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BOOK REVIEW

Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria

REVIEWED BY FRANKLIN C. JESSE, JR.*

DRAETTA, UGO, RALPH B. LAKE AND VED P. NANDA, BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS, Butterworth Legal Publishers, St. Paul (1992); (\$100.00); ISBN 0-88063-750-1; 214 pp. (hardcover).

Breach and Adaptation of International Contracts analyzes various legal principles that are applied to international contracts to deal with situations in which a contract's performance does not develop as expected. It attempts to discuss whether these principles, which are common within national legal systems, are adapted in unique ways in the international arena by drafters of international contracts or by those who deal with international contractual problems after they arise.

In searching for these unique international adaptations, the authors first compare the same principles in civil and common law systems. They then attempt to determine the extent to which these principles have been "delocalized" in the international setting, i.e. delocalized by embodying modifications to the national rules in a way that transforms the principles into ones that are to some extent autonomous and not reliant on a national system for enforcement. The authors attempt to determine whether and to what extent a separate body of "delocalized" or international contract principles has developed in the international law context, calling it the *Lex Mercatoria*, or new merchant law.

The authors lay the groundwork for their analysis by identifying the special aspects of international contracts that distinguish them from wholly domestic contracts. This brief, but cogent discussion sets the stage for the author's repeated observations that established domestic legal

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principles in any national system do not adequately address the circumstances that are unique in trans-national situations.

The first chapter also introduces the concept of the *Lex Mercatoria*, the notion that business practices can evolve independently of national legal systems to eventually comprise a system of rules that are autonomous in their existence, and in their enforcement, from the legal systems of the contracting parties. The authors note that elements of such a law merchant can be found in the development of uniform international laws (e.g. the Vienna Convention on International Sales), standard form international contracts or clauses (e.g., INCOTERMS of the International Chamber of Commerce), special standard trade practices within industries (e.g., I.C.C. Uniform Customs and Practices for Documentary Credits), and arbitral decisions that are not necessarily based on national laws (e.g., arbitrators exercising their power as *amiable compositeurs*).

The book identifies many standard legal concepts that relate to contract situations in which performance is not complete. For example, the authors discuss the elements of breach, the remedies for breach, the quantification of damages, the limitations of liability due to force majeure or other reasons, and the contractual self-protections against breach. For each concept, definitions and treatment of the principle within the common law and civil law systems of the *Lex Mercatoria* are provided to determine to what extent extra-national definition and treatment (usage) patterns can be discerned.

For example, Chapter Three examines principles used in different legal systems to quantify the measure of damages once entitlement to damages due to breach has been established. The authors discuss common law principles/approaches. Within that discussion, the authors distinguish the similar approaches under English and United States law. Civil law principles for damage assessment are then discussed and contrasted with approaches under English law.

Having laid this groundwork, the authors then attempt to determine special international trade practices that have evolved to quantify damages once entitlement has been established.

The authors discuss the use of terms such as "consequential damages" and "indirect" damages. Several interesting observations are made regarding confusions in meaning that can result from the use of one of these terms outside of the national legal system in which the term's meaning has been developed, e.g. use of "consequential damages" outside the context of the United States legal system. The authors draw some conclusions in this chapter as to basic rules that may be derived by examining international arbitration decisions.

In other chapters, the authors analyze numerous other principles that relate to incomplete fulfillment of contract requirements. For each chapter, the same approach is taken as in Chapter Three: definition of the principle, discussion of its special importance in international situations, treatment of the principle under common law and civil law, and analysis

of the principle to discover if it has been modified in definition or application in the international context, thus supporting the notion that there is indeed an evolving *Lex Mercatoria* that is independent, to some extent, of any national legal system.

Although the book is largely academic and perhaps theoretical in its style, it does have practical value to an international law practitioner. It identifies approaches that have been taken in contract drafting to cope with the special qualities of an international contract setting. It illustrates the difficulty of achieving a true meeting of the minds when contracting parties come from different legal systems, systems which do not use the same approaches or definitions when addressing a given issue.

The authors' suggestion that there are unique common threads of international contract practices and principles is perhaps more a matter of style than a matter of practical substance. Each reader of this book can evaluate the evidence presented and draw his or her own conclusions. The benefit of the authors' presentation lies more in their analysis than in their conclusions. The authors' tendency to draw conclusions from relatively scant evidence of published arbitral decisions detracts somewhat from the credibility of their insightful observations.

The book distills many difficult concepts and distinctions into relatively brief and abstract discussion. Expanding the explanations of the principles addressed would enhance readability. Presenting more case illustrations of the principles addressed would also greatly assist the reader in grasping the ideas presented. As written, the book requires more analytical energy from the reader than many would care to expend.

The book should be of particular interest to academicians who have an interest in international trade or contract issues and particularly those who follow the debate over the existence of a *Lex Mercatoria*. However, it should also be of interest to the practitioner who has more than a superficial interest in international contract issues. Some ideas presented in the book are obviously those of writers with real and extensive practical international trade law experience. The authors' presentation will challenge reading practitioners to re-evaluate some of their approaches in dealing with day-to-day international contract issues.

All in all, the book contains an interesting blend of academic, theoretical and practical concepts. It succeeds in offering new insights for its readers, regardless of the varied perspectives those readers possess.

