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The Law of International Trade in India

The Problem of Standardisation

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Abstract of the Paper

The paper which will be presented deals with the law of international trade in India with specific attention to the problem of standardisation of terms and concepts. It first shortly deals with the subject matter and sources of the law of international trade and then goes on to look at the various methods by which standardisation is sought to be achieved particularly in India. It goes onto look at some of the main attempts at standardisation by International Conventions and Model laws and the way in which legislatures and courts have used such materials to bring about uniformity with world practice. It ends with a glance at what the future holds and what we at the Commonwealth Law Association can do about it.

It was 1760 and the process of change from an agrarian and handicraft economy to one dominated by industry and production of goods using machines, now known as the first industrial revolution was under way. This mass production of manufactured goods depended heavily on international trade since Britain had to draw its raw materials from across the world including its colonies.

One of the features which set the stage for the industrial revolution and facilitated its growth was the increase in international trade. The great ports of Britain at that time including London,

Liverpool, Plymouth and Southampton saw a huge rise in trade and commerce. To minimize the risk associated with international trade a highly sophisticated legal structure came together consisting of new concepts relating to international sale of goods, contracts of carriage by sea, creation of payment mechanisms like bills of exchange and letters of credit and instruments like insurance, the purpose whereof was to spread the risk of international trade in a manner that permitted much greater participation of men of commerce in international trade. London became the centre of the development of learning and practice of the law of international trade. To some extent it continues even today to hold premier position in this regard. With the breakup of the empire after the end of the second world war this legacy of a highly sophisticated legal structure to facilitate international trade and commerce was inherited by the commonwealth nations who has a common heritage in this regard with Great Britain.

The nature of the subject

International Trade transactions relate to exportation of goods or services from one country to another and all these transactions can be referred to as EXPORT TRANSACTION.[1]In such transactions domestic laws of both countries will be applicable along with the law of international trade, governing the obligations while the goods and services are in transit depending on nature of obligation.

[1]*See Schimitthoff's Export Trade, The Law & Practice of International Trade by Clive M. Schimitthoff, Eighth Edition (1986), Published by Stevens*

Export transactions were founded on the contract of international sale of goods. Such contracts which had at its object the exportation of goods are to be distinguished from other contracts of sale which were not the direct or immediate cause for the shipment of goods. Such contracts for the international sale of goods were entwined with other contracts in particular with the contract of carriage by sea, air or road under which the goods are exported and the contract of insurance by which they are insured. It is also inter-linked with the law and practice of maritime law which define the rights and obligations of ships and ocean-going vessels. They included contracts for payment made under bankers' letters of credit. All these aspects along with the method and jurisdiction for enforcing such contracts have become the subject of law of international trade.[2]

The sources of the law of international trade

The law of international trade is a mix of many things. Ancient law, the common law of obligations, statutes, and international conventions and so forth.

Maritime law in Britain and across the Commonwealth was developed on the basis of ancient principles of law based on customs and practices of different sea going nations parts of which was modified in statutes often incorporating provisions of international

[2] Sehmitthoff Export Trade, the law and Practice of International Trade by Clive M Sehmittoff

conventions unifying the laws practiced in several maritime countries.

To illustrate the position in India we may look at the law of carriage of goods by sea in India. The law is primarily contained in certain specific statutes like the Indian Bills of Lading Act 1856, The Indian Carriage of Good by Sea Act 1925, The Merchant Shipping Act of 1958 and general statutes such as the Marine Insurance Act 1963, the Contract Act of 1872, the Evidence Act of 1872, the Indian Penal Code 1816, the Transfer of Property Act 1882, the Civil Procedure Code 1908, the Criminal Procedure Code 1973, the Companies Act 1956 now replaced by the Act of 2013. It also contains and adopt general principles of law such as the law of Tort, public and private international law etc. The statutes relating to the administration of ports like the Indian Port Act of 1908 and Major Port Trust Act 1953 supplements specific aspects of the law in this context. Various regulatory measures affecting ships, goods and persons in connection with importation or exportation of goods are contained in the Customs Act 1962. As in the case of British and Commonwealth jurisdiction, many of the provisions of these Acts have been adopted from rules formulated by various international conventions. For instance the Carriage of Goods by Sea Act of 1925 contains by way of schedule the Hague rules. In addition, as I will show, it is within the competence of Indian Courts to apply general principles of maritime law. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed by any statute.

The problem of Standardisation

One of the main challenges of settling the law of international trade is to standardize terms used in the export trade to prevent misunderstanding amongst those engaged in International Trade that might be caused by the different interpretations given to the same term in different countries. Export transaction usually embodied terminology which was unique to itself like FOB and CIF clauses. These terms were developed by international mercantile custom. They are, however, sometimes interpreted differently in different countries and their meaning may be modified by agreement between parties, the custom of a particular trade or the usage prevailing in a particular port.

