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The final seller's right of redress under the Consumer Sales Directive and its complex relationship with the CISG

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I. Introduction

Directive 1999/44/EC (the Consumer Sales Directive; hereinafter "the Directive")¹ is the most important European provision in the area of consumer protection law and – to the extent to which it has already been transposed² – has often had a profound influence on national legal systems. Suppliers feel particularly hard hit by *inter alia* the provisions of national law concerning contractual liability which have ensued from Art. 4 of the Directive.^{3/4} That Art. states that the final seller must be able to take action against the producer, a previous seller or any other intermediary in the event that the final seller is liable to the consumer for a lack of conformity.

Many national legislatures were met with largely stinging criticism from scholars in their efforts to shore up the legal remedies and prevent the waiver of such remedies by parties to consumer sales contracts.⁵ Lawmakers took the view that – above and beyond the actual requirements for implementing the Directive⁶ – a mandatory or quasi-mandatory character must be conferred upon any remedy.⁷ Insofar as the Directive has been transposed, Member States have also created individual recourse claims as well as special arrangements concerning statutory limitations and burdens of proof partly benefiting final sellers, given the fact that Art. 4 leaves the procedures and modalities up to the national legislatures.⁸

However, it is questionable whether the remedy provisions arising from Art. 4 of the Directive – which (as shown) have been constructed so as to be inalienable – even apply to export contracts in the first place. For instance, in accordance with Art. 1(1)(a) of the CISG,⁹ when an exporter based in Germany supplies a buyer in another CISG contracting state with goods that in turn wind up being sold to a private consumer, the first supplier relationship is automatically governed by UN sales law, which foresees no special remedies.¹⁰ Ruled out would be German law, which would ordinarily apply in this case based on national conflict of laws provisions.¹¹ The exporter's posi-

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¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, at 12). On the drafting history and subject-matter of the Directive, see *Antenbrink/Schneider*, Die europaweite Vereinheitlichung von Verbrauchsgüterkauf und -garantien, [1996] VuR 367 et seq.; *Anders*, Zur Reform des Kaufrechts, [2000] ZRP 293 et seq.; *Grundmann*, in: *Grundmann/Bianca* (eds), EU-Kaufrechts-Richtlinie, Cologne (D), 2002, Introduction, paras 1-39; *Gsell*, Die zeitlichen Grenzen der Gewährleistungsrechte des Verbrauchers nach der EU-Richtlinie zum Verbrauchsgüterkauf, [1999] ERPL 151 et seq.; *Micklitz*, Die Verbrauchsgüterkauf-Richtlinie, [1999] EuZW 485 et seq.; *Staudenmayer*, Die EG-Richtlinie über den Verbrauchsgüterkauf, [1999] NJW 2393 et seq.

² For a closer examination of this topic, see *Schermaier* (ed.), Verbraucherkauf in Europa – Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG, Munich (D), 2003.

³ Art. 4 of the Directive provides:

Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.

⁴ However, Art. 4 of the Directive enjoys a special status to the extent to which it does not directly concern the relationship between consumer and seller and is thus not oriented towards consumer protection per se.

⁵ *Saenger* (in: *Dörner* et al. (eds), Bürgerliches Gesetzbuch – Handkommentar, 2nd ed., Baden-Baden (D), 2002, §§ 478, 479 BGB, para. 9) describes this practice as an unprecedented interference with contractual freedom. Critical also, see *Pfeiffer*, in: *Dauner-Lieb* et al. (eds), AnwaltKommentar, Munich (D), 2002, Art. 5 Kauf-RL para. 11; *Prinz von Sachsen Gessaphe*, Der Rückgriff des Letztverkäufers – neues europäisches und deutsches Kaufrecht, [2001] RIW 721, 733.

⁶ The non-mandatory character of the final seller's remedies follows from the fact that only those remedies that are available to the consumer are inalienable under Art. 7(1). Moreover, those remedies are explicitly addressed in the Recital 9. See also *Pfeiffer* (*supra* note 5), Art. 5 Kauf-RL para. 10; *Micklitz* (*supra* note 1), 485, 487; *Prinz von Sachsen Gessaphe* (*supra* note 5), 727.

⁷ See, e.g., § 478(4) BGB and Art. 7:25(2) of the Netherlands civil code.

⁸ See, e.g., §§ 478, 479 BGB or § 933b ABGB.

