Implementing the UNILEX database and applying the CISG and UNIDROIT principles

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Treaties that introduce uniform substantive rules combined with the existence of international principles pursuing the same aim in the field of contract law, may help to improve the foreign investment climate, particularly in the EBRD’s countries of operations.

Introduction

Prospective foreign contractual parties may be deterred from entering into a mutually profitable transaction when the applicable law is not their own, due to the added risks and information costs involved. Even the stipulation of a favourable choice-of-law provision does not solve all the problems, since there may be cases where it is difficult to reach such an agreement. Furthermore, and more importantly, many domestic laws are somewhat outdated and not tailored to international commercial transactions.

This article presents the UNILEX database on international case law based on the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles for International Commercial Contracts. The discussion highlights the importance of uniform interpretation and application of “hard law” instruments, such as CISG, as well as “soft law” codification, for example the UNIDROIT principles, along with the specific role of international case law in this context. Reference will also be made to the application of the CISG and UNIDROIT principles in central and eastern Europe.

The need for uniform interpretation and application of international commercial law instruments

One of the greatest challenges facing those drafting instruments on uniform law is how to ensure that the consensus achieved “on the books” becomes effective “in action”. In other words, the task of creating conventional uniform rules is far from complete following the successful approval and ratification of (or accession to) an international instrument. The most important test is whether the uniformity reached is followed by homogenous interpretation and application in practice.

Many well-known factors, however, may play a role in disrupting uniformity when a decision-maker is confronted with rules of international origin. These may include the different approach in interpreting statutory texts, as well as the influence of the domestic law background of the decision-maker, all the more so if it is a national court and not an international arbitral body. This was the reason those drafting CISG introduced Article 7 (1), which clearly states that “in interpreting the Convention, regard is to be had to its international character and to the need to promote uniformity in its application…”


3. Belarus, Estonia, Hungary, Lithuania, Poland, Russia, Serbia, Slovak Republic and Ukraine.

This formulation has served as a model for subsequent conventions,\(^5\) as well as for other non-binding international instruments such as the UNIDROIT Principles for International Commercial Contracts,\(^6\) and at the European level, the European Principles of Contract Law (PECL).\(^7\)

**International case law as “persuasive” authority**

Although it is important, Article 7 is justly considered a general provision, indicating a goal to achieve rather than imposing any specific methods.\(^8\) The question is, therefore, how best to implement it in practice. Short of granting a supranational tribunal the power to decide on the correct interpretation of uniform law, various solutions have been envisaged.

In the writer’s opinion, the most effective way to ensure a truly common understanding of uniform rules is that judges and arbitrators (as well as practising lawyers) have an awareness of how the same provisions have already been interpreted and applied in previous case law from different countries. Single decisions and consistent interpretative trends in different jurisdictions may well be considered “persuasive” authority.\(^9\)

In the words of a well-known decision taken by an Italian tribunal: “such foreign case law, contrary to what a minority of authorities have argued, is not binding on this Tribunal. It must nevertheless be considered in order to assure and to promote uniform enforcement of the United Nations Convention, according to its Article 7(1).”\(^10\)

While by no means bound by such judicial precedents, decision-makers should, under Article 7(1), at least refer to them and clearly define any differing solution.\(^11\) Certainly, the role of international scholarship in disseminating information on existing case law in various languages and in clarifying or criticising their outcome should not be underestimated. It may offer judges and arbitrators convincing arguments for disregarding certain previous decisions and starting new trends, especially where general clauses or unclear provisions are concerned. Case law as such, however, remains of paramount importance.

**Development and structure of the UNILEX database**

The UNILEX database was developed under the direction of M. J. Bonell (first at the Center for Comparative Studies in Rome, and later by a small group of researchers) to aid the uniform application of CISG. UNILEX can be accessed on the internet, free of charge, at www.unilex.info and mainly contains international case law on CISG. At the time of writing, the decisions came from 29 states as well as several different arbitral courts. Furthermore, it also covers the practical application of UNIDROIT principles (especially arbitral awards, but also domestic court decisions).

