

INTERNATIONALITY, UNIFORMITY AND OBSERVANCE OF GOOD
FAITH AS CRITERIA IN INTERPRETATION OF CISG: SOME
REMARKS ON ARTICLE 7(1)

*Alexander S. Komarov**

INTRODUCTION

National rules on the law of sales are subject to quite substantial discrepancies in approach and concept. The Vienna Convention of 1980 (CISG) had been created for the unification of the law governing the international sale of goods in order to overcome these divergences that amount to serious obstacles in the development of international trade.

A necessary condition for the CISG to fulfill more efficiently its purpose was to provide a uniform legal environment for international sales transactions in order for the uniform text to be interpreted by the courts and international arbitral tribunals in a consistent manner in all national jurisdictions where it is adopted. As it was put by one commentator:

The adoption of the CISG is only the preliminary step towards the ultimate goal of unification of the law governing the international sale of goods. The area where the battle for international unification will be fought and won, or lost, is the interpretation of the CISG's provisions. Only if the CISG is interpreted in a consistent manner in all legal systems that have adopted it, will the effort put into its drafting be worth anything.¹

In spite of the great care taken by the drafters of the CISG coming from different legal systems and traditions to make uniform rules as clear and easy as was possible in a process of finding a compromise, it would have been too idealistic to expect that no disputes would arise as to the meaning and application of the Convention.

The CISG contains two articles that are concerned with interpretation, namely, one dealing with the interpretation of the Convention (Article 7) and

* President, International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, Moscow.

1. John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in *REVIEW OF CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2000-2001* 115 (Pace Int'l Law Review ed., 2001), available at <http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html>.

another—with the interpretation of the statements and conduct of a party to a contract (Article 8). The difference between them consists in the fact that the first one is addressed to the courts, and the parties to the contract would apply the second. On the other hand, it was submitted² that it could be argued that *both* articles are directed to the courts since judgment is delivered by the courts, and *both* are also directed to the parties since it is they who must comply with the Convention. There is, nevertheless, a difference between the two kinds of interpretation. They find themselves on different levels: the first is concerned with the law, the CISG, and the second with the behavior of the parties to the contract. At the same time, statements and declarations of intent objectively contribute not only to the interpretation of the contract, but to the interpretation of the law as well.

The goal to preserve the uniform interpretation of the text of the Convention and to avoid domestic-oriented interpretation that would likely lead to narrow and conflicting interpretations of the provisions of the Convention could be achieved only by providing a special legal mechanism. It should direct all those who apply rules provided for in the text of the CISG to use the means that could be adequate to its goals. Presently, practically nobody would argue very strongly against that the criteria for that, i.e.—international character of the Convention, the need to promote uniformity in its application and the observance of good faith in international trade—were well chosen. This approach was expressly formulated in Article 7(1) CISG.

The idea to minimize the effect of domestically oriented practices in the process in international trade by introducing specific interpretative provisions of the CISG was quite ambitious but very pragmatic. From the outset it was argued that the application of Article 7(1) could be unpredictable because it was inevitably vague and, as a consequence, would have been open to surprising results. On the other hand, it was also stressed that a considerable merit of the paragraph would lay in the fact that it proclaimed an up-to-date legal policy in harmony with the exigencies of world trade which postulated that “no recourse to national law should be admitted in interpretation.”³

The general observation of means of interpretation of the Convention may be supplemented by the reference to an interesting remark relating to evaluation of the rule stipulated in Article 7(1). It was suggested that because

2. Gyula Eörsi, *General Provisions*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2-2* (Nina M. Galston & Hans Smit eds., 1984), available at <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html>.

