Autonomous Interpretation of Uniform Commercial Law: The East-West European Divide

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Abstract

The requirement for autonomous interpretation of international instruments has been a subject of concern for decades. Academics have particularly paid attention to the so-called common law/civil law divide. Yet, is this the only divide, which persists? By showcasing the distinct Bulgarian approach to autonomous interpretation of international instruments, this paper raises concern about the East-West European divide, which has been ignored by Western scholarship. It draws on two concrete examples – the Bulgarian interpretation of the CISG and EU consumer directives – to underscore that Bulgarian legal cultural particularities endure in these different contexts despite the various mechanisms aimed at enhancing uniform interpretation, which have been put into place. Finally, the paper calls for the development of more elaborate strategies for facilitating autonomous and more uniform interpretation, which consider the idiosyncrasies of East European jurisdictions like Bulgaria. The question is relevant both for international instruments, which are already in force, as well as for the advancement of future harmonizing documents.

1. Introduction

The requirement for autonomous interpretation of international instruments has been a subject of concern for decades.[1] Some scholars worry that despite this requirement, national judges are often tempted to approach international instruments with 'national assumptions', which leads to divergent interpretations.[2] Other commentators raise awareness of the persistent common law/civil law divide. For instance, it has been argued that when

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[1] See for instance RJC Munday, *The Uniform Interpretation of International Conventions* 27 International and Comparative Law Quarterly 450 (1978); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law* 24 Georgia Journal of International and Comparative Law 183 (1994); Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation* 5 Revue de droit uniforme 683 (2000); John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press 2007); Camilla B Andersen, *Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (Wolters Kluwer 2007); Franco Ferrari, *The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case Law (Part I)* 13 Internationales Handelsrecht 137 (2013); Franco Ferrari, *The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case Law (Part II)* 13 Internationales Handelsrecht 181 (2013).

[2] Phillip Hellwege and Lucinda Miller, *Control of Standard Contract Terms* in Gerhard Dannemann and others (eds), *The Common European Sales Law in Context: Interactions with English and German Law* 467 (Oxford University Press 2013).

confronted with gaps, continental lawyers usually seek solutions within the uniform instrument in question while common lawyers seek the help of external sources.[3]

Yet, is this the only divide, which persists? Due to historical prejudice and linguistic difficulties, contemporary leading authorities on international commercial law traditionally ignore the particularities of East European jurisdictions, which have distinct legal cultures.[4] However, these jurisdictions' complex legal heritage, including their communist experience, continues to influence the interpretation of international instruments and has implications for the enhancement of international trade. Particularly interesting, from a Western perspective, is the case of Bulgaria, which ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1990 and joined the European Union (EU) in 2007. A survey of Bulgarian case law and academic commentaries on the CISG shows consistent disparities between Bulgaria and other continental legal systems. The main reason for the differences seems to be the fact that Bulgarian judges and arbitrators rely on Bulgarian law and legal theory to interpret the Convention although there is general agreement that Article 7(1) of the CISG requires that the document be interpreted autonomously.[5] This is troublesome in light of recent claims that academic commentaries on the CISG, collections of case law as well as the training of a new generation of lawyers resulted in an infrastructure in which the document could flourish.[6]

Furthermore, an examination of Bulgarian case law on EU consumer law also demonstrates striking contrasts between Bulgaria and other EU countries despite the requirement to interpret EU legislation autonomously.[7] Once again, the phenomenon can be explained with Bulgarian judges' commitment to use Bulgarian law as a reference in interpreting EU law. This in turn highlights that Bulgarian legal cultural particularities persist even though the EU has developed diverse mechanisms to enhance uniform interpretation –

[3] Maren Heidemann, *The Autonomous Interpretation Method in International Law with Particular Reference to the Proposed European Sales Law I* 93 Amicus Curiae 21, 24 (2013).

[4] Studies on East European laws are scarce. The lack of research is particularly visible in the debate on the harmonization of contract law in the European Union. For instance, key publications of the Common Core Project ignore East European jurisdictions altogether. See, for instance, Simon Whittaker and Reinhard Zimmermann (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000), John Cartwright and Martijn Hesselink (eds), *Precontractual Liability in European Private Law* (Cambridge University Press 2011).

[5] The article requires that in interpreting the Convention, 'regard is to be had to its international character and to the need to promote uniformity in its application'.

[6] Olaf Meyer, *Promoting Uniform Sales Law* 24 European Business Law Review 389, 390 (2013).

[7] On this 'long-established principle of EU law', see Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law*, 122-133 (2nd edn, Routledge 2013).

from the preliminary references before the Court of Justice of the European Union[8] to initiatives such as the European Judicial Training Network.[9]

In other words, by showcasing the distinct Bulgarian approach to the interpretation of international instruments, which have already been implemented, this paper raises concern about the East-West divide that continues to haunt Europe. It also calls for the development of more elaborate strategies for facilitating autonomous and more uniform interpretation, which take into account the legal cultural particularities of jurisdictions like Bulgaria. While the discussion is relevant for international instruments which are already in force, it can also inform future projects aimed at the advancement of uniform commercial rules.

2. Preliminary Remarks: Particularities of the Bulgarian Legal Culture

Before explaining the important differences between the reasoning in Bulgarian case law pertaining to the interpretation of international instruments and the reasoning in West European case law, it is worth highlighting some particularities of the Bulgarian legal culture which stand out.

The accumulation of case law and commentaries on the CISG has comforted many who feared that the autonomous interpretation of the Convention was endangered. As noted above, academics argue that because of these developments, the Convention flourished.[10] The enthusiasm seems to be shared by some national courts too. For instance, the District Court of Rimini observed that the risk of interpretative differences with regard to the CISG appears 'remote' in light of the 'many worthwhile publications that help to reduce interpretative differences, namely, data bases that collect and edit international case law … and law reviews that specialize in international sales law …'[11] Yet, as underscored below, not only Bulgarian judges and arbitrators seem to approach the CISG from a national perspective, but also they neither seem to refer to international publications nor to international case law. In other words, they have not taken advantage of the various resources for the CISG such as the case

[8] This procedure allows national courts of Member States to ask the Court of Justice of the European Union about interpretation or validity of European law. They are binding not only on the national court, which initiated the proceedings, but on all Member States. See Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings 2012/C 338/01 of 6 November 2012.
[9] This initiative encourages judicial dialogue and education on a pan-European scale.
[10] Meyer, above, at 390.
[11] *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*
Available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html.

law databases, which are available online,[12] or the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, which is regularly updated.[13]

One may be tempted to quickly attribute this phenomenon to language difficulties – after all, these decisions and commentaries are primarily translated in English, which senior Bulgarian judges, arbitrators, and law professors do not necessarily speak fluently. According to statistics by Eurostat, for example, Bulgaria and Hungary are the countries with the lowest level of acquisition of foreign languages.[14] While this is certainly part of the problem, we will see below that the same issue persists with regard to the application of EU consumer law too. The decisions of the Court of Justice of the European Union, however, are translated in all EU languages. Moreover, they are binding on all EU national courts. Yet, Bulgarian judges seem to ignore them and to interpret EU law based on their subjective assumptions, which are informed by Bulgarian legal theory and doctrine.

