

# UNIFICATION OR HARMONISATION ATTEMPTS IN INTERNATIONAL TRADE LAW

## INDRODUCTION

International trade has always been a forefront to harmonise and unify the law. The needs of international trade has brought national sovereigns to compromise towards unification of private law both on regional and on international level. At regional level, besides the European Union which is a regional single market continuing unification process through directives and the works in preparation for unified Company and Contract Code, the world also has witnessed the other regional harmonisation attempts that have occurred in Africa and most recently in Asia in the area of contract law.<sup>1</sup> At international level unification has basically been accomplished in the following matters (but not limited to) : international commercial arbitration, international sales of goods, carriage of goods by sea, security interests ,international payments, electronic commerce<sup>2</sup> and the International Chamber of Commerce's International Rules for Interpretation of Trade Terms (INCOTERMS) and the Uniform Customs Practise for Documentary Credits.<sup>3</sup> This study is dedicated to examine the instruments that has been formed to harmonise contract law, carriage of goods by sea and trade terms in conjunction with the needs of international commerce for unification.

## CISG (The Convention on the International Sale of Goods)

The attempts to generate a unified rules for international contracts had began in the 1920s. UNIDROIT (The International Institute for Unification of Private Law ) started to work on a draft treaty in 1930 and adopted a convention on the formation of international sales of contracts and another on the content of such contracts in 1964, however, these regulations could not reach sufficient success to unify the contract law.<sup>4</sup> 'To keep the process alive, the promoters of unification shifted its venue to UNCITRAL (United Nations Commission on International Trade Law)'.<sup>5</sup> UNCITRAL had been established 1966 by the United Nations General Assembly in order to remove legal barriers, in that way responding to international commercial needs.<sup>6</sup> The CISG has been one of the most significant outcome of the UNCITRAL for unification of international trade law which has been the product of a long

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<sup>1</sup> Ingeborg Shwenzer, 'Who needs Uniform Law and Why ' (2013) 58(4) Villanove Law Review 723

<sup>2</sup> United Nations Commission on International Trade Law, 'Uncitral Text and Status' [http://www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html) > accessed 10 November 2014

<sup>3</sup> Paul B. Stephan, 'The Futility Unification and Harmonisation in International Trade Law' (1999) No 99- 10 University Virgina School of Law Legal Studies Working Paper Series [http://www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999\\_Stephan.pdf](http://www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999_Stephan.pdf) > accessed 10 November 2014

<sup>4</sup> Stephan (n 3) 23

<sup>5</sup> Stephan (n 3) 23

<sup>6</sup> Muna Nludo, 'Uncitral and Unification of International Trade Law' [ 1998] 24 (3) Cornell Law Forum 3

term work on the requirements of international commercial contracts. CISG was adopted in 1980 in the Vienna and has been ratified by 83 contracting countries so far.<sup>7</sup>

The facilities of the CISG firstly could be considered in relation to its contribution to the legal predictability needed by international trade. To decide the governing legal regime of the contract has been a major problem for international trade in the absence of unified set of rules. 'Buyer or seller cannot determine which law will apply until he or she completes a detailed conflicts of law analysis to determine which law has been the closest relationship to the transaction.'<sup>8</sup> to get to know the scope of his or her rights and obligations under the contract to conduct the trade relation. This situation could cause unforeseen heavy sanctions for the parties. The choice of law clause in the process of the foundation of the contract could not remove legal uncertainty as aimed the level, also may lead to an unbalanced legal relation between the parties. That is to say, economically more powerful party will be more likely to force its own domestic legal regime by inserting the choice of law clause in standard contracts. As consequence, whereas the stronger party will be familiar with its domestic law, the weaker party could confront the problems to understand the foreign legal regime in terms of both language and unfamiliarity of practical application.<sup>9</sup> Besides, there has always been the risk on that chosen law may be dishonoured out of the its domestic jurisdiction as well as the interpretation problems of the foreign law in different jurisdiction.<sup>10</sup> 'Considering that kind of situations , the application of the CISG can be seen as a good compromise. Both parties have the same chance to get familiar with the CISG. The CISG is published in nearly every language in the world. Additionally, there are many commentaries or other scholar writings on the CISG.'<sup>11</sup> The CISG provides predictability for both parties to enter in international trade relation securely through published decisions of the courts on the internet<sup>12</sup> and worldwide commentary on the application matters.

