

S o c i é t é d e s N a t i o n s

INSTITUT INTERNATIONAL DE ROME POUR L'UNIFICATION DU DROIT PRIVE

PROJET D'UNE LOI INTERNATIONALE SUR LA VENTE

OBSERVATIONS OF Mr. GUTTERIDGE

Rome, Novembre 1938.

I.

I have now had the opportunity of seeing the amendments proposed by Dr. Rabel to the Loi sur la Vente and Mr. Bagge's criticisms and suggestions.

- 1 - I wish to make my position clear i.e. that the observations which follow are made on my own responsibility and only represent my personal opinion.
- 2 - I prefer to say nothing about drafting points; these can be settled at Rome and I do not wish to introduce any further element of confusion.
- 3 - I propose first of all to deal with each of the controversial articles, and then to express the reservations which I think I ought to make. This task is not an easy one owing to the fact that the original draft is now the subject matter of many proposed amendments and counter amendments, and I hope I may be excused for my omissions or misunderstanding of which I may be guilty. I have followed the numbering of the articles of the original draft.

Article 11. - See reservations hereafter. I am doubtful about the new alinea 1: it may go too far, and I think it should be excluded.

Article 17. - I understand that this is now agreed between Dr. Rabel and Mr. Bagge.

Article 17a. - It would seem to be difficult to apply this in the case, for instance, of a sale requiring the issue of a Received for Shipment Bill of Lading or some form of a Through Bill of Lading. I agree therefore with Mr. Bagge.

Article 34 (New Article 22). - The question of "exoneration" seems to turn on the revised Article 85 suggested by Mr. Bagge in his observations.

Alinea 1. - I would be prepared, in order to arrive at agreement, to accept this subject to the elimination of the final sentence "ou causerait au vendeur des sacrifices économiques qu'on ne doit pas raisonnablement demander à lui" I am afraid that this qualification would be dangerous to admit the principle that economic hardship is a ground for exoneration. It might for example, enable a party to escape from his obligations where the rate of exchange was against him, or where the goods had fallen in market value since the making of the contract.

Articles 25 to 29. - I am of the same opinion as the Dutch Government as to the "système des notifications", but I do not press this point as I feel that some concession is due in return for the abandonment of the "interpellatio".

Article 30. - I accept Dr. Rabel's article 91a at p. 26 of the report.

Article 31. - I cannot agree with the suggestion of the Scandinavian governments.

Article 35. - I am opposed to the notification in this case also but do not wish to insist on my objection.

Articles 49, 51 and 56. - I think that it may be desirable to distinguish between the case of unascertained goods (choses de genre) and goods to be manufactured. There is much to be said for

a rule which would permit of a second delivery in the first mentioned case provided that it is made within the period allowed by the contract. But I feel that it ought to be left to the decision of the buyer in the latter case whether he will allow repairs to be done or not. I can conceive of cases in which the exercise of such a right by the seller would be a source of serious embarrassment to the buyer, who would be left in a state of uncertainty as to whether the repairs would be satisfactory or not. The rule, in my opinion, is unduly favourable to the seller.

Article 52. - I am in favour of a short period, but I might observe that the Law Revision Committee in England has recently declared for the contrary view. I would support the reconsideration of the time from which the period is to run if it is thought expedient to do so.

Article 72. - I agree with Dr. Rabel that default in payment ought not to be a ground entitling the seller to "resolve" the contract.

Article 80. - I agree in principle with Dr. Rabel's amendment.

Article 84. - See my observations on Articles 25 to 29.

Article 89. - I agree with Mr. Bagge that this article should be retained.

Article 99. - I am unable to accept this article. I agree that it is possibly a logical consequence of the provisions of Article 97, but I feel that a court ought not to be obliged to order restitution where a partly performed contract is avoided. It should have a discretion to deal with the matter by giving the party aggrieved a compensation in money in lieu of ordering restitution.

Articles 105 and 106. - I think that these should remain as originally drafted.

Reservations

In order that I may not be open to any accusation of inconsistency hereafter I am obliged to make certain reservations, but I will confine myself to those which seem to me to raise important questions of principle i.e.; - Articles 10, 11, 34 (and the other articles to the same effect) 49, 56, 72, 84, 87 alinea 2, 97, 99.

Article 6 bis. - I would like to make two observations.

- a) I think it is unwise to deal with "string contracts". The result will, I fear, be that in certain trades all contracts may as a matter of routine exclude the International Code.
- b) I do not understand this article. If all the parties to the "string" accept the International Code the article is unnecessary. If they decline to accept the Code the article achieves nothing.

