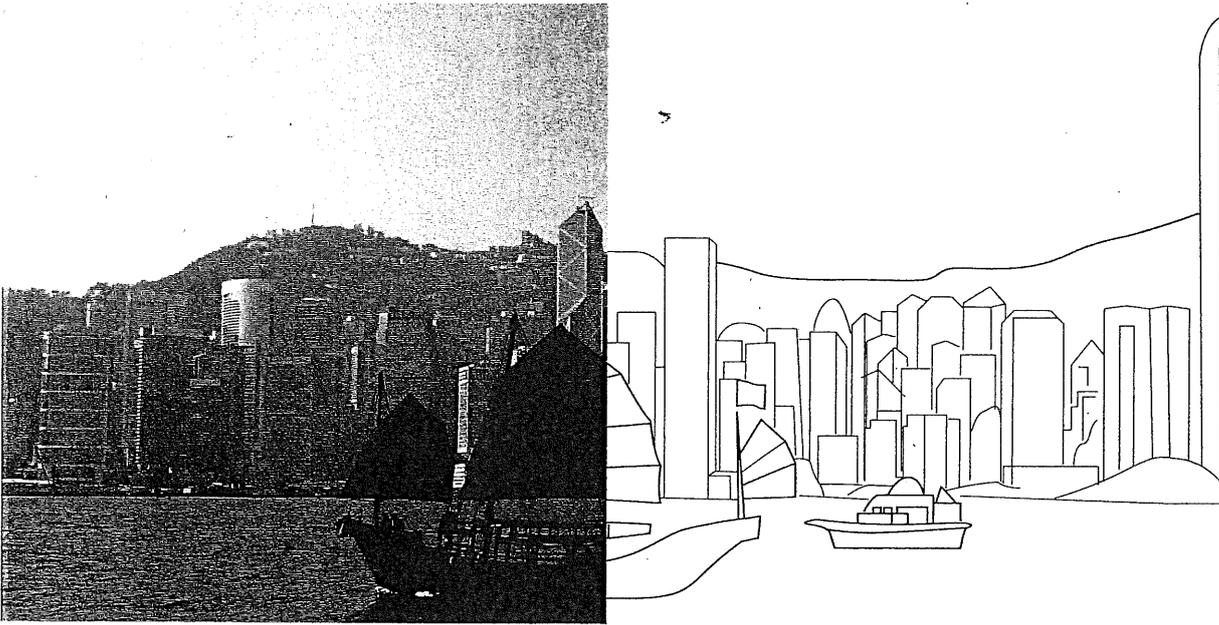


edited by
ingeborg schwenzer
and lisa spagnolo

towards uniformity
the 2nd annual maa
schlechtriem cisg conference



international commerce
and arbitration
volume 8

series editor
ingeborg schwenzer

eleven
international publishing

GLOBAL SALES LAW – THEORY AND PRACTICE

Ingeborg Schwenzer* and Christopher Kee**

1 EMPIRICAL RESEARCH

1.1 Previous Surveys

Despite the importance of global trade, until very recently little was known about how the law interacts with actual practice. There were many anecdotal stories being told. One of these stories, in particular, was that parties disliked the CISG and therefore were regularly contracting out of its application. In recent years there has been an increase in empirical research in this field, however these surveys have been limited as to the geographic area approached, as well as to the number of survey respondents. As far as geographic areas are concerned, these surveys focussed on Germanic legal systems (Germany,¹ Switzerland² and Austria³), the USA⁴, and a rather small survey with under 50 respondents conducted in China.⁵ There have been other surveys which did not directly address the CISG but

* Dr. iur. (Freiburg, Germany), LL.M. (Berkeley, USA), Professor for Private Law, University of Basel, Switzerland.

** Dr. iur. (Basel), LL.B., BA (Hons) (Deakin), Senior Researcher, Faculty of Law of the University of Basel, Adjunct Professor, City University of Hong Kong, and Honorary Fellow, Deakin Law School.

1 J. Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis', 69 *RebelsZ* 457 (2005); M. Köhler & Y. Guo, 'The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems – An International Comparison of three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China', 20 *Pace Int'l L.J.* 45 (2008).

2 J. Meyer, 'UN-Kaufrecht in der schweizerischen Anwaltspraxis', 104 *Schweizerische Juristen-Zeitung* 421 (2008); C. Widmer & P. Hachem, 'Switzerland', in: F. Ferrari (Ed.), *The CISG and its Impact on National Legal Systems*, 281 (2008).