3. *Id.* at 2-4.

most of the articles, if not all, manifest a purpose and the policy, in a sense the entire Convention is a cross-reference to this article.⁴

INTERNATIONAL CHARACTER

It is expressly stated in the documents relating to the legislative history of the Convention that it is important to avoid an interpretation of the Convention that is influenced by the concepts used in the legal system of the forum country.⁵ This was obviously aimed to restrain the homeward trend in application of the CISG. It has always been underlined that the CISG was not a law complementary to national laws, but was meant to be an exhaustive regulation.⁶

Unlike in the other international projects of unification of international sales law, i.e. ULIS, UNCITRAL in preparing the text of the CISG accepted the goal of preserving and furthering uniformity and used the indication about the international character of the Convention as a floodgate against an all too broad recourse to domestic law.⁷

Even before the CISG had come into force, different suggestions as to the sources of interpretation of the Convention were expressed. A collection of precedents followed by critical annotations and the use of the legislative history were indicated mostly among possible sources of guidance in interpreting the provisions of the Convention. In particular, Professor Honnold suggested already in one of the first CISG commentaries, that decisions construing the Convention and secondary analysis would also clarify the significance of focusing on the “international character” of the Convention. Actually, many authorities called for the publication of cases construing the Convention to increase the potential for its uniform application.⁸

4. Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 21 (Cornell Int'l Law Journal ed., 1995).

5. See UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, VIENNA, 10 MARCH-11 APRIL 1980, OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE AND SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE MAIN COMMITTEES 17 (1981) [hereinafter RECORDS].

6. Eörsi, *supra* note 2, at 2-5.

7. PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 36 (1986).

8. Hillman, *supra* note 4, at 21.

The necessity of “autonomous” interpretation of the CISG, resulting from the desire to abandon the domestic rules and concepts, has always been stressed by almost all commentators of Article 7(1).⁹ Such an approach has already been confirmed in case law in Germany and Switzerland in the application of the Convention.¹⁰

It is not surprising that in the developed national legal systems the courts have additional means in dealing with the problem of interpretation of CISG provisions in cases where there is a need to resort to interpretation of particular rules. In cases where Convention norms are formulated very close to corresponding domestic rules the courts take advantage of such similarity. Such methods, obviously, may be employed only when the use of domestic interpretative experience would not lead to the results that could be inconsistent with international character of regulation contained in the CISG. In other words, the international setting of the transaction in these cases should not be overlooked.

In a recent U.S. court decision it was stated that case law interpreting analogous domestic law provisions may also inform a court where the language of the relevant provisions of the Convention tracks that of the domestic law, even though the domestic law “is not *per se* applicable.”¹¹ The court in its decision meant, in particular, provisions of Article 2 of the Uniform Commercial Code.

From the outset, the commentators of the Convention pointed out the very important role which its legislative history could play in providing the basis for authentic interpretation of the provisions of the uniform legislation. The current court practice also gives very convincing examples of positive attitude to these valuable materials.

It seems that the courts applying the CISG may benefit from international scholarly writing relating to it as well. In many national legal systems, although to a different extent, the legal doctrine occupies a very notable place among the methods used by the judiciary in the adjudicating process. This tradition may successfully develop for the sake of ensuring effective application of the CISG as well.

9. See, e.g., MICHAEL JOACHIM BONELL, *BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW* 65, 73 (1987).

10. See CLOUT Case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 Sept. 1997]; CLOUT Case No. 271 [Bundesgerichtshof, Germany, 24 Mar. 1999]; CLOUT Case No. 333 [Handelsgericht des Kantons Aargau, Switzerland, 11 June 1999].

11. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, art. 7, ¶ 2, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/7 (2004).

The number of publications, both in hard and electronic form, on different aspects concerning the contents and the practice of application of the CISG is increasing each year. Those treaties that are prepared by the specialists that participated in the drafting of the Convention are especially of great value for a better and correct understanding of the Convention provisions. Such doctrinal works and other authoritative CISG commentaries are usually based on the extensive analysis of information about the Convention and the practice of its application in different parts of the world coming from practically all accessible sources. Obviously, such writings may play a vital role in promoting the authentic application of the CISG in member-countries as an instrument of international origin.

