Reimagining transnational validity under the CISG

A gateway to "homeward trend" interpretations

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Abstract

Purpose – The aims and objectives of the United Nations Convention on Contracts for the International Sale of Goods (CISG) have been defeated by the intrusion of domestic laws of different contracting states in the interpretation of the provisions of this Convention. One of the most abused channels of this un-uniform interpretation is through art 4 of the CISG, which excludes the matters of validity and property from the Convention's jurisdiction. This paper, therefore, aims to critically analyze the dangers of unsystematic reliance on the domestic laws in the interpretation of art 4 of the CISG on matters involving transnational validity and property.

Design/methodology/approach – The paper will use doctrinal methodology with critical and analytical approaches. The paper will incisively study the doctrines, theories and principles of law associated with validity of commercial contracts and the implications of exclusion of the doctrine of "validity" under the CISG.

Findings – The findings and contribution to knowledge will be by way of canvassing for a uniform transnational validity doctrine that will streamline and position the CISG to serve as a uniform international commercial convention.

Originality/value – This paper adopted a conceptual approach. Even though the paper ventilated the views of many writers on the issue of application of the doctrine of validity under the CISG, the paper, however, carved its own niche by making original recommendations on how to create a uniform validity jurisprudence under the CISG.

Keywords Validity, Transnational, CISG, Commercial contract, UNIDROIT, Uniform convention

Paper type Conceptual paper

1. Introduction

The fundamental objective of any uniform supranational law lies with the necessity for the propagation and promotion of one body of law that will oversee similar activities/transactions in all contracting states and to serve as a catalyst for law reform and revision in an area where common ground has been found among contracting states. This is the virtue canvassed and entrenched in the United Nations Convention on the Contracts for the International Sale of Goods (CISG)[1] (Lookofsky, 1991). The CISG is not a holistic Convention[2] – its uniformity mantra stops where its limitations of scope start; in addition to providing rules that aid the homogenous application of the CISG, arts 1-6 of the CISG also contain rules that decisively and without doubt manacled the scope of application of the Convention.

These limitation rules are put in place because they preserve the sovereignty of domestic laws of sale, which apply side by side with the CISG[3] (Observations of the Government of Federal German Republic, 1956) in certain contexts. It goes without saying then that certain rules contained therein in the CISG have opened up a gateway to "homeward trend" (John, 1989) interpretations of the CISG in line with the autochthonous or home-grown ingredients of the various domestic laws.

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Schlechtriem and Butler while justifying limitation rules under the CISG are of the view that:

> [. . .] unification of sales law of different legal jurisdictions/traditions through the CISG is only a partial one, the CISG only purports to regulate a section of the law, namely that concerning a sales contract and its performance [. . .]. Accordingly it is advisable to stipulate in a contract not only the applicability of the CISG, but also the domestic law governing the contract (Peter and Petra, 2009).

The most recognizable rule of this limitation of the uniform applicability of the CISG is the rule of "validity" as provided under art 4 (a) (b) of the CISG. Art 4 of the CISG provides that:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> - the validity of the contract or of any of its provisions or of any usage; and
> - the effect which the contract may have on the property in the goods sold.

The above provision goes a long way to substantively and procedurally exclude from the ambit of the CISG issues which bother on validity and on the possible effect a contract of sale of goods under the CISG may have on the property in the goods sold. This paper will argue that there is a concept of "transnational validity" under the CISG that needs to be protected to achieve the uniformity objective of the Vienna Convention. Transnational validity therefore means those private international uniform legal concepts that have the tendency to render a contract of international sale of goods void and or voidable. Some of these concepts take the nomenclature of vitiating elements like capacity, mistake, fraud, illegality, duress and unconscionability, among others.

