

Handelsrecht

2

APRIL 2012

WETENSCHAPPELIJKE ARTIKELEN

The CISG Advisory Council / Prof. dr. I. Schwenzler LL.M.

Interpretive uncertainty: methodological solutions for interpreting the CISG / Prof. L.A. DiMatteo PhD en dr. A.U. Janssen

Praktische ervaringen met en enige valkuilen in het Weens Koopverdrag / Mr. M.A.W. van Maanen

Dienen algemene voorwaarden te worden bijgesloten onder de vigueur van het Weens Koopverdrag? / Mr. dr. T.H.M. van Wechem

Sales involving Carriage of the Goods / Prof. dr. B. Piltz

Problems Legal Practitioners Face in Finding the Law Relating to the CISG- Hardship, Defective Goods and Standard Terms / Prof. dr. C. Ramberg

The influence of documentary payment mechanisms on parties' rights and obligations under the CISG: an interpretive challenge / Mr. M.C. Bijl

Wettelijke rente, Weens Koopverdrag en IPR / Mr. dr. R.I.V.F. Bertrams

COMMERCIALIA

M.D.A. van Bodegraven

O. Böhmer

M.J. Boon

A.L.H. Ernes

R.H.P. Hageman

C.J. de Jong

S.A. Kruisinga

P.M. Leerink

S.M. Oude Alink

M. Snel-de Kroon

H.J.E. Veerbeek

G.M. Veldt

Verschijnt
6x per jaar

UITGEVERIJ *Paris*

NTHR

Het tijdschrift heeft als onderwerp het (grensoverschrijdend) handelsrecht dat van invloed is op de Nederlandse rechtsfeer. Centraal staan: vervoerrecht; verzekeringsrecht; betalingsverkeer/zekerheidsrecht; handelskoop; e-commerce; waardepapierenrecht; hulp- en tussenpersonenrecht; IPR en rechtsmacht; geschillenbeslechting in het handelsrecht; internationaal contracteren; Europese ontwikkelingen in het handelsrecht en toezicht op financiële dienstverlening.

Redactie

Prof. mr. drs. M.L. Hendrikse (hoofdredacteur); bijzonder hoogleraar handelsrecht en verzekeringsrecht OU (JPR advocaten-leerstoel)/directeur UvA Amsterdam Centre for Insurance Studies (ACIS)/opleidingsdirecteur Master Verzekeringskunde UvA Amsterdam Business School/universitair hoofddocent privaatrecht UvA/rechter-plaatsvervanger in de Rechtbank Utrecht/lid Geschillencommissie Kifid (verzekeringskamer)

Mw. mr. M.J. Boon (redactiesecretaris): Wetenschappelijk Bureau Hoge Raad

Mr. H. Boonk: Boonk Van Leeuwen advocaten

Prof. dr. M.A. Clarke: hoogleraar handelsrecht St. John's College, Universiteit van Cambridge

Mw. prof. mr. A.L.H. Ernes: bijzonder hoogleraar dogmatiek civiel en handelsrecht OU (JPR advocaten-leerstoel)/verbonden aan UM/raadsheer-plaatsvervanger in het Gerechtshof Arnhem

Prof. dr. H. Heiss: Ordinarius für Privatrecht, Rechtsvergleichung und Internationales Privatrecht Universität Zürich en voorzitter projectgroep 'Restatement of European Insurance Contract Law'

Prof. mr. Ph.H.J.G. van Huizen: hoogleraar handelsrecht UU/Banning advocaten

Mw. mr. S.A. Kruisinga: universitair hoofddocent handelsrecht UU

Mr. M.A.W. van Maanen: Van Traa advocaten

Mr. ing. N.J. Margetson: Margetson & Margetson advocaten/UvA

Prof. dr. B. Piltz: hoogleraar internationaal handelsrecht Universiteit Bielefeld/BDPHG Rechtsanwälte Gütersloh

Prof. mr. J.G.J. Rinkes: hoogleraar privaatrecht OU, bijzonder hoogleraar Europees consumentenrecht UM, raadsheer-plaatsvervanger in het Gerechtshof te Arnhem

Prof. mr. F.G.M. Smeele: hoogleraar commercial law EUR/Van Traa advocaten

Mw. mr. N. Vloemans: Ploum Lodder Princen advocaten

Prof. mr. J.B. Wezeman: hoogleraar handelsrecht en ondernemingsrecht RUG/VMW Taxand

