

~~Contract Drafting Under the CISG~~

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I. Introduction

The present topic is of eminent importance. All the beneficial efforts of the Vienna Convention are likely to remain useless if the contracts of international sales of goods governed by the CISG are poorly drafted. The Vienna Convention's success does not only depend on the number of states which are parties to the Convention nor on the quality of judges implementing the rules of uniform sales law, but also, and in the first place, on the contracting parties themselves.

How is a sale contract to which the Vienna Convention is applicable to be drafted? It should be mentioned that the contract in question is an international business transaction, thus raising issues which are limited neither to sales contracts nor to the Vienna Convention. This is why the wording of the agreement is largely dependent on the drafter's legal background. It is well-known that drafters from common law countries go into every detail and do not hesitate to reproduce legal provisions. By contrast, civil lawyers address only the most important aspects of the contract without considering details. It is needless to underline that the Vienna Convention does not impose any mandatory type of wording. Consequently, the national traditions will continue to influence drafting style of sales contracts with their positive and negative sides. Concerning the content of the contract, the parties will have to consider—as is the case with other contracts of international trade—the different techniques of conflict resolution taking into account the advantages and disadvantages of arbitration. In the case of judicial litigation, the question of international jurisdiction is of great importance. A clause of jurisdiction should, if possible, be included in the contract. In addition, the contracting parties will have to

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consider appropriate securities, for example opening a documentary credit.

Of course, these aspects are not specific to sales governed by the Vienna Convention. Only the particularities connected to the Vienna Convention will interest us here. This contribution will not address all the questions relating to all kinds of international sales potentially governed by the Vienna Convention, but will confine itself to the common core of all sales transactions, regardless of the goods in question, be they manufactured products intended for resale, machinery specially built for the buyer's needs or commodities. The issues relating to long-term contracts will also be set aside. Consequently, specific clauses tied to this kind of sales will not be addressed by the present report.

Three kinds of main issues have to be considered. Firstly, should the parties opt out of the Vienna Convention or not (I)? Secondly, how are the gaps left by the Convention to be filled? It is well-known that the Convention does not cover all aspects of the sale (II). Finally, every conscientious drafter will have to address the question as to whether to modify any provision of the Convention, or to concretise some of its vague concepts (III).

II. Opting out of the Vienna Convention

Under article 6, the contracting parties can entirely exclude the application of the Convention. Today's seminar speakers are wholly convinced of the great merits of the Convention. This attitude reflects the predominant position of the scientific community. ^① Criticism passed on the Convention ^② is largely ill-founded. ^③ And even if some provisions are not perfect on one point or another, these shortcomings can easily be overcome by

^① The Vienna Convention was often presented, on the occasion of the commemorative celebrations of its 25th anniversary, as the most successful realisation of the harmonization of international trade law, see particularly the reports of the Vienna Colloquium of March 2005, *Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sales of Goods*, The Journal of Law and Commerce, No. 1, 2005/2006, p. 1 et seq.

^② Especially Clayton P. Gillette and Robert E. Scott, *The Political Economy of International Sales Law*, International Review of Law and Economics, 2005, pp. 446-486.

^③ See particularly Peter Schlechtriem, *25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, in Harry M. Flechtner, Ronald A. Brand and Mark S. Walter (eds.), *Drafting Contracts Under the CISG, The UNCITRAL Digest as a Contract Drafting Tool*, Oxford University Press, 2008, p. 175 et seq.

appropriate contractual clauses, as we will see later on. ① It is true that a certain number of professional or legal organisations advise practitioners to opt out of the Convention. ② ~~This counsel should be taken with a pinch of salt, because it is likely to be a consequence~~ of habit, in spite the fact that the Convention has existed now for 25 years. Calls by eminent authors in favour of abandoning the practice of “opting out” ③ can only be welcomed, as well as the favourable attitude of international organisations which have drawn up general terms and conditions using the Vienna Convention. This is the case of the ICC Model Contract International Sale Contract for Manufactured Goods Intended for Resale, ④ and also the International Commercial Sale of Perishable Goods Model Contract, set up by the International Trade Centre. ⑤

However, it is possible that one of the parties imposes the opting-out of the Convention, i. e. making it a question of principle (Take it or leave it). It is also possible that both contracting parties wish to apply—for any given reason—any national law allegedly more suited for their purposes, owing to the nature of the goods or the general terms and conditions drawn up under a national law and having proved its merits. ⑥ In these cases, the parties should be as clear as possible and arrange for an express opting-

① See infra III.