3 J. Meyer, 'UN-Kaufrecht in der österreichischen Anwaltspraxis', 20 *Österreichische Juristen-Zeitung* 792 (2008).

4 M. Gordon, 'Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges', 46 (Suppl.) *Am. J. Comp. L.* 361 (1998); Köhler & Guo, *supra* note 1; G. Philippopoulos, 'Awareness of the CISG Among American Attorneys', 40 *U.C.C. L.J.* 357 (2008); P. Fitzgerald, 'The International Contracting Practices Survey Project', 27 *J.L. & Com.* 1 (2008).

5 Köhler & Guo, *supra* note 518.

considered cross border transactions in Europe⁶ and the worldwide use of transnational law.⁷

Against this research background our research group in Basel decided to conduct a global survey on the use and understandings of law in international sales transactions.

1.2 Global Sales Law Surveys

The Global Sales Law survey was conducted online in Fall 2009 and was supported by the United Nations Commission on International Trade Law (UNCITRAL). The survey was conducted in the six UN languages. Approximately 5000 individuals received personally addressed letters in United Nations envelopes. There were four target groups – practising lawyers, arbitrators, businesses engaging in trade and law schools. In addition various email lists were used to draw attention to the survey website. It is estimated that about 9,000 people across the globe would have received an invitation to participate. Approximately four weeks after the letters, follow up emails were sent. The survey was open for a period of six weeks ending in early November 2009.

The survey website run by our research team received more than 1,500 hits and 640 useable responses.⁸ Responses were submitted from 85 countries,⁹ of which 58% are CISG member states. Many of these countries have not been included in reported surveys before, especially countries from South America, the Middle East, Africa and Asia.

In addition to the online survey we continue to collect and review general terms and conditions of, thus far, more than 80 businesses¹⁰ which were published and freely available in English, French or German on the internet.

6 S. Vogenauer & S. Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate', in: S. Vogenauer & S. Weatherill (Eds.), *The Harmonisation of European Contract Law*, 105 (2006).

7 K.P. Berger & H. Dubberstein, 'Anwendung Transnationalen Rechts in der internationalen Vertrags- und Schiedspraxis', 101 *Zeitschrift für Vergleichende Rechtswissenschaft* 12 et seq. (2002).

8 Initial analysis has identified useable responses per category to be: Arbitrators 98; Lawyers 347; Businesses 60; Law Schools 135.

9 Including lawyers from 66 different countries. The IP addresses of respondents were examined to determine this figure. There is a certain margin of error in this number as some respondents may have been using a proxy server which would have hidden their true location. The likelihood of this affecting the figures was considered minimal.

10 All companies searched are on the Forbes 500 list.

2 RESULTS IN DETAIL

2.1 *Sales Cases in General*

The increase in international trade is clearly reflected by a comparable increase in sales law litigation and arbitration. Practitioners in law firms were asked to report on the total number of sales law cases between 2004 and 2008. The results indicate a steady increase of approximately 5% per year which almost exactly equals the development of world trade during this period.¹¹ On average arbitrators indicated that 16% of their case load involved goods transactions over the last 10 years. If this percentage is applied to the total number of arbitrations reported by arbitral institutions during that period (not including ad hoc arbitrations) it can be hypothesised that nearly 5,000 arbitrations concerned the sale of goods over that period.¹²

2.2 *CISG Cases*

Having regard to the total number of sale of goods cases, the increase in the number dealing with the CISG is all the more impressive. Whereas throughout the 1990s CISG cases were scarce, at least in the majority of CISG member states, today it can confidentially be said that more than 2,000 cases are listed in the leading case databases on the CISG.¹³ We estimate this is four times more than ten years ago. The significant majority of these cases have been decided by state courts. This is notable because it has been suggested – and is confirmed by our survey – that more than 60% of international commercial disputes are not litigated before courts but rather go to international commercial arbitration. Arbitral awards are typically not published as confidentiality is one of the main features of arbitration. Thus the real number of CISG cases must be a multiple of those published in the databases.

11 This figure can be found at <http://www.wto.org/english/res_e/statis_e/its2009_e/its09_world_trade_dev_e.pdf>, at 7.

12 This figure is based on the reported statistics published by the Hong Kong International Arbitration Centre (HKIAC), available at <http://www.hkiac.org/show_content.php?article_id=9>.