In as much as the validity provision of art 4 of the CISG is an autonomous incentive that induces buoyant ratification of the CISG by many countries, but it still constitutes a "loophole" that greatly undermines the unifying effect of the CISG (Hartnell, 1993). After all, Joseph Lookofsky was right when he writes that "in a well-integrated world, the formal harmonization of private law would keep pace with the globalization of private business" (Lookofsky, 1991). There is a need to do more in protecting the international outlook and integrity of the CISG. The best way to do it is by not opening up the convention's frontiers to domestic laws assaults. The CISG is a self-contained body of rules, independent of and distinct from the different domestic laws. The recourse to rules of domestic law in the interpretation of "transnational validity" under the CISG hinders the search for the elusive goal of uniformity and thereby producing divergent interpretations (John, 2000). This paper will be making a case for the review of the Convention to introduce provisions on validity as can be seen in the International Institute for the Unification of Private Law (UNIDROIT) principles of international commercial law. The end point of this will create an atmosphere for the jurisprudential growth and development of validity concept that will be transnational.

2. Dangers of multiple interpretations of validity matters

The CISG being primarily concerned with contractual rights and obligations is not concerned with validity and property in the goods. Such issues remain within the province of national law. And yet, experience at the national level tells us that the real-world distinctions are much harder to make (John, 2001).

Determining the different national laws interpretations of what amounts to validity will be nebulous, and it has been suggested that if a contract is rendered void *ab initio*, either

retroactively by a legal act of the state or of the parties such as avoidance for mistake or revocation of one's consent under special provisions protecting certain persons such as consumers, or by a resolutive condition (i.e. a condition subsequent) or a denial of approval of relevant authorities, the respective rule or provision is a rule that goes to validity and therefore is governed by domestic law and not by the CISG (Peter and Schwenzer, 2010).

However, this definition of validity will definitively spawn into multiplicity of interpretations according to the legal background and traditions of each national law. Honnold had seen this danger when he writes:

> The Convention, faute de mieux, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. The tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing (John, 1989).

It can hardly be denied that the focus on the domestic laws interpretations of validity will not necessarily lead to a coherent and streamlined interpretation of art 4 CISG's validity rule. This is because the doctrine of autochthony will tend to preserve the peculiarities of various legal systems. As the Convention provides no clear indication as to the ultimate extent of any uniform transnational validity concept (Schroeter, 2014), hence, from the outset, the uniformity creed of the CISG is a suspect. This is because there was never from the beginning an honest intention to create a supranational uniform international commercial treaty-law that will unify all contracts of sale of goods without the intrusion of national laws.

Ulrich G. Schroeter holds the opinion that those who are not comfortable with the exclusion provision of the CISG somewhat overstate the risks inherent in art 4 CISG, which as it stands is in truth both useless and harmless (Schwenzer and Spagnolo, 2014). He argues that since the Convention–accordingly "governs only" the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract, the validity of contractual provisions can by definition not be governed by the CISG, because a contract itself cannot be the source of the very rules meant to control it[4] (Flechtner, 1998).

The above argument derived more from logic than experience. It is a matter of common legal knowledge that efficacy of law entails the regulatory potency imbued in the law. That is why most countries' constitutions are supreme and need not be dependent on any other law to derive and drive its supremacy. Every rule is a contract bargained and enacted among the drafters before it becomes a rule, except the express exclusion of the validity rules from the CISG; the Convention would have conveniently defined validity and enforced it.

However, art 4 does not help matters by delving into vague terminologies and phrases. Assuming but not conceding the fact that the sphere of CISG should be limited to only the formation of contract of sale of goods, then the next question begging for answer will be what items apart from the obvious (offer, acceptance and obligations of buyer/seller, among others) can comfortably make the list of formation of contract of sale. It will be instructive to observe that some pre-contracts of sale items are deeply rooted in validity (Peter and Schroeter, 2013). In addition, art 4 even affects the fundamental rule of party autonomy as provided under art 6. Contracts which the national law forbids are invalid if this is the consequence prescribed by that law (Peter *et al.*, 1984).

