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Memorandum, UNIDROIT Study Group on Codification of International Trade Law, Second Session, April 5-10, 1982

Peter Winship
Southern Methodist University, Dedman School of Law

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M E M O R A N D U M

To: Peter H. Pfund,
Assistant Legal Adviser for Private International Law

From: Peter Winship

Subject: UNIDROIT Study Group on Codification of International Trade Law, Second Session, April 5-10, 1982

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The UNIDROIT study group on the progressive codification of international trade law held its second session in Rome from April 5-10, 1982. The 17 participants reviewed draft texts on the rules governing the substantive validity of international contracts (UNIDROIT Study L, Docs. 20 & 21). Although the session discussed in detail the substance of these drafts it did not have time to prepare final texts. At the end of the meeting it was understood that Michael Bonell of the UNIDROIT Secretariat, who had acted as secretary to the session, would prepare a summary of the discussions and the draftsmen of the texts submitted to the session would then prepare revised texts.

I. Background

The codification project was inspired by a series of reports submitted to UNIDROIT by Tudor Popescu in 1970-1972. In response to these reports the UNIDROIT Governing Council appointed a steering committee composed of Popescu, Rene David and Clive Schmitthoff. This committee met four times in the period 1974-1978 and made recommendations with respect to the scope and method of further work. At the suggestion of the steering committee an enlarged study group was convened at a first session in Rome from September 10-14, 1979 to consider draft texts on the formation and interpretation of contracts. Following this first session special working groups were appointed to prepare draft texts on the validity of international contracts. These subcommittees met several times in 1980-1981 and submitted the results of their discussions to the second session of the enlarged study group held earlier this April. The principal draftsmen of these texts

were Ulrich Drobnig & Ole Lando (Mistake, Fraud, Threat, Unequal Bargaining Power & Gross Unfairness) and M. Andrae & Dietrich Maskow (Public Prohibitions & Permission Requirements).

II. Participants at Second Session

Seventeen participants attended the second session (see list of participants attached as Appendix). Ten of these participants were present at the first session in 1979 and three others had attended subcommittee meetings or had commented on earlier draft texts circulated by UNIDROIT. The four new participants were Arthur Hartkamp (Netherlands), J. Wade (U.K.; Netherlands), Michael Will (West Germany), and myself. Guenther Treitel (Oxford) was unable to attend. Observors from the Organisation of American States and from the Hague Conference were also present, as were members of the UNIDROIT Secretariat.

Early in the session Michael Bonell stressed that participants came as individuals and did not represent governments. From discussions with others I believe I was the only participant supported directly by a government. UNIDROIT apparently paid the expenses of an unstated number of participants, including the draftsmen of the texts submitted to this session.

A great majority of those present were trained in civil law systems, especially those influenced by the German codes. There were three participants from East European countries and three from common law countries but all the rest were from West European countries. This limited geographical representation was exacerbated by some notable absences. Rene David, who was a member of the steering committee and who chaired the first session of the study group, has withdrawn from the project. The reasons given were his desire to be with his family and to concentrate on his academic writing. His absence and the absence of Professor D. Tallon of Paris (who, however, submitted comments for consideration) meant the virtual non-participation by persons from francophonic countries. In addition, several persons who attended the first session of the study group were also absent, including representatives from Nigeria and from the UNCITRAL Secretariat.

As a result of these absences there was decreased representation from Eastern Europe and no representation from Third World countries.

The level of debate was high, with very few extraneous remarks. Throughout the discussions greater emphasis was placed on doctrinal considerations than on commercial needs or practices. The most active participants were Ulrich Drobnig, Arthur Hartkamp, Lars Hjerner, Ole Lando, and Dietrich Maskow. The native-English speakers also participated actively. The draftsmen of the texts submitted (Drobnig, Lando, Maskow) were skillful in their presentation of the texts and flexible in their response to criticism. Lando was particularly concerned about the need to reach decisions which would be acceptable to both traders and governments. Hjerner, who will report to the International Chamber of Commerce, was particularly forceful on the need to consider commercial practices. Several participants also remarked on the flexibility shown by Maskow and contrasted this approach with his participation at the 1980 Vienna diplomatic conference on international sales contracts.

Popescu was elected chairman, although he insisted on sharing his responsibility with Clive Schmitthoff. Meetings were conducted almost entirely in English, which caused some difficulty because Popescu relied on the simultaneous translation into French which did not always capture the nuances of the discussion. Schmitthoff maintained better control when he was in the chair

Michael Bonell was an effective secretary but notwithstanding his general efficiency there were several instances where votes were taken on poorly-framed questions and a number of substantive issues were left to the drafting committee (which never met because of lack of time).