Probably the most interesting feature of UNILEX is that a search for case law can be conducted not only by date and jurisdiction, but also by specific details listed under each article. This feature was developed initially on the basis of current international commentaries but later also took the most commonly litigated questions into account. Moreover, a search across a wide array of subject matters is possible.

Another important aspect that singles out UNILEX is that each decision is provided with keywords in English summarising the most relevant legal points and is presented in an English abstract. This reports, with as much detail as possible, the facts underlying the decision in order to facilitate future use.\(^12\)

Lastly, there is an added feature of a list of bibliographical references, ordered by authors, articles and by specific areas of interest. It is possible to print all the information or to cut and paste it into text documents.

**UNILEX’s role as an aid to the interpretation and application of CISG**

Any discourse on Article 7(1) runs the risk of remaining too theoretical if no concrete examples are provided. A “reasoned” database such as UNILEX can be of practical utility.

5. See the 1988 Ottawa Conventions on International Financial Leasing (Art. 6 (1)) and Understanding Clinging (Art. 4 (1)); more recently the 2001 Cape Town Convention on International Interests in Mobile Equipment (Art. 5 (1)).

6. Art. 1.6 (1) UNIDROIT principles. 7. Art. 1.6 (1); Landby/Beale (eds.) (2000), Principles of European Contract Law, Part. II, Wolter.

7. See F. Ferrari (cited note 3).


10. Tribunale di Vigevano, 12 July 2000, abstract and original full text in UNILEX. All other decisions cited in this article are to be found in UNILEX. The quote is, however, taken from the English translation available at the CISG web site of Pace University.


12. Predictably, permission to publish the original text of arbitral awards is not easy to obtain. The ICC itself, however, in its periodical publications collected inter alia decisions on CISG and on the UNIDROIT principles, ICC International Court of Arbitration Bulletin both in English and French.
help in solving some of the interpretative issues inevitably raised by international conventions in general and CISG in particular.

A few instances exist where UNILEX has been expressly cited as a reliable source of information, not only by scholars but also by judges and arbitrators wishing to cite foreign case law in order to sustain or reject an argument under CISG.19 UNILEX facilitates the search of precedents that have stressed the importance of an autonomous interpretation of CISG provisions under Article 7(1), or used previous foreign case law (as well as scholarly opinions and preparatory works), by grouping them together under general issues of Article 7.

Some examples may help to illustrate the importance of referring to previous case law for issues that are not explicitly addressed by CISG but represent common problems in practice:

**Implied exclusion of CISG.** The Convention allows parties to exclude its application (which is otherwise automatic if the territorial and substantive requirements of Articles 1-5 are met). Although not expressly mentioned in CISG, an implied exclusion by means of indirect language is considered to be effective. A quick search in UNILEX under Article 1, “choice of the law of a Contracting State as governing law of contract” (or a search by the topic “implied exclusion”), however, will alert decision-makers and lawyers that the overwhelming majority of cases from various jurisdictions do not consider the choice of the law of a Member State (either in the contract or in the procedural documents) as sufficient in itself to exclude the application of the Convention. Typically, anything short of an express exclusion would not be accepted. This may be useful information both in litigation and in drafting the contract.15

**Distributorship agreements.** Another common problem concerns the meaning of “contract of sale” under CISG. In particular, are framework distribution agreements covered by the Convention? Again, UNILEX makes things easier by expressly listing “distributorship agreements” under Article 1. The vast majority of decisions deny application of CISG to the distributorship agreement while upholding it for any subsequent sale contract concluded on its bases,16 except when the framework contract contains specific sales provisions.17

Other interpretative issues in CISG are certainly less easy to solve, especially when the application of general clauses is concerned: “reasonableness of time” for notice of non-conformity by the buyer (Article 39(1) CISG) or “fundamental” character of the breach leading to the right to avoid (terminate) the contract (Article 25 CISG). General clauses are a clear indication that those drafting the Convention wished to leave certain discretion to judges. This is where the inclusion of bibliographical references in UNILEX reveals its importance, since the guidance of scholarship is needed. Knowledge of international judicial trends remains, however, essential. Concerning Article 39(1) CISG, for example, it underscores the close link between the duty to examine the goods and that to notify the non-conformity, and points out the need to consider the circumstances of the case (type of goods, type of non-conformity). Even more interestingly, it shows that the vast majority of cases are decided not on such questions but on the buyer’s failure to meet the burden of proving either the non-conformity or the notice within reasonable time.

