The CISG has established a World law of international sales and has influenced several national sales laws. It has launched initiatives to prepare a World law of international contracts and an EU law on contracts. It was the “godfather” of the UNIDROIT Principles of International Commercial Contracts (UPIC) and the Principles of European Contract Law (PECL), which again have influenced the interpretation of the CISG.

Art. 7(1) CISG provides that in its interpretation, 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. Art. 7(2) CISG lays down that questions concerning matters governed by the CISG, 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. The questions to which art. 7 gives rise and other methodological questions need to be expounded, and that is what this book does.

The wish expressed by most, if not all its contributors is to achieve uniformity in the application of the CISG. There have been divergences. Some judgments have shown a homeward trend. Courts have interpreted the CISG to mean the same as the corresponding provisions in their domestic law. It appears from the article by Wei Li that in the first years after 1988 the China International Economic Trade Arbitration Commission (CIETAC) did not raise the issue on the applicable law to international sales contracts. Although the application of CISG is now the rule in the CIETAC it may still happen that the CISG is not applied when it should have been, and applied when it should not have been, or that it is applied wrongly.

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1 As of December 2008 the CISG had been adopted by 72 States.
4 See Perales Viscasillas in this book.
5 See Li in this book.
6 See Wu, CIETAC’s Practice on the CISG, Nordic Journal of Commercial Law 2005, 1 et seq.
Divergences have also appeared in the interpretation of the CISG. Some, if not most, courts and arbitral tribunals pass lightly over the requirement in Art. 14 CISG that the price has to be included in the offer,\(^7\) a few take it seriously.\(^8\) Most courts and arbitral tribunals seem to apply the good faith principle to the parties’ behaviour and not as prescribed by Art. 7(1) CISG to the interpretation of CISG only,\(^9\) but there are still courts and arbitrators who restrict the principle to the interpretation of CISG.\(^10\)

However, as pointed out by Ulrich Magnus,\(^11\) “the divergences are less than one could expect bearing in mind that no central CISG court exists.” Magnus states that “the dogmatic foundations of the method of interpretation of the CISG are relatively stable despite the fact that the CISG itself only sets out guidelines and aims for its interpretation but no precise method of interpretation.”\(^12\) It is also my impression that the divergences of interpretation are relatively few, and this in my view has another reason. On the whole, the laws of today have been framed by the Western European Tradition\(^13\) and this tradition has also developed a common sense of justice.

When the CISG was negotiated we saw that the different legal backgrounds of the Members caused disagreement on some points, but there was not so much divergence about the substance of the rules as one could have expected. On most issues there was a common conception of what was just and expedient. When the PECL and the UPIC were negotiated the experience was the same. The Members of the two groups frequently tried to visualise how concrete cases would be solved in their country and found that

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\(^7\) See cases reported in Unilex at Art. 14 CISG.


\(^9\) See cases reported in Unilex at Art. 7 CISG.


\(^12\) In his very careful study of the interpretation of statutes in England and on the Continent Vogenauer (Die Auslegung von Gesetzen in England und auf dem Kontinent, Tübingen 2001) finds a trend towards uniformity.

\(^13\) See also Markesinis, Comparative Law in the Courtroom and the Classroom, Oxford 2003, 50: “In the European world (which is also present physically and intellectually in the Australian, New Zealand, and Northern and Southern American worlds) one finds the most developed ideas likely to deserve careful study. Is it really suggested that this is not a fact? And if it were not, why would hugely important countries like China, Korea and the former Eastern block be studying these (Western European) systems and trying to import their notions and institutions as they build their own financial markets and the legal infrastructure that goes with them?”
the national contract laws generally differed more in the formulations and techniques than in the result. The Members often agreed on how the rules should be. I venture to assert that most of those general principles that André Janssen and Sörren Claas Kiene extract from the provisions of the CISG were shared by those who drafted the PECL and the UPIC. Some of them are in fact common to most of the existing legal systems. Very few countries do not support party autonomy, the principle of good faith and preservation of the contract. As pointed out by Bruno Zeller regarding the good faith principle they may do it differently, or to use Rodolfo Sacco’s expression their legal formants of the principles may differ but the basic ideas are the same.

The lesson taken is that contract law is based more on ethical and economic considerations that are common to the lawyers of the Western European Tradition than on national cultural attitudes. But as said there are divergences and the question is how uniformity of the present and future understanding of CISG can be achieved.

