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THE CONTRIBUTION OF UNCITRAL TO THE HARMONIZATION OF INTERNATIONAL SALE OF GOODS LAW BESIDES THE CISG*

This article discusses two lesser known UNCITRAL texts on sale of goods law: the Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention) and the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance. It illustrates the importance of the Limitation Convention for regional economic integration, in particular, in Eastern Europe, and makes suggestions for legislative activities relating to this Convention with a view to promoting its use and uniform interpretation. Finally, it argues that technical assist ance in trade law reform may be particularly effective in addressing certain conse quences of globalization, and therefore calls for increased attention of international actors to this field of work.

Keywords: *UNCITRAL. Limitation Convention. Agreed Sum Due upon Fail ure of Performance. Regional economic integration. Technical assistance in trade law reform.*

The United Nations Commission on International Trade Law (UNCITRAL) is the core body in the United Nations system for the modernization and harmonization of international trade law. For more than forty years UNCITRAL has been active as a law-making body, preparing texts covering many of the areas relevant to international trade. While the first efforts of UNCITRAL went towards the preparation of treaties, following the example of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards that foreshadowed the establishment of the Commission, attention was eventually paid also to texts of a less binding na-

* The views expressed herein are those of the author and do not necessarily re flect the views of the United Nations.

ture, which are often considered "soft law" sources. Model laws were thus prepared with a view to complementing conventions by facilitating their uniform application and interpretation; later, legislative guides and similar texts were also drafted, in an effort to further complete existing instruments and support their adoption.

This article discusses UNCITRAL's less well-known texts on sale of goods law, illustrates some of the UNCITRAL Secretariat's current technical assistance activities in this area and finally makes some suggestions for future action.

1. THE FIRST BORN: THE LIMITATION CONVENTION

In the area of international sale of goods, UNCITRAL started work in its early days by capitalizing on the extensive preparatory studies carried out in the previous decades as well as on the conventions finalized shortly before the establishment of the Commission, namely, the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964, (ULF)[1] and the Convention relating to a Uniform Law on the International Sale of Goods, 1964 (ULIS).[2] In this context, the first outcome of the work of UNCITRAL was the Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention),[3] which intended to consolidate a limited, but complex area of the law of sale of goods.

The Limitation Convention was a forerunner and indeed functionally forms a part of the United Nations Convention on Contracts for the International Sale of Goods (CISG). [4] In fact, the text of the Limitation Convention was finalized and adopted as a separate treaty due to the uncertainty then surrounding the possibility to conclude rapidly the preparation of the CISG.[5]

The Limitation Convention establishes uniform rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from the contract or relating to its breach, termination or validity. By doing so, it brings clarity and predictability on an aspect of great importance for the adjudication of the claim.

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[1] United Nations, *Treaty Series*, 834, 169.

[2] United Nations, *Treaty Series*, 834, 107.

[3] Concluded in 1974 and amended in 1980: United Nations, *Treaty Series* 1511, 3.

[4] Concluded in 1980. United Nations, *Treaty Series* 1489, 3.

[5] However, a sudden acceleration in the drafting process brought to the adoption of the CISG in 1980.

In fact, most legal systems limit or prescribe a claim from being asserted after the lapse of a specified period of time to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost and to protect against the uncertainty that would result if a party were to remain exposed to unasserted claims for an extensive period of time. However, numerous disparities exist among legal systems with respect to the conceptual basis for doing so, resulting in significant variations in the length of the limitation period and in the rules governing the claims after that period. Those differences may create difficulties in the enforcement of claims arising from international sales transactions. In response to those difficulties, the Limitation Convention was prepared and adopted in 1974. The convention was amended by a Protocol adopted in 1980 in order to harmonize its text with that of the CISG, in particular, with regard to scope of application and admissible declarations.

The Limitation Convention applies to contracts for the sale of goods between parties whose places of business are in different States if both of those States are Contracting States or, but only in its amended version, when the rules of private international law lead to the application of the law of a Contracting State. It may also apply by virtue of the parties' choice if so allowed under applicable law.

The Convention sets the limitation period at four years (art. 8).[6] Subject to certain conditions, that period may be extended to a maximum of ten years (art 23). Furthermore, the Limitation Convention also regulates certain questions pertaining to the effect of commencing proceedings in a Contracting State.

The Limitation Convention further provides rules on the cessation and extension of the limitation period. The period ceases when the claimant commences judicial or arbitral proceedings or when it asserts claims in an existing process. If the proceedings end without a binding decision on the merits, it is deemed that the limitation period continued to run during the proceedings. However, if the period has expired during the proceedings or has less than one year to run, the claimant is granted an additional year to commence new proceedings (art. 17).

