



INTERNATIONAL SALES LAW AND ITS INTERPRETATION

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Abstract

The study reviews and compares the sources of uniform substantive law on international sales and contracts, to give an overview of the methods elaborated to interpret them. Have uniform law instruments hammered out a common solution for their interpretation? They have gradually confronted with the problem of interpretation and developed the rules governing interpretation, moving away from the definition of the content of some specific legal concepts towards abstract principles of construction, such as the international character of the instrument. The most influential in this area has been the regulatory approach of the Vienna Sales Convention. However, there are still distinctions in relation to the possible role of private international law (conflict of laws), more precisely the role of the national law designated by private international law, in filling loopholes.

Keywords: CISG, international sales, interpretation of contracts, UNIDROIT Principles, unification of contract law

INTRODUCTION

This paper deals with the interpretation of sources of uniform substantive law related to international sales. It covers the problem of gap filling too. Determining the exact content of legal concepts and their relationship with each other requires interpretation.¹ One of the key question of the effectiveness of uniform substantive law instruments is the extent to which they can preserve the internal coherence of their rules when answering those questions of interpretation that inevitably arise in their application.² If interpretation means determining the meaning of a legal source, it must be accepted that this is in fact a prerequisite for any judicial decision applying the law. A related but subsequent level of difficulty is that of choosing between different, competing meanings, or clarifying a provision of a norm with uncertain content, by searching for the legislator's purpose and comparing different linguistic versions. The task is made more difficult by the fact that international conventions may reflect the influence of several legal systems, may represent a sophisticated balance between them, or may use ambiguous legal concepts as a compromise. Moreover, different fora in different states may interpret texts in different official languages.³ A similar challenge is the process of filling legal loopholes (gaps). Despite these challenges of legal pluralism, international conventions do create uniform law, and it is right to strive to maintain their integrity during the process of interpretation.⁴

¹ Speaking of interpretation: this paper does not distinguish between the expressions of 'interpretation' and 'construction', using these terms interchangeably to describe the activity of determining the content of the law. Bryan Garner, A. *A Dictionary of Modern English Usage*, (Oxford: OUP, 1995) 462.

² Paul Schiff Berman 'The inevitable legal pluralism within universal harmonization regimes: the case of the CISG' (2016) 21 *Uniform Law Review* 23-40. 40.

³ Even the most carefully prepared official translations can have subtle linguistic discrepancies.

⁴ Radosveta Vassileva, 'Autonomous Interpretation of Uniform Commercial Law: The East-West European Divide' (2018) 29 *European Business Law Review* 885-906.



The paper analyses and compares the 1935 and 1939 UNIDROIT Drafts⁵, the 1964 Hague Convention (ULIS and ULFIS),⁶ the Vienna Sales Convention (CISG),⁷ the UNIDROIT Principles (UPICC)⁸ and the Draft Common European Sales Law (CESL).⁹ This comparison offers a concise view of the developing interpretation of uniform law instruments over the last eighty years.

1. The 1935 and 1939 UNIDROIT Drafts

In Articles 12-14 of the 1935 UNIDROIT Draft, it gave definitions of some basic concepts that appear in many other Articles, namely "*communication without undue delay*", "*current price*" and "*national law*". It therefore provided an interpretation of only some specific concepts. This was not an interpretation provided by the courts, but by the law-making institution itself. However, a more general rule of interpretation also appeared in Article 10 of the 1935 UNIDROIT Draft and, later, in Article 13 of the 1939 Draft: according to which, '*where clauses or forms usual in trade*' are included in a contract, the court seized must construe them in accordance with the commercial usages of trade.

To fill in the legal gaps, the 1935 UNIDROIT Draft also provided rules in its Article 11, essentially requiring the application of the *general principles* that inspired the uniform law, insofar as it did not explicitly refer to a national law to settle the question.¹⁰ This solution, the reference to general principles, as we shall see, will accompany the unification of law throughout the following decades. The Report on the Draft moreover cited Article 1(2) of the Swiss Civil Code as the source of the rules,¹¹ which in fact placed the courts in a role similar to that of the legislature, insofar as neither the Code nor customary law gave them any guidance.¹²

Reference to national law was not uncommon in this early version of the uniform law on the sale of goods, as was the case in Articles 34, 36, 59, 74 and 83, in important matters such as the additional circumstances of the seller's exemption from liability for damages.¹³ Moreover, Articles 23, 24, 70 and 85 did not refer to the law designated by private international law, but referred directly to the law of the competent court, the *lex fori*, in connection with certain questions of *specific performance*, the claim to the purchase price, as was pointed out in the Report on the Draft.¹⁴ In this case, therefore, the Draft itself contained conflict of laws rules.

Similarly, the 1939 UNIDROIT Draft also typically did not contain general provisions on the construction of the uniform law, apart from the role of trade usages as indicated above but did specifically define some concepts in Articles 14-16. Thus, the concepts of '*without undue delay*', '*current price*' and '*municipal law*', the latter being understood as the law of the State that is applicable under private international law.¹⁵ The 1939 UNIDROIT Draft provided guidance for filling the so-called internal legal gaps in line with its predecessor in the second paragraph of Article 11. On the one hand, it emphasized that it excluded the otherwise applicable law on matters within its scope, unless it expressly so

⁵ UNIDROIT, League of Nations, *Draft of an International Law of the Sales of Goods*. (Rome: La Libreria Dello Stato, 1935 (1935 UNIDROIT Draft).

also UNIDROIT, 'Projet D'Une Loi Uniforme sur la Vente Internationale Des Objets Mobiliers Corporels' and 'Draft Uniform Law on International Sales of Goods (Corporeal Movables)'. In *L'Unification du Droit = Unification of Law: A general survey of work for the unification of private law (Drafts and Conventions)* (Rome: UNIDROIT, 1948) 103-159, (1939 UNIDROIT Draft).

