

# The Law and Practice of International Commercial Contracts in the 2000s

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It may, indeed, be questioned whether it serves any purpose whatsoever to forecast what may happen in the next millenium. Could we really know anything at all about that? Needless to say, it is quite impossible to make a precise forecast but nevertheless it is possible to discern some important trends which seem to point in a certain direction. It is the purpose of this short article to pinpoint some of these trends. First, I will deal with what seems to represent some sort of revival of the “law merchant”, nowadays usually referred to as *lex mercatoria*. The concept of *lex mercatoria* is much-debated and no one can claim to have gained recognition of a universally accepted definition. It seems much easier to determine what *lex mercatoria* is *not* than to exactly define what it *is*. Everyone seems prepared to accept that *lex mercatoria* does not represent *legislation* of a particular country, or particular countries, even if such legislation would be derived from international sources. Basically, *lex mercatoria* is *de-nationalized* and may loosely be described as general principles of international trade and commerce independent of any particular legal system.<sup>1</sup>

Although *lex mercatoria* is frequently met with considerable scepticism, particularly when it is suggested that *lex mercatoria* should *replace* an application of the law which would follow from choice of law principles, it is generally accepted that *lex mercatoria* may apply insofar as it represents general principles of law which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade

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<sup>1</sup> See, e.g., O. Lando, *Principles of European Contract Law*, Liber memorialis Francois Laurent, Ghent 1989 p. 562: “... rules of the international conventions and uniform laws, of some international usages and customs, and of the common core of the legal systems”; A.M.Garro, *The Gapfilling role of the UNIDROIT Principles in international sales law: some comments on the interplay between the Principles and the CISG*, Tulane Law Review 1995 p. 1149 and H.Yeytia, *The requirements of justice and equity in contracts*, Tulane Law Review 1995 p. 1192 note 2: “an autonomous legal order, independent of any one legal system which encompasses general principles of international trade and commerce” and p. 1197 notes 21–24 with references to a number of other efforts of definition.

concerned (cf. the same definition of usage in CISG art. 9.2).<sup>2</sup> However, in such cases, it may be argued that *lex mercatoria* does not *replace* national law but rather becomes relevant by the *application of national law* in accepting usage of trade as a part of the individual contract. In most jurisdictions, usage of trade is accepted in international trade disputes *either* by virtue of its mere existence – *ex proprio vigore* – *or* by the usually fictitious method to assume that the parties themselves impliedly have made the usage a part of their contract.<sup>3</sup>

### **Incoterms 2000 and UCP 500**

As other examples of the impact of *lex mercatoria* on national law could be mentioned Incoterms 2000 and UCP 500 representing rules elaborated under the auspices of the International Chamber of Commerce (ICC). Incoterms have been widely accepted in many countries of the world as an acceptable interpretation of the most commonly used trade terms, such as FOB, FCA and CIF. And UCP 500 – uniform customs and practice for documentary credits – are treated as almost the only authoritative guidance for the application of the law and practice not only in relation between the banks involved in the financial transaction but also in their relation to the applicant of the credit and the beneficiary. But even here, the legal nature of these international rules may be questioned. Since the ICC is a non-governmental organization it has, of course, no status equivalent to that of a legislator. Whatever is produced by the ICC will therefore stand or fall depending upon its merits. Perhaps it is true to say, that the rules elaborated within the ICC stand better chances to be accepted as international usage of the trade owing to the method of work practised in their elaboration. The first step would usually be to set up a small working party within the respective ICC Commission, e.g. the Commission on International Commercial Practice for the delivery terms and the Banking Commission for the rules relating to documentary credits. On the basis of such preliminary reports, the Commissions would deliberate and, after further refinements, send the draft rules for comments to the National Committees of the ICC over the whole world to ensure a global acceptance of the rules and that the rules will become widely known to and regularly observed by the traders. But, even if the rather stringent requirements for the acceptance of an international usage of the trade would fail, the rules may still become applicable through an *express reference* to them in the contract concerned. Thus, contracts frequently contain an express reference to Incoterms and the forms used by banks invariably refer to the latest version of UCP, now UCP 500.

