (a), if one of his places of business is situated in a State where no such prohibition or permission requirement exists.

Article 5 : Prohibitions and permission requirements to be observed

1. The observance of foreign public prohibitions under Article 2, and of foreign public permission requirements under Article 3 paragraph 1 may be refused only if their observance is incompatible with the public policy ("ordre public") of the forum.

2. The application of foreign prohibitions and permission requirements whose adoption is permitted or required by international agreements may not be refused in relations involving States parties to the respective agreement.

3. Nothing in these rules shall limit the application of the prohibitions and permission requirements of the State of the forum.

Article 6 : Prohibitions and permission requirements concerning individual terms of contract

Where prohibitions under Article 2, or permission requirements under Article 3 paragraph 1, refer only to individual terms of the contract, then in cases of such a prohibition, or of failure to obtain such permission within the period fixed by Article 3 paragraph 6, or of refusal of permission, the contract shall be considered to be concluded without the corresponding term if, having regard to all the circumstances of the case, it is reasonable to uphold the contract in the absence of this term.

Article 7 : Mandatory character of the rules

The rules contained in Articles 1, 2, 3 paragraph 1, and 5 are mandatory.

EXPLANATORY REPORT

A. GENERAL REMARKS

Introduction

1. The Rules proposed proceed from the fact that this set of problems will be included in Chapter 3 of the Rules of the "Progressive Codification of Trade Law" (Validity), and will form a separate chapter thereof.

2. At present, special significance for the validity of international trade contracts is assumed by those mostly mandatory rules which serve to achieve politico-economic aims and which are shaped by the social and economic system, including the organization of the respective State's foreign trade. The proposed Uniform Rules would lose a great deal of their importance if they overlooked this issue. All States have an interest in the acknowledgment of their own norms of this kind by other States and their courts, as well as by foreign arbitral tribunals. This interest can, however, be satisfied only on the basis of mutuality, and therefore within the framework of an international agreement. International rather than national regulation is better suited to meet the interest which States have in the mutual consideration of national norms. It ensures a higher degree of legal security and effectively avoids the disregard of national norms by the parties, for instance through choice of law and jurisdiction clauses.

3. The Informal Working Group on the Progressive Codification of International Trade Law at its meeting held in Copenhagen on 31 March and 1 April 1980, decided that the problems relating to illegality should be included in the Rules and treated from the standpoint of conflict of laws (UNIDROIT 1980 P.C. - Misc. 2, p. 5). The first version of this material was accordingly worked out (UNIDROIT 1980, Study L, Doc. 18). It was put up for discussion at the session of the Informal Working Group held in Hamburg from 23 February to 25 February, 1981. This version takes into account the proposals submitted at this session (cf. the Report submitted on this session prepared by the UNIDROIT Secretariat - UNIDROIT 1981 P.C. - Misc. 3). This material deals with the impact of prohibitions and permission requirements on the validity of international trade contracts and in this way covers only one aspect, though an especially important one, of illegality.

4. It is almost certainly the case that no unified regulation of the circumstances under which prohibitions or permission requirements apply, can be reached at the present time. The laying down of such legal rules is contingent on such factors as the economic system, the level of economic development, the structure of foreign trade, integration into economic groupings, which always almost differ from one country to the other. Even in those cases where harmonisation or even unification does not seem to be excluded, codification would not be the proper way of proceeding.

I. Survey of the present legal situation

5. Before describing in detail the possibility of including illegality on account of norms of a politico-economic character in the Rules, an aperçu will be provided of the present legal situation in this field. In so doing the framework of validity will be exceeded, and general consideration given to the effect of foreign public or mandatory rules on international trade contracts. Here, in this part, poor definitions, slight overlappings, or divergencies in the chosen terms are still accepted. In the subsequent survey, special attention will be devoted to more recent international agreements concerning economically relevant spheres, irrespective of whether they are in force, have only been passed or are still at the drafting stage. The relevant material on this subject is at present not very comprehensive. In consequence, the situation under each national law could be dealt with in a fairly extensive manner.

Contractual practice in this field cannot be regarded as being representative as these problems are not subject to the will of the parties. It responds however to the present legal situation and is, in this respect, revealing.

(a) International agreements and draft agreements

6. Probably the best known example of the regulation of the relevance to contractual relationships of national, and in particular foreign, provisions with politico-economical objectives, is Article VIII sec. 2 (b) of the Bretton Woods Agreement, the first sentence of which reads as follows:

"Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

7. Thereafter, further agreements show the same tendency. Thus for instance Article 16 of the Convention on the Law Applicable to Agency, adopted in the framework of the Hague Conference on Private International Law (Protocol of the Final Session on June 6, 1977) but not yet in force, read as follows:

"In the application of this Convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, these rules must be applied whatever the law specified by its choice of law rules"

Only three aspects of this rule will be highlighted here:

- It places the emphasis on the scope of application which the respective rules are intended to have within the State which enacted them;
- It refers not only to the validity of a contract but also to the positive formulation of its content (possibly contrary to the intention of the parties);
- It is an optional provision simply designed to bring about the application of foreign mandatory rules by other States.

8. Similarly, Article 7, para. 1 of the EEC Convention on the Law Applicable to Contractual Obligations, of June 19, 1980, which also has not yet come into force, reads as follows:

"When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract."

