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Conference Report: '20 Years of CISG in the Netherlands', Amsterdam, 20 April 2012

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On 20 April 2012, the Netherlands Journal of Commercial Law (*Nederlands Tijdschrift voor Handelsrecht*) held its annual conference in Amsterdam. This bilingual conference was dedicated to the 20th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in the Netherlands. It provided an opportunity for both academics and practitioners from various jurisdictions to exchange thoughts and experiences with respect to the interpretation and application of the CISG. The descriptive summary of the presentations outlined in this conference report is selective and does not cover all the information and ideas posited by the authors. A full version of the conference papers is published in the *Nederlands Tijdschrift voor Handelsrecht* (Netherlands Journal of Commercial Law), in the second issue of 2012, pages 46–106.

The Chair of the conference, Dr Sonja Kruisinga,[1] welcomed the participants and gave an introduction in which she emphasized the important role of the Netherlands in the development of the conventions on international sales transactions.

The first part of the conference focused on the general trends in the application and interpretation of the CISG in its Member States. Prof. Dr Ingeborg Schwenzer[2] addressed the uniform application and interpretation of the CISG and the role of the CISG Advisory Council therein. Adopted by 78 Member States and with several countries that are in the process of joining the Convention, the CISG is by far the most successful convention in the field of private law. Additionally, the CISG has played a unifying function in a more indirect manner by exerting influence at both international and national levels. The drafters of the UNIDROIT Principles of International Commercial Contracts (hereinafter 'UNIDROIT Principles') and the Principles of European Contract Law (PECL), as well as domestic legislators in, *inter alia*, Finland, Estonia, and the People's Republic of China have followed the CISG to great extent, for example, with respect to the systematic approach and the remedy mechanism. Despite this great success, the restraining factor in the global unification of sales law is the lack of a uniform interpretation of the Convention by the courts in the various Member States. The courts have often proven to interpret

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the flexible CISG text in a manner that is consistent with their own familiar domestic background without taking its international character and its main objectives into consideration, that is, the so-called homeward trend.

Without a supreme court, it is challenging to safeguard the uniform interpretation of the Convention, but by no means impossible. For instance, in 1988, United Nations Commission on International Trade Law (UNCITRAL) established a system for collecting and publishing translated abstracts of court decisions and arbitral awards relating to the Convention: Case Law on UNCITRAL Texts (CLOUT).[3]

In addition, in 2001, the CISG Advisory Council was established. On its own initiative or upon a request by a professional association or international organization, such as the International Chamber of Commerce, the CISG Advisory Council published an Opinion relating to the interpretation and application of the CISG. In her presentation, Schwenzer briefly named and elaborated upon the nine Opinions that have already been published on different topics.[4] Lacking binding authority for courts and arbitral tribunals, these Opinions do provide persuasive authority as they are often cited in scholarly writings, arbitral awards, and court decisions.

Taking the cue from Ingeborg Schwenzer, Prof. Larry DiMatteo[5] and Dr André Janssen[6] presented their paper on methodological solutions for interpreting the CISG. Sharing Schwenzer's concerns, Janssen immediately stressed in the introduction that a lack of development and consensus regarding the interpretive methodologies for interpreting the CISG endangers the functioning of the Convention. In order to find a uniform interpretive methodology, the courts could gain insight from a combination of national interpretive techniques. Every jurisdiction has its own set of methods that, despite the differences in terminology and approaches, ultimately often lead to the same or similar results. In general, four traditional national methods of interpretation can be identified, namely a

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3 <www.uncitral.org/uncitral/en/case_law.html>.

4 The CISG Advisory Council has issued nine Opinions on the following topics: 'Electronic Communications under CISG' (2003), 'Examination of the Goods and Notice of Non-conformity' (2004), 'Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG' (2004), 'Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts' (2004), 'The Buyer's Right to Avoid the Contract in Case of Non-conforming Goods or Documents' (2005), 'Calculation of Damages under Article 74′ (2006), 'Exemption of Liability for Damages under Art. 79′ (2007), 'Calculation of Damages under Article 75 and 76′ (2008), and 'Consequences of Avoidance of the Contract' (2008). The Opinions are published on the website of the CISG Advisory Council: <www.cisgac.com/default.php?sid=128>.

