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FURTHERING THE UNIFORM APPLICATION OF THE CISG: SOURCES OF LAW ON THE INTERNET

Camilla Baasch Andersen†

The 1980 UN Convention on Contracts for the International Sale of Goods ("CISG"),¹ in force for more than 10 years,² is constantly gaining more success as more countries choose to ratify it. It is now in force in 52 countries, whose trade activity accounts for over two thirds of all world trade.³

As those familiar with the CISG are well aware, the Convention is a *uniform* sales law. This goal of uniformity is presented in the preamble, where it is evident that the drafters intended the Convention to be an adoption of uniform rules governing contracts for the international sale of goods in the interest of removing "legal barriers in international trade" and promoting "the development of international trade."⁴ Uniformity applies throughout the Convention by way of Article 7(1),

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¹ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex I, reprinted in 19 I.L.M. 668 [hereinafter CISG].

² The CISG was signed in Vienna in 1980, entered into force a year after the ratification by the tenth member state, and in accordance with Article 99(1), on January 1, 1988. At this time, the CISG is applied in: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, United States of America, Yugoslavia and Zambia.

³ The CISG is now in force in 52 States, as of 8 June 1998, according to the UN Treaty Section. These are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Chile, China (PRC), Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Lithuania, Luxembourg, Mexico, Moldova, Netherlands, New Zealand, Norway, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uzbekistan, Yugoslavia, Zambia, and the USSR (superseded). In 1999 the Convention will enter into force in Greece and Mongolia (January 1, 1999 and February 1, 1999, respectively).

⁴ CISG, *supra* note 1, at Preamble.

which states: "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."⁵

But uniformity does not follow automatically from a proclamation of uniform rules. Uniformity is a difficult goal to achieve, as uniform words do not always ensure uniform results,⁶ especially where a Convention is in effect throughout countries with completely differing social, economic, and cultural backgrounds, and perhaps most significantly, different legal systems. Differences in interpretation and application will arise, as indeed they have in the case of the CISG, in the form of, for example, *faux amis*⁷ or domestic influence on flexible terms, such as "reasonable time."⁸

It is also uncertain what degree of uniformity the Convention strives to achieve. Absolute uniformity would seem to be a utopian goal in light of the kaleidoscope of nations involved. However, when considering the need for predictability in contracts and the goal of the Convention to remove barriers in international trade, then it would be safe to assume that the uniformity of the CISG requires little variation in international practice, and for the provisions of the Convention to be applied similarly, if not identically, throughout the signatory States.

⁵ *Id.* art. 7.

⁶ See John O. Honnold, *The 1980 Sales Convention: Can Uniform Words Give us Uniform Results?* 2 JURIDISK TIDSSKRIFT 3-14 (1990-1991).

⁷ An example of such a conceptually presupposing "false friend" in the realm of the CISG is found in article 47, which has been called the *nachfrist*-rule by the Secretariat in its commentary to the draft convention. See UN DOC A/CONF.97/5. Some German courts have mistakenly equated article 47 with their domestic rule of *nachfrist* in HGB §326, and interpreted the article as a right for the seller and a duty for the buyer, rather than an optional right for the buyer. See, for example, OLG Düsseldorf, February 10, 1994 [6 U 119/93] (UNILEX) regarding the sale of textiles from Italy to Germany, and Landgericht Duisburg, April 17, 1996 [45(19) O 80/94] (UNILEX).

⁸ Article 39 of the CISG, which represents a significant part of international CISG practice, prescribes that the buyer must advise the seller of any non-conformities of the goods within a reasonable time period in order to rely hereupon. The interpretation of "a reasonable time" has varied significantly in practice as well as in theory, and vague domestic trends would seem to be distinguishable. For more information on the subject see Camilla Baasch Andersen, *Reasonable Time in the CISG—Is Article 39 Truly a Uniform Provision?* 1999 REVIEW OF THE CISG (1998).

How, then, is the Convention's uniformity best safeguarded?

