Session 11 — Implementing the Convention on Contracts for the International Sale of Goods

How 'International' Is International Commercial Law? Key Findings of UK Research[1]

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1. *Introduction*

The primary aim of the research work was to establish whether a particular culture has developed within the selected groups, in response to international instruments of commercial harmonisation and if so, what had informed this approach.

From the research undertaken, it is apparent that the approach of all has been characterised by competing tensions between 'the national' and 'the international' and between the shared ideal of international instruments and the application of national laws. Moreover, the tensions evident in one institution or group have also been found to influence the approach to international instruments of others. Therefore, it cannot be said that each has a distinct and individual culture; rather there are inter-related cultures which have been informed by the complex inter-relationship between the different institutions and groups.

2. *The Universities*

Within university Law Schools, despite subjects being variously described as 'International Trade Law' or 'International Commercial Law', it is English sales law which is generally taught at undergraduate level as the applicable law for international sales.

This at first appeared to be a consequence of the Practitioners' Regulating Authorities setting the six 'foundation subjects' as prerequisites for a Qualifying Law Degree; but on closer inspection there remains scope for universities to offer international content within undergraduate commercial law subjects, at least within the LLB Degree Programme. Despite this, only 15% of universities include detailed study of international conventions which have not been incorporated into English law, and whilst a further 45% of law schools include a brief introduction to rules such as Incoterms, it means 40% of universities in England and Wales do not include *any* international content within commercial subjects at undergraduate level. This means that many graduates enter commercial practice with knowledge solely of English law.

Nevertheless, there is some tension between 'national' and 'international' within law schools, as some 80% offer LLM Courses in 'International Commercial Law' (including some law schools who do not offer any commercial law at undergraduate level). This tends to suggest that universities have developed a culture which treats international commercial law as a postgraduate academic subject rather than as a potentially applicable law for cross border transactions. This culture appears to be strongly influenced by financial considerations as postgraduate courses with international content attract high fee paying foreign students. It should also be noted that postgraduate law studies are outside the reach of the practitioner regulating authorities and therefore the law schools are able to wholly set their own curriculums.

3. *The Practitioners*

The University culture that has developed is also supported and reinforced by Practitioners and their firms. It was found that commercial firms are willing to accept trainees with little or no knowledge of

[1] This paper presents the key findings from a thesis submitted in respect of the Degree Doctor of Philosophy at University of East Anglia School of Law in 2012 entitled 'Instruments of International Commercial Harmonisation in England and Wales: How 'International' is International Commercial Law?' The complete thesis is available at https://ueaeprints.uea.ac.uk/47955/1/WALLACE-Ph_D_THESIS_FINAL.pdf.

commercial law beyond a simple 'awareness' and certainly no knowledge of international commercial laws. Consequently, there is no vocational need for students entering commercial practices to have any concept of international commercial instruments and this must impact on the culture and attitudes that these individuals develop towards such instruments going forward.

Given that 90% of commercial cases handled by London law firms involve an international party[2], it was not surprising that 92% of the international law practitioners responding to the research questionnaire had advised on international commercial rules or practices, such as Incoterms or UCP600 and regularly incorporated them into contracts. However, when it came to whether a practitioner would recommend a ***convention*** such as the CISG where it would be applicable to the situation, the approach was somewhat different. Although 34% had been asked to advise on the CISG nearly half of these practitioners stated they would *not* recommend clients incorporate this convention into sales contracts, and some routinely recommended the CISG should be expressly excluded. The questionnaire responses also highlighted some misunderstandings held by practitioners as to the CISG's applicability and/or provisions — with some stating 'the CISG was not law' or that the CISG 'must be ratified in the place of actual performance' in order to be applicable.

There was a general perception amongst the practitioners surveyed that English law is adequate for cross border transactions and therefore there was no need for international conventions. In fact, the superiority of English law was given by practitioners as a reason to recommend the CISG's *exclusion* from contracts, as English law was "the accepted basis for international sales contracts, given it has an established reputation for legal certainty, fairness and transparency"[3].

