CELEBRATING SUCCESS BY ACCESSION TO CISG

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At times, pomp and circumstance create substantive dynamism and provoke unintended results. When I received the invitation to the joint UNCITRAL-VIAC conference to "celebrate success," I was asked in the invitation letter to comment on the reasons why some of the former Soviet countries such as Armenia, Azerbaijan and Kazakhstan have not acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG) while others such as Georgia, Kyrgyzstan and Uzbekistan have. That was a very pertinent question given the past and present political and legal similarities of the six countries on the list. I was not surprised not to find Tajikistan and Turkmenistan mentioned. The organizers of the conference were simply aware of the fact that Turkmenistan has for the time being opted to isolate itself in a significant way from international conventional life, whereas Tajikistan is still handicapped by the civil war which had lasted far too long and has caused delays in economic, legal and judicial reform.

Instead of speculating, however, on the reasons, I decided to forward the question to Ministers of Justice and other high ranking officials in different institutions of all three countries with whom I entertain long-standing relationships in my capacity as head of a legal and judicial reform project which is financed by the German Ministry of Economic Development and Cooperation (BMZ) and executed by the German Office of Technical Cooperation (GTZ).

In my side-letter I recalled that I had suggested on several occasions to ratify the CISG. I also mentioned that it was a pity to be excluded from "celebrating success," unlike the so many member countries representing some two-thirds of world trade and coming from very diverse political and legal cultures world wide.

The Vienna Conference unfolded its benign effects and the reactions were positive indeed. Workshops were organized in Astana in February 2005, in Baku in March 2005 and during a mission of the Armenian Minister of Justice in Bremen in February 2005 where I had an opportunity to substantiate my advice for accession.

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The first argument for membership is compatibility. The CISG fits well into the context of respective national civil legislation in post-Soviet countries. In fact, the Convention's text had even been consulted when drafting the civil codes of some of the Commonwealth of Independent States (CIS) countries (which is in itself a matter to be proud of). There are certainly differences, especially between the CISG and codes of countries which have closely followed the CIS-Model Civil Code. This Code relies heavily on forms thus contradicting Article 11 of the CISG. It does not allow for the revocation of offers once they have reached the other party, thus deviating from Articles 15 and 16. It always requires specific performance, and restitution in kind normally takes precedent over monetary compensation, thus being less lenient than Article 28. The buyer must not always examine the goods and give notice to the seller before exercising his rights, thus being more lenient than Articles 38-39.

Important as they may be, these differences do not create insurmountable hurdles and do not create fundamental conceptual contradictions between national codes and the CISG, especially since adhering states may express reservations of applicability. In addition, parties have considerable leeway to deviate both from their national codes and from the Convention. In most other respects there is a high degree of identical regulation.

Interestingly enough, one of the reasons which facilitated the accession in Georgia was the argument that there was so much similarity, whereas in Uzbekistan the opposite argument was used: the legislator realized that due to transitional problems, the Civil Code still carries more than one Soviet relic. Ratification of the CISG was considered a practical device to eliminate such relics, at least for the international sphere, and to introduce more trade-friendly and modern concepts. In the meantime, Uzbekistan has also started to modernize its national Civil Code with a group of drafters oriented more to the CISG "philosophy" of free trade.

The second argument for accession is stability. In countries where the legislative frame for doing business is still quite volatile and subject to frequent and sometimes erratic changes, business partners are certainly relieved to be able to rely on a text which is not only fair and equitable but has proven long-lasting and solid. This is especially true for small and middle-sized enterprises, which cannot afford to spend much money on legal fees nor have contracts drafted in much detail. It seems evident that the existence of the CISG can contribute largely to reduce transaction costs.

The third argument is flexibility. Articles 92-96 offer a wide range of possibilities for contracting states to restrict the application of parts of the Convention. One might even be tempted to say that the range of possible

restrictions is too wide, because any reservation by any state necessarily reduces uniformity and clarity and necessarily adds to transaction costs. To quote but one example: the Soviet Union had decided against a very well reasoned international trend to do away with written and other forms of contracts, which have found their expressions in the CISG. It had declared Articles 11 and 29 not applicable in order to maintain the heavy regime of formalities which was typical for Soviet law. The advantage of swift and smooth conclusion of contracts had been given away. Unfortunately, the Russian Federation has maintained the reservation. It is apparently not advisable for other post-Soviet states to follow this approach, advice which was accepted by both Uzbekistan and Georgia. The example is used in order to underline the complexity of advising. While adaptability of the text to legal preferences might represent an advantage of acceptability, it may at the same time turn against the intention to harmonize the international law of sales contracts, and should be exercised with great care and precaution.