Foreign commentators may wonder why the differences in reasoning highlighted below have not been identified so far. The answer is certainly complex. Firstly, one of the particularities of Bulgarian scholarship is the reluctance to discuss court decisions and arbitral awards in detail in their writing. For years, case law in Bulgaria was not public and thus Bulgarian legal science became more abstract and theoretical compared to legal science abroad. Whereas this has recently changed, it is still difficult to find court decisions. Although all courts are now obliged to have a website and publish their decisions, their sites are old-fashioned and difficult to navigate: many of them do not even allow the user to search by keyword. Although there are some modern electronic databases, they are not comprehensive and access to them is expensive.[15]

Secondly, the dialogue between West European and East European jurisdictions is limited. Whereas there are many 'worthwhile' publications, as stated by the District Court of Rimini,[16] it is rare to find in-depth commentaries which refer to court decisions and arbitral

[12] The most comprehensive is the one developed by the Pace University Institute: http://iicl.law.pace.edu/cisg/search/cases.

[13] The latest version was published in 2012, at https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf.

[14] See Eurostat News Release entitled 'Two-thirds of working age adults in the EU28 in 2011 state they know a foreign language', at http://ec.europa.eu/eurostat/documents/2995521/5162658/3-26092013-AP-EN.PDF/139b205d-01bd-4bda-8bb9-c562e8d0dfac (accessed 12 October 2017).

[15] The most popular one is www.apis.bg.

[16] *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.* Available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html.

awards from Eastern Europe. Although this phenomenon can be explained with language difficulties and communism, which interrupted the exchange of ideas between the East and the West,[17] the restricted comparative dialogue seems unfortunate considering that West and East European countries are trade partners and they belong to the same community (the EU).[18] Bulgarian legal science has thus taken a path of its own, but as we will see below, academic articles are a secondary source of law which judges and arbitrators rely on in their practice.[19]

Thirdly, many East European lawyers continue to have a socialist mindset, which is difficult to overcome. As it is well-known, judges usually think of the result they want to achieve and only then seek the legal means to justify it – what they say they do and what they actually do may not necessarily coincide. In other words, their approach in a particular case is informed by their values. Communism, however, certainly left a long-lasting mark on the legal values of East European jurisdictions like Bulgaria. Senior judges earned their degrees during communism and were forced to adapt to a different social model after the fall of the Berlin Wall. To this day, nonetheless, they are more inclined to promote altruism and to prioritize substantive fairness in agreements over freedom of contract in many circumstances. This is particularly visible when one compares the values of Bulgarian contract law to the values of the contract laws of market economies which have not experienced drastic political changes and reforms in the recent past – for instance, England.[20]

Surely the question whether these are purely Bulgarian features or East European trends remains open and merits further research.[21] As explained below, nonetheless, it is obvious that Bulgaria seems to 'swim upstream' in many ways compared to West European

[17] Prior to communism, Bulgarian lawyers, especially academics, felt at home in several jurisdictions. Many Bulgarian professors had degrees from several countries. They were confident to discuss foreign laws and to criticize the reasoning in foreign judgments. Many Bulgarian academics published abroad too. On the history of Bulgarian law, see Dimiter Tokushev, *History of the New Bulgarian State and Law 1878-1944* (Sibi 2008).

[18] For example, Bulgaria's most important trade partners are Germany and Italy. See Eurostat's article 'Intra-EU Trade in Goods – Recent Trends', http://ec.europa.eu/eurostat/statistics-explained/index.php/Intra-EU_trade_in_goods_-_recent_trends (accessed 11 November 2017).

[19] In that light, it is worth mentioning that in Bulgaria the divisions between the legal professions are not as sharp as in other jurisdictions. It is common for academics to practice law or to serve as judges. Moreover, arbitrators are often academics or practicing lawyers.

[20] Radosveta Vassileva, *Contract Law and the Social Contract: Rethinking Law Reform in the Field of Contract Law from the Perspective of Social Contract Theory* LXV(III)(11) Pravni zivot 267-286 (2016).

[21] Undoubtedly, communism influenced the legal cultures of East European states, albeit to a different extent – the Soviet Union embraced a highly ideological civil code in 1964 while non-Soviet countries like Bulgaria, Poland, and Hungary remained more moderate. At the same time, following communism, some countries, including Bulgaria and Poland, carried out largely only cosmetic reforms of their private law compared to other states.

jurisdictions. This certainly shows the need for more elaborate strategies aimed at promoting uniform interpretation of international instruments, which take into consideration the legal cultural particularities of all countries, which are involved.

One should not, of course, forget that interpreting international instruments from a domestic perspective is not always disruptive. The CISG, for instance, is not comprehensive and does not provide definitions of key concepts such as private international law – thus it has been argued that one has to refer to the notion of private international law at the forum.[22] Moreover, from an EU perspective, the motto of the Union is 'United in Diversity'. In the past, commentators have argued that interpreting EU law from the perspective of the general principles of national law could result in Member State friendly interpretation of EU law.[23] Disruptions, however, occur when legal certainty is compromised. For instance, when it is likely to reach a different result when applying the same instrument depending on the forum of litigation. While even within the same jurisdiction it is possible to have discrepancies in results, we will see that there are palpable differences between the reasoning of Bulgarian courts and arbitral tribunals and their Western counterparts – in other words, a noticeable East-West divide, which seems culturally rooted.

3. The CISG and the East-West Divide

This section explores the East-West confrontation which shaped some of the debates during the drafting of the CISG and resulted in unclear wording of some of the provisions. It then focuses on the particularities of the Bulgarian approach towards interpreting the Convention by exploring Bulgarian case law and doctrinal writing.

3.1. ***Drafting the CISG***

It is often forgotten that socialist countries played a role in the genesis and the drafting of the CISG. For instance, Hungary, Yugoslavia and Bulgaria participated at the Diplomatic Conference in the Hague in 1964, which adopted the forerunners of the CISG – the

[22] Ferrari, *The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case Law (Part I)*, above, at 146.
[23] See Martijn Hesselink, *The General Principles of Civil Law: Their Nature, Roles and Legitimacy* in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships*, 131-80 (Hart 2013).

Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.[24] Moreover, East European representatives actively participated in the Working Groups on the CISG and the debates on wording.[25] In addition, eleven socialist states engaged in the discussions at the conference organized by the United Nations General Assembly in Vienna in 1980 at which the final draft of the CISG was approved.[26]

The legal cultural differences between Western Europe and socialist states shed light on certain features and compromises in the document. It has been emphasized, for instance, that legal certainty and cooperation among parties to an agreement were important for socialist states.[27] That is why, these states were supportive of the provisions which '[protect] parties against unknown foreign laws, [reduce] the time of negotiation, and [aid] the parties in seeking amicable, fair resolutions of their disputes'.[28] At the same time, it has also been stressed that Western and socialist states clashed on a number of issues – the necessity of written form of the agreement, the mirror-image rule, usages, open price terms, negotiation in good faith, etc.[29] In turn, this can explain some peculiar provisions. For example, Article 96 of the CISG permits contracting states not to comply with Article 11 and 29, which allow contracts to be formed and modified orally. Also, Article 14(1) which requires that the price be expressly or implicitly 'fixed' seems to contradict Article 55 which provides a mechanism for determining the price if it is not expressly or implicitly fixed.

