Uniformity of laws: a reality of just a myth?

Uniformity of laws: a reality or just a myth?

B. Zeller

Victoria University, Melbourne, Australia
E-mail: bruno.zeller@vu.edu.au

Abstract: This paper attempts to show that the greatest impediment to a reduction in the transaction cost consists of two factors. First, the problem of the choice of laws makes contracting a hazardous enterprise for those who have an information disadvantage. Second, the reluctance of the legal profession to embrace and familiarise themselves with uniform international laws does not enhance a client's expectation to be able to access the 'best' law. It is argued that the inclusion of international uniform laws such as the United Nations Convention on Contracts for the International Sale of Goods (CISG, 1980) will reduce the transactions costs either at trial or when a problem arises as both parties operate in essence under the same law and, hence, a negotiated settlement is more likely. The paper specifically addresses the problem which can emerge when a contract is silent as to which law will govern the legal relationship. Close attention is given to a possibility of overcoming choice of laws problems by applying the CISG, instead of explicitly excluding the CISG. This paper also investigates the inclusions of soft laws into contracts and the ability of such an inclusion to reduce transaction costs. The conclusion is that the inclusion of uniform laws reduces uncertainty and is, furthermore, merely recognition of a development which is gathering speed.

Keywords: international sales contracts; problems of drafting contracts; choice of governing law; conflict of laws; uniform international laws; United Nations convention on contracts for the international sale of goods; CISG; UNIDROIT principles.

Reference to this paper should be made as follows: Zeller, B. (2008) 'Uniformity of laws: a reality or just a myth?', *Int. J. Private Law*, Vol. 1, No. 3, pp.231–242.

Biographical notes: Professor Bruno Zeller is an Associate Professor at the Victoria Law School, Victoria University, Melbourne, Australia, and an Adjunct Professor at Murdoch Law School, Perth, Australia. He has published extensively and internationally on the United Nations Convention on Contracts for the International Sale of Goods (CISG, 1980) and related matters.

1 Introduction

In 1988 Ernst Zitelmann advanced the notion that domestic laws in all the legal systems in the world should be replaced by one uniform 'global law'.[1] While such an endeavour has a logical foundation, it is nevertheless an overly optimistic idea. The search for a uniform global law could be compared to the famous entry in ancient maps of Africa namely. The term '*Hic sunt leones*, here are the lions' referred to the country south of the

Sahara and is an expression of the lack of understanding of the Europeans what lay behind the great expanse of sand.[2] The same can be said in relation to a search for a global law.

It is common knowledge that such endeavours did not eventuate despite many efforts. In order to create a 'global law' – akin to crossing the Sahara – the problem of sovereign legal systems needs to be overcome. It can be safely assumed that the creation of a supranational global law with its own supranational system of courts is and remains a dream for many years to come. At this stage it cannot be envisaged that nations would give up their legal sovereignty and have their individual citizen subjected to a 'global Law and court system'. As an example the attempts of nations to create a global system via the WTO treaties is stumbling and whether a successful conclusion of a unified world trade system inclusive of agriculture can be created is doubtful. Also trading blocks such as the EU still maintain 'domestic' systems despite ongoing endeavours to form a unified EU legal system.

History and practical experience has shown that the only solution is to create a 'half way house'. The aim is to draft conventions which in turn are to be included in every legal system and for the courts of every legal system to apply the uniform laws. Ernst Rabel in 1930 built on the idea of a global law but on a much more modest level – looking at one area of law only – by proposing a unified sales law and published a legal text to that end. Many attempts have been made to unify global laws in discrete areas. Some succeeded whereas others failed. It is simply impossible to take a holistic approach to unification and a more differentiated treatment must be sought.[3] This is so as 'legal transactions' inevitable will touch on many aspects of law and must be dealt with discretely.