Adoption of the common law as a means of standardisation

By and large the law relating to such terminology devised and developed by Britain has been followed by Commonwealth countries including India. By adopting the common law in these instances, the problem of standardisation is minimized at least as far as the Commonwealth nations are concerned. I have listed in my paper cases where the Indian Courts have expressly adopted the English common law in this regard.

For example, the terms "*Ex Works*" came to be interpreted in the case of *Chief Commissioner of Excise and Customs Vs. Ispat Industries*[3] and in the case of *Tata Iron and Steel Co. Vs. CCE*[4]

[3] *Reported in (2002) 8 SCC 338*

[4] *See also* Escorts JCB Ltd. Vs. CCE (2003)1 SCC 282; CCE Vs. Emco Ltd. (2015) 10 SCC 321

The scope of f.o.b contract and c.i.f contract was enunciated by the Supreme Court of India in *Contship Container Ltd. Vs. D K Lall*[5] while dealing with goods misdelivering by sea air carrier interpreted and held as under,

The use of international conventions to achieve unanimity

But the world of trade is today much larger than the commonwealth. Hence the need has been felt to standardize the terms in which export and import business is transacted by multilateral negotiations between nations. These attempts can be classified into three groups, uniform conditions of general character, standard contract forms applying to specified international transactions and thirdly general terms of business[6].

The two most important attempts at standardization by discussion and negotiation between countries are the result of the efforts of the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce better known as INCOTERMS (International Rules for the Interpretation of Trade Terms).

ICC Incoterms

The efforts of the ICC have resulted in the uniform custom and practice for documentary credits, the uniform rules for corrections, the rules of the ICC Court of Arbitration, uniform rules for a combined transport document etc.

WHAT IS UNCITRAL AND WHY WAS IT FORMED

[5] (2010) 4 SCC 256
[6] Mario Mattuci The Unification of Commercial Law, 1960 JDL 137

UNCITRAL was established by the UN General Assembly in 1966 to promote the progressive harmonisation and unification of international trade law. UNCITRAL has since become the core legal body of the United Nations system in the field of international trade law. The Commission comprises 60 member States elected by the United Nations General Assembly for a term of six years. Membership is structured to ensure representation of the world's various geographic regions and its principal economic and legal systems.

India is a *founding member* of UNCITRAL. India is only one of eight countries which have been a member of UNCITRAL since its inception. Last year, it was re-elected for a term of six years (2016-2022).

UNCITRAL develops different types of texts to modernize and harmonize the law of international trade. These texts are generally legislative in nature, such as conventions, model laws and legislative guides, or non-legislative texts such as contractual rules that can be incorporated into commercial contracts and legal guides.

Convention: an agreement among States establishing obligations binding upon those States that ratify or accede to it.

Model law: a set of model legislative provisions that States can adopt by enacting it into national law.

Legislative guide: a text that provides guidance for the development of laws, discussing relevant policy issues and choices and recommending appropriate legislative solutions.

Contractual rules: standard clauses or rules designed to be included in commercial contracts.

Legal guide: a text that provides guidance for the drafting of contracts, discussing relevant issues and recommending solutions appropriate to particular circumstances.

Judicial perspective: An interesting aid to standardize the law rade is to be found in the judicial perspective to the UNCITRAL model law on cross border insolvency which was finalized and adopted on 1st July 2011. As is apparent from its name, the document discusses model law from a judge's perspective. It sets out materials and cases taken from different jurisdiction on topics such as the interpretation and application of the model law. In an annexure to it case summaries are provided on cases taken from different jurisdiction including India[7].

LEGISLATIVE TEXTS BY UNCITRAL

Legislative texts include the following:

- United Nations Convention on Contracts for the International Sale of Goods

[7] Ashapura Minichem Ltd

- Convention on the Limitation Period in the International Sale of Goods
- UNCITRAL Model Law on International Commercial Arbitration
- UNCITRAL Model Law on Procurement of Goods, Construction and Services
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit
- UNCITRAL Model Law on International Credit Transfers
- United Nations Convention on International Bills of Exchange and International Promissory Notes
- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)
- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade
- UNCITRAL Model Law on Electronic Commerce
- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects
- UNCITRAL Model Law on Electronic Signatures
- UNCITRAL Model Law on International Commercial Conciliation
- United Nations Convention on the Assignment of Receivables in International Trade

- UNCITRAL Legislative Guide on Insolvency Law and the United Nations Convention on the Use of Electronic Communications in International Contracts.