It is submitted that, in fact, the national judges quite often resort to scholarly writings if they, in the process of application of international instruments, confront problems that are difficult to resolve based on their previous experience of applying domestic law. But this fact is usually left outside the text of the court decision and could be traced only indirectly. In cases where an international instrument is applicable, a direct reference to the doctrine, including foreign sources, looks quite natural and justifiable, and obviously would substantially contribute to the high quality and persuasive value of such decision. As a good example in this respect, a court decision in Austria which was taken in 2000 might be considered. In this case, the court had used several references to the commentaries of the CISG in order to clarify the meaning of particular CISG provisions it was to apply in the given case.¹²

UNIFORMITY

The significant step towards realizing the UNCITRAL's role in achieving the goal of uniform application of the Convention was establishing of a system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that have emanated from the work of the Commission (CLOUT—Case law on UNCITRAL texts).

Among other things, the purpose of the system was to enable judges, arbitrators, lawyers, parties to commercial transactions and other interested persons to take decisions and awards relating to those texts into account and to promote the uniform interpretation and application of the uniform texts.

12. Oberster Gerichtshof, Austria, 13 Apr. 2000, available at <http://cisgw3.law.pace.edu/cases/000413a3.html>.

The system now includes several hundred abstracts of decisions and arbitral awards that are relevant to the interpretation or application of the CISG. Among them are decisions and awards that interpret or apply a specific provision or provisions, as well as those that do not refer to a specific provision but relate to the legal text in general. The abstracts are intended to provide sufficient information to enable readers to decide whether it is worthwhile to obtain and examine the complete decision or arbitral award that is the subject of the abstract.

The large number of CISG-related cases collected in CLOUT prompted another important step in the direction to promote the uniform application of the CISG. In 2001 the Commission requested the UNCITRAL Secretariat to prepare a tool specifically designed to present selected information on the interpretation of the Convention in a clear, concise and objective manner.¹³ This request originated the UNCITRAL Digest of Case Law on the U.N. Convention on the International Sale of Goods. Objectively, now there is no reason to doubt that the goal of uniform interpretation of the CISG has greatly benefited from CLOUT, and the Digest will further support this development.¹⁴

Resorting to foreign case law on the CISG represents an interesting aspect of solving the problem of identifying the sources, which could provide the courts the opportunity to keep the application of the Convention in uniformity with the corresponding practice in other legal systems. It was suggested that the settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention. The Convention's requirement of regard for "uniformity in its application" calls for tribunals to consider interpretations of the Convention established in other countries.¹⁵

The actual application of the CISG, combined with the implementation of conventional commitment to interpret its provisions employing only the methods adequate to its international character has moved the courts in different countries to take the advantage of positive experience gained by the judiciary from other national jurisdictions. The persuasive value of adequate and consistent decisions coming from different states adhering to the CISG

13. Report of the United Nations Commission on International Trade Law on its Thirty-Fourth Session, U.N. GAOR, 56th Sess., Supp. No. 17, ¶¶ 391, 395, U.N. Doc. A/56/17 (2001).

14. Introduction to the Digest of Case Law on the United Nations Sales Convention, U.N. GAOR, 37th Sess., Note by the Secretariat, U.N. Doc. A/CN.9/562 (2004).

15. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 94 (3d ed. 1999).

could substantially promote and support the development of international character of interpretation of the Convention.

