Conference Report: CISG Basel Conference, 29 and 30 January 2015, University of Basel

The CISG entered into force around 35 years ago – reason enough to celebrate and discuss the state of this instrument. Under the auspices of the University of Basel, in cooperation with UNCITRAL and the Swiss Association for International Law, a large number of experts convened on 29 and 30 January 2015 in order to present current trends and problems.

Panel 1 dealt with the economic analysis of the CISG (Prof. Dr. B. Piltz, Dr. L. Spagnolo, G. Moser and Prof. P. Winship). The core question was whether and to what extent the CISG does in fact what it promises which is to reduce transaction costs. A lot of skepticism and reservations, in particular from the US-American speaker, about economic analysis were articulated but the overall impression was that it is more efficient to have the CISG than not to have it even though it is hardly possible to substantiate, let alone quantify, this impression. However, compared to alternatives, for example the selection of a national law by choice-of-law clauses including the numerous limitations to party autonomy, it appears plausible to believe that instruments like the CISG have beneficial effects. Any less favorable result would of course have been somewhat impolite on a birthday party for the CISG.

Panel 2 discussed extending the CISG beyond sales contracts in respect to distribution contracts, contracts on natural gas, on deduction and set-off and on the statute of limitations (Prof. Dr. P. Perales Viscasillas, Dr. F. Mohs, Prof. Dr. C. Fountoulakis, Dr. P. Hachem). It became clear that long-term contracts and service contracts are of growing importance and that the unification of contract law should continue working on these types of contracts. And indeed, UNIDROIT is currently working on principles for long-term contracts that may supplement the UPICC (http://www.unidroit.org/work-in-progress-studies/current-studies/long-term-contracts). On the basis of the current state of the CISG, each of the presentations demonstrated that the distinction between external and internal lacunae is far from trivial which sometimes may contribute to doubts about the economic

efficiency of unified law.

Panel 3, originally planned as the second part of the conference but postponed due to late arrivals (snow storms in New York), analysed the recent trend towards a decline of reservations to the CISG under Articles 92, 93, 95, 96 (Prof. Dr. U. Schroeter, Prof. Dr. J. Ramberg, Prof. Dr. S. Han). Reservations were described not so much as a flaw but rather as a tool for enabling uniformity, at least to the degree politically possible. It was assumed that the reservation in Article 94 for regional harmonization may play a growing role in the future, in particular in Asia.

Panel 4 again turned to the question of extending the CISG, now in respect to validity issues (Prof. Dr. S. Eiselen, Prof. L. Gama, Prof. J. Gotanda, Prof. E. Sondahl Levin), and discussed the complex relation of the CISG to the control of standard terms on fairness, to contractual limitations of liability, to the repayment of attorney's fees as damage and other issues. Contractual limitations for example could be viewed as covered by the CISG in respect to their incorporation, formal validity and interpretation whereas their validity as such, for example in light of protective or otherwise mandatory law, would have to be seen outside the scope, but it was suggested that the general standards of the CISG such as party autonomy, reasonableness or good faith should control and, if necessary, limit the impact of the applicable national law – an approach that slightly mirrors the control by the European Court of Justice of the exercise of public policy clauses by Member State courts in European instruments of private international law.

Panel 5, under the heading of "CISG, State Action and Regionalisation" discussed whether and to what extent the CISG, in particular in comparison to the CESL, would be suitable for sales contracts with consumers (Prof. Dr. Y. Atamer), how to fill gaps in Article 78 CISG relating to default interest for late payments (Prof. Dr. J. Ramberg), how to apply the CISG to government purchases, in particular in relation to mandatory requirements of public procurement law (Dr. C. Pereira) and the relation of the CISG to OHADA (Dr. J. A. Penda Matipe). It became clear that the CISG, by adequate interpretation and standard terms control, could address many of the core issues of consumer protection.

Panel 6 continued the discussion on the regionalization of the CISG by focusing on the harmonization in the EU and its impact on the CISG, for example by the Late Payment Directive (Prof. Dr. C. Witz), on the political difficulties in the past

and the currently limited, but may be not that much limited prospects of the CESL (M. Zaleski) – "replacement by modified proposal that will come to life this year", the harmonization in Asia, in particular with regard to the potential Principles (Prof. Dr. H. Sono) and Latin America (Prof. A. Garro).

Panel 7 dealt with the issue of the fairness of the CISG as contract law, partly with a focus on (compliance requirements for) supply and distribution chains. Prof. Dr. H. W. Micklitz posed the general question what kind of standards of fairness should apply to b2b sales relations, Prof. Dr. P. Butler addressed the relation between the "CISG and human rights – an Oxymoron?", Prof. Dr. P. Nalin discussed ethical standards in connection with international sales contracts, and Prof. Dr. A. Veneziano presented UNIDROIT's project on agricultural production contracts and explained the particularities – e.g. risk and value chain management but also imbalances of bargaining powers – and legal tools used by the parties up to now in this intriguing type of complex and relational contracts (http://www.unidroit.org/work-in-progress-studies/current-studies/contract-farming).

Last not least there was a round table discussion on the general issue of the future of unification of contract law (Prof. Dr. Ingeborg Schwenzer, Prof. Dr. Dr. h.c. M. Jametti Greiner, Dr. B. Czerwenka, Dr. L. Castellani, J. A. Estrella Faria) that revolved, amongst other themes, around the growing importance of relational contracts of all kinds (e.g. service contracts, long-term contracts etc.) – an excellent round-up for a truly excellent conference!