Book Review: Gustavo Moser, *Rethinking Choice of Law in Cross-border Sales* (Eleven International Publishing 2018)

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The current global trend in commercial and non-commercial matters is for States to grant ever greater freedom to parties in choosing the law applicable to their transactions. In the commercial field, such freedom may go as far as allowing the choice of non-State law, thus completing the process of detachment of business transactions from national provisions, even if the pitfalls of the mandatory application of public order rules may remain. In any case, the broader trend is clear and accommodates the ever-increasing global mobility of goods, services, funds and persons.

With more choice comes more accountability, and hence it is expected that as freedom increases greater diligence would be required when choosing the appropriate legal regime, especially when the choice is based on professional legal advice. Elements traditionally taken into consideration for that choice include the features of the transaction, the contractual power of the parties involved and existing usages and practices. Such generic elements may be relevant for transactions as diverse as a contract for the sale of cotton between a Burkinabe seller and a Bangladeshi buyer and a sudden marriage in Las Vegas.

A comprehensive and structured analysis of choice of law matters is necessary to appreciate the grounds for current decisions and the need, if any, to provide better options or additional guidance. This analysis may be carried out according to a quantitative approach based on the compilation of data and a qualitative approach based on identifying and explaining the underlying arguments. The outcome may lead to an assessment of the rationality of decision-making processes.

With respect to international commercial law, this discussion has taken place with respect to the actual use of the United Nations Convention on Contracts for the International Sale of Goods, 1980, known as "CISG", which represents one of the most significant uniform law texts both with respect to substantive content and to participation of States. The CISG being based on the principle of freedom of contract means that parties may opt out of its application, except for the use of the written form for those States that have lodged the corresponding declaration. The rate of opting out and underlying reasons have generated an interesting literature, in which different data has been explained with significantly varying arguments that range from the modest relevance of the CISG in ordinary business transactions to the limited awareness of the CISG by contractual parties and their legal counsels. The truth probably lies in the middle, is rather complex and is not crystallised. In general, it seems that traders and, at times, their legal counsels do not pay sufficient attention to the choice of the law applicable to their contracts for the sale of goods. For example, they may neglect to adequately consider the specific features of the contract, including by failing to account for the interaction between choice of law and choice of forum. Such negligence may have significant economic consequences on traders and may expose counsels to malpractice claims.

The book of Gustavo Moser on "Rethinking Choice of Law in Cross-border Sales" provides a comprehensive and timely contribution to this discussion. The book deals primarily with CISG matters, though several considerations may apply more generally to international commercial law. Statements and conclusions are supported by solid bibliographical references.

The author starts with an overview of existing research, which has increased in frequency and sophistication over the years to the point that studies before the year 2008 are qualified as "pioneering" and studies after that year as "innovative". The overview then discusses in detail the "Global Survey on Choice of Law", a major endeavour led by Ingeborg Schwenzer. That survey considered choice of law and CISG exclusion not only from a legal perspective but also from a psychological and economic one. The results provide a vast and significant dataset that is useful for several reasons, including in identifying the various motives parties may have for opting out of the CISG. Significantly, the survey results highlight the nexus between choice of law, choice of forum and availability of enforcement mechanisms.

Chapter 2 of the book provides a description of cognitive processes relevant to choice of law, including heuristics. The discussion is conducted along the lines of the juxtaposition between rational and intuitive responses and explains the reasons for the latter ones by identifying three classes of intuitive decision-makers: (pre)-judgmental, experiential and herd followers.

Chapter 3 offers an illustration of economic considerations relating to transaction costs, in particular those arising from information asymmetry and difference in bargaining power. These are two matters closely related to the justification for a broader use of uniform law. With respect to costs arising from learning a new law, one may wonder whether those costs are the legacy of times where individuals were in charge of providing legal advice as opposed to the current prevalence of law firms where knowledge is shared and learning processes are ongoing.

Chapter 4 discusses the interplay between choice of law and choice of forum issues, which are defined in a broad sense to include alternative dispute resolution methods. The practical importance of the matter may not be overstated.

The fact that the current landscape may be changing in light of recent treaties and other texts aimed at facilitating the cross-border recognition and enforcement of decisions by national courts (including those specialised in international trade) and of mediation settlements is also taken into account. The discussion usefully covers certain details such as the consequences of the choice of the seat of arbitration. The interaction between the Hague Convention on Choice of Court Agreements and the CISG is discussed in terms of synergy.

Chapter 5 aims at concluding the discussion on choice of law and uniform law by matching the concerns of the legal counsels, as compiled

in the Global Survey on Choice of Law, and the features of uniform law, namely the CISG. The resulting catalogue is a reminder of the benefits associated with uniform law. It could be possible to add a discussion of commonly chosen national laws and explain advantages and disadvantages arising from each of them. This may reinforce the case for the use of uniform law.

The fact that the CISG is not presented as the only possible solution to the legal needs of international trade, but as one of the possible solutions – actually, one of the few modern ones specifically designed for cross-border transactions – is in line with the current approach that favors freedom of choice of law, provided sound legal reasoning based on factual analysis informs that choice. The author also identifies the "commitment to freedom of contract" of the CISG as one of its main benefits: indeed, even if parties opt out, in some jurisdictions the CISG may be the main, if not the only, gateway to upholding a choice of law other than national law.

While the main focus of Moser's book is on the important question of choice of law and dispute resolution, greater treatment of the equally important issue of dispute prevention by proactive contract management would also be welcome.

The general conclusion of the book is that uniform law – namely the CISG – is often excluded because it is simply not liked by traders and their legal advisors and that the reasons for this dislike are unclear and may be unrelated to rational legal arguments. This is a dangerous approach that does not serve commercial interests and may expose involved lawyers to professional liability. Hence, this conclusion highlights the importance of capacity-building. Universities and bar associations could do much in that respect.

At the international level, the ongoing joint effort of the Hague Conference on Private International Law, UNCITRAL and UNIDROIT in drafting a legal guide on international commercial contracts (with a focus on sales) should be noted. Given the significant amount of work carried out in the field of uniform international contract law, the guide aims at providing an illustration of the interaction among existing uniform law legal texts. Its draft will be widely circulated for comments so as to benefit from the feedback of the intended users.

In the longer run, and from a different angle, the use of artificial intelligence agents in automated contract conclusion may assist in providing a more structured and coherent approach to choice of law and forum matters.

Overall, Moser's book provides relevant information to those interested in learning how to make efficient decisions with respect to choice of law in international commercial contracts or to improve existing decision-making processes. It is also a valuable reference work for those concerned with assessing and improving the practical relevance of uniform law in commercial transactions across borders.