

# Action Plan for a European Contract Law

## European Contract Law and CISG

Ulrich Magnus, Hamburg<sup>1</sup>

### I. The Action Plan

1. The EU Commission's Action Plan for a more coherent European Contract Law<sup>2</sup> refers at various instances<sup>3</sup> to the United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>4</sup> These references address three different aspects of the relationship between the CISG and a possible European Contract Law: First, and this is only implicitly an issue, whether the fact poses problems that not all EU member states have yet ratified the CISG. Second, whether and to which extent the CISG can serve as a basic source for a European Contract Law?<sup>5</sup> Third, how should the relationship between the CISG and a possible European instrument on contract law be structured?<sup>6</sup>
2. The following refers only to the relationship between a future European contract law and the CISG and intends to answer to the aforementioned questions.<sup>7</sup> Two underlying assumptions have, however, to be expressed and to be taken into account. First, it is very likely that the CISG will be ratified by further states and will become a true global sales law even to a greater extent than it is already now. At present, with its 62 Contracting States it already covers almost all major industrial and trading nations.<sup>8</sup> Thus, the CISG is and will with all probability remain a cornerstone of international harmonisation of sales law. The second assumption is that it is not very likely that the CISG will be substantially changed in the foreseeable future. Its general structure and policy decisions have been approved of by many court decisions and scholarly writing. A recent review conference<sup>9</sup> has not revealed any urgent need for reform of the CISG.

### II. Problems through lacking ratifications

#### *1. Present state of ratifications*

---

<sup>1</sup> Professor of Law at the University of Hamburg; Judge at the Hanseatic Court of Appeal of Hamburg.

<sup>2</sup> Communication of 12 February 2003, COM(2003) 68 fin., Off. J. C 63 of 15 March 2003, p. 1 (cited as Action Plan).

<sup>3</sup> See No. 63, 96 Action Plan.

<sup>4</sup> Concluded on 11 April 1980 in Vienna.

<sup>5</sup> See No. 63 Action Plan.

<sup>6</sup> See No. 96 Action Plan.

<sup>7</sup> The author has worked in the field of CISG (and its predecessor, the Hague Uniform Sales Law) since 25 years. He is the National Correspondent of the Federal Republic of Germany to the United Nations (UNCITRAL) in this respect and is one of the five authors of a Digest on CISG which UNCITRAL is about to publish.

<sup>8</sup> E.g., United States, Russia, China, Canada, Australia, most European countries inside and outside the EU etc. Most important non-members are thus far Great Britain, Japan and Korea.

<sup>9</sup> Organised by UNCITRAL and the University of Pittsburgh on 6 and 7 February 2003.

3. Within the present EU twelve of the fifteen member states also contracting states of the CISG. Only the United Kingdom, Ireland and Portugal have not yet ratified the CISG though the United Kingdom is still one of the two surviving member states<sup>10</sup> of the predecessor of the CISG, namely of the Hague Uniform Sales Law (ULIS and ULF).<sup>11</sup> The Hague Sales Law is however dead letter in the UK since it is only applicable if expressly agreed upon by the parties.<sup>12</sup> During the thirty years of ULIS' and ULF's being in force in Great Britain no single case has been reported in the UK where the parties had deliberately chosen the Hague Sales Law.<sup>13</sup>
4. But also among the CISG members of the EU the unification intended by CISG is impeded because several states used some of the reservations offered by CISG: the Scandinavian EU countries Denmark, Finland and Sweden declared the reservation under art. 92 CISG and ratified the CISG without its Part II (the formation part). Thus for matters of formation they are no CISG contract states. They further declared the reservation under art. 94 (priority of regional unification of law [within the Nordic countries]). Moreover, under art. 93 Denmark excluded the applicability of the CISG for the Faroer Islands and Greenland.

