Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With

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I. Autonomous Interpretation of the CISG

It is common knowledge that in order to create international legal uniformity, it is insufficient to merely create and enact uniform laws or uniform law conventions, because “even when outward uniformity is achieved [...] uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.” The drafters of the most recent international uniform commercial law conventions were aware of this, as evidenced by the fact that they inserted into these conventions provisions designed to reduce the danger of diverging interpretations. This is also true as far as the United Nations Convention on Contracts for the International Sale of Goods, (CISG) is concerned. According to Article 7(1), in interpreting the CISG, “regard is to be had to its international character and to the need to promote uniformity in its application.” According to many legal writers who have dealt with interpretation of the CISG, this means that in interpreting it one should always take into consideration that it is a result of international unification efforts, i.e. that it was not elaborated, unlike any domestic statute, with any particular legal system or lan-

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4It has often been stated that it is only possible to reduce the danger of diverging interpretations; it is not possible to eliminate them altogether; see, e.g., JOSEPH M. LOOKOFSKY, CONSEQUENTIAL DAMAGES IN COMPARATIVE CONTEXT 294 (1989).


7Art. 7(1) CISG: “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.”


9WERNER MELIS, Art. 7, in KOMMENTAR ZUM UN-KAUFRECHT 87 (Heinrich Honsell ed., Zürich 1997); ROLAND LOEWE, INTERNATIONALES KAUFRECHT 32 (Vienna, 1989).
Thus, it has been suggested that it is necessary to read the CISG not through the lenses of domestic law, but rather in an autonomous manner. This is why in interpreting the CISG one should not resort to the meaning generally attached to certain expressions within the ambit of a particular legal system. This is also true in those cases where the expressions adopted in the various original versions of the CISG correspond to expressions to which a particular meaning is attached in specific legal systems, provided that the legislative history does not show that an expression was chosen because a particular meaning was attached to it.

What has been said thus far is true for the criteria to be used in the interpretation process as well. The CISG is not to be interpreted on the basis of “domestic” interpretive criteria, since this would be detrimental to the goal pursued, i.e. the unification of (sales) law, since in different legal systems different interpretive criteria are used. Various authors have, however, pointed out that in order to create uniform law, it is insufficient to “autonomously” interpret uniform law instruments. This becomes even more evident if one considers that there are instances where more than one “autonomous” interpretation of the same concept are plausible. In these instances uniformity will, despite an “autonomous” interpretation, not be guaranteed; according to some legal scholars, uniformity would in these cases merely amount to a “random occurrence.”

II. Interpreting the CISG in Light of Foreign Case Law

The drafters of the CISG were aware that although an “autonomous” interpretation is needed for the purposes of uniform law, uniformity will still depend on the interpretation of the same concept under different legal systems. This is why the drafters of the CISG provided for a method of interpretation that is autonomous but also uniform. The “autonomous” interpretation is based on the concept of the “international character” of the CISG. This means that the interpretation of the CISG should be based on an approach that takes into account the international character of the instrument.

EINHEITSRECHT 77 (Baden- Baden, 1994).
14Franco Ferrara, Der Begriff des “internationalen Privatrechts” nach Art. 1 Abs. 1 lit. b) des UN-Kaufrechts, ZEITSCHRIFT FÜR EUROPAISCHES PRIVATRECHT 162, 166 (1998); MAGNUS, supra note 13, at 153.
15DIEDRICH, supra note 14, at 59 ff.; Hein Kötz, Rechtsvereinheitlichung-Nutzen, Kosten, Methoden, Ziele, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1, 8 (1986).
tonomous" interpretation would certainly promote uniformity, it would not necessarily guarantee it. This is why they provided not only for the obligation to “have regard to the Convention’s international character,” but also for the obligation to have regard “to the need to promote uniformity in its application.”19 This is no surprise, given the close link between these two kinds of obligations:20 They both tend to promote uniformity and are both based upon the knowledge that the elaboration of a uniform law instrument does not per se create uniformity.21

