

- Deterrence as a principle, and whether it only applied to geographical locations or certain groups, reveals some very careful thinking about the difficulties involved with such concepts.
- The judges seemed to be very frank about the fact that public opinion influenced sentencing albeit subconsciously.
- There was also some concern expressed about the difficulties raised by community involvement in sentencing, particularly the media and so-called law and order champions.
- Some judges saw a positive role for the media in disseminating information about sentences.
- Generally speaking, the judges tended to rely on submissions from counsel to settle the proper range of sentences.

This is a very interesting book and well worth reading, especially for the large number of quotes from the judges.

It struck me when I reached the end of Professor Mackenzie's work that there was an even bigger book in this. Interviewing everyone involved in the sentencing process, including the offenders and counsel would give us a pretty good idea if it really did come right in the end.

Reviewed by Keith Chapple SC

## International Sales Law: A Critical Analysis of CISG Jurisprudence

By Larry DiMatteo, et al  
Cambridge University Press, 2005



The United Nations Convention on Contracts for International Sale of Goods (CISG) was adopted on 11 April 1980 and entered into force on 1 January 1988. As at February of this year, 64 countries had adopted the CISG as their international sales law. Within Australia, the convention has been implemented municipally by each of the states: see, for example, *Sale of Goods (Vienna Convention) Act 1986*

(NSW). The *Trade Practices Act 1974* (Cth) also provides, in section 66A, that:

The provisions of the United Nations Convention on contracts for the International Sale of Goods, adopted at Vienna, Austria, on 10 April 1980, prevail over the provisions of this Division to the extent of any inconsistency.

To date, state legislation enacting CISG has not given rise to much case law in Australia. Nor do the important provisions of this legislation attract much attention in leading Australian texts on contract law.

The broad approach of this book, written by predominantly American academic lawyers, is to track through the CISG

(which is reproduced in an appendix), dealing, in turn, with writing requirements, offer and acceptance rules, obligations of buyers, obligations of sellers, common obligations of buyers and sellers, breach of contract by seller and buyer, damages, excuse and preservation. It draws together and analyses decisions from a range of jurisdictions with published arbitration awards involving the interpretation of the CISG. As such, it is an extremely valuable collection of multiple-jurisdictional material that may otherwise not be available or, at least, not available in distilled form to practitioners. (For those interested in the area, one important qualification to this statement is the Pace Law School web site (<http://cisgw3.law.pace.edu/cisg>) which is a web site specialising in CISG jurisprudence.)

As with many international conventions, the language employed in many sections of the CISG is open ended, no doubt reflecting compromises necessary in the drafting of the convention to permit it to be brought to fruition. Such open ended language, however, opens up the possibility of varying interpretations which is anathema for a Convention which was adopted to promote uniformity and certainty in an important area of commercial law. The scope for varying interpretations is all the greater, of course, given the absence of an international court empowered authoritatively to pronounce on the meaning of the various articles of the convention. As one example, the authors observe (p.75) that:

A review of CISG jurisprudence involving the battle of the forms scenario finds courts struggling to devise a unified framework for applying CISG rules. Most troubling is that courts seldom use cases from other contracting states.

On the other hand, the authors conclude that:

CISG jurisprudence has done more good than harm in removing legal obstacles to international trade. It has helped to overcome what Franco Ferrari has called the problem of 'nationality of law'. Although it has not yet attained critical mass, CISG jurisprudence has grown significantly. As it has grown, greater uniformity of application has been evidenced.

The authors draw attention to the problem of 'homeward trend' viz. the demonstrated tendency of a forum court to favour its own, local principles as at least informing the text of an international convention. Recent decisions of Australian courts on other conventions such as the Warsaw Convention (see *Qantas Airways Ltd v Povey* (2005) 79 ALJR 1215) have emphasized the need for the internationalist interpretation of legislation which implements an international convention: see also the decision of the NSW Court of Appeal in *British American Tobacco (Investments) Limited v Eubanks for the United States of America* (2004) 60 NSWLR 483 dealing with the Evidence on Commission Act implementing the Hague Convention on that subject.

One of the reasons for a homeward trend, it may reasonably be surmised, is the perceived relative lack of availability in accessible form of the jurisprudence of other jurisdictions in relation to the convention. The current text goes a long way to overcoming that problem. Whilst not an annotated commentary on the convention, it provides an extremely useful survey of decisions in the area. It also contains an extremely detailed table of authorities and cases, secondary materials and arbitration decisions from a range of jurisdictions.

Aspects of the convention may surprise conventional contract lawyers. Thus, the convention has been interpreted in certain signatory countries as permitting evidence of the parties' subjective intent with regards to the contract in dispute, even in the absence of ambiguity. One of the most important

provisions of the CISG is article 38 which provides that the buyer 'must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.' Article 39 provides that the buyer loses the right to rely on a lack of conformity of the goods if he or she does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he or she has discovered it or is or ought to have discovered it. These two articles provide classic examples of open ended language being used by the drafters of the CISG. The authors point out, by reference to case law gleaned from different jurisdictions, differences of approach in this area. In the context of determining "reasonable time" for sending a notice of non-conformity under article 39 of the convention, for example, the authors (at 164) draw attention to a Swiss decision where the court observed that:

Whereas jurisdictions of the Germanic legal family demand an immediate notice ...in Anglo-American and Dutch law the notification ...of defect given several months after discovery of the defect is deemed to be within an appropriate time limit.

The Swiss court in that case adopted a medium time frame of one month as a compromise.

The primary value of this book to practitioners is its clear and systematic run through of the key provisions of the CISG together with an identification of the case law, an identification which, because of the nature of the beast, is not readily available elsewhere. In drawing attention to different interpretations of various provisions by different national courts, the text usefully highlights the substance of those competing interpretations. As noted above, it does so in the context of a general plea for a more internationalist approach by national courts interpreting the CISG, that is to say an approach which devotes more attention to decisions by other national courts on articles under consideration. The book will be very useful for those called upon to advise in relation to any dispute concerning the international sale of goods. That is scarcely an area which could be described as narrow in an era of liberalised trade.

Reviewed by Andrew Bell