As a matter of fact, there are cases that may be taken as quite spectacular examples in this respect. In those extraordinary cases the court decisions contain references to numerous foreign decisions applying the CISG. Actually, there are two Italian decisions where the court quoted about forty foreign court decisions as well as arbitral awards.¹⁶ But, of course, it is more common that the courts refer to one or two foreign decisions or arbitral awards. So, for example, in one case in order to reach a definite conclusion, an Italian court relied on a previous decision of a Swiss court, stating that precedents in international case law should be taken into account to promote uniformity in the application and interpretation of the CISG.¹⁷

However, the method of interpretation of the uniform text based on domestic court decisions had not always been looked at as creating no problems in achieving the goal of uniform application of CISG. The critical attitude concentrated on the fact that a high reliance on cases may create the impression that they were the primary source of international sales law and that the Convention's principles were inadequate. It was suggested that such an environment might encourage tribunals not only to take their eyes off the principles [of the Convention] but to engage in distinguishing, overruling, and even manipulating precedent.¹⁸

There are now quite a number of court decisions, in particular, in the U.S., Germany, and Switzerland, referred to in the UNCITRAL Digest on the CISG that evidence that references to the need of taking into account the Convention's international character are used to justify non-applying national legal tools in interpretation of the concepts used in the Convention.¹⁹ One of

16. See CLOUT Case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Tribunale di Rimini, Italy, 26 Nov. 2002, available at <http://cisgw3.law.pace.edu/cases/021126i3.html>.

17. Tribunale di Pavia, Italy, 29 Dec. 1999, available at <http://cisgw3.law.pace.edu/cases/991229i3.html>.

18. *Id.*

19. See, e.g., CLOUT Case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 Apr. 1994]; CLOUT Case No. 138 [Delchi Carrier SpA v. Rotorex Corp., 10 F.3d 1024 (2d Cir. 1995) (United States)]; CLOUT Case No. 171 [Bundesgerichtshof, Germany, 3 Apr. 1996]; CLOUT Case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993]; CLOUT Case No. 222 [MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A., 144 F.3d 1384 (11th Cir. 1998) (United States)]; CLOUT Case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT Case No. 413 [Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd., No. 96 Civ. 8052 (HB)(THK), 1998 U.S. Dist. LEXIS 4586 (S.D.N.Y. April 7, 1998)]; CLOUT Case No. 418 [Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, S.r.l., No. 99-0380 Section "K" (1), 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999)].

the U.S. court decisions may be taken as an example to illustrate how such an approach is working in practice. In this case the court came to the conclusion that the parol evidence rule of domestic law was not applied to the interpretation of a contract governed by the CISG.²⁰

It should always be remembered by the courts that when they are looking for the solutions of problems relating to application of the CISG in domestic case law, the goal to achieve uniformity and certainty in the international sales law should have priority. This means that the result of such exercise should not go beyond the situation that can be objectively expected by the parties in an international setting. It is submitted that the increasing practice of application of the CISG and further accumulating international experience in this field would make less acute the need to apply the experience based on domestic regulation in its interpretation.

GOOD FAITH IN INTERNATIONAL TRADE

It is well known that the legal notion of "good faith," which is widely used in quite a number of national legal systems, mainly belonging to the civil law tradition, has no single meaning even within one domestic legal system. It seems logical that the same duty would extend to international agreements and international contract law. The general provisions and rules on good faith and fair dealing can also be found in a number of uniform legal texts relating to international transactions, including UNCITRAL texts. However, the problem still exists as to how broad in scope the duty of good faith should be and the extent to which it would govern the relationship between contracting parties.

Introduction into the CISG of a provision creating an obligation on observance of good faith in its interpretation was the ground for extensive disputes in the process of preparing the uniform text. There was much discussion in UNCITRAL about the desirability of including in the Convention a general requirement of good faith and fair dealing which would be extended to the formation of the contract as well as application and interpretation of the provisions of the Convention.

[I]t was feared that there could be no general agreement on what "good faith" might mean in international transactions. . . .²¹ Opinions on the role to be played by good faith

20. CLOUT Case No. 222, *supra* note 19.

21. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 465-66 (1989).

ranged from the idea that it should be viewed as an obligation present at all stages of the contracting process to the view that good faith should not be explicitly mentioned in any provision.

