

The Legal Practitioners' Problems in Finding the Law Relating to CISG - Hardship, Defect Goods and Standard Terms¹

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1 Introduction

There is no longer any ambition from the lawmaker to present law in a way accessible to the ordinary citizen. The target for lawmakers and the intended user of law is the professional lawyer (judges and legal counsellors). However, not only the ordinary citizen, but also the modern practicing lawyer faces problems in accessing the content of law. In this presentation, I will use CISG as an illustration of problems consisting of information overload, blind spots and misleading structures. I claim that the law needs to be presented in a new way in order to facilitate practitioners' understanding of the law.

2 Information Overload

Legal practitioners are faced with a problem of information over load. There are too many norms (national legislation, national case law, international "autonomous" conventions, numerous international soft law instruments, foreign case law (CLOUT), abundant national and international legal literature etc.²

The situation is particularly problematic when the legislation is of international origin.³ CISG is an international convention and the objective is to solve many (maybe all?) disputes between international parties to a sales transaction. What to do with matters not expressly settled in CISG? Art. 7.2 states that matters governed by CISG but not expressly settled by CISG shall be settled in conformity with the general principles upon which CISG is based. If the national general contract law is not to be applied, what applies instead? If the rules on CISG sales law is intended to constitute an autonomous contract law regime, then how to establish the content of this contract law? Everyone who is theoretically confronted with an autonomous legal regime not based in national law, necessarily gets confused.⁴

The problematic relationship between sales law and general contract law is clearly demonstrated by a rather recent case from the Belgian Supreme Court.⁵

2 Among others, Pierre Bourdieu has addressed this problem in *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings Law Journal* 814 1986-1987. Also Gunther Teubner has described this feature of law, inter alia in *Alienating Justice: On the surplus value of the twelfth camel*, in David Nelken and Jiri Přibán, *Law's New Boundaries: Consequence of Legal Autopoiesis*, Ashgate, Aldershot 2001, 21-44.

3 These problems have been described by Chiara Cravetto & Barbara Pisa, *The 'Non-sense' of Pre-contractual Information Duties in case of Non-concluded contracts*, *EPRL*, 2011, Vol. 10 No. 6, p. 759; R. Sefton-Green, *Choice, Certainty and Diversity: Why more is less*, *ERCL* 2011, p. 134-150.

4 The EU Sales law proposal is a European regulation and has as an objective to solve all disputes between parties to which the law is applicable. To present the EU Sales law as an autonomous legal regime, is indeed confusing for the practitioner.

5 Cass. (Belge) 19 juin 2009, nr. C.07.0289.N, "jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf¼F-20090619-4", Arr. Cass. 2009 nr. 422. The case is commented in (2011) 19 *EPLR* 1.

The parties concluded contracts for the sale of steel tubes. After the conclusion of the contract, the price of steel increased by 70 %. The seller requested an adjustment of the contract price but the buyer refused to modify the price.

The price increase did not constitute force majeure according to CISG Art. 79, since the seller was able to deliver the steel tubes although it had become exorbitantly expensive to do so. There was no “hindrance” to deliver, which is a requirement in CISG Art. 79. Hardship or the effects of changed circumstances is not expressly regulated by CISG. The Belgian Supreme Court applied the rules on hardship in UNIDROIT Principles of International Commercial Contracts since these rules restates general principles of the law of international trade. The Belgian Supreme Court decided that the contract should be adjusted to the seller’s favour.

Now, three main questions arise: First, is hardship a matter governed by CISG at all?⁶ Second, if so, does UNIDROIT Principles restate the general principles upon which CISG is based? Thirdly, if so, does the Unidroit Principles provision on hardship allow adjustment in the specific case? I will not go into depths analysing this particular case. I simply refer to it as an example of the difficult situation for the legal counsellor trying to grasp the content of law.

Some 15 years after CISG was introduced, a number of soft law instruments were introduced which more or less purported to have captured the *lex mercatoria* or the general principles of contract law, inter alia the Unidroit Principles of International Commercial Contracts, the Principles of European Contract Law, the Draft Common Frame of Reference and the EU Sales Law proposal. There are many more such soft law instruments floating around. The CISG Advisory Council produces Opinions trying to gap fill CISG. There is abundant literature on how to handle CISG gaps; many big coherent commentaries, monographs, law journal articles. Furthermore, Uncitral collects all national case law on CISG in CLOUT.

What should the counsellors representing the parties do? Read all these things? Clients are generally not prepared and willing to pay for such reading. Can the parties demand of a diligent (and perhaps expensive) counsellor that she already is familiar with all these sources of information? Is it fair to require of legal counsels to be superhuman and to master all this information?