If national laws are allowed the leisure of dictating what transnational validity means, then the purpose of CISG will be diminished[5]. Validity under art 4 encompasses any issue by which the domestic law would render the contract void, voidable or unenforceable[6] (Geneva PharmaceuticalsTech, 2007). But, where there is a doubt in sifting items which

should fall into validity category between the domestic law and the convention, then the Convention should take preeminence. This view has been adumbrated upon by Peter Schlechtriem thus:

> I think that the gap which has been created by application of the national rule is to be filled with provisions of the Convention. A domestic law which does not restrict itself to declaring certain clauses void but prescribes the content of international sale contracts would violate the Convention. In case of doubt, I think we should start out from the assumption that national laws are weaker and must yield to the international norm. Moreover, a national legislature which would adopt conflicting legislation would violate the obligations which its government has incurred by signing the Convention (Galston and Smit, 1984).

Furthermore, the distinction between formation of contract and validity issues is too blurred to be sufficiently substantiated. Indeed, they are intertwined in the Scandinavian countries. The CISG formation and validity distinction itself appears troublesome. Both formation and validity rules relate to the process by which a contract comes to be, and any attempt to separate them will be an exercise in quandary. For this and other reasons, the Scandinavian countries all ratified the CISG subject to art 92 reservation, whereby they declined to accede to the CISG formation rules (Part II) entirely (Lookofsky, 1991), and this act constitutes a divisive approach to the acceptance and application of the "Scandinavian version" of the CISG.

The uniform application of the CISG is most germane in reducing the fears of forum shopping and indecisive legal posturing. When a sale is subject to the CISG, those who would shop for forum can no longer shop for law: when contracting parties reside in CISG contracting states, national courts and international arbitrators need no longer choose between the various national statutes of sale. This will reduce the dangers of multiple interpretations of any part of the CISG including the validity matters.

3. Need for uniformity on validity matters

Jacob Ziegel lauded the need for an impartial legal regime in the mold of the CISG. He went on to illustrate that if countries x and y do not have a mature sales law, or if parties in those states proposing to engage in trade with each other are not happy to accept the law of either state as the proper law of the contract, then obviously an international sales law may provide an appropriate solution to the parties' difficulties (Jacob and Claude, 1981. But provisions like art 4 are needless, if the aim of any uniform international commercial law instrument is to provide an identical legal platform[7] (Sturley, 1987), then CISG inelegant art 4 should be amended[8] (Ryan, 1995). The CISG is not to be interpreted on the basis of domestic interpretive criteria; otherwise, this would be detrimental to the goal pursued, i.e. the unification of (sales) law, as in different legal systems, different interpretive criteria are used (Kötz, 1986). While criticizing some of the CISG provisions, Ziegel maintains that:

> Important aspects of sales law are excluded from the Convention so that the sought after certainty and uniformity may not in fact be reached. Even where the Convention clearly does apply, many questions of exegesis and application will remain uncertain and it will require a substantial period of time to develop a body of reliable and authoritative precedents.

Therefore, by giving the national law a firm grip of one of the most important aspects of legal control "validity", it goes without saying that the soft-spot for the national laws of parties will surely override the international outlook of the CISG (Jacob and Claude, 1981).

R.J.C Munday is of the opinion that, 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

(Munday, 1978). It can be seen therefore that litigation could become even more complex than it is at present where foreign law issues are raised by one of the parties and the goal of a simple, uniform and readily predictable international law of sales may turn out to be illusory (Jacob and Claude, 1981).

It has been held that whoever has to apply the Convention must make efforts to adopt solutions which are tenable on an international level, and this means offering solutions which can be taken into consideration in other contracting states as well (Ulrich, 1999). Contracting states should cultivate the habit of perusing the precedents laid down by another contracting state to achieve the advantage of internationally accepted application and interpretations of the CISG as canvassed under art 7 (Cook, 1997). Thus, transnational validity provisions can easily be streamlined, as contracting states take cue from the precedent of one another on how to fashion out a common interpretations of validity matters.