As a result domestic law has changed dramatically over the past 30 years. The landscape has been remodelled as a result of globalisation through transplantations and the introduction of uniform international laws. These laws were either spawned by agencies of the United Nations such as UNCITRAL or by independent bodies such as UNIDROIT in Rome. Furthermore the efforts of trade blocks in their attempts to create a unified system of law cannot be underestimated. This work however is also progressing very slowly as each aspect of law such a corporate law or consumer laws – just to mention a few – must be investigated in turn. The result of these efforts is that domestic law has been 'enriched' by a body of law which was not designed and drafted by their own municipal parliaments but by academics and practitioners which in a sense reduces the political compromise situation which inevitably leads to a result which is not the best outcome.

Despite the success of some instruments several barriers need to be overcome in order to implement laws drafted by international bodies. It is one thing for a country to sign a convention but it is another step for a country to actually include the law into its domestic system. Ratification depends entirely on the perception by a particular state if there is a need to do so and have the uniform law applied within that jurisdiction. Arguably this will happen if the state has an incentive to do so or assumes that there are economic benefits Even if the convention is included into the domestic regime success is still not guaranteed.

The effect of a unified law is measured by its uptake within particular systems. The economic benefit and hence the uptake will not depend on the governments evaluation but on the parties who will incorporate the law into their legal framework.

To that end the legal community needs to have understood the system and is willing to prescribe to the uniform legal rules. Unfortunately the result is that many legal professionals still have their feet firmly planted in an ever diminishing domestic paddock. This becomes apparent when the application and interpretation of uniform laws is the focal point. Judging by the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in Australia, many court and legal professionals have not yet understood or did not endeavour to understand the significant differences between the interpretation and application of international instruments.[4] It can be said that too few of the decided cases reflect a proper application of the CISG and in some cases it was astonishing that they were ever brought to trial as the matter was lost before the trial even begun.[5] This is a discomforting level of ignorance in relation to international instruments. It is also interesting to note that the Australian Government ratified the CISG but then turned around and allowed government departments to specifically exclude the CISG from their contracts. It is arguably not a good example for the economic community to change their inward looking tendencies and embrace uniform international rules in favour of domestic ones. Australia is not the only country where such a lack of understanding can be discovered. In the US Professor Fitzgerald has conducted an empirical study of the knowledge of the legal practitioners' understanding of "International Contracting Practices" and found the same lack of knowledge as it is anecdotally known in Australia.[6]

To simply remain within one's own legal system may at first glance be a perfectly good solution. It guarantees that the legal system is understood or at least ought to be understood by the plaintiff. However this argument ignores the fact that another system namely an international one would be better suited and supply a better outcome. Fitzgerald has noted in his survey what has been suspected by academics that:

> "In essence a significant number of lawyers are defaulting to the wrong law, in the absence of an effective choice of law clause, when trying to determine the rights and responsibilities arising out of international commercial transactions."[7]

Furthermore only the dominant contractual party can insist on relying on their own terms and conditions and many businesses are not always in that favoured position and hence have to submit to a foreign legal system. If an understanding of uniform laws is part of the stock of knowledge of lawyers errors in selections of choice of law clauses can be minimised. If both parties work from the same legal facts – that is a uniform law – it can be argued that potentially conflicts can be minimised and transaction costs reduced. This is so because both parties possess the same knowledge and hopefully litigation based on erroneous information about the foreign law can be avoided.

This paper will explore the advantages of carefully analysing the choice of law clauses as otherwise unexpected results can eventuate. The uniform law instrument which will be analysed is the CISG which has now been ratified by 70 nations. The number of states is arguably significant enough to suggest that the CISG is a successful convention hence warranting a careful analysis within the scope of this paper.

2 Problem of choice of laws – a general discussion

It is a truism to argue that there is only a problem in relation to choice of laws,[8] because there is no 'global law'. If there would be a uniform global law the conflict of law rules would have become redundant as all domestic laws are the same.[9] As the second

alternative, choice of law rules could have been unified. This rule only takes on substance within each legal system and hence can vary between countries. As an example the Brazilian Civil Code points to the law of the country where the obligation came into being whereas in the USA the conflict of law rules vary depending on the subject matter of the obligation. A question of validity is governed by the same approach as the Brazilian Civil Code whereas the question of performance is governed by the law of the place of performance.[10]

The EU follows the Rome Convention Article 4 which points to the law with which a contract has its closest and real connection. It is obvious that depending where jurisdiction is sought different results as to the governing law will be obtained.

