Contracts of Carriage and International Conventions

Franco Ferrari
Professor of Law, New York University
franco.ferrari@nyu.edu

ABSTRACT
The relationship between uniform substantive law conventions and private international law rules is contentious. In this paper, the author discusses why resort to private international law has to give way to the application of uniform substantive law conventions.

Key words
Unification of law, private international law, conflict, lex specialis

Even though this paper was presented as part of the session on ‘Contracts of carriage and international conventions’, the topic assigned to me lends itself to being addressed in a much wider context, since the question of the ‘hierarchy between conflict rules and uniform law’, my topic, is one that is relevant in respect of many other types of contracts.

The problem of the hierarchy arises due to the fact that the applicability of both the private international law rules and the uniform substantive rules (where based on a limited uniform law instrument1) is triggered when the relationship is not a purely domestic one, thus leading to the potential applicability of both sets of rules. It is, however, important to determine which set of rules to resort to, since the substantive rules ultimately applicable may differ according to whether one resorts to one set of rules rather than another.

It is common understanding that where a contract bears ties to more than one country, courts cannot simply resort to their domestic substantive law to solve substantive issues.

1. For the distinction between limited and unlimited uniform law conventions, see, eg, Franco Ferrari, ‘Uniform law’ in Jürgen Basedow et al (eds), The Max Planck Encyclopedia of European Private Law (Oxford 2012) 1732.
Rather, they will need to determine which substantive rules to apply. It is often suggested that in order to identify the substantive rules applicable to an international contract, resort is to be had to the rules of private international law of the forum, as these rules are specifically designed to solve the issue of what rules apply where a relationship has links to more than one country.

This, however, does not seem to be the correct approach, since it does not at all take into account the coming into force of uniform substantive law rules, such as the rules set forth by the many transport law conventions or the CISG, and their relationship with the private international law rules of the forum. In my opinion, which finds ample support in case law from the most disparate countries, where uniform substantive law rules are in force in the forum State, resort to these rules has to be preferred over resort to private international law where the uniform substantive rules are prima facie applicable. Scholars have justified this approach on constitutional grounds, arguing that some legal systems afford to international treaties (including those setting forth uniform substantive law) a higher standing in the hierarchy of sources of law than to purely domestic statutes (including those on private international law). Of course, this justification is only convincing where the rules of private international law are themselves not originating from an international treaty and where the forum’s system is a monist one, one that accepts that the internal and international legal systems form a unity that does not require for the contents of international treaties to be implemented through a domestic statute. In a dualist system, such as Norway, international law is not directly applicable domestically, but must first be translated into national legislation before it can be applied by the national courts. Therefore, the foregoing justification cannot lead to the solution of the problem raised by the potential applicability of the two sets of rules referred to earlier.

Some scholars suggest that resort to treaty-based uniform substantive law prevails over resort to private international law (that is not treaty-based) due to the requirement that Parliament needs to approve treaties by way of a statute, and that this parliamentary approval requires a majority different from the one required for ordinary statutes, thus making the approval subject to a special requirement, which, in turn, allows resort to treaty-based uniform substantive law to prevail in light of the principle pursuant to which the more spe-

cific rule overrides the more general one. Since, however, the issue of approval is left to a State's own internal procedures, this justification is convincing only when its narrow prerequisites are met. Where, on the other hand, no special mechanism or majority is required for treaty approval (as in Norway), that justification cannot be resorted to in order to solve the hierarchy issue at hand.

In my opinion, there is a more general reason for resort to uniform substantive law rules to prevail over resort to private international law, and this even where the formal rank of the sources of private international law and uniform substantive law is the same, namely the principle referred to above pursuant to which 'lex specialis derogat legi generali'. In my opinion, uniform substantive law is more specific than private international law on several levels. On the one hand, it is designed to be applicable to a more specific set of contracts than existing private international law rules: While the treaty based uniform substantive rules all govern certain specific types of contract only (provided that other specific – and rather restrictive – requirements are met), private international law rules are generally devised to apply to a wider range of contracts. But even where the sphere of application of the private international law rules is limited to specific contracts, as is, to just give one example, the case of the rules set forth by the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (in force in Norway), the application of these rules is not limited to contracts that meet a specific internationality requirement. Like other rules of private international law, which are supposed to apply whenever there is a conflict between different laws and, therefore, do not define internationality in one way or another, the rules laid down by the 1955 Hague Convention do not define internationality either, which makes them applicable to any kind of international contract for the sale of goods. The competing uniform law instrument, the CISG, on the other hand, defines internationality in a very specific way (Article 1(1)), thus limiting its own (international) sphere of application and making the CISG more specific.

Still, the most important reason for resort to uniform substantive law to prevail over resort to private international law is a different one (and this reason applies irrespective of the formal hierarchical relationship between the private international law and uniform law): uniform substantive law is more specific in that it solves the substantive issues – meaning those issues that the parties ultimately want to see solved – ‘directly’, thus avoiding the two steps required by resort to private international law, consisting in the identifi-

8. ibid.
11. See Ferrari and Torsello (n 5) 35, 36.
cation of the applicable law and the application thereof. From this it follows that where a
given treaty-based uniform law is in force, courts will have first to determine whether that
uniform law applies rather than resort to their rules of private international.\textsuperscript{12}

Although there is ample case law to show that this is the prevailing view today, it may
well be worth inserting a provision into the future statute on private international law so
as to leave no doubt about the approach to be taken. In my opinion, one should, however,
not take Article 25 Rome I Regulation as a model (not even \textit{mutatis mutandis}). Although
this provision also tackles the issue of what rules to have recourse to in case of potential
applicability of more than one set of rules, the provision solely deals with conflicts between
private international law rules.\textsuperscript{13} According to the prevailing view, Article 25 Rome I Regu-
lation does not address the relationship between its rules and those contained in uniform
substantive law instruments. Any rule to be inserted into the new private international law
statute should also address the statute’s relationship with uniform substantive rules.

In light of the foregoing, allow me to end my remarks with the suggestion of a provision
that may be useful to solve the issue at hand (as well as that of the relationship between the
rules of the new statute and any private international law rules having treaty origin):

The provisions of this statute shall not affect the application of any provision contained in legis-
lation implementing international conventions, including conventions setting forth substantive
rules, to which Norway is a party.

This provision requires Norwegian courts to turn first to the provisions of conventions as
implemented by domestic statutes (in the area of both private international law, such as
the aforementioned 1955 Hague Convention on the Law Applicable to Contracts for the
International Sale of Goods, and uniform law, such as the CISG) before turning to ‘purely’
domestic rules, such as those of the future private international law statute. Where there is
a conflict between different rules that prevail over the ‘purely’ domestic provision, as is the
case in the area of contracts for the international sale of goods, given that both the 1955
Hague Convention and the CISG are in force in Norway, the above \textit{lex specialis} rule will
solve the issue (in favour on the uniform substantive rules).

\begin{itemize}
  \item \textsuperscript{12} For this reasoning, see Tribunale di Forlì (Italy), 16 February 2009, \texttt{<http://cisgw3.law.pace.edu/cases/090216i3.html>}
  accessed 10 September 2018; Tribunale di Vigevano (Italy), 12 July 2000, \texttt{<http://cisgw3.law.pace.edu/cases/000712i3.html>}
  accessed 10 September 2018.
  \item \textsuperscript{13} See Sebastian Omlor, ‘Art. 25’ in Franco Ferrari (ed), \textit{Rome I Regulation. Pocket Commentary} (Sellier 2015)
  505-507.
\end{itemize}