

**EDITORIAL REMARKS ON THE MANNER IN WHICH
THE PECL MAY BE USED TO INTERPRET OR
SUPPLEMENT ARTICLE 8 OF THE CISG**

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I. The Subject-Matter of Interpretation

a. Two kinds of interpretation that both the Convention¹ and the Principles of European Contract Law² deal with should always be distinguished. First, the interpretation of the provisions, subject to Article 7(1) of the CISG and Article 1:106 of the PECL, respectively. Second, the interpretation of the contract, subject to Article 8 of the CISG and Article 5:101 of the PECL, respectively³

b. The Convention does not mention the interpretation of the contract; however, it

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1 United Nations Convention on Contracts for the International Sale of Goods, U.N.DOC.A/CONF.97/18, reprinted in [1980] xi UNCITRAL yearbook 149, available at <http://www.untreaty.un.org/ENGLISH/bible/engfehinternetbible/part I/chapterx/treaty17.asp> [hereinafter CISG].

2 Commission on European Contract Law, *Principles of European Contract Law* (Ole Lando & Hugo Beal eds., Kluwer Law Int'l 2000) [hereinafter PECL].

3 PECL arts. 1:106, 5:101; CISG, supra note 1, arts. 7(1), (8). The Comment to art. 5:101 of the PECL also mentions complete interpretation, as a process akin to regular interpretation of contract, but intended for filling the gaps that may arise in the contract. This can be done by resort to implied obligations in accordance with art. 6:102(c) of the PECL. There is no comparable provision in the Convention. The closest CISG equivalent that can be used for complete interpretation is art. 9.

addresses the interpretation of unilateral statements and the conduct of each party.⁴ In contrast, the Principles expressly state that the contract is the subject matter of interpretation.⁵ It is beyond doubt, however, that Article 8 of the CISG is also concerned with interpretation of the contract,⁶ whether it is a contract made through an exchange of communications, a single instrument supplied by one party and accepted by the other, an instrument drafted and signed by both parties jointly, or a contract concluded in some other way.⁷ This difference between the CISG and PECL is in expression and emphasis only. The Principles are more bilaterally oriented in its formulation, starting from the common intention of the parties⁸ and finishing by applying the standard of reasonableness to both parties.⁹ In contrast, the Convention concentrates on cases in which one party has had a more active role in the preparing of the contractual instrument.¹⁰ Article 8 of the CISG puts stress on the intention of each individual party and on the understanding that the other party would have attributed to its statements and conduct.¹¹

Although like the Convention, the Principles allow for the possibility of one party's intention to prevail, even when different from the literal meaning of the words, this figures as an exception to the general rule of mutual intention.¹² The practical importance of this difference may appear in the case of contracts in which both parties fully participated in the drafting of the contractual instrument. Paragraphs (1) and (2) of Article 8 of the CISG would seem to be inapplicable to such an

4 See *Secretariat Commentary on art. 6 of the 1978 Draft*, para. 2, available at <http://www.cisg.law.pace.edu/dsg/text/secomm/secomm-07.html>. [hereinafter *Secretariat Commentary*]; see CISG, *supra* note 1, art. 8 sees. (1) and (2): 'statements made by and other conduct of a party are to be interpreted*.'

5 See PECL, *supra* note 2, art. 5:101 para. (1): 'a contract is to be interpreted', para. (2): 'that one party intended the contract to have a particular meaning*', 'the contract is to be interpreted', para. (3) 'the contract is to be interpreted'.

6 This is borne out by the emerging case law on the CISG. As of the date of this analysis [March 9, 2002] the CISG website available at <http://www.cisg.law.pace.edu/cisg/text/ca/casecit.html>, reports 900 cases which reflect an abundance of express or implicit attention to art. 8 of the CISG by judges and arbitrators, including rulings which draw on this provision to assist in the interpretation of the contract as well as the intention of the parties.

7 See *Secretariat Commentary on art. 7 of the 1978 Draft*, para. 2, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-08.html>. [hereinafter *Secretariat Commentary*]; see also JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 163 (2d ed. 1991); Professor Zeigel's analysis of art. 8 of the CISG in Jacob S. Ziegel & Claude Samson, *Report To The Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, available at <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2/html>.