Basedow illustrates this divergence with a simple example.[11] German buyer and American seller sign a contract at Zurich airport. The sale involves delivery of goods to Brazil on CIF terms.

> "A Brazilian court would apply Swiss law, while both the German and American court would apply the CISG in the first place and issues not governed by that Convention would be subject to German law as the law of the seller in a German court and , arguably, to Brazilian law as the law of the place of performance by an American Court."[12]

This example clearly illustrates that jurisdictional issues and hence the associated conflict of laws rules play an important role in determining the governing law. Unification would have taken away the unpredictability with regard to the choice of a substantive rule only.[13] Attempts were made to conclude a convention regulating private international law however so far this has proven to be an elusive goal.

To draft such a convention has not been helped by the fact that conventions in general are not codes; they are not complete statements of law on a particular topic. The reason is that policy preferences of states in the drafting process are likely to diverge than coincide.[14]

However because of the prevalence of uniform laws recourse to national law has been reduced but because international contracts cannot stand alone but need a legal framework which can only be provided by domestic law, the conflict of laws rules are still indispensable.[15]

It must be stressed that the objective of the drafting of choice of law clauses should not only be the reduction of transaction costs but an attempt to chose the most appropriate forum and a governing law which offers the best advantage for a particular contractual situation. As an example commodity contracts nearly always chose English law and London as the forum in their contractual clauses despite the fact that neither party has any connection to England nor are the goods ever passing thought England. This is so as the commercial courts in London have developed an expertise over centuries and that particular historical familiarity with the law appears still to be valued by commodity traders. Some evidence suggests that in many situations the 'home advantage' is chosen not because of a conscious decision of the drafters but because the drafters do not understand the law once a transaction 'crosses borders'. Inadvertently such a lack of knowledge can produce the opposite effect namely the best law is not necessarily chosen and hence the costs of litigation can offset the reduction of transaction costs. It must also be added that in many instances counsel will draft agreements that pursue their own interests as they would risk loosing business "arising from the contract in question to foreign lawyers if they recommend the reference to foreign law as the law governing the contract".[16]

3 The CISG and the choice of laws – a practical discussion

At the onset it must be stated that the discussion below is only relevant in situations where parties are not contract takers as in such situations terms are entered into on a take it or leave it basis. To be precise if a buyer is the dominant party the seller has not much option except to decline the business which is rarely the case. If on the other hand the seller is the dominant party a choice is still possible as in many cases the seller is not the only possible source as others can supply the relevant goods at near or the same costs. In these cases legal advisors ought to be skilled enough to analyse the choice of law clauses and negotiate the best option for their clients.

In relation to the CISG, the convention has become part of our domestic law and governs international contracts. The domestic law, that is the common law and relevant statutes, are only of relevance if the CISG has a gap which needs filling. For that reason it is still important to include a choice of law clause into any contract. There is however an alternate way to overcome the problem of discovering the applicable law by first looking at the general principles of the CISG and see whether a choice of law rule is embedded in the Convention. In other words the question is whether there is a gap in the CISG which would need to be filled by the relevant domestic law. If there is no gap and the CISG covers this issue then the matter could be resolved by taking recourse to the CISG.

