

Contracts between International Organizations and Private Law Persons

August Reinisch

TABLE OF CONTENTS

A.	Introduction	1
B.	Legal Capacity of International Organizations to Enter into Contractual Relations with Private Parties ..	3
C.	Types of Contracts: Rental Agreements, Sales Contracts, and Services and Employment Contracts	5
D.	The Law Governing Contracts between International Organizations and Private Law Persons	7
E.	Evaluation.....	14

A. Introduction

- 1 In general, (intergovernmental) international organizations enjoy both international and national (or domestic) legal personality (→ *International Organizations or Institutions, General Aspects*). This implies that they may have rights and obligations under both international and national law. The agreements they may enter into thus range from → *treaties* governed by international law to contracts subject to national law. Though contracts with private parties are most likely to be governed by a specific national legal system, it is frequently asserted both by academics as well as international courts and arbitral tribunals that such contracts may also be ‘denationalized’ or ‘internationalized’, or made subject to → *general principles of law*, to international law or a body of quasi-international rules.
- 2 This broad variety of potentially applicable law was recognized by the 1977 Oslo Resolution on ‘Contracts Concluded by International Organizations with Private Persons’ of the → *Institut de Droit International* (‘IDI’). In its Art. 2 the IDI expressed the desirability ‘that the parties expressly specify the source, national or international, from which the proper law of the contract is to be derived’. Art. 3 of the Oslo Resolution provides that the parties may stipulate that ‘domestic law provisions referred to in the contract shall be considered as being those in force at the time of conclusion of the contract’. This acknowledgement of ‘stabilization’ clauses equally recognizes domestic law as the potentially applicable law of contracts involving international organizations.

B. Legal Capacity of International Organizations to Enter into Contractual Relations with Private Parties

- 3 As a rule, the constituent treaties and/or privileges and immunities agreements of international organizations provide for their express capacity to perform legal acts under national law, such as entering into contracts, acquiring property and initiating legal proceedings. The prototype of such a domestic legal personality clause is Art. 1 sec. 1 of the Convention on the Privileges and Immunities of the United Nations (1946) (1 UNTS 15). It states that ‘[t]he United Nations shall possess juridical personality. It shall have the capacity: (a) to contract; (b) to acquire and dispose of in movable and immovable property; (c) to institute legal proceedings’. At the same time, this provision specifies the more general functional personality clause of Art. 104 UN Charter according to which ‘[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as

may be necessary for the exercise of its functions and the fulfillment of its purposes'. The constituent documents and privileges and immunities treaties of other international organizations regularly contain identical or very similar provisions (→ *International Organizations or Institutions, Privileges and Immunities*).

- 4 While such treaty clauses only bind an international organization's Member States, non-member States also normally recognize the domestic legal personality of international organizations. Such recognition may either be stipulated in a headquarters, host or seat agreement (→ *Host State Agreements*) or it may result from the recognition of an international organization's domestic legal personality enjoyed in a non-Member State. This autonomous → *private international law* approach was accepted by the Swiss Federal Supreme Court (*Arab Organization for Industrialization v Westland Helicopters Ltd*) as well as, in the end, in the protracted *Arab Monetary Fund* litigation before English courts (*Arab Monetary Fund v Hashim [No 3]*).