⁶ *Convention relating to a Uniform Law on the International Sale of Goods (ULIS)*, signed at The Hague, on 1 July 1964; *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS)*, signed at The Hague, on 1 July 1964.

⁷ *United Nations Convention on Contracts for the International Sale of Goods (CISG)*, signed at Vienna on 11 April 1980.

⁸ Latest edition: *UNIDROIT Principles of International Commercial Contracts*, (Rome: UNIDROIT, 2016) (hereafter: UPICC)

⁹ *Common European Sales Law, CESL*, Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law, COM(2011)0635 final.

¹⁰ 1935 UNIDROIT Draft Article 11.

¹¹ 1935 UNIDROIT Draft, 25.

¹² Swiss Civil Code, Article. 1.

¹³ E.g. 1935 UNIDROIT Draft, Article 34.

¹⁴ 1935 UNIDROIT Draft, 26-27.

¹⁵ 1939 UNIDROIT Draft Article 16.

provided.¹⁶ If, on the other hand, it did not expressly resolve a problem falling within its scope, the court was required to apply the general principles which inspired the uniform law.¹⁷

2. The 1964 Hague Conventions (ULIS, ULFIS)

The 1964 Hague Conventions followed the same pattern, except that the list of the terms specifically explained was modified in Articles 10-13 of ULIS, which define '*fundamental breach of contract*', '*promptly*', '*current price*' and '*a party knew or ought to have known*'. To this was added the definition of '*usage*' in Article 13 of ULFIS. Article 17 of ULIS, with some modification, also repeated the key provision of the 1939 UNIDROIT Draft on filling legal gaps, perhaps in less clear terms, because it is not obvious from the text that it is related filling the so-called internal legal gaps. According to Article 17 of ULIS, matters not expressly covered by the Convention had to be arranged in accordance with the general principles on which the Convention is based.¹⁸ It is true that the first sentence of the second paragraph of Article 11 of the 1939 UNIDROIT Draft, which expressly prohibited the application of otherwise applicable law, was omitted, but this follows from the injunction in Article 2 of ULIS, which generally prohibited the application of the rules of private international law unless the Convention provided otherwise.¹⁹ As the commentator on the convention, TUNC, put it, the strict rule was intended to exclude any theoretical dispute which might then be reflected in the practice of the courts.²⁰

Article 17 of ULIS has been the subject of much criticism. Some doubted that the general principles²¹ can be properly determined and feared that the fora in charge would find general principles based on their own legal system. The representative of the Federal Republic of Germany, on the other hand, saw a lack of the role of private international law in filling the legal gaps, meaning he would have relied on the provisions of otherwise applicable law.²² During the revision of ULIS, i.e. in the preparation of the Vienna Sales Convention, the role of commercial usages in filling the legal gap was also raised, but the representatives of some of the member states of the Comecon²³ would have rather invoked the law of the seller's place of establishment.

3. The Vienna Sales Convention (CISG)

The CISG refers to the requirement of '*reasonableness*' in more than forty places in its text, in various phrases as '*reasonable time*' or '*unreasonable inconvenience*'.²⁴ An even greater challenge is that the CISG is applied by different state fora and arbitral tribunals, meaning there is no single system of courts and no supreme judicial forum to guarantee uniformity of interpretation.²⁵ The concepts of local laws can infiltrate the world of uniform law, not only through references of conflict of laws, but also if the forum in question relies on them when it interprets the international instrument and fills in legal gaps.²⁶

¹⁶ Peter Winship, 'Private International Law and the U.N. Sales Convention, Cornell' (1988) 21 *International Law Journal* 487-533. 494.

¹⁷ 1939 UNIDROIT Draft Article 11.

¹⁸ ULIS Article 17.

¹⁹ M. Wilderspin, In Ulrich Magnus, Peter Mankowski, (Magnus-Mankowski), *Rome I Regulation, Commentary, European Commentaries on Private International Law, ECPII*, Volume II (Cologne-Munich: Otto Schmidt, 2017) 488.

²⁰ André Tunc, *Commentary of the Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale, The Hague, 1966*, https://iicl.law.pace.edu/sites/default/files/cisg_files/tunc.html (downloaded 08.04.2022) 36; Winship, above no. 16 at 492.

²¹ For example, a representative of Austria or the Soviet Union, see Winship, above no. 16 at 510.

²² Gyula Eörsi, 'The Hague Conventions of 1964 and the International Sale of Goods' (1969) 11 *Acta Juridica*, 321-354, 333; Winship, above no. 16 at 492.

²³ Council for Mutual Economic Assistance (CMEA), established in January 1949 to facilitate and coordinate the economic development of the eastern European countries.

²⁴ Erin O'Hara O' Connor, 'The Role of the CISG in promoting healthy jurisdictional competition for contract law' (2016) 21 *Uniform Law Review* 41-59, 48.

²⁵ Fernando Gomez, Some Law and Economics of Harmonizing European Private Law, in Arthur S. Hartkamp - Martijn, W. Hesselink - Ewoud, Hondius - Chantal, Mak - Edgar Du Perron (eds), *Towards a European Civil Code*. 4th revised and expanded edition. (The Hague: Kluwer, 2010) 401-426. 410. Ulrich Schroeter, 'Gegenwart und Zukunft des Einheitskaufrecht' (2017) 81 *Rabel's Zeitschrift*, 32-76, 46.

²⁶ See Vassileva above no 4 at 905.

