THE VIENNA SALES CONVENTION AS AN INTERNATIONAL *LINGUA FRANCA* – RECENT TRENDS AND RESULTS OF THE UNIFORM INTERPRETATION AND APPLICATION

Ph. D. Thesis Abstract

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Budapest, 2009

I. Research Objectives

Up to this date seventy-four countries of five continent have acceded to the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) including all the important participants of world trade (except for the United Kingdom and India). Japan, Lebanon, Armenia and Albania have ratified the Convention recently.[31] The published cases of the CISG have already exceeded 2400 decisions. The CISG is considered as one of the most successful international conventions, hence based on the number of participant countries at least in theory, worldwide export-import transactions are conducted according to the same rules. But the real success of the Convention depends on other factors as well, one of them is the general awareness of the CISG and its relevant rules on the part of practicing lawyers in the participant countries. In addition to awareness, the most important factor regarding the success of the twenty-year-long CISG history is its uniform application. It refers to criteria such as the avoidance of homeward trend and the consideration of foreign decisions as a persuasive value. In recent years, the number of decisions based on uniform application has grown in every contracting countries (mainly, e.g. in Switzerland and Italy).

On the other hand, upon measuring the rate of success several commentators draw attention to the fact that the CISG can be used as a model for legislation and drafting contracts. According to *Prof. Magnus* the Convention can be depicted as a global catalysator that influences international and national sales laws as well as general contract law rules.[32]

Therefore, two different aspects can be described: one of them is the direct application of CISG in international commercial transactions, while the other one is the indirect influence of CISG on international, regional and national legal development and sales law reforms.

The objective of the thesis is to approach the issue of the Convention as an international *lingua franca* (an effective, uniform vehicular language for nations who use different native languages) from the aspects mentioned above.

Accordingly, the research is focused on the analysis of certain CISG articles and its interrelations, with special regard to the latest trends of uniform interpretation and application, reviewing and commenting on its results, comparing and contrasting the articles with the Hungarian internal law as well as evaluating Hungarian verdicts brought under the CISG.

[31] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html
[32] Ulrich MAGNUS, 25 Jahre UN-Kaufrecht. (2006) *Zeitschrift für Europäisches Privatrecht.* 107.

II. Methods and Sources of Research

In spite of the fact that legislations, opinions and descriptions of CISG cases give a descriptive character to certain parts of the thesis, the use of comparative and analytical methods are given particular importance in order to analyse interrelations. The thesis compares and contrasts CISG and Hungarian rules and different approaches and judges Hungarian cases in international context as well.

Legal literature and sources necessary for the research were collected during several years. The library of Hague Academy of International Law, articles published on the website of Pace Law School and case abstracts made public on the UNIDROIT website were valuable resources in the process of research.[33] The dissertation includes the most significant Hungarian legal literature and cases to be found in the database of the Supreme Court of Hungary.

III. Brief Summary of the Dissertation, Scientific Results

Content and Structure

The thesis consists of four main structural parts. The first one gives the concise summary of the model function of the CISG as an international *lingua franca*. In the next part the basics of the uniform interpretation and application are described, while the third and the forth parts deal with the latest trends and results of the uniform interpretation and application of the Convention in detail.

The elaborate study of the uniform concepts presented in six chapters of the third part constitutes the central core of the thesis. The dissertation puts into focus all the thorny issues and disputed questions that the CISG Advisory Council hereinafter: CISG-AC) commented on in their opinions. On the other hand, the thesis takes into consideration Hungarian national law, including the latest draft of Civil Code (hereinafter: draft Civil Code) and the academic proposal in connection with the new Civil Code edited by *Prof. Lajos Vékás* (hereinafter: academic proposal).

Beyond that, another trend is examined in the last part of the dissertation. Namely, certain decisions of the European Court of Justice dealing with jurisdiction are analysed that have an indirect influence on the uniform application and interpretation of the CISG.

Scientific Results

1. When referring to the CISG's success, commentators have often referred to the CISG's impact on national legal systems as well. Thus the thesis reviews the CISG's *'Ausstrahlungswirkung'*, i.e. the influence on the national (e.g. German, Chinese, Polish and Hungarian) and international legislators (e.g. OHADA, EU, UNIDROIT). At the end of the first part the thesis states that the CISG can be effective in the course of concluding a transnational contract. The concept of the CISG can be a great help to the parties who come from different countries and have diverse legal background and culture for communication in order to use the same language without *faux amis*.

