THE CONVENTION ON INTERNATIONAL SALE OF GOODS AND BRAZILIAN LAW: ARE DIFFERENCES IRRECONCILABLE?

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I. INTRODUCTION

As of February 2005, sixty-four States had adopted the United Nations Convention on Contracts for the International Sale of Goods of 1980 (Convention),[1] as their law on the international commerce of goods among parties having places of business in different States.[2]

Brazil is not among the countries that subscribed to the Convention. The reasons why it has so far abstained from joining the Convention are not officially known, but word of mouth among Brazilian scholars and legal practitioners suggests that, like in a number of other States, the disinterest in the Convention results from a mixture of diffuse factors, some of which may be of a legal nature, while some may be due to idiosyncrasies of the Brazilian legal community, the business sector, and the Government.

The following comments focus mainly on certain provisions of the Convention and their correlatives in the Brazilian law on the sale of goods, with the purpose of sensing how far apart they are from each other. Ultimately, an evaluation of the prospects for the Brazilian adhesion to the Convention will also be submitted.

II. THE NATIONAL PARADIGM

Because there are multiple laws potentially applicable to a given international contract, each party tends to propose its own national law as the one applicable to that contract. The preference for national law is generally

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1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18, Annex 1, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668 (Apr. 11, 1980), *available at* http://www.uncitral.org/en-index.htm [hereinafter CISG].

2. For an updated list of signatory States, see Status: 1980—United Nations Convention on Contracts for the International Sale of Goods (2005), *at* http://www.uncitral.org/en-index.htm.

due to the respective party being more knowledgeable of it along with a certain degree of mistrust in foreign legal standards.

The selection of the applicable law is done either directly, by a choice of law provision, or indirectly, through the choice of forum clause, so that the contractual obligations will ultimately be governed by a set of rules presumably agreed upon by the parties. In both cases, however, the choice will be determined by the bargaining power of the parties, or by the rules of private international law of the forum State.

The assumption that a State preserves the application of its national law by not adhering to an international normative instrument such as the Convention is a *non-sequitur*. Indeed, because of the above considerations, one cannot assure that the national law of a non-signatory State will apply to contracts involving the commercial transactions engaged in by its nationals.

Notwithstanding that, when approaching international normative instruments such as the Convention, legal communities of all countries tend to use their own national laws as a paradigm. This may be seen in a number of scholarly comments, comparing certain provisions of the Convention with those of national laws on the sale of goods,[3] with a focus on the features that depart from their respective legal traditions.

Indeed, the analysis and comprehension of an international normative convention starts with the confrontation of its provisions with the domestic law of the analyst. He or she will attempt to perceive the ideology that inspired the drafting of the instrument by comparison to the standards in use by his or her own legal system. This is how jurists have approached foreign laws for centuries.[4]

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3. *See inter alia* Paul Lansing & Nancy R. Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 N.C. J. INT'L L. & COM. REG. 63 (1980); B. Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 187 (1988); Anette Gärtner, *Britain and the CISG: The Case for Ratification—A Comparative Analysis with Special Reference to German Law*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 59 (Pace Int'l Law Review ed., 2001), *available at* http://www.cisg.law.pace.edu/cisg/biblio/gartner.html#*; John McMahon, *When the U.N. Sales Convention Applies and Some of the Reasons Why it Matters to You and Your Clients* (*presented* May 23, 1996), *available at* http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html; Jacob B. Ziegel, *The UNIDROIT Contract Principles, CISG and National Law*, *available at* http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html; Allison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 9 (Pace Int'l Law Review ed., 2001); Monica Killian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. TRANSNAT'L L. & POL'Y 217 (2001).

4. On the mistrust of twelfth century Anglo-Saxon jurists in regard to foreign laws, and their pride in their own laws, see Leontin-Jean Constantinesco, *Traité de droit comparé*, L.G.D.J., Tome 1, at 73-74

Bearing that in mind, a comparison of certain salient provisions of the Convention with Brazilian contract law may illuminate the existing differences, and help to understand whether or not those differences are likely to impair the coexistence of national and international rules within Brazilian legal order.

III. BRAZILIAN CONTRACT LAW ON THE SALE OF GOODS

Before looking into Brazilian law on the sale of goods, it should be pointed out that it has recently undergone a complete overhaul, with the entry in force of a new Civil Code (New Civil Code),[5] on January 11, 2003. The new civil legislation replaced the Civil Code of 1916 as well as the Commercial Code of 1850, which became obsolete in view of the profound changes that occurred during the last century in the social and economic relations within Brazilian society. During such period, several hundred amendments were introduced in the former Codes, and an equally great number of special laws have been enacted, dealing with a myriad of aspects of societal relations (e.g., family, intellectual property, real property, civil liability, and companies, to cite just a few). In spite of that, principles of contract law in the field of sale of goods remained nearly untouched over the life of the old Civil Code (with the conspicuous exception of the Consumers' Defense Code, enacted in 1990).[6]

A. General Clauses

The New Civil Code introduced fresh concepts in Brazilian contract law. Two general clauses (*Generalklauseln*)[7] deserve special mention, because they were not spelled out in the former Civil Code neither in scattered legislation on civil nor commercial matters: one that states that freedom of contract shall be based upon and limited by the *social function of contract*,[8] and another that posits that, in the conclusion and performance of the contract, the parties shall observe the principles of honesty and good faith.[9] A corollary of the first

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(1972).

