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The practice of excluding the CISG: time for change?

Comment on the limited use of the CISG in private practice (and on why this will increasingly change)*

by Eckart Brödermann,
Dr. iur. (Hamburg), Maître en droit (Paris), LL.M. (Harvard)♦

There is an old peasants' saying in *Friesland*, Germany: "*Wat de Boor nicht kennt, dat freet er nicht.*" - English: "*What the peasant does not know, he does not eat.*" This proverb summarises both (i) the essence of the problem of only limited use of the 1980 Vienna Convention on the International Sale of Goods ("CISG") and/or their explicit exclusion according to Art. 6 CISG and (ii) it explains why this attitude is going to change or, in fact, why it is increasingly changing in view of the CISG's inherent value that it corresponds to a market need.

1. The CISG corresponds to a need in the market

The CISG is the result of worldwide efforts for uniformity in one of the most central areas of international trade law. It corresponds to a need in the business community to have neutral legal instruments available in several languages¹ and ready to use without substantial costs of research on a neutral law. In my international practice out of Hamburg, Germany, I have been sensing this need over and over again. Companies often need a neutral law in view of their lack of market power to impose their own law (this observation applies not only to small and medium size enterprises ("SME") but also to large corporations when they negotiate with other large corporations from other jurisdictions or with a strong, truly independent SME which simply does not accept the imposition of any law). Similarly, companies selling to many different markets or, in particular, to Europe need a tool to cope with the entire European market in a proper form avoiding thereby, as much as possible, the exposure to approximately 30 different legal orders within and adjacent to the European Community.² Incidentally, it is this same need for uniformity which also inspires to use the *UNIDROIT Principles (2004)*³ when an international contract covers more

* The spoken version will be binding. Depending on the situation, the spoken version may be restricted to parts of the observations prepared hereinafter.

♦ The official version of the CISG is equally valid and available in the six United Nations languages Arabian, Chinese, English, French, Russian and Spanish, see e.g. www.uncitral.org. This website also contains the CLOUT database which is a collection of case law on cases falling under the scope of the Convention growing steadily. Besides this official website content, the CISG is available in several other languages on different websites on international trade. These translated versions – even though not binding – give the chance to contracting parties from all over the world to read the text of the Convention in their mother language and thus feel comfortable when applying it to their contract.

² Details, important as they are, such as the impossibility to avoid the application of local national mandatory law (e.g. as a result of the application of Art. 7 II of the 1980 *Rome Convention on the law applicable to contractual obligations* or correlating provisions in Art. 8 of the future *Rome I regulation on the law applicable to contractual obligations*) need to be left aside for the purposes of this comment. These questions arise irrespective of the choice of law.

³ See www.unidroit.info.

than just issues of sale⁴, or which justifies the efforts of the European Commission and the European Parliament to work on a neutral optional instrument within the project of a *Common Frame of Reference* for Europe.⁵

Whenever I talk to clients active in international trade and tell them about the CISG, or as the case may be, the CISG supplemented by the *UNIDROIT Principles (2004)* to the extent that a subject is not covered in the CISG⁶, they are usually convinced by this concept regardless of their nationality or their place of business. Sometimes clients ask for a comparison between the CISG and the provisions on sale in the German Civil Code. Yet, this is rare. As a result, I am using both the CISG and the UNIDROIT Principles quite often when negotiating or drafting a contract. Of course, from an academic and sometimes also practical viewpoint, there may be deficiencies: Some things need to be regulated differently in a given set of circumstances. Some rules in the CISG are the result of a compromise.⁷ In addition, some states like Denmark have made reservations to parts of the CISG, as for example Part II (Contract Formation). However, this is again detail. The mere **sake of known uniformity** is such an asset that it overrides by far such disadvantages as declarations of some countries being member to the Convention regarding matters of form for example.