However, the above approach is not without difficulties, as foreign case laws are not always available or accessible, and in most cases, they are not easily decipherable, given that they are written in the language of the country that it governs[9]. But incisive efforts toward globalization of international commercial law have yielded bountiful returns under the auspices of United Nations Commission on International Trade Law (UNCITRAL) and database of international case law and bibliography (UNILEX). Franco Ferrari captures the giant strides being made in the area of overcoming the obstacle of non-accessibility of international commercial law decisions available thus:

> 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 web sites on the Internet where, at no cost, foreign court decisions, especially French, German and American ones can be retrieved (Ferrari, 2001).

It can be argued that transnational validity provisions would have been enjoying the benefit of widely circulating publications by UNCITRAL, UNILEX and the CISG database as maintained by Pace University USA and Queen Mary University London and other institutions that have taken up the responsibility of disseminating invaluable international commercial materials.

It has been contended that one of the reasons for excluding validity and issue of property from the CISG is that "drawing up relevant rules would have overextended the convention and unreasonably delayed its conclusion" (Schlechtriem, 2009). But this argument is neither here nor there, as it is not justifiable to sacrifice completeness and uniformity on the altar of time.

CISG would have still been an imperfect Convention; indeed, no law is perfect in all areas of coverage. But a more comprehensive convention that deals with issues excluded under art4 (a) (b) or sourcing it out to other sister uniform conventions would have been a positive step in the right direction toward creating uniform international commercial law.

UNCITRAL for the sake of uniformity should not have given up on the issue of validity by allowing domestic laws exclusive jurisdiction. An attempt to codify and unify the possible comparative transnational validity matters that could have arisen within the context of international sale of goods would have been collated, debated and enacted just like other provisions of the CISG (Karollus, 1991).

CISG according to Martin Karollus "was not elaborated, unlike any domestic statute, with any particular legal system or language in mind", so CISG drafters could have conveniently gone ahead and created during the diplomatic conferences (drafting process) its own ideal matters of transnational validity and how the convention regulates them or at least seriously consider the work on validity by the International Institute for the Unification of Private Law (UNIDROIT).

Jacob Ziegel in his report to the Uniform Law Conference of Canada on Convention on CISG was of the view that:

> Unidroit has been working on a uniform law on rules governing the validity of international contracts, and these have been circulated by UNCITRAL. [Doc. A/CN.9/143]. However, in view of the difficulty of reaching consensus on a suitable set of rules the UNCITRAL working group preparing the draft convention did not attempt to incorporate such rules into CISG.

Abandoning work on the unification of private law of transnational validity is regrettable. Many countries have adopted the CISG, making the Convention one of the most popular and acceptable United Nations Conventions. Thus, missing the opportunity to sell transnational rules of validity along with the laws that govern formation of contract, general principles of contract of sale and obligations of parties as contained in the CISG have put a spanner in the work of great assemblage of persons who participated in the CISG project.

Then, it can be rightly argued that the CISG cannot perfectly legislate on all aspects of international sales life. This obvious weakness is further fine-tuned by the provision of art 7 of the CISG. Article 7(2) provides that:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

What this means is that any matters arising from the lack of total coverage of validity provisions assuming the CISG provided for it could still be dealt with by the general principle on which the CISG is based or by the rule of conflict of laws under art 7 of the CISG. This approach would have helped in creating uniform transnational validity jurisprudence in the international sales law[10] (Lookofsky, 1989) while probably retaining the national laws as a default rule in filling the gap where the CISG suffers lacuna[11] (John, 1991).

