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INTERNATIONAL SALE OF GOODS

Observations of representatives on the draft of a Uniform Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods

Note by the Secretary-General

INTRODUCTION

1. The Working Group on the International Sale of Goods, at its eighth session (New York, 4 to 14 January 1977), invited representatives of Member States and the observers who attended that session to submit to the Secretariat their observations on the text of the draft Uniform Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods which has been prepared by the International Institute for the Unification of Private Law (UNIDROIT). 1/

2. At the time of issuing this note, observations had been received from the representative of the United Kingdom of Great Britain and Northern Ireland. The text of these observations is set out in an annex to this note.

1/ See report of the Working Group on the International Sale of Goods on the work of its eighth session (A/CN.9/128), para. 174.

Annex

OBSERVATIONS OF THE REPRESENTATIVE OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON THE UNIDROIT DRAFT ON VALIDITY

1. These observations will be largely confined to articles 6, 10 and 11 of the draft because these are the key articles upon the acceptability of which everything else depends. For the difficulties which are presented by the other articles, reference may be made to the Secretariat's commentary (A/CN.9/WG.2/WP.26/Add.1).

Article 6

2. This article lays down three sets of conditions which must be fulfilled at the time of the conclusion of the contract in order to enable a party to avoid a contract for mistake. Each set of conditions presents particular difficulties and therefore requires individual consideration.

Article 6 (a)

> (a) the mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known;

3. There are two difficulties in this clause. The first lies in determining the meaning to be given to the phrase "in accordance with the above principles of interpretation", and the second in reconciling the apparent meaning of the phrase "such importance that the contract would not have been concluded on the same terms ..." with the meaning which the Max Planck report shows that it was intended to bear.

4. In giving a meaning to the phrase "in accordance with the above principles of interpretation" (i.e. those in article 3 and article 4) one must distinguish between the mistake and the object of the mistake. The mistake is the mistake of one party, though it may (but need not) be shared by the other party; see article 6 (c) ("the other party has made the same mistake") and article 7 (2). The "above principles" can therefore play no part in determining whether there has been a mistake, because those principles are concerned only with the interpretation of a common intent. On the other hand they do play a part in relation to the object of the mistake. This object must have been "of such importance that the contract would not have been concluded on the same terms if the truth had been known", and in order to determine whether the contract would have been so concluded it is not sufficient to look simply to the probable

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attitude of the mistaken party, i.e. one must not ask whether he himself would have accepted (or offered) the same terms (in this respect the Secretariat's commentary is, according to the interpretation of the Max Planck report, in error). One must look, in the first place, to the actual common intent of both parties (article 3 (1)). But this, as the Max Planck report accepts, will rarely have existed, i.e. it is very unlikely that the parties will have asked themselves at the time of the conclusion of the contract which elements were of the necessary importance; and if they did ask themselves the question, it is very unlikely that they arrived at an agreed answer. (Indeed, if they did agree on the answer, the question of mistake will presumably not arise, since the situation will be governed by that agreement). If there is no such common intent, one must look (article 3 (2)) to what the mistaken party thought, but only if the other party knew or ought to have known what that was. But, as the Max Planck report once again accepts, this condition is very unlikely to be satisfied, and one is left with article 3 (3): "the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties".

5. The meaning of article 6 (a) is therefore that the mistaken party's mistake must be of such importance that reasonable persons in the same situation as the parties would not have concluded the contract on the same terms if they had known the truth. And it is here that the central difficulty of the clause lies. On the one hand the test thus formulated is very artificial: it presupposes that for any given set of circumstances there is an objectively ascertainable set of terms on which reasonable men would agree. And on the other hand the formulation is much too wide, as the Secretariat's commentary makes clear. Almost any difference between the circumstances as they were thought to be and the circumstances as they in fact were might have led reasonable men to make some modification, even if only a small one, of the terms on which the contract was concluded.

6. It is, however, evident from the Max Planck report that this very wide interpretation was not intended. For the report takes it for granted that a mistake as to the value or the marketability of the goods will not normally be sufficient. And yet reasonable persons in the same situation as the parties would certainly not have expected the price to be the same if the value of the goods had been different. The key to the restrictive interpretation adopted by the Max Planck report is the importation by the report of the additional requirement that the mistake must be "essential", or, to be more precise, the importation of the gloss that the only mistake which can be "of such importance that the contract would not have been concluded on the same terms if the truth had been known" is a mistake which, having regard to usage and commercial practice, reasonable persons would consider to be "essential". To this there are two objections. The first is that if this is the meaning intended, it should be expressed in the text; the second is that even if it were expressed it would introduce a new element of uncertainty. In this connexion it is worth noticing that the Italian Civil Code proceeds on somewhat similar lines in that there is a requirement that the mistake be essential and what is essential is defined in

terms, inter alia, of what is "determinative of consent". a/ But even though the test is much more closely defined, being limited to mistakes as to a "determinative" quality of the thing or the other person, it has given rise to difficulties of interpretation. The meaning given to it is, according to a leading commentary, "not what a superficial reading suggests". b/ The qualities to which the courts have regard must, it has been said, c/ be "those which by the nature of the thing or by express agreement are to be considered essential to the social function or the economic purpose of the thing". In an international context a test of this kind would give rise to wide variations in application.