Further, **in some situations**, a conscious choice for the CISG also is **simply more advantageous** for a client than choosing autonomous national law. For example, under the CISG-regime it is possible to alter some rules as a matter of contract negotiation or adaptation while, under German national law, the correlating rule is mandatory. Such examples in which the CISG provides the 'better law' for a party are rare, but they exist. Thus, in case of a guarantee given by the seller with respect to the quality or performance of the good, Art. 36 para. 2 CISG permits to negotiate nonetheless an overall limitation of liability (e.g. to a maximum amount)⁸, while § 444 of the German Civil Code contains a mandatory prohibition of any such limitation of liability under such circumstances.⁹ As a result, both the non-consideration of the CISG and the standardised exclusion of the CISG may sometimes even amount to malpractice.

But still, a clause that can be found in international contracts quite often, may read, for example: "*This contract is governed by German national law excluding the Vienna Convention on the International Sale of Goods.*"

So the question remains: Why, under these circumstances, do many corporations still explicitly exclude the application of the CISG according to Art. 6 CISG?

⁴ See Brödermann, The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal, *Uniform Law Review* 2006, 749-770.

⁵ See Brödermann, Betrachtungen zur Arbeit am Common Frame of Reference aus der Sicht eines Stakeholders: Der weite Weg zu einem europäischen Vertragsrecht, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2007, 304-323. In the conference on European Contract Law organised on 28 April 2004 by the German Federal Ministry of Justice, the Ministry of Justice of Baden-Württemberg and the Commission it has become apparent that the European Commission continues to concentrate on the creation of such an optional instrument in addition to the preparation of the scientific and (then) the political *Common Frame of Reference*.

⁶ Again, details raised by some academics on the incompatibility between the CISG and the UNIDROIT Principles (see e.g. Herber, "Lex mercatoria" und "Principles" – gefährliche Irrlichter im internationalen Kaufrecht, *IHR* 2003, 1-10 [7f.]) need to be left aside. They can be dealt with in the contract drafting process, if that is sensed to be necessary in special circumstances.

⁷ See e.g. Bonell, European Contract Law and the Development of Contract Law Worldwide (I. 1.), Speech given at the 4th European Jurists' Forum (March 2007) as a Member of the 1980 Conference on the Convention on the International Sale of Goods.

⁸ See e.g. Schwenzler in Schlechtriem/Schwenzler, *Kommentar zum Einheitlichen UN-Kaufrecht-CISG*, 4th edition Munich 2004, Art. 36 note 11.

⁹ The German practice tries to circumvent the prohibition through creative wording of the content of the guarantee, see e.g. D Schmidt, in: Prütting/Wegen/Weinreich *BGB Kommentar* 2nd edition Neuwied 2007, § 444 note 5. The choice of the CISG would enhance the chances in succeeding to limit liability of the seller in a reasonable way.

2. What the peasant does not know, he does not eat

The answer is sometimes ignorance, sometimes fear, sometimes a reluctance to change existing patterns – and be it for lack of time and resources to concentrate on something new.

a) Ignorance

Some lawyers or businessmen are **simply not aware** of the CISG or the *UNIDROIT Principles (2004)*.

- For example, in my arbitration practice, I recently had a Dutch-Russian case without any explicit choice of law. When the arbitration tribunal advised on the applicability of the CISG – both the Netherlands and the Russian Federation are contracting states – it just caused surprise on both parties' sides. This kind of case is typical.
- Similarly, in all situations in which the CISG has to be applied as part of a national law of a party to a contract according to Art. 1 para. 1 lit. b) CISG, this usually surprises lawyers involved in the case. In a (classical) German-English case – the German party being the seller¹⁰ – my reference to the CISG in a mediation session last month prompted the opposing lawyer to indicate opposition also on this point in case we should not settle (which we did). The lawyer representing the English party at the time of the contract negotiation had definitely not seen the issue.