② See about Germany, Justus Meyer, *UN-Kaufrecht in der deutschen Anwaltspraxis*, *RabelsZ*, 2005, p. 457 et seq.

③ See, for example, Philipp De Ly, *The Relevance of the Vienna Convention for International Sales Contracts, Should We Stop Contracting it out?*, *Business Law International*, 2003, p. 241 et seq.

④ ICC Model Contract of International Sale, Manufactured goods intended to resale, ICC Publication, especially Art. 1, No. 1.2 : “Any questions relating to this Contract which are not expressly or implicitly settled by the provisions contained in this Contract itself ... shall be governed: A. by the United Nations Convention on Contracts for the International Sale of Goods...”

⑤ The Centre is a creation of the UNCTAD and the WTO, which has its headquarters in Geneva; the contract is available on the website of the Centre: <http://www.jurisint.org/en/con/339.html>; see Article 14 of the model contract: “In so far as any matters are not covered by the foregoing provisions, this Contract is governed by the following, in descending order precedence: The United Nations Convention on Contracts for the International Sale of Goods...”

⑥ See the general conditions of the FOSFA (Federation of Oils, Seeds and Fats Associations) and GAFTA (The Grain And Feed Trade Association), reproduced in Michael Bridge, *The International sale of Goods, Law and Practice*, Oxford University Press 1999; this conditions submit the contracts to the English law and take care to draw back expressly the Vienna Convention, see general conditions FOSFA (clauses No. 27 and 28) and GAFTA (clauses No. 31 and 33).

out-clause of the Vienna Convention: The present contract shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods. Of course, certain implied opting-out-clauses do not raise issues of interpretation, e. g. when the parties choose the law of a state which is not a party to the Convention. However, choice of law clauses in favour of a state which is party to the Convention usually lead to the application of the Convention. Case-law goes largely in this direction, as is reflected by Digest under Art. 6. Even if this case-law may raise some criticism,^① it seems useless to go against this stream. On the contrary, it is preferable to take this dominant position into account in order to ensure a uniform interpretation of the Convention (Art. 7 § 1). It is obvious that the contracting parties should clearly express their intention concerning a choice of law in favour of a state party to the Convention, in order to avoid any dispute as to its meaning. Therefore, they should provide a clause like: "The present contract is subject to French law, under the exclusion of the United Nations Convention on Contracts for the International Sales of Goods."

III. The Gaps in the Convention

It is well-known that the Vienna Convention does not cover all aspects of the sale. The Convention presents a lot of gaps. Traditionally, the so-called external gaps in the Convention are opposed to those qualified as internal, because of the different ways of filling them. It is of tremendous importance for the contract drafters to be aware of the existence of these gaps and to try to fill them.

A. External Gaps

The matters excluded entirely by the Convention are determined by the famous Arts. 4 and 5. According to Art. 4, the validity of the contract and the validity of any of its provisions in particular are not covered by the Convention. The exception relating to the validity of contractual clauses is particularly significant when the contracting parties use their freedom of contract in order to derogate to any rule of the Convention.^② Therefore, the question of validity of limiting and discharge clauses must be checked under the

① The decisions are often not substantiated enough regarding to article 8 CISG.

② See infra III.

national law applicable to questions not covered by the Convention. ① The same applies to penalty clauses sanctioning the violation of contractual obligations. Let's take the example

~~of the sale of machinery between a seller based in Germany and a buyer based in China.~~
Let's imagine that the seller's general terms and conditions provide the following: "The seller is not liable for any damage caused by the non-conformity of the goods." The validity of this contractual provision has to be appreciated under the national law governing the contract outside the Convention's scope, hence the significance of the rules of international private law in order to identify the law applicable to the contract. The drafters will have to handle these with care. Any mistake in this field can lead to fatal consequences. Most of the systems of conflict of law rules allow the parties to choose their law. ② This is also the case under Chinese law. The parties should take advantage of this freedom. Consequently, the drafters have to verify the validity of the clause under the law they intend to apply to the contract as to the matters excluded from the Convention. If, in the previous example, the contracting parties have chosen German law, the provisions of the BGB concerning general business terms and conditions will apply, in particular § 307 sanctioning unfair clauses. ③

The important question of the limitation of claims arising from a sales contract is not subject to the Vienna Convention either, but to the New York Convention of 1974 as amended by the 1980 Protocol. ④ If, however, this convention is not applicable—which will often be the case—the question of limitation has to be answered by the national law, as

① See the French case law, Cass. civ. 1^{ère}, 13th February 2007, CISC-France.