Further, there are a number of provisions in CISG which have proven unsatisfactory in practice.18 A look at the decisions under Articles 46 and 48 of CISG, for example, reveal how difficult it is to apply the rules to remedy non-conformity and to determine the relationship between the buyer’s remedy and the right of the seller to amend non-performance.

Lastly, judicial precedents are instrumental in pointing out the most disturbing gaps in the Convention: among others, the lack of rules on standard terms or on the limitation of action (prescription). In isolated instances, courts have even reached reasonable solutions by applying purported general principles of CISG to solve such matters.19 This should prompt parties to use express
language in the contract or to make reference to other instruments which provide a better answer to the abovementioned obscurity and gaps, such as the UNIDROIT principles.

UNILEX’s impact on the practical application of the UNIDROIT principles

Perhaps the most original feature of UNILEX is that it covers both CISG and the UNIDROIT principles. So far as the latter are concerned, in fact, it represents the only complete database on case law and bibliography. As is well known, the UNIDROIT principles are a set of non-binding rules of doctrinal origin applicable to international commercial contracts. In the case of a “soft law” instrument such as this, the importance of monitoring its practical application is even more relevant than where uniform binding rules are concerned. Not only does it permit the gathering of information on the interpretation of single provisions; more importantly, it shows the effective acceptance of the persuasive rules in practice.²⁰

To this end, the preamble to the UNIDROIT principles, indicating how they should be used, is followed in UNILEX by a detailed list of issues concerning the ways in which the principles can be applied in practice as:

- governing rules of law of the contract expressly chosen by the parties, further specifying whether the decision-maker is a domestic court or an arbitral body
- a source of “general principles of law”, the lex mercatoria or the like
- a means of interpreting and supplementing international uniform law
- a means of interpreting and supplementing domestic law.

One example is of special interest in this context. According to the preamble, the Principles “may be used to interpret or supplement international uniform law instruments”.²¹ A search for case law in UNILEX shows that the overwhelming majority of cases involve the relationship between the principles and CISG. The opinion of scholars on the legitimacy of using the UNIDROIT principles to interpret and/or fill the gaps of CISG is divided.²²

Reference to the relevant issue in UNILEX allows the searcher to find a certain number of arbitral cases where CISG and the UNIDROIT principles have been referred to together, although parties had not expressly chosen the latter as the governing rules of law of their contract. Significantly, such decisions do not address the vexed theoretical question of legitimacy but more practically, it was seen to be useful to apply both in order to have a more solid justification for the given solution.²³

Decisions on CISG and the UNIDROIT principles in the EBRD’s countries of operations

At first glance, the number of published decisions on CISG issued in the EBRD’s countries of operations may seem inferior to expectations, since the Convention has by now been ratified, accessed or accepted by succession in the great majority of such states.²⁴ There are various reasons for the limited practical application of CISG: in some instances, the recent adoption or notification of succession; in others, the lack of awareness, information and/or interest of the business community and practising lawyers or the tendency to indiscriminately exclude the Convention.²⁵ Nevertheless, we already find a number of decisions rendered by Supreme Courts;²⁶ moreover, CISG was applied by the Arbitration Courts attached to the national Chambers of Commerce.²⁷

Among recent cases, the most interesting in this context are the ones where courts endeavoured to interpret CISG autonomously and to fill the gaps by referring to its general principles or to non-binding codifications such as the UNIDROIT principles and, less frequently, the PECL.