⁹ The high economic importance of UN sales law is demonstrated by the ever increasing number of Contracting States (currently 62).

¹⁰ For a closer examination, see *Bridge*, in: *Grundmann/Bianca* (*supra* note 1), Art. 4 Kauf-RL para. 50.

¹¹ See Art. 3(1) of the 1980 Rome Convention and Art. 28(1) and (2) EGBGB.

tion with respect to remedies would be clearly superior in this case to what it would be under domestic law, since its sales contract would be subject to the more liberal rules of the UN Sales Convention rather than the more stringent national remedies – such as the German remedy, which is mandatory in all cases (§ 478(4) BGB).

Questionable and up to now not completely clarified is however whether this also applies to the national law which was created to transpose a directive of the European Union, since in these cases the mandate of application in Art. 1(1)(a) of the UN Sales Convention conflicts with that contained in the Directive in accordance with Art. 10(1) EC read in conjunction with Art. 249(3) EC.¹² What is consequently decisive is whether the provisions of national law, which are based upon directives of the European Union – particularly those national provisions transposing Art. 4 of the Directive on the final seller's right of redress – can also obtain validity also in the case of international contracts for the sale of goods, which are essentially subject to the UN Sales Convention.

II. Approaches towards resolving the conflict

1. Interpretation according to the object and purpose of the regulations

The object and purpose of the comprehensive bodies of legislation yield no information on the question of primacy.¹³ However, the UN Sales Convention has its sights on the unification of international sales law and consequently it could follow that a subsequently enacted national civil law must be subordinate to the UN Sales Convention, since only in this way will the standardisation of international sales law not be jeopardised – a consideration which is ultimately unpersuasive. By the same token, one could argue that the national transposing legislation be accorded precedence over the CISG in order not to detract from the effect of the Directive. This illustrates therefore the fact that no unequivocal determination can be made as to the relationship of the UN Sales Convention and the Directive in general and the national implementing regulations providing remedies in particular.

2. Applicability of the principle of speciality

The *lex specialis* rule of legal reasoning also cannot be relied on to answer the question of primacy.¹⁴ A special legal rule, as

distinguished from any other legal rule, is qualified by the fact that it falls entirely within the scope of the more general legal rule.¹⁵ This must apply *mutatis mutandis* for the speciality of entire complexes of regulations.¹⁶ The UN Sales Convention does not cover all cases foreseen by the Directive, however. In fact, as becomes clear in Art. 2(a) CISG, consumer sales are excluded from the convention's scope. The CISG is thereby not “more special” *vis-à-vis* the Directive and the national legislation implementing it. Conversely the Directive on the basis of the limitations contained in Art. 1(1) and (2)¹⁷ does not apply to cases covered by the CISG, so that no “speciality” is likewise present for this constellation.

3. Applicability of the *lex posterior* principle

It is dubious whether the *lex posterior* rule of legal reasoning – by which later norms generally suppress earlier norms – can contribute to resolving the problem. The principle is based upon the assumption that by enacting a new rule lawmakers intend to repeal a contradictory existing rule. However, as correctly emphasised, the principle is only to be understood as an aid to interpretation, and not as a hard and fast rule.¹⁸

A consistent application of the principle to the question at hand would lead to incongruent results at the European level since the national implementing legislation – and thereby the national provisions transposing Art. 4 of the Directive – would constitute the newer norm and thus prevail over the CISG as it was earlier incorporated into domestic law in these states.¹⁹ However, for England, Ireland, and Portugal – none

wendungskonvention, Berlin (D), 1991, Art. 2 CISG comment 2; Schurr, Die neue Richtlinie 99/44/EG über den Verbrauchsgüterkauf und ihre Umsetzung – Chancen und Gefahren für das deutsche Kaufrecht, [1999] ZfRV 222, 225. Justly critical and dismissive, see Pfeiffer (*supra* note 5), Art. 1 Kauf-RL para. 29; Magnus, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht, revised ed., Berlin (D), 1999, Art. 2 CISG para. 30; Wartenberg, CISG und deutsches Verbraucherschutzrecht, Baden-Baden (D), 1998, at 22.

¹⁵ Larenz, Methodenlehre der Rechtswissenschaft, 6th ed., Munich (D), 1991, at 267 et seq.

¹⁶ Wartenberg (*supra* note 14), at 22.