Prof. mr. R.M. Wibier: hoogleraar privaatrecht UvT/Allen & Overy advocaten

Prof. dr. R. De Wit: hoogleraar handelsrecht VU Brussel/Van Doosselaere Advocaten Antwerpen

Medewerkers

Mw. mr. M.C. Bijl (UU)

Mr. M.D.A. van Bodegraven (Banning advocaten)

Mr. O. Böhmer (Van Traa advocaten)

Mw. mr. drs. H.M.B. Brouwer (Boekel De Nerée advocaten/UvA)

Mr. R.H.P. Hageman (Banning advocaten)

Mr. C.J. de Jong (UvA Amsterdam Centre for Insurance Studies (ACIS))

Mr. P. Klik (EUR)

Mr. P.M. Leerink (JPR advocaten/OU)

Prof. mr. W.J. Oostwouder (hoogleraar UU/Loyens&Loeff advocaten)

Mr. S.M. Oude Alink (Van Traa advocaten)

Prof. mr. C.E. du Perron (hoogleraar UvA)

Prof. mr. A.F. Salomons (hoogleraar UvA)

Mw. mr. M. Snel-de Kroon (JPR advocaten)

Mr. J.L. Snijders (AKD Advocaten & Notarissen)

Mr. H.J.E. Veerbeek (ING Finance)

Mw. mr. G.M. Veldt (Kneppelhout & Korthals advocaten)

Mr. G.J.P. de Vries (UvA)

Mr. T.H.M. van Wechem (Baker&McKenzie advocaten)

Prof. mr. B. Wessels (hoogleraar UL)

Mr. drs. R. Zwitter (EUR)

Redactiesecretariaat

Mw. mr. M.J. Boon

Hoge Raad der Nederlanden

Postbus 20303

2500 EH 's-Gravenhage

e-mail m.boon@hogeraad.nl

Het al dan niet op verzoek van de redactie aanbieden van artikelen impliceert toestemming voor openbaarmaking en verveelvoudiging t.b.v. de elektronische ontsluiting van het tijdschrift.

Voor gegevens uitgever en abonneeadministratie zie binnenkant achteromslag.

Inhoud

HANDELSKOOP

46 The CISG Advisory Council

Prof. dr. I. Schwenger LL.M.

52 Interpretive uncertainty: methodological solutions for interpreting the CISG

Prof. L.A. DiMatteo PhD en dr. A.U. Janssen

70 Praktische ervaringen met en enige valkuilen in het Weens Koopverdrag

Mr. M.A.W. van Maanen

81 Dienen algemene voorwaarden te worden bijgesloten onder de vigeur van het Weens Koopverdrag?

Mr. dr. T.H.M. van Wechem

86 Sales involving Carriage of the Goods

Prof. dr. B. Piltz

89 Problems Legal Practitioners Face in Finding the Law Relating to the CISG- Hardship, Defective Goods and Standard Terms

Prof. dr. C. Ramberg

93 The influence of documentary payment mechanisms on parties' rights and obligations under the CISG: an interpretive challenge

Mr. M.C. Bijl

101 Wettelijke rente, Weens Koopverdrag en IPR

Mr. dr. R.I.V.F. Bertrams

107 COMMERCIALIA

M.D.A. van Bodegraven

O. Böhmer

M.J. Boon

A.L.H. Ernes

R.H.P. Hageman

C.J. de Jong

S.A. Kruisinga

P.M. Leerink

S.M. Oude Alink

M. Snel-de Kroon

H.J.E. Veerbeek

G.M. Veldt

Prof. dr. I. Schwenzer LL.M.*

The CISG Advisory Council

1. INTRODUCTION

On a global scale, the United Nations Convention on Contracts for the International Sale of Goods – the CISG – is by far the most successful convention in the field of private law. The CISG currently has 78 Member States. Nine out of the ten leading trade nations are Member States, the United Kingdom being the sole exception. Today, the CISG potentially covers more than 80% of the world trade. Each month we receive good news concerning the CISG, be it that the Nordic countries have recently withdrawn their Article 92 CISG declaration, i.e. the reservation not to apply Part II – the part on formation of contracts, be it that more and more smaller countries are joining, such as Madagascar and Costa Rica, not yet counted among the 78 Member States. Other important countries are expected to join in the near future; this is especially true for Brazil, one of the most important transition economies, as well as for some African countries. At the time being, Africa is still under-represented among the Member States.

