

Obstacles of Convention on International Sale of Goods 1980 (CISG) in the Promotion of International Trade

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Abstract:

The United Nations Convention on Contracts for the International Sale of Goods, 1980 (the Convention, or CISG) has become in over 30 years an important tool for international trade. The Convention provides a uniform framework for contracts of sale of goods between parties whose places of business are in different States. By defining rights and obligations of the parties in a transparent and easily understandable manner, the Convention furthers predictability in international trade law, thus reducing transaction costs. However, this assessment is largely based on how States perceive the advantages of the CISG. This contribution asks how other actors involved in the legal process (such as commercial parties, attorneys, in house-lawyers and courts) perceive the CISG. To this end, three persistent obstacles of the CISG are identified: its problematic uniform application by national and arbitral courts, its regular exclusion by parties, and its incompleteness. This calls for recognition that the establishment of a global uniform law is not the only possible way in which international trade can be promoted. It would be equally important to allow parties to make the national jurisdiction of their choice applicable to the contract. The value of the CISG then lies primarily in providing commercial parties with a common frame of reference, allowing them to compare the solutions of the CISG with various national jurisdictions and to act upon this.

Key words: The United Nations Convention on Contracts for the International Sale of Goods, International Trade

INTRODUCTION

The United Nations Convention on the International Sale of Goods (CISG) has gained worldwide acceptance since its adoption by the United Nations Commission on International Trade Law (UNCITRAL) in 1988.¹ CISG is usually seen as a big success and perhaps as the greatest legislative achievement in the field of uniform law in history.² Its success would not only lie in the number of participating States, but also in its role as a role model for other texts, including the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law (PECL)³ and Draft Common Frame of Reference,⁴ the OHADA Acte uniforme portant sur le droit commercial général (AUDCG),⁵ the Principios Generales del Derecho de Contratos,⁶ the European Directive on Sale of Consumer Goods⁷ and several national revisions of contract law such as the 1988 uniform Nordic Sale of Goods Act, the 1999 Contract Law of the People's Republic of

¹ Adopted in Vienna on 11 April 1980, 1489 UNTS 3, available at www.cisg.law.pace.edu.

² Joseph Lookofsky, Loose ends and contorts in international sales: problems in the harmonization of private law rules, *American Journal of Comparative Law* 39 (1991), 403.

³ Ole Lando & Hugh Beale (eds.), *Principles of European Contract Law, Parts I and II*, The Hague 2000 and Ole Lando et al (eds.), *Principles of European Contract Law, Part III*, The Hague 2003

⁴ Christian Von Bar & Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, 6 vols., München 2009.

⁵ Adopted in 2010; *Journal Officiel OHADA* 15 (2011), No. 23, available through .

⁶ Ingeborg Schwenzer & Pascal Hachem, *The CISG – Successes and Pitfalls*, *American Journal of Comparative Law* 57 (2009), 457-478.

⁷ *ibid* p 480-485.

China and the new German law of obligations of 2002.⁸ This apparent success of the CISG is well known. Its three major achievements seem to be that the original contracting states were able to adopt a common text that can be seen as a codification of commercial contract practice, that the treaty is popular among states aiming to become a party and, finally, that the CISG is an important model for revisions of national law and for other international texts. Interestingly, all three achievements are almost exclusively based on how states perceive the importance of the CISG. The question can be raised whether the same is true for other actors involved in the legal process, such as commercial parties, attorneys, in-house-lawyers and courts. It is somewhat surprising that the abundant literature on the CISG does not more often adopt this alternative and critical⁹ perspective when measuring the success of the Convention, in particular in view of the evidence that parties often exclude its applicability. The aim of this contribution is to adopt this more critical perspective and discuss several obstacles related to uniform laws. This is not to downplay the importance of efforts to create more legal uniformity – the other contributions to this volume show that these efforts can be very valuable – but to obtain a better picture of their drawbacks and ways to remedy these.

