The CISG as a Model for an International Contract Law

I am honoured to address this conference on this auspicious occasion celebrating the 35th Anniversary of the Convention on the International Sale of Goods (CISG). For the topic I was asked to address I will consider two themes that have emerged from the discussions yesterday and will no doubt be considered further in the sessions following. The first is the role of the CISG as a legal model for harmonising contract law. The second is its performance at a practical level as a model for international contracting.

Structurally, the CISG can never be – and it never aspired to be – a comprehensive model for an international contract law. The CISG deals only with specific aspects of a sale of goods contract. It does not deal with property issues. Significantly, it does not deal with the issue of the validity of the contract.

The greatest failing of any harmonisation effort occurring outside a unified political structure is the lack of an overarching legal institution that can make binding interpretations of its provisions. The CISG addresses this by directing an approach to interpretation that will promote uniformity, and this is supported by the CLOUT1 database which collects CISG decisions from all over the world. Unfortunately, however, divergent interpretations have nevertheless persisted. Practically, the resulting uncertainty may be mitigated to some extent by a choice of dispute resolution forum clause.

The CISG espouses the value of compromise in two ways. First, structurally, it is a compromise between a comprehensive uniform substantive law model (where the uniform law is automatically applicable when certain conditions are met), and the Westphalian infrastructure of national laws arbitrated by domestic principles of private international law. The CISG applies automatically when both parties are from Contracting States, but there is scope for private international law to operate, in respect of gaps not answerable by the underlying general principles of the CISG and in respect of issues outside the scope of the CISG. Private International law is also relevant where the parties have chosen the law of a Contracting State to govern their sale of goods contract. This is a highly controversial provision both in its rationale as well as its interpretation. Contracting States were allowed to make a reservation not to apply the provision. Singapore has done so, and has not removed it despite strong academic lobbying to do so.2

The second way in which the CISG espouses compromise is in the substantive contents of the applicable rules. Many see this as a weakness, but compromise has been necessary to obtain widespread acceptance. At the microcosmic level, every contract negotiator understands the need for compromise.

---


These compromises made the CISG a success where its predecessors had signally failed, i.e. the *Uniform Law on the International Sale of Goods* and the *Uniform Law on the Formation of Contracts for the International Sale of Goods*.

The CISG has also been a successful model because of the significance it places on party autonomy. Thus, where the Convention applies, contracting parties are allowed to opt out of it altogether, or to opt out of selected provisions. However, this freedom has led to common practices in some jurisdictions, where lawyers routinely exclude the application of the CISG.

As a model of harmonisation, there is no doubt about its tremendous success in geopolitical reach. It has attracted membership of 83 countries in 35 years. As a treaty dealing with a general area of private international law, its record is probably surpassed only by the New York Convention on the enforcement of arbitral awards, with 149 countries in 57 years. These 83 CISG signatory countries reportedly account for more than two-thirds of total world trade.

The CISG has been a successful model in the way it has influenced other instruments in the field of international or regional contract law. Its influence has been felt, directly or indirectly, in instruments like the UNIDROIT Principles of International Commercial Contracts (PICC), in the Principles of European Contract Law (PECL), the Draft Common Framework of Reference (DCFR) and the draft Common European Sales Law (CESL) in Europe, and in the OHADA in Africa.

As a model for an international contract law, the CISG has clearly been successful in casting influence on national laws. It has exerted strong influence on domestic Chinese contract law, Russian contract law, and has influenced reforms in German and Dutch laws, several Scandinavian and Eastern European countries, Egypt, and reforms under discussion in Japan. To my knowledge, however, no common law country has modified its domestic sales law according to the CISG model.

---

6 [http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002](http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002).
There is, however, an important distinction between political acceptance of the CISG, and practical acceptance by the parties directly involved in cross-border trade, ie, businessmen and lawyers.\textsuperscript{14} The very factors that made the CISG a success at the political level can cause difficulties at the operational level. For example, the compromise achieved in respect of the substantive rules creates a learning curve for all lawyers whether they are from civil law or common law or other traditions. The broad language in which the substantive principles are expressed made it easier for states to become signatories, but made it more difficult especially for lawyers schooled in the common law tradition to understand and accept. The narrow scope of application of the CISG meant that other laws need to apply to fill the gaps anyway, and parties may prefer a less fragmentary legal framework.

The CISG has not fared as well in common law countries as many had hoped for. Among the non-signatory countries, one is hard pressed to identify any major civil law trading nation, whereas the United Kingdom and India stand out as two major common law economies. The abstention of the UK is particularly significant with England being the well spring of the common law. Whether this is due to political inertia or whether it is for the protection of the common law of sales as an international institution is a matter of some debate. It is probably both. Further, generally the track record of common law signatory countries has not been strong in generating CISG case law, and many such cases have received scholarly criticisms for taking insular approaches to interpreting the CISG.

There are two major reasons why the CISG has not fared well in common law countries. The first is that the text, while it no doubt adopted compromises between the common law and civil law positions in respect of a number of key issues,\textsuperscript{15} is expressed in the structure and language of the civil law tradition. While it may be argued that the two traditions are converging anyway, especially with the increasing focus of the common law on purposive interpretation of statutes, the CISG still presents a higher learning curve to common lawyers than to civilian lawyers. For example, the technique of determining the “general principles” underlying a sparsely-worded civil code which is then used to inform the interpretation of the code and to fill in gaps, is as natural to the civilian lawyer as it can be mystifying to the common lawyer. Just as the determination of general principles of common law from dense text in a jungle of specific cases can be mystifying to the civilian lawyer. This reflects the deductive and inductive thought processes which permeate the civil and common law traditions respectively. On the other hand, this could be mitigated in due course through mutual interactions and understanding.