Article 11. - I am opposed to this article. The reference to the general principles inspiring the Code is too vague, and will I believe, introduce an element of uncertainty because there is no guarantee that these general principles will be defined in the same way by all countries. No rule of this kind is found in any of the commercial conventions of recent years. I am well aware of the danger of divergent interpretation but this article seems to me to provide no remedy. The only cure is an International Court of Appeal.

Article 28. - No observations.

Tender of documents.

I am in agreement with M. Bagge

Usages.

I agree with Dr. Rabel that Article 10 requires reconsideration. It met with severe criticism by the British Advisory Committee. It is lacking in precision. A usage must be certain and notorious before a court can be required to give effect to it. It should also be international. A possible exception is where a representative is employed to deal in a particular market or on a particular exchange.

I suggest the following amendment :

"The parties to a contract shall be bound by a usage which is certain and reasonable :

- a) Where they enter into the contract with express reference to the usage.
- b) Where (though it is not mentioned in the contract) the usage applies to the transaction in question, and each party knows of the usage or the usage is such that it is known generally by persons contracting in similar circumstances.
- c) Where the transaction in question is carried out on a particular market or in a particular exchange by a representative who knows or must be presumed to know of the usage. In this event it is immaterial whether a party employing the representative is aware of the usage or not".

There is one other point which may create difficulty. Suppose there is a usage which contradicts the terms of a written contract ? Shall the contract prevail or the usage ? The answer to this question seems to be that the contract must prevail unless the usage is merely relied upon to explain the meaning of words used in the contract e. g. the custom in certain trades in England that a dozen means thirteen.

Exoneration.

M. Bagge and Dr. Rabel invite me to make suggestions for the settlement of this extremely controversial and difficult question. I have re-considered it and in particular have studied with care the valuable section of "Das Recht des Warenverkaufs" which deals with this matter including the "Sphären theorie" to which Dr. Rabel has directed my attention.

I may say that I am in general agreement with the system set up by the project with one very important exception, namely, the proposal to grant exoneration in regard to "choses de genre" where performance is possible but owing to altered circumstances imposes on the seller or the buyer a burden which is greatly in excess of anything that was contemplated by the parties when they made the contract. I mention both the seller and the buyer because I think that the rule must be the same for both. If the seller is to be exonerated because delivery means economic disaster to him the same treatment must be given to the buyer if to accept and pay for the goods would ruin him.

I regret that I find myself unable to agree to M. Bagge's proposal that the parties should be exonerated in such a case where performance involves an economic sacrifice which cannot reasonably be expected from them.

If the contract provided that the goods though unascertained were to come from a particular source of supply the seller ought, no doubt, to be exonerated in the event of frustration because the character of the contract has been altered and performance as originally agreed becomes impossible. But if this is not the case the question is whether the seller is to be exonerated and the buyer is to suffer or vice versa. M. Bagge's rule does not provide a solution of this difficult problem. This coupled with the uncertainty in business created by his rule leads me to think that exoneration as regards choses de genre should be confined to those cases in which the obstacle creates a delay which is such as would destroy the identity of performance when it can be resumed with the performance originally agreed to be rendered. The result is that there will be hardship either to the seller or the buyer as the case may be. But we gain nothing by a rule which merely shifts the loss from the shoulders of one party on to those of the other.

Let us suppose that A in Italy has ordered coal for his factory from B in Cardiff. Delivery is delayed owing to some cause beyond A's control. Either A or B must suffer and I can think of no rule which will prevent this. It seems to me to be better to leave the parties to deal with the question where "choses de genre" are concerned.

I am only expressing my own views but I would like to call attention to the views of the British Government because I think they represent the opinion generally held in English legal circles.

I have considered whether a rule could be drafted specifying the events which are to constitute exoneration somewhat on the lines of the exceptions contained in the Hague Rules on Bills of Lading. But it would, I fear, be impossible to make a selection of casualties which would be appropriate to all trades.

Finally I wish to observe once again that the great difficulty in this matter is largely due to the fact that in practice a rule which is acceptable to sellers is generally objected to by the buyers and vice versa.

III.

Usages.

In view of Mr. Rabel's observations (3rd Series at p. 24) I have considered this question and venture to make the following suggestion.

Article 10. - The parties to a contract for the sale of goods shall be bound by a usage, even where it conflicts with the present law if:

- a) The parties have entered into the contract with express reference to the usage, or
- b) If the usage although not referred to in the contract is known to the parties or is such that they must be presumed to know it, or
- c) If the transaction in question is carried out on a particular market in which the usage prevails by a representative who knows or must be presumed to know of it. In this event the party employing the representative is bound by the usage whether he was aware of it or not at the time of such employment.