No claim shall be recognized or enforced in legal proceedings commenced after the expiration of the limitation period (art. 25(1)). Such expiration is not to be taken into consideration unless invoked by parties to the proceedings (art. 24); however, States may lodge a declaration allowing for courts to take into account the expiration of the limitation period on their own initiative (art. 36). Otherwise, the only exception to the rule barring recognition and enforcement occurs when the party raises its

[6] Article numbers refer to the consolidated text of the amended version of the Limitation Convention.

claim as a defense to or set-off against a claim asserted by the other party (art. 25(2)).

Despite clear complementarities between the CISG and the Limitation Convention, the former has been significantly more successful in terms of adoption by States than the latter. Several reasons contribute to explain this: lack of resources, including parliamentary time, for international trade law reform may have induced some countries to prioritize the adoption of the CISG over that of the Limitation Convention;[7] moreover, in certain jurisdictions prescription is associated with public policy issues, and are therefore more hesitant to adopt supranational uniform texts in this field; finally, at the outset the Limitation Convention was perceived as a product of the interests of Socialist countries and as such was received with caution in Western and Central Europe. The adoption of the Limitation Convention in capitalist countries, including the United States of America, did not affect this view sufficiently to influence the pattern of its adoption.[8]

Nevertheless, the Limitation Convention did not disappear from the international arena. Scholars kept this treaty in due consideration in light of its remarkable technical content.[9] Some States interested in creating a comprehensive legal framework for contracts for the international sale of goods continued adopting the Convention. In other cases, such calls were not immediately heeded. This was the case, for instance, in the People's Republic of China, where the adoption of the Convention has been recommended.[10] This was also the case in Canada, where the Uniform Law Commission prepared in 2000 a new Uniform International Sales Conventions Act meant to deal with multiple conventions relevant in the field.[11] However, the Uniform International Sales Conventions Act

[7] K. Sono, "The Limitation Convention: the Forerunner to Establish UNCITRAL Credibility", *http://cisgw3.law.pace.edu/cisg/biblio/sono3.html*, 3 December 2010.

[8] The USA ratified the Limitation Convention on 5 May 1994, i.e. twenty years after the original adoption of the treaty.

[9] Selected articles discussing the Limitation Convention include: K. Boele Woelki, "The Limitation of Rights and Actions in the International Sale of Goods", *Uniform Law Review / Revue de droit uniforme* 4:3:1999, 621 650; A. F. Hill, "A comparative study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2 725 of the Uniform Commercial Code", *Texas international law journal*, Winter 1990, 1 22. See also R. Zimmermann, *Comparative Foundations of a European Law of Set off and Prescription*, Cambridge University Press, Cambridge New York 2002. Moreover, the provisions of the Limitation Convention are commented in I. Schwenzer (ed.), *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press Oxford 2010[3], 1215 1270.

[10] H.Song, J. Zhao, "Comments on the Convention on the Limitation Period in the International Sale of Goods Discussing the possibility of ratifying the Convention", *International Trade Journal,* 6/1984, 48 52.

[11] Available at *http://www.ulcc.ca/en/us/index.cfm?sec 1&sub 1u6*, 3 December 2010

has not yet been adopted by any Canadian jurisdiction. The reasons are manifold: limited visibility of the matter at the political level and therefore priority on the legislative agenda; complexity of dealing with a number of treaties (including the two versions of the Limitation Convention) simultaneously; on-going reform towards even shorter prescription periods (two years) at the domestic level. However, such arguments do not preclude further legislative action, provided adequate reasoning and support are provided.

Case law applying the Limitation Convention has not been readily available. However, this seems more related to the difficulty of accessing existing decisions than to the lack thereof. In fact, the first abstracts relating to the Limitation Convention are about to be published by the UNCITRAL secretariat in the Case Law on UNCITRAL Texts (CLOUT) collection.[12] Easy availability of case law is likely, on the one hand, to raise the awareness of practitioners on the Limitation Convention, thus leading to its wider application, and, on the other hand, to highlight the importance of reporting existing cases, thus paving the way to collecting further material to be used for orientation and guidance.

