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Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods

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Abstract

The United Nations Convention on Contracts for the International Sales of Goods (CISG) came into force in 1988 when the required number of States deposited their instruments of ratification. In 1989 the relevant Australian Parliaments introduced the CISG as the Sale of Goods (Vienna Convention) Act. Through that process the Convention became part of our domestic law.

Significantly articles 7 and 8 - the interpretative articles - were incorporated into the CISG. Article 7 basically has two functions. First it assists in interpreting the Convention and secondly it defines the boundary between the application of the CISG and domestic law.

Article 7(1) requires that the CISG be interpreted uniformly to promote the international character of the Convention. Recourse to domestic principles is not allowed. A new autonomous method of interpretation is developed with the aid of case law and practices. Article 7 also points to the application of good faith in international trade. Good faith as a principle is not only applied to the interpretation of the CISG as a whole but it also regulates the behavior of the parties.

Article 7(2) recognizes that the CISG was never intended to be a complete statement of sales laws. The members of the diplomatic conference in Vienna could not agree on the inclusion of several important principles of contract law into the Convention such as the principle of validity. As a consequence article 7 also delineates between the application of the CISG and domestic law through the process of gap filling. This thesis develops the principles and tools needed to implement article 7(2) as gaps need to be filled in conformity with the general principles on which the CISG is based. It is also contended that restatements of contract law, such as the UNIDROIT Principles, if adopted by contractual parties will minimize references to domestic law.

In response to the mandate of article 7, this thesis shows that tribunals and courts will look for a solution within the "Four Corners" of the CISG in a manner contemplated by those preparing it rather than taking recourse to domestic law. It is also argued that the failure to apply the rules contained within the "Four Corners" does not indicate an unwillingness to depart from domestic laws. Rather it reveals that a "sophisticated grasp" of the provisions of the CISG has not yet been achieved.

Article 8 explains the interpretative rules regarding the relations between contractual parties. In particular the subjective as well as the objective intent of parties must be elicited in order to arrive at a correct understanding of the mutual obligations entered into by the parties. Article 8 touches on subtle and difficult issues, which are only partially solved through article 7. Some domestic doctrines such as the parol evidence rule and the rules on mistake need to be abandoned or reviewed.

This thesis highlights the importance of reading the CISG within its "Four Corners" as individual articles cannot be read and interpreted in isolation. They are connected through general principles on which the CISG is based.

The conclusion, supported by doctrinal writing and international jurisprudence, is that the CISG has been interpreted pursuant to the autonomous mandate and that courts in general have understood the significant differences of the CISG

compared to domestic law.

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CHAPTER 1

THE DEVELOPMENT OF UNIFORM LAWS - A HISTORICAL PERSPECTIVE

Overview

- The aims of this chapter are to consider:
    - The problems of interpretation as Conventions are implemented into domestic law.
    - The interpretation of the CISG within its "Four Corners", that is, without regard to domestic principles and concepts.
    - The influence of internationalization and globalization on the application of international uniform laws.
    - The work by Rabel in 1935 and later by Kötz that laid the foundation for the development of unified international laws.
    - The effects of transplantation of principles on the unification process of international laws.
    - The influence of autonomous concepts on the harmonization process.

1. Description of the Problem

The United Nations Convention on Contracts for the International Sales of Goods 1980 (CISG) was adopted in Vienna during a Diplomatic Conference.[1] The CISG came into force in 1988 when the required number of States deposited their instruments of ratification.[2] Through that process the Convention became part of our domestic law. As such any interpretation and application will be effected through domestic courts and tribunals.

This thesis will investigate how domestic courts apply the CISG. The interpretation and application by domestic courts of the Convention referring to domestic law fail to realize the objectives of the CISG. The objectives demand that the CISG be interpreted within its Four Corners.

The diversity is illustrated by two cases using the parol evidence rule.[3] In both instances the courts were asked whether a party can rely on statements made by the parties, which are not contained in the written contract. In *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A (MCC-Marble)*[4] the court held that, pursuant to article 8 of the CISG, such statements are to be taken as expressions of the subjective intent of parties and are to be included into the contract. On the other hand in *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr. Inc (Beijing Metals)* the court stated that "the parol evidence rule would apply regardless of whether Texas law or the CISG governed the dispute."[5] *MCC-Marble* in contrast to *Beijing Metals* interpreted and applied the CISG without recourse to domestic principles that is within the Four Corners of the Convention. *Beijing Metals* did not understand the mandate of the CISG, which simply prohibits recourse to domestic principles and methods.

The premise of this thesis is that the CISG should be interpreted within its "Four Corners" without regard to domestic concepts and principles. Most importantly, it should be interpreted as an international standard. Furthermore, the methods of interpretation are not to be found within domestic techniques but are subject to an autonomous method of interpretation, which is explained in chapter 3. Articles 7 and 8 lay down the interpretational rules and play a pivotal part in the development of the argument for they are essential to achieving the important principle of international uniformity. International case law will be analyzed to investigate how courts and tribunals have followed the mandate of articles 7 and 8.[6]

Academic literature has focused on specific problems associated with the mandate of articles 7 and 8. In Germany, for example, attempts have been made to draw the whole argument together and view article 7 as it affects the Convention as a whole. Most attempts are "doctrinal" in nature. This thesis investigates how the courts and tribunals have contributed towards an interpretation and application of the CISG within stated objectives of the CISG in the "Four Corner approach". Relevant principles are elicited from articles and existing jurisprudence are investigated to illustrate a methodology of interpretation and application of the CISG.

Australian commentary and case law is sparse. No serious attempts have been made so far to explore fully the influence of the CISG within our legal system.[7]

2. Methodology

This thesis is concerned with comparative analysis, statutory interpretation and questions of contract theory. These issues should be placed within the context of internationalization and globalization. However it is not the purpose of this thesis to discuss the major ideas on the above topics in detail.[8] Some general remarks will however be made to understand the basic underlying ideas. Importantly, the concept of globalization is not to be confused with internationalization. Internationalization is understood to refer to cooperative activities of national actors beyond the nation state.[9] Globalization is different.

> "*It is a multifaceted phenomenon that escapes easy definition. ⇨ It is sufficient to observe that it is in the present stage of development of the international system that globalization has been fully recognized as a specific feature of international relations, which impact the political, economic, ecological, social and cultural life of societies around the globe in an unprecedented manner."*[10]

Whether the development of private international law is to be classed as an expression of internationalization or globalization is not important in this context. Of importance is the recognition that globalization created a new perception of the political process in which UNCITRAL and other bodies could liberalize domestic laws and move beyond national borders. In essence a "qualitative leap in the course of history" has been observed.[11]

Globalization requires that the CISG be interpreted and applied as an international legal instrument without recourse to domestic concepts and principles. For example, a German buyer refused to pay for New Zealand mussels on the grounds that the mussels could not be sold as they contravened German health standards.[12] The

court ruled in favor of the seller, as the health standards were not international in character and therefore only known in Germany.[13]

The purpose of this thesis is thus not to compare domestic practices. However, it is argued that domestic law can assist in understanding the application of the CISG within the Australian context. This thesis will also discuss the impact various Restatements on International Contracts have on the understanding of the CISG.[14] This chapter therefore will introduce key concepts which are necessary in understanding the application of articles 7 and 8 and hence the CISG.

3. The Development of Uniform Laws - a Historical Perspective

Arguably the single most noticeable development in the last 40 years in economic terms is globalization, which has naturally increased the importance of cross-border trade. These developments have contributed greatly to the internationalization of trade.

In 1935, a concept that the world was divided into States with their own independent economic, social and legal systems would not have attracted much attention. In 1935, a revolution in substantive law had started which has not yet run its course. Ernst Rabel commenced the debates regarding the introduction of a worldwide uniform sales law.[15] Private international law was considered to be complicated, abstract and had the reputation of being the "nuclear physics of jurisprudence."[16] Scholars were debating the possibility of applying foreign laws within their jurisdiction. Uniformity was not the issue but rather the question of the correct application of the relevant domestic law.

The first tentative steps towards unified international laws resulted in the realization that the conflict of law rule using nationality as a connecting factor would lead to different results according to different domestic laws in use. In France and Italy, domestic law was always kept in "reserve" should the judge experience problems applying foreign laws.[17] Kötz, amongst others, advocated strongly that the solution to the problem is the creation of "general principles". These general principles could be used to create the foundation for harmonization or unification of international laws.[18] Significantly, he argued that the teasing out *(Ermittlung*) of general principles is not only the task for the legal academics but also for judges.[19] These issues have now come to fruition with the creation of international unified laws in the form of treaties and model laws such as the CISG, which is the focal point of this thesis.

a. The Effects of Globalization

A key factor in the development of international trade laws is globalization. There has been a deliberate effort on the part of government and non-government players to liberalize or deregulate the world markets.[20] As a consequence, global responses to commercial legal issues have changed the perception of countries and boundaries. Technology transfers, the amalgamation of regions and countries into common markets, the demographic shift between old technology countries and new emerging markets as well as the increasing cost differentiation between global industries and national industries have been key points in globalization.[21]

> *"Globalization simply is unstoppable. Even though it may be only in its early stages, it is already intrinsic to the world economy. ◆ Companies of all sizes [must] now compete on global markets and learn to adjust their strategies accordingly, seizing the opportunities provided by globalization."*[22]

In this context the "[Internet], technology's latest spatio-temporally transforming offering"[23] has become a borderless information center, marketplace and channel for communication and payment and has extended exponentially the global reach of the business community.[24] Such developments point to the need to put in place legal systems, which can fulfill the needs of the international and transnational business community.

The legal systems and professions of many countries have been slow to keep pace with the needs of the new economic reality. One problem has been an ongoing debate between economists and jurists on the need for the creation of a "world law."[25] Economists are of a view that a State intervention through the legal system should be kept to a minimum as individuals and firms will inevitably reach an economic solution through market forces.

The majority of jurists on the other hand advocated that legal coordination is required to effectively embrace globalization.[26]

b. Unification of Laws

There are also jurists, notably in England and to a lesser degree in the United States, who believe that it should be left to the market to decide whether the "commercial world prefers the familiar certainties of English law or the Utopian and unpredictable ideals of Conventions."[27] The argument is that unification of law is not as important as one domestic system, namely the common law via the Commercial Court in London, is in effect the compromise solution for parties who cannot agree on a governing law. A paramount need of the commercial community, namely certainty, would be best served by one coherent system rather than through a Convention, which is a "multi-cultural compromise" therefore lacking coherence and consistency.[28] It is the inability to recognize that such views are untenable as comparative law offers the only way by which laws can become international.[29] Consequently such international uniformity will exhibit coherence and consistency.

Historically, England was very active in the development of international law but failed to take the next step and ratify the CISG.[30] The English view as explained by Nicholas[31] is out of step, not only in light of the historical background but also because the common law countries "have long made reciprocal references to each others decisions and are now invoking continental law to a remarkable degree."[32]

As far as unified laws are concerned, history is being repeated. Roman law was the essential source of law on the continent of Europe and only disappeared in the eighteenth century.[33] Also many countries, in their modernization undertook "massive transplants" such as the introduction of the German "*Bürgerliches Gesetzbuch*" into Japan.[34] As an interesting sideline, the only successful attempt to transplant Common Law was in the context of colonialization.[35]

Some scholars have argued that a "common law" is not achievable simply by a process of unification, harmonization or transplantation.[36] Such a view may be correct if attempts at the creation of a unified or common law are directed at a total body of law. Differences in political or social organization need to be overcome to achieve such unification. Not surprisingly one point of view states:

> *"[It] is not only useless, but dangerous to extend attempts at harmonization into fields in which legal differences reflect differences in political or social organization or in cultural or social mores."*[37]

However the evidence supports the view that laws have been transplanted successfully and such a movement of a rule or a system from one State to another has been common in history.[38] Watson has argued that:

> *"Law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making and they observed the [apparent] benefits which could be derived from it. What is borrowed that is to say, is very often the idea."*[39]

It is exactly for these reasons that Rabel has succeeded in proposing a unified model law. Today many successful Conventions and model laws are enshrined in legislation. It is important that a distinction is made at unification of a total system and harmonization or unification of a segment of the legal system. This is important for the purpose of market integration, or facilitation of commerce. It is the pragmatic approach, which might be thought likely to succeed.

> *"The line between what is to be and what can usefully be unified must ◆ be drawn pragmatically and flexibly, not dogmatically or rigidly."*[40]

Unification of specified areas of law such as the sale of goods has been successful internationally because of the above arguments. It is not surprising that principles or ideas of law have been slowly recognized as being universal. As an example, principles of continental laws have taken a foothold in common law countries. As England is now part of the EU such trends will accelerate especially if current attempts in creating a codified

European commercial law are successful.[41] A "flow on effect" can already be observed in continental Europe where a President of the German Federal Court said:

> *"In giving his opinion, the national judge is not only entitled to engage with the views of other courts and legal systems; he is also entitled, when applying his own law and naturally giving full weight to its proper construction and development, to take note of the facts that a particular solution conduces to the harmonization of European law. In appropriate cases this argument enables him at the end of the day to adopt the solutions of other legal systems, and it is an argument he should use with increasing frequency as the integration of Europe proceeds."*[42]

c. The Influence of Autonomous Concepts on the Harmonization Process

A desire for autonomous laws has passed the stage of "looking at" and evaluating general principles only. Private law harmonization, which includes the modeling of a commercial law infrastructure, has been taken up actively not only by the United Nations but also by other broad membership-based organizations such as UNIDROIT and the ICC, which does not exclude an option for commercial law unification amongst economic blocks.[43] Trade blocks such as ASEAN, the EU, NAFTA and others are also involved in providing regional solutions.[44] Trade blocks are already a force to significantly influence international legal developments. As an example, discussions in relation to the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters indicate that the EU is arguing strongly for amendments, significantly to article 37, which deals with the relationship with other Conventions. Article 37 notes that the Hague Convention prevails over any other instruments.[45] The EU proposal is that the Brussels Convention and the Lugano Convention referred to as the "European instrument" should take precedence over the Hague Convention in all European Instrument States.[46] The conclusion is that the EU and other trade blocks are actively involved in the creation of international autonomous law instruments within their sphere of influence. Non-aligned States cannot simply ignore these developments and retreat behind domestic systems of law. Such attitudes are isolationist and will hinder the development and participation of non-aligned States in world trade.

The indication is that the next step in the recognition of uniform principles, namely the "formalization of principles" has been reached. The underlying goal is to unify laws and hence an application and interpretation must be universally acceptable and not constructed with domestic solutions in mind. This thesis will investigate how successfully international uniform laws have been applied.

Only the CISG will be investigated as an example of a unified international law, because the Convention is based on comparative research and deals with the sale of goods.[47] The CISG is not the only set of rules governing the international sales of goods. UNIDROIT and the European Commission have introduced their own "restatements", which are slowly gaining acceptance among the international business community. Both of these restatements in addition to embracing common sets of legal principles also took the opportunity to include principles found and established in the CISG. The list would not be complete if the work of the Pavia group under its chair Guiseppe Gandolfi were not mentioned.[48]

What is the economic reality in respect to the models advanced by economists and jurists? The experience of German unification at the end of the 19th century and the beginnings of the European Communities in the 1950's shows that legal harmonization follows economic harmonization.[49] The East-West unification of Germany and the further developments of the EU exhibit the same tendencies.

However it should be noted that currently the third economic harmonization process in the EU has begun, that is the Eastern enlargement and its associated institutional reforms.[50] By analogy with earlier economic enlargements and unification moves, new developments in harmonization of trade laws will not be actively pursued for the time being. Efforts are gathering momentum to convert regional groups such as APEC and NAFTA into more active bodies to standardize commercial laws.[51] It is conceivable that in the near future the option to harmonize laws amongst trade blocks will be considered.

The evidence is that the business community, by its political will and driven by economic reality, has opened

national borders and is operating within a global economy. Of importance is the Internet and e-mail, which exponentially extends the global reach of the business community. "The various dogmas and beliefs held as sacrosanct by individual sovereign legal parishes are not necessarily so hallowed by the business community."[52]

On the one hand, the business community as contracting parties operate in an international setting whereas legal systems generally hold on to their own national reality. David suggests that the principal reasons for such attitudes stem from conservatism, routine, prejudice and inertia.[53] In relation to unified sale of goods laws, nothing better illustrates this point than the English legal system, which as "another case of splendid isolation"[54] has not yet fully grasped the significance of the EU as a wider community with their own unified laws. Schlesinger who coined the phrase "intellectual isolation" best describes such attitudes.[55] In the 18th century Lord Mansfield already commented:

> *"The mercantile law, in this respect is the same all over the world. For from the same premises, the same conclusions of reason and justice must universally be the same."*[56]

Lord Manfield succinctly links reason and justice to the attainment of a uniform homogeneous law. In effect he understood the requirements of a successful international law well ahead of its successful implementation. Globalization and internationalization were the catalysts to reinvigorate Lord Mansfield's thinking. The application of a unified law to cross-border transactions is economically sound and produces superior results compared with the application of domestic law.[57] Even the British legal system has now entered into the phase of "Europeanisation".

d. The Autonomous Contract

The debate of the "autonomous contract" has long ceased to be of academic interest only.[58] It has become an economic and legal reality. In essence to understand the transnational need for sales laws a

> *"study not of contract law, but rather of contract practice is the key to understanding the economic properties of contracting that are necessary to work out sensible uniform laws for commercial purposes."*[59]

What then is the difference between "contract law" and "contract practice"? It is implicit in the description that contract law is tied to a system of law based on a national or domestic body of law. Through that particular municipal system, contract law would have evolved based on known and understood principles. However, contract practices are looking beyond a legal system and the law in general. Practices transcend legal, social and economic thoughts and processes and have become universal. That is, they are common elements, which transcend borders.

It might be argued that, once contract practices have been identified, an international law can be put into practice. Looking at this question, Honnold asks:

> *"Can clear, predictable international law be made from the divergent rules of dozens of domestic legal systems, rules built with local idioms for which there are no equivalent terms in other languages?"*[60]

The answer he noted is "unhappily no, but that is not the end of the story."[61] It must be remembered that any kind of legal regulation is a potential source of unpredictability but the transnational nature of international business provides an additional source or dimension to the difficulty of securing predictability.[62]

The solution is found in the work done by Kötz and even earlier by Rabel. In essence, an autonomous contract has to be constructed which will not alleviate all the problems but will provide the commercial community with a framework. Within that framework at least one problem of municipal law can be eliminated namely the divergence of idioms which require local knowledge and contribute towards cross border legal risks. In a recent paper, the Australian Law Reform Commission (ALRC) stated that the first principle of an international agreement

> *"which aims to improve commercial law at either a procedural or substantive level should have as one of its expected outcomes the reduction or better management of cross border legal risks faced by Australian firms."*[63]

On a procedural level, international developments of harmonization or assistance have not kept pace with current circumstances and there is a need for more effective arrangements.

> *"The court system can no longer be regarded as an institution operating exclusively behind national walls. The system now functions increasingly in an international environment and must respond to that circumstance."*[64]

The problem then is twofold. First a clear set of autonomous contract laws should be written which are acceptable to the legal systems of a significant number of countries. Confidence in such a system can be achieved only once it is tested in a practical sense. The second problem is that uniformity and predictability can be achieved only if such a system is applied and most importantly interpreted uniformly.

Amissah has recognized that the autonomous contract as a concept must be based on three ideas. The autonomous contract is first an expression of the will that governs international commerce, secondly is a means of seeking to transcend national boundaries and thirdly is designed to be virtually self-contained and self-governing.[65]

CHAPTER 2

THE CISG

Overview

- This aim of this chapter is to consider the legal status of the CISG in international trade.
- This chapter introduces the notion that courts and tribunals will look for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it rather than take recourse to domestic law. In particular the following issues will be analyzed:
    - The advantages of international law in managing of cross border legal risks.
    - The role of uniformity and predictability in achieving a common legal theory.
    - The role of the *Vienna Convention on the Law of Treaties* on interpretation of the CISG.
    - The application of the CISG in domestic law, particularly articles 1 to 8.
    - The effects of multilingual translations and the choice of words on the development of a methodology of international interpretation.
    - The impact of domestic law on the CISG.

1. Introduction

The Convention, in its decreed purpose or outcome, intends to overcome shortcomings identified by organizations such as the Australian Law Reform Commission (ALRC) and states that:

> *"the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."*[66]

It is apparent that the underlying philosophy of the CISG is that the development of international trade and the removal of legal barriers necessitate the creation of uniform laws. Such uniformity cannot be achieved by taking

recourse to domestic concepts, principles or methods of interpretation.

Australia ratified the CISG on April 1, 1989.[67] Legislation concerning it has been enacted by each State and in particular in Victoria through the *Sale of Goods (Vienna Convention*) *Act 1987* (Vic). It should also be noted that s66A has been introduced into the *Trade Practices Act 1974 (*Cth*)* [TPA]. It provides that:

> *"The CISG takes precedence over provisions of the TPA as well as providing that where the Act would apply were it not for a term in the contract, the term is overridden and the Act applies."*[68]

The Victorian legislation provides in s 6 that the Convention in case of conflict overrides domestic legislation. Furthermore the CISG is "self-inclusive" but permits via article 6 an exclusion of the international law in favor of domestic law.

In Australia the advantage of using international sales laws has not been fully recognized and anecdotal evidence suggests that business has taken up the option contained in article 6 to exclude the CISG. The CISG will apply automatically and "opting out" is only valid if the parties adequately indicate their agreement to do so.

Australian practitioners are not alone in trying to "opt out" of the CISG and Will suggests that German, French and Italian jurists whenever possible are trying to use article 6.[69] One German global business systematically excludes the Convention in favor of German, Austrian or Swiss domestic law. The Board of Management must approve any deviation from nominated domestic systems, such as reliance upon the CISG.[70]

Some legal advisors continue to believe that a choice of domestic law allows business to move in familiar territory. However such an attitude appears to be "nationally introverted" which is specially highlighted if "nationally extrovert" systems such as the one in Switzerland are used as a comparison.[71]

The following Turkish example can illustrate this point. What would be the effect if Turkey entered into a contract with a German business and insisted on Swiss Commercial Law? At first glance one would assume that a "neutral" domestic law has been chosen favoring neither party. However, that is not the case. Turkey in the modernization of its system of law adopted Swiss commercial law. To opt out of the CISG in favor of the Swiss Commercial Code means that Turkish business uses its own domestic law. One would not consider this to be a compromise or an adoption of a "neutral" system. However to adopt the CISG certainly gives no advantage to either party and is in the true sense a "neutral" system of law.

A further point should also be considered. The UNIDROIT restatement, the Principles of International Commercial Contracts [PICC], which are modeled to a great extent on the CISG, have influenced the drafting of the Russian Civil Code, the Estonian Law of Obligations and the Civil Code of the Republic of Lithuania.[72] It should also be noted that the development of the New Chinese Contract Law was significantly influenced by the CISG.[73]

Such developments indicate that the emphasis in the modernization process of domestic law has changed. The adoption of mature domestic systems as demonstrated by the Turkish hypothetical appears at first glance to have given way to the adoption of international laws. A more global view might enhance a municipal system in its efforts to maintain an international perspective.

Another aspect of the choice of domestic law is that there is a danger of not managing cross border risks effectively. In *Roder Zelt und Hallenkonstructionen GmbH v. Rosedown Park Pty. Ltd. (Roder Zelt*)[74] the impression is gained that counsel for the defense was not properly prepared as "they made only passing reference to the Convention."[75] Philosophically, they did not understand the impact of the CISG on the domestic system. The problem of understanding the impact of international law is one of education, not only of business but also its legal advisers. This view is strengthened if we consider that only two reported cases have been decided in Australia since ratification in 1989 and both indicate a lack of understanding.[76]

The purpose of this thesis is not to investigate how the CISG has to be brought effectively to the attention of the legal profession, rather it will examine whether courts and tribunals are using the CISG appropriately, that is

within the mandate of article 7 and 8.

2. Uniformity and Predictability; The Problem - Restated

It is accepted worldwide that the CISG is not "point zero" in the development and interpretation of international Conventions in general and international sales laws in particular. Rather it is the culmination of attempts. It dates back to Rabel followed by the Cornell Project and is closely linked to the UNIDROIT inspired Hague Uniform Law for International Sales (ULIS and ULF). This was the basis on which the CISG was built.[77]

Tribunals and courts should thus be able to look back at historical models and understand better the impact that ratification of international treaties such as the CISG has on domestic law.

This thesis seeks to show that tribunals and courts will look for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it rather than taking recourse to domestic law. It is also argued that the failure to apply the rules contained within the "Four Corners" is an error of interpretation rather than an indication of an unwillingness to depart from domestic laws.

Such an investigation is of importance as the essence of exporting is to sell goods abroad. From a legal point of view the contract of sale is a central feature of the transaction.[78] Many other contracts such as transport and insurance are supported by the central contract for sale. It is therefore important to create a legal climate which supports the central contract in a uniform and predictable manner to confidently operate in an international environment. It has been suggested that international laws in general and the CISG in particular "lack a common legal theory and practice upon which judges and practitioners can rely."[79] This appears to be true and needs to be distinguished from the view that:

> *"[illegible] The uniform law from the very moment of its coming into operation starts to differ from itself. Every judge in every country is a sovereign interpreter of the text, and the judge became a judge by learning the system of law of his own country. And as the speediest bird is unable to fly out of itself, so the judge is unable to forget the law that he has learned. Divergent or contradictory interpretations, like the application of rules of different countries lead to different judgments."* [80]

The difference between the two opinions is illustrated by the fact that Diedrich recognizes that uniformity and predictability are possible to achieve if a common legal theory and practice can be established. Supportive evidence that a common legal theory and practice is possible can be found in the original 1935 proposal of a Unified Sales Law. A comparison with the CISG indicates that the basic structure of the two laws show remarkable similarities.[81] Rabel indicated that a unification of law is successful only if a compromise is achieved. Such compromise can be achieved through comparative studies especially between the Anglo-American system on one hand and the Continental systems including Japan and South America on the other.[82]

Réczei on the other hand assumes that judges are trapped in municipal thinking and practices. This thesis shows that judges are not unduly trapped in municipal thinking and practice.

