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Introduction to the digest of case law on the United Nations Sales Convention

Note by the Secretariat

1. The United Nations Convention on the International Sale of Goods, 1980 (the Convention, or CISG) has become in 25 years an important tool for international trade. The Convention provides a uniform framework for contracts of sale of goods between parties whose places of business are in different States. By defining rights and obligations of the parties in a transparent and easily understandable manner, the Convention furthers predictability in international trade law, thus reducing transaction costs.
2. The Convention has, as at 1 May 2004, 63 States parties, which come from all legal traditions, have very different economies, and together account for over two thirds of global commercial exchanges.¹ The number of academic works dedicated to the Convention grows constantly,² as does the amount of related case law—currently, well over 1,000 cases are available from various sources. Its contribution to the goal of unification of international trade law is definitely significant.
3. One reason for the wide acceptance of the Convention stems from its flexibility. The drafters of the Convention achieved this flexibility through the use of different techniques, and, in particular, by adopting a neutral terminology, by promoting the general observance of good faith in international trade, by establishing as a rule that the general principles on which the Convention is based should be used when filling any gap in the set of standards created by the Convention,³ and by recognizing the binding effects of agreed usages and established practice.⁴
4. The drafters of the Convention took special care in avoiding the use of legal concepts typical of a given legal tradition, concepts often accompanied by a wealth of well-established case law and related literature that would not be easy to transplant in different legal cultures. This drafting style results from a deliberate



choice to ensure that the Convention would promote harmonization of substantive law by the largest number of States, regardless of their legal tradition.

5. Article 79 of CISG offers an example of this drafting style, as it does not refer to terms typical of the various domestic systems such as “hardship”, “force majeure” or “Act of God”, but provides instead a factual description of the circumstances that may excuse failure to perform. The choice of breaking down sophisticated legal concepts, often bearing elaborate domestic interpretative records, into their factual components is evident in the replacement of the term “delivery of goods” with a set of provisions relating to performance and passing of risk. Similarly, the use of the notion of “avoidance of the contract” in the Convention introduces a legal concept that may overlap on a number of well-known domestic concepts and calls for autonomous and independent interpretation.

6. Another technique used by the Convention’s drafters to achieve flexibility is the adoption of rules more easily adaptable to the different trades than the equivalent domestic requirements. Thus, for instance, article 39 of CISG demands that the notice of non-conformity of goods shall be given within a “reasonable” time, instead of indicating a strict deadline to give such notice.

7. The combination of substantive provisions, terminology and drafting techniques reflected in the Convention ensures its high level of adaptability to evolving commercial practices.

8. The approach taken by the drafters of the Convention is aimed at facilitating the harmonization of international trade law. However, it also increases the need for a uniform interpretation of its text in the different jurisdictions where it is enacted. Therefore, the issue of uniform interpretation of the Convention by reference to both domestic and foreign case law requires particular attention. In this respect, it should be recalled that article 7 (1) of the Convention sets a uniform standard for interpretation of its provisions by stating: “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 [...]”⁵

9. While this provision is paramount to set common standards for interpretation, the goal of uniform interpretation benefits greatly from the adequate diffusion of judicial decisions and arbitral awards, presented in a systematic and objective way. The positive effects of such material are manifold and reach beyond providing guidance during dispute resolution. For example, it provides valuable assistance to drafters of contracts under the Convention and facilitates its teaching and study. Moreover, it highlights the international nature of the Convention’s provisions and thus fosters participation to the Convention by an even larger number of States.

10. The United Nations Commission on International Trade Law (UNCITRAL), in accordance with its mandate,⁶ has undertaken the preparation of the tools necessary for a thorough understanding of the Convention and for its uniform interpretation.

11. UNCITRAL has established a reporting system for case law on UNCITRAL texts (CLOUT).⁷ CLOUT was established in order to assist judges, arbitrators, lawyers, and parties to business transactions, by making available decisions of courts and arbitral tribunals interpreting UNCITRAL texts; and in so doing, to further the uniform interpretation and application of those texts.