The CISG represents a partial paradigm-shift in the interpretation of the uniform law, and in the way of filling legal gaps. The role of general principles is maintained; as we can see, this solution has existed and been perpetuated since 1935, but new requirements are also introduced in relation to interpretation, such as international character, the importance of uniform application and the role of good faith. In this way, a comprehensive set of new rules was provided on construction. There is also a reference to international private law, after the explicit denial of its role in earlier sources. Moreover, as will be discussed, the CISG provision has inspired a whole series of interpretative rules in private international law conventions, too.

The CISG provides its relevant rules in Article 7. The rules are clear at first reading, yet they raise some difficult questions, even in the context of the Article on uniform interpretation. Among these, it continues to focus primarily on the possible role of local law and the problems associated with recourse to conflict of laws. It is also worth noting that the interpretative path offered by the CISG is far from a simple grammatical interpretation, which is not at all becoming outdated in the judicial practice of some States.²⁷

The first condition requires the *international character* of the CISG to be taken into account as an interpretative requirement. This means, first and foremost, requiring an autonomous interpretation, emphasizing that it is a *sui generis* international document, which is not directly connected to the law of any State. Therefore, its rules must be interpreted independently of national laws and their legal institutions, and their content must be derived from their own text and context.²⁸ This international character is linked to the requirement of *uniform application*, which poses a particular challenge to the legal practitioner. On the one hand, because the Convention exists in six official languages,²⁹ all of which are equally authoritative, but the terminology used in them does not yet show complete equivalence.³⁰ On the other hand, in the case of the CISG, there is no designated 'Supreme Court', 'European Court of Justice' or 'International Court of Justice' which could be the final binding forum for deciding questions of interpretation. In this situation, a great deal depends on the training and broad vision of judges and arbitrators, who, when considering questions of interpretation, would in fact take into account the constantly evolving and developing case law of the Convention throughout the world. The first condition is that this jurisprudence shall be available and accessible. This is facilitated by the CLOUT database (*Case Law on UNCITRAL Texts*) and the UNILEX database,³¹ which, in addition to the CISG, also collects international case law and a bibliography of the UNIDROIT Principles of International Commercial Contracts. Other additional databases are also available,³² and the *Digest on the United Nations Convention on Contracts for the International Sale of Goods* performs a similar function.³³

²⁷ For example, on the development of English judicial practice in the 20th century, and the slow move away from the exclusivity of grammatical interpretation, see Lord Denning, *The Discipline of Law* (London: Butterworths, 1979) especially 9-17.

²⁸ Peter H. Schlechtriem, Ingeborg, Schwenzler, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, edited by Ingeborg, Schwenzler, 4th ed. (Oxford: OUP, 2016), (Schlechtriem&Schwenzler) 122. It raises an interesting problem of interpretation if a provision of the CISG is obviously modelled on the law of a State, as in Article 74 on the amount of damages, which is clearly inspired by English law and the decision in *Hadley v. Baxendale*, 9 Ex. 341 (1854). Some of the literature suggests that in such a case, the root (English) law should also be taken into account. P. Mankowski, In Peter Mankowski, *Commercial Law. Article by Article Commentary*. (Baden-Baden - München - Oxford: Beck, Hart, Nomos, 2019) Forty years after the birth of the CISG, this approach seems controversial to the author.

²⁹ Official languages: English, Arabic, French, Chinese, Russian, Spanish.

³⁰ One such place is Article 3(2) CISG, which states that 'This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.' Here the English uses the term '*substantial*', while the French uses '*essentielle*' - a subtle difference. Schlechtriem&Schwenzler, above no. 28 at 126.

³¹ <http://www.unilex.info> (downloaded 08.04.2023).

³² See for example www.cisg-online.ch (downloaded 08.04.2023) and <https://iicl.law.pace.edu/cisg/cisg> (downloaded 08.04.2022). Mankowski, In Mankowski, above no. 28 at 38.

³³ (Munich, Sellier, European Law Publishers, 2004). The 2012 version of more than 700 pages and the 2016 version are also available online: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg-digest-2012-e.pdf> (downloaded 08.04.2023) and https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf (downloaded 08.04.2022).

In addition, the Advisory Council on the CISG, a private initiative, seeks to provide guidance by analysing and giving opinions on sensitive problems of interpretation.³⁴ Thanks to this abundant and easily accessible information, it seems that so far it has been possible to avoid sharply divergent interpretations of the Convention by the courts of the various States,³⁵ so RABEL's optimism seems to be broadly justified, and a uniform law can be made to work without a uniform system of appeal courts,³⁶ although achieving a uniform interpretation based on case law can be a long process and the possibility of divergent interpretations and thus of legal pluralism is always present.³⁷ Also worrying is the practice of the US courts, which tend to interpret the CISG provisions in the light of the UCC.³⁸

However, the requirement of uniformity cannot be transformed to a system of precedents, and there is no international public law or constitutional framework for it. The judgments of foreign courts have a persuasive force,³⁹ in that the uniqueness of circumstances must be taken into account, despite previous examples of interpretation. Thus, for example, there is no justification for standardizing the content of the term '*reasonable period of time*' as a deliberately open-ended term; an analysis of the specific circumstances is required in each case.⁴⁰ Judges may also have different attitudes towards the CISG jurisprudence. A judge in the Anglo-Saxon legal system may turn more easily to the case law of other States, with an inherent interest in the world of 'law in action,' as well as 'law in books', than a judge brought up in the continental tradition, who may prefer to turn to commentaries and legal literature when a problem of interpretation arises.⁴¹ Several judgments have held that it is permissible to consult the international legal literature when interpreting the CISG,⁴² and to take into account the history of the codification of the Convention.⁴³

The case law of the courts is also nuanced in other respects. Some courts have held that not all the terms of the Convention are to be interpreted autonomously. While, for example, the terms '*purchase*', '*goods*', '*place of business*' and '*habitual residence*' are to be interpreted autonomously, the term '*private international law*', which appears in Article 1(b) or even in Article 7(2) of the CISG, is not necessarily so, but the interpretation of the forum must be taken into account.⁴⁴ Indeed, although the fora recognise that the case law interpreting domestic sales law is not directly applicable, it may nevertheless be an indication of the approach of the court if the language of the domestic law and the relevant Articles of the CISG are close.⁴⁵

³⁴ Mankowski, In Mankowski, above no. 28 at 38; Ingeborg Schwenzer, *Global Unification of Contract Law. Uniform Law Review*, (2016) 21 60-74, 74; Schlechtriem&Schwenzer, above no. 28 at 124-126.

