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” The Internet: Tool of Law, Source of Law or Tool for Sources – Use of the Internet in Legal Practice using Examples from International Sales”

Camilla Baasch Andersen
Queen Mary, University of London

The Internet: A Research Tool and a Practitioners Source

Anyone working in research of any field of law will recognize the importance of the Internet in legal research. Through on-line searching and databases we have information available at our fingertips, making research easier and simpler than ever. But in the field of international law, the internet is not only a convenient tool, but an essential one which renders information accessible which would not otherwise be within a researchers grasp. With a few mouse-clicks and a minimum of searching we can access the judgements of Courts and Tribunals whose cases were not otherwise accessible – for instance the Supreme Courts of many Countries have entered their cases onto websites on the internet,^[1] and these will often be cases which would not be reported in this Country in any paper-form. To find them would mean travelling to the country in question and conducting research in premises. The use of the Internet as a legal tool is something which has been developing over the years. Scholars have referred to Internet sites in numerous articles and essays,^[2] not only for caselaw reference but also for citations to other scholars. There have been several articles on the subject of legal sources on the Internet, especially in German.^[3] But this is a well known fact, and a relatively banal one at that.

What is more novel is the use of the internet as a case-finder and source of law in caselaw; the use of the internet as a source of law and not just a source of sources. This is becoming more and more widespread in one particular field, namely that of international sales, my particular field of research. And it is no coincidence that this is an area for examining and developing this new frontier, as the Internet is a welcome solution to many problems. Allow me to illustrate the point.

The Example of the CISG

The 1980 UN Convention on Contracts for the International Sale of Goods (the CISG) has been in force for over 10 years now,^[4] and is constantly gaining more success as more countries chose to ratify it – it is now in force in 62 countries which account for over two thirds of all world trade.^[5]

As those familiar with the CISG will be well aware, the Convention is a uniform sales law. This goal of uniformity is presented in the pre-amble, wherein it is evident that the drafters intended the Convention to be an adoption of uniform rules governing contracts for the international sale of goods in the interest of removing ”legal barriers in international trade” and promoting ”the development of international trade”. Uniformity applies throughout the Convention by way of Article 7(1), which states: “In the interpretation of this Convention, regard is to be had to its international character and

to the need to promote uniformity in its application and the observance of good faith in international trade.”

But uniformity does not follow automatically from proclaiming uniform rules. Uniformity is a difficult goal to achieve, as uniform words do not always ensure uniform results,[6] especially where a Convention is in effect throughout countries with completely differing social, economic and cultural backgrounds, which represents different legal systems. Differences in interpretation and application will arise, as they indeed have in the case of the CISG, in the form of, for example, *faux amis*[7] or domestic influence on flexible terms, such as “reasonable time”.[8]

It is also uncertain which degree of uniformity the Convention strives at. Absolute uniformity would seem to be a utopian goal due to the kaleidoscope of nations involved, but when considering the need for predictability in contracts and the goal of the Convention to remove barriers in international trade, then it would be safe to assume that the uniformity of the CISG requires international practice not to vary, and for the provisions of the Convention to be applied similarly, if not identically, throughout the States in which it is in force.

So how may the Convention’s uniformity best be safeguarded?

As mentioned above, Article 7(1) requires consideration of the Conventions uniformity to be had when interpreting it. Scholars and practitioners agree that this provision represents a duty for the CISG practitioner to look to international practice in the interpretation or determination of the provisions of the Convention.[9] If a wide variety of practice from other countries is considered when a CISG issue is examined by a domestic practitioner, then that practitioner’s decision will be based on international precedents as well as his own evaluation, and will be in keeping with the spirit of international uniformity of the Convention. The practitioner need not necessarily follow the international precedent if he considers it incorrect or inapplicable to the case at hand, but there is a duty to take similar cases from international practice into consideration regardless.[10]

Nevertheless, references to international practice in reported judgements concerning the CISG are, unfortunately, very rare.