Moreover, the Limitation Convention is now receiving renewed interest in light of a global trend that sees legislative reform towards a reduction of the time period necessary for limitation and, at the same time, increased difficulty in ascertaining applicable law, in part due to that legislative reform activity.[13]

Countries exporting manufactured goods should be particularly interested in increasing predictability in this area of the law by adopting the Limitation Convention. This is even more important for small and medium-sized enterprises, as protracted uncertainty over potential liability may significantly affect the management of their limited capital and assets.

Moreover, the Limitation Convention is interesting not only for its intrinsic technical qualities and for the fact that it sheds light on a particularly intricate area of the law of sale of goods. At times of repeated calls for further codification of uniform texts, it seems particularly advisable to seek careful coordination between regional and global levels, and to capitalize on existing texts by using them as building blocks towards the establishment of a broader legislative framework. Hence, the adoption of the Limitation Convention should be seen as a step towards further

[12] These abstracts relate to cases from Cuba, Hungary, Montenegro, Serbia and Ukraine.

[13] Y. Sugiura, "Japan After Acceding to the CISG Should We Consider Ratifying the Limitation Convention Next?", *Towards uniformity: the 2nd annual MAA Schlechtriem CISG conference* (eds. i. Schwenzer, L. Spagnolo), Eleven/Boom Publishers, The Hague 2011.

legal and economic integration at all levels, and as such should be promoted and implemented.

The Limitation Convention is already particularly relevant in certain regions of the world, namely Eastern Europe, where it enjoys widespread adoption. Further expansion of its application would therefore be particularly useful to strengthen certainty in regional commercial relations. Besides promoting awareness with a view to fostering uniform interpretation, further legal reform may also be usefully undertaken in this region. In fact, one main difference between the unamended and the amended version of the Convention lies in the scope of application. The unamended text foresaw application exclusively when all parties to the contract for sale of goods are located in States parties to the Convention. The relevant article 3 was amended to bring it in line with the article 1(1) (b) CISG and allow for application of the Limitation Convention when the rules of private international law make the law of a State party applicable to the contract of sale.[14] This means that the Limitation Convention may apply also when one or more of the parties to the contract do not have its place of business in a State party to the Limitation Convention, as long as the law applicable to the contract of sale is that of a State party to the Convention. This mechanism may significantly expand the reach of the Convention.

The Socialist Federal Republic of Yugoslavia adopted the Limitation Convention in 1978, necessarily, in its unamended version. When they became parties to the Convention (as successors to the Socialist Federal Republic of Yugoslavia), Bosnia and Herzegovina, Montenegro and Serbia did not adopt the treaty in its amended version, and therefore the original narrower scope of application of the Convention still applies in those countries. Slovenia, meanwhile, adopted the amended text of the Limitation Convention, while Croatia and the Former Yugoslav Republic of Macedonia have not yet adopted the Convention in any form.

States that are still a party to the original text of the Limitation Convention should, therefore, consider adopting its amended version,[15] and those that are not yet a party should consider becoming parties to this more recent text. This recommendation could apply as well to other States in South East Europe, such as Bulgaria, an original signatory of the Limitation Convention that has yet to ratify it.

[14] K. Sono, section IV.C, points out that article 3 of the Limitation Convention, as amended, refers to the law applicable to the contract of sale, and not to the law applicable to the limitation period.

[15] Montenegro has already expressed its intention of doing so.

2. A CONTRACTUAL TOOL: THE UNIFORM RULES ON CONTRACT CLAUSES FOR AN AGREED SUM DUE UPON FAILURE OF PERFORMANCE

After the conclusion of the CISG, work on sale of goods continued for a few more years, leading to the preparation of the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (the Uniform Rules).[16] The Uniform Rules seek to unify the treatment, particularly as to validity and application, of clauses that provide for the payment by a party of a specified sum of money as damages or as a penalty in the event of the failure of the party to perform its contractual obligations in an international commercial transaction.[17]

The Uniform Rules failed to attract immediate interest for a number of reasons not directly related to their content: the matter had been raised at a late stage in the context of CISG negotiations, and its discussion in the Working Group was postponed to after the conclusion of the CISG; the Working Group kept the topic on the agenda for several sessions, but was increasingly involved in work in other fields, such as arbitration and transport law;[18] moreover, this was an early example of an UNCITRAL text to be used contractually, and not intended for statutory adoption. While later such texts became more common, it may have been difficult at the time to fully appreciate the value of the Uniform Rules when applied by virtue of contractual choice.

