Convention on the International Sale of Goods

Summary

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The Vienna UN Convention of 11 April 1980 on the International Sale of Goods (CISG) is in force since more than ten years in more than sixty countries. All Member States of the European Union are parties to CISG except Cyprus, Ireland, Malta, Portugal and the United Kingdom. Apparently these states of the EU have problems with the ratification of CISG. Up to now almost 1000 cases on the CISG have been reported[1] and hence it is worthwhile to make an assessment of potential differences in the interpretation of the Convention. We have chosen five topics for closer scrutiny and these topics were presented by our speakers from five different countries in penetrating papers. There is no need to summarize these papers individually. I shall limit myself to some observations on more general problems which have been touched by all speakers.

1. Differences and Harmony

Unifying law worldwide by international legislation is not an easy task. It took fifty years for finalizing the text of the well accepted draft of the CISG if the efforts of UNIDROIT to draft the preceeding Hague Uniform Law of 1 July 1964 on the International Sale of Goods is also qualified as a step towards unifying the law of international sales by UNCITRAL[2]. But it is even

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[1] *Ulrich Magnus*, Das UN-Kaufrecht – aktuelle Entwicklungen und Rechtspechungspraxis: ZEuP 10 (2002) 523–541 (524).

[2] UNIDROIT, founded in 1926, started to work on the law of international sales in 1929 according to the decision of the Directing Council of 1929 (*Rabel*, Internationales Institut für die Vereinheitlichung des Privatrechts in Rom: RabelsZ 3 [1929] 402–406 [405]). *Ernst Rabel*, the first director of the Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht and member of the Directing Council of UNIDROIT, had suggested to assume this research; cp. the paper submitted in 1929 to UNIDROIT: *Ernst Rabel*, Ob-

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harder to maintain uniformity as soon as the CISG entered into force and national courts and arbitration tribunals have to apply CISG without guiding precedents of a supranational court. National courts have to strive for uniformity by consulting case law of the contracting states and by consulting a vast number of books and articles on CISG. Therefore we wanted to know whether these efforts to achieve uniform application of CISG were successful.

There are at least three types of rules with different problems for uniform interpretation: hard and fast rules, provisions granting a certain degree of discretion and rules for problems without explicit answers given by CISG.

a) Hard and fast rules

Every international draftsperson tries to use plain language, to avoid terms and concepts which may be understood differently in the states parties and to formulate rules as precisely as possible. Also UNCITRAL tried to achieve this ideal[3]. In addition to this art. 7(1) CISG urges that "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". It is interesting to observe that in many cases this goal has been achieved thanks to the various tools of information about cases from many jurisdictions and about scholarly writings. But there are also remarkable differences in interpretation of rather plain provisions. One example is art. 6 concerning the exclusion of the application of the Convention by the parties[4]. But also art. 25 CISG defining the term "fundamental breach of contract" created problems because in most civil law countries this type of breach of contract was unknown[5].

servations sur l'utilité d'une unification du droit de la vente au point de vue des besoins du commerce international: RabelsZ 22 (1957) 117–123 (cited: Observations). The first draft of a uniform law (text in: *Rabel*, Das Recht des Warenkaufs II [1958] 374) was finished in 1935. Cp. *Rabel*, Der Entwurf eines Einheitlichen Kaufgesetzes: RabelsZ 9 (1935) 1–79 and 339–363. A special commission, appointed in 1952, revised this draft and submitted it to the Hague Conference on the Unification of Sales Law which opened for signature the Uniform Law on the International Sale of Goods in 1964 (BGBl. 1973 I 856; RabelsZ 29 [1965] 171). This Uniform Law was only ratified by nine states (Belgium, Gambia, Germany, Israel, Italy, Luxemburg, Netherlands, San Marino, United Kingdom). UNCITRAL, founded in 1966, started to work on a new convention in 1968. Cp. *Herber*, Die Arbeiten des Ausschusses der Vereinten Nationen für internationales Handelsrecht (UNCITRAL): RIW/AWD 1974, 577–584, and 1976, 125–133, and 1977, 314–320; *Ulrich Huber*, Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge: RabelsZ 43 (1979) 413–526.

[3] *John O. Honnold*, Uniform Law for International Sales under the 1980 United Nations Convention[3] (1999) Art. 7 CISG No. 87.

[4] *Daan Dokter*, supra p. [Nr. 4ff.].

[5] *Gerhard Lubbe*, supra p. [No. 2ff.].

b) Rules with some discretionary elements

International legislation has to be flexible for at least two reasons. Gaps because of disagreement of the delegates should be avoided and international instruments regulating international commercial activities have to pay regard to unexpected and unforeseeable circumstances in different countries and different continents. CISG accepted these requirements and embodied several discretionary elements in many provisions. We discussed some of them, especially the arts. 39 and 79 CISG. In art. 39(1) "notice … specifying the nature of the lack of conformity [has to be given] within a *reasonable time*" and according to art. 79(1) "a party is not liable for failure to perform it he proves that the failure was due to an impediment beyond his control and that he could not *reasonably* be expected to have taken the impediment into account". Because of these discretionary elements it is not surprising that the time limit of art. 39(1) has been fixed differently[6] and that the predictability of frustrating impediments could be interpreted differently under the *force majeur* - clause of art. 79 CISG[7]. In such cases courts are allowed to exercise their discretion and to deviate from precedents of other jurisdictions for good reasons.

c) Gaps in CISG

Not all questions concerning international contracts for the sale of goods have been settled by the Convention. According to art. 7(2) they have to be settled "in conformity with the general principles on which it [the Convention] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". The rate of interest to be paid under art. 78 CISG has not been fixed by the Diplomatic Conference and therefore has to fixed according to art. 7(2). Needless to say that the answers to this question of rate of interest are not unanimous[8].