Of particular importance is the compromise reached in the debate on the role of good faith. Article 7(1) now provides that the Convention should be interpreted in 'observance of good faith in international trade'. It has been argued that '[by] relegating the relevance of good faith to the interpretation of the Convention, a hard-won settlement was reached between those who would have preferred a provision imposing directly on the parties the

[24] John Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview* 27 American Journal of Comparative Law 223, 225 (1979).
[25] See, for instance, Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination* 22 Stanford Journal of International Law 263-303 (1986); See also UNCITRAL, *Report on Ninth Session* (1977) and UNCITRAL, *Report on Eleventh Session* (1978).
[26] Alejandro M Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods* 23 The International Lawyer 443, 444 (1989).
[27] Sara G Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles* 13 North Carolina Journal of International Law and Commercial Regulation 109, 115 (1988).
[28] *Ibid.*
[29] *Ibid* 116; Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, above, at 461.

duty to act in good faith during the formation, performance, and termination of the contract of sale, and those who were opposed to any explicit reference to the principle of good faith'.[30] The Hungarian representative who was one of the active participants in the discussions[31] on the CISG emphasized: 'almost everybody thought it was a strange compromise, in fact burying the principle of good faith and thus covering up the lack of compromise'.[32]

While we will see below that compromises in the wording may come with a hefty price when it comes to interpreting the CISG, it is worth noting that the Hungarian representative was particularly adamant to introduce a duty of good faith at the formation stage of contract. He proposed the following wording: 'In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith'.[33] It should be stressed that East European jurisdictions not only had ascribed a central role to good faith in their contract laws, but also introduced other open norms allowing judicial intervention and moralization of agreements such as the principles of socialist coexistence.[34] For example, Bulgaria which was the first communist country to enact a communist law on obligations[35] in 1950 developed the notion of 'socialist good faith', which had to be observed during the negotiation of agreement, during its performance, as well as in interpreting the contract.[36] In that light, it is not surprising that one of the key criticisms against the inclusion of a provision on good faith in the CISG was that it introduced a 'moral exhortation' which would likely result in legal uncertainty as national courts would interpret it in light of their 'legal and social traditions'.[37]

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[30] Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, above, at 467.

[31] He has published extensively on the CISG. See Gyula Eörsi, *Unifying the Law (A Play in One Act with a Song)* 25 American Journal of Comparative Law 658 (1977); Gyula Eörsi, *General Provisions* in Nina Galston and Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (New York 1984).

[32] Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods* 31 American Journal of Comparative Law 333, 349 (1983).

[33] See UNCITRAL, *Report on Ninth Session* (1977) 66.

[34] While the principle was part of the 1936 Soviet Constitution, it was not part of the contract laws of all communist countries. In Bulgaria, Poland, and Hungary, the violation of the rules of socialist coexistence voided the agreement *ab initio*. However, in the Soviet Union and the Czech Republic, it did not result in nullity. See Vitali Tadjer, *Civil Law of People's Republic of Bulgaria: General Part. Section 1*, 85-87 (Sofia 1972).

[35] To clarify, the first Soviet Civil Code was enacted in 1922, but it was primarily based on German, Swiss, and French law. The subsequent Soviet Civil Code of 1964 was substantially more ideologized. See Asya Ostroukh, *Russian Society and Its Civil Codes: A Long Way to Civilian Civil Law* 6 Journal of Civil Law Studies 373, 388-390 (2013); Bulgaria enacted a Law on Obligations and Contracts in 1950.

[36] See Articles 12, 20, and 63 from the Bulgarian Law on Obligations and Contracts. Following a cosmetic reform in the early 1990s, 'socialist good faith' was replaced with 'good faith'. In principle, 'socialist good faith' meant the good faith exercised within a socialist community and thus had a broader scope compared to good faith in other jurisdictions.

[37] See UNCITRAL, *Report on Eleventh Session* (1978) at 35.

3.2. Interpreting the CISG

Comparing Bulgarian and foreign case law and academic commentaries on the CISG reveals disparities of interpretation which are not only illustrative of legal cultural differences, but may also lead to divergent outcomes in similar circumstances. This section explores three main issues to demonstrate the distinct Bulgarian approach to interpreting the document – gap-filling in the absence of an explicit rule in the CISG, the role of good faith in the Convention, and tacit exclusion of the Convention. As noted above, there is general agreement that Article 7(1) of the CISG requires that the document be interpreted autonomously. However, we will see that Bulgarian lawyers traditionally approach the document from the perspective of the Bulgarian 'legal and social tradition' and impose Bulgarian assumptions on the parties.

3.2.1. Gap-filling

As underlined in the introduction, some authors argue that when confronted with gaps, continental lawyers usually seek solutions within the uniform instrument in question, thus they 'naturally resort to underlying principles, perhaps by analogy or teleological deductions'.[38] By contrast, common lawyers usually seek the help of external sources. However, examining Bulgarian case law on the CISG and comparing it with case law from other continental jurisdictions reveals important differences in the interpretation of Article 7(2) of the CISG which provides the mechanism for gap-filling and raises concern about an East-West divide. This article states: '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'. In other words, in case of gaps, matters should be settled in conformity with the general principles on which the CISG is based. Only in the absence of such principles, matters should be settled according to the rules of private international law.

However, in Bulgaria, Article 7(2) is usually used as an excuse to apply Bulgarian law directly without looking for general principles or establishing analogies, thus imposing 'Bulgarian' assumptions on the parties. Bulgarian arbitral practice illustrates this tendency. For example, in an Arbitral Award of 24 April 1996 by the Bulgarian Chamber of Industry

[38] Heidemann, *The Autonomous Interpretation Method in International Law with Particular Reference to the Proposed European Sales Law I,* above, at 24.

and Commerce, the tribunal concluded: 'According to Article 7(2) CISG, Article 83 of the [Bulgarian] Law on Obligations and Contracts is applicable if the promisee is at fault, as a matter not expressly regulated in the Convention'. In the award, the tribunal used Article 83[39] of the Bulgarian Law on Obligations and Contracts in order to reduce the amount of damages. It deemed that the buyer had contributed to the damages because even though it informed the seller of the non-conformity via correspondence, it did not submit the quality certificates evidencing non-conformity of the goods on time. It seems striking that the tribunal did not even consider if there are general principles of the CISG, which can be applied in the circumstances, but directly referred to Bulgarian law. For instance, the tribunal could have reasoned by analogy to Article 77, which requires the promisor to mitigate damages in case of breach. Moreover, it could have invoked the duty to observe good faith in international commerce as required by Article 7(1): many authors have explicitly defined good faith as a general principle of the CISG.[40] The practice to resort to Bulgarian law without considering the general principles on which the CISG is based seems to be consistent in Bulgarian arbitral practice. In an Arbitral Award of 12 March 2001, the tribunal held: 'According to Article 7(2) CISG, when there is a gap, as well as when there are matters governed by the Convention which are not expressly settled in it, the applicable law is the Bulgarian substantive law as the municipal law of the seller who owes the obligation characterizing the contract'.[41]

Bulgarian court practice also provides striking examples of the weight judges put on Bulgarian law. For example, Decision 64 of 29 October 2014 by the District Court of Lovech concerned an agreement between a Bulgarian company and a French company which expressly stipulated that the CISG was applicable in case of disputes. One of the submissions

[39] It states: 'If non-performance is also due to circumstances for which the promisee is responsible, the court can reduce the amount of damages or release the promisor from liability. The promisee is not liable for damages which the promisee can avoid by complying with the duty of good husband'.