As mentioned above, interpretation of Article 7(1) requires consideration of the Convention's goal of uniformity. Scholars and practitioners agree that this provision imparts a duty on the CISG practitioner to look to standards of international practice in the interpretation or determination of the provisions of the Convention.⁹ If standards of practice from other countries are considered when a CISG issue is examined by a domestic practitioner, then that practitioner's decision will be based on international precedents as well as his own evaluation. Furthermore, this approach will be in keeping with the spirit of international uniformity of the Convention. The practitioner need not necessarily follow the international precedent if he considers it incorrect or inapplicable to the case at hand, but there is a duty to take similar cases from international practice into consideration.¹⁰

Nevertheless, references to international practice in reported judgements concerning the CISG are, unfortunately, very rare. Professor Franco Ferrari reported recently,¹¹ that of nearly 300 judgements examined by him,¹² only one took international practice into consideration when considering a CISG

⁹ This is supported by the U.S. Supreme Court in a case concerning the meaning of the term "accident" as used in the Warsaw Convention, wherein the Court stated: "We find the opinions of sister signatories are entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404 (1985). See also Joseph Lookofsky, UFR 1996.139 (in Danish); ALBERT KRITZER, A GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 109; Franco Ferrari, *Specific Topics of the CISG*, 15 J. L. & COM. 1, 1995. "The interpreter must consider 'what others have already done,' i.e. he must consider the decisions rendered by judicial bodies of other Contracting States." *Id.* at 11, with reference to DIETRICH MASKOW, LA VENDITA INTERNAZIONALE, La Convenzione Dell 11 Aprile 1980 (1981).

¹⁰ See FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW (1992). "What matters here is not a prejudicial effect of rulings by foreign courts or arbitral tribunals and not that the decision taken by an organ, which by accident was entrusted first to deal with a specific legal issue, is attached a particularly great importance; rather, the existing material in regard to relevant rulings has to be taken account of when giving the reasons for a decision." *Id.* at 56 (emphasis in original).

¹¹ See Franco Ferrari, *Remarks on the Autonomy and the Uniform Application of the CISG on the Occasion of its Tenth Anniversary*, INTL. CONTRACT ADVISER (1998).

¹² See MICHAEL WILLS, CISG, THE FIRST 300 OR SO DECISIONS (1997).

issue.¹³ Other practitioners have indirectly taken international case law into account by referring to other scholars who have done so.¹⁴ While this is a step in the right direction, it does not fulfil their Article 7(1) duty to look to international precedents. This is so, not only because it is the judgements themselves which should form the precedents and not the scholarly interpretation and commentary, but also because scholars frequently have a greater opportunity to analyze case law from their own domestic legal system (both in terms of availability and linguistic problems) and cannot always present a well rounded picture of international precedents.

In defense of those practitioners who have failed to consider international precedents, there are many problems connected with this duty. The difficulties are related primarily to the limited availability of international practice and the language of the cases. The CISG is practiced in approximately 50 different languages with vastly different alphabets. The practitioners cannot be required to find all existing practice, let alone understand it.

With the arrival of a US Circuit Court of Appeals decision on June 29, 1998,¹⁵ however, the problem would seem well on its way to being, at least partially, solved. The case concerns the issue of whether a court must consider parole evidence in a contract dispute governed by the CISG. When considering Article 8 of the CISG, the Court stated in an *obiter dictum* fashion that the parties had not referred to any international practice, but that the Courts own research had uncovered a database at www.cisg.law.pace.edu, which was a very promising reference

¹³ See Tribunale Civile di Cuneo, January 31, 1996 [45/96] (*Sport D'Hiver di Genevieve Culet v. Ets. Louyes et Fils*), regarding sports clothes delivered in French sizes rather than Italian sizes as agreed, where the judge turned to international case law for precedents on the term "reasonable time" in article 39.

¹⁴ This is mostly evident in those judgements concerning article 39, which favour the "noble month" approach, and refer to Ingeborg Schwenzer, art. 39, in *KOMMENTAR ZUM EINHEITLICHEN UN-KAURECHT* 357 (Peter Schlechtriem ed., 2d ed., Munich 1995) and her assessment of an international compromise of domestic determinations of "reasonable time." See, e.g., Obergericht Kanton Luzern, January 8, 1997 [11 95 123/357], Amtsgericht Augsburg, January 29, 1996 [11 C 4004/95], and Bundesgerichtshof, March 8, 1995 [VIII ZR 159/94].