I am not familiar with the details of how the counsellors argued in the Belgian case. I will anyhow use it as an example of how an unfortunate strategy from the buyer’s legal counsel may lead to a detrimental outcome for the client. The legal counsel probably chose to argue that the gap in CISG with respect to hardship should be filled with national law (Belgian law) and

6 This question is analysed in depth by Rodrigo Momberg Uribe, *The Duty to Renegotiate an International Sales Contract in Case of Hardship*, International Case Note, (2011) ERPL 19, p. 119. See also CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG*, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, at “www.cisgac.com”, describing the different opinions in the legal literature on how to manage hardship in international sales.

demonstrated to the court that Belgian case law is very restrictive in allowing departure from the principle of *pacta sunt servanda* due to hardship. I suppose – but I do not know for sure – that the buyer's legal counsel decided to argue solely on the basis of national Belgian law. Maybe the outcome would have been different if she had argued on the basis of Unidroit Principles and explained that the Unidroit Principles article on hardship provides very limited scope for adjustment. Had she better explained for the court how to apply the Unidroit Principles' rule on hardship, her client would probably have won the case. I am rather confident that the outcome came as a total surprise to the buyer's legal counsel. It was quite unpredictable that the court would gap fill CISG with Unidroit Principles and it was certainly unpredictable that the Belgian Supreme Court would misunderstand how to apply the Unidroit provision on hardship.

Can we blame the buyer's legal counsel? She was most likely not aware of all the potential sources of law that the court could decide to be inspired by and apply. She probably did not see the development lurking in Belgian law, ready to be crystallized in the present case. Again, can we blame her? I claim we cannot. We cannot require of a legal counsel to find her way in the jungle of information overload. It is theoretically possible for a very niched expert to find her way. However, it is not reasonable to have expectations of normal practitioners to master all the sources of law relating to CISG and to make a successful strategic argumentation after having analysed all the sources.

The information over load is a threat to foreseeability in law. The information over load makes the strategic planning of argumentation extremely difficult.

3 Blind Spots

A problem of a different nature than information over load is when the easily accessible law does not address a particular question. Instead of not finding his way in a jungle of too many sources of information, the practitioner is unable to identify the content of law, due to a blind spot. Let me give an example.

CISG Art. 35 provides that the goods shall be in conformity with the quantity, quality and description *required by the contract*. The article continues by clarifying what quality the goods should have unless the parties have *agreed* otherwise. In order to apply this article, the content of the parties' agreement must be established and CISG does not provide any guidance with respect to the interpretation of contracts.⁷

The legal counsel sometimes does not identify that rules on interpretation of contracts may be relevant since the reference to such rules is not very clear from CISG. The issue of interpretation is a blind spot to him. At least from my Swedish experience, the practitioners often do not “discover” the issue of interpretation of the contract and it does not strike them as natural to apply general contractual rules on interpretation when faced with a case on defect

7 The CISG Advisory Council is planning to address this issue, see “www.cisgac.com”.

goods.⁸ The explanation is probably the impression of CISG (and many national Sales Acts) being self-contained. It does not come naturally to a practicing lawyer to look outside CISG to find the general contract law rules on interpretation. This is particularly so in states law where there is no legislation on the interpretation of contracts (for instance in Sweden).

Can we blame a practitioner for not seeing that a problem is solved outside CISG? Can we require of him to understand that he should apply general principles and not dissect the answer from a seemingly autonomous legal regime? Compared to the problem of information over load, we are probably more inclined to be reproachful against the blind-spotted lawyer. Still, I have a lot of sympathy for a practitioner being blinded by the non-user-friendly interface of CISG in this particular respect.

The blind spots - i.e. the lack of guidance in existing legislation to other "places" where a problem may be solved - is problematic for the practicing lawyer.

4 Misleading Outdated Structures

A never-ending problem with law is the constant change. Some rules are laid down in old concepts, structures or legislation. It is difficult for the practicing lawyer to understand that the law and the argumentation may have changed even though the legislation remains unaltered. This can be illustrated by an example from CISG.

CISG Art. 19 concerns the formation of contracts when the acceptance differs from the offer and states that sometimes the parties may be bound by contract even though the offer and acceptance do not coincide. It is often said that this provision applies to a situation where one party refers to standard terms. CISG Art. 19 states that "the terms of the contract are the terms of the offer with the modifications contained in the acceptance". The strange thing is that this provision on *content* of the contract is placed in a chapter headed "*Formation of the contract*".⁹

Normally, a dispute concerning standard terms arises after the parties have performed their obligations. They agree that they have a contract, but they disagree about the terms (i.e. the content). Consequently, the issue in dispute is not whether a contract is formed.