[40] For instance, Albán identifies six general principles of the CISG: good faith in international business, interpretation as per the real intention and reasonability, promissory estoppel, party freedom, and duty to mitigate damages. See Jorge Oviedo Albán, *The General Principles of the United Nations Convention for the International Sale of Goods* 4 Cuadernos de Derecho Transnacional 165-179 (2012); DiMatteo has identified three main unifying principles of the CISG: unification of law, the principle of good faith as internationally recognized, and the increasing certainty and predictability of transactions. See Larry DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability, L=(ii)*^{2} 23 Syracuse Journal of International Law and Commerce 67, 94 (1997); Koneru also recognizes good faith as a general principle of the CISG. Other general principles he identifies include protecting restitution, reliance, and expectation interests of the aggrieved party as well as the duty to mitigate the damages. See Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles* 6 Minnesota Journal of Global Trade 105, 120 and 138 (1997).

[41] Arbitral Award 33/98 of 12 March 2001.
Available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010312bu.html.

which the claimant had made was that the defendant had negotiated in bad faith. The court first examined if the Bulgarian rule on negotiations in bad faith was applicable. Then, it stated that the CISG did not contain an explicit provision on negotiations in bad faith and that is why it was irrelevant. The judicial reasoning can certainly be criticized in light of Bulgaria's Constitution. Notably, its Article 5(4) states: 'International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation'. In other words, the Bulgarian Constitution explicitly states that ratified conventions have the primacy over national provisions in case of contradiction. Hence, the court should have first examined if there was a relevant provision in the CISG, then pursuant to Article 7(2) of the Convention, it should have examined the general principles of the Convention, and only then referred to the relevant national provisions. As already noted, many commentators argue that good faith is a general principle of the CISG. Assuming the court disagreed with this argument,[42] it is still remarkable that it did not even consider the general principles of the CISG before it discussed Bulgarian law.

It is also interesting that on occasion Bulgarian arbitrators and judges alike use Bulgarian law to emphasize why a certain explicit provision in the CISG should be applied. One can find numerous examples. For instance, in Arbitral Award 14/98 of 30 November 1998, the tribunal relied on Article 55 of the CISG to hold that a contract is valid even if the price is not expressly or implicitly defined. It felt compelled to reiterate that the same conclusion could be reached pursuant to Article 326(2) of the Bulgarian Law on Commerce. In a recent decision, the Sofia City Court also emphasized that the application of Article 55 of the Convention and Article 326(2) of the Law on Commerce lead to the same results.[43] Moreover, in Decision 452 of 22 August 2014 on com. c. 8/2013, the District Court of Stara Zagora emphasized that one can reach the conclusion that the buyer is obliged to pay the price once they receive the goods both on the basis of the Convention and the Bulgarian Law on Commerce. On the one hand, this practice seems redundant in light of Article 5(4) of the Bulgarian Constitution, referred to above, which explicitly states that ratified conventions have the primacy over national provisions in case of contradiction. On the other hand, it

[42] There is debate over the reference to good faith in the Convention implies good faith in the formation stage. See Paul J Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods* 18 Journal of Law and Commerce 333, 345 (1999).
[43] Decision 256 of 25 March 2009 on com. c. 1148/2006.

demonstrates the importance which Bulgarian arbitrators and judges give to Bulgarian law when interpreting and applying the Convention.

The Bulgarian approach can be contrasted with the legal practice in other jurisdictions. For instance, in a Decision of 17 February 2015,[44] the French *Cour de cassation* emphasizes that 'internal gaps in the Convention should be firstly filled by relying the general principles on which it is based and only in the lack of alternative by relying on the rules of private international law'. It also stressed that the fact that Polish law applied to the contract under examination could not call into question 'the preponderant role of general principles for all matters falling within the scope of the Vienna Convention, although not expressly decided by it'. Moreover, in another Decision of 27 November 2012,[45] the French *Cour de cassation* stresses that the application of a principle of French law – notably the rule on brutal rupture of commercial relations stipulated in article L. 442-6.I.5° of the French *Code de commerce* – complied with the 'necessity to ensure the respect of good faith in international commerce' stipulated in Article 7(1) of the CISG. In other words, while it applied a national provision, the court had examined if it contradicted the CISG. Whereas commentators may criticize the decision since the interpretation of good faith within the CISG is one of the key contentious matters, as we will see below, one observes an effort on behalf of French courts to at least formally comply with the general principles and the wording of Article 7(2) unlike Bulgarian arbitral tribunals and courts.

3.2.2. Good faith

Article 7(1) which provides that the Convention should be interpreted in 'observance of good faith in international trade' has given rise to considerable debate about the role good faith plays in the CISG. For some, it is purely an interpretative tool. For instance, in ICC Arbitration Case No. 8611 of 23 January 1997, the arbitral tribunal explicitly stated: 'Article 7(1) is applicable to the interpretation of the CISG only, and is not to be referred to as a source of the parties' rights and duties with respect to performance of the contract'. Some commentators have emphasized that good faith is 'relevant solely as an additional tool of interpretation to which judges must resort and which must be employed by them to neutralize the danger of reaching inequitable results'.[46] Yet, as highlighted above, many authors have

[44] *pourvoi*: 12-29550.
[45] *pourvoi* 11-14588.
[46] Ferrari, *The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case Law (Part I),* above, at 155.

identified good faith as a general principle of the Convention, although there is debate whether it covers both the performance and the formation stage.

At the same time, while views are inconsistent, there seems to be an effort to detach the notion of good faith embedded in the CISG from purely domestic notions. For example, in a Decision by the Court of Appeal of Milano of 11 December 1998[47] it was specified that the notion of good faith established in Article 1375[48] of the Italian *Codice civile* cannot 'in any way replace the definitive and mandatory context of the Convention's provisions which – as specified in Article 7(1) – adopt an independent notion of good faith'. In a similar fashion, the Appellate Court of Dusseldorf held that while under the German principle of good faith, one can expect from a 'commercially active partner' to ask for a copy of standard terms before concluding a contract, one cannot apply these requirements in the same way to international trade pursuant to Article 7(1).[49] Commentators have also argued that Article 7(1) 'bars purely local definitions and concepts of construing the international text'.[50] Others have aimed at deriving an international definition of good faith by examining doctrinal writing and case law, which can assist in the interpretation of the CISG.[51]

