The Changing Landscape

Helping Companies Cope with Trade Law

By Jean-François Bourque

The international business student who left school some ten years ago without keeping pace with major developments in international trade law would need more than a short briefing. Many of the important rules which govern the day-to-day international transactions of private business have become effective only since 1988.

Consider the following major uniform rules for international contracts which recently have come into play:

- 1988: the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods entered into force. Some 50 States have ratified it and its 101 provisions are now the ground rules for international sales;
- 1990: the International Chamber of Commerce drafted the latest Incoterms (a new version is scheduled for 2000). Incoterms provide definitions of the most commonly used trade terms in foreign trade;
- 1994: the Hague Convention of 1978 on the law applicable to agency agreements entered into force;
- 1994: the International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts were published, representing a significant step forward in the globalization of legal thinking and practice;
- 1995: the two UNIDROIT Ottawa Conventions of 1988, on international leasing and international factoring, entered into force.

There has been a sea change in the landscape of international trade law. New ground rules govern contracts. Before, business transactions between private companies would be solely governed by a given national law. If a sales dispute arose between two companies established in two different countries, courts or arbitral tribunals would settle it in accordance with a national law, probably either that of the seller or of the buyer. In most cases, one contracting party would be less familiar with the applicable law than the other.

Today, there is a growing body of international uniform rules that govern private business relationships. Company managers (and their legal advisors) should be aware of the existence and basic content of these instruments because they are

shaping the fundamental rules for contractual dealings.

Legal competition between countries

Globalization has highlighted existing disparities between countries in their legal environments. A secure, stable and transparent legal environment is a competitive asset for nations; without it, they are unlikely to attract and retain business investments. Sixteen African states have tackled this problem by simply unifying all of their major laws relating to business, and by creating a Common Court of Justice and of Arbitration *(see articles on pages 22–25)*.

Out of the impressive 30,000 treaties registered at the United Nations (published in hard copy in over 1450 volumes at the rate of 60 new volumes per year), in addition to other sources, today there are about 300 major international legal instruments that govern international trade in areas such as transport, intellectual property, dispute resolution and contracts. These instruments are either model laws, international conventions or recognized trade usages and practices.

It is not a simple task for a national government to get a global picture of its status vis-à-vis these major legal instruments on international trade. One reason is that international trade conventions, model laws and trade usages are mostly developed by a multitude of specialized international bodies. These include the Hague Conference on Private International Law, the International Chamber of Commerce (ICC), the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Economic Commission for Europe (UNECE), the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on International Trade and Development (UNCTAD), the World Customs Organization (WCO), the World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO).

In order to assist governments and their business communities to assess their legal status in international trade, ITC has identified the most important of these instruments and is progressively making them available in three languages (English, French and Spanish), together with a brief presentation and list of adhering states, all in one Internet site, the Juris International database *(see pages 18–19)*. These instruments, however, are of little use without a harmonized effort to apply them.

Rationalizing intra-regional trade

If a problem arises between a seller from China and a buyer from Canada on the quality of textiles shipped to Vancouver, there is a high probability that the dispute will be governed by the 1980 Vienna Sales Convention which both Canada and China have ratified. The very existence of neutral ground rules facilitates settlement of the parties' differences. The same could not be said of contracting parties from many neighbouring countries such as Malaysia and Thailand, or Ethiopia and Sudan.

In fact, lack of harmonization in the application of international trade conventions is a great barrier to intensifying regional trade. This especially affects small and medium-sized enterprises (SMEs).

Dispute resolution is another area where harmonization of trade law practices is needed. Today, chambers of commerce and law associations in many developing countries are creating arbitration centres. Not only do they alleviate case-loads of local courts, but they are also becoming centres for resolution of small commercial disputes in the region. In this process, new arbitration laws are being enacted, some widely diverging in content. Greater care should be given to harmonizing these arbitration laws at a regional level, through the influence of such instruments as UNCITRAL's model law on international commercial arbitration (1985), so that diverging national laws do not impede regional integration.

