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INTERNATIONAL COMMERCIAL LAW

MLL336

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So, in order to try to resolve cases where conflict of laws arise, particularly in international proceedings the procedure that must be established before a proceeding can take place are as follows:

1. Determining which jurisdiction, the case will be heard

In a conflict of laws situation, a court of law is not concerned with whether it has jurisdiction over the dispute, but deals with the appropriateness of its jurisdiction to hear the case.

<i>Voth v Manildra Flour Mills (1990)</i> 'Clearly Inappropriate Forum' test	
Facts:	<ul style="list-style-type: none"> • Manildra was a NSW company and Voth was a US accountant • Manildra sold starch to MMC in the US • Voth negligently advised MMC that it didn't need to pay withholding tax on interest payable from MMC to Manildra • Manildra suffered loss because the tax wasn't paid and also suffered loss in Australia on interest payable to the ATO and not being able to take advantage on tax losses • Manildra sued Voth in NSW for professional negligence • Voth appealed to the HC to stay the proceedings as the NSW could wasn't the appropriate forum for the dispute. • The HC looked at the connecting factors between Australia and the dispute and the US and the dispute
Decision:	The alleged tort was committed in Missouri and thus the liability should be determined by the law of Missouri and the action in the Australian court should be stayed as it was a clearly inappropriate forum.

2. Determining the substantive law that will govern the dispute (which countries laws will be applied as governing the case)

Once the jurisdiction has been decided, then it must be decided which law should be applied to the dispute. Sometimes this would have been set out in the contract, which laws will be applied if a dispute is to arise (what the 'governing law' is). But where there is no such clause in the contract, the test applied by the courts is to seek the system of law that has the closest connection to the case.

3. The enforcement of foreign judgements

When a court makes a decision to resolve a dispute, the decision may sometimes have to be enforced in a place outside of the jurisdiction making the decision, which means other laws and courts of different countries become involved. This then can mean that conflict of laws arises from the enforcement of a foreign judgement. At common law a person must apply to a local court for the enforcement of a foreign judgement locally.

TOPIC 2: INTERNATIONAL SALE OF GOODS

Defining 'International Sale of Goods?'

An international sale of goods is a sale involving parties from different countries. A contract that deals with such a transaction is a contract for the international sale of a good.

There are three main elements in an international sale of a good:

1. **That there is a sale**
This is different from an exchange of goods, countertrade is a means of international commerce, and not international sale.
2. **The subject matter of the sale is a 'good'**
This has different meaning in different countries according to different laws. The CISG does not include the sale of ships, vessels, electricity or aircrafts.
3. **The sale is effected at an international level**
This involves various international elements, such as foreign buyers/sellers, a foreign destination of the goods, foreign banks or the application of foreign law.

Laws Affecting Contracts for the International Sale of Goods

The laws affecting contracts for the international sale of goods occur in the following hierarchy:

1. **Conventions**
Conventions protect civil, political, economic and social rights of people. The main applicable convention for the international sale for goods is the **United Nations Convention on Contracts for the International Sale of Goods (the CISG)**, which as of March 2015 has 83 member countries.

The primary idea behind the CISG is to provide a unified international sales law.

The CISG, along with other conventions are binding upon its members by its own force, but a model law is only a model for domestic law making and cannot be enforced by its own.
2. **Customs**
Customs can be regarded as the original source of international commercial law, due to the fact original international commercial law was based on *lex mercatoria*, which was a custom. International conventions are largely codifications of customs that are shared and accepted by most countries in the world.
3. **Domestic Law**
Domestic law is important to the international sale of goods, because although countries like Australia have made legislation regarding the contents of the CISG, which means it is the law of the country, there are some areas that the CISG may not cover, that domestic legislation does (for example the passing of property).

Applying the CISG

When determining whether the CISG applies, there are main provisions that determine the application of the CISG:

Is the CISG's geographical sphere of application satisfied? – Article 1

Article 1 says that the convention applies to contracts of sale of goods between parties whose places of business are in different States, when the States are Contracting States or when the rules of private international law lead to the application of the law of a contracting State. If the one party was not aware that the other party was in a different state then them, the CISG doesn't apply and normal domestic law applies. For the CISG to apply, under **Art. 1 CISG**, there must be a contract, for sale, of goods, between parties, who have places of business located in different States, with either **Art. 1(1)(a) CISG** or **Art. 1(1)(b) CISG** applying.

ARTICLE 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (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.

Where are the relevant places of business? – Article 10

Article 10 assists in identifying where the relevant place of business regarding the sale of good. It states that if a party has more than one place of business, the place of business is the one which has the closest relationship to the contract and its performance and if they have no place of business then their habitual residence will be used.

ARTICLE 10

For the purposes of this Convention:

- (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.

Ensuring that the contract has not been excluded – Article 2

Article 2 sets out exclusions and limits the conventions application regarding sales contracts.

ARTICLE 2

This Convention does not apply to sales:

- (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.

No further limitations (death or injury) – Article 5

Article 5 places further limitations upon article 2, limiting the Conventions application in the case of damage for personal injury or death.

The CISG does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

ARTICLE 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Is the contract within the scope of the CISG? – Article 3

Article 3 determines that the contract is as a whole either governed by or not governed by the CISG.

Article 3(1) says a contract for the supply of goods which still have to be manufactured is generally treated as a contract of sale and thus falls into the scope of the Convention.

Article 3(2) says CISG doesn't apply to contracts for services, it requires the share of services to be clearly in excess of 50% of the total value of the party's obligations in order to render the Sales Convention inapplicable.

ARTICLE 3

- (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 obligations of the party who furnishes the goods consists in the supply of labour or other services.

Are the issues within the scope of the CISG? – Article 4

Article 4 identifies the specific legal issues that fall under the scope of the CISG, this includes the formation of contracts and the rights and obligations of the parties. But the regulation of any other issues is left to the domestic law that would otherwise apply.

ARTICLE 4

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:

- (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.

Have the parties derogated from the CISG? – Article 6

Article 6 preserves the party's autonomy to detract, vary or exclude from the CISG.

ARTICLE 6

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.

Interpreting the CISG

Interpretation of the CISG is essential for the application of the CISG.

The provisions of the Convention must be construed in the broad context of the circumstances involved, taking into account the notion of contract preservation and promotion that underlies the Convention.

Article 7 says to interpret the CISG, its international character and the need to promote uniformity in its application and the observance of good faith in international trade must be considered. Questions concerning matters governed by the CISG 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.

There are three steps to interpreting the CISG (as they are set out in Article 7)

1 **International Character, Uniformity and Good Faith – Article 7(1)**

The provisions of the Convention should be construed in the light of the terms of the contract and the intention of the parties as seen in the contract concerned. This requires the parties to a contract to give appropriate consideration to the modifications made by parties with respect to the effect of particular provisions.

2 **The General Principles of the CISG – Article 7(2)**

This requires the parties and the court to consider the general principles on which a particular legal relationship is based and to make a choice between such principles under the relevant conflict rules. This gives rise to the possibility that the same provision of the Convention may be given a different interpretation in different situations based on the court of law it is being heard in.

3 **Rules of Private International Law**

If the first two steps fail, then you can go outside the scope of the CISG and look towards domestic law principles.

ARTICLE 7

(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.