

Problems Legal Practitioners Face in Finding the Law Relating to CISG - Hardship, Defective Goods and Standard Terms¹

Christina Ramberg

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1 Introduction

There no longer is any ambition by lawmakers to present the law in a way that is accessible for ordinary citizens. The target for lawmakers and the intended user of the law is professional lawyers (judges and legal counsellors). However, not only ordinary citizens, but also practicing lawyers face problems as to accessing the content of the law. CISG is used here as an illustration of the problems consisting of information overload, blind spots and misleading structures. The law needs to be presented in a new way in order to facilitate the understanding of the law even by practitioners.

2 Information Overload

Legal practitioners are faced with a problem of information overload. There are too many norms in the forms of national legislation, national case law, international “autonomous” conventions, numerous international soft law instruments, foreign case law, as well as abundant national and international legal literature, etc.²

This situation is particularly problematic when the legislation has international origins.³ CISG is an international convention and its objective is to solve many (maybe all?) disputes between international parties to a sales transaction. How are matters not expressly settled in CISG decided? Art. 7.2 states that matters governed by CISG but not expressly settled by CISG are to 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 is to be applied instead? If the rules on CISG sales law are intended to constitute an autonomous contract law regime, then how is the content of this contract law established? Any individual theoretically confronted with an autonomous legal regime not based in national law becomes 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. Gunther Teubner has also described this feature of law, inter alia in *Alienating Justice: On the surplus value of the twelfth camel*, in Nelken, David & Príban, Jirí, *Law's New Boundaries: Consequence of Legal Autopoiesis*, Ashgate, Aldershot 2001, 21-44.

3 These problems have been described by Cravetto, Chiara & Pisa, Barbara, *The 'Non-sense' of Pre-contractual Information Duties in case of Non-concluded contracts*, EPRL, 2011, Vol. 10 No. 6, p. 759; Sefton-Green, R. *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 in the case had concluded contracts for the sale of steel tubes. After the conclusion of the contracts, 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 delivery, 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 the UNIDROIT Principles of International Commercial Contracts since these rules restate general principles of the law of international trade. The Belgian Supreme Court decided that the contract should be adjusted in the seller’s favour.

Now, three main questions arise: First, is hardship a matter governed by CISG at all?⁶ Second, if this is the case, do the UNIDROIT Principles restate the general principles upon which CISG is based? Thirdly, if this also is the case, does the provision on hardship in the Unidroit Principles allow adjustment in the specific case? A deeper analysis of this particular case is not necessary here. The case is simply referred to as an example of the difficult situation for legal counsel trying to grasp the content of the law.

Some fifteen 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 fill in the gaps in CISG. There is abundant literature on how to handle these gaps; many extensive commentaries, monographs, and law journal articles. Furthermore, Uncitral collects all national case law on CISG in CLOUT and there are other similar case collecting activities.

What should legal counsel for the parties do? Read all these different sources? Clients are generally not prepared nor willing to pay for such studies. Can the parties demand of a diligent (and perhaps expensive) counsel that she already is familiar with all these sources of information? Is it fair to require that legal counsel be superhuman and master all this information?

The details of how the legal counsel argued in the Belgian case are not known to me. It however can be used as an example of how an unfortunate strategy by the buyer’s legal counsel may lead to a detrimental outcome for the

6 This question is analysed in depth by Momberg Uribe, Rodrigok *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.

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 demonstrated to the court that Belgian case law is very restrictive in allowing departure from the principle of *pacta sunt servanda* due to hardship. Suppose – which I do not know for sure – that 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 article in the Unidroit Principles on hardship provides a very limited scope for adjustment. Had she better explained for the court how to apply the rule on hardship under the Unidroit Principles, her client probably would have won the case. I am rather confident that the actual outcome in the case 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 not predictable that the Belgian Supreme Court would misunderstand how to apply the Unidroit provision on hardship.

Can we blame the buyer’s legal counsel? She most likely was not aware of all the potential sources of law that the court could decide to take as inspiration. 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 that legal counsel 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 make successful strategic arguments after having analysed all these sources.

This information overload is a threat to the foreseeability of the law. This information overload also makes the strategic planning of arguments extremely difficult.

3 Blind Spots

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

CISG Art. 35 provides that the goods are to be in conformity with the quantity, quality and description *required by the contract*. This article continues by clarifying the 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

Legal counsel perhaps may not readily identify which rules on contract interpretation may be relevant since there is no reference to interpretation in CISG. The issue of interpretation is a blind spot. At least from my Swedish

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

experience, practitioners often do not “discover” the issue of contract interpretation and it does not strike them as natural to apply general contract law rules on interpretation when faced with a case on defective 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 of CISG to find the general contract law rules on interpretation. This is particularly the case in countries 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 of CISG? Can we require 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 overload, we are probably inclined to be more reproachful against the lawyer blindsided by this blind spot. Still, I feel sympathy for the practitioner thus affected by the user-unfriendly 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 the law is the fact that it is in a constant state of change. Some rules are laid down in old concepts, structures or legislation. It is difficult for practicing lawyers to understand that the law and the reasoning 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, stating that under certain circumstances, 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 entitled “*Formation of the contract*”.⁹

8 Some examples from CLOUT: It is difficult to know for sure, but I get the impression that the buyers in the CLOUT case 752, CLOUT No. 71 (Austria, Oberster Gerichtshof, 7 Ob 302/05w, 25 January 2006) were too quickly 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. 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”) also 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.

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

The old contract law was based on the theory that the content of a contract is established at the exact moment of formation. If the point of formation is established, the content is automatically established at the very same point in time. The traditional view was that the contract's content was constituted at the same time and by the same means as its 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, it became clear that the traditional method was not sufficiently flexible. It does not provide a good tool for establishing the common intention of the parties and is not in harmony with how businesspersons perceive their relationships. 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, nature and purpose of the contract, the preliminary negotiations, conduct subsequent to the conclusion of the contract, custom and usage, usage 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 many times would be better off applying the modern dynamic methods for establishing the content of

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, paras. 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 & Schwenger, 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.

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 wrongly led to establish the content by using the outdated and limiting offer-and-acceptance-model.

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

One example: A German case from Oberlandesgericht Köln concerned the battle of the 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 counsel instead argued by referring to general rules on contract interpretation 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 legal counsel for using old-fashioned offer-and-acceptance methods when she argues that her client's standard terms form part of the contract? Has she breached her obligations towards her client to provide advice with skill and care? Is she liable for 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 as to formation of contract?

Misleading old structures is a problem for practicing lawyers. It is extremely difficult for practitioners to follow the evolution in law and identify where the concepts they have learned at university and which are unaltered in the legislation, have undergone dramatic changes. 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 perhaps 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 the law makes the practitioner's life difficult. The content of the 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 areas of private law.

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

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

The content of the law has been presented differently throughout history. An example of change was the medieval codification of usages, presenting 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 the law in books with abstract rules (articles). Another example is the extensive codification-movement on the European continent, which introduced a new more structured interface for practicing lawyers. The former ad hoc type of rules had become too unstructured for the practitioners. A third example of an interface change is the US Restatements of Contract law, making the law more accessible to practitioners at 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 the law.

It is crucial to find a new user-friendly interface for the 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 the law should be constructed. I only know that the new means of communication can be applied to facilitate for practitioners.

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

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.

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.

I find this vision stimulating and interesting. It is potentially a seed for something worth elaborating further. I unfortunately cannot provide a more substantial and coherent description as to a new legal interface. The purpose of this 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 the 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, of safeguarding the democratic society.

