

# INTERPRETATION HARDSHIPS REGARDING THE CISG, IN PARTICULAR ARTICLE 7

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## Abstract

Even though there are many instruments facilitating the autonomous interpretation of the CISG, it is never an easy task to apply an international treaty in the same way in Contracting States with different legal and cultural traditions. Uniform application of international private law is hard to achieve and there are some crucial question. I intend to observe the role of Article 7 of the CISG in a comprehensive way, which provision is about uniform application, good faith and how to settle matters, which are not expressly settled in the CISG. I also intend to present cases regarding this article demonstrating the concrete problems judges and arbitrators have to deal with. My goal is to summarize briefly the interpretation hardships in the case law regarding Article 7 of the CISG based on international judgements and academic literature. I also analyse some Hungarian cases that has not been published internationally so far. The conclusion is that the importance of Article 7 of the CISG might not be reflected well in Hungarian case law, even though this provision could be of great help – taking into consideration that the CISG is not commonly and widely applied in Hungary.

## Keywords

Interpretation; CISG; Article 7; Case Law.

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## 1 Introduction

Nowadays international commerce became beyond question really significant and because of globalization cross-border transportation of goods gives a real chance to be the part of it for almost everyone. Our daily life is unimaginable without the opportunity to take part in this kind of commercial activity – not only for enterprises, but even for consumers.

Nonetheless international commerce is not an unregulated topic: it is well regulated on international level, because the interest of those who take part in it requires the uniformity. The subject of this study is the successful convention, CISG, in particular Article 7, which is a very multi-functional provision and is primarily the source of unification. The achievements of the CISG are incontestable on the field of international trade, however it is also important to take into consideration some problematic questions. The CISG has more than 80 Contracting Parties,<sup>2</sup> so understandably because of this high number the uniform interpretation of the CISG can easily face hardships, since there are many states with different legal system and traditions. These countries may interpret the CISG rules differently – which is a clear obstacle of the main goal of uniform regulation worldwide. As a solution for this Article 7 of the CISG is containing rules for taking into consideration the international character, to promote uniformity, to observe good faith and it also contains a rule how to fill legal gaps.

In my study, I will write shortly about the CISG itself, the institutions that can improve and help the uniform application and interpretation, next the barriers that are present in spite of the previous factors and in the light of the previous questions I write about Article 7 of the CISG and also present some cases which are good examples for the wide possibility of how to apply it.

## 2 CISG

CISG was accepted in Vienna 1980 and was made by the United Nations specialized body - UNCITRAL. The convention's goal is to regulate uniformly

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<sup>2</sup> There are 86 parties of the CISG, information available at: *Status. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* [online]. UNCITRAL [accessed on 2017-07-08].

the problems regarding international trade and to promote wide acceptance. Its success was obvious from the start: in the Vienna Conference almost half of the parties of the United Nations represented themselves and many countries signed the CISG immediately.<sup>3</sup>

It was not accidental that the CISG was elaborated within the work of UNCITRAL: this institutions main task is to coordinate and promote the harmonization and unification the law of international commerce, to contribute to wider participation in the existing conventions, and it also works on preparing new conventions and model laws.<sup>4</sup> It is important to note, that the CISG also had antecedents: in 1935 within the International Institute for the Unification of Private Law (“UNIDROIT”) was created the first draft of a uniform law on the sale of goods. After World War II the work continued with drafts, and in 1964 in a Diplomatic Conference held at The Hague, twenty-eight States approved two Conventions: the Uniform Law on the International Sale of Goods (“ULIS”), and the Uniform Law on the Formation of Contracts for the International Sale of Goods (“ULF”), however these two Hague Conventions failed to accomplish the desired result of unification of sales law.<sup>5</sup> The real improvement was the CISG.

Nonetheless it was only natural that in the centre of unification stood the question of international commercial regulation already early in the 20th century. On this field, the development was really dynamic even in the aspects of different countries so it became clear on this field that the differences in national regulations and the uncertainty regarding the solutions of rules on conflict of laws caused obstructive effects in international relations.<sup>6</sup>

<sup>3</sup> MÁDL, Ferenc, VÉKÁS, Lajos. *A nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga*. Budapest: Elte Eötvös Kiadó, 2012, p. 287.

<sup>4</sup> Milassin is referring to the United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966: Establishment of the United Nations Commission on International Trade Law in his book, while defining the tasks of UNCITRAL, see: MILASSIN, László. *Az ENSZ Nemzetközi Kereskedelmi Jogi Bizottsága (UNCITRAL)*. Győr: Universitas-Győr Nonprofit Kft., 2016, p. 31.