³⁵ Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of World Contract Law' (2008) 56 *The American Journal of Comparative Law* 1-28, 5; Michael Joachim Bonell, 'The law governing international commercial contracts and the actual role of the UNIDROIT Principles' (2018) 23 *Uniform Law Review* 15-41, 19.

³⁶ Ernst Rabel, 'A Draft of an International Law of Sales' (1938) 5 *The University of Chicago Law Review* 543-565. 565. Ulrich Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Camilla B. Andersen, Ulrich G. Schroeter (eds), *Sharing international commercial law across national boundaries: Festschrift for Albert H. Kritzer on the occasion of his eightieth birthday*. (London: Wildy, Simmonds and Hill, 2008) 425-469, 469.

³⁷ O'Hara O' Connor, above no. 24 at 48. Herbert L. Lazerow, 'Uniform Interpretation of CISG' (2019) 52 *The International Lawyer* 369-392, 392.

³⁸ Mankowski, In Mankowski, above no. 28 at 39.

³⁹ Ibid. 36.

⁴⁰ Schlechtriem&Schwenzer, above no. 28 at 125.

⁴¹ Berman, above no. 2 at 25.

⁴² UNCITRAL: *Digest of Case Law...* 42 and 47. CLOUT case No. 426 (*Oberster Gerichtshof*, Austria, 13 April 2000), available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_426_leg-1651.html (downloaded 08.04.2022).

⁴³ UNCITRAL: *Digest of Case Law...* 42-47. CLOUT case No. 720 (*Netherlands Arbitration Institute*, the Netherlands, 15 October 2002); *Landgericht Aachen*, Germany, 20 July 1995, (referring to the codification history of Article 78), also available at www.cisg-online.ch (downloaded 08.04.2023); CLOUT case No. 84 (*Oberlandesgericht Frankfurt a.M.*, Germany, 20 April 1994).

⁴⁴ UNCITRAL: *Digest of Case Law...* 42 and 47. CLOUT case No. 651 [*Tribunale di Padova*, Italy, 11 January 2005]; *Tribunale di Padova*, Italy, 25 February 2004, English translation available at https://www.uncitral.org/clout/clout/data/ita/clout_case_651_leg-2048.html (downloaded 08.04.2022).

⁴⁵ UNCITRAL: *Digest of Case Law...* 42 and 47 *U.S. District Court, Southern District of New York*, United States, 20 August 2008; *U.S. District Court, Southern District of New York*, United States, 16 April 2008;



The commentaries to the CISG understandably devote a great deal of space to the third interpretative requirement, the '*observance of good faith in international trade*'. This is probably one of the most sensitive points of the Convention, where the uniform law has chosen a solution that is itself divisive, or at least has not been backed by a common position⁴⁶ and has not been included in previous uniform substantive law instruments. For example, the principle of *good faith and fair dealing* (*Treu und Glauben*), although it has a long history in German contract law, is not part of the English contract law tradition, having emerged there only as a transposed legal concept through the EU directives on consumer transactions. Moreover, for a private lawyer familiar with the history of the institution, it is a source of uncertainty, that the CISG is only about *good faith*, not about good faith and fair dealing,⁴⁷ and is therefore not a continuation of a principle developed in German law. Maybe this requirement was imported from Article 31 of the Vienna Convention on the Law of Treaties, which considered good faith, together with free consent and *pacta sunt servanda*, as a universally recognised principle.

Article 7 of the CISG does not even require the seller and buyer to take into account the principle of good faith in their contractual relationship directly, although some of the legal literature tends to do so,⁴⁸ but rather relies on the interpretation of the Convention to observe good faith to the extent that it is expected in *international* trade. The reference to international trade also means that, here too, there should be no recourse to the interpretations developed in the law of individual Contracting States.⁴⁹ Of course, when interpreting certain Articles of the CISG in good faith, this may indirectly affect the rights and obligations of the parties,⁵⁰ as it is evident from the case-law. For example, the courts have derived the duty of cooperation and providing information of the parties to a sales contract from good faith as an interpretative requirement of the CISG.⁵¹ It is certainly no coincidence that it is mainly the fora of continental legal systems, and among them mainly German courts, that have ruled in this spirit.

The principle of observance of good faith in international trade requires, for example, that the party applying general contract terms must make them known to the other contracting party,⁵² and includes the prohibition of abuse of rights and the principle of *venire contra factum proprium*.⁵³ However, the literature here also emphasises that the content of good faith should not be determined by reference to national law, but the courts may take into account various international conventions and their drafts or international commercial customs. In interpreting the Convention, comparative law may be of importance in the development of common solutions acceptable at international level, but the direct importation of concepts and interpretative content developed in national laws should be avoided.⁵⁴

American Arbitration Association, United States, 23 October 2007; CLOUT case No. 699 [*U.S. District Court, Eastern District Court of New York*, United States, 19 March 2005; *U.S. District Court, Northern District of Illinois*, United States, 21 March 2004 (citing seven foreign court judgments); CLOUT case No. 580 [*U.S. Court of Appeals* (4th Circuit), 21 June 2002]; CLOUT case No. 138 [*U.S. Court of Appeals* (2nd Circuit), United States, 6 December 1995] available at: <https://iicl.law.pace.edu/> (downloaded 08.04.2022).

