CELEBRATING ANNIVERSARIES

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When in February 2005 international experts met at Victoria University, Wellington it was to celebrate two anniversaries: the tenth anniversary of the coming into force of the United Nations Conventions on Contracts for the International Sale of Goods ("CISG") in New Zealand which entered into force in 1995 as the Sale of Goods (United Nations Convention) Act 1994 and twenty-five years of the CISG on the world stage.[1] In these twenty-five years the CISG has been ratified by 65 countries accounting for two-thirds of the world trade.[2] The CISG has been perceived as a benchmark for the successful unification of international commercial law in the post-war era[3] and has been heralded as "arguably the greatest legislative achievement aimed at harmonizing private commercial law."[4] In Germany, Switzerland but also in the United States the CISG has found hold not only in the countries' jurisprudence and academic writing but also as part of the teaching syllabus.[5]

The aim of the Wellington Symposium was to re-familiarise New Zealand's legal community with a part of contract law which seems to have been forgotten or, even worse, which had never gotten into the conscience of New Zealand's legal profession.

When the Law Commission in 1992 published its report on the question of whether New Zealand should accede to the CISG its main reasons for supporting New Zealand's accession were the CISG's acceptance by states which participated at the time in half of New Zealand's external

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1 The Sale of Goods (United Nations Convention) Act 1994 came into force on 1 October 1995.

2 As at October 2005; Michael van Alstine "Dynamic Treaty Interpretation" 146 (1998) U Pa L Rev 687, 689.

3 Harold S Burman "Building on the CISG: International Commercial Law Developments and Trends for the 2000" (1998) 17 J L and Commerce 355.

4 Kevin Bell "The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods" (1996) Pace Int'L Rev 237, 238.

5 The Pace Law School website lists over 300 decisions containing references to the CISG for each of Germany and the United States and over 200 for Switzerland <http://www.cisg.law.pace.edu> (last accessed 5 November 2005); see a comprehensive literature review in Peter Schlechtriem/ Ingeborg Schwenzer *Kommentar zum Einheitlichen UN-Kaufrecht –CISG*- (4th ed, Beck, Muenchen, 2004) XXXV- LXXXII, see also Jane May/Michael Cavanaugh "A CISG Literature Review" NZACL website <http://www.vuw.ac.nz> (last accessed 6 November 2005).

trade and even more importantly Australia's accession to the CISG in 1989.[6] The Commission's forecast was that New Zealand's accession would reduce the costs and uncertainties for New Zealand businesses operating in international commerce.[7] But even though the Law Commission supported the accession to the CISG it raised the question of whether the understanding of the CISG was sufficiently widespread through the business and professional communities and what could be done if there was a lack of understanding.[8]

It was opportune, therefore, to take stock after ten years whether the CISG has made the contractual life of New Zealand businesses easier. The lack of jurisprudence and academic writing in New Zealand on the CISG seem to suggest that the CISG is the sleeping beauty of New Zealand's statute book. The New Zealand case law databases show just four cases under the search terms "CISG", "Vienna Convention", and "Sale of Goods (United Nations Convention) Act 1994", while the Pace Law School Website (the main CISG database) holds nine New Zealand cases which mention the CISG.[9] Anecdotal evidence seems to suggest that the standard form contract of all major New Zealand law firms exclude the CISG.[10]

To the limited extent that New Zealand courts have had recourse to the CISG, they appear to have found the contract interpretation mechanisms of the CISG particularly helpful. In *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* the Court of Appeal discussed, albeit obiter dictum, whether the subsequent conduct of the parties could be taken into account to interpret the contract.[11] The Court found that taking into account subsequent conduct was an established international practice, as recognised by Article 8(3) of the CISG which by virtue of the Sale of Goods (United Nations Convention) Act 1994 was now part of New Zealand law.[12] The Court observed that "there is something to be said for the idea that New Zealand domestic contract law

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6 New Zealand Law Commission *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's proposed Acceptance* (1992) (NZLC RC 23, Wellington 1992) paras 126, 128.

7 New Zealand Law Commission *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's proposed Acceptance* (1992) (NZLC RC 23, Wellington 1992) para 134.

8 New Zealand Law Commission *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's proposed Acceptance* (1992) (NZLC RC 23, Wellington 1992) para 3.

9 See <http://www.cisg.law.pace.edu> (last accessed 6 November 2005).

10 See in regard to the lack of jurisprudence and academic writing: Henning Lutz "The CISG and Common Law Courts: Is there really a Problem?" (2004) 35 VUWLR 711, 728, 729 with an overview of the New Zealand decisions. Lutz also correctly notes that database searches are only part of the picture and cannot be relied on completely (728). See in regard to excluding the CISG in standard form contract in Australia: Luke Nottage "Who's Afraid fo the Vienna Sales Convention (CISG)?" (2005) 36 VUWLR 817 fn 8.

11 *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* (1996) 7 TCLR 617 (CA).