<sup>5</sup> FELEMEGAS, John. The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation. *Review of the Convention on Contracts for the International Sale of Goods (CISG)* [online], 2000-2001, pp. 115–265 [accessed on 2017-04-26].

<sup>6</sup> BÁNREVY, Gábor. *A nemzetközi gazdasági kapcsolatok joga*. Budapest: Szent István Társulat, 2005, p. 25.

Nowadays there are 86 parties of the Convention, which shows the interest of the states and the success of the CISG. However, if we want to get a clear picture of reality we should observe the situation much closer.

## 2.1 Helping and Hindering Instruments Regarding the Uniform Interpretation and Application

The CISG itself contains rules helping uniform interpretation and application: the *Preamble* states: “...*the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade...*”. The other important provision is Article 7 of the CISG which I will introduce hereinafter.

First, we must highlight the importance of the official Secretariat Commentary on CISG,<sup>7</sup> which I will use in my study while observing Article 7 of the CISG. In addition, there is the CISG Advisory Council, which was established in 2001 on private initiative. Its main task is to publish its decisions regarding questions of interpretation and application of the CISG, so, its main goal is to promote uniform interpretation and application. The members of the CISG Advisory Council are more like scientists than representatives of their country and legal system. The Council's operation is based on authorization of Article 7 of the CISG.<sup>8</sup>

There are many databases containing and systematizing case law regarding the CISG. The four most important databases are the followings: first, Case Law on UNCITRAL Texts (CLOUT)<sup>9</sup> which was established in 1988 by the UNCITRAL Secretariat to help the work of UNCITRAL. This collection helps judges, arbitrators, lawyers, parties to be informed on court decisions and arbitration awards related to texts created by UNCITRAL and also to promote the uniform interpretation and application of the CISG

<sup>7</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat [online]. [accessed on 2017-04-25] (“Secretariat Commentary”).

<sup>8</sup> SZABÓ, Sarolta. *A Bécsi Vételi Egyezmény, mint nemzetközi lingua franca: az egységes értelmezés és alkalmazás újabb irányai és eredményei*. Budapest: Pázmány Press, 2014, pp. 59–60.

<sup>9</sup> *Case Law on UNCITRAL Texts* (CLOUT) [online]. UNCITRAL [accessed 2017-04-25].

and other UNCITRAL texts.<sup>10</sup> Secondly, the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 Edition presents cases and other information regarding the CISG in a format based on chapters corresponding to its articles. The Digest 2016 makes reference to the full text of the decisions when it is needed, yet the CLOUT reports cases only in the form of abstracts.<sup>11</sup> Thirdly, it is important to mention the work of the Institute of International Commercial Law of the School of Law, Pace University which has elaborated a huge database that is universal and free of charge for anyone interested in researching CISG.<sup>12</sup> Finally, there is the UNILEX system, which is a database of international bibliography and case law not only on the CISG, but also on the UNIDROIT Principles of International Commercial Contracts and like the other databases it contains detailed abstracts of cases.<sup>13</sup> Besides these well-known instruments, we cannot forget that the publication of relevant international case law on as many languages as possible is one crucial step forward the autonomous interpretation. This is why it is as important as the upper mentioned one to have a database in French,<sup>14</sup> or from April 2017 in Hungarian!<sup>15</sup>

After the short summary of instruments helping the uniform interpretation and application of the CISG, I would like to highlight the fact, that the CISG was published in six official languages.<sup>16</sup> In my opinion this fact itself can cause an opportunity for national courts to interpret and apply it in different ways. Questions of interpreting a foreign language is always problematic.

<sup>10</sup> *Case Law on Uncitral Texts (CLOUT). User Guide* [online]. United Nations General Assembly, 2 June 2010, p. 2 [accessed on 2017-04-25].

<sup>11</sup> *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 Edition* [online]. New York, 2016, p. XII [accessed on 2017-04-26] (“Digest 2016”).

<sup>12</sup> *CISG Database* [online]. Institute of International Commercial Law, School of Law, Pace University [accessed on 2017-04-26].

<sup>13</sup> *UNILEX on CISG and UNIDROIT Principles* [online]. UNIDROIT [accessed on 2017-04-26].

<sup>14</sup> *CISG France* [online]. [accessed on 2017-04-26].

<sup>15</sup> *CISG – Nemzetközi adásvételi jog* [online]. Széchenyi István University Egyetem [accessed on 2017-04-26].

<sup>16</sup> Article 101(2) of the CISG states: “... DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.”

