

Keynote Address for UN Day Seminar 2020

“40 Years of Global Harmonisation in International Trade Law”

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Introduction

“Harmonisation” has a nice ring to it – favourable connotations – everyone singing from the same song sheet.

The idea of harmonised rules governing the international sale of goods has an obvious appeal – I suggest that if it had not been implemented in 1980, surely its time would have come by now. But ideas that have an immediate and obvious theoretical appeal do not necessarily yield the widespread practical benefits that are expected of them. My reading of critical commentary on the *UN Convention on Contracts for the International Sale of Goods* (referred to as the “CISG” and the “Vienna Convention”) leaves me in a state of uncertainty as to how commonly it features in the international sale of goods. Perhaps a reason for this is that it is referred to so infrequently in the reported cases—a matter to which I shall return.

Origins

The impetus for the Convention was the great increase in international trade in the twentieth century.

The desirability of uniformity in international sales law was recognised in the 1920s, and by 1930 the International Institute for the Unification of Private Law (UNIDROIT), under the auspices of the League of Nations, began work directed to establishing a treaty that would harmonise the law of international sales of goods.

In 1964 two treaties arose out of a conference of interested nations at the Hague, but did not gain widespread acceptance. They were a *Convention Relating to a Uniform Law on the International Sale of Goods* and a *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods*. Those Conventions did not secure widespread acceptance.

And so it was that the United Nations created its Commission on International Trade Law (UNCITRAL) in 1966 to promote “the progressive harmonisation and unification of the law of international trade”.

Initially, UNCITRAL worked on revising the two Hague conventions, but in 1978, in the light of comments received from United Nations members and international organisations, UNCITRAL adopted a *Draft Convention on Contracts for the International Sale of Goods*.

The UN convened a conference in Vienna in March 1980 to consider adoption of a treaty founded on this Draft. On 11 April 1980, the 62 countries participating in the conference unanimously adopted the Draft with very few amendments.

The Convention entered into force on 1 January 1988.

Jumping forward

As of 25 September 2020, 94 States had ratified, acceded to, accepted or succeeded to, the CISG. They include Australia and our major trading partners, including the People’s Republic of China, the USA, Japan,

France, Germany, Canada, The Netherlands, Belgium, Spain and Italy. A notable exception is the United Kingdom. Other exceptions are India, South Africa and Nigeria. At one stage it was said that the United Kingdom intended to ratify once parliamentary time permitted, but it seems clear that there is entrenched opposition to ratification there.

Australia ratified the Convention on 17 March 1988 and it came into force here on 1 April 1989.

In Australia the CISG is adopted by a *Sale of Goods (Vienna Convention) Act* of 1986 or 1987 of every State and Territory.

Sections 5 and 6 of those Acts provide that the Convention's provisions have the force of law in the particular State or Territory and prevail over any other law in force there to the extent of any inconsistency.

Section 68 of the *Australian Consumer Law*, the successor to s 66A of the *Trade Practices Act 1974*, provides that the Convention's provisions prevail over Div 1 ("Consumer Guarantees") of Part 3-2 of the ACL to the extent of any inconsistency.

The provisions mentioned make the CISG part of the municipal law of Australia, not foreign law, and therefore the CISG is not a matter of fact on which expert evidence can be received: *Roder –v- Rosedown Park Pty Ltd* (1995) 17 ACSR 153.

Some features of the CISG

I will mention the Convention's sphere of application and then refer to three specific provisions that have generated some commentary.

As to the sphere of operation, Art 1 of the CISG states that it 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
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

Thus, assume a contract for the sale of goods between an Australian seller and a Chinese buyer. The Convention will apply by reason of paragraph (a). If a contract for the international sale of goods provides that it is to be governed by the law of Japan, then assuming that by the rules of private international law the law of a Contracting State, such as Australia, is governing, the Convention will apply by reason of para (b) above.

Article 2 provides that the CISG does not apply to certain categories of sales, eg, generally speaking, sales of goods bought for personal, family or household use; sales by auction; sales of ships; and sales of electricity.