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<sup>2</sup> See also the Finnish, Norwegian and Swedish Sale of Goods Acts art. 3.

<sup>3</sup> See as an example of such method CISG art. 9.2.

## The Revival of Lex Mercatoria in the Modern Version of General Average

In the same manner, Comité Maritime International (CMI) – a non-governmental organization with the objective to obtain unification of maritime law<sup>4</sup> – has taken upon itself the task to revise the rules of general average, now in the form of the 1994 York/Antwerp Rules, and these Rules are invariably referred to in charterparties, bills of lading and other transport documents for carriage of goods by sea. In this area of the law, it is particularly interesting to note that the rules relating to general average originally appeared in Lex Rhodia de jactu and were subsequently reproduced in the Digests of Roman Law 14–2: “Ut si levandæ navis gratia mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est”. The principles of general average subsequently became an important custom of the trade found in Consolato del mare, Rôles d’Oléron and Wisby Sea-Laws. With the development of states with strong central power the rules of general average were incorporated in statutory acts and thus, by legislative action, left the former status as *lex mercatoria*. However, it is particularly interesting to note that, in later years, the rules relating to general average have been deemed to be better suited for a regulation by international trade itself through the non-governmental organization concerned, such as CMI. The Swedish Maritime Code makes a reference *en bloc* to the York/Antwerp Rules, which thereby have received the “blessing” of the legislator and become a part of the Swedish national law. Consequently, under Swedish law the York/Antwerp Rules do not need a reference in the contract concerned for their application as they have left the old and rather uncertain status as *lex mercatoria*.<sup>5</sup> Nevertheless, although the York/Antwerp Rules under Swedish law must be regarded as a part of the national law, the sources of that law are not derived from the Swedish legal system but rather from the *same sources* as are giving rise to *lex mercatoria*.

### International Standard Contracts

Another very important area, where general principles may become developed so as to form the basis of *lex mercatoria*, is represented by various *international standard contracts*. However, there is no fundamental difference between contracts individually negotiated and standard contracts, except that the latter do not usually get the same attention by the contracting parties themselves as terms which they negotiate individually.<sup>6</sup> Insofar as standard contracts become

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<sup>4</sup> See, e.g., J. Ramberg, *Unification of maritime law – a success story with happy end?* [Festschrift Lars Hjernér, Stockholm 1990 pp. 513–524].

<sup>5</sup> See for the historical background to the rules of general average Lowndes & Rudolf, *The Law of General Average and the York-Antwerp Rules* [British Shipping Laws Vo.7], London 1990, pp. 3–9, R. Rodière, *Traité General de Droit Maritime, Evénements de mer*, Paris 1972, pp. 290 ff and for the interesting adoption 1967 of the rules as expressed by *lex mercatoria* E. Hagbergh, *Sjölagen*, Stockholm 1969 pp. 158 ff.

<sup>6</sup> See, e.g., Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Art. 3.

incorporated into the individual contract by reference, or by practice which the parties have established between themselves, it is difficult to treat them as anything other than can be found in the very agreement between the contracting parties. Nevertheless, if a particular standard contract is *consistently* used in international trade, it is sometimes suggested that also such a standard form could constitute *lex mercatoria*. This might be theoretically acceptable but hardly becomes a practical reality in view of all the different variations appearing in various standard contracts. True, *some* rules of standard contracts may sometimes be rather persuasive but it seems unlikely that a *full standard form* will become used to such an extent that it would gain the same status as e.g. Incoterms 2000, UCP 500 or the 1994 York/Antwerp Rules. If, however, a *regular* use of a standard contract or standard conditions could be proven within a specific geographical area there is, in my view, no reason to treat the regulation differently from rules appearing as usage of the trade.<sup>7</sup>

Perhaps it is true to say that *lex mercatoria* basically lost its importance as an autonomous legal régime when States with growing national legislation and emerging case-law assumed the responsibility for the development of the law. Subsequently, *lex mercatoria* could only play its rôle *within the boundaries of the applicable national law* in the form of an acceptable usage of the trade or a sometimes fictitious implication of the intention of the contracting parties. Although it may well be possible to suggest universally acceptable general principles – e.g. that the contracting parties should be held to their bargain under the principle of *pacta sunt servanda*, that unfair and unconscionable contracts and clauses should not be enforced and that contracts should be performed in good faith – there are considerable variations in different jurisdictions in applying such general formulæ. It is therefore difficult to accept such general principles as a basis for an *autonomous legal régime* without some further – and more precise – international recognition.