The same verdict does not apply to the second expression of flexibility, namely the right of contracting parties to opt totally or partly out of the CISG. This is probably a realistic option for big parties to big contracts that prefer tailor-made clauses and can afford to pay for their drafting. Notwithstanding its limited use, governments may feel more at ease to adhere to the CISG when they know that it is not jus cogens for their enterprises.

At the time of writing this paper (June 2005), the countries mentioned above had taken steps to membership, although at different paces. In Azerbaijan the Convention is still with the Ministry of Economic Development, but nobody doubts that it will make its way to ratification. Procedures are slow but steady. In Armenia the Constitutional Court has confirmed the constitutionality of the CISG and the government has sent the text for ratification to parliament after the necessary approval by the Minister of Foreign Affairs. In Kazakhstan the Ministry of Industry and Trade and the Ministry of Justice have taken the matter up and approved it as representatives of the government. The other official steps will follow, including the decision of the President, the analysis of the Constitutional Council and finally the vote of Parliament.

The reactions in different countries indicate that non-adherence to the CISG is not based on systemic or ideological resistance. That is a significant difference to the other UNCITRAL jubilee, the twenty-year-old Model Law on International Commercial Arbitration which in many transformation states has met stiff resistance from parts of the judiciary, prosecutors and government officials. While in some countries commercial arbitration is looked upon with suspicion and apprehension, the CISG is more neglected

than resisted. We neither find outright political opposition or obstruction, nor particularities of legal cultures or widespread attitudes of judges who do not want to learn and apply new legislation (given that also national law is mostly new and frequently changed anyway). We rather find a lack of civil society, the absence of independent chambers of commerce or other commercial organizations, and (groups of) persons who might express a positive interest and lobby the Convention in parliaments. This is partly due to the fact that in Soviet times all international business transactions were channeled through Moscow, and the republics had little exposure to the outside world. It needs active cooperation and legal assistance to overcome these shortcomings which are naturally based in the old system.

These conclusions are confirmed by results of an inquiry in judicial practice of the CISG member states in central Asia and the Caucasus concerning the use of the CISG. The quotation from a letter of 30 November 2004 (No. 1/236), by which the vice chairman of the Georgian Supreme Court, Dr. Valeri Khrustali, answered my respective question is typical: "A concrete case where could have been indicated Vienna Convention, could not be found, but at the same time I would like to notify, that the general principles of Vienna Convention are used in the court practice." Two points clearly appear. The CISG is vaguely known and not resisted, but it is at the same time not actively used to motivate court decisions.

I received an identical answer from the vice chairman of the Uzbek Supreme Economic Court, M. Azimov, during an interview on 1 February 2005 in Tashkent. Although he and I had conducted a seminar on the CISG for judges in Tashkent in 2000, not one decision refers to the Convention so far, even if the text is certainly known and, as the vice-chairman put it, close to the heart of the magistrates. He supported his opinion by quoting a report of the Supreme Economic Court of 26 March 1998 on the enforcement of foreign court decisions. The report insists on the binding force of international conventions to which Uzbekistan is a member, and complains that judges have not yet developed a methodology to integrate them in their decision making process.

The same is true for Kyrgyzstan where no case is listed, and where the former Vice President of the now dissolved Supreme Economic Court, and now judge at the Supreme Court, Mr. Dovletov, confirmed during an interview on 22 November 2004 that neither the Supreme Economic Court nor the Supreme Court had ever referred to the CISG.

The reason for the lack of court practice is neither the rejection of the CISG nor the absence of cases, but a lack of active knowledge. This situation is reinforced by the fact that well trained lawyers who would normally prepare

the litigation and would introduce the CISG if it supported their clients' case are still in short supply in some of the member countries, and even where they are present, they are not always taken seriously by the courts which still pursue the old authoritarian ex-officio principles of court proceedings. This leads me to conclude the overview by advocating legal and judicial cooperation, along with training for the legal profession, both in non-member and member countries, which have all undertaken big efforts to open their economies up to the world.