¹⁵ *MCC Marble Ceramic v. Ceramica Nuova D'agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998).

on international CISG precedents, but nonetheless contained nothing addressing the subject of parole evidence.¹⁶

Given this shining example of thorough research, this judgment represents a milestone in legal practice on two frontiers: First, it cites an Internet database as an official reference to a source of law. The citation alone is a significant development. Well developed Internet databases should not be restricted for the use of scholars since they offer a convenient and comprehensive source for practitioners as well.

Second, it complies most satisfactorily with the duty in Article 7 to look to international practice. The judgment reflects investigation of both standards of international practice as well as related precedents. This result was achieved by utilizing one of the most comprehensive sources of reported international CISG practice currently available. By doing so, the judgment was in accordance with reported practice, and moreover, the applicable CISG provision was treated in a more uniform manner.

The database the *McMarble* decision refers to is the CISG database at the Institute of International Commercial Law at the Pace University School of Law. The database is an extremely informative site for those interested in the CISG, as well as an important tool for individuals researching the Convention in depth. It contains essays and bibliographies on the CISG, as well as lists of contracting states and their reservations. But most importantly for the practitioner, the site contains a schedule of cases from different Member States and search capability for pinpointing particular issues and CISG provisions. With its links to the German CISG database at <http://www.jura.uni-freiburg.de/ipr1/cisg> and the CISG-France database at <http://www.jura.uni-sb.de/FB/LS/witz/cisg.htm>, it is also possible to access the original language text of many decisions.

The database has been well received, and it is therefore not surprising that it earned recognition as being the first Website used as a source in a US international commercial law judgment.¹⁷ In addition to this, work is currently under way to open

¹⁶ See *id.*

¹⁷ Earlier this year, the Executive Secretary of the Pace Institute for International Commercial Law, Albert Kritzer, received the New York State Bar Association Award for Distinction in International Affairs for his work on the database.

mirror sites in other Member States in their original language,¹⁸ so that cooperation of case law exchange can be reciprocal and not just benefit English-speaking practitioners or scholars.

There are also other databases for CISG practice and information. The UNCITRAL has its own case law database called *Case Law Of UNCITRAL Texts* (CLOUT) which can be found on the Internet at the UNCITRAL Homepage <http://www.un.or.at/uncitral/htm>. Information on loose-leaf services can also be found at this site. A database in Tromsø, Norway at http://ananse.irc.uit.no/trade_law/nav/trade.html is specializing in international trade law, and also contains much information on the CISG, particularly concerning Norway's unique incorporation of the CISG into Norwegian law. In addition to these Internet sites, the Italian National Research Centre for Comparative and Foreign Law Studies has a database of CISG case law called UNILEX compiled by Professor Michael Bonell and published by Transnational Juris. This database is not available on the Internet, but the Centre has an internet site which provides Italian CISG case law and useful CISG information at <http://soi.cnr.it/~crdcs/crdcs/cisg.htm>. This site also contains a link to the UNILEX homepage and enables a visitor to purchase access to the database.

The use of the Internet as a legal tool has been increasing over the years. Scholars have referred to Internet sites in numerous articles and essays,¹⁹ not only for case law reference,

Joel B. Harris, Chair of the International Law & Practice Section of the New York State Bar Association stated: "The value of this resource to attorneys, judges, arbitrators, traders and scholars around the world and its potential for contributing to the development of a truly uniform international law of contracts is self-evident." 2 STATE BAR NEWS, ANNUAL MEETING EDITION, 28 January 1998.

¹⁸ Sites which have already opened include CISG Finland <<http://www.utu.fi/oik/tdk/cisg/cisg.htm>>, CISG Brasil <http://www.cisg.law.pace.edu/galindo-da-fonseca/brasil-uff/>, CISG Spain and Latin America <<http://www.uc3m.es/cisg>> and CISG Japan <<http://www.law.kyushu-u.ac.jp/~sono/cisg/english.htm>>. Patrick Wautelet of Katholieke Universiteit Leuven states that CISG Belgium is imminent, and Albert Kritzer assures that others will follow, including CISG Israel and CISG Iran.

