

LECTURE TWO

Introduction to the Law of International Sales of Goods

INTERNATIONAL CONVENTIONS GOVERNING INTERNATIONAL TRADE AGREEMENTS

There are very large number of public international law agreements and conventions, of both a bilateral and a multi-lateral nature, that impinge upon international trade transactions. The aim here is to introduce the reader to the general concept of international conventions and through the analysis and application of a selective number of conventions, to show how to apply such conventions to the settlement of disputes in respect of private international agreements that are governed by international conventions.

Traditionally, this subject has been concerned with commercial traders rather than the consumer market. However, with the advent of internet consumer sales private citizens are quite likely to buy goods from abroad, placing their transactions firmly within the realm of the Law of International Sales of Goods. For this reason, it may now necessary to consider what impact domestic consumer law has on such transactions.

The inter-relationship between private international agreements and international conventions. There are several ways in which an international agreement can be affected or governed by international convention.

1 The contract can expressly incorporate rules contained within a convention.

Care has to be taken when this occurs that the convention rules do not conflict with mandatory rules of the state which cannot be contracted out of, as with *The Komninos S*, where a contract said to be governed by the Hague-Visby Rules was nonetheless still subject to mandatory provisions of the Greek Maritime Code governing the standard of care imposed on sea carriers.

2 The law of a signatory state may specify that the contract is subject to the rules of a convention.

The Hague-Visby Rules provide an example of this in the UK. Similarly, the Hamburg Rules are automatically incorporated in signatory states such as Egypt.

3 The law of a signatory state may permit the parties to contract into a convention.

S1(4) Uniform Laws on International Sales Act 1967 permits parties to contract on the basis of Uniform Laws on International Sales (ULIS). Hague Convention 1964.

4 The law of a signatory state may be based on or incorporate a convention as an integral part of its own law.

The People's Republic of China provides an example of this in respect of the United Nations Convention on Contracts for the International sale of Goods, Vienna. 1980.

5 The law of a signatory state may require the parties to incorporate a convention, by means of a clause paramount.

The Hague Rules as applied in the US provide an example of this. Problems occur where the parties omit to include a clause paramount as in the *Vita Food Case*. The domestic state may or may not have criminal sanctions for failure to insert a clause paramount – but nonetheless the result is that the convention does not govern the contract in the absence of such a clause..

6 An arbitrator is given the power to choose the rules or law that he or she will apply to a contract and the arbitrator chooses to apply the rules of a particular convention.

A contract may contain an arbitration clause governed by the Model Law. In the absence of a choice of law clause and there is no clear domestic law applicable to the contract, and in particular where the arbitrator is permitted to decide ex aequo bono, resort may be had by the arbitrator to the rules of a convention, a fortiori if the parties are citizens of a signatory state to the convention.

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Sources of law governing the international sale of goods in the UK.

- 1 **The Common Law.** Much of the law governing the sale of goods and international sales of goods are to be found in the common law. In particular :- the law of agreement, offer, acceptance, counter offer; consideration : the parties to a contract and privity : the terms of the contract, exclusion clauses, limitation clauses and liquidated damages clauses : general damages : breach : and vitiating factors such as duress, frustration and mistake.
- 2 **The Sale of Goods Acts.** There have been a series of Sale of Goods Acts, the most significant being the Sale of Goods Act 1979. Subsequent sale of goods amendment acts have been incorporated into the 1979 re-enactment by addition. Take care to use the latest version in Current Statutes rather than the Public and General which does not contain the amendments. Out of date statute books are similarly deceptive.
- 3 **General statutes.** These are too numerous to provide an exhaustive list but include Limitations Act 1980, Unfair Contract Terms Act 1977, Misrepresentation Act 1967, Privity Act 1999 (or pending)
- 4 **Custom of the trade.** Covers issues as diverse as trade terms on goods, e.g. timber and on methods of loading and insurance cover. *Hillas v Arcos*.
- 5 **In house rules appropriated to the contract.** INCO Terms governing import export contracts such as cif and fob contracts, bills of lading, charterparties, road haulage standard term contracts and most construction contracts.
- 6 **European Community Law.** Treaty Obligations, in particular Art 30 et seq, and Art 80 et seq, Regulations, EC Directives and ECJ reports on the same.
- 7 **European Convention of Human Rights.** Now incorporated into English Law by the Human Rights Act 1999.