¹⁷ Art. 1 of the Directive provides in paragraphs 1 and 2(a)-(c):

1. The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.

2. For the purposes of this Directive:

(a) consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;

(b) consumer goods: shall mean any tangible movable item, with the exception of:

- goods sold by way of execution or otherwise by authority of law,
- water and gas where they are not put up for sale in a limited volume or set quantity,
- electricity;

(c) seller: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession.

¹⁸ Larenz (*supra* note 15), at 266 et seq.; Hausmann, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 13th ed., Berlin (D), 1996, Art. 3 EGBGB para. 14; Wartenberg (*supra* note 14), at 23.

¹⁹ Art. 11(1) of the Directive set 1 January 2002 as the deadline for na-

¹² On the conflict between the CISG and the Directive, see also Janssen, Kollision des einheitlichen UN-Kaufrechts mit dem Verbraucherschutzrecht am Beispiel der Richtlinie über den Verbrauchsgüterkauf und -garantien, [1999] VuR 324 et seq.; Piltz, Gestaltung von Exportverträgen nach der Schuldrechtsreform, [2002] IHR 2, 4; Staudinger, Die ungeschriebenen kollisionsrechtlichen Regelungsgebote der Handelsvertreter-, Haustürwiderrufs- und Produkthaftungsrichtlinie, [2001] NJW 1974, 1978.

¹³ Point (a) of Art. 4 CISG explicitly states that the Convention does not regulate the validity of the contract or any of its individual provisions, thereby offering no solution to the conflict. Because the national provisions enacted pursuant to Art. 4 of the Directive do not concern invalidity, point (a) of Art. 4 CISG does not apply.

¹⁴ However, numerous authors have generally viewed UN sales law as the more specialised regulation in contrast to national consumer protection law. See, e.g., Enderlein/Maskow/Strobbach, Internationales Kaufrecht – Kaufrechtskonvention, Verjährungskonvention, Rechtsan-

of which are CISG contracting states – the CISG would take precedence over national implementing legislation in the event that they join the UN Sales Convention. Thus, while the CISG would have to prevail there in cases of conflict with the Directive as transposed, such would not be the case in rest of the EU Member States.

The same problem also arises in the case of the EU accession countries. Although all except for Cyprus and Malta have already acceded to the CISG, they have not yet transposed the Directive because they are not currently Member States. When they officially gain this status and the ensuing obligation to implement the Directive into national law, the same situation would arise as in England, Ireland or Portugal – thus contributing to fragmentation within the European legal order.

Based on these difficulties, attempts have been made at a restrictive interpretation of the *lex posterior* principle. Thus, as a rule it is not applicable to cases where national consumer protection law enters into force only *after* the UN Sales Convention. This flows from the basic assumption that lawmakers would not want to violate international law obligations.²⁰ Accepting a restriction of this sort would point to the superiority of the UN Sales Convention. However, there is in turn the possibility of exceptions to this non-application of the *lex posterior* principle – a discussion of which will not be entered into here – which can thus nevertheless lead to different results.²¹ Moreover, with respect to national law implemented as a result of directives, this international law obligation conflicts with the European rule²² to refrain from anything that could impair the practical effectiveness of the EC Treaty. Consequently the *lex posterior* principle cannot be used to arrive at a clear cut answer to the question of primacy.

4. The Consumer Sales Directive as an international agreement within the meaning of Art. 90 CISG

In accordance with Art. 90 CISG, the UN Sales Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement. In end effect this means that the

CISG as transformed into national law is subordinate to the rules similarly adopted into national law which arise from other international law arrangements.²³ This would encompass all agreements, bilateral or multilateral.²⁴ Whether directives are also to be understood as falling under this category is open to discussion, however.²⁵ A direct application of Art. 90 CISG is in any event out of the question: Directives as such do not constitute international agreements and both primary and secondary EC law are today overwhelming understood as self-standing sources of law distinct from international law given the structure of the Community.²⁶ However, since directives ultimately rely on the Rome Treaty as secondary EC law, an analogous application of Art. 90 CISG could be plausible.²⁷ Proponents of this position would have the law implementing the directive take precedence over the UN Sales Convention. However, an analogy of this sort can only be accepted in the case of regulatory loopholes.²⁸

This latter possibility is ruled out, however, given the potential direct applicability of Art. 94 CISG. This provision allows Contracting States having the same or closely related legal rules on matters governed by the CISG to enter declarations at any time excluding the Convention's application – even in part.^{29,30}

The very wording of Art. 94 (“the same or *closely related* legal rules”) provides an argument for its use in the case of a national law implementing a directive, even taking into account potential differences resulting from the transposition of directives into the domestic law of Member States.³¹ This also accords with the purpose of Art. 94 CISG which seeks to re-

²³ Wartenberg (*supra* note 14), at 44.