8 See PECL, *supra* note 2, art. 5:101, para. (1).

9 See PECL, *supra* note 2, art 5:101, para. (3).

10 See CISG, *supra* note 1, art. 8.

11 See J. VILUS, *KOMENTAR KONVENCUE UN O MEDUNARODNOJ PRODAJI ROBE* [COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS] 24 (Obvezno Provo, Druga Knjiga, ed., Goldstajn, Informator, Zagreb) (1981).

12 Provided that the other party could not have been unaware of such intention at the time of conclusion of the contract. See PECL, *supra* note 2, art. 5:101, para. (2).

instrument because they differentiate between the one who makes a statement and the one who receives it. On the other hand, Article 501 of the PECL would be fully applicable.¹³ One reason for the different approach in formulation probably lies in the history of the Article 8 provision of the CISG. If one keeps in mind the fact that this provision originated from the commission draft on the formation of contracts, where it was used in interpreting an offer and acceptance, and became applicable to statements and conduct after formation of the contract.¹⁴ Only later, when the two drafts on formation and sales were merged, the Convention's one-party orientation becomes understandable.¹⁵ The second reason for this difference probably lies in the predominance of the theory of mutual intent as the basis of contract in the majority of the laws of European states whose lawyers participated in the drafting of the PECL.¹⁶ Such a unison view of the basis of contract did not exist among the member states of UNCITRAL.¹⁷

c. The rules on interpretation of the contract, such as the parties' statements and conduct constituting the contract, are necessary when the meaning of certain provisions is ambiguous, or when the different clauses of a contract contradict each other.¹⁸ The interpretation of unclear or contradictory provisions may be necessary in order to determine whether there is in fact a contract, its content, and the effect of certain notices or other acts of parties upon the performance or existence of the contract.¹⁹ One of the purposes that the rules on interpretation have to serve (determine whether a contract has been concluded) has been treated by Article 2:101, a separate provision in the PECL, thus, giving rise to another formal difference between the CISG and PECL. The Principles state in Article 2:101 that a party's intention to be legally bound, as a condition for concluding a contract under Art. 2:101(1)(a), shall be determined on the basis of that party's statements and conduct, i.e., whether these statements or that conduct gave the other party a reason to believe that the first party wanted to be legally bound.²⁰ However, in the notes on the PECL, the commentators refer judges and arbitrators to the entire rules of interpretation contained in chapter 5 (with subjective standard inclusive) in determining whether the party to whom statement or other conduct was addressed had reason to assume that the first party intended to be bound.²¹

13 This would mean that a judge or arbitrator would have to interpret such an instrument by reference to art. 8(3). See Honnold, *supra* note 7, at 163; Ziegel, *supra* note 7.

14 See Secretariat Commentary, *supra* note 7, para. 2.

15 See Honnold, *supra* note 7, at 162.

16 See *id.* at 164; PECL, *supra* note 2, art. 5:101, cmt B.

17 See Secretariat Commentary, *supra* note 7, para. 3.

18 See PECL, *supra* note 1, art. 5:101, cmt. A, at 287.

19 See Secretariat Commentary, *supra* note 7, para. 1.

20 See PECL, *supra* note 2, art. 2:101, cmt. B. This provision is clearly more inclined to the objective standard of interpretation. See *infra*, para. f).

21 "Even if in his inmost mind a party had no intention to be legally bound, most of the laws will hold that he is bound if the other party to whom the statement or other conduct was addressed had reason to assume that the first party intended to be bound. Whether this is the case is to be decided under the rules of interpretation." PECL, *supra* note 2, art. 2:102, nn.

The CISG does not dedicate a particular provision to this purpose, but instead, relies on Article 8, an all-embracing provision, which applies to interpretation of all statements and conduct of the parties, either during the formation of the contract or during its performance and possible termination. Professor Honnold points out that this article has an even wider scope because it applies also to post-contract communications and actions.²²

d. There is an obvious difference in the type of contract to which these rules can possibly be applied. While Article 8 of the CISG is to be applied only to interpretation of contracts for the international sale of goods, this being further limited by the exclusion of certain international sales by the Convention text itself, the purpose of the interpretation rules contained in Chapter 5 of PECL is much wider, i.e., they are intended to serve for interpretation of "any sort of contract,"²³ including contracts for the international sale of goods.