## *2. Future state of ratifications*

5. In 2004 the EU will be enlarged in all probability by ten new members.<sup>14</sup> Eight of them are already CISG states. Only (the Greek part of) Cyprus and Malta have not yet ratified the CISG. Therefore in 2004 twenty out of the then twenty-five EU states will belong to the CISG regime. But also some of the newcomers have already declared reservations: either under art. 95 (the private international way of application of the CISG is excluded)<sup>15</sup> or under art. 96 (written form reservation).<sup>16</sup> Furthermore, Hungary has declared that it still considers the General Conditions of the Council for Mutual Economic Assistance to be subject to the provisions of art. 90 CISG (priority of competing conventions).
6. In general it can be stated that the CISG has unified and will unify professional crossborder sales within the EU to a large extent. But still the extent and effect of this unification is less effective than it could be due to lacking ratifications and various reservations.

## *3. Problems*

7. The described state of affairs has the consequence that EU enterprises have to be aware that different sets of rules govern their inner-European sales transactions. In most cases the CISG applies; normally no considerations –

---

<sup>10</sup> The other one is Gambia.

<sup>11</sup> Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), both of 1 July 1964 with the respective Introductory Conventions.

<sup>12</sup> The same is true for Gambia.

<sup>13</sup> There is only one English case citing the uniform sales law in an obiter dictum: *Butler Machine Ltd. v. Ex-Cell-O*.

<sup>14</sup> Cyprus, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia.

<sup>15</sup> Czechia and Slovakia have declared this reservation.

<sup>16</sup> Estonia, Hungary, Latvia, Lithuania have declared this reservation.

neither on private international law nor on substantive national sales law – are then necessary (although it must be admitted that the CISG does not cover all questions related to sales; then the conflicts rules must determine the applicable national law<sup>17</sup>). In a number of situations the CISG does however not apply.<sup>18</sup> In these situations, first the applicable law must be designated according to private international law rules (which are unified throughout the EU in the Rome Convention); in a further step the applicable national sales law must be identified which in case of Irish, Portuguese, Greek<sup>19</sup> or Maltese law is less easy than in case of English law.

8. The need to be aware of the fact that different law – with different final results – can apply and to take precautions against unfavourable results increases necessarily the costs of such transactions for the involved enterprises because in advance and more so in case of dispute legal advice on the law or court or arbitration decisions must be sought and paid for. This may induce enterprises to abstain at all from business transactions with those EU states whose internal law might be applicable and is not easily accessible.
9. The application of uncertain law can in principle be avoided by a choice of law agreement. But this possibility less often succeeds than one would expect. It is rather often not feasible because the parties cannot agree on a certain law; and not rarely a choice of law is invalid according to the applicable law, in particular if the choice is tried to be made by way of standard contract terms.
10. The uneven ratification of the CISG in the EU leads also to a certain imbalance: while a sale by a German seller to an English buyer is governed by the CISG the same case is regulated by English substantive law when the English party is the seller and the German party the buyer.<sup>20</sup> In an internal market and in a single area of law this is a strange result.

#### *4. Recommendation*

11. Viewed from the perspective of reduction of transaction costs for professional transborder sales within the EU an unreserved ratification of the CISG by all EU member states (or by the EU itself) is to be recommended.

### **III. CISG as a basis of a European contract law**

12. The CISG covers two different parts of substantive contract law: provisions concerning the formation of contracts<sup>21</sup> and provisions concerning the rights and obligations of the parties of a professional international sale of moveable goods.<sup>22</sup> The formation part could easily be extended to cover every type of

---

<sup>17</sup> See Art. 7 par. 2 CISG. A rather often case where the conflicts rules have to step in is the rate of interest which is left open by Art. 78 CISG.

<sup>18</sup> This is the case where the parties have validly excluded the CISG or have chosen the law of a Non-CISG state or where no choice has been made and the seller has his place of business in a Non-CISG state in the EU. It has to be stressed that the choice of the law of a CISG member state is not regarded as an exclusion of the CISG but leads to the application of the CISG.

<sup>19</sup> In case of Cyprus.

<sup>20</sup> This is the outcome when no valid choice of law has been made due to Art. 4 par. 2 Rome Convention.

