ORGANISATION OF A UNIDROIT INFORMATION SYSTEM OR DATA BASE ON UNIFORM LAW

Meeting of Experts on the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR)
Brussels, 26 to 27 September 2000
(Secretariat memorandum)

Rome, August 2000
At the present meeting the Group of Experts on the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR) is called upon to discuss the manner in which the UNILAW data base should be able to respond to the needs of prospective users as regards the CMR, and also to examine the proposals put forward by the Secretariat in this respect. It should be borne in mind that the intention of the UNIDROIT Governing Council is that UNILAW should become the point of reference for the subject-matters dealt with as regards information available. UNILAW should therefore be a supple instrument that facilitates research to the greatest extent possible and that caters for the needs of a variety of different users: practising lawyers, judges and arbitrators, legislators, operators of the different business sectors involved, and of course academics.

Two aspects need to be examined, which, although closely linked, are easiest considered separately. The first is the type of information that a user of the data base would want to be able to obtain by consulting it, the second the structure of the data base from the technical point of view (the links between the different sections, search options, etc.). So as to facilitate consideration by the Group, the technical structure will be considered first, after which its application to the CMR will be considered. Prior to that, however, a brief reminder of how the UNILAW data base was originally envisaged is in order.

1. UNILAW AS ORIGINALLY ENVISAGED

The prospectus on the UNILAW data base first prepared by the Secretariat in 1995/1996 illustrated a number of conclusions reached following the surveys conducted towards the end of 1994 to ascertain the interest of different target groups in a uniform law data base.1

The surveys conducted among potential users confirmed that the following information should be made available by the data base:

- the text of international conventions and related instruments (protocols)
- official explanatory report(s)
- the status of implementation with reservations
- national implementing legislation and legislation deriving from the convention
- national case law
- case law of international or supranational courts of justice (if any)
- case law of arbitral tribunals (where possible) and
- bibliographical references.

UNILAW is intended to be an "intelligent" data base. It is intended to obviate the inconveniences of indiscriminate key-word systems by making the information retrievable by

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1 In 1994 the UNIDROIT Secretariat conducted surveys among four categories of potential users of the data base (members of the International Bar Association, international organisations, arbitral institutes and tribunals and chambers of commerce and industry) to determine the interest for a data base such as the one envisaged. The results of the survey are analysed in Study LXIX – Doc. 2, UNIDROIT 1995.
legal concept. The materials should therefore be analysed by experts in the field who will be responsible for the extrapolation of these concepts from the instruments. It is intended that the information contained in the data base on a specific subject will be accessible through these key-words in addition to being accessible through more simple and obvious classifications such as the date of the decision rendered or the name of the court it was rendered by.

The texts of the international instruments will be made available in full, in English and French. Where available, also the official Explanatory Reports will be made available in English and French. Links will be provided to the relevant articles of the Conventions.

The decisions of courts will be made available in summary form in English and French, with the original text accessible where possible in full.

The bibliographical references will be in the original language, classified by subject-matter and searchable also by author, date of publication, etc.

The possibility to access one set of information directly while consulting another, for example accessing the full text of a decision while consulting the text of the convention or the bibliographical references, will be provided for.

2. **Technical Structure of the Data Base**

   For any user the most important feature of a data base is the way in which the material it contains may be retrieved, in other words the search possibilities that have been provided for. No matter how important the collection of materials contained in the data base, if the search possibilities do not permit a user to arrive at the material it will be of little use. There are a number of possible methods, and these are often available in combination. The methods originally envisaged for UNILAW were the following:

   ♦ search by article of the convention
   ♦ search by date and number of the legislative instrument
   ♦ search by the date of a judgment
   ♦ search by the name of the court
   ♦ search by the names of the parties to a case
   ♦ search by key-words
   ♦ search by issues and
   ♦ full text search

   A data base that already exists and that is similar in conception to the UNILAW data base is the UNILEX data base created by the Centre for Comparative and Foreign Law Studies directed by M.J. Bonell and set up as a joint initiative by UNIDROIT, the University of Rome I, and the Italian National Research Council (CNR). At present the UNILEX data base
only deals with the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts. The Secretary-General of UNIDROIT and Mr Bonell have agreed that, in view of the similarity between the projects and the close ties between the institutions that promote them, UNIDROIT and the Centre should advance together, and that therefore the UNILEX data base, which already exists (albeit not in Internet-compatible form), should serve as the basis for future developments of both UNILEX and UNILAW. The UNILEX data base was however created for CISG and is therefore eminently suited to the needs of that particular instrument. As each and every subject-matter has its particular needs, modifications will per force have to be made to cover the needs and requirements of the subject at hand, currently Road Transport in general and the CMR in particular. It is therefore necessary to examine the UNILEX as it presently exists from the point of view of the needs of the CMR and to determine whether its present characteristics are suited to those needs. In this process it should however be borne in mind that a number of the modifications proposed may be covered by the functions of the browser through which a user would access the data base.