The Polish Supreme Court, for example, in a dispute involving the sale of a specific type of leather for shoes by a Polish supplier to


²⁴. See among others ICC Arbitral Award, December 1997, No. 8,817, on the subject matters of usages and mitigation of damages: the Tribunal stated that it would apply CISG “and its general principles, now contained in the UNIDROIT principles”; ICC Arbitral Award, March 1998, No. 9,117, on merger clauses, written modification clauses and contract interpretation: in applying CISG the Tribunal considered it “informative” to refer to the UNIDROIT principles, “because they are said to reflect a world-wide consensus in most of the basic matters of contract law”. Other examples are provided below, para. VI. See also M. J. Bonell, An International Restatement, cited note 2.

²⁵. The date of entry into force of the Convention will be: Albania 1 June 2010; Armenia 1 January 2010; Belarus 1 November 1990; Bosnia and Herzegovina 6 March 1992; Bulgaria 1 August 1991; Croatia 8 October 1991 (notification of succession to the Yugoslavian Republic in 1998); Czech Republic 1 January 1993; Estonia 1 October 1994; FYR Macedonia 17 November 1991 (notification in 2006); Georgia 16 August 1994; Hungary 1 January 1998; Kyrgyz Republic 1 June 2000; Latvia 1 August 1998; Lithuania 1 February 1996; Moldova 1 November 1995; Mongolia 1 January 1996; Montenegro 3 June 2006 (notification 23 October 2006); Poland 1 June 1996; Romania 1


30. Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 23 January 2008, cited note 26. Other interesting examples are Supreme Economic Court of Belarus, 20 May 2005, cited note 13 and Commercial Court of Brest Region (Belarus), 8 November 2006 (rate of interest under Art. 78 determined by the applicable domestic law – Art 1093 (1) of Civil Code of Belarus provides application of international usages in contracts with foreign elements if they do not contravene the law of Belarus – reference to the full text of Art 7.4.9 of the UNIDROIT principles).

31. Supreme Court of Poland, 6 November 2003, No. III CZP 61/03.

32. Supreme Court of Lithuania, 6 November 2006, No. 3K-P-382/2006.

Lastly, concerning the application of the UNIDROIT principles, of particular interest are the decisions that testify their role in “interpreting domestic law” and in “serving as a model for national legislation”. For example, a resolution rendered by the Polish Supreme Court on whether under Polish law a contractually stipulated penalty must be paid even where the creditor has suffered no loss, stated that the debtor is not released from paying it even if it can prove that the creditor has not suffered any damage, and in this context expressly referred to the UNIDROIT principles (Article 7.4.13). Further, in a dispute between two Lithuanian parties concerning the bidding procedure for a construction contract, the Lithuanian Supreme Court referred to the UNIDROIT principles in order to interpret Article 6.163 of the Lithuanian Civil Code, a provision clearly influenced by international rules such as the Principles themselves.
Conclusion

It is important to take judicial precedents into account to ensure uniform interpretation and application of international commercial law instruments. It is the opinion of the author that Article 7(1) of the CISG and similar provisions require judges or arbitrators to make reference to previous international case-law; while such precedents are not technically binding, an adequate justification at least should be given when choosing an interpretation which is contrary to a consistent trend of previous judicial decisions.

In any case, the practical utility of information on judicial precedents cannot be denied, both when a controversy arises and when drafting agreements or standard terms. UNILEX on CISG and on the UNIDROIT principles is certainly not the only reliable source of such information, especially where the Convention is concerned. Moreover, the importance of scholarly guidance in interpreting judicial trends has to be stressed.

By virtue of its specific characteristics, however, UNILEX has proved itself particularly valuable. Thus, it may constitute an interesting point of reference for other uniform law instruments. Take the example of the model laws – especially useful in regional harmonisation as shown by the activity of the EBRD: in spite of their peculiarities, their practical application would benefit from disseminating knowledge not only on the adoption of (and changes to) the original text but also on case law. UNILEX only allows a search in English (although some domestic law concepts are also included). This does not diminish the value of creating “reasoned” databases on judicial trends for instruments in specialised areas where the legal vocabulary is necessarily circumscribed.

The conclusion is that UNILEX has already proved itself to be one of the most useful tools for scholars and practitioners alike – although certainly not the only one available – and could well provide an example for other areas of uniform commercial law.

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