In Hungary, people barely talk any foreign languages<sup>17</sup> so it is only natural that national courts, lawyers and others use much likely the national regulation. It is not only in Hungary, but for example also in China, that there are signs of the fact, that Chinese regulation is more favourable than the CISG by courts and arbitrators.<sup>18</sup> A great issue is that there is no upper judicial forum, which could really help the uniform application and its decisions could be guidelines for national courts to take them into consideration.

In the light of the above-mentioned facts, how can a single article of the CISG help to maintain the goal: uniform interpretation and application?

### 3 The Multifunctional Article 7

First of all, Article 7 of the CISG contains the following:

*“(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*

*(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”*

The importance of Article 7 is great: it was the first rule among the general provisions of the CISG that demanded to monitor application and help unification of the convention. Later this rule became a measurement in creating the text of other UNCITRAL documents.<sup>19</sup>

The Secretariat Commentary observed this article in a strict way, as it contains only the basic information, like the necessity to avoid differing constructions of the provisions of CISG by national courts, because there are

<sup>17</sup> Glavanits writes more detailed about this question in her study GLAVANITS, Judit. Obstacles of ODR in Developing Countries. In: *UNCITRAL Furthering the Progressive Harmonization and Modernization of International Trade Law*. Conference working paper, manuscript, 2017, p. 1.

<sup>18</sup> YONGPING, Xiao, WEIDI, Long. Selected Topics on the Application of the CISG in China. *Pace International Law Review* [online], 2008, Vol. 20, No. 1, p. 101 [accessed on 2017-04-26].

<sup>19</sup> MILASSIN, László. *Az ENSZ Nemzetközi Kereskedelmi Jogi Bizottsága (UNCITRAL)*. Győr: UNIVERSITAS-GYŐR Nonprofit Kft., 2016, p. 59.

sharp divergences in approach and concept among national rules. The task of Article 7 of the CISG is to solve this. The Secretariat Commentary also writes about the principle of good faith.<sup>20</sup>

From another approach, Article 7 of the CISG is containing the unification clause, because there is no upper judicial forum that could ensure uniform application. With this the danger is real: it can happen that national courts apply the CISG in their own perception with their own domestic traditions, constraining the goal of the convention.<sup>21</sup> Another approach in Hungarian literature is similar: the greatest danger for an internationally unified law is when in the contracting states national courts work out different case law. The role of Article 7(1) of the CISG is to restrain national courts and arbitrators from turning to domestic law while applying the convention.<sup>22</sup>

As for this short summary, I do not intend to observe every aspect of Article 7 of the CISG, I think showing the above-mentioned assertions in cases is much more useful.<sup>23</sup>

### 3.1 Related Cases

The following case is a good example of applying Article 7 of the CISG in a comprehensive way.

In the first matter, a Serbian seller and an Albanian buyer concluded a “Sales and distribution agreement”, which expired on 31 December 2007. However, the arbitration clause provided it “*shall survive termination or expiration of (the Contract)*”, so it was not time barred. The parties also agreed in the arbitration clause, that they may resort to arbitration within 30 days if the dispute could not be amicably settled. Thus, when the buyer failed to pay its obligation within 45 days of the delivery of the goods, the seller initiated the arbitration proceedings. The contract between the parties also contained a choice of law

<sup>20</sup> Secretariat Commentary, pp. 17-18.

<sup>21</sup> VÖRÖS, Imre. *A nemzetközi gazdasági kapcsolatok joga II.* Budapest: Krim Bt., 2004, p. 102.

<sup>22</sup> MÁDL, Ferenc, VÉKÁS, Lajos. *A nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga.* Budapest: Elte Eötvös Kiadó, 2012, p. 297.

<sup>23</sup> For further information about Article 7 of the CISG it would be worth to take a look at classic commentaries, like SCHWENZER, Ingeborg (ed.). *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)*. 4th ed. Oxford: Oxford University Press, 2016, p. 1602; or HONNOLD, John O. *Uniform Law for International Sales Under the 1980 United Nations Convention*. Edited and updated by Flechtner, Harry M. 4th ed. Kluwer Law International, 2009, p. 748.