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grammatical, systemic, historic, and teleological interpretation. These traditional techniques can be very useful in identifying a uniform interpretive approach. However, in order to find a truly autonomous methodology as required by Article 7(1) CISG, it is important to look beyond these domestic methodologies. DiMatteo went on to describe alternative methods of interpretation, that is, the application of underlying principles to the CISG, analogical application among the CISG provisions, analogical application of foreign case law and secondary legal sources such as scholarly writings and the Opinions of the CISG Advisory Council. Finally, DiMatteo illustrated that the use of soft law, such as the UNIDROIT Principles and the PECL, comparative law, contextualism, economic interpretation, and party-generated rules, may provide helpful guidance for an autonomous interpretive methodology for interpreting the CISG.

In his presentation, Marc van Maanen[7] shared some practical experiences and highlighted some potential pitfalls with respect to three specific topics. Van Maanen illustrated that Articles 38 and 39 CISG, incorporating the buyer's duty to examine the goods and to give notice of any lack of conformity, may be considered as a potential pitfall for the buyer. These provisions do not contain specific time limits for the examination of the goods, putting the buyer bearing this duty in a difficult position. Van Maanen indicated that the deadline for the examination of goods, as well as the extent of such an examination, depends on different factors. For instance, the case law illustrates that the inspection of perishable goods, such as watermelons, must take place before their transportation, when the sales contract does not involve the carriage of goods. The obligation of early notification also applies to durable goods such as tiles.

With respect to Article 35 CISG, Van Maanen outlined a uniform case law that shows that it is generally the buyer's responsibility to inform the seller about public law requirements in his country. However, Van Maanen illustrated that when the parties agree on Delivery Duty Paid terms (Incoterms), it is the seller who is responsible for all customs formalities and for obtaining the import licence in conformity with the public law requirements of the buyer's country.

As to the interpretation of the parties' agreement, Van Maanen concluded that the CISG contains no pitfalls. On the contrary, according to him, the flexible interpretive standard set out in Articles 8 and 9 CISG is of great importance for international trading practice. According to these provisions, the parties' statements are to be interpreted according to their intent where the other party knew or could not have been unaware of that intent. In other words, the statements are to be interpreted according to the understanding of a reasonable person taking into account all relevant circumstances of the case, including negotiations, earlier established practices between the parties, and international trade usages. Such an

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interpretive approach gives the court the opportunity to look beyond the grammatical interpretation of the contract terms, bearing in mind diverging trade customs.

Highlighting the requirement and importance of a uniform interpretation and application of the CISG, Dr Edwin van Wechem[8] raised the following four questions regarding the use and applicability of standard terms in international sales contracts: (1) Which court is competent to decide on disputes relating to the application and interpretation of the standard terms? (2) On the basis of which law must it be determined whether the standard terms are applicable to the contract? (3) Are there specific rules regarding certain types of clauses, such as retention of title clauses? (4) Which rules apply to the use of the standard terms in an electronic environment?

As to the first question, Van Wechem observed that standard terms and conditions often contain a jurisdiction clause. Dutch courts should answer the question whether the court referred to in the standard terms and conditions is indeed competent on the basis of Article 23 Brussels I Regulation, if the Brussels I Regulation is applicable. Pursuant to Article 23 of the Brussels I Regulation, a jurisdiction clause must be in writing, in a form that accords with the practices established by the parties or in a form that accords with a usage of which the parties are or ought to have been aware. For this reason, Van Wechem recommended to make the terms and conditions available in a language that can be understood by the other party.

Which law applies to the question whether the terms and conditions are applicable? Van Wechem outlined four scenarios to answer this question. (1) Both parties have their places of business in a contracting state to the CISG, and the seller did *not* exclude the applicability of the CISG in his standard terms. (2) Both parties are vested in a Member State to the CISG, and the seller excluded the applicability of the CISG in his standard terms. (3) Only the seller is vested in a Member State to the CISG and failed to exclude the CISG in his standard terms. (4) Only the seller is vested in a Member State to the CISG, and he excluded the CISG in his standard terms.