This section of the document therefore illustrates the different search possibilities and links that exist in the present UNILEX data base, and makes a few suggestions for modification.

I. THE OPENING OF THE DATA BASE

The UNILEX data base opens with the “Select Instrument” option:

One feature which needs to be added is an “Exit” option already at this stage. Furthermore, Road Transport is but one of the many sections that the UNILAW data base will comprise once it becomes operational. The first option will therefore need to be the selection of the subject-matter (Transport, Intellectual Property, Cultural Property, etc.), followed by a selection of the instrument desired.
II. TYPE OF INFORMATION

Once the Instrument has been selected, UNILEX passes to a first selection of the type of information desired:

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Info on Database</td>
<td>Select by Date</td>
</tr>
<tr>
<td>Text of Instrument</td>
<td>Select by Country</td>
</tr>
<tr>
<td>Status of Instrument</td>
<td>Select by Articles</td>
</tr>
<tr>
<td>Subjects</td>
<td>Bibliography</td>
</tr>
<tr>
<td>Select by specific term</td>
<td>Select by Author</td>
</tr>
<tr>
<td>Select by subject heading</td>
<td>Select by Article</td>
</tr>
<tr>
<td></td>
<td>Select by Area</td>
</tr>
</tbody>
</table>

Select Instrument

Current Instrument: CIGS Issue September 1999

III. INFORMATION ON THE DATABASE

The “Info on Database” option opens the following small window:

Unilex up to September 1999

Cases: 367

Bibliographic References: 1,354

IV. TEXT OF INSTRUMENT

The “Text of Instrument” option opens the following window:

Text of Instrument

Article: 

PRIOR NEXT PRINT

(Text of the Article)

CISG
At present, no possibility exists to view the text of the Convention in its entirety, and this possibility should be provided for, as should the possibility to scroll the text. Furthermore, it should be possible to print the text of the Convention in its entirety. The “Print” option goes first to a preview of the page with the text as it will print, after which a second commend to print must be given.

V. STATUS OF INSTRUMENT

The option “Status of Instrument” opens the following window:

<table>
<thead>
<tr>
<th>States Parties to the Instrument</th>
<th>Signature</th>
</tr>
</thead>
<tbody>
<tr>
<td>Search</td>
<td></td>
</tr>
<tr>
<td>Ratification, Approval,</td>
<td></td>
</tr>
<tr>
<td>Acceptance, Accession</td>
<td></td>
</tr>
<tr>
<td>Entry into force</td>
<td></td>
</tr>
</tbody>
</table>

The “Country” box lists the countries that are parties to the convention. As they are selected, the reservation they have made (if any) appears in the “Reservations” box.

At present, it is only possible to search by country. The possibility to search by article number should also be provided for, as a user might want to find out which countries have made reservations to a particular article. Furthermore, a distinction should be made between the categories “Ratification”, “Approval”, “Acceptance” and “Accession”. A full list of the parties to the convention, with an indication that they have made one or more reservations, should be made available and should be printable. In general, it should be possible to print the information that appears on screen, which it at present is not possible to do. A link should be provided to the ratification tables relating to successive instruments, such as protocols that modify the convention, as the parties often are different and a user might need to find out quickly and easily what countries are parties to what instrument. Furthermore, annotations should be possible, for example to indicate successor States.
VI. **Subject Selected by Specific Term**

The option “Select by Specific Term” opens the following window:

![Analytical Index](image)

A “Search” leads to the main list of issues with the word searched for highlighted. As the cursor progresses down the list of issues, the number of the articles of the convention that are linked to that particular issue appears on the right hand side of the screen. Clicking on the number of the article leads to the article screen with the text of the article and the connected issues.

At present a search for a term will lead to the list of issues that have been extrapolated in an analysis of the text of the convention. The cursor stops at the first hit, with the consequence that the list of issues must be scrolled down to find the others. Furthermore, also partial hits are highlighted, such as the “for” in the word “conformity” when a search is made for “liability for”. The possibility of only the hits being listed one after the other should be examined, with a view to eliciting whether or not listing them out of context would be practicable.