In that light, it is interesting that the Bulgarian understanding of the role of good faith in the Convention seems to be based on national assumptions. The work of Prof. Marinova may be exemplary of this tendency. Prof. Marinova is a leading authority on international sales. In her monograph dedicated to the CISG,[52] she underscores that good faith is identified as a general principle of the Convention, which has to be defined by analysing its meaning in Roman law, continental law, and the common law.[53] Moreover, in an article entitled *The Role of Good Faith in International Sale of Goods Contract Formation and Execution*,[54] Marinova examines selected articles by foreign authors as well as Bulgarian doctrinal writing prior to communism dedicated to good faith and concludes that good faith is relevant to extra-

[47] *Bielloni Castello v. EGO.*
Available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981211i3.html.
[48] The article requires performance in good faith.
[49] Decision of 25 July 2003.
Available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030725g1.html.
[50] John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 95 (4th edn, Wolters Kluwer).
[51] Powers, for instance, maintains: 'The obligation of good faith is the duty to act reasonably and to avoid a breach of the trusting relationship that exists between contracting parties'. See Powers at 352.
[52] Diana Marinova, *The Contract for the International Sale of Foods* (Feneya 2013).
[53] *Ibid* at 51.
[54] Diana Marinova, *The Role of Good Faith in International Sale of Goods Contract Formation and Execution* 29 Revista europea de derecho de la navegacíon marítima y aeronáutica 15-23 (2012).

contractual relations,[55] the performance of the contract as well as to fill in gaps in the contract.[56]

Firstly, it is notable that Marinova's conclusions coincide with the role of good faith in contemporary Bulgarian law. Under Bulgarian law, the doctrine of good faith has a relatively large scope. Bulgarian law requires good faith in the negotiation of the agreement[57] and in its performance.[58] Moreover, it requires that contracts be interpreted in good faith.[59] Secondly, it is also interesting that she derives her conclusions primarily based on academic articles dedicated to national notions of good faith. While such analysis is, of course, valuable in providing background on the difficulty of developing a uniform definition of good faith, it cannot give a clear-cut answer to what good faith in the document means, particularly because Article 7(1) requires autonomous interpretation.

It is striking, from a Western perspective, that Prof. Marinova neither engages directly with the wording of the CISG nor with its legislative history. Notably, it is well-known that there are two main schools of interpretation – literal and purposive. If one relies on a literal approach to interpretation of the CISG, one would see that Article 8 of the CISG, which is relevant to contract interpretation, refers to the reasonable person standard rather than to good faith. While there is ample literature discussing the similarities and differences between the reasonable person standard in the common law tradition and good faith in the continental tradition, there is no definite conclusion to the debate.[60] In addition, the CISG does not contain an explicit provision requiring negotiations in good faith. Moreover, examining the legislative history of the CISG shows that draft proposals to include good faith as a requirement at the formation stage[61] as well as to endorse good faith as a standard of interpretation of agreements were actually rejected.[62]

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[55] *Ibid* at 22; The author seems to refer to non-contractual liability.
[56] *Ibid* at 23.
[57] Article 12 of the Bulgarian Law on Obligations and Contracts.
[58] Article 63 of the Bulgarian Law on Obligations and Contracts.
[59] Article 20 of the Bulgarian Law on Obligations and Contracts stipulates: 'In interpreting contracts, the real common will of the parties shall be sought. Individual provisions shall be interpreted in their interconnection and each of them shall be understood in the context of the overall contract by considering the purpose of the contract, usage, and good faith'.
[60] See, for instance, Michael Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?* 9 The Canadian Business Law Journal, 385 (1984); JF O'Connor, *Good Faith in English Law* (Dartmouth 1990); Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995); Roger Brownsword and others (eds), *Good Faith in Contract: Concept and Context* (Dartmouth 1999); Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000).
[61] As noted above, the Hungarian representative had insisted on such provision.
[62] Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, above, at 349.

These clarifications are important because the above-mentioned Bulgarian monograph and article are an example of the compilatory analytical spirit of Bulgarian scholarship, which tends to examine national and foreign scholarly writing and to create patchwork solutions based on subjective views.[63] In turn, nonetheless, Bulgarian scholarly writing is a secondary source of law, which has the same persuasive value as case law.[64] Indeed, Bulgaria's courts and arbitral tribunals often rely on scholarly writing in their decisions. That is why, considering the tendency of Bulgarian judges and arbitrators to prioritize Bulgarian law discussed above as well as the relatively generous interpretation of good faith under Bulgarian law,[65] one may be concerned that such examples of scholarly writing may encourage Bulgarian adjudicators to ascribe a larger role to the principle when interpreting the CISG compared to foreign adjudicators.

3.2.3 Tacit exclusion

A third notable difference between the Bulgarian and foreign understanding of the CISG is the interpretation of Article 6 which allows parties to exclude the application of the Convention. It is interesting that when confronted with similar facts, Bulgarian and foreign lawyers seem to reach different results. In an ICC case of 2002, the arbitral tribunal concluded that '[unless] the parties had agreed to exclude the CISG, the reference to French law would mean that the Convention applied'.[66] Moreover, it held that 'the reference to French law did not suffice to exclude the application of the CISG' on the basis of doctrine and case law.[67] The French *Cour de cassation* maintains the same view.[68] Similarly, the Tribunal Cantonal in Switzerland held that 'a choice of law in favour of the national law of one of the States party to the Convention could not be interpreted as a tacit exclusion of the application of the CISG'.[69] In principle, it seems that some courts may allow tacit exclusion based on the way the parties worded their claim. For instance, the Spanish Supreme Court

[63] On Bulgaria's patchwork approach to developing law and interpretation, see *Economic Onerosity in Context: Particularities and Development of Bulgarian Law* in Radosveta Vassileva, *Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?* (Doctoral Thesis, University College London 2016) at chapter 2.
[64] On the role of Bulgarian scholarly writing, see Rosen Tashev, *General Theory of Law*, 147-150 (Sofia 2010).
[65] Under Bulgarian law the notion of good faith is rather hazy and overlaps with other principles, including the fairness of exchange which judges on occasion tend to interpret literally. *See The Conceptions of Contract and Justice in Bulgarian and English Contract Law* in Radosveta Vassileva, *Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?* (Doctoral Thesis, University College London 2016) at chapter 4.
[66] ICC Arbitral Award Number 11333. Available at http://www.unilex.info/case.cfm?id=1163.
[67] *Ibid*.
[68] See *pourvoi* 95-20273.
[69] Case 224/2004/PBH of 24 November 2004. Available at http://iicl.law.pace.edu/cisg/case/switzerland-november-24-2004-tribunal-cantonal-appellate-court.

assumed parties had excluded the application of the CISG because they had only presented arguments based on Spanish law before the previous instance'.[70]

By contrast, Bulgarian arbitrators and judges seem to 'swim against the stream'. For instance, in an Award of 1997, a Bulgarian arbitral tribunal relied on Bulgarian scholarly writing to exclude the application of the CISG solely because the parties had explicitly identified Bulgarian law as applicable to their dispute.[71] In another case of 2010,[72] a different arbitral tribunal emphasized that Bulgarian doctrine seems to support both the view that a simple reference to national law excludes the application of the CISG as well as the view that parties have to explicitly agree to exclude the application of the Convention because it forms part of Bulgarian law. The tribunal in question opted for the latter interpretation but did not provide any concrete arguments why it took that decision. In a recent Decision by the District Court of Plovdiv of 2013, it was held once again that the fact that the parties had an explicit clause stipulating that German law was applicable to their contract excluded the application of the CISG.[73] In other words, Bulgarian legal practice seems contradictory and inconclusive. The main reason for that are the strong views of Bulgarian scholars, which seem to be historically rooted.[74]

4. EU Harmonization of Contract and the East-West Divide

In addition to the CISG, the EU harmonization project also provides food for thought about the difficulty of achieving uniform interpretation on an international scale. Notably, the EU disposes of diverse mechanisms to promote uniform interpretation – from the preliminary references before the Court of Justice of the European Union to initiatives like the European Judicial Training Network which offers exchange programmes and continuous training for the European judiciary. However, we will see that despite this elaborate framework, an East-West divide in interpretation can still be discerned.

