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THE CISG IN A GLOBALISED WORLD

A CIVM NO MUNDO GLOBALIZADO

Prof. Dr. Ingeborg Schwenzer

Abstract: The United Nations Convention on Contracts for the International Sale of Goods (CISG) is classified as an important instrument capable of facilitating the solution of disputes which involve international sale of goods. The Convention is so important in that scenery because of its advantages which are, for example, the reduction of costs and time spent on the resolution of cases, and the possibility of making the decisions more predictable for the parties. Note that the CISG already has a significant role as an inspiring example for the internal legislation of different countries and, in the future, that role will develop even more in virtue of the accelerated growth of international trade. Besides that, the Convention also represents a great success deriving from the efforts to unify the legislation in that context.

Keywords: Convention on International Sale of Goods. CISG. International sale of goods. Unification of legislation. International trade.

Resumo: Analisa-se a importância da Convenção das Nações Unidas sobre Contratos Internacionais de Venda de Mercadorias (CIVM) como um instrumento capaz de facilitar a solução de litígios que envolvam a venda internacional de mercadorias. Com esse intuito demonstram-se suas vantagens, como a diminuição dos custos e do tempo gastos na resolução de casos, e a possibilidade de tornar as decisões mais previsíveis para as partes, gerando assim uma maior

segurança jurídica. Conclui-se que a CIVM já tem um papel significativo como modelo inspirador das legislações internas de diversos países e que, no futuro, esse papel se desenvolverá ainda mais em virtude do acelerado crescimento do comércio internacional. Além disso, reconhece-se o grande sucesso que a Convenção representa decorrente dos esforços no sentido de alcançar a unificação da legislação sobre a matéria.

Palavras-Chave: Convenção Internacional sobre Venda de Mercadorias. CIVM. Venda internacional de mercadorias. Unificação da legislação. Comércio internacional.

I. Introduction

"The United Nations Convention on Contracts for the International Sale of Goods (CISG) (...) has now gained worldwide acceptance."[1] With this statement the late Professor *Peter Schlechtriem* described the process of the unification of international trade law that began with the works of the famous Professor *Ernst Rabel* in the 1920s and has recently seen Japan become the 71st member state of the CISG. It is indeed a story of worldwide success everyone has hoped for but most probably did not expect. And even though much has been said about the scepticism of commercial trade practice towards the Convention and its alleged minor role in the legal community – today this can be discarded as gossip.

Approximately 2,500 – published – court decisions and arbitral awards, an abundant number of scholarly writings, numerous conferences and last but not least the Annual Willem C. Vis International Commercial Arbitration Moot show the prominent role the CISG plays in practice, legal science and legal education.

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1 Peter Schlechtriem, in; Peter Schlechtriem/Ingeborg Schwenzer (ed.), *Commentary on the UN-Convention on the International Sale of Goods (CISG)*, Oxford University Press, 2 ed., 2005, 'Introduction' paragraph 1.

II. History

The historical developments of international sales law have often been reported and this is certainly not the place to give another full account. Thus only the most important milestones will be addressed.

The roots of the unification of sales law dates back to the year 1928 when Ernst Rabel suggested pursuing the unification of international sales law. In 1964 the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were drafted and finalized at the conference in The Hague. However, these first uniform sales laws did not fulfil their high hopes and expectations. Although their practical relevance should not be underestimated, only nine countries became member states while important economies like France and the USA did not participate. Furthermore, the so-called socialist and developing countries perceived these uniform laws as favouring sellers from industrialised Western economies.

In the 1960s the United Nations Commission on International Trade Law (UNCITRAL) resumed the work on the unification of sales law using the Hague Conventions as a basis. In 1980 delegates from 62 nations deliberated the CISG at the now famous Vienna Conference. Finally, the Convention entered into force on 1 January 1988. The official languages are Arabic, Chinese, French, English, Russian and Spanish.

III. Member states

Today the CISG has 71 member states. A few figures may shed further light on this number. Nine out of the ten leading trade nations in 2006 are today member states with the United Kingdom being the sole exception. In the first quarter of 2008 the first ten countries importing goods from Brazil and nine out of the first ten countries exporting goods to Brazil were member states. Within the ever increas-

ing market of the European Union 23 out of the 27 members are member states of the CISG.

