THE ICC MODEL IN THE FORMULATION OF NEW UNIFORM INTERNATIONAL LAW

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Historical Perspectives

The origins and development of the law that legal practitioners must work with each business day in every part of this world is really a matter of philosophical discussion, but the practical implications and results are very concrete. The "Why?" of the discussion is a matter of recorded history, and the divergence of the commercial law into different systems can be followed with the rise of the sovereignty of the nation-state world order that we now have.

As set out in a prior article, the present trends in private international law have tended to mirror the development of the lex mercatoria that emerged from the Dark Ages of Europe - a time when law was the authority of the local lord and neither national nor international law yet existed (Jolly 2005, p.82). Merchants and tradesmen had to take affairs into their own hands for mutual protection and progress. The pertinent point in this comparison being that the impetus of the development of the law was the necessity of private persons in trade with foreigners. Rules and regulations (which progress to the status of law) were developed and promulgated by merchant guilds. Enforcement of these rules of commercial practice was also carried out by these same guilds. Disputes between trading parties were submitted to and adjudged by tribunals appointed and convened by the guilds. In them these rules and practices became so customarily accepted that they evolved into the lex mercatoria, which in turn became the basis of the commercial laws of the various nations that evolved as the dominant sovereign governments of the modern era.

The dominance of the nation-state and jealous asserting of its sovereignty over the affairs of its citizens (including business dealings) forced the application of its own domestic law to the exclusion of the former internationally-active guild jurisdiction. In this process, the concept of customary international law consisting of only diplomatic relations between sovereign nations came into being, and the commercial law lost its international effectiveness to separate domestic laws applied on a case-by-case basis. What evolved from this was the grouping of similar domestic laws into basically three main categories: Continental Law (or Civil Code Law) espoused by the European nations, the English Common Law, and the Religious (Islamic) Law of the Arabian nations (Tomizawa 1999, pp. 24-27). The nature of the law of a country naturally spread to and became

applied to the countries of colonial connections. Thus English Common Law is prevalent in the USA, Canada, Australia, India and other former English colonies. Continental Law can be found in former Spanish and Portuguese colonies South American countries, former French colonies in Africa and Southeast Asia, and former Dutch colonies in South America and Southern Asia. Islamic law now prevails in countries of the Middle East and Northern Africa.

For nearly three centuries when the term "international law" has been used, the speaker most likely referring what we now refer to as "customary international law", that being the law of diplomatic relations (Takakuwa 2003, p.4). The prevailing conception during this period was that competent parties of an "international" matter could only be sovereign governments of the concerned nations. If a private person (natural or legal entities) of one (sovereign) country had a significant claim against a private person of another country and neither of these parties would consent to the jurisdiction of a domestic court of either country, then the recourse was for the claimant to petition his own government to champion the issue to the government of the other country. The customary international law recognized only the obligation of a sovereign state to protect the property and rights of alien private persons within its jurisdiction, but the extent and quality of that protection was a matter of sovereign discretion. Only private persons with personal reservoirs of the political capital to be able to influence government could hope to avail of these services.

Here at the outset of the twenty-first century, we have reached a stage of global political, social and commercial development that we are much more interdependent and interacting at all levels of society - not just on national government levels. Accordingly when we drop the term "international law" now, we just cannot know exactly what law is being talked about unless we have the full context of the situation. If we're discussion some action of the WTO, for instance, then it is likely that we are still talking about diplomatic interactions. However, if we are talking about sales contracts or INCOTERMS, then we are in the realm of what we now refer to as "private international law".

As a result of this historical development of different legal systems, the private businessmen of each country tended to rely upon their own country's domestic law to govern their various transactions. When parties to a contract came from different countries (especially with different legal systems), the tendency was to insist that the law governing interpretation and enforcement of the contract be that of each's own country. There was fear of discrimination against foreign parties when subject to the jurisdiction of a foreign court. This distrust of unfamiliar foreign law was actually an impediment to trade, since many contract negotiations failed on the point of what would be the governing law and where neither party would consent to the other's choice.