Though their use in practice does not seem to be widespread, the Uniform Rules constitute an important intellectual achievement as they suggest a viable compromise between the notions of liquidated damages clauses, which are acceptable in many jurisdictions, and of penalty clauses, which may, on the contrary, find more difficulties in being recognized by courts.[19] Moreover, by limiting the power of judicial intervention to cases when the sum agreed "is substantially disproportionate in relation to the loss that has been suffered",[20] they anticipated and may further

[16] UNCITRAL, *Yearbook*, vol. XIV: 1983, part three, II, A (272).

[17] On the Uniform Rules, see A. Komarov, "The Limitation of Contract Damages in Domestic Legal Systems and International Instruments", *Contract damages: domestic and international perspectives* (eds. D. Saidov, R. Cunnington), Hart Pub., Oxford Portland 2008, 245 264; P. Hachem, *Agreed Sums Payable upon Breach of an Obligation Rethinking Penalty and Liquidated Damages Clauses*, Eleven/Boom Publishers, The Hague 2011, as well as his contribution to this volume.

[18] The area of work of that Working Group was generically identified in "International Contract Practices". The documents produced by that Working Group are available at *http://www.uncitral.org/uncitral/en/commission/working groups/2Contract Practices.html*

[19] However, the Uniform Rules may find application only in presence of liability for failure to perform: Uniform Rules, article 5.

[20] Uniform Rules, article 8.

support the trend towards the mitigation of such clauses when excessive which is present, in particular, in civil law countries. Given the regular calls for undertaking new codification projects in the field of contract law and, more specifically, of provisions relating to contractual damages, the Uniform Rules need to be taken into due consideration when discussing such projects.[21]

3. CURRENT TECHNICAL ASSISTANCE ACTIVITIES RELATING TO THE LAW OF SALE OF GOODS

From the administrative standpoint, the UNCITRAL Secretariat receives and allocates resources mainly on the basis of the legislative work carried out in UNCITRAL Working Groups. Therefore, the lack of an active working group dealing with sale of goods after the adoption of the Uniform Rules did not facilitate supporting the promotion of the adoption and of the uniform interpretation of texts on sale of goods in the long term. Nevertheless, important results were achieved, for instance with the establishment of the CLOUT (Case Law on UNCITRAL Texts) case reporting system. CLOUT proved in turn to have strong points (multilingualism) and weaknesses (uneven coverage of jurisdictions and irregular timing in the publication of abstracts). CLOUT represents the main source of information on CISG case law in certain languages, and a useful complement in the others, especially when reporting cases from jurisdictions not usually covered by other sources. Moreover, CLOUT contains cases on texts relevant for the law of sale of goods other than the CISG, such as the Limitation Convention and certain legislative provisions on e-contracting inspired by UNCITRAL texts on electronic commerce. The Digest of Case Law on the CISG has also proven to be useful.

With respect to case law analysis, additional work by the UNCITRAL Secretariat in identifying trends that may challenge the uniform interpretation of the CISG is already planned, subject to availability of resources. That work should enable the Commission's consideration of additional appropriate measures to further streamline the application of the CISG in the various jurisdictions while at the same time preserving the flexibility already contained in the text of that treaty.[22]

The renewed focus on technical assistance and cooperation activities in the UNCITRAL Secretariat opened the door to a more comprehen-

[21] This will be the case for the forthcoming CISG Advisory Council Opinion on "Scope of the CISG under Article 4 Fixed sums".

[22] For a recent discussion of the open textured nature of the provisions of the CISG, see H. A. Blair, "Hard Cases under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges", forthcoming in *Duke Journal of Comparative & International Law*, 2010. Available at SSRN: *http://ssrn.com/abstract 1695634*

sive approach to its work in the area of sale of goods. The promotion of the adoption of the CISG based on certain parameters such as regional trading patterns has started bearing fruit. Moreover, a more systematic approach has contributed to highlight a contradiction in the common attitude of practitioners towards the CISG that sees, on the one hand, a desire to benefit from a uniform law of sales in theory and, on the other hand, frequent opting out of the CISG in practice due to reasons not always evident.[23] Fortunately, recent evidence indicates that the opting out practice is becoming less prevalent.[24]

The increase in the technical assistance activities of the UNCITRAL Secretariat relating to uniform texts on sale of goods is particularly justified in light of some enduring effects of globalization: the steep increase in cross-border trade, including in regional economic integration organizations; the fragmentation of some sovereign States into smaller entities; and the widespread use of electronic communications.