International Conventions ancillary to international sales of goods.

- The most obvious cover contracts for the carriage of goods, such as The Hague, The Hague-Visby and the Hamburg Rules and liability for expense incurred during carriage, such as the York Antwerp Rules in respect of general average and international pollution conventions.
- These are closely followed by the UNCITRAL Conventions covering the financing of, and the guaranteeing of finance of, international sales agreements.
- Criminal type legislation covers contracts for international drug sales, intellectual property and in particular scientific products, money laundering etc.
- Conventions covering jurisdiction such as the Brussels and Lugano Conventions, The Rome Convention on the choice of law and conventions on dispute resolution and the enforcement of arbitral awards such as the New York Convention.

International Conventions on Sales of Goods.

Clearly, it would be highly desirable if an effective, fair, comprehensive international convention could govern all international sales of goods, freeing the parties from the uncertainties of the diverse provisions of domestic laws of sales of goods. All parties could contract without fear of strange foreign provisions frustrating their intentions. No party would have to fear being prejudiced by biased foreign laws. A universal international sales convention has been the holly grail since the turn of the century.

However, domestic law makers have not been in such a hurry to embrace such a convention and drafting one that has all these qualities has not been easy, nor has the task of persuading states to sign up to such a convention.

Part of the problem for draftsmen has been in deciding how much to cover in such a convention. Should it cover the law of agreement, mandatory terms and conditions and base standards, jurisdiction provisions and conflict of laws provisions, safe guards for domestic trial, enforcement mechanisms, ancillary matters such as delivery and carriage and conditions to govern them etc ? The second problem is that the text of all international conventions is a consequence of compromise between competing national interests, often concluded by delegates who are neither legal nor commercial experts.

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UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967

The first major international convention to receive any significant attention in the UK was ULIS incorporated into English Law by the *Uniform Laws of International Sales Act 1967*.

1. Application of Uniform Law on the International Sale of Goods	See articles 3 & 4
<p>(1) <i>In this Act 'the Uniform Law on Sales' means the Uniform Law on the International Sale of Goods forming the Annex to the First Convention and set out, with the modification provided for by Article III of that Convention, in Schedule 1 to this Act; and 'the First Convention' means the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1st July 1964.</i></p> <p>(2) <i>The Uniform Law on Sales shall, subject to the following provisions of this section, have the force of the law in the United Kingdom.</i></p> <p>(3) <i>While an Order of Her Majesty in Council is in force declaring that a declaration by the United Kingdom under Article V of the First Convention (application only by choice of parties) has been made and not withdrawn the Uniform Law on Sales shall apply to a contract of sale only if it has been chosen by the parties to the contract as the law of the contract.</i></p> <p>(4) <i>In determining the extent of the application of the Uniform Law on Sales by virtue of Article 4 thereof (choice of parties) (a) and (b) [omitted]</i></p> <p style="padding-left: 20px;">(c) <i>in relation to a contract made on or after 1 February 1978, no provision of that law shall be so regarded except sections 12 to 15 of the Sale of Goods Act 1979.'</i></p> <p style="text-align: center;">.....</p>	By virtue of s1(4) and articles 3 and 4, the UK derogated from the automatic incorporation of the Convention into contracts for international sales of goods governed by English Law, leaving it to the parties to expressly incorporate the Convention into the contract. The take up on this option by commercial men was insignificant.

2. Application of Uniform Law on the Formation of Contracts for the International Sale of Goods	
<p>(1) <i>In this Act 'the Uniform Law on Formation' means the Law forming Annex I to the Second Convention as set out, with the modifications provided for by paragraph 3 of Article I of that Convention, in Schedule 2 to this Act; and 'the Second Convention' means the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1st July 1964.</i></p> <p>(2) <i>Subject to subsection (3) of this section the Uniform Law on Formation shall have the force of law in the United Kingdom.</i></p> <p>(3) <i>The Uniform Law on Formation shall not apply to offers, replies and acceptances made before such date as Her Majesty may by Order in Council declare to be the date on which the Second Convention comes into force in respect of the United Kingdom.</i></p> <p>(1) [omitted] & Section 3. to 5 [omitted]</p>	

The United Nations Convention on Contracts for the International Sale of Goods, made at Vienna in 1980 has been embraced by many in commerce outside the UK. Thus it is standard practice for trade with China and forms the basic law governing CIETAC Arbitrations for trade with China.¹ It has not been incorporated into English Law but there it has many supporters who would like to see it adopted. Nothing prevents an English party to an international sales contract from contracting on Vienna terms.