⁴⁶ M.J. Bonell (2008 above no. 35 at, 4. Disputes over the interpretation of good faith may have contributed to the UK's failure to ratify the CISG. See Natalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 *Pace International Law*, 145-181, in particular 165-168.

⁴⁷ The same uncertainty arising from the use of the term "good faith" has also been present in European contract law since the creation of Directive 93/13/EEC.

⁴⁸ In fact, it is difficult to justify why, if the good faith criterion is to be applied to the interpretation of the Convention, it should not be applied to the interpretation of commercial contracts.

⁴⁹ Mankowski, above no. 28 at 40.

⁵⁰ Schlechtriem&Schwenzer, above no. 28 at 127.

⁵¹ UNCITRAL: *Digest of Case Law...* 42 and 51. *Oberlandesgericht Celle*, Germany, 24 July 2009, CLOUT case No. 1189 [*Tribunale di Rovereto*, Italy, 21 November 2007]; *Oberlandesgericht Köln*, Germany, 21 December 2005, *Landgericht Neubrandenburg*, Germany, 3 August 2005, *Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce*, Serbia, 9 December 2002, CLOUT case No. 445 (*Bundesgerichtshof*, Germany, 31 October 2001).

⁵² Schlechtriem&Schwenzer, above no. 28 at 127.

⁵³ UNCITRAL: *Digest of Case Law...* 43. 51. CLOUT case No. 595 (*Oberlandesgericht München*, Germany, 15 September 2004); *Tribunale di Padova*, Italy, 31 March 2004, *Tribunale di Padova*, Italy, 25 February 2004.

⁵⁴ Schlechtriem&Schwenzer, above no. 28 at 128, 131.



The author of these lines also considers it natural that the various contractual principles (PECL,⁵⁵ UPICC) aiming at the international or European harmonisation of contract law should at least provide a reference point for the interpretation of the CISG, since they are often more comprehensive and offer more detailed rules.⁵⁶ All the more so since, in 2007 the CISG's drafting institution, the UNCITRAL, itself explicitly endorsed the UNIDROIT Principles, suggesting that they be used to interpret the Vienna Sales Convention⁵⁷ and more recently expressed its appreciation for the preparation of the 2010 version of the UNIDROIT Principles, valuing their contribution to the expansion of international trade by developing general principles for international commercial contracts.⁵⁸ The supporting resolution also recalls the objectives of the UPICC, which explicitly state that the Principles can be used to interpret or supplement legal instruments containing uniform international law.⁵⁹ Against this background, the SCHLECHTRIEM and SCHWENZER Commentary, while recognising that they may offer 'internationally acceptable' solutions, cautions against the use of different principles of contracts, arguing that the political background of these instruments is different and that they are predominantly of the continental legal tradition.⁶⁰

It should be noted, however, that one of the model clauses on the choice of UNIDROIT Principles would also allow contracting parties to choose the law of a State, and possibly the CISG as part of it, to interpret and supplement it in accordance with the UPICC.⁶¹ The commentary on this option assumes that the UPICC is not identical to the general principles underlying the Vienna Sales Convention⁶² and cannot automatically be taken into account. It was therefore necessary to draft a clause to ensure the interpretative role of the UPICC.

A separate question is the treatment of legal lacunae, which is provided for in Article 7(2) CISG, partly on the model of Article 17 ULIS.⁶³ The question of how far the uniform law is 'self-supporting', watertight, able to provide answers to questions relating to international sales, and to what extent it needs the assistance of conflict of laws rules. The solution requires a multifaceted analysis.⁶⁴

First, a distinction must be made between so-called external and internal loopholes (gaps).⁶⁵ External legal loopholes are those areas which are expressly excluded from the scope of the Vienna Sales Convention, in accordance with the provisions of Articles 2 to 5, or which are clearly outside the scope of the Convention. In such cases, in the absence of a uniform law, recourse must be made immediately to private international law and the substantive law designated by it. By contrast, although, in theory internal legal loopholes do fall within the Convention's scope, there is no express rule on the question raised. The existence and scope of internal loopholes is, of course, also affected by the interpretation of the Convention, and an expansive interpretation of the Articles obviously reduces the number of gaps. At this point, therefore, interpretation and the effort to fill the loopholes almost meet.

Issues that constitute internal loopholes must, in accordance with Article 7, be resolved in the first instance in accordance with the general principles underlying the Convention. The CISG does not list these general principles but, over the past decades, the legal literature has 'distilled' and generalised a number of principles from the Convention's specific provisions. Among several other principles, the

⁵⁵ Ole Lando, Hugh Beale (eds), *Principles of European Contract Law. Parts I and II*, (The Hague: Kluwer, 2000) Ole Lando, Eric Clive, André Prüm, Reinhard Zimmermann (eds): *Principles of European Contract Law. Part III*. (The Hague: Kluwer, 2003).

⁵⁶ Bonell (2018), above no. 35 at 32-33.

⁵⁷ Bonell (2008), above no. 35 at 27. Also, UNCITRAL, *HCC and Unidroit Legal Guide...* 78. See also Pilar, Perales Viscasillas, 'Interpretation and gap-filling under the CISG: contrast and convergence with the UNIDROIT Principles' (2017) 22 *Uniform Law Rev* 4-28, in particular 20-24.

⁵⁸ United Nations Report of the United Nations Commission on International Trade Law Forty-fifth session (25 Ju-e - 6 July 2012) General Assembly Official Records Sixty-seventh session, Supplement No. 17 A/67/17 V.12-55154 33.