Importantly, Article 6 provides that the parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions. It would therefore be open to our Australian seller and Chinese buyer to agree simply to exclude the Convention or to agree that their contract is to be governed by the law of England, even though the United Kingdom is not a Contracting State. Moreover, even if the parties do not so provide expressly, the application of the Convention to their contract will be subject to any inconsistent express terms of it.

I turn to three particular provisions.

First, Article 7(1), the interpretation Article, provides:

“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.”

This provision, of a kind not familiar to foreign lawyers, would require a court, in interpreting the Convention, at least to have regard to relevant decisions of the courts of other Contracting States. It would also require the court to have regard to the goal of promoting the observance of good faith in international trade. But note that this is in the interpretation of the Convention: we are not speaking here of a substantive contractual obligation of good faith.

The second provision to which I referred earlier relates to avoidance (termination) for breach. Article 49(1) provides that the buyer may declare the contract avoided if the failure by the seller to perform any of its obligations under the contract or under the Convention amounts to a “fundamental breach” of contract. Similarly, Art 64(1) provides that the seller may declare the contract avoided if the buyer’s failure to perform any of its obligations under the contract or the Convention amounts to a “fundamental breach” of contract. The concept of “fundamental breach” is defined in Art 25 as follows:

“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen, such a result.”

These provisions are different from the domestic law of Australia (and of the UK) relating to the sale of goods which also permits termination for breach of a contractual term that constitutes a “condition” of the contract.

It is understood that the view has been taken in the United Kingdom that the interpretation Article (Art 7) is too wide and uncertain in its scope to be acceptable, and that the limitation of the right of termination for breach to cases of fundamental breach (Arts 49(1), 64(1) and 25) is too restrictive, to be acceptable.

Before leaving termination for fundamental breach, I would like to raise a jurisprudential question, which, for all I know, may have been noted and discussed by others. The distinction between a statutory implication of conditions and warranties into contracts for the sales of goods, either generally or specifically in consumer transactions, and contravention of an obligation imposed unilaterally by statute, is well known. Breach of the former is a breach of contract, the remedies for which are obtainable in courts having jurisdiction to enforce contractual obligations. But the remedy for contraventions of the latter kind will attract the remedies provided by the statute which will be obtainable in courts given jurisdiction by the statute. In terms, the Convention directly imposes obligations on buyer and seller. But the many references in the Convention to breach of contract suggest that non-observance of any of those obligation was intended to be regarded as a breach of contract. I will say no more on this curious point.

The third provision to which I referred earlier is Art 39. The preceding Art 38 provides that the buyer must examine the goods or cause them to be examined “within as short a period as is practicable in the circumstances”. Article 39 provides that the buyer loses the right to rely on the 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, and in any event within two years from the date on which the goods were actually handed over to the buyer.

While there are some qualifications, they do not prevent us from saying that these provisions have no counterparts in Australian domestic sale of goods law.

This brings me back to the impact that the CISG has had. It has been suggested that a further reason why the United Kingdom has not acceded to it is a concern that it might result in a loss of commercial litigation and commercial arbitration from London. The reasoning seems to proceed along these lines. When English law governs a contract for the international sale of goods, the parties will often choose litigation or arbitration in London for the resolution of any dispute between them. In contrast, the application of the CISG clearly does not favour any particular jurisdiction over another. Indeed it might be said to favour an arbitral tribunal comprising members drawn from more than one Contracting State. Because of the privacy and confidentiality of arbitration, we do not know how commonly the CISG already features in arbitral awards.

Ms Dianne Tipping, the Chair of the Board of the Export Council of Australia, informs me that her impression is that a significant number of small to medium sized Australian exporters do not give much thought to the Convention, their practice being to enter into brief (one- or two-page) export contracts, which neither exclude nor otherwise address the CISG. Of course, silence of their contract on the matter would not prevent it from applying to an export from Australia to an importer located in another Contracting State. I do not know the extent to which more substantial contracts for the international sale of goods, such as contracts for the sale of commodities, commonly exclude or otherwise address the Convention.

Conclusion

I look forward to learning from our speakers the extent to which the CISG applies to international contracts for the sale of goods to which a party is

Australian; the extent to which it is common practice for such contracts to exclude or modify the application of the Convention; and why it is that there have been so few reported Australian decisions on the Convention.