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[70] *Compañía Mercantil NER-TOR v. Autolux F. Strub.*
Available at http://www.iicl.law.pace.edu/cisg/case/spain-february-24-2006-tribunal-supremo-supreme-court-compania-mercantil-ner-tor-v-autolux.

[71] Arbitral Award 71/94 of 29 September 1997.

[72] Arbitral Award 18/2009 of 30 April 2010.

[73] Decision 68 of 22 February 2013 on com. c. 413/2012.

[74] Both contemporary and communist authorities emphasize that parties have to explicitly agree on the application of the Convention. See Todor Todorov, *Private International Law, the European Union and Bulgaria* 251 (Sibi 2009); Jivko Stalev, *The Vienna Convention on the International Sale of Goods*, 19 (Sofia 1981).

The EU harmonization project itself is certainly one of the most ambitious initiatives aimed at developing common rules of private law. Due to political opposition, nonetheless, it changed direction several times. At first EU institutions focused on harmonizing consumer law by implementing a series of directives.[75] Then, almost two decades ago, the European Commission emphasized the need for broader harmonization with the purpose of enhancing the internal market. It deemed that the palpable differences between the contractual regimes of EU Member States constituted barriers to trade.[76] A Draft Common Frame of Reference was produced,[77] but its subsequent cold reception[78] forced the Commission to narrow down its ambition and to put forward a draft regulation on a Common European Sales Law, which has a significantly limited scope.[79] As it was not approved by the Council of the EU,[80] the Commission focused on developing two new proposals for directives, which form part of its Digital Single Market Strategy – one pertaining to 'certain aspects concerning contracts for the supply of digital content'[81] and another one pertaining to 'certain aspects concerning contracts for the online and other distance sales of goods'.[82]

[75] Doorstep Selling Directive 85/577/EEC, Package Travel Directive 90/314/EEC, Unfair Contract Terms Directive 93/13/EEC, Timeshare Directive 2008/122/EC (or Directive 94/47/EC depending on the state of transposition), Distance Selling Directive 97/7/EC, Price Indication Directive 98/6/EC, Injunctions Directive 98/27/EC, Consumer Sales Directive 99/44/EC, and Directive on Consumer Rights 2011/83/EC (repealing Directive 85/577/EEC and Directive 97/7/EC).

[76] COM(2001) 398 final and COM(2003) 68 final; These communications resonated prior resolutions of the European Parliament calling for broader harmonization of European private law: A2-157/89, A3-0329/94, and B5-0228, 0229–0230/2000.

[77] Arguably, the Draft Common Frame of Reference has the scope and purpose of a civil code, Martijn Hesselink, *The Common Frame of Reference as a Source of European Private Law* 83 Tulane Law Review 919, 923 (2009); Reinhard Zimmermann and Nils Jansen, *"A European Civil Code in All but Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference* 69 Cambridge Law Journal 98-112 (2010).

[78] In 2010, the Commission published a green paper proposing seven options for the future of the Draft Common Frame of Reference among which a regulation on a European Civil Code, a regulation on European Contract Law, a toolbox, etc.: COM(2010)348 final; Stakeholders, including the UK, expressed concern about the initiative's necessity, legal basis and feasibility. See *The UK Response*, http://ec.europa.eu/justice/news/consulting_public/0052/contributions/310_en.pdf (accessed 12 October 2017).

[79] COM(2011) 635 final; Resolution P7_TA(2014)0159; The Common European Sales Law was proposed as an optional instrument which parties could choose for specific types of cross-border agreements: it was supposed to apply only to distance B2C contracts or B2B contracts in which one of the parties is a small and medium-sized enterprise.

[80] The Commission withdrew the proposal in December 2014 with the announcement of its 2015 Work Programme. Its Annex 2 stated that the Common European Sales Law would be modified 'to fully unleash the potential of ecommerce in the Digital Single Market'. See COM(2014) 910 final. The European Consumer Association indicated the Commission was forced to abandon the proposal due to pressure from the UK, France, Germany, the Netherlands, Belgium, and Austria.
See *CCBE Position on Contract Rules for Online Purchases of Digital Content*, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/20150914_EN_CCBE_Pos1_1442909360.pdf (accessed 12 October 2017).

[81] COM(2015) 634 final.

[82] COM(2015) 635 final; An amended version was put forward in 2017. See COM(2017) 637 final.

On the one hand, the project is interesting because it demonstrates the difficulties of reaching agreement on a relatively small scale – even when the EU had only fifteen Member States,[83] there was heated debate not only about the direction the initiative had to take, but also about its legal cultural implications.[84] On the other hand, examining the challenges of achieving uniform interpretation even in the realm of consumer law, [85] which, as a more recent development, may be regarded as less culturally infused compared to mainstream private law,[86] could provide insights into the East-West divide which persists. Notably, Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts offers ample illustration of the difficulties of achieving uniform interpretation in the EU despite EU's framework, including the Court of Justice which oversees the uniform application of EU law. Notably, as the Directive has been in force for a while, national courts as well as the Court of Justice have accumulated case law, which permits the identification of divergences of interpretation in practice.

4.1. UK v. Bulgaria

The UK and Bulgaria are interesting to study as they transposed the Directive almost verbatim unlike other EU Member States.[87] In the UK, it is currently part of the Consumer Rights Act 2015[88] and in Bulgaria it is part of the Law on the Protection of Consumers.[89] The

[83] The first important enlargement of the EU to the East took place in 2004 when Latvia, Lithuania, Estonia, Poland, Hungary, the Czech Republic, Slovakia and Slovenia joined. Then, Bulgaria and Romania became members in 2007. Croatia accessed the EU in 2013.

[84] A key topic of the debate was whether it was possible to overcome the common law/civil law divide. See Pierre Legrand, *Against a European Civil Code* 60 Modern Law Review 53 (1997); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences* 61 Modern Law Review 11 (1998); Ole Lando, *Culture and Contract Laws* 3 European Review of Contract Law 17 (2007).

[85] Note that the various jurisdictions embrace different divisions of law. Bulgarian law distinguishes formally between commercial, civil, and consumer agreements. In England, by contrast, there is no autonomous commercial law. Consumer law is not treated as a separate branch either at least formally.