Uniform law provides specific answers to such issues. It increases legal predictability of international transactions, especially with respect to legal systems of countries that are newcomers in global markets, and therefore reduces transaction costs. It re-creates legal uniformity in regions that, despite political separation and sometimes conflict, keep strong economic, linguistic and cultural ties, and therefore helps to counter the negative economic effects of State fragmentation and, through renewed ties, may assist in preventing further tensions. It provides a complete enabling legal framework for the use of electronic communications, which are best dealt with on the basis of supranational texts given the inherent identity of the underlying operations in each country as well as the ability of new technologies to interact at great distance, now further improved by their ubiquitous mobility. Thus, modern, comprehensive and coherent legislation based on international standards may assist in fostering economic development through the use of information and communication technologies and, in particular, in bridging the digital divide that still penalizes certain countries.

In short, globalization may well aim at reducing State regulation; however, it does not exclude, but rather demands a sophisticated enabling legislative environment. Many jurisdictions may face challenges in developing such an environment on their own. As a result, the need for international cooperation, especially in critical areas such as international

[23] See the data collected by S. Vogenauer, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law a Business Survey Final Results*, Oxford, October 2008.

[24] See the contributions of L. Mistelis and N. Schmidt Ahrendts in this *volume*, and H.M. Flechtner, "Changing the Opt Out Tradition in the United States", *University of Pittsburgh Legal Studies Research Paper Series*, Working Paper No. 2010 10, March 2010. Available at SSRN: *http://ssrn.com/abstract 1571281*

trade, is thus more acute. As sale of goods represents the backbone of cross-border commerce, it should receive attention and resources accordingly.

4. SUGGESTIONS FOR FUTURE ACTIVITIES

The project on the "Implementation of the United Nations Convention on the International Sale of Goods and the system of international commercial arbitration in Southeast Europe " provides an example of a successful initiative in the promotion of the adoption and uniform interpretation of the CISG.[25] Thanks also to this project, the CISG has become the common law for sale of goods in the Balkans, and indeed the whole of Central and Eastern Europe.[26] Significant capacity-building has fostered interest for the CISG in the region: case reporting, scholarly studies, and analysis of judicial application have increased, to the benefit of the overall knowledge of the Convention and of its uniform implementation in the region.

Replicating this initiative in other regions would be desirable. In particular, Central and Eastern European economies in transition have traditionally expressed strong interest for the uniform law of sale of goods and a revival of such tradition would be welcome. Activities could include strengthening capacity, especially with respect to academic dialogue and access to specialized academic and research resources by young scholars, and adopting a more comprehensive and structured approach in case collecting and reporting, with a view to providing a complete overview of regional CISG interpretative trends.

Legislative work could foresee a review of certain CISG declarations that seem out of line with current business needs, such as those on written form and those excluding the application of article 1(1)(b) CISG, with a view to submitting to the consideration of Governments the possibility of withdrawing those declarations. Such work should also build on the above-mentioned considerations to promote the broader adoption

[25] F. von Schlabrendorff, F. von. Implementation of the United Nations Convention on the International Sale of Goods and the system of international commercial arbitration in Southeast Europe: a report on a GTZ project, undertaken with the support of the United Nations Commission on International Trade Law, S.l., 2010.

[26] European States that have not yet adopted the CISG include, among EU member States: Ireland, Malta, Portugal and the United Kingdom; among non EU member States: Andorra, Liechtenstein, Monaco and San Marino. The position of such States vis à vis adoption of the CISG is not even. For instance, in 1992 the Irish Law Reform Commission recommended the adoption of the CISG in its Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (LRC 42 1992). San Marino, still a party to the ULF and the ULIS, may consider denouncing those treaties and adopting the CISG soon.

of the Limitation Convention in its amended form. Moreover, several countries, for instance in the Balkans, could start considering adopting legislation on electronic communications based on UNCITRAL texts, including the United Nations Convention on the Use of Electronic Communications in International Contracts (the Electronic Communications Convention).[27] Indeed, two of the main functions of the Electronic Communications Convention are to provide legislation to countries lacking any, and to promote a common core set of rules on electronic communications, thus facilitating the removal of legal obstacles to international trade, including those arising from existing treaties such as the CISG. Thus, the Electronic Communications Convention is immediately relevant for the law of sale of goods when a transaction is conducted using electronic means.

[27] Concluded in 2005. United Nations Publication Sales No. E.07.V.2 (treaty not yet in force). Other relevant UNCITRAL texts include the UNCITRAL Model Law on Electronic Commerce, 1996, with additional article 5 bis as adopted in 1998 (United Nations Publication Sales No. E.99.V.4), and the UNCITRAL Model Law on Electronic Signatures, 2001 (United Nations Publication Sales No. E.02.V.8).