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Herausgegeben von Ulrich Magnus und Peter Mankowski
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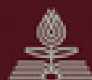
Lars Meyer

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 EU[1] 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 regime[5] and is of particular interest to businesses and individuals involved in international transactions.[6] By comparing the UNIDROIT Principles of International Commercial Contracts[7] and the Principles of European Contract Law[8] with Indian statutory contract law – which is primarily embodied in the Indian Contract Act, 1872 and the Specific Relief Act, 1963[9] – 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.

foreign and international sources of inspiration“,[10] and perhaps even as signifying a growing relevance especially of the UPICC to English contract law.

Moreover, as the European Commission has called for a critical review of its so-called "sector-specific approach" in relation to EU legislation and is even contemplating the option of adopting a uniform (optional) instrument on contract law,[11] the question of whether English common law and the contract law statutes of the continental Member States could be integrated into a set of uniform rules has also attracted a high level of political interest throughout Europe.

From an Indian legal perspective, a comparison of Indian statutory contract law with the two sets of Principles might indicate whether the rules and concepts found in these two non-legislative instruments could actually serve as a source of reference or inspiration for courts and arbitral tribunals in India when deciding disputes pertaining to international contracts. This could be particularly interesting in light of the fact that India's new arbitration law[12] in principle permits the application of non-legislative "soft law" like the UNIDROIT Principles as a source of supplementary rules to fill gaps in Indian law, and possibly even to govern international disputes. This survey might therefore help answer the question of where and how the rules set forth in the UPICC actually differ from those found in Indian statutory contract law, and where they might provide a valuable alternative. (In fact, it is apparently a political intention to encourage Indian and foreign parties to make increasing use of arbitration as a means of resolving international commercial disputes[13] might further magnify the relevance of this particular issue.)

This survey thus compares European and international contract law principles with the Indian statutory laws on contractual non-performance, or breach of contract, and remedies. As the UPICC and the PECL are probably the most complete and elaborate collections of common rules and concepts found especially among the national laws EU Member States, the survey is concerned with those two instruments rather than any national systems. In fact, as the European Principles practically form the basis of the EU-endorsed Common Frame of Reference (CFR),[14] "the core of the non-performance concept in the [CFR] consists of the development of the ideas used in the PECL“;[15] the latter will therefore play a

10 See Michael Joachim Bonell, *The UNIDROIT Principles and CISG – Sources of Inspiration for English Courts?*, Uniform Law Review 2006 at 305.

11 See generally *infra* Ch. I(I)(B)(1).

12 See *infra* Ch. II(I)(B).

13 See, *e.g.*, *Bhardwaj says prospects are bright for making India an arbitration hub*, IndLaw.com (not attributed), 20 October 2007, available at http://www.indlaw.com.

14 See *infra* Ch. I(I)(B)(1).

15 See Fryderyk Zoll, *The Remedies for Non-Performance in the System of the Acquis Group*, in Rainer Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (2008) at 190.

pivotal role in the drafting of new EU legislation, new national laws, and possibly even a (optional) uniform European code on contracts.

The general finding of this survey is that the UNIDROIT and European Principles and Indian statutory contract law not only share a notable structural proximity in that their black letter rules are often accompanied by Explanations and Illustrations; the three regimes' rules on non-performance and remedies in many respects either appear to be derived from the same legal concepts or (are likely to) provide for quite similar outcomes.

II. Structure and methodology

The first Chapter of this survey gives a general overview of the UNIDROIT and European Principles and sets out the state of affairs in the ongoing process of harmonising (and possibly unifying) international and particularly European contract laws. It closes with an examination of the value of the Principles' approach to the process of legal harmonisation, *i.e.*, to developing uniform rules based on common concepts found in different contract law systems. Chapter II provides an introduction to the Indian Contract and Specific Relief Acts and their historic backgrounds, and Chapters III to VIII present a detailed comparison of the three regimes' rules on non-performance and remedies. Finally, a Conclusion recites the major findings of this survey.

Due to the substantive and structural parallels between the Principles and the relevant Indian statutes, the comparison is structured as a rule-by-rule presentation of their substantive rules, followed in each case by a "comparative analysis" of their major differences and similarities. While the Principles' provisions on a particular issue are generally presented and discussed in a single section, any substantive divergences between these two instruments are identified in the context where they appear. Given that, from a geographical perspective, the UNIDROIT Principles are intended to be applied universally and that their drafters drew from the most extensive pool of legal systems, the survey's mode of presentation roughly follows the structure of the UPICC by comparing each provision in their Chapter 7 with its counterparts in the European Principles and in Indian statutory contract law. Areas of focus include the particular concepts of non-

See also Ole Lando, *The Structure and Legal Values of the Common Frame of Reference (CFR)*, European Review of Contract Law 2007 at 246, according to whom "for the time being most of the rules [of the CFR] prepared are those of the PECL," and Ulrich Magnus (*supra* note 5 at 279), who has observed that the (preliminary) rules of the so-called *Acquis Principles*, too, largely correspond to the Principles' provisions on non-performance and remedies. See generally *infra* Ch. I(I)(B)(1).

performance and breach of contract underlying each regime, as well as their rules on specific performance and the (other) remedies available for non-performance.

Finally, as this survey is concerned with Indian *statutory* contract law as opposed the entire body of Indian law on contracts, references to any relevant Indian or English case law are being kept to a minimum and included only where they are essential for the understanding of the workings and implications of a particular statutory rule, or where their inclusion facilitates the comparison of a provision with the Principles.[16] The comparative analysis will focus less on evaluating the quality of each regime's provisions and rules but rather on identifying their similarities and divergences and assessing whether any of them might emanate from a superior idea or concept.

16 It should also be noted that especially court decisions and arbitral awards that may be relevant to this survey but were published after January 2009 are not reflected in this survey.