When could a South African court be expected to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG)?

M Wethmar-Lemmer
BCom LLB LLM MA
University of South Africa

OPSOMMING

Wanneer kan daar van 'n Suid-Afrikaanse hof verwag word om die Weense Koopverdrag toe te pas?

In terme van artikel 1(1) van die Weense Koopverdrag is die verdrag van toepassing op koopkontrakte vir roerende goedere tussen partye wie se plekke van besigheid in verskillende state is (a) indien die state lidstate tot die verdrag is of (b) indien die reëls van die internasionale privaatreg lei tot die toepassing van die reg van 'n lidstaat. Suid-Afrika is tans nie 'n lidstaat tot die Weense Koopverdrag nie en is dus tans nie in die posisie om die verdag in terme van artikel 1(1)(a) toe te pas nie. Die betekenis van artikel 1(1)(b) is egter nie volledig duidelik nie en mag moontlik op sodanige wyse geïnterpreteer word dat 'n Suid-Afrikaanse hof verplig is om die verdrag toe te pas op 'n internasionale koopkontrak vir roerende goedere indien die reëls van die Suid-Afrikaanse internasionale privaatreg die reg van 'n lidstaat as die toepaslike reg aandui. Die korrekte interpretasie van artikel 1(1)(b) word in hierdie artikel ondersoek. Verder word daar aandag geskenk aan die vraag of partye 'n direkte keuse ten gunste van die Weense Koopverdrag as die reg van toepassing op hul kontrak kan uitoefen. Ten slotte word daar gekyk na argumente ten gunste van die ratifikasie van die Weense Koopverdrag deur Suid-Afrika en ander Afrikastate.

1 Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] regulates one of the most important contracts in international trade, namely contracts for the sale of movable, tangible objects[2] between parties who have their places of business in different states. The CISG currently has 70 member states, including the United States of America, Canada, Australia, New

1 This Convention was adopted at a diplomatic conference of the UN held in Vienna during 1980 and came into force on 01-01-1988. The full text of the Convention may be accessed online at http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (accessed 28-03-2008). This Convention is often referred to as the Vienna Sales Convention.

2 Schlechtriem in Schlechtriem and Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2005) 28; Dalhuisen *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* (2007) 366 both give this description to "goods" under the Convention.

Open Rubric

East.[3] As Schlechtriem observed,[4] the CISG has now truly gained worldwide acceptance.

To date only nine African states have ratified the CISG[5] and South Africa is not a member state. However, most of Africa's and particularly South Africa's trading partners are member states. Therefore, within the context of the harmonisation of law and particularly of international sales law in Africa, attention must be given to the question of whether or not it would be advantageous for non-contracting African states to become member states to the CISG.[6] As long as South Africa and the many other African states remain non-contracting states to the CISG, the question of whether a forum situated in a non-contracting state could be expected to apply the CISG by virtue of article 1(1)(b), is relevant.[7]

According to article 1(1) of the CISG, the Convention applies to contracts for the sale of movable goods between parties whose places of business are in different states either (a) when the states are contracting states or (b) when the rules of private international law lead to the application of the law of a contracting state.[8] Since South Africa is currently a non-contracting state, a South African court would not be placed in a position to apply the CISG under article 1(1)(a).

However, it is possible to interpret article 1(1)(b) in such a manner that it would require a South African forum to apply the CISG to an international sales dispute even though South Africa is not a member state. In order to determine whether this is indeed the correct interpretation of article 1(1)(b), three questions need to be answered. Firstly, is article 1(1)(b) only applicable to contracting states, referring only to their rules of private international law? Secondly, does article 1(1)(b) refer to the private international law rules of the forum? Thirdly, when a forum's private international law refers to the law of a CISG contracting state, is this a reference to that state's domestic (sales) law or does it

3 The list of member states of the Convention may be accessed at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 15-01-2008).

4 Schlechtriem 1.

5 Currently the African member states to the CISG are Burundi, Egypt, Gabon, Guinea, Lesotho, Liberia, Mauritania, Uganda and Zambia.