II. Interpretation Based on Subjective Standard (Establishing the Intention)

e. The basic similarity between the CISG and PECL rules on interpretation of contracts lies in the combination of the subjective and objective methods of interpretation. Both the Convention and the Principles instruct the judge or arbitrator to start by establishing the intention of the parties.²⁴ As indicated above, the PECL wants judges and arbitrators to primarily look for the common intention of the parties,²⁵ and only in exceptional cases interpret the contract in the way intended by one party.²⁶ On the other hand, the CISG does not refer to the common intention of both parties but only to the intention of an individual party. There are some further differences in the wording of the respective rules. For example, Article 5:101(2) of the PECL elegantly avoids the repetitive and tautological nature of the formula used in the CISG to describe the awareness that one party had of the other party's particular intent: "where the other party knew or could not have been unaware what that intent was."²⁷ Instead, the PECL simply states: "[if] the other party could not have been unaware of the first party's intention."²⁸ Further, the PECL specifies the relevant moment for assessment of the other party's awareness - this is the moment of conclusion of the contract. Such precision is lacking in Article 8 of the CISG, perhaps naturally, since it refers more broadly to interpretation of statements and conduct of a party whenever they were given or undertaken.

22 Honnold, *supra* note 7, at 163.

23 PECL, *supra* note 2, "Survey of Chapters 1-9."

24 CISG, *supra* note 1, art. 8 sec. 1.; PECL, *supra* note 2, arts. 5:101, paras. (1) and (2).

25 PECL, *supra* note 2, art. 5:101, para. (1).

26 *Id.* art. 5:101, para. (2).

27 See Velus, *supra* note 11, at 25.

28 PECL, *supra* note 2, art. 5:101, para. (2).

III. Interpretation Based on Objective Standard (the Criterion of a Reasonable Person)

f. If there are no indicators of the parties' true intentions, both the CISG and PECL instruct the court or arbitrator to apply the objective criterion, which is the understanding that a reasonable person would attribute to the statements and conduct of the parties to the contract in the equivalent circumstances.²⁹ Again, the PECL is somewhat more precise in defining the situation which triggers the switch from the subjective to objective criterion.³⁰ The objective criterion is applicable when a different intention from the literal meaning of the words cannot be established, i.e., when no evidence of parties' actual intentions is available. To some extent, the CISG laconically introduces the second paragraph of Article 8, which calls for an objective interpretation, with the wording: "If the preceding paragraph is not applicable."

IV. Auxiliary Criteria of Interpretation

g. Both the Convention and the Principles give the judge or arbitrator a non-exhaustive list of matters that may be relevant in determining either the meaning intended by the parties or the reasonable meaning of the contract.³¹ The PECL list is more comprehensive. If we make a close comparison of relevant factors, we notice that the Convention does not mention the following: good faith and fair dealing; the nature and purpose of the contract; the interpretation that has already been given to similar clauses by the parties; the meaning commonly given to terms and expressions in the branch of activity concerned; and the interpretation that similar clauses may have already received.³² Surely, most of these factors may also be taken into account when applying the auxiliary interpretation rule from Article 8(3) of the CISG.

h. Some may question, however, whether good faith and fair dealing could be used as a tool of interpretation of a contract governed by the Convention, because of the well-known fact that the proposals for imposition of this requirement upon parties and their conduct were expressly rejected during the drafting process.³³ In spite of such legislative history of the Convention text, it has become commonplace among commentators of the CISG to mention the observance of good faith by the parties as a general principle on which the Convention is based.³⁴ If this view is accepted,

29 Id. art. 5:101, para. (3); CISG, *supra* note 1, art. 8 sec. 2.

30 PECL, *supra* note 2, art. 5:101.

31 Id. arts. 5:101, 5:102; CISG, *supra* note 1, art. 8 sec. 3.

32 PECL, *supra* note 2, art. 5:102.

33 For a detailed comparative commentary on the role of good faith in the three instruments- the CISG, the PECL and the UNIDROIT Principles - see the editorial remarks of John Felemegas and Ulrich Mangus accompanying art. 7 of the CISG, available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp7.html#er> and <http://www.cisg.law.pace.edu/cisg/principles/uni7.html#un>, respectively.