<sup>21</sup> Art. 14 – 24 CISG.

<sup>22</sup> Art. 25 – 88 CISG.

contract<sup>23</sup> since it does not contain features which are specific for sales only. The central substantive part applies on the contrary only to sales contracts. But its structure could also be generalized and extended to other types of contracts, in particular to contracts of services. Are there reasons to do this?

13. The CISG has already formed the basis of the UNIDROIT Principles<sup>24</sup> as well as of the Lando Principles.<sup>25</sup> Both are modelled after the CISG and depart from its solutions in only very few respects. Moreover, the Directive on Consumer Sales<sup>26</sup> has taken over much of the structure of the CISG and even of the wording of some of its provisions although the CISG deals only with sales transactions between professionals. Thus, since the Directive has to be implemented in all EU member states CISG has become to some extent integral part of the internal sales law of all EU countries. Moreover, recent national law reforms in EU countries, namely the Dutch Nieuw Burgerlijk Wetboek and most recently the German Civil Code (BGB), have adopted the CISG's general structure of obligations and remedies even as the model of their general law of contractual obligations.
14. The CISG therefore forms already now a major source of existing European contract and sales law and probably will – and in my view should – do so also in future. But whether the CISG will continue to found the basis of a European contract law depends on the fact whether the CISG's solutions would fit into such a future European contract law. This matter cannot be fully pursued here but some essential considerations can be stated.
15. As far as the formation of contracts is concerned the CISG's solutions are based on the traditional model that an agreement is reached by subsequent declarations of the parties. CISG regulates this normal mechanism of concluding a contract in a rather satisfactory way.<sup>27</sup> It is true, however, that neither any other form of agreement nor the problem of contradicting standard contract terms nor the problem of the significance of letters of confirmation is expressly addressed though these problems can be dealt with, and are dealt with and solved by way of interpretation of the respective provisions of the CISG. But in no way would a European instrument on contract law be hindered to add further provisions on other forms of agreement, on conflicting general conditions or letters of confirmation – as the Lando Principles and the UNIDROIT Principles already do.<sup>28</sup>
16. As far as the material sales part is concerned the CISG's solutions are mainly based on the Common Law but ingredients of Civil Law are added. The general structure is that each party is bound to perform its obligations. Unless provided otherwise by national law each party is in principle entitled to request

---

<sup>23</sup> This has been done so for instance in Russia; see ...

<sup>24</sup> UNIDROIT Principles of International Commercial Contracts of 1994.

<sup>25</sup> (Lando) Principles of European Contract Law.

<sup>26</sup> Directive (1999/44/EC) of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>27</sup> More or less the same rules have been adopted by the UNIDROIT Principles (Art. 2.1 ss.) and the Lando Principles (Art. 2:101 ss.).

<sup>28</sup> See Lando Principles: Art. 2:209 (conflicting general conditions), Art. 2:211 (other forms of agreement); UNIDROIT Principles: Art. 2.12 (writings in confirmation), Art. 2.19 ss. (contracting under standard terms, battle of forms etc.).

performance.<sup>29</sup> In case of any kind of non-performance the aggrieved party is at least entitled to damages<sup>30</sup> unless the party in breach is excused because an impediment beyond this party's control has caused the breach.<sup>31</sup> Fault is, however, no requirement of a damages claim or any other remedy. The remedy of termination is only granted in case of a fundamental breach which deprives the aggrieved party of the substantial benefit of the contract.<sup>32</sup> But termination is a remedy of last resort. Moreover, the remedy of price reduction is made available under certain conditions.<sup>33</sup>

17. This general structure for both the formation and the substantive sales law has been adopted by the UNIDROIT Principles and the Lando Principles and appears suitable for any kind of contract.<sup>34</sup>