Before 1998

A prominent CISG scholar, Prof. Ferrari, reported in 1998,[11] that of nearly 300 judgements examined by him,[12] only one took international practice into consideration when considering a CISG issue.[13] Indirectly, other practitioners had taken international caselaw into account by referring to scholars who have done so,[14] and while this was a step in the right direction, it does not fulfil the duty in Article 7(1) to look to international precedents; not only because it is the judgements itself which should form the precedents and not the scholarly interpretation and commentary, but also because scholars frequently have a greater opportunity to analyse caselaw from their own domestic legal system (both in terms of availability and linguistic problems) and cannot always present a well rounded picture of international precedents.

In defence of those practitioners who have failed to consider international precedents, there are many problems connected with this duty, not only regarding the availability of international practice, but also regarding the language of the cases. The CISG is being practised in approx. 50 different languages with numerous completely different alphabets. The practitioners cannot be required to find all existing practice, let alone understand it. But the Internet presents a solution to this problem.

The MCC Marble Milestone – the first case law reference to the Internet

However, since 1998, there has been a trend for the more widespread use of international precedents. With the arrival of a US Circuit Court of Appeals decision on June 29th 1998,[15] the problem of

accessibility and language would seem well on its way to being at least partially solved. The case concerns the issue of whether a court must consider parole evidence in a contract dispute governed by the CISG. When comparing Article 8 of the CISG, the Court stated in an *obiter dictum* fashion that the parties had not referred to any international practice, but that the Courts own research had uncovered a database at www.cisg.law.pace.edu which was very promising re. international CISG precedents, but nonetheless contained no practice on parole evidence.[16]

With this shining example of good research, this judgement represents a milestone in legal practice on two frontiers:

- Firstly, it cites an Internet database as an official reference to a source of law. This in itself is a wonderful development, as well founded Internet databases should not be restricted for the use of scholars since they can be a convenient and in-depth research tool for practitioners as well.

- Secondly, it complies most satisfactorily with the duty in Article 7 to look to international practice; it searches for international practice and possible precedents on its own accord, and does so by way of one of the most comprehensive sources of reported international CISG practice available. By doing so, the judgement has ensured that it is in accordance with reported practice, and that the CISG thus, on this issue, has a more uniform practice.

The Pace Database

The database at www.cisg.law.pace.edu which the judgement refers to, is the CISG database at the Institute of International Commercial Law at the Pace University School of Law. The database is an extremely informative site for all who are interested in the CISG, as well as an important tool for those who are researching the Convention in depth. It contains essays and bibliographies on the CISG, as well as lists of Contracting States and their reservations, but most importantly for the practitioner, it contains a schedule of cases from different Member States and search apparatus for pinpointing particular practice. With its links to the mirror-sites of CISG-databases in different countries, [17] co-operation of caselaw exchange can be reciprocal and not just benefit English-speaking practitioners or scholars and it is also possible to access the original language text of many judgements. But, perhaps even more significantly, the ongoing Queen Mary case translation programme, run in cooperation with the Centre for Commercial Law Studies here in London, provides full text translations of judgements into English, eliminating the language barrier to the use of foreign case law. And astonishingly, this service is free of charge, open to all scholars and practitioners alike.

The database has been well received everywhere, and it is not surprising that it is this Website which earns the "feather in the cap" of being the first to be cited in a US international commercial law judgement.[18]

Much more praise has been earned and reaped. In late 1998, the Executive Secretary of the Pace Institute, Albert Kritzer, received the New York State Bar Association Award for Distinction in International Affairs for his work on the database. Joel B. Harris, Chair of the International Law & Practice Section of the New York State Bar Association stated: "The value of this resource to attorneys, judges, arbitrators, traders and scholars around the world and its potential for contributing to the development of a truly uniform international law of contracts is self-evident."

