

Internationalrechtliche Studien

Beiträge zum Internationalen Privatrecht,
zum Einheitsrecht und zur Rechtsvergleichung

Herausgegeben von Ulrich Magnus und Peter Mankowski

Band 60

Lars Meyer

Non-Performance and Remedies under International Contract Law Principles and Indian Contract Law

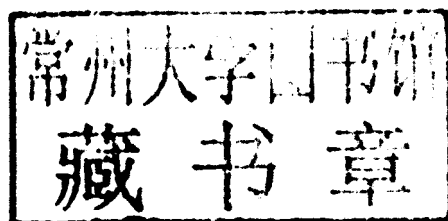
A comparative survey of the UNIDROIT Principles
of International Commercial Contracts,
the Principles of European Contract Law,
and Indian statutory contract law



PETER LANG

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Introduction

I. Generally

India's emergence as a major economy and promising trading partner especially of the Member States of the European Union (EU), the United States and its Asian neighbours has significantly accelerated the subcontinent's integration into the world economy. Following its recent conclusion of a free-trade agreement with the ten countries of the Association of South-East Asian Nations (ASEAN), the subcontinent's negotiations of a similar trade deal with the EU¹ therefore mark another significant step in perpetuating its position as a rising economic power that some expect to generate the fastest-growing gross domestic product (GDP) among large countries over the next 20 to 25 years and an estimated annual growth of as much as 10 per cent.²

Trade between India and the EU as a trade bloc has been growing constantly since India took up a reform process involving regulatory liberalization and a gradual decrease of restrictions on foreign investment in 1991.³ Today, the EU is India's largest trading partner and biggest source of foreign direct investment, with India in turn being one of Europe's top ten trading partners.⁴ Given the two regions' continuous efforts to further increase bilateral trade and economic cooperation between India and both the EU and the individual Member States, there is a vast array of issues calling for an examination of whether India's legal and regulatory environment is sufficiently calibrated to accommodating fast-growing trading activity between the two regions and the increasing inflow of European foreign direct investment into the subcontinent.

Simultaneously, businesses of all sizes are more and more often confronted with the question of whether and to what extent India's laws and judicial system provide reliable and predictable rules as well as effective protection for foreign

1 See *cf.* the European Commission's overview of the European Union's bilateral trade relations with India at http://ec.europa.eu/trade/issues/bilateral/countries/india/index_en.htm.

2 See, *e.g.*, *A bumpier but freer road*, *The Economist* (not attributed), 2 October 2010 at 67.

3 Following a drastic rise in foreign debt and inflation, India in 1991 instituted a new industrial policy aimed primarily at attracting foreign investment. This measure marked the beginning of a series of reforms aimed at opening up its previously restrictive policy on trade, industry and foreign investment.

4 See *cf.* European Commission, *supra* note 1.

investors and trading partners. While this general question obviously involves specific topics such as intellectual property protection or India's peculiar employment laws, it also appears useful to examine how similar or how different the general legal frameworks in India and the EU actually are. One such general area of law is that of contractual non-performance (or breach of contract) and remedies, which may well be regarded as the core part of any contract law regime⁵ and is of particular interest to businesses and individuals involved in international transactions.⁶ By comparing the UNIDROIT Principles of International Commercial Contracts⁷ and the Principles of European Contract Law⁸ with Indian statutory contract law – which is primarily embodied in the Indian Contract Act, 1872 and the Specific Relief Act, 1963⁹ – this survey seeks to identify where and to what extent the “common core” of Europe's major contract law systems and Indian law provide identical, similar or diverging rules on non-performance and remedies.

At the same time, a comparative analysis of European contract law principles especially with the Indian Contract Act may be valuable for a few additional reasons. First, this survey might serve as a contribution to the discussion and evaluation of the actual dogmatic compatibility of the civil-law and common-law traditions in the area of contractual non-performance and remedies, which is especially interesting with a view on the process of international contract law harmonisation. Given that the Indian Contract Act was enacted under the British Empire's colonial rule and most of its provisions were therefore derived from English common law, it may be regarded as a source of “codified English common law” on contracts. In other words, given that existing English statutes such as the Sale of Goods Act, 1979 merely cover specific areas of contract law, the Indian Contract Act might provide a useful indication of how English contract law could actually be codified or transposed into more general statutory legislation. In fact, recent judgments containing references to the UNIDROIT Principles and the UN Convention on Contracts for the International Sale of Goods (CISG) can be perceived as demonstrating an “increasing openness of English courts towards

5 See, e.g., Ulrich Magnus, *Das Recht der vertraglichen Leistungsstörungen und der Common Frame of Reference*, *Zeitschrift für Europäisches Privatrecht* 2007 at 260.

6 One observer has described the UNIDROIT Principles' provisions on non-performance as, “[i]n practical terms, (...) the substantive heart of the whole Principles. It is where the Principles' solutions to a large proportion of real world disputes in commercial transactions are to be found.” See Arthur Rosett, *UNIDROIT Principles and Harmonisation of International Commercial Law: Focus on Chapter Seven*, *Uniform Law Review* 1997 at 441. Accordingly, the articles contained in Chapter 7 of the UPICC are among those cited most by arbitral award making reference to this instrument. See Michael Joachim Bonell, *The UNIDROIT Principles in Practice* (2002) at XIII.

7 Hereafter also referred to as “UNIDROIT Principles” or “UPICC.”

8 Hereafter also referred to as “European Principles” or “PECL.”

9 Hereafter also referred to as “Indian Contract Act” and “Specific Relief Act”, respectively.