VII. **Subject Selected by Subject Heading**

The “Select by Subject Heading” option opens the following window:
The subjects that are listed are the main headings of the Issues list, each of which is expandable at will. When they are expanded and a specific issue thus expanded is highlighted, the relevant article appears in the "Articles" box on the right. The "Print" option leads to a preview of the entire list of issues, with all the headings and sub-headings (see Annex 1). The “Preview” window is the following:

When, however, the number of the relevant article that appears in the “Article” box is clicked, this leads to the window with the text of the article and the related issues. The “Print” option that appears at this point leads to the following window:
Depending on what options are selected, the information will be printed. Prior to printing, a preview will be presented (see Annexes 2 – 6).

It should be noted that at present it is not possible to print the full text of the convention, and that this option should be provided for. Nor is it possible to print the issues identified for all the articles, they must be printed one at a time, and again this is an option that should be provided for. As regards the cases, the print preview shows only the case selected, but all the cases are printed, not just the one selected. This is however no doubt a bug that can easily be amended, also because the bibliography option works correctly: if one is selected, just that one is printed and not all. Furthermore, the pages printed should always indicate to what they refer.

VIII. CASES SELECTED BY DATE

The option “Cases – Select by Date” opens the following window:

```
Cases of article X by date

Search

Insert the date in the following format: yyyyymmdd; e.g., 19980318 means 18 March 1998

Date  Country  Court

CISG  Total cases:
```
IX. CASES SELECTED BY COUNTRY

The option “Cases - Select by Country” opens the following window:

<table>
<thead>
<tr>
<th>Cases of article X by country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Search ________________________</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date</th>
<th>Country</th>
<th>Court</th>
</tr>
</thead>
</table>

| CISG | Total cases: |

X. CASES SELECTED BY ARTICLE

The option “Cases - Select by Articles” opens the following window:

<table>
<thead>
<tr>
<th>Article</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article: ______________________</td>
</tr>
</tbody>
</table>

(Text of the Article)

| Cases by Issue | Cross Refs |

(List of Issues identified for the Article)

| CISG | Issue Cases: | Issue Cross References |

The options “Prior” and “Next” lead to the prior or the following article.

The option “All Cases” leads to the choice “All cases by country” or “All cases by Date”. When the first of these is selected the following window, which to all intents and purposes is identical with the window for “Cases – Select by Country”, opens:
If “All cases by Date” is selected the following window, which again to all intents and purposes is identical with the window “Cases – Select by Date”, opens:

**Cases of Article X by country**

<table>
<thead>
<tr>
<th>Date</th>
<th>Country</th>
<th>Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

CISG  Total cases:

The window that opens for the “Bibliographical References of article X” is also to all intents and purposes the same as the window “Bibliography – Select by Author”. To be noted is that the search possibility is limited to the author:

**Bibliographical References of Article X**

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

CISG  Total References:
The option “Cases by Issue” at the bottom of “Cases - Selected by Article” opens the following window:

Clicking on the number of the cases of the country desired opens the window with the list of the cases of that country as follows:

and clicking on the case desired in that list opens the case in the following manner:
The option “Cross refs” in the window with the text of the article opens a small window as follows:

<table>
<thead>
<tr>
<th>Cross references</th>
<th>Article</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>CISG</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Clicking on the number of the article opens the window with the text of the article.

**XI. BIBLIOGRAPHY – SELECT BY AUTHOR**

The option “Bibliography – Select by Author” opens the following window, which is almost identical with the window that opened for bibliographic references by author for a specific article:
XII. **BIBLIOGRAPHY – SELECT BY ARTICLE**

The option “Bibliography – Select by Article” opens the following window:

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
</tr>
</thead>
</table>

It should be noted that the “Search” option permits only to a search by author, it is not possible to search by title or by subject-matter.

XIII. **BIBLIOGRAPHY – SELECT BY AREA**

The “Bibliography – Select by Area” option opens the following window:

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
</tr>
</thead>
</table>

CISG | Total References: |
---|---|
As indicated in the window, the “Search” possibility exists exclusively for a search by author, and the “Area” option gives a list of predetermined areas from which a selection can be made – no free search is possible. In this window a list of references appears on screen. When the desired reference is selected, a window with the following details appears:

The “Print” option opens a small window as follows:
The “Print” button leads to a preview of the page to be printed. Depending on what options have been ticked, the information on the page to be printed will be more or less detailed. In other words, if all three options have been selected, the entries printed will contain information on the publisher as well as on the relevant bibliographic areas and on the related articles. If only the bibliographic areas have been selected, the entries will contain that but not information on the publisher or on the related articles. The options do not refer to the possibility to, for example, print all the entries relating to a specific bibliographic area.