But it is added:

"In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or nonapplication."

In this way, certain problems arising from the application of conflicting norms of several national laws can be avoided. However, the possibility of evaluating the content of foreign norms could easily be abused if it were universally admitted.

The problems connected with such a far-reaching application of mandatory rules of several legal systems are also evident from Article 22 para. 1 (1) of the EEC Convention which permits the entering of reservations with regard to Article 7 para. 1. The EEC Convention, moreover, contains other rules providing for the application of the mandatory rules of certain legal systems, chosen according to different criteria, irrespective of the law agreed upon as the law of the contract. This is the case in general of the mandatory rules of the law of a country to which all the elements of the contract refer although the parties referred to the law of a different country as the proper law (Article 3, para. 3); this, furthermore, applies to consumer contracts and employment contracts in favour of the mandatory provisions of the habitual residence, or, respectively, the habitual place of employment, as far as they are protective clauses in favour of the consumer or the employee (Articles 5 and 6). The law thus defined has the character of a minimum standard.

9. In Article 4 para. 1 of the United Nations Convention on the International Multimodal Transport of Goods, the question of national regulations and control provisions is touched upon in a very roundabout manner:

"This Convention shall not effect, or be incompatible with, the application of any international convention or national law relating to the regulation and control of transport operations."

In addition, Article 4 para. 3 of the Convention imposes the obligation on multimodal carriers to abide by the law applicable in the country of their operations and, of course, by the provisions of the Convention.

10. The Vienna Convention of April 11, 1980, concerning the law of sale, expressly dispenses with the regulation of the validity of the contract (Article 4 letter a), and touches upon the problems under discussion only in Article 54, according to which the obligation of the buyer to pay the price also requires that he take such steps and observe such formalities as are called for the contract and any laws and regulations, in order to effect payment. In respect of this obligation, the cumulative application of the legal provisions of the states concerned is taken as the basis.

11. Article 16 para. 2 of the General Conditions for the Specialization and Cooperation of Production between the Organizations of the CMEA Member Countries of February 15, 1979 (ABSK/RGW) provides for the contract not taking effect on its conclusion (these conditions apply ex lege to multilateral contracts):

"However, if the legal provisions of the country of one of the parties require permission of the contract by the competent State organ, the contract takes effect on the day the last required permission is granted, unless the parties agreed an other date."

12. The question of mandatory norms was the subject of lengthy controversy in the discussions on the Convention of the Law of Agency initiated by UNIDROIT, without the problem being solved (cf. discussion of the questions in UNIDROIT 1980, Prep. Group Agency, Doc. 2, p. 6 et seq.).

(b) National regulations

13. At present no general rules of conflict of laws exist which require the application of foreign public law.

14. Certain consideration is provided for by the Austrian PIL Law on Consumer and Employment Contracts (with regard to consumer contracts express mention is made of protection under private law). As to consumer contracts, the autonomy of the parties is limited in favour of the mandatory rules of the country of habitual residence, and in respect of contracts of employment in favour of the habitual place of employment, these norms being minimum standards established in favour of the consumer or the employee as the case may be (cf. Bundesgesetz v. 5. Juni 1978 BGBl 1978, No. 302, para. 41, para. 44).

15. In the Swiss PIL Bill (Bundesgesetz über das Internationale Privatrecht, Schweizer Studien zum internationalen Recht, Bd. 12) the application of law is unmistakably no longer confined to provisions of a private law nature.

Rather the application of a provision of foreign law is not excluded by ascribing to it a public-law character (Article 13 para. 3). The proper law is in principle applied to international trade contracts, including those of its rules characterised as rules of public law (resulting from Article 13 as a whole). Reservations are made by "ordre public" in its negative and positive functions (Article 17). The latter refers to the exclusion of foreign law insofar as Swiss Law, given its special purpose, requires exclusive application. Moreover, the bill provides for a separate application ("Sonderanknüpfung") of internationally mandatory rules (i.e. with a claim for application irrespective of the rules of private international law), subject to the following prerequisites (Article 18):

- exclusive scope of application of the foreign law;
- sufficiently close connection between this law and the circumstances;
- an especial interest in application on the part of the issuing state;
- recognition of the legitimacy of the purpose aimed at by the issuing State (aspect of the evaluation of foreign law);
- application must not be in conflict with "ordre public" in negative or positive respects.

16. The PIL-Laws of Socialist States, likewise, do not regulate the consideration of the relevance of foreign mandatory rules on contracts. Neither the GDR law concerning international economic contracts, nor the Czechoslovakian law concerning legal relations in international trade directly cover this question.

Within the framework of Article 12 of the GDR Law on International Economic Contracts (German abbr. GIW - Gesetz über internationale Wirtschaftsverträge) which provides for the nullity of contracts in the event of breach of a legal prohibition and impossibility of performance, and of Article 38 concerning the invalidity of contracts to the extent that public permissions as a prerequisite for validity have not been granted, it is generally held that foreign prohibitions and permission requirements may also be taken into account. Their application is only limited to the extent that they are contrary to "ordre public", which is in particular the case where they are contrary to the general principles of democratic international law. When deciding on recognition, account must be taken of the extent to which with regard to comparable regulations of the GDR the effect on contractual relations is considered by the issuing State (cf. Kommentar zum Gesetz über internationale Wirtschaftsverträge, Berlin 1978, S. 83, 118; Maskow/Rudolph, Regelung der Kollisionsprobleme der internationalen Wirtschaftsbeziehungen in der DDR, AWD 1980, S. 26). Here foreign law is considered within the framework of the substantive norms of GDR law. As with the English doctrine of the relevance of the law of the place of performance, the application of GDR law as the lex causae is presupposed.