[33] www.cisg.law.pace.edu, www.unilex.info

2. The CISG's success depends – *inter alia* – on courts that are to interpret the Convention autonomously and in the light of the need they are supposed to promote uniformity in its application as well. Accordingly, Article 7(1) of the CISG declares the criteria of the interpretation of the Convention.[34] The first criterion explains that 'regard is to be had to its international character'. The reference to the international character of the CISG embodies the principle of autonomous interpretation. It excludes any recourse to the meaning of legal terms in domestic laws. Thus the terms of the CISG must be interpreted *per se* taking into account its function within the context of the Convention. In recent times the need of autonomous interpretation has appeared in several countries' case law such as Austria, Germany, Italy, Spain and Switzerland.

The second criterion refers to the 'need to promote uniformity in its application'. The application of the CISG's rules as uniform as possible in all Contracting States is a principle which is necessarily derived from the unificatory aim of the Convention. This aim can be achieved only if the courts applying the CISG have regard to the decisions of courts in other states, thus develop a common interpretation of the Convention. Remarkable sources are available in this respect, e.g. CLOUT ('Case Law on UNCITRAL Texts')[35] which is an information system established by the UNCITRAL Secretary. Other international database recording CISG decisions are UNILEX[36] and the website of the Institute of International Commercial Law of the Pace Law School.[37] Finally, the UNCITRAL's Digest on the United Nations Convention on Contracts for the International Sale of Goods offers compilations of selected cases on Articles of the CISG.

By analysing the recent trends of the uniform interpretation and application, the thesis focuses on a new, private initiative. The CISG Advisory Council, established by a number of most eminent scholars, aims at promoting the uniform interpretation of the CISG. The CISG-AC is guided by the mandate of Article 7 of the Convention (as far as its interpretation and application are concerned) with a paramount regard to international character of the Convention and the need to promote uniformity. The first opinion of the CISG-AC deals with the topic of how the Convention can accommodate electronic communications with traditional ways of communication, and the published opinion suggests interpretation of all CISG provisions that pertain to communication. The second opinion is about the examination of the goods and notice of non-conformity Articles 38 and 39. The third opinion compares and contrasts Parol Evidence Rule, Plain Meaning Rule, contractual Merger Clause and the CISG. The forth opinion explains the details of contracts for the sale of goods to be manufactured or produced and mixed contracts (Article 3); the fifth is about the buyer's right to avoid the contract in case of non-conforming goods or documents; the sixth analyses the calculation of damages under CISG Article 74. Finally, the seventh is about exemption of liability for damages under Article 79 of the CISG.

[34] '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.'
[35] www.uncitral.org
[36] www.unilex.info
[37] http://www.cisg.law.pace.edu

3. The results of the thesis in connection with semantic content on the way of unification are described as follows:

Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts
Regarding the question of whether the contracts for the sale of goods to be manufactured or produced are governed by the CISG or not, in the interpretation of the term 'substantial part' under Article 3(1) CISG, the CISG-AC included that primarily an 'economic value' criterion should be used, and an 'essential' criterion should only be considered if the 'economic value' is impossible or inappropriate to apply taking into account the circumstances of the case. Thus the contradiction between the English ('substantial') and the French ('essentielle') terms could be overcome too. However, the author agreed with *Prof. Schlechtriem*'s point of view, who stated that in exceptional cases values and functions of the respective contributions are interdependent in determining what is substantial. Consequently, the opinion of the CISG-AC should not be entirely handled as a hard and fast rule. To draw an inference, 'substantial' should not be quantified by predetermined percentages of value, it should be determined on the basis of an overall assessment.

Regarding mixed contracts (Article 3(2)), the judicial practice has created uniformity in case of contracts for the supply of goods and services whether one contract or more (one mixed contract or several contracts) should be concluded, depending primarily upon the intention of the parties. In the interpretation of the parties' agreements relevant factors include, *inter alia*, the denomination and entire content of the contract, the structure of the price, and the weight given to the different obligations by the parties under the contract.