The national residence against replacing new perspective of law leads to major difficulty to run toward unification. However, the CISG has gained common acceptance of the states from both common and civil jurisdictions since it was adopted. The CISG could be seen as good harmony of common law and civil law systems which makes easier to gather common acceptance. The importance of harmonising different approaches relies on reaching the most proper codification for needs of international trade maybe more importantly than gathering consensus. In the course of work on the CISG 'when the drafters selected between pre-existing common and civil law rules they generally selected the most efficient rule.'<sup>13</sup> As an example, according to the CISG, buyer has no right to rely on lack of conformity to avoid the contract in any case. To announce that the contract is avoided there should be any fundamental breach as an instrument of common law system which refers to breaches that

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<sup>7</sup> United Nations Commission on International Trade Law, 'Status United Nations Convention on the Contracts for the International Sale of Goods' [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) > accessed 10 November 2014

<sup>8</sup> Nludo (n 6) 4

<sup>9</sup> Shwenzer (n 1) 724

<sup>10</sup> Shwenzer (n 1) 723

<sup>11</sup> Peter Gruber, 'Convention International Sales of Goods (CISG) in Arbitration' [2009] I.B.L.G 15

<sup>12</sup> Nludo (n 6) 6

<sup>13</sup> Larry A. Dimatteo, 'CISG as a Basis of Comprehensive International Sales Law' (2013) 58 (4) Vill. Law. Rev. 691

fundamentally damages the buyer's expectations to take benefit from the contract.<sup>14</sup> Fundamental breach instrument constitutes as an efficient regulation for international trade in terms of preventing uneconomical the back-carriage process in every case which could enhance costs the view of the fact that risks and costs for international trade are higher than compared to domestic ones related to much longer distant transportation process.<sup>15</sup>

Implementation of domestic laws could not fit the international contracts for some matters on the ground that they are generally formed in the frame of internal commercial relations. For instance, Turkish<sup>16</sup> and Swiss Supreme Court makes a distinction between defective goods and different goods.<sup>17</sup> Whereas the buyer has to make a prompt notice to claim the remedies in the case of delivery of defective goods, the later has been evaluated as non-performance which gives to right to claim the damages whether it made notice or not in ten years.<sup>18</sup> Likewise, to deliver less amount of quantity than described in the contract stays in scope of partial performance, for the rest of non-performance able to be claimed in ten years lapse of time.<sup>19</sup> Considering the CISG, this matters different from domestic laws suits more for international transactions. Article 35 uses a common notion which collects the description, the quality, the quantity of goods under the notion of conformity of the contract.<sup>20</sup> Not to lose the right of claim the lack of conformity for any issue, the buyer shall give a notice in reasonable period of time after he has discovered or ought to have discovered to non-conformity by checking the goods short period of time.<sup>21</sup> The solution the CISG provides is more predictability and reliability for international trade relations by prohibiting unexpected costly claims with more amount of interest that could be brought forwards in long period of time.