Whilst much of the Convention bears a striking resemblance to English law there are also differences. In particular, privity of contract is different (though the significance of this will is by the Contract (Third Parties Act 1999). There is no reference to the passing of property in Vienna. Again, since the new amendments to the Sale of Goods Act this is of less significance than previously.

SCOPE AND APPLICATION OF CONVENTIONS

The remainder of this lecture concerns what contracts are governed by ULIS and VIENNA and general measures. The texts of the Conventions and the Sale of Goods Act 1979 are provided in the work sheets below and space is left for students to enter comments and cross reference other sources of law in order to conduct a critical analysis of the respective benefits and burdens of contracting on such terms. This should be done each week before the sessions to enable students to engage in group evaluation during workshops.

¹ See *CISG Data Base*. Annotated Text from PACE LAW SCHOOL. www.cisg.law.pace.edu/cisg/text/cisg-toc.html

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ULIS : SPHERE OF APPLICATION OF THE LAW

ARTICLE 1 ULIS : <i>Scope – international sale of goods</i>	
<p>1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different Contracting States, in each of the following cases:</p> <ul style="list-style-type: none">(a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;(b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;(c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected. <p>2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.</p> <p>3. The application of the present Law shall not depend on the nationality of the parties.</p> <p>4. In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.</p> <p>5. For the purpose of determining whether the parties have their places of business or habitual residences in 'different States', any two or more States shall not be considered to be 'different State' if a valid declaration to that effect made under Article 11 of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods is in force in respect of them.</p>	
ARTICLE 2 ULIS : <i>Rules of Private international law</i>	
Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law.	
ARTICLE 3 ULIS : <i>Opt out clause</i>	
The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied.	
ARTICLE 4 ULIS : <i>Opt in clause</i>	
The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to the Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law.	

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ARTICLE 5 ULIS : Exclusions	
<ol style="list-style-type: none"> 1. The present Law shall not apply to sales: <ol style="list-style-type: none"> (a) of stocks, shares, investment securities, negotiable instruments or money (b) of any ship, vessel or aircraft, which is or will be subject to registration; (c) of electricity; (d) by authority of law or on execution or distress. 2. The present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments. 	

ARTICLE 6 ULIS : Future Goods	
<p>Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.</p>	

ARTICLE 7 ULIS : Not restricted to commercial partners	
<p>The present Law shall apply to sales regardless of the commercial or civil character of the parties or of the contracts.</p>	

ARTICLE 8 ULIS : Obligations (formation, ownership & validity excluded)	
<p>The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided there, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.</p>	

ULIS : GENERAL PROVISIONS

ARTICLE 9 ULIS : Customs of the trade	
<ol style="list-style-type: none"> 1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves. 2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties. 3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned. 	

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ARTICLE 10 ULIS : <i>Breach –knowledge & intent</i>	
For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.	
ARTICLE 11 ULIS : <i>Reasonable time</i>	
Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed.	
ARTICLE 12 ULIS : <i>Price</i>	
For the purposes of the present Law, the expression 'current price' means a price based upon an official market quotation, or, in the absence of such a quotation, upon those factors which, according to the usage of the market, serve to determine the price.	
ARTICLE 13 ULIS : <i>Knowledge – reasonableness test</i>	
For the purposes of the present Law, the expression 'a party knew or ought to have known', or any similar expression, refers to what should have been known to a reasonable person in the same situation.	
ARTICLE 14 ULIS : <i>Usual Communications</i>	
Communications provided for by the present Law shall be made by the means usual in the circumstances.	
ARTICLE 15 ULIS : <i>Writing</i>	
A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.	
ARTICLE 17 ULIS : <i>Omissions and general principles of law</i>	
Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.	

