KLUWER LAW INTERNATIONAL

International Sales Law and Arbitration

Problems, Cases and Commentary

Joseph F. Morrissey and
Jack M. Graves

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INTERNATIONAL SALES LAW AND ARBITRATION

PREFACE

Transactions in goods form a substantial part of any general business law practice. Whether an attorney serves as transactional counsel in negotiating the terms of a "deal" or as an advocate when a dispute arises, a sound foundational knowledge of commercial law and dispute resolution options is a fundamental prerequisite for any business practice.

Our commercial world is shrinking every day, and the concept of an insular local practice is increasingly becoming a relic of our recent, but quickly disappearing, past. Accordingly, an international perspective on both the sale of goods and dispute resolution has become essential for all business practices.

For the prospective international business attorney—destined for practice in Beijing, Paris, or Chicago—the value of an international understanding of this area is obvious. Such attorneys will encounter cross-border transactions as a matter of course and will need to know the legal infrastructure that governs them and subsequent disputes that arise.

Perhaps less obvious is that for the prospective local attorney—destined to practice in Xian, Lyon or Omaha—an international understanding of this area is also valuable. An attorney can learn much about her own legal system by discovering and comparing other alternatives. Such a comparative perspective is particularly important in the commercial world where parties generally possess substantial autonomy in ordering their own legal affairs. Knowledge of a variety of legal systems and trade practices will help these attorneys structure the best deal for their clients. Further, clients in small towns around the world will increasingly be engaging in cross-border sales transactions. Attorneys for such clients must be equipped to handle the issues that will face them. In short, an international perspective is invaluable for any prospective commercial lawyer, and this casebook is intended to provide just such a perspective.

This casebook includes materials on both (i) the substantive contract law governing the international sale of goods and (ii) the law governing international arbitration as a means of contract dispute resolution. This integrated approach is somewhat unique, inasmuch as substantive contract law and dispute resolution are generally treated as separate and distinct subject matter areas. Traditionally, courses and casebooks have examined international sales law independently or in conjunction with domestic sales law. Similarly, international commercial arbitration has been studied in isolation, or in relation to domestic arbitration law, litigation, or other forms of alternative dispute resolution. While the two may

both be included in a broad survey level course in international business transactions, this particular casebook is atypical as it narrowly focuses on the intersection between international sales law and international commercial arbitration.

One reason to present these two subjects together is that an arbitration agreement is, at its core, a contract—one that obligates the parties to settle their controversies through a private adjudicative process resulting in a final and binding resolution of the dispute. As such, the subject of international commercial arbitration can be presented very effectively in a doctrinal course covering international contracts in a way that enhances the process of learning both. Moreover, international commercial arbitration is the dominant means of resolving disputes arising out of international sales transactions. Accordingly, an arbitration agreement is an integral part of any international sales agreement and consideration of the two topics in tandem is therefore both logical and effective for promoting understanding of both.

The work of the United Nations Commission on International Trade Law (UNCITRAL) in the areas of both international sales law and international commercial arbitration also reflects this close and symbiotic relationship between international sales and arbitration. Likewise, the Willem C. Vis International Commercial Moot (the Vis Moot) has been bringing students together from all over the world on an annual basis for over 14 years to study both of these topics together. The alumni of the Vis Moot have been publishing the Vindobona Journal of International Commercial Law for over a decade to promote and publish scholarship specifically in these two areas.

We have adapted the notion of a traditional "casebook" here inasmuch as most of the substance of international law is not contained in the past cases of any one particular country, but is more centrally focused on statutory law, as further explained in international treatises and various tribunals' interpretations of the agreements of previous parties. Throughout this book we use an assortment of materials—chief among them the principal statutes governing international sales and arbitration, but also certain cases, arbitral decisions, commentary, and other sources—to illustrate the law and a variety of issues that arise under that law. In each section we also pose a series of problems intended to provide students with an opportunity to apply the law, as aided by the additional materials presented in the "casebook." Finally, we have endeavored to provoke students with questions about the policies underlying the various approaches taken by the prevailing laws.

