

“The significance of the CISG for the harmonisation and transplantation of international commercial law”

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1 Introduction

It is often said that one of the aims of comparative law is to help in the harmonisation of law, but the intellectual worlds of the comparatist and the harmonisation scholar rarely coincide. This is not surprising.

“When law is internationalised it changes. It is denationalised, modernised and liberalised, sometimes intentionally, sometimes inadvertently.”¹

The aim of this article is to act as a modest bridge between the two worlds by exploring the landscape in which harmonisation of international commercial law takes place and, in particular, one of the most successful attempts, the Vienna Convention on the International Sale of Goods (CISG)

The CISG is more than merely an example of a harmonised international law. It is also a product of comparative studies. It is useful to remember that the whole process of drafting and refining the CISG spanned a period of thirty years. Furthermore the CISG was not only “about the law” but also about what was politically acceptable. In essence comparative legal studies were the foundation of any suggestion as to what was acceptable to diverse groupings such as the civil law countries, the common law countries, the communist or eastern block countries and the developing or underdeveloped countries.

In a commercial world however the success of an international instrument or any other law for that matter is measured by the degree of its acceptance by those who apply and use the law. One could ask; why is the CISG important? Is it because of harmonisation or transplantation issues? The answer is neither. It is important because the drafters were acutely aware that nations would sign the convention only if it reflects their aspirations and expectations. Hence the comparatist supplies the answer as to what are the shared fundamental expectations or general principles on which everybody can agree. This suggestion leads to the conclusion that harmonisation and transplantation are merely the practical applications of a product which has its origin

* I would like to thank Gerry Box of Victoria University, Melbourne for reading an earlier draft which was much appreciated.

¹ Karrer “Internationalisation of Civil Procedure – Beyond the IBA Rules of Evidence” 2004-4 *Uniform Law Review* 893.

in comparative studies. This paper attempts to “map the territory” and it is hoped that it will encourage further comparative work in the area of private international law.²

This observation makes the adoption of a unified or harmonised law to solve problems associated with international sales quite important. Eiselen in an important paper explained why South Africa should adopt the CISG and it is useful to repeat in part his excellent treatment on this matter.³ He specifically noted that:

“In the process of creating a new economic order, it is extremely important to remove any unnecessary bafflers impeding trade that might exist. Although most of the countries in southern Africa share a common legal background in regards to contract – Roman-Dutch law – there is no unified law of sale and, as far as the rest of Africa is concerned, even a common legal heritage is lacking.”⁴

Broadly speaking, harmonisation of commercial law takes place either by internationally agreed instrument or transplantation of foreign law. A third method, which might be regarded as a hybrid of the above two, is by adoption of an internationally agreed model law. Therefore a state can simply ratify an international instrument in order to harmonise the international aspect of its commercial law; adopt a model law in order to achieve the same object; transplant foreign law as a substitute for its domestic law;⁵ or combine ratification of an international instrument with transplantation .

Numerous harmonisation attempts have taken place which been driven by bodies such as UNCITRAL, UNIDROIT and the European Commission to mention a few. The CISG is arguably the first successful international instrument dealing with the international sale of goods. The CISG is significant for the harmonisation of international commercial law through comparative studies. For the first time vastly different legal systems could agree on a “common denominator.” Furthermore the CISG has been the source or inspiration for many transplants. Importantly aspects of the CISG have not only been adopted into domestic law but also into other conventions. Hence the CISG is not only an example of harmonisation but transplantation as well. It is for these reasons that the CISG must be considered to be an important development in the harmonisation of commercial law worldwide.

To begin the detailed analysis it is valuable to remember what Lord Mansfield had to say in the 18th century. He commented:

² Of special interest should be the newly adopted ALI/UNIDROIT Principles of Transnational Civil Procedure see 2004-4*Uniform Law Review*.

³ Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” 116 *South African Law Journal*, part II 323 324.

⁴ *Supra*.

⁵ It is not the purpose of this paper to discuss whether legal transplant in one form or another will function as planned.

