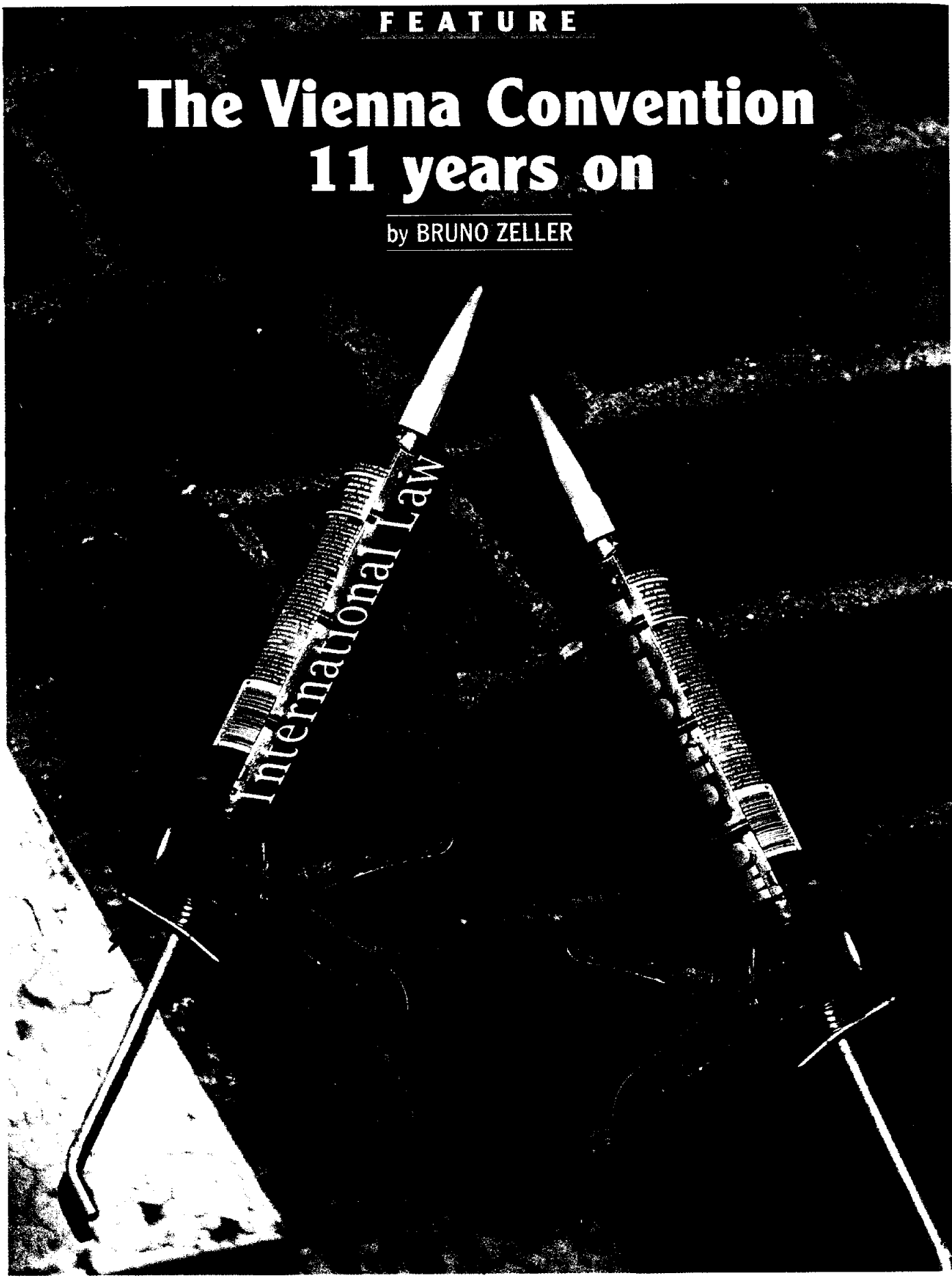
FEATURE

The Vienna Convention 11 years on

by BRUNO ZELLER



The Vienna Convention cannot be ignored, nor can it be read in a vacuum.