Beyond the global unification of sales law, it is well known that the CISG has exerted influence at both the international and the domestic levels.¹ Thus, when the first set of the UNIDROIT Principles of International

Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG not only in their systematic approach but also with respect to the remedy mechanism.² The same holds true for the Principles of European Contract Law (PECL) issued in 1999.³ The EC Directive on certain aspects of the sale of consumer goods should also be mentioned in this context.⁴ OHADA based its *Acte uniforme sur le droit commercial général* (AUDCG) primarily on the CISG.⁵ Finally, the Draft Common Frame of Reference published in 2009 and, based thereupon, the Draft Common European Sales Law published in October 2011 are little more than a continuation of all these different unification efforts based on the CISG.⁶ Unification endeavours in South East Asia also follow this trend.

Over the last two decades, the CISG has also proven to be a decisive role model for domestic legislators, and not just on an international level.⁷ Finland, Norway and Sweden took the coming into force of the CISG in their countries on 1 January 1989 as an opportunity to enact new domestic sale of goods acts, thereby heavily relying

* Prof. dr. I. Schwenzer, Dr. iur. (Freiburg, Germany), LL.M. (Berkeley, USA), Professor for Private Law, University of Basel, Switzerland. The present article is a transcript of a lecture given on the occasion of the Annual Conference of the Netherlands Journal of Commercial Law entitled '20 years CISG in the Netherlands' on 20 April 2012 in Amsterdam, The Netherlands. All web pages were last accessed on 27 January 2012. The author is deeply indebted to Mr. Philippe Monnier, MLaw, attorney at law, for his assistance in the preparation of this article.

1. See P. Schlechtriem, '25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts', in: H. Flechtner/R. Brand/M. Walter (eds.), *Drafting Contracts Under the CISG*, New York: Oxford University Press 2008, p. 167-187, 174 et seq. (hereinafter cited as '25 Years'); P. Schlechtriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations', *Juridica International* 2005-10, p. 27, 27 et seq. (hereinafter cited as 'Basic Structures').
2. See UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (PICC) (2010), available at www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf. See also M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law', *Am. J. Comp. L.* 2008-56, p. 1, 16; I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, Oxford: Oxford University Press 2012, p. 3.47 et seq. (hereinafter cited as '*Global Sales and Contract Law*').
3. See Principles of European Contract Law (PECL) (1999) available at frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm. See also O. Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law', *Am. J. Comp. L.* 2005-53, p. 378, 381; I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 2, p. 3.56 et seq.
4. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, L 171/12.
5. See U.G. Schroeter, 'Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht', *Recht in Afrika* 2001, p. 163, 166 et seq.
6. See C. von Bar et al., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Munich: Sellier European Law Publishers 2009. See furthermore P. Schlechtriem, 'Basic Structures', *supra* note 1, p. 175 et seq.; C. von Bar, 'Working Together Toward a Common Frame of Reference', *Juridica International* 2005-10, p. 17, 22; I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 2, p. 3.60 et seq.
7. The same had already been true, albeit to a lesser extent, of the Hague conventions on the sale of goods ULF and ULIS, which in turn served as a basis for the drafting of the CISG. For example, the Dutch *Burgerlijk Wetboek* of 1992 was drafted to closely follow the provisions of ULIS; see S.A. Kruisinga, 'The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law', *Electronic Journal of Comparative Law* 2009-13, p. 1, 2 et seq.

on the CISG.⁸ With the end of the cold war and the collapse of the former Soviet Union, the young Eastern European states looked to the CISG when facing the task of formulating their new civil codes.⁹ This holds true, on the one hand, with regard to the Commonwealth of Independent States (CIS)¹⁰ as well as, on the other hand, the Baltic states, amongst which Estonia is the most prominent exponent. Nowadays, China is of utmost importance for international trade. The contract law of the People's Republic of China dated 15 March 1999 also closely follows the CISG.¹¹ Finally, the modernisation of the German Law of Obligations which began in the 1980s was, from the very beginning, strongly influenced by the CISG.¹²

2. UNIFORM INTERPRETATION OF THE CISG

Article 7(1) CISG reads: '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.'

