CISG vs. Regional Sales Law Unification

With a Focus on the New Common European Sales Law

edited by Ulrich Magnus
Introduction

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On 11 October 2011 the EU Commission has released a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 fin; abbreviated: CESL). It is an optional instrument, primarily for international sales. The parties of such a sale must opt for it. However, if chosen it provides for many mandatory rules though mainly but not exclusively for consumer sales. Yet, there is a rival already there: the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) which also regulates international sales of goods in principle between merchants. In many respects the CISG is the original root of the CESL, in particular for its provisions on international sales between businesses. Europe which actually was the birthplace of the CISG now starts to install an own competing sales law. This Common European Law is designed to enable uniform sales law in the EU but also for sales transactions beyond its borders.

Other regions of the world have their own experience with competing global and regional unification of sales law. This is particularly true for the United States with its Uniform Commercial Code (UCC), for Australia with its common law background and for the African OHADA states which adopted a modified CISG as their common sales law. The contributions to this book discuss the respective regional experience in order to give insights and infer conclusions how reasonable, useful, necessary or unnecessary such regional vs. global sales law unification is. This may influence the judgment on CESL which is still in the making.

The contributions do not focus so much on the details of differences between the CISG and the respective regional sales law but rather on the kind and eventual problems of coexistence between the two competitors.

Instead of an introduction to these problems I would like to address four points: the spirit of the place of this conference, the significance of the CISG, the movement of regional sales unification and lastly the questions which the development and in particular CESL pose.

First, the *genius loci*. There is very good reason that this conference took place in the Max Planck Institute in Hamburg. This is a particularly apt place to discuss the current state of relations between the global and the regional unification of sales law. For, the first director and founder of the Institute, Ernst Rabel, was also the initiator and mentor of the Uniform Sales Law. He is the father of all international sales unification. Much in the CISG goes back to him, in particular the structure and most major policy decisions. Even the formulation of many provisions differs not much from his first proposal. Thus, the global sales law has its roots in this Institute and almost all later directors of the Institute took an active interest in the subject.
Let me add a personal remembrance that leads us also to our second point, the CISG’s impact and importance: When I came to the Institute in 1973 – now almost four decades ago – the Institute’s director was Konrad Zweigert. In 1974 the Hague Uniform Sales Law had entered into force in Germany and two or three years later at one occasion Zweigert posed the question whether there was any experience with this law. I then made an empirical field study asking all German courts and chambers of commerce whether and to which extent they applied the new law. The conducting of this study came to the knowledge of a very influential German business association, actually the German business association. An official of that association contacted Zweigert and urged him to forbid me the conducting of the study. The reasons for this initiative never became quite clear. Evidently, business circles were not favourable towards the new law and might have feared that it could impede their practice regularly to agree on German internal law as applicable law. Zweigert ordered me to come to his office, informed me, wanted to hear what I had to say and then simply said, smiling: “Go on with your study. I do not care whatever their attitude is.” By the way, the later published outcome of the study was typical: The German courts applied the new law only in one out of ten possible cases. By that time, the new law was either excluded or overlooked. But since then, this initially defensive or even hostile attitude against the uniform sales law has now completely changed. In Germany the CISG is often applied and much less excluded than in its early years.

You find a similar reaction in many, if not all countries which have just ratified the CISG: initial reluctance or even hostility, but then steadily growing acceptance. It needs time to make the new law known, to get familiar with it, to discover its advantages, to change the preceding attitude and tradition and to accept and apply the new law. And in contrast to new mandatory law it needs even more time because the CISG can be excluded, its application can be avoided. Enterprises are not forced to change their habits in respect of the applicable law. In other words; the reception of the CISG is an on-going process that lasts a considerable time.

Like in Germany in most ‘older’ CISG countries the CISG has now grown up and has almost reached its adult age. Its practical relevance can hardly be doubted. Not only for Germany, it is a misdescription if it is said that the CISG still leads a “shadow existence”, that it is in most cases excluded or that its importance in practice is negligible. The contrary is true. The CISG’s practical

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1 See U. Magnus, Das Haager Einheitskaufrecht und die gegenwärtige deutsche Praxis, Neue Juristische Wochenschrift 1977, 2000 ss.

significance is also underpinned by the fact that it is the law in now 78 States; the estimates are that three quarters or even more of world trade automatically fall within its scope. Each year an increasing number of court decisions on the CISG from all over the world is reported.

However, practical importance is only one aspect that matters for the CISG’s general importance. The Convention has become a model for national and international legislation on sales law as well as on general contract law. The CESL Draft is only the most recent example. Further, the CISG is the fundament of international soft law, in particular of the PICC and the PECL, the UNIDROIT Principles of International Commercial Contracts as well as the Principles of European Contract Law. In addition, it influences teaching and teachers of law, at least of international commercial law. There is hardly any course on that subject worldwide that does not prominently mention the CISG.

The CISG, as Peter Schlechtriem expressed it, has become a legal “lingua franca” among the lawyers of the world. In a positive sense, the Convention is the legal face of globalisation where one uniform set of rules ideally suffices for international sales transactions. And as the essence of the most comprehensive and thorough study on the CISG’s impact on national laws Franco Ferrari asked the rhetoric question: “In light of this, what is the CISG if not a success, at least in Europe, where it is not only applied more often than elsewhere but is also applied in ways that better conform to the mandate to promote uniformity in its application?”