3. **Examples of Search Interfaces:**

In addition to the search options illustrated above, a number of other could be added to the data base. These include what could be termed a “search by parameters”, where to narrow the search a certain number of parameters. Examples of such a search could be the following:

1. **Search for Cases Using Parameters**

   - Database Info: 314 cases; Last update: 09/15/96 10:58:06
   - New Cases: latest decision: 1996.08.20
   - Jurisdiction:
   - Tribunal:
   - Case Name:
   - Case No./Docket No.:
   - Date/Year: dd.mm.yyyy (03/04/1000) or dd/mm/yyyy (09/04/1000)
   - Sender’s Country:
   - Caller’s Country:
   - Consignee’s Country:
   - Goods Involved:
   - Application of CMR:
   - CMR Provisions: Key Provisions only

   You can use article numbers, paragraphs and subparagraphs (examples: 20 or 20 (1))

   [Search]
II. **Search for Bibliography using Parameters**

- **Database Info**: 326 References; Last update: 10/01/98 13:42:32
- **New references**: latest reference: 1998:03:18
- **Country**: any country
- **Author**: 
- **Title**: 
- **Source / Publisher**: 
- **Language**: no selection
- **Date / Year**: dd mm yyyy (03/04/1998) or dd/mm/yyyy (03/04/1998)
- **CMR Provisions**: Key Provisions only

An evaluation should be made as to whether such an option should be offered also by UNILAW.

III. **Full Text Search**

Another option is the full text search, where a word freely selected by the user leads to the information desired. In such cases all the material in that particular section is searched. An evaluation should be made as to whether such an option should be offered also by UNILAW.

IV. **Frames**

A normally quick and easy way of passing from one section of a data base to another is by using fixed frames with links to the relevant sections. In such cases it is sufficient to click on the desired section to pass there immediately. An example of such a frame could be the following:
4. THE CMR – QUESTIONS FOR THE CONSIDERATION OF THE GROUP

A first look at the CMR brought to mind a number of questions that the Group might like to consider in addition to the more general points already mentioned in Section 2 of this document:

1. Is it sufficient to have a search by keyword passing through the “Issues”, or should a direct search also be provided for? (For example, should it be possible to arrive at a list of relevant cases on the “liability of the carrier” without first arriving at the list of issues identified? Similar reasoning applies to the bibliographic references and also to the text of the Convention.)

2. How should the keywords be structured? Freely, as in a full text search, or in a tree-structure, bearing in mind that the levels of a tree structure might well be interchangeable?
For example: Right of sender disposal of goods could also on other occasions be Right of disposal of goods sender’s right. Should links be provided both up and down the tree structure?

3. If a tree structure is opted for, what would the relationship be with the Issues?

4. If a full text search is provided for, should there be the possibility to conduct a Boolean search?

5. As regards the relationship between the main issue and the search word: should it be possible to arrive at the article by searching for a word which does not concern the main issue dealt with in the article?

6. The idea has always been that it should be possible to arrive at the text of an article (or also at cases and bibliographic references) by using words that are not specifically mentioned in the text of the article, as in many instances the texts avoid the use of terminology which may be too national in character and instead prefer to describe what is intended. To what extent should this be possible?

7. It has also always been the idea that the words that should form the core of the keywords should be those extrapolated from the text of the Convention to which others should be added as cases and other materials are added. How open-ended should the list be?

8. When a word in an article is searched for, it is suggested that the word itself should be highlighted on screen, even if the full text of the article is visualised.

9. How should the summaries be prepared? What degree of detail should be included in the facts of the case?

10. Is it necessary to standardise the language used in the summaries and if so to what extent?

11. What instructions should the national correspondents be issued with?
SPECIFIC TERMS / SPECIFIC HEADINGS (only main headings) (first three pages)

CISG

ACCEPTANCE
- acknowledgement of receipt of offer, does not constitute acceptance
- acceptance with modifications, modified acceptance
  -- battle of forms
  -- counter offer
  -- letter of confirmation, writings in confirmation, Bestätigungsschreiben
  -- material modifications, non material modifications
  -- delay in transmission
  -- is nevertheless effective
- by conduct
- late acceptance
- of an oral offer
- requirements
- silence or inactivity
- time of effectiveness
- time limits
- withdrawal of acceptance
- see COMMUNICATIONS, FORMATION OF CONTRACT, GAPS IN CONVENTION, GENERAL
- PRINCIPLES OF CONVENTION, OFFER