THE RELATIONSHIP BETWEEN CROSS-BORDER TRADE AND UNIFORM LAWS

Before I discuss several specific obstacles related to the CISG, it is useful to devote some attention to the relationship between

⁸ www.fundacionfueyo.udp.cl/archivos/catedra-der-cont-informe-chile.pdf

⁹ See, however, Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, *Ohio State Law Journal* 45 (1984), 265 ff., Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, *Virginia Journal of International Law* 39 (1999), 743 ff. and Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, *International Review of Law and Economics* 25 (2005), 446-486.

cross-border trade and uniform laws in general. The preamble to the CISG states that the convention serves to 'promote the development of international trade. This is usually seen as the main aim of unifying laws, based on the assumption that if laws among countries differ, parties may refrain from doing business abroad (or will in any event incur costs when they decide to contract with a party in another country). We can find this motive not only in the CISG, but also in many other unifying conventions. The European legislature also frequently uses the argument when it takes harmonizing measures in the field of contract law, as it has abundantly done in the last 20 years. However, it is important to realize that there is not necessarily a causal relationship between unification of laws and an increase in cross-border trade.¹⁰ There are two reasons for this. The first is that parties, when making the decision (not) to contract, are usually led by other factors than (contract) law. If they are restrained from entering into a cross-border transaction, this may be due more to factors like distance and differences in language or culture than to differences in the law. And in so far as law does play a role in making decisions about contracting, it is likely that fields like procedural law or tax law form greater barriers to trade than differences in contract law (that consists largely of non-mandatory rules anyway). This means we must not overestimate the importance of unification of contract law for decisions about contracting: in reality, parties are led by various motives. The second point is more fundamental: commercial parties do not necessarily have an interest in unification of laws. It must be assumed that their concern is to have some legal system applicable to their contract, rather than that this system is a uniform one. This is important to emphasize because in so far as commercial parties

¹⁰ European Journal of Law and Economics 2011, with contributions by Smits, Low, O'Hara, Gomez & Ganuza and Wagner, available through <<http://www.springerlink.com/content/261142tm11514620>>

have a choice between various legal systems that can be applicable to their contract, they are likely to choose the legal system they know best, or that (in their view) provides them with most legal certainty. True, in an ideal world they would probably prefer to have one law applicable to all their transactions, no matter where they take place. However the general obstacle of uniform laws is that they never provide a truly self-standing jurisdiction that completely excludes the applicability of national law. In this sense, the creation of a uniform sales regime can even complicate matters: it means that parties are no longer governed by one law, but by several fragments consisting of national rules (applicable as a result of the conflict of laws rules in question) and of the rules of the CISG. These general considerations reveal that if parties have the choice between a uniform international sales regime and a domestic system, they do not necessarily prefer the former. Let us now look into some specific obstacles of the CISG against the background of this finding.

Obstacles of the CISG

Most authors identify three persistent obstacles of the CISG: its problematic uniform application by national and arbitral courts in the contracting states, its regular exclusion by parties, and its incompleteness. It can be argued that they are all part of one overall obstacle with uniform laws Uniform application of the CISG by courts. Much is written about the question whether uniformity of application under the CISG exists ¹¹or is at all possible. There is unanimity on the point that the answer is completely dependent on what one understands uniformity to

¹¹Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, Louisiana Law Review 61 (2001), 473; Daniela de Lukowicz, *Divergenzen in der Rechtsprechung zum CISG: Auf dem Weg zu einer einheitlichen Auslegung und Anwendung?*, Bern 2001; the various contributions to Franco Ferrari (ed.), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences*, Munich 2003

be. If this means an identical interpretation of every provision, it is very difficult to achieve uniformity even within one country. The general opinion therefore seems to be that some form of 'consistent' interpretation,¹² varying degrees of similar effects' or the achievement of 'a standard of common discourse' or 'relative uniformity'¹³ is enough to speak of a uniform application of the CISG. This implies that, viewed from the perspective of the drafters of and signatories to the CISG, a relatively low standard of uniformity suffices. This is well reflected in the open-ended provision of art. 7 (1) CISG¹⁴, stating that in the interpretation of the Convention, 'regard is to be had to its international character and to the need to promote uniformity in its application. It is also reflected in the fact that the Convention is seen as a success despite the absence of a court of final appeal that deals with disputes on the CISG, or of an official administrative body that gives guidelines on how to interpret its provisions. The methods that are used in interpreting the CISG are in line with this not too ambitious desire to have only relative uniformity. The court is not allowed to rely on some national law, but should engage in a truly autonomous interpretation. This duty includes the need to take into account foreign court decisions on the interpretation of the provisions, even though it is disputed how

¹² Eric Bergsten, *Methodological Problems in the Drafting of the CISG*, in: André Janssen & Olaf Meyer (eds.), *CISG Methodology*, Munich 2009, 5-31, at 31.

