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# THE UNIFORM COMMERCIAL CODE: A RUSSIAN POINT OF VIEW

*Alexander S. Komarov\**

## I. THE UCC IN SOVIET LEGAL DOCTRINE

The development of private law in western countries was not a matter of very high priority in Soviet legal doctrine, especially during the post-war period. This obviously can be explained by ideological reasons which played a very important role on the battlefields of the cold war.

Legal research in the area of foreign private law was mainly directed toward a critical social-economic analysis of those aspects of law which were supposed to demonstrate the crisis in the law of capitalist states and their inability to solve the actual social problems.

The ideological aspect usually was not present if the subject matter of the analysis was more or less technical rules, such as those relating to commercial transactions. Such rules were studied for practical reasons since foreign law was always considered an important part of the legal framework of international commercial deals.

The circle of Soviet lawyers involved in research and practical application of foreign law was very narrow: mostly they were academicians in central scientific and educational institutions, some of whom were involved in international commercial arbitrations that took place in Moscow, as well as domestic legal advisers of foreign trade associations.

The interest in the Uniform Commercial Code (the Code or UCC) during this period of time was stimulated mainly by academic research rather than by practical needs since the trade turnover between the United States and the Soviet Union was not substantial. On the other hand, the driving force of academic analysis of the Code was the understanding that the development of the law of the most economically advanced and industrially developed country provided

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the best example of the trends generally appropriate to the legal systems of other western countries.

In a student textbook on civil and commercial laws of capitalist countries published in 1966,<sup>1</sup> the UCC was discussed among other legal approaches that comprised the law of the capitalist countries. The general attitude and evaluation of the Code's merits and drawbacks were mainly academic and, to a certain extent, shaped ideologically.

The textbook noted that the Code drafters not only intended to unify particular legal rules for application in the whole territory of the United States, but also expected that the project would serve as a model for law reform in other countries.<sup>2</sup> This meant that the Code should have become a practical implementation of the "world civil law" and that as such demonstrated "the intention of American imperialists to impose their law to other countries."<sup>3</sup> The textbook also suggested that the adoption of the Code would hardly replace the case law as a decisive source of law in the United States.<sup>4</sup>

The Russian translation of the 1962 version of the UCC was first published in the USSR in 1969. It did not include the official comments.<sup>5</sup> This fact might be, to some extent, illustrative of the character and purpose of that publication. Nonetheless, the translation was performed on a highly professional level by legal scholars engaged in comparative law research and education.

In the introductory article of the Russian translation of the Code, written by an eminent Soviet law professor,<sup>6</sup> the reasons for a Russian translation and publication of the Code were explained in a manner consistent with the traditional Soviet legal doctrine. Yaichkov stated that, since one of the most important tasks in the field of social sciences was "to provide detailed criticism of contemporary bourgeois law,"<sup>7</sup> the translation of the Code would, of course, be of interest to

1. INSTITUT MEZHDUNARODNYKH OTNOSHENIY, GRAZHDANSHOYE I TORGOVOYE PRAVO KAPITALISTICHESKIKH GOSUDARSTV [INSTITUTE OF INT'L RELATIONS, CIVIL AND COMMERCIAL LAW OF CAPITALIST STATES] (1966).

2. *Id.* at 47.

3. *Id.*

4. *Id.*

5. YEDINOOBRAZNIY TORGOVYY KODEKS SSHA [UNIFORM COMMERCIAL CODE OF THE UNITED STATES] (S. N. Lebedeva et al. trans., 1969).

6. K. K. Yaichkov, *Vstupitel'naya Stat'ya k Yedinoobraznomu Torgovomu Kodeksu SSHA* [Introduction to UNIFORM COMMERCIAL CODE OF THE UNITED STATES], *supra* note 5.

7. *Id.*

all those who study the economics and the law of the United States. Simultaneously, he suggested that the Code would also be of major interest to different Soviet organizations such as foreign trade, transportation, and finances, which in their roles had to deal with the application of the commercial laws of the United States.

