

# Northwestern Journal of International Law & Business

---

Volume 8

Issue 3 *Winter*

---

Winter 1988

## Commentary on Professor Gabor's Stepchild of the New Lex Mercatoria Symposium: Reflections on the International Unification of Sales Law

Willis L. M. Reese

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [International Law Commons](#)

---

### Recommended Citation

Willis L. M. Reese, Commentary on Professor Gabor's Stepchild of the New Lex Mercatoria Symposium: Reflections on the International Unification of Sales Law , 8 *Nw. J. Int'l L. & Bus.* 570 (1987-1988)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

## Commentary on Professor Gabor's *Stepchild of the New Lex Mercatoria*

*Willis L. M. Reese\**

I welcome Professor Gabor's analyses of the Hague Draft Convention.<sup>1</sup> The Convention is a natural sequel to the United Nations Sales Convention, which has been ratified by the United States and came into effect on January 1st of this year. This latter convention deals with the substantive law of sales and is designed to play a role for the entire world similar to the one played by the Uniform Commercial Code in the United States. Undoubtedly, many states will be slow to ratify the Sales Convention, and some will not do so at all. Thus, implementation of rules addressing the issue of applicable law in sales, where the states involved have different laws in the area, is desirable. This is the task of the Hague Draft Convention. Professor Gabor argues that "the absence of one well-developed body of private international law engenders substantial uncertainty and legal insecurity for both United States and foreign citizens contemplating transnational legal relationships."<sup>2</sup> This Commentary will explore the accuracy of Professor Gabor's statement.

Professor Gabor's belief that it would be best if all nations applied the same choice of law rules in the area of sales is clearly correct, subject to the proviso that the rules would have to be good ones. To be effective, rules must be clear and not justifiably subject to varying interpretations. They must also lead to uniform and desirable results. These objectives

---

\* Charles Evans Hughes Professor of Law Emeritus, Columbia University. Reporter, RESTATEMENT (SECOND) OF CONFLICT OF LAWS.

<sup>1</sup> Professor Gabor has written two articles on international choice of law: Gabor, *Emerging Unification of Conflict of Laws Rules Applicable in the International Sale of Goods*, 7 NW. J. INT'L L. & BUS. 696 (1986)[hereinafter *Emerging Unification*]; Gabor, *Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective*, 8 NW. J. INT'L L. & BUS. 538 (1988)[hereinafter *Stepchild of the New Lex Mercatoria*]. The latter is a contribution to this Symposium.

<sup>2</sup> Gabor, *Stepchild of the New Lex Mercatoria*, *supra* note 1, at 540.

are often difficult, if not impossible, to attain in important areas of choice of law. Take, for example, a rule that the rights of the parties to a contract are determined by the law of the place of making, that is, the state where the last act necessary to bring the contract into existence occurred. Such a rule would be easy to apply and could lead to uniform results. It is also possible, however, that courts would take different views on what constitutes the last act necessary to make a contract effective. In addition, experience has shown that application of this type of rule often leads to unfortunate results.<sup>3</sup> Such an approach would therefore be unacceptable. At the other extreme is the British rule that calls simply for the application of the "proper law" of the contract. This rule gives courts ample freedom to reach what they deem to be the correct result in any particular case. But, it affords little or no predictability of result and accordingly leaves much to be desired.

The present day solution is an attempt to steer a line somewhere between these two extremes. Modern codes and conventions, including the Hague Draft Convention, state quite precisely what law will govern a particular issue, and then afford flexibility by adding some usually vaguely phrased escape device. For example, it may be provided that the usually applicable law should be disregarded if some other state is the one "most closely connected"<sup>4</sup> or "manifestly more closely connected"<sup>5</sup> with the contract. Many European codes and conventions provide additional flexibility with the provision that the normally applicable law is to be disregarded if its application would lead to a result that is "manifestly incompatible with public policy."<sup>6</sup>

These modern codes and conventions, like the Hague Draft Convention, do assure some predictability of result. Inevitably, however, courts will differ with respect to the circumstances in which the normally applicable rule should be disregarded and solution to the choice of law question found in the vaguely phrased escape provision. It is further to be expected that escape provisions will be interpreted differently in different countries and by different courts. In short, uncertainty of result and lack of predictability are likely to persist despite the widespread adoption of a choice of law convention. To be sure, these evils would be mitigated if, as Professor Gabor suggests, some international body could be given ulti-

---

<sup>3</sup> It would, for example, lead with fair frequency to the application of the law of a state that has no significant contact with either the parties or the transaction.

<sup>4</sup> See, e.g., Convention on the Law Applicable to Contractual Obligations, European Economic Communities, art. 4, June 19, 1980, 23 O.J. EUR. COMM. (No. L266) 1 (1980).

<sup>5</sup> Hague Draft Convention, art. 8(3).

<sup>6</sup> *Id.* art. 18.

mate authority to determine the proper interpretation of a convention.<sup>7</sup> Such a solution is hardly practical in this day and age, however.

Further, disparity in the results that would be reached in a given case by application of different choice of law rules must not be exaggerated. It might be difficult to find many cases where substantially different results would be reached by application of the British "proper law" approach instead of the approach of Section 188 of the *Restatement (Second) of Conflict of Laws*. It is thought that the same would be true if the approach of the French courts were substituted. This is because the same basic value—protection of the justified expectations of the parties—underlies the contract law of most countries. It is to be expected that the courts will apply their choice of law rules in a way that will uphold this common value.

The rule governing the autonomy of parties also supports the proposition that differently phrased choice of law rules need not lead to different substantive results. It is almost universally agreed that parties can select the law that will govern their contract. This rule, however, is phrased somewhat differently in different countries. In common law countries, it is subject to qualifications: the state of the chosen law must have a reasonable relationship to the parties to the contract, or application of the chosen law should not violate a fundamental policy of the state having the greatest concern with the case.<sup>8</sup>

In European countries the rule is phrased without qualifications, which would suggest that the contracting parties have complete power to choose the governing law. This impression is erroneous. Civil law courts will not apply the chosen law if its application would violate the public policy of the forum.<sup>9</sup> European courts will look to certain laws (*lois d'application immediate, lois de police*)<sup>10</sup> before they even turn to the choice of law question. Such laws usually belong to the forum, but there are indications that a court will also give consideration to "policy-type" laws of other states.<sup>11</sup> It therefore cannot be said that contracting parties in civil law countries have more power to choose the law governing their contract than they would have in common law countries.

My statements should not be taken as serious criticism of Professor Gabor's article. It would certainly be desirable if all states applied the same choice of law rules. It would be difficult, however, to reach agree-

---

<sup>7</sup> Gabor, *Emerging Unification*, *supra* note 1.

<sup>8</sup> See, e.g., RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 187 (1971).

<sup>9</sup> See, e.g., Hague Draft Convention, art. 18.

<sup>10</sup> Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, 51 RABELS, ZEITSCHRIFT 60, 77-78 (1987).

<sup>11</sup> See, e.g., Hague Draft Convention, art. 7.

ment on such rules, and there is always the strong possibility that these rules would be interpreted differently in different states. Even in the absence of uniform choice of law rules, the world will continue to rotate on its axis.