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APLA Meeting, Bangkok, November 1995

Globalisation of contract law: Rules for commercial contracts in the 21st century

*By Whitmore Gray, Emeritus Professor of Law, University of Michigan, and
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This is a paper given at the Asia-Pacific Lawyers Association meeting held in Bangkok in November 1995. The author describes the principles of international commercial contracts published in 1994 by the International Institute for the Unification of Private Law. Professor Gray sees a new era of harmonisation of contract law. An appendix gives an abstract of a contract law decision given by an Austrian Court in 1994.

Merchants have traditionally been reluctant to submit their disputes to the Courts of a country foreign to them. They feared a bias against them on the part of the local Judge, but they were also apprehensive about any dispute resolution procedure that involved the application of unfamiliar law. Even if their domestic lawyer had some familiarity with the foreign law in question, an additional lawyer in that country would have to be consulted to get an authoritative prediction as to what a Court might decide.

In our modern commercial era, many parties keep international contract disputes out of the Courts committing them to arbitration. While arbitration proceedings often fail to live up to their advertised advantages of speed and economy, most lawyers think the need is for better arbitration procedures, not for going back to the Courts.

The second need, finding contract law rules of high quality to use in the dispute resolution process, has been much more difficult to satisfy. While individual countries have "modernised" some of the form and substance of their contract rules, they are still idiosyncratic, and are difficult for foreign lawyers to work with. How is a foreign lawyer to advise his or her client on a choice of law negotiation without a thorough knowledge of the foreign law? Of course, even if the foreign law is finally found to be acceptable, or even "good", the client may feel

there is too much loss of face in agreeing to it. In a surprisingly large number of contracts, the parties do not choose any law, or they direct the adjudicators to apply "general principles of [international] commercial law". While this may have simplified the negotiations by eliminating arguments over which party's law would be named, many lawyers have described to the author over the years their frustration with this technique. If "general principles" are chosen, at the time of an arbitration an extensive investigation into international commercial practices is required, and often research into various foreign statutory rules and patterns of Court decisions as well. A common comment is that in many cases the adjudicator has felt that he or she was, in effect, left free to apply the rule the adjudicator liked best ie often any rule that could be used to justify the *result* the adjudicator liked best.

The early merchants often had their own supra-national rules. In England, Lord Mansfield theoretically "incorporated" the law merchant into the English case law, but as a result it became domestic law and lost any supra-national, unified character. The Scandinavian countries unified their sales law across national boundaries by statute. Following World War II, the International Institute for the Unification of Private Law (UNIDROIT) in Rome, originally an offspring of the League of Nations, provided in the

1960s the impetus and support for the Hague Conventions on International Sale of Goods. However, they were ratified by only a few countries, and the United Nations Committee on International Trade Law (UNCITRAL) took up the torch and eventually produced the Vienna Convention on International Sale of Goods (CISG). Now widely adopted, it provides not only a legislated framework where applicable, but a mode which could be used helpfully for modernising domestic contract law. It embodies thoughtful choices of the "best", "modern" rule to be applied to common contract problems, choices made by representatives of a wide range of countries with divergent economic circumstances and legal traditions. The CISG provides a model of both form and substance, and has the additional advantage of having official versions in all the UN official languages.

The most recent arrival on the contract law scene, however, has even brighter prospects for use in the coming century. The UNIDROIT Principles of International Commercial Contracts, published in 1994, are the next step in the evolutionary process described above. Building on, though not just copying, UNCITRAL's CISG, the UNIDROIT Working Group expanded the scope beyond sales of goods to all commercial contracts. Taking advantage of an extended period for drafting, legal specialists representing civil law,

common law and socialist systems elaborated a set of rules tailored to the needs of a wider range of typical international commercial transactions, rules which would embody what were perceived to be the best solutions even if those solutions were not yet widely adopted by leading commercial countries. Their stated objective was

to establish a balanced set of rules designed for use throughout the world irrespective of legal traditions and the economic and political conditions of the countries in which they are to be applied. This goal is reflected both in their formal presentation and in the general policy underlying them. (Principles of International Commercial Contracts, p 12 (UNIDROIT, Rome 1994).)

Translations into a growing number of languages are already available, and it may be assumed that this new "lingua franca" of contract rules will be used by those who teach as well as by practising lawyers. One early use may be to incorporate the UNIDROIT Principles in a contract in place of the choice of law clause referring to "general principles of international commercial contracts" mentioned above. Another use may be as an aid to interpreting domestic legislation or Court practices which takes into account "general usages or principles in international commercial contracts," or even as an aid to interpreting the CISG. [The Viennese decision reproduced below provides an actual example of this use.] Finally, the UNIDROIT Principles provide a fine basis for modernising the domestic legislation of any country. Not only are the rules sensible and well-phrased, but their use will make any country's legislation seem more recognisable to foreign investors and merchants evaluating the local climate for doing business. The resources are already in place for locating all the interpretations of the CISG by various tribunals, and no doubt will also be extended to cover the UNIDROIT Principles. We finally are poised on the edge of a new era of harmonisation of contract law, where we will all be able to benefit from each others' experiences, developing better and more easily recognisable rules of law. □

Date: 15-06-1994

Country: *Arbitral Award*

Adjudicating Court: Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien

Number: SCH-4366

Parties: Unknown

Abstract

In 1990 and 1991 an Austrian seller and a German buyer concluded contracts for the sale of rolled metal sheets. The initial contracts provided that the goods were to be delivered "FOB Hamburg", by March 1991 at the latest. Later, due to the buyer's financial difficulties, the seller allowed the buyer to take delivery in instalments according to the possibilities of resale, and the buyer had to pay promptly after receiving each invoice and cover all storage costs. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause, the seller commenced arbitral proceedings, demanding payment of the price. The seller further asked for damages, including those deriving from a substitute sale of the undelivered goods.

The sole arbitrator held that since the parties had chosen Austrian law, the contracts were governed by CISG as the international sales law of Austria, a contracting State (Art 1(1)(b) CISG).

With regard to the goods delivered but not paid, the sole arbitrator found that the seller was entitled to payment of their price (Arts 53 and 61 CISG). Regarding the cover sale made by the seller, the arbitrator observed that the seller had the right to make a cover sale, and presumably even a duty to do so because of the duty to mitigate damages (Art 77 CISG). The seller would be entitled to the difference between the con-

tract price and the substitute sale price.

The sole arbitrator further held that interest on the price accrued from the date payment was due (Arts 78 and 58 CISG). Since the parties' agreement required the buyer to pay after receiving each invoice, interest accrued from the date of such receipt, which should occur within 10 days after issuance of each invoice.

The sole arbitrator held that the interest rate is a matter governed but not expressly settled by CISG. Therefore, it must be settled in conformity with the general principles on which the CISG is based (Art 7(2) CISG). Referring to Arts 78 and 74 CISG, the arbitrator found that full compensation is one of the general principles underlying CISG. In relations between merchants, it is expected that the seller, due to the delayed payment, resorts to bank credit at the interest rate commonly practiced in its own country with respect to the currency of payment. Such currency may be either the currency of the seller's country, or any other foreign currency agreed upon by the parties. The arbitrator observed that this solution is stated also in Art 7.4.9 of the UNIDROIT Principles of International Commercial Contracts. The interest rate awarded, therefore, was the average prime rate in the seller's country (Austria), with respect to the currencies of payment (US dollars and German marks).

Original in German unpublished

Independent Judges

The persons entrusted with the great interests of the state may, even without any corrupt view, sometimes imagine it necessary to sacrifice to those interests the rights of a private man. But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel

himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power.

– Adam Smith
The Wealth of Nations (1776)