III. The Substantive Discussion

Although the session had before it two draft texts it spent almost four of the five days on the first text which dealt with invalidity because of mistake, fraud, threat, unequal bargaining power and gross unfairness. With the exception of the draft

provisions on unequal bargaining power and gross unfairness the draft before the session can be traced back to texts prepared for UNIDROIT in the 1960s by the Max-Planck-Institut and adopted by the Governing Council of UNIDROIT in 1972. The session made rather heavy going through these provisions and several close votes on particular issues suggest that they were issues on which reasonable persons could differ. The text, when redrafted to conform with the decisions of the session, may differ in details from domestic U.S. law but should be compatible with U.S. interests. In any event, the matters dealt with are of little practical significance for international trade.

The two draft provisions on unequal bargaining power and gross unfairness were the major stumbling block in the discussion of this first text. Debate focused on the formulation of these provisions rather than on the need for them. After several abortive attempts to find a compromise solution the session agreed on the following formulation prepared by Lando and Hartkamp:

Article 7. Unjustifiable 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, or

b) the commercial setting and the purpose of the contract.

In the course of the discussion it was agreed that the provision would only apply to mercantile (i.e., non-consumer) transactions and was not designed to allow a party to avoid a contract because of "market dependence" (i.e., claims that the other party is a monopolist or oligopolist).

In the abstract it is difficult to assess this "unjustifiable disparity" provision. All the arguments in support of the

unconscionability section of the Uniform Commercial Code were made in support of this provision. The strongest of these arguments appear to be (1) that avoidance for unconscionability now takes place covertly and it is better to regulate the problem overtly, and (2) that experience with the U.C.C. suggests that legal rules on unconscionability are not of great significance in mercantile transactions.

The second text on "public prohibitions and permission requirements" is more controversial. Discussion of the draft began at the end of the fourth day of the session with several participants questioning whether the draft should be included in the codification. The session did not vote on this issue until the end of the fifth day, at which time only three participants (Delvaux, Hjerner, and I) voted against the principle of including some provisions on this subject matter.

The provisions on public prohibitions are by far the most important. By "public prohibitions" is apparently meant mandatory legal rules which prohibit certain types of contract and declare any contravention of these rules to be void. The basic idea of the revised draft is that all states should treat a contract as "null" if any state with a significant connection to the contract would treat the contract as a whole as a nullity. Among the sources cited in support of this general proposition are Article VIII, sec. 2(b) of the Bretton Woods Agreement and Article 7, para. 1 of the 1980 EEC Convention on the Law Applicable to Contractual Obligations.

My own evaluation of these provisions is that it is premature to talk of a restatement of generally-accepted principles in this area, that the generality of the text leaves the scope of application very unclear, and that the governmental interests involved would be more appropriately addressed by diplomatic conferences convened to consider more narrowly-defined subject areas. Lars Hjerner expressed many of the same views even more forcefully and he noted that the provisions of the text run counter to the general principle that international commerce should be as free as possible from national interference with the flow of trade.

To the extent that the revised draft is more restricted than the original text these arguments were effective.

The permission or licensing provisions are less controversial. "Public permission requirements" apparently refer to licensing requirements of public authorities which must be complied with before a contract will become effective. The draft text states rules on the applicable law, on when a contract subject to a licensing requirement will become effective, and on the consequences of failure to obtain a license. Most of these provisions as revised reflect current commercial understanding.

IV. Evaluation

I see two distinct questions for the Department of State.

(1) Should the U.S. government send a delegate to future sessions of the study group?

I would not put a high priority on this project and therefore would not recommend sending a delegate. This would be consistent with the fact that no other government sends an official delegate.

(2) Should the U.S. representative to the UNIDROIT Governing Council support the continuation of this project?

Given the nature of the project and the limited geographic representation of participants I am very dubious that the project will have any practical impact on the law governing international trade in the foreseeable future. The project is, of course, consistent with the original purpose of UNIDROIT and must be evaluated in the light of the general effectiveness of the Institute as well as in comparison with other specific projects carried on by UNIDROIT.

My impression is that the principal value of this project is the opportunity it gives to meet periodically with colleagues from other countries to exchange information and to hone drafting and negotiating skills. This opportunity can be of some practical importance: most of the participants advise their governments on law reform projects and many have represented their countries at diplomatic conferences.

