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Cécile Legros

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The CISG Advisory Council : a model to improve uniform application of the CMR ?

The CMR convention celebrates its 60th Anniversary this year. On this occasion, a first colloquium was organized in Rouen – France last May. The subject of this colloquium was to identify the discrepancies in the application of the convention by the domestic courts of the State parties. A few remedies were also explored.

Indeed, the CMR convention belongs to the category of uniform law conventions whose aim is to set a certain number of rules, which should be applied identically in the State Parties in order to avoid differences in treatment of the operators involved in international situations. Uniform law is also supposed to promote the development of international trading.

But such goal may be compromised by discrepancies in the application of the convention by domestic courts, especially when a provision of the convention is subject to interpretation. The very weakness of international uniform law is the lack of international court in charge of dealing with such cases or at least in charge of uniform interpretation. And even if some conventions, as the CMR in its article 47, provides for an interpretation by the ICJ, we must note that this provision has never been used and seems inefficient.

In the introduction of the Rouen colloquium, I raised certain possible remedies which could rather easily be implemented to improve the uniform application of the CMR. I called these remedies 'informal processes' as my idea was to consider remedies that could be developed concretely, avoiding the recourse to Amending Protocols of the convention, as we all know that it is not likely to happen.

I would like here to explore some of these 'informal mechanisms'.

First, I will expose two original mechanisms existing for other international conventions, and second I will discuss whether one of these mechanisms could be transposed to the CMR.

I – Informal existing mechanisms to improve uniform application of international conventions

The issue of uniform application of international conventions is shared by all institutions governing these conventions.

Among several mechanisms identified, I have been working recently, along with one of my Ph.D. students, particularly on two remedies that have in common to allocate the power of interpretation of a convention to a panel of experts, more or less officially appointed.

Hague conference. One of these solutions arises from certain Hague conventions on the grounds of Article 8 paragraph 2 of the Status of the Hague conference. This article provides for 'special committees' whose purpose is the practical study of the functioning of the conventions. In practice, such committees have issued opinions that are sometimes used by courts in cases related to these conventions¹.

¹ For example : Convention of November 15, 1965 on the service abroad of judicial and extra-judicial documents in civil and commercial matters.

However I will not develop this mechanism as it does not seem to be transposable to the CMR convention. This convention has indeed no 'mother' international organization that could be used as a basis for the creation of such committees and therefore no legal ground exists.

CISG. The second mechanism we have been studying relates to the CISG. Every scholar interested in international trade law knows that exists a very wide system of databases coordinated by UNCITRAL providing domestic case law on the convention (CLOUT). But what is less known is the existence of the CISG Advisory council².

According to its website³, the 'Scope and Aims' of the CISG-AC is the following : "The CISG-AC is a private initiative which aims at promoting a uniform interpretation of the CISG".

It is a private initiative in the sense that "its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to CISG". As declared Professor Jan Ramberg, member of this council, in an interview in 2005, the Council is : " Offering Worldwide Authoritative Opinions For the Uniform Application and Interpretation of the CISG ".

The legal ground which guides the Council is article 7 of the CISG Convention : "as far its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity". The Council also takes into account the multinational and multi-lingual character of the CISG.

Professor Franco Ferrari declared, about the uniform interpretation of the Vienna Convention⁴ : "It results that uniformity can only be reached if the interpret while analysing takes into account practice in other countries. The interpret must consider "what the others already achieved", referring to decisions issued in other countries on the same issue. He added " these decisions can have a precedent value, or a persuasive value "⁵.

How does it work in practice ?

The panel of experts meets twice a year and establishes a list of issues to be studied, related to identified difficulties in interpretation. After a thorough study of the issues, the CISG-AC issues opinions relating to the interpretation and application of the Convention on request or on its own initiative. Requests may be submitted to the CISG-AC, in particular, by international organizations, professional associations and adjudication bodies⁶. For each topic, a rapporteur is appointed.

Every two year, a legal opinion is issued giving the interpretation of the working group on this issue.

² I would like to thank here gratefully Professor Claude Witz who is the French expert on CISG and who kindly accepted to expose to us the main lines of the CISG-AC philosophy and mechanism. See website.

³ <http://www.cisgac.com/about-us/>.

⁴ Free translation from the author.

⁵ F. FERRARI, "*Interprétation uniforme de la Convention de Vienne de 1980 sur la vente internationale*", Vol. 48 N°4, Octobre-décembre 1996. pp. 813-852, spéc. p. 813.

doi : 10.3406/ridc. 1996.5312

http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1996_num_48_4_5312

⁶ In practice, these requests are very rare.

The question arising from this initiative is : **What is the effect of such opinions ?**

We all have noticed that this Council is a private initiative of about ten scholars. The experts come from different countries parties to the CISG Convention and the panel represents different legal cultures, all being experts in international sales' law. Such initiative was not however totally non official as the group has been funded by the UNCITRAL and works closely with this organization, even if the organization does not recognize legally the opinions issued.