With regard to the legal contents of the Code, Yaichkov stressed at the outset that it represented rather peculiar and, at the same time, quite logical results of the legal development in the United States in the field of commercial transaction regulation. A peculiarity of this achievement was attributed to the fact that such wide-scale codification within the legal system was based primarily on case law.

Yaichkov also suggested that the judge-made character of the law in the United States would certainly undermine, to a great extent, the unifying effect of the Code. He reasoned that it would not be realistic to expect a change in the attitude of the judiciary toward the existing body of law. This point was stressed in spite of the subordinate role of both common law and the law of equity in relation to the rules of the Code.

Attention was also drawn to the fact that, unlike continental civil law, and despite its title, the Code did not embrace legal regulation of commercial transactions as a whole. Nevertheless, Yaichkov pointed out that the Code represents a clear example of "commercialization" of the legal regulation of noncommercial transactions. This commercialization showed that the primary purpose of this codification was to serve the interests of the business community, especially "big business" such as banks.

Although the contents of the Code were generally described as having many extremely detailed rules, Yaichkov emphasized at the same time that these rules did not deal with unimportant matters and that, in many instances, they had instructive value.

The legal technique used in the Code was mainly criticized from the viewpoint of civil law tradition. The first criticism related to the redundancy of language, caustic formulations, and numerous cross references to articles. Special attention was paid to the use of "rubber stamp" notions such as "reasonable commercial standards" and "good faith," which gave the courts almost unlimited freedom of interpretation.

For a reader of the Russian translation of the UCC, serious difficulty arises in attempting to understand its contents adequately since many legal terms, notions, and definitions employed by the Code do not have equivalents in Russian legal terminology. Basically,

this lack of understanding was due to the fact that Soviet law, from the viewpoint of legal technique, followed the continental civil law tradition.

It should also be mentioned that some of the commercial transactions regulated in the Code were completely unknown to the Soviet law dealing with economic activities. This was due to the nonprivate nature of regulation which existed in the Soviet Union whereby all commercial activities, except minor transactions, were conducted by governmental entities—for instance, banking transactions and secured interests.

The first publication of the Code in Russian obviously was not a great event for the Soviet legal community. However, it undoubtedly marked the beginning of a new interest in the legal regulation in foreign states. The Code represented an alternative to a socialist system and gave the opportunity for those studying the law of capitalist countries to work with legal texts which were much closer to the original texts, as opposed to trying to read between the lines of ideologically influenced essays on “current contradictions of bourgeois law.”

In student textbooks on foreign civil and commercial law published in the last decades, the general treatment of the Code basically has not changed. It always has been pointed out that the Code represents a great achievement in codification and modernization of the law in the United States; however, the government was forced to unify commercial law for the benefit of monopolies.<sup>8</sup>

The modernization of current commercial law in the United States to meet the needs of contemporary commercial practices by way of adopting the Code was usually considered more successful as compared to the realization of the goal of unification of the law. The former was evidenced, in particular, by the rules on irrevocable offer as well as by the codification of trade terms such as F.O.B.<sup>9</sup> and C.I.F.<sup>10</sup> delivery terms.

As far as the unification of the law was concerned, the major counterproductive elements identified were: (1) conservatism of court

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8. Ministerstvo Obrazovaniya SSSR, *Grazhdanskoe i Torgovoe Pravo Kapitalisticheskikh Stran* [MINISTRY OF EDUC. OF THE U.S.S.R., CIVIL AND COMMERCIAL LAW OF CAPITALIST COUNTRIES] 39 (1980).

9. F.O.B. is an abbreviation for “free on board.” U.C.C. § 2-319 (1990).

10. C.I.F. is an abbreviation for a “price [that] includes in a lump sum the cost of the goods and the insurance and freight to the named destination.” *Id.* § 2-320.

practices in each particular state, and (2) the introduction of amendments into the Code when adopted by different states. Hence, the Code was appraised as quite an important step on the way to unification of commercial law in the United States which, nevertheless, would not result in actual unification.<sup>11</sup>

It was also noted that the Code, in terms of legal technique, was written in a very complicated manner and it was expected to be used by highly qualified professional specialists. Further, it was suggested that even for professionals, many of the UCC rules became clear only after thorough study of, and close acquaintance with, the comments to them. On the other hand, it was always emphasized that the rules of the Code corresponded to modern commercial practices and techniques used in commercial transactions.