In order to create a legal theory and practice, a common tool needs to be applied to the CISG namely the interpretative article 7. This is the key that opens the door to a common unified approach to the interpretation and application of the CISG. By applying this interpretative article, a common interpretive practice supported by case law has been created, which takes on the function of a common legal theory.

It is possible there will be divergent judgments if article 7 is not understood and applied correctly. Réczei had a particular point of time in mind, namely the point of introduction of a unified system of law. It would be difficult to argue that an international unified system of law would not suffer from divergent decisions at the beginning. By analogy, the United Nations Security Council and General Assembly asked for Advisory Opinions of the International Court of Justice as a basis to form decisions. Uncertainties, which required opinions, are typically clustered within the first 10 years of the Court's existence with only a handful of comparable advice sought in the following 30 years.[83]

3. Harmonization of Laws

An intended outcome of international agreements is the harmonization of laws. Some factors have been identified which limit the effectiveness of harmonization through Conventions such as the CISG. One of the factors identified by the Australian Law Reform Commission is that "effective harmonization does not require uniformity but does require a common conceptual basis."[84] Such views need some comments. Undoubtedly a conceptual basis is the foundation upon which any legal system is built. Such a basis varies, as an example, between common law countries and civil law countries. To argue that harmonization in an international setting requires a common conceptual basis is not wrong. Such an argument however requires that harmonization is not expected to be present at the introduction of the international sales law. Common concepts need to be "bedded down" and require therefore some evolutionary process. Courts, tribunals and academic writing can facilitate such processes.

As the CISG had to take into account different social, economic and legal systems, only the outcomes, that is decided cases and doctrinal writings, will contribute to the development of an internationally valued concept. Through the creation of a conceptual basis, independent from domestic systems, harmonization can be achieved.

However, even in such a situation there is still a danger that harmonization is only superficially effective. The CISG is a consensus created by Contracting States from a cross section of various economic, social and legal systems and arguably "the person looking at the currently effective Uniform Law from a certain distance will be surprised by its selective and fragmentary nature."[85]

Uniformity of laws is still a pre-condition to achieve the goal of harmonization. Uniformity indicates that cases are decided in the same way, thus achieving uniformity of outcome. Such matters need careful nurturing and developing.[86]

4. The CISG - some Fundamental Observations

The expected benefit of any Convention, and the CISG is no exception, depends on the fact that it is implemented in a manner contemplated by those preparing it.[87] Importantly the CISG cannot be viewed and interpreted in isolation. If it is based on domestic law, diverging judicial interpretations would lead to a fragmented approach and uniformity could not be achieved. International development plays an important part in interpreting and understanding the CISG. In such a way cross border legal risks such as unfamiliarity with municipal law are reduced and the business community will gain the benefits which can be achieved through the CISG. These benefits are by no means certain or guaranteed and ongoing development and interpretation on an international, rather than a national level will contribute towards uniformity.

The first step towards the goal of uniformity has been achieved by the acceptance of the CISG as a uniform international sales law. The second component of uniformity, the availability of a body of tested and accepted case law, is progressing. We have entered the phase of "predictability". This phase can be demonstrated by examples using article 35(2)(a). This article stipulates that goods must be "fit for the purpose for which goods of the same description would ordinarily be used." The three examples below test the relationship between "ordinary purpose" and domestic industry standards.

The first example is a 1999 German decision.[88] An Austrian seller supplied vine wax to a German buyer. The court stated that the seller was obliged to:

> *"deliver wax that is suitable for the treatment of vines, but that the black wax did not meet the industry standard - of which both parties were aware and which both parties applied."*[89]

The wax therefore is not in conformity with the contract pursuant to article 35.

This case can be usefully contracted with a second example decided by the Federal Court of Germany.[90] The buyer imported New Zealand mussels, which did not conform to local food standards according to German Law (*Lebensmittel und Bedarfsgegenstandesgesetz*). The Federal Court affirmed the decision of OLG Frankfurt of April 1994 and stated:

> *"Decisive is that a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and that the purchaser, therefore cannot rationally rely upon such knowledge of the seller."*[91]

The seller can indirectly rely on the fact that it was unreasonable to rely on his skill and judgment if the place of usage was not communicated to him. The court listed three exceptions to its rule:

> *"(1) if the public law and regulations of the buyer's state are identical to those enforced in the seller's state; (2) if the buyer informed the seller about those regulations; or (3) if due to "special circumstances," such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations at issue."*[92]

The third example, *Medical Marketing International, Inc. v Internazionale Medico Scientifica, S.r.l* [93] shows that the above rule has been accepted as a persuasive precedent by an American court. The facts were similar and the court noted that the third exception as noted by the German court was applicable. The American decision may not establish the use of foreign decisions as precedents but at least it can be argued that the foreign decision was used as "persuasive authority" and contributes towards predictability of outcome.

Another impact of the CISG is that an international sales law is replacing some domestic laws. The parol evidence rule, which in brief excludes oral evidence, and which contradicts or varies terms of a subsequent or contemporaneous written agreement, can be used to illustrate this point. Article 8(3) of the CISG provides that:

> *"In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."*[94]

The most important factor in advancing the CISG is the understanding of a common conceptual basis. This necessitates the development of a new approach to interpretation and remedies, which are not yet applied in domestic dispute resolutions. As an example, Von Doussa J. in *Roder Zelt* [95] (the CISG applied to the contract of the sale of goods) commented that the pleadings "are expressed in the language and concepts of the common law, not in those of the Convention."[96] As noted above, counsel made only passing reference to the Convention. Von Doussa J. also added that the provisions of the Convention replace the common law concepts and common law remedies.[97]

The CISG, to be effective, must become part of our domestic system through ratification, which is the unstated philosophical underpinning of the system with the acceptance of the paramount rights of sovereign nations.[98] This fact is well established in precedent. Lord Atkin suggested that:

> *"Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action."*[99]

The question is what standing has the CISG within our domestic law? Von Doussa J. explained:

> *"[illegible] the Convention, which is now part of the municipal law of Australia, the meaning of that law, and its application to the facts, is to be determined by this Court. It is not a matter for expert evidence. The Convention is not to be treated as a foreign law which requires proof as a fact."*[100]

6. The Application of the CISG

As stated earlier: "The provisions of the Convention prevail over any law in force in Victoria to the extent of any inconsistency."[101] However, the CISG is not a complete statement in relation to the sale of goods. It is therefore important to understand the application of the CISG, which is regulated in chapter I.[102] Such an

understanding is essential to be able to place the Convention within the context of domestic law.

More importantly. an understanding of articles one to eight is essential as these articles play an important role in understanding the application of the CISG. In essence, an understanding of articles one to eight is fundamental in the development of a method of interpretation and application of the CISG.

a. Article 1

At first glance, it appears that the interpretation of article 1 does not pose any problems. This article states:

> *"(1) This Convention applies to contracts of sale of goods between parties whose place of business are in different States:*
>
> *(a) when the States are Contracting States; or*
>
> *(b) when the rules of private international law lead to the application of the law of a Contracting State."*

An ICC arbitration case is illustrative in the application of article 1(a). The arbitrator ruled that the CISG, which is the law of California, applies pursuant to article 1(1)(a).[103] However. interpretations by courts have shown that the articles of the CISG cannot be read in a vacuum.[104] Article 100(2), has an important bearing on the application of article 1, if the question of acceding to the Convention needs to be answered. In *Ytong v. Lasaosa*,[105] both Spain and France were Contracting States when the matter was brought before the court. However only France but not Spain had acceded to the CISG at the time of concluding the contract as stipulated by article 100(2) therefore the Court of Grenoble applied article 1(1)(b) and not article 1(1(a).[106]

In an ICC arbitration between a German seller and a Spanish buyer, the arbitrator applied article 1(1)(a)[107] to contracts made after August 1, 1991 and article 1(1)(b) to those made after January 1, 1991.[108] Contracts made before January 1, 1991 had to be dealt with under German Civil Law (choice of law) as neither of the two countries had ratified the CISG.[109]

In another case, an arbitrator had to decide the choice of law in a contract, which was silent on this issue. The seller was from Russia, the buyers from Argentina and Hungary and the stipulated forum was Zürich in Switzerland. The arbitrator applied the law of the forum namely Swiss law. According to Swiss domestic law, he had to apply the Hague Convention, which led him to apply Russian domestic law. As the CISG is part of Russian domestic law, the arbitrator could apply the CISG as the governing law.[110]

The three quoted examples support the view that article 1 must be applied carefully to avoid a wrongful application of the CISG. Not all interpretations followed the same line of reasoning. Two Italian decisions illustrate this clearly. The first dispute was between an Italian seller and a Japanese buyer. The contract was subject to Italian law. The majority of arbitrators, with one dissenting, came to the conclusion that the choice of law amounted to an implicit exclusion of the CISG.[111] Such a conclusion is wrong. The court correctly stated that the conflict of law rule leads to the application of Italian law and should have applied article 1(1)(b) as Japan is not a Contracting State. If a country ratifies the Convention it becomes part of its own body of law. If a matter falls within the sphere of application of the CISG then the Convention must be applied.

The second case, *Nuova Fucinati S.p.A. v. Fondmetal International A.B.* is similar.[112] The court correctly found that article 1(1)(a) is not applicable, as Sweden was not a Contracting State. The court went on to reject the applicability of article 1(1)(b) on the grounds that the article only operates in the absence of a choice of law by the parties. The court read the sub-section far too narrowly and, through a lack of understanding of article 7, was lead into error. The two Italian cases illustrate that the tribunals did not interpret the CISG correctly and show a lack of understanding of the purpose of the CISG, specifically article 7.

An Austrian Arbitration proceeding best sums up the correct application of article 1.

> *"According to the predominant view in international legal writings, the parties' choice of the law of a*

Contracting State is understood as a reference to the corresponding national law, including the CISG as the international sales law of that State and not merely to the non-unified domestic sales law."[113]

b. Article 2

Article 2 in brief partly restricts, and partly clarifies the notion of "contracts of sale of goods."[114] It does so by stating to which sales of goods the Convention is not applicable. One of those exclusions relates to consumer contracts. To fall under the category of consumer contracts it is stipulated that the seller either could not know or ought not to have known that the goods were for personal use. Two cases both dealing with the purchase of a motor car illustrate this point. An Austrian decision found the sale of a Lamborghini not to be governed by the CISG due to article 2(a). It noted that the CISG was not applicable because the seller proved that he knew that the car was bought for personal use.[115]

This should be contrasted with a decision by the *Landsgericht* [District Court] Köln. The buyer again used the car for personal use but the seller of the car knew that the purchaser was a dealer in motor cars and therefore article 2(a) was not applicable.[116] The conclusion is, that article 2(a) limits the application of the CISG to commercial contracts.[117] Article 2(e) may be noted as it indicates that ships or aircraft are excluded but not parts of ships or aircraft. A Yugoslav Foreign Trade Arbitration illustrates this point.[118]

The clause in the contract stipulated that "Yugoslav substantive law" was the applicable law. The subject of the contract was the purchase of a ship. The arbitrator correctly pointed to the fact that both countries, Egypt and Yugoslavia, were signatories of the CISG. However due to the exception in article 2(e) the CISG was not applicable and therefore Yugoslav substantive law must be read as meaning Yugoslav domestic law.[119]

c. Article 3

A contract for work done and material or labor supplied is basically treated as a contract for sale.[120] Neither of the adjuncts to goods can be "a substantial part" of the contract. Courts have interpreted this section with the widest possible view and have not restricted the "substantial part" to only monetary values but also looked in their determination to the intention of the parties concerned. A German court ruling clarifies article 3 as far as the obligations of parties in relation to the supply of value other than goods is concerned.[121] A machinery part had to be delivered and installed in the buyer's factory. The court found it impossible to calculate the value of the goods compared with the installation costs. The court therefore looked at the basic reason for the contract as well as the reason for the dispute and found that the delivery of the precision machinery was the essence of the contract. Everything else was of subordinate concern.[122]

d. Article 4

Article 4 is another restrictive article stating that, except as otherwise expressly provided, the CISG is not concerned with questions of validity therefore "laying down rules for the objective agreement necessary to create a contract of sale."[123] As far as the form of contract is concerned this is settled in article 11 which declares that the international contract is free from any requirements as to form. Furthermore, except as otherwise expressly provided, the CISG is not concerned with "the effects, which the contract may have on the property in the goods sold. This aspect is left to municipal law. Article 4 will be discussed in more detail in chapter 6.

e. Article 5

This article provides that liability of the seller for death or personal injury caused by the goods to any person is not within the scope of the CISG. This ought not to be a contentious article. There is minimal jurisprudence in existence dealing with this matter.

f. Article 6

Article 6 recognizes the principle of contractual freedom, that is, party autonomy by stating: "the parties may exclude the application of the Convention or derogate from the effect of any provision."[124] The indication that,

as an example, German law is applicable does not mean that the CISG has been excluded, as the Convention is part of domestic law, hence the choice of German law includes a choice of the CISG.[125] Courts have recognized that not only an express exclusion is possible but that article 6 also includes the possibility that the CISG can be excluded implicitly. However, the *Landgericht* [District Court] München indicated that merely referring to a domestic law of a country does not constitute an implicit exclusion of the CISG.[126] Article 6 demonstrates that the CISG emphasizes equality between the buyer and the seller and that the rules laid down in the CISG can only be varied through mutual consent.

g. Article 8

Article 8 focuses on the parties' actual intentions as well as laying down criteria to apply where that intent is in doubt.[127] The court will not only look at a statement but also examine the conduct of the parties including "the negotiations, any practice which the parties have established between themselves, usage and any subsequent conduct of the parties."[128] As this article is linked closely to article 7, which is the focal point of this thesis, article 8 is discussed in detail in chapter 7.

7. Interpretation of the CISG

a. Introductory Comments

To give substance to the CISG an understanding of what the Convention attempts to achieve is important. For that purpose, the Preamble should be restated:

> *"the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade".*[129]

Basically, the CISG is concerned with three aspects: the adoption of uniform rules, a contribution towards the removal of legal barriers in international trade, and the promotion and development of international trade.

The adoption of uniform rules has been achieved. The ratification process introduced harmonized laws into various domestic systems replacing municipal rules. In Australia, the CISG would have replaced in part the Goods Act, the Trade Practices Act and the law on contracts. The CISG promises to take into consideration the variances and differences encountered through different social, economic and legal systems, which would as a result advance different solutions to potentially the same problems. With such a system in place, the legal barriers to international trade would be removed reducing or at least managing cross border legal risks faced by Australian firms.

A successful application of any law is influenced by the way it is interpreted. In the case of the CISG, the interpretation must be an "international" one. As seen above, such a task seems difficult as the judiciary traditionally base their decisions on a conceptual basis known to them namely the domestic system. Conventions in this sense are no different from domestic laws.

The amended Hague Rules (Carriage of Goods by Sea), for example, have not included an article specifically devoted to the interpretation of its articles. In that sense an interpretation can be based on a methodology relying on municipal practices. By contrast, the CISG has, however, introduced an article which specifically dictates the interpretative concepts required to apply the CISG. Article 7 states:

> *"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."*
>
> *"(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*

Given that article 7 is written clearly, and assuming that courts and tribunals, as well as the legal profession and their clients understand it, there is great expectation that uniform laws will govern international trade. However if the interpretation of the CISG is not understood, recourse to domestic law is inevitable. The question therefore is whether article 7 is clear and unambiguous. If the interpretative article is unclear the mandate of the CISG as a uniform international sales law will never be achieved. Karollus certainly thinks that this is unlikely when he notes that the CISG "is well on the way to becoming the Magna Carta of international trade."[130]

Experience with domestic legislation has shown that words are never precise. To give legislation life and meaning, interpretation is essential. Domestic as well as international legislation share problems which are common to both. International legislation has to address additional unique concerns. To successfully interpret legislation, two problems need to be analyzed. First, the policy of interpretation needs to be understood; and secondly, a method of interpretation must be devised to implement the policy.

The first step is to recognize the goals or policy of interpretation. The CISG has recognized this requirement, which is addressed in article 7(1). The article sets the goal or policy of interpretation. In its broadest sense, the policy requires a uniform application of the Convention.

Before the method of interpretation is determined to satisfy the mandate of the CISG, some of the differences between domestic and international legislation and in particular the CISG are examined.

At the outset, we need to be aware that interpretation is not only a problem of the application or choice of words, but also of the application of concepts or principles which are contained in the legislation. Any interpretative tool needs to make provision to interpret words within a conceptual framework.

b. Multilingual Implications

Domestic legislation needs to consider the choice and clarity of words. International legislation, in addition, needs to consider the effects of translation on the meaning of words as most conventions unfortunately are not only written in one language alone. This gives rise to a new method of interpretation when meaning must be given to a word, which is unclear. A translation of the same word or article in different languages may be needed to find a possible answer to the original question.

Article 3(1) can be used to illustrate this. The particular issue is that the buyer can supply a "substantial" part of material. What is the meaning of substantial? The German and French translations of the CISG use the words "*Wesentlich*," and "*un part essentielle.* " "*Wesentlich*" does not match exactly the French or English translation. It corresponds better with "*un part essentielle*" rather than the English "substantial." It is not debated that substantial or essential can be used to translate "*Wesentlich".* However several German legislations using "*Wesentlich*" use the translation of "essential."[131] Hence to look at "substantial" as found in article 3(1) the word essential must be kept in mind and may help to overcome any ambiguities, which may otherwise arise.

There is another factor, which is important namely which is the authentic language of the text? Texts, which are not authentic cannot be used authoritatively and must be given only persuasive status. The authentic texts of the CISG are Arabic, Chinese, English, French, Russian and Spanish. All other languages are not authentic as they are official translations only. Considering that all meetings in Vienna were conducted in English or French, these languages should be given priority over other authentic texts as they best represent the intentions of the representatives at the 1980 Diplomatic Conference.[132] Hence looking at the above comparison between the English, French and German translations, the German would carry less weight than the other two. It must also be noted that even between the authentic translations of the CISG solutions to unclear meanings of words is difficult especially if differences need to be understood, which are of a conceptual nature.

The translation of concepts from one language into another one is difficult. Kastely states:

> *"[W]ords used in one language ◆ carry implications different from those in another ◆ The terms 'offer' and 'acceptance' provide powerful examples of this. In English these words carry a rich heritage of legal doctrine, and their equivalents in the Western European languages have similar depth ◆ Yet the*

> *translations of these words used in the other official versions, such as Chinese and Arabic, do not carry similar implications ."*[133]

Yet even within one language difficulties may arise. The German text is not only the translation between English and German but also the result of a joint drafting of Austria, Germany, the former German Democratic Republic and Switzerland. As such it could be argued that within the German speaking group of nations a translation was achieved which takes into consideration the "heritage of legal doctrine". However, equally well, one may argue that:

> *"[it] can lead to an inevitable choice between precise adherence to the original text in the translation, with the risk that the rendering of the translation is inelegant or out of harmony with linguistic usage, or a freer rendering which responds to the structure and usage of the second language but at the sacrifice of legal accuracy."*[134]

Rabel anticipated such a problem in translation and suggested that the translation of difficult passages should not be according to legislative language (*Gesetzessprache*) but according to legal language *(Rechstsprache*).[135]

The conclusion, which can be drawn, is that words to be included into a unified law have to be chosen very carefully. Only through a careful choice of words can problems be minimized, which otherwise may eventuate in translations not only of the word but also of the concept which are expressed by the words in question.

c. Concept of Choice of Words

The approach to the choice of words as required above also fits into the policy of uniform interpretation as it views words not in a national but international context. It also overcomes the problem Honnold describes as literary "deconstruction."[136]

Such considerations make the choice of words harder and require a special solution. The drafters of the CISG sought to solve this particular problem by consciously "root[ing] out words with domestic legal connotations in favor of non-legal earthy words to refer to physical acts."[137] An example is the passing of risk.[138] In domestic legislation whenever passing of risk is examined, words are used such as "title or property" passes to the buyer or seller. The CISG on the other hand uses the words "[goods] handed over"[139] or "[goods] taken over".[140] Such phraseology helps in the determination of the meaning of words or articles. The CISG repeats in essence what one of the great judges namely Lord Mansfield C.J. in 1761 observed:

> *"The daily negotiations and property of merchants ought not to depend upon subtleties and niceties, but upon rules easily learned and easily retained because they are the dictate of common sense."*[141]

The trend to use "non-legal earthy words" is not only limited to international Conventions. Within domestic law such moves are becoming well established. The Income Tax Assessment Act 1997 (Cth), as one of its aims, is rewriting the Income Tax Assessment Act (1936 (Cth). The purpose is "[to] rewrite the law with a better structure and [therefore] make it easier to understand."[142]

Keeping the above in mind, it is argued that legislative interpretation requires an approach different from the one traditionally adopted by the legal profession. Indeed, to appreciate the full meaning of words and to resolve many ambiguities they must be read within the context of the CISG.[143] In other words the meaning must be elicited within the "Four Corners" of the Convention.

To illustrate this a question could be asked, namely how does the CISG define goods? Article 2 does not describe positively the meaning of goods. It states and lists exclusions. At first glance, the solution to the definition of goods is everything not excluded in article 2. This is not very satisfactory but by further reading of the CISG a more narrowly defined description can be elicited. Article 35 mentions goods as required by the contract and "which are contained or packaged" in the manner required by the contract.[144] Article 46(3) requires that, if goods do not conform to the contract, the seller can remedy the lack of conformity by "repair".[145] Articles 85 to 88 regulate the preservation of goods and article 87 specifically mentions "warehousing" of goods. What

conclusions can be drawn from this? If there is uncertainty as to whether a particular item can be classified as goods, a court can ask additional questions such as whether the item in question is movable, tangible property that can be packaged, repaired if necessary and warehoused if required.

8. Impact of Domestic Law

a. Introductory Comments

Whenever conceptual issues are examined it should be remembered that the CISG like any other international convention contains provisions which result from negotiations "amongst wildly different interests over long time periods [and] with narrow windows of political opportunity."[146]

It is important to note that the CISG from the very beginning was never intended to be an exhaustive source of law on the international sale of goods. As an important example, the legislation itself states that it "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."[147] Rights of third parties are not included, statute of limitations or prescription issues are not included, etc. Except as otherwise expressly provided, the question of validity is specifically excluded. It follows that the CISG cannot govern without domestic or other law. The problem with interpretation is not only restricted to what is in the legislation but also what is excluded from it. The view, which needs careful examination, is whether the exclusions through interpretation are made as narrow as possible or as wide as possible. In other words to what extent is domestic law applicable?

Some of these questions are answered by the Convention itself in the interpretative article 7. However, the article also introduces new problems of a conceptual as well as interpretative nature and at the outset it should be acknowledged that other factors and competing values such as maturity of a domestic economic and political system may intrude.

As an example it is useful to compare the changes to the contract law of China, which have been implemented on October 1, 1999. Most of China's regulations possess unique characteristics. Two features will be looked at briefly to illustrate the above point.

First, Chinese judges or arbitrators tend to take a global view of the resolution of disputes rather than to confine themselves to strictly legal issues. Harmony of outcome is as important as the application of the law. A good example can be found in a judgment where the arbitrator had to address the question of loss of profit. He found that once the goods in question could be purchased elsewhere and the price had fallen no award of loss of profit was appropriate.[148]

Secondly - and most importantly for our purpose - is the fact that these regulations, which should be considered private law, contain elements of public law. It is this particular public law aspect, which makes any interpretation and dispute resolution uncertain. Even if an article of the CISG were clearly applicable, it could be negated by a higher authority on the grounds that the contract as a whole infringes on the public interest pursuant to article 4 of the Foreign Economic Contract Law (FECL).[149] How is that possible when the CISG prevails? It is of no consequence in China that the CISG in its articles declares that it will prevail over domestic law. As stated above, within the Chinese legal system, policy and law are closely interrelated. Policy would dictate that any private matter which infringes on whatever is deemed to be of public interest must be set aside. The law has therefore been framed accordingly as seen in article 4 of FECL. It is precisely for this reason that the CISG does not prevail over but modifies or replaces Chinese law.[150] The theoretical picture that the CISG should prevail is contained in the laws and regulations of the People's Republic of China but many Western firms have learned that, contrary to their lawyer's opinions, a different picture can emerge. Since October 1, 1999 the new Contract Law of China on the surface has abolished State interference as expressed in article 4 of FECL. It brought the contract law in line with Western thinking. Whether the judiciary will ignore the State's interest and interpret the black letter law or will follow subtle pressure of the political system and preserve a de facto State interest remains to be seen. The main point to note is the problem of creating a conceptual framework, which is understood and implemented by all Contracting States.

The CISG unlike other conventions did not vest interpretational authority with an international tribunal, nor has any editorial board been created to amend the CISG as the need arises.[151] Two examples to the contrary can be quoted. First, in the United States an editorial board meets regularly with a view to amend, if necessary, the Uniform Commercial Code (UCC). Secondly the European Court of Justice interprets the Brussels Convention on Recognition and Enforcement of Judgments and its decisions are binding on all member states of the EC. The obvious advantage not to have similar practices in place is the fact that it has a bearing on the sovereignty of contracting States. The alternative would have been politically unacceptable. It is doubtful if many States would have accepted the CISG if a court like the European Court of Justice would have influenced domestic law of contracting States with its decisions. A very good example should be noted. In 1992 Switzerland had the opportunity to join the European Economic Zone (EWR), which would have been the first step in joining the EC.[152] The Swiss people rejected the initiative and in 1999 the seven bilateral agreements with the EC were accepted by parliament and ratified by referendum in 2000. The main reason for the 1992 rejection was the fact that the contract with the EWR contained an automatic right to changes in law. If the EC changes legal rules, these changes apply automatically to all member states.[153] Even in retrospect it is still recognized that a loss of sovereign self-determination was unacceptable, as Switzerland would have been subjected to a rule from Brussels.[154] The 2000 acceptance was heavily influenced by the fact that Switzerland has no obligation to adjust or accept EU legal changes.[155] The loss of sovereignty influenced Switzerland to reject such a partnership and would do so again. By analogy the same arguments would be advanced by many States if the CISG would have interpretational authority vested in an international tribunal.

