

Drafting and Negotiating International Commercial Contracts

By Prof. Fabio Bortolotti



Review by Prof. Jan Ramberg

This book is intended as a tool for anyone engaged in drafting and negotiating international commercial contracts. It is primarily useful for those who have at least some knowledge of law in an international setting but also contains valuable advice to non-lawyers. The author – not only as President of the International Chamber of Commerce Commission on Commercial Law and Practice for a number of years, but also as the initiator of the International Distribution Institute (IDI) – is very well suited to address the problems arising with respect to choice of the applicable law, dispute resolution and the various problems involved in drafting and negotiating international contracts. He has been the chairman of a number of working groups preparing drafts for the many model forms of the ICC. Accordingly, the book deals with these models, some more fully while others merely have been mentioned.

As a practicing lawyer, the author knows the misunderstandings and pitfalls, such as mistakes with respect to the scope of the applicable mandatory law and the general policy in various jurisdictions. In particular, he points at the different aspects of laws protecting the weaker party – such as commercial agents and in some cases distributors – and the different attitude to clauses determining payment in case of delay (s. 32-33), where so-called penalty clauses are invalid in the Anglo-American jurisdictions unless they appear as a pre-assessment of the economic loss following from delay in delivery (so-called liquidated damages clauses).

Generally, the style of presentation is very appropriate for the intended readers. One would have thought that matters relating to choice of law and jurisdiction are too technical to be of interest to traders. However, practical aspects must be borne in mind. Out of the many disputes which

may arise the great majority are usually settled amicably between the parties, particularly in relationships which are intended to continue over a longer period of time. Nevertheless, choice of law and jurisdiction may well place a party enjoying the benefit of the application of the law and jurisdiction of its own country in a good position when the parties discuss a settlement. The other party may have to engage a local lawyer and, in some cases, get opinions on the legal issues involved under the foreign law. Needless to say, this may well influence the settlement, where it would be difficult for the party with the upper hand not to exploit the situation. On the other hand, it is pointed out that in some cases it may indeed be better for a party to choose a foreign law, for instance where a principal would benefit from the weaker protection accorded to distributors under the foreign law as compared to the law of his own country.

The book deals with many interesting issues and, in a book review, it would be difficult to deal with them all. The choice between national law as distinguished from general principles of law – the so-called *lex mercatoria* – is particularly important. It is a fallacy to believe that the choice of a national law would always give the parties better certainty when a dispute arises. There are few national laws which deal with commercial matters exhaustively. The many gaps existing in national laws would have to be filled and, indeed, general principles of law recognized in most jurisdictions would sometimes provide better certainty. The supremacy of national law is obvious, where the law purports to protect the weaker party in the contractual relationship, such as consumers, employees and commercial agents. In other cases, it may well be better to avoid a national law altogether so as to achieve better neutrality between the contracting parties. Arbitrators acting under the ICC Rules of Arbitration, are expressly authorized to apply any rule of law which they find appropriate, when the parties themselves have not chosen a particular national law (Art. 17.1).

Even though it may be appropriate in a contract to refer to a set of rules expressing general principles – such as the UNIDROIT Principles of International Commercial Contracts – the author points at some problems where, in his view, the rules could be less appropriate. Quite rightly, he suggests that there is a hierarchy between the various rules to be applied. First the contract clauses followed by general principles, then the trade usages and finally the UNIDROIT Principles (s. 213). This is a model which is used in the latest version of the ICC Agency Model Contract. However, he stresses that some of the articles of the UNIDROIT Principles may work to the disadvantage of a party as they may offer a too easy escape from contractual obligations.