6 See par 6 below. Ten years ago, the South African Department of Trade and Industry launched a project in this regard. See Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" 1999 SALJ 323; Eiselen "Adopting the Vienna Sales Convention: Reflections eight years down the line" 2007 SA Merc LJ 14.

7 The question with regard to the interpretation of article 1(1)(b) is of relevance for all non-contracting states. It warrants mentioning that the United Kingdom is also currently a non-contracting state to the CISG.

8 Contracting states to the CISG are allowed to make a reservation in terms of article 95 of the CISG that they will not be bound by article 1(1)(b) of the Convention. The United States of America made such a reservation. The effect of an article 95 reservation on the application of the CISG is a complex issue and will not be addressed in this article. References to "contracting state" in this article refer to CISG contracting states that have not made a reservation in terms of article 95.

include a reference to the CISG? Furthermore, the question needs to be answered whether parties may elect to apply the CISG to their contract. If the last question is answered in the affirmative, South African courts may be expected to apply the CISG in order to uphold the principle of party autonomy, an important private international law doctrine.

2 Does the CISG refer to the private international law of a contracting state only?

If article 1(1)(b) of the CISG is interpreted as referring to the private international law of a contracting state only, then a South African forum would not be called upon to apply the CISG until South Africa becomes a contracting state to this Convention. The meaning of article 1(1)(b) is not clear in this regard since it merely refers to "the rules of private international law".

According to the international law of treaties, treaties are binding upon states in accordance with the principle of *pacta sunt servanda*.[9] In other words, only contracting states to a convention are bound to uphold and give effect to the convention. In theory, this principle may justify the conclusion that the phrase "the rules of private international law" as employed in article 1(1)(b) of the CISG refers to private international law of forums situated in contracting states only, since non-contracting states to the CISG are by no means bound to give effect to the content of the said Convention.

However, numerous court decisions applied the CISG[10] pursuant to article 1(1)(b) by forums situated in non-contracting states to the CISG. Quite a few decisions were handed down by German courts applying the CISG by virtue of article 1(1)(b) before the CISG came into force in Germany.[11] All these decisions[12] concern disputes based on contracts for the international sale of movable goods concluded between German buyers and Italian sellers.[13] The German courts all followed the same approach: they referred to the rules of German private international law in order to determine the law applicable to the dispute at hand. The rules of German private international law pointed to the law of a CISG contracting state, namely Italian law, as the proper law of the contract and therefore the courts applied the CISG in terms of article 1(1)(b) even though the courts handing down the decision were situated in a non-contracting state at the

9 Dugard International Law: A South African Perspective (2005) 406. See article 26 of the Vienna Convention on the Law of Treaties (1969) which states that "every treaty in force is binding upon the parties and must be performed by them in good faith".

10 The full text and abstracts of all the decisions concerning the CISG referred to below may be accessed on the UNILEX website. The general address of this site is http://www.unilex.info/. These cases have case numbers, but it is not possible to search the UNILEX site by case number only. The following URL needs to be used: http://www.unilex.info/case.cfm?pid=1&do=case&id=6&step=Fulltext. The "6" in the stated URL refers to the case number. In order to avoid unnecessary repetition of the full URL, only the case numbers will be referred to below. The cases below may be accessed by substituting the "6" in the URL provided with the relevant case number.

11 The CISG came into force in Germany on 01-01-1991.

12 UNILEX case numbers 1, 5, 6, 7, 22 and 24 (accessed 15-01-2008).

13 The CISG entered into force in Italy on 01-01-1988.

time. Belgian courts have delivered a few decisions[14] in which the CISG was applied by virtue of article 1(1)(b) before the CISG had come into force in Belgium.[15] Furthermore, decisions were also delivered by the Dutch courts[16] applying the CISG under article 1(1)(b) before the CISG entered into force in the Netherlands.[17]

Schlechtriem supports the view that the CISG is applicable irrespective of whether the rules of private international law of a contracting or of a non-contracting state lead to the application of the law of a contracting state.[18]

3 CISG and the Private International Law of the Forum

The question has also been asked whether article 1(1)(b) refers to the private international law *of the forum*. An interpretation of this article to mean the rules of private international law of the forum, is probably the only correct interpretation thereof, though it is somewhat disquieting that the words "of the forum" were not included.

