

THE HARMONISATION OF COMMERCIAL LAW: POLICIES AND PROBLEMS

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1. Introduction

The world of law comprises a number of distinct legal families Romanist, Germanic, Common Law, Socialist, etc. — each of which in turn comprises many different systems of law. Every family, and within that family every legal system, has its own tradition, its own style of legal thinking, its own method of lawmaking and its own process of judicial determination of disputes.

This rich variety of jurisprudence is at once a source of fascination for the scholar and of irritation, if not worse, for the merchant. To transact business within one's own borders has nowadays become complex enough, with an ever-increasing volume of legislation dictating what is not to be done, what must be done and the method of doing it. But the problems of the businessman and the financier are compounded when they engage in international commerce, thereby potentially subjecting themselves to a foreign legal regime with which they may be unfamiliar, which may look on their endeavours with a less indulgent eye than does their own legal system and which may place all sorts of unexpected procedural barriers in the way of assertion and enforcement of their legal rights.

It is thus little wonder that those engaged in international trade should seek to reduce their problems either by localising the legal regime through a choice of law clause or by procuring, through contract or international Convention, a set of standard rules to regulate their rights and duties. In the days of the law merchant this was achieved largely through international trade custom and usage. The travelling merchants created their own system of international private law, founded on the twin pillars of good faith and speedy despatch of business. The growth of national legislation, accompanied by judicial displacement of the merchant courts, led to a

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more nationalistic approach to international contracts, which is proving increasingly inconvenient for inter-State trade.

There are two main methods of approaching harmonisation. The first is to harmonise the substantive laws of the countries concerned. This is, of course, the theoretical ideal, but it is enormously difficult and time-consuming except where the aspect of law to be harmonised is narrow. The second is to leave national laws unchanged and merely to harmonise the conflict rules governing the aspect of law in question.

The use of conflict of laws rules and of choice of law clauses to overcome the effect of differences in national laws is a useful device which avoids the burden of unifying the substantive law of different States. It does, however, suffer two disadvantages. In the first place, one party may be reluctant to subject himself to the laws of the other's country, feeling himself thereby disadvantaged. Secondly, national laws have evolved primarily to deal with domestic transactions and may not be well suited to transactions that are international in character. Hence the efforts of international organisations to develop standard rules governing international commercial transactions.

The purpose of this paper is to raise some questions, and to offer some tentative conclusions, as to the role of harmonisation of commercial law, the desirable limits of harmonisation and the methods and institutions by which it may best be achieved. I shall consider first the function and utility of harmonising measures taken outside the framework of the EEC Treaty and then go on to consider the special position of the Community in the unification of commercial law.

2. Institutions and Methods Outside the EEC Treaty

The principal methods of harmonisation outside the EEC Treaty are: the international convention, embodying uniform laws or rules and carried into effect by the contracting States; uniform rules prepared by international organisations and incorporated by contract; and, in the sphere of private lawmaking, model contracts. To these may be added internationally defined trade terms.

Examples of Conventions in the sphere of commercial law are the Uniform Law on International Sales and its successor, the Convention on the International Sale of Goods; the Geneva Convention on Bills of Exchange and Promissory Notes; and the Hague Rules and their successors, the Hague-Visby Rules and the (not yet adopted) Hamburg Rules. Various international organisations were involved in the formulation of these Rules and their embodiment in Conventions, including the International Law Association, the international Institute for the Unification of Private Law, the United Nations Commission on International Trade Law and the Hague Conference on Private International Law. Examples of uniform rules not embodied in a Convention or carried into national legislation are

the Uniform Customs and Practice for Documentary Credits, promulgated by the International Chamber of Commerce and currently undergoing a further revision; and the Uniform Rules for Collections, also published by the ICC. Numerous model contracts have been devised, including standard-terms supply and construction contracts settled by the United Nations Economic Commission for Europe and by the Council for Mutual Economic Assistance. All of these depend for their application on their adoption by the contracting parties. Internationally defined trade terms are exemplified by Incoterms, a most useful set of price and delivery terms published by the ICC which not merely define typical terms but set out the respective duties of buyer and seller in contracts in which such terms are used. Incoterms do not have legal force, except so far as incorporated into the contract, but they do provide strong evidence of generally accepted mercantile understanding of the duties of the parties to a contract of sale in which the defined terms are used.