### *Recommendation*

18. The CISG should be taken as the basic model for a European contract law.

## **IV. Rank between CISG and EU Contract Law**

### *1. Present place of CISG in the national systems*

19. At present the CISG is a regulation that the EU-CISG member states have introduced in addition to their general sales and contract law. It is confined to international sales of goods between professionals and supersedes as far as it reaches any contradicting national sales and contract law. The CISG occupies the same position in federal states like the US, Canada or Australia. However, there this priority is granted only in cases of international sales; the CISG does not apply to sales within a federated state,<sup>35</sup> for instance between a Californian seller and a buyer in New York.
20. If several states have unified their sales law by regional unification – like the Scandinavian countries have done – then nonetheless the CISG applies to sales between parties with places of business in such states unless these states have declared the reservation of Art. 94 CISG that their regional unification should have priority over the CISG – as again the Scandinavian countries have done.

### *2. Possible rank of CISG under a European contract law*

21. The options concerning the relationship between the CISG and a uniform European contract law depend to some extent on the form such an instrument will have. But whatever form – a mandatory or an optional instrument – will finally be adopted the main option is the following: either to continue to apply

---

<sup>29</sup> See Art. 46 and 62 CISG.

<sup>30</sup> See Art. 45 par. 1 lit. b and 61 par. 1 lit. b CISG.

<sup>31</sup> See Art. 79 CISG.

<sup>32</sup> See Art. 49 and 64 in connection with Art. 25 CISG.

<sup>33</sup> Art. 50 CISG.

<sup>34</sup> Most of it has been adopted by the German ‚Schuldrechtsreform‘ of 2002.

<sup>35</sup> Jayme, in: Bianca/Bonell, Commentary on the International Sales Law – The 1980 Vienna Sales Convention (1987) Art. 1 no. 2.2; Magnus, in: v. Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener UN-Kaufrecht (CISG) (ed. 1999) Art. 1 no. 70.

the CISG also to sales between the EU-CISG member states or to replace it by a uniform EU contract law.

22. A *first and radical option* would be to urge all CISG members in the EU to renounce the CISG as such so that instead again the general rules of private international law and the designated national law would apply. For inner-EU sales would then either the chosen law apply or – absent any choice – the law provided for by a European contract law if it were binding law, otherwise the national law of the respective state. The great disadvantage of this solution would be the impairment – for Europe in fact the abolition – of the far reaching unification which has thus far been achieved through the CISG in the field of international sales law and which has proved useful. Again, private international law would have to be resorted to. Transaction costs would be probably significantly higher than at present.
23. A *second option* could be that the EU-CISG member states remain CISG member states but give priority to the regional EU unification by declaring the reservation under Art. 94 CISG. Since Art. 94 CISG requires that the states declaring this reservation must have “the same or closely related legal rules on matters governed in this Convention” the regional unification of law must lead to “legal rules”. Legal rules must be rules which are binding in the sense that they apply as far as the parties are not allowed to deviate from them.<sup>36</sup> This would be the case if the EU would for instance enact a regulation on contract law including sales law or on sales law alone. Whether the enactment of an EU directive concerning sales law would also constitute “legal rules” is disputed<sup>37</sup> but should be answered in the affirmative.<sup>38</sup> The advantage of this solution would be that within the EU a uniform sales law would apply both for domestic and inner-EU sales. The disadvantage would be that a distinction between inner-EU sales and sales with parties from non-EU states had to be made (unless the EU regulation would be identical with the CISG but then a separate EU regulation would be superfluous).
24. The same result would be achieved if the EU member states would unify their sales law through an international treaty. This seems however an unrealistic option which can be neglected.
25. A further – *third – option* could be a non-binding EU instrument like a mere set of principles or similar optional rules which the parties of a sales transaction could choose but which would not apply without such choice. In that case Art. 94 CISG would not apply. The CISG – as far as ratified by EU member states – would rank with priority over any such optional EU unification between EU-CISG countries. This is the present situation with the addition only of a further optional set of rules. The presently differing state of ratification of the CISG in the EU adds, however, as mentioned above, to the

---

<sup>36</sup> There seems to exist, however, no literature or other material on the interpretation of the term “legal rules”.