Van Wechem concluded that in the case of the first scenario, the question whether the terms and conditions have been agreed upon should be answered on the basis of the CISG. According to him, there is no general duty to transmit standard terms to the other party at the time of the conclusion of the contract, as has been held by the German Supreme Court in its decision of 31 October 2001. With regard to the second scenario, Van Wechem concluded that it must first be established whether the CISG has validly been excluded pursuant to Article 6 CISG. If the court decides that the CISG has indeed been excluded, the conflict between the parties will

8 Baker & McKenzie, Amsterdam, the Netherlands, director of Law@Work B.V.

then be governed by the law chosen in the standard terms. In the third and fourth scenarios, the court should apply the Convention if the applicable law is the law of a country that is a signatory to the Convention. The court must then answer the question whether the standard terms are applicable on the basis of the CISG.

With respect to retention of title clauses, Van Wechem concluded that the question whether a retention of title clause is incorporated in the standard terms and conditions as part of the parties' agreement is governed by the CISG. Moreover, he observed that the CISG Advisory Council Opinion No. 1 provides guidance as to which rules apply to the use of the standard terms in an electronic environment.

During the brief discussion after the first part of the conference, Ingeborg Schwenzer replied to one of the questions that the CISG Advisory Council's Opinion on the incorporation of standard terms is expected to be published in August 2012 and that the line of reasoning of the German Supreme Court in its decision of 31 October 2001 will probably not be followed.

During the second part of the conference, some specific issues were discussed. The first speaker after the break, Prof. Dr Burghard Piltz,[9] posed the question: 'what is a contract of sale involving carriage of goods under the CISG?' The answer to this question is relevant, for example, in order to determine when the buyer should examine the goods. Article 38(2) CISG namely provides that if the contract involves the carriage of the goods, the examination may be deferred until the goods have arrived at their destination. Despite the fact that several provisions in the CISG refer to carriage of goods, Piltz observed that the Convention does not contain a definition of a contract of sale involving carriage of goods. However, some provisions in the CISG may provide some guidance in clarifying the concept of a contract of sale involving the carriage of the goods under the CISG. For example, Article 31(a) CISG provides that if a contract of sale involves the carriage of the goods, delivery takes place at the moment the goods are handed over to the first carrier. For this reason, the prevailing view is that a contract of sale involves the carriage of goods when an independent carrier is involved. Piltz finds that this criterion should not be decisive as independent carriers may also be involved in a situation that does not fall within the scope of sales involving the carriage of the goods. According to Piltz, the most important aspect of a contract of sale involving carriage of the goods is that the place of delivery and the place of taking delivery do not coincide. Thus, according to Piltz, a contract of sale involves the carriage of goods in situations where a distance has to be bridged between the place of delivery of the seller and the place of taking delivery by the buyer.

Maartje Bijl[10] explored the influence of documentary payment mechanisms on the parties' rights and obligations under the CISG. She posed the questions to what extent the CISG is suitable to deal with documentary sales and whether trade

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usages such as the Uniform Customs and Practice for Documentary Credit (UCP) 600[11] can be used in conjunction with the CISG. The obligation of the seller to hand over documents under the CISG is outlined in Articles 30 and 34 CISG. Article 34 provides that a seller should hand over the documents at the time and place and in the form required by the contract. However, not only under the CISG but also under the UCP is a seller required to deliver conforming documents by the time agreed upon in the contract or, in a documentary sales transaction, by the time stipulated in the documentary credit. In general, as the principle of strict compliance is salient in documentary credit transactions, this requirement under the UCP is more stringent than under the CISG. According to this principle, a bank is only entitled to honour payment upon a complying presentation of documents. Thus, the obligation to present complying documents is of such importance in a documentary sales transaction that a non-complying presentation may be regarded as a fundamental breach pursuant to Article 25 CISG authorizing the buyer to avoid the contract as stipulated in Article 49 CISG. Bijl concluded that if the parties have made a reference to the UCP in their sales contract, the seller's obligation to present conforming documents under the UCP should be taken into account in determining whether the buyer is entitled to avoid the contract under the CISG if the seller fails to present 'clean' documents. In other words, a seemingly minor defect in the presentation of the documents, which in a regular sales transaction might not have resulted in a fundamental breach, could in a documentary sales transaction constitute a fundamental breach.