The languages are an impediment for the unification of the law. Since the working language of those who drafted CISG was English there is a tendency to give prevalence to the English version. That, however, will not help those judges or arbitrators who do not understand English. In addition, the CISG has been translated into the languages of the Contracting States, and it is likely that a court will rely on the translation rather than on one of the authentic versions, and the texts of the CISG’s six authentic languages do not all have exactly the same meaning.

The working groups that prepared the UPIC, the PECL, and the Draft Common Frame of Reference (DCFR) have tried to unify the terminology. The European Union has struggled for a long time with the divergences of interpretation of EU law caused by the different languages. In the Action Plan for a More Coherent European Contract Law, the European Commission gave a high priority to a common terminology. For this purpose the

14 See Janssen/Kiene in this book.
15 See Zeller in this book.
16 There is as mentioned above no World Court to which national courts can refer questions of the application and interpretation of the CISG. The CISG Advisory Council is a committee whose primary purpose is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative. So far only seven opinions on the interpretation of the CISG were delivered. See on the Council http://www.cisgac.com/default.php?sid=128.
17 See Bergsten in this book (under B.II.4).
DCFR\textsuperscript{19} contains an annex with a list of definitions of terms such as \textit{contract}, \textit{damage}, \textit{goods}, \textit{loss}, \textit{writing} etc. UNCITRAL might consider establishing a dictionary of terms used in the UNCITRAL texts. Another obstacle for uniformity of application is that what Franco Ferrari calls the "\textit{domestic background assumptions and conceptions}.”\textsuperscript{20} Each country has its own legal atmosphere. The common lawyers breathe a legal air which is different from that of the civil lawyers; the legal mentality of the Chinese\textsuperscript{21} and the Japanese has its distinctive features and so on.

A French sage has said that if you plan for the coming ten years you should plant a tree; if you plan for a one hundred years you should educate your people. According to Franco Ferrari the "\textit{CISG has to become part of the domestic background assumptions and conceptions in order for the disruptive effect of the natural resort to domestic background assumptions and conceptions to be overcome. For this result to be reached, law school curricula as well as text books will have to be changed to incorporate the study of the CISG}.”\textsuperscript{22} I agree, and I would add that the students should learn to study and use the case law on the CISG. In my view the cases are as important as is the doctrine. But we have to be patient knowing the time it will take before the students become judges who can use their new background assumptions and conceptions. The CISG is in fact now taught in several law schools, and PECL and UPIC in some, but not in as many as is necessary in order to establish a truly international attitude.

There is also a need to establish an influential international regime. Today there are some academic lawyers operating on the international scene. They hold conferences and they write books and articles which address an international readership. They know that they must establish common attitudes, that the ideas they wish to promote must be acceptable, and the language they write palatable to an international audience.

Today the international regime is not very large. Compared to the number of academic lawyers its members are few and their influence not very great. At present the governing bodies of the law faculties of many countries have not fully realised the impact of the ongoing globalisation. If they would read the Writing on the Wall, they would do more to promote an internationalisation of the legal science and the law curriculum. This, however, will eventually become a necessity, and there is therefore reason to have trust in the future. But also here we must be patient.

This book will give a push. It is a very useful contribution to the international doctrine.

\begin{footnotes}
\item[20] See Ferrari in this book (under F.).
\item[21] See for instance Li in this book.
\item[22] See Ferrari in this book (under F.).
\end{footnotes}
Methodological Problems in the Drafting of the CISG

Eric Bergsten

It is well known that the CISG is a revision of the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). What is less known or appreciated is the significance of that history. The revision process raised a certain number of methodological problems, some of which are common to all international unification of law efforts. Some of those problems and their consequences were appreciated at the time, while others were not. This chapter will discuss a number of the methodological problems that were encountered during the revision process in UNCITRAL and will suggest some of the consequences that follow.

A. Introduction

One reason for the unification of law is that it is a symbol of the existence of a newly unified state. That was a significant element in France following the Revolution and in Germany following unification in the end of the nineteenth century. In those cases unification was achieved through adoption of the unified law as national law. The equivalent in the European Union would be the adoption of a regulation rather than a directive calling for implementation by the Member States, though EU regulations seem to have lost much of their political symbolism. When the unification efforts anticipate world-wide or, at least, broad adoption, such as in regard to the CISG, there has to be a different motive.

Whatever the motive, the international unification of law is always a difficult task. Unification of law implies that the subject matter is one that is already subject to a functioning set of legal rules in the different political entities concerned. As pointed out in the Schmitthoff Report that led to the creation of the United Nations Commission on International Trade Law (UNCITRAL):

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1 Available at http://www.unidroit.org/english/conventions/c-main.htm.