Instead, as far as the CISG is concerned, such tasks have been left to domestic courts. Any decisions, which interpret the CISG wrongly, cannot be amended on an international level. However international legal scholars, who are quick to point out mistakes, scrutinize all decisions by courts and tribunals, which as a result should influence the future thinking of courts and tribunals. It can be suggested that the CISG therefore lacks a mechanism of change and that there could be the danger of stagnation. Such a view is to be rejected.

Articles 6, 8 and 9 allow contractual variations or inclusions of customary practices. The end result will be a uniform sales law, which can be adapted to individual needs, and therefore it will adapt to a changing environment by taking into consideration uniformity as well as the ability to encompass individual needs. By analogy the Partnership Act (1958) Vic can be quoted. It clearly is a framework legislation and specifically allows contractual variations to override the basic legislation thus creating "personalized" uniformity.

b. Conclusion

The CISG has established itself as the benchmark for the unification of commercial law and will indicate the trend into the next century.[156] UNIDROIT has produced two important restatements modeled on the CISG: first, the Principles of International Commercial Contract Law (PICC); and secondly, the Convention on International Factoring. UNCITRAL currently has produced a draft Convention on Assignment in Receivables Financing. It is not surprising that it is also - where appropriate - modeled on the CISG. Furthermore the Commission on European Contract Law has released the Principles on European Contract law (PECL). The evidence is that the CISG has shown that it is possible to produce acceptable international substantive law despite initial scepticism. For these reasons an understanding of the CISG and its interpretation is of importance. Without a sound knowledge of the CISG real advances in harmonization of international laws would not progress as fast and smoothly as possible. PICC and PECL have recognized and improved on the problems, which would initially emerge with the creation of a unified international law. PICC furthermore is increasingly referred to in arbitral matters and a jurisprudence of decided cases is available.[157]

In the final analysis, it is for domestic courts to interpret the Convention not in the light of their own domestic experience but with the help of scholarly writings and a body of international case law. The next chapter poses the question, what approach to interpretation is best suited to fit the requirements pursuant to article 7 and also avoid ethnocentric practices of national courts?

CHAPTER 3

ARTICLE 7(1) OF THE CISG - THE INTERPRETIVE MANDATE

Overview

- The aim of this chapter is to introduce article 7, the interpretive provisions of the CISG. In particular the following will be discussed that:
    - Article 7 is the basis for the creation of a common interpretative methodology.
    - The function of a common legal theory on which the CISG relies is contained in article 7.
    - A methodology of autonomous interpretation can be developed which is unique to international Conventions.
    - *Fothergill v Monarch Airlines* has introduced principles and methods, which are to be used by domestic courts in the interpretation of international instruments in preference to domestic principles.
    - The interpretative articles in the *Vienna Convention on the Law of Treaties* have further influenced domestic courts in recognizing that texts of Conventions cannot be fully understood using a domestic interpretative methodology. There is a need to look beyond municipal borders for solutions.
    - *Travaux préparatoires* are documents frozen in time and are only to be treated as valuable historical insight into the political and social interplay of members of a group.
    - The Convention cannot be read "through the lenses of domestic law" but must be interpreted autonomously within its "Four Corners."
    - International case law is of importance as it is the only expression of an interpretation of the CISG by domestic courts and hence will indicate the level of understanding of the application of the CISG.

1. Interpretation of the CISG

a. Introduction

A search for a description of article 7, which would attract the least disagreement, one could not go past statements like: "This rule is one of the most discussed rules of the CISG"[158] or, "this article is arguably the single most important provision in ensuring the future success of the Convention."[159] Article 7 has attracted attention beyond the CISG. It has been included fully or partially in several other international Conventions and model laws. The UNCITRAL Draft Convention on Assignment in Receivables Financing has included article 7 fully.

The UNIDROIT Convention on International Factoring used article 7 but provided that "regard is to be had to its object and purpose as set forth in the preamble."[160] Such an inclusion builds on article 7 by stressing that the method of interpretation needs to be focused on the "Four Corners" of the Convention. The Draft UNIDROIT Convention on International Interest in Mobile Equipment [161] follows the combined approach taken by article 7.[162]

The UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL) both included sections on interpretation, which relied heavily on article 7 of the CISG. The significance of this development is twofold. First, the CISG has influenced the drafting of interpretational articles in Conventions and restatements of varying subject matters. This suggests that the inclusion of article 7 ought to be regarded as a general principle of international law. Secondly, it is argued that there is common intention to create a methodology for an interpretation and supplementation contained in article 7, which has created a core consensus in drafting future Conventions or model laws.

Article 7 of the CISG has been recognized as the leading exponent in autonomous interpretation on which all subsequent attempts will be modeled. It has been shown that the importance of article 7 has reached beyond the CISG. As an example German domestic law states that if article 7 is not taken into consideration it will give rise to an appeal on "material" grounds.[163] Article 550 of the *Zivile Prozess Ordnung* (ZPO) stipulates that a breach

of the CISG must be resolved through the application of article 7.[164]

It is therefore imperative that article 7 and its jurisprudence is understood. This thesis demonstrates that article 7 is the basis for a common interpretative practice, which in turn will take on the function of a common legal theory on which the CISG is based.

2. Methodology of Interpretation

a. General Remarks

Article 7 is the key to understanding the CISG, as without fully understanding article 7, the application of the CISG cannot produce consistency and hence achieve predictability.

It is recognized that there has been a divergence of opinion in interpreting international Conventions. In Australia it has been argued that Conventions are not self-executing and are included within our domestic law. As a result, it has been contended that the interpretation and application of that law must occur according to domestic techniques and aided by the body of domestic law. Others expressed a contrary view and applied the "autonomous" model that is:

> *"without making reference to the meaning one generally attributes to certain expressions within the ambit of a determined system, because otherwise the result would not only be a lack of uniformity, but also the promotion of forum shopping."*[165]

At first glance, using methods founded on a domestic system will contribute towards a predictable and uniform outcome but only within a particular domestic system or at best within a trade bloc. However such an outcome is not attainable between different domestic systems. One only needs to compare the civil law and common law systems to appreciate that differences will occur. The methodology of interpretation in civil law countries is based on the understanding that the guiding principle must be found in the design and structure of the legal text.[166] Common law lawyers are skilled at explaining and applying the common law but these skills are not matched by comparable skills in the interpretation of legal text.[167] Such differences in the approach to and the methodology of interpretation arguably have a high probability of achieving diverse outcomes.

The logical product of failure to achieve uniformity is a search for the best solution resulting in "forum shopping." The variances in interpretation between different domestic systems would need to be significant in order to warrant additional efforts or expense to choose a forum where a party seeks a tactical advantage. At first glance, the occurrence of such variances seem to be remote especially as the difference can only be in the interpretation and not in the substantive law. However such a difference is not impossible. As already indicated in chapter one, two Italian cases interpreting article 1 came to the conclusion that a term "subject to Italian Law" is an implied exclusion of the CISG contrary to the view in other countries.[168] The conclusion is that international Conventions and specifically the CISG require that "regard is to be had to its international character" therefore rejecting the application of domestic concepts.

As mentioned briefly in the last chapter, the text of the CISG contains "unique supranational collective terms formed out of compromises between State delegates based on several systems of law."[169] The effect of such considerations resulted in the choice of words, which are not based on domestic technical usage. The conclusion is that these words are unsuitable for an interpretative mechanism based on a literal meaning. If the words used in the CISG are a compromise solution of various systems of law it follows that techniques based on municipal systems cannot be used and must be replaced by an autonomous technique.

To devise a methodology, which will achieve the aim of the CISG as stated in the preamble, article 7 and the underlying policy must be understood and applied. It ought to be restated that all uniform laws encounter a structural difficulty of delineation between the application of the international unified law and municipal law. As Magnus already observed in 1989, a Convention like the CISG cannot differentiate between its laws and domestic law in all cases, otherwise a Convention becomes too unwieldy and complicated.[170] Hence article 7 in its solution devised two broad aims. First, article 7(1) sets the policy to interpret the rules within the Convention.

Secondly, article 7(2) prescribes the policy to fill gaps and hence describes the boundary between the CISG and domestic law. However article 7 does not prescribe the method used to achieve the policy.

Magnus suggested a simple three-tiered approach to interpretation.[171] First, it needs to be determined whether the subject matter is covered by the Convention, or whether it is expressly excluded. Validity in article 4 is an example, which also needs to be defined through interpretative methods. Secondly, is the matter covered in the CISG but not expressly stated? He suggests the term "secretly regulated" (*Heimlich mitgeregelt*)[172] which denotes the application of general principles. Should no general principle be discoverable, then as a third step the solution must lie within the application of domestic law. This approach in reality is not a method but rather a mechanical solution to the policy set out in article 7.

However, it is clear from the above that due to the policy requirement, methods based on municipal dogmas must be rejected. If municipal interpretative methods cannot be used, how do we interpret the CISG? The obvious solution would be to use a supranational or autonomous method of interpretation. Such an autonomous method of interpretation was developed in the European Community Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention/EuGVu).[173] However the autonomous concepts were developed by the Court of Justice and subsequently applied in the individual Member States.[174] However, as indicated earlier this method is politically unacceptable to interpret the CISG autonomously.

b. Autonomous Interpretation and the Interpretation Ladder

An autonomous method of interpretation does not suggest that a completely new method is devised but it indicates that a novel approach to interpretation is being advocated. The novel approach should combine the traditional grammatical, systematic and historical method of interpretation, which is supplemented by a comparative method and is referred to as the "interpretation ladder".[175] The question is whether an autonomous interpretation is merely a label for the uniform interpretation of the CISG separate from domestic law or, as Diedrich suggests a novel approach to interpretation.

There has been an argument put forward that the autonomous interpretation is not an interpretation in addition to other methods such as a systematic or historical method.

> *"Rather, it would seem to be a principle of interpretation that gives preference to a particular kind of teleological and systematic argument in interpreting a legal text."*[176]

Roth goes further by arguing that:

> *"... supporters of autonomous interpretation actually derive the meaning of terms from the wording in context, keeping object and purpose in mind, and resorting to the preparatory work of he treaty when necessary."*[177]

The argument in a philosophical sense is that a distinction ought to be made between autonomous interpretation and autonomous meaning.[178] However, such a distinction although constituting an interesting scholarly endeavor is fraught with danger. What textual methods of interpretation do we adopt in order to arrive at an autonomous meaning of the text within the CISG? Gebauer did not develop the distinction of "autonomous" in a consistent manner. He argued that: "national solutions of a legal problem can serve as an argument in the context of uniform law."[179] Such a statement is not wrong, the socialization process of national solutions should serve as an aid to interpretation specially as universal principles have been included in the CISG. However as soon as such an argument is put forward the possibility of the autonomous meaning of conventional text is no longer possible. In a true sense, concepts which are found in various systems, are imported into the interpretative process therefore making an autonomous meaning impossible. Gebauer also draws attention to the distinction of uniform law and uniform interpretation. Again, such a distinction is not of practical use as it only states the obvious. The CISG is a uniform law, which needs to be interpreted uniformly pursuant to article 7(1). However the problem is that an autonomous interpretation can be reached without achieving uniformity. Gebauer argues against the binding character of foreign precedents.[180] He notes that:

> *"If national courts were prevented from seeking better and different solutions to a given problem, the application of uniform law would become even more rigid, so defeating the purpose. The interpretation of uniform law stands or falls by an exchange of different ideas in order to develop autonomous solutions."*[181]

Such a statement indicates that Gebauer in his endeavor to define and explain "autonomous" lost or sacrificed the important concept of uniformity. If courts were to seek better and different solutions, then one could argue that the solution arrived at in the first instance is either flawed or allowed to have a variation leading to a lack of uniformity. If a decision has to be made whether to interpret the CISG autonomously or uniformly then there can be no argument. Article 7(1) clearly prescribes the mandate of uniformity.

An autonomous interpretation must always be subordinate to a uniform interpretation. If this argument is drawn to its logical conclusion, a court or tribunal is obliged to consult academic writing as well as foreign case law otherwise the possibility of a breach of article 7(1) is real.[182] It can be argued that a breach of article 7(1) can give rise to an appeal on a point of law. It is interesting to speculate whether an appeal court in Australia would allow such an appeal to proceed.

Not only is the Convention itself a compromise between different systems, but also the methodology of interpretation must be based on compromise. The problem, however, is that not all methods of interpretation are suitable to be included into the "interpretation ladder." Because the words used in the CISG are not "technical" in nature, the method of interpretation cannot be "technical" in nature either. Furthermore, the literal approach used in the common law system must also be viewed with caution. Even within the common law system the literal approach to interpretation is beyond being questioned.[183]

The CISG, and in particular article 7, do not prescribe a method of interpretation. It follows that due to the policy requirement in article 7, namely the international character of the CISG, a purely municipal method of interpretation is rejected. The "interpretation ladder" consists of elements found in various systems of law. The question then is how do we choose the various elements required to achieve an autonomous method of interpretation? This question is not settled and furthermore it is not the purpose of this thesis to attempt to reach an answer based on a doctrinal methodology. It is sufficient to appreciate that whatever "mix" or *ratio Conventionis* is advocated it must reflect stability and predictability, which is founded on the principles revealed in the preamble of the CISG. In other words the CISG must be interpreted within its Four Corners free from domestic law principles.

c. Clear and Unclear Terms - a Distinction in Terminology

A distinction can be drawn between clear, unambiguous terms and "unclear" terms of a statute. As soon as a distinction takes place the interpretative process has started. Two problems might be noted. First, what is considered to be a clear and unambiguous term must be determined according to the policy described in article 7, that is, without recourse to domestic law. Secondly, the temptation to interpret clear and unambiguous terms must be resisted. Parliamentary sovereignty demands that courts are subordinate to the will of parliament, which is enshrined in law.[184] As far as "unclear" terms are concerned, a methodology based on the policy of article 7 must be applied to give meaning to these terms.

It has been argued that international uniform law has its origin neither substantially nor methodically in the common law system but follows the civil law in structure.[185] An uncritical acceptance of such a view could lead to the conclusion that the mechanism of interpretation based on common law must be rejected as inappropriate or at least must be viewed with caution.

However, it has been established that the mechanism of interpretation is based on the principles contained in the article 7 and, like the CISG, the "interpretation ladder" consists of elements found in various legal systems. Unless the common law is excluded from the "various legal systems" the above assertion is correct. However, if the rules of the CISG are studied, one can see that several provisions such as article 35 track domestic common law rules. Furthermore, it would also be inconceivable that the representatives of the Common Law States would have allowed an international law to be constructed which is devoid of any influences of the common law. How then

are we to understand that "international uniform law has its origin neither substantially nor methodically in the common law system but follows, in structure, the civil law?"[186] It appears that the argument can only be viewed as far as the "origin" of international uniform law is concerned. The origins can be traced back to the work by Rabel and Kötz. The language and interpretation as expressed in article 7 is closer related to the civil law than the common law. Methodologically, civil law has a greater influence on the CISG than common law. However, the common law has substantially influenced the content of provisions to a great extent. In sum, common law systems still contribute to a lesser degree than civil law systems to the mechanism of interpretation used in defining the CISG.

Considering that "officially clear and unambiguous terms" as well as "unclear terms" form the unique rules based on compromise between various legal systems, a clear grasp of the mandate of article 7 is essential.

It is important that domestic law and its methods of applying international Conventions are also understood. There are two important reasons to engage in such an investigation. First, it will explain how domestic law deals with the interpretation of international Conventions in that it explains the relationship between domestic law and international Conventions. Secondly, it will give an indication how domestic methods of interpretation can be used in defining or constructing an "interpretation ladder".

3. Domestic Law and International Conventions

The CISG is not the first international convention which had to be applied by domestic courts. It can be assumed that domestic systems have laws in place which assist in the interpretation of international conventions. The beginning therefore must be an investigation of the jurisprudence of domestic law in the interpretation of international conventions. Whatever the outcome of this investigation, the results should not be used automatically to interpret the CISG. It will provide a level of awareness, which could be of assistance in understanding the mandate of article 7. The purpose of this thesis does not require an in depth discussion but a working knowledge is important as it will highlight differences as well as similarities between the interpretation of the CISG pursuant to article 7 and other conventions where the interpretation is left to domestic techniques and law.

a. Fothergill v. Monarch Airlines

An investigation begins with *Fothergill v. Monarch Airlines* [187] (*Fothergill*). The House of Lords decision dealt with the interpretation of the Warsaw Convention on the Liability of Air Carriers. This case is important as it is the foundation on which Australian courts can base their interpretation of international conventions and it is of sufficient persuasive authority that it cannot be ignored. To appreciate the significance of *Fothergill,* reference must be made to its passage through the courts.

The facts are simple. The plaintiff flew from Rome to Luton. Pursuant to article 1 of the Warsaw Convention, the carriage was an "international carriage". The baggage check contained a clause stating: "In case of damage to baggage ... complaint must be made in writing to the carrier forthwith after discovery of the damage and, at the latest, within seven days from receipt."[188] When the plaintiff collected his luggage he discovered that the side seam of his case was completely torn away. He reported the damage, which was duly noted. When Mr. Fothergill opened the suitcase at home he discovered the loss of items and notified his insurance company. Monarch Airlines received notice more than seven days later. The airline admitted liability in relation to the damage to the suitcase but rejected liability in relation to the lost items. They contended that the loss of the articles constituted "damage" pursuant to article 26(2) of the Convention, which states:

> *"In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo ..."*[189]

The airline supported their contention that the word damage in article 26(2) also includes loss of contents by referring to the published minutes of the negotiations of the Hague Protocol in 1955.[190]

The Court of Appeal rejected the airline's argument affirming the decision reached by the primary judge, Kerr J. [191] On appeal, the House of Lords reversed the decision.

(i) Court of Appeal Decision

The Court of Appeal [192] did not reach a unanimous decision, Lord Denning MR dissenting. The question all judges addressed was the influence of *travaux préparatoires* in defining "damage" as well as the French text, which was to prevail in case of inconsistency.[193] The court of appeal acknowledged that the word damage in article 26(a) is ambiguous and the question therefore was what tools of interpretation are to be applied to come to a conclusion. Browne LJ. noted the views of Viscount Dilhorne who said:

> *"In construing the terms of a convention it is proper and indeed right, in my opinion, to have regard to the fact that conventions are apt to be more loosely worded than Acts of Parliament. To construe a convention as strictly as an Act may indeed lead to the wrong interpretation being given to it."*[194]

Browne LJ. did acknowledge that he must have regard to the above statement but he went on to say that he agreed with Kerr J who said:

> *"As a matter of ordinary English the loss of articles from an undamaged suitcase would not be described as a case of "damage" in the sense of physical injury ... It can make no difference that the suitcase itself was damaged."*[195]

It is difficult to see the connection between the two statements. It could be argued that Browne LJ. missed the point as the definition of "damage" is not a question of "ordinary English" but one of international understanding. Such an understanding is the underpinning philosophical principles of international interpretation of conventions. In order to elicit the "true meaning" the literal approach to interpretation should be dismissed. Lord Denning MR. showed a much greater insight when he noted that:

> "*I am prepared to say that when the Parliament of the United Kingdom gives its authority to an international convention, by incorporating it into our municipal law, then the courts of this country can have regard to the travaux préparatoires, ... so as to ascertain what was the meaning intended by the draftsmen and signatories of the convention."*[196]

The important fact Lord Denning MR. advocates is that the literal approach must give way to a purposive one. English law cannot supply the answer when unclear words need to be given a meaning. The tools at the court's disposition were the *travaux préparatoires* and the meaning of damage in the French text, which will prevail in the case of inconsistencies. The *travaux préparatoires* can be used:

> *"... not only to see what the mischief needing to be remedied, not only to see what was the purpose or object of the draftsmen, but also to find out what they really meant to convey by the words they used."*[197]

The minutes of the Hague Conference of 1955 do shed light on the meaning of damage in article 26(2). Mr. Loaeza (Mexico) who was the chairman of the drafting committee said that it was not necessary to insert the words "or partial loss" after the word "damage" as it was understood that damage included partial loss.[198] Despite the fact that the word "damage" is ambiguous, the evidence is sufficient to include the words "or partial loss" into the interpretation of article 26(2).

Both Browne LJ and Lane LJ dismissed the use of *travaux préparatoires* but for different reasons. Lane LJ contended that the word "damage" is not ambiguous and hence need not to be interpreted. Furthermore he noted that such an inquiry would be unfair on passengers or consignor.[199] He justified his remarks by stating that:

> *"[The passengers] can only ascertain their rights and any limitation on them by reading the terms of the convention. They do not and could not know of the existence or content of the minutes and memoranda of the 1955 Hague conference, which have been shown to us. It seems to me quite wrong that they should be adversely affected by statements made at that conference ... "*[200]

Browne LJ relied on the fact that there is no authority justifying a departure from the established principles applicable to the construction of purely English statutes.[201] He extended this view to international conventions as in his view only dicta suggested otherwise and furthermore the minutes were never published in England.[202] Arguably, the conclusion can be reached that both judges are of the opinion that it is only for the court to decide what words in a statute mean. However such a view is in conflict with their concern that the public should have access to the *travaux préparatoires* before they are taken into consideration by the court.

Of interest is also the fact that Lord Diplock undertook to consult the views of foreign text writers and decisions and came to the conclusion that "judicial and academic opinion clearly is in favor of interpreting "damage" as including "partial loss."[203] However, Browne LJ dismissively observed that the opinions of the text book writers "who may be very eminent but about whose status and qualification we have no information" did not contribute to a "corpus of law."[204]

(ii) House of Lords Decision

Considering the facts and the decision of the Court of Appeal the ruling by the House of Lords could be termed as being "revolutionary". It was noted that the semantic approach to statutory construction is being replaced by "an increasing willingness to give a purposive construction to the act."[205] A departure from traditional legal methods of interpretation is observed. These methods are best described by Lord Simonds LC.

> *"It is at least clear what the gap is [which is] intended to be filled and hardly less clear how it is intended to [be filled]. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed."*[206]

In *Fothergill*, the court concluded that the literal approach had to be rejected as it conflicts with the purpose of the Convention. Lord Scarman commented that if the literal construction had been legitimate he would have used it. However, it does not make sense as it does not meet the commercial purpose of the Convention.[207] It is apparent that the House of Lords indicated a shift in interpretation. As far as international conventions are concerned the plain meaning approach was rejected. Lord Diplock stated:

> *"It should be interpreted, as Lord Wilberforce put it in James Buchanan & Co., Ltd v. Babco Forwarding & Shipping (U.K.) Ltd. [1978] A.C. 141, 152, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation."* [208]

He went on to say that:

> *"the language ... has not been chosen by an English draftsman. It is neither couched in the Conventional English legislative idiom nor designed to be construed exclusively by English judges."*[209]

Fothergill should be viewed as a watershed case if we compare the above views of Lord Diplock with his previous statements in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [210] where he said:

> *"It is for the court and no one else to decide what words in a statute mean. What the committee [writing the travaux préparatoires] thought they meant is, in itself irrelevant. Oral evidence by members of that committee as to their opinion of what the section meant would plainly be inadmissible. It does not become admissible by being reduced to writing."*[211]

Attention was also drawn to the interpretative rules of the *Vienna Convention* specially article 31 and 32 despite the fact that the *Vienna Convention* did not govern this case. (It came into force subsequent to *Fothergill*). It was pointed out that English courts would be under a constitutional obligation to consider the implications of the *Vienna Convention* on Conventions concluded after the *Vienna Convention* came into effect.[212]

Of significance was the opinion of the majority that consideration must be given to *travaux préparatoires,* foreign case law and scholarly writing. Again the court pointed to differences between interpretations of domestic legislation versus the interpretations of Conventions. It was explained that the above aids would not be legitimate to use in the case of interpretation of domestic legislation.[213] But to deny domestic courts the use of the above aids would be "a damaging blow to the unification of the rules which was the object of signing and then enacting the Convention."[214] However aids to interpretation are only to be used after it is established that the terms of the Convention do not solve the problem. This is because ambiguities or doubts persist.

The court pointed to the shortcomings of the aids of interpretation and concluded that *travaux préparatoires* must be carefully chosen so they do not represent the views of a few. A parallel to this is the treatment of parliamentary debates. A speech of a member of parliament does not necessarily reflect the future outcome as expressed in the legislation. However the collective arguments may shed some light as to the problems which were debated and can be used as persuasive argument in a way no different from the submissions of counsel in court. The court also recognized the problems associated with foreign judgments. Care and attention must be taken to look only at authoritative statements, that is decisions from superior courts. The reporting is not always accurate and there is difficulty in obtaining these judgments, which are sometimes only obtainable in summary form. However "our courts will have to develop their jurisprudence in company with the courts of other countries from case to case, a course of action by no means unfamiliar to common law judges."[215]

Careful attention was also given to scholarly writing. Lord Diplock was cautious when he said:

> *"It may be that greater reliance than is usual in the English courts is placed upon the writings of academic lawyers by courts of other European states [and] subsequent commentaries can have persuasive value only."* [216]

Lord Scarman sums it all up when he states:

> *"Rules contained in an international Convention are the outcome of an international conference; if, as in the present case, they operate within the field of private law, they will come under the consideration of foreign courts; and uniformity is the purpose to be served by most international Conventions, and we know that unification of the rules relating to international air carriage is the object of the Warsaw Convention. It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting States the mischief of any other view is illustrated by the instant case. To deny them this assistance would be a damaging blow to the unification of the rules which was the object of signing and then enacting the Convention. Moreover, the ability of our judges to fulfill the purpose of the enactment would be restricted, and the persuasive authority of their judgments in the jurisdictions of other contracting states would be diminished."*[217]

There are important conclusions, which can be drawn from the *Fothergill* case. First, tribunals and courts are strongly persuaded to look for a solution within the "Four Corners" of the Convention. Secondly, the *Fothergill* case also established that no recourse should be taken to principles and methods of interpretation, which have been developed within domestic law. Thirdly, if the meaning of the words as found in the Convention are unclear, recourse can be taken to aids of interpretation such as *travaux préparatoires*, scholarly writings and foreign case law. Fourthly, the plain meaning or literal approach was rejected in favor of looking at the words within the context or purpose of the Convention.