5. Código Civil [C.C.] Law n. 10.406 (Braz.).

6. Código de Proteçao e Defesa do Consumidor [C.D.C.] art. 8.078 (Braz.).

7. *See* Nelson Nery Junior, *Contratos no Código Civil—apontamentos gerais*, *in* O NOVO CÓDIGO CIVIL: ESTUDOS EM HOMENAGEM AO PROFESSOR MIGUEL REALE 408 (Ives Gandra da Silva Martins Filho et al. coords., 2003).

8. C.C. art. 421.

9. C.C. art. 422.

general clause is that no agreement shall prevail that contravenes the social function of property and of the contract, which is deemed to be a matter of public policy.[10] The corollary of the second general clause is that the concept of objective good faith has been erected as a requisite of every transaction governed by Brazilian law.[11]

From what has been said, one may conclude that party autonomy is no longer considered as a sacrosanct principle of Brazilian contract law. The notion of *contractual justice* superseded legal individualism, formerly the exclusive source of contractual obligations, and now prevails over the absolute application of the ancient principle of *pacta sunt servanda*. In so doing, the New Civil Code adopted certain concepts already found in the laws of a number of other States.[12]

The New Civil Code spelled out for the first time in Brazilian statutory law the concepts of *gross disparity*[13] and of *hardship*,[14] which Brazilian courts and scholars had long ago accepted as transplants from other national laws (such as those of France, Italy, Germany, Spain, United States, Chile, and the United Kingdom), and present also in the UNIDROIT Principles of International Commercial Contracts.[15]

B. Specific Issues

A closer look at a number of specific issues in the New Civil Code helps to test their consistency (or lack thereof) with the Convention. The following issues were selected among those that generally trouble practitioners when drafting, negotiating or litigating over international sales contracts: (i) formation of the contract, (ii) price and price reduction, (iii) additional time for performance, (iv) fundamental breach, and (v) specific performance.

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10. C.C. art. 2.035 (sole paragraph).

11. On the traditional approach to good faith by Brazilian law and jurists, see Judith Martins Costa, *Os Princípios Informadores do Contrato de Compra e Venda Internacional na Convenção de Viena de 1980*, *in* REVISTA DE INFORMAÇÃO LEGISLATIVA 115 a. 32 n.126 (1995).

12. The laws of Portugal, Germany, Italy, Hungary, Poland, Norway, Switzerland, Greece, Argentina, among others, admit the adjustment of contractual transactions, based upon the rule that good faith shall preside over the formation as well as over the execution of agreements. *See* NELSON BORGES, DA CLÁUSULA "REBUS SIC STANTIBUS" A TEORIA DA IMPREVISÃO (1988).

13. A *lesion* occurs when a person under extreme necessity or due to inexperience, undertakes an obligation manifestly disproportionate to the value of the other party's obligation. C.C. art. 157.

14. In contracts of continued or deferred performance, if the obligation of one of the parties becomes excessively onerous, with an extreme advantage to the other party, as a result of extraordinary and unforeseeable events, the debtor may request termination of the contract. C.C. art. 478.

15. UNIDROIT Principles of International Commercial Contracts arts. 3.10, 6.2 (2004).

i. Formation of Contract

In regard to contract formation, the Convention provides that "a proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."[16] The Convention's approach to contract formation in an offer to the public seems to be at odds with the Brazilian New Civil Code, which states, among other things, that an offer to the public shall be deemed a contract proposal if it contains the requisites essential for the contract, except where the opposite might result from circumstances and usages.[17] What constitutes a rule in the Convention, in the New Civil Code is the exception, and vice-versa.