The majority of the commercial law Conventions possess features similar to those which characterize the optional uniform rules:

1. They are limited to private law.
2. They are concerned with the rights and duties of contracting parties.
3. They are confined to international contracts.
4. Except for the transport Conventions, and other Conventions affecting health and safety, they may be excluded or varied by the contract.

3. Harmonisation by the EEC

The creation of the Common Market added an entirely new dimension to the harmonisation of commercial law in Europe. Previous harmonising measures depended either on the willingness of States to adopt and implement Conventions or on the willingness of contracting parties to embody a model code or set of uniform rules into their contracts. With the EEC Treaty came the power of the Community institutions to make laws penetrating directly into the national legal systems of member States. Whilst the EEC shares with international organizations the objective of removing obstacles to international trade, its approach to harmonisation has hitherto proceeded along radically different lines. Most of the Community's commercial law activity has been in the field of public, rather than private, law, through its competition rules, its treatment of intellectual property rights and its rules for the supervision and solvency of banking, insurance and other financial institutions. In pursuance of its ultimate goal, a single Common Market, the EEC has made regulations and directives which, with a view to avoiding distortion of the market and facilitating the free movement of capital and goods, harmonise aspects of national law for domestic as well as international transactions. Moreover, in contrast to most uniform rules of the type promulgated by other international

institutions, the EEC rules are essentially obligatory in character, overriding, rather than supplementing, private contracts.

However, more recently the EEC Commission has shown an increasing interest in the harmonisation of private commercial law. In 1973 it put forward proposals for a Directive on the recognition of non-possessory security over moveables. With the accession of three new member States this project was abandoned as too complex. In 1979 the Commission returned to the charge with a more modest proposal for a Directive on the legal consequences of creating simple reservation of title to goods. This in turn was much debated and subjected to searching criticism. However, further work was left in abeyance because the Council of Europe had also taken an interest in the subject and was engaged in producing a draft European Convention on simple reservation of title.

The EEC's most ambitious project in the field of private law is undoubtedly the draft European Bankruptcy Convention, designed to introduce the concepts of unity and universality into international bankruptcy and winding up. The work has gone on for well over a decade and shows no signs of abating.

4. *The Rationale of Harmonisation*

All this legislative activity raises fundamental questions about the purpose, utility and method of harmonising private commercial law to which I should now like to turn. For ease of exposition I shall confine myself for the most part to contracts and to the relations of the contracting parties *inter se* and *vis-à-vis* third parties.

(i) The rights of contracting parties *inter se*.

1. *Are permissive rules useful?*

It is a reasonable starting point that to the extent to which contracting parties are to be left free to make their own law, there is in general no great advantage in trying to do it for them. Thus the Unidroit draft proposals for uniform laws on leasing and factoring have relatively little to say concerning the leasing contract or the factoring agreement, on the basis that such contracts are invariably reduced to detailed writing and that little purpose is served by laying down rules which the parties will be free to exclude or vary by the terms of their contract.

However, there are several examples of such optional rules. Thus we have the York-Antwerp Rules on General Average, which go back to 1864 and were promulgated in their most recent form by the International Maritime Committee in 1974, and the Uniform Customs and Practice for Documentary Credits, formulated by the International Chamber of Commerce. Both sets of rules depend for their application on their incorporation into the relevant contract, and in both cases the parties are free to vary the rules as they think fit. Yet the two sets of rules are in universal

use, from which we must conclude that they are regarded the world over as fulfilling a useful function. By contrast, use of the Uniform Law on International Sales seems to have been minimal, sellers and buyers preferring to rely on their own standard terms of sale and purchase.

My limited researches have not revealed the existence of any study into the reasons why ULIS has proved such a failure when the York-Antwerp Rules and the UCP have been so successful. Yet it is important to find the answer to this question, for it may throw light on the conditions that have to be satisfied in order to make the preparation of permissive uniform rules worthwhile. In the case of ULIS, its unpopularity was ascribed to "serious technical flaws with respect of policy and clarity".¹ The response of UNCITRAL was to devote a decade of intensive activity to the production of a new and better set of uniform rules, which became embodied in the Convention on Contracts for the International Sale of Goods. What was not done was to investigate the question whether any uniform rules on sales contracts were necessary at all.

