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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

CONTRACTS IN GENERAL

Note prepared by the Secretariat of UNIDROIT for the 1st meeting of the Working Committee on the progressive codification of international trade law

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I. Brief survey of the state of work

In 1970, Professor Popescu, a member of the Governing Council, drew up, at the invitation of the Secretariat of UNIDROIT, a preliminary study on the possibilities of proceeding to a progressive codification of international trade law and arrived at the following conclusions (cf. U.D.P. 1970 - Et. L - Doc. 1):

- the elaboration of a Code of International Trade law would meet a specific need felt by practitioners of international trade law itself;
- such a programme must, to be carried through successfully, in the first stage at least necessarily be limited to certain fundamental aspects of, and problems associated with, international contractual relations: of particular importance are problems relating to the formation of contracts in general, the conditions of validity relating to their substance, interpretation, the transfer of debts and rules concerning proof.

This first study was followed by a second report submitted by Professor Popescu in 1971 to the Governing Council of the Institute (U.D.P. 1971 - Et. L - Doc. 2), in which an attempt was made to set out the various aspects of the problems of formation of contracts (pp. 1-6), the conditions of validity relating to their substance (pp. 6 and 7) and and interpretation, on the one hand of the preposed uniform law (pp.7-17), and on the other that of the content of specific individual contracts (pp. 18-21); as to the actual carrying out of the programme of codification, Professor Popescu suggested the setting up of four working parties, the first making a comparative study of the different common law systems, the second that of the civil law systems, the third that of the Socialist States and the fourth that of the Latin American States.

After taking note of the findings of Professor Popescu, the Governing Council decided to entrust him with the task of undertaking a further detailed study of the possibilities of codification in respect of (a) formation of contracts and (b) the conditions of validity relating to the substance of contracts. After consulting a large number of international organisations and specialised institutes, Professor Popescu submitted, in 1972, a detailed report to the Governing Council (U.D.P. 1972 - Et. L - Doc. 3), the conclusions of which may be summarised as follows :

(a) formation of contracts (pp. 9-15): the most delicate aspects of this question would seem to concern the definition of an international contract, which is of importance above all for delimiting the scope of application of the proposed Code, the offer (the extent of its binding character) and acceptance (the required form; the character of an acceptance accompanied by new counter-offers; effects of a late acceptance). For almost all of those aspects and problems, it would however seem possible to adopt the solutions already reached for sales contracts in the Uniform Law on the Formation of Contracts for the International Sale of Goods of 1964.

(b) conditions of validity relating to the substance of contracts (pp. 15 - 16): here again it was felt that the future Code could adopt the solution already worked out for sales contracts in the UNIDROIT draft Uniform Law on the Validity of Contracts for the International Sale of Goods.

With regard to the next steps to be taken, Professor Popescu mentioned the following alternatives: either the setting up of a Working Committee to undertake a study and to draw up a draft on the formation of contracts and the conditions of validity relating to their substance, or the continuation of the preliminary study of the possibility of achieving codification in the future and an examination in particular of the problems associated with non-performance of contracts.

The Governing Council chose the second alternative and directed the Secretariat of UNIDROIT to carry out the preliminary study.

In 1973 the Secretariat submitted to the Council a report (U.D.P. 1973 - Et. L - Doc. 4), containing the results of its investigations. These may be summed up as follows:

- hesitations with regard to the advisability of tackling the problem of non-performance of contracts, without first having solved those relating to their interpretation and performance, in the light of the fact that these three questions mutually condition one another;
- the necessity, when dealing with the general problem of non-performance, of identifying the specific points of comparison between the different systems of positive law, since their approaches and solutions to the general question of non-performance often differ considerably. In the light of this first comparative examination of the problem, these points would seem to be the following:

a) The objective characteristics of the different cases of non-performance (delay, defective performance, non-performance in the narrow sense);

b) The conditions under which the debtor is held liable for the above-mentioned circumstances: the problem of "contractual liability";

c) The consequences of the liability of the debtor: the problem of the "compensation of damage";

d) The influence of the various cases of non-performance in the objective sense (ascribable to the debtor or not) on the position of the innocent party to the contract as regards the performance of his obligations.

After taking note of these hesitations and difficulties of a methodological character, the Governing Council instructed the Secretariat to set up a restricted Committee of experts which should take any further decisions on the question.