17. As to Soviet PIL, Lunz takes the view that the relevance for private law relationships of foreign mandatory rules may be recognized. What matters here is not the application and factual enforcement of foreign administrative acts as such, but the recognition or non-recognition of this or that effect for the given contract which, according to its nature, should be solved on the basis of PIL. Here, express mention is made of export, important and currency regulations. This does not imply, however, that their relevance is to be determined on the basis of the tradition conflict of laws rules; there may be criteria for a separate application as well (Lunz, The course of private international law, general part, Moscow 1973, p. 178 et seq. cf. also as to Hungary: Meznericz, Foreign Exchange Legislation and PIL, in: Questions of International Law, Budapest 1964, p. 93).

18. In general, one may start from the premise that the Socialist countries apply their own mandatory rules according to their intended scope of application and call for their being taken into account by courts and arbitral tribunals of other States (e.g. Lunz, loc. cit., p. 30). At the same time, however, these States are prepared to recognise the effect of absolutely mandatory provisions of the law of foreign States regarding contractual relationships, provided that there is a sufficiently close connection and that "ordre public" is not violated (for instance, discriminating provisions against Socialist states in the sphere of foreign trade).

(c) Caselaw

19. As legislation with regard to the recognition of the relevance of foreign mandatory rules on private law relationships has not yet progressed very far, caselaw plays an important role. It is not uniform in the Western industrialized countries, and is essentially marked by protection from or, respectively, limitation of, the legal effect of nationalization regulations, in particular of Socialist States and the external trade laws of these countries, including foreign exchange law.

20. Under English caselaw, foreign internationally mandatory law is applied if it is the proper law of the contract or the law of the place of performance. Here, it is not clear whether in applying the mandatory rules of the place of performance we are dealing with a reference to the law of conflict, or to a substantive rule of the English law of contract. Application is excluded if we are dealing with foreign "revenue, fiscal or political law", or if public policy is violated. The application of foreign internationally mandatory law is justified as "an act of comity". ("An English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act has to be done", *Zivnostenska Banka National Corporation v. Frankman*, (1949) 2 All E.R. 671, cf. *Cheshire/North, Cheshire's Private International Law*, 1970, p. 223).

21. In Swiss caselaw, the principle of non-application of foreign law has been superseded. Application or nonapplication is preceded by an evaluation of the rules. Insofar as foreign public law serves exclusively or predominantly the protection of private interests there is no reason to reject such a public law on account of its nature (B.G. v. 2.2.1954. BGE 80 II S. 53, also BGE 95 II, S. 109). The limits of application or nonapplication are not clearly fixed. To the extent that application is rejected, reference is made to "ordre public" (Stucki, *Der Grundsatz der Nichtanwendung fremden öffentlichen Rechts im schweizerischen IPR*, Zürich 1971).

22. Under the caselaw of the Federal Republic of Germany also there is no general principle of the nonobservance of foreign public law. Its application or nonapplication depends on an assessment of the rules in question. The nonapplication of a given mandatory law is justified by reference to the traditional principles of the nonapplication of foreign public law, the special treatment of public law under conflicts law, the territorial principle, and the lack of extra-territorial effect. Like the Swiss BG, the BHG of the FRG distinguishes between norms of public law which predominantly serve the protection or the interests of individuals, and those serving the achievement of the aims of foreign States in the fields of economic and state policy. Foreign exchange provisions of the Socialist countries

are in particular classified as belonging to the latter category (BGH 31, 367; cf. Schulte, Anknüpfung von Eingriffsnormen, insbesondere wirtschaftsrechtlicher Art, im internationalen Vertragsrecht, Bielefeld 1975).

Furthermore, if the foreign State is able to ensure enforcement of its mandatory law with the result that the debtor is virtually prevented from performing, foreign mandatory law will normally be observed within the framework of the application of the provisions of the lex causae concerning impossibility of performance. Acceptable foreign public law, also a politically motivated law of a foreign country (e.g. American embargoes imposed on Socialist states) is frequently enforced on the basis of the substantive provisions on good morals (para. 138 BGB), (e.g. BGH 34, 169). Here, application is not subject to the proper law.

23. Under French caselaw, foreign imperative regulations are classified as "lois politiques" having territorial application only, with the result that they are not applied. There is however the practice that foreign imperative norms may be taken into account if in the event of their non-application good morals are affected. The classification of foreign norms as "lois politiques" is not defined. There is a tendency to define them as such in accordance with the desired result. The decision is made dependent on whether foreign imperative norms are of an extraordinary character or, owing to legal development they have transgressed the sphere of the extraordinary character (e.g. foreign exchange laws - Seine 9.2. 1965 Rev. crit. 55 (1966) 282 et seq., Cass. 16.10.1967 Rev. crit. (1968) 661).