⁵⁹ Mankowski, In Mankowski, above no. 28 at 39-40.

⁶⁰ Schwenger, above no. 34 at, 67; Schlechtriem&Schwenger, above no. 28 at 131.

⁶¹ 'This contract shall be governed by the law of [State X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2016).

⁶² UNIDROIT: *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*. 21.

⁶³ Winship, above no. 16 at 509.

⁶⁴ Michael Bogdan, *Private International Law as Component of the Law of the Forum*. (The Hague: Brill-Nijhoff, 2012) 352, 38-39; Berman, above no. 2 at 26.

⁶⁵ Mankowski, In Mankowski, above no. 28 at 40.



primacy of the autonomy of the parties, the duty of cooperation and the exceptional nature of the terminating contractual relationships or the *favour contractus* are worth mentioning.⁶⁶ Moreover, the literature also refers to the importance of the UNIDROIT Principles in the context of the formulation of general principles and their possible role in 'gap filling'. This position refers to the continuous development of the general principles of transnational contract law, which is also reflected in the UPICC.⁶⁷

However, even more important is the role of private international law in filling the gaps in uniform law. The CISG understandably sees this as a last step, an *ultimum refugium*,⁶⁸ since the uniform law was created precisely to go beyond the need to subordinate international sales transactions to different state laws by means of conflict of laws rules,⁶⁹ and thus to make their legal assessment difficult to foresee and uncertain. Indeed, if we take a sufficiently broad view of the provisions of the Vienna Sales Convention, many legal loopholes can be filled.⁷⁰ At the same time, however, the interpretation of the Convention and the formulation of general principles should not be overstretched, by attempting to extend it to issues on which the CISG is obviously silent. This also would lead to legal uncertainty since it is never known what the forum in question will 'see' in the CISG text. It is therefore appropriate, as a last resort, to seek the assistance of private international law, as provided for in Article 7(2) of the Convention. The text referring to conflict of laws was, moreover, the result of considerable discussion. The Government of Mexico, for example, had previously considered the role of private international law to be particularly dangerous from the point of view of uniformity and international character;⁷¹ the final version, reflecting a compromise, was the result of Italian and Czechoslovak proposals in the Vienna Sales Convention.⁷²

Obviously, private international law must be applied if the parties have excluded a provision of the CISG and have not declared how they will replace it, thus creating a legal vacuum. The conflict of laws rules applied by the courts may be the product of uniform law themselves, such as the 1955 Hague Convention on the Law Applicable to International Sales Contracts, of which eight States are currently members (including five EU Member States),⁷³ or regional instruments such as the Rome I Regulation on the law applicable to contractual obligations, or even a state's own rules of private international law. The arbitral tribunals will choose the applicable law according to their own rules and procedures.⁷⁴

Particular questions of interpretation may arise if the contracting parties have excluded part of their legal relationship from the CISG, i.e. if they have made use of *dépeçage* and subjected it in part to other, national law. In interpreting these parts, account must obviously also be taken of the applicable law's own rules of interpretation, but it must also be borne in mind that the legal relationship as a whole falls within the scope of the Vienna Sales Convention, which expressly requires uniform interpretation.⁷⁵

4. The UNIDROIT Principles (UPICC)

The UPICC carry forward the provisions of the CISG on interpretation in Article 1.6 with two significant differences. The differences with the CISG are that the above-quoted article does not include good faith as a requirement for the interpretation of the Principles themselves, nor does it refer to the use of the law applicable under the provisions of private international law as a last resort to fill legal gaps. However, perhaps as a logically clearer solution, the UNIDROIT Principles set out, as a separate

⁶⁶ Ibid. 41; Ioanna, Thoma, 'Relations between Conflict of Laws Rules and Uniform Law' (2000) 53 *RHDI*, 169-188, 187.

⁶⁷ J. Michael Dennis, 'Modernizing and harmonizing international contract law: the CISG and the UNIDROIT Principles continue to provide the best way forward' (2014) 19 *Uniform Law Review* 114-151, 121 and 131.

⁶⁸ Mankowski, In Mankowski, above no. 28 at 40; Thoma above no. 66 at 187.

⁶⁹ Hercules Booyens, 'The International Sale of Goods' (1991-1992) 71 *The 17 S. Afr. Y.B. Int'l L.* 71-89, 79-80.

⁷⁰ Winship, above no. 16 at 530.

⁷¹ Winship, above no. 16 at 514.

⁷² Winship, above no. 16 at 514-515.

⁷³ Denmark, Finland, France, Nigeria, Norway, Italy, Switzerland and Sweden, entered into force on 1 September 1964. Source: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=31> (downloaded 30.01.2024).

⁷⁴ Schlechtriem&Schwenzer, above no. 28 at 141.

⁷⁵ I. Thoma, above no. 66 at 183-184.



requirement, the application of good faith and fair dealing for the parties to an international commercial transaction and, where applicable, the parties to a sales contract.