He points at Article 3.10 dealing with excessive and unfair advantage and stresses that “a businessman who claims to have made a bad deal because of his inexperience or lack of bargaining skills” should not be accorded the benefit of Article 3.10 which “in its present wording (is) unacceptable for international trade” (s. 64). Also, he makes similar remarks with respect to the provisions on hardship contained in Articles 6.2.1-6.2.3 of UNIDROIT Principles. Indeed, the latter provisions should require a clear contractual intent and should not be implied where the parties have not agreed, e.g. to use the ICC hardship clause (appended to the book s. 44). He makes a similar observation with respect to Article 2.1.20 on “surprising terms”, as a businessman should not be accorded the possibility to claim surprise as an excuse when the contract turns out to be unfavorable for him. Although I agree with these observations, I think that a distinction has to be made between contract terms and law as policy. True, if UNIDROIT Principles would be regarded merely as a gap-filling mechanism for incomplete contracts, the observations by the author are wholly appropriate. However, UNIDROIT Principles go much further than that, as do the Principles of European Contract Law (PECL). Provisions dealing with “gross disparity”, “hardship”, or “surprising terms” are sometimes needed to protect a party in a contractual relationship. Also, if a national law were to be chosen instead of UNIDROIT Principles, there would be similar provisions protecting contracting parties.

Although arbitration would in most cases be preferable in international commercial contracts, the author points out that, in some cases, it may well be better to choose an appropriate court for particular disputes. This possibility may be further enhanced by the 2005 Hague Convention on Choice of Court Agreements (not yet in force). The coming into force of the convention would in a way establish an even playing field between arbitration and court proceedings, since arbitration awards, as distinguished from court awards (outside EU), would nowadays be enforceable in most countries under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The 2005 Hague Convention would compel courts in convention countries not only to dismiss an action where the parties have chosen another forum but also compel the courts to take jurisdiction according to the reference made by the contracting parties. Also, and more importantly, the court award would be enforceable in all convention countries.

The author addresses a number of important contract law matters, such as the possibility to make contracts entered into orally binding by performance even though the contract requires written form. He also deals with matters relating to the pre-contractual stage – such as the problem of so-called letters of intent – and with self-sufficient contracts believed to be standing alone without support by an applicable law or some gap-filling mechanism (s. 165-170). He also deals with the problem where both parties make reference to their general conditions of trade (the so-called “battle of forms”). He points out that an application of Article 19 of the UN Convention on Contracts for the International Sale of Goods (CISG) would contain a solution if it were to be applied. In this case, it could be held that a party referring to his general conditions, after having received an offer from the other party containing a reference to its general conditions, would succeed in the absence of an objection by the first party (the theory of the so-called “last shot”). Nevertheless, it must be underlined that the application of article 19 is difficult, as it contains an exception where the counter-offer contains materially different terms (the so-called “materiality test”). Also, it may well be inappropriate to find a solution at all in an article dealing with non-conforming acceptance. He therefore mentions that, alternatively, you could choose the so-called “knock-out principle” contained in UNIDROIT Principles of International Commercial Contracts Art. 2.1.2 meaning that both references take effect but only in so far that the respective general conditions conform with each other.

The book contains valuable advice to parties negotiating a contract. Great care – in some type of contracts such as “distribution contracts” – should be taken to assess the legal framework and, in particular, the existence of mandatory protective law in the various jurisdictions. In addition, a proper analysis must be made of the “contractual setting”. Matters which should be observed could relate to important questions such as the effect of clauses on liquidated damages (s. 185). Are they exhaustive or are there additional remedies when these have not been cut off by clear wording? What is the effect of a failure to meet a minimum sales provision in a distributorship contract? Is it only termination or could damages be claimed in addition? Would a party have to object to a non-conforming confirmation in writing in order to avoid that the contract is deemed to have been concluded on the basis of the confirmation (cf. UNIDROIT Principles of International Commercial Contracts Art. 2.1.12 and PECL 2:210)? Would performance or other type of conduct imply acceptance of a non-conforming acceptance or would acceptance by such conduct be sufficient to validate a contract which has not been entered into in writing although prescribed by law? (s. 200).

There can be no doubt that anyone engaged in drafting and negotiating international commercial contracts, particularly in the European Union, would greatly benefit from the book both with respect to the sensible advice and the solutions of problems arising in the implementation and interpretation of such contracts.

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Jan Ramberg -- Professor Emeritus, Vice-President of the ICC Commission on Commercial Law and Practice 1996-2007, Chairman of CISG Advisory Council 2004-2007, Author of i.a. *ICC Guide to Incoterms 2000* and *International Commercial Transactions* (3 ed. 2004).