Movement Toward Uniformity of Laws Among the Different Legal Systems

With the expansion of international trade as the result of innovations and improvements in transportation modes during the twentieth century, international traders became more concerned about the inhibiting factor of the conflicting laws of the parties to such transactions. Relying upon governments to work out trade disputes, processes that consume considerable time and expense, were proven to be too cumbersome and inefficient for practical business. Politics of government is easily corrupted, and the process often reflects the interests of the party with the most influence and the most resources - an unreliable situation at best. The experience then proved that government interventions were most effective in the macro-business situation, dealing with treaties and international agreements covering mutual recognition of rights of trade and navigation, freedom of travel for private persons, monetary controls and regulation, and other such conditions essential to an established and stable framework in which trade can exist and be carried on. However, for the relationships between contracting parties, a more practical and personally enforceable network of uniform legal conditions needed to be established. This new emergence of private persons uniting to formulate the policy to govern their own business affairs probably can best be illustrated in the efforts of the International Chamber of Commerce (ICC).

It is in this latter regard that movement began in the era of new peace and search for international accommodations in the aftermath of World War I. In France, the site of much tragedy of the war, the initial impetus came from the former French Minister of Commerce, Etienne Clementel. He drew together business leaders from several nations (Belgium, Britain, France, Italy and the United States) with a clear purpose to serve world business by promoting trade and investment, open markets for goods and services and the free flow of capital. The ICC was founded in 1919 in Paris, France and continues to be headquartered there today, but with a vastly increase membership in the thousands representing about 130 countries around the world. Its function to serve the private sector's facilitator of expanding world trade has not changed except to get ever more influential in setting the terms of control and regulation (www.iccwbo).

The projection of the ICC as the prime example of the private sector's growing position as a creator of private international law can be made is several aspects. Its activities have expanded over the years, so that today it has a well established program through arranged committees and appointed representatives to make a significant presence is the activities where the new uniform laws are being discussed and created. A look then at the structure of the ICC would then be instructive.

Organizational Structure of the ICC

1. The ICC Membership

The body of the International Chamber of Commerce is made up of members from the private business communities around the world. Directly, members of the ICC are enrolled by application of the individual company, who typically will also be a member of their own national organization as well as the Chamber of Commerce and Industry of their hometown or city. There are many "Chambers of Commerce" around the world, but they are not necessarily affiliated or part of the national or international organization. The whether a local chamber of commerce is part of the national chamber of commerce will vary from nation to nation in the degree of affiliation as well as its legal status. Typically a chamber will have NGO (non-government organization) status, but in some countries they will be incorporated as a non-profit corporation or foundation, and in others they simply hold informal "club" status without official registration. In all cases, however, a chamber of commerce does represent the collective voice of the local business community.

At the national level, most nations have a national affiliation of the local chambers of commerce. Again that organization may vary from country to country. National Committee of the Chambers of Commerce of that country, which sends its delegates to the ICC World Council, may not necessarily be a part of the national chamber of commerce organization of the country. Indeed the national organization is not a member of ICC, but the significant fact is that each the will most likely have common members who participate actively in both systems of organization. It is here that we get the common connections. Delegates are commonly chosen based upon their active participation and commitment to serve the interests of their sponsoring organizations.

2. The ICC World Council

The heart of the ICC as an organizational body is the ICC World Council. Acting as a general assembly of the membership composed of delegates from all the national committees around the world, it is the ICC's supreme governing body. It normally meets twice a year and received reports from and acts upon the recommendation of the various commissions and committees that have been established to draft common policy on select areas of business activities further described below. For those countries without established national committees, direct members are also invited to participate in the Council activities as interim representatives of their national business interests. It is to be noted, these delegates are not representatives of their home governments (although some may happen to be governmental employees), but rather they are private persons expressly commissioned to espouse the business viewpoint and interests of the companies and business of their home countries. Most have been active members of their own home country National Council, and are appointed by such national council as its delegate in the world body.

