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The O.H.A.D.A.C. Principles on International Commercial Contracts: A European Perspective.

Let me start by saying what an honor it is to be here and address this conference. Unification of law has a long tradition, the past decades remarkable achievements have been made, and it is a great thing that now in the Caribbean we will see the birth of Principles on International Commercial Contracts for the Caribbean.
My comments will be in the form of a brief review of unification or harmonization projects, from a European perspective, which will hopefully help identify factors which may contribute to the success of these Principles.

## I. The beginning. From the failure of ULIS/ ULF (*Loi Uniform Formation / Loi Uniform Vente International*) (1964) to the success of the CISG (Convention on the International Sale of Goods) (1980)

- Bridging the differences (political, (industrial) development, linguistic, and diffences between civil law and common law).

Bridging the differences (political, (industrial) development, linguistic, and differences between legal traditions such as civil law and common law) is by no means an easy task. What has been achieved so far? We can take the 35 year old 1980 Vienna convention, the Convention on the International Sale of Goods (CISG) as a starting point of our analysis.

The CISG turned out to be a success.[1] Why did its predecessors, the The Hague Sales Conventions of 1964, fail? The lack of success is generally contributed to the domination by Western-European States. The conventions were too 'European–continental': socialist countries and developing nations were not involved. This mistake was not repeated in Vienna: at the conference which adopted the CISG, 62 states took part, from all parts of the world, from different legal cultures, with different interests.

- Treaty: automatic application, determined by 'nationality' parties (place of business)

Art. 1 of the CISG is pretty straightforward. It provides that the Convention applies to contracts of sale of goods between parties whose place of business are in different states,

[1] UNCITRAL reports that as of 26 September 2014, 83 States have adopted the CISG (Pace website.

providing for an automatic application of the Convention to the contract.[2] What consitutes 'a place of business'[3] and the question of 'nationality' for purposes of the CISG in practice has proven to be a 'non-issue', as demonstrated by the lack of case law.[4] In practice, in the application of the Convention, we happily refer to parties to a dispute as for example 'the French seller'or 'the Spanish buyer'. Of course, *parties* to a contract of sale are allowed to 'opt-out' by way of art. 6, which provides that the parties may exclude the application of the Convention, or derogate from or vary the effect of any of its provisions.

- Opt-in (ULIS/ ULF) vs. opt-out (CISG)

This relatively simple system of sphere of application and applicability compares favorably to the rather complicated system of the The Hague Conventions. ULIS Art. 1 provided for a fairly sophisticated system of application of the Convention, which need not be discussed here. More important for our discussion: the *States* were given the option[5] to declare that the State would apply the Uniform Law *only* to contracts in which the parties thereto had chosen that Law as the law of the contract. As a result of this reservation, parties would be bound only if they 'opted-in'. It is clear that the CISG system of 'opting out' has contributed to its success. One cannot help wonder what would have become of the CISG if an 'opting in' system would have been chosen …. 'Opting in' offers greater chances of success, but is not always possible.

- Usage. CISG and INCOTERMS

In hindsight, it is remarkable how in the early days of the CISG the relationship between uniform law and 'usage', more specifically the relationship between uniform law and trade terms, was perceived as a hurdle or even a threat to the success of the CISG.

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[2] When the States are Contracting States, sec. 1 a, or when the rules of private international law lead to the application of the law of a Contracting State, sec. 1 b. Part IV of the Convention, 'Final provisions', allows for a limited number of reservations, the most important of which are art. 95 regarding subparagraph (1) (b) and art. 96 regarding evidence by writing. *States* are given a limited number of options to 'opt-out'.

[3] Art. 1 provides that the Convention applies to contracts of sale of goods between parties whose places of business are in different States Art. 1 sec. 2 provides that 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. Section 3 specifically provides that 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 the Convention. Art. 10 of the convention provides the criterium of the 'closest relationship to the contract and its performance'.

[4] The Pace-website lists 39 cases (consulted September 2015).

[5] Article IV.