### **The Future Rôle of Legislators Within the Field of Trade Law**

So far, I have given a rather sketchy description of the situation but this may perhaps be enough as a starting point for asking whether or not matters will change in the next millenium. Is there then something around the corner or will the situation continue to be basically the same? Perhaps, one may assume that, in the future, legislators basically will refrain from intervening within the field of trade law unless legislation is required in order to *preserve public interests*, such as protection of the market, the environment, consumers, weaker parties, third party rights and generally parties other than the contracting parties themselves.

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<sup>7</sup> The question whether it is possible to apply regulations found in standard conditions *ex proprio vigore*, and thus without reference to them in the individual contract, or finding implied agreement owing to prior use by the same contracting parties, is much-debated. See from the Swedish debate U. Bernitz, *Standardavtalsrätt*, Stockholm 1993 p. 30 f; K. Krüger, *Norsk kontraktsrett*, Bergen 1989 p. 484, J. Ramberg, *Allmän avtalsrätt*, Stockholm 1996 p. 142 and pp. 145–146 as well as the Norwegian Supreme Court Case NRt 1973 p. 1967 where the Nordic Conditions for Freight Forwarders were accepted without reference to them in the individual contract.

A further reason for such limitation of the efforts of the legislators stems from internationalization of international trade.

Everyone who has taken part in the cumbersome work to elaborate an international convention within the field of trade law could testify that the legal manpower spent on the venture does not always stand in proportion to the result achieved. In any event, broad consultations with organizations representing the trading partners in the area concerned are indispensable. It is therefore suggested that legislators should not – at least not as a primary target – intervene in the field of the law where contracting parties are basically permitted to agree as they please. True, if it would be possible to elaborate a complete legal régime covering international trade law generally, at least on a regional level, that would, indeed, be worthy of considerable legislative efforts. But it may well be wise to proceed with caution so that whatever may be regarded by some as the best solution does not become an enemy of what is good. After all, when you build a house you do not start with the roof but with the cumbersome work to lay the proper foundation and raise the building stone by stone.

### **CISG and the UNIDROIT and European Principles**

The 1980 UN Convention of Contracts for the International Sale of Goods (CISG) – based as it is on its predecessors the Uniform Law on International Sale of Goods and the Uniform Law on the Formation of Contracts for International Sale of Goods – constitutes an impressive achievement through the collaboration of legislators from a great number of countries. The work started within UNIDROIT in the 1920s and would not have led to success without the ambitious and knowledgeable initiatives taken by renowned jurists specializing in the law of sale of goods. Although CISG has not been ratified by the United Kingdom it may be regarded as “world law” in the area of sale of goods. CISG is not only important as a regulation of international contracts of sale of goods but also as an exponent of general principles of commercial law appropriate for other contract types as well. This being so, it is certainly not remarkable that the success of CISG resulted in yet more efforts to elaborate general principles for international commercial contracts. Such principles now exist in the form presented by UNIDROIT in 1994 (the UNIDROIT Principles of International Commercial Contracts, hereinafter “UNIDROIT Principles”). A parallel development took place in a particular Commission on European Contract Law under the chairmanship of professor emeritus Ole Lando of Copenhagen. Part I was ready in 1995 and Part II was completed during a meeting of the Commission in Stockholm in May 1996 (hereinafter “European Principles”). It is expected that the work of the Commission will be published in the course of 1997. One may well ask why it has been deemed necessary to elaborate a regional régime for the European Union instead of promoting a global régime, such as the UNIDROIT Principles. The answer appears to some extent from the words “Contract Law” which denote that the objective of the Commission on European Contract Law goes further than only to provide suitable general principles for commercial contracts available for contracting parties wishing to incorporate the principles into their individual contracts. The work should rather

be regarded as a pre-runner to a complete European Civil Code replacing the comprehensive codifications of some of the Member States of the European Union.