② Party autonomy in choice of law has meanwhile prevailed in the vast majority of the world's private law systems and is therefore legitimately considered as a "general principle recognized by civilized nations" (Art. 38 ICJ Statute). However, exceptions still exist in Latin American Law systems, Vischer, Huber and Oser, *Internationales Vertragsrecht*, 2nd ed., 2000, p. 33; choosing the law governing their contract remains impossible to parties in Brazil, Columbia, Uruguay and Paraguay, Vischer, Huber and Oser, *Internationales Vertragsrecht*, 2nd ed., 2000, p. 34. A similar situation can be found in Saudi-Arabia, Vischer, Huber and Oser, *Internationales Vertragsrecht*, 2nd ed., 2000, p. 36.

③ To avoid the strictness of the provisions of the German Civil Code in the field of general conditions, some practitioners recommend, even in French-German business, the Swiss law; see Jochen Bauereis, *Le nouveau droit des conditions générales d'affaires*, in *La réforme du droit allemand des obligations*, under the direction of Claude Witz and Filippo Ranieri, Société de Législation comparée, 2004, p. 97 et seq., especially p. 105 et seq.

④ See the website of the UNCITRAL.

determined under the rules of conflicts of law. If those rules link the limitation to the law applicable to the contract—as is the case in Europe under the Rome Convention on the law applicable to contractual obligations^①—the parties can choose a law that suits their interests best. However, their interests will generally be opposed, particularly in the delicate issue of the limitation period of the buyer's claim for non-conformity. The seller will be eager to benefit from a limitation period that will quickly protect him from any claim on behalf of the buyer, whereas the buyer will seek the longest period possible. In the end, the position of the party holding the bargaining power will prevail.

So far, we have considered only the application of national law. But the parties can also consider relying on the Unidroit Principles of International Commerce Contracts for questions of validity of the contract or contractual provisions as well as limitation of claims arising from the sale. However, this solution is, in general, available only if the parties provide for an arbitration clause.^②

B. Internal Gaps

Art. 7 § 2 deals with matters governed by the Convention without expressly settling them. These gaps are therefore qualified as internal, and their filling requires a two-step procedure. The first step is to fill the gap with a general principle on which the Convention is based. In the absence of such a principle, the second step is to fill the gap with the applicable law determined under the rules of international private law. The contracting parties should avoid this complex procedure and its fortuitous results by including appropriate contractual provisions.

But in the first place, the drafters have to identify these gaps. Doctrinal commentaries on the Vienna Convention or the Digest can be helpful to this purpose. For instance, the drafters will easily find out that the Convention remains silent on matters like

^① See article 10 (1), d).

^② Thus, under the Rome Convention on the law applicable to contractual obligations and according to the very dominant opinion, only the choice of a state law is possible. The proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations foresees a more liberal solution, which would allow the parties to “choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community”, JDI 2006, p. 404 et seq., spec. p. 413. The exposition of the reasons underlines that “the form of words used would authorise the choice of the UNIDROIT principles, the Principles of European Contract Law...”, p. 407. But it is not sure that this solution will prevail in regard to the reluctances of the European Parliament.

interest rates (Art. 78), the place of the restitution of the price following the avoidance of the contract or the burden of proof concerning the non-conformity of the goods. It is needless to say that these points should be clarified by appropriate contractual provisions.

The drafters can usefully rely on suggestions and standard clauses proposed by the doctrine,^① standard form contracts drawn up by the international institutions cited previously^② and also on the case-law solutions summarized in the Digest. Another more global solution would be to provide a catch-all clause which refers to the Unidroit Principles in order to fill the Convention's internal gaps succinctly.^③

IV. Amendments to the Convention's Provisions

The Convention establishes the well-known principle of freedom of contract: according to Art. 6 and subject to Art. 12, the contracting parties can derogate from any provision of the Convention. Such modifications can be made in three different ways.

① See the many propositions of clauses, in Peter Schlechtriem, *25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, in Harry M. Flechtner, Ronald A. Brand and Mark S. Walter (eds.), *Drafting Contracts Under the CISG, The UNCITRAL Digest as a Contract Drafting Tool*, Oxford University Press, 2008, p. 175, and the different advices under each article of the Convention. See also M. Klotz and John A. Barrett Jr., *International Sales Agreements, an Annotated Drafting And Negotiating Guide*, *Kluwer Law International*, 1998; John P. McMahon, *Guide for Managers and Counsel*, <http://cisg.law.pace.edu/cisg/guides.html>, last visited December 1, 2007; John P. McMahon, *Drafting CISG Contracts and documents and Compliance Tips for Traders*, <http://www.cisg.law.pace.edu/cisg/contracts.html>, last visited December 1, 2007.