12 *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* (1996) 7 TCLR 617, 627 (CA) Blanchard J.

should be generally consistent with the best international practice."[13] In *Thompson v Cameron* Chambers J permitted a party to give evidence of the pre-contractual negotiations of the parties and the parties' subsequent conduct referring to the Court of Appeal's decision in *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd.*[14]

The Symposium was fortunate to have Sir Kenneth Keith presenting the opening address. Sir Kenneth was President of the Law Commission at the time when the Law Commission examined the question whether New Zealand should accede to the CISG. Sir Kenneth reminded the audience about the reasons why at the time the Law Commission favoured accession. As mentioned already, one of the strongest arguments for the accession and the application of the CISG to international commercial contracts was and still is that most of New Zealand's most important trading partners have ratified the CISG. The CISG, therefore, provides a frame-work which allows parties to choose a "neutral" law different from both their domestic jurisdictions (there is, therefore, no "home" advantage). Furthermore, the CISG contains a body of rules in regard to international commercial contracts which were modelled on business reality.

The Symposium started with papers presented by two of the leading academics in the area of the CISG: one of the founding "fathers" of the CISG, Professor Peter Schlechtriem, and an acknowledged leading commentator, Professor Ingeborg Schwenzer. They not only represented academia but also the civil law view point and gave an overview of the CISG addressing some fundamental issues. To counter balance the academic and civil law view on the CISG, Dr Luke Nottage and Rajeev Sharma gave an insight into the practical relevance of the CISG from a common law practitioner's point of view (representing New Zealand and Australia on the one hand and Canada on the other) in the second part of the Symposium. A lively discussion followed each of the sessions and culminated in a Panel Discussion at the end of the Symposium. Professor Campbell McLachlan and Nicholas Whittington commentated on the paper given by Professor Schlechtriem and Professor Schwenzer whereas lawyers David Patterson and Meredith Kolsky-Lewis commented on Dr Nottage's and Rajeev Sharma's papers.[15]

I SOME FUNDAMENTAL ISSUES

The beginnings of the CISG were born out of the concerns about the barriers to international trade caused by national differences in contract law. The first attempt to codify an international commercial sale of goods law in the 1960s (initiated by the International Institute for the Unification of Private Law ("UNIDROIT")) failed to achieve wide acceptance due to the predominance of Western European states and Western European legal scholarship in the drafting of the two

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13 *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* (1996) 7 TCLR 617, 627 (CA) Blanchard J.

14 *Thompson v Cameron* (27 March 2002) HC Ak AP 117/SW99, B 1257/IM01, Chambers J para 20.

15 Meredith Kolsky-Lewis is now a lecturer at the Victoria University Faculty, Wellington. Before taking up her lectureship in 2004 she was a lawyer with Shearman & Sterling LLP in Washington DC.

Conventions.[16] When UNCITRAL undertook a second attempt on drafting an international convention on contracts for the sale of goods in the 1970s it made sure that common law and civil law jurisdictions were represented as well as states from all continents to represent to the diversity of legal systems.[17] The result is a Convention which is acceptable to and accepted by civil and common law jurisdictions, developed and developing countries, and exporters and importers - an amalgamation of the two major legal families.

Professor Peter Schlechtriem, in his presentation and paper, showed that the rules governing the application of the CISG, set out in Articles 1 to 6 of the CISG, followed simple requirements and have been followed in other international conventions or draft conventions.[18] He pointed out that through the possibility of opting out and opting in to the CISG party autonomy in regard to freedom of contract is guaranteed. Parties which do not have their seat of business in one of the Contracting States to the CISG have the possibility to opt into its application. The CISG devises a set of rules for the contract which are defined by reference to two issues: the place of business of the parties and the subject matter of the contract. Special regard was given to the meaning of "goods" in the CISG which is the substantive requirement for its application. Even though generally goods have been understood to mean tangible objects, questions have arisen in regard to software. Professor Schlechtriem drew a distinction between software which was acquired for eternity and was a good and software which was for use only for a short period of time which was not a good.[19] But not only the ordinary sale of goods was covered by the CISG. According to Article 3(2) CISG a mixed contract, where the contract has a sale and a service component, falls under the CISG. The presentation also gave an overview of the scope of the CISG: the fact that validity of the contract and damages for personal injury, for example, are not issues covered by the CISG. Professor Schlechtriem explored in particular the interpretation and gap-filling of the CISG. The drafters of the CISG were well aware that no codification can ever be perfect and, therefore, the CISG contains provisions to guide its users how to fill apparent gaps.

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16 New Zealand Law Commission *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's proposed Acceptance* (1992) (NZLC RC 23, Wellington 1992) para 16. The two Conventions were: Uniform Law for the International Sale of Goods and a Uniform Law on the Formation of Contracts for the International Sale of Goods. From the 28 States attending the negotiations 19 were from Western Europe, three from Eastern Europe but not the Soviet Union, and only one from Asia, Latin America and Africa.