From the obligation to have regard to the need to promote uniformity in the CISG’s application legal scholars have deduced, on the one hand, that “whoever has to apply the Convention, must make efforts to adopt solutions which are tenable on an international level, i.e. solutions which can be taken into consideration in other Contracting States as well.”22 The more the various concepts are interpreted “autonomously,” the more this result is able to be achieved.23 On the other hand, both American24 and foreign25 legal writers have interpreted the aforementioned obligation to mean that in applying the CISG courts have to take into account relevant decisions of other States.26

Resorting to foreign case law undoubtedly promotes uniform application of the CISG. However, requiring interpreters to consider

19MAGNUS, supra note 13, at 155.

20For similar statements, albeit referred to in the 1988 Unidroit Convention on International Factoring, see Ferrari, supra note 15, at 111 et seq.


25MICHAEL J. BONELL, Art. 7, COMMENTARY ON THE INTERNATIONAL SALES LAW (a cura di Cesare Massimo Bianca e Michael J. Bonell, Milano 1987); ENDERLEIN ET AL., supra note 17, at 62; FRANCO FERRARI, VENDITA INTERNAZIONALE DI BENI MOBILI. AMBITO DI APPLICAZIONE, DISPOSIZIONI GENERALI 138 (Bologna, 1994); ROLF HERBER and BEATE CZERWENKA, INTERNATIONALES KAUFRECHT 48 (Munich, 1991); MAGNUS, Währungsfragen, cit., 123; DIETRICH MASKOW, THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS FROM THE PERSPECTIVE OF THE SOCIALIST COUNTRIES, in LA VENDITA INTERNAZIONALE 54 (Milan 1981); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT 66 (Munich 1993); MAGNUS, supra note 13, at 155.

26Ferrari, supra note 8, at 831-832.
foreign decisions can create practical difficulties, for two main reasons. First, foreign case law is not readily available, i.e. it cannot easily be retrieved. Second, foreign case law is often written in a language unknown to the interpreter.

In order to overcome these obstacles, various steps have been undertaken. UNCITRAL, for instance, publishes – on the basis of a decision taken on the occasion of its twenty-first session – “CLOUT” ("Case Law on UNCITRAL Texts"). A collection of abstracts of court decisions from all over the world dealing with UNCITRAL texts, among others the CISG. Additionally, the Centre for Comparative and Foreign Law Studies in Rome has developed UNILEX, a collection of case law and an international bibliography on the CISG which aims at promoting the knowledge of foreign case law. Finally, various universities have created websites on the Internet where, at no cost, foreign court decisions, especially French, German and American ones can be retrieved.

One must wonder, however, whether the knowledge of foreign case law is sufficient to solve all the substantive issues. In my opinion, it cannot. The knowledge of foreign case law is not per se sufficient to guarantee uniformity, as the knowledge of domestic case law does not avoid all interpretative problems within a particular legal jurisdiction. If the knowledge of foreign case law were sufficient to create uniformity in the CISG’s application, this would mean, if taken to an extreme, that the first position taken on a specific issue by any court would be the one shaping all the successive case law. This can hardly be true, especially since foreign case law has, according to the majority view, merely persuasive value.

III. Uniform Interpretation and Application of the CISG by Courts Prior to the Decision of the Tribunale di Vigevano

It goes without saying that courts, too, are obliged to have regard for foreign decisions concerning the CISG.
to the CISG’s international character in interpreting it. Some courts have indeed referred to this obligation. For instance, a Swiss court decision states that in interpreting the CISG “one has to have particular regard to its international character (Article 7(1)). The starting point of any interpretation must be the Convention itself not domestic law.”40 One Italian tribunal also has mentioned the need to take into account the CISG’s international character in interpreting it.41 A similar view was taken by a German court decision, which emphasized the need to have regard to the Convention’s international character.42 Reference to the need to avoid interpreting the CISG in the light of domestic law can be found in some U.S. cases as well. In one case, the court stated that “although the CISG is similar to the UCC with respect to certain provisions, […] it would be inappropriate to apply the UCC case law in construing contracts under the CISG.”43 A very similar statement was recently made by the German Supreme Court in respect to the possibility to apply German case law regarding the Commercial Code to the CISG.44

