

UNIVERSITY OF OSLO
JUR5240 - Comparative Private Law

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LECTURE / SEMINAR

HARMONISATION OF INTERNATIONAL COMMERCIAL LAW 1:

- Current issues in uniform law and its application
- Harmonisation projects
- Role of the EU
- Role of other institutions
- General contract law vs commercial law

The law of international sales has been the subject of uniformisation efforts since the early 1960s. CISG (short for Convention on the International Sale of Goods), or by its official name

United Nations Convention on Contracts for the International Sale of Goods (1980)

Done at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

The text is available online at <http://www.cisg-online.ch/cisg/conv/convuk.htm> and <http://www.cisg.law.pace.edu/> where you also find a comprehensive database with case law and literature.

Two most prominent predecessors: **Hague Uniform Laws on International Sale of Goods 1964 (ULIS)**. These were two previous uniform sales law instruments designed by groups of scholars at the International Academy of Private International Law in The Hague, NL. They were also ratified by some states as conventions.

The success of the CISG is based on its adoption at the UN conference in 1980 in Vienna. It had been drafted originally by UNIDROIT in Rome and then finalised by UNCITRAL, the United Nations Commission on International Trade Law.

This brief retrospective already brings us to the main points which we will discuss in this lecture and the next:

What is the difference between laws drafted in political gremiums (ministries, conferences) and law drafted by scholars? What other model laws and conventions are there? We will list the terminology within international trade law.

Can rules designed to apply to international sales contracts or generally to international commercial contracts which are drafted and published but not formally adopted by state organs be law?
Do they lack legitimacy?

Do such rules help international trade or are they a folly of specialists in the area of international contract law?

Can such rules provide uniformity in international trade law?

What is the role of CISG in relation to other 'model laws' and international conventions?

What institutions are there drafting international rules of law?

Institutions who are involved in the uniformisation of international trade law are state organs as well as private bodies:

The EU, state representatives at international conferences, the UNIDROIT Institute in Rome, see their website <http://www.unidroit.org/> and the database UNILEX containing court decisions and literature. The ICC (International Chamber of Commerce in Paris) and its national branches, the Courts of Arbitration in London (LCIA), in New York, Paris, Zurich, Vienna and elsewhere, Trade Associations, Banks, the UNCITRAL.

Observe the differences and special nature of these: what does this mean for the legal nature, eg 'legitimacy' for the model laws or state laws which they produce?

The Treaty of Amsterdam has given the EU institutions the possibility to enact more legislation in the area of private law, and ample use has been made of this: among others the judicial co-operation in civil and commercial matters has resulted in a number of Regulations in this field. These have replaced the Brussels Convention on the Enforcement of Judgements and (from 2009) the Rome Convention of the Law Applicable to Contracts. (so called Brussels I and Rome I Regulations). The UK are currently conducting a consultation in order to prepare a decision of whether to opt into „Rome I“. In the UK, we therefore have to analyse the legal nature of CISG as well as the status of the choice of law regime.

Looking at *ICC case 7110* we can understand why parties have an interest in a particular choice of law and what the role of non-state laws can be.

As the case is unpublished: read Filip De Ly 'National Report: The Netherlands: An Interim Report regarding the Application of the UNIDROIT Principles of International Commercial Contracts in The Netherlands', in *A new Approach to International Commercial Contracts: the UNIDROIT Principles of International Commercial Contracts*, Bonell, MJ (Ed), The Hague, Kluwer Law International (1999), 203-235;

Alternatively, read notes on this in:

M. Heidemann: Methodology of Uniform Contract Law – The UNIDROIT Principles as a source of law, *EBLR* 18 (2007), 709-767, read p751-767.

And read optionally: De Ly, F, 'Choice of law clauses, UNIDROIT Principles of International Commercial Contracts and Article 3 Rome Convention, The lex mercatoria before domestic courts or arbitration privilege?', *Etudes offertes à Bathélemy Mercadal*, Paris, Editions Francis Lefebvre (2002), 133-145.

Scope of CISG:

Article 1 (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2 This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by

(b)

of electricity; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f)

Here we can see that we have to distinguish between contracts for business purposes and those concluded „privately“.

Is this a straightforward definition? How does this distinction appear in national laws?

Is it legitimate to distinguish between merchants and non-merchants as in German law, or is this „unconstitutional“? How does EU consumer law fit in with this?