17 Peter Schlechtriem and Ingeborg Schwenzer *Kommentar zum Einheitlichen UN-Kaufrecht – CISG*- (4th ed, Beck, Muenchen, 2004) Einl I 28

18 Peter Schlechtriem "Requirements of Application and Sphere of Applicability of the CISG" (2005) 36 VUWLR 781.

19 Peter Schlechtriem "Requirements of Application and Sphere of Applicability of the CISG" (2005) 36 VUWLR 781.

Professor Schwenzer concentrated in her paper on Article 49 CISG which allows the buyer to avoid the contract due to a fundamental breach. The approach to avoidance of contract is one of difference among civil law countries.[20] The common law takes a different approach from the civil law approach again. The concept of fundamental breach as envisaged by the CISG is not used in either legal family. Professor Schwenzer argued in her paper that Article 49 devises an avoidance concept which deserves support (and also provides a "neutral" answer on the issue of avoidance for parties from different jurisdictions). The concept of avoidance in the CISG has an interest in upholding the contract, the cancellation of a contract being a remedy of last resort, and, therefore, reflects real business practice. In the area of commodity trading and documentary sales law the CISG, used in conjunction with the INCOTERMS and the UCP 500, can offer a workable solution.[21] How workable and practical the solution in regard to avoidance offered by Article 49 CISG is, can be ascertained from the fact that Germany, Norway, Finland, and the Netherlands all adopted the CISG avoidance concept in one form or the other when modifying their domestic sales law.[22]

Both papers clearly demonstrated that New Zealand businesses and lawyers should not need to be afraid to choose the CISG for their international contracts. The CISG's structure is clear and easy to follow, its solutions are orientated on modern business practices and it cannot be underestimated how advantageous it can be that it provides a "neutral" legal solution if parties are from different jurisdictions.

II THE PRACTITIONER'S VIEW

The second part of the Symposium was devoted to the practical application of the CISG in the day to day business of a lawyer advising his or her client. Two practitioners from two, for New Zealand important, common law jurisdictions, Australia and Canada, gave an overview of their experiences. As in New Zealand, despite the fact of having been Member States to the CISG for over a decade, both in Canada and Australia case law on the CISG is sparse and the acceptance and use of the CISG resembles by no means the use and acceptance in most Continental European countries. However, according to both speakers there is light at the end of tunnel and a positive, a CISG friendly that is, development in both jurisdictions can be detected.

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20 However, as Schwenzer noted in recent years a considerable number of the Continental European countries have overhauled their civil codes and aligned their avoidance provisions with that of Article 49 CISG (Ingeborg Schwenzer "The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG" (2005) 36 VUWLR 795.

21 Ingeborg Schwenzer "The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG" (2005) 36 VUWLR 795.

22 German Statute on Modernisation of the Law of Obligations 2002, § 323, Norwegian Sale of Goods Act 1988 § 39, Finnish Sale of Goods Act 1987, § 39, Burgerlijk Wetboek 1992, art 6:265. It also has to be noted that countries like China and Latvia have used the CISG as one of their models when redrafting their domestic sales law.

In his paper Luke Nottage not only started with a case study where the recourse to the CISG made his life, advising his client, easier but also examined how countries like Japan could benefit from acceding to the CISG and how countries like Australia need to work harder to take full advantage of the CISG. He especially dealt with the possible objections which can be raised by a common law lawyer against the application of the CISG. Nottage argues how, for example, through more academic writing and CISG teaching, the acceptance of the CISG can be furthered.

Rajeev Sharma in his presentation took the audience through the development of CISG jurisprudence in Canada. This analysis of eight Canadian cases showed that the Canadian courts have grown more comfortable with the application of the CISG as time has gone by. The outlook is quite optimistic.

III WHERE TO NOW

Holding the Symposium on the CISG in New Zealand was one of the steps to raise awareness among the legal community about the CISG's possibilities. The publication of the Symposium's papers is another. Sir Kenneth in the preparation of his opening address had sent a questionnaire to all legal academics teaching in the commercial, contracts and private international law area of the five New Zealand law faculties to ask whether they taught the CISG as part of the curriculum. The answers to his questionnaire seemed to suggest that, except for two academics, the CISG is not taught to New Zealand law students (at least not a part of the standard curriculum). There also needs to be more debate about the CISG among academics and practitioners.[23]

It would be wrong to suggest that the CISG is free of controversy. Since a superior court for the CISG is missing, domestic courts have come to different interpretations of CISG. However, more and more decisions and arbitral awards contain a sophisticated comparative analysis of decisions from other jurisdictions and other legal systems. A unified interpretation is emerging albeit slowly.

In conclusion, in my view, the seminar papers confirmed in my mind that the New Zealand business community can only gain from using the CISG as their law for international commercial contracts. For academics the examination of the CISG provides an exciting inroad into the world of comparative analysis and the opportunity to familiarise oneself with other jurisdictions and legal concepts.

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23 The last published article on the CISG originated from a student paper written as part of the Victoria University LLM programme (Hennig Lutz "The CISG and Common Law Courts: Is there really a Problem?" (2004) 35 VUWLR 711).