The provision of Art. 9 sec. 2 makes room for 'usage' or international custom.[6] With regard to Incoterms the solution to the problem is even more simply one of interpretation: articles 6 and 8 allow for derogation of the provisions of the CISG and for interpretation of statements and conduct of parties. A reference to a specific Incoterm in abbreviated form (F.O.B.) may be deemed sufficient. The CISG 'benefits' from the existence of Incoterms, which provide (additional) rules on matters which would be hard to regulate in the context of the set up and style of the Convention.

- Uniformity in application? Application by national courts. Opinions CISG-Advisory council. Access to decisions through internet

Another major threat to the success of the CISG lies in the problem of uniformity in application. Disputes arising under the CISG are decided either by arbitration or by *national* courts. There is no 'Supreme CISG court', decisions on appeal remain within the national court systems. The risk of a jurisprudence with a national bias[7] is obvious, and indeed in the early years such a tendency could be witnessed (especially in the United States of America).

The 'void' created by the absence of a 'Supreme CISG court' can only be filled in part by the CISG-Advisory Council (CISG-AC) which issues Opinions on a regular basis.[8]

Information, of course, is the perfect antidote. In order to disseminate information more efficiently, at the time various elaborate systems were set up for the CISG. Remember, these were the 1980's…… Nowadays, we have the Internet that allows us to have access to court opinions and arbitral decisions from all over the world.

## II. From U.P. to PECL to DCFR

- U.P.: Unidroit 1994 Principles of International Commercial Contracts (*Principes Relatifs aux Contrats du Commerce International*).

[6] Art. 9 sec. 1 provides that the parties are bound by 'any usage to which they have agreed and by any practices which they had established between themselves'. Art. 9 sec. 2 provides that the parties are considered - unless otherwise agreed -to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

[7] Despite article 7, section 1, which provides: 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 to trade.

[8] As of today, 16 opinions have been issued, see the Pace-website.

- From sales law to contract law

In 1980, a special Working Group for drafting the Unidroit Principles was constituted and the drafting process really started, leading eventually to the publication of the (first) Principles in 1994.[9] The Unidroit 1994 Principles are "Principles of International Commercial *Contracts*", and their scope is not confined to 'sales law', as is the case with the CISG.

- International Restatement of general principles of contract law (?).Non-binding instrument, see Preamble.

It is important to emphasize that the Unidroit Principles do not constitute "law'. Rather, the Principles follow the model of the American Restatements. In the Introduction of the Unidroit publication, the Governing Council clearly states that "the Principles, which do not involve the endorsement of Governments, are not a binding instrument and that in consequence their acceptance will depend upon their persuasive authority."[10]

As to substance, there is a clear connection between the Unidroit Principles and the CISG, which is openly recognized in the Introduction to the publication. However, since the Principles are not - unlike the CISG – a 'binding instrument', the Principles face the challenge of applicability: parties will have to 'opt in'. 'Opting in' may be done by an explicit reference to the Principles, or, as is stated in the preamble: "They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."[11]

How do we measure the success of the Principles? The Principles have been expanded over the years.[12] But are the Principles used in practice? An indication of this

[9] As of 1971 preparations for the Unidroit Principles started.

[10] The Preamble to the text of the Unidroit Principles, explaining the purpose of the Principles, is also clear in that regard:

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like.

They may provide the solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

[11] Also, "They may be used to interpret or supplement international uniform law instruments.", which is interesting because it 'links'the Principles with the CISG. In practice the Principles are considered general principles in the sense of article 7 CISG: "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 ….". The fact that the CISG is older than the Principles is ignored.

[12] See the UNILEX-website.

may be found in reported cases. "UNILEX", the website for the Unidroit Principles, lists 419 cases (of which 192 are by arbitral tribunals). In measuring its success, and especially in comparing it with the success of the CISG,[13] we need to consider the somewhat modest approach of the Principles as described above.

- PECL: Commission on European Contract Law (Commission Lando) Principles of European Contract Law (1995, 2000, 2003).