② See other model contracts at <http://www.jurisint.org/en/con/index.html>. Nevertheless, the clauses must not be written up blindly, see the critics that have been formulated about the ICC model contract, James M. Klotz, "Critical Review of The ICC Model International Sales Contract", <http://cisgw.3.law.pace.edu/cisg/biblio/klotz.html>.

③ See Michael Bridge who proposes the following clause: "Matters governed by the United Nations Convention on the International Sale of Goods but not expressly settled by the Convention are to be determined in accordance with the Unidroit Principles of International Commercial Contracts so far as these are not inconsistent with the general principles upon which the United Nations Convention on the International Sale of Goods 1980 is based." Michael Bridge, *Choice of Law and the CISG: Opting In and Opting Out*, in Harry M. Flechtner, Ronald A. Brand and Mark S. Walter (eds.), *Drafting Contracts Under the CISG, The UNCITRAL Digest as a Contract Drafting Tool*, Oxford University Press, 2008, p. 49.

The first one is to alter the Convention's rule. For instance, in case of non-conformity, the delivery of substitute goods is subject to the existence of a fundamental breach (Art. 46 § 2). It is conceivable that, at the buyer's suggestion, the contract moderates this requirement with a clause such as: "Subject to minor discrepancies which are usual in the particular trade or through course of dealing between the parties, any non-conformity of the goods will allow the buyer to claim delivery of substitute goods." Provided that, of course, the buyer is able to impose such a favourable rule. The exact content of the contract will therefore depend on each party's bargaining power.

The second type of possible amendment is a specification to those provisions of the Convention which are formulated in a too general way without considering the specific difficulties in a concrete situation. For instance, the question of whether the seller has to deliver goods in accordance with the rules of public law standards in the country in which the goods will be used is highly controversial. ① The contracting parties should clarify this point by including a clause such as: "In order to conform to the contract, the delivered goods will have to match the rules of public law standards of the country X."

The third type of amendment tends to concretise the Convention's vague concepts, in particular the one of "reasonableness". These vague concepts, sometimes referred to as one of the Convention's flaws, ensure the CISG's flexibility in the interest of the contracting parties. Thanks to this feature, the Convention takes into account national or regional traditions, which is one of its strong points. For instance, the vagueness of the notion of reasonable time, which is of tremendous importance concerning the notice of lack of conformity and the declaration of avoidance, can easily be concretised by appropriate clauses. ② Thus, the parties can avoid the risk of apparently arbitrary judicial decisions. Referring to the period of notice of lack of conformity, the drafters can rely, for instance, on the ICC Model Contract International Sale Contract for manufactured goods intended for

① See Ingeborg Schwenzer in Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, 2nd ed., 2005, Art. 35, para. 17 et seq.

② See Volker Behr, *Dealing with Non-Conformity—A Transaction Test Analysis of CISG Regulations on Examination and Notice under Articles 38-44*, in Harry M. Flechtner, Ronald A. Brand and Mark S. Walter (eds.), *Drafting Contracts Under the CISG, The UNCITRAL Digest as a Contract Drafting Tool*, Oxford University Press, 2008, p. 518 et seq., esp. p. 534.

resale.^① Far from being a threat, these vague concepts should be considered as a challenge for transactional lawyers. They should be considered as “red flags”, advising the parties to include specific provisions.^②

V. Concluding Remarks

So much for an overview of cases in which contract drafters will have to show their talents. Concerning the drafting matters, the role of the lawyers does not end here. During the performance of the contract, the contracting parties may issue statements such as fixing an additional period of time for performance, giving notice of lack of conformity or declaring the contract avoided. Such statements should be formulated with care. That is to say that lawyers will also have to advise the parties in the drafting of notice during the performance of a contract. In other words, particular attention is not only required for “contract drafting”, but also for “notice drafting”.

^① Art. 11. 1: “The Buyer shall examine the goods as soon as possible after their arrival at destination and shall notify the Seller in writing of any lack of conformity of the goods within 15 days from the date when the Buyer discovers or ought to have discovered the lack of conformity. In any case the Buyer shall have no remedy for lack of conformity if he fails to notify the Seller thereof within 12 months from the date of arrival of the goods at the agreed destination.”

^② See Peter Schlechtriem, *25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, in Harry M. Flechtner, Ronald A. Brand and Mark S. Walter (eds.), *Drafting Contracts Under the CISG, The UNCITRAL Digest as a Contract Drafting Tool*, Oxford University Press, 2008, p. 175 et seq., especially p. 180.