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UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS

ARTICLE 1 ULFCIS : <i>Application – formation of international sales contract</i>	
The present law shall apply to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Uniform Law on the International Sale of Goods.	
ARTICLE 2 ULFCIS : <i>Intention to opt out</i>	
<ol style="list-style-type: none"> 1. The provision of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply. 2. However, a term of the offer stipulating that silence shall amount to acceptance is invalid. 	
ARTICLE 3 ULFCIS : <i>Writing</i>	
An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.	
ARTICLE 12 ULFCIS : <i>Communicated</i>	
<ol style="list-style-type: none"> 1. For the purpose of the present law, the expression "to be communicated means to be delivered at the address of the person to whom the communication is directed. 2. Communications provided for by the present Law shall be made by the means usual in the circumstances. 	
ARTICLE 13 ULFCIS : <i>Customs of the trade</i>	
<ol style="list-style-type: none"> 1. "Usage" means any practice or method of dealing which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract. 2. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned. 	

UNCISOG VIENNA 1980 : Sphere of Application

ARTICLE 1 VIENNA : <i>Scope – goods – international sale</i>	
<ol style="list-style-type: none"> 1. This Convention applies to contracts of sale of goods between parties whose places of business are in different states: <ol style="list-style-type: none"> (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. 2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. 3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention. 	

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ARTICLE 2 VIENNA : <i>Scope - exclusions</i>	
<p>This Convention does not apply to sales:</p> <ul style="list-style-type: none"> (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity. 	

ARTICLE 3 VIENNA : <i>Future goods : Goods and Services</i>	
<ul style="list-style-type: none"> 1. Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. 2. This convention does not apply to contracts in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labour or other services. 	

ARTICLE 4 VIENNA : <i>Scope of convention</i>	
<p>This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:</p> <ul style="list-style-type: none"> (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold. 	

ARTICLE 5 VIENNA : <i>Liability for death & personal injury</i>	
<p>This convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.</p>	

ARTICLE 6 VIENNA : <i>Opt out clause</i>	
<p>The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.</p>	

SALE OF GOODS ACT 1979 : APPLICATION

1. Contracts to which Act applies SOGA 1979	
<ul style="list-style-type: none"> (1) This Act applies to contracts of sale of goods made on or after (but not to those made before) 1 January 1894. (2) In relation to contracts made on certain dates, this Act applies subject to the modification of certain of its sections as mentioned in Schedule 1 below. (3) Any such modification is indicated in the section concerned by a reference to Schedule 1 below. (4) Accordingly, where a section does not contain such a reference, this Act applies in relation to the contract concerned without such modification of the section. 	

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VIENNA : GENERAL PROVISIONS

ARTICLE 7 VIENNA : <i>Interpretation of convention text</i>	
<ol style="list-style-type: none">1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.	
ARTICLE 8 VIENNA : <i>Meaning of statements</i>	
<ol style="list-style-type: none">1. For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.2. If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.3. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.	
ARTICLE 9 VIENNA : <i>Customs of the Trade</i>	
<ol style="list-style-type: none">1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.	
ARTICLE 10 VIENNA : <i>Place of Business</i>	
For the purposes of this Convention: <ol style="list-style-type: none">(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;(b) if a party does not have a place of business, reference is to be made to his habitual residence.	
ARTICLE 11 VIENNA : <i>Writing</i>	
A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.	

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ARTICLE 12 VIENNA : <i>Variations in writing & Article 96</i>	
Any provision of Article 11, Article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect of this Article.	
ARTICLE 13 VIENNA : <i>Electronic Communications</i>	
For the purposes of this Convention 'writing' includes telegram and telex.	

FURTHER READING : Commentaries and application of the convention.

There are an enormous number of sources on and commentaries concerning the application of this convention both in the journals and on the net.

The Convention is referred to as CIGS on the internet by the US Law Schools.

Useful sites :

<http://www.cisg.law.pace.edu> This is a superb source – a must to visit.

<http://www.un.or.at/uncitral/>

<http://itl.irv.no/trade> law/papers/UNCITRAL/html

<http://www.law.cornell.edu/library/sales.html>

<http://itl.irv.uit.no/trade> law/papers/CISG.bibliography.1996.winshop.html

These sites contain commentaries on the articles, case studies from around the world and extensive articles and readings.

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International Sales. UN Convention on Contracts for the International Sale of Goods. Parker School of Foreign and Comparative Law. Columbia University. Matthew Bender 1984.

EXAM QUESTION

- 1(i) In what circumstances would a judge or arbitrator consider the provisions of
- (a) ULIS, or
 - (b) the VIENNA convention
- respectively, applicable to the determination of a dispute before him or her?
- and
- 1(ii) If either convention is applicable, consider the scope of that applicability and any special rules that might need to be taken into account.