If there is no gap the next question would be whether such a rule would displace the otherwise applicable domestic law. First the question would need to be answered whether a substantive rule 'trumps' a procedural rule of the forum. It is argued that substantive rules will in general take precedent over a procedural rule in case of a conflict. Secondly there is nothing to suggest that private international laws are mandatory in nature hence the CISG arguably could displace an otherwise applicable domestic private international law rule.[17] This view finds support by the fact that:

> "… the essential quality of [a] uniform substantive law is its applicability to those cases specified by the restrictions it sets on its own sphere of application."[18]

Hence if Articles 31 and 57(1) are considered to be restrictions in relation to conflict of laws, they would displace the domestic private international law rules.[19] Such an approach would provide certainty in the application of the governing law as the domestic variations in the application of the choice of law rules would be overcome. It is indeed true to argue that private international law "amounts to an engine of international discord detracting from the unity of the CISG that courts and arbitrators should only use as a last resort".[20]

It can be argued that a choice of law rule is indeed embedded in the CISG if Article 1(a) applies that is both parties have their place of business in a Contracting State. This means that the CISG will apply as the governing law. It is agreed that in most circumstances the court where jurisdiction has been seized will apply the choice of law rule of the forum to determine the governing law. However, as argued above, once uniform laws are involved which include a conflict rules the conclusion is that the uniform rule – in this case the CISG – should be extended to elicit the choice of law rule. The obvious advantage is that certainty and predictability has been introduced and most importantly it can be done within a framework of familiarity. It is not unusual for

courts to look at the place where payment is due as supplying the relevant substantive law.[21] In other words courts strive to elicit the place where the contract has its real and most substantial connection.

Returning to the assertion that Articles 31 and 57(1) can be used to extract a general principle which will make a choice of laws irrelevant; it needs to be considered specifically in light of the above conclusions.

Article 31 describes the obligations of the seller whereas Article 57(1) deals with the obligations of the buyer. Simply put, Article 31 first upholds a possible contractual duty, namely that the seller is obliged to deliver the goods at any agreed particular place. If there is no such obligation, his obligation to deliver goods consists 'in handing the goods over to the first carrier for transmission to the buyer'. This obligation corresponds as close as possible to an Incoterm FCA contract. The remainder of Article 31, in essence, repeats the above as in all other cases the seller is obliged to place the goods' at the buyer's disposal at the place where the seller had his place of business'. It can be argued that in line with judicial precedent, the closest connection is the seller's place of business.

As far as the buyer's obligation is concerned, Article 57(1) demands that the price is paid to the seller 'at the seller's place of business'.

In other words, an application of Articles 31 and 57(1) lead to the same conclusion, namely that the performance of contractual obligations is due at the seller's place.[22] The fact that the law of the seller governs the contract is nothing new and is repeated in many international instruments such as the Rome Convention and many domestic systems of law also follow this rule.[23] The inevitable conclusion is that the CISG does not collide with domestic laws on this subject because the CISG has displaced both the substantive law and the choice of law rules of the *lex causae*.[24]

It appears to be clear from the discussion above that a potential weakening of a contractual position arises when the CISG is explicitly excluded. The problem now is that a contractual party has given up the only common factor in a relationship mainly the CISG in favour of a potentially unknown foreign law. Even if foreign law is explicitly chosen at least the CISG should be retained as the common feature to both parties.

Such exclusion is arguably not helping clients who have submitted to a foreign law even if it is a neutral law. An example will illustrate this point namely the absence of a perfect tender rule in the CISG. This example is very pertinent for US parties as they would rely on UCC Article 2. The buyer can reject the delivery if he 'fails in any respect' to conform to the contract which in effect can defeat or postpone contract formation.[25] This will inevitably lead to interrelated problems affecting customs duties, letter of credits, third party obligations, *etc*.[26] The CISG takes a far more pragmatic attitude which is in tune with international trade realities. There are only two possible solutions available to the aggrieved party in cases of defects of goods. If the damage is minor the buyer has to pay for the goods and accept the goods hence conclude the contractual obligations. Damages or any other relevant compensation can then be claimed. If on the other hand the breach is fundamental the contract can be avoided. The CISG simply tries to keep the contract afoot as long as possible which avoids having to deal with interrelated problems if a contract can be avoided for even a minor discrepancy. It can be safely argued that transaction costs are potentially increased when choosing the UCC Article 2 instead of the default rule supplied by the CISG.