“The mercantile law, in this respect is the same all over the world. For from the same premises, the same conclusions of reason and justice must universally be the same.”⁶

Lord Mansfield succinctly links reason and justice to the attainment of a uniform, homogenous law. In effect he understood the requirements of a successful international law well ahead of its successful contemporary implementation. In our own time globalisation and internationalisation have acted as catalysts to reinvigorate Lord Mansfield’s thinking. It has been argued that the application of a unified law to cross-border transactions is economically sound and produces superior results compared with the application of domestic law.⁷ Amongst academic authors, Ancel has observed that disparities in municipal legal systems are:

“contrary to the requirements of [a] modern economy [and] a uniform law is superior to a system of conflicts of law, which allows the existence of those specific differences on which it is based.”⁸

Despite all attempts at harmonisation, substantive contract laws still vary greatly and even in the European Union there is no uniform contract law. There are still considerable differences.⁹ The joint response of the Commission on European Contract Law (CELL) was unambiguous. They noted that a business cannot assume that the private law of another Member State is the same as their own and without detailed knowledge of foreign laws runs the risk of “substantial loss of claim or unsuspected liabilities.”¹⁰

However some caveats may be noted. First, harmonisation as such is neither necessary nor essential in all circumstances:

“In situations where differences in national laws are not material to the conduct of international commerce, there is little reason to create uniform law. Uniformity has very little innate value in this area [and] has appeal only insofar as it eliminates or minimizes hurdles caused by disparity.”¹¹

Second, in some areas of law, even if some claim that harmonisation should take place, national culture (including political, legal, historical, ideological and other

⁶ *Pelly v Royal Exchange Assurance Co* [1757] Burr 341 347.

⁷ Blase, "Leaving the Shadow for the Test of Practice - On the Future of the Principles of European Contract Law" (3) *Vindobona Journal of International Commercial Law and Arbitration* 34. It must be pointed out that this view is not universally shared. As an example Sir John Hobhouse, "International Conventions and Commercial Law: the Pursuit of Uniformity" (1990) *106 LQR* 530.

Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724 have debated this point to the contrary.

⁸ Ancel "From the Unification of Law to its Harmonisation" (51) *Tulane Law Review* 108 (1976) 114

⁹ Lando "Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?" *Uniform Law Review* 123 (2003) 125.

¹⁰ *Joint Response of the Commission on European Contract Law and Study Group on European Civil Code* available at:

http://www.sgecc.net/media/download/stellungnahme_kommission_final1.pdf at 113.

¹¹ Gopalan "New Trends in the Making of International Commercial Law" (23) *Journal of Law and Commerce*. 117 (2003) 124.

elements), which has to respond to internal pressure, still resists harmonisation efforts. Consumer protection law can be cited as an example.

Third, harmonisation is a long, slow and expensive process. Kötz also adds the costs of a loss of domestic political competition for legal solutions as a cost of harmonisation.¹²

Fourth, although national culture may not succeed in stopping harmonisation, culture remains a stumbling block which is at worst not surmountable or at best difficult to shift. Therefore harmonisation must be treated with caution because in its ultimate form it means “absolute uniformity of legislation among the adopting jurisdictions”.¹³ There is no doubt in anybody’s mind that such a theoretical harmonisation is rarely if ever achievable.

An example of the strength of national culture can be seen in legal language and thinking. Each legal system has its own rhetorical community with its own unwritten understanding of the system’s underpinning legal principles and vocabulary. For example Waddams points to Quebec law where specific performance can only be demanded “*dans les cas qui le permettent*”¹⁴, which can be translated as: “in cases where it is allowed or which admit of it.” Without intimate knowledge of Quebec law and practice it is difficult to understand what is meant by this phrase.¹⁵

This phenomenon can be clearly demonstrated by the way in which the drafters of the CISG tried to avoid it by using jurisdiction neutral terms.¹⁶ These words are devoid of municipal meanings, they cannot be given a literal meaning nor may a meaning of these words be based on domestic law. The Swiss Supreme Court¹⁷ complied with this approach when they examined the requirement of Art 39(1) CISG on notice of nonconformity of goods. The court had to examine the degree of specificity of a notice of lack of performance. Compared with the French and English texts the German text was too strict. The wording in the German text (*genau zu bezeichnen*) translates as; “specifying with precision the nature of...” whereas in the English text the clause reads: ‘specifying the nature of the lack of conformity...’ The French text confirms the English version by stating “*préciser de ce défaut...*”.¹⁸ Hence the court took the less rigid view as being the correct one.

It would be remiss not to note some important criticism which was directly levelled at the CISG but could be equally applicable to any other uniform instrument. Rosett is especially critical of the CISG. It is never disputed that the convention is a political

¹² Kötz “Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele” 50 *RebelsZ*, 1 (1986) 12.

¹³ Ziegel “Harmonisation of Private Laws in Federal Systems of Government: Canada, the USA and Australia” in Cranston R (ed) *Making Commercial Law: Essays in Honour of Roy Goode* Clarendon Press (1997)

¹⁴ Art 1601 Civil Code of Quebec.

¹⁵ Waddams “The Choice of Remedy for Breach of Contract” in Beatson J and Friedmann D (eds) *Good Faith and Fault in Contract Law* Clarendon (1995) 472.