In view of these sharply divided opinions, a compromise was finally reached in including in Article 7(1), a rule providing that in its application the Convention must be interpreted taking into account the need to observe good faith in international trade. This compromise was described also as a compromise between those who feared that the good-faith standard was too vague and took on too many different meanings in different legal systems, and those who supported the use of a broad standard to police inappropriate conduct.²²

One of the writers on the CISG called the concept of “good faith” one of the most controversial ones for the users of the CISG and stated that the controversy relates not only to the exact function of the concept, but also extends to its qualitative definition.²³

It is worth recalling that the problem regarding the role of the CISG provision on good faith started to be a point of a serious debate already in the early years after the adoption of the Convention. Since the effect of the compromise seemed to provide that the parties have no general duty to act in good faith, there was a clear disagreement between the drafters of the Convention as to the impact, if any, that the principle of good faith may have on the behavior of the parties to an international contract for the sale of goods, i.e. during the formation, performance, and termination of the contract of sale.

On the other hand, since interpretation of the Convention may indeed lead to application of the good faith clause, it might be argued that in such cases it was not the Convention, which was interpreted, but the contract. In this connection, it was submitted that interpretation of the two, however, couldn't be separated since the parties necessarily interpret the Convention also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract.²⁴

The commentators representing the civil law tradition usually more positively than the commentators coming from common law countries have been looking at the prospects of application of this principle in connection with CISG. According to the latter position:

22. Hillman, *supra* note 4, at 21.

23. Felemegas, *supra* note 1, at 115.

24. Eörsi, *supra* note 2, at 2-8.

[T]he reference to the observance 'of good faith in international trade' in Article 7(1) indicates one of the general principles that must be regarded in interpreting and extending the uniform law. Whether or not effective international standards of good faith can actually be determined must be left to studies in comparative law. The principle has affected the formulation of a number of provisions in CISG and the leading commentary on CISG cites Articles 21(2) and 19(2) as likely 'candidates' for an interpretation based on the principles of good faith.²⁵

Moreover, "the requirements of good faith in international trade could also prevent an all too hasty resort to domestic regulations and legal custom."²⁶

On the other hand, in the common law world a dominant view²⁷ has been that good faith in the CISG acts only as a principle for the interpretation of the Convention itself, although, it is and will be prompted by other articles of the CISG, but more in the interpretation of the Convention than in practice or contract performance.

It would be useful to mention that the [Secretariat] Commentary provides numerous examples of situations in which good faith may be a relevant factor, several of which include the formational phase of a contract.²⁸

Although many decisions of domestic courts recognizing the good faith duty under the CISG are to be found in the major data banks on the CISG, their analysis leads to the conclusion that there is still a definite lack of uniformity in the interpretation of this rule of the Convention.

This situation notwithstanding, the present CISG case law is evidencing that the application in different states, including common law jurisdictions, of this principle with regard to interpretation of the contents of the contract of international sale of goods governed by the CISG is gaining wider recognition.²⁹

As a concluding remark, the following U.S. Court of Appeals decision may be taken as a good illustration of interpretation of the CISG in accordance with its in-built interpretation rules.³⁰ In this case the court, quoting a U.S. legal writer, stated that if the parties decide to exclude the Convention it

25. SCHLECHTRIEM, *supra* note 7, at 37-39.

26. *Id.* at 36.

27. See, e.g., Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods*, 18 J.L. & COM. 333, 343 (1999).

28. See RECORDS, *supra* note 5, at 18.

29. For reference to caselaw applying the concept of good faith in international trade law, see the UNILEX database, available at <http://www.unilex.info/dynasite.cfm?dssid=2375&dsmid=14276>.

30. BP Oil Int'l v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. 2003) (United States), available at <http://cisgw3.law.pace.edu/cases/030611u1.html>.

should be expressly excluded by language which states it does not apply and what law shall govern the contract. According to the court, such “an affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG” pursuant to Article 7(1).³¹

31. *Id.* at 337.