Legislation

- Contracts (Applicable Law Act) 1990 (of England)
- EC Convention on the Law Applicable to Contractual Obligations (Rome Convention) 1980
- Draft Council Regulation COM (2005) 650 final (‘Rome I Regulation’)
- Draft Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), PE-CONS 3691/07, available at <<http://register.consilium.europa.eu/pdf/en/07/st03/st03691.en07.pdf>>
- UNIDROIT Principles of International Commercial Contracts 2004, available at <<http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>>
- UNCITRAL Model Law on International Commercial Arbitration (1985/2006), Art 28
- Arbitration Act 1996 (of England), s 46
- 1986, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf
- CFR (Common Frame of Reference), published by Sellier
- PECL (Principles of European Contract Law), available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm

HARMONISATION OF INTERNATIONAL COMMERCIAL LAW 2:

- Sales law: CISG in its context: implementation techniques and application
- Position and application of CISG in the UK

CISG has not been ratified in the UK yet. Therefore, the legal nature of the instrument is to be analysed: can CISG be made the governing law of the contract by parties whose place of business is in the UK? If it can (,only') be chosen as contractual terms, what effect does this have?

We will discuss the pro's and con's of such choice and the legal nature and scope of CISG in the UK and other jurisdictions.

Eurotunnel v Balfour Beatty [1992] 2 Lloyd's Rep 7 (CA); [1993] 1 Lloyd's Rep 291 (HL)

This case concerned an arbitration clause which the appellants (from CA) wished to set aside. The applicable law was "principles common to both English and French law"

Discuss the motivations behind choice of law.

Halpern & Ors v Halpern & Anr [2007] EWCA Civ 291

(available at

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2007/291.html&query=%2522applicable+and+law%2522+and+rome+and+convention&method=boolean%23disp150%23disp150>)

This case concerns the admissibility of a choice of anational (in this case Jewish) law before English courts.

Brief Notes from the Reasons of Halpern v Halpern (CA 2007)

Speech of LJ Waller

1 (21) RC not applicable because not law a country disputed. Argument rejected. On facts.

2 (21) The case involves a choice of different countries: English, Swiss and Jewish. law. . "But the fundamental reason why the argument is hopeless is because the starting point for the Rome Convention was a point accepted by all countries party to that Convention , that laws could not exist in a vacuum; by 'laws ' were meant laws enforceable in the courts of countries whether parties to the Convention or other states. Paragraph 32-081 of the 14th Edition of Dicey, Morris and Collins puts the matter succinctly and in my view correctly:" **'that a choice of *lex mercatoria* is not an express choice of law under the Rome Convention'**. **'Contracts cannot exist in a vacuum'**.

3 (22) further hint to not allowing anational law is the treatment of mandatory laws in Art 3(3) and 7 of the RC.

4 (23) LJ Waller does not believe that the matter falls outside the scope of the RC under the heading of wills and succession and **uses the expression 'compromise of an arbitration'**

'However it would seem to me that a compromise of an arbitration dealing with a dispute as to whether assets outside an estate should be brought into account in order that one party should gain his fair share could not be termed a contract relating to "wills and succession".

5 (24) Rix J in *Al Midani v Al Midani* [1999] 1 Lloyd's Reports 923

The judge emphasises that under the RC choice of anational law is not an option as in the above case where Sharia law was contemplated to be the proper law ;'as a branch of foreign law'. (page 930).

The quoted case also concerned an agreement to arbitrate and its construction, and those are excepted from the RC .Art 1 (2) (d).

Now, even under the traditional common law view, the choice of law of a country (*Amin Rasheed*) was intended , p.62 of the case.

See Lord Diplock in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 at 65]

6 The judge does agree, however, that anational law can be used to **interpret** 'the obligations under an agreement to arbitrate (24).

7 (25) Conclusion1 : the RC applies to the compromise agreement, and the applicable law is to be established under the RC and it is the law of a country.

8 The judge sees no necessity to decide between English or Swiss law as applicable to the matter, "since no one has suggested that Swiss **law** is any different from English **law**" (28)

It is unclear whether this refers to the fact that it is undisputed or whether the difference would be a decisive factor in the view of the judge.

10 (29) **↓**,The judge rules out both an express and an implied choice of Jewish law as a matter of English conflict law and concludes that English law is the applicable law.

11 (33) The judge accepts that Jewish law is a suitable body of law to be 'a contractual framework' for a contract between Orthodox jews, as distinct from Sharia law which seems to have diverging traditions ('schools of thought'. This is in the interest of certainty about what the incorporated foreign law is.

15 (37) The judge confirms that under the **Arbitration Act 1996 (s 46)** law which is not the law a country ('other considerations'), ie Jewish law, would be choosable by the parties in arbitration proceedings, and such an award would be enforceable. Also, a breach of the arbitration clause would lead to a stay of proceedings. [Channel Tunnel Case].