Through the operation of the *Sale of Goods (Vienna Convention) Act* 1987 (Vic) (the Victorian Act), the UN Convention on Contracts for the International Sale of Goods 1980 (the Vienna Convention, or CISG) has now been in operation in this state for 11 years.[1] Besides scholarly writings there is no case law of significance in Australia[2] to guide business and the legal profession in its application. However, in Europe (notably Germany) and the US some important case law is being developed. Such a development cannot be ignored in Australia as these foreign court rulings, depending on the choice of law or forum, are either of persuasive or binding nature to an Australian company.

Von Doussa J, in a Federal Court decision[3] concerning the application of the CISG to the contract of sale of goods, found it important enough to point out (at 12) that the pleadings "are expressed in the language and concepts of the common law, not in those of the [Vienna] Convention", with counsel making only passing reference to the CISG. He added (at 55) that the provisions of the CISG replace the common law concepts and common law remedies. Such a commentary, together with the international development of case law, is a clear indication that the CISG cannot be ignored. No doubt, until such case law is well established, any outcome of litigation will be unpredictable. This article will attempt to analyse how far the interpretation and application of the CISG has progressed and discuss some of the reasons for such unpredictability of outcomes.

It has been said "the CISG forces its way, uninvited, into contracts for the sale of goods".[4] Such a comment is based on ss5 and 6 of the Victorian legislation. Section 6 in brief states that "the provisions of the Convention prevail over any other law in force in Victoria" and s5 proclaims that the provisions of the Convention have the force of law in Victoria. Section 66A of the *Trade Practices Act* (the *TPA*) in essence repeats the above. Therefore the CISG will in effect prevail over any law in force in Australia to the extent of any inconsistencies. Whether the Australian courts will apply the CISG in all applicable situations pursuant to s6 is not yet known. Certainly other jurisdictions have not applied the CISG in all relevant cases. In a recent US case,[5] for example, the seller was too late in raising the argument that the CISG was applicable and the court wrongly applied domestic law.[6]

At this stage, 53 countries have adopted and ratified the CISG. Not all of Australia's major trading partners have adopted it,[7] which makes it important that the choice of law question is investigated and understood. Such a choice requires a clear understanding of three factors:

1. What is the applicable private law?;
2. What is its relationship with the CISG?; and
3. How is the CISG interpreted by the applicable foreign courts and tribunals?[8]

The fact that most international contracts include a choice of forum clause to facilitate possible arbitration adds weight to such an investigation. In such an event, unless stipulated differently, the domestic law of the forum will apply.

Bruno Zeller

CHOICE OF LAW

To make an informed choice of law, it is important for a buyer to understand the applicability of the CISG. Article 1, which has two important limbs, explains the sphere of application. Article 1(1)(a) (the less controversial one) states in effect that the CISG will apply to contracts where the parties have their place of business in contracting states. In a recent US case, *Delchi Carriers SpA v Rotorex Corp.*,[9] the Circuit Court of Appeals confirmed that the CISG is applicable pursuant to article 1 when the contract was silent on the choice of law.

Article 1(1)(b) extends the application of the CISG to situations "when the rules of private international law lead to the application of the law of a contracting state".

Practitioners must consider the impact of the Vienna Convention when drawing up international contracts for sale of goods, since overseas case law suggests a purely national perspective may be too narrow where there is a choice of whether to apply local or international law.

The implication of this is that if a buyer contracts with a seller of a state which is a signatory to the CISG, the CISG will apply despite the fact that the state of the buyer is not a contracting state. To avoid article 1, and hence the application of the CISG, the contract must stipulate a non-contracting state as the choice of law.

However, recent interpretations by courts have shown that the articles of the CISG cannot be read in a vacuum.[10] Article 100(2), for example, has an important bearing on the application of article 1 if the question of acceding to the CISG needs to be answered. In a French decision,[11] the Court of Grenoble applied article 1(1)(b) and not article 1(1)(a). When the matter was brought before the Court, both Spain and France were contracting states, however only France had acceded to the CISG at the time of concluding the contract as stipulated by article 100(2), making it imperative to use article 1(1)(b) and not (a).[12] In an interesting arbitration decision[13] between a German seller and a Spanish buyer, the arbitrator applied article 1(1)(a) to contracts made after 1 August 1991 (both countries were contracting parties) and article 1(1)(b) to those made after 1 January 1991 (when only Germany was a contracting party). Contracts made before 1 January 1991 had to be dealt with under German civil law as neither of the two countries had ratified the CISG. It is clear by the two quoted examples that article 1 must be applied carefully to avoid a wrongful application of the CISG.

