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Methodology of the
unification of commercial law
in the 2000's

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This is a series of papers aims at contributing to that program by documenting studies undertaken by academic staff, students and guest speakers.

About the author:

Jan Ramberg graduated in 1955 from Uppsala University, in 1970 obtained his LL.D. from Stockholm University and in 1996 was awarded an honorary degree as professor of private law. Professor Ramberg has been a practising lawyer and has worked on the boards of several large enterprises. In addition he is known for his work as a national and international arbitration court judge and is a member of the International Arbitration Court of London.

As Vice President of the ICC Commission on International Commercial Practice he has been involved in international trade law and practice development for more than thirty years. He is the author of many books and articles on contract law, maritime law, transport law and *Incoterms* 1990, 2000 etc. published in English, German and Swedish.

Professor Ramberg has actively worked in the sphere of maritime law, having been the President of the Maritime Law Association of Sweden, a member of the editorial board of "Lloyd's Maritime and Commercial Law Quarterly", President of the Board of the Scandinavian Maritime Law Institute, as well as the Honorary Vice-President of the *Comité Maritim International*.

Author of numerous publications, Professor Ramberg was RGSL's first Rector, from 1999-2001.

This is the publication of a speech made on August 29, 2001 in Riga by the first RGSL Rector, Professor Emeritus Jan Ramberg at the farewell event on the occasion of the end of his term of office.

When unification of commercial law is contemplated it is necessary to raise a number of questions. I will mention four such fundamental questions and will then try to give some tentative answers or at least comments.

The four questions are:

Why, where, how and when?

Let us first ask ourselves **why** there should be unification of the law. Is unification an end in itself? I submit no. One could even argue that unification of the law is detrimental to the colourful variety of cultures, ideas and customs and, indeed, to the right of the people in the different States to develop these in a manner which they think fit.

BUT, in some areas of the law – such as commercial law – one would have to make an assessment. The elements of legal culture are rather weak although admittedly still present. To mention one example which is relevant in the Baltic States, the attitude to the requirements for a binding contract. In most jurisdictions, the fundamental principle of freedom of contract prevails so that with few exceptions there are no specific requirements as to form for a binding contract, while in other jurisdictions the necessity to ensure adequate evidence of the existence of a binding contract makes some contracts unenforceable unless made “in writing”.

Indeed, this is the only rule, which is mandatory under the law of those States, which have made reservations according to Article 12 to the main principle of CISG in Article 11, Article 29 and Part II that contracts of sale need no formalities and can be entered into orally (Article 6 compared with Article 12).

Still, even in the absence of basic different attitudes and customs, the question remains: why unification? There is no general answer to that question so we have to proceed to the following question, namely **where** is there a need for unification?

It is certainly no coincidence that the existing unification has developed in areas of the law where the domestic law simply does not suffice to reach its very objective because the environment is international and knows no boundaries. Not surprisingly then, international customs and later legislation by international conventions developed in the field of maritime law. Here, in the Baltic States, it is particularly appropriate to refer to Hanseatic maritime law which developed in a similar fashion in the Mediterranean maritime customs, such as *Lex Rhodia de jactu*, *Consolato del Mar* and *Rules d'Oléron* but, at this stage, not by legislation. Instead, it was accepted by merchants as their law or, in Latin, as *lex mercatoria*.

In the later 1800s, the need for international unification became unavoidable in the field of intellectual property law simply because the use of such property is not restricted to the territory in which it was created and we therefore need to ensure a reasonable revenue for the creators of ideas and cultural achievements from which we all benefit worldwide. Needless to

say, the advent of e-commerce would result in chaos unless its future development would be if not controlled so at least based on common understandings on a global level. Even regional legislation by the European Union – directives or regulations, or by the United States’ Uniform Electronic Transactions Act, would be insufficient.

The examples of international unification referred to so far are easily understandable. But what about other more general areas of commercial law, such as specific types of contract, or general principles? Here, the need for unification of the law is not equally obvious. We have to compare the situation in case of non-unification with any potential improvements through unification. Let us start with the law of sales.

