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Roland Loewe

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PRESENTATION AT THE 1997 WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT ON THE CISG

THE SPHERE OF APPLICATION OF THE UNITED NATIONS SALES CONVENTION

Roland Loewe†

INTRODUCTION

It is a pleasure for me to speak before you on the sphere of application of the Sales Convention. Even if this pleasure is a little diminished because my working languages always have been German and French and not English, but I am sure that you all will help me. My exercise will be less hard because you have all worked on the Sales Convention and I fear that in certain aspects you know more about it than I. All that I can do is to try a coherent summary of the sphere of application of the CISG and perhaps provide some supplementary information on *its history and background*. *For doing this I have not consulted books and articles by learned professors. I have only trusted my memory.* Since 1962 I was involved in the development of this Convention. We are all jurists and you know that memory of testimonies are always subjective and often wrong, so it may happen that learned professors know better than ourselves what we have done and why we have done so. In this case, please forgive me.

† Professor Loewe was the Chairperson of the first committee of the Vienna Diplomatic Conference at which the CISG was promulgated. He was also a delegate at the 1964 Diplomatic Conference at which the antecedents of the CISG was developed: The Hague Sales Convention (ULIS) and the Hague Formation Convention (ULF).

DIMENSIONS OF THE SALES CONVENTION

Everything in this world has three dimensions. It is the same for the Sales Convention. There is a material sphere of application, a geographical sphere of application and a temporal sphere of application.

TEMPORAL SPHERE OF APPLICATION

The easiest is the temporal sphere of application of the Convention. It is not retroactive. This is a principle coming from penal law. No one should be punished if he has done something that was not punishable at the time. In civilized countries this principle is extended to all branches of law because this makes foreseeable the consequences of a certain behavior. The principle of no retroactivity corresponds also to international treaty practice. But from all principles there are exceptions. The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 is not limited to awards rendered before its entry into force. You will believe that this question is meaningless in respect of a 39 year old instrument and you are right, but not entirely. Even after 39 years, frequently new states accede to the New York Convention and all member states are bound to enforce all applicable foreign arbitral awards — including awards which were not enforceable when they were rendered. Beyond that, the New York Convention permits two reservations: it may be limited to commercial matters, and it may be limited to awards rendered in member states. These reservations can be withdrawn at any moment but if a country withdraws such a reservation, it is bound to enforce old foreign awards which it would not have recognized before the withdrawal. Let us come back to our subject.

Parts II and III of our Convention apply when the offer is made on or after the date when the Convention enters into force in respect of the two Contracting States of the places of business of seller and buyer. Or, in the case of Article 1 par. 1 (b), a rule which we will consider a little later, of the State whose rules of international private law lead to the application of the law of a Contracting State. Part III, the sales provisions, but not the formation provisions of Part II, apply already if the offer was made before this date and the conclusion of the contract takes place thereafter. Article 23 states that the contract is concluded when

the acceptance of the offer became effective, and Article 18 (2) states that this moment is when the indication of assent reaches the offeree. There are exceptions for late or modified acceptance but it would lead us too far from our subject, which is sphere of application, if we try to go into these details.

MATERIAL SPHERE OF APPLICATION

What is a sale? The Convention does not answer this question. We must consider common sense. A sale is an exchange of goods against money or at least against things which are accepted by everyone instead of or in replacement of money. For the moment I am not able to indicate such a means of payment. The times of emergency rations seem to be passed. I remember that in Yugoslavia before World War II, a matchbox was given instead of half a dinar when one had no coins. The same is done often in Italy with coins for telephones and perhaps elsewhere with tokens for subways. These are certainly not examples to be taken in account. Exchange of goods against other goods is barter and not a sale. Exchange of goods against services in Roman law *do ut facias, facto ut des* is also considered as a barter or as a transaction *sui generis*, but in no event as a sale.

What are goods? Here one needs to take into account the history of the Convention. The early drafts in the 30s, 50s, and 60s were only in French. They identify their purpose as regulating the international sale of *objets mobiliers corporels* – translated literally as movable physical things. For the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS), the word “goods” has been used in the English version but in the French text, *objets mobiliers corporels* was maintained. It was at the New York Conference on the 1974 Prescription Convention that the French text also was simplified to *marchandises* without any intention to change its meaning. Goods in the sense of the 1980 Sales Convention are all things which have volume and can be moved. It is sufficient that they became movable at the occasion of the sale. Example given, fruit which is still on the tree. German speaking colleagues may be interested to know that for Germany, the German version of ULIS spoke only about movable things because in the definition of the German civil code all things are physical. By way of contrast, the Austrian civil code qualifies also rights as things of

not physical nature. The Austrian translation followed entirely the French objets mobiliers corporels as bewegliche Körperliche Sachen.

Not all sales of goods are covered materially by the Convention. Article 2 contains a list of six exceptions. It is not possible in our short time to give you details on the reasons of all these exceptions. In general, they are motivated by the impossibility to know really if the sale is of a national or of an international character, or by the strong link between the sale and the territory where the sale takes place, or by the possible conflicts with other international instruments, or finally by the nature of the operation which is more an exchange or a barter than a sale.