Many authoritative commentaries on the CISG accept that article 1(1)(b) refers to the private international law of the forum.[19] However, one commentator raises the question of whether a forum in a non-contracting state, which is faced with an international sales law dispute that is referred to the law of a contracting state by the applicable private international law rules, should apply the CISG or whether it should make a further inquiry into the private international law of the latter state.[20] The answer to this question would hinge upon the forum state's approach to *renvoi*.

An Austrian decision delivered by the *Bundesgericht für Handelssachen*[21] in Vienna provides an example of the position when *renvoi* is indeed taken into account. This case concerned a dispute regarding a contract for the international sale of goods concluded in 1988 between an Italian seller and an Austrian buyer. The court determined that the rules of Austrian private international law referred to the law of Italy. Italy was a CISG contracting state. However, the Austrian

14 UNILEX case numbers 264, 265, 267, 268 and 269 (accessed 24-10-2007).
15 The CISG entered into force in Belgium on 01-11-1997.
16 UNILEX case numbers 31, 32 and 34 (accessed 24-10-2007).
17 The CISG entered into force in the Netherlands on 01-01-1992.
18 Schlechtriem 17. Furthermore, Schlechtriem 34 states in this regard that "[i]f the conflict rules of the forum in a non-contracting state like the UK or Japan lead to the application of the (sales) law of a contracting state, it has to apply the contracting state's law as foreign law".
19 See, for example, Schlechtriem 26, 33; Dalhuisen 405. Fawcett, Harris and Bridge *International Sale of Goods in the Conflict of Laws* (2005) 919 contend that, even though the text of article 1(1)(b) does not state which country's rules of private international law are referred to, "practical sense and the absence of any intelligible alternative mean that only the forum's rules could be applied".
20 Reczei "Area of operation of the international sales conventions" 1981 *American Journal of Comparative Law* (*AJCL*) 513.
21 UNILEX case number 12 (accessed 15-01-2008).

court found that *renvoi* had to be taken into account. The court denied the application of the CISG since Italian private international law referred back to Austrian law and Austria was not a contracting state at the relevant time.

However, in jurisdictions where *renvoi* would not be applied in these circumstances, such as would be the case in a South African forum,[22] a further inquiry into the private international law rules of the proper law would not be made. Schlechtriem supports the no-*renvoi* approach for purposes of article 1(1)(b) of the CISG.[23]

The authority supporting the application of *renvoi* in these circumstances seems scant and in light of convincing authority supporting a no-*renvoi* approach it may be concluded that article 1(1)(b) indeed refers to the rules of private international law *of the forum*.

4 A reference to the CISG or to domestic law

In terms of public international law, when a state ratifies a convention, the state is under the obligation to amend its law to give effect to the provisions of the convention.[24] Therefore, it may be said that the convention is incorporated into the domestic law of such contracting state.[25]

Reported case law exists in support of the view that a reference to the law of a CISG contracting state includes a reference to the CISG. To date numerous arbitral awards,[26] and Argentinean,[27] Austrian,[28] Belgian,[29] Canadian,[30] Dutch,[31] French,[32] German,[33] Italian,[34] Spanish[35] and Swiss[36] court decisions have been

22 See Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 2003 81-84 for the approach to renvoi in South Africa. See also Neels "Die gedeeltelike uitsluiting van renvoi in resente wetgewing" 1992 TSAR 739 in this regard. It also warrants mentioning that the Rome Convention on the Law Applicable to Contractual Obligations (1980) specifically excludes renvoi (see article 15 of the Rome Convention).

23 Schlechtriem 35 argues that article 1(1)(b) functions as an internal allocation norm and excludes renvoi.

24 Aust Modern Treaty Law and Practice (2000) 144. See also Jacobs and Roberts (eds) The Effect of Treaties in Domestic Law (1987).