Moreover, The International Association of Law Libraries has recognized the website as a "A great project - containing nearly all information about CISG gathered in one site. They show us the way to get a successful partnership worldwide, through this innovative site.", and has awarded the website the first annual website award for non-commercial site in 2002.[19]

Other Databases of International Sales Law

There are also other databases for CISG practice and information. The UNCITRAL has its own caselaw database called Case Law Of UNCITRAL Texts (CLOUT) which can be found on the Internet on the UNCITRAL Homepage (<http://www.un.or.at/uncitral/htm>), where information on loose-leaf service can also be found. The problem with this database is that it only contains abstracts, and that it cannot comment on cases. In addition to this, the Italian National Research Centre for Comparative and Foreign Law Studies have a database of CISG caselaw called UNILEX compiled by Prof. Bonell and published by Transnational Juris, which has been made available online on popular demand. It is accessed either directly at <http://www.unilex.info/> or can be accessed via the PACE database where there is a link to a case or abstract.[20]

Other cases quoting or using the Internet

Since then, there have been a handful of other cases who comply with this duty to look to international caselaw.[21] Some of these utilise the internet source either directly by looking to it themselves as the 5th Circuit Court did in *MCC Marble*, see for instance *St. Paul Insurance v. Neuromed Medical Systems*, 2002 U.S. Dist. LEXIS 5096 (Southern Dist. New York:March 26, 2002) contains half a dozen citations to this website. Also mentioning Pace in its URL citation, in *Impuls v. Psion-Teklogix*, 2002 U.S. Dist. LEXIS 22977, n. 1 (November 22, 2002), the District Court for the Southern District of Florida advises that "[h]elpful information regarding the CISG can be found at th[is] website." The most recent example is an Italian case from Tribunale di Rimini 26.11.2002,[22] wherein the Court stated that it relied for each issue on a number of decisions on CISG already rendered by foreign courts and arbitral tribunals. In so doing the Court declared that, though precedents in international case law cannot be considered legally binding, they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of CISG (Art. 7(1) CISG). In this respect the Court stressed the importance of existing databases and of specialised law journals as a tool for the dissemination of international case law and made an express reference to the UNILEX Database on the Internet and the PACE database and its mirror-sites.

Other cases, however, do not quote *ex officio* examinations by the Court of cases on the internet, but it is obvious from counsel's briefs, the nature of the court's opinion, etc., that the courts have drawn on this website, e.g., *Medical Marketing v. Internazionale Medico Scientifica*, 1999 U.S. Dist. LEXIS 7380 (Eastern Dist. Louisiana: May 17, 1999), *Zapata Hermanos v. Hearthside Baking*, 2001 U.S. Dist. LEXIS 15191 (Northern Dist. Illinois).

Another category of CISG cases hide their use of the Internet more thoroughly, but to the trained eye it is discernible. Courts look at, and are sometimes swayed by, caselaw referred to them from the legal counsel of the parties even if they do not refer to it expressly – these will often be cases which the legal counsel would not have been able to locate or translate without the aid of the database. An example of the latter is found in a Danish decision from the Maritime Commercial Court of Copenhagen, where the Court is clearly paraphrasing criteria from a Dutch CISG precedent on frozen cheese in a case on frozen fish. They do not expressly refer to the case in the judgement, but since it is clear in the exchange of documents that Counsel for the seller quoted this case using the English words of the translated text as available on the Internet at the PACE database, we know that the Court are indeed using this source, albeit indirectly, when finding for the seller using the exact same wording.[23]

In the realm of the European Court of Justice, reference was made to Internet sources by an agent for the European Commission. The reference was to the Pace database in the "written observations" lodged by the Commission, and was – in the words of to the Agent who wrote the observations - made "to show that according to up to date information, a vast proportion of international trade was covered by it and that articles 36, 38 and 60 could serve as a source of inspiration to answer the question posed by the French court." [24]

All in all, the use of electronic databases and Internet Websites as sources of law is a giant step towards being able to find the latest and the most comprehensive CISG practice. Unfortunately, there are still certain limits to the practice the databases can provide. The practice of some CISG states is not reported to any accessible authorities; practice from China or Arab Republic, for instance, is still relatively limited, however, international scholarly co-operation is opening up the borders for transnational practice insight.

Caveat on Internet Quotation

There can be no doubt that the Internet is an extremely useful tool for legal scholars and practitioners. It is, however, important to keep in mind that the Internet is constantly changing; sites and materials are constantly added or removed. When using the Internet as a citation to sources of law, the dates the sites were visited are thus highly relevant, as they will indicate the likelihood of the material still being available. Keeping electronic copies of important material is highly recommended.