The first of the mentioned exceptions concerns mainly consumer sales. Imagine the case, Mrs. Ökzan goes to a supermarket in Vienna and she takes potatoes, celery, milk and paper for the toilet and then she comes to pay.

The girl at the market says it comes to ATS 64.50.

Then the girl hesitates, looks to Mrs. Ökzan, asks: "Are you Austrian?"

Mrs. Ökzan: "No. I am Turkish."

G: "But you live in Vienna?"

Mrs. Ökzan: "No I don't live in Vienna. I live in Bayromoglu. I visit my son only for a fortnight. He works in Vienna."

G: "But where is Bayromoglu."

Mrs. Ökzan says it's near Izmit

G: "And where is Izmir?"

Mrs. Ökzan: "Izmit is a town approximately 100 km east of Istanbul but it's not Izmir, it's another town Izmit."

Then the girl says: "I must take notice of this all because the jurists of the supermarket will then think over if the Sales Convention applies because in case of something wrong with your potatoes, with your milk, with your celery or with your paper, the market should be liable not in conformity to Austrian law but to the Vienna Convention."

So, contrary to the Hague Convention of 1964 it was absolutely necessary to exclude consumer sales.

Sea-going ships and vessels for inland navigation of a certain size should be registered, sometimes also aircraft. There is a world-wide convention on the registration of sea-going ships and a European convention for inland navigation vessels. Un-

fortunately, these instruments are not accepted by all relevant states and do not harmonize the conditions for registration, but only the consequences. Nevertheless, property and other real rights cannot be acquired otherwise than by registration. Such rights must be in conformity with the law of the state of the registration. The authors of the Sales Convention had three options:

- (1) subject ships and vessels and eventually aircraft to the Convention at the risk that the buyer cannot obtain ownership;
- (2) exclude these goods entirely;
- (3) exclude only registered ships and vessels.

There are differences between the registration laws concerning the size and other qualifications and information asked of the owner in respect of nationality, domicile, residence and other matters. What to do with ships or vessels that should be registered but are not? What to do with those that should be registered in two or more states? The UNCITRAL Working Group oscillated between solutions (1) and (2). Finally, the Diplomatic Conference decided to exclude these goods entirely. In cases where jurists have to choose between alternatives and, after long consideration, one approach is chosen by a relatively large assembly, it is quite normal that a new (smaller) group of other lawyers, considering the same issue, will come to a contrary conclusion. You can find many examples of this in the UNIDROIT Principles, but in our specific case also at the Hague Conference of International Private Law, the 1985 Convention on the Law Applicable to Contracts for the International Sale of Goods (an instrument without any chance of success). Its Article 3 expressly includes ships, vessels, boats, Hovercraft and aircraft. At part 33 of the Explanatory Report to this convention, Prof. von Mehren does not give any convincing or even understandable argument for this dissenting opinion of the Hague Conference.

A very similar situation exists for electricity. As I have explained the word "goods" was considered as a synonym for *objets mobiliers corporels*: goods having a certain volume. Gas is included in the CISG, electricity is not. It was not necessary in the Vienna Convention to explicitly exclude the sale of electricity from the scope of the application. It was done more or

less to avoid insecurity and discussion. The said Hague Conference includes electricity for the same, or if you like, the opposite reasons.

Mainly for two types of contracts it may be disputed if they are contracts for the sale of goods or contracts for services. The first type, the client supplies materials, the manufacturer produces the goods. If the client supplies all of the materials, it is undoubtedly a contract for services. If the client supplies no material, the transaction must be treated as a sale of goods. Where is the limit? Article 3 par. 1 of the Sales Convention states that it is not a sale of goods if the client supplies a "substantial part" of the materials. This language is a bit vague. "Substantial part" must not be the preponderant or the more valuable part, but the value of the materials furnished by the client certainly play a role. On the other side, the value of the service of the production itself is outside the consideration. One should wait to have decisions which could give guidelines.

Article 3 (2), which contains the phrase "preponderant part," discusses the situation in which the same party furnishes goods and supplies connected services. These situations are very frequent when factories are to be equipped with machinery and made ready to work. In this situation simply the more valuable part of the goods or services is decisive. In these cases, the authors of the Vienna Sales Convention intended to avoid a dualism of regimes where one part of the contract should have been submitted to the Convention but not the other. In reality, nevertheless, this may create difficulties if one cannot find in the Vienna Sales Convention a solution for a typical question concerning service contracts. The first part of Article 7 par. 2 may not give an answer and one can be forced to apply to this question national law which means that as a result a dualism of regimes cannot be avoided. It is not my intention to speak in connection with the scope of application on contracting in or contracting out questions. But where it may be uncertain if the Convention will apply because there may be doubts in regard to the importance of furnished material or about the "preponderant part" of goods or services, parties should foresee in their contract the applicability or non-applicability of the Convention.

Finally, the Convention applies to all kinds of damages which parties may cause each other but not to liability for death

or personal injury caused by the goods. In the countries of the European Union a directive has created common standards on products liability. Probably the same has happened elsewhere. The Sales Convention had no intention to enter in conflict with these rules.