Every one may wonder how these opinions could influence uniform law. What is original and interesting in this initiative is that the worldwide reputation of these experts in the field of international sales' law has granted the opinions an informal, but nevertheless practical, authority. Such, authority can be measured in practice by the reference to certain opinions in court cases. Professor Claude Witz, who is the French expert in international sales' law, publishes yearly abstracts of relevant court decisions applying the convention. The German and Dutch Courts sometimes refers to these opinions. For example, the German federal Court of Justice (BGH, 28 May 2014)⁷ applied the opinion n°13 " Inclusion of Standard Terms under the CISG "⁸ in a case related to a provision included in a standardized leasing contract stipulating the settlement of the obligation of the seller to buy back the equipment.

Even if the effects of such opinions on domestic case law remain modest, I believe this initiative is worth studying. In my speech in Rouen, I suggested to develop the use of international case law databases⁹. But I must confess that such tools only allow Courts or arbitrators to be aware of the solutions in several countries implementing an international convention. But these databases do not say what should be the adequate solution according to uniform law criteria. On the contrary, the information provided by databases, completed with legal opinions from reputed scholars as the CISG-AC, could provide a better guidance for domestic courts.

II – How can we create a "CMR Advisory Council" ?

Based on the assumption that the CISG AC could serve as a model for the CMR, it is then necessary to identify the conditions to be met to create such a CMR council.

I have identified at least 3 necessary conditions:

1. The initiative
2. The panel's composition
3. The material conditions
 - a. travel and accommodation expenses

⁷ CISG-online, n° 2513; Claude Witz, *Droit uniforme de la vente internationale de marchandises* : juillet 2013 - décembre 2014, Recueil Dalloz 2015 p.881.

⁸ CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013.

⁹ C. LEGROS, "Modalités de l'interprétation uniforme de la CMR : Quelles difficultés ? Quels remèdes ?", *Unif. L. Rev. / Rev. dr. Unif.* (2016), to be published.

- b. webmaster
- c. collection and dissemination of information

1. The initiative

The CISG AC was created upon a private initiative of scholars and more particularly from late Professor Albert Kritzer from the Pace University and the Centre for Commercial Law Studies at the Queen Mary University in London. Professor Kritzer then solicited worldwide experts in international sales of goods to constitute the council.

Among the European scholars or Research centers specialized in international carriage of goods by road, it is then necessary to find a reputed Professor, or a group of scholars, who would be interested in such an adventure.

2. The panel's composition

As a purely private initiative, the constitution of such a panel is necessarily subjective and based upon personal links between scholars. Of course, it cannot be denied that the opinion on the degree of expertise and reputation of the chosen academics is necessarily subjective. However, if the leader wants his initiative to be successful and efficient, he has to be as objective and open minded as possible in choosing his partners.

The choice of members issued from different countries and various legal cultures is also fundamental.

Among the panel of international experts on one topic, the choice of scholars rather than lawyers or solicitors, or even judges, is justified by the necessary intellectual and material independence of the council. Thus, should be required from these participants the same conditions that bears on arbitrators : independence and impartiality. As declared on the CISG AC website : " It is a private initiative in the sense that its members do not represent countries or legal cultures ...". They should not represent trade interest either. The idea is that the opinions should reflect the 'best' solution as regards uniform interpretation of the concerned convention.

Coming back to the CMR, I believe it would not be so difficult to identify, among the State Parties, a dozen of reputed experts on the CMR. Of course the success of the enterprise is subject to approval of these experts to be part of such initiative. Which supposes that these scholars are convinced that such an advisory council is worthwhile.

3. The material conditions

A condition of the independence of the members of a council should be the absence of remuneration. If the panel is constituted by scholars, this condition could be rather easily met, provided that their expenses are covered. As a consequence, such panel would need a special funding for travel and accommodation expenses related to the meetings of the council but also to promotional operations.

The success of the enterprise is also subject to efficient collection and dissemination of information on the opinions issued. In particular, an efficient website and may be a webmaster should be funded.

Which raises the following question : how could these expenses could be funded?

The CISG AC has been funded in its early stages by the UNCITRAL, but it is not the case anymore. Comparatively, the CMR does not have a "mother" international organization. Unfortunately, UNIDROIT transferred the management of the CMR database to the IDIT¹⁰, which is a non profitable private association, as it was no longer capable of dedicating staff to feed this database.

Having recourse to the IRU does not appear to be appropriate as this international organization defends the interests of road carriers and thus would not guarantee the independance of the council.

One possibility would be to obtain EU funding, as the major State Parties to this convention are EU Member States.

Even if finding a permanent source of funding of such a council remains a serious issue, the cost of functioning should not be so high (setting aside possible wages) and could possibly be borne, at least during a reasonable launching period, by the research centers of the scholars.

Conclusion : let's do it !

¹⁰ As for the CMR : CMR UNIDROIT-IDIT DataBase : <http://www.idit.asso.fr>.