Furthermore it has to be recognised that on occasions parties cannot agree on the selection of a governing law as both reject the application of the others' domestic law. The solution obviously is that the parties need to agree on the application of a third

unrelated system of law. The first point which needs to be made is that parties often confuse the need for a law which represents both contractual positions and the domestic law of a politically neutral state.[27] A common contractual position would necessitate that the parties choose a law which reflects both parties' underlying legal system. As an example a Canadian seller and an Australian buyer could conceivably chose the law of England as representing as close as possible their own contractual positions. However on many occasions a third law is chosen namely what is perceived to be a 'neutral' law. Switzerland and the UK profit greatly from these decisions. Two points need to be made. First, choosing the law of Switzerland or England both parties would be governed by a law which is 'foreign' to each contractual party. Secondly in most cases the choice of a 'neutral law' is in reality confusion between choice of law and jurisdiction. Switzerland presents a stable political structure; it is known to be efficient and effective in the protection and enforcement of awards. In other words Switzerland is viewed as having an efficient jurisdiction. However despite having an efficient jurisdiction the underlying law may not be as suitable as another jurisdiction in resolving potential contractual issues.

An example will highlight the problem of submitting to a foreign law in this case a 'neutral law'. If the law of Switzerland is chosen then at the same time the law of Turkey is chosen as Turkey transplanted the Swiss Civil Code into their legal regime. As a matter of fact the two systems of law are so close that it may be said that they are the same.[28] Swiss law in itself (and any other law for that matter) contains differences which may be hard to understand. As an example non delivery and defective delivery are discussed briefly. It would be permissible to believe that non-delivery applies in situations where goods have not been delivered. Defective delivery applies when the delivered goods for one reason or another do not conform to the contract. The reality is not so simple.

Under the Swiss Law of Obligation, non-delivery stands for the failure of a seller to deliver goods exactly as provided by the contract. If for example a Fork lift truck with automatic transmission is ordered but one with manual transmission is delivered this constitutes non-delivery. Defective delivery would only apply if the automatic transmission fork lift as ordered and delivered proves to be faulty. The distinction is easy to work out if specific goods are the subject of the contract. However once non-ascertainable goods are ordered the distinction becomes rather difficult to predict. If, for example, Merlot wine would be ordered from region X but Merlot wine from region Z is delivered does this constitute non-delivery or defective delivery? The answer is it amounts to a non-delivery. However the delivery of empty oil barrels instead of empty petroleum barrels has been held to be a defective delivery.[29]

The distinction is important as in cases of non-delivery, the remedies available to the aggrieved party go beyond those available under the sales law namely Article 197 *et seq*. In cases of non-delivery, the aggrieved party may be granting a *Nachfrist*, rescind the contract or insist on specific performance and can do so within a ten-year period.

In cases of defective delivery the buyer can merely rescind the contract or claim a reduction of the price and furthermore strict time limits apply. However, if the aggrieved party wishes to claim damages the criterion of 'immediacy of causation' pursuant to Article 208 (2) & (3) of the Swiss law of Obligation has also to be satisfied. (Another principle with is not known in common law) The CISG and many other legal systems do not make the above distinctions.

A further potential problem in applying the CISG – or any other international instrument for that mater – is the fact that these instruments require a different mode of interpretation. The result is that the interpretation of contracts differs from domestic practices. Most international instruments have an interpretative article embedded in the regulatory regime.

As pointed out above many international instruments contain an interpretative article such as Article 7 in the CISG. In short this article mandates that an international view is to be taken and domestic precedent cannot be used and hence recourse to international decisions is essential.

A further point is that the CISG also mandates the interpretation of contractual documents via Article 8. This article takes the subjective as well as the objective intent of parties into consideration. To put the matter into domestic phraseology the contextual approach is to be applied and not the textual one. In other words the parol evidence rule cannot be applied. The advantages of such an interpretation of contractual intend is obvious. The CISG does not separate the contractual instrument from the negotiations; the intent of the parties in other words – what they mutually expected the contractual obligation to be – is the paramount determinate aspect.