It must be pointed out, however, that the courts are not only bound to interpret the CISG “autonomously”; they are also obliged to have regard to the need to promote uniformity in the Convention’s application by taking foreign case law into account. Nevertheless, only a few court decisions have, to date, referred to foreign case law.45 In one Italian case46 two foreign court decisions were referred to analytically, one German47 and one Swiss,48 in order to decide whether a notice of non-conformity given to the seller twenty-three days after delivery of sporting clothes that turned out to be larger than was agreed upon was timely. This issue was also dealt with by a more recent Italian court decision,49 in which the court analyzed a Swiss court decision.50 In another case, a French court51 quoted a German court decision52 without, however, examining it at all.

IV. The Importance of the Decision of the Tribunale di Vigevano

If one takes into account what has just been said, the importance of the decision of the Tribunale di Vigevano, Italy is self-evident. When dealing with some of the typical issues raised by the CISG, such as party autonomy, notice of non-conformity and burden of proof, the court referred to about 40 foreign court decisions and arbitral awards.53 The court has, in other words, more than any

40 Gerichtspräsident Laufen, May 7, 1993, UNILEX.
42 OLG Frankfurt, April 20, 1994, RECHT DER INTERNATIONALEN WIRTSCHAFT 595 (1994).
45 See generally Ferrari, supra note 39, at 495.
46 Tribunale di Cuneo, January 31, 1996, UNILEX.
48 Pretura Locarno-Campagna, April 27, 1992, UNILEX.
49 Tribunale di Pavia, December 29, 1999, supra note 41.
51 Cour d’appe1 Grenoble, October 23, 1996, UNILEX.
52 OLG Düsseldorf, July 2, 1992, RECHT DER INTERNATIONALEN WIRTSCHAFT 45 (1993).
53 In its decision, the court referred to court decisions from Austria, France, Germany, the Netherlands, Switzerland and the United States.
other court before it, taken into account the need to have regard to foreign case law in order to promote uniformity. It has done so, however, with the awareness that foreign case law is not binding. This is evident from the decision itself. Indeed, the court expressly states that foreign case law, "albeit non-binding, as suggested by a few legal writers, must nevertheless be taken into account in order to guarantee and promote a uniform application of the Vienna Sales Convention."\(^{54}\) The court correctly rejected the minority view,\(^{55}\) which attributes binding force to foreign case law and which even asks for the creation of a "supranational stare decisis."\(^{56}\) As far as the suggestion to create a "supranational stare decisis" is concerned, it does not take into account the rigid hierarchical structure of the court system which the stare decisis doctrine presupposes and which on an international level is lacking.\(^{57}\)

The decision of the Tribunale di Vigevano is, however, noteworthy not only because of the large number of foreign cases quoted and the statement that foreign case law merely has persuasive value, but also because the court quoted, apart from decisions published in law reviews, decisions published in the UNILEX database as well as in two of the aforementioned online databases.\(^{58}\)

\(^{54}\) Tribunale di Pavia, December 29, 1999, supra note 41, at 933 (expressly stating that "foreign case law merely has persuasive value.").

\(^{55}\) Cf. SCHLECHTRIEM, supra note 13, at 29-30; MAGNUS, supra note 13, at 21. Albeit with reference to the UNIDROIT Convention on International Factoring, see also FRANCO FERRARI, IL FACTORING INTERNAZIONALE 115 (Padova, 1999).


\(^{57}\) See also Ferrari, supra note 23, at 128.

\(^{58}\) Supra notes 33-37

V. Exclusion of the CISG

One of the issues touched upon by the court relates to the parties’ possibility to exclude the CISG,\(^{59}\) which led several authors to label the CISG as a “dispositive” convention.\(^{60}\) After having stated that the CISG does apply to the case at hand by virtue of Article 1(1)(a), the court expressly stated that the parties had not taken advantage of the possibility of excluding the CISG. Unlike other courts, the Tribunale di Vigevano did not, however, limit itself to emphasizing the fact that the parties had not excluded the CISG. Rather, it grasped that occasion to deal in more detail with the issue of implicit exclusion which it, like many\(^{61}\) – albeit not all\(^{62}\) – courts

and legal writers⁶³ considered admissible.