²⁴ Achilles, Kommentar zum UN-Kaufrechtsübereinkommen (CISG), Neuwied (D), 2000, Art. 90 CISG para. 1; Herber/Czerwenka, Internationales Kaufrecht, Munich (D), 1991, Art. 90 CISG para. 2; Karolus, UN-Kaufrecht, Vienna (A), 1991, at 34; Piltz (*supra* note 20), § 2 para. 157; Magnus (*supra* note 14), Art. 90 CISG para. 3. Favouring limitation of multilateral agreements, see Enderlein/Maskow/Strohbach (*supra* note 14), Art. 90 CISG comment 5.

²⁵ The same holds true for EU regulations.

²⁶ See ECJ 15 July 1964 – 6/64 – *Costa/Enel*, [1964] ECR 1251, 1269; ECJ 17 December 1970 – 11/70 – *Internationale Handelsgesellschaft* [1970] 1125, 1135; Schweitzer/Hummer, Europarecht, 5th ed., Berlin (D), 1996, paras 73-82; Rudolph, Kaufrecht der Export- und Importverträge, Freiburg (D), 1996, Art. 90 CISG para. 3; Wartenberg (*supra* note 14), at 45.

²⁷ So Daun, Grundzüge des UN-Kaufrechts, [1997] JuS 813; Herber/Czerwenka (*supra* note 24), Art. 90 CISG para. 4.

²⁸ See Pawlowski, Methodenlehre für Juristen, 3rd ed., Heidelberg (D), 1999, para. 467 et seq.; Raisch, Juristische Methoden, Heidelberg (D), 1995, at 151 et seq.

²⁹ Magnus (*supra* note 14), Art. 94 CISG para. 4, Wartenberg (*supra* note 14), at 49 (with reference to *argumentum a maiore ad minus* and the wording).

³⁰ Up to now, Denmark, Finland, Norway and Sweden have made use of Art. 94 CISG. See also Magnus (*supra* note 14), Art. 94 CISG para. 1.

³¹ Favouring the application of Art. 94 CISG to both directives and national implementing legislation, see also Achilles (*supra* note 24), Art. 90 CISG para. 2; Rudolph (*supra* note 26), Art. 90 CISG para. 3, Art. 94 CISG para. 5; Magnus (*supra* note 14), Art. 90 CISG para. 4, Art. 94 CISG para. 1 and Wartenberg (*supra* note 14), at 47 et seq.

tional transposition. This led to an undesirable and factually unjustified incongruity with numerous other provisions which had been based on EU directives. Those which were enacted prior to the national law implementation of the UN Sales Convention consequently became inferior to the CISG. Moreover, the *lex posterior* principle cannot solve the question of precedence in the case of consumer protection laws which entered into force simultaneously.

²⁰ Czerwenka, Rechtsanwendungsprobleme im internationalen Kaufrecht, Berlin (D), 1988, at 151; Piltz, Internationales Kaufrecht, Munich (D), 1993, § 2 paras 65, 67; Kropholler, Internationales Einheitsrecht: Allgemeine Lehren, Munich (D), 1974, at 94, fn. 6.

²¹ Critical, see also Wartenberg (*supra* note 14), at 23.

²² See Art. 10(2) EC.

spect the existence of similar legal systems, whereas Art. 90 CISG is not tailored to directives and national implementing legislation.³² The crucial factor for Art. 94 CISG to apply is ultimately the important function of the declaration entered by the Contracting States as to the overriding provisions.³³ In the case (or absence) of such declarations, the difficult and sometimes impossible judicial assessment³⁴ as to whether – and if so what – provisions of the national law are based upon a directive falls away. The analogous application of Art. 90 CISG would on the other hand render such a judgment inevitable. The possibility of entering a declaration thus ensures that EU countries can fulfil their implementing obligation under Art. 10(1) EC read in conjunction with Art. 249(3) EC without threatening legal certainty in international sales law – leading to a fair balancing of interests between national consumer protection and international sales law. Thus, as long as the EU Member States refrain from entering declarations under Art. 94, as most have done to date, the national provisions based on Art. 4 of the Directive are subordinate to those of the UN Sales Convention.³⁵