## II. THE UCC AND LAW REFORM IN POST-SOVIET RUSSIA

The creation of a legal framework for a decentralized economic relationship is one of the most important prerequisites for the transition to a market economy in modern Russia. Soviet law during the entire period of its existence had been based on and exclusively served the social system which, as a matter of principle, denied active involvement of a private person in economic activities.

Legal forms which were inherited from prerevolutionary history and were originally supposed to be used as private-law devices during the Soviet years, happened to be deprived of the conditions for their objective development, and these legal means continued to nominally exist in legislation.

Economic life was regulated by public-law means, which provided very narrow limits for the freedom of action for economic operators. Moreover, many legal forms that are necessary for the regulation of business transactions and are vital for the protection of private interests within market relationships were ineffective in the national legal system.

Under these circumstances, in addition to turning their attention to the research of traditional legal technique, the drafters of the new Russian legislation also focused on the laws of the countries with developed market economies. The drafters hoped to find solutions

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11. MINISTERSTVO OBRAZOVANIYA SSSR, GRAZDANSKOE I TORGVOE PRAVO KAPITALISTICHESKIKH GOSVDARSTV [MINISTRY OF EDUC. OF THE U.S.S.R., CIVIL AND COMMERCIAL LAW OF CAPITALIST STATES] 57 (1992).

which might be adequate to meet the needs of law reform in post-Soviet Russia. This process was stimulated for political reasons as well since there was a great eagerness on the part of political reform currents to provide quick and ready solutions for the creation of a legal system based on market economy values.

In some instances such an approach actually resulted in the adoption of law reform solutions which did not fit within the traditionally established institutions and commonly recognized approaches in national legal development. In particular, this occurred with legislative suggestions which were based on the experience of common-law countries.<sup>12</sup> The reason behind this result seems to be found not only in underestimating legal necessities, but sometimes even in total ignorance of, the differences in the basic notions of a legal rule in common-law countries and the continental civil law systems to which Russian law historically followed.

There are also other reasons that go beyond legal technique that put limits on the possible integration of the legal solutions adopted presently in western industrially developed countries—in particular, in the United States, with some of the unique features of their legal systems—into the new Russian legal system. I will attempt to illustrate this point using the Code as an example.

One of the underlying purposes and policies of the Code is to permit the continued expansion of commercial practices through custom, usage in trade, and performance of the parties. This idea is reflected clearly enough in the formulation of the legal rules contained in the Code. Actually, it means that in the legal context of business transactions, priority is given to existing trade custom and usage, yet much is still left to be decided by the parties in their agreement.

Undoubtedly this is a quite workable and necessary solution for commercial relations in a country with a developed market economy where business transactions have been entered into by people in great quantities for many generations. It also means objectively that a developed, customary infrastructure of business relations supported by a considerable amount of experience on a public, as well as a private, level, must be available. Therefore, the underlying idea of

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12. Ye. A. Sukhanov, *Razvitiye Grazhdanskogo Zakonodatel'stva Rossii pri Perekhode k Rynku, v Grazhdanskom Prave Rossii pri Perekhoge K Rynku* [E. A. Suhanov, *Development of Civil Legislation of Russia in Transition to the Market*, in *CIVIL LAW OF RUSSIA IN TRANSITION TO THE MARKET*] 25, 30 (1995).

the Code is based upon the assumption that the role of legal regulation is confined to facilitating business deals and allowing the parties the maximum amount of freedom in making their contracts.

The situation in a country with a transitional economy, like Russia, obviously is very far from what has been described. Thus, the legislative approach employed by the Code does not seem to be completely adequate to the level of business relations of an economy in transition, where customs or usages are not yet established in commercial transactions.