Arguably, it is the reputation of English law which brings commercial cases to the courts and arbitral tribunals in London, even when the parties have no connection with the UK[4], so the Practitioners' approach is also based on the fact that English law is not only a governing law but has also effectively developed into an industry — an industry which Practitioners are keen to protect.

4. Government/Parliament

Government and Parliament are also keen to promote and protect this legal industry, given the revenue it generates, and it is this sense of protectionism which appears to be at the crux of the culture that has developed within Parliament and Government towards international commercial conventions.

This culture of protectionism is evident from the complex justification process for ratifying commercial conventions. English constitutional law requires an Act of Parliament to incorporate a convention into English law but the research has shown that international private law is not high on Parliament's legislative priority list. This is clearly reflected in the fact that international commercial conventions and protocols have in the main required Private Members' Bills for their introduction rather than being introduced into Parliament as a Public Bill. Furthermore, enabling legislation to pass international commercial conventions and protocols into English law has always had to compete against the social issues and economic policies of the day, so lack of parliamentary time is often cited as a reason for a convention's non-ratification[5]. However, it is interesting to note that during the research, Parliamentary time had been allocated to bills as diverse as 'Keeping Primates as Pets', 'Caravan Sites', 'Food Waste' and 'Snow Clearance' — so as Sir Roy Goode as commented some years ago, the excuse of lack of Parliamentary time "wears a little thin after 20 years"[6].

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[2] Ministry of Justice & UK Trade and Investment, 'Plan for Growth: Promoting the UK's Legal Service Sector' (2011).

[3] Quote from questionnaire response.

[4] See for e.g. *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL) per Dilhorne LJ at 162.

[5] See Sally Moss, 'Why the United Kingdom has not Ratified the CISG' 25 J.L. & Com. 483 2005-2006, p. 483.

[6] R.M. Goode, 'Insularity or Leadership: The Role of the United Kingdom in the Harmonisation of English Law' (2001) 50 Int'l. & Comp. L. Q. 756.

Moreover, in other areas of law, such as human rights or public international law, laws have become internationalised in the UK almost without question, but it is apparent from the research that Parliament has a sense of reluctance for legislating on international private law matters and that tensions exist between making laws and protecting freedom of contract. For instance, it took some 42 years from 1882 to 1924 before Parliament, as a result of an international convention, placed uniform bills of lading on the statute books, and even then, Parliament still showed signs of being averse to legislative interference with the contractual autonomy between merchants and carriers.

These factors may account for the culture of reluctance that has developed within these institutions to enacting the requisite legislation to bring international conventions such as the CISG into domestic law, as these would arguably compete against 'the English legal industry'.

5. The Judiciary

However, even when international conventions have been ratified there are still competing tensions between 'international' and 'national' laws when they come to be interpreted in the courts of England and Wales. Outwardly, there appears to be an 'international' view, with various judges emphasising the need for conventions to be "construed on broad principles of general acceptation" and not "rigidly controlled by domestic precedents of antecedent date"[7]; and other landmark cases have sanctioned the use of the travaux préparatoires[8] and the French text[9] of the Convention when interpreting convention provisions.

But the research has shown that such international sources have only been followed to the extent that it is possible to do so without impacting on the principles and concepts inherent in English law; and although there has been some uniformity with the decisions of other contracting states, it has usually been in cases where foreign judgments coincide with or are used in support of the approach taken by the English judiciary.

This approach has arguably allowed the judiciary to effectively develop its own method of interpreting international commercial conventions and whilst this approach has allowed the judiciary to minimise the effects of international commercial law, it has perhaps tended to place conditions on the overall objective of international conventions, being uniformity.

6. The Traders

Finally, in the case of the traders, the group that international commercial instruments were developed to assist, the research showed that whilst most were familiar with rules and practices such as Incoterms and the UCP; in respect of international conventions, their approach was largely one of ignorance.