Despite the fact that the CISG is the choice of law, it can be avoided pursuant to article 6, which allows the parties to exclude or vary the CISG. There is a further complication to this. Article 92(1) allows a contracting state to exclude Parts II and III. In effect the state is not considered a contracting state in respect of those parts it deleted.[14] Furthermore, article 95 allows a state to make reservations in relation to the application of article 1(1)(b). Such a declaration was made by the US[15] but not by Australia.

EXCLUDING THE CISG

As mentioned above, the CISG or any section or parts may be excluded or varied according to article 6. Such a choice does not mean that exclusion is automatic or certain. The exclusion clause contained in article 6 is part of the CISG, and if excluded would create a gap in the interpretation of the CISG. It can be argued that in this context article 7 must be looked at. It stipulates that there must be a uniform interpretation of the provisions of the CISG and a uniform approach to "gap-filling".[16] The method of gap-filling is stipulated in article 7(2). If the matter is not governed by the CISG, private international law will provide the applicable law. If, on the other hand, the CISG deals with the matter but it is not expressly settled, it is to be settled in conformity with the general principles on which the article in question is based.

If, for instance, article 35 were excluded, private international law would need to be consulted. In Victoria's case it would be the *Goods Act* or the *TPA* or a foreign law, depending on the choice of law. As s6 of the Victorian Act stipulates that the CISG has the force of law and prevails over any other law, a court would need to look at the reason for invoking article 6. It is possible that the court could apply *Golden Acres Ltd v Queensland Estate Pty Ltd*[17] and rule that the choice of invoking article 6 is against public policy.

It could also be further argued that as only gap-filling is applied, all applications and interpretations of private international law would need to be in "observance of good faith in international trade": article 7(1). How far this argument will carry is not known as it still remains to be seen whether judges in Australia will interpret the private international law as stipulated by article 7.[18] It is encouraging to note that Von Doussa J has done so by specifically mentioning the applicability of article 7.[19] The CISG, however, does not give much guidance to a court faced with the interpretation of its rules.[20] This seems to be a serious obstacle to uniformity of legal rules dealing with international sales if local courts apply and interpret the CISG with the ideology of their own domestic legal system in mind. The legal profession may well be faced with having to deal with different interpretations of the CISG, depending on the country in which a dispute settlement takes place.

US APPROACH

After 10 years only two cases had been reported where the CISG had been applied in the US,[21] but this number has increased to 14 in the past two years.[22]

It appears that a clear trend is emerging in the judicial approach to the interpretation of the CISG. Originally, in *Delchi*,[23] the US Circuit Court discussed two lines of reasoning in interpreting and applying article 7. First, the Court argued that if the language of the CISG tracked the Uniform Commercial Code (UCC) then domestic case law could be used to help in gap-filling. The CISG uses the term "possible consequence" in article 74, which is not a UCC term. The UCC uses the terms "incidental damage" or "probable consequence". In interpreting article 74 domestic interpretation of the UCC would be used for guidance (at 1028).

As a second line of reasoning the Circuit Court relied on scholarly writings on the subject and concluded that even if the CISG rule was directly inspired by domestic law, the "court should not fall back on its domestic law, but interpret the rule by reference to the Convention".[24] It appears that the Court set the stage to interpret the CISG according to article 7, but ig-

nored its introduction and proceeded to analyse the case as it would interpret the UCC, only consulting US commentators and case law.[25] The Court, though mindful of the international character in the interpretation of the CISG and the need to promote uniformity in its application, was unable to overcome its own ethnocentric bias.

Looking at other reported cases there seems to be a conflicting message emerging. In *GPL Treatment Ltd v Louisiana Corp*[26] (a trade dispute between a Canadian and a US corporation) the court applied domestic law and concluded (at 477) that the point of applying the CISG was raised too late. One dissenting judge in a footnote made the observation that the trial court erred in refusing to apply the CISG.

Harry Flechtner[27] pointed to the fact that the courts have not yet secured an international outlook. "The judiciary of other countries, particularly in Europe, may have a leg up on achieving the proper viewpoint because they have long been forced to deal with cross-border transactions and foreign law."