<sup>37</sup> See thereto Ferrari, in Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht – CISG – (3rd. ed. 2000) Art. 94 n. 5.

<sup>38</sup> Also the implementation of a directive which the member states are obliged to execute would lead to the same or closely related legal rules within the EU. Art. 94 CISG does not distinguish how the unity of law is effected except that for unification by way of international agreements Art. 90 CISG applies. It is, however, the clearly prevailing view that secondary EU legislation – regulations and directives – do not qualify as “international agreements” under Art. 90 CISG: see, e.g., Schlechtriem, Internationales UN-Kaufrecht (2<sup>nd</sup> ed. 2003) no. 345a.

transaction costs of sales within the EU and constitutes a clear disadvantage of this situation.

26. *Fourth option*: The same situation as under the third option would result if the EU introduced a binding contract (sales) law instrument but did not urge the EU-CISG member states to declare the reservation under Art. 94 CISG. Again, the CISG would prevail over the regional unification as well as over national law. But also the disadvantage would be the same as under the third option. (It seems that the OHADA<sup>39</sup> has adopted this option by introducing an OHADA sales law which follows in general the CISG but also differs from it on important aspects.<sup>40</sup> Though at present only one OHADA state is also a CISG state this duplication of similar but not identical rules on the same subject appears to be problematic.)
27. A *fifth option* would be to urge all EU member states which thus far have not done so to ratify the CISG without any of the possible reservations. As the Community has evidently – and in my view correctly – answered the question in the affirmative whether it has a competency in the field of international sales law even the Community itself could ratify the CISG. After such an unreserved and full ratification the CISG would then also prevail over any conflicting regional EU legislation on contract (sales) law. The advantage of this solution would be that all international sales inside the EU and most of those between EU parties and parties from outside the EU could be treated on the same footing. This would mean that only one wellknown and judicially elaborated set of rules (the CISG) had to be applied.<sup>41</sup> Again, this would result in a considerable reduction of costs for international sales transactions which EU enterprises otherwise have to bear.

### 3. Recommendation

28. The fifth option has strongly to be recommended namely that all EU members (or the EU as such) ratify the CISG without reservation.

## V. Technical Place of CISG in a European Contract Law

29. As mentioned above at present the EU-CISG states have added the CISG to the existing national law as a special regulation for professional transborder sales which prevails over the national law when its conditions of application are met. On the European level the same form of ‘cohabitation’ between CISG and a European Contract Law should be chosen. The European Contract Law had to cover and provide solutions for all kinds of sales – pure domestic, inner-European and international sales as well as consumer and professional sales. But that European instrument could – and should – leave untouched the special regime of the CISG.

---

<sup>39</sup> Organisation pour l’Harmonisation du Droit des Affaires en Afrique to which at present 16 African states belong.

<sup>40</sup> For example, the two years period of Art. 39 par. 2 CISG is reduced to one year (Art. 229 Acte uniforme relatif au droit commercial general); the possible excuse of delayed notice under Art. 44 CISG is abolished etc.

<sup>41</sup> About 1000 court decisions on CISG have thus far been reported from the various contracting states. More than 300 have been published by UNCITRAL in English abstracts under the “CLOUT” system (Case Law On UNCITRAL Texts). Commentaries on the CISG exist in almost all contracting states and last not least the text of the CISG is available in the language of each contracting state.

30. As far as the substantive rules on sales law are concerned which a European instrument would contain it recommends itself to adopt the CISG solutions and the CISG wording to the most possible extent. The reason is simple: a reduction of the diversity of legal rules within the EU would also reduce the transaction costs. Moreover, the CISG is already, as pointed out, a basis of European contract and sales law.

## **VI. Conclusions**

1. The CISG should be ratified by all EU member states (or by the EU itself) without any reservation. It should also in future govern the inner-EU transborder sales transactions.
2. The CISG should be taken as the basis for a European contract law. A European sales law should correspond as much as possible to the CISG.