ADDITIONAL PERIOD OF TIME
- damages for delay in performance
- fixed by the buyer
- fixed by the seller
- see AVOIDANCE, BREACH OF CONTRACT, DAMAGES

AGREEMENT TO ARBITRATE
- application of Convention to determine existence

ALIUD PRO ALIO
- see also CONFORMITY OF THE GOODS

ANTICIPATORY BREACH
- see AVOIDANCE, SUSPENSION OF PERFORMANCE

APPLICATION OF THE CONVENTION
- autonomy of the parties
- conclusion of contract before entry into force
- material scope of Convention
  -- agreements to agree, Vorvertrag, contratto preliminare
  -- contract of sale of goods
    --- quota of a company
    --- software, hardware
    --- barter, counter-trade transactions
    --- contracts for supply of goods to be assembled
    --- contracts for supply of goods to be manufactured or produced
    --- distribution contracts, distributorship agreements
    --- franchising
    --- mixed contracts for supply of goods and services
--- turnkey and product-in-hand contracts, works contracts
-- contracts similar to contract of sale
-- culpa in contrahendo
-- formation of contract international character of contract of sale
-- matters not expressly settled
-- rights and obligations of the seller and of the buyer
-- by virtue of rules of private international law
-- Convention applicable as 'lex mercatoria'
-- parties' choice of Convention as governing law of contract
-- parties' choice of law of Contracting State
-- parties' place of business in different Contracting States

- parties' nationality, irrelevance
- territorial scope of Convention
- undisclosed foreign principal –
- see AUTONOMY OF PARTIES, EXCLUSIONS FROM CONVENTION, GAPS, PLACE OF BUSINESS

AUTONOMY OF THE PARTIES
- parties' choice of law of Contracting State
- parties' choice of law of non-Contracting State
- general principle of the Convention
  - limits
    -- limits on formal requirements
- total or partial exclusion of the Convention

AVOIDANCE OF THE CONTRACT
- anticipatory breach
- by buyer
  -- loss of right In respect of delivery
  -- loss of right in respect of restitution
    --- retention of other remedies
  -- no period of grace
  -- requirements
  -- seller's offer to cure
  -- loss of right in respect of payment
  -- period of grace not to be granted by court or arbitral tribunal
  -- requirements
  -- form of notice of declaration of avoidance
  -- implied declaration of avoidance
  -- effects on contractual provisions
- by seller
- effective by notice of declaration of avoidance
- effects of avoidance
- partial avoidance
- restitution
- time of avoidance
BREACH OF CONTRACT
- by seller
  -- failure of delivery
  -- fundamental breach
  -- late delivery
  -- partial breach
  -- fundamental breach
  -- late performance
  -- non performance
  -- partial breach
  -- breach of secondary obligation
- by buyer
- caused by other party
- effects
- fundamental breach in general
- fundamental breach and passing of risk
- see REMEDIES FOR BUYER’S AND SELLER’S BREACH

BURDEN OF PROOF
- in case of non conformity of the goods
  -- proof of defects
  -- proof of examination
  -- proof of notice of non conformity
- in case of third party rights on goods
- in case of damages
- in case of rejection of the goods

BUYER’S OBLIGATIONS
- examination of goods
- payment of price
- preservation of the goods
- specification of the goods
- taking delivery
- see AUTONOMY OF THE PARTIES, DUTY TO COOPERATE, EXAMINATION OF GOODS,
- PAYMENT OF PRICE, PRICE, PRACTICES, SPECIFICATION OF GOODS,
- TAKING DELIVERY, USAGES

CANCELLATION
- see AVOIDANCE OF THE CONTRACT

CARRIAGE
- examination of goods
- insurance
- passing of risk
- seller’s obligations
- time of payment
1 Material scope of application