It is beyond dispute that in the interpretation of the words 'preponderant part' under Article 3(2) CISG primarily an 'economic value' criterion should be used, and an 'essential' criterion should only be considered whereas the 'economic value' is impossible or inappropriate to apply taking into account the circumstances of the case. However, one aspect of CISG-AC opinion explaining the 'preponderant' as a term not to be quantified by predetermined percentages of value, but on the basis of an overall assessment, has been sharply criticized by other scholars. There is no denying that jurisprudence and judicial practice have developed at a minimum level, accordingly, the CISG does not apply to a mixed contract if the service part of the contract amounts to more than 50 percent. On the other hand, it is clear that CISG-AC was intent on initiating a uniform standard when paragraphs (1) and (2) of Aricle 3 must be judged.

Finally, it is necessary to point out that paragraphs (1) and (2) of Article 3 of the CISG governs different matters, though in complex transactions there may be some reciprocal influence in their interpretation and application. In those situations, the CISG-AC suggests that the transaction as a whole should be analysed taking into account the 'pro Convention' principle.

The interpretation and proof of the contract – Parol Evidence Rule, Plain Meaning, Merger Clause
The CISG includes no version of the Parol Evidence Rule. To the contrary, several CISG provisions provide that statements and other relevant circumstances are to be considered when determining the effect of a contract and its terms. (The most important of these are Articles 8 and 11.) Under the CISG it is allowed that extrinsic (or parol) evidence may generally be considered when determining the meaning of a contractual term. In sum, the

Parol Evidence Rule and the Plain Meaning Rule therefore does not apply when the CISG governs a contract. (US courts have so held so).

Article 6 permits the parties to derogate from most of articles of the CISG or vary their effect, e.g. by merger clauses. According to the Merger or Entire Agreement Clause which usually appears among the concluding terms of a written agreement, the writing contains the entire agreement of the parties and that neither party may rely on representations made outside the writing. Thus a Merger Clause when in a contract governed by the CISG derogates from norms of interpretation and evidence contained in the CISG. (The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing.) Moreover, if the parties intend, a Merger Clause may bar evidence of trade usages. However determining the effect of a contractual Merger Clause, the parties' statements, negotiations and all relevant circumstances, if the parties agreed upon them, should have been taken into account. To sum up, the supplement of a Mercer Clause is advisable for the parties. The transplantation of the Mercer Clause rule in the Hungarian draft Civil Code (5:67. §) is not entire, unless this definition is just unilateral. A contrary in the academic proposal (similarly in the UNIDROIT Principles of International Commercial Contracts and in the Principles of European Contract Law), the dual function of the Merger Clause has been ruled.

In relation with the e*xamination of the goods and notice of non-conformity* the following observations can be made:

Although a buyer must examine the goods, or cause them to be examined, within as short a period as practicable in the given circumstances, there is no particular sanction for failure to do so (Article 38). However, if the buyer fails to do so and there is a lack of conformity of the goods that an examination would have revealed, the notice period in Article 39 commences from the time the buyer 'ought to have discovered it'. The time and the method of examination of the goods depend on the circumstances of the specific case, while the period for examining for latent defects commences when signs of the lack of conformity become evident.

Considering the content of the notice – in contrast with the German translation of '*genau bezeichnet'* –, the notice should contain appropriate and not precise information for the buyer. In some cases it may mean that the buyer must identify in detail the lack of conformity, in other cases the buyer may only be able to indicate the lack of conformity (e.g. a notice describing the symptoms is enough to specify the nature of the lack of conformity). In recent times the case law in Germany and Switzerland seems to expand this former rigid interpretation (under the influence of the German legislation) by broadening the semantic content on the way of unification.

When determining a 'reasonable period', all the circumstances of the specific case must be taken into account. It is still controversial how the period is to be calculated for durable goods in a normal case. If excessive differences in interpretation are to be prevented, in some scholars' opinion a 'noble month' ('*Grosszügiger Monat*' denominated by *Prof. Schwenzer*) should be adopted as a rough average. However, this point of view followed by some German and Swiss scholars as well as the German and Swiss General Supreme Court has been met with criticism by the great majority of other scholars and in the opinion given by the CISG-AC too. To sum up, no fixed period, whether one month or otherwise, should be considered as reasonable in the abstract without taking into account the circumstances of the case. Because it would lead to incorrect and unjust result (like in the Ugandan used shoes case).[38]

[38] Landgericht Frankfurt, Germany, 11 April 2005

To contrast with the Hungarian domestic rules, the Hungarian Code Civil contains different approaches in connection with sale and supply contracts. Thus the applicable rules depend on the qualification of the contract. The draft Civil Code provides a more coherent regime.