3. The Chairmanship and Executive Board

The executive functions of the World Council are vested in an executive committee form of arrangement composed of the incumbent Chairman and Vice-Chairman, elected for two-year terms, and the immediate predecessor Chairman. The Chairman acts as the titular head and the public representative of the organization during his term of office. Vice-Chairmen usually advance to Chairman positions in succession so that the Chairmanship as a unit enjoys, in rotation, the tenure of members up to six years, and thus capitalize upon their accumulated experience, personal knowledge of the historical development of on-going activities, and the contacts in the world business community build over the years. It is indeed a rich and vital resource for the organization.

The Council also elects an Executive Board of between 15 to 30 members, who serve three-year terms and with one third retiring at the end of each year (replaced by the election of a new one-third membership for the following year). Again the rotation of this membership in this manner insures a fair composition of experienced members in the group every year. Vacancies are filled for the unexpired term of the lapsing member. The function of the Executive Board is to provide implementation of the ICC policy (established by the approval of the World Council) and to oversee other administrative activities of the organization.

4. The Secretary General

The Secretariat of the ICC is its administrative office and manager of the employees of the organization that carry on its daily activities. It is headed by the Secretary General who is appointed (hired) by the World Council upon the recommendation of the Executive Board. The staff of the Secretariat perform the daily housekeeping and communication functions to carry out the ICC's programs and policies. Housed at the headquarters facilities in Paris, it maintains liaison with the ICC organizations around the world.

5. The commissions

The various commissions of the ICC are the primary organs where the promulgated policies and rules of the organization are hatched and developed. The ICC has classified the international business activities into seventeen different sectors of specialize concern. At present there are more than 500 business experts who have volunteered to work in the commissions assigned to work out the ICC official position in relation to the sector of their respective assignments (www.iccwbo.org). These commissions scrutinize proposed international and national government initiatives affecting their respective subject areas and to prepare the positions of the international business community for submission to international organizations and governments. In this way the voice of the private sector is given effect and the implications of regulatory provisions can be evaluated against the applications to practical business experience.

The ICC Process of Developing Uniform Business Rules and Laws

As a private, non-governmental organization, the ICC does not have any law-making power or authority. Indeed, the first aspect of this issue that much be recognized, is that the ICC issues "policy" statements and (through the work of the commissions) promulgates "rules" and "model" contracts provisions and laws for consideration and common use world-wide. While not legislative in character, these still have rather profound effect on the law applied in individual cases.

Individual members, working as teams in the commissions specializing in seventeen designated areas of business concerns, examine, evaluate and draft policies and rules in relation of current problem issues faced in the practice of international trade today. Their effort is to provide common perameters which can be applied anywhere in the world and in relations to any law system of the world. These are not to usurp the jurisdiction or control of national laws, but to allow conflicting national laws of parties from different countries to enjoy uniform standards and interpretations - taking the conflict and guess-work out of the business arrangement and allowing it to work freely and expediently. The significance of this might be best observed by looking at a couple of examples.

1. INCOTERMS

Probably the most well recognized of the ICC products in international trade, the INCOTERMS provides rules for uniform governing of rights and responsibilities between international traders. These rules are not legislative in effect, but simply are current restatements of the commonly accepted and applied allocations of risks between a buyer and seller in an international transaction. They are an outgrowth of customary practices over the years. INCOTERMS are constantly reviewed and evaluated to maintain current relevance and practicality. First issued in 1953, they have been revised and up-dated versions published every ten years or so - the most current editions being INCOTERMS 2000.