With respect to the burden of proof a general principle of CISG may be formulated like this:

The burden of proving an alleged fact rests on the party who bases his claim on that fact[9].

2. Reasons for different results

There is no disagreement that the Convention has to be interpreted autonomously that is an independent construction detached from national peculiarities of interpretation of statutory rules. And yet there are different results

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[6] *Franco Ferrari*, supra p. [IV].

[7] *Peter Winship*, supra p. [II].

[8] *Florian Faust*, supra [B II].

[9] *Ferrari*, supra [n. 22ff.]; *Dokter*, supra [Nr. 7].

in application of the same CISG provisions in different courts. Especially three reasons are responsible for these divergencies.

a) Rules of civil procedure

CISG did not unify the law of civil procedure. Therefore it may happen that different rules of civil procedure may influence the answer to the same question raised in different Member States. This becomes very clear in cases concerning art. 6 and the problem of exclusion of CISG altogether. Under the principle of iura novit curia the court seized has to make up its mind whether the parties' pleadings based on national sales law amounts to an implied exclusion of the Convention whereas under the opposite rule the court has to decide this question only if explicitly raised a party and asking for the application of CISG[10]. Such differences and divergencies are unavoidable and must be borne under the different rule of civil procedure governing in the Member States.

b) Differences based on CISG

It would be very unusual if all courts agreed on all aspects of construction of CISG provisions. As with any instrument we have to face different interpretations until time has come when important questions will have been settled by convincing precedents followed by courts in important Member States. As soon as case law increases the courts' discretion will be limited for the same situation arising under the same or similar circumstances. But even if there is no discretionary element to be excercised, the debate concerning unsettled questions of law (e.g. the rate of interest) will contribute to solutions based either on a common minimum (e.g. rate of interest had to be fixed by the national law governing the contract under the conflicts rules of the forum state) or on the parties' stipulations discarding any uncertainties under the Convention (e.g. the contracting parties may directly fix the rate of interest or at least select the law governing the rate of interest).

c) Differences based on national law

It sometimes happens that national courts forget to interprete CISG autonomously and take refuge to national principles of construction. This, of course, is a mortal sin to be punished by condemning such decisions to an inferno section of CLOUT (Case Law on UNCITRAL Texts). Fortunately there are only very few deviations from the correct way to achieve uniform

[10] *Dokter*, supra [Nr. 6 und 12].

interpretation of CISG and it is hoped that the publication of case law in several accessible languages will minimize the cases going astray.

3. Retrospect and Prospect

75 years ago when UNIDROIT decided in 1929 to start research on a convention unifying substantive law of sale of goods *Ernst Rabel* (1874–1955) finished his observations on the need to unify sales law with the words: "Au reste, il ne faut pas oublier le but suprême de nos efforts: il est idéaliste. Nous cherchons à ouvrir une voie au droit mondial des obligations tout entier. Cette œuvre est lente, mais les dévouements qui lui seront consacrés seront puissants en eux-mêmes."[11] The anticipation of the idealist *Ernst Rabel* proved to be realistic. *Rabel*, himself a victim of racial persecution, had to leave the Kaiser-Wilhelm-Institut and Germany. World War II interrupted research and the submission of drafts to a diplomatic conference. Even the first attempt to unify the law of international sale of goods by the Hague Uniform Law failed. In these times of unrest, nationalism and suspicion international cooperation, exchange of ideas and comparative analysis were not met with favour. *Stefan A. Riesenfeld* (1908–1999), also a refugee from Germany, in his reminiscences of *Karl Llewellyn* (1893–1962), the main author of the American Uniform Commercial Code, recalls a conversation he had with *Llewellyn* in 1935: "He mentioned the failure of courses in comparative law and told me never to reveal when I relied on an idea coming from continental Europe, because that would be 'the kiss of death', again reiterating that admonition three times over so that it would sink in as it did."[12] Times have changed now. Today it may become true what *Ernst Rabel*, according to the recollection of *Max Gutzwiller* (1889–1989), the great Swiss scholar, said in October 1954 in an interview asked for by a Swiss radio station: "Er gab der Hoffnung Ausdruck, die *Vente uniforme* ('seine' *vente uniforme*) möchte in Geist, Inhalt und Methode der Auftakt zu einer transnationalen Einheit auf dem Gebiet des Obligationen- und Handelsrechts werden, zu einem neuen 'gemeinen Privatrecht' unserer Tage."[13]

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[11] *Rabel*, Observations (supra n. 2) 123.

[12] *Stefan A. Riesenfeld*, Reminiscences of Karl Llewellyn, in: Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht, Karl N. Llewellyn und seine Bedeutung heute, ed. by *Ulrich Drobnig/Manfred Rehbinder* (1994) 11–16 (14).

[13] *Max Gutzwiller*, Professor Ernst Rabel †: Zeitschrift für Schweizerisches Recht N.F. 74 I (1955) 425–431 (431).