As seen the CISG facilities the international commercial needs in many aspects. On the other side, it has some shortcomings consist of absence some important matters as validity of contract, questions of consent, limitation of liability clauses.<sup>22</sup> However, it can be stated that the CISG significantly has achieved its aim by its common language and common understanding of key concepts among different legal systems.<sup>23</sup>

## **INCOTERMS (International Commercial Terms)**

INCOTERMS are internationally recognized standard terms commonly used in international trade transactions. They were formulated by International Chamber of Commerce (ICC) firstly in 1957 and revised in 1967, 1976, 1980, 1990, 2000 and 2010. According to ICC, the

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<sup>14</sup> Duhaim's Contract Law Dictionary, 'Fundamental Breach of Contract' <http://www.duhaime.org/LegalDictionary/F/FundamentalBreach.aspx> accessed > 10 November 2014

<sup>15</sup> Gruber (n 11)

<sup>16</sup> E. Aksakal, 'Birlesmis Milletler Anlasmasi Kapsaminca Saticinin Sozlesmeye Uygun ve Ucuncu Kisilerin Hak veya Taleplerinden Ari Mal Teslim Etme Borcu' [2014] 88(1) Istanbul Barosu Dergisi 341 <http://www.istanbulbarosu.org.tr/proje/dergi/18/files/assets/basic-html/page343.html> accessed 20 November 2014

<sup>17</sup> Shwenzer (n 1)

<sup>18</sup> Shwenzer (n 1)

<sup>19</sup> Yargitay Hukuk Genel Kurulu (Supreme Court of Assembly of Civil Chambers) E. 2012/13- 751 K. 2013/256

<sup>20</sup> Article 35 United Nations Convention on the Contracts for the International Sale of Goods

<sup>21</sup> Jason C.T Chuah, 'Law of International Trade Cross-Border Transactions' (4<sup>th</sup> Sweet& Maxell 2009) 159

<sup>22</sup> Shwenzer (n 1)

<sup>23</sup> Ingborg Shwenzer, 'CISG Successes and Pitfalls' (2009) 58 (2) Am. J. Comp. L. 457

main aim to set up standard terms is to reflect the international trade practice.<sup>24</sup> They focus on clarifying the parties respective obligations related to delivery of goods, passing of risk, costs.<sup>25</sup> INCOTERMS supply secure, predictable legal area for international traders by clearly defining the role of the parties for every type of carriage model to externalise different interpretations of the courts. Before the standardization of the ICC, the different interpretations of the courts were argued and so three amount of survey were executed by the ICC in 1923, 1928 and 1953 contains the interpretation of the various jurisdictions on trade terms.<sup>26</sup> ‘They were only preparatory work, indicating the differences in the interpretation of trade terms, but without them unifying formulation would not be possible’<sup>27</sup> Besides of the observation of international trade practices, that could indicate the particularly usage of the comparative legal method for standardization of INCOTERMS as such in the international conventions. That makes INCOTERMS profound harmonised source for international trade for their specific area. Additionally, different from the international conventions, the standard international trade terms are used up to the choice of trading parties without formal state adaption process. This facilitates by-passing the state objections barrier consists of the contradictions among different type of legal approaches which makes the consensus more difficult for unification leads to compromise on needs of international practise and shortcomings of the conventions. Therefore, the standard trade terms could be seen as an important tool for unification with more detailed, clear and balanced provisions for some points.

For instance, under the article 67(1) of the CISG, the passing of risk is defined by the expression of “hand over to carrier”, however, this expression does not certainly assign the risk related to requirements of customs of international trade which are formed more detailed under the INCOTERMS as FOB, FAS and CIF. When we handle the FOB INCOTERM with the CISG, it is realized that ‘the notion of “handing over to a carrier” is a broader concept than “loading on vessel” as the condition for passing of risk to buyer in FOB INCOTERM. The former does not necessarily require that the good should be delivered on board the vessel, it suffices that the goods are delivered to a container yard, which acts as an agent for the carrier.’<sup>28</sup> Regard to that, the application of a FOB INCOTERM with the CISG can be seen as to transfer an undefined trade custom in the CISG to the convention for implementation rather than basically interpreting as an opt out of article 67 (1) of the CISG.