In its decision, the court mainly deals with the (rather practical) issue of whether the CISG must be considered as having been excluded where the parties pleaded on the sole basis of a particular domestic law (in the case at hand, Italian law) despite the fact that all of the CISG’s criteria of applicability were met. The court correctly stated that the mere fact that the parties argue on the sole basis of a domestic law must not necessarily be taken to mean that they have excluded the CISG.⁶⁴ Indeed, in order for it to have the effect of excluding the CISG, the parties must have been aware of its applicability in the first place. If they were not aware of the CISG’s applicability, the courts will have to apply the CISG. Nowadays, this appears to be the prevailing view in legal writing — as well as in case law. A German court,⁶⁶ for instance, adopted this view when it stated that the parties arguing on the sole basis of a domestic sales law may be regarded as having excluded the CISG when “it results that their pleadings correspond to an agreement of the parties to exclude the Convention.”⁶⁷ If the “behavior during the proceedings is not based upon a conscious choice of a domestic sales law, but rather on the erroneous opinion that this law would anyway be applicable,”⁶⁸ the CISG would have to be applied by virtue of the principle iura novit curia, as expressly stated by the Tribunale di Vigevano.

VI. Timely Notice of Non-Conformity

After having stated that the CISG was applicable, the court dealt with the issue of non-conformity. Specifically, with the issue of

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⁶⁴Ferrari, supra note 63, at 116-117.


⁶⁷OLG Celle, 24 May 1995, UNILEX.

⁶⁸Id.
whether the buyer had lost its right to rely on the lack of conformity due to an inadequate notice.

As pointed out by the Tribunale di Vigevano, a notice is inadequate when it is not made within a reasonable period of time after the non-conformity was or should have been discovered. The starting point of the court’s discussion of the timeliness of the notice is the statement that the reference to the “reasonable time” must be considered a “general clause” which obliges the courts to give regard to all the circumstances of a specific case. One such circumstance is the nature of the goods, as expressly stated by the Tribunale di Vigevano, quoting prior decisions by a German court and a Dutch court. Thus, where the goods are perishable, the notice of non-conformity must be given within a shorter period of time than that within which notice concerning durable, non-perishable goods must be given.

The court also stated that, among the circumstances to be taken into account, one must consider party autonomy. Because the CISG provisions dealing with the issue of conformity (Articles 35-44) are not mandatory, the parties may freely agree upon a period of time within which the notice has to be given. Thus, in the case at hand, the parties had not agreed upon a specific period of time, nor were the goods perishable, the court rightly stated that it could measure the timeliness of the notice more liberally. Nevertheless, because in the case at hand notice was given four months after the defects had been discovered, the notice could not be considered timely. In order to reinforce this conclusion, the Tribunale di Vigevano referred to several foreign court decisions according to which a notice given three, or even two months after the discovery of the defects must be considered late.

VII. Specificity of the Notice of Non-Conformity

In order to preserve the right to rely on the lack of conformity, it is not sufficient, however, that the buyer notifies the seller in time. According to CISG Article 39(1), the notice must also have specific content. It does not, however, have to have a specific form, as expressly stated by the Tribunale di Vigevano. This specificity

IM VERGLEICH ZUM ÖSTERREICHISCHEN RECHT 113 (Peter Doralt ed., Vienna 1985).

See also AG Augsburg, 29 January 1994, UNILEX.

See also AG Roermond, 6 May 1994, UNILEX. This specificity

75See also Pretura Torino, 30 January 1997, UNILEX.


77AG Augsburg, 29 January 1994, UNILEX.