One observation must be added. In the Court of Appeal, Lord Dennings MR. allowed the cross-appeal on the ground that Mr. Fothergill's initial complaint satisfied the requirements of article 26(2). He justified his decision on a presumed conversation between Mr. Fothergill and the lady at the reception where the complaint was made. He noted that:

> *"The lady at the reception merely asked ... what is the nature of the damage? He replied look at it. The side seam has completely parted from the case. She did not ask him whether any of the contents were missing. If she had, he would probably have answered: I cannot tell now, I must wait till I get home." I think that Mr. Fothergill's complaint was all that art 26(2) required of him."*[218]

Arguably the conclusion of Lord Denning would be attributed today to the principle of good faith. There appeared to be, at least in the mind of Lord Denning, an obligation on the part of Monarch Airlines to fulfill their part of the obligations pursuant to the Warsaw Convention in good faith. The fact that the lady at reception did not investigate further possible hidden damages leads to the conclusion that there was a breach of good faith.

Fothergill might usefully be compared with a recent United States case namely *Chan v. Korean Air Lines Ltd*.[219] The contrast is remarkable. Justice Antonin Scalia who had the ability to consult *Fothergill* chose not to do so. He noted:

> *"[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part a usurpation of power, and not an exercise of judicial function. ... We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where it stops - whatever may be the imperfections or difficulties which it leaves behind."*[220]

It indicates that Justice Scalia did not intend to develop the treaty within an international setting. Instead he used a textualism to remain within a framework, which *Fothergill* clearly rejected. It is remarkable that *The Amiable Isabella* [221] had to be quoted in order to basically retreat to the application of municipal law to solve an unsettled question. It must be noted that supporters of a "dynamic" interpretation recognize an active rather than static judicial role in ensuring the vitality of statutes.[222]

b. The Vienna Convention on the Law of Treaties

The *Vienna Convention* [223] is not directly relevant to the interpretation of the CISG as it only regulates the mechanism through which States can enter into a binding treaty with each other. These obligations are contained in Part IV of the CISG. However, as the *Vienna Convention* has its own interpretative articles namely 31 and 32, it is important to investigate how Australian courts interpret jurisprudence where articles 31 and 32 are applicable. It should give an insight into the ability or willingness of the judiciary to apply statutes, which do not have a domestic source to solve municipal disputes. *Fothergill* gives us little guidance as the *Vienna Convention* was not in force at that time and was therefore only mentioned briefly. However, in *Fothergill* the interpretation of international conventions was changed dramatically. Lord Roskill as part of his judgment furnished a useful history of the development of the interpretation of international conventions.[224]

The first consideration of articles 31 and 32 in an Australian case was the *Commonwealth of Australia v. Tasmania (The Tasmanian Dam Case)*,[225] where the above assumption can be tested. Can changes in Australian law be discovered in the treatment of the interpretation of treaties? The court generally believed that the *Vienna Convention* codified existing customary law and furnished "presumptive evidence of emergent rules of general international law."[226] The comparison of article 31 of the *Vienna Convention* - specifically, the principle of good faith -- with applicable principles in Australian domestic law leads to the conclusion that there was no equivalent principle in existence in 1983. The term good faith is only now in the process of becoming recognized as a principle within domestic law.

Brennan J. noted that: "there is no occasion to resort to preparatory work if the text of a Convention is sufficiently clear in itself."[227] Such a view is far too narrow. The very reason *Fothergill* is of such importance is the fact that it was decided by the House of Lords that a word might be sufficiently clear within a Convention. However, if the context or purpose of the Convention is ignored that meaning may not reflect the intention of the treaty.

In *Applicant "A" & Anor v. Minister of Immigration & Ethnic Affairs & Anor* (*Applicant "A"*),[228] the court consulted the *Vienna Convention* as well as taking note of *Fothergill*. The conclusion was that the starting point for any interpretation had to be the treaty and "accordingly, technical principles of common law construction are to be disregarded."[229] McHugh J. commented that article 31(1) contained three separate but related principles. First, the principle of good faith which flows directly from the rule *pacta sunt servanda*; second, that the ordinary meaning of the words as expressed in the Convention are authentic and represent the parties' intentions; and third, that the ordinary meaning of the words are not to be determined in a vacuum but rather within the context of the

treaty or its object or purpose.[230] Australian cases do not provide a clear answer in respect to the relationship between recourse to context, object and purpose of the treaty and the words and phrases of a treaty. McHugh J. determined that the correct approach to article 31 is to be found in the statements by Zekia J in the European Court of Human Rights *in Golder v. United Kingdom*:[231]

> *"Judge Zekia emphasised an ordered yet holistic approach. Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered."*[232]

The approach of all judges in *Applicant "A"* to article 31(1) [233] can be best summed up by McHugh J. who observed:

> *"The lack of precision in treaties confirms the need to adopt interpretative principles, like those pronounced by Judge Zekia, which are founded on the view that treaties "cannot be expected to be applied with taut logical precision". Accordingly, in my opinion, Art. 31 of the Vienna Convention requires the courts of this country when faced with a question of treaty interpretations to examine both the "ordinary meaning" and the "context ... object and purpose" of the treaty".*[234]

In *Applicant "A"*, the court recognized the importance of article 31 and supported its finding by taking not only *travaux préparatoires* into consideration but also foreign case law. The Tasmanian Dam case, with the exception of the views expressed by Murphy J., did not recognize the importance of an examination "both of the ordinary meaning and the context ... object and purpose of a treaty."[235] The prevailing view was that: "at the end of the day, the interpretation of the text itself must determine the content of the obligation it imposes."[236]

The High Court recently confirmed that:

> *"Article 31 provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of its object and purpose. ... Primacy must be given, however to the natural meaning of the words in their context".*[237]

It is significant that foreign case law was viewed as persuasive. It shows that the judiciary was well aware that a domestic approach to the interpretation of international law is not adequate. Australian courts appear to have moved away from municipal techniques and adopted a "uniform interpretation" method. Such an assumption if tested with domestic case law is arguably correct. The question is can the same be said if domestic outcomes are tested against international jurisprudence? For this purpose the leading Swiss case on the application of articles 31 and 32 will be analyzed.[238] In brief, the dispute involved an interpretation of a contractual clause. The contract was between Germany and Switzerland in relation to an extension of German rail links through Switzerland.

The court referred to E. de Vattel and quoted his maxim: "That which does not need to be interpreted is not to be interpreted."[239] However the judges indicated that absolute primacy could not be given to the natural meaning of words within a treaty.

To begin with, the natural or normal meaning of the words within the text of the treaty must be elaborated pursuant to article 31. Only when the meaning is ambiguous or obscure can extrinsic sources such as *travaux préparatoires* and the purpose and history of the treaty itself be used.[240] The conclusion is that the Swiss and Australian Federal Court's interpretation and application of articles 31 and 32 are not divergent; uniformity is a feature. It can therefore be argued that Australian interpretations are "international" in character.

As seen in Chapter 2, the *Vienna Convention*, primarily through articles 31 and 32, assists in the interpretation of treaties, that is, public international law. However, that does not mean that the *Vienna Convention* is not used to assist in the interpretation of private international law. As an example, in *Great China Metal Industries Co. Limited v Malaysian Interntional Shipping Corporati*,[241] the term "perils of the sea" had to be given meaning. McHugh J, as an aid to interpretation referred to *travaux préparatoires* as well as the *Vienna Convention* as the Hague Rules did not incorporate an interpretative article into its regime. Such recourse is not uniformly accepted. It is therefore not surprising that McHugh J states:

> *"Uniformity of interpretation has not been the feature of the Hague Rules. In particular, courts in the United States and Canada on one hand and in France, Germany, England and Australia on the other have diverged in their approach."*[242]

It can be argued that this shows the importance of including interpretative articles into conventions, otherwise a uniform international interpretation is not possible. McHugh J confirms the argument:

> "*If uniformity of interpretation could be achieved by abandoning the approach taken by this Court in Gamlen, I would be in favor of overruling Gamlen. But to overrule that decision would not yield uniformity - the approach of courts in England, Germany and France would remain different."*[243]

In *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd*,[244] the court in its deliberations recognized that in the interest of uniformity, interpretations must be unconstrained by technical rules of English law.[245] In effect, they only referred to *Babco Forwarding & Shipping Ltd*.,[246] noted in *Fothergill*. They should have referred to *Fothergill*, which built on *Babco Forwarding & Shipping Ltd* and is far more important.

Arguably, McHugh J felt that he could make the comments in relation to uniformity because he relied on the interpretative assistance of the *Vienna Convention* in contrast to the High Court in Gamlen. It would be interesting to see whether the courts in England, Germany and France did refer to the *Vienna Convention*. The suspicion is that they did not do so.

The conclusion must be drawn that the principles used in the interpretation of treaties pursuant to the *Vienna Convention* do contribute toward a uniform international jurisprudence. The *Vienna Convention* has been used to assist courts to interpret private international law conventions, which do not have interpretative articles. Such recourse indicates the importance of an inclusion of an interpretive article into any convention or treaty.

It is remarkable that the House of Lords in *Fothergill* came to a conclusion which appears to be ahead of its time. The *Vienna Convention*, as far as the interpretational aspect is concerned, did not improve on the general principle introduced by the House of Lords except by adding the concept of good faith.

c. Travaux Préparatoires

Much has been said in international as well as domestic legislation on the use of *travaux préparatoires* and other extrinsic aids to interpretation. *Fothergill* and the *Vienna Convention* specifically permit the use of such aids to interpretation and many authors encourage their use in the interpretation of the CISG as well. In common law, *Pepper v Hart* [247] created a landmark decision by allowing reference to parliamentary debates. In Australia, special legislation has been passed which specifically permits reference to Hansard as an aid to interpret legislation.[248] Lord Griffiths argued that the self-imposed judicial rule to ignore legislative history as an aid to interpretation is outdated.[249]

> *"The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*[250]

Such views are not without their critics. The purposive method of construction of statutes is established in England. It is attributed to a shift to the teleological approach of European Community jurisprudence and the influence of the European Court of Human Rights.[251] However, some writers contend that: "it is a fairy tale to think that the subjective views of members of parliament, sitting in two separate chambers can be determined."[252]

It is argued that an acceptance of extrinsic material such as *travaux préparatoires* should only be done in extreme circumstances. The text as contained in its "Four Corners" must be the starting point and not the history of the legislation. As the CISG is the result of a conference of participants belonging to different social, legal and economic systems, the views by definition must be divergent. Of interest only is the compromise, which is the text. By consulting the views of the delegates much can be gained, especially as it might disclose perceived

problems with the proposed text. However, it does not disclose the politics of closed doors and the deals done to obtain support for other points on the agenda. The most important problem is that the views as expressed in the *travaux préparatoires* are aspects frozen in time. A good example is the demise of the Eastern Bloc and the rise of globalization. The views expressed by Russia and its allies are of little consequence today whereas the influence of globalization, which was not thought of, is of importance. Interestingly Johan Steyn who was in favor of the views in *Pepper v Hart* writes:

> *"I am now inclined to agree with Lord Renton Q.C. and Lord Hoffman that the Pepper v Hart decision has by the judgment of experience probably been shown to be an undesirable luxury in our legal system. The pragmatic case against the decision in Pepper v Hart is strong."*[253]

Steyn takes a pessimistic view on the use of extrinsic material. It should be recognized that the material is a collection of views of many different interest groups and therefore must be treated with caution. The fact is that *travaux préparatoires* and parliamentary debates are a valuable historical insight into the political and social interplay of members of the group. Such insights are not undesirable luxuries. Used appropriately, these views are desirable as they can be of assistance in the interpretation of a text if all other means are exhausted.

4. Article 7 - General Remarks

An "autonomous" interpretation is the most appropriate way to interpret the Convention. However the above discussion resolves the problem of policy but not the one of interpretative techniques or methods. What methods or techniques do we choose, given that article 7 has not been designed to solve problems of interpretations? Its purpose is describing the goals of interpretation.[254] A method of interpretation according to the "interpretation ladder" is not a totally satisfactory way to achieve a uniform method and can be applied transnationally, especially knowing that domestic courts interpret the CISG.[256] Given that municipal courts in Australia have already moved away from the "classical" common law approach, the interpretation ladder is a feasible option in approaching international interpretation. *Fothergill* and subsequent decisions in conjunction with domestic legislations such as s 52 of the Trade Practice Act and the use of foreign case law and academic writing showed it is only a small step from an interpretation of municipal law to an international one. To take that step requires an understanding of the interpretative policies of the CISG. This supports the view that courts tend to look for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it. Therefore, it can be argued that the techniques or methods of interpretation do not need a description but must be chosen to achieve what the policy sets out to do that is to achieve "the international character of the Convention."

Article 7 contains basically three different rules.[256] First, a general one as to interpretation; secondly, one regarding filling of gaps; and thirdly, a rule regarding the relationship between the CISG and national law.

The interpretation pursuant to article 7 is limited to Part I, II and III but does not include Part IV (final provisions).[257] As explained in chapter 1, Part IV is regulated by the *Vienna Convention*. The fact that the interpretation has to be "international in character" stands out. Such a demand to interpret legislation with an international view in contrast to a national one is not isolated. It follows the economic trend of globalization in the late 20th century. Economic policy is designed to "transcend national borders in order to maximize the utilization of resources."[258] To assist such a development it has become imperative to regulate economic activities such as international trade. Arguably, a repetition of history can be seen when in the Middle Ages the law merchant was created. It achieved in essence exactly the same as the CISG attempts to do today. The general rules as to interpretation are contained in article 7(1):

> *"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade"*

Enderlein and Maskow have identified several elements or words, which they believe are crucial in the understanding of this article namely "Convention", "International Character", "Application", "good faith" and "international trade".[259] The commentary of the Secretariat [260] merges these elements into two broader headings the "international character of the Convention" and "Observance of good faith in international trade."

5. International Character of the Convention

a. The Problem of Internationality

The international character of the Convention and the observance of good faith dictate a policy of avoiding the application of domestic law. This is very important especially in the case of Australia and the United States where domestic legislation tracks in part the CISG. The obvious temptation for courts would be to "read the Convention through the lenses of domestic law."[261] To ratify a Convention indicates that the common will, as expressed in the Convention, must prevail above those expressed within domestic law.[262] In *Filanto S.p.A. v. Chilewich International Corp. (Filanto*),[263] the court acknowledged this but made the following remarks: "[the Uniform Commercial Code] does not apply to this case, because the State Department undertook to fix something that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways."[264]

The court importantly recognized that the CISG and the UCC are not interchangeable but missed the real significance of the CISG to respond to the international need of a uniform sales law. However *Filanto* did establish that there should be no room left to apply "functionally equivalent, but differently construed national rules."[265] The temptation for judges and the parties settling disputes is to look at what is familiar, especially at first glance. For example, in *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd*[266] (*Calzaturificio*) the judge commented that: "case law interpreting article 2 of the Uniform Commercial Code may also be used to interpret the CISG where the provisions in each statute contain similar language."[267] Such attitudes are not restricted to American CISG jurisprudence alone. In *Kotsambasis v. Singapore Airlines Ltd*[268] the court referred to *The Shipping Corporation of India Ltd v. Gamlen Chemical Co*.[269]

> *"It is only if the interpretation of certain words by a national court assists in the interpretation of the same words that appear in an international Convention that any significant weight can be imported to the municipal law."*[270]

This view is not supported by the intent as expressed in *Fothergill* and subsequent decisions. To solve issues within the CISG - or any Convention for that matter - by analogy with domestic law is contrary to the international character.

Within Australian law, s.19 of the Goods Act (Vic) 1958, tracks article 35 of the CISG. Great care needs to be taken that interpretation of the CISG is not attempted with the language or case law of s.19 in mind. In *Delchi Carrier S.p.A. v. Roterex Corp* (*Rotorex*)[271] the judge stated - inaccurately though -that there is virtually no case law under the Convention. He then pointed out that in such a case "we look to its language and to the general principles upon which it is based."[272] The court appeared to recognize the importance of avoiding the application of domestic law by pointing to the fact that "the Convention directs that its interpretation be informed by its international character."[273] Despite the fact that the *Rotorex* court appeared at first to understand the mandate of article 7, the court went on to proclaim that: "Case law interpreting analogous provisions of article 2 of the UCC may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."[274] In this respect *Rotorex* made the same misinterpretation as the one in *Calzaturificio*, with the difference that in *Rotorex* the court, at least, recognized that "UCC case law is not per se applicable."[275] However *Rotorex* went on to review exclusively UCC case law as an aid to interpret the CISG. *Rotorex* missed the point that article 7(1) sets the goal of the interpretation of the CISG and, thus, relates to unclear matters.[276]

The first Canadian decisions in 1998 also set a poor precedent for the application of the Convention. In *Nova Tool & Mold Inc. v. London Industries Inc* (Nova Tool)[277] the litigant as well as the judge ignored the CISG and applied domestic law despite the fact that rightfully the CISG should have been applicable. The second Canadian case, *La San Guiseppe v. Forti Moulding* [278] is no less intriguing. The CISG was applied as the correct governing law. Swinton J. though did apply the relevant articles but failed to recognize the implications of article 7. In a discussion where she states that the seller did not breach article 35, she added that the seller did not breach either the ss.14 to 16 of the Ontario Sale of Goods Act.[279] It appears that Swinton J. was not aware of the mandate in article 7, which arguably states that the CISG overrides domestic law. Domestic sales law cannot

coexist with the provisions contained in the CISG. It also needs to be noted that in a further statement in the decision s.121(1) of the Courts of Justice Act was used to calculate pre-judgment interest where in effect article 78 governs the question of interest. The failure of courts to correctly interpret and apply article 7 can be attributed to a failure to recognize that the method of interpretation still remains a textual one with the addition that the purpose of the Convention, the legislative history, and the drafters' intent may be taken into account.[280] It can be argued that Swinton J not only failed to follow the mandate of article 7 of the CISG, but also failed to take note of the principles developed in the *Fothergill* case.

Most importantly the CISG cannot be interpreted from national juridical constructions and terms.[281] *Rotorex* mistakenly noted that "The CISG requires that damages be limited by the familiar principle of foreseeability established in *Hadley v. Baxendale, 156 Eng. Rep. 145 (1854)*."[282] A principle of foreseeability was established in *Hadley v. Baxendale* but it is based on a domestic concept. This principle of foreseeability may well have elements in common with the foreseeability principle expressed in article 74 of the CISG, but to tie *Hadley v. Baxendale* into article 74 is patently wrong.

Rotorex is a good example of the danger that domestic courts could construct the CISG within their own experience and procedures. Especially where a court relies heavily on a literal interpretation and concludes that solutions must be found within the statute, as the only expression of parliament's wishes. However, in *Fothergill* the court indicated that this approach is incorrect. The second danger lies in the choice of precedents. It is well established in Australia that precedents are only found within our own legal systems. Cases outside our body of law are regarded at best as persuasive but certainly not binding. The CISG breaks this particular view. To "promote uniformity in its application,"[283] the Convention indicates that the creation and application of precedents extends beyond national boundaries. Authority for such an approach is not only derived from the Convention but also from *Fothergill*. Most authorities have called for publications of cases.[284] All available and reported cases are now published and available on the Internet.[285]

b. Interpretation within the "Four Corners" of the Convention

There is a danger that some domestic tribunals, especially in countries which rely heavily on precedent, may "take their eyes off the principles and engage in distinguishing, overruling and even manipulating precedents."[286] Australian tribunals culturally try to find the answer within the statute itself, and treat cases outside their jurisdiction only as secondary material if guidance is required. In *Roder Zelt*, as an example, Von Doussa did not refer to either CISG case law or scholarly writings. He followed the suggestion of Hillman who maintains that tribunals should "try to find answers within the "Four Corners" of the Convention and to look to cases only in the unusual case where the Convention does not supply adequate guidance."[287] Such an extreme view is fraught with danger. It assumes that all tribunals understand the principles contained in the CISG as well as using the same method of interpretation. It also assumes that concepts expressed in the CISG are understood by all. Such an approach as advocated by Hillman can lead to fragmentation rather than uniformity. Cases are still the only international expression of an interpretation of the CISG by a domestic court. It indicates to other tribunals how a particular principle has been interpreted and applied. The *Obergericht* [Appellate Court] Luzern [288] reviewed international case law to arrive at a determination of the terms "examination of the goods"[289] and "notice of lack of conformity."[290] The court concluded that German case law interpreted the above cases narrowly whereas the Dutch and American indicate a more liberal approach. The court observed that the gap between these two positions had to be narrowed in order to arrive at a uniform application of the CISG.[291]

The *Obergericht* Luzern demonstrates that the approach advocated by Hillman will not lead to uniformity. Importantly, it will afford scholars the opportunity to critically analyse these decisions and if necessary point to errors. It appears that increasingly tribunals and courts do review international case law and take these findings into consideration when making their decisions.[292]

The first step is to look within the "Four Corners" of the CISG. Secondly, courts need to consult cases and scholarly writings and treat them as persuasive, as was confirmed in *Fothergill*. In this way, the international character and the promotion of uniformity is guaranteed. Suggestions have been made that, as foreign decisions are not available or the court decisions are not expressed adequately, it is increasingly difficult to keep the code

uniform.[293] The Lords in *Fothergill* made it abundantly clear that not all decisions even within domestic law are persuasive precedents. However in international law the same should not apply. Decisions of all courts are of interest not only to academic writers but the judiciary as well because decisions of any court should be evaluated and considered based exclusively on the caliber of judicial reasoning. Furthermore decisions of all courts are an indication how much the CISG has penetrated the hierarchy of courts. Therefore, it would be difficult to keep the CISG uniform if we could not look to and consult foreign judgments. As pointed out, the U.S. courts have consulted and applied German decisions namely in the application of article 35. The inward looking view of a Four Corner's approach only appears to result in local decisions rather than international ones.

The meaning of terms and rules has to be concluded from the words within the CISG. But a construction is not only reliant on the words but also the context and function the rules have within the CISG as well as other material, which has a connection to the CISG.[294] This point can be illustrated by re-examining a term confined to the common law system namely the parol evidence rule. The mere fact that this rule is confined to the common law system would, at first glance, bring it into conflict with "the international character and uniformity of application" of the CISG. In *Calzaturificio*[295] the court recognized this by stating that: "contracts governed by the CISG are freed from the limits of the parol evidence rule ... [and] the standard UCC inquiry ... has little meaning under the CISG."[296] As a further example, U.S. courts used "naturally and normally" as a test to determine the application of this rule. Flechtner suggested that: "The use of a test so firmly tied to our domestic law traditions without clear authorization in the text of the CISG would do violence to the directives of article 7(1)."[297]

c. Conclusion

In sum, this part has shown that the international character of the Convention demands its interpretation is done without recourse to national laws. The above discussion has revealed several decisions where this mandate was not met. Put into perspective, in the context of the more than 1,000 CISG decisions that have been handed down, it can be argued cases where recourse to domestic law has been taken are rare. They appear to emanate from early decisions within several jurisdictions but mainly from common law countries. In at least one instance, the judiciary in the United States appears to have overcome the problem of relying on domestic law. Significantly in *Medical Marketing International Inc v Internazionale Medico Scientifico S.r.l* [298] a landmark case was created by the U.S. court accepting a decision by the Federal Supreme Court of Germany as precedent, thus fulfilling the mandate of the international character of the Convention pursuant to article 7(1). In Australia only two cases so far applied the CISG and arrived at a correct outcome. However the reasoning have displayed unfamiliarity with the application of new concepts. Von Doussa remarked that the provisions of the Convention replace the common law concepts and common law remedies.[299]

On the surface, the above cases would disprove the hypothesis of this thesis. But put into perspective, only isolated cases can be found which do not fulfill the mandate of the "international character" of the Convention. Additionally, these errors do not form a lasting pattern and are more likely "teething problems" of the CISG within a domestic jurisdiction. Of great interest will be the development of the CISG in Canada. It is disappointing that the Canadian judiciary not only failed to take note of the existing jurisprudence of the CISG but also failed to take note of *Fothergill*. The correct application of article 7(1) of the CISG mirrors many of the observations made in *Fothergill*.

CHAPTER 4

ARTICLE 7(1) OF THE CISG - THE CONCEPT OF GOOD FAITH

Overview

- The aim of this chapter is to develop the principle of good faith. In particular the following points are made:
    - Good faith is not only applicable to the Convention, it also applies to the parties' rights and obligations.
    - Good faith and bad faith are interchangeable principles.

- The interpretation of good faith in Australian jurisprudence is tentatively established as a contractual duty, and the socialization process can be used as an analogical tool to define good faith within the CISG.
- A comparison with the UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law is not helpful in determining the meaning of good faith within the CISG.
- Good faith has a dual role: first, as a principle expressed as a state of mind; and second, as a principle to be used in prescribed situations.