Why all this on the CISG, its applauded significance and success? This leads us to our third point: the regional unification of sales law, not only but most recently in Europe. Despite the evident appreciation of the CISG all over the globe we nevertheless face regional attempts and effective achievements to unify sales law even by contracting states of the CISG. I leave aside the old Nordic Sales Law of 1905 which started regional unification of sales law long before any global unification of that area of law. If it is allowed to regard the United States as a region – because the single US States enjoy vast legislative competences in civil law – the most successful and prominent example of regional sales law unification is certainly the American Uniform Commercial Code and its Chapter 2 which is on sales. One could argue that this is just a national codification of sales law. However, the UCC is a mere model law which in itself has no binding force at all. Such model laws may or may not be adopted by the legislation of the single US States and only after such adoption a model law becomes binding. With certain variations each of the 50 US States except Louisiana has accepted Chapter

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2 of the UCC (although Louisiana adopted the rest of the UCC). Thus, the UCC in fact harmonised the law for a territory that in economic and social terms is widely comparable to the present EU. On the other hand, the US also ratified the CISG which applies to all single US States though not for sales among them.

A further example, where the CISG and regionally uniform law meet, is Australia. The whole continent has adopted the CISG; but all separate units of the Australian Federation which like the single US States enjoy broad competences in civil law are governed by the Common Law with specific sale of goods acts which are all modelled after the English Sale of Goods Act of 1893.

Quite another example of rivalry between the CISG and regional sales law is to be found in the OHADA which stands for Organisation pour l’Harmonisation en Afrique du droit des Affaires. This supranational organisation with own competences and an own central court was formed by an international treaty of 1993 between states of Africa’s mid-west. Today, OHADA has 17 Member States. Only very few of them, namely Benin, Gabon and Guinea, have ratified the CISG. However, the OHADA itself has enacted uniform acts which become binding when ratified by the Member States. Among those acts the uniform act on general commercial law is the most important one. It is more or less a commercial code, which was first enacted in 1998 and has been revised in 2010. It also provides for rules on commercial sales which widely copy the CISG. Thus, a modified CISG has been made the sales law among and in the OHADA states.

The most recent approach to harmonise sales law on a regional level is the European CESL initiative. This optional instrument primarily addresses b2c sales and b2smme sales. The latter ones are commercial sales where at least one party is a sme, a small or medium-sized enterprise. However, the EU Member States may extend the applicability of CESL to huge enterprises – non-smes – as well. One wonders whether without this provision the parties themselves could not do this. Anyway, CESL applies only if the parties validly choose it. Only then even its mandatory provisions become binding law.

My fourth and last point concerns the questions which the different ways to organise the coexistence of global and regional unification or harmonisation of sales law raise. How do the CISG and the competing sales regulation interact? How is their relationship structured? How reasonable, useful, necessary or unnecessary is such coexistence? Which are the experiences of those regions which practice a side by side existence of CISG and further sales regulations? How do they organise this situation? Do they face problems? Which are the eventual problems? Can we learn for CESL from them? Has CESL to be modified? If so, in which respect? The final question is: Is regional unification still an adequate answer in times of globalisation of trade and if so, under which conditions?

The contributions to this book intend to provide answers to these questions.

5 Art. 7 (1) CESL Regulation.
6 Art. 13 (b) CESL Regulation.
The U.S. Experience with the UCC and the CISG: Some Insights for the Proposed CESL?

Harry M. Flechtner

The U.S. has lengthy experience living with two bodies of law aimed at creating uniform substantive legal regimes for cross-border sales transactions. The two sets of uniform sales law in force in the U.S., of course, are Article 2 of the Uniform Commercial Code (“UCC”), a project motivated largely by a desire to foster uniformity in sales law for interstate transactions within the U.S. internal market (although it is not limited to those transactions), and the U.N. Convention on Contracts for the International Sale of Goods (the “CISG”), a treaty whose purpose is to create a global regime of uniform sales law for international sales. I will attempt to identify lessons that might be useful if Europe comes to face a similar situation, i.e., if the Member States also end up living with two uniform sales law regimes, one designed primarily with the internal EU market in mind (the proposed Common European Sales Law (“CESL”),¹ should it enter into force) and the CISG, to which most EU members are Contracting States. My thinking on this topic has been greatly influenced by a unique opportunity created for me by a Fulbright grant through the Austrian-American Educational Commission: from March through June 2012 I taught a course comparing the CESL and Article 2 of the UCC at the University of Salzburg.

I. The history, rationale, and “enactment architecture” of the UCC: Lessons for the CESL

In keeping with my usual practice, let me begin by stating the obvious – but something that is worth keeping in mind as I proceed: Article 2 of the UCC, the CISG, and the CESL all share the same fundamental goal, which is to reduce the transactions costs imposed on cross-border sales by non-uniform law in the jurisdictions whose law may potentially apply. These three bodies of sales law, furthermore, pursue this goal using the same fundamental strategy: promulgating uniform substantive rules, as opposed to, e.g., uniform or international rules of private international law for sales transactions.