[86] It does not seem accidental that EU institutions focused on consumer law first. On the one hand, it is difficult for politicians to justify opposing better consumer protection. On the other hand, mainstream private law is often associated with nation-building and seems to be a more sensitive subject – historically, when declaring independence or carrying out major social reforms, altering the rules of private law is one of the first steps a country takes. For example, the Law on Obligation and Contracts of 1892 and the Law on Commerce of 1897 were among the first pieces of legislation Bulgaria's Parliament enacted following Bulgaria's Liberation from the Ottoman Empire in 1878.

[87] In Germany, for instance, it was deemed that national legislation already offered the protection the Directive aims for.

[88] Part II and Schedule 2; Note the UK carried out a reform of its consumer law in 2015. The rules on unfair terms were initially transposed as Unfair Terms in Consumer Contracts Regulations 1999 *SI 1999/2083.*

[89] Chapter 6.

aforementioned Directive provides the definition of an unfair term[90] and a non-exhaustive list of examples of clauses, which could be deemed unfair.[91] It also stipulates an important exception – the so-called core terms, which pertain to the subject-matter or the adequacy of the price, should not be subjected to the fairness test unless they are not expressed in plain and intelligible language.[92] Comparing English and Bulgarian case law reveals striking differences between the reasoning of English and Bulgarian judges with regard to both the weight of the core-term exception as well as the application of the fairness test.

For example, in the leading decision *Office of Fair Trading v. Abbey National,*[93] the key question for the UK Supreme Court was whether overdraft charges by banks form part of the core terms of a contract for a personal current account. The court stressed: 'Charges for unauthorised overdrafts are monetary consideration for the package of banking services supplied to personal current account customers. They are an important part of the banks' charging structure …'[94] By holding that these charges form part of the core terms of the consumer contract, the court avoided subjecting them to fairness review under Regulation 5 of the Unfair Terms in Consumer Contracts Regulations 1999 (now Section 62 of the Consumer Right Act 2015) and ruled in favour of the banks. By contrast, one can find a series of Bulgarian decisions – Decision 245,[95] Decision 165,[96] Decision 205,[97] and Decision 424[98] – in which Bulgarian judges deemed that clauses allowing banks to change the interest rate on mortgages if their standard variable rate alters were unfair. It is surprising that the courts *did not even consider* the core-term exemption[99] having in mind that interest rates could be regarded as pertaining to the subject matter and/ the adequacy of the price in a loan agreement. At the time these decisions were rendered, there was already case law by the Court of Justice of the European Union – for instance, *Matei v. SC Volksbank*[100] – in which

[90] Pursuant to Article 3(1) of the Directive, a non-individually negotiated term is unfair if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
[91] Annex to the Directive.
[92] Article 4(2) of the Directive.
[93] [2010] 1 AC 696.
[94] *Ibid* [47].
[95] Decision 245 of 10 August 2017 of the Plovdiv Appellate Court on com. c. 823/2016.
[96] Decision 165 of 2 December 2016 by the Bulgarian Supreme Court of Cassation on com. c. 1777/2015.
[97] Decision 205 of 7 November 2016 by the Bulgarian Supreme Court of Cassation on com. c. 154/2015.
[98] Decision 424 of 2 December 2015 by the Bulgarian Supreme Court of Cassation on civ. c. 1899/2015.
[99] Stipulated in Article 145(2) in the Law on the Protection of Consumers.
[100] Case C-143/13.

the concrete steps to be followed by national courts when analysing whether the core-term exemption applied were clarified.[101]

Moreover, the Bulgarian interpretation of the fairness test also seems particular. In all aforementioned Bulgarian judgments, it was deemed that these clauses violated the principle of good faith because the lender could unilaterally alter the standard variable rate. In Decision 165, Decision 205 and Decision 424 the Bulgarian Supreme Court of Cassation was particularly concerned that the bank did not specify the precise mathematical formula it would use to recalculate its standard variable rate in the mortgage agreement itself.[102] In other words, a reference to the standard variable rate was insufficient. In Decision 245, the Plovdiv Appellate Court was troubled by the formula itself – the judicial panel held that some components of the formula such as the LIBOR rate were objective factors while others such as the credit risk were subjective because they were determined by the bank itself. The latter argument seems obscure as banks determine risk according to standard methodologies which take market factors into account.

It is important to clarify that most of these loans were valued in foreign currencies. Decision 245, for example, concerned a 7-year mortgage at a variable rate, which was valued in Swiss Francs. Due to the stability of the currency, the borrower was given the attractive interest rate of 4.5% when they first signed the contract in 2007.[103] However, at the end of 2007 the Swiss Franc became progressively stronger,[104] which increased the cost of the bank's funding and induced it to change its variable interest rate on Swiss Francs – in 2012, it reached 7.2%. Pursuant to the indexation clause in the agreement, the bank altered the interest rate on the mortgage. According to the Plovdiv Appellate Court, this was unfair. In practice, these Bulgarian decisions imply that the currency risk should be borne by the lender, which does not seem to take into account the nature of the services and the circumstances attending the conclusion of the contract as required by Article 4(1) of the Directive.[105] It is worth mentioning that borrowers had the option to hedge their mortgage by opting for a fixed

[101] The decision concerned mortgages at a fixed interest rate which contained a provision allowing for the interest rate to be altered when there is a significant change in the money market.
[102] Note this requirement appeared formally in the Bulgarian Law on Consumer Mortgages when Bulgaria transposed Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property. Nonetheless, this Directive should not be applicable to the disputes at hand as it supersedes the facts.
[103] Note in the same year, the same bank offered 7% interest on loans in US Dollars, 6.7% for loans in Euros and 7.75% for loans in Bulgarian Levs.
[104] See the statistics available on the site of the European Central Bank, http://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-chf.en.html (accessed 20 September 2017).
[105] Transposed as Article 145(1) of the Bulgarian Law on the Protection of Consumers.

interest rate. They could have also chosen a mortgage in another currency. Moreover, altering the variable interest rate when certain circumstances arise is standard international lender practice.[106]

4.2. Different Weight of Case Law by the Court of Justice of the European Union

It is also interesting that while there was case law by the Court of Justice of the European Union on the fairness test in the Directive when the Bulgarian courts rendered their decisions, Bulgarian judges did not consider it, but jumped straight to abstract definitions of good faith from Bulgarian doctrine.[107] This is striking in light of the requirement for autonomous interpretation of European legislation. It has been proposed that '[this requirement] means that the approach to interpreting domestic legislation implementing an EU Directive must reflect the European origins of the legislation by not relying on established national law, or the national laws of another Member State, in interpreting such a provision'.[108]

In *Aziz v. Caixa d´Estalvis de Catalunya,*[109] for instance, the Court of Justice held that to evaluate if a provision led to a significant imbalance in the agreement to the detriment of the consumer, one had to examine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force.[110] Moreover, to assess whether the imbalance arises contrary to good faith, 'it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations'.[111] It is worth mentioning, for instance, that in *Cavendish Square Holding BV v. Talal El Makdessi, ParkingEye Limited v. Beavis,*[112] the UK Supreme court relied on these criteria to determine if a £85 fee for overstaying at a car park violated