The York-Antwerp Rules and the UCP share three characteristics which may account for their widespread popularity. Both concern a narrow field of law; the field is one which in many countries had not been codified by national legislation; and more importantly, both involved highly technical questions arising from contracts in which the paying party (insurer in the one case, banker in the other) was a member of an organised profession which could speak for him and represent his interests in international negotiations.

By contrast, ULIS and the complementary convention on formation of contracts, ULFIS, covered a much broader field of law; the field was one that had been codified in all major legal systems, so that the party in the better bargaining position had no need to subject himself to the new international rules but could incorporate a choice of law clause applying his own national law; and the enterprises engaged in international sales were so numerous and diverse in character that there was no effective focal point of interest of representation.

Will CISG fare any better than ULIS? Only time will tell. Certainly CISG is a great improvement on ULIS and is much more likely to commend itself to the commercial community. Already several States have signed the Convention and more are coming up to the starting post. In view of the enormous work put into the making of the Convention and the importance of ensuring that such ventures are not frustrated the United Kingdom does, I think, have some moral obligation to ratify the Convention, instead of simply standing on the sidelines and, as so often in the past, proclaiming the superiority of the English rules over others. This said, I have to confess to a feeling of scepticism as to the commercial acceptability of

¹ JOHN HONNOLD, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 Am. J. Comp. Law 223, 225 (1979).

CISG. Most enterprises engaged in international trade have their own standard terms of purchase and sale and see no good reason for abandoning the selection of their own national law. Whose terms will prevail will typically depend on where bargaining power lies at the time of the contract. Another important feature is that whereas a code like the UCP on documentary credits is relatively self-contained, and it suffices to incorporate it by contract, the modern international sale contract has to include many provisions relating to matters not covered by the Convention, including escalation clauses, currency risk clauses and the like. If CISG succeeds, it will rank as one of the great achievements in the harmonisation of international trade law. If it does not, then we shall have to consider afresh whether the immense labour involved in a project concerning purely permissive law would not be better directed to more modest projects where there is arguably a greater need.

If I may summarise the optimum conditions for the success of a purely permissive set of rules governing relations between contracting parties, they are these:

- (1) The field covered is narrow.
- (2) It remains uncoded in the national laws of several major States.
- (3) It involves transactions which are highly institutionalized.
- (4) The transactions are international in character.
- (5) Adoption of the rules will liberate contracts to which they apply from constraints imposed by national laws which are seen as obstacles to international trade.²

2. What form should the rules take?

Given that the field of law is one which lends itself to harmonisation, what form should this take? Should it be a Convention or merely a set of uniform rules promulgated by an international organisation and incorporated into contracts by an express incorporation clause? In general, the latter seems preferable for permissive rules. Conventions involve States. They are therefore particularly hard to negotiate and harder still to modify. Prospective Contracting States have to have regard not only to business interest but to wider matters of State policy. Permissive rules are best left to the international business community, assuming that it is sufficiently institutionalized in the relevant sector to allow for the effective organisa-

² Thus the Unidroit proposed rules on international financial equipment leasing provide for so-called penalty clauses to be enforceable unless wholly unreasonable, whilst the draft rules on international factoring seek to give effect to the assignment of receivables under a factoring agreement despite a prohibition against assignment in the supply contract. This is designed to remove what could be a serious obstacle to large-scale receivables financing.

tion of the work and the formulation of the rules. The huge success of the UCP shows what can be done by essentially private enterprises.

3. *Mandatory rules.*

Quite different considerations apply where the projected harmonising measure is intended to be mandatory in character. In that situation the task of the harmonising law is not to do the parties' job for them but on the contrary to override contractual provisions that are considered to be objectionable as a matter of policy. The typical case is the contractual provision for exclusion or limitation of liability. Even in international contracts it may be thought necessary to outlaw or curb such clauses, as where the contract is with a consumer or involves the transportation of passengers or cargo.