The second reason is that the common law on the sale of goods is itself a recognised international institution. It has been said that the commercial world expresses a strong preference for the common law as applicable law because of its practical and market-friendly


approach, as well as its superior problem-solving ability. Results of recent European surveys indicated preference for English law as the commercial law of choice for cross-border commerce. Results of other surveys have challenged the argument that lack of a uniform sales law has impeded cross-border trade. An early survey by Cap Gemini Ernst and Young indicated that consistency of decision-making and enforceability of awards were far more important legal considerations than the identity of the applicable law. Recent European studies suggest that what really drives cross-border trade are business factors, not the applicable law.

The two reasons are related. While the CISG has proven itself as a viable international contract law for many sale of goods transactions, historically the common law was there first, and it has remained a major player in the field. One needs to be careful about promoting one law or another as the international contract law. There is room for more than one law for international contracting, even for the sale of goods. Some may like the principles in the CISG. Others may prefer hard-nosed certainty that is more clearly found in the common law or other national systems. Contract laws (and their sale of goods subset), whether international model laws or internationalised national laws, are themselves competitive products in the marketplace. Given its origin, the CISG is a unique product in the sense that even if it is not the chosen law, it “provides commercial parties with a common frame of reference in which they are able to compare the solutions of the CISG with various national jurisdictions”, and accordingly to choose an appropriate applicable law and to derogate from specific rules as desired.

From the transaction costs perspective, it is not obvious that the CISG will be the most efficient choice in a sale contract between traders in common law countries. On the other hand, a common lawyer will probably find it easier to deal with the CISG than the internal law of a non-common law country. Chain sales can affect the transaction costs equation, as generally it is more efficient to have the same law govern the entire chain. These issues are best left to market forces. The most important thing about choice is that it should be informed, and perhaps more could be done to educate lawyers about the CISG beyond the law school.

18 Cap Gemini Ernst and Young, Commercial Court Feasibility Study (2001).
curricula. It has been argued that many instances of contractual exclusions of the CISG are not attributable to parties’ ignorance or abhorrence of the CISG but to lawyers’ unwillingness to invest in learning the CISG. In a country like Singapore which adopts a dualist view of public international law, perhaps we need to remind ourselves that the CISG is actually an aspect of domestic Singapore law.

However, problems can also arise if there are too many international contract laws. In addition to the various international and regional instruments alluded to above, there has been a suggestion that UNCITRAL should embark on a project to develop a new international contract law. Efforts are ongoing to develop Principles of Asian Contract Law (PACL). Additionally, some national legal systems offer themselves as legal systems of choice in the marketplace of applicable laws. As a free-market advocate, I do not see a problem in presenting businessmen – who are “consumers” of applicable laws – with more choices. The problem is really in controlling costs – time, effort and expense – incurred in creating and promoting such laws, as well as the additional transaction costs of dealing with too much information. For example, the question must be seriously asked whether ASEAN or even Asian legal harmonisation can ride on existing global instruments like the CISG instead of creating new instruments from scratch. Whatever other products appear in the market, I am confident that the CISG will continue to be seen as one premium product. In this respect, Singapore as the only ASEAN signatory to the CISG perhaps has some evangelical role to play.

23 In Singapore, both the National University of Singapore Faculty of law and the Singapore Management University School of Law offer the CISG as optional modules. In 2015, a team from the Singapore Management University (SMU) became the first Singapore team to win the championship in the Vis East Moots in Hong Kong, while another SMU team emerged first runner-up in the Vienna Vis Moots.
28 The proposal is described and strongly rebuffed in MJ Dennis, “Modernizing and harmonizing international contract law: the CISG and the UNIDROIT Principles continue to provide the best way forward” (2014) 19 Uniform Law Review 114.
play in this region. One potential obstacle here may the interface, or lack thereof, between the CISG and Islamic legal traditions.

Turning to CISG as a model for international contracting in Singapore: there is evidence that its prospects are improving. Singapore’s experience with the CISG is not atypical of common law countries. While it is clear that at least in recent years CISG cases have come before international arbitration tribunals seated in Singapore, there has not been a single reported or known unreported judicial decision on a CISG contract since the CISG took effect in Singapore in 1996. Anecdotally, one hears about routine exclusion of the CISG in practice. The Singapore International Commercial Court (SICC), established this year, is a game-changer in many ways. Parties may prefer CISG cases to go to arbitration so that the decision can be made by arbitrators knowledgeable in CISG or at least the civil law. This factor can now be replicated in the SICC with its eminent panel of International Judges who hail from different legal traditions.

The CISG has fared slightly better in Singapore as soft law. In 2004, VJ Rajah JC (as he then was) in a domestic sale of goods case, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594, referred to the CISG to support his obiter statement that the common law postal acceptance rule should be seriously reconsidered in the context of email correspondence. More recently, two Court of Appeal cases referred to the CISG to support an expanded scope of admissible extrinsic evidence in the construction of contract terms. Neither of these involved sale of goods contracts. This judicial reference to the CISG in connection with a point of general contract law is all the more significant in measuring the sphere of influence of the CISG.

I conclude on that optimistic note. I am confident that the fruitful discussions started yesterday will continue with full force, and that all the participants today will find the sessions following to be instructive and productive.

---

33 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.