The buyer's right to avoid the contract in case of non-conforming goods or documents
The CISG concept of avoidance supports the interest for upholding the contract whereby cancellation should only be a remedy of exceptional resort (*extrema ratio*). The thesis analyses the buyer's right to avoid the contract in case of non-conforming goods and the seller's possibility to cure.

To determine whether there is a fundamental breach in case of non-conformity of the goods entitling the buyer to avoid the contract according to Art 49(1)(a) CISG, primary regard is to be given to the terms of the contract. Furthermore, if the contract does not make clear what amounts to a fundamental breach, regard is to be given in particular to the purpose for which the goods are bought. In the judicial practice such factors are emphasized like goods bought for himself or resale, the position of the buyer and the nature of the defect as well.

The CISG-AC stated that 'there is no fundamental breach where the non-conformity can be remedied either by the seller or the buyer without unreasonable inconvenience to the buyer or delay inconsistent with the weight accorded to the time of performance.' This phenomenon can be valued as an approach towards a national concept, namely the German *'Recht zur zweiten Andienung'*. However, the great majority of scholars advocate an opposite view alleging that the text of Convention does not include it at all. Consequently, this point of view of the CISG-AC is highly disputed.

The thesis briefly concerns the issues of additional costs or inconvenience resulting from avoidance, buyer's right to withhold performance and non-conforming documents. With regard to commodities the thesis draws attention to the fact that special standards have to be applied in determining whether there is a fundamental breach or not. In the commodity market, string transactions prevail and prices are subject to considerable fluctuations. Therefore, timely delivery by handing over clean documents – that can be resold in the normal course of business – is always of the essence of the contract. If the parties do not stipulate this importance by respective clauses, this can be derived from the circumstances by an interpretation of the contract pursuant to Article 8(2) and (3) of the CISG. As a result, in practice the possibility for the seller to cure any defect in the documents according to article 48(1) of the CISG does not exist in the commodity trade. Thus, in this specific trade branch, the solution under the CISG is quite similar to that under the perfect tender rule in common law jurisdictions. The CISG, used in conjunction with the INCOTERMS and the UCP, offers a workable solution for the scope of issues and potential problems in the field of commodity law.

Regarding the construction of avoidance between the Hungarian Civil Code and the CISG, there are sufficient dissimilarities. This fact must be emphasized, because in case of several Hungarian decisions[39] the forum applied the CISG in parallel with the Hungarian Civil Code, stating that the two concepts rule the right of avoidance in a similar way. This approach absolutely contradicts the autonomous interpretation of the Convention.

[39] Court of Appeal Szeged Gf. I. 30.350/2003. (BH2004.250); Gfv. E. 30.206/2004/2.

Calculation of Damages under CISG Article 74
Article 74 does not provide specific guidelines for calculating damages, consequently the forum that is supposed to make a decision, frequently faces several issues such as lost profits, damages for loss of goodwill, attorneys' fees and costs and punitive damages. After analysing the relating opinion of the CISG-AC, the dissertation draws the conclusion that the opinion generally follows the majority point of view of the jurisprudence (for instance, Article 74 reflects the general principle of full compensation). However, the CISG-AC suggests a new concept considering the level of proof. Applying the so called 'interpretative approach', it declares that the aggrieved party has the burden to prove, with reasonable certainty, that it has suffered loss and the aggrieved party also has the burden to prove the extent of the loss as well, but need not do so with mathematical precision (for example, the use of expert testimony, economic and financial data, market surveys and analysis, or business records of similar enterprises). The above uniform concept is proved by relying on applicable national procedural law, and to resolve this issue may be counterproductive. This uniform approach is necessary because the question of whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case. Scholars are divided on this question.

Finally, it is worth mentioning that the Article 74 of the CISG was adopted as a model to create the provision of calculating damages in the Hungarian draft Civil Code (5:118. §).

Certain cases of the consequences of avoidance of the contract
Focusing on the Article 79 (1) of the CISG, the thesis declares that particularly higher courts have interpreted this rule *stricto sensu*.