Having regard to the development of international trade these figures become all the more impressive. In 2006 the worldwide merchandise trade amounted to USD 11.783 billion, about ten times as much as when the Convention was drafted. This is not in the least due to the containerisation that has revolutionised cargo shipping. As of 2005 some 18 million total containers made over 200 million trips per year. There are ships that can carry 15.000 20-foot equivalent units. Today it is cheaper to ship a bottle of wine from South America to Hamburg than to bring it from Hamburg to Munich.

IV. Cisg as role model

Today it is a well known fact that the CISG has exerted influence on an international as well as domestic level. Thus, when the first set of PICC was launched in 1994 they closely followed the CISG not only in its systematic approach but also with respect to the remedy mechanism. The same holds true for the PECL issued in 1999. Furthermore the EC Directive on certain aspects of the sale of consumer goods should be mentioned here. It took its definition of conformity of goods from Article 35 CISG and thus introduced this concept into the domestic sales laws of the EU member states. In Africa the 16 member states of the Organisation for the Harmonisation of Business Law in Africa, or in French, *l'Organisation pour harmonisation en Afrique du Droit des Affaires* (OHADA) have adopted the *Acte uniforme sur le droit commercial général* (AUDCG) which is also primarily based on the CISG. Finally, the Draft Common Frame of Reference published in the beginning of 2008 is not much more than a continuation of all these different unification efforts based on the CISG.

Three main features can be identified that have influenced all of these instruments. First, the drafters of the CISG endeavoured to

depart from domestic legal terms and concepts, instead seeking an independent legal language. Indeed, to a large extent they succeeded. Likewise, traditional domestic systematic approaches have been discarded. Instead the Convention features a transparent structure unfettered by any historical whimsicalities. Thus, for example, the sections on the obligations of the seller are followed by the section on remedies for breach of contract by the seller. What has proven most influential on a substantive level is, however, the remedy mechanism. The Convention, unlike the Roman heritage in Civil Law countries, does not follow the cause oriented approach but the breach of contract approach of Common Law descent. Special features of these systems have been overcome making the CISG truly suitable for the international context.

Over the last two decades the CISG has also proven to be a decisive role model for domestic legislators and not just on an international level. Finland, Norway and Sweden took the coming into force of the CISG in their countries on 1 January 1989 as an opportunity to enact new domestic sale of goods acts, thereby heavily relying on the CISG albeit without Part II of the CISG (the provisions on formation of contracts). Lately, Denmark has joined the other Scandinavian states by adopting a similar Sale of Goods Act. With the end of the cold war and the collapse of the former Soviet Union the young Eastern European states looked to the CISG when facing the task of formulating their new civil codes. This holds true on the one hand with regard to the Commonwealth of Independent States (CIS) and the Baltic states amongst which Estonia is the most prominent exponent. Nowadays, China is of utmost importance for international trade. The contract law of the People's Republic of China dated 15 March 1999, again, closely follows the CISG. Finally, the modernisation of the German Law of Obligations which began in the 1980s was from the very beginning strongly influenced by the CISG. Although the final outcome that entered into force on 1 January 2002 had lost much of that initial spirit, one may still identify the basic concepts of the CISG.

V. Cisg in practice

It certainly is clear nowadays that the mere existence of the CISG is well known amongst lawyers engaged in international trade. However, there still seems to be a certain tendency to recommend the exclusion of the Convention, especially in commodity trade. Recent surveys seem to confirm this finding stating that around two thirds of the survey participants indicate to exclude the CISG. There are three main reasons given for this strategy. First, although the CISG is commonly known the degree of familiarity with its application and functioning in practice is still very low. Lawyers still prefer their own domestic law and seem to stick to the saying "You can't teach an old dog new tricks". Second, and following from the first reason, whenever the position of a party in the market allows for retaining its own domestic law in a contract, it prefers to do so. Third, the parties are not yet convinced of the advantages of the CISG compared to domestic sales laws. This argumentation, however, holds several shortages.