II. The decisions to be taken in connection with future work

A prerequisite for any attempt at international unification is a precise knowledge of the national law of the different States on the matter under consideration. Then if, as is the case with the progressive codification of the law of contract in general, there exist national rules specifically worked out for international relations (e.g. the Czechoslovakian International Trade Code) or unification at an international or federal level (e.g. the various uniform laws worked out at UNIDROIT, and the American U.C.C., the subject matter of which is the prototype of all contracts of exchange, namely sale), particular attention must naturally be paid to them as they represent a first endeavour to overcome the differences between the various national positive laws. It is for this reason that the Secretariat of UNIDROIT, with a view to facilitating the task of the Working Committee, has prepared a comparative table concerning the three above-mentioned attempts at unification, one of an international, one of a federal, and one of a national character (Etude L - Doc. 5, UNIDROIT 1973).

Some preliminary conclusions to be drawn from this comparison are the following:

(a) as regards the problem of the formation of contracts, the conditions of validity relating to their substance and their interpretation, the Czechoslovakian Code on the one hand, and the U.C.C. and the respective uniform laws on international sale on the other, undoubtedly share a large number of common features and similarities;

(b) as to the problem of the modes of performance of contracts and that of non-performance, the rules laid down in the U.C.C. and ULIS seem, apart from a few basic principles, to be too specific and designed to meet the special needs and problems of the contract of sale to be capable of direct comparison with the rules laid down in the Czechoslovakian Code for contracts in general, this latter therefore being the only reference guide for possible future rules in the proposed international Code.

In these circumstances it would seem that the following questions should be put to the Working Committee:

1. 1. In drawing up the proposed Code of international trade law, is it advisable to take as a basis for comparison only the international legislative work (the Uniform Laws on International Sale; COMECON General Conditions), federal rules (the U.C.C.) and special national rules (Czechoslovakian International Trade Code) at present in force or,

1. 2. while taking account of these instruments, to undertake in addition a comparative study of all the principal national systems, in which case,

1. 3. does the Committee agree to the division into 4 distinct groups (common law systems; civil law systems; the systems of the Socialist States and the systems of the countries of Latin America) suggested in the UNIDROIT document (U.D.P. 1971, Et. L - Doc. 2, p. 21) or would it suggest another approach ?

2. 1. Should the proposed Code of International Trade Law be limited in scope to contracts in general or should it also deal with

2. 2. specific contracts (if so, which ?)

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

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

4. 1. From the comparative table prepared by the Secretariat of UNIDROIT it would seem that the best chances of succeeding in preparing uniform rules on contracts in general would at present lie in the fields of formation and conditions of validity relating to substance and above all in that of interpretation of contractual terms, while

it would seem much more difficult to find common rules and principles in relation to modes of performance and non-performance: does the Committee agree with this analysis or

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

5. 1. As regards the proposed uniform rules on formation and condition of validity relating to substance of contracts in general, does the Committee consider it possible simply to take over the rules contained in the UNIDROIT Uniform Laws on Formation and Validity of contracts of sale of movables (cf. the conclusions along these lines set out in U.D.P. 1972, Et. L - Doc. 3) or

5. 2. is it of the opinion that, while these two uniform laws on sale may be valuable for reference during the working out of the future rules on contracts in general, other principles and rules of positive law should be considered (if so, which ?) ?

6. 1. Does the Committee consider it possible to proceede to the unification of the principles and rules relating to non-performance of contracts, without first working out rules concerning interpretation and the modes of performance, or

6. 2. is it of the opinion that methodological considerations require that these two problems be considered first (cf. in this sense U.D.P. 1973 - Et. L - Doc. 4) ?

7. 1. As regards the specific problem of non-performance of contracts, does the Committee consider that the corresponding comparative study should conform with the indication set out in U.D.P. 1973 - Et. L - Doc. 4, p. 13
or

7. 2. would it propose a different work plan (if so, which ?) ?

8. 1. In the light of the answers to the preceding questions, what work programme would the Committee propose for the future ? In particular

8. 2. in what order should the problems be dealt with;

8. 3. what methods should be followed;

8. 4. what does the Committee consider to be the minimum time in which the work could be completed ?