1. Observance of Good Faith in International Trade

a. Introduction

The principle of good faith in contractual dealings has a varied degree of acceptability. In civil law countries notably in the German and French legal system, good faith is well established. In Australia, good faith has a tentative foothold and will be discussed below in more detail. However, England appears to be "the last bastion" clinging to a "rigorous interpretation of contractual obligations."[300] The United States is the only common law country that has included good faith into its statutory sales law regime. The new Contract Law of the People's Republic of China [301] has also taken note of the principles of good faith and included the principle into several articles. Article 6, the most important one, states: "The parties shall abide by the principle of honesty and good faith in exercising their rights and performing their obligations."[302]

The CISG also refers to good faith in article 7(1) and notes that good faith must be observed in international trade. The question is what exactly is good faith and how is it applied? As to the meaning of good faith, the drafters of the CISG feared that a precise definition and application might not be possible.[303]

b. The Scope of Good Faith

Article 7(1) is said by some to proclaim that the principle of good faith only covers "the application of the Convention rather than the parties, rights and obligations."[304] In other words, good faith is not used to interpret the contract; it is an obligation to interpret the Convention in good faith. By analogy the obligation would mirror the one expressed in the *Vienna Convention*. As explained previously, there is an obligation on States to interpret Conventions in good faith.

This is in contrast with the UNIDROIT and PECL restatements, which specifically note that "each party must act in accordance with good faith and fair dealing in international trade"[305] or "in exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing."[306] Both principles add that the parties may not exclude or limit this duty. Within the common law system, the UCC in section 1-203 in contrast with the CISG states: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[307] Within the American legal system, such a statement is not isolated as a similar declaration can be found in section 205 of the Restatement (Second) of Contracts which declares that: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."[308]

Two aspects need to be investigated first what does good faith mean and secondly what aspect does good faith cover pursuant to article 7(1)? Notably there is no definition of good faith within the Convention. In other words the true meaning not only of article 7(1) but also the definition of good faith needs to be established. In Germany where good faith has been recognized for a long time and an extensive library of relevant cases exist no actual definition of good faith has been established.[309] By analogy the same could apply to the CISG and arguably a definition of good faith is not needed in order to understand and apply such a concept.

As far as the CISG is concerned, the purpose of article 7(1) should be stated as "uniformity must be promoted and good faith must be applied and observed in international trade."

Two important points stand out "uniformity" and "good faith." This combination suggests that recourse to

domestic definitions of good faith is contrary to the autonomous interpretation of the CISG. This was confirmed in *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd y Seolia Confectionery Co*. (*Dulces Luisi*)[310] where the tribunal stated that the principle of good faith must be interpreted internationally without "resorting to its meaning under Mexican law."[311]

Within the context of the CISG, article 7 would be considered a "general principle" on which the uniform sales law is based.[312] Support for such a contention is found in the comments by the Secretariat, which is the closest counterpart to an official commentary. The Secretariat Commentary states:

> *"There are numerous applications of this principle in the particular provisions of the Convention. Among the manifestations of the requirement of the observance of good faith are the rules contained in [several] articles."*[313]

If this statement is uncritically accepted, it can be argued that the principle of good faith cannot be restricted to the examples as listed by the Secretariat.[314] The principle of good faith applies to all aspects of the CISG, that is, to both interpretation and application of the Convention. A careful consideration of the articles listed by the Secretariat leads to the conclusion that good faith is also linked to specific instances. As an example, article 40 states:

> "*The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or of which he could not have been unaware and which he did not disclose to the buyer."*

The drafters of the CISG indicated a particular situation which is not considered to be within the principle of good faith. The court therefore is relieved of the burden to discover what good faith means. A German case illustrates this principle.[315] The buyer lost the right to rely on article 39, as he did not examine the goods within as short a period as the circumstances required. Importantly, the buyer could not show that the seller was in breach of article 40. Bad faith (*Bösglaubigkeit*) is only shown in this instance if the seller ignores faults, which are obvious to the eye and which could have been discovered by the seller through simple care and attention.[316]

c. The Interchangeability of Bad Faith and Good Faith

The *Oberlandesgericht* [Appellate Court] München in the above case did not use the term "good faith" but chose to use "bad faith." It appears that good faith and bad faith are used interchangeably despite the fact that these terms are opposites. However, the findings of the above court must be treated cautiously as it is not repeated in other jurisdictions

Is the mandate of article 7(1) still achieved if courts instead of promoting good faith, take the negative view and discourage bad faith? The first point is that article 7 does not promote such an approach although it does not explicitly discourage it either. Arguably such an approach can be used as an additional tool if everything else does not produce a clear outcome. The same argument is found in American domestic law where a debate as to the meaning of good faith has resulted in different approaches. In brief, Professor Robert Summers stated that good faith is a term without a general positive meaning of its own but functions as "excluders."[317] He asks what type of behavior does the judge intend to rule out and he lists a number of types of bad faith such as evasion of the spirit of the deal, lack of diligence and slacking off.[318] Such a definition according to Professor Summers "provides judges with indispensable guidance and may serve as a kind of unifying 'theory' that, if anything can, ties various [judicial] decisions together."[319]

Professor Farnsworth and Professor Burton, on the other hand, advocated the positive approach. Professor Burton criticized the theory by stating that courts "typically use the doctrine to render agreed terms unenforceable or to impose obligations that are incompatible with the agreement reached at formation," rather than "to effectuate the intentions of the parties."[320]

The problem of how "to effectuate the intentions of the parties" is solved by the CISG within its Four Corners. A search of the articles, which are affected by good faith, lead to the discovery that some articles describe bad faith

behavior. A good example of bad faith can be discovered in article 40. That type of behavior can be excluded. The conclusion is that bad and good faith can be used compatibly and are consistent with the goal of article 7.

The fact that the application of good faith and bad faith is admissible is not the only conclusion. So far it has been established that good faith is applicable to the interpretation of the Convention only. However, as the principle of good faith is contained in several articles which are applied to contracts, the conclusion is that good faith is also applied to the contract. The logical extension is that good faith is applied to the relations between contractual parties.

d. Dual Role of Good Faith

The dual role of "good faith" to interpret the Convention, as well as the behavior of contractual parties, is not recognized universally by all. The drafting history supports Professor Winship's argument to the contrary.[321] He is also supported by the ICC Arbitration Case No 8611.[322] The arbitrator said that "since the provisions of art. 7(1) CISG concern only the interpretation of the Convention, no collateral obligation may be derived from the promotion of good faith."[323]

Powers on the other hand argues that the academic world continues to debate the exact meaning and scope of good faith. He lists three distinct groups of commentators arguing first that good faith is required in contract performance only.[324] The second group suggests that the mandate of good faith not only covers contract performance but also extends to contract formation. The third group suggests that good faith is only used for CISG interpretation.[325] Felemegas specifically points to the different arguments and concludes that in his opinion "the possibility of imposing on the parties additional obligations must not be admitted because it is clearly not supported by the legislative history of the CISG"[326]

The problem is that the main supportive argument of all groups is the drafting history, which in turn suggests that the history is either inaccurate or is capable of multiple interpretations.

e. Good Faith and Travaux Préparatoires,

The conclusion as suggested by *Fothergill* and the *Vienna Convention* is that *travaux préparatoires* must be treated carefully. However it is instructive to note the course of events which led to the inclusion of good faith in the CISG.

The first and second rounds of debate over the inclusion of a good faith provision produced heated discussions.[327] Generally, the main argument against the inclusion of good faith was that the concept was too vague and would not result in uniform interpretation.[328] The drafters in the end organized a specific working group in order to reach a compromise solution.[329] A compromise was possible because a majority of delegates supported an inclusion of the concept of good faith linked closely to the mandate of uniformity:

> *"It was pointed out that such principles are expressly stated in many national laws and codes and that it was thus appropriate that similar provisions be found in international Conventions. It was also pointed out that such provisions on good faith and fair dealing contained in national laws had in some legal systems become useful regulators of commercial conduct."*[330]

The *travaux préparatoires* reveal that article 7 is a compromise and that, in order to reach a compromise, concessions had to be made. The "safe" conclusion is that only the final product, namely the CISG itself is the prime document to be taken into consideration. Article 7(1) is clear in its mandate to promote uniformity by applying good faith. It is logically impossible to apply good faith to the Convention as a whole without influencing or affecting the behavior of the parties. The discussion confirms the view this thesis has taken that *travaux préparatoires* arguably are predominantly of historical interest.

f. The Jurisprudence of Good Faith

The presence of good faith as an obligation of the parties in the jurisprudence of the CISG is impressive. In

Filanto,[331] the court by implication applied the principle of good faith. Specifically, the court noted that *Filanto* "cannot rely on the contract when it works to their advantage and repudiate it when it works to their disadvantage."[332] In *Dulces Luisi*,[333] article 7 was used to impose a standard of behavior upon the parties. The behavior of the Korean buyer was contrary to the principle of good faith. A Budapest arbitration proceeding applied article 7(1) as a standard to be observed by the parties.[334] The arbitrator noted that the issuance of a bank guarantee, which had already expired, was contrary to the principle of good faith.[335] In *SARL Bri Production "Bonaventure" v. Societe Pan African Export*[336] the seller was insistent to know where the goods namely jeans were sent. It was specified that the jeans were to be sold to South America and Africa. The purchaser however despite assurances to the contrary sent the jeans to Spain. The plaintiff claimed 10,000 francs as compensation for abuse of process. The court agreed with the plaintiff's position and found that the buyer acted contrary to the principle of good faith in international trade pursuant to article 7(1). On the one hand, the court applied article 7(1) to the relations between parties but also used the principle of good faith as a tool to levy, in essence, a fine. Whether the principle of good faith can be used in such a way remains to be seen, especially as the court also awarded damages of a further 10,000 francs under article 700 of the new French Code of Civil Procedure.

More conventionally, good faith performs a dual role: one directed to the parties, the other to the judiciary. "The former role arises from the textual provisions and the general principles of the Convention, and the latter role comes from the legislative history of the Convention."[337] The views of Professor Ziegel are relevant. He stated that while article 7(1) "does not refer specifically to the observance of good faith in the formation of the contract, its language is sufficiently broad to admit its inclusion."[338]

Article 7(1) explains how the CISG must be applied. Textual interpretation of an article leads to the discovery that its primary role is to interpret the Convention. Thus it allows the interpreter to discover that such an obligation creates a principle of "good faith." As there is an obligation to read and interpret the articles within the context of the CISG, such a principle must be applied to the relationship of the parties. Subsequent articles regulate such a relationship.

In *Diepeveen-Dirkson BV v. Niewenhoven Veehandel GmbH* [339] the seller signed a contract, which contained a penalty clause. The seller contended that the penalty was disproportionate to the harm suffered by the buyer. The seller argued that on grounds of good faith and fairness the penalty ought to be decreased to a more appropriate level. The court found that the principle of good faith does not extend to terms willingly entered into by parties and found no basis within the CISG to reduce the penalty. After all, the question as to penalty clauses is governed under domestic law.

Currently there are not enough decided cases under the CISG to conclude whether the courts have interpreted the principle of good faith correctly. The principle of good faith still needs to be developed. Professor Farnsworth showed a great deal of insight when he noted at the advent of the UCC:

> *"Still the lesson is there, and the Code's concepts of goods faith performance and commercial reasonableness await development, even beyond the bounds of the Code, at the hands of resourceful lawyers and creative judges."*[340]

Looking back to the *Tasmanian Dam case*, the only reference to good faith was a point made by Brennan J. who linked "good faith" to the rule of *pacta sunt servanda*. In *Applicant "A"* the same applied. McHugh J. was of the opinion that "good faith ... flows directly from the rule *pacta sunt servanda*."[341]

The CISG also contains the basic rule that contracts are binding. Interestingly, Magnus did not make that link with article 7. Arguably, this leads to the conclusion that good faith within the context of the CISG is more than or something different from *pacta sunt servanda*.[342]

The CISG itself does not offer much help either in defining good faith. In German domestic jurisprudence, the same is applicable and one must read between the lines to find a definition.[343] Both UNIDROIT Principles and PECL have introduced a definition or closer description of good faith into their model laws. Arguably, a debate as to the standard of good faith is not needed in relation to the CISG. Conceivably, the drafters of the CISG by

design or good luck have avoided the need for courts to "adopt a doctrine of good faith ... to improve contract enforcement" [344] by tying good faith to specific situations.

2. Interpretation of Good Faith in Domestic Jurisprudence

a. Introduction

The CISG, in contrast with some domestic laws and Conventions, has introduced good faith as a principle which covers the application of the Convention and, in the opinion of many, covering as well as the relations between parties to the contract. As such a new, powerful and irresistible way of interpreting international laws has been created.

The easiest and by far the safest way to achieve international uniformity in applying the CISG would be the accessibility of a common set of rules explaining how good faith is to be applied. But "it will be impossible to satisfy this hope, because there is, in fact, no such common stock of concrete rules."[345] Such an outcome is not surprising. To have such a common stock of concrete rules would mean that it is possible to span different legal systems and work from a common conceptual basis. It is this problem, namely the desire of the Convention "not to identify itself with any legal system but to conjugate with all" [346] which gave rise to the need to introduce a tool to interpret the application of the Convention. As only certain issues are regulated in the CISG and others such as validity are excluded for the most part, gap filling together with the principle of good faith must overcome this problem.

How do we give meaning to "good faith" as the CISG does not give a definition? There are arguments to suggest that the principle of good faith as developed in relevant domestic systems ought to be applied. However, such an argument is dangerous as it could lead to the use of domestic law and not satisfy the international requirements as stipulated by article 7(1). Such a view is not new, or unique to the CISG. The House of Lords, in a 1962 decision stated:

> *"It would be deplorable if the nations should, after protracted negotiations, reach agreement ... and that their several courts should then disagree as to the meaning of what they appeared to agree upon."*[347]

This statement together with *Fothergill* is persuasive and contradicts the domestic view held by many common law courts that the meaning of legislation in general and good faith in particular is deduced solely from the words of the statute.[348] A brief review of what good faith means in domestic law could give an indication of its meaning. Yet the CISG cannot be interpreted using national judicial constructions and terms. The solution again must be found in the "interpretation ladder." In other words, good faith needs to be interpreted in combination with the traditional grammatical, systematic and historical methods supplemented by a comparative method.[349]

b. Good Faith in Australian Jurisprudence

It appears there are signs in many common law countries to suggest that the notion of good faith has taken a foothold. In Australia, good faith was used as an *obiter dicta* in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*.[350] In Canada, Ziegel suggests that a "growing number of common law precedents in Canada ... support its [good faith] adoption."[351] Canada is in the process of developing a distinct duty of good faith applicable to contract enforcement, whereas England still has not found "that good faith has any concrete meaning in the context of contract law."[352] Good faith without a concrete meaning would threaten the important principles of certainty and predictability. Appeals to principles of fairness are not often allowed as illustrated in *Union Eagle Ltd v Golden Achievement Ltd*.[353] A purchaser of land was 10 minutes late in making the payment of the purchase price. Time expressly was of the essence. Lord Hoffman noted:

> *"in many forms of transactions it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the term of the contract will be enforced."*[354]

These observations are supported by the view expressed by Goode who in a speech suggested that "we in England

find it difficult to adopt a general concept of good faith" and "we do not know quite what it means."[355] However, it cannot be said that principles of fairness are not known and applied in English law. Bingham LJ. said:

> *"[I]n many civil law systems, and in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. ... English law has characteristically, not committed itself to such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."*[356]

This leads to the belief that in a common law country like Australia it would be difficult to search domestic law and discover principles of good faith. This assumption is false. There are direct references to good faith as a principle within the Australian legal system. Good faith as an expression of mutual confidence is also indirectly expressed in various legislation. As an example, s.52(1) of the Trade Practices Act states: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." Importantly, Fox J said:

> *"Section 52 is a comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It does not purport to create liability at all; rather it establishes a norm of conduct ..."* [357]

Arguably, our system shows an ability to change or accommodate change despite that they do not "adopt the language of any common law cause."[358] The conclusion is that good faith could be imported into our domestic law as a principle. This is especially important as otherwise aliens receive greater protection under the CISG than nationals would under domestic law.

In England, Goode as late as 1992 still expressed the view that:

> *"The last thing we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable, and if that means that the outcome of disputes is sometimes hard on a party we regard that as an acceptable price to pay in the interest of the great majority of business litigants."*[359]

At this stage, it can be said that Professor Goode's comments are not helpful. Only if the judiciary fails to grasp the significance of good faith as a concept and fails to implement its principles would good faith be a "vague concept of fairness." In contrast, another comment in the same year, this time in Australia, expresses a completely different view. Justice Priestley argued:

> *"The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith with are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognized as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States."*[360]

Notably, Justice Priestley believes that good faith is already an implied tool to solve contractual disputes. He commented and referred to article 7 of the CISG in his attempt to understand good faith. Considering that he used the words "an orthodox technique", it can be argued that a recognition of good faith as a principle is well established within Australia. It gives weight to the argument that the Trade Practices Act, for example, implicitly uses good faith.

Good faith is not only implicitly used in Australia, courts increasingly rule on the meaning of "good faith" creating an ever-increasing jurisprudence. Good faith has moved well beyond a "vague concept of fairness." Sheller JA in Alcatel Australia Ltd. v Scarcella [361] commented that :

> *"The decisions in Renard Constructions and Hughes Bros mean that in New South Wales a duty of good*

> *faith both in performing obligations and exercising rights, may by implication be imposed upon the parties as part of a contract."*[362]

Good faith was noted as obiter dicta in Renard Construction but it has been developed further and has been accorded serious consideration. Broadly speaking, good faith has been given two divergent meanings. Miller J. in Bond Corporation Pty. Ltd. v. The Western Australian Planning Commission (Bond)[363] noted that:

> *"The first is a broad or subjective view which requires inquiry into the actual state of mind of the person concerned ... The second involves the objective construction of the words by the introduction of such concepts as an absence of reasonable caution and diligence. The particular interpretation apt to the use of the words in a given legislative context will depend on the decision-maker's elucidation of the purpose of the legislature."*[364]

The first meaning as to the state of mind has been viewed as being imprecise but not capable of giving rise to an enforceable obligation. As it is only declaratory, Giles J. in Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd [365] stated:

> *"It is difficult to regard the parties as having undertaken in 1993 to declare at a future time that they had a commitment to good faith ... the cumulative uncertainty of "commitment," "attempt," "negotiate" and "in good faith" is forbidding."*[366]

Lord Atkin was even more blunt when he declared that: "the concept of a duty to carry on ... in good faith is inherently repugnant to the adversarial position of the parties ...."[367] Unfortunately it has not been recognized that good faith, as a state of mind, does not need to have a particular outcome. Even if a problem is forbidding in its vagueness,

> *"the courts should strive to give effect to the expressed agreements and expectations of those engaged in business, notwithstanding that there are areas of uncertainty and notwithstanding that particular terms have been omitted or not fully worked out."*[368]

Arguably, the conduct of parties is determined by their state of mind. Therefore a state of mind of parties will become apparent and will be translated into "conduct " of the parties. It is well established in law that equity regulates the quality of contractual performance.[369] It can also be argued that performance equates to conduct. Finkelstein J. recognized this when he noted that a party has to act in good faith "not only in relation to the performance of a contractual obligation but also in the exercise of a power conferred by the contract."[370] As an opposing view, Gummow J. observed that:

> *"it requires a leap of faith to translate these well established doctrines and remedies into a new term as to the quality of contractual performance."*[371]

It is important to note the arguments of the appellant and defendant in Hughes Aircraft Systems International v. Airservices Australia.[372] The question was debated whether Australian law recognizes a duty of good faith. The applicant argued that the conclusion of Priestly JA in Renard was important, namely that:

> *"people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community standards."*[373]

The respondent, on the other hand, countered that argument by inviting Finn J to follow the views as expressed by Gummow J above. Finn J. noted it would be difficult to disagree with Gummow J's

> *"characterisation both of the methodology of Australian contract law while it remained subject to direct English control and of the role assumed by equity in regulating contract formation and performance."*[374]

He further added that his view "inclines to that of Priestley JA."[375]

The second meaning of good faith is of great interest and needs a careful analysis. Good faith is viewed as a concept. At first glance, a concept is capable of being a term at law. However, there are divergent views on this matter. Wright J. in Asia Pacific Resources Pty Ltd v Forestry Tasmania[376] rejected the implication of good faith as a term of law:

> *"The novel good faith concept, ... whilst capable of statement with beguiling simplicity can never be a pure question of law ... because even its most ardent proponents appear to recognise that good faith is incapable of abstract definition and can only be assessed as being present or absent if the relevant facts are known or are capable of being known."*[377]

There are several points worth noting. Wright J. did recognize that good faith is a concept, but he rejected the concept as a question of law as it is incapable of abstract definition. In order to be applicable no abstract definition is required as Wright J. himself pointed out. Good faith does not need to be independently defined or reduced to a rigid rule: "it acquires substance from the particular events that take place and to which it is applied."[378]

To associate good faith to a concept does not explain what the core principle of good faith is. To call it, like the CISG, a general principle does little to illuminate the debate beyond the point that good faith will take on meaning or "substance from the particular event that takes place and to which it is applied."[379] Stapleton identified and enunciated a conceptual common denominator of good faith.

> *"The good faith doctrine comprises standards/obligations/considerations that seek to temper the deliberate pursuit of self-interest in situations where the conscience is bound. ... To act in good faith requires that you do not act dishonestly, do not deliberately contradict yourself or deliberately exploit a position of dominance over another."*[380]

The final outcome is a concept or principle that is simple and easily applicable. It still requires a state of mind conducive to the standards described above but good faith can also be tied to events or particular situations. Einstein J. in Aiton[381] came to the conclusion that good faith concepts acquire substance from particular facts and therefore a determination must be made on a case-by-case basis "using the broad discretion of the trial court."[382]

Even if there are rules and phrases of good faith developed in a particular system, they must be able to be transplanted into the CISG. Conceivably, they could have been written to satisfy a particular need, which is not apparent in the CISG. Rules are only meaningful within a particular context. For example, it can be said that most of the common law countries do not recognize a duty of good faith in pre-contractual negotiations.[383] The danger is that rules or principles developed with the facts of a given case in mind, are applied as a reference to other cases or developed as a source of more general rules and hence implemented into a normative text.[384]

The judiciary in New South Wales appears to have firmly established the practice to look at domestic and international jurisprudence as well as consulting doctrines worldwide. It can be confidently argued that the precedent established by Fothergill when dealing with international conventions has extended into the interpretation of domestic law. A strong argument can be advanced that the judiciary is well prepared to apply the CISG pursuant to article 7. The courts in Australia appear to have overcome the historical limitations imposed by the common law. The gap between principles applied internationally and within domestic law has narrowed considerably.

(i) Conclusion

Good faith contributes towards an understanding of a new concept not previously found within our domestic system of law. Fothergill has provided the first stage by pointing to a different way of interpreting international conventions. In Fothergill, it was observed that aids of interpretation, which could not legitimately be used in interpreting domestic legislation could be used to interpret international conventions. In Australia, this process progressed further and these tools, previously restricted to the interpretation of international conventions, have

found their way into the interpretation of domestic law. In Aiton, Einstein J quoted domestic and international sources. Of significance, is that he noted the passage by Finn J. in Hughes Aircraft:

> *"It (good faith) has been propounded as a fundamental principle to be honored in international commercial contracts: see eg UNIDROIT, ... Its more open recognition in our own contract law is now warranted notwithstanding the significant adjustments this would occasion to some of contract law's apparent orthodoxies."*[385]

Finn J. stated in South Sydney District Rugby League Football Club Ltd v. News Ltd [386] that Australia had not yet "committed itself unqualifiedly to the proposition that every contract imposes on each party a duty of good faith ... in contract performance and enforcement."[387] However, it is clear where Finn J. stands in this debate. He noted in passing that despite the fact that there is supposed uncertainty with good faith terminology, the States and Territories were not deterred from introducing article 7(1) of the CISG into domestic law.[388] Arguably, Finn J. should have been more optimistic in his assessment of the Australian judiciary. In Far Horizons Pty Ltd v. Mc Donald's Ltd,[389] a principal area of debate concerned the question whether there was an implied duty to act in good faith in the exercise of power under an agreement.[390] Counsel for the defense contended that there was no such obligation and besides, such implication was excluded by the entire agreement clause. Byrne J. dismissed that argument and noted that there was such a duty: " I do not see myself at liberty to depart from the considerable body of authority [on good faith]."[391]

Arguably, the judiciary has believed that good faith and orthodoxies within the contract law are irreconcilable. However, the concept of good faith is irreversibly making its mark, which requires that our perception of domestic contract law be changed. Such an attitude shows that good faith is an important concept. It is so important that it necessitates changes to our orthodox contract law. Such changes in attitude are becoming more frequent. For example Austin J commented:

> *"Any inclination I might have to contribute to the emerging law on the contractual duty of good faith is thwarted [as the defendants conduct was not inconsistent with the duty of good faith.]"*[392]

It can be said that: "Australian courts have recognized the application of the doctrine of good faith."[393] Powers argues that the meaning of good faith is essentially the same in common law as well as in civil law countries and only the application may be different.[394] Arguably, it follows that the gap between the interpretation of domestic law and international Conventions has been significantly narrowed. The climate has been created where an understanding by courts of good faith pursuant to article 7(1) of the CISG is easier and clearer. This supports the thesis and demonstrates the point that a non-application of rules contained within the "Four Corners" of the Convention, and specifically article 7 is an error of interpretation rather than an unwillingness or inability to depart from domestic law.

3. Good Faith and the "Restatements" - UNIDROIT Principles of International Commercial Contracts (PICC) and Principles of European Contract Law (PECL)

Before turning the attention to good faith as expressed in the CISG, it is important to examine briefly how the restatements on international contracts have viewed this question. These principles do not constitute a legal system in the strict sense, but they contain useful guidelines.[395] Such guidelines have already found their way into arbitral proceedings. A study of these principles is important, as PICC and PECL had the advantage of building on the CISG without political constraints.