There is an explanation for such ignorance: While the CISG was concluded in 1980, it came into force in many countries around 1990 or later after ratification in the 1980s.¹¹ First court decisions and first books and commentaries followed. The generation of lawyers (including in-house counsels) which had left school by the time, then say 25 years old, is now in its mid-forties and thereby often in charge of giving advice. The CISG has never been a natural part of their education. Without continued legal education in just this area of law, they do not know about the CISG and certainly not about the more hidden way of applicability by virtue of Art. 1 para. 1 lit. b) CISG which brings it into action as a result of the application of private international law.

b) Fear

Many lawyers know only vaguely about the CISG. They do not want to run the risk to give an advice on a set of law as they cannot evaluate the consequences. Even if the CISG is part of the international sales law of their own country, they prefer to choose the national law which they have studied and which they know in and out. They never took the time to concentrate on the CISG. As a consequence, they stay away from it to avoid doing something wrong and / or becoming liable for it: In some cases where the CISG is even better for their party, they may do so nonetheless not even realising that they do not act in favour of their client.

c) Reluctance to change existing patterns

Many companies have made a choice early on to opt out of the CISG as a matter of standard. Often this decision was taken many, many years ago. At the time when the decision was taken it may even have been a logical step: There was no case law on the new convention. In some countries like Germany the old national law then in force was even better for the seller than the CISG (for example, the available remedies were more restricted; there were formal rules for the buyer to secure its rights). Thus a seller-company was well advised to exclude the CISG. This has changed: Today there is ample case law on the

¹⁰ In such circumstances the presumption in Art. 4 para. 1 of the 1980 Rome Convention on the International Sale of Goods respectively in Art. 28 para. 1 of the German Introductory Code to the German Civil Code (which has transformed Art. 4 para. 1 of the 1980 Rome Convention into national German law) leads to German law, which, according to Art. 1 para. 1 lit. b) CISG, includes the CISG at the exclusion of autonomous German national law in the German Civil Code.

¹¹ A detailed list of time of ratification and entry into force in the different countries can be found under http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

CISG available on the internet.¹² There are excellent commentaries in various languages.¹³ Moreover, in Germany, for example, the Civil Code was changed with effect as of 2002. To a large extent, the new German sales law is akin to the CISG¹⁴ or even based on it.¹⁵ In some respects, the new national German law is tougher on the seller than the CISG. Since then, a company may have adopted its standard terms and conditions to comply with the obvious changes in the law. Yet, often a re-evaluation of the exclusion of the CISG was not part of the agenda since 2002.

3. As the peasants are learning about the CISG, they will eat it

During the past 20 years the world has changed dramatically. Each of us and each company is part of a global world, whether we want it or not. Our general mind-frame has become more international: International action is no longer just a field for a small group of specialists. As a result, international means like the CISG which are ready to cope with the effects of globalisation are constantly becoming more and more attractive. Lawyers who learn about the CISG – a legal device with meanwhile a track record of 15 - 20 years – listen more attentively. The next generation of lawyers learns about the Convention at school. At least, the CISG is increasingly becoming part of the international legal education around the globe which the growing Willem C. Vis Moot Court is one of the best examples for. An entire generation of lawyers is emerging which will be knowledgeable about the CISG and open to choose the CISG. This generation knows about the inherent advantages of CISG such as the possibility to use it as a neutral law or to cope with 26 European legal orders at the same time. This generation will have the guts to wipe out unnecessary, fearful exclusion clauses according to Art. 6 CISG as shown before.

In other words: The peasant – the legal profession – increasingly knows about the CISG and is thereby more and more ready to eat it. Let us all do our share in teaching about the CISG so that it becomes known better in the future. And as we do so, let us include the *UNIDROIT Principles (2004)* on this way.

Lisbon/Hamburg, in May 2007

¹² See for example on www.unilex.info, www.cisg-online.ch or www.cisg.law.pace.edu.

¹³ See, e.g., *Bianca/Bonell*, Commentary on the International Sales Law. The 1980 Vienna Sales Convention, Milano 1987; *Honnold*, Uniform Law for International Sales Under the 1980 United Nations Convention, 3rd edition Deventer 1999; *Schlechtriem/Schwenzler*, Commentary on UN Convention on the International Sale of Goods (CISG), Oxford 2005.

¹⁴ One example for this is § 434 German Civil Code, see e. g. *Schmidt*, in: Prütting/Wegen/Weinreich, BGB Kommentar 2nd edition Neuwied 2007, § 434 BGB, Rn. 89.

¹⁵ *Schlechtriem* 10 Jahre CISG – Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts, IHR 2001, 12-18.