As regards the details, the official commentary to Article 1.6 makes it clear that, although the application of the UPICC is at the will of the parties, it constitutes an autonomous legal order which lays down rules of interpretation to ensure uniform application.⁷⁶ This is all the more necessary because there are various obstacles to uniform interpretation, as Voganauer's commentary points out: like many international instruments, the UNIDROIT Principles have several official language versions (English, French, German, Italian and Spanish), and unofficial translations have also appeared in other languages, Arabic, Chinese or even Hungarian. The risk of divergent interpretations is increased by the use of the usual open-ended concepts such as 'reasonable' or 'fair' or 'good faith', which are necessary in comprehensive codifications, and there are only a limited number of definitions in the Principles, such as in the 1935 or 1939 UNIDROIT Draft, or in many international conventions since then.⁷⁷ Moreover, as in the case of the CISG, there is no international forum that can interpret the UNIDROIT Principles with binding force. There is the Unilex database, which keeps track of the jurisprudence on the UPICC, but there is no body such as the CISG Advisory Council, which could at least issue opinions with a strong persuasive force on contentious interpretation issues.⁷⁸

Article 1.6 of the UNIDROIT Principles, modelled on Article 7 of the CISG, obviously offers similar answers to the difficulties of interpretation that arise. It should be stressed that what is at stake here is the interpretation of the UNIDROIT Principles themselves, although this is not always perceived in the jurisprudence and, in some cases, reference is made to this provision in the context of the interpretation of arbitration agreements too.⁷⁹ This is surprising, considering that the UNIDROIT Principles devote a whole chapter to the interpretation of commercial contracts, carefully assessing aspects such as the intention of the parties, the interpretation of statements and other conduct, relevant circumstances, reference to contract or statement as a whole, the requirement that all terms to be given effect), the *contra proferentem* rule or the treatment of linguistic discrepancies and the supplying an omitted term,⁸⁰ however, it is also a fact that the way in which the UNIDROIT Principles are interpreted and their content is determined does have an indirect effect on the legal relationship between the contracting parties.

In this case too, it is clear (and the official commentary emphasises this) that the terms and concepts used in the UPICC must be interpreted in the light of their international character, not by adopting the traditional meaning they may have in the domestic law of a State.⁸¹ This is all the more justified because the Principles are rightly seen as the fine distillation of decades of comparative international law work. It differs from the Vienna Sales Convention in that the interpretative guidelines include consideration of the *purposes* of the UPICC, and to this is linked the promotion of uniform application. In any case, the explicit reference to the purpose of the Principles, and of the individual provisions, could also open the way to a teleological interpretation, which has been so useful in recent decades, for example, in the European Court of Justice⁸² or which Lord Denning has called for in English law.⁸³

The definition and, in essence, the interpretation of some concepts are also laid down in advance in the UNIDROIT Principles, thus reducing any difficulties of interpretation that may arise in the future. Hence,

⁷⁶ UPICC 15. Also, *UNCITRAL, HCC and Unidroit Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales*. (Vienna: United Nations Commission on International Trade Law, Hague Conference on Private International Law, 2021) 85.

⁷⁷ See, for example, the UNIDROIT Convention on International Factoring, Article 1 (2)-(4) (UNIDROIT Convention on International Factoring, Ottawa, 28 May 1988.).

⁷⁸ Stefan Vogenauer ed., *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*: 2nd ed., (Oxford: OUP, 2015) 186-187.

⁷⁹ *Ibid.* 182.

⁸⁰ See UPICC, Chapter 4, Articles 4.1-4.8.

⁸¹ UPICC 16; E. J. Brödermann, In Mankowski above no. 28 at, 491.

⁸² Koen, Lenaerts, José A. Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, *EUI Working Papers*, AEL 2013/9, Academy of European Law, Distinguished Lectures of the Academy, 23-26.

⁸³ Baron Alfred Denning, above no. 27 at 9-22.



Article 1.11 deals with, for example, the definition of 'court', 'place of business', 'obligor' and 'writing', in other words the written form.

Here again, the general principles are used to fill in the loopholes (*supplementation of the Principles*), namely where issues are covered by the UNIDROIT Principles but not explicitly regulated by them. The first step is obviously to identify the legal gap, whether it is a matter which is covered by the UPICC but not regulated, (i.e. an internal legal gap), or whether it is an area that is deliberately not covered or excluded by the UPICC, (an external legal gap). In the latter case, the aim is not to fill loopholes. Bearing in mind that the Principles apply to international commercial contracts, it means that consumer contracts, non-contractual obligations, property relations and civil procedure are outside their scope. In several cases, the UNIDROIT Principles themselves exclude certain matters that would otherwise fall within their scope; for example, the section on representation does not regulate an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority according to Article 2.2.1(3); similarly, the chapter on validity does not contain provisions on lack of capacity, according to Article 3.1.1.⁸⁴

To make matters easier compared to the CISG, the UPICC, as a kind of general part of commercial contract law, explicitly contains general principles, specifically on freedom of contract, the absence of particular forms, the binding nature of the contract, the requirement of good faith and fair dealing and the prohibition of inconsistent behaviour.⁸⁵ In comparison, it is somewhat disturbing that the official commentary emphasises the method of analogy in the first place,⁸⁶ given that this method has detailed and sometimes different rules in different legal systems.⁸⁷

However, unlike Article 7 of the CISG, Article 1.6 of the UPICC does not refer, as a last resort, that, in the absence of general principles, the filling of legal gaps must be resolved according to the law applicable under the rules of private international law, which is an obvious solution and is also provided for in a number of international conventions drawn up by UNIDROIT.⁸⁸ Point 4 of the official commentary to Article 1.6 simply states that the parties may at any time agree on a national law, the rules of which are complementary to the Principles and provides appropriate model clauses to that effect.⁸⁹ This possibility is of course given, but it does not explain the lack of reference to private international law, and perhaps reflects reservations on the use of conflict of laws. Nevertheless, the possibility of supplementing the UNIDROIT Principles on the basis of the law designated by private international law, in the absence of any other solution, is clearly there.⁹⁰ Moreover, Article 1.4 of the UPICC indicates that the Principles do not limit the application of mandatory rules of national, international or supranational origin, designated by private international law.