Since the focus is now on commercial law, consumer law will not be addressed. In consumer law, there are obvious policy considerations, which require mandatory law on the domestic or regional level, such as within the European Union. But when there are no such policy considerations why should we seek unification of the law? Can we not entrust contracting parties to achieve what they want under the paradigm of freedom of contract? Well, we would then have to ask ourselves to what extent contracting parties are able to achieve a complete, unambiguous contract, which could work satisfactorily without the support of rules of law or legal principles. Could I ask you all to respond to the question I am now going to put to you? I would like all those who have seen a complete contract – wholly autonomous not needing any support at all from legal principles or rules of law – to raise your hand. Well, in fact, I submit there has never been such a contract and we will never see it in the future either. I am going to give you an example

of difficulties, which may arise in practice. At one time I chaired an arbitration tribunal and the dispute concerned an acquisition of a company where, as is frequently the case, the buyer was disappointed and frustrated by not fully reaching his objective with the acquisition. The contract excluded the application of the Swedish Sale of Goods Act which otherwise would have applied to the contract. The seller, which is also frequently the case, objected to the buyer's plea for avoidance of the contract and damages by asserting that the buyer, at the time of the conclusion of the contract, knew or at least ought to have known the circumstances, which he now invoked to support his plea. Perhaps somewhat impolitely I asked the seller whether he relied on any particular provision of the contract to support his opposition to the buyer's plea on that basis. There was no such provision in the contract and the explicit rule of the Sale of Goods Act that would have supported the seller's plea had been eliminated. Also, the contract contained a so-called entire agreement clause making anything outside the written contract itself impossible to invoke in order to supplement or interpret the contract. What then? An interesting question, I think, which I did not have to answer as arbitrator because the parties settled the case. But which *is* the answer then? Well, contracts do not and cannot exist in a legal vacuum but have to be understood on the basis of at least such principles of law which are fundamental for their implementation or, as the English say, in order to obtain business efficacy. Whether the buyer may lose his remedies by knowledge or inexcusable lack of knowledge about a non-conformity of the goods depends, of course, on the circumstances in each case but we do need guidance from some rule of law when the contract is silent on this point.

When considering whether we need support not only from domestic law but from internationally recognized rules or principles of law, it is appropriate to distinguish between three different categories, namely:

- Precise rules needed for the implementation of the contract.
- Principles required to support the drafting, interpretation and good faith fulfilment of contracts.
- Principles and rules of law needed for dispute resolution.

Let us first deal with precise rules and consider a case where a Latvian exporter of timber makes a contract with an importer in the United States. Clearly, it is not enough that the parties agree on quality, quantity and price but also about time and place of delivery. And they usually do. They do address the “what, when, where and how”-questions of the contract but frequently no more. Let us suppose that they have so agreed and on FOB requiring the goods to be shipped not later than during the month of September 2001. Unfortunately, there are different understandings about FOB in Latvia and the United States. What then? Do they now know for sure who of the seller or the buyer should contract for carriage or who should take care of export clearance? Do they know which documents the seller must present to the buyer or his bank to obtain payment? Do they know exactly where the risk for loss of or damage to the goods passes from the seller to the buyer? We do not get a satisfactory answer to all these questions in the absence of an internationally recognized interpretation of FOB. Not surprisingly, the International Chamber of Commerce (ICC) set as its first goal for trade facilitation – international rules for the interpretation of trade terms. As a result, *Incoterms* 1936 were published with subsequent revisions

triggered by changes in transport techniques, documentary and other customary practice and e-commerce as evidenced by the present version, *Incoterms* 2000. The same need for international unification is felt with respect to the buyer's payment obligation. Which evidence of the fulfilment of the seller's obligations is required? Which documents must be presented under a so-called documentary credit? Again, the ICC assisted with appropriate rules – the ICC Uniform Customs and Practice for Documentary Credits – now in the version UCP 500 (1993). And when the buyer asks the seller for performance guarantees the guarantor – usually a bank – would need to know the exact requirements for payment to the buyer as evidenced by the ICC Uniform Rules for Contract or so-called Demand Guarantees (ICC publ. 325 and 458). So far, such implementation rules are internationally recognized and, indeed, indispensable.