7. In short, the objection to article 6 (a) as it stands is that it is unacceptably wide, and the objection to it if it were to be reformulated to express what is contained in the Max Planck report is that the criterion would be so variously construed that no uniform body of interpretation would develop.

8. An illustration of the scope for divergent interpretations is provided by cases of mistake as to value or as to marketability. As is remarked below, (see para. 16) it is difficult to find realistic examples which would not be excluded by one or more of the other provisions of the draft, but one may instance two conceivable fact situations:

(a) A contract for the sale of a quantity of copper is concluded in ignorance of the fact that the Government of State X has just announced the release of a large amount of the metal from its strategic stocks. The market price falls in consequence.

(b) An importer in State A contracts to buy from a manufacturer in State B a quantity of souvenirs of the President of State B, who is about to celebrate his jubilee and who enjoys a considerable popularity in State A. Unknown to both parties the President has died at the moment of conclusion of the contract.

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a/ Article 1429: Mistake is essential (1) when it relates to the nature or the object of the contract; (2) when it relates to the identity of the object of the performance required by the contract or to a quality of that object which, according to common understanding or in relation to the circumstances of the contract, should be considered to be determinative of consent; (3) when it relates to the identity or qualities of the person of the other party, provided that one or the other were determinative of consent; (4) when, in the case of mistake of law, it was the sole or principal reason for the contract.

b/ Mirabelli, Commentario sul Codice Civile, 2nd ed., IV.2 ad loc.

c/ Rassegna di Giurisprudenza sul Codice Civile, ad loc.

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If one applies to these cases the test formulated in article 6 (a) as it stands, one must surely say that a reasonable buyer in case (a) would not have bought at the same price, and a reasonable seller would not have expected to sell at the same price. And similarly in case (b) a reasonable buyer would not have bought at all and a reasonable seller would not have expected to sell if it had been known that the President was dead. The Max Planck report, as has been noted above, takes it for granted that both cases would be excluded, apparently on the ground that the mistake would not be regarded in commercial usage as "essential". But it is difficult to see that there can be a usage as to whether a mistake is essential or not. It is no doubt true that no system of law would allow these mistakes to vitiate the contract, but this is either because the definition of mistake is so restricted as to exclude such matters (as in the Italian Civil Code referred to above d/) or because a specific remedy for lesion is taken to exclude any other remedy for mistake as to value.

Article 6 (b)

> (b) the mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance;

9. The difficulty here, as the Secretariat's commentary indicates, is that the concept of assumption of risk, without further elaboration, is very vague. The Max Planck report suggests that the mistaken party assumes the risk if at the time of the conclusion of the contract "he does not fully know all the relevant facts", with the result that the contract is speculative. But this hardly helps. The most obvious examples of speculative contracts are those in which some of the relevant facts are not known because they lie in the future and each party therefore makes his own guess as to what they will be (e.g. future movements of prices). But mistakes about future facts are specifically excluded by article 8. The facts to which the Max Planck report refers must therefore be present facts. But whenever a party is mistaken (unless the mistake is one of law) he necessarily "does not know all the relevant facts"; otherwise he would not be mistaken. What the Max Planck report means presumably is that the mistaken party "does not fully know all the relevant (present) facts and is aware that he does not know them". But in that case he is not mistaken. An example is provided by a recent French case e/ in which the buyer, a firm which made ladies' clothes, bought some velvet furnishing material which it intended to make into trousers. The seller knew this, but gave no undertaking as to the cloth's suitability. The

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d/ Neither value nor marketability are a "quality of the object". Similarly, the German Civil Code confines mistake (in this context) to "qualities of the thing which are regarded in ordinary dealing as essential" (B.G.B., para. 119.2).

e/ Cass. com. 4 July 1973, D.1974.538.

cloth proved unsuitable and the buyer sought to avoid the contract on the ground that he was mistaken as to a "substantial quality" in view of which he had entered into the contract, viz. the suitability of the cloth for trousers. It was decided (and the decision was upheld) that the buyer was not mistaken, since he was an expert and knew that the cloth was furnishing material and might not be suitable for trousers.