It is encouraging to note that the High Court understands that uniformity of law is an important feature which contributes towards certainty and predictability in international trade. The homeward trend – that is the only focus on one's own domestic system – has not been abolished but certainly weakened by the High Court of Australia. This does not mean that the High Court has abolished the parol evidence rule but decisions are taken with the view to reflect international customs that is a view towards uniformity of decisions in certain discreet areas of law – domestic or international – has been achieved.

Generally speaking the High Court has indicated that foreign judgements must be taken into consideration even if a domestic law tracks an international convention such as the Warsaw Convention. In a domestic matter the High Court noted:

> "decision must be reached by this court with close attention to any relevant developments of international law, including decisions of the municipal courts of other states parties."[30]

The Australian High Court went on to state that "no differentiation could be drawn on the basis that it was not obligatory for Australia to apply the language of the Warsaw Convention to domestic carriage by air within Australia".[31]

The mere fact that the Warsaw convention was transplanted into Australian domestic law was sufficient for the High Court to abandon ethnocentric interpretation in favour of an international one. Arguably a reason not to adopt an international interpretation would be difficult to maintain and would run contrary to the objective of certainty.

4 The success of non legal rules

Not all successful rules are part of a legal system's body of law. Many organisations such as UNCITRAL, UNIDROIT and the ICC have drafted model laws or soft laws which in some circumstances have been applied in preference to domestic black letter law. The reason is simple; party autonomy created an 'application ladder' which asks tribunal and courts to interpret the contract as it stands. The black letter law merely is a fall back position which fills gaps left open by a contractual document. The only exceptions to

party autonomy are mandatory laws which cannot be excluded. Hence documents such as the UCP 600[32] and Incoterms are widely applied to the exclusion of domestic laws. Because there is a wide body of law and academic writing, the rules are predictable and the results foreseeable.[33]

As far as the UNIDROIT principles are concerned courts are starting – at least in a questioning way – address the advantages the Principles can offer when interpreting contracts. Courts in many jurisdictions have referred to the Principles on several occasions.

Three decisions are of interest namely two English and a New Zealand one. It is specifically instructive to note the views expressed in *Hideo Yoshimoto v Canterbury Golf International Ltd.* The New Zealand Court of Appeal found it necessary to refer to the UNIDROIT Principles and the CISG as they grappled with difficulties in interpreting a contract. Specifically the advantages of Article 4.3 of the Principles were explained as allowing the court a more realistic approach in the interpretation of contracts. However the court did not apply the Principles or the CISG for that matter, as they were not prepared to go beyond these declarations. The court commented:

> "But while this Court could seek to depart from the law as applied in England and bring the law in New Zealand into line with these international conventions, I do not think it would be permitted to do so by the Privy Council."

At the time of this decision the Privy Council was still the highest appellate court in New Zealand. Arguably therefore there is sufficient evidence that domestic systems have engaged in considering the Principles in the process of 'creeping' transplantation. Bonell points out that the Principles are useful as a means of interpreting and supplementing the otherwise applicable law in cross border transactions. The argument Bonell advances is that even if the CISG is applicable the UNIDROIT principles can be used as a guide to clarify otherwise unclear matters where the CISG is either silent or not explicit. Furthermore nothing would prevent a domestic seller or buyer to include the UNIDROIT Principles as clauses into the contract. The interesting part would be that the contract cannot be interpreted using the parol evidence rule as the contract via the UNIDROIT principles contains a valid interpretative rule which must be used. This is so as the parol evidence rule is not a mandatory domestic law hence the contract takes precedence over the fall back position namely the common law or any other statutes.

The UNIDROIT Principles and the CISG have also found their way into English case law despite the fact that the UK has so far refused to ratify the CISG despite being very proactive in the drafting process.