25 Fawcett, Harris and Bridge 916-917 state that "the Vienna Convention is in Contracting States a part of the domestic law of the Contracting State. In that state's courts, the Convention is not foreign law but rather local, specialized law that applies in the same way as is applied any separate laws for commercial and consumer contracts of sale. If the Convention is part of the forum state's domestic law in this way, and if that state subscribes to the principle of *jura novit curia*, then its courts will be bound to apply the Convention even if the parties themselves do not invoke it." See also UNILEX case number 387 (accessed 28-03-2008) in this regard.

26 UNILEX case numbers 37, 471, 1043 and 1130 (accessed 15-01-2008).

27 UNILEX case numbers 820 and 925 (accessed 15-01-2008).

28 UNILEX case number 202 (accessed 15-01-2008).

29 UNILEX case numbers 176, 261, 264, 265, 267, 268, 269, 749, 778 and 780 (accessed 24-10-2007).

30 UNILEX case number 1168 (accessed 15-01-2008).

31 UNILEX case numbers 31, 32, 34, 61, 94, 95, 97, 124, 333 and 391 (accessed 24-10-2007).

32 UNILEX case numbers 27, 106, 109, 276, 379, 493, 717, 735 and 984 (accessed 15-01-2008).

handed down that expressly state that the CISG is applied on the grounds that a reference by the forum's rules of private international law to the law of a contracting state includes a reference to the CISG. However, the forums listed are all situated in CISG contracting states. It remains to be seen whether forums in non-contracting states would apply the CISG as part of the legal system indicated by their rules of private international law.

5 Application of the CISG in terms of Article 6: Opting in to the Application of the CISG

It has long been recognised that party autonomy, or the ability of the parties to choose the law applicable to their transactions, plays a central role in international sales law. In general, South African forums will uphold an express choice of law effected by the parties to an international contract.[37]

Should parties to a contract for the international sale of goods be allowed to choose the CISG directly to govern their dealings, it would mean that even forums in non-contracting states who recognise the principle of party autonomy, such as South Africa, will be expected to apply the CISG.

Article 6 of the CISG gives effect to the principle of party autonomy. According to article 6 "[t]he parties may exclude the application of the Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".

Despite the fact that theCISG contains a provision allowing parties to exclude the applicability of the Convention,[38] it contains no express provision on the possibility of parties opting into the application of the Convention where it would not otherwise apply.

It is submitted that whether or not the parties are allowed to choose the CISG directly as the governing law of their contract is to be determined in accordance with the rules of private international law of the forum.[39] In other words, is the direct choice of an international convention as the governing law of a contract

33 UNILEX case numbers 1, 3, 4, 5, 6, 7, 8, 13, 22, 24, 25, 26, 63, 68, 128, 145, 150, 169, 219, 255, 868 and 917 (accessed 15-01-2008).

34 UNILEX case number 275 (accessed 15-01-2008).

35 UNILEX case number 432 (accessed 15-01-2008).

36 UNILEX case numbers 41, 42, 105, 383 and 409 (accessed 15-01-2008).

37 Forsyth 295-302 and 304; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA (D) 509 525 F-G: "That our law recognises party autonomy in respect of the proper law of the contract seems clear. Thus where the parties have expressly or impliedly agreed upon a governing law our Courts would give effect to the intention of the parties." See, in general, Nygh *Autonomy in International Contracts* (1999).

38 As provided for in article 6 mentioned above.

39 Fawcett, Harris and Bridge 687. Schwenzer and Fountoulakis *International Sales Law* (2007) 33 state in this regard that "[w]hether the parties may deliberately choose the CISG as the law applicable to their contract is a question governed by domestic law. It depends on how much leeway the domestic law gives to party autonomy regarding the choice of substantive law. In other words, the question of whether the parties may expressly choose the CISG as the applicable law to their sales contract, regardless of whether they have their places of business in a contracting state or not, will depend on their respective domestic law."