[106] For example, in a Discussion paper entitled *Fairness of Changes to Mortgage Contracts* in which the UK Financial Conduct Authority clarifies how its Handbook applies to consumer mortgages, it is explained that changing the standard variable rate is likely to be fair under the rules of financial conduct. While it is possible for a term to be fair under the Handbook but unfair under the Directive on unfair terms, such analysis is illustrative of what is acceptable in the industry. See DP 14/2 of July 2014 by the Financial Conduct Authority.
[107] In Decision 165, the Bulgarian Supreme Court specifically emphasized that good faith is associated with the generally accepted moral rules stemming from laws, custom and morality established at a given stage in the development of human society that has shaped the specific ethical norms to be observed in fulfilling the duties and exercising the rights of members of the community.
[108] Twigg-Flesner at 122.
[109] Case C-415/11.
[110] *Ibid* [126].
[111] *Ibid* [126].
[112] [2015] UKSC 67.

the fairness test.[113] The majority held that the term was not unfair because it 'did not exclude any right which the consumer may be said to enjoy under the general law or by statute'.[114] It also stipulated that the requirement for good faith was not violated because the consumer had every reason to agree to the penalty: 'They were being allowed two hours of free parking. In return they had to accept the risk of being charged £85 if they overstayed'.[115]

If the Bulgarian courts had applied the test, as underscored in *Aziz*, they may have reached a different conclusion to the one they did. Notably, it is unclear how a provision allowing the interest rate on a mortgage to be changed if the variable interest rate alters deprives the consumer of any rights under general Bulgarian law. On the contrary, Bulgarian law has embraced diverse rules which allow the price in a contract to be changed. For example, Article 307 of the Law on Commerce allows for termination or modification of agreements when they become contrary to fairness and good faith. Moreover, Bulgarian case law indicates that courts interpret this requirement rather generously.[116] In addition, one could arguably assume that a consumer could agree to such a term if it was individually negotiated. As already mentioned, in the case concerning the mortgage in Swiss Francs, the consumer accepted the very attractive interest rate of 4.5% when they entered the agreement – the interest rate on mortgages in Bulgarian levs was 7.75% and 6.7% on mortgages in Euros. It seems reasonable that an average consumer would accept the risk that this rate could increase if the Swiss Franc became stronger all the more that this was a 7-year mortgage entered into with a variable interest rate.

Overall, one can see that even though the UK and Bulgaria transposed the Directive almost verbatim and even though there is case law by the Court of Justice on important contentious matters such as the core-term exemption and the fairness review, there are notable differences between the reasoning of English and Bulgarian judges, which seem to be

[113] In the past some commentators have raised concern that continental doctrines like good faith which were introduced in England through European directives irritated English law and resulted in new divergences. See Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, above, at 11; At the same time, in recent years, it seems that English judges have made efforts to study case law by the Court of Justice in an attempt to bridge the gap.
[114] [2015] UKSC 67, [107].
[115] *Ibid*, at [109].
[116] See, for instance, Decision 50/2010 of the Varna Appellate Court on com. c. 10/2010 in which a long-term lease was terminated as it was deemed that it had become contrary to fairness and good faith. The main reason was a change of economic circumstances (economic crisis). Examining historical data about the rate of inflation in Bulgaria reveals that the court was concerned about a change of 6%. The agreement was entered into at the beginning of 2007 and the claimant sought relief in 2008. In 2006 inflation was 6.5%, in 2007-12.5%, and in 2008-7.8%. See Press release by Bulgaria's National Statistical Institute, http://www.nsi.bg/sites/default/files/files/pressreleases/Inflation_god2011.pdf (accessed 10 November 2016).

culturally informed. It seems that, on the one hand, the differences in result stem from different legal values, which are historically rooted and which infiltrate consumer law. UK courts are known for their commercial sensibility while Bulgarian courts traditionally promote social justice and often stigmatize big commercial entities. What is more striking, on the other hand, is the Bulgarian tendency to skip important tests, which are established in the Directive itself or in case law by the Court of Justice. By contrast, the UK Supreme Court tries to comply with these tests at least on the surface.[117]

5. Conclusion and Recommendations

By showcasing the distinct Bulgarian approach to autonomous interpretation, we raised concern about the East-West divide, which may jeopardize the future of uniform commercial law if more elaborate strategies aimed at facilitating uniform interpretation are not developed. We drew on two concrete examples – the Bulgarian interpretation of the CISG and EU consumer directives – to underscore that Bulgarian legal cultural particularities persist in these contexts despite the various mechanisms put into place.

Firstly, legal cultural differences between Western Europe and socialist states not only shaped the early debates on the CISG, but also explain some of the gaps in the document. Moreover, as visible from Bulgarian case law on the CISG, Bulgarian judges and arbitrators continue to approach the document with national assumptions to this day. Secondly, contrary to West European perceptions, the current EU framework seems insufficient to facilitate uniform interpretation of harmonizing legislation even in a less ambitious, purely EU context. Comparing case law from Bulgaria and West European jurisdictions reveals that even seemingly benign instruments such as the EU consumer directives continue to be interpreted differently across the EU despite ample case law by the Court of Justice.

In order to achieve uniform interpretation of international instruments, one needs to further develop strategies which consider the particularities of East European jurisdictions like Bulgaria. Having in mind the distinct features of Bulgaria's legal culture explained above, one may consider the following:

[117] In *ParkingEye*, for instance, Lord Toulson dissented on the substantive application of the fairness test. [2015] UKSC 67, [299]-[314].

– **Promoting a culture of reading foreign commentaries and case law among East European judges and arbitrators:** As established above, a common feature of Bulgarian decisions on the CISG and European consumer law is Bulgarian judges' and arbitrators' reluctance to examine foreign commentaries and case law. Thus, it seems important to promote a culture of reading among them by creating more opportunities for continuing professional development, such as exchange programmes, conferences, and language classes. One should also keep in mind that senior East European judges earned their degrees during communism and had to adapt to drastic changes in legislation following the fall of communism and the subsequent entry to the EU, so they need more time and personalized attention in order to adjust.

– **Encouraging academic scrutiny of court decisions and arbitral awards:** Bulgarian scholars need to develop a habit of examining and critically analysing court decisions and arbitral awards. This would require more effort on their part given the challenges of locating court decisions, explained above. Ideally, East European courts should work towards improving access to their practice too by developing more efficient websites.

– **Enhancing the comparative dialogue between Western and Eastern scholarship**: As argued above, East European jurisdictions are traditionally marginalized by Western commentators. Hence, it is necessary to encourage comparative research between East and West European jurisdictions, including critical discussion of East European decisions on international legal instruments. Research collaborations between East and West European scholars can also be envisaged in light of language difficulties, which may arise, in order to identify and criticize inconsistencies of interpretation of international instruments.

– **Identifying and promoting common legal values:** One can certainly question if it is realistic to expect that East European jurisdictions will overcome their communist heritage. Once again, it seems that dialogue is key. East European judges, arbitrators and scholars are traditionally side-lined by Western lawyers and this inevitably enhances the gap between the East and the West. If, however, the aim is uniform interpretation, we need to aim at harmonizing our legal values too.