The legal effect of INCOTERMS comes from the voluntary acceptance and incorporation into the contract established the legally binding relationship between the parties. By adopting these terms into the contract, the legal interpretation necessarily follows that established by the relevant rule. Most national laws of contract now recognize INCOTERMS as the binding interpretation. Indeed these terms have been adopted into domestic law, as by the example of the 1997 revision of Article 2 of the Uniform Commercial Code in the USA, the note to which states in part:

> "[I]f the meaning of a stated shipment or delivery term cannot be found in the agreement or an applicable usage of the trade, the meaning may be determined by reference to the Incoterms of the International Chamber of Commerce." (Brand 2000, p.15)

2. International Court of Arbitration

One of the oldest and another of the well-recognized organs of the ICC is the International Court of Arbitration. Established in 1923 as the arbitration body of the ICC, it represents the old ideal of commercial traders governing conflicts among their members and of settling disputes among themselves with arbitrators of expert knowledge and experience. The practices of this arbitral court over the years has established arbitration as the preferred alternative dispute resolution procedure, taking the matter out of the time consuming and costly national court systems, and putting it under a more efficient regime of expert arbitrators. It also helps to avoid the old suspicion that one party would be treated prejudicially by the courts within the country of the other party. In international arbitration, the parties participate in selection of the independent and politically neutral arbitrators, and they can have more assurance of truly impartial judgment in a tribunal that is familiar with and understands the commercial context of the case.

With more than 80 years of experience, the International Court has well established procedures that can be utilized by the legal community of any country in the world. The number of cases submitted under these procedures has grown each year. The rapid globalization of the world economy in recent years has increasing involved parties with little international experience, who are faced with problems of different linguistic, legal and cultural backgrounds. The distrust factor is ever greater, and is compounded by distance and the prospect of having to fight the other party on his home ground. The arbitration processes offers the advantage of negating all these negative factors in a less formal and less stressing resolution process.

3. The ICC Model International Sale Contract

Of more recent development, the ICC's Commission on Commercial Law and Practice (CLP) has drafted and published several model contract forms for use in international trade situations. They presently have six of these models with several more in the development process, but it should suffice here to look at the Model International Sale Contract as a representative example.

The task force of the CLP, drawing upon the combined experience of its members, drafted a model form of contract to provide a reliable and equitable standard legal document for global export-import businessmen. It is an attempt to provide clear and concise contractual conditions and provisions standard with currently accepted trade practices and balancing the interests of the export seller and the import buyer. It serves a the model setting out the standard terms common to all contracts with the ICC General Conditions of Sale. From this beginning point the negotiating parties can adopt the general conditions set out in the draft model or go on to more specific conditions as may be applicable to their particular circumstances.

Note that this is not legislation of any particular law in the matter, but based upon the internationally accepted principle of the freedom on contracting parties to set the terms (and legal effect) of their contract as they desire, it in effect becomes the vehicle for the establishment of the governing law to be used in the contract relationship. This Model was developed with reference to the legal principles established in the United National Convention on Contracts for the International Sales of Goods (UNCISG). The interaction of this model with the uniform treaty law provides the common application of uniform law to the relationship.

4. ICC Delegations to the United Nations and other International Agencies

As noted above, one of the most important functions of the chamber of commerce organizations around the world is in influencing the development of legislation of laws affecting commercial matters. The ICC does this on an international scale by providing delegations which participate in the various activities of the United Nations and its specialize agencies. When international treaties are being considered, these delegates provide the businessman's point of view and often contribute considerable data and information for consideration in the development of the proposed treaty - which is the international equivalent of legislated law.

Going back to the UNCISG mentioned above, ICC delegates participated the in UN Commission on International Trade (UNCITRAL) and were active in the drafting of the provisions of that treaty which was initially adopted in 1980. Since then more countries have signed on to the treaty, and the body of case law on the legal interpretations of its provisions has become impressive. ICC delegates continue to participate in the review committees that tract the development of this body of law and look for necessary refinements in the legislative provisions. In this manner, the private business sector, represented through the ICC, has had an effective hand in the development of the new uniform international law of contracts.