permitted in terms of the conflict rules of the forum?[40] According to Fawcett, Harris and Bridge, article 1(1) of the Rome Convention on the Law Applicable to Contractual Obligations (1980) refers to the choice between the laws of different countries only, and the CISG is not a legal system *per se*, but may only form part of a system of law to the extent that it is incorporated into the domestic legal system applicable in terms of the choice of law principles. They argue that contracting parties may therefore not opt into the CISG where the Rome Convention contains the applicable private international law of the forum (*ie* in the EU Members States).[41] This position will change with the enactment of the proposed Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I Regulation).[42] Article 3(2) of the proposed Rome I Regulation states that "[t]he parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community".[43]

Schlechtriem points out that the question whether the CISG may be chosen directly, and not as part of the law of a contracting state, is still a controversial one.[44] They submit that this issue should be determined with reference to the applicable conflict rules and "[i]f those rules allow not only the choice of law enacted as state law, but of 'law' in general, the parties may be allowed to choose the CISG directly".[45]

Some authors suggest that parties should be allowed to choose as governing law international instruments such as the CISG, the UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), and the Uniform Customs and Practice for Documentary Credits (UCP).[46] The proponents of this view advance the following reasons for this submission: Firstly, it is common practice to incorporate such international legal instruments into international contracts without reference to a national legal system, as evidenced for example by the fact that almost all letters of credit contain a reference to the UCP and not to a national legal system; secondly, the alternative of first having to establish the applicable domestic legal

40 Another question related to party autonomy and the CISG is whether a choice of the law of a CISG contracting state includes a choice of the CISG or whether such a choice of law clause excludes the application of the CISG. This question will be addressed in a later article.

41 Fawcett, Harris and Bridge 687.

42 The text of the proposed Rome (I) Regulation may be accessed at http://eurlex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf (accessed 28-03-2008).

43 According to the Explanatory Memorandum to the proposed Rome (I) Regulation, under article 3(2) the choice of, for example, the UNIDOIT principles or the Principles of European Contract Law would be permissible. The Explanatory Memorandum is also accessible at the internet address sited in n 43 above.

44 Schlechtriem 88; Schlechtriem "Requirements of Application and Sphere of Applicability of the CISG" 2005 *Victoria University of Wellington Law Review* 781.

45 Schlechtriem 88.

46 Neels and Fredericks *Revision of the Rome Convention on the Law Applicable to Contractual Obligations* (1980): Perspectives from international commercial and financial law" 2006 TSAR 121 122-125. (This article was originally published in 2004 *Euredia Revue européenenne de droit bancaire et financier / European Banking and Financial Law Journal* 173-190.)

system and then to determine whether the said system allows for incorporation of the international legal instrument is too complicated and would complicate litigation unnecessarily; thirdly, the principles with regard to incorporation by reference are ambiguous in many legal systems; and lastly, international legal instruments are mostly more advanced and readily determinable than domestic legal rules.[47] Furthermore, it has been submitted that the omission of an express reference to the possibility of opting in should not be interpreted as preventing parties from being entitled to do so.[48]

Case law in which the CISG was applied pursuant to an agreement on its application by the parties does exist. Most of these decisions state that the CISG is applicable in terms of article 1(1)(a) or 1(1)(b) *and* based on the fact that the parties agreed to its application.[49] However, one Belgian decision finds the CISG applicable because the parties expressly agreed to the CISG as the applicable law and makes no reference to article 1(1)(a) or 1(1)(b).[50] All these decisions were delivered by forums in CISG contracting states however, it still remains to be seen whether a forum in a non-contracting state such as South Africa would apply the CISG because of an agreement on its applicability by the parties.

6 Adoption of the CISG in South Africa and on the African Continent

Before reaching a conclusion on the possible application of the CISG by South African courts whilst South Africa remains a non-member state, the question of whether South Africa and the other African non-member states should consider adopting the Convention needs to be addressed.

As stated above, due to the fact that most of South Africa's and other African states' trading partners are CISG contracting states, African companies with their places of business in non-contracting states trading abroad have to contend with the provisions of the CISG on a regular basis.