¹³ Larry A. DiMatteo, Lucien J. Dhooge et al, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge 2005, 2. Also see John Honnold, *The Sales Convention in Action – Uniform International Words: Uniform Application?*, *Journal of Law and Commerce* 8 (1988), 207.

¹⁴ Article 7 of CISG (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.

to qualify this comparative inspiration. It seems to go too far to qualify this as a form of binding precedent. Various databases and soft law-principles ¹⁵ will help the court in reaching some level of convergence. Despite these mechanisms, the interesting question remains to what extent a 'homeward trend can really be avoided. The CISG uses many open-ended terms that do not particularly qualify for one uniform interpretation. In my view, the importance of the question to what extent the CISG can indeed be uniformly applied is limited. This is because I do not believe that the ultimate test is whether the CISG creates a uniform regime, but it is as we saw in that section (The relationship between cross-border trade and uniform laws) whether it promotes the development of international trade. It was already seen that these two are not necessarily the same thing.

A second perceived obstacle of the CISG is that parties often exclude it. A survey by Koehler shows that 70,8% of parties in the United States and 72,2% of parties in Germany routinely exclude the applicability of the CISG. ¹⁶The general conditions of branch organizations such as the Federation of Oils, Seeds, and Fats Associations (FOSFA) and the Grain and Feed Trade Association (GAFTA) contain provisions to the same effect. An older survey among some large companies in the Netherlands demonstrated that most of them exclude the applicability of the CISG as well. This same survey showed that smaller Dutch companies often do not exclude the CISG, unless legal advice was sought by one of the companies involved. Once they found that the CISG might be applicable, they still decided to exclude it. The usual arguments given for this opt-out are that, in case parties are aware of the substantive rules of the CISG, they fear that it leaves too much room for varying interpretations. In case the content is unknown to the parties,

¹⁵ 2 In particular the UNIDROIT Principles of International Commercial Contracts can provide context to the CISG-provisions

¹⁶ www.cisg.law.pace.edu/cisg/biblio/koehler.html

they are reluctant to invest the time and money to change this. It is surprising that this opt-out is often seen as problematic in the academic literature on the CISG. The special characteristic of the Convention is that it creates a uniform regime that does not replace existing national regimes on sale of goods, but only adds an extra option for parties that feel their interests are served better by the uniform sales regime than by some national law. However, this does not mean that it is wrong if parties decide to opt out of this regime. To the contrary: in every case in which a party is aware of the existence of the CISG and its potential applicability to the contract, there is an empirical test of its usefulness. The recurrent theme is apparently that we should not confuse the need for uniformity with the interests of parties or the wish to promote international trade: the one does not follow from the other.

The third problem is the incompleteness of the regime created by the CISG. This incompleteness manifests itself in at least two different ways. The first has to do with the sales regime of the CISG itself. It is well known that the Convention governs only the formation of the contract of sale and the rights and obligations of the parties (including contractual remedies). Art. 4 CISG¹⁷ leaves out questions of validity of the contract and the effect of the contract on the property in the goods sold. The second reason for incompleteness is that the commercial parties the CISG aims to serve are usually not only interested in a suitable contract law regime (or private law regime in general), but also in other fields such as procedural law and tax law. The problem therefore is that the CISG regime is not exclusively applicable to the party relationship. Gaps will have to be filled by the domestic law that is applicable in accordance

¹⁷ Article 4 of CISG (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.

with the rules on conflict of laws. I believe this is one of the main reasons why parties exclude the CISG: they prefer the imperfectness of one whole national jurisdiction to the situation in which their rights and obligations are governed by fragments of different origin, no matter how high the quality of these fragments may be.