INCOTERMS constitutes an important reference of the international trade customs on the basis of deriving from long term trade practises and widely usage of international trades.<sup>29</sup> With this regard, they could support the predictability and unification among different

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<sup>24</sup> Jan Ramberg, ‘ICC Guide to Incoterms 2010’ (2011) N.720 E. ICC Publication 8 <http://store.iccwbo.org/content/uploaded/pdf/ICC-Guide-To-Incoterms%20AE-2010.pdf> > accessed 10 December 2014

<sup>25</sup> Juana Coetzee, ‘Interplay between Incoterms and CISG’ (2013) 32(1) Journal Law of Commerce <http://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/39> > accessed 9 December 2014

<sup>26</sup> Clive M. Schmitthoff ‘Unification or Harmonisation of Law by means of Standard Contracts and General Conditions’ (1968) 17 (3) Int’l & Comp. L.Q. 552

<sup>27</sup> Schmitthoff (n 39)

<sup>28</sup> Coetzee (n 38)

<sup>29</sup> Schmitthoff (n 39)

jurisdictions even though in the absence of explicit referencing INCOTERMS in the contract through the interpretation of the courts. (as seen in the example of *St Paul Guardian Ins Co v Nemuromed Mcd and BP Oil Int'l Ltd. V Empresa Estatal Petroles* cases.)<sup>30</sup> That indicates the significant function of INCOTERMS for unification owing to being a strong presumption of representation of the international trade customs.

## **Carriage of Goods by Sea, Hague Rules to Rotterdam**

'For decades, sea carriers – taking the advantage of their superior bargaining power insisted on the inclusion of clauses into contract of carriages that exempted them even from their basic common law liability.'<sup>31</sup> National level regulations has been insufficient to cross over this situation.<sup>32</sup> It can be assumed that domestic regulations and applications could be shaped in frame of situation of the states in carrier industry rather than international commercial needs. It is a reality that some countries have strong carrier industry related to their geographical position, while other countries have to rely on the foreign carrier industries to execute their international trade. This geographical variation among states could lead to different domestic applications. The counties with strong carrier industry could tend to develop protective approach that saves the industry from risks, whereas the others could try to redeliver power from carrier industry.<sup>33</sup>

To clarify the obligations of the parties on international level it is important to make a fair balance between the carriers and the shippers. Therefore, the international community was urged to produce international legal regime pursuit of two aims: '(i) flexibility to allocate risks in line with their commercial needs, and (ii) prevention of abuse and protection for the parties in weaker bargaining position.'<sup>34</sup> With this regard, Hague Rules (The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading) was the first attempt which adopted under Comite Maritime International in 1920 which is perceived as a supplement of minimum protection for shippers interests.<sup>35</sup> Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea) adopted in 1978 as following unification work could not take the support of important shipping powers which fails to operate as a uniform regime.<sup>36</sup> Despite this, Hamburg Rules could be seen as important and relatively successful unification attempt which moves unification process toward needs of international trade by making some balancing differences between obligations of shippers and carriers. Under the Hamburg Rules, 'carriers lose their immunity for injuries caused by nautical fault as well as the other Hague Rules Article IV (2) exemptions from liability and

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<sup>30</sup> Leonardo Graffi, 'Remarks on Trade Usages and Business Practises in International Sales Law' (2011) 29(2) J.L. & COM 273

<sup>31</sup> Theodora Nikaki, Baris Soyer 'A new International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient of Just Another one for the Shelves?' (2012) 30 (2) Berkeley Journal of International Law 302

<sup>32</sup> Nikaki (n 24)

<sup>33</sup> Stephan (n 30) 15

<sup>34</sup> Nikaki (n 24)

<sup>35</sup> Nikaki (n 24)

<sup>36</sup> Nikaki (n 24)

must compensate shippers for losses attributable to delay in delivery, over and above damage to cargo.<sup>37</sup>

The last unification work was executed under the UNCITRAL and resulted in codification of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea Convention adopted 2008 calls Rotterdam Rules.<sup>38</sup>