Moreover, the general problem of information-pollution on the internet should be considered seriously where it is relied upon as a serious and correct source of information. Edited databases, which ensure the quality of the material at hand, may be relied upon to a certain extent, but – as with all other forms of sources which cannot be validated – great care should be taken in attributing importance to information which cannot be checked.

Status of the Internet: A Source of Law?

The question is: With all this use of the Internet directly in practice, can we deem it a source of law onto itself, instead of categorising it as a source of sources? There are two arguments in support of this:

A) The Internet is now such a significant legal tool, that many databases contain research, articles and commentaries that are not published in paper-form and not available elsewhere. Where such original material is quoted, is the Internet not a direct source of law in the way a law journal is? It is certainly more than a fact-finding tool. For instance, the PACE database are currently captaining a research study which will publish a comparative analysis of different contracting principles as they appear in the UNIDROIT Principles, the CISG and the Principles of European Contract Law. The findings here are original to the database, and valuable to the legal profession.

B) Through search-engines which are unique, Internet databases collate and gather material, cases, and commentaries and presents them in a manner unique to that website which because of the way it is presented can spark unique and original impressions, ideas and – for practitioners – results. Even though this material COULD be found elsewhere, its individual way of presenting findings can shape legal thinking. For instance, if searching on the PACE database for cases on “reasonable time”, it will not only bring to the searchers attention cases on Article 39.1 and notification of non-conformity, but the fact that 37 provisions contain the word “reasonable” and that one of these is Article 8.2 which applies the right to “reasonably” in interpret actions to the entire convention. This is significant for a number of reasons, which I will not go into here. A search on commentaries to this will also reveal information that might not be found in the same context elsewhere. Through the vastness of information contained therein, and a good search engine, the Internet can heighten awareness of certain aspects.

C) The main argument, however, for why the Internet is a source of law is the fact that it is seen, in the cases where it is referred to, to actually influence the law by influencing the judges applying the law. At the root of all theoretic definitions to what constitutes a source of law, surely, we find the practical influencing, the fact that where we can show that something is directly influencing the outcome of a legal dispute, it IS a source of law, whether or not it satisfies theoretical requirements.

The main problem is, of course, that the Internet itself, with no check and balances, is too vast and uncontrolled to be, in itself, a source of anything but confusion and occasional information. It overflows with information, the key to using it is a good search engine, no matter which field it is employed in. And because of this wealth of information and – occasional – lack of selectiveness, too much incorrect or badly written information or disinformation finds its way onto the web. The need for a selective editing and effective search engine prompts the success of databases such as the PACE or UNILEX databases, both of which have high standards of scholarship and editors who work hard to keep the material up to date and correct.

So, perhaps, instead of rushing to deem the Internet a source of law, we should simply acknowledge that Internet sources, such as these edited databases, are sources of law. The distinction between the Internet as a whole, and selected Internet Sources also makes an illustrative parallel to the “paper-world” more clear. If we see these edited databases as representatives of dematerialised law journals with the added advantage of accessibility and navigation ability due to their electronic form and digitalisation, then we can better grasp the importance of editorship and quality of sources, in much the same way as we qualify the paper journals.

Closing remarks on the CISG and Internet Databases as Sources of Law

Before the CISG entered into force, the Convention was debated at a conference in Freiburg, Germany in 1987, where Prof. Honnold - in anticipation of the problems of uniformity that would arise - stated that he presumed most countries would condition their ratification of the Convention on the establishment of an International Sales Law Centre to monitor the international practice of the convention, as proposed by Prof. Rajski of Poland.^[25] Such a centre was never created, although the establishment of an expert committee such as the CISG Advisory Council, does provide a certain framework for the interpretation of the convention. However, with the arrival of extensive databases with international networks on the internet, such as the database at the Institute of International Commercial Law at Pace, it is possible for practitioners to comply with their duty in Article 7 to consider international practice in the interest of the uniformity of the Convention. When doing so, they ensure that the Convention is a giant leap closer to its goal of uniformity.