C. Types of Contracts: Rental Agreements, Sales Contracts, and Services and Employment Contracts

- 5 All international organizations need to enter into a broad variety of private law contracts in order to perform their day-to-day operations. These contracts may concern anything from the renting of office, storage and other space, to the procurement of office equipment, such as PCs, typewriters, or paper. Technical international organizations enter into Commodity Agreements (→ *Commodities, International Regulation of Production and Trade*) to purchase and sell raw materials, such as sugar, tin or cacao, or acquire technical equipment, such as space launchers or satellites (see the cases of the → *International Tin Council [ITC]*). But general political organizations also, such as the → *United Nations (UN)*, may have to provide for logistical support, such as the lease of aircraft, ships, and the like when they engage in → *peacekeeping* or disaster relief operations.
- 6 In addition to the procurement of goods, international organizations regularly have to contract for the provision of services by third parties, such as the construction of buildings, the transportation of goods, the design of computer software, or for professional services by lawyers and doctors. Other services have also to be contracted for frequently by international organizations. On a more permanent basis, services are rendered to international organizations by their staff. The legal basis of the relationship between an international organization and its employees is usually a contract, normally supplemented by the internal staff rules and regulations of the international organization (→ *International Organizations or Institutions, Internal Law and Rules*; → *Civil Service, International*).

D. The Law Governing Contracts between International Organizations and Private Law Persons

- 7 In practice the 'functional' immunity regularly enjoyed by international organizations (→ *International Organizations or Institutions, Immunities before National Courts*) is frequently broadly interpreted, often leading to an absolute immunity from legal process. As a result of this tendency, national court cases which address applicable law questions in contractual disputes between international organizations and private parties are rather limited. Due to the prevailing confidentiality of arbitral proceedings the outcomes of such

alternative dispute settlement methods are equally hard to obtain. It is thus very difficult to ascertain the actual practice of international organizations in the field of contracts with private parties.

- 8 An alternative empirical method was employed by the IDI's rapporteur on 'Contracts Concluded by International Organizations with Private Persons'. In response to his detailed questionnaire (57 Ann IDI I [1977], 110), the UN stated that it sought 'to avoid wherever possible reference to any specific law of application, especially any system of national law, and to consider the governing law of the contract to be found in general principles of law, including international law, as well as the terms of the contract itself ('Legal Opinions of the Secretariat of the UN' [1976] UNJYB 165).
- 9 In more recent practice, however, it seems that most sales, rental and service contracts between international organizations and private parties are governed by national law. The question which (national) law applies to a particular contractual relationship is a question of private international law or conflict of laws. In practice, this means that it will usually be determined either by national courts or by arbitrators. Since international organizations enjoy the same party autonomy to determine the applicable law as any other private parties, it is normally the law expressly or implicitly chosen by the parties. It appears that in the practice of most international organizations, the national law at the place where services are rendered, office space is rented or goods are supplied is usually expressly chosen as the applicable law (Rensmann 334; Sands and Klein 462).
- 10 In the absence of an express choice of law the private international law rules of the dispute settlement forum will determine the applicable law. In the case of lease agreements this is usually the so-called *lex situs*, or the law of the place where the property is located; in the case of sales or contracts for the provision of services it will be the law either of the place where the goods or services are rendered or to which the contract otherwise has the closest connection.
- 11 In addition to national law, international law may be applicable to contracts between international organizations and private parties. Clearly, international law may become relevant as the law expressly chosen by the parties. This is the practice in the case of some international financial institutions which, in their loan agreements, expressly exclude national law and provide for the application of international law and/or general principles of law (see also → *Debts*). Though this practice is mainly pursued in loan agreements with States, it is also sometimes used in contracts with private parties. Other international development banks generally subject their lending and borrowing activities to national law. Since international law may not be as detailed and refined as national contract law, its usefulness as *lex contractus* may be limited. Also, an 'internationalization' of contracts between international organizations and private parties may be less important than in the case of → *contracts between States and foreign private law persons*. There such a 'denationalization' of contracts serves the purpose of insulating them from the power of States to change their own law and thus to abrogate the contractual obligations they have entered into with private parties. Since international organizations do not have their own legal order comparable to a State's 'national' law they cannot manipulate it to their advantage. Thus, any national law chosen may be regarded as neutral.
- 12 The closest equivalent to a State's national law, the internal law of an international organization, is of relevance in the special case of certain employment contracts with organizations. However, as a rule, not all kinds of employment relationships with, or quasi-permanent provisions of services to, international organizations are governed by such internal law. Rather, there is a general distinction between permanent staff and local

or technical staff as well as less regular service providers. The precise delimitation between these two categories of persons providing services to international organizations is difficult in practice. The latter types of contractual relations are usually governed by national law, either contractually chosen or determined by the applicable conflict of laws rules.