A commending characteristic of the CISG is the fact that it is a neutral convention – it favours neither seller nor buyer[51] and succeeds in bridging the divide between common-law and civil-law systems.[52] These features of the CISG provide two very compelling arguments in favour of adoption of the Convention by South Africa and other African states.

Firstly, it is a well-known fact that the economies on the African continent are developing economies. The result of this fact is that an African company is frequently the economically weaker party in an international sales contract and

---

47 Neels and Fredericks 123.
48 Ferrari "Specific topics of the CISG in the light of judicial application and scholarly writing" 1995 *Journal of Law and Commerce* 1 96.
49 UNILEX case numbers 43, 180, 211, 217, 509, 511, 741, 836, 875, 987, 1014 and 1174 (accessed 06-03-2008).
50 UNILEX case number 263 (accessed 06-03-2008).
51 Fiselen 340.
52 Fiselen 340.

often therefore in a weaker bargaining position. In this regard it has been stated that:

> "It is therefore no surprise that international commercial agreements involving trade with African countries often contain choice of law and jurisdiction clauses selecting the law and tribunals not of the African country, but of the other partner, particularly that of a European or an American jurisdiction."[53]

The African company is at a further disadvantage since it has to contend with a foreign legal system, the content of which is often unknown. Adoption of the CISG by African states increase chances of its applicability to international contracts between African merchants and merchants from other continents and, since it favours neither party,[54] placing both parties on an equal footing.

Secondly, one of the greatest impediments to harmonisation of law in Africa is the fact that African states have vastly diverse legal systems. As a result of colonisation, some African states belong to the common-law legal tradition, others form part of the civil-law tradition and others have mixed legal systems.[55] However, the CISG has proved to be acceptable to states from all legal traditions. Adoption of the CISG by most or all African states would lay the foundation for the harmonisation of international sales law in Africa. The harmonisation of trade law within Africa will remove, what has been termed, one of the largest non-tariff barriers[56] to international trade in Africa. Increased international trade on the African continent will strengthen African economies and increase Africa's standing in the global economy.

It has been argued that South Africa's adoption of the CISG would provide impetus for many other African, especially Southern African, states to accede to the Convention as well, since South Africa is one of the leading African economies.[57]

The strongest criticism levelled against the CISG is that the broadly formulated legal concepts give rise to legal uncertainty[58] and make international harmony of decision problematic. However, the large number of contracting states to the CISG attests to the fact that this is not an insurmountable problem and it is clear that the advantages of adopting the CISG by far outweigh its disadvantages.[59]

7 Conclusion

The correct interpretation of article 1(1)(b) remains a controversial and unsettled topic. Article 1(1)(b) and its true function and meaning is still being debated by scholars in both contracting and non-contracting states to the CISG. It remains

53 Bamodu "Transnational law, unification and harmonisation of international commercial law in Africa" 1994 *Journal of African Law* 125 129.

54 See also Bonell "Introduction" in Bianca and Bonell Commentary on the International Sales Law. *The 1980 Vienna Sales Convention* (1987) 15 in this regard.

55 Bamodu 127.

56 Ndulo "Harmonisation of trade laws in the African Economic Community" 1993 *International and Comparative Law Quarterly (ICLQ)* 101 102.

57 Eiselen 355.

58 Eiselen 362.

59 Eiselen 369.

to be seen how the South African courts will interpret this provision. At this stage of inquiry, it may be proposed that the Convention's preamble, its drafting history[60] and existing case law on the topic support a reading of the CISG that would make the Convention applicable *ex* article 1(1)(b) if the private international law rules of the forum, be it in a contracting state or a non-contracting state, refer to the law of a CISG contracting state. Furthermore, it is submitted that the private international law of the forum and in particular the role of party autonomy in the applicable conflicts law, would determine whether parties would be allowed to choose the CISG to govern their contract directly. Lastly, it is recommended that South Africa take the necessary steps for adoption of the CISG. Widespread adoption of the CISG by African states would provide a basis for the harmonisation of international sales law in Africa and promote international trade on the African continent.

60 Winship "Private International Law and the UN Sales Convention" 1988 *Cornell International Law Journal* 487 521.