Work on the Principles of European Contract Law (PECL) started somewhat later than the work on the Unidroit Principles, but the activities of the two groups bear a close resemblance.[14] Unlike the Unidroit Principles, PECL are not limited to commercial contracts: PECL are applicable to all contracts, including consumer transactions and private contracts.[15]

  - Goal: New Perspectives of a Common Law of Europe / A European Uniform Commercial Code / A European [European Community] Code of Private Law?

In the Introduction to Part I, "Express adoption by the parties" and "A basis for harmonization" were mentioned as purposes for which the principles are designed.[16] For the discussion in this paper it suffices to note that the purpose listed last indeed was fulfilled in the sense that the 'successor' to PECL has produced extensive work that may provide a basis for harmonization.

DCFR: Draft Common Frame of Reference Study Group on a European Civil Code 2008.

- A consolidated composite text.
- Soft law

[13] The Pace-website lists a total of 3134 CISG-cases (e.g.: 531 cases for Germany alone) (consulted September 2015).

[14] The first part of the PECL was published in 1995; since 1999 the second part has been available. The final version was published in 2002.

[15] At the time of publication, 16 jurisdictions were presented.

[16] In full: A foundation for European legislation; Express adoption by the parties; A modern formulation of a *lex mercatoria*; A model for judicial and legislative development of contract law; A basis for harmonization.

As of 2005, the work of the Commission on European Contract Law is continued by the *Study Group on a European Civil Code*, that as an ultimate goal aspires to a consolidated composite text.[17] In 2008 a Draft Common Frame of Reference (DCFR) was presented. The Group has also developed rules for specific contracts, such as the Principles of European Law on Sales.[18] The DCFR has inspired the debate in academic circles. Impressive as the work of the Study Group may be, its work has not achieved the status of 'a binding instrument'.

European directives, on the other hand, although fragmentary in nature, are in force in the European countries.

## III. The force of European Directives. Consumer law

- Directives protecting consumers: Unfair contract terms 1993, Distance contracts 1997, Consumer sales 1999, Consumer rights 2011. The failure of the 2008 proposal for a consolidated text.

European Directives can be seen as an alternative way of 'unifying' the law. Ignoring other Directives,[19] I jump straight ahead to a discussion of the directives on Unfair contract terms (1993)[20], Distance contracts (1997)[21], and Consumer sales (1999)[22]. I single out these directives, because they, together with the older directive on 'Contracts negotiated away from business premises' (1985)[23], were designated to be consolidated into a new more comprehensive directive. These plans, launched in 2008, failed to materialize however. Instead, a new 'Directive on Consumer rights' with a more limited scope was adopted in 2011.[24] The failure of the 2008 proposal is a considerable set-back.

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[17] The Group is managed by Christian von Bar and includes several members of the former Lando commission.

[18] The Group also developed rules for extracontractual obligations (tort, unjustified enrichment, benevolent intervention in another affairs) and fundamental questions in the law on mobile assets.

[19] Skipping directives on other related subjects as consumer credit contracts, 1987, package travel contracts, 1990, contracts relating to the purchase of the right to use in the properties a time-share basis, 1994, service contracts, 2006.

[20] Directive 93/13/EEC on unfair terms in consumer contracts.

[21] Directive 97/7/EC on the protection of consumers in respect of distance contracts.

[22] Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

[23] Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises.

[24] Directive on Consumer Rights (2011/83/EC). which had be in force in member States June13, 2014. The new directive replaces *only* 2 directives: the Directive on the protection of consumers in respect of distance contracts and the Directive on contracts negotiated away from business premises. The Consumer sales directive as well as the Unfair contract terms directive remains in force *separately*.

If the proposal had become law, a large and more elaborate body of 'uniform' consumer contracts/sales law would have been in force.

- The impact of consumer law on contract law

The directives mentioned above deal with consumers. It should be noted that they do influence general contract law. In the process of implementing the directives, legislators are forced to consider the choices made, and sometimes extend the chosen rules to the general provisions.