Non-legislative texts include the following:

- UNCITRAL Arbitration Rules;
- UNCITRAL Conciliation Rules;
- UNCITRAL Notes on Organizing Arbitral Proceedings
- UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works
- UNCITRAL Legal Guide on International Countertrade Transactions

Adoption of International Conventions in Municipal Laws.

One of the best ways to standardize the law of international trade is to incorporate international conventions and model laws into the municipal law of the country. In the Indian context, many of the conventions have been adopted into our municipal laws by legislation. Two areas of law that have recently been adopted into municipal law is in the sphere of arbitration law and insolvency law.

ARBITRATION

In 1996, India enacted the Arbitration Act, 1996 based on UNCITRAL Model Laws and the UNCITRAL Rules. The Parliament clearly

indicated that the Act had substantially adopted the Model Law on International Commercial Arbitration 1985 ("the Model Law") which had been drafted by UNCITRAL. The objective, as the court observed, was to pursue the "progressive harmonization and unification of the Law of International Trade". It would therefore be appropriate to bear the said objective in mind while interpreting any provision of the Act. [8]

INSOLVENCY

In December 1997, the General Assembly endorsed the Model Law on Cross Border Insolvency, developed and adopted by UNCITRAL. It provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State.

The Model Law is designed to apply where:

(a) Assistance is sought in a State (the enacting State) by a foreign court or a foreign representative in connection with a foreign insolvency proceeding;

(b) Assistance is sought in the foreign State in connection with a specified insolvency proceeding under the laws of that State;

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[8] Reliance Industries Limited and Ors. vs. Union of India (UOI) (28.05.2014 - SC): MANU/SC/0518/2014; Shin-Etsu Chemical Co. Ltd. vs. Aksh Optifibre Ltd. and Ors. (12.08.2005 - SC) : MANU/SC/0488/2005]

(c) A foreign proceeding and an insolvency proceeding under specied laws of the enacting State are taking place concurrently, in respect of the same debtor;

(d) Creditors or other interested persons have an interest in requesting the commencement of, or participating in, an insolvency proceeding under specified laws of the enacting State.

The Model Law anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent debtor's assets in one or more States or to act as a representative of the foreign proceedings at the time an application under the Model Law is made. It also requires an enacting State to specify the court or other competent authority that has the power to deal with issues arising under the Model Law. Acknowledging that some States will nominate administrative bodies rather than courts, the definition of "foreign court" includes both judicial and other authorities competent to control or supervise a foreign proceeding. The Model Law envisages that particular entities, such as banks or insurance companies, the failure of which might create systemic risks within the enacting State, may be excluded from the operation of the Model Law.

India has adopted the Model law in its new Insolvency and Bankruptcy Code. This has been done to bring the law on par with that of matured jurisdictions. It was done to generate greater confidence among foreign investors, adequate flexibility for seamless integration with the domestic insolvency law and a robust

mechanism for international cooperation. The necessity of having cross-border insolvency framework under the Code arises from the fact that many Indian companies have a global footprint and many foreign companies have presence in multiple countries, including India.

The role of the judiciary in developing the law of International Trade

- **By Interpretation**

UNCITRAL materials have been used by Indian courts to interpret statutory provisions wherever possible.

A recent approach of the Indian courts using UNCITRAL materials in judicial interpretation is found in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited[9]

There, while interpreting the expression "existence of a dispute" under Section 8(2) (a) of the Insolvency and Bankruptcy Code, the court placed reliance on the "Legislative Guide on Insolvency Law of UNCITRAL " which stated that

> *"Denial of an application to commence proceedings:*
>
> *....The preceding paragraphs refer to a number of instances where it will be desirable, in those cases where the court is*

[9] (2018 (1) SCC 353)

required to make the commencement decision, for the court to have the power to deny the application for commencement, either because of questions of improper use of the insolvency law or for technical reasons relating to satisfaction of the commencement standard. The cases referred to include examples of both debtor and creditor applications. Principal among the grounds for denial of the application for technical reasons might be those cases where the debtor is found not to satisfy the commencement standard; where the debt is subject to a legitimate dispute or off-set in an amount equal to or greater than the amount of the debt...

Examples of improper use might include those cases where the debtor uses an application for insolvency as a means of prevaricating and unjustifiably depriving creditors of prompt payment of debts or of obtaining relief from onerous obligations, such as labour contracts. In the case of a creditor application, it might include those cases where a creditor uses insolvency as an inappropriate substitute for debt enforcement procedures (which may not be well developed); to attempt to force a viable business out of the market place; or to attempt to obtain preferential payments by coercing the debtor (where such preferential payments have been made and the debtor is insolvent, investigation would be a key function of insolvency proceedings).