However, despite all its merits and successes, the state of uniformity that has been achieved throughout the world by the CISG is still a rather fragile one. In many countries, especially in Germany, but also in the United States, it is still advocated that parties should opt out of the CISG as the outcome of litigation or arbitration under the CISG is allegedly unpredictable.¹³ Courts in almost all countries are criticized for following a homeward trend, i.e. for interpreting the CISG against their familiar domestic background instead of seeking a truly uniform application and interpretation.¹⁴ As recently as in 2008, the District Court for the Southern District of New York¹⁵ relied upon the UCC to clarify the CISG. The court claimed – by reference to a statement in a 1995 decision¹⁶ – that there was virtually no American case law on the CISG and thereby ignored the abundant US case law on the CISG from outside the Districts of New York.

The crucial question is: how can we achieve a uniform application and interpretation of the CISG around the globe, among civil law and common law jurisdictions,

among developed, developing and transition countries, across language and cultural barriers?

Unlike the European Communities or OHADA, the CISG has no single supreme court guarding the uniform interpretation of uniform or harmonized law and this may be regarded as a severe disadvantage. However, there are other means to safeguard uniformity.

Allow me to briefly mention a few of them.¹⁷ First of all, already in 1988, UNCITRAL established the information system 'CLOUT' (Case Law on UNCITRAL Texts) which aims to enable the exchange of decisions concerning UNCITRAL Conventions. Reporting offices in the Member States collect all decisions on the CISG and transmit them to the Commission's Secretariat in Vienna, which in turn makes the original decisions available and subsequently publishes a translated abstract of each decision in all six UN working languages. Numerous other databases further alleviate the task of researching court decisions and arbitral awards. Finally, the UNCITRAL Digest on the CISG offers compilations of selected cases on articles of the CISG. Since UNCITRAL is an administrative agency of the UN, however, it must refrain from any critical comments on domestic developments in Member States and thus is not able to give any valuable guidance on the future development of the CISG, especially in cases of divergent interpretation.

3. THE CISG ADVISORY COUNCIL

3.1. Inception and Members

It was against this background that the CISG Advisory Council was established in 2001. The initiator was the late Professor Al Kritzer who, from his retirement as the General Counsel of a multinational company until his death in 2010, not only devoted his whole energy but also personally provided significant funding to promote the worldwide propagation and recognition of the CISG, as well as its uniform interpretation and application. Besides initiating the CISG Advisory Council, Al Kritzer was one of the co-founders of the Institute of International Commercial Law at Pace University, New York, where he most notably established the Pace database on the

8. Of course, the method of implementation of the CISG differed. While Finland and Sweden introduced the CISG alongside their domestic sales laws, Norway enacted one single sales law for international and domestic sales contracts. See for criticism V. Hagström, 'CISG – Implementation in Norway, an Approach not Advisable', *Internationales Handelsrecht* 2006-6, p. 246, 246 et seq. In 2007, a new Danish Sale of Goods Act was drafted. An English translation is available at www.sprog.asb.dk/SN/Danish%20Sale%20of%20Goods%20Act.pdf.

9. See P. Schlechtriem, '25 Years', *supra* note 1, p. 177 et seq.

10. See R. Knieper, 'Celebrating Success by Accession to CISG', *J. L. & Com.* 2005-25, p. 477, 477 et seq. The Commonwealth of Independent States is a supranational organization between states of the former Soviet Union, see www.cisstat.com/eng/frame_cis.htm for further details.

11. See only A.E. Butler, 'Contracts for the International Sale of Goods in China', *International Litigation Quarterly* 2006-21, p. 3, 4 et seq.

12. See P. Schlechtriem, 'Internationales Einheitliches Kaufrecht und neues Schuldrecht', in: B. Dauner-Lieb/H. Konzen/K. Schmidt (eds.), *Das neue Schuldrecht in der Praxis*, Cologne: Heymanns 2002, p. 71-86, 71 et seq.

13. For criticism see R. Koch, 'Wider den formulärmässigen Ausschluss des UN-Kaufrechts', *NJW* 2000-53, p. 910, 915.

14. See I. Schwenzer, 'The Application of CISG in Light of National Law', *Internationales Handelsrecht* 2010-10, p. 45, 46 et seq.

15. *Hilaturas Miel, S.L. v. Republic of Iraq* 573 F. Supp. 2d 781 (S.D. N.Y. 2008), CISG-online 1777.