Conclusion

This paper has continued the theme of the development of uniform private international law by and for the private sector itself. It is posited that the private business sector, after centuries of subjection to self-serving national laws favoring the political interests of the respective sovereigns, in recent times found its former role of joint and cooperative effort in private business associations (such as the guilds of old or the chambers of commerce today) to effectively influence the laws being promulgated to govern their activities. It is a case of trying to capture control of one's own destiny by instituting a self-regulation mechanism. There are several means for going about this process, and in this paper the functions of the International Chamber of Commerce has been chosen

to illustrate these.

The first aspect is that of setting the internationally accepted and recognized definitions of basic business terms and phrases (commonly used in contractual forms). The ICC has done this in particularly noteworthy manner with the establishment and publication (world-wide) of its International Rules for the Interpretation of Trade Terms, better known as INCOTERMS. With more than fifty years of experience now, the INCOTERMS have become recognized and accepted by the judicial of most countries in matters of commercial disputes. By incorporating the precise designation of a particular INCOTERM in the contract provisions governing a particular business transaction, the parties automatically provide for the established legal interpretation (and application) related to that term, regardless of the jurisdiction in which the matter is to be tested at litigation. Such international precision was not possible under the older conflict of laws regimes.

The second aspect is the establishment of the International Court of Arbitration under the ICC. This was one of the ICC first major accomplishments in the assertion of the private sector in the interpretation and enforcement of international private law applied to international business transactions. Founded in 1923, it has continued to provide an alternate dispute resolution forum for international traders, avoiding the uncertainties and biases that have been experienced in reliance upon domestic courts to judge international disputes. Indeed the ICC practice and experience in this area have set the standards for arbitration proceedings around the world. This reflects also the ancient practice of allowing the tribunal judging a matter to be a member of the business community with knowledge and expertise in the matters related to the dispute. The whole process is much more expeditious and less costly than the litigation regimes of most domestic court jurisdictions.

A third aspect is that of providing model contract forms which parallel the legal provision of the newly forming uniform international commercial (private) law. By using these commonly accepted draft models, the parties avoid uncertainty that the intended effect be adversely determined under separate domestic laws, and they also limit the chance of bias in litigation arising under a foreign legal jurisdiction. The example here was the ICC's Model International Sale Contract (with its acknowledged relationship to the UNCISG).

Finally a fourth aspect is the participation by private business persons in the drafting of new international laws, in the form of treaties and conventions, which affect international business transactions. The ICC is a vehicle for this by providing delegations of business representatives to participate in the committees and commission established for such drafting. The example cited is

that of the delegation from the ICC which participated in the formulation of the United National Convention on Contracts for the International Sale of Goods which was promulgated in 1980. Other such delegations have been provided in the establishment of UNIDROIT and in the various groups that worked on the Annexes to the Marrakesh Treaty of 1994 establishing the World Trade Organization and the international regulatory regime for such thing as international sale of services, intellectual property rights and the settlement of trade disputes.

This is the age of the development of the uniform international private law, and legal practitioners and scholars of all countries should not miss the opportunity to participate in this exciting development. Unfortunately Japan has maintained a very conservative outlook for the change of its domestic law, particularly how it may be adversely influenced by legal concepts from abroad. However the international climate is favoring the trends to uniformity, and Japanese Bengoshi and legal scholars need to be active participants in this movement. By doing so they can contribute the Japanese point of view and provide a voice for maintaining the legal philosophy that is commonly favored here.

The point of this paper is to make more private legal practitioners aware of the opportunity they have to be a meaningful part of this process on an international scale. We need to guide our students, apprentices and others who will be facing the results of these developments in the future to also be aware of how they must be looking for taking an active role in their own time as well. Sitting by the side line will only insure that your particular argument will not be voiced and you will have no one but yourself to blame in the end. We all need the active participation of the private sector to insure the true uniformity and stability of the future international private law.

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