Thereafter, Prof. Dr Christina Ramberg[12] discussed the problems that practitioners face in finding the law relating to, for example, hardship in cases where the sales contract is governed by the CISG. She used a case decided in 2009 by the Belgian Supreme Court[13] to illustrate these problems with respect to the application and interpretation of the CISG regarding the issues not specifically regulated by the Convention. In this Belgian case, the parties concluded a contract for the sale of steel tubes. After the conclusion of the contract, the price of steel increased by 70%. The seller requested the buyer to adjust the price, but the buyer refused. Since the effect of changed circumstances or hardship is not expressly regulated in the CISG, the Belgian Supreme Court used other sources to fill this gap and eventually applied the UNIDROIT Principles and decided in favour of the seller.

Ramberg outlined that this reasoning by the Belgian Supreme Court and especially the application of the UNIDROIT Principles to decide this case might

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11 Uniform Customs and Practice for Documentary Credit (UCP). Drafted by the International Chamber of Commerce (ICC) Banking Commission. Reference is made to ICC Publication No. 600 (rev. 2006).

12 University of Stockholm, Sweden.

13 Cass. Belg. 19 Jun. 2009, No. C.07.0289.N. The case is commented upon in *ERPL* (*European Review of Private Law*) 2011-1.

have been a surprise to the lawyer assisting the buyer in this matter. This counsel might have argued that the CISG does not deal with the question of changed circumstances and consequently this question should have been decided on the basis of Belgian law. Ramberg illustrated that the counsel might have been unaware of the potential sources that the Supreme Court could use to fill this gap in the CISG. She underlined the need for a more user-friendly presentation of the law as, according to Ramberg, it is almost impossible for a (general) practising lawyer to master all sources of law in relation to the CISG. To reach this goal of a more user-friendly presentation of the law, a new interface of law should be developed in order to safeguard the trustworthiness of the legal system.

As a final speaker, Dr Roeland Bertrams[14] raised the question of which uniform or national law should be applied to determine the applicable statutory interest rate in contracts that are governed by the CISG. To illustrate the problems that may arise in relation to this question, Bertrams referred to a Dutch case decided by the District Court of Arnhem on 11 April 2002.[15] In this case, a Surinam seller and a Dutch buyer concluded a contract of sale. This contract, governed by Surinam law, provided that the purchase price had to be paid in US dollars. Although the Surinam seller did not receive payment, he waited about two years before he initiated legal proceedings. The seller claimed interest over the sum pursuant to Surinam law. This interest rate amounted to 3% per month, that is, 36% per year. The interest rate in the Netherlands at that time was approximately 8%–10% per year. The question arose as to which law or what standards should apply to determine the interest rate. Should Surinam law be applied as the *lex causae*, US law as the *lex monetae*, Dutch law as the law of the place of the debtor or uniform law such as the CISG?

The CISG does not provide much guidance in determining the applicable interest rate. Article 78 CISG merely provides that 'if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it'. Neither does it provide for a percentage that should be applied nor for a method to determine the interest rate. Consequently, the question arises whether the interest rate should be and can be determined on the basis of general principles of (uniform) law or whether this rate should be determined on the basis of the national law that is found to be applicable on the basis of the rules of private international law. According to Bertrams, the applicable law should be the national law found through the application of the relevant rules of private international law. However, it seems that there is no uniformity in the case law and the legal literature as to whether the application of these rules of private international law leads to the application of the *lex causae* or the *lex monetae*. Bertrams argued in favour of the application of the *lex monetae*, as the statutory interest rate in the *lex monetae* is most closely connected to

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15 *NIPR* 2002, 252.

the level of inflation of the currency and the position of that currency against other currencies.

In general, it can be said that – so far – little attention has been paid to the CISG in the Netherlands. Therefore, it was very interesting that the editorial board of the Netherlands Journal of Commercial Law decided to dedicate its annual conference to the 20th anniversary of the CISG in the Netherlands. This annual conference provided an opportunity for academics and practitioners to exchange ideas on the application and interpretation of the CISG and its possible pitfalls. Although it is undisputed that the CISG provides an important legal framework for international commercial contracts, it followed from the presentations that its uniform application and interpretation require specific attention for this aim by the courts, arbitral tribunals, and practitioners.