



UNIDROIT 1982
Study L - Doc. 23
(Original: English/French)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE PROGRESSIVE CODIFICATION
OF INTERNATIONAL TRADE LAW

Working papers considered by the Study Group
during its second session, held in Rome from 5 to 9 April 1982

Rome, April 1982

Codification Group
2nd session
Misc. 1
(Original: French)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

Second session, Rome 5 to 10 April 1982

Observations on the Draft Rules on the Substantive Validity
of International Contracts (UNIDROIT 1982, Study L, Doc. 20

and 21), by Professor D. TALLON

Rome, March 1982

Observations on the draft Chapter 3: The Substantive Validity of
International Contracts, Section 1: Mistake, Fraud, Threat, Unequal
Bargaining Power and Gross Unfairness (Professors U. Drobnig and O. Lando)

Article 2

(a) It should be specified that a mistake as to value is never to be taken into consideration, save where it is the result of fraud or duress, etc.

As regards the drafting of Article 2, I would therefore suggest that the text of the present draft be kept as a first paragraph and that a second paragraph should be added providing that:

"2. Mistake as to the value as such has no effect on the contract." (+)

(b) The question of a mistake caused through the fault of the mistaken party does not to my mind appear to have been satisfactorily resolved, either as regards form or as regards substance.

As regards form, the question is dealt with indirectly by reading Article 2 in conjunction with Article 19 (2).

As regards substance, I am not sure that the solution of allowing the mistaken party to rely on a mistake caused through gross negligence is satisfactory.

A third paragraph might be introduced, providing that:

"3. If a mistake is due to the fault of the mistaken party, it does not prevent this party to avoid the contract unless it amounts to a gross negligence (faute lourde). But the other party may obtain damages from the mistaken party. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake." (+)

Article 4

I am still undecided as to the desirability of this rule. It is true that in the case of sales there may be irksome confusion between mistakes as regards the material quality of the goods and the warranty against latent defects (as is the case in France), whence Article 34 of ULIS. However, I am still not quite clear as to the consequences which might flow from a general application of this rule. It is accordingly wise, as you suggest, that this rule should be reexamined later when we come to remedies.

Translator's note: the proposals of Professor Tallon denoted by a cross (+) were drafted in English in his French original and have not been modified in this translation.

Article 5

I have some difficulty in accepting the case for regarding misrepresentation as assuming "fraudulent non-disclosure" ... Should one not be more severe and replace "fraudulent" (which may imply malice) by "deliberate" (which simply assumes that the party acted with full knowledge of what he was doing)? This would be in line with the trend of French case-law.

The French version would then read: "la non-révélation délibérée de circonstances ...".

Article 6

I assume that the last sentence should be read as: " ... omission with which ..."

Unlawful (improper) = in French: illicite?

Article 8 (Gross unfairness)

The question of terminology is here important for it depends on the criterion of appraisal used, whether objective or subjective or both. The term employed in the text refers to both criteria (as was decided at Hamburg): "grossly unfair disparity". "Unfair" covers the subjective element, "disparity" the objective aspect.

That is why I feel that it is necessary to modify the title of this article "Gross unfairness", which gives priority to the subjective aspect (unlike the text itself) and appears to indicate that Article 8 is nothing more than an application of Article 7 and not a separate ground for avoidance. Would it not be preferable to use the title: "Unfair disparity"?

Furthermore, the idea of freely assumed risk, which had been put forward in Hamburg, has disappeared.

Article 9

I am still opposed to paragraph 1 which I find rather negative.

Article 12

The title "Counter offer" is ambiguous. Perhaps it would be better to speak of the "acceptance of mistake"? The clarification given in the commentary to the effect that this possibility is reserved for cases of mistake, and does not extend to cases of fraud, should be incorporated in the text, for the expression "mistaken party" is also employed when speaking of the victim of fraud.

Article 13 ("court or arbitrator")

Cf. Article 19 (2) (which I propose incorporating in Article 2) which refers only to the "court".

