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Chapter 1 : Michael Joachim Bonell

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The proposed code included two parts: Years later, the scope of the project was substantially altered and work then focused on the preparation of what is now known as the "Principles of International Commercial Contracts. Rather, it resumes work on a "world code of international trade law" advocated by Clive M. Schmitthoff some twenty years ago. The last two decades have seen the worldwide success of the United Nations Convention on Contracts for the International Sale of Goods CISG and also the adoption of additional international uniform laws dealing with topics within specific areas such as transport law, banking law, arbitration, e-commerce, and bankruptcy. The proliferation of specific uniform laws makes the idea of combining these specific pieces into a unified whole more compelling. Since most of the recently adopted instruments have been prepared under the auspices of UNCITRAL, [7] its Secretary has taken the initiative to re-open discussion on the codification of international trade law. Instead, I will concentrate on two main aspects: Not a "Commercial" Code Like the U. Another, and more important reason, is that the traditional distinction between "civil" and "commercial" parties and transactions has become somewhat outdated and remains under challenge even in those legal systems that still hold to the distinction. Whether the so-called consumer contracts should be covered remains to be decided. In any case, the Global Commercial Code should avoid interfering with existing or future domestic rules for the protection of consumers. Not a "Code" "It is fair to say that the draftsmen of the [U. They wanted to correct some false starts, to point the law in the indicated directions, and to restore the law merchant as an institution for growth only lightly kept in bounds by statute. Most of these rules already exist in the form of separate international conventions or model laws [21] and others are added for the occasion. Instead, these rules must be coordinated not only in terms of formal presentation and terminology [23] but also to some extent, in content. The individual states were free to adopt the model law as stated or with modifications. In fact, many states have adopted variations of the model law, but most of the variations are of little or no significance. First, sovereign states are less likely to adopt such a far-reaching instrument in its entirety without modification. Second, at the international level, there are marked differences in the legal traditions of the affected nations. In addition, some nations are parties to other regional or universal uniform laws covering the same topics as the Global Commercial Code. These nations may prefer to retain the other uniform laws and exclude the entirety of corresponding chapters of the Global Commercial Code. UNCITRAL should work in close cooperation with the international organizations and formulating agencies that [page 93] have prepared uniform law instruments that may become part of a Global Commercial Code. The establishment of a "Code Coordination Council," composed of independent experts and functioning as an advisory body, would seem to be particularly appropriate. This limited scope, already evident in most of the existing international uniform law instruments in the field of trade law, would be even more appropriate with respect to the Global Commercial Code. To expect nations to agree on and adopt an instrument of this magnitude, which is intended to replace domestic laws in their entirety, would be absolutely unrealistic and politically counterproductive. Restricting the Global Commercial Code to cross-border transactions is appealing for many reasons. For instance, transactions between parties of different countries create confusion and conflict as to the applicable law governing the transaction. This situation exists in the world of electronic commerce. Although transactions occurring over the Internet may be considered "virtual," in that national boundaries have little or no effect on the transaction, these transactions often involve parties who reside in different countries. Electronic commerce should not be considered completely detached from the territory of individual countries and operating exclusively in a "lawless" Cyberspace. Nations are generally less determined to impose their own laws to ensure that their own nationals have the same opportunities enjoyed by their foreign competitors. This is generally true for all countries with a planned economy. For

obvious reasons, nations cannot impose their own regulations, which are based on a more or less centralized system of production and distribution, on their foreign trade partners. Consequently, these nations have no other choice than to accept the idea of separate legal regimes governing domestic and international transactions. For example, the English and German legislatures have taken a less rigid position on the unfair contract terms in international trade contracts and a more liberal attitude towards "international commercial arbitration. For instance, a general provision could state that the entire Code applies whenever a single transaction "involves a choice between the laws of different States" [33] or "affects the interests of international trade" [34] or alternatively, individual chapters could apply based on specific transactional criteria. On the other hand, parties to international transactions should be free to exclude the application of the code in its entirety. The remaining issue is whether the parties should be permitted to make a purely negative choice, by deciding that they do not want the Global Commercial Code to apply, or whether they should be required to make a positive choice, by excluding the application of the Global Commercial Code only on condition that they indicate the domestic law applicable in its place. As a model, Article 7 1 of the CISG states, "[i]n the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application. An example is found in Article 7 2 of the CISG, which states that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based. One possibility would be to resort to the general contract law of the individual States, as does the U. The advantage is that there are solutions to most issues since only domestic laws provide a complete system of formally binding principles and rules in the field of contract law. However, one disadvantage is determining which of the conflicting domestic laws applies in each case. Another and more important disadvantage is that the differences in content between the various domestic contract laws in sovereign States are far more marked than those between the state laws in the United States. Consequently, the solutions may well vary considerably depending on which domestic law is applicable in a given case. Varied solutions seriously jeopardize the ultimate goal of the Global Commercial Code - uniformity. Another possibility would be to seek recourse by "internationally accepted principles of contract law" as the supplementary source of law of the Global Commercial Code. The obvious advantage is to obtain a maximum degree of uniformity, by avoiding the application of principles and rules of domestic law to transactions otherwise governed by the Global Commercial Code. However, the notion of "internationally accepted principles of contract law" is rather vague. Decisions would emerge on an ad hoc basis with the potential for unpredictable and arbitrary results. These Principles cover important issues that are normally neglected in international uniform law instruments, such as contract formation, validity, interpretation, performance, non-performance and remedies. Despite the fact that these Principles are nonbonding, they have gained worldwide recognition in academic circles and in practice, in only six years. On that occasion, Ole Lando recalled the controversy between the German jurists Thibaut and Savigny, which occurred at the beginning of the nineteenth century. Lando recognized that even today there are those who, like Thibaut, strongly advocate the idea of the codification of private law in Europe, and those who, like Savigny, object that such an ambitious project is questionable from a political point of view. While this may appear to be a contradiction, it is not. What is envisioned at the international level is not a comprehensive code intended to replace the existing national civil codes. Instead, the proposed Code will be an integrated body of rules relating to the most important commercial transactions, leaving the general contract law to be supplemented by other more flexible instruments such as the UNIDROIT Principles of International Commercial Contracts.

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