1.1 Contract of sale of goods

1.1.1 Civil or commercial character of the contract not relevant

1.1.2 Contracts for the sale of hardware / software

1.1.3 Contracts similar to contract of sale

1.1.3.1 Distributorship agreements

1.1.3.2 Other cases (barter, counter-trade, works contracts, etc.)

1.2 Parties with places of business in different States

1.2.1 Concept of place of business

1.2.2 Concept of different States

1.2.2.1 Undisclosed foreign principal

2 Territorial scope of application

2.1 Parties situated in Contracting States

2.2 Application of law of Contracting State based on rules of private international law

2.2.1 Application of Convention based on choice of parties

2.2.2 Choice of the law of Contracting State as governing law of contract

3 Convention as 'lex mercatoria'
1 Material scope of application

1.1 Contract of sale of goods

<table>
<thead>
<tr>
<th>Date</th>
<th>Country</th>
<th>Court/Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>16-07-1992</td>
<td>Netherlands</td>
<td>Gerechtshof’s Amsterdam</td>
</tr>
<tr>
<td>17-09-1993</td>
<td>Germany</td>
<td>Oberlandesgericht Koblenz</td>
</tr>
<tr>
<td>20-12-1993</td>
<td>Arbitral Award</td>
<td>Hungarian Chamber of Commerce and Industry Court of Arbitration</td>
</tr>
<tr>
<td>26-08-1994</td>
<td>Germany</td>
<td>Oberlandesgericht Köln</td>
</tr>
<tr>
<td>15-05-1996</td>
<td>France</td>
<td>Cour d’Appel de Grenoble</td>
</tr>
<tr>
<td>08-05-1997</td>
<td>Arbitral Award</td>
<td>Hungarian Chamber of Commerce and Industry Court of Arbitration</td>
</tr>
<tr>
<td>05-01-1999</td>
<td>France</td>
<td>Cour de Cassation</td>
</tr>
</tbody>
</table>

1.1.1 Civil or commercial character of the contract not relevant

1.1.2 Contracts for the sale of hardware 1 software

<table>
<thead>
<tr>
<th>Date</th>
<th>Country</th>
<th>Court/Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>17-09-1993</td>
<td>Germany</td>
<td>Oberlandesgericht Koblenz</td>
</tr>
<tr>
<td>08-02-1995</td>
<td>Germany</td>
<td>Landgericht München</td>
</tr>
<tr>
<td>22-09-1995</td>
<td>Germany</td>
<td>Oberlandesgericht München</td>
</tr>
</tbody>
</table>

1.1.3 Contracts similar to contract of sale

1.1.3.1 Distributorship agreements

<table>
<thead>
<tr>
<th>Date</th>
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<tr>
<td>17-09-1993</td>
<td>Germany</td>
<td>Oberlandesgericht Koblenz</td>
</tr>
<tr>
<td>19-03-1996</td>
<td>Hungary</td>
<td>Metropolitan Court of Budapest</td>
</tr>
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1.1.3.2 Other cases (barter, counter-trade, works contracts, etc.)

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<tr>
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<td>15-12-1998</td>
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1.2 Parties with places of business in different States

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</table>
1 Requirements for offer

1.1 Specification of addressees

18-06-1997 Austria Oberster Gerichtshof

1.2 Definiteness of terms

24-03-1992 Hungary Metropolitan Court of Budapest
08-02-1995 Germany Landgericht München

1.2.1 Indication of nature of goods

20-03-1997 Austria Oberster Gerichtshof

1.2.2 Determination of quantity

10-11-1994 Austria Oberster Gerichtshof
06-02-1996 Austria Oberster Gerichtshof
03-07-1997 Switzerland Bezirksgericht St. Gallen

1.2.3 Determination of price

10-01-1992 Hungary Metropolitan Court of Budapest
22-04-1992 France Cour d'Appel de Paris, 15ème chambre, section A
25-09-1992 Hungary Supreme Court of the Republic of Hungary
04-03-1994 Germany Oberlandesgericht Frankfurt am Main
10-11-1994 Austria Oberster Gerichtshof
1995 Arbitral Award ICC Court of Arbitration - Paris
04-01-1995 France Cour de Cassation
03-03-1995 Russian Federation Tribunal of Int.l Commercial Arbitration of the Russian Federation Chamber of Commerce

1.3 Indication of offeror's intention to be bound

05-12-1995 Switzerland Handelsgericht St. Gallen
03-07-1997 Switzerland Bezirksgericht St. Gallen

2 Public offers

2.1 Considered simple invitation to make offer

2. 1. 1 Contrary intention expressed by offer

3 Offeror's death or incapacity

3. 1 Termination of offer
1.2.1 Concept of place of business

1994 Arbitral Award  ICC Court of Arbitration - Paris

1.2.2 Concept of different States

2.1 Parties situated in Contracting States

20-05-1991 Argentina  Juzgado Nacional de Primera Instancia en lo Comercial No. 7
1992 Arbitral Award  ICC Court of Arbitration - Paris
24-03-1992 Hungary  Metropolitan Court of Budapest
03-07-1992 Germany  Landgericht Heidelberg
16-09-1992 Germany  Landgericht Berlin
30-09-1992 Germany  Landgericht Berlin
14-10-1992 Germany  Amtsgericht Zweibrücken
28-04-1993 Germany  Landgericht Krefeld
04-05-1993 Mexico  COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico
14-05-1993 Germany  Landgericht Aachen
09-09-1993 Switzerland  Handelsgericht Zürich
06-12-1993 Switzerland  Tribunal Cantonal de Vaud
1994 Arbitral Award  ICC Court of Arbitration - Paris
1994 Arbitral Award  ICC Court of Arbitration - Paris
18-01-1994 Germany  Oberlanesgericht Frankfurt am Main
04-03-1994 Germany  Oberlanesgericht Frankfurt am Main
06-05-1994 Arrondissementsrechtbank
(1) 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.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