79See also RB Zwolle, 5 March 1997, UNILEX, as well as AG Kehl, 6 October 1995, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 565 (1996), quoted by the Tribunale di Vigevano in its decision.

80FERRARI, supra note 60, at 211; PILTZ, supra note 24, at 193-94; Ingeborg Schwenzer, supra note 3, at 420; Martin Welser, Die Vertragsverletzung des Verkäufers und die Folgen ihrer Verletzung, in DAS UNCITRAL-KAUFRECHT
requirement was introduced in order to give the seller the opportunity to decide how to react to the buyer’s claim (by examining the goods himself, by repairing the goods, or by delivering substitute goods).\textsuperscript{81} In the case at hand, the court correctly stated that the notice was not specific enough. Although one should not overemphasize this requirement,\textsuperscript{82} a notice that merely refers to the fact that “the goods caused problems” cannot be considered a proper notice. Indeed, such a generic notice (not unlike similar ones where reference is solely made to the fact that the goods are “defective in all parts,”\textsuperscript{83} that they “do not conform to contract specifications”\textsuperscript{84} or that they are the outcome of “poor workmanship,”\textsuperscript{85} etc.)\textsuperscript{86} does not put the seller in a position to choose what steps to take.

What has been said in the last two chapters would without any doubt by itself suffice to deny the buyer the right to rely on the lack of conformity, especially since, as pointed out by the Tribunale di Vigevano, the buyer can rely neither on Article 40 (according to which the lack of proper notice is of no consequence where the seller was aware, or could not have been unaware, of the lack of conformity and did not notify the buyer), nor on Article 44 (according to which the buyer retains at least some rights if he has a reasonable excuse for not giving proper notice). Both are intended to limit the harshness of the consequences of a lack of proper notice. The court also dismissed the buyer’s claim for another reason, linked to the burden of proof.

\section*{VIII. Burden of Proof Under the CISG}

There is a dispute among legal scholars as to whether the issue of burden of proof is a matter governed by the CISG.\textsuperscript{87} According to several legal\textsuperscript{29} scholars, this issue is not dealt with by the Convention which is – why one should – apart from some exceptional cases\textsuperscript{88} - have recourse to domestic law.\textsuperscript{89} This point

\textsuperscript{81}See also Schwenzer, supra note 23, at 411-412.
\textsuperscript{82}See also Reinhard Resch, Zur Frage bei Sachmängeln nach UN-Kaufrecht, ÖSTERREICHISCHE JURISTENZEITUNG 470, 470 (1992).
\textsuperscript{83}OLG Frankfurt, 20 April 1994, NEUE JURISTISCHE WOCHENSCHRIFT 1013 (1994).
\textsuperscript{84}HG Zürich, 30 November 1998, SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 188 (1999).
\textsuperscript{86}See, e.g., Burghard Piltz, Neue Entwicklungen im UN-Kaufrecht, NEUE JURISTISCHE WOCHENSCHRIFT 553, 557 (2000).
\textsuperscript{87}Several monographs have been written on the subject of burden of proof; see, e.g., CLEMENS ANTWEILER, BEWEISLASTVERTEILUNG IM UN-KAUFRECHT; INSBESONDERE BEI VERTRAGSVERLETZUNGEN DES VERKÄUFIGERS (Frankfurt 1995); MICHAEL HENNIGER, DIE FRAGE DER BEWEISLAST IM RAHMEN DES UN-KAUFRECHTS: ZUGLEICH EINE RECHTSVERGLEICHE DIE GRUNDLAGENSTUDIE ZUR BEWEISLAST (Munich 1995; ALEXANDER IMBERG, DIE VERTEILUNG DER BEWEISLAST BEIM GEFÄHRÜBERGANG NACH UN-KAUFRECHT (Frankfurt 1998); REINHARD JUNG, DIE BEWEISLASTVERTEILUNG IM UN-KAUFRECHT (Frankfurt 1996); BIRGIT REIMER-ZOCHER, BEWEISLASTFRAGEN IM HAAGER UNDI WIENER KAUFRECHT (Frankfurt 1995).
\textsuperscript{88}See, e.g., MAX HUTTER, DIE HAFTUNG DES VERKÄUFIGERS FÜR NICHTLIEFERUNG DER WARE BZW. LIEFERUNG VERTRAGSWIDRIGER WARE NACH DEM WIENER UNCITRAL-ÜBEREINKOMMEN ÜBER INTERNATIONALE WARENKAUFVERTRÄGE VOM 11 April 1980 44 (Diss. Regensburg 1988).
of view also has been taken up by a number of courts. There is, however, no agreement among these legal writers as to how to determine the applicable domestic law. Whereas some legal writers hold the view that one should always resort to the *lex fori*, others propose to resort to the domestic law made applicable by virtue of the rules of private international law of the forum.