13 The precise number of cases is difficult to calculate and is in any event increased regularly. The Pace Website reports 2,500 cases, and the CISG-online website reports 2,094 – although some cases are reported on both sites, there are many that are only reported on one database. Consequently, the real figure may be closer to 3,000.

More than 100 decisions have been delivered by US courts alone,¹⁴ however despite this in 2008 two decisions of the Southern District of New York claimed that there was 'virtually no American case law on the CISG'.¹⁵ Presently there are more than 360 CIETAC arbitral awards that have been translated and reported on the Pace website. CIETAC is the China International Economic and Trade Arbitration Commission. As CIETAC only publishes a selection of its arbitral awards and even then only three years after they have been rendered, it can be expected that virtually thousands of arbitral awards concerning the CISG must exist in China.

The importance of the CISG in international litigation and arbitration is clearly mirrored in the results of our survey. Arbitrators in particular reported a significant increase in the numbers of CISG cases they were asked to determine. Over the last ten years respondent arbitrators indicated they had heard 1,306 cases in total involving the sale of goods; in 2008 alone 217 of these were CISG cases. Thus it can be extrapolated that a very high percentage of all sale of goods cases involve the CISG.

3 FAMILIARITY WITH THE CISG

Time and again it has been reported that unfortunately lawyers are still not very familiar with the CISG. In the surveys previous to ours, results regarding familiarity have varied greatly – from an almost 100% familiarity reported from Germany and Switzerland,¹⁶ good familiarity reported from China and Denmark, to much less familiarity in mainly Common Law countries.¹⁷

14 As of 9 June 2010, there are 115 reported U.S. cases on the CISG-online website, available at <<http://www.cisg-online.ch>>, run by Prof. Ingeborg Schwenger at the University of Basel, Switzerland, containing selected articles and numerous court decisions and arbitral awards, and 136 on the Pace website, available at <<http://www.cisg.law.pace.edu>>, run at Pace University, New York, U.S.A., containing numerous materials, scholarly writings, court decisions and arbitral awards. Other case law can be found on the Case Law on UNCITRAL Texts (CLOUT) database, available at <http://www.uncitral.org/uncitral/en/case_law.html>, which contains court decisions and arbitral awards to increase international awareness of UNCITRAL texts and to facilitate their uniform interpretation and application. See also UNILEX, available at <<http://www.unilex.info>>, run by Prof. Michael Joachim Bonell, containing materials, court decisions and arbitral awards on the CISG as well as the UNIDROIT Principles of International Commercial Contracts 2004.

15 *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F Supp 2d 781 (S. D. N. Y. 2008), 20 August 2008, CISG-online 1777, available at <<http://cisgw3.law.pace.edu/cases/080820u1.html>>; *Macromex Srl. v. Globex International Inc.*, 2008 WL 1752530 (S. D. N. Y. 2008), 16 April 2008, CISG-online 1653, available at <<http://cisgw3.law.pace.edu/cases/080416u1.html>>.

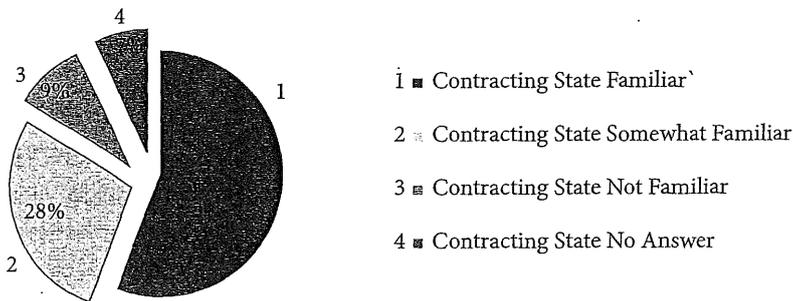
16 L. Spagnolo, 'A Glimpse Through the Kaleidoscope: Choices of Law and the CISG', 13(1) *Vindobona Journal of International Commercial Law and Arbitration* 135, at 138, note 14 (2009).