24. Dutch caselaw does not acknowledge any general principle of non-application of foreign public law. With regard to foreign mandatory rules, the consideration of the proper law of the contract plays a significant role for both the justification for their application and also for their exclusion. Unacceptable foreign law is excluded by means of the ordre public clause or, respectively, an arbitrary determination of the proper law of the contract. On the other hand, foreign rules not belonging to the lex causae can be taken into account through the general clause of good morals (cf. Mathilde Sumampouw, Anmerkung zu BGE 23.3.1965, RabelsZ 1966, S. 341 ff., in particular analysis of Dutch caselaw for instance H.R. 4.1.1967 Ned Jur 1958, P. 485 H.R. 16.11.1956 N.J. 1957 Nr. 1 Rb Amsterdam, 26.2.1957, RabelsZ 24 (1959), S. 313).

25. In the Scandinavian countries there is a tendency to apply invalidating rules of a foreign proper law, unless they result to be contrary to the "ordre public" of the forum (cf. Mambro, Ordre public and fraus legis in Norwegian conflict law, Internationales Recht und Diplomatie, 1957, S. 315 f., Lando, Contract, International Encyclopedia of Comparative Law III 24, p. 200 et seq., Beckmann, RabelsZ 25 (1960), p. 541 et seq.).

(d) Contractual practice

26. The practice of international trade contracts is, in general, based on the view that a State's mandatory provisions with a politico-economical orientation which refer to circumstances concerned by them, have to be observed. Accordingly, the entry into force of the contract is made contingent upon the required public permissions; the parties undertake to introduce measures of adjustment if the performance of certain obligations will be affected or rendered impossible by the future issuance of such provisions.

27. As an example of the many standard contracts, guidelines and similar documents influencing contractual practice, mentioned should be made here of INCOTERMS. INCOTERMS, as widely applied private rules of interpretation for delivery clauses customary in trade, proceed from the cumulative application at least of the permission requirement provisions of the countries of the exporter and importer, and on the basis of such an assumption assign the duty to obtain these permissions (cf. for instance CIF A.3. and B.8.).

II. Conclusions for the creation of a uniform rules

28. It is a well-established principle that the mandatory rules of the lex fori, insofar as they are intended to apply independently of the conflict of laws rules, are given effect (cf. also Lando, loc. cit., p. 200).

29. There is no generally binding principle of the non-application of corresponding foreign rules, as far as their relevance on contractual relations is concerned.

30. The question of whether or not to apply foreign law of this kind is not, as a rule, made dependent on the consideration of mutuality.

31. As the mandatory rules of the lex fori are applied in any event (cf. item 28) but foreign mandatory provisions are also considered at the same time, there is a tendency to apply the cumulation principle. This seems acceptable because it corresponds to the principle of peaceful co-existence which implies the recognition of different social and economic systems possessing different legal systems (including provisions on prohibitions and permission requirements). This principle is also reasonable insofar as contracts which do not comply with the imperative rules of a given State, frequently cannot be performed by lawful means in the same State. However the agreements which take into account the cumulative principle have mostly emerged from a socio-economically homogeneous group of States.

32. In the legal writings we still find views which, on principle, favour the application of only one national law. So, on the one hand, the application of the proper law is advocated so as to preserve the unity of the legal order and to offset the frequent nullity of contracts (e.g. Serick, *Die Sonderanknüpfung von Teilfragen im internationalen Privatrecht*, *RabelsZ* 18 (1953), 633 ff., Vischer, *Kollisionsrechtliche Parteiautonomie und dirigistische Wirtschaftsgesetzgebung*, in *Festgabe Gerwig*, Basel 1960, S. 167 ff.; Mann, *Eingriffsgesetze und internationales Privatrecht*, in: F.A. Mann, *Beiträge zum Internationalen Privatrecht*, 1976, S. 178 ff.; Van Mecke, *Vertragsautonomie und Wirtschaftsgesetzgebung im internationalen Privatrecht*, in: *ZfRV*/7 (1966), S. 23 ff.).

In an internationally uniform set of rules dealing mainly with questions of a substantive nature, the argument that the unity of the legal order is secured through the application of the proper law loses much of its meaning.

33. Frequently, also a separate application ("Sonderanknüpfung") is proposed (e.g. Bydlinski, *Anm. zu OGH Juni 1959*, *öst. ZfRV*, 1 (1961) S. 22 ff., Neumayer, *Zur positiven Funktion der kollisionsrechtlichen Vorbehaltsklausel*, *Festschrift Dölle* 1963, S. 179 ff., Neumayer, *Die Notgesetzgebung des Wirtschaftsrechts im IPR*, in: *Berichte der deutschen Gesellschaft für Völkerrecht* Nr. 2, 1958, S. 35; Zweigert, K., *Internationales Privatrecht und Öffentliches Recht*, in: *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel*, S. 124; Wiethölter, *Zur Frage des internationalen ordre public*, in: *Berichte der deutschen Gesellschaft für Völkerrecht* H. 7, 1967, S. 133 ff.; Wengler, *Die Anknüpfung des zwingenden Schuldrechts im IPR*, *ZfRV* 54 (1941) S. 168).