¹⁹ In fact, according to PETER W. MARTIN, INTRODUCTION TO BASIC LEGAL CITATION (1997-98 ed.) (based on the THE BLUEBOOK, A Uniform System of Citation, (16th ed.) (1996)), the American Bar Association approved a resolution in 1996 recommending that courts adopt a uniform public domain citation system "equally effective for printed case reports and for case reports electronically published on

but also for citations to other scholarly writings. There also have been several articles on the subject of legal sources on the Internet, especially in German.²⁰ The European Court of Justice also witnessed a reference to the Internet by an agent for the European Commission. The reference was to the Pace database in the "written observations" lodged by the Commission, and was, in the words of the agent who wrote the observations, made "to show that according to up to date information, a vast proportion of international trade was covered by it and that articles 36, 38 and 60 could serve as a source of inspiration to answer the question posed by the French court."²¹

The use of electronic databases and Internet Websites demonstrates significant progress in providing the most current and comprehensive sources of law related to the CISG resources. Unfortunately, there are still certain limitations related to databases resources. The practice of some CISG states is not reported to any accessible authorities; practice from China or Arab Republics, for instance, is still inaccessible. However, international scholarly co-operation is opening the borders for trans-national practice insight. The Pace database has recently acquired CISG sources from eastern Europe, which previously

computer disks or network services" and laying out several key elements of such a system. See <<http://www.law.cornell.edu/citation/citation.table.html>>, visited July 16, 1998. For examples of Law Reviews citing internet Websites, see Rebecca H. Marek, *Continuity for Transatlantic Commercial Contracts After the Introduction of the Euro*, 66 FORDHAM L. REV. 1985, (1998), which refers to the Pace CISG database repeatedly (notes 167, 172, 181, 237, 243, 244, 246, and 336). See also Daniel Vice, *Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution*, 29 N.Y.U. J. INT'L L. & POL. 577 (1998) (referring to numerous sites concerning the implementation of Biodiversity Treaties).

²⁰ See Thomas Hoeren, *Das Internet für Juristen, eine einföhrung*, 50 NEUEN JURISTISCHES WOCHENSCHRIFT 3295 (1998); Detlef Kröger, *Einföhrung in das Internet für Juristen*, visited October 10, 1998 at <<http://www.jura.uni-osnabrueck.de/ak-inet/Aufsatz.htm>>, Jan Kaestner, *Nutzungsmöglichkeiten des Internets für Juristen*, visited October 27, 1998 at <<http://www.uni-muenster.de/Jura.itm/hoeren/mitarbeiter/kaestner/Jurcom.htm>>.

²¹ Quoted from correspondence with the Agent for the Commission, Mr. Xavier Lewis, who referred to the Pace database in the case of *Concorde v. Captain of the Vessel "Suhadiwarno Panja,"* C-440/97 GIE Groupe, currently pending before the European Court of Justice. The case concerns the interpretation of the 1968 Brussels Convention, and was referred by the French Cour de Cassation. A notice which contains a summary of the questions referred is published in the OFFICIAL JOURNAL, OJ 1998 C 55, 21(20 February 1998).

had been unobtainable, and they are currently being translated and made accessible on the Website.

There can be no doubt that the Internet is an extremely useful tool for legal scholars and practitioners. It is, however, important to keep in mind, that the Internet is constantly changing; sites and materials are regularly added or removed. When using the Internet as a citation to sources of law, the dates the sites were visited are highly relevant, as they will indicate the likelihood of the material still being available.

Before the CISG entered into force, the Convention was debated at a conference in Freiburg, Germany in 1987, where Professor John O. Honnold—in anticipation of the problems of uniformity that would arise—stated that he presumed most countries would condition their ratification of the Convention on the establishment of an International Sales Law Centre to monitor the international practice of the convention, as proposed by Professor Rajski of Poland.²² Such a centre was never created, but with the arrival of extensive databases with international networks on the internet, such as the database at the Institute of International Commercial Law at Pace, it is possible for practitioners to comply with their duty in Article 7 and consider international practice in the interest of the uniformity of the Convention. When doing so, they ensure that the Convention is closer still to its goal of uniformity.

²² See *Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice* in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT, 145 (Peter Schlectriem, ed.). Prof. Rajski (Pol.) stressed the need for a centre for research and documentation “in all branches of internationally uniform law,” or, if this is considered too ambitious, the research center could be confined to UNICITRAL activities. *Id.* Under Rajski’s proposal, the Center’s activities would include documentation, research, legal training and expert advice. The writer of the present report endorses the importance of such comparative research. Surely the general entry into force of the Sales Convention should and will stipulate these developments.