Economic operators in centralized systems are accustomed to guidance in their transactions by administrative authorities. Traditionally, partners to economic transactions were not directly interested in the transactions and did not take full responsibility for their acts. It is because of this approach that it was necessary in the new Russian Civil Code generally to give the preference—not to custom and usage—but to dispositive rules of law formulated in the Civil Code, and to use them as gap fillers in contracts unless the parties agreed otherwise.

One of the tasks of the new Russian Civil Code is to assist with the formation of commercial practices. This is a unique mission as compared to codification, which took place in other countries in the past years. Codification, as a rule, merely sums up, to a certain extent, previous legal development. Codification also achieves definite results by formulating legal norms and principles which usually are already established by practice. New solutions, comparatively small in number, which were supposed to promote new legal approaches and ideas, still have a solid foundation in previous legal development.

Nonmandatory rules of the new Russian Civil Code have enormous pedagogical value for economic operators who are relatively inexperienced in business deals. At the same time, these rules are formulated to reflect, in substance, the established practices of economic transactions which at the present time, still have enough features of the old system.

The further progressive development of business practices in Russia will of course create trade customs and usages which will certainly play an important role in the regulation of commercial transactions. Thus, in order to give the necessary flexibility to the regulation of business transactions, it will be unavoidable to amend the interrelation fixed in the Civil Code between custom and usage,



on one hand, and dispositive rules of law, on the other, in favor of the former.

Another example of a legal technique adopted by the Code which is not fully comparable with historical legal tradition in Russia, is the wide use of notions such as "reasonable" in the formulation of legal norms. Soviet legal doctrine has always considered such rules very vague. Also, for a majority of Russian lawyers, this approach has introduced unpredictability in legal relations, and such uncertainty should be avoided in legislation altogether.

Nobody would argue that effective implementation of such rules presupposes a highly developed and qualified judiciary and a considerable volume of case law. For the time being in Russia, with regard to both of the pointed elements for objective reasons, much is left to be desired. To a great degree Russian judges who have been involved in economic dispute settlements are experienced in applying rules of positive law, which leave very little to their discretion and usually provide for clear-cut answers to a limited number of situations. Russian courts on all levels lack necessary practical experience in finding solutions based on such criteria as "reasonable."

Nevertheless, noting the flexibility of modern commercial practices, some articles in the new Russian Civil Code make reference to certain criteria that follow the example of the Code. This adoption also explains why the case law relating to the application of the Code might be very helpful for those who will apply the new Russian law to ascertain how these rules are to be applied to particular economic situations.

Obviously, it does not mean that the possibility of taking advantage of a certain legal development in common-law systems and, in particular, legal models provided by the Code, is totally unavailable for a country such as Russia in its present situation. In a market economy, within the broad framework of legislation regarding property rights and other legal relations, economic transactions are governed primarily by contract. Furthermore, although the legal framework may vary significantly from country to country both as to the theoretical basis and the legal techniques, there are customary contractual structures for commercial relations that are used without much modification in practically all market economy countries with different underlying legal systems.

In this respect the Code, unlike any legislative text in other countries, gives a wide variety of examples for business transactions covering many of these aspects. For business people in countries with

a transitional economy—where current commercial practices are rather primitive and undeveloped—the descriptive character of some of the Code rules and commentaries might be very helpful in shaping business deals in the emerging Russian market economy which accords to sound commercial standards.

Taking into account the dimensions and other objective aspects of the United States economy, its role in creating the legal framework for business, including the UCC, might be more valuable for modern Russia than the experience of continental European countries. This may be the case despite the similarity of the legal technique used by both.

However, to ensure a successful solution of the legislative problems relating to the creation of a new law on the basis of other countries' experience, it is very important to take into account not only the advanced legal developments in a certain legal system, but also to adopt it to the legal culture of a recipient country.

In other words, in order to reach an acceptable solution, we should address and subsequently solve the problem of coupling highly developed legal technique with legal traditions and the realities of social and economic relations.