16. *Delchi Carrier, SpA v. Rotorex Corp.* 10 F. 3d 1024 (2nd Cir. 1995), CISG-online 140.

17. See I. Schwenzer/P. Hachem, in I. Schwenzer (ed.), *Slechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Art. 7 CISG para. 11 et seq. (hereinafter cited as 'CISG Commentary').

CISG and International Commercial Law¹⁸ which now features more than 2600 CISG-related court decisions and arbitral awards from around the world as well as an electronic library of around 1400 scholarly articles on the CISG.

The CISG Advisory Council is a private initiative chartered in the United Kingdom. Its members do not represent countries or international institutions but are scholars specializing in comparative contract law and international commercial law with a strong emphasis on international sales law and the CISG. This guarantees that the Council is independent and able to criticize developments in certain Member States. The founding members of the CISG Advisory Council were: Eric Bergsten, formerly Secretary General of UNCITRAL, Vienna; Michael Joachim Bonell, University of Rome La Sapienza, formerly Secretary General of UNIDROIT; the late Allan Farnsworth, Columbia University, New York; Alejandro Garro, likewise Columbia University; Sir Roy Goode, University of Oxford; Sergej Lebedev, Moscow Institute of International Relations, Jan Ramberg, University of Stockholm; the late Peter Schlechtriem, University of Freiburg; Hiroo Sono, Hokkaido University, Sapporo; and Claude Witz, Universities of Strasbourg and Saarbrücken. Quite a few of the founding members not only had attended the Vienna Conference on the CISG but were heavily involved in the drafting of the CISG itself. Shortly after its formation, Pilar Perales Viscasillas, now University Carlos III, Madrid, and I joined the Advisory Council. Later on, John Gotanda, Villanova University, Philadelphia, and Michael Bridge, London School of Economics, became members, and most recently we welcomed Shiyuan Han, Tsinghua University, Beijing. During its first years, the group was chaired by Peter Schlechtriem, then by Jan Ramberg and Eric Bergsten and now by me.

3.2. The Work of the CISG Advisory Council

The primary purpose of the CISG Advisory Council is to issue Opinions on questions relating to the interpretation and application of the CISG. Topics are either chosen by the CISG Advisory Council itself when it comes to the conclusion that developments in different Member States endanger uniformity or by request from international organizations, professional associations or adjudication bodies. In the past, such requests have been made by, among others, the International Chamber of Commerce and the Association of the Bar of the City of New York Committee on Foreign and Comparative Law. After deciding upon a topic for an Opinion, a rapporteur is nominated, either from among the Council itself or a distinguished scholar who is an expert in the respective field. The rapporteur prepares the Opinion which is then usually discussed in three or four sessions before the final version is approved by the Council members. The CISG

Advisory Council meets about once or twice a year in different places around the globe. Usually, its meeting is combined with an international conference on the CISG, very often at a point in time when a country is about to become or has just become a Member State of the CISG. Prominent examples in the recent past have been Tokyo, Japan, in 2008 and Sao Paulo, Brazil, in 2011, where at the time of this writing the accession to the CISG is currently being debated in Parliament.

The working language of the CISG Advisory Council is naturally English; all Opinions are drafted and finalized in English. The Opinions are first of all published on the website of the CISG Advisory Council with links from many domestic websites dealing with the CISG.¹⁹ Most importantly, however, the Opinions are translated not only into the other working languages of the UN but also into many other languages, in particular by young scholars who themselves are devoted to the CISG and dedicated to the idea of a global unification and harmonization of commercial law. On the domestic level, the Opinions are then regularly published in journals on international and/or domestic commercial law, thus ensuring their wide dissemination among all interested circles.

The CISG Advisory Council works on a truly comparative basis. Although the starting point for any discussions is the CISG, court and arbitral decisions as well as scholarly writings on the CISG from all Member States are considered. However, we then step back and also consider the solutions found in the respective domestic legal systems. As the most important legal systems are represented by members of the CISG Advisory Council and many members are genuine comparatists, knowledgeable in other legal systems, these discussions prove to be extremely prolific.

3.3. Topics Covered by CISG Advisory Council's Opinions

Up to now, the CISG Advisory Council has published nine Opinions. I will briefly describe their backgrounds and solutions.