In *ProForce Recruit Ltd v Rugby Group Ltd*[34] – a domestic case – Mummery LJ noted:

> "careful consideration may have to be given to the aims to be achieved by contractual interpretation and the precise extent to which the law requires an objective interpretation, It may be appropriate to consider a number of international instruments applying to contracts. It is sufficient to take two examples. The UNIDROIT Principles of International Commercial Contracts give primacy to the common intention of the parties and on questions of interpretation requires regard to be had to all the circumstances, including the pre-contractual negotiations of the parties (art 4.3). The UN Convention on Contracts for the International Sale of Goods (1980) provides that a

> party's intention is in certain circumstances relevant, and in determining that intention regard is to be had to all relevant circumstances, including preliminary negotiations."

Similar sentiments were expressed in another English domestic case by Lady Ardon in *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd*.[35] It certainly can be argued that the English courts are increasingly becoming aware of the need to 'modernise' contractual interpretation in order to stay in step with international developments.

It can be added in passing that many legal practitioners are familiar with arbitration and many institutional arbitration rules specifically allow the arbitrators to use non-black letter laws if the parties authorise the tribunal to do so. As an example the ACICA[36] rules as well as the Swiss Rules of international Arbitration have a similar clause which states:

> "The arbitral tribunal shall decide as amiable compositeur or ex acquo et bono only if the parties have expressly authorized the arbitral tribunal to do so."[37]

Simply put the black letter law is always assumed to be applicable unless the parties decide otherwise. However the choice is there and if the parties wish to do so they can move to a non black letter law which is then applicable as the substantive law of the contract and hence avoid the application of a particular domestic law.

A particular pertinent point needs to be made specifically relevant to common law countries. As pointed out above London and English law is often chosen as a preferred clause in a contact. As an example commodity sales basically only operate through the London courts. A recent development is of importance. The EU currently is making progress with the writing and eventual introduction of a uniform European Sales law. No doubt such a move will change the English Common Law. On an official political level, unification of sales laws has played an important part. A few years ago, the European Parliament passed a resolution requesting the European organs to start work on a pan-European Contract Law. That was in 1989 and a second time in 1994. Although at the beginning the Commission was reluctant, it has now become active. The Commission listed the various options available for a further development of Contract Law in the EU in its communication of 2001. Based on the opinions which the Commission received, the European Commission published an 'action plan' for a coherent European Contract Law. In this action plan, the Commission provides for the drafting of a so-called "reference frame" for Contract Law,[38] which should form the basis for further reflection on an optional instrument in the area of European contract law. The reference frame is expected to be published by the end of 2007. Several 'think tanks' have taken up the work, and the 'soft law codification' in the form of the Principles of European Contract Law (1995/1999/2003) shows that the sceptics of a unified, 'Europeanised' contract law are wrong. Considering the desire of the EU to strengthen and develop unified laws amongst its members, the question is, what will happen if Britain 'properly' joins the EU fold. If the European Commission introduces a 'common European contract law', will such an event override the common law and replace it with a common European Law? This may sound futuristic and improbable but considering that the EU has not only survived but has enlarged its influence, the improbable today may become reality tomorrow.

The conclusion simply is that unification of laws in general and sales laws in particular are strongly embedded in legal thinking in the EU. No doubt the unified EU sales law will reflect its parentage namely the CISG and PECL and hence as far as interpretation of contracts is concerned, rely on a contextual approach. Whether the UK,

or any other EU domestic system for that matter, can 'hold out', remains to be seen; but the advantage for any legal practitioner to become familiar with unified laws such as the CISG is clear.

5 Conclusion

It should be obvious by now that the creation of a global law is currently impossible but at the same time 'creeping' globalisation of law is also a fact. Uniform laws, transplantations and modernisation of laws taking into account the successful uniform laws such as the recent amendments to the German BGB will eventually reduce the availability and hence importance of domestic laws as the most important factor in choosing a governing law. In other words, the differences between individual domestic bodies of laws have only been narrowed because at the same time differences still exist.

The argument of this paper hinges on the recognition of legal practitioners to realise that uniform laws are a viable alternative which will reduce the uncertainty in case a foreign law needs to govern the issues at hand. There are increasing numbers of domestic systems in the world which do have uniform laws embedded in their system which either run parallel with their own 'home-grown' domestic law or have replaced it entirely.