> *"The objective was no longer to unify domestic law by special legislation, but merely to 'restate' existing international contract law. As a result, the decisive criterion in the preparation of the UNIDROIT principles was not just which rule to adopt by the majority of countries (common core approach), but which of the rules under consideration had the most persuasive value and/or appeared to be particularly well-suited for cross-border transactions (the better rule approach)."*[396]

PICC in article 1.7 declares not only that "each party must act in accordance with good faith and fair dealing in international trade" but that the parties may also not exclude or limit this duty.[397] Importantly, the drafters

made the point that international trade standards in relation to good faith may be different from domestic ones.[398]

The Quebec Research Centre of Private and Comparative Law at McGill University prepared a dictionary in French and English.[399] They point out that in civil law good faith is not only understood in a subjective but also in an objective manner whereas in common law good faith is only measured on a subjective basis. In order to underline the objective aspect of good faith, "fair dealing" was introduced.[400] As good faith and "bonne foi" can be taken to be the equivalent, it is not surprising that both PICC and PECL had to add to their good faith "fair dealing." The CISG does not have to take such a step as the official languages of English and French contain both meanings and hence the objective as well as subjective meaning of good faith is included globally in the CISG. This is a further confirmation that good faith in the CISG does not only refer to the state of mind of a given party, but also refers to a meaning which depends on the context and purpose of the legislation.

a. The UNIDROIT Principles (PICC) and the PECL - Comparison with the CISG

What then is the difference between PICC and the CISG? Magnus in his editorial remarks on PICC noted that "the difference between the CISG and the Principles can be nearly neglected as far as the general concept of good faith in international trade is concerned."[401] However, of more interest is his comment that by combining the CISG and PICC "one gets a good impression what good faith in international commercial relations should and could mean."[402]

The impression is gained that there is an unwarranted lack of confidence in the meaning of good faith. In both the CISG and PICC, good faith has been given a subjective as well as an objective meaning, which incidentally coincides with the views expressed in domestic law. PICC in its Official Comments specifically notes that the "comments on the articles are to be seen as an integral part of the Principles."[403] This indicates that in effect, this element of the travaux préparatoires of the UNIDROIT Principles is to be given a prominent role in the interpretation of the PICC.

Turning our attention to PECL it appears that the newest of the restatements of contract law has used the "best of both worlds" model. Not only is good faith prominently noted in the interpretation and supplementations article 1:106, but also in article 1:201 where it states that "each party must act in accordance with good faith and fair dealing." PECL had the ability to compare the CISG with PICC and as a consequence included the mandate that good faith must not only be used to interpret PECL as a whole but also to regulate the behavior of the parties.

4. Good Faith and the CISG

a. Introduction

The above discussion has shown that domestic Australian law contains serious attempts to interpret good faith. Since Justice Priestley opened the debate properly in Renard Constructions, much has changed in the perception of good faith.

It can be argued that the current domestic approach to the examination of good faith could be used to assist in determining the meaning of good faith within the CISG. To take this path, one has to be acutely aware not to fall into the trap of transplanting principles from domestic law into the CISG. The discussion of article 7 indicates that there is no such mandate. It is argued that to duplicate an approach to interpretation which helps to explain the principle within the Convention is permissible. By analogy with sociology, we are looking at the socialization process and not the outcome or product of socialization. A process can be duplicated like the production of bricks but the outcome or finished product namely the brick itself - or the concept of good faith in our case - can vary enormously depending on the culture of the society. It is the mandate of international uniformity that will determine the outcome. As such the mandate of autonomous interpretation is still valid.

As said previously, this thesis adopts the stance that good faith has a dual role: first, to interpret the Convention; secondly, to regulate the behavior of the contractual parties. Good faith therefore has two distinct functions or roles. For that reason, the discussion is twofold. First, good faith is examined as a state of mind; secondly, good

faith is looked at as a principle found in various articles. It has been suggested that a definition of good faith should be used to understand article 7(1). However, it is argued that such a definition does not help to advance the application of good faith. Attempts have been made to define good faith. As an example, Powers suggests that:

> *"The duty of good faith can be defined as an expectation and obligation to act honestly and fairly in the performance of one's contractual duties. A certain amount of reasonableness is expected from the contracting parties."*[404]

This may be true but how is such a definition applied? It still leaves the judiciary with a "functional problem." Powers included only one function into his definition, namely the application to contractual obligations. He has not included into his definition a treatment of good faith as applicable to the Convention as a whole. How can good faith, as applied to the Convention, carry expectations to act "honestly and fairly" with the outcome not directly applicable? Good faith, more to the point, is a precondition, a holistic mind-set, which can be applied through concrete examples to the behavior of parties. To explain the function of good faith, it is more useful to look at approaches rather than definitions.

b. Approaches to Good Faith

Various commentators have suggested that there are four possible approaches to the role of good faith. First, it is used only to interpret the CISG. Secondly, that the conduct of the contracting parties is governed by good faith. Thirdly, that good faith is a general principle of the CISG. Fourthly, that good faith is a general principle of lex mercatoria and UNIDROIT.[405]

The first comment is that good faith may well be a general principle of UNIDROIT and even lex mercatoria but to use principles which are not tied within the "Four Corners" of the CISG would do "violence" to its mandate. Such an approach must be rejected on the same grounds one would reject the argument that domestic principles and concepts are to be used in the interpretation. The homeward trend has been condemned and rejected by scholars and judges alike. What can be learned from UNIDROIT and municipal law is the socialization process, which is transplantable into the CISG because the Convention is an "international cultural construct."

The second comment is that the three remaining points are not logical extensions of article 7(1). If article 7(1) had provided a tool by which the CISG is interpreted, such a tool would need to be a general principle. Article 7(1) as a provision is what it says, a singular point within a piece of legislation. It is only repeated if another provision repeats the same message. In order for a concept to apply to all provisions and articles, it has to be a principle. The "notion of good faith in international trade is explicitly stated as a principle of the Convention in article 7."[406]

If it is a principle it is not only applicable to the interpretation of the Convention, that is all articles but it will also indirectly affect the conduct of parties. Kastely, as an example of good faith, cited the provisions dealing with preservation of goods and mitigation of damages.[407] It is argued that there are really only two approaches to an understanding of the role of good faith. First, it is a principle to be used to interpret the Convention as a whole, which is a principle expressed as a state of mind. Secondly, some articles specifically refer to the general principle of good faith and therefore good faith is linked directly to specific situations. As mentioned above, the jurisprudence of article 7(1) supports this argument. This is of importance as the only serious argument against such an interpretation of good faith came from Professor Winship.[408] He suggested in his conclusion that the whole debate had to wait for interpretations by courts.[409] This has now taken place and demonstrates that Professor Winship's initial conclusion was incorrect. As a result, it is argued that good faith must be approached as a principle expressed as a state of mind and as a principle with specific situations in mind.

c. Good Faith, a Principle Expressed as a State of Mind

Good faith covers the application of the Convention as well as the rights and obligations of the parties. In simple terms, it is a "general duty" based on judicial interpretation of community standards, reasonableness and fair play.[410] It must be stressed that good faith as indicated is a general duty and not a duty based on morality. This stance has already been taken in the drafting process of article 7(1).[411] It would be presumptuous to suggest

that article 7(1) is based on morality. Such a concept would never lend itself to becoming a uniform concept, as morality is a social duty based on cultural norms. International law, and in particular good faith, must be a concept capable of treading a middle ground that is acceptable to all. For that reason its definition must be a general duty rather than a specific one.

So far only the application of good faith has been discussed but not what good faith actually means within the context of the CISG. A brief examination of domestic law and its treatment of good faith opened a small window of understanding. Importantly, it showed two things: there is no universally accepted definition of good faith; and each country treats the principle of good faith differently. One fact emerges, domestic interpretation and definitions of good faith cannot be transplanted into the CISG as explained in Dulces Luisi.[412] A common thread can be nevertheless detected, namely, the understanding that good faith is a state of mind as well as a concept.

The best starting point is to go back to article 4, which states that the CISG only "governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." Article 7(1), as far as good faith is concerned, applies to the interpretation of the totality of the CISG. The mandate is primarily directed to the judiciary to interpret the CISG in good faith. Such an interpretation covers the formation of the contract and the right and obligations of the buyer and seller. Article 7 also created a principle of good faith found through the CISG such as article 40. As such, it is not only directed to the judiciary but also to the parties as noted by the Court d'Appel de Grenoble in Bonaventure.[413] The language of article 4 also supports such a conclusion. The question is, whether good faith extends beyond the specific instructions which are to be found within the Convention. In other words, is the mandate in article 7 broad enough to allow the judiciary as well as the parties to the contract to rely on a general principle of good faith and apply it to any conduct not consistent with good faith?

There is no controversy in stating that article 7(1) urges the judiciary and the parties to the contract to observe good faith in international trade. The purpose of article 7(1) is to interpret the Convention in good faith. It therefore refers to the state of mind of those interpreting the Convention. The natural or normal state of mind when interpreting the Convention is with good faith. It can be argued that there is no need to refer in the jurisprudence to article 7(1) as this article is applied to every case at hand in the "normal course" of interpreting the CISG. In a German case, the court looked at the relationship between articles 49 and 48. Article 49, which covers the buyer's rights to avoid the contract, prevails over the seller's rights to cure defects, which are covered in article 48. The court noted, by referring to the underlying purpose of the provision (Sinn und Zweck der Vorschrift) that article 49 only prevails if the delivery of non-conforming goods amounts to a fundamental breach.[414] Significantly, the courts view was that - even if the defects were serious - it does not amount to a fundamental breach if the seller is willing to deliver substitute goods without unduly inconveniencing the buyer.[415] This choice of words indicates that the court took note of the mandate of good faith. The state of mind of the court was such that it automatically applied good faith. The Supreme Court of Germany had to decide whether the seller waived his right to rely on articles 38 and 39. The CISG deals with such a waiver under article 40. The court noted that the seller waived his right in an implied manner.[416] The seller entered into protracted negotiations over the lack of conformity and even offered compensation and paid for an expert at the buyer's request, which showed that the seller by implication waived his rights to rely on article 39.[417] Such an argument is based on an implied recognition that the CISG must be interpreted with good faith and also that the parties to a contract can rely on good faith behavior. Again article 7(1) was not expressly quoted, which suggests that good faith is nevertheless applied but as a state of mind. As such, good faith does not require a definition and arguably a doctrine of good faith is not required.

The logical conclusion therefore is that article 7(1) only needs to be specifically invoked when specific or unusual circumstances compel the judiciary to note the absence of good faith.

However, this does not determine if the CISG has been interpreted with good faith in mind. It is possible that good faith is not applied at all. An outcome could also be the result of ignorance or mistake of any kind. The only logical conclusion is that the interpretation of the CISG in good faith could minimize errors. However, in the end we are still dealing with a state of mind and therefore measurable outcomes cannot be identified. The application

of good faith after all demands a "holistic approach." Such a view is strengthened by an analogical extension of history. Historians believe that information in letters and chronicles mainly describes items which are new or newsworthy. People seldom report facts which are either known by the other party or are universally known. It can therefore be argued that good faith is the state of mind which is expected to pre-exist by all those interpreting the CISG. Only if the balanced state of affairs, that is, the presence of good faith is disturbed, is there a need to comment and apply explicitly article 7(1). Arguably, the only time good faith is absent is when bad faith is apparent. The Colombian Constitutional Court noted:

> *"There is nothing more against reality: in all juridical systems that recognize the principle of good faith, validation is a form of granting security to the life of business and, in general, to all judicial relationships."*[418]

No direct penalties or remedies flow from the principle of good faith, as it applies to the Convention as a whole. The same applies to the parties. If a party fails to exhibit good faith and is not in direct breach of any other articles within the Convention, the CISG through article 7(1) does not allow the court "to manufacture" remedies or principles as shown in Bonaventure [419] where the court awarded 10,000 francs damages. The Australian Trade Practices Act in s52 also applied a similar mandate in stating that a corporation shall not engage in conduct that is misleading or deceptive. Fox J states that [s.52] "does not purport to create liability at all; rather it establishes a norm of conduct."[420] However, unlike the CISG, the Trade Practices Act introduced consequences for failure to observe s.52 "elsewhere in the same statute, or under general law."[421] As the CISG does not provide for failure to observe article 7 and hence creates a gap, the courts are free to apply domestic law as shown again in Bonaventure where the court applied French domestic law to compensate the plaintiff for abuse of process.

d. Good Faith as a Principle in Prescribed Situations

The reverse is true if good faith or bad faith is exhibited in direct conflict with articles where the principle of good faith is included such as article 40. In these circumstances, a breach of these articles requires the court to invoke the principle of good faith but the court is not required to embark on a great "philosophical dissertation" to discover the meaning of good faith. Good faith is linked directly to prescribed situations and hence is explained. There are several articles, which contain good faith as a principle and some will be discussed to illustrate the above point.[422]

(i) Article 40

Beijing Light Automobile Co., Ltd v. Connell Limited Partnership (Beijing Metals)[423] has to be regarded as the leading case. It revolves around the question whether article 40 was applicable. A lock plate, which was installed in a machine, broke four years after installation. Pursuant to article 39(2) the buyer loses the right to rely on a lack of conformity of goods after two years. However, article 40 states that; 'The seller is not entitled to rely on the provisions of article 38 and 39 if the lack of conformity relates to facts which he knew or could not have been unaware of and which he did not disclose to the buyer."[424] The seller, in other words, has an obligation to disclose defects. Article 40 is a "safety valve" which allows a buyer to overcome articles 38 and 39 if the reason for his late discovery of non-conformity is based on the seller exhibiting bad faith (or not exhibiting good faith). The first comment the court made is that article 40 is only to be applied in special circumstances. The court must be convinced that a fact of which the seller had knowledge of or ought to have had in its mind resulted in a loss to the buyer. Such conduct can be described as an awareness of bad faith.

> *"The requisite state of awareness that is the threshold criterion for the application of article 40 must in the Tribunal's opinion amount to at least a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity."*[425]

Such a ruling is consistent with the views of the Oberlandesgericht [Appellate Court] München, which noted that bad faith is shown if the seller ignores faults which are obvious to the eye and which are discoverable by simple care and attention of the seller.[426] Some scholars argue that the standard for reliance on article 40 must be at least due to "slightly more than gross negligence" or even "approaching deliberate negligence."[427] This suggests that article 40 should only be applied in exceptional circumstances and not in special

circumstances.[428] However the real consideration behind any standard must be the principle of good faith. Good faith requires, as the Stockholm arbitration tribunal noted, a "requisite state of mind."[429] It can be argued that a breach of good faith has started once the seller ought to have discovered the non-conformity. In other words, once non-conformity is shown to be evident to the eye as pointed out by the Stockholm Chamber of Commerce, a breach of good faith has occurred.

In relation to good faith, the courts have not resolved an issue of a conceptual nature but rather put a practical interpretation to a conceptual issue. In another case, the Landgericht [District Court] Stuttgart criticized the lower court as they allowed article 40 to be used despite the fact that the seller tried to use the article to overcome his breach of the contract.[430] This is an indication that the principle of good faith was applied correctly in the spirit and manner contemplated by those who prepared article 7(1). The same observation also applies to articles, which include an observance of good faith.

(ii) Article 49(2)

Article 49 allows the buyer to declare the contract avoided. If the seller has delivered the goods the buyer loses that right subject to two exceptions: first "in respect of late delivery, within a reasonable time after he has become aware that delivery has been made";[431] and secondly "in respect of any breach other than late delivery, within a reasonable time."[432]

The fact that the buyer loses the right to avoid the contract after delivery is an expression of good faith as it would allow the buyer to: "deliberately exploit a position of dominance over others."[433] Once goods have left a country a seller is committed to expense and inconvenience, a position which undoubtedly can be exploited. The exceptions mirror such a view as late delivery, when detected early, can still either be aborted or losses minimized. Other breaches must be communicated within a reasonable time. The Supreme Court of Germany pointed out that a buyer could not rely on article 49(2)(b) because the attempt to avoid the contract was too late.[434] The seller wrote that they would make good any quality defects in the future. The court indicated that such a statement does not constitute an abandonment of the duty to notify the seller within a reasonable time of the desire to abandon the contract.[435] The Bulgarian Chamber of Commerce and Industry refused the application of the buyer to have the contract avoided because the goods were delivered and the buyer did not give reasonable notice.[436] In fact he sold 90% of the goods and therefore waived the right of protection under article 49(2). A Spanish court ruled that a 48-hour period was sufficient to avoid the contract after the buyer was notified of a late delivery.[437] It was noted that this was the third late delivery. As the buyer did not complain as to the lateness of the two previous deliveries, he could only avoid the contract as far as the third delivery was concerned.

(iii) Article 29(2)

Article 29 allows a contract to be modified or terminated by mere agreement of the parties. f the contract is in writing and modifications must be in writing such a contract may not be modified in any other way. "However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."[438] The intent of this article is clear. If a party deliberately contradicts the content of the contract by his conduct and the other party relies on such a conduct, then this constitutes a breach of good faith in line with article 7(1). In Graves Import Co. Ltd. and Italian Trading Company v. Chilewich International Corp.,[439] the buyer was precluded from asserting that there was an oral modification as the contract specifically excluded oral modifications. It is clear that the above facts do not correspond to a breach of good faith. Rather they are a breach of an express term on which the other party relied. Another point was noted in Societe Camara Agraria Provincial de Giupuzcoa v. Andre Margaron;[440] namely, that conduct must be a positive act and not just a conclusion gained from the general mood of a meeting. However, silence can be construed as a conduct under certain circumstances. If a party refrains from action which he is entitled to take, such as the insistence on a substitute delivery, that conduct can be interpreted by the other party as a modification or termination of an agreement.[441] Cases dealing with a breach of good faith pursuant to article 29(2) are rare and hence the observation has to be made that such breaches are either not taken to court or are not a mischief which needs fixing. However, article 29(2) does contribute to the general mood of article 7(1) which indicates that dealings between parties must be in good faith which will ultimately contribute to a smooth and efficient way "to do

business."

(iv) Articles 38 and 39

These two articles are interrelated and should be treated together. Article 38 obliges the buyer to examine goods "with as short a period as is practicable in the circumstances." The result of these examinations must be communicated to the seller pursuant to article 39 "within a reasonable time after he has discovered or ought to have discovered it." The principle of good faith indicates that a buyer must establish efficient and expeditious business practices. Goods which show defects or cause disputes should not be left in a country in storage because costs should be held to a minimum. The seller must be afforded at the earliest practicable opportunity to decide the fate of the goods in order to minimize unnecessary costs.

The Landgericht [District Court] Berlin refused an application for damages as the defects in children's shoes were easily discoverable and should have been noted at delivery.[442] The defects were only communicated to the seller after three months. The court indicated that pursuant to article 38 the buyer should have inspected the shoes at delivery or at least within a week and should also have notified the seller pursuant to article 39 within a week after discovery of the defects.[443]

Parma ham was delivered at Christmas but only inspected after the holiday period. The court in Riedlingen held that the defendant was obliged to at least randomly check the goods upon delivery, which would have satisfied the obligations under article 38 especially as the Parma ham was "going off" 2 to 3 hours after unpacking.[444]

In another German case, cloth was found to be defective but examination was undertaken too late. The court took into consideration that the defects were apparent to the eye and therefore the delay of one week to inspect the goods was unreasonable.[445]

If there is a lack of conformity of the goods, pursuant to article 39, the buyer must notify the seller "within a reasonable time after he has discovered or ought to have discovered it" otherwise he will lose that right. The question is not what constitutes a "reasonable time" which has been discussed at length in legal literature.[446] The question at hand is what constitutes a breach of good faith.[447] A lack of conformity must be notified within a reasonable time, not only after it is discovered, but also after it ought to have been discovered. It poses an obligation on the buyer to expediently make sure that the goods supplied correspond with his expectations. The seller must be able to rely on the good faith of the buyer to expediently complete the contract by performance or alternatively notify the seller that there is a breach of the contract.

e. The Question of "Reasonable"

In the above discussion of article 38 and 39, the question of "reasonable" time has been left open. The meaning of "reasonable" can never be a question of law but rather a question of fact as it can only take on substance from the particular event that takes place and to which it is applied. Good faith as a principle is required to interpret situations like the one described above. Hence, an examination of provisions which rely on "reasonable" needs to be undertaken to discover whether good faith is an integral part of the process of defining such terms. It is implied that good faith as a state of mind is present as it needs to be applied to the Convention as a whole.

The decision of the Supreme Court of Germany where the court used the term a "regular" four-week period to describe a "reasonable time" is of interest.[448] Such a statement causes concern and Schlechtriem pointed to this problem in his case commentary.[449]

> *" ... [When] applying international uniform law, the Federal Supreme Court cannot, as it can for German law, claim the last word and suggest the term "regular" a ruling with precedential effect; instead it must in the interest of keeping legal uniformity, consider how foreign case law and legal scholars interpret the reasonable period."*[450]

Article 7(1) not only requires that each provision is interpreted uniformly but also with good faith. Uniformity in an application of "reasonable time" can never be achieved. It is a question of fact. Each situation to which

reasonable time is tied can vary. However, within each similar situation uniformity can be achieved.

There must be an underlying principle, which defines "reasonable" in order to achieve uniformity. Such a term however cannot be defined adequately without a purpose in mind. That particular purpose is defined by the CISG in article 7(1), namely good faith. Good faith therefore should bring uniformity to the interpretation of "reasonable" in each defined situation. A mutually acceptable middle ground is found, as there is no application of a standard period only a uniformly applied principle. It gives both parties the opportunity to keep the contract afloat in line with the general mood of the CISG. Therefore, the seller or the buyer is not put to an unreasonable disadvantage. In other words, a uniform application of good faith is evident and should assist in achieving uniformity and consistency.

An examination of the CISG leads to the discovery that "reasonable" is contained in approximately 37 provisions. The most important of these is article 8(2). Many scholars have suggested that "reasonableness" is a general principle and because of its subjective nature creates a gap, which needs filing pursuant to article 7(2).[451]

This creates a problem. It has been discovered that the question of "reasonableness" must be solved through the general principle of good faith as well as gap filling. The question is whether there is a possible conflict to uniformity if a problem is solved through article 7(1) instead of 7(2). Good faith as explained above is a state of mind, which influences the courts and tribunals in the interpretation of the CISG. As it is contained in article 7(1), it must be applied to the Convention as a whole. Every provision must be approached with good faith in mind. Therefore "reasonable" is subject to the application of good faith.

Gap filling, on the other hand, is restricted to unclear matters. The word "reasonable" certainly is unclear as to a concrete application but not as a concept. It can be deemed to be a general principle.

But exactly where does good faith fit in? Does it solve unclear matters? As a state of mind it does not, as good faith does not directly contribute towards a solution. It merely provides the framework in which the solution must be found. Good faith provides the qualitative aspect of all matters contained within the CISG but not the concrete solutions required to settle disputes. These solutions are to be found within the provisions or when the matter is unclear pursuant to article 7(2) through gap filling. General principles will assist in this process.

However, good faith as a state of mind is the "overlay" as nothing in the CISG should be interpreted and applied without the application of good faith. As discussed above, good faith is not only a state of mind but is also tied to specific situations or circumstances. However, these circumstances in the main call for a prohibition of abuse or of actions contrary to previous conduct.[452]

In sum the definition and application of "reasonable" must be undertaken on two levels. The principle of good faith will supply the framework. The principle of reasonableness will give meaning and substance to the provisions. The above discussion again points to the cohesive character of the CISG. Article 7 has ensured that each provision is interpreted with the underpinning philosophical mandate of uniformity in international trade. The CISG is a "multilayered" statute, which must be read and interpreted in context that is within its "Four Corners."

Each provision links to article 7 which in turn provides the framework for general principles which are needed to fill gaps and assist in the interpretation of a uniform international sales law. From a practical point of view, courts and tribunals must take great care that individual provisions are not interpreted in isolation as uniformity could not be guaranteed and hence the incident of flawed decisions is increased.

The purpose of good faith therefore can be described as the tool which links the integral parts of the CISG and moulds them into a cohesive statute.

f. Conclusion

Article 7(1) explains the concept or policy under which the CISG needs to be interpreted. Because uniformity needs to be promoted, regard must be had to international case law and scholarly writing. Judicial decisions do

refer to cases and writings in an extensive way. German cases specifically rely extensively on scholarly writing whereas case law is not as widely used. However such practices are changing. Because of the international character of the CISG, the use of domestic law and functionally similar rules, which are tied to domestic system of law, cannot be used in the interpretation of the CISG. Above all, good faith must be observed in the interpretation of the Convention. It is also used by courts to set a standard of behavior between parties.

Australian courts can derive authority to follow article 7(1) through two sources: first and most importantly, through the process of ratification the CISG itself obliges Australian courts to follow the mandate; secondly, Fothergill established a persuasive precedent and in its ratio gave life to the interpretation of international Conventions. As far as good faith is concerned, Australian courts should not encounter any problems, as by analogy the Trade Practices Act has introduced principles not dissimilar to good faith. Domestic courts must be aware that the Trade Practices Act, which is functionally similar in certain rules cannot be used to interpret good faith under the CISG. However, what is clear is that good faith is not a concept, which is "unknown" in Australian domestic law. As such, good faith as a concept is not difficult to master within the context of the CISG.

Importantly, article 7(1) also leads to the discovery of tools or methods to interpret the CISG which are different from the ones used to interpret domestic law. As already covered in Chapter 1, the international character of the Convention is a mandate to consider the effects of translation on the meaning of unclear words. The Fothergill case also recognized that interpretation of an international convention, which spans different legal, economic and social systems, must be "unconstrained by technical rules." Words therefore must be read within the context of the CISG, that is, within the Four Corners of the Convention -- as such promoting uniformity in the application of the CISG.

Case law specifically using article 7(1) is sparse. However, by its very nature there is no expectation to see many decisions, as it appears to be natural to apply uniformity and good faith in international contracts. There is no real need to invoke article 7, unless something of dubious or difficult nature emerges, and the CISG as well as the contract between the parties needs the reassurance, that the approach or policy of interpretation is correctly used or alternatively, has been misused by contractual parties. Article 7(1), as stated above, invites courts to take a much more liberal and flexible attitude when interpreting the CISG. In particular, courts ought to "look, whenever appropriate, to the underlying purposes and policies of individual provisions as well as the Convention as a whole."[453] Considering such a mandate, it can be argued that article 7(1) is also implicitly used in interpreting individual provisions.