Nevertheless, no usage shall be binding if and in so far as it is uncertain, unreasonable or inconsistent with the terms of the contract.

N.B. - There is one matter I have not dealt with because I presume it is covered by the word "unreasonable" i.e. a usage which is unlawful either by the *lex loci contractus* or the *lex loci solutionis*.

Article 11. - My objection to this article is that I think it will give rise to serious difficulties. The draft law is to some extent an adaptation of the rules of French, German, Scandinavian and

English law, and when an appeal is made to the "general principles by which the law is inspired" I am afraid that this will mean the introduction of those laws into the argument. Thus a new element of uncertainty and controversy will be introduced which will be quite as serious - if not more so - than any difficulty connected with the application of the rules of private international law. Further English judges will not be permitted to consult the "Rapport" and the general principles may not be discoverable by them except by a process of exegesis in which event it is hardly to be expected that they would not take into consideration the principles of the law in which they have been trained. I therefore think that this Article will break down in practice.

I might add that I was present at Geneva in 1930 when this same question arose in connection with the Uniform Law of Bills of Exchange. The general opinion seemed to be that the only way of preventing diversity of interpretation from arising would be by periodical revisions of the Uniform Law which would dispose of such diversities. The true remedy is an international court of appeal but this is, of course, impracticable.

Article 99. - I regard the solution arrived at as unbusiness like. If a buyer transforms the goods he ought to keep them and rely on his remedy by way of damages. The goods may have lost their identity so as to be valuable to the buyer but useless to the seller and I cannot see that any purpose is served in such a case by permitting the return of the goods and recovery of the price.

Exoneration.

The objections of the British Committee to the articles of the draft law dealing with this question were, in the main, based on two grounds.

In the first place, it was thought to be undesirable to introduce this question into a law confined to sales of goods. A somewhat curious position might arise for example if the contract of sale was to be governed by one set of principles and entirely different principles were to be applicable to the ancillary contracts by which the sale is financed or the goods are carried and insured. The Committee felt that if the matter was to be dealt with it should be considered in relation to the whole of the law of obligations and not merely with reference to one section of it.

Secondly, the Committee did not regard the question as ripe for decision. In England there is much controversy as to the exact nature of exoneration in the case of impossibility of performance and as to the extent to which it should be permissible. It was felt that there was no assurance that any solution arrived at in the draft law would be generally acceptable and that the introduction of this question into the draft law would probably jeopardise any chance of its adoption.

I feel that these criticisms are well founded but as I have been requested to make suggestions I will do so though with the greatest reluctance and diffidence.

The real difficulty is to find a satisfactory solution in the case of sales of choses de genre (unascertained goods). It is, in my opinion, no true solution to lay down a rule which shifts the loss in such cases from the shoulders of the seller on to those of the buyer. Ideally the rule should be either one which distributes quantitatively between them losses

for which neither can be held responsible, or a solution which enumerates the individual cases in which the parties are to be relieved from the duty of performance. These solutions are no doubt impracticable, and consequently a solution must be sought for of a purely pragmatical character i.e. one which though not ideal is in the best interests of international commerce. I feel that it is of paramount importance that the duties under the contract should not be relaxed to such an extent as to encourage a party to set up a plea of exoneration whenever performance unexpectedly becomes more difficult or costly than he had expected. If the parties wish for such relaxation the proper place for it is in their contract and not in the draft law.

My suggested rule is, therefore, as follows :

Article X, (I) Unless otherwise agreed the parties to a contract for the sale of goods shall be released from further performance of the contract if it becomes impossible in the following events :

- a) If before the risk has passed the specific subject matter of the contract has perished without any fault on the part of either the seller or the buyer owing to circumstances beyond the control of the parties, or
- b) If performance of the contract is prohibited by the law of the place in which performance is due, or
- c) If to the knowledge of both parties performance depends on the continued availability of some specific thing other than the subject matter of the contract and that thing perished or ceases to be available before the risk has passed owing to causes which they were not bound to foresee and are beyond their control.

(II). The parties shall also be released :

If performance has been suspended owing to causes which they were not bound to foresee and are beyond their control and are such that when it becomes possible to resume performance of the contract the circumstances have altered to such an extent as to destroy the identity of the performance originally contemplated with performance in those circumstances by the parties. The fact that performance calls for an economic sacrifice from one or both of the parties shall not of itself be regarded as destroying the identity of performance within the meaning of this article.