The UNIDROIT Principles of International Commercial Contract (UPICC) can serve as a gap-filling model law to cure the defect in the CISG's inability to provide for validity matters (Michael, 2011). The UNIDROIT Principles may be used as a means of interpreting and supplementing international uniform law instruments. Generally, if the UNIDROIT Principles contain a relevant rule, that rule should be preferred. The UNIDROIT rules are easy to find, and their application will reduce legal research costs and enhance predictability and uniformity of outcomes. If no UNIDROIT rule is available, any prevailing rule of international case law should be applied (Mather, 2001). Chapter 3 of the UPICC 2016 provides for validity. It is germane to note that matters that bother on illegality, mistake, validity of mere agreement, initial impossibility, fraud, duress, misrepresentation, threat and gross disparity are all covered under Chapter 3 of the UNIDROIT Principles 2016.

However, art 3.1.1of the UNIDROIT Principles 2016 excludes the application of matters of capacity from the jurisdiction of this model uniform law[12]. It follows that the CISG can rely on the UNIDROIT Principles as a gap-filling law in those matters that are covered under Chapter 3 of the model law. One major problem facing this proposal is that as the UNIDROIT Principles have not been adopted in the form of an international treaty or

incorporated as such in any domestic law, it still remains to be seen how such use can be justified in the absence of any reference to them by the parties.

4. Overlap of CISG and domestic laws on validity/property matters

Under the CISG, legal capacity, illegality, mistake, agency contracts and host of other sensitive issues are omitted from the jurisdiction of the Convention (Indira, 2005). In addition, the issue of property in the goods sold is also excluded under art 4 (b) of the CISG. The rationale behind this is that many domestic laws have their peculiar divergent approaches to the issue of property and reaching a consensus during the CISG diplomatic conference would have been chasing the shadow.

The CISG simply places the seller under an obligation to transfer property in the goods to the buyer. But the questions of where and how the transfer of property is affected are matters that oust the jurisdiction of the CISG pursuant to art 4(b) (Schlechtriem, 2009). It can be argued that the CISG contains some rules that may be relevant to property rights as between the seller and the buyer. However, the CISG does not deal with property claims of third parties. Thus, the question whether the buyer takes the goods free of some third party's claim is left to the applicable domestic law selected in a choice-of-law process (Mather, 2001).

It will be instructive to reiterate that certain pure validity matters have attained a considerable level of successes under the CISG. These buttress the fact that the ambivalent nature of "validity" and lack of a clear-cut definition of what it means or connotes will always haunt the "home trend" CISG jurists, practitioners and aficionados who built the CISG to be a castle of many exit ways. Some of the overlaps between CISG and national law on validity matters are presented next.

First, art 11 provides for the amelioration of requirement of writing in the formation of contract under the CISG. It goes on to provide that contract of sale may not be evidenced or concluded in writing and that it may be proved by any means, including witness. This provision together with provisions of art 29 of the CISG will automatically fall into validity issues once a contracting state makes the art 96 reservation (Schlechtriem, 2009). Thus, the combined provisions of art 12 and art 96 of the CISG will make contract of sale of goods that is not evidenced in writing a validity issue, thereby rendering it null and void or voidable depending on the vitiating legal terminology and approach of the domestic law.

Second, some national laws see initial impossibility as a validity issue, as some cases in this scenario can easily be categorized under the doctrine of mistake which has no place under the CISG[13]. It has also been argued that art 79 of the CISG which governs impossibility does not make any difference like English law as to the time of the occurrence of impediments that will lead to frustration of the contract[14]. The CISG does not differentiate between initial and subsequent (impossibility) impediments; even if performance of the contract is already impossible when concluding the contract, hitherto, it has no effect on the validity of the contract as it would have under some national laws that adopted English common law[15] (Yesim *et al.*, 2011; Schlechtriem, 2009). Furthermore, despite the tendency to categorize the concept of mistake under the "validity umbrella" which ousts the jurisdiction of the CISG, nevertheless, arts 8(1), 27 and 71 of the CISG make suggestions to varieties of concept of mistake (Schlechtriem, 2009). This ambivalent nomenclature of the concept of mistake buttresses the point that the CISG could have comfortably accommodated expressly the concept of mistake without encouraging non-uniformity by allowing domestic laws to determine the concept of mistake in the guise of falling into validity item.