One may argue that the standard incorporated in the Convention opens the possibility for the public to be misled into believing that the offer is a proposal, when it actually is not. However, in a scenario of international trade, where parties are generally merchants and misunderstandings should always be avoided, it would seem quite unreasonable to infer that a general offer should be read as a contract proposal (save, of course, where such intent clearly stems from the offer). Therefore, the solution presented by the Convention appears better suited to international commerce than that of the Brazilian New Civil Code.

ii. Price and Price Reduction

In what seems to be incoherent provisions, the Convention also speaks of the necessity of an expressly or implicitly fixed price (or a provision for its determination) for a proposal to be deemed *sufficiently definite*, while Article 55 seems to validate a contract which "does not expressly or implicitly fix or make provision for determining the price," in which case "the parties are considered . . . to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."[18]

An equally controversial provision exists in the Brazilian New Civil Code regarding price determination in a sales contract. The general rule is that a

16. CISG art. 14(2).
17. C.C. art. 429.
18. CISG arts. 14(1), 55.

sales contract is deemed perfected upon agreement of the parties on its object and price.[19] In the New Civil Code, the determination of the price may be left to a third party, to a stock market or to market price in a given date and place, or yet by reference to indices and parameters, provided that they are susceptible of an objective determination.[20] In addition to that, if the sale has been agreed upon by the parties neither fixing the price nor the criteria for its determination, it shall be deemed that the parties agreed to submit to the current price habitually practiced by the seller.[21] In other words, price determination as set by the New Civil Code may be inferred from factors other than the will of the parties, even without the express manifestation of the buyer.

Eminent scholars have produced differing interpretations about the interplay between Articles 14(1) and 55 of the Convention,[22] and the debate over this issue is far from pacified.[23] It is noteworthy, however, that a more liberal approach to price determination has been taken by both the Convention and the New Civil Code, meaning that a sales contract may exist even in the absence of a price directly or indirectly set.

The Convention permits the reduction of the price if the goods do not conform to the contract, if they become unfit for their intended use, or yet if their value is affected by a defect.[24] The New Civil Code maintained the old and traditional provision of the former Civil Code allowing for price reduction, but only where the goods delivered by the seller contain hidden defects which render them improper for their intended use, or decrease their value.[25]

Despite the discrepancies in the prerequisites for price reduction established by the Convention and by the New Civil Code, the solution made available in each norm is not opposed to the solution offered by the other.

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19. C.C. art. 482.

20. C.C. arts. 485-487.

21. C.C. art. 488.

22. *See* E. Allan Farnsworth, *Formation of Contract*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 3-1, 3-5 to 3-18 (Nina M. Galston & Hans Smit eds., 1984); Killian, *supra* note 3, at 237; FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 208-09 (1992); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 325 (2d ed. 1991).

23. *See* Helen Kaminski PTY. Ltd. v. Mktg. Austrl. Products, Inc., No. M-47 (DLC), 1997 U.S. Dist. LEXIS 10630, at *8 (S.D.N.Y. July 21, 1997).

24. CISG art. 50.

25. C.C. art. 441.

iii. Additional Time for Performance

The extension of time for fulfillment of contract obligations, an equivalent to the German-law institution of *Nachfrist*,[26] was one of the innovative solutions of the Convention, with a twofold purpose. First, it avoids the abrupt termination of the contract due to a default by either party to comply with the time initially agreed for performing the obligations,[27] and second, it demonstrates the contract breach, where a doubt might exist as to whether delay should be deemed a fundamental breach in a particular contract.[28]

No such doctrine exists in the Brazilian New Civil Code, in which the rule on the time for compliance is embodied in the old Roman dictum *dies interpellat pro homine*, i.e., where the contract states a given time for the obligation to be fulfilled, the mere lapse of such time is enough to characterize the breach. However, where the contract does not fix the time for the performance of the obligation, a notification to the party in delay is required to set the debtor officially in delay. Therefore, the solution provided by the Convention for the case of delay is not entirely unknown, although it goes beyond Brazilian law requirements and practices.

iv. Fundamental Breach

Article 25 of the Convention introduces the concept of *fundamental breach*, using a formulation that has attracted strong criticism, both in regard to its form and its substance.[29] Drafted in cryptic language, this provision seems intended to circumscribe the events of default committed by one of the parties to such things that would render the expectations of the other party entirely frustrated, and further, only if the defaulting party did or could foresee such a result.

Nothing similar to degrees of contract breach is found in the New Civil Code of Brazil. The general rule is that unfulfillment of obligations amounts

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26. Anette Gärtner contests the German origin of this legal doctrine. *See* Gärtner, *supra* note 3, at 43.

27. For Bernard Audit, "[f]or both practical and legal reasons, it is more important to avoid the rescission of contract in the context of international sales than in the setting of domestic transactions." Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, *in* LEX MERCATORIA AND ARBITRATION 173, 183 (Thomas E. Carbonneau ed., 1998).

28. *See* Williams, *supra* note 3, at 9-57.