The first Opinion published in 2003 dealt with 'Electronic Communications under CISG',²⁰ Professor Christina Ramberg, at the time from Gothenburg University, being the rapporteur. When the CISG was drafted in the 1970s nobody thought about electronic communication. Telegram and facsimile were the only modern media discussed under the topic 'writing'. Notwithstanding any endeavours that have been made to unify and harmonize questions on electronic communications on a global scale,²¹ it seems indispensable that these questions be settled under the CISG itself. Thus, the Opinion makes it clear that

18. The database is available at www.cisg.law.pace.edu/.

19. The CISG Advisory Council's website is available at www.cisgac.com/.

20. CISG-AC Opinion No. 1 (C. Ramberg), 'Electronic Communications under CISG', available at www.cisgac.com/default.php?ipk-Cat=128&ifkCat=143&sid=143.

21. UNCITRAL Model Law on Electronic Commerce dated 12 June 1996, available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf; UN Convention on the Use Of Electronic Communications in International Contracts dated 23 November 2005, available at www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf; ICC eTerms 2004, available at www.iccwbo.org/policy/law/id3668/index.html; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of

electronic communications qualify as 'writing' wherever this term is used by the Convention or by the parties in their contract. It furthermore provides clarification on when a declaration made by electronic means is dispatched and reaches the other person.

The second Opinion – issued in 2004 with Eric Bergsten as rapporteur – concerned 'Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39'.²² The background for this Opinion was the fact that the duty to examine goods and give notice of any lack of conformity is known to some but not all of the Member States of the CISG. This has prompted disparate case law concerning the interpretation of Articles 38 and 39 CISG, ranging from allowing the buyer only a few days to inform the seller of any non-conformity to not discussing this prerequisite at all if there is no sign of the buyer having acted fraudulently. The Opinion offers guidelines on how to interpret Articles 38 and 39 CISG. Specifically, it emphasizes that the two periods in Article 38 CISG (examination) and Article 39 CISG (notice) must be kept strictly separate and develops relevant criteria to be taken into account when assessing the periods of time under these provisions.

The third Opinion – also issued in 2004 – addressed a problem which typically poses difficulties to common law lawyers under the CISG, namely 'Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG'; the rapporteur was Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA.²³ The Opinion made it clear that domestic concepts such as the parol evidence rule or the plain meaning rule that play a significant role in the interpretation of contracts under common law do not apply under the CISG. Instead, interpretation of the contract is exclusively dealt with by the relevant provisions of the CISG which also govern the interpretation of merger clauses.

In its fourth Opinion – also of 2004, the rapporteur being Council member Pilar Perales Viscasillas – the CISG Advisory Council discussed the issue of 'Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3)'.²⁴ This question is of utmost practical importance especially as many complex contracts

– sale of machinery or factory facilities – nowadays involve both the manufacture of the goods as well as numerous elements of service obligations. By focussing on the economic value of the respective parts of the contract, the Opinion tried to make the delimitation of contracts falling under the CISG and those still subject to domestic law more predictable.

'The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents' was addressed in the fifth Opinion in 2005, which was prepared by me.²⁵ First of all, the background for this Opinion was, here again, disparate interpretations of what amounts to a fundamental breach of contract – thus giving the right to avoid the contract – in case of non-conforming goods or documents. Secondly, this Opinion aimed to appease common law lawyers who argue that the CISG does not fit the necessities of commodity trade because it does not acknowledge the perfect tender rule. Indeed, practice shows that the CISG yields satisfying results in commodity trading²⁶ – at least outside of London.²⁷

Core issues of the law of damages were treated in Opinion No. 6 in 2006 and Opinion No. 8 in 2008, both prepared by Council member John Gotanda, dealing with 'Calculation of Damages Under Article 74'²⁸ and 'Calculation of Damages Under Article 75 and 76'²⁹ respectively. Due to divergent views in domestic legal systems, major imponderables exist on the questions of which losses are recoverable under the CISG, how the damages are measured, who bears the burden of proof and whether the standard of proof for loss incurred is also a matter covered by the CISG and if so, which standard should be applied. On all of these matters, the Opinions take a clear stance having regard not only to the needs of international trade but also to the latest developments in different domestic legal systems.