34. The difficulties of a separate application consist in finding the decisive criterion for the connexion because we are dealing with very different areas of substantive law (for instance customs laws, foreign exchange laws, import and export prohibitions, regulations on value safeguards, anti-trust law, investment laws, price regulations etc.). Efforts are made, on the one hand, to develop special connecting factors for individual branches of law, as for instance competition law and labour law, and on the other, to provide for general clauses referring to any mandatory law (cf. also Joerges, *Vorüberlegungen zu einer Theorie des internationalen Wirtschaftsrechts*, *RabelsZ* 1979, 1, S. 34 ff.). This is in line with the general tendency of the regulation of contractual obligations by means of conflict of laws. In the Swiss bill concerning Private International Law (see above) and in the EEC Convention, attempts are made to meet both variants (Articles 13 and 18).

In caselaw the approach of separate application has been followed only indirectly. On the one hand the relevance of foreign mandatory law which claims to be applied to a given contract has been denied, though on the basis of different reasons, even when it was the proper law, by an artificial determination of the law to be applied.

On the other hand, foreign mandatory law has been taken into account although it did constitute the proper law through the regulation of the impossibility of performance or, respectively, through the general clause for illegal contracts (in particular smuggling). A technique which connects the different aspects of a legal relationship in different ways leads to the cumulative principle.

35. Leaving aside Anglo-American and in particular English practice, there are no unambiguous rules stipulating the cases when imperative foreign law is to be applied. There are certain rules concerning special connecting factors regard to some types of contract where one of the parties has economic supremacy, such as for instance contracts of employment, certain insurance contracts, consumer contracts and, to some extent, contracts on commercial agency, and with regard to clearly localized contracts (for instance lease contracts). Here, at least, the parties' autonomy is limited in respect of mandatory rules (on this subject see Kropholler, *Das kollisionsrechtliche System des Schutzes der schwächeren Vertragspartei*, *RabelsZ* 1978, S. 634 ff.).

36. Should the debtor, because of the capacity of the foreign law to impose itself be actually hindered in performing, but the direct effectiveness of the respective foreign norms not be recognised (this, however, is the case with English law), they may be taken into account at least within the framework of the substantive provisions concerning the impossibility of performance. Here, in general, unacceptable mandatory law is again not taken into account.

37. The Rules proposed hereafter are limited to such problems of illegality as have direct consequences for the contract's validity. Whether it is possible or not to apply the proposed basic concepts also to other spheres - perhaps to the positive shaping of the content of international trade contracts by national mandatory norms - is not prejudged in this way and must be the subject of further investigation. These problems were the subject of heated discussion within the Informal Working Group. Here, the viewpoint prevails that it was not possible at the present stage to arrive at a regulation of this issue.

38. The proposed Rules only relate to those mandatory provisions influencing the validity of international trade contracts from the first aspect and contain no regulation with regard to further-reaching consequences, e.g. the seizure of what has been acquired by this contract, disciplinary punishment etc.). The proposed Rules do not aim at giving international validity to legal provisions through prohibitions and permission requirements as such, but under certain circumstances only recognise certain consequences on private law relationships.

39. Yet confining the norms which are to be recognised through the proposed Rules to those referring to the validity of contracts, is still not sufficient because the number of norms to be recognised would be too large, thus rendering the acceptance of these Rules difficult. Recognising the effects which imperative prohibitions and permission requirements might have on private law relationships would constitute an important step because the idea of such foreign provisions and, to a certain extent, even of administrative acts resting thereon being taken into account, would be accepted in this way. This would involve very far-reaching mutual concessions by States, all the more so since foreign norms we are looking at here often do not coincide with another state's own interests. Such concessions, therefore, cannot be made without any restriction. Further limitations must derive not only from the content but also from the subject and character of the proposed Rules.

40. Thus the problems of the proper characterisation of the norms to be taken into account arises. Whereas a number of international conventions speak of "mandatory rules", the terms "prohibitions and permission requirements" are used in the proposed Rules. Thus, emphasis is placed not on the legal character of the corresponding provisions but on their effects. As legal provisions stipulating prohibitions and permission requirements always have a mandatory nature in order to be able to fulfil their functions, the group of norms we are dealing with here forms a special case of mandatory regulations. The legal provisions on prohibitions and permission requirements are precisely those which the states issuing them wish to see applied irrespective of the proper law i.e. imperatively. What matters is just this kind of mandatory norms since they are of the greatest significance and the way their claim for observance is regulated almost always gives rise to considerable complications in the event of their non-observance. This implies, on the other hand that the proposed Rules do not aim at justifying the effectiveness national prohibitions and permission requirements of a purely private law character. Insofar as purely private law prohibitions and permission requirements are relevant to international trade contracts, one should seek an internationally uniform regulation which would have then to be included in the corresponding substantive provisions of the Uniform Rules.

Different points of view were however expressed concerning this issue by the members of the Informal Working Group. While some wished to confine the application of mandatory provisions of a private law nature to those of the proper law, others considered it possible to apply them independently, while yet others would like to have them considered insofar as the non-observance of prohibitions and permission requirements produces consequences on the contractual relationship as such. As the proposed Rules do not make any special statement in this respect, this question is left to interpretation and requires further consideration.