The prevailing view, however, appears to be that the issue of burden of proof is a matter governed by the CISG (at least “implicitly” or “indirectly”). This view has been justified, on the one hand, on the grounds that the CISG itself provides at least one rule on the allocation of the burden of proof, namely the one to be found in Article 79(1). Thus, it cannot be asserted that the issue of the allocation of burden of proof is not governed by the CISG. On the other hand, legal scholars have pointed out that the issue of burden of proof is so closely linked to the substantive law that a rule on the allocation of burden of proof must necessarily be derived from the substantive law, *i.e.* the CISG.

If one agrees with the view that the issue is dealt with by the CISG, one still has to decide how the burden of proof must be allocated in practice. A close examination of both the legislative history of the various provisions, as well as their wording, has led legal scholars to elaborate the general principle that each party has to prove the existence of the factual prerequisites contained in the provision from which it wants to derive beneficial legal consequence. The Tribunale di Vigevano as well has evinced this principle from the CISG, as have other courts cited by the Tribunale di Vigevano; indeed, according to the Tribunale di Vigevano, “ei incumbit probatio, qui dicit, non qui negat.” As pointed out by the Tribunale di Vigevano itself, this principle leads to another con-
clusion as well: a party claiming an exception has the burden of proving the factual prerequisites of that exception.¹⁰⁵

Once the Tribunale di Vigevano had stated the general principle, it provided some examples of how the burden of proof must be allocated in practice. It stated, for instance, that the party claiming that the internationality of the contract was not apparent, which would lead to the CISG’s inapplicability by virtue of Article 1(2), has to prove this. The court also stated that the aforementioned general principle obliges the party claiming that the CISG’s applicability had been excluded by the parties to prove the existence of such an agreement between the parties. As far as the issue of damages is concerned, the aforementioned principle leads, according to the Tribunale di Vigevano as well as a Swiss court,¹⁰⁶ cited by the Italian court, to the damaged party having to prove the damage, the breach of contract, the causal link between the breach of contract and the damage, as well as the foreseeability of the loss.

From this general principle another rule can be derived: the buyer who asserts the non-conformity of the goods must prove the lack of conformity as well as the existence of a proper notice.¹⁰⁷ Because in the case at hand the buyer did not prove that lack of conformity, the Tribunale di Vigevano could have rejected the plaintiff’s claim for this reason alone.

IX. Conclusion

The conclusions which can be drawn from reading the decision of the Tribunale di Vigevano are obvious. Recourse to foreign court decisions in interpreting and applying the CISG which legal scholars have been asking for since the CISG’s coming into force is apparently possible. It is also obvious, however, that not all the courts (as mentioned earlier) will apply the CISG as the Tribunale di Vigevano did. One can only hope that the Tribunale di Vigevano will soon have to decide another case dealing with the CISG. [page 239]

¹⁰⁵Franco Ferrari, Art. 4, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT, supra note 23, at 104; MAGNUS, supra note 13, at 123.
¹⁰⁶HG Zürich, 26 April 1995, UNILEX.
¹⁰⁷See also HG Zürich, 30 November 1998, SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 185 (1999); HG Zürich, 26 April 1995, supra note 106; OLG Innsbruck, 1 July 1994, UNILEX, to which the Tribunale di Vigevano expressly refers in its decision.