1 Interpretation of Convention

<table>
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<th>Date</th>
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1.1 Consideration of international character of Convention

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1.1.1 Recourse to Convention's legislative history

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1.2 Need for uniform application of Convention

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1.2.1 Recourse to foreign case law and scholarly writing

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2 Gaps in Convention

2.1 Matters governed but not expressly settled by Convention

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<td>Internationales Schiedsgericht der Bundekammer der gewerblichen Wirtschaft - Wien (Vienna), Austria</td>
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</table>

2.2 Matters excluded from scope of Convention (see art. 4)

2.3 Methods for filling in gaps

2.3.1 Application by analogy of other provisions of Convention

<table>
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2.3.2 Recourse to general principles of Convention

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2.3.2.1 Examples of general principles

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<td>Mexico COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico</td>
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<td>France Cour d'Appel de Grenoble</td>
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2.3.2.2 Recourse to UNIDROIT Principles

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2.3.3 Recourse to domestic law

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2.3.3.1 Applicable law determined by choice of law rules of forum

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<tr>
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<td>1994</td>
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<td>15-06-1994</td>
<td>Arbitral Award Arrondissementsrechtbank</td>
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</tbody>
</table>
An Italian seller and a German buyer entered into a contract for the sale of a cargo of fruit. A dispute arose between the parties.

The court held that CISG did not apply as the contract had been concluded before January 1, 1988 being the date that Italy's ratification of CISG according to Art. 99(6) CISG took effect. That is, after Italy's denunciation of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (Art. 100 CISG).
CISG

Giova ricordare al riguardo che, ai sensi dell'art. 100, la convenzione si applica alla formazione dei contratti conclusi in seguito ad una proposta intervenuta dopo l'entrata in vigore della convenzione la quale, come si è appena rilevato, esplica i suoi effetti a partire dal 1 gennaio 1988, ai sensi del precedente art. 99 il quale ha cura di specificare che per gli Stati legati dalle convenzioni de L'Aia le ratifiche entreranno in vigore solo alla data in cui le denunce, eventualmente richieste da parte dei suddetti Stati riguardo alle convenzioni medesime saranno entrate in vigore. Questa norma di coordinamento si rendeva necessaria dal momento che la convenzione, secondo quanto previsto nell'art. 90, non prevale su un accordo internazionale già concluso, o da concludere, che contenga disposizioni attinenti alla materia regolata dalla convenzione.

Appare evidente, alla stregua dei precedenti richiami, che rispetto ad una proposta anteriore al 1° gennaio 1988 non può farsi capo alla nuova convenzione, ma deve porsi mente alle menzionate convenzioni de L'Aia e di Bruxelles alla cui stregua va ricercata la soluzione del problema di giurisdizione di cui queste sezioni unite sono investite.

Published in Italian:
- Il Foro Italiano, 1989, I, 2878
- Giustizia Civile, 1989, I, 1888
- Rivista di diritto internazionale privato e processuale, 1994, I, 138

Excerpts of judgement in:
- Rivista di diritto internazionale privato e processuale, 1990, 155

Commented on by:

90, 99, 100

Date: 1989
Country: Arbitral Award
Number: 5713/ 1989
Adjudicating Court: ICC Court of Arbitration - Paris
Parties: Unknown

APPLICATION OF CISG - CISG APPLICABLE AS LEX MERCATORIA (Art. 1 CISG)

ARBITRATION - CISG REFLECTION OF TRADE USAGE

CONFORMITY OF GOODS - BUYER'S OBLIGATION WHERE LACK OF CONFORMITY - TIMELY EXAMINATION (Art. 38 CISG)

NOTICE OF LACK OF CONFORMITY WITHIN REASONABLE TIME AFTER DISCOVERY (Art. 39 CISG)

SELLER'S KNOWLEDGE OF LACK OF CONFORMITY (Art. 40 CISG)

DAMAGES - SET OFF FOR LACK OF CONFORMITY

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A seller and a buyer concluded in 1979 three contracts for the sale of goods. As agreed, the buyer paid, upon presentation of the shipping documents, 90% of the price with the balance to be paid later. The goods of the second contract did not conform with the contract specifications. After treating the goods in order to make them more saleable, at considerable expense, the buyer sold the goods to third parties. The seller commenced arbitration proceedings claiming the balance of the purchase price (10%) remaining due under each of the contracts. The buyer counterclaimed alleging that the seller's claim should be set off against its direct losses, financial costs and lost profit and interest.