17 Spagnolo, *supra* note 16, at 138. For surveys on the U.S., see *supra* note 4 generally.

Our survey asked both law firm practitioners and businesses to state their relative familiarity with the CISG. As a percentage of the total number of respondents in each sub-survey, 78% of lawyers and 45% of businesses reported being familiar or somewhat familiar. However, to draw a meaningful comparison with other surveys it is necessary to examine the responses coming from CISG member states alone. The respective figures are 84% for lawyers and 63% for businesses. Although these figures are encouraging and higher than previous surveys,¹⁸ the lack of familiarity on the part of businesses is alarming. This is particularly the case as only 13% of businesses reported using external lawyers.

Lawyers were also asked whether they discussed the CISG with their clients. Examining only the replies from those situated in CISG member states it can be seen that 45% always or sometimes raised the issue. Interestingly 5% indicated they never discussed the CISG. However, it is impossible to draw any significant conclusions from these statistics. A high percentage of respondents failed to provide any response (40% of those from CISG member states) and even fewer answered a subsequent question inquiring as to the circumstances in which the lawyers would raise the CISG.

Figure 1 Lawyer Familiarity in Contracting States as %



EXCLUSION OF THE CISG

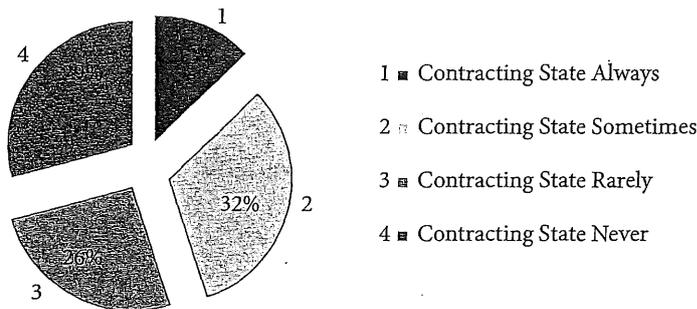
The question of the extent to which parties are opting out, or excluding the operation of the CISG has become a perennial one. Hearsay suggests the number of opt-outs is considerable. The empirical evidence from other surveys is less emphatic, suggesting that between

¹⁸ Fitzgerald, *supra* note 4, at 41, citing 65% U.S. lawyers when all categories of familiarity are combined.

37% and 71% of lawyers promote opting out.¹⁹ The 71% comes from a survey of U.S. lawyers, although the sample was very small.²⁰

Our survey figures are considerably less dramatic. Of the lawyers from CISG member states who answered this question, only 13% reported always excluding the CISG, and a further 32% reported they did so sometimes. A considerable 55% answered that they never or rarely excluded the CISG. The respective figures for US lawyers who provided a response were: 12% always excluding, 42% sometimes excluding, and 46% never or rarely excluding. The responses from non-contracting states are similar to the US. Amongst that group 19% always excluded the CISG, 36% did so sometimes, while 45% rarely or never excluded it.

Figure 2 Lawyers Contracting Out in Contracting States as %



Unlike in other surveys, unfamiliarity with the CISG was seldom cited as a reason for excluding it by the lawyers who responded to the question, although many respondents who excluded the CISG indicated a certain preference for their own domestic law. Some respondents from South America expressed their concern about a lack of case law – the two jurisdictions in question were Brazil, a non-member state, and Chile, a CISG signatory. It is evident though that many of the respondents do carefully consider the most appropriate law to be applied to their client’s situation and decide accordingly. This underscores the good degree of familiarity with the CISG already noted above.

¹⁹ Spagnolo, *supra* note 16, at 136.

²⁰ M. Köhler, *Survey regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application*, (2006), available at <<http://www.cisg.law.pace.edu/cisg/biblio/koehler.html>>.

5 CHOICE OF LAW CLAUSES

Businesses were asked whether they included a choice of law clause in their standard terms and conditions. It is significant that 47% indeed did so; this coincides with the findings of other surveys that the possibility of choosing the applicable law is highly valued.²¹ Such a choice cannot on its own be interpreted as a decision to opt out of the CISG, if for no other reason than that a choice of law clause is quite a sensible way to deal with those areas not covered by the CISG.