34 See R. Herber, General Provisions, in *Commentary on the UN Convention on the International Sale of Goods* 63 (P. Schlechtriem ed., 1998).

the principle of good faith and fair dealing could also serve as a potential auxiliary factor in interpretation of the parties' statements, conduct and contractual provisions in general, even though it is not expressly mentioned in the relevant article of the CISG, as it is in the PECL.

i. Both Article 8(3) of the CISG and Article 5:102 of the PECL include preliminary negotiations as one of the factors to be taken into account by the judge or arbitrator who is interpreting the contract. This is generally understood to mean that the parol evidence rule existing in some legal systems is precluded.³⁵ Even a merger clause, possibly inserted into the contract, does not automatically bar the judge from considering any evidence of preliminary negotiations for purposes of interpretation under either of these instruments.³⁶ The parties wishing to exclude such evidence for all purposes, including the purposes of interpretation, can still do so by stating accordingly in the merger clause. This would be a derogation from Article 8(3) of the CISG and Article 5:102 of the PECL, which is allowed on the basis of party autonomy.³⁷

V. Specific Rules of Interpretation

j. The Convention does not frame any rules on interpretation other than the general rule contained in Article 8 of the CISG. In contrast, the PECL contains five such specific rules of interpretation: the contra proferentem rule (Art. 5:103); the rule on giving preference to negotiated terms (Art. 5:104); the rule on interpreting the individual provisions with reference to contract as a whole (Art. 5:105); the rule on giving

35 See Honnold, *supra* note 7, at 171; See also the editorial remarks of Joseph M. Perillo accompanying art. 8 of the CISG, available at <http://www.cisgJaw.pace.edu/cisg/principles/uni8.html#edrem> ("Editorial Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 8"); MCC - Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A, 144 F.3d 1384 (11th Cir. 1998), available at <http://cisgw3.law.pace.edu/cases/980629ul.html>; But cf. Beijing Metals & Minerals Imp./Exp. Corp. v. Am. Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir. 1993), available at <http://cisgw3.law.pace.edu/cases/930615ul.html>. In *Mitchell Aircraft Spares v. European Aircraft Serv.*, 23 F. Supp.2d 915(N.D. 111. 1998), the court, however, confirmed the growing body of U.S. jurisprudence to the effect that, in a case governed by the CISG, art. 8 displacethe U.S. parol evidence rule. See also *Calzaturificio Claudia v. Olivieri*, 1998 WL 164824 (S.D.N.Y.1998), available at <http://cisgw3.law.pace.edu/cases/980406ul.html>; *Filanto S.p.A. v. Chilewich Intl.Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), available at <http://cisgw3.law.pace.edu/cases/920414ul.html>. The court in *Mitchell Aircraft* also disagreed with the possible holding to the contrary in *Beijing Metals*; See Albert H. Kritzer's editorial comments in the *Mitchell Aircraft* case presentation, available at <http://cisgw3.law.pace.edu/cases/981027ul.html>.

36 See Honnold, *supra* note 7, at 171. "The search for common intention is compatible with rules which forbid the proof of matters in addition or contrary to a writing, for example if the parties have negotiated a merger clause to the effect that writing contains all the terms of the contract (see art. 2:105: Merger Clause), as it refers to external elements only to clarify the meaning of a clause, not to contradict it." PECL, *supra* note 2, art. 5:101, cmt. B.

37 PECL, *supra* note 2, arts. 5:102, cmt., 1:102, para. (2); see CISG, *supra* note 1, art. 6.

preference to interpretation which renders the terms of contract effective (Art. 5:106); and the rule on interpretation in case of linguistic discrepancies (Art. 5:107). Undoubtedly, these specific rules may be referred to as supplementary rules in aid of interpretation of the CISG because they are not inconsistent with but are in accord with the evident intent of Article 8 of the CISG. Indeed, some of these rules are described as the origin of solutions adopted in Article 8.³⁸ They are an absolute necessity for interpretation of contracts made in an international and, often, multilingual setting.

38 *E.g.*, the provision in art. 8(2) of the CISG has been described as rooted in the *contra proferentem* rule. See Honnold, *supra* note 7, at 165.