As noted above, where there is evidence of improper use of the insolvency proceedings by either the debtor or creditors, the insolvency law may provide, in addition to denial of the

application, that sanctions can be imposed on the party improperly using the proceedings or that that party should pay costs and possibly damages to the other party for any harm caused. Remedies may also be available under non-insolvency law. Where an application is denied, any provisional measures of relief ordered by the court after the time of the application for commencement should terminate (see chap. II, para. 53).”

This, the Court felt will bring the law in line with international practices, which permit unsecured creditors (including employees, suppliers etc. who fall under the definition of operational creditors) to file for the initiation of insolvency resolution proceedings.”

- **By Incorporation**

It has been recognized by Indian courts that Indian statutes tend to lag behind the development of International Law in comparison to contemporaneous statutes in other maritime countries.[10] Although Hague rules are embodied in the Carriage of Goods by Sea Act 1925, India never became a party to the international convention laying down those rules (the International Convention for Unification of Certain rules of law relating to Bills of Lading, Brussels 1924). Instead it merely followed the 1924 legislation of United Kingdom.

[10] MV Elizabeth vs. Harvan Intestment and Trading (1993) Supp (sub2) SCC 433.

When the Hague rules were sub-planted by the Hague Visby rules adopted by the Brussels protocol of 1968, the United Kingdom promptly adopted the same by the Carriage of Goods by sea Act of 1971. The Indian legislation did not, however, progress. It neither took account of Brussels protocol nor the Hamburg rules of 1978. The Hamburg rules prescribed the minimum liabilities far more justly and equitable and sought to correct the bias in favour of carriers viz-a-viz cargo owners. India has also not adopted the International Convention relating to the arrest of sea going ships, Brussels 1952 nor has India adopted the Brussels Convention of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Convention of 1926 and 1967 relating to maritime liens and mortgages. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade.

Therefore, the courts have felt the need to incorporate the principles contained in such conventions as part of the common law of India in the sphere of international trade. There is no incongruity in doing so as the principles incorporated in the convention are themselves derived from the common law of the nations embodying the felt necessities of international trade. Accordingly despite the apparent statutory restrictions of the exercise of admirality jurisdiction by courts in India, it was held by the Indian Supreme Court in *MV Elizabeth* that the statutory law cannot be considered to be the entire law relating to admirality and that Indian courts, particularly the higher courts were entitled to devise procedural rules

by analogy and experience specially where statutes are silent and remedy has to be sought by recourse to basic principles, because the jurisdiction of superior court is plenary unless otherwise indicated. On this basis it was held in that judgment that the admiralty jurisdiction covers all claims in Tort and Contract arising out of any agreement for carriage of goods by sea.

The future of the law of International trade

With the march of time the nature of transactions involved in international trade have undergone a significant change. Information technology has now become the primary enabler of all kinds of transactions, businesses, services and even goods. A new frontier has, therefore, opened up which requires fresh efforts of the international community to formulate legal structures that would protect IT enabled international transactions. Perhaps sufficient attention is yet to be paid to developing new structures to accommodate such change.

What can the Commonwealth Law Association contribute?

What is it that conference of this kind and an association like the Commonwealth Law Association can contribute to the further development of the law of international trade. Sharing all experiences between members of different States which have come together in the present conference would no doubt identify areas which require more effort in the field of standardization and other aspects of the law of international trade. In this way and in this sense significant

contributions can be made which could become the basis for further development. In the course of this conference we were informed that later this year the Commonwealth Law Association would be meeting in June 2019 in Johannesburg to formulate guidelines relating to contract clauses. Perhaps a chapter may be added on international export transactions as well.

The author

The author is a practicing advocate and has been handling commercial and constitutional litigation for over 30 years in the Supreme Court of India and High Courts across the country. After obtaining a first class in Economics from the University in Kolkata in 1981, he read for the Law Tripos. in the University of Cambridge and then qualified for the English Bar from Lincoln's Inn in 1985.After completing his education he started practicing in the High Court of Kolkata and subsequently in the Supreme Court of India. He was designated a Senior Advocate in 2002. He has frequently appeared before international and domestic arbitral tribunals. He has been a regular participant and speaker at the Commonwealth Law Conference since 2011, at the Cambridge Symposium on Economic Crime since 2013 and other international conferences. He has co-authored the Arbitration section of Halsbury Laws of India. He is an accredited Advocacy Trainer with 16 years experience. He loves to read history and biographical works. He is very fond of travelling and welcomes this opportunity to visit the wonderful country of Zambia and to marvel at the magnificence of the Victoria Falls, a short walk from this conference venue.