Rotterdam Rules were regulated considering new developments of the international transportation occurred over the last decades. The scope of the carriage is extended to “multimodal carriage” including before and after sea carriage transportation process which calls as door to door sales different from “*tackle to tackle*” in Hague Rules and “*port to port*” as governed in Hamburg Rules.<sup>39</sup> Under the Rotterdam Rules, period of responsibility of carrier is adapted modern transportation model of international trade by expanding to cover all transportation period. The other development is the regulating of the functional provisions on electronic transport records which updates the outdated regimes.<sup>40</sup>

Besides modernisation function, Rotterdam Rules supplies more predictable conditions, providing more and detailed provisions for carriers, shippers and third parties rights and obligations compared to ex regimes. For instance, ‘the courts in the major jurisdictions have been split over whether the responsibility for the operation of loading, stowage and discharge of the goods may be validly transfer from the carrier to shipper or the consignee and whether FIOs in bills of lading are valid.’<sup>41</sup> In response to this uncertainty, Article 13.2 of the Rotterdam Rules obviously allows the carrier and shipper stating that ‘agree that the loading, handling, stowing and unloading of the goods is to be performed by shipper, the documentary shipper or consignee. Such an agreement shall be referred to in the contract particulars.’<sup>42</sup> That prevents the uncertainty to assign the responsibility between different parts by the courts. The Rotterdam Rules could seen as continuation of Hamburg Rules toward unification aiming to eliminate the Hague regime to balance carrier and shipper interests by regulating ‘deletion of the nautical fault rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, the higher limit of liability’<sup>43</sup> through more amount of diverse provisions which also include the modern developments as electronic commerce and multi model carriage. However, Rotterdam Rules could not gain common recognition as in the case with Hamburg Rules. Therefore, The Hague Rules keeps going on being main unified source for international carriage of goods by sea.

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<sup>37</sup> Stephan (n 3) 18

<sup>38</sup> Hakan Karan, ‘Any Need for a International Instrument for a New Instrument International Carriage of Goods by sea : the Rotterdam Rules’ (2011) 42(3) J. MAR. L. 441

<sup>39</sup> Karan (n 31)

<sup>40</sup> Karan (n 31)

<sup>41</sup> Nikaki (n 24)

<sup>42</sup> Article 13.2 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

<sup>43</sup> Kofi Mbiah, ‘Updating the Rules on International Carriage of Goods : Rotterdam Rules’

<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Kofi%20Mbiah.pdf> > accessed 5 December 2014

The motivation to prevent the problems arising from confliction between different types of national laws, unbalance bargaining power between trade partners and inadequacy of the domestic laws for international trade has caused impulse to take steps towards unification in the various areas. The unification process had began earlier than 1920's in transportation area and followed by the works on the contract law and model standard trade terms, international payments, electronic commerce. All the instruments have been gradually improved towards more unified legal regime within the years in the context of existing and changing international trade needs with the help of increasing desire for the unification. These regulations have been outcome of long term work and the process seems to continue when considered historical development.

## **CONCLUSION**

The unification works in the field of contract law, trade terms and carriage of goods by sea have been discussed so far in relation to the reasons urge the works. The needs relies on passing over different domestic laws which are unfamiliar for the foreign traders and having more proper legal regime for international trade urged the formation of the unified contract law. The CISG, the last codification of the international contract law, responses the needs of international trade providing legal predictability as a commonly accepted and easily accessible convention.

INCOTERMS were formed to regulate delivery of goods, passing of risks, cost in with the purpose of reflecting international custom in detail and clearly to by pass different type of national courts' interpretation on the international trade terms. They were updated a few times over the years. INCOTERMS also guide the courts as representatives of trade usages.

The unbalanced negotiating power between shippers and carriers led to formation of carriage conventions. These conventions gradually brought more balance legal regulations to allocate the responsibility and risk regime between carriers - shippers and more predictability through increasing provisions.

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