clause, providing that the Contract “*shall be governed and construed in accordance with applicable regulations and laws of the Republic of Serbia*”, and since Serbia has ratified the CISG, the arbitrator stated that the CISG should be applied. In the meaning of Article 78 of the CISG, the seller was entitled to interest on the purchase price the buyer did not pay. Since the CISG does not determine the interest rate to be applied, the arbitrator found that the rate had to be determined in accordance with the principles of the CISF, in particular that of full compensation. The arbitrator also noted, that seller cannot get into a better position because of full compensation, than he would be if the contract was performed. The arbitrator considered the purpose of achieving uniform application of the CISG while applying Article 7(1), he also applied Article 7 while filling the gaps regarding the question of interest, and in my opinion, he also used the good faith rule, because he said that applying Serbian law in accordance with interest rate – as the seller requested – would result in overcompensation of the seller.<sup>24</sup>

In my perception in this case it was necessary to apply every aspect of Article 7 to make the right decision, but even so there are many cases where only parts of Article 7 are needed. And yet, even applying Article 7 of the CISG is not always consistent: sometimes we can get the same results from different ways. In the following examples in both cases Dutch tribunals had jurisdiction and the question was whether general provisions could be applied or not. However, in the first case the tribunal took into consideration the fact that the CISG does not contain rules regarding general provisions and so applying Article 7 of the CISG the tribunal got the final judgement from CISG and as a result of gap-filling, German law,<sup>25</sup> while in the second case no tribunal referred to Article 7, they applied only the provisions of the CISG.<sup>26</sup>

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<sup>24</sup> Arbitral award of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of 28 January 2009, No. T-8/08 [online]. In: *Pace Database on the CISG and International Commercial Law*. Pace Law School, Institute of International Commercial Law [accessed on 2017-04-26].

<sup>25</sup> Decision of Arrondissementsrechtbank Arnhem, Netherlands of 17 March 2004, No. 107309 /HA ZA 03-2099 [online]. *Pace Database on the CISG and International Commercial Law*. Pace Law School, Institute of International Commercial Law [accessed on 2017-04-26].

<sup>26</sup> Decision of Hof 's-Hertogenbosch, Netherlands of 29 May 2007, No. C051069/HE [online]. *Pace Database on the CISG and International Commercial Law*. Pace Law School, Institute of International Commercial Law [accessed on 2017-04-26].



### 3.2 Hungarian Case Law on Article 7

Even though the application of the CISG is mandatory for the courts in Hungary too, there are out of a few cases referring to the CISG in the text of the decision. Here I present three cases to represent the routine of the Hungarian courts applying or referring to Article 7 of the CISG.

In the first case, the main question was if there was a sales contract or not, because to be able to apply the CISG it is by all means necessary to have a sales contract between the parties. However, in this matter there was no mutual intention between the parties to sell or buy the involved equipment. The situation was that the plaintiff's subsidiary company was part of defendant's Ltd. since 2002, and the plaintiff also negotiated with the defendant to become partners since then. On 3 February 2005 Plaintiff undertook to commit money on building the defendants new production hall. Still in June 2004 the plaintiff delivered an industrial equipment to the defendant's depot, and billed 49.000 €, while defendant kept it among the Ltd's assets, and recorded it in his accounting. However, on 8 November 2006 defendant sent it back saying it is unnecessary because the planned investment failed. The defendant claimed the plaintiff bought the equipment to accomplish the investment, and the invoice would have been paid of capital increase. Yet, plaintiff stated there was a sales contract between the parties and the judgement of the court violated many articles of the CISG, like for example Article 7, that should have been applied. In this case however there was no sales contract, so the CISG was not applicable.<sup>27</sup> As we can see in this case Article 7 of the CISG did not play a great role to solve the dispute, it was just merely referred to.

In the second, so called "egg" case the parties concluded a contract in which the Romanian seller would deliver 6,000,000 pieces of eggs to Hungarian buyer from 14<sup>th</sup> to 50<sup>th</sup> week of 2006. However, on 12 May 2006 defendant, the buyer stated he cannot accept any eggs, while plaintiff, the buyer didn't consent to it. On 13 May 2006 because of bird flu an official movement and sales restriction entered into force in Romania regarding living chicken, yet the production at the defendant's didn't stop completely in the concerned

<sup>27</sup> Decision of Kúria, Hungary of 12 November 2013, No. Gfv.30106/2013/6 [online]. In: *birosag.hu*. National Office of Judiciary [accessed 2017-04-29].

period, in November 2006 he even ordered eggs. The plaintiff referred in his suit on the CISG and he even referred to Article 7, while the defendant referred there was a force majeure in Romania. The CISG was applicable in this case on the basis of Article 1(1)(b) of the CISG and the tribunal determined the defendant could not prove the period of force majeure and the fact that he let the plaintiff know about the situation in Romania within a reasonable time, and it was a fact that the production did not stop completely.<sup>28</sup> In this case Article 7 was also just shortly referred to: the plaintiff referred to Article 7(2) of the CISG, stating that Hungarian law should be applied.