[1] See Annex I for a list of numerous Supreme Court websites.

[2] In fact, according to the “Introduction to Basic Legal Citation (1997-98 ed.) by Peter W. Martin based on the 16th ed. “Bluebook”, (visited 16.07.1998 at <http://www.law.cornell.edu/citation/citation.table.html>), the American Bar Association approved a resolution in 1996 recommending that courts adopt a uniform public domain citation system "equally effective for printed case reports and for case reports electronically published on computer disks or network services" and laying out several key elements of such a system. For examples of a Law Reviews citing internet Websites, see 66 *Fordham Law Review* (1998) p. 1985-2031, which refers to the Pace CISG database repeatedly (notes 167, 172, 181, 237, 243, 244, 246, and 336) for articles, caselaw, signatories, etc. as well as 29 *N.Y.U. Journal of International Law and Politics* (1998) p.577-639, which refers to numerous sites concerning the implementation of Biodiversity Treaties.

[3] See Thomas Hoeren: "Das Internet für Juristen – eine einföhrung" in 50 *Neuen Juristisches Wochenschrift* (1998), p. 3295-3298, and Detlef Kröger: "Einföhrung in das Internet für Juristen", visited 27.10.98 at <http://www.jura.uni-osnabrueck.de/ak-inet!/Aufsatz.htm>, and Jan Kaestner: "Nutzungsmöglichkeiten des Internets für Juristen" visited 27.10.98 at <http://www.uni-muenster.de/Jura.itm/hoeren/mitarbeiter/kaestner/Jurcom.htm>.

[4] It was signed in Vienna in 1980, and entered into force a year after the ratification by the tenth member state, in accordance with Article 99(1), on January 1st, 1988. At this time, the CISG applied

in: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, United States of America, Yugoslavia and Zambia.

[5] UN Treaty Section reports the following Member States as of 10.10.2002: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Columbia, Croatia, Cuba, Czech Rep., Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgystan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Saint Vincent & Grenadines, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia & Zambia

[6] See Prof. Honnold in "The 1980 Sales Convention – Can Uniform Words give us Uniform Results?" in 2 *Juridisk Tidsskrift* (1990-1991), p. 3-14.

[7] An example of such a conceptually presupposing "false friend" in the realm of the CISG is found in Article 47, which has been called a *nachfrist*-rule by the Secretariat in its commentary to the draft convention (UN DOC A/CONF.97/5). Some German courts have mistakenly equated Article 47 with their domestic rule of *nachfrist* in HGB §326, and interpreted the Article as a right for the seller and a duty for the buyer, rather than an optional right for the buyer. See for example OLG Düsseldorf of 10.02.94 [6 U 119/93] regarding the sale of textiles from Italy to Germany, and Landgericht Duisburg of 17.04.96 [45(19) O 80/94].

[8] Article 39 of the CISG, which represents a significant part of international CISG practice, prescribes that the buyer must advise the seller of any non-conformities of the goods "within reasonable time" in order to rely hereupon. The interpretation of "reasonable time" has varied significantly in practice as well as in theory, and vague domestic trends would seem to be distinguishable. For more information on the subject, see Baasch Andersen in "Reasonable time in the CISG - is Article 39 truly a uniform provision?", Review of the CISG, 1998 Kluwer, available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html> .

[9] This is supported by the U.S. Supreme Court in a case concerning the meaning of the term 'accident' as used in the Warsaw Convention, wherein the U.S. Supreme Court stated: "we find the opinions of sister signatories are entitled to considerable weight" [*Air France v Saks* 470 U.S. 392, 404 (1985)]. See also Lookofsky in UfR 1996.139 (in Danish), Albert Kritzer in "Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods", p. 109, and Prof. Ferrari in "Specific Topics of the CISG" in Journal of Law and Commerce, Vol. 15, 1995: "The interpreter must consider **what others have already done**, i.e. he must consider the decisions rendered by judicial bodies of other Contracting States," p.11 with reference to Maskow in "La Vendita Internazionale. La Convenzione Dell'11 Aprile 1980" in note 54.