However, Professor Kritzner[28] has commented that the reasoning of the court in *MCC-Marble Ceramic Center Inc v Ceramica Nuova D'Agostino SpA*,[29] in its approach to the CISG, differs significantly from previous decisions. First, the court quoted and applied scholarly writings, and second, it observed and applied CISG case law (CISG jurisprudence). US cases were discussed and the court also called for attention to decisions of other states as a source of "persuasive authority".[30]

CONCLUSION

Foreign decisions have shown that it is critical for importers/exporters and commercial lawyers to be familiar with the CISG. There are certainly areas where the CISG tracks domestic legislation in the sale of goods, whereas other areas will produce potentially different outcomes. For example, in *MCC-Marble Ceramic Center* the court indicated that the CISG precluded the application of the parole evidence rule.

Interpretations of the CISG applying articles 7 and 8 can produce a new body of international law. What is of concern is the fact that significant trade blocs such as the EC have adopted the CISG as the de facto sales law.[31] It remains to be seen whether Australian courts will adopt the "international" view on interpretations or stay with "local" views. Whatever the outcome, if there is an incompatible view between Australian interpretations and foreign interpretations the view within a trading bloc may be favoured over a local interpretation. Such an outcome may well increase the uncertainty of the CISG. However, this can be overcome by Australian courts considering the international view by taking account of the scholarly writings and decisions of foreign courts. ■

Notes

Bruno Zeller is a lecturer in commercial law at Victoria University of Technology.

1. The *Sale of Goods (Vienna Convention) Act* is identical in all states and territories.
2. Only one case cited in note 3 below.
3. *Roder Zelt und Hallenkonstruktionen GMBH v Rosedown Park Pty Ltd* (unreported) 13 ACLC 776 (extracts); [1995] 17 ACSR 153.
4. G Kennedy, "The Vienna Convention – an international trap for locals", [1997] 71(6) *LIJ* 47.
5. *GPL Treatment Ltd v Louisiana-Pacific Corp.* 894 P.2d 470 (Or. Ct. App. 1995).
6. See also note 24 below.
7. England and Japan have not yet adopted the CISG.
8. There are presently well over 500 leading cases available worldwide.
9. *Delchi Carrier SpA v Rotorex Corp.* 71 F.3d 1024 (2nd Cir. 995).
10. JJ Callaghan, "UN Convention on Contracts for the International Sale of Goods: Examining the gap-filling role of two French decisions" (1995) 14 *Journal of Law and Commerce* 188.
11. *Ytong v Lasaosa* [1993] Cour d'Appel de Grenoble, Chambre des Urgences, No 92/4223 (Fr).
12. ICC Arbitration Award 8611/HV/JK of 1997.
13. Note 10 above, p188.
14. CM Bianca and MJ Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, 1987, Milan, p643.
15. Note 10 above, p188.
16. MN Rosenberg, "The Vienna Convention: Uniformity in interpretation for gap-filling – an analysis and application" (1992) *ABLR* 442 at 443.
17. [1969] Qd R 378.
18. Note that procedural rules will displace the provisions of uniformity as stipulated by article 7.
19. *Roder Zelt und Hallenkonstruktionen GMBH*, note 3 above, at 20.
20. RA Brand and HM Flechtner, "Arbitration and contract formation in international trade: first interpretations of the UN Sales Convention" (1993) 12 *Journal of Law and Commerce* 239.
21. S Cook, "The UN Convention on Contracts for the International Sale of Goods: a mandate to abandon legal ethnocentricity" (1997) 16 *Journal of Law and Commerce* 157.
22. Schedule of US cases on the CISG search form on the Internet.
23. Note 9 above.
24. Carbonneau (ed), *Lex Mercantoria and Arbitration*, 1990, Transnational, p154.
25. Cook, note 21 above, pp259, 260.
26. 894 P.2d 470 (Or. Ct. App. 1995).
27. HM Flechtner, "More US decisions on the UN Sales Convention: scope, parole evidence, 'validity' and reduction of price under Article 50" (1995) 14 *Journal of Law and Commerce* 172.
28. Editorial remarks on Internet site www.cisg.law.pace.edu.
29. 144 F.3d 1384 (11th Cir. (Fla.) 1998) No 97-4250.
30. See note 27 above, fn14.
31. HM Flechtner, "Another CISG case in the US courts: pitfalls for the practitioner and the potential for regionalized interpretations" (1995) 15 *Journal of Law and Commerce* 129.