96% of the traders responding to the research questionnaire did not know of the CISG's existence as an alternative to English law and during follow-up interviews, the majority stated that the international contract provisions of the CISG were 'a good idea'. Moreover, 15% stated that, had they been aware of the CISG, they may have voluntarily contracted on its terms, as they had experienced difficulties establishing international sales contracts with new buyers in new markets areas, due to differences in legal regimes.

Most of the traders stated during interviews that they relied on information on cross-border sales contracts supplied by legal advisers, freight forwarders and government international trade websites, and this again demonstrates again how cultures that have developed towards international commercial instruments in one particular institution or group influence and inform the approach of others. The approach of Practitioners would suggest that it would be English law that would be recommended if legal advice was sought by a trader and the 'International Commercial Contracts' section within the government's international trade website contains only information on Incoterms — there is no information on other potentially applicable sale of goods laws such as the CISG.

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[7] *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 (HL) per Lord MacMillan at 350.

[8] *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL).

[9] *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL).

Consequently, in the cross-pollination of approaches some of the international commercial conventions, which were developed to overcome specific impediments to international trade, are not being used by the very merchants they were intended to benefit and in some cases traders are not even aware of their existence. That is not to assume that traders would necessarily use international conventions by choice even if they were aware of them, as such use would perhaps also necessitate overcoming the culture that the traders appeared to have to contracts in general — whether offer and acceptance match perfectly is less of a problem for instance, than how and when delivery will be effected until such matters are in dispute. This then raises the issue as to whether international commercial instruments are developed for the needs of traders or for the legal needs of practitioners, and whether the 'needs' of the two institutions are ever resolved by one instrument, but this is beyond the scope of this particular research.

7. Conclusion

The insular approach that the institutions and organizations studied have developed in relation to international commercial law, conflicts with the global image that each strives to portray. For example, Government departments[10] promote and support international trade as a major contributor to the economy; most universities in England and Wales promote their international perspective and there has been a growth in the number of large co-called 'international' law firms (both those indigenous to the UK and US law firms establishing London offices) — to the extent, that a senior partner in Clifford Chance stated that he did not feel bound so much by the ethics or rules of conduct of the Law Society of England and Wales, but by international codes which more clearly affect their transnational and international business[11]. Consequently, although there may be a fear of international commercial instruments it is perhaps not caused by an overriding fear of globalisation as such.

However, there is clear evidence within the institutions and groups studied, that a distinct culture has developed towards international commercial instruments. At its basis is the tension between 'international' and 'national' law; and an apparent need to protect English law. Moreover, there is an overriding sense that international instruments are used as a means of better fitting English law to cross-border transactions; rather than applying such conventions as an alternative to or in preference to English law. So rather than international commercial law there is, in essence 'internationalised' national law.

In order to minimise the reliance solely on domestic law there must be changes in the culture that has developed towards international commercial conventions. For this to happen, two potential solutions can be identified. Firstly, law schools need to ensure that international alternatives to English law are included within undergraduate commercial law subjects, as introducing the CISG, for example, to the next generation of practitioners is perhaps a better approach than trying to alter long-held perceptions that national is best.

Secondly, rather than conventions which require government ratification and legislation to formally enact them into national law, perhaps the way forward is the development of recommended international rules or practices by the trading sector to overcome specific issues in cross border trade. It is perhaps not a coincidence that the groups studied were more familiar with rules such as Incoterms and the UCP, whilst many were unaware of the international conventions, so more analysis needs to be undertaken as to the type of international instruments that are used to harmonise commercial law.

Thus, rules and practices developed by the international trade sector, would be approved and used by the international trade sector without requiring government or parliamentary intervention, and in doing so a new *lex mercatoria* may emerge. This could potentially enable more effective and greater harmonisation of commercial laws and may also help overcome the cultures that have developed in respect of the existing international commercial instruments.

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[10] Such as UK Trade & Investment (UKTI).

[11] Avrom Sherr, 'Globalization and the English Judiciary' (2001) p.8-9; Available at http://sas-space.sas.ac.uk/259/.