In the third case a Spanish seller, as plaintiff and a Hungarian buyer, as defendant concluded a contract of 27-28 tons fish. Because the seller did not perform even in the fixed additional period of time, the buyer had to purchase fish from other distributors, and the damage he suffered added up to 35 100 €. The plaintiff demanded 35 100 € plus interests, while the defendant asked for the rejection of plaintiff's suit, asked firstly for the compensation of 35 100 €, and secondly submitted counter-claim. In the CISG the compensation is not regulated so applying Article 7(2) of the CISG resulted in applying Hungarian law. Basically, the Spanish law should have been applied, however the parties agreed on the exclusion of foreign law, so Spanish law could not be taken into consideration. In the judgement, the plaintiff got 17 € of interest from the defendant and the jury highlighted the fact that he rejected the defendant's counter-claim, the 35 100 € has been taken into account.<sup>29</sup>

In this case the conflict was between an Austrian seller and a Hungarian buyer, because the defendant, the buyer did not pay for the goods. The plaintiff sued the defendant for 91 104,04 €. The question was whether Austrian or Hungarian law could be applied – in the final judgement the applicable law was the Austrian law regarding the interest rate, however in this case the interesting thing was that *expressis verbis* in the text of the judgement no one

<sup>28</sup> Decision of Budapest Környéki Törvényszék, Hungary of 5 March 2014, No. G.40313/2010/71 6 [online]. In: *birosag.hu*. National Office of Judiciary [accessed 2017-04-29].

<sup>29</sup> Decision of Pécsi Ítéltábla, Hungary of 06 April 2011, No. Gf.30010/2011/7 6 [online]. In: *birosag.hu*. National Office of Judiciary [accessed 2017-04-29].

mentioned the fact, that the CISG does not have provisions regarding the interest rate – even though they referred more than one time to Article 7(2) of the CISG – and this is why it had to be the Austrian law to determine the interest rate.<sup>30</sup>

Even though the number of cases concerning the CISG is not high in Hungary, Article 7 of the CISG can be of great use, like in the third and fourth cases, and in some cases, like the first two they just refer to Article 7 of the CISG, where the importance of this provision is not sensible.

#### 4 Conclusion

It is not a question that the CISG has achieved great results and Article 7 plays a great part in it. However, in the road to achieve real uniform interpretation and application of the CISG, there are still many obstacles.

Article 7 of the CISG is an essential rule, however, it is not enough and is not a perfect solution: even if there is a right direction, it can be interpreted broadly. In my opinion, national courts – understanding with the above-mentioned scholars – apply much likely their own regulation, which they know and trust. In my perception, a higher jurisdictional forum could be a way for solving this issue, so national courts could have a pattern they could use, and there would not be any uncertainty and it could be a great starting point when applying an international Convention. Like that, even if there were a legal gap, national courts would much likely apply the CISG and maybe even judges, lawyers, legal advisors and others would not insist on applying their own national rules.

The possible lack of trust is reflected in Article 6 of the CISG: “*The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*” Glavanits has made an interesting empirical research regarding the CISG in Hungary. She determined that the exclusion of law is not typical in Hungarian practice, however if they take the opportunity they do it regarding the CISG. The most common answer among the respondents was related to the fact, that applying only Hungarian regulation is more favourable for sellers, than the CISG and in cases the

<sup>30</sup> Decision of Győri Ítéltábla, Hungary of 12 January 2010, No. Gf.20087/2009/7 6 [online]. In: *birosag.hu*. National Office of Judiciary [accessed 2017-04-29].

CISG is not excluded but in which the CISG does not regulate an issue, there the applicable law doubles and it makes harder to solve the conflict.<sup>31</sup> Years before, Koehler has made similar conclusion in his empirical study regarding the CISG: the reasons for an exclusion are mainly practical and the lack of familiarity of the Convention means the most relevant cause. Koehler also states: “*If a law is not applied the chance is let slip by the practitioners to make use of, or at least experience, the advantages ‘preached’ about the law in the literature, with the result that any incentive to apply the law fails to arise.*”<sup>32</sup> I agree with Koehler on that and in my opinion, it is also of crucial importance to help increase the trust regarding the CISG, especially in Hungary.

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<sup>32</sup> KOEHLER, Martin F. Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application [online]. In: *Pace Database on the CISG and International Commercial Law*. Pace Law School, Institute of International Commercial Law [accessed on 2017-04-26].

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