Settling international business disputes out of court responds to the requirements of business operators for neutrality, rapidity and flexibility. Some 120 countries are now applying the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, which makes it possible for an arbitration award to circulate, be recognized, and enforced as if it were a final national court judgment.

As stated earlier, business executives, lawyers and judges in several countries are cooperating to create their own arbitration and mediation systems. In Europe, Belgium has 30 such centres. Most developing countries are presently starting up with one main centre. Setting-up arbitration centres requires training of would-be arbitrators, up-dating legislation, drafting arbitration rules and sometimes renting or purchasing premises.

Cooperation agreements between arbitration institutions are becoming a means to facilitate the resolution of intra-regional disputes.

Company lawyers face international competition

Contrary to Pascal's saying, "How convincing a well-paid lawyer is when defending his own cause", legal specialists do not make as strong a case for their profession as they might. Legal services are still perceived negatively, as an unnecessary expense and usually in connection with a courtroom case.

In international trade, though, legal services can be an asset. Clients can see that legal aspects of trade are as important as production, marketing or financing when dealing with unknown partners.

The reality is that there is a drastic change in the marketplace for legal services. Companies are consolidating and forming global alliances in order to meet the needs of their clients. Concurrently, the legal profession is opening up to competitors like big accounting firms, which are taking on increasing amounts of legal work. There is continuous pressure from clients to improve the cost and quality of legal services, be

they in-house services or services given by lawyers or jurists.

Lawyers from several developing countries face competition by foreign law firms on their own stomping grounds. They may have a comparative edge in hourly rates, but find reliable information sources with difficulty and at greater cost.

Companies need access to current legal information

While it is evident that the most powerful party in a negotiation will hold the steering wheel, few realize that information is indeed an important component of power in private commercial dealings.

In 1998, ITC conducted a survey on international contracts, with exporters' associations, trade promotion organizations and chambers of commerce from 115 developing countries responding. The answers showed that while 85% of user companies needed model contract forms and guidelines, only 32% had access to any type of model contract, and often only to one model contract form, sometimes dating back half a century. Following this survey, ITC decided to include a special contract section containing model contract forms, guidelines and clauses in its Juris International database.

Furthermore, as there was a great demand for model contracts for the sale of foodstuffs and products subject to rapid deterioration, a working group of international lawyers and legal specialists developed a model contract with guidelines for businesses engaged in international trade of perishable goods. The contract will be made available in March 1999, after screening by a pro-bono committee of specialists from 25 countries representing the major legal and socio-economic systems of the world. Other model contracts and practical guidelines for SMEs and non-lawyers will be drafted according to the needs expressed in the survey. ◗

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New Partnership Launches Juris International

Front, left to right: Daniel Poulin, University of Montreal; J.D. Bélisle, ITC; François Jacquot, University of Nancy; and M. Islam, ITC. Back: the trans-Atlantic team of contributors and Juris coordinator.

ITC, in partnership with the University of Montreal, Canada, and the University of Nancy, France, recently launched Juris International, a trilingual collection of international trade law information for developing countries, at the "Partners for Development" international conference in Lyon, France, on 9 November 1998. *(For more about "Partners for Development", see pages 28–29.)*

Juris International aims to bring legal trade information within the reach of small and medium-sized enterprises (SMEs) in developing countries. It provides full texts, with explanatory notes, for 300 major international legal instruments; model contracts; model clauses; information about newly created arbitration centres in developing countries; and information on other leading arbitration institutions.

SMEs in developing countries often find it difficult or expensive to obtain relevant international trade law information, particularly in different languages. The partnership to make this information more accessible brings together the expertise of the University of Montreal, specialized in multilingual databases; the University of Nancy, specialized in European law and databases; and the International Trade Centre, with its long experience in trade promotion. ◗

ITC's International Trade Law Services

for SMEs and lawyers in developing and transition economies

- Juris International: International trade law information (international legal instruments, contracts, dispute resolution, company lawyers associations, intra-regional trade);
- Model contracts, guidelines and training for SMEs;
- Alternative dispute resolution: training in alternative dispute resolution and advice on creating and managing dispute resolution centres;
- Networking of business lawyers' associations.