[10] See Enderlein & Maskow in "International Sales Law": "What matters here is not a prejudicial effect of rulings by foreign courts or arbitral tribunals and not that the decision taken by an organ, which by accident was entrusted first to deal with a specific legal issue, is attached a particularly great importance; rather, the existing material in regard to relevant rulings has to be taken account of when giving the reasons for a decision.", p. 56.

[11] See Franco Ferrari: "Remarks on the autonomy and the Uniform Application of the CISG on the Occasion of its Tenth Anniversary", International Contract Adviser (Kluwer Law International).

[12] From Michael Will's "CISG – the First 300 or so Decisions", Basel 1997.

[13] See Tribunale Civile di Cuneo of 31.01.96 [45/96] (*Sport D'Hiver di Genevieve Culet v. Ets. Louyes et Fils*), regarding sportsclothes delivered in French sizes rather than Italian sizes as agreed, where the judge turned to international caselaw for precedents on the term "reasonable time" in Article 39.

[14] This is mostly evident in those judgements concerning Article 39 which favour the "noble month" approach, and refer to Schwenger in Schlechtriem's "Kommentar zum Einheitlichen UN Kaufrecht" p. , and her assessment of an international compromise of domestic determinations of "reasonable time". See, for example, Obergericht Kanton Luzern of 08.01.97 [11 95 123/357], Amtsgericht Augsburg of 29.01.96 [11 C 4004/95] and Bundesgerichtshof of 08.03.95 [VIII ZR 159/94].

[15] U.S. 11th Circuit Court of Appeals *MCC Marble Ceramic v. Ceramica Nuova D'agostino, S.P.A.*, 1998 U.S. App. LEXIS 13722. n *MCC-Marble v. Ceramica Nuovo*, 144 F.3d 1384, n.14

(June 29, 1998), the 5th Circuit Court of Appeals calls attention to <<http://www.cisg.law.pace.edu>> [16] *Ibidem*, note 15: "a promising source" for "persuasive authority from courts of other States Party to the CISG"

[17] See Annex II for a list of the CISG Database Sites.[18] in State Bar News Annual Meeting Edition, 28 January 1998, p. 2.

[19] See <http://www.iall.org/articles.htm>: "IALL wants to recognise valuable legal information websites by this award. ... The Association would like to encourage the development of useful, authoritative, reliable, and user-friendly sites and will make its selection on this basis." The selection panel was *Lisbeth Rasmussen* (Copenhagen University), *Jules Winterton* (Institute of Advanced Legal Studies, London), *James Butler* (Supreme Court of Victoria, Melbourne), and *Lyonette Louis-Jacques* (University of Chicago).

[20] For a list of other links to websites on international sales, see Annex III.

[21] One of the best examples is Tribunale di Pavia of 29.12.1999 which looks to an astonishing number of cases and foreign authorities, and refer to cases on the internet.

[22] Available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/021126i3.html>

[23] See Maritime Commercial Court of Denmark of 31.01.2002, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020131d1.html>

[24] Quoted from correspondence with the Agent for the Commission, Mr. Xavier Lewis, who referred to the Pace database in case C-440/97 GIE Groupe Concorde v Master of the Vessel "Suhadiwarno Panja", <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020131d1.html>. The case concerns the interpretation of the 1968 Brussels Convention, and was referred by the French Cour de Cassation. A notice which contains a summary of the questions referred is published in the Official Journal at OJ 1998 C 55 of 20 February 1998, p. 21.

[25] See "Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice", in Schlectriem (ed.) "Einheitliches Kaufrecht und Nationales Obligationenrecht", p. 145: "Prof. Rajski (*Pol.*) stressed the need for a centre for research and documentation "in all branches of internationally uniform law," or, if this is considered too ambitious, the research center could be confined to UNICITRAL activities...Under Rajski's proposal the Center's activities would include documentation, research, legal training and expert advice. The writer of the present report endorses the importance of such comparative research. Surely the general entry into force of the Sales Convention should and will stipulate these developments."