12. CLOUT covers case law related to conventions and model laws prepared by UNCITRAL, although the majority of its cases refers to the Convention, and to the UNCITRAL Model Law on International Commercial Arbitration, 1985.
13. A network of national correspondents, appointed by the governments that are party to at least one UNCITRAL convention or have enacted at least one UNCITRAL model law, monitors the relevant judicial decisions in the respective countries and reports them to the UNCITRAL Secretariat in the form of an abstract. The Secretariat edits and indexes the abstracts and publishes them in the CLOUT series.
14. The network of correspondents ensures coverage of a large number of domestic jurisdictions. The availability of CLOUT in the six official languages of the United Nations—a unique feature among CISG case law reporters—greatly enhances the dissemination of the information. These two elements are key to promote uniformity of interpretation on the widest possible scale.
15. In light of the large number of CISG-related cases collected in CLOUT, the Commission requested a tool specifically designed to present selected information on the interpretation of the Convention in a clear, concise and objective manner.⁸ This request originated the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods.
16. The goal of uniform interpretation of CISG has greatly benefited from CLOUT, and it is expected that the Digest will further support it.
17. The Digest presents the information in a format based on chapters corresponding to CISG articles. Each chapter contains a synopsis of the relevant case law, highlighting common views and reporting any divergent approach. The Digest is meant to reflect the evolution of case law and, therefore, updates will be periodically released in the form of individual chapters that will replace the previous ones. While the CLOUT system reports cases only in the form of abstracts, the present Digest makes reference also to the full text of the decision whenever this is useful to illustrate the point.
18. The Digest is the result of the cooperation between the national correspondents and the UNCITRAL Secretariat. It also greatly benefited from the contribution of Professor Franco Ferrari of the Università degli Studi di Verona, Facoltà di Giurisprudenza; Professor Harry Flechtner of the University of Pittsburgh School of Law; Professor Ulrich Magnus of the Universität Hamburg, Fachbereich Rechtswissenschaft; Professor Peter Winship of the Southern Methodist University School of Law; and Professor Claude Witz, Lehrstuhl für französisches Zivilrecht, Universität des Saarlandes, who prepared its first draft.

Notes

¹ United Nations Convention on Contracts for the International Sale of Goods, 1980, United Nations *Treaty Series*, vol. 1498, p. 3. CISG is deposited with the Secretary-General of the United Nations. Authoritative information on its status can be obtained from the United Nations Treaty Collection on the Internet, at <http://untreaty.un.org/>. Similar information is also provided on UNCITRAL's website at <http://www.uncitral.org/>.

- ² UNCITRAL prepares yearly a *Bibliography of recent writings related to the work of UNCITRAL* (for the year 2004, see United Nations document A/CN.9/566 of 19 April 2004), available on UNCITRAL's website at <http://www.uncitral.org/>.
- ³ Art. 7 CISG: "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. 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."
- ⁴ Art. 9 CISG: "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."
- ⁵ This clause served as a model for similar provisions in other uniform legislative texts. See, for example, United Nations Convention on the Assignment of Receivables in International Trade, art. 7 (1) ("regard is to be had to its ... international character"; UNCITRAL Model Law on Electronic Commerce, art. 3 ("regard is to be had to its international origin"); UNCITRAL Model Law on Cross-border Insolvency, art. 8 ("regard is to be had to its international origin").
- ⁶ UNCITRAL should be active, inter alia, in "[...] promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade [and] collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade; [...]": General Assembly resolution 2205 (XXI) of 17 December 1966, available on UNCITRAL's website at <http://www.uncitral.org/>.
- ⁷ Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, New York, 11-20 April 1988, United Nations document A/43/17, paras. 98-109. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1 to A/CN.9/SER.C/ABSTRACTS/42. The forty-two CLOUT reports are also available on UNCITRAL's website at <http://www.uncitral.org/>.
- ⁸ Report of the United Nations Commission on International Trade Law on its thirty-fourth session, 25 June-13 July 2001, A/56/17, paras. 391, 395, available on the UNCITRAL website <http://www.uncitral.org/english/sessions/unc/unc-34/A-56-17e.pdf>