¹⁶ Certain languages have been stipulated as being official languages namely Arabic, Chinese, English, French, Russian and Spanish. When the text needs interpretation the official languages are given priority whereas the ‘other languages’ carry only secondary significance.

¹⁷ Switzerland 13 November 2003 Supreme Court available at:

<http://cisgw3.law.pace.edu/cases/031113s1.html>.

¹⁸ *Supra.* abstract prepared by Blaise Stucki.

document because it is a product “hammered” together by delegates from varied political and legal backgrounds. Rosett calls it a “cut and paste job”¹⁹ It is therefore not surprising to see Rosett suggest that:

“... in their anxiety to reach an agreement the delegates often buried problems without resolving them, cut off their messy ends, or adopted a verbal formula which hides persistent disagreement.”²⁰

However this criticism must be put into context. Rosett himself agrees that the problems to which he alludes include “all the areas that are currently controversial and produce disputes.”²¹

It should be understood that harmonisation arguably runs through three distinct stages which were not recognised by Rosett. A valid criticism cannot be “global” but ought to address shortcomings within each stage as each step has different problems, accordingly different solutions are needed.

First, harmonisation must draw together international issues and even controversial disputes. Once a document has been established it affords the opportunity to put one solution on the table. In that sense uniformity or harmonisation has occurred. It is the “nature of the beast” that messy ends are cut off. A diplomatic conference will rarely reach “perfect” consensus, as factional interests seldom allow the creation of such a solution. Furthermore how can the question whether “one is prepared to coordinate the judicial and social context in which those rules take on meaning” be resolved in the drafting process? The question is; if that is so, is not harmonisation doomed from the outset? The answer is no.

It is the second and third stages which are crucial in determining the utility of harmonisation. The second stage is when practical problems emerge, that is litigation will be brought to the courts and tribunals. In the third stage which is the telling one, the solutions of courts can be analysed and compared. It is the result of the “theoretical harmonisation or unification.” If there is harmony then unification of law has been successful if there is disharmony the unification process is a failure. Of course part of this process is whether a “critical mass” of application has been achieved. In the end the saying “the proof is in the eating of the pudding” applied to law as well. Rosett himself alludes to this point where he states that it is easier to accept an unsatisfactory text if one is confident that it can be improved with experience.²²

Since perfect harmonisation is not achievable, Zamora has argued that the adoption of rules or even models must be resisted and that the different legal concepts of different jurisdictions must be accommodated instead.²³ This involves the formulation of general legal principles, while at the same time recognising that there are gaps which

¹⁹ Rosett “CISG Laid Bare: A Lucid Guide to a Muddy Code” 21 *Cornell Int’l L.J.* 575 589.

²⁰ Rosett “The International Sales Convention A Dissenting View” 18 *Int’l Lawyer* 445 447.

²¹ *Supra*.

²² *Supra* 448.

²³ Zamora “NAFTA and the Harmonisation of Domestic Legal Systems: The Side Effects of Free Trade” (12) *Arizona Journal of International and Comparative Law* 401 (1995) 403.

will of necessity be filled by domestic law. Such a method appears to have the greatest chance of success and avoids the ethnocentric trap.

A trend to this effect can be observed in the growth of regionalism. Legal state boundaries are surpassed of those of a larger construct, obliging individual states to adapt their legal system to accommodate “common” legal concepts.

Such a solution requires, as a minimum, a clear understanding of the conflict of laws issues involved and the necessity for the enforcement of judicial or arbitral decisions. Historically, some attempts at unification have been made in these areas. The most common approach to enforcing judicial and arbitral decisions has been to regulate jurisdiction.²⁴

2 Harmonisation of Conflict of Law Rules

Relatively successful harmonisation attempts in the EU have been made in the area of choice of law issues²⁵ and the recognition and enforcement of judgments in civil and commercial matters.²⁶ This is important, since certainty as to which law will apply has been achieved, at least in theory. However, from a practical point of view this is not always the case. For example, the Rome Convention still leaves some doubt as to which law the courts will apply.²⁷ To some extent, this is inevitable, since there are limits to the extent to which a jurisdiction can be regulated. One of the problems is that outcome-determinative selections of a forum will advantage one party to the detriment of the other, and mechanisms which are sophisticated enough to avoid this result do not exist.²⁸

Federal states might manage to resolve the difficulty, since they enjoy the benefit of having the “law area” and the *lex fori*²⁹ reaching beyond the individual components, involving the common law of the federal state. Indeed, both Australia and Canada have arrived at decisional harmony under the direction of their highest appellate courts.³⁰ In Canada:

“The nature of our constitutional arrangements – a single country with different independent States or provinces in Canada - exercising territorial legislative jurisdiction – would... support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout this country.”³¹

Comment [NHD1]:

Comment [NHD2]:

Comment [NHD3]:

Comment [NHD4]:

Comment [NHD5]:

Comment [NHD6]:

²⁴Walker "The Utility of the ALI/UNIDROIT Project on Principles and Rules of Transnational Civil Procedure" (4) *Uniform Law Review* 803 (2001) 806.

²⁵Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980.

²⁶EC Council Regulation No 44/2001 of 22 December 2000, *Official Journal of the European Communities* L 12, 16/01/2001, 1.

²⁷Lando, supra n 9, 125.

²⁸Walker supra n 24, 808.

²⁹See *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 (High Court of Australia) 627-8.

³⁰{Walker supra n 24, 811.

³¹*Tolofson v Jensen*[1994] 3 SCR 1022 (Canadian Supreme Court) para 69. Similar views are also expressed in Australia, see *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

In Australia: “the common law of Australia includes the rules for choice of law.”³² Unfortunately, once independent nations are involved, such luxuries do not apply. So in the end the problem still remains, despite the efforts of decades of work by the Hague Conference on Private International Law.

Another possible problem is the incorrect application of foreign law by the court. Outcomes are rarely consistent. A study of 40 American decisions showed that in 36 cases the foreign law was either wrongly applied or the result was highly doubtful.³³ Such an incorrect application may arise from an honest mistake. For example, civilian law courts find it difficult to apply or understand common law rules based on equity, such as trust and specific performance. The application of the French rule of *astreinte* can be equally difficult outside that jurisdiction.³⁴ Common law judges find it difficult to understand the principle of good faith, as well as the principle that subjective intent can be used to ascertain the terms of a contract. The problem is exacerbated if the foreign law is closely linked to the procedural law or specific institutions of the foreign jurisdiction, in which case an adjustment to the law of the forum is difficult if not impossible. Incorrect application may also derive from an antagonism towards foreign law, in which case covert techniques are used to secure an outcome which is palatable to the ethnocentric inclination of the court of the forum.³⁵

It has been suggested that one solution to the determination of jurisdiction lies in what some call a “global community of courts”.³⁶ Stemming from, but going beyond, a desire and need for greater cooperation on the political level,³⁷ we see in the process of international legal dispute settlement a much greater willingness of courts to cite each other’s cases. This is a phenomenon which, some argue, justifies the use of the word “community”.³⁸ Slaughter argues that, in order to move from cooperation to a community of courts, there must be an acknowledgement by judges of:

”a set of common principles that define their mutual relations... [and] recognise the principles of checks and balances, positive conflict, pluralism, legitimate difference, and the value of persuasive authority. Common principles and an awareness of a common enterprise will help make simple participation in transnational litigation into an engine of common identity and community.”³⁹

In international commercial law the justification is stronger than in other fields, given the removal in some important municipal systems of a domestic litigant’s right to sue in his own jurisdiction if he engages in transnational business.⁴⁰

³² Supra.

³³ Lando supra n 9, 126 fn 7.

³⁴ Supra.

³⁵ Supra 127.

³⁶ See Slaughter ”A Global Community of Courts” (44) *Harvard International Law Journal* 191 (2003) 193.

³⁷ Peters ”International Dispute Settlement: A Network of Co-operational Duties” (14) *European Journal of International Law* 1 (2003) 1-2.

³⁸ Supra. But note that Slaughter calls the community ‘partial’ and ‘emerging’. {Slaughter, supra n 36, 194.

³⁹ Slaughter supra n, 36, 194.

⁴⁰ Supra n 36, 209, citing decisions in this regard from the United States and England.

The creation and ratification of international conventions may well have assisted in this process. One outcome of such conventions could be a global case-law, and this has already been shown to be achievable, especially in the case of the CISG. The increased preference for alternative dispute resolution processes (ADR) may also have been a factor in the increased level of cooperation.⁴¹ Another impetus in this direction was the development by bodies such as UNCITRAL and the International Chamber of Commerce of arbitration rules which have been adopted by many sovereign countries into their domestic legal framework. A further part of the equation is the active cooperation between courts in specialised areas such as the gathering of evidence and jurisdictional problems, an example of which is the consensus among the courts of numerous jurisdictions to apply the law of the place of the accident unless the litigant has a closer connection to another forum.⁴²

Some have argued, however, that the problems cannot be solved by regulating jurisdiction,⁴³ and that the only solution is the harmonisation of entire procedural regimes.⁴⁴

3 Harmonisation of Procedural law

Whether such an undertaking will be successful is debatable, because the differences between procedural systems are profound. The problem is compounded by the fact that “litigants who resort to a court to obtain relief must take the court as they find it.”⁴⁵ In contrast, the conflict of laws rule will allow parties to choose their governing law at will in their agreement.

Put simply, “rules of civil procedure in many jurisdictions remain characterised by idiosyncrasies.”⁴⁶ One example is constituted by the differences between the basic responsibilities of the participants in the dispute resolution process.⁴⁷ Such differences may derive from differences in social attitudes, and for this reason be very difficult to eradicate. For example, in some jurisdictions, the focus is on the restoration of the aggrieved litigant’s asset base, ie full compensation of loss. In other jurisdictions:

⁴¹ One factor influencing the trend towards more ADR is the recognition that the ‘winner-takes-all’ solution is not the best way to solve a dispute in all circumstances, especially when commercial relationships need to be maintained. There is a powerful argument that ADR on the international plane is an essential tool because: ‘In the age of globalisation there are very few transnational relationships within the global fabric that can be completely disrupted in the aftermath of a dispute.’ {Peters, supra 37, 6.

⁴² Slaughter supra n 36, 209, referring to the courts of the United States, Australia, Japan, Switzerland, and Quebec as ‘moving toward’ this position.

⁴³ Walker supra n 24, 803.

⁴⁴ See *Zapata v Hermanos* 313 F 3d 385 (7th Cir 2002) (award of attorney’s fees), discussed for example by , Flechtner, H and Lookofsky, J (2003) ‘Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal’ (7) *Vindobona Journal of International Commercial Law and Arbitration* 93 at 97. For an opposing view see Vanto, J (2003) ‘Attorneys’ Fees as Damages in International Commercial Litigation’ (15) *Pace International Law Review* 203 and Zeller, B., “Damages under the Convention of Contracts for the International Sale of Goods” (2005) Oceana Press, Chapter 9.

⁴⁵ *John Pfeiffer* supra n 29 , 543.

⁴⁶ Einstein and Phillips “The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales.” *Uniform Law Review* (2004-4) 815.

⁴⁷ Walker supra n 24, 814.

”the law seeks not to restore the parties’ former positions so much as to respond to certain social welfare concerns that are likely to be associated with the kind of dispute being resolved.”⁴⁸

For instance, the very high damages awarded in the United States in tort claims are imposed as a means of social control, whereas in other jurisdictions such control is achieved by other means.

Even if there is no deep-seated reason for the difference, there may be resistance to harmonisation because of the cost of producing and adopting a uniform system.⁴⁹ Resistance may also come from a legal profession reluctant to learn new ways.

One possible solution, as already implemented in harmonised sales law, is to establish a second harmonised code for cross border matters.⁵⁰ However, the real problem, arguably an insurmountable one, has been correctly stated by Walker:

“the differences between the systems operate at such a fundamental level of principle as to require a change in the instinctive approach taken by participants to their various roles and their relative responsibilities to one another.”⁵¹

This does not mean that the harmonisation of all procedural rules is impossible. A significant amount of work has been done in the field by ALI/UNIDROIT. In 2004 UNIDROIT has published the Principles of Transnational Civil Procedure.⁵² The publication of the Rules has already had its impact as practitioners and academics alike have engaged in comparative analysis of their domestic procedural laws. Einstein, a Justice of the Supreme Court of New South Wales, Australia has already concluded that given the extent of similarities with the ALI/UNIDROIT Principles “the procedural law of that State is already at the forefront of the shift towards greater international uniformity.”⁵³

Much of the future work can benefit from the lessons learned in the introduction of harmonised substantive rules, such as the importance of those in control of domestic systems understanding and implementing the changes, and the effectiveness of model laws, such as the UNIDROIT Principles, as a reference point for reform.

4 Harmonisation of Substantive Law

It is fair to say that the difficulties in overcoming the problems of differences in national laws in the context of international sales have not been successfully tackled by attempts to unify conflict of law rules. UNCITRAL and other bodies have therefore

⁴⁸ Supra.

⁴⁹ Supra 815.

⁵⁰ Supra 816.

⁵¹ Supra.

⁵² see *Uniform Law Review* 2004-4.

⁵³ Einstein supra n 46, 815.

attempted to unify some substantive areas of law, for such harmonisation provides greater certainty and predictability. In commercial contract law it is generally recognised that the CISG and the UNIDROIT Principles are the two “major achievements in the history of the unification of contract law in the field of international commerce.”⁵⁴

The key factor in the need to develop a uniform international legal regime is globalisation. Technology transfers, the amalgamation of regions and countries into free trade areas and customs unions, the demographic shift between old technology countries and new emerging markets as well as the increasing cost differentiation between global industries and national industries have been key points in globalisation. The result is:

“There has never been a better time to be an international commercial law scholar. After decades of being held hostage to state-centered ideas, international commercial law has finally broken through to become more solution oriented.”⁵⁵

The development of harmonised law has taken place on two levels, regional and global. Therefore an understanding of regional, as well as international sales instruments is important.