The formulation of mandatory rules for international contracts through the classic method of a Convention, translated into the national laws of member States by whatever means (if any) are necessary, poses relatively few problems in policy terms. A State cannot be bound by a Convention to which it has not assented, and if a number of Contracting States come together to agree on mandatory rules affecting international contracts, that is their prerogative.

4. *The EEC.*

Much more controversial is the growing involvement of the EEC in areas of private contract law. In the field of commercial law the Commission has submitted a number of proposals which have yet to receive the approval of the Council. They include proposals for Council Directives on consumer credit, contracts of guarantee, doorstep sales, commercial agency, insurance contracts and sales with reservation of title. The legal basis usually relied on for these proposed Directives is Article 100 of the EEC Treaty, with Article 235 as a longstop in case of need. Article 100 provides as follows:

"The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market..."

The concern generated by the Commission's activity in relation to the contracts above referred to, and to other areas of activity, was twofold. First, in contrast to a Convention, an EEC Directive leaves member States

with no choice but to enact implementing legislation. Moreover, the Directive is directly applicable, and may even have direct effect, in member States. Secondly, the effect of several of the proposed Directives was not to provide a set of uniform rules for international transactions but to harmonise *national* laws affecting domestic transactions. Questions began to be raised not merely as to problems created by the drafting of the Directives but as to the objectives they were intended to achieve and even, in some cases, as to their *vires*.

In October 1977 the Law Commission produced a highly critical Report on the proposed EEC Directive on the law relating to commercial agents.³ The proposed Directive, concerned to provide commercial agents with a range of non-excludable rights, was put forward as necessary to the proper functioning of the market.

"The differences which exist between one legal system and another in relation to commercial representation make for a continuing and quite definite inequality in conditions of competition. Moreover, those differences act as a barrier to the carrying on of the business of commercial representation in the Community."⁴

And later:

"Basically the proposal has two objectives. The first is to remove the differences in law which are detrimental to the market. They affect the conditions of competition and create considerable legal uncertainty. This applies, for example, in relation to the goodwill indemnity, which is known in some Member States but not in others. It is more expensive for the principal to have an agent in those countries in which the goodwill indemnity is already compulsory by law, and this operates very much to the economic advantage of principals who are not under an obligation to pay any indemnity after the contract has terminated."⁵

The Law Commission was minded to accept this proposition, which is, however, of doubtful validity. It is difficult to see the justification for seizing on a single element in the contractual relationship between the parties and to take no account of the fact that in a country where the law does not prescribe compensation to an agent on termination of his agency there may be other aspects of the contract as regards which that law gives the

³ *Law of Contract: Report on the Proposed E.E.C. Directive on the Law Relating to Commercial Agents* (Law Com. No. (4).

⁴ *Proposal for a Council Directive to co-ordinate the laws of the Member States relating to (self-employed) Commercial Agents* (COM (76) 670 final), Explanatory Memorandum.

⁵ *Ibid.*

agent better protection than elsewhere. Moreover, the proposition proves too much, for it leads to the conclusion that we should harmonise all commercial law.

Apart from detailed criticisms of the drafting, the Report attacked the fundamental thrust of the proposed Directive.

"There are thus many respects in which the directive prevents the principal and the commercial agent from making a binding arrangement which is acceptable to them both. However sensible, reasonable and fair it may be in its effect, it is liable to be converted into something which is intrinsically unfair and which makes a nonsense of the bargain that was made."⁶

The Law Commission's conclusion was that

"the directive's defects of substance, presentation and drafting are such that it fails even to provide a basis for negotiation."⁷

In 1978 the House of Lords Select Committee on the European Communities produced a Report on *Approximation of Laws under Article 100 of the EEC Treaty*.⁸ This Report examined in detail the limits of Article 100 as the legal basis for harmonisation Directives, concluded that in some instances at least Directives made or proposed under Art. 100 were *ultra vires* and went on to question whether the problems to which the Directives were supposedly aimed actually existed. Having heard evidence from staff of the Commission, the Select Committee remained unconvinced that sufficient preparatory work had been done to establish the illeffects which some of the Directives were designed to eradicate. In the field of contract law the Report commented:

"In general the Committee question the desirability of interfering in particular sectors of the law of contract, for if this policy is pursued the result will be to produce a web of special circumstances."⁹

In the sphere of consumer protection, there may be more compelling arguments for harmonisation in order to secure minimum standards of fairness throughout the Community. But interference with business contracts, whether domestic or international, needs to be justified by analysis considerably more rigorous than that which hitherto appears to have been conducted. A general appeal to the objectives of the Treaty under Article 2 is unlikely to persuade member States that a sufficient case has been made

⁶ Report, *supra* n. 3, para. 34.

⁷ *Ibid.*, para. 53.

⁸ HL Session 1977-78, 22nd Report, *Approximation of Laws under Article 100 of the EEC Treaty* (HL 131).

⁹ *Ibid.*, p. 6.

out. It was a belated recognition of this fact that led to the revision of the Unidroit draft Convention on Agency in the rights and duties of principal and agent *inter se* as well as their relations with third parties. In its final form, adopted in February 1983, the Convention has been wisely restricted to the latter.

(ii) The treatment of third party rights

So far, my remarks have been directed to measures aimed at harmonizing in some degree the rights and duties of parties to a contract *inter se*. My tentative conclusions are that harmonising provisions of a purely permissive, or dispositive, nature, should be confined to international contracts covering a narrow field which remains largely uncoded by national laws and is highly institutionalized, and that the most appropriate harmonising vehicle is not a Convention but a code of uniform rules, a model contract or a set of uniform definitions of trade terms, formulated by an international trade body such as the ICC. Mandatory rules interfering with freely negotiated business contracts should not be introduced in the absence of compelling evidence of the existence of a mischief which such rules would help to eradicate or an objective of the Treaty which the rules would help to promote and the pursuit of which falls within the rule-making power.

Different considerations apply to a harmonisation proposal designed to resolve conflicts between a party to a contract and a third party, e.g. between one who sells goods under reservation of title and a third party to whom the buyer wrongfully resells the goods before he himself has acquired title. Obviously these are not matters than can be dealt with by contract, and they therefore need to be regulated by rules having mandatory force. However, the problem of harmonisation in this area is acute if the field is not narrowly defined. A huge effort went into the formulation of Article 9 of the American Uniform Commercial Code, which is designed to unify the treatment of security interests in personal property. If this proved so difficult in a country that is 98 per cent common law, how much more formidable is the task of harmonising this area of law in Europe, with its two great legal families, the civil law and the common law, and striking conceptual differences even between one civil law jurisdiction and another.

As an indication of a restricted field in which harmonisation is feasible, let me instance the Unidroit project on uniform rules for international financial equipment leasing. Recognising the financial character of such leasing contracts, these rules are designed (*inter alia*) to place responsibility where it properly belongs by giving the lessee a direct right of action against the supplier for loss or damage sustained by him as the result of the supplier's failure to deliver the equipment in accordance with the supply contract between him and the lessor; and the lessor is for the most part (though not entirely) made immune from liability to the lessee for such failure. Such a concept would be novel in most jurisdictions but with

careful drafting it can be made to work despite major differences in the structure and concepts of law in the jurisdictions affected.

It is when the harmonisers attempt to grapple with a more complex field of law — in particular, that branch of law which is concerned with property rights — that serious difficulties begin to arise. The EEC proposed Directive on security interests in movables¹⁰ went no further than to provide for mutual recognition of security interests created in a member State, yet even this limited objective proved too difficult of attainment. The later EEC draft Directive on the so-called simple reservation of title¹¹ has run into similar problems, as has its successor, the draft Convention prepared by the Council of Europe. Both drafts suffer from the fundamental weakness that they fail to recognize the security function of title reservation, and thereby ignore all the developments in legal thinking that have taken place over the last thirty years, as well as gravely underestimating the degree of technical knowledge it is necessary to possess in order to draft uniform rules affecting basic concepts of property law. Thus on several occasions the Explanatory Report ascribes to the proposed Convention a legal effect not warranted by the text.¹² Moreover the reasoning underlying some of the policy decisions is decidedly opaque. For example, we are told¹³ that registration of title reservation is not considered necessary since third parties are adequately protected by the requirement that the reservation of title is expressed or accepted in writing. How this is supposed to protect an innocent third party who *ex hypothesi* is not aware of the existence of the title reservation clause, or even of the sale agreement as a whole, is a mystery.