The three problems identified in the above all deal with a specific aspect of the CISG: the lack of uniformity in application, the exclusion by contracting parties and the incompleteness of the legal regime it creates. All three aspects are in my view related to an important characteristic of uniform legal regimes created by way of international conventions: they do not create a full-fledged and self-standing jurisdiction. For the moment, the CISG provides primarily a text without a developed system of case law, without one highest court and without surrounding rules for related areas of law, including enforcement. This does not downplay the importance of the CISG from the viewpoint of States interested in creating a harmonized regime. However, it does suggest that the CISG is problematic from the viewpoint of commercial parties. It is well known that the primary thing that these parties want to achieve is certainty, allowing them to calculate the costs and benefits of a certain transaction. It can be the law that provides such certainty, but it can also be some other trust-creating device. If parties can choose between a national jurisdiction and the CISG, and have full information about the substantive rules in each of these regimes, they are not likely to choose for the latter. Schanze recently put it like this:

‘For the case of non-delivery of marketable goods in kind, which is probably the most relevant case in international sales, German law answers: “specific performance”, English law: “money damages”, the CISG “maybe either”.’

This view of the CISG explains why a high percentage of parties exclude it. The case law on the CISG is in this respect

also telling. Relatively few cases deal with matters of substantive law and many are about the very applicability of the CISG. Questions like whether the CISG was excluded or not, whether there was a contract of sale and whether the contract could be qualified as an international and commercial one seem to play a large role. This is not a sign of a shared conviction in the business world that the CISG is the best possible regime to be applicable to the contract. Two important consequences follow from this analysis. The first is an optimistic one: the more the CISG is not excluded by parties, and the more case law is produced by the courts, the more legal certainty it can provide. This will lead to an increase of parties not excluding the uniform sales regime, which will again lead to more case law and as a consequence to more legal certainty. We already see some signs of this 'network effect. Viewed this way, it could just be a matter of time until the CISG is also successful in view of the parties' interests. The second consequence is that as long as the CISG is an optional set of rules, it will have to compete with national jurisdictions. In so far as commercial parties are indeed primarily after a legal regime that provides them with as much legal certainty as possible, our hopes should not be too high that the CISG will in fact be chosen more often. One could of course reason that the CISG offers additional advantages for parties, such as that it is a 'neutral law' or that it is better geared towards the interests of commercial parties but I do not believe that these reasons are convincing for most commercial parties.

CONCLUSION

The obstacles identified in the above are all problems of CISG. However, the main point of this contribution is that these are only problems if one considers the establishment of a uniform law as the only possible way in which international trade can be promoted. This is, however, not the case. If the above

analysis is right, it would be much more important to allow parties to make the national jurisdiction of their choice applicable to the contract. Although this possibility already exists in most countries for the type of relationship that the CISG aims to cover, it would be good to reflect further upon this alternative to a uniform sales regime. The great value of the CISG is then that it provides commercial parties with a common frame of reference: they are able to compare the solutions of the CISG with various national jurisdictions and to act upon this.

BIBLIOGRAPHY

- 1- Adopted in Vienna on 11 April 1980, 1489 UNTS 3, available at www.cisg.law.pace.edu
- 2- Cf. Joseph Lookofsky, Loose ends and contorts in international sales: problems in the harmonization of private law rules, *American Journal of Comparative Law*.
- 3- Christian Von Bar & Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, 6 vols., München 2009.
- 4- Adopted in 2010; *Journal Officiel OHADA* 15 (2011), No. 23, available through <www.droitafrique.com>.
- 5- www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_chile.pdf
- 6- Cf. Ingeborg Schwenzer & Pascal Hachem, *The CISG – Successes and Pitfalls*, *American Journal of Comparative Law* 57 (2009), 457-478.
- 7- *European Journal of Law and Economics* 2011, with contributions by Smits, Low, O'Hara, Gomez & Ganuza and Wagner, available through

<<http://www.springerlink.com/content/261142tm11514620>>

- 8- Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, Louisiana Law Review 61 (2001), 473; Daniela de Lukowicz, *Divergenzen in der Rechtsprechung zum CISG: Auf dem Weg zu einer einheitlichen Auslegung und Anwendung?*, Bern 2001; the various contributions to Franco Ferrari (ed.), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences*, Munich 2003.
- 9- Eric Bergsten, *Methodological Problems in the Drafting of the CISG*, in: André Janssen Olaf Meyer (eds.), *CISG Methodology*, Munich 2009.
- 10- Larry A. DiMatteo, Lucien J. Dhooge et al, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge 2005, 2. Also see John Honnold, *The Sales Convention in Action – Uniform International Words: Uniform Application?*, Journal of Law and Commerce 8 (1988).
- 11- www.cisg.law.pace.edu/cisg/biblio/koehler.html