8 Some examples from CLOUT: It is difficult to know for sure, but I get an impression that the buyers in the CLOUT case 752, CLOUT No. 71 (Austria, Oberster Gerichtshof, 7 Ob 302/05w, 25 January 2006), too quickly was thrown into the default rules in CISG Art. 35 and did not use modern contract interpretation methods. Since the seller was aware of the buyer's need with respect to security standards, the contract could have been interpreted to have implicit terms in this respect. Also the CLOUT Case 400, CLOUT No. 35 (France, Cour d'Appel de Colmar, 99/02272, 24 October 2000, ARL Pelliculest v. Morton International GmbH/Société Zurich Assurances S.A., Published in French: "witz.jura.uni-sb.de/CISG/decisions/300101.htm") gives an impression that general rules on interpretation of contract could have added a new dimension to the case.

9 The CISG Advisory Council is planning to address this issue, see www.cisgac.com.

The old contract law was based on the theory that the content of a contract is established at the exact moment of formation. If it was established at what point in time the offer and acceptance met, the content automatically consisted of the coinciding content in the offer and acceptance. The traditional view was that the contract's content was constituted at the same time and by the same means as formation. The traditional theory did not distinguish between the question of whether the parties are bound to perform *at all* and the question of *what* they are bound to perform. According to the traditional theory, it was therefore natural to solve problems of interpretation of contracts by resorting to rules on formation.

As time went by, it became clear that the traditional method was not flexible enough. It does not provide a good tool of establishing the common intention of the parties and is not in harmony with how businessmen perceive their relationship. This insight has developed rapidly during the 30-year period after CISG was introduced.

Modern theory makes a distinction between formation and interpretation. Many supreme courts throughout the world have developed sophisticated methods for establishing the content of a contract, taking into account the wording, the nature and purpose of the contract, the preliminary negotiations, conduct subsequent to the conclusion of the contract, usages, usages between the parties, fairness and other factors.¹⁰

CISG Art. 19 is not well suited to solve the problem of incorporation of standard terms.¹¹ CISG misleads the practitioner by having fragmentary and partial rules on interpretation in a chapter on formation.¹² This structure leads practicing lawyers to apply the old formalistic method of basing the content of the contract on the moment of formation. The lawyer would many times be better off if she applied the modern dynamic methods for establishing the content of the contract. Instead of being inspired to apply modern methods for interpretation by taking into account many factors (including the parties conduct subsequent to the conclusion of the contract), the practicing lawyer is

10 See Unidroit Principles Chapters 4 and 5; PECL Chapters 5 and 6.

11 It is disputed in the legal literature how to handle incorporation of standard terms, particularly with respect to battle of forms, see Honnold, J & Flechtner, H, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th Ed. 2009, para. 170.3 and 4; Magnus, U, *Wiener UN-Kaufrecht (CISG)*, in Staudinger. *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, 3d Ed., Hamburg 2005, p. 258 f.; Mullis, in Huber, P & Mullis, A, *The CISG. A new textbook for students and practitioners*, 2007, p. 91 f and p. 93 f; Murray, J, *The Definitive »Battle of the Forms«: Chaos Revisited*, 20 *J. of Law & Commerce* (2000), p. 1 ff.; Perales Viscasillas, P, *Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles*, 10 *Pace Int'l L. Rev.* (1998), s. 97 ff; Schlechtriem, in Schlechtriem, P & Schwenzer, I (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2005, Art. 19 para. 20; Schlechtriem, P, *Battle of the Forms in International Contract Law: Evolution of approaches in German Law, UNIDROIT Principles, European Principles, CISG; UCC Approaches under Consideration*, *Festschrift Rolf Herber*, 1999, s. 36 ff.

12 Unidroit Principles, PECL and DCFR also have this unfortunate structure.

misled to establish the content by using the out dated and limiting offer-and-acceptance-model.

There are numerous cases concerning incorporation of standard terms illustrating that the practitioner is misled to apply concepts relating to formation of contracts, when she would be better off applying general rules on interpretation of contracts.¹³

An example: A German case from Oberlandesgericht Köln concerned battle of forms.¹⁴ The court seems only to have taken into account to what extent the acceptance corresponded to the offer (i.e. the rule in CISG Art. 19) and applied the "last shot-principle". Had the counsellor instead argued by referring to general rules on interpretation of contracts and considered other factors - such as usages between the parties and the conduct subsequent to the formation of the contract, including passivity - the outcome may have been different.

Can we blame a legal counsellor for using old-fashioned offer-and-acceptance methods when she argues that her client's standard terms form part of the contract? Has she breach her obligations towards her client to provide advice with skill and care? Is she liable to pay damages to her client if she loses the case due to the court stating that the contract was concluded at a point in time when the standard terms were not referred to? Or is it acceptable that she solely argues on the basis of the explicit regulation in CISG Art. 19 on formation of contract?