The terminology needs to be harmonised.

It would perhaps be advisable to lay down a general rule specifying that the powers granted to the courts should always be understood as being also granted to arbitrators.

Article 16

Who has the burden of proving that the contract is severable? Perhaps unseverability should be linked to the reasonableness of upholding the remaining contract. My proposal would read as follows:

"If the ground of avoidance affects only part of a contract, avoidance is limited to this part of the contract if,

- (1) the contract is severable;
- (2) giving due consideration ..." (+)

Article 19

See my comments on Article 2.

Observations on the draft Chapter 3: The Substantive Validity of International Contracts, Section 2: Public Prohibitions and Permission Requirements (Dr Andrae and Professor Maskow)

This draft relates to a field which is still as yet largely unexplored and raises questions which are far more complex than the draft on the general validity of the contract, so that it is more difficult to make observations on it at a distance.

If the part dealing with permissions is on the whole satisfactory, the question of prohibitions, on the other hand, does not seem to me to have been sufficiently clearly thought out. I wonder whether there are not serious fundamental ambiguities which a wide-ranging discussion would help to iron out.

In Article 1 the text speaks of "public prohibitions" and then in Article 2 the word "public" disappears. If I am quite clear what is meant by the term "public permission" (even if I should prefer to speak of "permission by a public authority"), I am not clear what is meant by a "public" (as opposed to a private) prohibition. If what is had in mind is

the general body of a country's mandatory legislation, then it will be easy to set aside the rules which we are drawing up once they are not consonant with the mandatory rules of a country. Thus, Article 9 of Section 1 provides that the validity of the contract shall not be affected by initial impossibility, contrary to what is the position held on this subject under many legal systems. It would suffice for this rule to be classified as a "public prohibition" for Article 9 to become ineffective. One should accordingly at least endeavour to resolve this conflict, or else give a less restrictive definition of "public prohibition", which is not easy either. That is why I feel that a thorough reexamination is necessary.

Reading Sections 1 and 2 one after the other also leads me to make observations which are more limited in scope, relating to the harmonisation of the two texts. This harmonisation is necessary from three points of view:

(1) terminology: Section 1 employs the term "void", whereas Section 2 uses the term "null".

(2) presentation: in Section 1 the articles are limited in length, whereas in Section 2 Article 3 is very long indeed.

(3) substance: for example Article 16 of Section 1 needs to be harmonised with Article 6 of Section 2.

Proposed definition of "Lesion" contained in Memorandum No. 42
of the Scottish Law Commission on Defective Consent and Consequential Matters

"1. Annulment of an obligation on the ground of lesion shall be competent when a party can show that unfair advantage has been taken of his weak, personal or economic position.

It will be presumed that unfair advantage has been taken:

- (1) in mutual obligations, when there is a gross disproportion between the prestations of the parties; or
- (2) when it is proved that serious prejudice has been or will be sustained as a consequence of the obligation by a party who was in a situation of dependence upon the other party;
or
- (3) when it is proved that serious prejudice has been or will be sustained as a consequence of the obligation by a party who, as the other party knew or ought to have known, was suffering from impairment of mental capacity or was weakened by illness, age or addiction to alcohol or drugs; or
- (4) when it is proved that serious prejudice has been or will be sustained as a consequence of the obligation by a party who, as the other party knew or ought to have known, lacked the normal ability to protect his own interests when undertaking obligations through ignorance, inexperience, lack of education or understanding of language.

2. When it is claimed (or appears to the court) that the consent of a party to an obligation has been given because unfair advantage has been taken of his weak, personal or economic position, the party maintaining the obligation shall be entitled to present evidence regarding its commercial setting, its purpose and effect to rebut this allegation."