It is worth noting again that Article 1.6 of the UPICC on Interpretation and Supplementation does not speak about good faith. It does, however, devote a specific article to good faith as a requirement binding on the parties to a commercial contract. According to Article 1.7 '*each party must act in accordance with good faith and fair dealing in international trade. Parties may not exclude or limit this duty*'.⁹¹ The purpose of the norm is to ensure that the choice of non-state law, in the given case the UNIDROIT Principles, does not open the way to the derogation of mandatory rules found in the UPICC, as well as in otherwise applicable state law.⁹² Thus, whereas the CISG refers to good faith only in its interpretation of the Convention, the UNIDROIT Principles, conversely but justifiably, impose a requirement of good

⁸⁴ Vogenauer, above no. 78 at 204.

⁸⁵ See Articles 1.1 to 1.3 and 1.7 to 1.8 of the UNIDROIT Principles 2016. Also, Brödermann, In Mankowski above no. 28 at 492.

⁸⁶ UPICC 17. 'The first step is to attempt to settle the unsolved question through an application by analogy of specific provisions'

⁸⁷ Vogenauer, above no. 78 at 203.

⁸⁸ See, for example, the UNIDROIT Convention on the International Receipt of Claims, Article 4(2), cited above.

⁸⁹ UPICC 17.

⁹⁰ Vogenauer, above no. 78 at 204.

⁹¹ UPICC Article 1.7.

⁹² Symeon C. Symeonides, 'Contracts subject to non-state norms' (2006) 54 *The American Journal of Comparative Law*, 209-232. 228.

faith and fair dealing on the parties to commercial transactions, which then recurs in many other norms of the instrument.

5. Draft Common European Sales Law (CESL)

The draft CESL Regulation, at least at the level of the normative text (black letter rules), does not contain specific provisions on the interpretation of the planned EU Regulation and its annex, unlike the other documents analysed, notwithstanding the fact that the CFR *Expert Group*, which prepared the draft Common Sales Law, has explicitly discussed this issue, based on the principles laid down in the CISG.⁹³ Perhaps the silence of the norms may also be explained by the fact that the European Court of Justice has developed a set of interpretative principles over the past decades to explore the meaning of Community and EU law.⁹⁴

However, recital (29) of the CESL proposal does set out some guiding principles for interpretation. According to these, once a valid agreement has been reached on the application of the Common European Sales Law, only the Common European Sales Law will govern in the matters covered by it. The Common European Sales Law must be interpreted '*autonomously*', in accordance with the well-established principles of interpretation of EU law. Questions relating to matters governed by the Common European Sales Law but not expressly dealt with therein can be answered only by interpretation of its rules, without recourse to any other law. The last turn is certainly aimed at excluding private international law, returning to the approach that preceded the CISG.

In addition, the rules of the CESL must be interpreted in the light of the underlying objectives and principles and all its provisions.⁹⁵ In the following paragraphs, it specifically addresses general principles such as freedom of contract,⁹⁶ the principles of good faith and fair dealing and the protection of a valid contract. As in the UPICC's solution, good faith and fair dealing are now presented as a principle governing the way in which the parties cooperate and thus as a means of interpreting the contract they have concluded, rather than the CESL itself, although this distinction is not sufficiently explicit in the overlapping paragraphs of the preamble.

The CESL provides an unprecedentedly long list of definitions, ranging from a to y, in Article 2, starting with basic concepts such as '*contract*',⁹⁷ '*good faith and fair dealing*', '*loss*', '*standard contract terms*', '*trader*', '*consumer*', '*goods*' and '*damages*', but also including, for example, the definition of '*durable medium*' and '*business premises*'. It contains a number of definitions, starting with the category of contract, which were not laid down in the previous instruments,⁹⁸ thus trying to ensure a foreseeable and autonomous interpretation of the concepts, independent of national laws.

This list, with a separate bundle of definitions relating to business-to-business and consumer transactions in a different structure, is also maintained in Article 8 of the ELI Statement,⁹⁹ aiming to amend and improve the text of the CESL. However, it would nevertheless consider it appropriate to include a general provision on interpretation: this is contained in its Article 7, based on similar provisions in previous uniform legal instruments on international sales.¹⁰⁰ In other words, the Common European Sales Law should be '*interpreted autonomously and in accordance with its objectives and the principles underlying it.*' Internal legal loopholes should also be filled in accordance with the objectives and fundamental principles of the CESL, without recourse to the national law that would apply in the absence of an agreement to choose the CESL. Finally, the Article proposed by ELI enshrines the principle of *lex specialis derogat legi generali*, stating the primacy of special rules over general rules. Furthermore, the ELI Statement considers it appropriate to set up an advisory body similar to the CISG Advisory Council and stresses the importance of a digest of case law and cooperation between the courts of the Member

⁹³ CFR Expert Group, Minutes of the Fifth Meeting, 30 September - October 2010. 3.

⁹⁴ See Lenaerts, Gutiérrez-Fons, above no. 82.

⁹⁵ COM(2011)635 final, 21-22.

⁹⁶ CESL (30).

⁹⁷ CESL draft regulation Article 2 (a) '*contract*' means an agreement intended to give rise to obligations or other legal effects'.

⁹⁸ Although, as noted above, the 1935 UNIDROIT Draft already contained definitions.

⁹⁹ Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011)635 final (Vienna: European Law Institute, 2012).

¹⁰⁰ ELI Statement, Article 7, interpretation.

States, and the possibility of settling disputes relating to the CESL by means of online and alternative dispute resolution.

CONCLUSION

Uniform law instruments have gradually developed certain principles governing their interpretation, such as the international character of the instrument. The requirement of autonomous and uniform interpretation became a norm. A significant difference between the uniform contract law sources applied today remains the acceptance/or rejection of good faith as a principle of interpretation. In the case of filling legal gaps, the general principles underlying the conventions have been considered since the first drafts of UNIDROIT. There are still distinctions in relation to the possible role of private international law, more precisely the role of the national law designated by private international law, in filling loopholes.

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