4 1 Regional Harmonisation

In regional groupings such as the European Union and NAFTA, considerable effort has been devoted to finding solutions to the problems arising out of local legal differences. In addition to the “official” development of law, private and quasi-governmental efforts have also been important. The efforts of the Commission on European Contract Law (CELL), which culminated in the publication of the European Principles of Contract Law, constitute just one example.

Harmonisation in such groupings creates a multi-layered legal system. At the bottom are the still diverse municipal legal systems; on the second level are harmonised regional norms; on the third level international unified rules play an important role.

However, regional groupings aim for intra-harmonisation, that is harmonisation within the grouping only and not inter-harmonisation and differences will accordingly persist. Glenn pointed to a fundamentally different underlying philosophy. He noted:

“The law of the European Union would therefore represent nineteenth-century thought cast forward into the twentieth and twenty-first centuries. Uniform national laws, which had replaced local customs, must in their turn be replaced by uniform European laws. NAFTA would represent a much older idea, well expressed by Gaius, to the effect that people are

⁵⁴ Danhan 'The UNIDROIT Principles and Their Influence in the Modernisation of Contract Law in the People's Republic of China' 107 (2003) Ibid 107.

⁵⁵ Gopalan "New Trends in the Making of International Commercial Law" 23 Journal of Law and Commerce 117 (2004) 117.

governed both by law that is particular to them and by law that is common to humanity, or at least to the NAFTA countries.”⁵⁶

This observation is correct in two ways. First, there are differences between regional groupings. Second, the findings of CELL are not surprising. The Commission confirmed what had been anecdotally recounted. Although a business will always find ways and means to trade effectively with a profitable client, running the gauntlet of diverse municipal legal systems is expensive and frustrating. In other words, transaction costs due to different national contract laws impact significantly upon the costs of cross border transactions.⁵⁷

4 2 International Instruments

The best solution currently on offer to minimise cross-border problems seems to be the use of international instruments such as the CISG, as at least both parties are “in the same boat.” This is not to suggest that the CISG is without its problems.

On the international level much work has been done. As far back as 1929 Ernst Rabel⁵⁸ recognised that a harmonised and unified contract law is the easiest approach to legal harmonisation, and will contribute towards economic globalisation and foster the flow of trade between nations. Rabel started the debates regarding the introduction of a worldwide uniform sales law.⁵⁹

It would be unrealistic to argue that total harmonisation can be achieved. It cannot. However carefully drafted, unified law cannot be comprehensive. It needs to develop, and one of the principal places in which it can do so is through application by municipal courts which take correct decisions in choosing it as the applicable law and in applying it. The risk in such a process is that the unified law diverges on the local level. Only with the introduction of a “supranational *stare decisis*” might harmonisation be preserved. However, such a suggestion is unworkable, as it does not take into consideration “the rigid hierarchical structure of the court system which the *stare decisis* doctrine presupposes and which on an international level is lacking.”⁶⁰

On the other hand, judicial comity, the “global community of courts referred to above”, might achieve a similar result to that realised by hierarchy in municipal systems. Such a spirit of judicial comity is not merely an aspirational aim. On the contrary international unification and harmonisation has as a by-product achieved relative consistency and comity. If the jurisprudence of the CISG and other unified instruments are considered, there already is a common identity and community. To realize that the ‘community of courts’ has been achieved as far as the CISG is concerned, one need only look to a decision of the Tribunale di Vigevano. The court did more than any other court before it to consult foreign case law in order to promote

⁵⁶ Glenn "Conflicting Laws in a Common Market? The NAFTA Experiment" (76) *Chicago-Kent Law Review* 1789 (2001) 1792.

⁵⁷ at 134.

⁵⁸ Rabel "Der Entwurf eines einheitlichen Kaufgesetzes" (9) *Rabels Zeitschrift* 1 (1935) 1.

⁵⁹ *Supra*.