Rome, 6 April 1982

Codification Group
2nd session
Misc. 3
(English only)

Chapter 3 : The Substantive Validity of International Contracts
Section 1 : Mistake, Fraud, Threat, Unequal Bargaining Power
and Gross Unfairness

Proposal for a new Article 7

1. A party may avoid a contract when the other party has taken advantage of his dependence, economic distress or urgent needs, or of his improvidence, ignorance, inexperience, or lack of bargaining skill, to obtain terms which make the contract as a whole unreasonably advantageous for the other party and unreasonably disadvantageous for him.
2. It will be presumed that unfair advantage has been taken if at the time of the making of the contract there is a grossly unfair disparity between the obligations of the parties or there are unfair contract clauses which grossly upset the contractual equilibrium.
3. In determining whether a contract or any clause thereof is avoidable under this article regard should be paid to the commercial setting and the purpose of the contract.

Rome, 7 April 1982 (morning)

Codification Group
2nd session
Misc. 4
(English only)

Proposal for a new Article 14

by Sir Thomas SMITH

Article 14 Notice of Avoidance

1. /as in text/
2. Where a party seeking to avoid a contract has been notified that rights of the other contracting party have been ceded to a third party, express notice of avoidance must also be given to that party.

NOTE

This seems a minimal concession to the third party and should reduce commercial uncertainty. It may be noted, however, that, whether he has received notice of avoidance or not, the proposed Article 17 (4) would still permit him to be subrogated to the rights of a contracting party under Articles 12 and 13.

Rome, 8 April 1982

Proposal for a new Article 17 by

Sir Thomas SMITH

Article 17 - Effect of avoidance

Avoidance shall take effect retroactively, subject to any rights of third parties.

1. A notice of avoidance which is accepted by the party receiving it shall take effect from the time of receipt /acceptance/.
2. A notice of avoidance which is rejected as unjustified by the party receiving it shall not take effect unless or until a court or arbitrator determines its validity.
3. The rights of third parties to immovable or movable property resulting from transfer of contractual rights shall be determined by national law, but, subject to this proviso:
 - (a) if a third party had acquired rights in good faith before notice of avoidance had been received by a party to the contract his rights shall be unaffected by that notice; but
 - (b) if a third party acquired rights after a party to the contract had received notice of avoidance these rights shall only be protected to the extent that his cedent's rights are protected.
4. A third party to whom a contracting party has transferred rights may be subrogated to the latter's rights and offer adjustment of contract under Article 12 or adaptation of contract under Article 13.

NOTE

The draftsmen's comment on Article 17 (as it stands) observes that "the rights which third persons may have are not affected". It is undesirable to deal with questions of property law in a codification concerned with obligations, since there are wide divergences in the "grammars" of property law between different jurisdictions. This policy has been recognised (wisely) in formulations of international sale of goods, but was disregarded disastrously in the British Sale of Goods Act 1893 (1979).

The present draft Chapter 3 by greatly extending the traditional categories of avoidance has consequently jeopardised (by increasing uncertainty) the position of bona fide third party transferees of contract rights - and there may have been many transfers in widely separated jurisdictions geographically since the original contract was formed before notice of avoidance is given. Because of this a further consequential amendment is suggested: see Misc. 4.

Rome, 8 April 1982

Codification Group
2nd session
Misc. 6
(English only)

Chapter 3 : The Substantive Validity of International Contracts
Section 1 : Mistake, Fraud, Threat, Unequale Bargaining Power
and Gross Unfairness

Proposal for a new Article 7

replacing Articles 7 and 8,
by Proff. Lando and Hartkamp

Gross disparity

A party may avoid a contract if at the time of the making of the contract there is a gross disparity between the obligations of the parties or there are contract clauses grossly upsetting the contractual equilibrium, which is unjustifiable having regard to, among other things,

- a) the fact that the other party has taken unfair advantage of his dependence, economic distress or urgent needs, or of his improvidence, ignorance, inexperience, or lack of bargaining skill, and
- b) the commercial setting and the purpose of the contract.

Rome, 8 April 1982