III. Consequences of the primacy of the UN Sales Convention

It should not be forgotten that the consequence in this case would be one which European lawmakers did not want – namely that on the basis of the superiority of the UN Sales Convention the national remedy provisions would in effect only be applicable in purely national supply contracts and thus that Art. 4 of the Directive would by and large be devoid of much effect for exports within the European Union. This places a final seller based within the EU at a disadvantage in international supplier relationships given that he himself is liable to the buyer on the basis of the strict demands of the Directive as transposed. For his non-EU suppliers, the CISG essentially controls for want of any provision equivalent to Art. 4 of the Directive.³⁶ The legal situation in Germany offers a perfect example of the fact that the final seller can land in a “trap without remedy” in the event of the applicability of UN

sales law, even in the absence of a modification or the exclusion of his right to recourse. Thus Art. 39(2) CISG establishes a cut-off period for warranty claims of two years from the date when the goods were handed over, basically conforming with the statute of limitations laid out in § 438(1)(3) BGB.

However, a remedy sought by the final seller can be frustrated by Art. 39(2) CISG, since this international cut-off period – in contrast to the statute of limitations in the German civil code – is not tolled in cases of a subsequent lawsuit brought by the consumer against the final seller.³⁷ Under the civil code, consumer claims against the final seller cannot lapse (e.g. on the basis of abortive attempts by the final seller to rectify defects), whereas under the CISG regime the expiry of the preclusive period under Art. 39(2) extinguishes the possibility of any remedy by the final seller against his suppliers. On the other hand, were the civil code to apply to the contractual relationship between the final seller and supplier, the former would be sufficiently protected by virtue of the modified commencement of the limitation period under § 479(2) BGB. Under that provision, claims of final sellers *vis-à-vis* their suppliers lapse as early as two months after the final seller meets a consumer claim.

IV. Conclusion

This discussion reveals that the national remedies based on Art. 4 of the Consumer Sales Directive do not apply to international contracts for the sale of goods based on the primacy of the UN Sales Convention. For the exporter, this is a considerable advantage, since remedies are not specially laid down in international sales law and above all else since they are freely negotiable and subject to the disposition of the parties, unlike many national implementing laws.³⁸ Exporters should thus fundamentally reconsider their usual practice of generally ruling out the UN Sales Convention under Art. 6 CISG and instead opting for internal national law.³⁹ Consultants in the export industry would themselves be well advised in any event to consider carefully the pros and cons regarding the applicability of the UN Sales Convention. An imprudent choice of the internal law on their side could give rise to malpractice suits from clients suffering damages from the faulty advice.

³² See also, *Wartenberg* (*supra* note 14), at 48. To the same effect, *Pfeiffer* (*supra* note 5), Art. 1 Kauf-RL para. 29.

³³ *Pfeiffer* (*supra* note 5), Art. 1 Kauf-RL para. 29, justifies the precedence of UN sales law with the fact that the Directive presupposes the existence of the Convention, and thereby acknowledges the priority of international sales law.

³⁴ It is often very difficult to tell whether national legislation stems from a directive. Firstly, the national law version may differ somewhat from the wording of the directive – a variance which is nevertheless acceptable in the process of transposition. Also, lawmakers often transcend the boundaries set by a directive, as was strikingly demonstrated by the German reform of the law of obligations and the respective directive. See also *Wartenberg* (*supra* note 14), at 48.

³⁵ Similarly, see *Piltz*, *Das UN-Kaufrecht in der Exportpraxis*, [2002] AW-Prax 260 et seq.

³⁶ For greater detail, see *Bridge* (*supra* note 10), Art. 4 Kauf-RL para. 50.

³⁷ See *Achilles* (*supra* note 24), Art. 39 CISG para. 14; *Magnus* (*supra* note 14), Art. 39 CISG para. 62.

³⁸ See *supra* note 7.

³⁹ A study conducted in Upper Franconia (D) revealed somewhat depressing findings regarding use of the CISG (*Sommerer*, *Die Anwendung des UN-Kaufrechts in der Praxis*, [2002] AW-Prax 19 et seq.). Only 8 % of those surveyed made a conscious choice for international sales law, 37 % excluded its application and 55 % had no idea whatsoever.