Good faith has two aspects. First, it is a state of mind of those interpreting or applying the CISG; and secondly, it is tied to specific aspects that are contained explicitly in various provisions. Courts and tribunals therefore, when interpreting the CISG, must have good faith in mind. It clearly has not the same impact in all provisions and decisions. It can be unimportant if a technical or factual provisions needs to be applied such as article 1 which states in brief that if one or both parties have their place of business in a Contracting State the CISG will apply. Such a decision is not influenced by good faith. However an argument could be advanced that, as shown in Nuova Fucinati S.p.A. v. Fondmetal International A.B.,[454] the court applied article 1 far too narrowly and missed the mandate of uniformity pursuant to article 7(1). As good faith is linked closely to uniformity the court furthermore did not apply good faith. As pointed out in Chapter 1, the court went on to reject the applicability of article 1(1)(b) on the grounds that it only operates in the absence of a choice of law by the parties. Chapter 1 concluded that the court did not understand article 7 and read the sub-section far too narrowly.

However, a more likely explanation is that the court made an error in interpretation rather than ignoring the mandate of article 7(1) as stipulated in the hypothesis. Such a situation is possible despite the presence of good faith. Ultimately, it does not matter how much good faith a court exhibits in applying factual or technical provisions, a wrong interpretation or application of law remains what it is, an error. However, some errors are influenced by a lack of application or understanding of article 7(1) and hence indirectly good faith. If a court in its judgment relied on Lord Atkin's words that " ... the duty to carry on ... in good faith is inherently repugnant to the adversarial position of the parties ...,"[455] a total disregard for the mandate of article 7(1) is displayed. Not only is the principle of good faith not observed but the mandate of uniformity, that is, the autonomous interpretation of the CISG is ignored as well. However, as seen in the above discussion, errors must be evaluated by their source

not by outcome. The whole purpose of the hypothesis of this thesis is to distinguish exactly between the two types of error. This thesis will show that tribunals and courts are looking for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it rather than take recourse to domestic law. A non-application of rules contained within the "Four Corners" is an error of interpretation rather than an unwillingness to depart from domestic laws. The above discussion supported by international jurisprudence has shown that so far the hypothesis is proven to be correct.

CHAPTER 5

ARTICLE 7(2) - GAP-FILLING

Overview

- This chapter argues that:
  - The CISG is not a complete statement of law and that gaps are to be filled pursuant to the rules laid down in article 7(2).
  - Article 7(2) delineates between internal as well as external gaps. If a legal issue is covered by the Convention then the answer must be found within the CISG.
  - There is a difference between gap filling and interpretation and that any mechanism of gap filing must take such a difference into consideration.
  - Analogy is an admissible tool to cover gaps but analogy must be applied within the Four Corners of the CISG.
  - Recourse to general principles differ from the use of analogy. Analogy is specific in character, and unlike general principles, cannot be applied on a wider scale.
  - A definition of uniform general principles has not yet produced uniformly accepted principles but it has produced a uniform mechanism for case law to "tease out" accepted general principles.

1. Introduction

The CISG is not a complete statement of sales law. On certain aspects such as consumer contracts, compromises could not be found and these are excluded pursuant to article 2. The fragmentary nature of the CISG leaves no option but to address this issue. Article 7(2) has recognized that there are gaps within the Convention which need filling and at least indirectly, clarifies the relationship between the CISG and domestic law.[456] Invariably there has to be a boundary between the application of the Convention and the use of domestic law. Article 7(2) 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."*

Exponents of the "plain language" approach to interpretation could argue that the legislators inserted this language in their text because they intended to have it apply to certain situations. In effect it cannot be denied that article 7(2) describes the existence of gaps within the CISG. There are two "types" of gaps, internal and external gaps. For the purpose of this thesis, matters that have been excluded from the CISG are termed external gaps or gaps "intra legem." Matters that need settling in accordance with general principles, that is matters governed by the Convention, but not expressly settled are internal gaps or gaps "praeter legem."

The principle of uniformity demands that the use of domestic law be restricted to situations specifically stipulated by the CISG - that is, the filling of external gaps. Rabel already took such a position in 1935 when he discussed the draft of the Uniform Sales Law of 1935.[457] At first glance, there appears to be no problem with the application of domestic laws to settle external gaps.

2. Choice of law issues

The competency of a court in any dispute needs to be determined under the rules of private international law. Though article 1 controls the application of the CISG, there is still a gap. That is, which court is competent to hear the matter? The CISG states that the rules of private international law will lead to the application of the relevant governing law. Article 1(1)(a) determines that the CISG is applicable when the States are Contracting States, which points to the relevant substantive rule of law, namely the CISG. The law applicable to external gaps depends on the choice of law. However, a choice of law is important in relation to article 1(1)(b). It must lead to the application of the law of a contracting State otherwise the CISG will not apply.

To determine the applicable law, the Handelsgericht [Commercial Court] Zürich noted that under the rules of private international law of Switzerland and in conjunction with article 3(1) of the Hague Convention of 15 June on the Law Applicable to International Sales of Goods, the contract was governed by Swiss law.[458] The filling of this external gap is not controversial, as every court and tribunal in the absence of a choice of law has to solve this problem. The application of the CISG starts with the filling of an external gap and not pursuant to provisions within the CISG. Article 1 can only be applied once the choice of law question has been settled.

Audit pointed out that the process of a choice of law varies from country to country. Therefore municipal laws are ill adapted to the regulatory needs of international trade.[459] This is debatable especially when a German decision is considered.[460] A Spanish firm negotiated a contract with a legally independent company based in Madrid, which had a connection with a German firm. The members of the board of both firms were partially identical. The initial order was sent to the Spanish "seller" but all other communications took place with the German manufacturer who sent the goods directly to the Spanish buyer. The question was whether the German court had jurisdiction according to article 5(1) of the Brussels Convention. To determine whether this was an international contract, the court examined the CISG and found that the German manufacturer's place of business had the closest relationship to the contract pursuant to article 10(a) of the CISG. The buyer knew this fact.[461]

The above ruling is not an isolated one. The Oberlandesgericht [Appellate Court] Celle was called to answer the same question under article 5(1) of the Brussels Convention.[462] In this instance, at issue was whether an assignment changed the place of payment. Under the CISG, pursuant to article 57(2) the buyer has to pay the purchase price at the seller's place of business. An assignment in itself is not governed by the CISG and therefore an external gap exists. The question, however, is not whether the assignment is valid but where the place of payment is. The place of payment is governed by the CISG and through analogy it is extended to the assignment, which changed from the seller's place to the place of the assignee.

The prime concern of the courts in the above examples was to interpret the Brussels Convention. In order to determine the place of performance, the CISG was used. Such developments could assist in a uniform determination of the choice of law question. The conclusion is that the CISG can assist in determining the choice of law question in so far as the place of business or the closest connection to the contract can be determined. The significance of the contribution of the CISG in the above matters is outside the scope of this thesis.

3. External gaps

A further distinction should be made as external gaps can be divided into two categories: first, matters on which the CISG is silent such as the choice of law; secondly, matters which the CISG specifically excludes such as consumer contracts pursuant to article 2. Diedrich also suggests such a distinction using the terminology of obvious and hidden gaps, "offensichtliche" and "versteckte Regelungslücke."[463]

The significance of such an observation is twofold. In the first place, obvious gaps delineate external gaps, whereas gaps on which the CISG is silent do not automatically point to an external gap. "Versteckte Regelungslücke" should primarily be treated as an internal gap and the method of applying general principles to fill such a gap should be applied. Only when that method does not yield a result will it become clear that the gap is actually an external gap.

Secondly, in relation to external gaps where the CISG is silent, article 7 cannot be invoked as there is no provision which needs interpreting. It must be understood that this only comes into force after the application of general principles yields no result. However where the external gap is indicated by the CISG, a provision or principle

needs to be invoked which requires interpretation. In such an event, the inevitable setting of limits between using principles or provisions within the Convention and the use of domestic law depends how hard we look for the inclusion of the CISG. This problem will be discussed in the next chapter in detail.

The problem of setting the boundary is contained in article 7(2) itself. This points to two critical variables. First, there are "matters governed by this Convention"; secondly, unclear matters that need to be settled in conformity "with general principles." The interpretation given to the above is different depending on where the focus is directed. If the important part is "matters governed by this Convention," general principles become secondary and are subsumed as long as the Convention governs a question. If, on the other hand, the focus is on general principles, then "matters governed by this Convention" is subordinate to the general principles. The scope of the latter interpretation is narrower than the first. A principle is assumed to exist on all matters governed by the CISG. But if there is no "general principle", a court would need to consult domestic law. Honnold has found an important alternative to domestic law by applying article 9 of the CISG. This suggests that the parties are bound by usage or practices which they have established between themselves. In addition, international trade use which is widely known and observed by parties also becomes part of a contract. Article 9 together with article 6 not only supplements the Convention but also, in case of conflict, supersedes the Convention's provisions.[464]

Magnus suggested that even if the legal issue is covered by, or exempt from, the CISG domestic law must be used if general principles are lacking.[465] In his view, general principles are the only point of reference and not the existence of a legal issue. Such a view is possible if we read article 7(2) as stating that "in the absence of such principles" domestic law can be consulted. In other words, if principles are absent irrespective of whatever is in the CISG, domestic law must be applied.

Arguably, article 7(2) does not lead courts and tribunals to such a conclusion as advocated by Magnus. The CISG specifically alerts interpreters to matters covered and not covered in the Convention. It can be said that if a legal issue is covered by the Convention, the answer to interpretation must be found within the CISG. Broadly speaking, if the gap pertains to "the formation of the contract of sale and the rights and obligations of the seller and the buyer,"[466] the Convention is applicable. This is supported by the mandate of article 7(1), which demands uniformity in the application of the CISG. It is the discovery of gaps through the application of principles which is supported by the CISG and not the decision whether principles are absent. The mechanism required to fulfill the mandate of article 7(2) therefore is how to fill gaps, and not how to discover principles.

The question is how to develop a mechanism to cover gaps? One approach, which has been advanced, is the "true code" methodology.[467] In brief, there are no gaps in a "true code," as a code is a:

> *"Legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law."*[468]

The "true code" relies on an understanding by the interpreter of the policy contained in the code. The CISG expressly stipulates these policies in article 7. The difficulty in applying the "true code" is that the general principles must be discovered uniformly. If general principles were to be discovered uniformly and recognized as such, the "true code method" would serve its purpose. Many common law countries would find such a method unfamiliar and the danger is to apply domestic law, instead of filling the internal gap with the help of general principles. Happ alluded to an interesting philosophical distinction in the choice of a methodology of gap filling. He points out that the method to be chosen is a secondary issue. The real question is, which method achieves the aim of article 7(1), namely a uniform application of the CISG.[469] This, however, appears to be a circular argument but it highlights the importance that uniformity of interpretation and application of the CISG is the most important consideration. Everything else is subordinate.

In sum, it is clear that article 7(2) not only regulates and assists in the interpretation of matters within the CISG, it also covers matters excluded from the Convention. This chapter will focus on internal gap filling. It will also address the problem of discovering and defining the key variables in internal gap filling including general principles and the mechanism to fill gaps. The question of the "black hole" or matters excluded from the

Convention will be examined in the next chapter.

4. Mechanism of Gap Filling

Before attempting to define and clarify the mechanism of gap filling, there is one important aspect of the history of article 7 to be considered. The vote to approve article 7 was 17 in favor, 14 opposed, and 11 abstentions.[470] This shows the article contains contentious and difficult issues. It also raises another point, namely how valuable is it to consult the legislative history of article 7(2)? The vote suggests that there may have been more people who disliked the article than those who liked it. Such a view gives a better insight than the fact that more people voted in favor of the article than against it.

The conclusion is that the travaux préparatoires must be treated with utmost caution. In Fothergill and in the Vienna Convention on the Law of Treaties it has been established that history is only of importance if it reflects a general view of the participants. In such a case the views take on a function of persuasive precedent. However, in the case of article 7(2), can it be said that the views expressed in the legislative history reflect a general view? There certainly must be doubt cast on such an assumption. Without clear and authoritative historical guidelines, courts must take recourse to academic writings and jurisprudence. Yet, in this case, care must be taken that academic reasoning and the reasoning of tribunals does not displace a practical achievable view, important in the establishment of a uniform international law. Courts and tribunals often do not aspire to reach a perfect solution. They may simply contend with a practical outcome.

With this in mind, it is important not to lose sight of the mandate of article 7(1). This article sets the stage for the interpretation by promoting a uniform approach using good faith and the international character of the Convention. In other words, article 7(1) defines the purpose and the principle of interpretation and is applied to the Convention as a whole. As such, it also includes article 7(2), which goes beyond the "big picture" and settles the problems of gap filling

In view of the mandate of article 7(2), namely to clarify the relationship between the CISG and domestic law, the hypothesis of this thesis needs to be re-examined:

> *"That courts and tribunals look for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it, rather than taking recourse to domestic law. Non-compliance is an error of interpretation rather than an unwillingness to depart from domestic law."*

It is also important to understand that the hypothesis is to "look for a solution," which is not only restricted to interpretation but extends to solving a problem. As discussed in Chapter 3, the problem of article 7(1) was the application of uniformity and good faith. The problem in this chapter, simply stated, is to find out how gap filling is achieved and, because of the autonomous mandate of interpretation, to explain and understand its relationship with domestic law. The solution to the interpretation of article 7(2) should be found within the "Four Corners" of the CISG.

To restate, article 7(2) describes two situations where gap filling is needed. First, if the matter is governed by the Convention but not expressly settled then a gap must be filled in conformity with general principles on which it is based. Secondly, if the matter is not covered then the gap must be filled taking domestic law into consideration. There are two reasons why a matter may not be covered by the Convention. First and most obviously, it has been specifically excluded from the sphere of application by the CISG itself such as most validity issues as provided in article 4. Secondly, changes in business methods can lead to apparent gaps. However, it should also be noted that changes in business methods do not necessarily led to gaps. Eiselen has demonstrated that e-commerce does not change the contract formation issue and the formalities required to enter into a contract.[471]

a. The Problem in Practice

The problem of applying article 7(2) can be illustrated through a "trilogy" of German decisions. The dispute commenced in the Landgericht [District Court] [472] and via the Oberlandesgericht [Appellate Court] [473] was finally settled on appeal in the Bundesgerichtshof [Federal Supreme Court].[474] The central question hinged on

the interpretation of reasonable time pursuant to article 39(2). In brief, a German seller delivered surface-protective film to an Austrian buyer. The buyer did not test the film on delivery. When he used the product he found that it left a residue of glue on the surface. The buyer notified the seller the next day of the problem but this notice was given 24 days after the film had been delivered.

As "reasonable time" is not defined in the CISG, a gap exists which needs filling. It has been recognized that "reasonableness" is a general principle of the CISG hence at first glance gap filling pursuant to article 7(2) should be achievable. The Landgericht pointed to the fact that article 39 does not set a time in which notice as to defects must be given to the seller. The court also pointed out that a time limit is alien to many domestic systems except Italy, which sets a time limit of 8 days. The court used doctrinal evidence to come to the conclusion that the term "reasonable" was a compromise in the drawing up of the Convention.[475] It must be assumed that the court concluded that travaux préparatoires were of no help except to indicate that the final article 39 was more "buyer friendly" than its predecessor. This led the court to the conclusion that one-month was appropriate with the proviso that depending on circumstances the period can be shorter.[476]

The Oberlandesgericht reversed the decision on appeal on the grounds that the notification of the lack of conformity was untimely. This Appellate Court argued that the time starts when the lack of conformity "could" have been discovered not "when" it was discovered.[477] Further the buyer ought to have undertaken a trial run to ascertain whether the goods conformed to the desired quality. The court also examined a matter, which the lower court did not take into consideration namely the negotiations between the parties in relation to the fixing of the defects. The court came to the conclusion that the negotiations pursuant to article 7(1) were in good faith and so did not impinge on the breach of article 39.[478]

The German Federal Supreme Court reversed that decision again but, unfortunately, made no comment on the decisions given in relation to "reasonable time" by the lower court. The Supreme Court found that the most important fact was the negotiations both parties had in relation to the fixing of damages. It also found that the fact of entering into negotiation amounts to implicitly waiving the right to rely on articles 38 and 39.[479] Unfortunately, the Supreme Court did not expressly rely on article 7 - as the Appellate Court did for the wrong reasons - to substantiate the decision. It certainly is a breach of good faith that a seller can enter into negotiations to fix a defect and then turn around and deny the buyer remedies which he would have had, had he not negotiated in the first instance. However, the Supreme Court did reach the correct conclusion, unfortunately, without the appropriate explanations. By contrast, Bonell as the sole arbitrator in an almost identical case held that the seller was estopped from raising the defense of late notice pursuant to article 39. Estoppel as such is not specifically referred to in the CISG but the general principle of good faith will fill the gap.[480]

What conclusions can be drawn from the above? At first glance it can be argued that "reasonable time" is a factual question and no interpretation or gap filling is required. However, if a definition of what constitutes a reasonable time is sought, solutions can vary greatly as seen in the above three proceedings on the film case.

It can be argued that a gap exists, which needs filling, however, none of the courts indicated what method it used to fill the gap, as the courts did not refer to article 7(2). The difference between the court of first instance and the first appeal merely indicated a more sophisticated line of reasoning in determining a "reasonable time." The lower court did take a simple approach but it did take note of scholarly writings. The attempt was made to find a solution within the "Four Corners" of the CISG, which shows that the hypothesis of this thesis is still affirmed. The Oberlandesgericht [Appellate Court] Karlsruh showed a better insight by recognizing that good faith pursuant to article 7(1) was also applicable. That court, however, showed a lack of understanding by not taking a holistic approach to the application of good faith. In the end, the German Federal Supreme Court arrived at the correct decision in relation to the case. Unfortunately, the Federal Supreme Court did not re-examine the gap-filling requirement and did not refer to the reasons of good faith to come to its conclusion.

The above "trilogy" also confirms the importance of selecting persuasive precedent from reported international jurisprudence. The above case also shows that all levels of the German court hierarchy did show a level of sophistication and knowledge in the application of the CISG.

In sum, it can be argued that it was not obvious whether the courts engaged in gap filling. They did not indicate clearly the use of the general principles nor did they show a method of applying article 7(2). It must be said that the courts did come to a conclusion but only by interpreting words within the relevant articles. The above discussion shows how difficult it is to recognize gaps in an appropriate manner in all circumstances. Courts may feel that interpretation rather than gap filling will bring about a solution to a dispute.

5. Gap Filling and Interpretation

What then is the difference between gap filling and interpretation? To take a simple approach, it can be argued that interpretation is applicable if a word or words are not clear. To give a word or phrase substance, the interpreter must give it meaning through interpretation. Legislators, for example, have tried to overcome the problem by including a definitional section in the legislation. The purpose of that section is to give a uniform meaning to words or phrases, which have more than one possible meaning. A gap, on the other hand, occurs when the legislator has not explained how a particular legal issue can be solved. It is an unintentional or intentional incompleteness in a code. It is important to recognize that a code can only have a gap if it were the intention of the code to replace pre-existing laws in a particular area.[481] Such assumptions are only correct if the gap is an internal one. However, it does not apply to an external gap, which needs to be filled through the application of domestic law. In effect, the opposite is true. The intention of the code was not to replace pre-existing laws in that particular area.

It is impossible to ascertain whether a gap exists without having examined the text. In essence, therefore, interpretation has already started. The importance is to recognize that the purpose of interpretation delineates the two. In "mere" interpretation, courts give meaning to something which is already in place, whereas in gap filling nothing is yet in place. The court must do so. Interpretation or application of a specific provision presents the closest connection to the Convention's system.[482]

Despite the vague character of principles, internal gap filling at least requires the courts to put something into place, which the code intended to be there in the first place but neglected to include. In German domestic law, as example, a difference is made between interpretation and development of the law. "Everything that goes beyond the wording is development of the law."[483] In the CISG, a distinction between interpretation and gap filling has been made in article 7. Subsection (1) explains the rules and methods of interpretation whereas sub-section (2) describes how gaps are to be filled. The important point is that it must be recognized when a gap actually exists and hence needs filling. How a gap is actually filled and still achieving uniformity pursuant to article 7(1) is the real question. Obviously, there is interplay between interpretation and gap filling but the point is that recognition of whatever function is undertaken best serves the mandate of uniformity. To resolve gap filling, the first step would be to see whether interpretation of a provision could cover the problem. If not, an analogical extension of a provision may supply the answer. If the gap still is not filled, internal gap filling through recourse to principles should be attempted. Only if still no answer can be found, can recourse be had to domestic laws and principles to fill what appears to be an external gap.

A decision of the Handelsgericht [Commercial Court] Zürich illustrates this point. It relied on article 7(2) to arrive at the conclusion that the buyer had to prove the existence of defects. The court found that it was implicit in the Convention that the buyer had to prove defects.[484] The fact that the court used the word "implicit" suggests that there was no gap and that the court engaged only in interpretation. The words in article 35 show that there is no gap and that logically only the buyer can, and indeed must, prove defects. As there was no gap, article 7(2) is not strictly relevant in this situation.

The court could argue that article 7(2) expects a matter to be expressly settled. In the above case the matter was not settled expressly but only by implication, therefore article 7(2) is applicable. However, such an argument would not be correct as "expressly settled" means the solution is found within the wording or meaning of the article. In order for a gap to exist, there is a need to search beyond the words or meaning of a particular article otherwise interpretation is the appropriate method. This does not require recourse to article 7(2).

In contrast the ICC Court of Arbitration had to make a ruling on the time frame of delivering replacement

parts.[485] The CISG is silent on this issue, hence a gap is in existence. The court referred to article 33(c) where the seller has to deliver goods within a reasonable time after the conclusion of the contract. By analogy, the court found that replacement parts must be delivered within a reasonable time after receipt of the buyer's order.[486] In this case, a gap exists and article 7(2) was correctly used to fill that gap.

Gap filling is not unique to international law. It is also a problem within domestic laws and therefore it is of importance to investigate how domestic law solves this problem.

6. Gap Filling and Domestic Law

As already discussed in Chapter 3, domestic methods or the socialization process of domestic systems, can be used to assist in the discovery of a method to fill gaps. It has been argued that "domestic techniques are necessary [as the CISG] provides only some guidelines and goals."[487] This is correct as long as it is clear that the domestic techniques are not transplanted in their structured domestic form. Municipal systems do not only contain principles unique to a particular system but also universally recognized techniques and principles, which were used as an important inclusion into the CISG.

Civil law countries and common law countries use different methods to fill gaps. The method advocated in the CISG is well known in civil law countries. In common law countries, statutes as a rule are not complete statements of a law; in contrast, civil law countries consider parliamentary laws as codes. As pre-existing laws are displaced, courts will look for solutions within the articles of the code. Such solutions require the use of analogy. This approach is anchored in legislation. For example, Austria, Italy and Spain have similar legislation in place. The Austrian General Civil Code as far back as 1811 proclaimed:

> *"Where a case cannot be decided either according to the literal text or the plain meaning of the statute, regard shall be had to the statutory provisions concerning similar cases ... If the case still remains doubtful, it shall be decided ... on the basis of principles of natural law."*[488]

Article 1 of the Swiss Civil Code goes even further and allows the judge to "decide according to the rule which he would establish as legislator"[489] if the code itself does not offer a solution.

Such rules are quite foreign to a common law lawyer, and indeed, the Common Law system operates differently. Historically, Common Law developed slowly over the centuries, aided by statutes, but in modern times the roles have been reversed. In the Civil Law system the change from the "ancient regime" was relatively abrupt with the introduction of the "Code Napoleon" which as a result created codes.

> *"In Common Law systems abrupt legal change has usually come through narrow, specific statutes that resemble islands surrounded by an ocean of case law."*[490]

General principles are not uncommon in common law systems where they are established in case law, as statutes are not complete statements. As an example, the Goods Act (1958) Vic. in s.4 states that the principles of common law, equity and law merchant shall continue to apply. The Goods Act therefore establishes rules for defined situations but case law is still the source of general principles to fill the gaps.

Statutes granting authority to fill gaps are not only restricted to civil law countries. The UCC, as an example, in section 1-102(1) provides that the legislation is to be "liberally construed and applied to promote its underlying purposes and policies." However this section is tempered by section 1-103, which states "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant ... shall supplement its provisions."

English courts are more reluctant to follow the lead of foreign courts in filling gaps. In Buchanan & Co. v. Babco Forwarding and Shipping,[491] Lord Denning advocated that, as the legislation was subject to a gap, the court should follow the lead of other courts and fill the gap according to the purpose of the legislation. The majority of the House of Lords commented adversely on the gap filling approach.[492]

In sum, it can be seen that common law and civil law countries use diverse techniques to come to a conclusion when legislations are unclear and interpretation alone cannot solve the problem. Due to the mandate of uniformity it is therefore most important to devise an autonomous methodology to fill gaps within the CISG. Such methodology must be based on the principles contained in article 7(2).

7. The Problem of Analogy

a. Introduction

Article 7(2) states that gaps need filling but does not mention which tool ought to be used to fill these gaps. To turn readily to domestic law for a solution as already discussed on several occasions must be rejected, as it is in direct conflict with the mandate of autonomous interpretation. An approach, which has been advocated, is by analogical extension of the provisions or general underlying principles of the uniform law.[493] There are two immediate questions: first, can an analogical extension be applied to both articles and general principles; and secondly, does the CISG allow the use of analogy. Another question is where does an analogical extension stop and interpretation of rules and principles start?