- 13 Employment contracts between international organizations and their staff members, on the other hand, are regularly exempted from national law. Instead, they are governed by internal employment law, sometimes also referred to as internal administrative law. It is usually codified in internal secondary law, often called Staff Rules and Regulations, and frequently supplemented by general principles of law, in particular of employment law. This exemption from national employment law, together with the immunity from national labour courts, is often regarded as necessary in order to create and maintain a uniform and independent international civil service (→ *Civil Service, International*). Administrative tribunals (→ *Administrative Boards, Commissions and Tribunals in International Organizations*), which usually enjoy exclusive jurisdiction over staff disputes, frequently assert that they are ‘bound exclusively by the internal law of the Organization ... as well as by general principles of law’ (*Re Waghorn* ILO Administrative Tribunal Judgment No 28 [12 July 1957]). National employment law may become relevant, however, when there is an express choice of law or reference to it in the contract or staff rules or when it might be viewed as reflecting a general principle of employment law (*Re Kock, N’Diaye and Silberreiss* ILO Administrative Tribunal Judgment No 1450 [6 July 1995]).

E. Evaluation

- 14 Although there are not many cases or arbitral decisions dealing with contracts between international organizations and private law persons, it is probably safe to assert that such contractual agreements are regularly governed by a national law, usually chosen by the parties. International law plays a rather limited role in the contractual relations between international organizations and outside private parties. It is only the field of employment relations that is usually governed by an international organization’s internal law which includes its rules and regulations as well as general principles of law.

SELECT BIBLIOGRAPHY

- J Salmon *Le rôle des organisations internationales en matière de prêts et d’emprunts* (Stevens Londres 1958).
 FA Mann ‘The Proper Law of Contracts Concluded by International Persons’ (1959) 35 BYIL 34–57.
 G Delaume ‘The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast’ (1962) 56 AJIL 63–87.
 CW Jenks *The Proper Law of International Organisations* (Stevens London 1962).
 F Seyersted ‘Applicable Law in Relations between Intergovernmental Organizations and Private Parties’ (1967) 122 RdC 427–616.
 G Beitzke ‘Zivilrechtsfähigkeit von auf Staatsvertrag beruhenden internationalen Organisationen und juristischen Personen’ (1969) 9 Berichte der Deutschen Gesellschaft für Völkerrecht 77–119.
 B Schlüter *Die innerstaatliche Rechtsstellung der internationalen Organisationen unter besonderer Berücksichtigung der Rechtslage in der Bundesrepublik Deutschland* (Heymann Köln 1972).
 B Knapp ‘Questions juridiques relatives à la construction d’immeubles par les organisations internationales’ (1977) 33 SchwJbintR 51–80.
 N Valticos ‘Les contrats conclus par les organisations internationales avec des personnes privées: Rapport provisoire’ (1977) 57(1) AnnIDI 1–131.
 N Valticos ‘Les contrats conclus par les organisations internationales avec des personnes privées: Rapport définitif’ (1977) 57(1) AnnIDI 132–91.
 F Morgenstern *Legal Problems of International Organizations* (Grotius Cambridge 1986).