Third, the CISG does not normally delve into the validity of individual clauses and standard terms, though the CISG may provide the parameter for assessing clauses under the

respective domestic law, and this is a clear case where the CISG seeps into the domestic law despite art 4(a) ouster provision[16]. The CISG-AC Advisory Opinion No 17 provides that:

> The Convention governs the incorporation and interpretation of clauses providing for the limitation and exclusion of liability of the obligor for failure to perform a contract for the international sale of goods ("limitation and exclusion clauses") (CISG-AC Opinion No. 17, Limitation and Exclusion Clauses in CISG Contracts, 2015).

The above opinion buttresses the fact that the CISG can be proactive in governing what seems to be a validity matter which has been erroneously surrendered at the mercy of multiplicity of domestic laws interpretations.

Generally, when there is a gross disparity between performance and counter performance, then the CISG will cede jurisdiction to the domestic law, as the above scenario bothers on validity matter (Schlechtriem, 2009). However, this is not totally correct, as performance and counter performance are part of "formation of contract" as envisaged under art 4 of the CISG. Additionally, art 7(1) of the CISG provides for the observance of good faith in international trade and the doctrine of good faith espoused therein can be used to adjudicate disproportionate performance and counter-performance instead of allowing domestic law to take up this challenge under international contract of sale of goods.

There is no provision for foreign currency awards under the CISG, so there is confusion in determining whether the matter is excluded from the CISG due to art 4(b) provision or whether it is a gap in the coverage of sale by the CISG and to be filled pursuant to art 7 (2) of the CISG[17] (Bridge, 2007).

Additionally, art 4(b) is another area where there are obvious overlaps between the CISG and the domestic law. Without the benefit of proper definition of what property means or connotes under the international sales law, it will be difficult to decipher whether the reference to property means just the general property or ownership or possessory interests in the sense of a special property (Bridge, 2007). The above contention can be supported with the provision of art 30 of the CISG, which states that "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention." It has been held that:

> The acts which the seller must do in order to deliver the goods and to hand over the documents are laid down in arts 31 to 34. However, the passing of property and the acts which the seller must do in order to transfer title to the buyer are not treated by the Convention. Article 4(b) provides that the Convention is not concerned with the effects which the contract may have on the property in the goods sold. This question is left to the law applicable under the conflict-of-laws rules of the forum (Ole, 1987).

It seems paradoxical when interpreting art 4(b) side-by-side arts 41[18] and 42[19] of the CISG, it does appear that, notionally, the Convention provides for issues of property in the goods, though in a limited sphere.

Under the common law, the concepts of ownership, property and possession are well-established and compartmentalized; it will be a Herculean task to dissuade a common-law practitioner linking property in the goods with right of lien and stoppage in transit.

More so, it is doubtful if the CISG actually meant to exclude the unpaid sellers' lien and right of stoppage in transit from its application simply because it does not deal with an interest of the party to the contract of sale of goods in the property in goods sold (Bridge, 2007). Under art 71(2)[20] of the CISG, it can be interpreted that the CISG provides for the right of lien and stoppage in transit, and it follows that the interest of the party in the property sold is the rationale for the legal remedy bestowed under art 71(2). Thus grudgingly, the CISG still deals with the issue of property in the goods sold, thereby playing

down any legal justifications for the exclusion provision of art 4. Trevor Bennet, however, differently interpreted art 71(2) of the CISG to the effect that it needs to be read in conjunction with the statement in art 4(b) that the Convention is not concerned with the effect which the contract may have on the property in the goods sold. A third person may therefore acquire the title to the goods from the buyer under the applicable domestic law, which would then govern the question whether those rights were subject to the seller's right to prevent the handing over of the goods to the buyer (Bennett, 1987). It can be said that the seller's right to stop delivery of the goods in transit to the buyer cannot impair the rights of third persons to whom the buyer has resold the goods or who have obtained title in the goods, nor does it affect the relationship between the carrier and the buyer (Mercédeh, 2005).