The authors would like to acknowledge the Vis Moot as the original impetus for the ideas underlying this casebook. While the authors believe the integrated approach taken by this casebook to be an effective one, irrespective of any interest in the Vis Moot, this approach is particularly valuable when used in a

course that is also intended to prepare students for possible participation in the Moot.[1]

In sum, our hope in combining the doctrinal treatment of international sales law and arbitration in a single casebook is to offer the opportunity to address these two subjects together, in a manner that leads to a deeper understanding of the individual aspects of each. Further, we hope that promoting a deep understanding of these topics will also aid one of the central goals of UNCITRAL—the facilitation and promotion of international trade, as the students who study these topics become practitioners and business people who are better equipped to participate in and strengthen the international commercial marketplace.

December 20, 2007

Joseph F. Morrissey

Jack M. Graves

[1] *See* Jack M. Graves and Stephanie A. Vaughan, *The Willem C. Vis Int'l Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity*, 10 Vindobona J. 173, 180-190 (2006) (Section 3.1, Professor Graves describing the concept of building a law school course around the annual Vis Moot problem).

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Thanks also to our friends who have journeyed through the challenges of much of this material in connection with the VIS Moot, including especially our good friends Dr. Eugen Salpius, of Salpius Rechtsanwalts GmbH; Professor Christiana Fountoulakis of the University of Basel; Professors Hrvoje Sikirić, Siniša Petrović, Nina Tepeš, and Davor Babić of the University of Zagreb; Kristof Cox and his colleagues at the Catholic University of Leuven; and Professors Harry Flechtner and Ronald Brand of the University of Pittsburgh. In addition, Professors Mike Allen, Brooke Bowman, Mark Bauer, Peter Fitzgerald, Jamie Fox and Brad Stone of Stetson University College of law have been incredibly supportive of this project in every way, from being sounding boards for ideas to reviewing the format of footnotes.

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tenacity and passion for teaching advocacy is a constant inspiration; and her support for our own respective efforts in recent years has played a very substantial part in the events leading up to this book.

INTRODUCTION

By Eric E. Bergsten

Professors Graves and Morrissey have indicated that the book they have written was inspired by the Willem C. Vis International Commercial Arbitration Moot. I consider it a great honor that teaching materials have been produced for use in law school courses in which the Moot is an integral part. That signals to me that the Moot is fulfilling its educational role. This book is directed at a larger audience as well, and it is well designed for general use in a course in international commercial law in both law schools and business schools. I wish it and the readers of this introduction great success.

International commercial law is the subject matter of this book. Commercial law is an interesting subject.[1] It becomes particularly interesting when the transactions take place between individuals and commercial entities in different countries. The way in which business operates is often different in the two or more countries concerned, and the law will certainly be different. It is sometimes possible to avoid having to concern oneself with the foreign law by a choice of law clause in the contract that provides that the contract will be governed by one's own law. However, that only shifts the problem to the other party; it does not eliminate it. What I have found to be the most interesting aspect of my work in the field of international commercial law has been the contacts with foreign lawyers. We think about the same problems, but with somewhat different perspectives. What is self-evident at home may be strange abroad.

The Moot is designed to give students a glimpse of what practice in this field consists of. It involves a dispute over a contract of sale subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG). The dispute is to be settled in arbitration. It has turned out that the combination of a sales dispute with international commercial arbitration as the means of dispute settlement is an excellent vehicle for introducing students to the legal rules that govern the relationships between commercial parties in different countries.

The value of the combination of CISG and arbitration was not as clear to me when the Moot began fifteen years ago in 1993. The Moot was intended to promote awareness of the work of the United Nations Commission on International Trade Law (UNCITRAL) and especially of the CISG to students

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[1] I have to admit that not everyone finds it so, which continues to amaze me.

around the world. The organization of a moot required a forum for the settlement of the dispute, and it was natural that the forum would be an arbitral tribunal. An international moot could not be based on the sales dispute arising in a national court, even though that also happens in practice. Moreover, UNCITRAL had done important work in the field of international commercial arbitration and the Moot could bring that work to the students' attention as well. By 1993 the UNCITRAL Arbitration Rules of 1976 were being used in many *ad hoc* arbitrations and were increasingly used as institutional rules with the changes necessary to fit them into an institutional context. The UNCITRAL Model Law on International Commercial Arbitration dating from 1985 had already been incorporated into many national arbitration laws and, even where the Model Law had not been adopted as such, it had become the standard by which new and existing arbitration laws were measured. UNCITRAL was also active in promoting the adoption of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). In summary, the subject matter of the proposed Moot was a contract of sale subject to the CISG with arbitration being a necessary, but at the beginning a subsidiary, feature.