Misleading old structures is a problem for practicing lawyers. It is extremely difficult for practitioners to reveal the evolution in law and to identify that the concepts they learned at university and which are unaltered in legislation, have undergone dramatic change. The evolution of law is an interesting phenomenon from an academic point of view. For the practitioner and her clients, it is only frustrating.

13 The CLOUT Case 23 CLOUT No. 2 (United States, U.S. District Court for the Southern District of New York, *Filanto, S.p.A. v. Chilewich International Corp*, 91 Civ. 3253 (CLB), 14 April 1992); CLOUT Case 135, CLOUT No. 10 (Oberlandesgericht Frankfurt a.M., 25 U 185/94, 31 March 1995), CLOUT Case 193, CLOUT No. 14 (Switzerland, Handelsgericht des Kantons Zürich, HG 940513, 10 July 1996), CLOUT Case 242, CLOUT No. 23 (France, Cour de cassation J 96-11.984, 16 July 1998, *S.A. Les Verreries de Saint-Gobain v. Martinswerk GmbH*), CLOUT Case 291, CLOUT No. 27 (Oberlandesgericht Frankfurt a.M., 5 U 209/94, 23 May 1995), CLOUT Case 445, CLOUT No. 39 (German Bundesgerichtshof, VIII ZR 60/01, 31 October 2001), are maybe all examples where the outcome would have been different if modern methods of establishing the content of contract had been applied. In the CLOUT Case 576, CLOUT No. 51 (U.S. [Federal] Court of Appeals, Ninth Circuit 05-05-03 U.S., 02 15727, 5 March 2003, *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*) the court appears to have supplemented the formation of contract model with something close to interpretation of contracts by referring to CISG Art. 8.3 and taking into account whether a party had affirmatively agreed to a forum selection clause contained in the invoice.

14 CLOUT Case 824, CLOUT no. 80 (Germany, Oberlandesgericht Köln, 16 W 25/06, 24 May 2006).

5 The Solution

As illustrated above, it is clear that the present interface of law makes the practitioner's life difficult. The content of law is hidden in jungles of information, behind blind spots and in inadequate maps of old structures. In this short presentation, I have given some examples related to CISG. There are more examples related to CISG and many more to other private law areas.

Modern business demands quicker legal advice to achieve faster decision-making. The more complex the law grows, the less can it encompass the need for fast decision making in business.

The practitioners (judges and legal counsels) need a more user-friendly presentation of the law. I believe it is time to start developing a new interface of law.

The content of law has been differently presented throughout history. An example of change was the medieval codification of usages, presenting the judges with a new comprehensible interface. Instead of having to know and apply old casuistic case law rules, the judges could more easily find the content of law in books with abstract rules (articles). Another example is the big codification-movement on the European continent, which introduced a new more structured interface to the practicing lawyers. The former ad hoc type of rules had become too unstructured for the practitioners and needed increased accessibility. A third example of an interface change is the US Restatements of Contract law, making the law more accessible to practitioners in a time when the case law had become difficult to overview. The presentation of the law in the Restatements was a useful interface for practitioners. There are many more examples in history of radical changes in the interface of law.

It is crucial to find a new user-friendly interface of law. I am not merely suggesting a new type of restatement or a new structure of a code.¹⁵ The new interface must be of a more revolutionary character. Additionally, the new interface must somehow be endorsed by someone (I am not sure who) in order for practitioners to rely on it.

Unfortunately, I do not have a ready answer as to how a new modern and user-friendly interface of law should be construed. I only know that the new means of communications can be applied to facilitate for practitioners to make the content of law more accessible.

During the work in the Study Group for a European Civil Code, some of my Dutch colleagues sometimes spoke about a vague vision of a modern interface of law. The vision was – if I understood it correctly – to put a fairly abstract question to a computer program, which then would display all the relevant provisions (and not the irrelevant provisions).

¹⁵ Many legislative institutions strive towards more user-friendly texts. For instance in the Netherlands, where Academie voor Wetgeving provides education for legislative lawyers not only focussing on language but also on a deeper level including the users' needs of easier access to the law. One step towards a more user-friendly interface of law is that legislators are aware and reflect on the users' perspective.

Example: When a question concerns the quality of the goods, the “pure” sales law rule on defective goods is displayed together with the general contract law rule on interpretation of contract.

I find this vision stimulating and interesting. It is a seed to something worth elaborating further.

I am sorry that I cannot provide any substantial and coherent description of a new legal interface. The purpose of my presentation is simply to point to the problems related to the present situation and draw attention to the need for change. The present interface of the content of law constitutes one of the main obstacles for real access to justice. It is not only a question of making life easier for practicing lawyers – it is fundamentally a question of safeguarding the trustworthiness of the legal system and, ultimately, the democratic society.