As the contract contained no choice of law clause, the court determined the applicable law in accordance with Art. 13(3) ICC Rules, and found that the law of the country of the seller was the proper law governing the contract. According to Art. 13(5) ICC Rules the court was required to take account of the relevant trade usages. The court found: '[that] there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980, usually called the 'Vienna Convention'. This is so even though neither the [country of the Buyer] nor the [country of the Seller] are parties to that Convention.' The court held that CISG reflected the generally recognised trade usages regarding the matter of non conformity of the goods in international sales.

Referring to Art. 38(1) CISG, the court found that the buyer had examined the goods within as short a time as practicable, in this case before shipment, and had given notice of the lack of conformity to the seller within a reasonable time (8 days after publication of the expert's report of the examination) (Art. 39(1) CISG). Further the court held that the seller was not entitled to rely on the provisions of Arts. 38 and 39 CISG as it knew or it could not have been unaware of the lack of conformity and did not disclose the lack of conformity to the buyer (Art. 40 CISG).

The court awarded the seller the full amount claimed and set it off against part of the counterclaim of the buyer.
As regards the applicable rules of [law of the Seller's country], the Arbitrators have relied on the Parties' respective statements on the subject and on the information obtained by the Arbitrators from an independent consultant [consultant's name]. The Arbitrators, in accordance with the last paragraph of Art. 13 of the ICC rules, will also take into account the 'relevant trade usages'.

[...]

The Tribunal finds that there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980, usually called 'the Vienna Convention'. This is so even though neither [Buyer's country] nor [Seller's country] are parties to that Convention. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting the trade usages.

The Vienna Convention, which has been given effect to in 17 countries, may be fairly taken to reflect the generally recognized usages regarding the matter of the non-conformity of goods in international sales. Article 38(1) of the Convention puts the onus on the Buyer to 'examine the goods or cause them to be examined promptly'. The Buyer should then notify the Seller of the non-conformity of the goods within a reasonable period as of the moment he noticed or should have noticed the defect; otherwise he forfeits his right to raise a claim based on the said non-conformity. Article 39(1) specifies in this respect that: 'In any event the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period'.

In the circumstances, the Buyer had the shipment examined within a reasonable time-span since [expert's name] was requested to inspect the shipment even before the goods had arrived. The Buyer should also be deemed to have given notice of the defects within a reasonable period, that is eight days after the expert's report had been published.

The Tribunal finds that, in the circumstances of the case, the Buyer has complied with the above-mentioned requirements of the Vienna Convention. These requirements are considerably more flexible than those provided under [the law of the Seller's country]. This law, by imposing extremely short and specific time requirements in respect of the giving of the notices of defects by the Buyer to the Seller appears to be an exception on this point to the generally accepted trade usages.

In any case, the Seller should be regarded as having forfeited its right to invoke any non-compliance with the requirements of Articles 38 and 39 of the Vienna Convention since Article 40 states that the Seller cannot rely on Articles 38 and 39, 'if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose'. Indeed, this appears to be the case, since it clearly transpires from the file and the evidence that the Seller knew and could not be unaware [of the non-comformity of the consignment to] contract specifications.

[...] This provision (Article 70 of the New French Code or Civil Procedure), even assuming that it may apply in the circumstances, does not in any way require the tribunal to reject the counterclaim if its examination might delay that of the main claim. It simply states that the counterclaim for setting off is always admissible except only that the tribunal may find it appropriate to sever the counterclaim from the main claim lest a concurrent examination of the counterclaim should excessively delay the judgement on the merits. In the present case, the main Claim and the Counterclaim, in accordance with the Terms of Reference, have been examined together so as to be the subject of a single award, and there is no reason to separate them.

[...]
Sources

Published in English:
- Yearbook of Commercial Arbitration, XV (1990), 70

Commented on by:

Related articles

1, 38, 39, 40, 45
Author: ACKERMAN, G.R.,

Title: Scholarly Commentary on Articles of the United Nations Convention on Contracts for the International Sale of Goods (Cornell Symposium)

Journal/Publisher: 21 CORNELL INTERNATIONAL LAW JOURNAL 535-573 (1988)

Bibliographic Area: Convention In General

Related articles: