

Book Reviews

Bruno Zeller, *CISG and the Unification of International Trade Law*, Routledge-Cavendish, New York (2007)

Bruno Zeller's book *CISG and the Unification of International Trade Law* is held out to "push the boundaries" of unification of international sales laws at the expense of domestic laws." The author further wishes the book to be controversial and to provoke debate on this matter. Both goals are achieved and it can therefore be said already at the outset that this author does not agree with all views taken in this book.

In particular, Zeller addresses the unification of laws itself, Article 7 CISG, conflict of laws issues relating to the applicability of the CISG, the remedy of specific performance, gap filling and finally the transplantation of laws. In all cases examined Zeller strongly advocates to solve legal problems within the 'four corners of the CISG' with Article 7 CISG being the 'cornerstone' of his reasoning.

With respect to the unification of laws itself Zeller convincingly answers to the criticism of – especially – English jurists towards the CISG. He states *inter alia* that the Convention provided viable rules for all kinds of markets, including commodity trade and points out that English law today already has lost its predominant position.

Concerning the uniform interpretation of the CISG Zeller specifically addresses the problem of gap-filling under Article 7(2) CISG. He believes that, e.g., the term 'reasonable period of time' in Article 39(1) CISG is a gap which needed to be filled in accordance with Article 7(2) CISG and thus by the general principles of the Convention. Zeller identifies 'reasonableness' as such principle and also relies on Article 7(1) CISG for 'good faith' to determine the 'reasonable period of time'. This author does not agree with this approach but follows a more narrow understanding of gap-filling. The problem of the 'reasonable period of time' can be solved without resorting to gap-filling namely by respecting the concept of uniform interpretation and using comparative research to develop a solution acceptable for countries with traditionally short periods of notice and more buyer-friendly countries.

In the context of conflict of laws Zeller rightly argues that in the interest of uniformity the reservation under Article 95 CISG applied only to the state which declared the reservation but not to courts in other states in cases where their conflict of laws rules point to a state that has made the reservation under Article 95 CISG.

Another point raised concerns the determination of the law applicable to aspects of a dispute that are not covered by the CISG or to the supplementation of an incomplete contract. Zeller submits that Articles 31 and 57(1) CISG contained a general principle favouring the law of the seller. This general principle was to be understood as a conflict of laws rule preempting domestic conflict of laws rules. The default rule therefore would be to apply the law of the seller via Articles 31

and 57(1) CISG. Going one step further, Zeller argues that these provisions could also be used to determine the relevant forum of dispute resolution. He puts forward that because most conventions on jurisdiction had incorporated the general rule that the relevant forum is at the place of the seller and that these rules and conventions were superseded by the CISG.

In this author's view both approaches are doubtful. First, the CISG does not contain conflict of laws rules and as favourable as a – worldwide – uniform set of conflict of laws rules may be, the CISG does not aim to be such body of rules. Second, the question which forum is relevant for disputes governed by the Convention is one that falls outside the sphere of the Convention. Article 31 and in particular Article 57(1) CISG may become relevant where the applicable rules of civil procedure point to the CISG to determine the place of performance, yet, both provisions do not take the first step in determining the relevant forum. At the Vienna conference the delegation of the Federal Republic of Germany suggested to include a specific provision in the CISG stating that the Convention was in no way to be understood as determining the relevant forum. The majority, however, considered this to be so obvious that an express statement was unnecessary and rejected the German proposition.

With respect to the remedy of specific performance Zeller puts forward that specific performance is generally available subject to the principle of good faith which he derives from Article 7(1) CISG. In his opinion Article 28 CISG is declaratory in nature giving courts the option to invoke domestic rules. He further argues that specific performance cannot be claimed where the price has dramatically changed in the market place, as this constituted a breach of good faith. Zeller's first argument seems to reveal an understanding of the term 'good faith' as to this principle not only being applicable to the interpretation of the Convention but also imposing obligations on the parties to the respective contract. This author, however, believes that the term "good faith" in Article 7(1) CISG only covers the first point.

Under the broad heading of gap-filling and the unification of law Zeller addresses the incompleteness of the CISG and certain cases in which the question what issues are excluded from the Convention poses difficulties. Particularly, Articles 4 and 5 CISG are examined. Starting with the latter provision Zeller rightly supports the view that a buyer that has been sued for personal injury by a third party should be able to claim reimbursement from the seller under the CISG. The reason for this was to be found in Article 7(2) CISG and the general principle that all pecuniary losses should be treated equally irrespective of their natures, therefore Article 5 was not to be applied. Whether there is in fact a difference in nature to other consequential damages is of course doubtful. The decisive point, however, is that the term 'any' in Article 5 CISG should not lead to the exclusion of cases as described by Zeller from the Convention.

In regard to the exclusion of validity questions under Article 4 lit. a) CISG Zeller suggests a two-tiered approach in determining if a question is really excluded from the CISG. First, it had to be asked if the CISG was concerned with the legal issue at hand, and if not, whether the issue is really one of validity. The interpretation of disclaimers for implied warranties is used as example. Zeller

submits that one cannot simply apply domestic law to determine the validity of such clauses but that regard is to be had to Articles 7(1) and 8 CISG as these provisions gave effect to the objective and subjective intent of the parties which then should lead to the result that where the parties have agreed on a disclaimer that disclaimer is to be considered valid.

Further points addressed in connection with Article 4 CISG are Set-Off, illegality and mistake. In regard to the first point, Zeller believes Set-Off to be possible under the CISG. With respect to illegality Zeller suggests to apply his proposed default rule derived from Articles 31 and 57(1) CISG in order to determine the law applicable to the question which then is usually the law of the seller. Concerning mistake, Zeller argues that mistakes in expression were only to be treated by domestic law. In the context of mistake in motive Zeller specifically refers to circumstances where the goods have perished at the time of the conclusion of the contract. He rightly argues against the approach followed by certain domestic laws, being that initial impossibility leads to the invalidity of the contract.

The last specific chapter in Zeller's book addresses the transplantation of uniform law into domestic legal systems. The main argument is that the introduction of a novel law does not create legal uncertainty. For purposes of illustration he refers to the reform of the German Civil Code (BGB) and the revision of the Uniform Commercial Code (UCC). Whereas the German legislator had specifically used the CISG as model for the modernisation of the law of obligations, the institutions concerned with the revision of Article 2 UCC were much more reluctant in conforming domestic sales law to the provisions of the CISG. He argues that today the CISG had developed rich case law around it. Therefore, the feared legal uncertainty was no longer – if it ever had been – a problem. The reluctance to apply the CISG was therefore in conclusion not a problem of its drafting but rather the reluctance of legal counsel to explain the advantages to their clients.

In conclusion, the book achieves its two goals set out at the beginning: Pushing the boundaries of unified law at the expense of domestic law and provoking debate on how uniformity can not only be preserved but rather fostered in international trade by putting forward new arguments and giving rise to reconsider arguments that may have been discarded in the past as not yet tenable. Therefore, in total, Zeller's work is to be considered a useful contribution to a necessary debate.

Pascal Hachem, ACI Arb
Referendar (Freiburg im Breisgau, Deutschland),
Research and Teaching Assistant, Senior Assistant Global Sales Law,
Chair of Private Law (Prof. Dr. Ingeborg Schwenzer, LL.M.),
Faculty of Law, University of Basel, Switzerland