Both the UNIDROIT and European Principles contain important rules for *inter alia* freedom of contract and the binding character of the contract (*pacta sunt servanda*) as well as general principles of good faith and fair dealing. Furthermore, more or less as in Part II of CISG, formation of contracts is dealt with but with important additions with respect to particular duties of the parties in the stage of negotiations as well as principles to be applied with respect to terms not individually negotiated. The rules with respect to validity, interpretation and contents of contracts as well as performance and remedies in case of non-performance (referring to all breaches of contract) are particularly important. However, a comparison between the UNIDROIT and the European Principles would show that the latter are more *complete* (they also contain a chapter on authority of agents) and add more *specificity*. Needless to say, it is easier to reach consensus within a region – where possible alternatives are more restricted – than when solutions are sought to satisfy all countries of the world.<sup>8</sup>

### **Which is Presently the Legal Status of the UNIDROIT and European Principles?**

The UNIDROIT and European Principles are of the same kind as *lex mercatoria* in the sense that they cannot be regarded as an applicable statutory law. True, the Principles could be used as model law for the elaboration of national law more or less in the same manner as *lex mercatoria* could provide a source of legislation.<sup>9</sup> In this respect, the UNIDROIT and European Principles should be of particular interest to countries in a stage of transition from planned to market economy, such as Russia and some countries in the Baltic region.<sup>10</sup> But the important matter arises to decide to what extent the Principles could be applied even *without legislative support*. It is here that the status of the Principles as a modern *lex mercatoria* becomes particularly apparent. Under the principle of freedom of contract the rules may, of course, be incorporated into individual contracts by express reference. If such reference is made, the Principles would supersede the provisions of any non-mandatory law which otherwise would have

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<sup>8</sup> See for presentation of the Unidroit and the European Principles M. J. Bonell, *The Unidroit Principles of International Commercial Contracts: Why? What? How?*, Tulane Law Review 1995 p. 1121 ff; *European Principles of Contract Law*, O. Lando and H. Beale, eds. Dordrecht 1995 and Ch. Hultmark, *Internationaliseringen av svensk avtalsrätt – Unidroit Principles of International Contracts*, Juridisk Tidskrift 1995/96 pp 655–669.

<sup>9</sup> It is interesting to note that the Norwegian and Swedish Sale of Goods Acts of 1907 and 1905 respectively contained a chapter on interpretation of trade terms (as the Danish Sale of Goods Act of 1906 still does, §§ 62–65), but that these Sections have now been removed from the Acts with the exception of Section 7 dealing with the expression “free delivered” (Sw. “fritt”, “levererad”, “fritt levererad”). In other words, a return to *lex mercatoria* as represented by Incoterms.

<sup>10</sup> See generally with respect to the difficulties pertaining to this transformation J. Ramberg, *Contractual Aspects of Privatization* (Privatization in Central and Eastern Europe, P. Sarcevic, ed. London 1992 pp 97–108).

been applicable. Failing reference, however, the Principles cannot be applied whenever they are *contrary to* any specific applicable law but they may well be used in other cases. First, they may be used to give a more *specific meaning* to general concepts and principles applied in any national legal system. Second, they may be used to *supplement* national law in cases where it fails to provide a solution. Third, reference in a commercial contract to “generally accepted international principles of commercial law” may under the circumstances be interpreted as an incorporation – partly or wholly – of the UNIDROIT or the European Principles as the case may be. Much will depend upon the general acceptance of the Principles by the international trading community and the inclination of contracting parties and their advisers to give them priority before the national law which otherwise would have become applicable. Whether such de-nationalization will occur on a global or regional basis, and thus give rise to a modern *lex mercatoria*, constituting a more or less complete regulation of the law of international commercial contracts, remains to be seen.