The seventh Opinion, which was drafted by Council member Alejandro Garro and issued in 2007, dealt with

information society services, in particular electronic commerce, in the Internal Market, L 178/1. See further I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 2, p. 11.01 et seq.; U.G. Schroeter, in: I. Schwenzer (ed.), *CISG Commentary*, *supra* note 17, Intro to Arts. 14-24 CISG para. 41 et seq.; P. Perales Viscasillas, 'CISG Articles 14 Through 24', in: H. Flechtner/R. Brand/M. Walter (eds.), *Drafting Contracts under the CISG*, New York: Oxford University Press 2008, p. 295-327, 320 et seq.

22. CISG-AC Opinion No. 2 (E. Bergsten), 'Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144.
23. CISG-AC Opinion No. 3 (R. Hyland), 'Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=145&sid=145.
24. CISG-AC Opinion No. 4 (P. Perales Viscasillas), 'Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3 CISG)', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146.
25. CISG-AC Opinion No. 5 (I. Schwenzer), 'The buyer's right to avoid the contract in case of non-conforming goods or documents', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=147&sid=147.
26. F. Mohs, 'The CISG and the Commodities Trade', in: A. Büchler/M. Müller-Chen (eds.), *Private Law, national – global – comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, Bern: Stämpfli 2011, p. 1285-1302, 1289 et seq.
27. Still doubtful M. Bridge, *The International Sale of Goods*, Oxford: Oxford University Press, 2nd edition, 2007, p. 1.03.
28. CISG-AC Opinion No. 6 (J. Gotanda), 'Calculation of Damages under Article 74', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148.
29. CISG-AC Opinion No. 8 (J. Gotanda), 'Calculation of Damages under CISG Articles 75 and 76', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=184.

'Exemption of Liability for Damages Under Art. 79'.³⁰ This Opinion first of all seeks to clarify the difficult relationship between Article 79 para. 1 and para. 2 CISG which gives rise to dispute mainly between common law lawyers on the one side and civil law lawyers with a Germanic background on the other. Furthermore, it answers the question of whether cases of hardship are covered by Article 79 CISG in the affirmative³¹ and outlines the possible remedies under the CISG in such cases.

The ninth and final Opinion, published in 2008, concerns 'Consequences of Avoidance of the Contract'; its rapporteur was Council member Michael Bridge.³² The avoidance of the contract raises difficult questions, as in domestic laws these issues are dealt with under various topics, such as rules on property law, unjust enrichment or a contractual regime. Unfortunately, the CISG itself has not covered these issues extensively thus leaving much room for interpretation and consequent insecurity and unpredictability. The Opinion tries to fill these gaps. It offers solutions as to the contractual nature of the consequences of avoidance, as to the modalities of the restitution of performance as well as to the restitution of benefits derived by either party from the performance before avoidance.

There are many more Opinions in the pipeline, some of which will hopefully be finalized this year. For quite some time, the Council has been discussing how public law requirements affect the conformity of the goods, an issue of great practical importance,³³ as well as the relationship between the CISG and domestic tort law remedies in case of property damage due to non-conforming or defective goods.³⁴ A further Opinion that was prompted by the Rotterdam Rules³⁵ will deal with the question of which transport documents qualify as documentary performance under Article 30 CISG. Still further

Opinions coming up will cover the incorporation of standard terms under the CISG,³⁶ agreed sums payable upon breach of an obligation in CISG contracts,³⁷ the determination of interest under Article 78 CISG³⁸ as well as the possibility of setting off claims arising from CISG contracts.³⁹ Finally, on the occasion of our last meeting in November 2011, we decided to prepare Opinions relating to opting out under Article 6 CISG⁴⁰ as well as on the reservations of Articles 95 and 96 CISG.

3.4. Achievements

Naturally, the Opinions of the CISG Advisory Council do not have any binding character on courts or arbitral tribunals. They are, however, regularly cited in scholarly writings on the relevant subjects. Moreover, and this is most remarkable, the Opinions have been relied upon by various courts. Thus a US court,⁴¹ after having discussed several approaches to a certain question, based its decision on the CISG Advisory Council's Opinion as being a 'persuasive authority' in this matter. Similarly, in a more recent case, a Dutch court of appeals explicitly cited the CISG Advisory Council's Opinion No. 2 in its assessment of the examination and notice requirements of Articles 38 and 39 CISG.⁴²

