Transnational law is not sufficient to govern contracts

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Goal of uniformity

• If inconsistent national law affects the contract, does transnational law ensure uniform legal effects?
Sources of transnational law

• "Principles rooted in the good sense and common practice of the generality of civilised nations” (Binding Public international law)
• Usages and practices (Binding lex mercatoria)
• International Conventions (Binding sources of law private law and non binding soft law?)
  – E.g. CISG
• Model Laws (Non binding soft law)
  – E.g. UNCITRAL Model Arbitration Law
• Private Codifications (Non binding soft law)
  – E.g. INCOTERMS, UCP 600
• Restatements (Non binding soft law)
  – E.g. UNIDROIT Principles, European Principles
Private Codifications

• International Chamber of Commerce, ISDA, branch associations
• INCOTERMS, UCP 600, Model Agreements, Codes, Definitions

• May be considered as expression of trade practices
• Alt.: Are applicable if incorporated by the parties
• May not prevail over conflicting mandatory rules of the applicable law
• Have a clearly determined scope of application
INCOTERMS

• ICC Terms of sale regulating:
  – Passage of risk
  – Division of costs
  – Obligations in connection with delivery (customs formalities, transportation, etc.)
Source: http://www.cbsc.org/alberta/tbl.cfm?fn=incoterm
The 4 groups of terms (Incoterms 2000)

<table>
<thead>
<tr>
<th>Term</th>
<th>Delivery</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-terms</td>
<td>Departure (not cleared or loaded)</td>
</tr>
<tr>
<td>F-terms</td>
<td>Main carriage unpaid (cleared)</td>
</tr>
<tr>
<td>C-terms</td>
<td>Main carriage paid (risk passes)</td>
</tr>
<tr>
<td>D-terms</td>
<td>Arrival (cleared for import only in DDP)</td>
</tr>
</tbody>
</table>
The 2 groups of terms (Incoterms 2010)

Term

• Delivery by any mode of transport
• Delivery by sea/inland waterway
The 11 INCOTERMS (Incoterms 2010)

- **EXW** EX WORKS (…named place)*
- **FCA** FREE CARRIER (…named place)
- **FAS** FREE ALONGSIDE SHIP (…named port of shipment)*
- **FOB** FREE ON BOARD (…named port of shipment)
- **CFR** COST AND FREIGHT (…named port of destination)
- **CIF** COST, INSURANCE AND FREIGHT (…named port of destination)*
- **CPT** CARRIAGE PAID TO (…named place of destination)
- **CIP** CARRIAGE AND INSURANCE PAID TO (…named place of destination)*
- **DAP** DELIVERY AT PLACE (…named place of destination)*

- **DAT** DELIVERY AT TERMINAL (…named place of destination)*
- **DDP** DELIVERED DUTY PAID (…named place of destination)*
INCOTERMS and Governing Law

- Delivery FOB, goods destroyed after passage of risk
- INCOTERMS: Buyer has to pay the price
- Governing law: Buyer not bound to pay the price if loss due to seller’s negligence (art. 66 CISG)
INCOTERMS and Governing Law

• Integration of applicable law
• Subject to applicable law
• Do not replace applicable law (e.g. Validity, Limitation, Interests, Remedies, etc.)
• May accommodate requirements of applicable law (e.g. allocate risk of customs duties)
Transnational law—Scope of Application

• Mostly compatible with national laws
• Desirable integration of national law
• If conflict, the applicable national law prevails

• Does it ensure uniform interpretation of contracts?
Restatements

• To improve lex mercatoria’s weaknesses:
  – Difficult to determine
  – Not systematic
  – Too vague

  – Not a codification of existing principles
  – Systematic set of principles based on consensus among international academics
UNIDROIT Principles of International Commercial Contracts

- Drafted in 1994 by the International Institute for the Unification of Private Law
- Establish a balanced set of rules designed for use throughout the world
- No binding effect
- Persuasive authority
Principles of European Contract Law

• "Commission on European Contract Law"

• Aim of PECL
  – Binding for all EU public contracts
  – Binding for private contracts, if referred to by parties
  – Long term: binding for all contracts
Green Paper on European Contract Law

• 1 July 2010 COM (2010) 348 final
• Public consultation on options to strengthen the internal market by making progress in the area of contract law
Proposal for Regulation

- Approved by the European Parliament on 26 February 2014
- Approval by Council pending
CESL:
Optional instrument, second regime

• Must be chosen by the parties

• Creates “within each member State’s national law a second contract law regime [...] identical throughout the Union and [existing] alongside the pre-existing [!] rules of national contract law” (recital 9)

• Should “not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them (recital10)
Entire Agreement clause

• Article 2.1.17 UPICC:

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.
May earlier developed specifications be taken into consideration?

• Article 1.8: A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

• Contract practice: Literal interpretation
Specs may not be used
• ICC 9117 of 1998
• Proforce Recruit Ltd
• Scotia Homes

Specs may be used
• Milan Chamber 2002
• Lemire v. Ukraine
Force Majeure clause

• CISG article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
Is failure by the supplier "beyond the party’s control"?

<table>
<thead>
<tr>
<th>Prevailing interpretation</th>
<th>Norwegian implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>• No</td>
<td>• Yes</td>
</tr>
</tbody>
</table>
Irrevocable Offer

- Art. 2.4 Unidroit: Offer is not binding until accepted, but cannot be revoked if it indicates that it is irrevocable (by fixing a time for acceptance or otherwise). Art. 1.4: Principles cannot derogate from overriding mandatory rules of the governing law.
- Art. 2:202, 1:103 PECL: Idem
Partial Impediment

• Unidroit: Not regulated (art.1.6: gap filling by autonomous interpretation, 1.8 usages between the parties, generally acknowledged usages)

• PECL: Not regulated (art.1:106(2): gapfilling by autonomous interpretation, otherwise governing law)
Conclusion

• Common Contract Law as a tool towards unification?
  – Unification is not exhaustive
  – Even unified wording is interpreted in light of interpreter’s own legal background
• Different legal systems will continue to survive long after unification (if any)
• CESL: ECJ may unify – but can discretionary evaluations on good faith and interpretation be unified?