Businesses and arbitrators were also asked to identify which law parties were choosing in their contracts, and lawyers were asked to identify the law which they recommend. As might be expected, businesses and lawyers displayed a preference for their own national law.²² Arbitrators reported a variety of generic laws such as the law of the seller, however consistently recurring references were made to English and Swiss law.²³ Especially among South American participants a reference to the law of the place of performance of the contracts was popular. This is not surprising as the conflict of law rules in this region usually designate this law as the proper law of the sales contract.²⁴ A further interesting response from a small number of arbitrators was the suggestion that the applicable law was that of the seat of arbitration, reminiscent of an old approach according to which the choice of the seat of arbitration also constitutes an implicit choice of law of that place.²⁵

In this context it is also interesting that arbitrators indicated that between 20%²⁶ and 36%²⁷ of cases involving the sale of goods applied non-national laws such as PICC and *lex mercatoria*.

21 Vogenauer & Weatherill, *supra* note 6, at 120, 'Importance of Ability to Choose the Governing law'.

22 This finding concurs with Vogenauer & Weatherill, *supra* note 6, at 121.

23 This finding concurs with S. Vogenauer, *Oxford Civil Justice Survey - Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law A Business Survey Final Results*, available at <<http://denning.law.ox.ac.uk/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf>>, questions 17.1 & 17.2.

24 E. Muñoz Lopez, *Modern Sales Law in Ibero-America*, at 36 (2011).

25 For example, this was the position in the U.K. before it was rejected in *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA* [1971] AC 572, at 596.

26 Including non responses. See also Fitzgerald, *supra* note 4, at 43, reporting that 50% of all respondents were not familiar with PICC.

27 Valid percentage response.

6 SPECIFIC CONTRACT CLAUSES

Our survey was also directed towards specific clauses contained in standard terms and conditions. Businesses were asked to report whether they included certain clauses. The results of these questions; as might be expected, reveal that limitation of liability clauses are very frequently included, with 55% of respondents indicating their use. Marginally in excess of one third of the respondents reported using both liquidated damages or penalty clauses, and INCOTERMS.²⁸ It is remarkable that at least 12% referred in their standard terms and conditions to the UN Global Compact or similar ethical guidelines.²⁹ All these results are supported by our study of general terms and conditions published on company websites.

7 DISPUTE RESOLUTION CLAUSES

Our survey results clearly indicate that disputes in international trade are today primarily a matter for arbitral tribunals. 60% of business respondents reported including a dispute resolution clause in their general terms and conditions. While this on its own does not speak to the predominance of arbitration, it supports the other statistics which do. Arbitration was strongly preferred by lawyers, 60% of whom recommended it to their clients. To this figure can be added, probably to a significant degree, the 12% who recommend a multi-tiered dispute resolution clause. Only 21% recommended litigation in state courts, and 7% mediation alone. These results are supported by other surveys that also report that 60% to 65% prefer international arbitration over state court litigation.³⁰ Confidentiality and speed are still noted as the primary reasons.³¹

The preference for international arbitration is clearly reflected in the development of the reported case load across many arbitral institutions. The case load of some institutions, especially those in the Asian region, has doubled or even tripled in the last ten years.³²

28 38% and 37% respectively.

29 For a discussion of the consequences, see I. Schwenzler & B. Leisinger, 'Ethical Values and International Sales Contracts', in: B. Leisinger & M. Probst (Eds.), *Human Security and Business*, 124 (2007).

30 Vogenauer, *supra* note 23, question 48, reporting that 63% of respondents preferred arbitration and 37% preferred litigation before a court when conducting a cross border transaction.

31 See, e.g., Vogenauer, *supra* note 23, (questions 49.1 & 49.2).

32 HKIAC website, *supra* note 12; see also S. Greenberg, C. Kee, *et al.*, *International Commercial Arbitration - An Asia-Pacific Perspective*, para 1.127 *et seq.* (2011).

8 CONCLUSION

Laws tend not to be the engine room of an economy, rather they follow some steps behind. International trade, or perhaps more accurately, global trade, is no different. The globalisation of trade transforms law. Industrialisation at the beginning of the 19th century precipitated the codification and rationalisation of law worldwide at the level of nation states. Global trade in the 21st century is moving us towards the a-nationalisation and delocalisation of law.

Whether a truly global sales law that satisfies all the needs of global trade will ultimately emerge, and indeed whether it would be entirely desirable, is something we can debate. However, we can already recognise and acknowledge the important contribution the CISG has made and continues to make to international trade. One must also acknowledge the role of instruments like PICC and INCOTERMS, and last but not least, international arbitration. All of these enhance predictability, which in turn saves costs, and increases trade. More trade will mean more of the positive effects upon law referred to above, and the emergence of a positive spiral.