But what about the second category with less precise rules of a more general character? Are they indispensable as well or at least beneficial? As examples could be mentioned the drafting, interpretation and implementation of contract clauses relating to the extent of compensation payable in case of breach of contract (so-called liquidated damages or penalty clauses), so-called relief or *force majeure* clauses whereby contractual obligations are modified or eliminated, cancellation clauses, entire agreement clauses and “in writing”-requirements for contract amendments. Do such clauses need support by some surrounding legal principles? And, if so, should these be internationally recognized? Should the efforts to achieve unification of the law that materialized with CISG be regarded as an academic exercise or as a powerful means to achieve trade facilitation? The success evidenced by the worldwide acceptance of CISG

seems to suggest the latter. But, most unfortunately, we are still awaiting the ratification by the United Kingdom. And the difficulties and confusion arising from the different approaches to penalty clauses in the common law and civil law jurisdictions are disturbing.

However, CISG does not provide solutions to all problems, which may arise under contracts of sale. Important matters such as validity of the contract and its provisions, product liability and property rights are left out. Here, efforts are on-going to follow-up the success of CISG with internationally recognized gap-filling rules as evidenced by the 1994 UNIDROIT Principles of International Commercial Contracts (UP) and the 2001 Principles of European Contract Law (PECL).

PECL points at other important aspects. Should we aim at global or regional unification? Is it enough with general principles or rules of law that remain in another form than law in the traditional sense as resulting from an act of the State itself? Here, we can note that the European Union Commission has in July 2001 dispatched a document with questions directed to governments, academics and trade organization asking for advice as to whether steps by the Commission to further harmonize the law of the Member States is desirable. It is to be expected that the answers to the document will be far from uniform.

The most important matter has to do with the question of **how** - that is the methodology of unification. Should unification be left to intergovernmental or non-governmental organizations, such as UNIDROIT, UNCITRAL and ICC, or bodies formed spontaneously by enthusiastic

academics and practitioners? Is legislation necessary or beneficial? If so, should it on the regional level be left to the Member States of European Union according to the principle of subsidiarity? Or is it detrimental to the objectives of the European Union to leave matters as they are? So far, EU law has developed on the basis of the Treaty with priority given to the implementation of the four freedoms of free movement of persons, goods, services and capital, as well as important policy matters relating to consumer protection, unrestricted competition and protection of the environment and fundamental human rights. Still, it is reasonable to expect that the development of EU law will continue to ensure a proper implementation of the important principle that not only consumer contracts but also contracts between merchants should be based on good faith and fair dealing. If so, we will sooner or later reach a point where EU law creates such inroads in the domestic law of the Member States that their legal systems become inconsistent if not contradictory. Thus, the question if we should aim at a European Commercial Code should not be answered by yes or no but raises another question, namely **when?**

However, before we consider the timing for legislative action we should address the third category of rules, namely those which are triggered in case of dispute resolution by courts of law or, as is usually the case in international commercial contracts, by arbitrators. Now, the matter becomes more technical. It may be that the contract contains precise guidance by indicating the applicable law. If so, it may be that the parties know what they do and that the party accepting the law of the country of the other party has assumed the risk of possible surprises in case of future disputes. In some cases, it may even occur that such party knows that law better than the party

benefiting from the application of his own law. But such cases are exceptions. In contract negotiations, clauses on jurisdiction and applicable law seldom become so-called “deal-breakers”. This is meat for the lawyers and contracting parties seldom attach much importance to such technicalities. So, in many cases, one of the contracting parties will unknowingly accept legal risks even to an unacceptable degree. When no choice of law has been made, courts of law and arbitrators would have to apply the law following from the choice of law principles of the forum that may or may not provide satisfactory guidance.

Here, international unification of the law is to a certain extent achieved by conventions, such as the 1955 Convention on choice of law applicable to international sale of goods and the general 1980 Rome Convention on choice of law for contractual obligations. But this would not always be satisfactory to both contracting parties. Let us assume that the parties have negotiated the matter of the applicable law but failed to agree. Why then should one of the parties be faced with a choice that he expressly opposed? Let us further assume that both parties have expressly agreed by a clause in their contract that, in the case of a dispute, the law of the country where a party has his habitual place of business, or the country where the contract was entered into or where the contract is to be partly or wholly implemented should not be applied. What then? If we accept such a negative choice – the Rome Convention in Article 3 only deals with a positive choice of law – we would, it seems, have arrived in a dead end street as far as choice of law is concerned. But there is a solution, namely the choice of so-called a national law rather than any specific national law.