⁶⁰ Ferrari "Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With" (20) *Journal of Law and Commerce* 225 (2001) 231.

uniformity.⁶¹ Furthermore in *Cherubino Valsangiacomo, SA v American Juice Import, Inc* the Valencia clearly expressed the view that “a different methodological approach than that of domestic laws is needed to interpret the Convention.”⁶² The court also reinforced the views expressed in the Tribunale di Vigevano when they noted that: “the only way to assure uniformity of interpretation ... is to take into account that which other tribunals have held when applying the [CISG].”⁶³

Such trends are only tentatively emerging in the application of non-unified municipal rules. Here, courts have only occasionally considered each other’s thinking and the spirit of judicial comity is more rarely encountered. For example, in *Euromepa SA v R Esmerian Inc*,⁶⁴ the court was split in its views. Judge Calabresi wrote glowingly of judicial dialogue whereas Jacobs CJ, in a dissenting judgment, pointed out that the court was: “interfering with French discovery practice and clogging the French appeals court with the random harvest of the American discovery.”⁶⁵ The attitude of Judge Owen may not be unusual. He refused to defer to a Hong Kong court by pointing out:

“I am an American judge and this is an American agency and I will keep jurisdiction and will direct payment into court... as out here in Hong Kong they practically give you a medal for doing this kind of thing [insider trading].”⁶⁶

The problem of the conflict of legal cultures is clearly highlighted in this instance. Feelings of this nature are arguably not isolated and can be best summed up by a statement of a Member of Parliament in Victoria, Australia when the introduction of the CISG into domestic law was discussed:

“I am concerned that Parliaments... need to jealously guard their sovereignty and ensure that they do not hand over legislative process to bodies that do not have to account for their actions or to persons who have no concept of the realities in their country but are simply happy to be member States of the United Nations.”⁶⁷

4 3 Harmonised Law and Conflicts of Laws

The harmonisation of substantive law does not entirely eliminate conflicts problems, but does reduce them. The question of which municipal law will govern the contract is not an issue as the unified law is the same wherever it is applied. However, the determination of jurisdiction is still, and always will be, an important question to be

⁶¹ Supra.

⁶² Editorial Remarks, Appellate Court of Valencia, Spain 7 June 2003 available at: <<http://cisgw3.law.pace.edu/cases/030607s4.html>>.

⁶³ Supra.

⁶⁴ 51 F 3d 1095, 1104-05 (2nd Cir 1995).

⁶⁵ Slaughter supra n 36, 209.

⁶⁶ [*Naumus Asia Co v Standard Chartered Bank* 1 HKLR 396] at 407-408 Judge Owen was quoted in the Hong Kong High Court which in the end assumed jurisdiction.

⁶⁷ Victoria, Parliamentary Debates, Legislative Council, 3 March 1987, 308

answered. But what can be said is that there is no longer a risk that a determination of jurisdiction alone might determine the applicable law.

4 4 Harmonisation by Incorporation of International Regimes

Another potential way of achieving harmonisation is the adoption of municipal laws by other countries. It will bring legal systems together and hence harmonise rules in certain areas. For example, when Mexico introduced a law for non-possessory security interests in movable property, it based it on the United States Uniform Commercial Code and Canadian Personal Property Security legislation.⁶⁸ The problem, of course, is that such regimes may not only be copied, but also changed and amended to suit particular domestic needs,⁶⁹ with the result that some argue that “harmony is lost as another version of the law springs up adding to the diversity.”⁷⁰ This may be the case at first glance. However, a harmonisation on a level of principle, “process harmonisation”, has been achieved.

In order to move beyond process harmonisation, one view is that the best solution to the divergences which occur when copying national laws, and the way of achieving a common understanding, and hence an increased confidence to trade across borders, is to base municipal rules on international uniform instruments.

It is not surprising, therefore, that besides ratifying the CISG, some countries have used international documents instead of municipal laws as a basis for the reform of their domestic regimes. In the drafting process of the new Chinese Contract Law, promulgated in 1999, reference was made both to the CISG and the UNIDROIT Principles. For example Art 113 Chinese Contract Law stipulates that:

“the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interest receivable after the performance of the contract, provided it is not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concludes the contract.”⁷¹

Since China also ratified the CISG, it can be argued that any dispute in China, whether under domestic law or under the CISG, will have the same outcome. Hence the criticism that such copying and changing of laws will create more proliferation of laws is not always applicable. The Chinese judiciary will be able to draw, in essence, on the same principles. This is especially so as the Chinese contract law: “shares the core spirit embodied in the [CISG]”⁷² in the interpretation of contracts. Hence an understanding of the CISG will assist any business person in understanding the fundamentals of Chinese Contract law. It is in effect no different if a dispute arises between a Turkish seller and a Swiss buyer and the governing law is Turkish law.

⁶⁸ Glenn supra n 57, 242.

⁶⁹ It is not the purpose of this paper to discuss transplantation in any detail. Therefore for a succinct and useful summary of transplant theories see Foster “Transmigration and Transferability of Commercial Law” *A Globalised World*, 58-60 .

⁷⁰ Gopalan supra n 56, 128.