41. Such terms as "administrative provisions" or "provisions under public law" were dispensed with because they are based on concepts of some legal systems but are not shared by all countries. Referring to them, moreover, would call for qualification. According to the prevailing view, reference is made on the basis of the lex fori so that foreign law is assessed by national standards, which means the first step towards excluding foreign law. Besides, there is no clear dividing line between public and private law, even in these countries knowing such a division.

42. Nor do the proposed Rules follow those theories which divide mandatory (public) rules into those serving the individual and those serving predominantly politico-economic aims. In the view of a large number of authors, such a division is highly problematic, even in the law of Western industrialized countries (see for instance Hiez, *Das fremde öffentliche Recht im internationalen Kollisionsrecht*, Züricher Studien zum internationalen Recht Nr. 29, S. 120 ff., F.A. Mann, *Eingriffsgesetz und internationales Privatrecht*, in: *Beiträge zum Internationalen Privatrecht*, 1976, S. 191 ff.). It would, moreover, be conducive to an unequal treatment of the mandatory provisions of Socialist countries with a largely nationalized economy. Universal rules, however, only can start from the principle of equal rights for the different economic systems. But within the "Progressive Codification" the point is precisely to recognise the effect of norms that serve politico-economic aims on the validity of international economic contracts.

43. An evaluation of foreign imperative rules as provided for in the Swiss PZL Law and in the EEC Convention, as a prerequisite for their application, strictly speaking contradicts the basic principles of private international law and thus was not considered in the proposed Rules. In accordance with the principle of sovereignty and non-interference in the internal affairs of other states, a state and its organs must refrain from an evaluation of foreign law unless it is in contradiction with the ius cogens under international law.

44. The recognition of the effects of foreign imperative prohibitions and permission requirements must also be limited in cases where they contradict the public order of the state where they are to be applied, i.e. from the viewpoint of their content. "Ordre public" serves this purpose (cf. the explanation of Article 4).

45. Observance of formal requirements as a prerequisite for validity was not included in the proposed Rules since Chapter 1 already deals with this problem. It has to be borne in mind, however, that formal requirements are sometimes used as instruments of supervision of foreign trade and that several countries wish to see them applied irrespective of the law of contract. In this extent such formal requirements move out of the purview of private law and the law of contracts, and eventually of a special law on the formation of contract, and come closer to regulations on prohibitions and permission requirements. They are linked with the latter in a merely practical respect insofar as the granting of public permission presupposes, in general, written contracts.

46. International conventions in the field of the law of contract are almost always characterized by a combination of unification and reference to conflict of laws since at the present stage of the creation of an internationally uniform law of contracts, purely international regulation is impossible. Also, efforts to render possible a largely autonomous further development of law on the basis of the international conventions themselves, have at least for the time being failed to meet with success. They were expressed in Article 17 of ULIS but were interpreted also then in a restrictive manner and have not since been repeated in this form at least not in the universal sphere with which we are concerned here. The combination of uniform regulation and reference to the national legal system is also to be found in the regulation of single institutes of law. In this way the principal example is set for applying it also in the regulation of prohibitions and permission requirements. Accordingly, the proposed Rules provide for such a combination.

47. Article 3, in particular, provides for a uniform regulation of such problems as grants of permission and information in this respect as well as default and refusal of permission as far as their consequences for the fate of the contract are concerned.

48. Provisions on the invalidity of contracts are in general of a mandatory nature. This applies in particular to the nullity or ineffectiveness of international commercial contracts caused by the violation of public prohibitions and permission requirements. In this respect, the practical effects of the regulations proposed here depends to a decisive degree on the legal character of the proposed Rules as such. Their character also influences single formulations. In order not to encumber discussion of matters of substance with these questions, the draft bases itself mostly on mandatory norms.

A number of further consequences are missing from the proposed Rules which, however, will derive from the Rules as a whole after they have been completed. This is, for instance, true of the consequences of false, delayed or omitted information on the granting or rejection of permissions, as well as of cases of total or partial performance of invalid or ineffective contracts.

B. ARTICLE BY ARTICLE COMMENTARY

Article 1

This Article stipulates the relevant rules concerning public prohibitions and public permission requirements.

Paragraph 1

This paragraph serves a double aim. Firstly, it makes it clear that the proposed rules refer to legal provisions which contain public prohibitions and public permission requirements, and to individual decisions resting thereon concerning the granting or rejection of a permission.

Reference to "generally accessible provisions of law" is advisable because in a number of countries administrative provisions in the field of supervision of foreign trade are frequently used, knowledge of which it is sometimes difficult for foreign partners to obtain. This may give rise to difficulties in providing evidence in lawsuits. It should not be made obligatory to recognize the relevancy of such foreign provisions to decisions regarding the fate of the contract. Insofar as such provisions contain permission requirements the party who needs the permission would have to insist on the insertion of a corresponding (mainly suspensive) condition in the contract. This is also the way in which the problem of knowledge is solved. It is presumed that both parties know the prohibitions and permission requirements contained in generally accessible provisions of law. The same also applies to the foreign party.

In its last part, paragraph 1 (cf. para. 40) defines the imperative character of the rules. Here, some international agreements and national regulations have been taken as a guide (cf. 7, 8 and 15).