CONTRACTS BETWEEN INTERNATIONAL ORGANIZATIONS AND PRIVATE LAW PERSONS

- CT Ebenroth 'Shareholders' Liability in International Organizations: The Settlement of the International Tin Council Case' (1991) 4 LJIL 171–83.
- G Marston 'The Origin of Personality of International Organisations in United Kingdom Law' (1991) 40 ICLQ 403–24.
- J-P Colin and MH Sinkondo 'Les relations contractuelles des organisations internationales avec les personnes privées' (1992) LXIX Revue de droit international et de droit comparé 7–43.
- M Hartwig *Die Haftung der Mitgliedstaaten für Internationale Organisationen* (Springer Heidelberg 1993).
- M Schneider 'International Organizations and Private Persons: The Case for a Direct Application of International Law' in C Dominicé *Études de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn Bâle 1993) 345–58.
- CF Amerasinghe *The Law of the International Civil Service* (2nd edn Clarendon Press Oxford 1994) vol 2.
- PHF Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Nijhoff Dordrecht 1994).
- M Wenckstern *Handbuch des internationalen Zivilverfahrensrechts* (Mohr Tübingen 1994) vol 2(1) *Die Immunität internationaler Organisationen*.
- D Meyer 'Les contrats de fourniture de biens et de services dans le cadre des opérations de maintien de la paix' (1996) XLII AFDI 79–117.
- P Klein *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant Bruxelles 1998).
- T Rensmann 'Internationale Organisationen im Privatrechtsverkehr' (1998) 36 ArchVR 305–44.
- A Reinisch *International Organizations before National Courts* (CUP Cambridge 2000).
- PJ Sands and P Klein *Bowett's Law of International Institutions* (5th edn Sweet & Maxwell London 2001).

SELECT DOCUMENTS

- Institut de Droit International 'Contracts Concluded by International Organizations with Private Persons' (IDI Oslo 1977) (1977) 57(2) AnnIDI 333.
- Institut de Droit International 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties' (IDI Lisbon 1995) (1995) 66(2) AnnIDI 445.
- Committee on Accountability of International Organisations 'Accountability of International Organisations—Final Report' in International Law Association *Report of the Seventy-First Conference (Berlin 2004)* (International Law Association London 2004) 164.
- Standard Chartered Bank v International Tin Council and Others* High Court Queen's Bench Division (Commercial Court) (17 April 1986) 77 ILR 8.
- Re International Tin Council* High Court Chancery Division (22 January 1987) 77 ILR 18.
- Re International Tin Council* Court of Appeal (27 April 1988) 80 ILR 181.
- Maclaine Watson & Co Ltd v International Tin Council* High Court Chancery Division (13 May 1987) 77 ILR 41.
- Maclaine Watson & Co Ltd v International Tin Council* Court of Appeal (27 April 1988) 80 ILR 191.
- Maclaine Watson & Co Ltd v International Tin Council* House of Lords (26 October 1989) 81 ILR 670.
- JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others* High Court Queen's Bench Division (Commercial Court) (24 June 1987) 77 ILR 56.
- JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others* Court of Appeal (27 April 1988) 80 ILR 49.
- JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others* House of Lords (26 October 1989) 81 ILR 670.
- Maclaine Watson & Co Ltd v International Tin Council (No 2)* High Court Chancery Division (9 July 1987) 77 ILR 160.
- Maclaine Watson & Co Ltd v International Tin Council (No 2)* Court of Appeal (27 April 1988) 80 ILR 211.
- Maclaine Watson & Co Ltd v Department of Trade and Industry* High Court Chancery Division (29 July 1987) 80 ILR 39.
- Maclaine Watson & Co Ltd v Department of Trade and Industry* Court of Appeal (27 April 1988) 80 ILR 47.
- Maclaine Watson & Co Ltd v Department of Trade and Industry* House of Lords (26 October 1989) 81 ILR 670.
- Arab Organization for Industrialization v Westland Helicopters Ltd* (1988) Schweizerisches Bundesgericht [Swiss Federal Court] 80 ILR 622.
- Arab Monetary Fund v Hashim (No 3)* [1990] 1 All ER 685.
- Arab Monetary Fund v Hashim (No 3)* [1990] 2 All ER 769 (Court of Appeal).

CONTRACTS BETWEEN INTERNATIONAL ORGANIZATIONS AND PRIVATE LAW PERSONS

Arab Monetary Fund v Hashim (No 3) [1991] 1 All ER 871 (House of Lords).

July 2006