⁷¹ Contract Law of the People’s Republic of China, China Legal System Publishing House, 1999.

⁷² Danhan supra n 54, 112.

The same can be said about the modernisation of the Estonian Civil Code, and therefore the Estonian law of obligations,⁷³ which was based: “above all on such model laws as CISG, the Principle of European Contract Law and the UNIDROIT Principles of International Commercial Contracts.”⁷⁴ The CISG specifically formed not only the basis for the drafting of sales laws but: “has also been an important source for drafting the general provisions such as breach of contract.”⁷⁵

Arguably, therefore, the CISG is not only important as an instrument which is applicable due to the ratification process. It is also important to understand the CISG if, say, Chinese or Estonian domestic law is the governing law.

5 Conclusion

This article has indicated that harmonisation and unification of laws is best achieved through the unification of substantive laws either through treaties or model laws. The CISG, despite of its’ difficult birth, is arguably the most successful international instrument adding uniformity in the application of international sales laws.

The CISG has been ratified at a pace comparable to that of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷⁶ The CISG, and to an extent the UNIDROIT Principles, have laid a framework for cooperation which goes beyond a mere common understanding of jurisdictional issues, “an understanding of each other’s goals, once a framework for cooperation has been established.”⁷⁷

Furthermore, the success of the CISG has laid the cornerstone for the foundations of unification, and has driven attempts at further developing unified laws. An understanding of the CISG is therefore essential to understand possible future development and provide advice to the business community.

Unfortunately the business community, or possibly their legal advisors, have not embraced or adopted the opportunity to simplify their international dealings, with sometimes alarming results.⁷⁸ Anecdotally, many large corporations still insist on explicitly excluding the CISG, an attitude which does not foster the simplification of legal rules, and is at odds with the globalisation and internationalisation of trade. On the other hand, it is becoming apparent that the usage of unified law is more and more widespread in areas such as arbitration, in which the UNIDROIT principles are

⁷³ Law of Obligations Act, General Part of the Civil Code Act and Private International Law Act Implementation Act, Passed 5 June 2002, (RT¹ I 2002, 53, 336), entered into force 1 July 2002.

⁷⁴ Varul "CISG: A Source of Inspiration for the Estonian Law of Obligations" (1/2) *Uniform Law Review* 209 (2003) 209.

⁷⁵ *Supra*.

⁷⁶ Kritzer *International Contract Manual – Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods – Detailed Analysis*, (1994) 623

⁷⁷ Slaughter *supra* n 36, 214.

⁷⁸ Some case law suggests that the unfamiliarity of the legal representatives resulted in unnecessary added legal costs for their clients.

frequently used. And it seems that the CISG may well be on its way to becoming the customary international trade law, an understandable trend, as the CISG has been ratified by nations who contribute and control two thirds of the world's trade.

Furthermore there is now a substantial body of law and academic writing available giving guidance on the interpretation and application of the CISG. Arguably this body of law: "makes one feel optimistic as to the possibility of a uniform interpretation of international unified law conventions."⁷⁹ This does not mean that uniform rules automatically equate to uniform application, as not all interpretative problems are resolved. Unfortunately much depends still on the attitude and understanding of the CISG by those who apply its regime. However the CISG: "has created, as it were, a legal slipstream, a draft, the effect of which is arguably larger than [its] specific provisions."⁸⁰ Quite simply, the CISG has changed the way harmonisation is viewed. It is now played on a global stage and national legal systems must adapt to these changes.

In the case of South Africa it is perhaps fitting to again note Eiselen. He stated that the advantages of adopting the convention far outweigh any disadvantages and that not only South Africa but that the wider region should take the necessary steps to ratify the CISG.⁸¹

"This will create the necessary legal framework within which international trade in the region can be developed and promoted by removing an unnecessary obstacle in a region where many businesses are either newcomers in international trade or would like to become participants. This step alone will, of course, not trigger the African renaissance hoped for, but will be an important building block in the process of creating the conditions within which it can take place and flourish."⁸²

It only remains to be said that for the comparatist, the prevalence of harmonisation efforts and the success of the CISG creates new challenges, including the nature and effectiveness of the harmonised regime so created, its relationship with domestic legal systems, the degree of harmonisation possible and the new ideas of precedent which seem to be emerging.

⁷⁹ Ferrari "Uniform Interpretation of International Commercial Law Conventions (with Particular Reference to the Vienna Sales Convention)" in Mariani N (ed) *The Evolution of Legal Systems, Bijuralism and International Trade* (2002) 443.

⁸⁰ Glenn supra n 57, 1793.

⁸¹ Eiselen supra at 3, 370.

⁸² Supra.