Paragraph 2

This provision makes it clear that the scope and effects of a prohibition on the contract are to be decided by the competent national law, i.e. the determination of the question whether the corresponding regulations constitutes an absolute prohibition or a permission requirement as a prerequisite for the effectiveness of the contract. In this way an attempt is made to avoid the result that prohibitions whose nonobservance in the country which issued them does not lead to the nullity of a contract but is sanctioned in a different manner (for instance as a petty offence which is not included in the proposed rules which only cover effects on the contractual relationship) nevertheless lead alternably to establishing nullity. Thus the concept of a prohibitory norm is interpreted in a relatively narrow sense. On the other hand, however, regard shall not be had only to its form. Prohibitory rules may also be couched in the shape of orders, probably by requiring that foreign trade may be carried out only by defined enterprises, and in consequence that any conduct contravening the order is prohibited. The definition covers both prohibitions referring to the contract as a whole and those referring to individual contract terms. Subsequently, both cases are regulated differently.

Paragraph 3

Here, the explanation given for paragraph 2 applies.

In practice, this paragraph may be still more important than the preceding one, because there is a whole series of permission requirements whose nonobservance does not lead to the ineffectiveness of the contract.

Article 2

This article recognises the nullifying effect of prohibitory provisions on international commercial contracts, in accordance with the cumulative principle (cf. 31) in the form of a general clause which does not confine itself to the relevance of specific prohibitory provisions or to the consequences on specific contracts. This is very far-reaching and without precedent (the Bretton Woods Agreement - cf. 6 - for instance only concerns foreign exchange provisions). The reason why this principle has nevertheless been proposed here is that for the time being only the problem of the validity of contracts is at stake. See further the limitations made in Article 4.

The advantage of this solution is that a certain approximation in the legal treatment of absolutely mandatory foreign law within the single legal systems is achieved while, at the same time, the priority of the imperative norms of lex fori is recognised. In this way the legal situation becomes more foreseeable and less dependent on the court seized of the case, than when foreign law is taken into account indirectly by means of general principle relating to material impossibility or the illegality of the contract. Furthermore, the foreign norms is acknowledged as having the same effects on the legal relationship as it would have in the State which established it. In addition, the proposed rules aim at determining the legal systems which may be considered as being concerned, so as to prevent too broad a cumulative application. Here, in the first instance, the prohibitions which are valid at the parties' places of business are declared to be significant. Beside these principal cases, letter b recognizes the relevancy of the prohibitions issued by those countries which have an significant connection with the corresponding contract. Here, for instance, it may be the case that the goods to be delivered are to be found or produced in these countries and are subject to an export prohibition. Possibly also transit countries which cannot be avoided provide for similar prohibition thus preventing the performance of the contract.

The provision in letter b constitutes a kind of "umbrella" rule which enables the covering of those exceptional cases where the recognition of a prohibition established by a country other than these of the places of business of the parties seems to be justified. Consequently the rather vague formula "has a significant connection" has been chosen. The separate description of the main cases of application, where undoubtedly exists a closed relations, in the preceding paragraph, however, is to make it plain that paragraph b shall not be applied simply when there is a loose relation to the law of a third State but only if it has a really decisive significance for the performance of the contract.

The proposed provisions assume that the term "place of business" will be defined at some other place in the Uniform Rules. The Informal Working Group discussed the question of whether a party who has several places of business should be obliged to perform the contract through a place of business situated in a State whose law does not oppose the performance of the contract even if the law of the place of business where the contract has been concluded subjects it to a prohibition or permission requirement. This idea was reflected in the proposed Rules by inserting a new Article 4, in accordance with the view shared by the majority of the members of the group.

The proposed Rules generally speak of a prohibition of the contract without saying whether the prohibition relates to the formation of the respective contracts or to the execution of the contractual obligations. This means that the legal basis of the prohibition is not specified. This solution was adopted so as to be able to meet the different concepts existing in the national legal systems or even different provisions within one and the same legal system.

Article 3

Paragraph 1.

Paragraph 1, in its essence, repeats the construction of Article 2 for cases where a permission requirement is provided. Dealing with these problems in a separate article is preferable because the further legal consequences differ from those in the case of prohibition.

Reference to the effect of the obligations according to paragraphs 3 to 6 makes it clear that notwithstanding the ineffectiveness of the contract as such, it may already have some effects.

Paragraph 2

Since the general principle is that the contract comes into force only after the last permission has been granted, irrespective of whether the other party has been informed thereof or not, it is necessary to fix some protective provisions for the party who has not been informed.

By referring plainly to the last permission it becomes possible also to cover those cases where a State requires several permissions. The formulation is based on Section 16 paragraph 2 of the ABSK/RGW quoted above (cf. 11).

This regulation, like the following provisions, implies not a solution under conflict of laws but substantive unification. As this has usually been neglected by the international conventions at present existing, there are only a few examples in this respect. What is more, the existing conventions, insofar as they comment on these problems, do not differentiate between prohibitions and permission requirements. Insofar as one proceeds from the assumption that the mandatory provisions of the national laws concerned are to be observed, this might imply an obligation to observe the corresponding permission requirements also. Thus, the contract would become valid when it enters into force in accordance with the provisions of the State according to which it enters into force last. This need not be the date when the permission is granted in that state. As regards this matter unification of the law seems to be possible. The fixing of a uniform date

for the contract's entering into force also represents a prerequisite for further provisions in this field. Reference to the possibility of different agreements between the parties points to the non-mandatory character of this provision. Reference to a date of effectiveness mentioned in the very permission itself is a consequence of the recognition of that permission.