16 (39) the judge points to the Rome 1 Regulation (then) in the making, which counsel for the respondents has raised. He points out that the RC in its current form is to be applied and the new efforts do not have an impact. He doubts that this Regulation will become binding in England.

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SPECIFIC QUESTIONS OF CISG:

- Differences between ordinary contract law and commercial contract law – national laws and international models.
- Art 35-40: Inspection rules

Read: Camilla Baasch Andersen: The Duty to examine the goods under the Uniform International Sales Law – An analysis of Art 38 CISG, EBLR 18 (2007), 797-814.

Article 38 (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 39 (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

- Differences/ Clashes? between continental and common law models:
- Non-performance and breach of contract

What is the difference between the two concepts – Does CISG set standards? Example: Reform of the German Civil Code

- Specific performance

Article 28 If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Read: M. Heidemann: Methodology of Uniform Contract Law – The UNIDROIT Principles as a source of law, EBLR 18 (2007), 709-767, read p742-746

The UK has made a reservation

- Good faith

Article 7 (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of

good faith in international trade. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

- Comparison with other uniform instruments and national laws

Compare Art 7 CISG with Art 1.7. UPICC.

Article 1.7 - Good Faith and Fair Dealing

- (1) Each party must act in accordance with good faith and fair dealing in international trade.
- (2) The parties may not exclude or limit this duty.

Can these provisions be applied in the UK at all?

Read Heidemann above, Bridge and Brownsword below.
Case law to be advised.

Reading on CISG:

Commentaries / Monographs:

John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), Kluwer.

See Michael G. Bridge, "The Bifocal World of International Sales: Vienna and Non-Vienna", in R. Cranston (ed), *Making Commercial Law* (Oxford University Press 1997), pp 277-96.

R Brownsword, NJ Hird and G Howells (eds), *Good Faith in Contract[:] Concept and Context* (Ashgate and Dartmouth 1999).

General:

BIANCA C.M. / BONELL M.J. (eds.) Commentary on the International Sales Law. The 1980 Vienna Sales Convention Giuffr , Milano 1987

FAWCETT J. / HARRIS J. / BRIDGE M. International Sale of Goods in The Conflict of Laws Oxford University Press (Private International Law Series), Oxford 2005

FERRARI F. (ed.) The CISG and its Impact on National Legal Systems, Sellier, Munich, 2008 (from IACL Comparative Law Congress, Mexico City 2008)

FERRARI F. (ed.) The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences, Sellier, Munich, 2003.

FERRARI F. International Sale of Goods / Contrat de vente international. Applicabilit  et applications de la Convention de Vienne sur les contrats de vente international de marchandises Helbing & Lichtenhahn (Basel); Bruylant (Br ssel) 1999

LOOKOFSKY J. Understanding the CISG in the USA: a Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods 2nd ed., Kluwer Law International, The Hague [et al.] 2004

SCHLECHTRIEM P. / SCHWENZER I. (eds.) Commentary on UN Convention on the International Sale of Goods (CISG) 2nd (English) ed., Oxford University Press, Oxford 2005

Journal Articles:

Schwenzer, I (1998/1999) 'Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts' 1 *European Journal of Law Reform* 289.

Bridge M, Uniformity and Diversity in the Law of International Sale
15 *Pace International Law Review* (Spring 2003) 55-89, available at
<http://www.cisg.law.pace.edu/cisg/biblio/bridge.html>

Bridge M, Does Anglo- Canadian contract law need a doctrine of good faith?, in *Can. Business L. J.*, 1991, p. 414

Bridge M (1991). The 1973 Mississippi floods: "Force majeure" And export prohibition. *Force majeure and frustration*. McKendrick E: 287-303.

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CASE LAW ON CISG IN THE UK?

United Kingdom 17 February 2006 Court of Appeal (Civil Division) (*ProForce Recruit Ltd v Rugby Group Ltd*) [Cite as: <http://cisgw3.law.pace.edu/cases/060217uk.html>]

United Kingdom 18 December 2006 Court of Appeal (Civil Division) (*The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd*) [Cite as: <http://cisgw3.law.pace.edu/cases/061218uk.html>]

- Application techniques with regard to CISG, Incoterms and other Model laws and uniform laws: interpretation rules, international instruments as supplementation for each other, gap theories.
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Article 7 (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Do concepts which are different in continental / common law systems contribute to uniformity in international contract law? How can these obstacles be overcome?

Reading:

Basedow, J (2006) 'Uniform Private Law Conventions and the Law of Treaties' 11 *Uniform Law Review* 731.

Heidemann, M (2007) *Methodology of Uniform Contract Law: The UNIDROIT Principles in International Legal Doctrine and Practice* (Berlin Heidelberg: Springer).

Revision