It is therefore astonishing to see legal practitioners exclude from their contracts the uniform aspect such as the CISG. The problem is that familiarity with their own legal system has not been achieved and hence when confronted with the issues of having to deal with the CISG the necessary technical and factual knowledge has not been learned. The result simply is that clients are not given the best advice. It is an inevitable fact – and the developments in the EU confirm this – that the march towards uniform global laws is inevitable. It is only a matter of time when this will happen and surely training in the new way of giving legal advice is also good advice.

Notes

1 Zitelman, E. (1916) *Die Möglichkeit eines Weltrechts: – Unveränderter Abdruck der 1988 erschienenen Abhandlung mit einem Nachwort*.

2 Basedow, J., (2007-4) 'Lex Mercatoria and the private international law of contracts in economic perspective', *Unif. L. Rev./Rev.dr. unif*., 697, at 697.

3 *Ibid*. at 701.

4 See in general Zeller, B. (2005) 'The CISG in Australasia – an overview', in F. Ferrari (Ed.) *Quo Vadis CISG?*, Sellier-Brylant.

5 *Italian Imported Foods Pty Limited v Pucci S.R.L. (Italy)* (2006) NSWSC 1060.

6 See the survey project in *27 J.Law & Commerce*, 2008, forthcoming.

7 *Ibid*.

8 In civil law country choice of laws is know as private international law.

9 Kozuka, S. (2007-4) 'The economic implications of uniformity in law', *Unif. L. Rev./Rev.dr. unif*., 683, at 684.

10 Basedow above n 2, at 710.

11 *Ibid*. at 710.

12 *Ibid*.

13 *Ibid*. at 684.

14 Kuzuka above n 9, at 688.

15 Basedow above n 2, at 706.

16 *Ibid*. at 708.

17 Zeller, B. (2007) *CISG and the Unification of International Trade Law*, Routledge, at 42.

18 Conetti, G. (1986) 'Uniform substantive and conflicts rules on the international sale of goods and their interaction', in P. Sarcevic and P. Volken (Eds.) *International Sale of Goods, Dubrovnik Lectures*, Oceana Press, 385, at 329.

19 Zeller above n 17.

20 Bridge, M. (1997) 'The bifocal world of international sales Vienna and non-Vienna', in R. Cranston (Ed.) *Making Commercial Law: Essays in Honour of Roy Goode*, Oxford, 277, at 285.

21 See for example *Olex Focas Pty Ltd. V Skodaexport Ltd.* (1998) 3 VR 380.

22 Zeller above n 17, at 44.

23 For an elaboration on this mater see *ibid*. at 44 ff.

24 Bridge above n 20, at 285.

25 Fitzgerald above n 6, at 24.

26 *Ibid*.

27 Fountoulakis, C. (2005) 'The parties' choice of neutral law in international sales contracts', *7 European Journal of Law Reform*, 302, at 306.

28 Turkey follows in effect all the High Court of Switzerland's decisions.

29 For further elaboration on this matter see Fountoulakis, C. (2005) 'The parties choice of "neutral law" in international sales contracts', *European Journal of Law Reform*, numbers 3/4, 304.ff, at 309.

30 *Air Link Pty Limited v Paterson* (2005) HCA 39 (10 August 2005) at 40.

31 *Ibid*. at 49.

32 Uniform Customs and Practice for Documentary Credits.

33 Kuzuka, above n 9, at 694.

34 2006 EWCA Civ 69.

35 A3/2006/0290e see also http://cisgw3.law.pace.edu/cases/061218uk.html.

36 Australian Centre for International Commercial Arbitration.

37 Swiss Rules Article 33.

38 This common frame of reference should provide for best solutions in terms of common terminology and rules, *i.e.*, the definition of fundamental concepts and abstract terms like 'contract' or 'damage' and of the rules that apply for example in the case of non-performance of contracts.