Paragraph 3

This provision also represents a substantial degree of unification. It imposes on the parties the obligation to apply for the required permissions. The distribution of the obligation between the parties seems to be in accordance with the provisions at present contained in various national laws or at least not in contradiction with them. A similar obligation is imposed by Incoterms. They, however, presuppose the validity of the contract but in addition deal with the risk of obtaining permission.

The provision of permission by the party whose country requires it constitutes the best possible solution from a politico-legal standpoint because this party, as a rule, is in the best position to obtain permission. This applies by analogy also to the solution which was found in respect of third countries. In both cases it is left to the parties to agree upon a different solution which better corresponds to the actual circumstances.

Paragraph 4

After the stipulating in paragraph 3 of who has to apply for permission, this obligation is described in detail in paragraph 4. This obligation, contrary to Incoterms, does not include the success of the endeavour to obtain permission. Permission as an act by the state would be senseless if it were pure routine, without the possibility of its not being granted. Therefore, in principle, a party cannot undertake the obligation to obtain permission with absolute certainty. What in accordance with the proposed Rules is required of this party, is that he applies for permission without undue delay and with reasonable care and diligence. This means that the party under consideration must exhaust all the available administrative remedies against a possible refusal of permission, although he is not required to appeal to the courts.

The obligation to bear all expenses corresponds to that envisaged in Incoterms. Information is obligatory because, in general, only the party applying for the permission will be informed by the competent state organ; however, the other party also needs to be clear as to the fate of the contract.

Ultimate refusal is a refusal against which no appeal can be lodged. Suspensive intermediate replies by the competent bodies are not included here. The obligation of information as envisaged here is frequently to be found in international trade contracts and is also given expression in important international standard contracts.

It goes without saying that these complex problems of the provision of permissions cannot be solved completely by the few rules proposed here. Only the major cases can be covered and a skeleton for the solution of the others be given. Thus it may be the case that the permission is refused but, at the same time, the prospect of its being granted held out for the coming budgetary year so that in spite of the exhaustion of all available remedies further efforts to obtain permission can be made. Such situations must be left to be dealt with by the parties.

Paragraph 5

This paragraph provides for a special consequence of a delay in receipt of information regarding the granting of permission. The risk of communication is imposed on the party who is required to apply for permission. This provision seems to be necessary, in particular because the entering into force of the contract often entails defined legal consequences. For instance, many terms refer to that date. As the contract, in accordance with para. 2, in general enters into force already on the granting of the last permission required, of which the other party still has to be informed, the result might be - in the absence of this provision - that time-limits already run without this party being aware of the fact and, consequently, without any possibility for him to use the time for fulfilling his duties.

The legal consequence provided for here is based on the idea of "functional synallagma". This regulation has its basis in the practice of international trade contracts.

Paragraph 6

As already stated even an ineffective contract establishes a relationship between the parties and cannot simply be dissolved unilaterally. On the other hand, this relationship has to be limited in time in the event of granting of permission taking more time. This paragraph seeks to cover that case. It gives both parties - although under somewhat different conditions - the right of withdrawal. The right of withdrawal is mentioned in the light of the effects created by a contract which is not yet effective. With six months, a relatively long period is proposed, though it has been left in square brackets in order to indicate the problem, all the more so since some members of the Informal Working Group advocated a longer period.

Article 4

Cf. explanations given under Article 2.

Article 5

Paragraph 1

The proposed rules provide for a far-reaching consideration of prohibitions and permission requirements. States will be prepared to do this only if certain restrictions are made which they consider significant for themselves. That is why the reservation in favour of "ordre public" is made. This reservation probably exists in any case in all national laws and it is also contained in the Convention on the Law Applicable to Agency (Article 17) and in the EEC Convention on the Law Applicable to Contractual Obligations (Article 16).

Instead of "public order", the words "basic principles of the state and legal order" could also be employed. The first terms has the advantage of being internationally used and accepted whereas the latter gives a clearer orientation with regard to content, stating that only significant deviations (incompatibilities) of foreign law from basic principles of a state's own law are to rule out the applicability of foreign law.

Paragraph 2

In international agreements, for instance those existing within the framework of GATT (if one thinks of some of the agreements negotiated during the Tokyo Round), to say nothing of the measures within the framework of regional economic associations, there is a tendency to exercise influence on national legislation in the sphere of foreign trade law and, moreover, on economic law as a whole. This rule reaffirms the application of national rules of law issued on this basis by the states parties to the agreement.

Paragraph 3

This paragraph confirms the principle of absolute priority of the lex fori, a principle already put into practice.

Article 6

This article deals with the consequences which prohibitions and permission requirements for single contract terms may have on the fate of the contract as a whole, and provides for an objective interpretation as is already the case with comparable provisions concerning avoidance.

Article 7

For the explanation, cf. item 48.