I should also note that many of the other participants felt the project was useful. Lando, for example, whose approach is very

pragmatic, feels it is useful to have a forum where participants are not under official instructions from their governments.

U n i d r o i t

INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE
INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMITE D'ETUDE SUR LA CODIFICATION PROGRESSIVE DU DROIT
DU COMMERCE INTERNATIONAL
STUDY GROUP ON THE PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

Deuxième session - Rome, 5 au 10 avril 1982
Second session - Rome, 5 to 10 April 1982

LISTE PROVISOIRE DES PARTICIPANTS
PROVISIONAL LIST OF PARTICIPANTS

M. C. Massimo BIANCA,	Professor of Civil Law, University of Rome Via Po, 43 - 00198 ROME
M. Franz BYDLINSKY,	Professor of Law, University of Wien Karl-Lueger-Ring 1 - A-1010 WIEN
M. Paul-Henry DELVAUX,	Assistant, Centre de droit des obligations de l'Université de Louvain Collège Thomas More Place Montesquieu, 2 - 1348 LOUVAIN-LA-NEUVE
M. Ulrich DROBNIG,	Professor, Director at the Max-Planck- Institute, Hamburg Mittelweg 187 - HAMBURG 13
M. Arthur S. HARTKAMP,	Legal Advisor (New Civil Code) Ministry of Justice Schedeldoekshaven 100 - THE HAGUE
M. Lars A.E. HJERNER,	Professor, Vice Chairman ICC Commercial Practice Commission P.O. Box 10 - S-170 11 DROTTNINGHOLM

M. Ole LANDO,	Professor of Comparative Law, Institute of European Market Law Rosenorns Allé 9[3] - DK 1970 COPENHAGEN
M. Hans G. LESER,	Professor, Director Institüt für Rechtsvergleichung, Universität Marburg Savignyhaus - D355 MARBURG
M. Berardino LIBONATI,	Professore ordinario di diritto commerciale, Università di Firenze, Via Condotti 91 - ROMA
M. Dietrich MASKOW,	Deputy Director of the Institute for Foreign and Comparative Law, Academy of Political and Legal Sciences of the GDR August-Bebel-Str., 79 - 1502 POTSDAM
M. Tudor POPESCU,	Professeur de droit du commerce international et de droit international privé à l'Université de Bucarest; Membre du Conseil de Direction d'UNIDROIT, Président du Comité 9, rue Sf. Voevozi - 78109 BUCAREST
M. Jerzy RAJSKI,	Professeur à la Faculté de droit, Directeur de l'Institut de droit civil, Université de Varsovie, Krak. Przedmiescie 26/28 - VARSOVIE
M. Clive Macmillan SCHMITTHOFF,	Hon. Professor of Law at the University of Kent in Canterbury, Visiting Professor of International Business Law, The City University, 10 South Square, Gray's Inn, - LONDON W.C.1
Sir Thomas SMITH,	Professor Emeritus Edinburg University Kirkton of Morham, HADDINGTON East Lothian Scotland
M. J. A. WADE,	Deputy Director, T.M.C. Asser, Institute for International Law, Alexanderstraat 20-22 - THE HAGUE
M. Michael WILL,	Professor of Law, Europa-Institut, Universität des Saarlandes D-6600 SAARBRÜCKEN 3
M. Peter WINSHIP,	Professor, Southern Methodist University, Dallas, Texas, U.S.A. Trinity College - OXFORD

OBSERVATEURS

OBSERVERS

ORGANISATION DES ETATS AMERICAINS (OEA)
ORGANIZATION OF AMERICAN STATES (OAS)

M. Gladys B. ALEMAN — Staff
Attorney - Codification Division
Secretariat for Legal Affairs
17th St. and Constitution Ave.
WASHINGTON, D.C., 20006

CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

M. Michel PELICHET — Secrétaire Général Adjoint
Javastraat 2C - LA HAYE

UNIDROIT:

M. Mario MATTEUCCI, — Président/President

M. Riccardo MONACO, — Secrétaire Général/Secretary General

M. Malcolm EVANS — Secrétaire Général Adjoint/
Deputy Secretary General

M. Michael Joachim BONELL — Secrétaire du Comité/Secretary to the Committ

M. François MENGIN, — Chargé de Recherches/Research Office

M. Nico ZACHMANN, — Collaborateur/Collaborator

Peter Winship October 1976

MISCELLANEOUS WRITINGS

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