29. Criticism has encompassed even the alleged misplacement of Article 25 in Chapter I of Part III, where it seems somewhat out of order. *See* ENDERLEIN & MASKOW, *supra* note 22, at 111.

to a breach, and the party in breach of its obligation is subject to pay damages to the other party, in addition to interest, monetary adjustment and attorneys' fees[30] (save for the case of a force majeure excuse). Moreover, the innocent party is entitled, at its option, either to terminate the contract or to require its fulfillment, in both cases together with damages.[31]

The position of the Convention and that of Brazilian contract law on this issue are quite far apart. The Convention language seems to grant the defaulting party a rather lenient treatment, making it extremely difficult for the innocent party to proceed to avoid the contract, unless the default is overtly undeniable, or if the contract clearly spells out the events of default.

One might reason that international sales contracts should not be easily avoided, due to the serious economic implications of avoidance.[32] While this may be true (and courts generally refuse to approve avoidance for minor deviations), it appears no less true that the innocent party must have effective means either to compel compliance by the defaulting party, or to avoid the contract.

v. Specific Performance

The compromise devised by the Convention drafters in the attempt to reconcile the common law and the civil law systems in regard to specific performance[33] ended up in an ambiguous formulation. The relevant provision of the Convention, instead of ruling on the rights and duties of the parties, addressed itself to the courts, stating that "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."[34]

Brazilian contract law as stated in the New Civil Code clearly permits a party to require the specific performance of a contract obligation unfulfilled by the other party,[35] in a move deemed to be progress in regard to previous rules which made specific performance rather exceptional. On this matter, the doctrine of the economic function of the law, according to which contract breach would be admissible if resulting in a more efficient allocation of

30. C.C. art. 389.
31. C.C. art. 475.
32. *See* Audit, *supra* note 27, at 183.
33. *See* Eric E. Bergsten, *The Law of Sales in Comparative Law*, *in* LES VENTES INTERNATIONALES DE MARCHANDISES (PROBLÈMES JURIDIQUES D'ACTUALITÉ) 13 (1981).
34. CISG art. 28.
35. C.C. art. 475.

resources,[36] or the common law tradition of damages as the sole compensation for a breach of promise,[37] would hardly reconcile with the general clause of *social function of contract*, now enshrined in the New Civil Code of Brazil.

Despite the ambiguity of Article 28 of the Convention, and regardless of the conceptual distinctions between the common law and the civil law approaches to the consequences of a breach of contract, the Convention would not impair the application of specific performance by Brazilian courts, who would be guided by the rules of domestic law on the sale of goods, thus allowing for specific performance also in an international sales contract. Therefore, no incompatibility is detected between the Convention and Brazilian national rules in this regard.

IV. CONCLUSION

This brief overview of certain Convention rules in comparison with the Brazilian New Civil Code provisions suggests that, notwithstanding the discrepancies that do exist between them, they are not of such extent as to represent a clash between the solutions offered by each one, to the legal problems of the sale of goods.

Moreover, one should bear in mind that the Convention aims at the discipline of international sales, thus leaving domestic relations on the sale of goods totally preserved. This is clearly an advantage, for States that join the Convention do not have to revoke or replace their internal rules in order to accommodate themselves to international legal practices.

Nothing in the Convention rules seems to offend fundamental principles of national contract law, so as to incite repeal by the Brazilian legal community. In fact, Brazilian scholars who have addressed the Convention have expressed no negative reaction to it in their writings—on the contrary, positive considerations are generally predominant.[38] Unlike what seems to be

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36. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE *passim* (1983).

37. As stated by Oliver Wendell Holmes, Jr.:

> *The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.*

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (Dover Publications 1991) (1881).

38. *See* NÁDIA DE ARAÚJO, CONTRATOS INTERNACIONAIS 133 (2d ed. 2000); IRINEU STRENGER, DIREITO DO COMÉRCIO INTERNACIONAL E LEX MERCATORIA 142 (1996); Patrícia Galindo da Fonseca, *O Brasil Perante uma Nova Perspectiva de Direito Mercantil Internacional*, 341 REVISTA FORENSE 193, 211

the case of the United Kingdom,[39] there is no hostility towards the Convention by lawyers, judges and politicians.

Why, then, has Brazil not joined the convention yet? A speculative answer would be that the forces that influence Brazilian policies on international trade—the business sector and academia—so far have not articulated a consensual view in regard of the Convention. Under those circumstances, the Brazilian Government may not consider that a legal framework for international sales is a priority for Brazilian foreign policy.

It appears, however, that time is ripe for the Brazilian adhesion to the Convention. The conformity to international legal standards in foreign trade is becoming gradually accepted by all sectors of Brazilian society, regardless of political shades and preferences, as there is an increasing consciousness that a body of law begins to exist, not aimed at a particular segment of the world economic forces, but at establishing an international paradigm,[40] favoring the development of international trade.

(1998).

39. *See* Williams, *supra* note 3, at 10.

40. For an analysis of a future global commercial law, see Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 99 (2001).