Scholarly opinions are divided on whether the situation of hardship (when a party whose performance has turned extraordinarily burdensome in economic terms or otherwise) is governed by Article 79 or not. Whereas some consider that the wording of Article 79 is sufficiently flexible to include an extreme situation of unexpected hardship within the meaning of 'impediment', other scholars state that there is no place in the CISG for any relief on account of economic hardship. To summarize, no satisfactory judgement has been been made in connection with hardship yet. The thesis (similarly to the opinion of the CISG-AC) accepts the possibility that the hardship can be judged under the CISG in order to promote the uniform application of the Convention.

Finally, though the Article 79 of the CISG was transplanted in the Hungarian draft Civil Code, it is worth mentioning that the Hungarian adaptation was not successful, and the final text is ambiguous and vague (unlike the academic proposal which reflects a clear and appropriate adaptation of the CISG concept).

4. Several decisions of the European Court of Justice in connection with jurisdictional issues have an indirect influence on the uniform application of the Convention. If the civil procedure law applicable to disputes arising out of the contract provides for jurisdiction at the place of performance and if such place of performance is determined in accordance with the law applicable to the contract (where the CISG is applicable), the procedural question of jurisdiction is determined by the CISG's substantive rules on the place of performance (Article 31 and 57). The Brussels, (old and new) Lugano Convention, and the Brussels I Regulation Article 5(1) and the Hungarian Code on private international law Article 55 (a) establish jurisdiction at the place of performance (*locus solutionis,*

Erfüllungsort, *lieu d'exécution*) of the contractual obligation in question. However, the Brussels I Regulation (and the new Lugano Convention) contains a special definition for the place of performance of the contracts regarding the sale of goods. According to this provision, unless otherwise agreed, the place of performance of the obligation establishing jurisdiction is the place in a Member State where, under the contract, the goods were or should have been delivered (*Lieferungsort*, *être livrées*). Though, this special rule could not dissolve all the problems arising from the *locus solutionis.* To recap, under the Brussels I Regulations regime and the relating judgements of the European Court of Justice, the CISG is applicable only in two cases.

Finally, the thesis briefly analyses some selected issues of the Brussels I regulation Article 23 and the Hague Convention on Choice of Court Agreements in order to provide practical considerations regarding the connection between the jurisdiction and applicable law.

Possible Applications of Scientific Results

Prof. Honnold declared as follows: *'The half century of work that culminated in the [CISG] was sustained by the need to free international commerce from a Babel of diverse domestic legal systems.'* The Convention's ultimate goal is uniform application of the uniform rules, and the avoidance of a Babel of diverse interpretations. With the perspective gained from twenty years' experience of the Convention in force, jurist and lawyers are now in a position to achieve a more nuanced and accurate understanding of the Article 7(1) uniformity principle. In the final part, the dissertation concludes that the scholarly 'global jurisconsultorium' (e.g. the active work and the opinions of the CISG-AC) *per se* is not enough, because the practitioner must find a path to uniformity. The CISG-AC's guideline and monographies dealing with these issues (this thesis as well) give assistance to this pathfinding quest.

As far as the CISG's impact on Hungarian courts the autonomous interpretation and application should be essential and indispensable. (Using the Hungarian commentary,[40] legal books[41] at least and referring to the foreign courts' decisions.) Consequently, the analysis of the foreign and national courts' judgements governed by CISG as well as the opinions of the jurisprudence included in the thesis can be considered as a useful resource. In addition, the dissertation gives comments and suggests amendments in connection with the draft Civil Code (for instance, merger clause and the consequences of avoidance of the contract). The results and findings of the thesis are widely applicable in higher education as well.

As *Prof. Honnold* stated, '*…international acceptance of the same rules gives us a common medium for communication -- a lingua franca -- for the international exchange of experience and ideas. It is not too much to expect that this dialogue will contribute to a more cosmopolitan and enlightened approach to law.'*

[40] Tamás SÁNDOR – Lajos VÉKÁS, *Nemzetközi adásvétel.* Budapest, Hvg-orac, 2005.
[41] Gábor BÁNRÉVY, *Nemzetközi gazdasági kapcsolatok joga.* Szent István Társulat, Budapest, 2007.; Ferenc MÁDL – Lajos VÉKÁS, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga.* Nemzeti Tankönyvkiadó, Budapest, 2004.; Imre VÖRÖS, *A nemzetközi gazdasági kapcsolatok joga I-III.* KRIM Bt., Budapest, 2004.