4. Conclusions

What lessons can we learn from experiences to date in the harmonisation of commercial law?

First, those who propose harmonising measures should be required to adduce compelling evidence that there really is a problem for which a solution needs to be found. All too often a harmonising measure originates as a bright idea by an individual or a group which is allowed to develop

¹⁰ Draft Directive on the recognition, in the case of moveables, of nonpossessory securities and of retention of ownership clauses (XI/466/73E).

¹¹ Draft proposal for a Council Directive on the legal consequences of agreements creating simple reservation of title to goods (III/872/79-EN), 1979.

¹² For example, the assertion in paragraph 15 that pre-existing debt is outside the meaning of "consideration" in art. 2(1) is not supported by the text of the article; paragraph 17 erroneously equates a clause vesting title in the seller after default in payment with a clause reserving title until payment; and paragraph 29 incorrectly states that the seller can repossess from a third party only if the latter is in bad faith.

¹³ Explanatory Report, paras. 21, 31.

to the point of a draft harmonising measure before any empirical work has been undertaken to demonstrate that harmonisation of the particular aspect of law involved is both necessary and likely to produce beneficial results. In the case of ULIS and CISG this omission has resulted in a vast amount of expert work to produce a set of rules for which there is little evidence of any need and which in practice is likely to be displaced by the parties' own contracts. In the case of the EEC, there has been a too ready assumption that differences in law distort the common market, without any hard evidence to support this. To the contrary, given the substantial differences in institutional structures, legal systems, business practices, culture, climate and political thought between one member State and another it is at least arguable that harmonisation, far from eliminating distortion, actually produces distortion by bearing more onerously on residents of some member States than of others.

Second, we should not be over-ambitious in our attempts to harmonise aspects of commercial law. It is better to devote limited resources to modest measures that can be achieved within a reasonable time span than to invest a huge amount of time and labour in producing rules which parties can quite safely be left to make for themselves or which are doomed to failure because of fundamental differences in legal concepts among the Contracting States.

Third, where the optimum conditions for success previously enumerated¹⁴ are not present, we should be slow to intervene with rules of a permissive character affecting contractual rights and duties of business enterprises. Companies and businessmen are usually well able to look after themselves (if they are not, they should not be in the market at all) and are much better able than outside agencies to decide what contractual terms are most suited to their requirements. In any event, as between parties who enjoy an ongoing business relationship nothing is static and adjustments and variations are constantly having to be made. Moreover business practices change much more rapidly than contract rules.

Fourth, any uniform laws affecting commercial relationships must be sufficiently flexible to accommodate commercial developments. Businessmen and their lawyers are constantly evolving new procedures, new types of contract, new security devices. It is vital to avoid rigid rules which will confine merchants to a strait-jacket from which they cannot escape. This is not to argue in favour of complete *laissez-faire*, merely to emphasize that commerce is dynamic and that the law must seek to match its dynamic character.

Finally, it is essential to involve businessmen and their trade or professional associations in discussions on harmonisation while ideas are still in their formative stage. To consult them only when a draft set of rules has been formulated is too late, because by that time the ideas of the law-

¹⁴ *Ante*, p. 6.

maker have been channelled down a particular track from which it is difficult to depart. The expertise of the professional is needed from the outset, so that the real problems can be accurately identified and the practicality of the proposed measures examined.

Given that there is a serious problem which could be resolved or alleviated by harmonising measures, it then behoves governments of the States involved to be constructive in their attitude towards such measures. It is all too easy to rally local support in favour of the *status quo* on the basis that one's own nationals know their own law and that this is vastly superior to anyone else's law is the subject under consideration. Even if true, this misses the essential point, which is that the rights of one's nationals will not necessarily be governed by their own law and that with a sensible harmonisation what they lose on the swings will be more than made up on the roundabouts.