5. Conclusion

The CISG governs international contract of sale of goods, by virtue of art 1 of the CISG, a contracting state that applies the CISG does so as if it is part of its own national law (Bridge, 2007). This is because the CISG is the law of international contract of sale of goods of any contracting state that ratifies it. During the early days of the CISG drafting process, the concerns of developing countries, developed countries and socialist countries emerged at a number of points in the legislative debates, and this has resulted in the standardized Convention that is now widely applied (Brussel, 1993). Though the uniformity of the CISG as it is presently constituted has been belittled by Michael Bridge when he writes that:

> Uniform law like the CISG is threatened from its inception by the centrifugal forces that lead to national courts absorbing international instruments into the fabric of their national legal culture. This is particularly dangerous where a body of uniform special law like sale has no body of uniform general contract law on which to drop anchor (Bridge, 2007).

The CISG should therefore drop anchor by defining and governing in details its own concept of transnational validity and property in furtherance of its uniformity responsibility and not abandoning this sensitive task to the domestic law of contracting states (Bridge, 2007). The domestic courts should also endeavor to positively and progressively interpret validity matters relating to the CISG in the light of promoting its supranational uniformity. Franco Ferrari observed that:

> There are many decisions that comply with the obligation to have regard for the CISG's international character and avoid resorting to domestic concepts to interpret the CISG. This is also true in the US, as can easily be derived from some US decisions. In St. Paul Guardian Insurance Co. *et al.* v. Neuromed Medical Systems and Support GmbH, *et al.*, for instance, it is stated that 'the CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language', a statement that is clearly incompatible with the homeward trend (Ferrari *et al.*, 2009).

It is true from the above that the greatest obstacle to uniform application of transnational validity concept under the CISG are the homeward trend apologists who are reluctant to give the uniform international law of sale of goods a real chance.

This paper does not suggest that all subject matters should be squeezed into the CISG, the convention is not a magic wand that runs all the errand of international sale of goods contract, but for the sake of achieving unvarying development of international commercial law of sale of goods, matters not covered under the CISG (such as validity matters) should be added via amendment or reform of the Convention or should be filled in by recourse to other uniform Conventions instead of resorting to the pluralism and divisiveness of domestic laws.