GEOGRAPHIC SPHERE OF APPLICATION

Last but not least, the geographical dimension. In the early 1930s when work on unification of sales law began, the world was quite different. International trade was not at all so significant as it is in our days. We in Austria imported some fruits from certain countries — oranges, bananas — but the rest was homemade. It was foreseeable that with better means of transport this situation would be changed. At this time international private law was not at all unified, even in most European states it was not codified. It was only codified in Czechoslovakia, Poland and Yugoslavia but for quite different purposes. These countries were created after the 1st World War in territories in which German, Austrian, Hungarian and Russian law was in effect. There was a need for domestic law rules of conflict which at the beginning constitutes not yet international but inter-local private law. And these rules later on could be used for international purposes. As international private law was uncertain and speculative a young organization, namely, the Institute for Unification of Private Law (UNIDROIT) in Rome, decided to produce a uniform law on international sales. The objective was that all national sales should be regulated by national laws, and all international sales should be regulated by one and the same unified international law. This set of rules should be indifferent to adherence of the states between which the sale took place. For this purpose, it was necessary to define the geographic dimensions of the international sales contract. Three alternative criteria were foreseen:

- (1) the carriage of the goods from one state to another,
- (2) offer and acceptance have been affected in different states,
- (3) delivery is to be made in a state different than those of offer and acceptance.

This definition is contained in the Uniform Law on the International Sale of Goods (ULIS) done at The Hague in 1964,

but states do not want a universal law applicable to transactions between non-members. The 1964 Diplomatic Conference was forced to permit three reservations concerning the geographical sphere of application of ULIS: application only if both parties have their places of business in two different member states; application only if rules of international private law lead to the law of a member state; application only if the parties agree to it. This last so-called British reservation reduces the Uniform Law to a set of rules which — more or less exceptionally — can be stipulated by the parties.

At the 1980 Vienna Diplomatic Conference, the British delegation again sought to obtain their reservation; this time, without success. This is a reason why Great Britain is still not a member of the Vienna Sales Convention. Eight or nine countries ratified ULIS but since they made use of different reservations to the geographical sphere of application, it was not so easy to establish in a given case that ULIS was to apply or not. This was one of the major criticisms of ULIS and an obstacle for many other states to accept it. At the second meeting of the UNCITRAL Working Group on the International Sales Convention, the universality principle was replaced by the Article 1 par. 1(a); that is to say, by the application of the Convention only if the places of business of the parties are in two different member states. I must confess that at this meeting I was opposed to such a radical diminution of the geographical sphere of application. My friends, the Belgium and the Egyptian delegates and I tried to propose common intermediary solutions but they were not accepted by the majority. As I think now, the majority was right in selecting this approach and abandoning unsatisfactory criteria such as the movement of goods over borders, the location of the offer and the acceptance or delivery in different states.

Article 10 explains which place is to be taken into consideration if a party had more than one place of business or if it has no place of business at all. Article 10 poses no major problem. The Convention is the law for international sales between parties from member states. If the Convention is not applicable because one party or both parties have their places of business outside the member states, national private law rules determine which law applies. It may be that the law indicated by the rules of conflict of laws is that of a member state. Then the

question arises if it should be the set of rules for internal or for international commercial operations. The authors of the Convention were of the opinion that it should be the latter and this for several reasons: The Convention is published and known as well as the national sales law. The Convention is especially conceived for international affairs. For an exporter or importer, the Convention will be a set of rules which he is accustomed to using. No party should be confronted with unknown or difficult to discover rules of civil or commercial law. Placing a foreigner in a worse situation because of their limited understanding of the applicable law is unacceptable. These are the main reasons for Article 1(1)(b) which makes the Convention also applicable where the rules of private international law lead to the application of the law of a Contracting State including the law of the forum. Nevertheless a reservation to adopt the Convention without its Article 1(1)(b) was requested and admitted. Out of more than 40 member states only China, Czech Republic, Slovak Republic and the U.S. have made use of this reservation.

Germany has declared that it would not apply Article 1(1)(b) in respect of any state that had made a declaration that that state would not apply Article 1(1)(b). This is perfectly permissible because a state is allowed to make use of a permitted reservation only partially. Following the rules of German international private law, the effect of the German restricted reservation is that if Article 1(1)(a) does not apply but the sale would fall under German national law or under the national law of any other Contracting States except China, Czech, Slovak or U.S. law, the Convention will apply. In the cases of these four states, German courts must apply the rule of these states for internal sales.

There are still other, more general possibilities of reservations affecting the sphere of application: countries are allowed to accept only Parts I, III and IV; or Parts I, II and IV of the Convention (Article 92). The Scandinavian States have used the first of these faculties and have, by that, excluded the rules on formation of the contract. They also declared that the Convention in its entirety will not be applied to sales where all parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden. Such a restriction of geographic sphere of application is also permitted (Article 90), but only insofar as

these countries have entered into an agreement that contains certain provisions on international sales, which seems to be the case.

These reservations are a little regrettable, but do not materially weaken the worldwide effectiveness of the UN Sales Convention which represents the greatest realization until now in the field of international unification of private law.