10. It would seem therefore that the test proposed by the Max Planck report for determining whether the mistaken party has assumed the risk of his mistake is unhelpful. But unless the concept of assumption of risk is given some closer definition (which does not appear easy) it is likely to be used by courts indiscriminately and unpredictably to exclude plaintiffs who are considered to be in some way undeserving.

Article 6 (c)

> (c) the other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

11. Here, as the Secretariat's commentary points out, the questions whether (i) a mistake was "caused" by the other party, or (ii) the other party's failure to disabuse the mistaken party of his mistake was contrary to "reasonable commercial standards etc." seem certain to give rise to wide divergences of interpretation. In both cases the main problem is that of silence. In case (ii) the question whether the party "ought to have known" and, more particularly, the question whether his silence was contrary to "reasonable commercial standards etc." pose difficult questions because commercial standards in this sphere vary according to the strength given in a particular legal system to the maxim caveat emptor. But the difficulty is greater in case (i). Causation is a notoriously elusive concept. The Max Planck report refers to the Anglo-American doctrine of innocent misrepresentation, and this would provide a workable rule, but it requires a positive representation, except in special circumstances which create a duty to disclose, i.e. a duty not to remain silent. The concept of causation may, however, embrace more than this. For the Max Planck report says that "silence of the co-contractant may cause the mistake", and this is not confined to such special circumstances (or to cases of bad faith). For the report adds that "/e/ven though /the co-contractant/ may have been totally free from blame, he caused the mistake if the course of events leading to the mistake originated in his sphere". It would seem therefore that, on the view taken by the Max Planck report, if one party's failure to speak is misunderstood by the other party as a representation and the second party in consequence makes a mistake within the meaning of article 6 (a), he may avoid the contract even though the first party had no reason to foresee the misunderstanding.

12. It is not only in cases of silence, however, that the elasticity of the concept of causation may cause difficulties. For example, the Max Planck report,

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in its discussion of article 7, says that if an offeror asks for the acceptance to be sent by telegram and, the offeree having complied with this request, there is a mistake in the transmission of the telegram, the offeror may be considered to have caused the mistake. Again, the Max Planck report, in its discussion of the present clause, says that "/m/ere puff used in advertising or in negotiations in itself is nowhere considered to be a representation", and this is no doubt correct, but the test adopted in the draft text is not that of representation but that of causation, and if causation is given as wide an application as it is in the examples so far considered, it is difficult to see why a puff should not be said to have caused a mistake.

13. In short, this clause also is likely to give rise to a wide variety of interpretation according to the force given by different legal systems to the maxim caveat emptor and the concept of causation.

Article 10

1. A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

2. Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be avoided for fraud if the other contracting party knew or ought to have known of the fraud.

14. The crucial difficulty lies in the first sentence of clause 1 and its relationship to article 6 (a). If article 6 (a) bears the restricted interpretation which is given to it by the Max Planck report, the first sentence here is acceptable. For on this interpretation, if the mistake was not caused intentionally the mistaken party may only avoid the contract if he can show that the mistake was "essential", whereas if the mistake was caused intentionally, even an "inessential" mistake will be sufficient, provided that it did in fact induce the mistaken party to conclude the contract. But if article 6 (a) bears the meaning which a normal interpretation would give to it (see above, paras. 5 and 8), the formulation of the first sentence here will lead to obviously unsatisfactory results. For on this interpretation the mistaken party who invokes article 6 (a) need only show that some term of the contract would have been different if the mistake had not been made, whereas under article 10 he must show that the contract would not have been concluded at all. See the Secretariat's commentary on this point.

Article 11

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

15. As the Secretariat commentary points out, this very general formulation leaves many questions unanswered. The result will inevitably be that national courts will interpret the article according to the principles which their own systems have adopted in this area, and there will in effect be no uniform law. If this is to be so, it is surely better that there should not be even the appearance of such a law.

Conclusion

16. The observations made above have in common the criticism that the draft is cast in such general terms that no uniform interpretation is likely to emerge, and that, in the case of article 6 (a) in particular, it is capable of bearing an intolerably wide meaning. And yet, paradoxically, this potentially very wide rule is subjected to a number of restrictions (article 6 (b), (c); article 8, and especially article 9 f/ and article 16 g/) which, at least if they are strictly interpreted, make it very difficult to conceive of circumstances likely to arise in international trade in which a plea of mistake could be successfully made.

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f/ "The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

It is not suggested that this restriction is undesirable. On the contrary, whether or not the Uniform Law includes any provisions on mistake, it is surely essential that it should contain something on the lines of this article to prevent a buyer from escaping from the restrictions imposed on the remedy for non-conformity by having recourse to a plea of mistake.

g/ "1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

2. The same rule shall apply in the case of a sale of goods that do not belong to the seller."