Notes

1. According to Joseph Lookofsky "The latest and arguably the greatest legislative achievement aimed at harmonizing private commercial law is the 'CISG': the United Nations (Vienna) Convention on Contracts for the International Sale of Goods".
2. The CISG according to Stefan Kröll is not a comprehensive code regulating all matters falling within its sphere of application. Certain matters were considered to be too controversial for inclusion in the CISG since the national laws differed too much to harmonize the various approaches. See 1978 UNCITRALY.B. 65f, U.N. Sales No. E.80.V.8.
3. Ulrich G. Schroeter writes that at the drafting stage of the Hague Uniform Sales Laws, predecessors to the 1980 Vienna Sales Convention (CISG), it was noted that questions of great importance, such as the validity of the contract, had been left for the domestic laws to govern but that this decision had been inevitable because of the "difficulties of unifying the law in this area". See the "Observations of the Government of Federal German Republic on 1956 Draft ULIS", in Diplomatic Conference on the Unification of Law Governing the International Sale of Goods (Documents), The Hague, Netherlands, 2-25 April, 1964, p. 82.
4. The CISG does not attempt to provide rules for every legal issue that can arise in an international sales transaction. Such an effort, indeed, would have required a massive body of civil and criminal law dealing with questions relating to everything from larceny and fraud to customs and libel issues. The Convention's ambitions, understandably, are far more modest.
5. More so, from the freedom of contract provision of Art 6 of the CISG, it follows that even parties would have been in a better position via contract clauses to determine what facet of validity questions they may want to be answered by the CISG in respect of their international contract of sale.
6. (Abstract prepared by Peter Winsh? National Correspondent), cites also as US District Court for the Southern District of New York - 201 F. Supp. 2d 236 (S.D.N.Y. 2002). The court also found that there was consideration to support the alleged contract and that the contract was therefore not invalid under applicable domestic law pursuant to art. 4(a) CISG.
7. In the instances where there are more than one autonomous interpretation of the same concepts under the CISG, uniformity would in these cases merely amount to a random occurrence.
8. To create international legal uniformity, it is insufficient to merely create and enact uniform laws or uniform law conventions.
9. A good example of this problem can be seen in the USA. Apart from the US generally noted suspicious attitude towards foreign laws, various US court decisions expressly refer to the "lack of case law" concerning the CISG at a time when there were already many foreign CISG cases, Helen Kaminski PTY LTD. v. Mktg. Australian Prod., Inc., Nos M-47 (DLC), 96846514, 97-8072A, at *3 (S.D.N.Y. July 23, 1997).
10. It has often been stated that it is only possible to reduce the danger of diverging interpretations; it is not possible to eliminate them altogether.
11. He writes that "the reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to its international character". This statement suggests that there must first of all exist a vibrant attempt to uniformly apply and interpret the CISG before having recourse to domestic law.
12. Comment on art 3.1.1 UNIDROIT Principles 2016 provides that this article makes it clear that not all the grounds of invalidity of a contract to be found in the various national legal systems fall within the scope of the Principles. This is in particular the case of lack of capacity. The reason for its exclusion lies in both the inherent complexity of questions of status and the extremely diverse manner in which these questions are treated in domestic law. In consequence, matters such as ultra vires will continue to be governed by the applicable law.

13. The rules as to passing of risk can be categorized under some national laws as a validity issue; however, arts 66-70 of the CISG provide for passing of risk and thereby making it justiciable under the CISG. See Switzerland art 20(1) OR.

14. Ndubuisi A. Nwafor "Comparative and Critical Analysis of the Doctrine of Exemption/ Frustration/Force Majeure under the United Nations Convention on the Contract for International Sale of Goods, English Law" and "UNIDROIT Principle", https://dspace.stir.ac.uk/bitstream/1893/21805/1/DR%20NWAFOR%20N.%20A.pdf (accessed on 7-08-2016). The doctrine of hardship is not provided for under the CISG, but this does not preclude art 79 of the CISG from applying to hardship situation as provided under CISG Advisory Council Opinion No 7, although Barry Nicholas holds the opinion that "exemption of liability on account of unexpected and excessive economic hardship was 'out of place' in a sales law". See Progress Report of the Working Group on the International Sale of Goods on the Work of its Fifth Session (A/CN.9/87), Annex III, reprinted in UNCITRAL Yearbook V: 1974 (1975) at 66.

15. It has been held that although the individual domestic law may recognize a number of mistakes as relevant, but recession is only possible where the CISG has not itself established rules for the very mistake giving rise to recession under the domestic law.

16. OGH, 7 September 2000, CISG – Online 642.

17. Michael Bridge also writes that disturbance of the buyers' quiet possession by the seller seems not to be covered by the CISG and the implication is that it can be held to have been excluded under the CISG. Meanwhile under certain domestic sales law like section 12(2) of the UK Sale of Goods Act of 1979, and the French (Civ Art 1626) law of sale, disturbance of buyers' quiet possession has nothing to do with validity, rather it is seen as part of obligations arising from contract of sale of goods between a seller and a buyer.

18. Art 41 of the CISG provides that: The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by art 42.

19. Article 42 of the CISG provides that: The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property: under the law of the state where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods were to be resold or otherwise used in that State; or in any other case, under the law of the State where the buyer has his place of business. The obligation of the seller under the preceding paragraph does not extend to cases where at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim, or the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

20. Art 71 provides that: A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of a serious deficiency in his ability to perform or in his creditworthiness; or his conduct in preparing to perform or in performing the contract. If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

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