- Proposed Optional instrument: Common European Sales Law (CESL) 2011. Instrument for sellers: 'traders'. B2B Opt-in. B2C explicit consent consumer.

In 2011, the European Commission proposed an optional Common European Sales Law.[25] Primarily, CESL is an instrument for traders. This facultative European contract law (a so-called 28th regulation – beside the 27 contract law systems of the member states) can be used at will of parties ('opt-in' rule). It will be interesting to watch this in practice – if the CESL ever comes into effect.

Traders could use the same set of contract terms when dealing with other traders from within and from outside the EU. Thus, the CESL has a dimension beyond Europe (competing with the CISG?).[26]

- Will there be a European Code? If so, will it be a Consumer Code, a Civil Code or a Commercial Code?

Will there ever be a European Code? Discussions concerning the issue go back to the '50s of the last century, but a resolution of the European Parliament of 1989 is generally considered the start of a serious consideration of the possibility of a "European Code". Now, more than 25 years later, the answer is: …… We don't know ….

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DG Justice has issued a guidance document in the EU languages to facilitate the effective application of the Directive.

[25] The Common European Sales Law will be applicable:
- only if both parties voluntarily and expressly agree to it;
- to cross-border contracts (Member States will have the choice to make the Common European Sales Law applicable to domestic contracts as well)
- for both business-to-consumer and business-to-business transactions
- if one party is established in a Member State of the EU.

[26] Compare CISG AC Declaration no. 1: The CISG and Regional Harmonization (available on Pace-website).

Will it be a Consumer Code, a Civil Code or a Commercial Code? Again, the answer is: …. We don't know …. The only thing we do know is that the Draft Common Frame of Reference (*soft law*) provides an interesting 'blue-print' and that over the years by way of the European directives (*binding*) remarkable progress in "unification" has been made, which will likely continue at increasing speed. Will the Common European Sales Law be the way to go?

Hopefully, from this short overview it becomes clear that all the "projects" discussed in one way or another have contributed to a state of affairs in "European contract law" that undoubtedly will develop even further.

## IV. Lessons to be learned

In projects aimed at unification of law, one better not start to ambitious, is a lesson to be learned from the The Hague Conventions. The more participants are included in the process, the more likely you'll succeed. 'Opting out' probably is a better solution than 'opting in', if you compare the failure of the 1964 Conventions with the success of the CISG. This solution however is not always feasible.

Uniform law can only benefit from the possibility of "inclusion" of trade terms and usages, as the example of CISG shows, allowing room for (additional) rules on matters which would be hard to regulate in the context of the set up and style of the more general rules such as Principles.

The Unidroit Principles - considering their modest approach - have enjoyed some success. In a way, they complement the CISG. More general rules were developed, not confined to a narrow but important field of law, sales. Gradually, the Unidroit Principles have been expanded and over the years there is case law, published by way of the Internet. Efficient communication and easy access is crucial to bring to life the Principles. Internet allows access to literature and to court opinions and arbitral decisions from everywhere. Principles, once adopted, can be revised and improved.

CISG and Unidroit Principles have inspired other projects in Europe. PECL served as a model for legislative development of contract law. Is there a need in the Caribbean for legislative development? PECL describes in more detail the relation with domestic law. Do we need a more in-depth analysis of the relationship of principles and domestic law, maybe per subject (PhD-projects), maybe per country[27]?

I am an academic, a scholar. From that point of view, the Principles that are presented at this conference offer great opportunities. Opportunities to open the dialogue

[27] Cp. D. Busch e.a. (ed.), *The Principles of European Contract Law and Dutch Law. A Commentary*, Nijmegen: Ars Aequi 2002.

between universities, between practitioners and academics, between participants from relatively small jurisdictions, using different languages, from different legal backgrounds, working together on one goal: finding common ground in a contract law that best suits the needs of our communities. Where this will lead us, we don't know, the only thing we know is that it will be a fascinating journey.