We have already seen that, in particular with respect to contract implementation, trade organizations such as ICC play an important role. In practice, implementation of contracts is far more important than the “sick” cases resulting in dispute resolutions. Thus, national rules, such as *Incoterms* 2000 and UCP 500, as well as international standard contracts, play a much more important role than legislation. International unification by such rules is indispensable for the common good of international commerce and there is no question that this methodology will continue to be used in the future. But, we must ask how could national rules be accepted for dispute resolution when the contracting parties have not – expressly or impliedly – agreed to make them a part of their contract? Is not then a choice of national law indispensable? Maybe so, but what should be done when, which is frequently the case, that law does not provide an answer? Are we then restricted to look for guidance in the legal doctrine developed by *domestic* scholars? Or should we go further and look for guidance elsewhere? I submit that the answer is clearly yes. And, if so, could we not also look for guidance in a set of rules developed by renowned scholars in co-operation? Such as UP and PECL? Is there any reason why such rules should not have at the least the same value and authority as when the same persons express their views individually? Although – even in the application of foreign law – the so-called “homeward trend” is understandable even in the application of foreign law we are frequently faced with uncertainties and lack of appropriate guidance. Which effect would a decision by a foreign court have on a question arising in the application of CISG? Should it be ignored or taken into consideration? If so, which foreign court decisions should be given particular weight? What if there are conflicting decisions? True, CISG Article 7 stresses the importance of a uniform application and, in order to

ensure that this does not only represent mere lip-service, CISG decisions are published by UNCITRAL in CLOUT and by UNIDROIT in UNILEX. But to which extent are courts of law and arbitrators actually inspired by this wealth of information? In order to give a more substantial contribution to the quest for uniformity expressed in CISG Article 7, the so-called CISG Advisory Council was formed in June 2001 with the objective to provide consolidated recommendations for the application of CISG. The Council comprises to date only 10 members but is aiming to expand the number so that all legal cultures of the world are represented. Anyway, the present members include the most renowned commentators of CISG. Well, is this an acceptable methodology for effective international unification of commercial law? I would again suggest yes. It may well be difficult to achieve consolidated recommendations, since dissenting opinions will be permitted. But is there any reason why a consolidated recommendation taking the existing decisions by courts in CISG-countries into account should carry less weight than a single court decision or, indeed, the views of a domestic legal scholar?

Legal principles and rules of law unsupported by traditional legislation may well be regarded with suspicion. Is not such a source of law rather unreliable when it lacks support by an act of State? Maybe, but what if guidance is simply not available in any other more reliable form? And what if the development of the law in a particular State falls short of the standard generally accepted in international commerce? Is it reasonable that such law by the application of choice of law principles should be forced upon the contracting party relying on what is and what is not generally acceptable?

No wonder that a rigid application of national law by courts of law may discourage contracting parties from resorting to courts of law and that in most international commercial contracts arbitration is preferred. And sometimes with instructions to the arbitrators not to apply any applicable law strictly. Here, under the UNCITRAL Arbitration Rules, the ICC Rules and most national laws and rules of arbitration, the principle applies that the arbitral award is final and that there is no right of appeal against the award if the arbitrators have committed a mistake in the application of the law. Indeed, under e.g. the ICC rules and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Article 17.1 of the ICC Rules and § 24 of the Stockholm Rules) the arbitrators – absent a choice of law by the parties – are permitted to by-pass choice of law rules entirely and choose whatever rule of law that they find appropriate. If the parties have chosen a particular law the arbitrators have to apply that law and a failure to do so, if discoverable, may lead to a successful challenge of the award. But if the parties have not chosen a particular law it is frequently better to choose an internationally generally recognized rule of law than a rule of law from a national law less recognized or perhaps even at odds with customary international practice.

The last question still remains – **when** shall we go further and develop a coherent system for the application of rules such as UP and PECL? Is some sort of endorsement by UNCITRAL or EU or individual States required? If so, in which form? Or should our aim be to follow-up by legislation on the national, regional or global level? I am convinced that these questions will be addressed during quite some time but I cannot

foresee which solutions will be adopted. So, I conclude with an old saying: Never let the potentially best solution be an enemy of a good solution. The answer is perhaps that the law - on national, regional or global level – should continue to coexist with whatever standards, principles of law or more or less precise rules of law and customary practice required for the common understanding and proper implementation of international commercial contracts.