Although it is now common ground in western, industrialised countries that the parties are free to choose the law applicable to their contract it is certainly not a standard that holds true in all parts of the world. The fear of giving western trade corporations too many advantages still leads developing and transition countries to deny validity to choice of law clauses. The most prominent example is still Brazil, where the validity of choice of law clauses is highly controversial. Thus, for example an American buyer acquiring goods from a Brazilian seller, being proud and confident of having contracted on the basis of the American UCC, may find itself in a very precarious condition when trying to sue the seller before Brazilian courts with domestic Brazilian law being applied to the sales contract. In the end this may very well lead to a situation where a party is confronted with a law that was hardly foreseeable and is not understandable or even truly accessible.

With respect to choice of law clauses stipulating the CISG as the law applicable this position should, however, be reassessed.

Whereas it seems quite understandable to rule out domestic laws tailored to the needs of experienced traders this protection mechanism does not seem necessary in relation to the CISG. The Convention takes the respective interests of buyer and seller into consideration in a well-balanced way.

But even if a choice of law clause is recognised a party insisting on its own domestic law may still encounter difficulties when litigating before the courts in a foreign country. First of all, the law has to be proven in court. This implies not only the necessity to translate statutes as well as other legal texts such as court decisions and scholarly writings into the language of the court but also to provide expert opinions. In some countries the experts may be appointed by the court, in others each party will have to come forward with sometimes even several experts. Needless to say the procedures can be very expensive. This may even be harsher under a procedural system where each party bears its own costs regardless of the outcome of the proceedings as is especially the case under the so called "American Rule". However, even if a party is willing to bear all these costs to prove a foreign law in court the question as to how this law is interpreted and applied is at best unpredictable and amounts to a lottery.

It can be argued that nowadays more and more international sales law disputes are not litigated before national state courts but rather are being resolved by international commercial arbitration. Still, the problem of proving the domestic law remains and translations are still necessary where this law is not accessible in English. Furthermore it is still not clear how arbitrators often coming from different legal backgrounds will apply any domestic law.

In many cases parties think to solve their problems by resorting to what they believe is a "neutral law" thereby often confusing political neutrality with suitability of the chosen law for international transactions. In particular, this seems to be the case with Swiss law. If the parties choose such a third law they are even worse off. First, they have to investigate this foreign law. Second, the trouble and costs in

proving it are even more burdensome. Last but not least, especially Swiss domestic sales law in core areas is unpredictable and not suitable to international contracts. This can be demonstrated by reference to only two examples. First, the Swiss Supreme Court distinguishes between *peius* and *aliud*; the latter giving the buyer the right to demand performance during ten years after the conclusion of the contract notwithstanding whether it gave notice of non-performance or not. Where the line between *peius* and *aliud* will be drawn in a particular case is almost impossible to forecast. The second example is compensation of consequential losses. Whether there is a claim for damages without fault depends on the number of links in the chain of causation. Extremely short periods for giving notice of defects as well as a limitation period of one year in case of a *peius* militate against domestic Swiss law for the international context.

All these shortcomings of domestic laws are prevented by applying the CISG. The text of the CISG is not only available in six authoritative languages but has been translated into numerous other languages. Court decisions, arbitral awards as well as scholarly writings are either written or at least translated into today's *lingua franca* of international trade, namely English. These are readily accessible not only via books or journals but also via websites. The abundant number of legal materials available gives reason to expect that judges and arbitrators are knowledgeable and able to apply the CISG in a predictable fashion.

VII. Conclusion

To sum up, better accessibility of the CISG saves time and costs, and makes the outcome of cases more predictable. These are the main advantages of the CISG when compared to the application of domestic law.

Most importantly, the success of the CISG shows that pursuing the unification of laws is the right way. The harmonising effect the

Convention had and has on domestic legal systems and its influence on other uniform instruments and projects prove the superiority of the CISG and disprove the argument that the competition of domestic legal systems may offer a viable perspective for the future of commercial law.

Uniform law not only helps resolving disputes, common language and common understanding of key concepts also facilitate negotiating and drafting sales contracts. This, in turn, again considerably helps in limiting transaction costs.

At the end of the day all criticism boils down to the aforementioned saying of the old dog unwilling to learn new tricks. However, a new generation of lawyers is already waiting at the doorstep to take over business; a generation trained in the CISG knowing the advantages of this set of rules and in general a generation bursting with curiosity about the world elsewhere.