The original conception of the Moot as involving a contract for the sale of goods with arbitration as a clearly subsidiary feature was similar to the way in which arbitration enters into the typical contract of sale, be it domestic or international. The business parties are interested in the transaction. If they anticipated disputes that could not be settled amicably, they would not enter into the transaction. An arbitration clause in the contract probably indicates that the parties used a form widely used in the particular trade or that the clause was in the general conditions of one or the other of the parties. A negotiated dispute resolution clause in a sales contract is a less common occurrence, though it is more likely to occur if the contract is large and not of a routine nature. There are, of course, some types of business activity in which disputes are so common that a dispute resolution clause is considered to be a necessary provision. Construction contracts are the most obvious example and there have been interesting developments in recent years in devising dispute resolution clauses for large construction projects, such as airports and large dams. The reports are that the adverse consequences of the disputes that inevitably arise have been significantly reduced.

Consistent with the conception that the Moot was primarily about the CISG, the early Problems had almost no issues of arbitration law or practice. Gradually that changed so that in recent years the Moot Problem has included both sales law and arbitration issues. It has been a happy development for many reasons. The one that is most relevant to the current book is that they fit so well together for educational purposes. They can be used to demonstrate both how the lawyer drafts the contract and how the provisions interact if the transaction does not go as anticipated.

When drafting a contract of sale, or when drafting the general conditions for a client's purchase orders, sales contract forms or order confirmations, the lawyer must draft in the light of the applicable law. A provision might be drafted, for example, to specify when and where the goods must be inspected and when notice of any alleged non-conformity must be given. The applicable law would already have provisions on those matters, but they may be either more general than would be desired in the specific contract or not well suited to the nature of the transaction. A course in which the law of sales was taught through the mechanism of contract drafting would be an effective way to teach both the doctrinal law and the business context in which the legal rules are applicable. The contract drafting exercise might include a dispute resolution clause, which we can now assume would provide for arbitration. It would be appropriate at that stage to discuss those aspects of the law of arbitration that one should know before drafting the clause. That would include such matters as the relative advantages of ad hoc or institutional arbitration, how the arbitrators are chosen, the procedure that will be followed before the tribunal and enforcement of the eventual award. In regard to the relationship between the arbitration clause and the remainder of the sales contract, one might discuss the separability of the arbitration clause from the sales contract in which it is located and where to look to determine whether the formal requirements to conclude a valid arbitration agreement through the use of the arbitration clause are the same as those to conclude a valid contract of sale.

In the Moot the same or similar questions are asked, but now from the point of view of the transaction as it actually took place. Was the notice of alleged non-conformity of the goods on time and sufficiently detailed? Was the contract of sale validly concluded? Was the arbitration agreement validly concluded? Is it possible that the contract of sale was validly concluded but not the arbitration agreement even though it was a clause in the sales contract or perhaps that the arbitration agreement was validly concluded but not the contract of which it was one of the clauses? What should the arbitral tribunal do if one of the parties has challenged the jurisdiction of the tribunal in the courts? All of these questions and more can be discussed in the classroom but they can be explored in more depth in the Moot.

This is not the place to discuss the advantages of arbitration, especially those arising in an international transaction. Suffice it to say that almost everyone would much prefer arbitration to litigating in the other party's courts, which would otherwise be the only option for one of the parties.