4. CONCLUSION

Although the story of the CISG can be classed as being one of 'worldwide success',⁴³ achieving day-to-day uniform application and interpretation of this international instrument and even merely maintaining it is a very difficult task. The CISG Advisory Council has fully committed itself to this endeavour. In this respect, the Council certainly follows a proactive approach: we neither content ourselves with restating the law as it has been conceived at the Vienna Conference in 1980, nor with elaborating the common core as it is reflected in state court decisions

30. CISG-AC Opinion No. 7 (A. Garro), 'Exemption of Liability for Damages under Article 79 of the CISG', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169.
31. For the now almost undisputed view, according to which hardship is covered by Art. 79 CISG, see I. Schwenzer, 'Force Majeure and Hardship in International Sales Contracts', *V.U.W.L.R.* 2008-39, p. 709, 713 with further references; for a minority view, arguing that cases of hardship are not covered by the Convention, see H. Stoll, in: P. Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods*, Oxford: Clarendon Press, 1st edition, 1998, Art. 79 CISG para. 39.
32. CISG-AC Opinion No. 9 (M. Bridge), 'Consequences of Avoidance of the Contract', available at www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=185.
33. See I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 2, p. 31.82 et seq.
34. See P. Schlechtriem, 'The Borderland of Tort and Contract - Opening a New Frontier?', *Cornell Int'l L.J.* 1988-21, p. 457, 467 et seq. See also F. Ferrari, 'The Interaction between the United Nations Convention for the International Sale of Goods and Domestic Remedies', *RechtsZ* 2007-71, p. 52, 70 et seq.; I. Schwenzer/P. Hachem, 'The CISG - Successes and Pitfalls', *Am. J. Comp. L.* 2009-57, p. 457, 469 et seq.
35. United Nations Convention on Contracts for the International Carriage of Goods wholly or partly by Sea dated 11 December 2008, available at www.rotterdamrules.com/images/convention.pdf.
36. For an in-depth comparative analysis see I. Schwenzer/P. Hachem/C. Kee, *Global Sales and Contract Law*, *supra* note 2, p. 12.01 et seq.
37. See P. Hachem, *Agreed Sums payable upon Breach of an Obligation*, Utrecht: Eleven International Publishing 2011, p. 167 et seq.
38. See K. Bacher, in: I. Schwenzer (ed.), *CISG Commentary*, *supra* note 17, Art. 78 CISG para. 27 et seq.
39. See C. Fountoulakis, *Set-off Defences in International Arbitration - A Comparative Analysis*, Oxford: Hart Publishing 2011, p. 123 et seq.
40. See L. Spagnolo, 'Iura novit curia and the CISG: Resolution of the Faux Procedural Black Hole', in: I. Schwenzer/L. Spagnolo (eds.), *Towards Uniformity, The 2nd annual MAA Schlechtriem CISG Conference*, The Hague: Eleven International Publishing 2011, p. 181-221, 204 et seq.
41. *Tee Vee Toons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH* 2006 WL 2463537 (S.D. N.Y. 2006), CISG-online 1272.
42. Gerechtshof Arnhem, *LJN* BL7399, 9 March 2010, CISG-online 2095.
43. I. Schwenzer/P. Hachem, 'The CISG - A Story of Worldwide Success', in: J. Kleinemann (ed.), *CISG Part II Conference*, Uppsala: Iustus 2009, p. 119-140, 140.

and arbitral awards interpreting the CISG. Instead, we seek to carefully develop the CISG and adapt it to the ever-changing world of global trade. Thus, we are engaging in fields that in 1980 clearly would have been perceived as external gaps in the CISG to be dealt with by the otherwise applicable domestic law. Prominent examples are the standard of proof in the law of damages, hardship under Article 79 CISG, or the interest rate under Article 78 CISG. Step by step we are expanding on questions that in many legal systems are treated as validity issues and thus are not covered by the CISG.⁴⁴ Some people might ask how the CISG Advisory Council can be so audacious. The answer is easy: because we think that this is the only way to achieve a uniform application and interpretation of the CISG. In all probability, it will never be possible to bring together all Member States of the CISG in order to amend the Convention and to fill the gaps where no consensus could be reached in 1980. But if the CISG is not cautiously adapted to the change that is taking place on the domestic as well as at the international level, it may sooner or later fall into oblivion buried under domestic particularities. Anyone convinced of the merits and benefits of international uniform commercial law simply cannot let this happen.

44. Art. 4(a) CISG.