The Moot simulates some aspects of an arbitration. It cannot simulate an entire arbitration. The Moot has no procedure for the students to gather the facts, though there is a limited substitution for it and the Moot is considerably more fact-intensive than are most moots. There is no witness examination before the

tribunal. Most importantly, there is no possibility for the parties to reach a settlement. Each of them could be the subject matter of an international competition, but it is not possible to have all of them in the same competition. The consequence is that the Moot emphasizes the interpretation and application of the law to the somewhat complex facts and the contentious side of arbitration rather than its more conciliatory side.

The Moot, like any other well constructed moot, serves as a vehicle to train law students in some of the ten "fundamental lawyering skills" lawyers should be able to engage in as identified in the American Bar Association's "MacCrate Report"[2]: (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication (oral and written); (6) counseling; (7) negotiation; (8) litigation and alternative dispute resolution procedures; (9) the organization and management of legal work; and (10) recognizing and resolving ethical dilemmas. Interestingly enough, the Moot seems to have had the greatest impact in this respect among the students from civil law countries, where the law is taught in a more doctrinal fashion than it is in the United States.

Among those lawyering skills the three that were preeminent in the conception of the Moot, and that remain at the forefront today, are legal analysis and reasoning, legal research and communication. Those lawyering skills can be exercised most effectively if the students begin with at least a basic knowledge of the subject matter. We can assume that the student participants from every country will have studied the law of contracts, though many will not have studied the special case of a sale of goods. Few will have studied the different approaches to the interpretation of legal texts in other countries. However, those different approaches to textual interpretation arise in the Moot because the sales dispute involves difficult questions of interpretation of the CISG. The CISG is the law of the 70 countries that are currently party to it. It is a text that is not of the same nature as the otherwise applicable domestic law of sales, i.e. UCC Article 2 in the United States. The text is the same in all 70 countries,[3] which might lead to the idea that it is a uniform law, adopted and subject to sovereign interpretation in each of them. It would be difficult to deny that that would be an accurate positive law description as far as it goes. However, it is not the entire story. One of the provisions in the CISG is Article 7(1): "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote

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[2] Task Force on Law Schools and the Profession, American Bar Association, Legal Education and Professional Development-An Educational Continuum (July 1992).

[3] There are some differences arising from the use of the relatively few permitted derogations by means of declaration and from inconsistencies in the six official language versions. Fortunately, there are only a few such differences.

uniformity in its application ...." That provision was also adopted by each of the 70 countries, and it is therefore a direction to the courts as to how to act when interpreting the CISG. The national courts and arbitral tribunals would not be fulfilling their obligations if they were not at least aware of the interpretations offered by courts in other countries to the provision in question. It is primarily the task of the lawyers for the parties to bring those different interpretations to the attention of the court or tribunal. That may be easier for the students to recognize in the Moot than it would be in the classroom. The Moot arbitrators who do not come from the United States or Germany may not be satisfied by a citation to a decision of the Second Circuit Court of Appeals or the *Bundesgerichtshof*. They may wish argument from a wider range of perspective. That would, of course, be true in practice as well. Moreover, what is often a surprise to students from common law countries is that some of the arbitrators will be more impressed by the interpretations offered by the legal scholars who have studied the question than they are by the decisions of even the most respected courts, since those opinions are recognized as having authority in many legal systems.

The description of the Moot just given may make it seem to be both educationally worthwhile and challenging. Most of the participants have found it so. The book that Professors Graves and Morrissey have written will do much to enhance the educational value of the Moot by offering the students who use it a basic foundation of knowledge of both the CISG and international commercial arbitration. The courses in which it might be used permit an even deeper penetration into the mysteries of these two areas of international commercial law. It should not be thought that use of the book or participation in a course in which the Moot is an integral part will eliminate the challenge. It will only increase it. So much will have been learned, but all that knowledge will still have to be applied to the facts of the Moot Problem and the arguments for claimant and later for respondent will still have to be communicated in writing and orally to lawyers and law professors who come from other countries. That is a real challenge. What I hear every year from the lawyers and law professors who come to the Moot in Vienna or Hong Kong is how well the students are prepared. I am sure that the users of this book will be among those praised for their dedication and understanding of the CISG and international commercial arbitration.

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