Article 7(2) does not expressly direct the interpreter to the use of analogy to fill gaps but it does not prohibit it either. The question therefore is; can analogy be legitimately used to fill gaps? Brandner suggests:

> *"the answer to this fundamental question is not self-evident, for it appears to me, prima facie, that recourse to general principles does not include analogy to a certain provision."*[494]

Though Brandner recognized an important distinction, he also created an uncertainty. Does he wish to distinguish between recourse to general principles and analogy to certain provisions when filling gaps? Or is he suggesting that analogical extension of general principles is somewhat different from analogical extension of certain provisions? If it is the latter, then analogy as such is not disputed as a tool to interpret the CISG pursuant to article 7. Indeed, some authors believe that the admissibility of analogy is directly addressed in the wording contained in the CISG.[495] The reason given is:

> *"because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed."*[496]

The above reasons add weight to the admissibility of analogy but at the same time pose another problem. It is not clear whether a distinction is made between using general principles or comparable rules to fill gaps. It appears that by assumption both methods are admissible depending on the usefulness in a given particular circumstance. The problem is that it will probably lead to divergent results in gap filling. To use comparable rules will result in a more narrow application than general principles, which are by definition much broader. Enderlein and Maskow allude to this point when they note:

> *"But it seems as though the Convention goes one step further permitting decisions which themselves go beyond analogy and reach into the area of a creative continuation of the development of the law. It also appears to be admissible under the Convention that decisions can be the result of principles which the Convention itself formulates and which do not necessarily have to be reflected in individual rules."*[497]

Whether such a broad outlook is admissible is not at issue at this moment and will be discussed below.

Returning to the original question, it must be concluded that there is a difference between principles and rules. The distinction is an important one and in recent times has been recognized as such.[498] General principles cannot be identical with provisions of the CISG. The Convention logically is the sum of all of its provisions. Article 7(2) states that unclear matters need to be settled in conformity with general principles on which the CISG is based. If the CISG is based on a general principle then that principle cannot be the sum of all of its provisions, it has to be something else. It is safe to argue that a principle has to be "in logic ... more general than the provisions of the Convention."[499] The danger applying a general principle is that it can go beyond the words as expressed within the CISG and therefore uniformity cannot be guaranteed.

Uniformity would be best served by applying analogy to provisions, which are within the "Four Corners" of the Convention. This view is strongly supported by Kern who also agrees that gaps can be filled by general principles as well as by analogy.[500] The latter is a more specialized and simpler method based on individual provisions and must be given priority over recourse to general principles.[501] Bonell, without favoring one method over the other, explained the interplay between general principles and analogy as follows:

> *"Recourse to general principles as a means of gap-filling differs from reasoning by analogy insofar as it constitutes an attempt to find a solution for the case at hand not by mere extension of specific provisions dealing with analogous cases, but on the basis of principles and rules which because of their general character may be applied on a much wider scale."*[502]

The problem of analogy is not really whether it is an admissible tool. By implication the CISG allows any tool to be applied to fill gaps as long as it fulfills the mandate of article 7. The real problem is "to what" analogy is applied.

b. General Principles and Analogy

A general principle is, as the word suggests, general. To recognize such a principle is not difficult but to translate something general into a more specific application is another matter. Article 57(1) can be used as an example. The article states that in the absence of an agreement, payment has to take place at the seller's place of business. Magnus inferred from that provision a general principle that if in doubt the place of performance for all payments is the creditor's place of business.[503] The Oberlandesgericht [Appellate Court] Düsseldorf recognized that article 57(1) indicated a general principle and found that the payment of damages for breach of contract pursuant to articles 45 and 74 were payable at the place of business of the creditor.[504] In Scea. Gaec des Beauches b. Bruno v Societe Teso Ten Elsen GmbH & Co. KG,[505] a French Appellate Court followed the same reasoning that it was a general principle which determined that payment be made at the place of business of the creditor.

One argument is that the above general principle is merely an extension of a provision. To contrast this with the general principle of good faith, a difference can be noted. Good faith is not extendable from any provision in an analogical exercise. It is truly a general principle as explained in Chapter 3. Can the general principle, as derived from article 57(1) according to Magnus, be classed as a pillar of the Convention? It can be strongly argued that it is merely an extension of a thought expressed in a specific provision. It can be argued that theoretically there is a boundary and distinction between general principles and provisions. In practice however, the distinction becomes blurred. A more practical approach could be more appropriate given that this thesis tries to look for a solution within the "Four Corners" of the Convention. In other words, the legislation must be able to solve practical problems. The reason for such a statement has an analogy in domestic law. How do we find the ratio decidendi? There is no unchallenged doctrine to find the ratio decidendi not even the material facts theory. Recognition is more important than a theoretical construct in the search of the ratio decidendi in a decided case.

Perhaps a fitting conclusion to the above debate are the words of Judge Brieant who noted in Filanto S.p.A. v. Chilewich International Corp [506] that "there are often limits to how many angels can dance on the head of a pin."[507] From a practical point of view it is sufficient for a court to fill gaps by analogy based on individual provisions but with the general principle firmly in mind. Bonell, in his views, agrees with the above discussion as he explains the difference in gap filling methods as follows:

> *"Recourse to 'general principles' as a means of gap filling differs from reasoning by analogy insofar as it constitutes an attempt to find solution for the case at hand not by mere extension of specific provisions dealing with analogous cases, but on the basis of principles and rules which because of their general character may be applied on a much wider scale."*[508]

This creates a new question, namely, how far do we extend analogy? Theoretically, it can extend to include domestic law. However, such an extension is excluded through article 7 on the grounds of uniformity and the international character of the Convention. The function of that rule is to draw a line against the application of rules in national legal systems. Hence the ideological element has disappeared, but the practical still

remains.[509]

c. Analogical Extension - the Practical Element

There are two views which can be advanced as to the practical mechanism of using analogy: first, to restrict analogy to the principles and provisions of the Convention; secondly, to extend the analogy to all articles of a similar nature which were drawn up by international conventions containing the same ideological element as the CISG. The argument that international Conventions and agreements are based on universally accepted principles lends strength to this point of view. However this argument has already been dismissed in this thesis.

Article 7(2) states only that analogy has to take place in conformity with the "general principles on which it is based." What does the "is" in the quote above refer to? One view is that it refers to the general principles on which the Convention is based. Alternatively, the matter on which the general principle is based forms the basis for settling uncertainties. Such a distinction leads to two solutions. First gaps must be filled taking into consideration only general principles or policies found within the Convention. Secondly gaps can be filled taking into consideration general principles wherever found as long as they contain ideological elements similar to the CISG. The second view is supported by article 9 of the CISG but needs to be treated with extreme caution or one might fall into the trap of applying concepts or laws which are outside the "Four Corners" of the Convention. The first view is in line with the mandate of article 7 and needs to be given preference. To explain the principles and maintain uniformity, a body of case law should also be consulted. Such a proposition is not without its critics. Hillman argued that:

> *"it is inconsistent to argue on one hand that the Convention's principles are an important source of law and that tribunals should prefer "true code" methodology and on the other hand to call for the collection of a body of case law to resolve issues arising under the Convention."*[510]

The view expressed in this thesis is different. Whatever methodology is applied it must achieve uniformity. As article 7 demands interpreters to use general principles and provisions discoverable within the CISG to fill gaps, a methodology must also follow this guideline. The "true code" approach fulfills the requirement of discovering and using general principles to fill gaps. However, to achieve uniformity would require every interpreter to find the same general principle and apply that particular principle in exactly the same fashion. This is a most unlikely outcome and arguably very difficult to achieve. Estoppel can be used to illustrate the above point. Three decisions one by the Bundesgerichtshof [Federal Supreme Court of Germany] [511] and the other one by a Vienna Arbitration proceeding [512] found that estoppel is a matter contained in the Convention and hence gap filling can be used to fill the internal gap. The third decision in Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories,[513] is of special importance. The court made it clear that:

> *"The CISG establishes a modified version of promissory estoppel ... and to apply an American or other version of promissory estoppel ... would contradict the CISG and stymie its goal of uniformity."*[514]

However in Tuzzi Trend Tex Fashion GmbH v. W.J.M.[515] a Dutch court found that estoppel is a matter, which needs to be resolved according to domestic law rather than general principles of the CISG.[516] It indicates that the court was unable to discover the general principle upon which estoppel is based namely good faith. The "true code" methodology is only the first, but essential, step in the process of achieving uniformity. Analysis of case law will supply the confirmation as to whether interpreters have discovered and applied the same principles uniformly.

In conclusion it appears that the mandate of article 7(2) is to fill gaps not only by general principles but also by analogy to provisions contained in the CISG. Unlike general principles, provisions need only interpretation and do not need to be "discovered" and therefore are more likely to preserve uniformity. However, general principles cannot be ignored, as they are doctrines on which the CISG is based. The critical issue is what are the principles and how can we discover these general principles within the Convention?

8. General Principles

a. Introductory Comments

Article 7(2) draws our attention to general principles which by the use of analogy, can fill gaps. The CISG does not explicitly define general principles. Brandner suggests that "the principle must be so important that without it the Convention as a whole might crumble."[517] However such a definition does not explain what general principles actually are meant to be besides "pillars of the Convention." In the above discussion of analogy a distinction has been drawn between legal provisions and general principles. Drobnig illustrates the distinction by pointing to the fact that it is bound up with the Roman division between leges and jus. Such a distinction was also used within article 7(2) of the CISG.[518] Drobnig observed that:

> *"it is almost of the essence of general principles of law that they are not laid down by any legislative action. They are nowhere readily formulated - rather they have to be elaborated."*[519]

How then can general principles be elaborated? Such a question can only be answered if the purpose for such elaboration is known. If it is for the purpose of a doctrinal analysis of general principles then the solution is a comparison of national and international systems of contract law, that is, comparative law. These principles therefore need only be understood in a broad sense. If the purpose is to discover general principles within the CISG, such an analysis must be rejected due to the mandate of article 7(1). However, this does not change the understanding of principles. They still must be understood in a broad rather than technical sense as they contain "rules" as well as "principles."[520] In Texaco v Libyan Arab Republic,[521] the arbitrator noted that general principles are one of the sources of international law.[522] Interestingly, the arbitrator argued that there is a difference between "general principles" and "principles of international law." He pointed out that "principles of international law" are of a wider scope than "general principles" because "the latter contribute with other elements [such as] international custom and practice ... to constitute [a] criterion for the internationalization of a contract."[523]

The conclusion here suggests that the CISG in article 7(2) refers to "principles of international law" and our attention must remain focused within the "Four Corners" of the CISG. However, due to its inception by leading international scholars, general principles which are found in various domestic systems have found their way into the CISG. They are either so general or so widely used such as say, freedom of contract, that they were imported into the CISG in total and unchanged. On the other hand, due to compromise solution others were changed or modified and are either unique to the CISG or predominantly but not exclusively found in other systems such as the binding effect of contractual promises. Consideration, a pillar in common law systems, is not included in the CISG.

It can be argued that the development of the CISG, and specifically general principles, have provided a philosophical link of the CISG to domestic systems of law. Therefore, an autonomous interpretation becomes impossible. Such an argument is not quite correct. The linkage to domestic systems cannot be denied but only in a general philosophical sense and not in a practical way backed by jurisprudence. The closest philosophical linkage is achieved by other international contract formulations such as PECL and PICC. The argument which follows is that analogical extensions in formulating general principles outside the CISG are acceptable when there is a close philosophical link. It is a convincing choice where "two conventions can form a coherent body of rules, using the same concepts for similar purposes."[524] Such an argument relies on two premises. First, that two conventions, or even two legal systems, can form a coherent body of law. Secondly, that the same concepts are used for similar purposes. But why have two conventions if they have a coherent body of rules? Logically this assumes that another convention or model law would only be written if it improves or adds to the original one. As soon as improvements or changes are introduced the two bodies of law will not be identical or coherent. They may be similar but there are differences setting the two sets of rules apart.

The second premise that the same concept can be used for similar purposes is specifically rejected by article 7(1). To "promote uniformity in [the Convention's] application" specifically draws on the premise that the "four corner" approach has to be taken. Furthermore the autonomy argument demands that functionally similar rules, which are tied to different systems of law, cannot be used to interpret the CISG.

It could be argued that the basic skeletal provisions of a PICC or PECL provision, which is identical to its CISG counterpart, could be used to assist in the interpretation of that particular provision. The problem, however, is that a provision would need to be identical and not merely similar to be comparatively used in the interpretation of the CISG. The real problem is that instead of having only one variable namely the interpretation of the CISG a second variable needs to be dealt with namely whether the PICC or PECL provision is identical or merely similar. Methodologically speaking and taking the mandate of article 7 into consideration, the only permissible approach is to rely on the four corners of the CISG when interpreting any of its provisions. It is not denied that PICC or PECL can be used to fill external gaps instead of reverting to domestic law. Many arbitral awards have recognized the potential of combining the two international uniform law instruments.[525]

Considering that it has been demonstrated that only the socialization process can be an acceptable transplant, what is the practical outcome from the above discussion? Ideally, scholarship is essential in formulating general principles so that courts and tribunals have the ability to rely on a ready made set of principles that can be used as a methodological tool in interpreting the CISG pursuant to its mandate as expressed in article 7(1).

b. General Principles within the CISG

Within the Convention, ample sources of internal principles are found. Hillman recognized four basic policies namely "freedom of contract, promoting cooperation and reasonableness to enable each party to receive the fruits of the exchange, facilitate the successful completion of exchange even when something goes awry and compensating injured parties for breach."[526] Magnus on the other hand indicates that he discovered no fewer than 26 general principles.[527] As soon as a comparison between the principles as proposed by Hillman and Magnus is attempted, a striking difference is discovered. The principles are not only different in "label" but also in "substance." A difference in "label" would not be problematic, as the name given to an object does not change its function. However a difference in "substance" is another matter. By simply listing the articles used to support various general principles, the compiled list suggested by Hillman varies from the one suggested by Magnus. Such a difference does not change the general principles, it merely explains how "general" is the general principle that has been described. That may be true but considering that the discovering and applying general principles must achieve uniformity, it can be argued that principles expressed differently will not lead to the same uniform results.

How do we discover a general principle and how do we recognize one? Magnus suggested that principles could be discovered in four ways: First, some articles claim to be applicable to the entire Convention such as article 6 denoting the principle of party autonomy. Secondly, a separate comprehensive thought can be derived from several provisions such as articles 67(2), 68 and 69(2). They provide that passing of risk requires identification of goods to the respective contract. Thirdly, single provisions might include legal thoughts, which are subject to generalization and are to be applied in similar situations; and fourthly, the overall context can show that a certain basic rule is implicitly assumed such as the rule "pacta sunt servanda." [528]

The first way to find principles appears to be the least contentious one and at first glance there should be no variance in the application. Hillman suggests that article 6 supports the party's intentions, [529] and Magnus uses the label of party autonomy. They both go on to argue that there are exceptions to this principle. Magnus states "except for provisions of art. 12 CISG, the validity issue to be determined in conformity with national law (art. 4(a) CISG) and the principle of good faith (art. 7(1) CISG), the parties' authority to regulate their relationship is unlimited."[530]

Hillman, on the other hand, suggests that several articles "eliminate formalities that might otherwise impede the parties from freely achieving their goal."[531] He lists articles 11, 29(1), 19(2), 8 and 9 and sees no restrictions as to a party's autonomy. On the contrary, he supports the view that autonomy as expressed in article 6 is further strengthened by the CISG in additional articles.

The conclusion here is that it is near impossible to define uniform general principles. The development of uniform general principles has not yet eventuated.[532] But at the same time we cannot deny the existence of general principles. In question is the existence of "uniform" general principles. In the absence of defined and recognizable

principles, we must rely on case law to "tease out" the principles by practice instead of the application of a generally recognized and acceptable model of general principles. But cases are not without their own problems especially in view of article 9. Uniformity of outcome is not as important as uniformity of application of principles. Hence, the outcome is not the key to uniformity but the mechanism to gain an outcome must be uniform.

Honnold used article 16 as an example to illustrate gap filling.[533] It is most illustrative to realize that in over 1,000 available cases there is only one consideration by any tribunal to deal with problems associated with article 16.[534]In fact tribunals never seriously considered article 16. What conclusion can we draw from this? It is reasonable to assume that Honnold would not devise an example in a most authoritative textbook if he did not consider the matter important. It is not denied that a gap does exist within article 16 as explained by Honnold. As human ingenuity is limitless, gaps can be found in any legislation, domestic or international. Courts inevitably have to deal with such gaps. However, not all of them will find their way to courts for a ruling. The purpose of article 7(2) is not so much how to discover gaps but how to fill them. Within the context of article 16 it is clear. The CISG deals with revocations of offers and therefore bars the application of domestic law. How do we discover gaps then? Huber put it simply:

> *"The question of what has to be considered a gap under the Convention cannot be answered on a mere rational basis. ... A common law jurist, because of his legal tradition, will probably tend towards a more restrictive interpretation of the Convention and its provisions. Thus he might more often be confronted with a gap, than would be a civil law jurist. Civil law jurists are more frequently used to work with generally framed, systematically conceived legal codes. Out of this experience, they are more readily prepared to solve unsettled questions or to fill gaps by referring to the general principles contained in the code itself."*[535]

Importantly, uniformity is not achieved automatically. There are by definition variances, which can only be solved by treating international jurisprudence as persuasive. Attention should be directed to a problem of gap filling which is not only discussed in legal writing but has also been the subject of many court cases. The question is whether the rate of interest, which is recoverable pursuant to article 78, is a gap, which needs filling by taking recourse to general principle. Article 78 states: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."

9. Interest Rates and Gap Filling

Bonell as the sole arbitrator in a Vienna Arbitration proceeding posed the question Is the rate of interest subject to domestic law or gap filling pursuant to general principles underlying the Convention?[536] He concluded by stating that the second view, that is gap filling, is the correct approach because:

"the immediate recourse to a particular domestic law may lead to results which are incompatible with the principle embodied in Art. 78 of the CISG, at least in the case where the law in question expressly prohibits the payment of interest. One of the general principles underlying the CISG is that of "full compensation" of the loss caused (cf. Art. 74)."[537]

Magnus on the other hand rejects the notion that the rate of interest is subject to gap filling. As a consequence it should be dealt with under domestic law.[538]

Consulting case law the same diverse results are repeated. Case law that does not seem to support the argument of general principle can be found readily. In C & M Srl v. Bankintzopoulos & O.E.[539] the Italian statutory rate of interest was applied. In 1994, Karollus identified no fewer than six German cases where the rate of interest was set according to domestic law and none where the rate was set according to a general principle.[540] That trend can be seen in another German case in 1996 where the rate of interest was set at 5% pursuant to articles 352 and 353 of the "Handelsgesetzbuches."[541]

Searching for case law supporting the view expressed by Bonell is difficult but possible. Two Argentinean cases

support the view that the solution of the rate of interest is found within the CISG by invoking article 9.[542] Also two Austrian cases support the view of filling a gap praetor legem. Obviously the above discussion does not affect cases where pursuant to article 6 the contract stipulates a set rate of interest. The court in Basel commented that the contractual rate was 9%.[543] This was 3.5% higher than the Austrian discount rate but the court enforced the contractual rate pursuant to article 6.

At first glance the problem seems to be very simple, namely, the determination of a rate of interest. The fact that the particular rate needs to be determined according to general principles appears to be contrived, as in the end result a domestic rate of interest must be applied which varies from country to country. One could be forgiven for arguing that this principle is philosophically rather than practically based. On closer inspection, two points become apparent. First, many courts and writers have missed the issue by focusing their attention on the history of the article. History affords us the opportunity to understand a particular position or article at a given time but it also affords us the opportunity to learn from the mistakes made in drafting legislation. Article 78 is an example. Secondly, many courts could not lift their eyes past the words of "rate of interest" and focus, as they should have, on the purpose of article 7 as a whole in interpreting article 78.

A useful starting point in analyzing article 78 is a brief history of the article. ULIS the predecessor of the CISG stated the rate of interest as the official discount rate at the seller's place of business plus one per cent. The subsequent working parties of the CISG discussed all the possible variations from interest to be charged at the official discount rate to tying the rate of interest to the place of performance and the place of business of the buyer. One argument centered on the fact that buyers could withhold payment to take advantage of variations of interest in different countries. Objections were also lodged on the grounds that in some Moslem countries the charging of interest is forbidden. Eventually in the 11th plenary meeting the article was adopted in its present form.[544]

The conclusion is that no definite solution to the charging of interest could be found despite the fact that there are hundreds of decisions dealing with article 78. The only definite opinion was that interest had to be charged. It is argued that a compromise was not reached. If it had been more than "the other party is entitled to interest" would have been included into article 78. The CISG is similar but not the same in its treatment of the rate of interest to other international laws such as article 7.4.9 of PICC and article 4:507 of PECL. Two arbitration cases are also relevant to this point.[545] Both cases used the general principle of full compensation, but also commented that the application of UNIDROIT or European Contract Law would lead to the same result.[546]

It is conceivable that judges by analogy could consult other laws and come to the same conclusion as they would under the CISG. However such a process is not within the principles contained in article 7. ICC Arbitration Case No 7331 of 1994 illustrates this point. The arbitrator correctly commented that there is no single internationally accepted rate of interest reflected in the Convention.[547] He went on to say:

"It is, however, acknowledged in international law that where the parties are silent as to choice of law with respect to the payment of interest, the law of the State applies in which the damage resulting from the delayed payment is suffered. It is furthermore acknowledged in international law that such damage is suffered at the place of the creditor and in the creditor's market. Therefore, this Tribunal shall apply the rate of interest effective for commercial matter in the country of the creditor, the [seller]."[548]

The conclusion is that the rate of interest can be calculated by more than one means. However the method by which the result is achieved is important. The practical argument should not displace the philosophical or conceptual argument.

Hillman advanced the argument that article 74 contains the general principle of full compensation which can be used to fill the gap in article 78.[549] Bonell argued that the compensation must be the actual loss the aggrieved party suffered.[550] As the creditor is expected to resort to bank credits that sum must be calculated as an actual loss at the creditors place of business. Honnold also advances the argument that a general principle does apply.[551] It is founded in article 74, which notes that damages are to be equal to the loss suffered. He stresses that the use of the word "suffered" leads to the application of a real commercial loss and not a contrived legal loss

pursuant to domestic law.[552]

In contrast some writers and the majority of courts and tribunals argue that there is no general principle and domestic law must be accordingly used to fill the gap. A Russian arbitrator commented that:

> *"Since the Vienna Convention does not provide for the rate of interest on the delayed amount of payment and for the mode of calculation, and it cannot be determined on the basis of the general principles of the Convention, the Arbitration Court took into account the provisions of the law of the [seller's] country."*[553]

What then is the real issue? The real issue is not the striking of a rate of interest but to achieve full compensation for any loss suffered. Article 78 adds certainty to the matter of full compensation by adding a rate of interest to the possible range of losses. This view finds support in article 84(1), which adds the right to interest if the seller has to refund the price. Article 84(2) further stipulates that the buyer must account to the seller all benefits which he has derived from the goods. The principle of full compensation would also include profits derived from investing the proceeds of the sale of goods, hence unjust enrichment has become impossible. Article 77 also alludes to the principle of full compensation as it urges the party who relies on the breach of contract to take all reasonable steps to mitigate the loss, including loss of profit and by analogy interest gains or losses.

An analysis of the problem of full compensation through a rate of interest is illustrated with the use of a hypothetical example. A seller supplies goods to a purchaser who in turn fails to pay the price. The general principle of full compensation requires that interest be paid. The question is what is the rate and how is such a rate determined? In this case, the answer is simple. The rate of interest at the creditor's place of business is applicable because it is the creditor who suffers the loss. Most case law does not deviate from this observation. Oberlandesgericht [Appellate Court] Frankfurt decided that the French rate of interest is applicable.[554] A German buyer did not pay the price to a French seller. The court correctly, after consulting academic writing, rejected the view that German law is applicable (the place of domicile of the buyer as well as the forum).[555]

The next problem is which rate of interest is applicable? The possibilities are that either the statutory rate or the prevailing commercial rate of interest is applicable. To start with, the creditor would have to prove his actual loss recognizing that pursuant to article 77 the creditor has to mitigate the loss. The following arbitration proceeding completely missed the mark.[556] An Austrian seller supplied goods to a Croatian buyer. The place of payment was Prague in the Czech Republic. The arbitrator believed that the applicable law was Czech law and he fixed the rate of interest according to the customary Czech rate of 12%.[557] The tribunal should have looked at the loss suffered by the buyer, which would have eventuated in Austria and not at the place of payment. Furthermore the buyer did not supply proof of loss. In the absence of such proof, it was argued that the statutory rate should be used. It guarantees, pursuant to article 7, a uniformity of application as the commercial rate is subject to fluctuation. This argument was used in the decision of Oberlandesgericht [Appellate Court] Hamm in 1995.[558] They applied the general principle of full compensation and rejected the seller's request of 14% because he failed to prove damages at the higher rate of interest. The court then applied Italian domestic law and awarded 10% interest pursuant to article 1284 of the *Codice civile*.

In our hypothetical example, an assumption is made that the buyer sold all the goods and instead of paying the price to the seller invested the money himself at his place of business. In such an event, the first question is still the same. What is the loss to the buyer? The buyer enriched himself unjustly and pursuant to article 84(2) he must account for these benefits. The question of the rate of interest is not important.

On closer examination, the conclusion is that article 78 contains the gap. Article 78 does not contain the general principle of full compensation, which is derived inter alia under article 74. Interest is to be paid irrespective of any circumstances pursuant to article 78. This position is supported by Diepeveen-Dirkson BV v. Niewenhoven Veehandel GmbH.[559] The contract contained a penalty clause in the event of late payment. The court not only awarded damages pursuant to the penalty clause but also invoked article 78. The buyer appealed on the basis that the penalty was disproportionate to the harm suffered by the seller. The court correctly dismissed that claim as pursuant to article 6, parties are entitled to include clauses into the contract that will be enforced by courts. The

inclusion of penalty clauses may have fulfilled the requirement of full compensation but has not fulfilled the right to claim interest according to article 78.

In sum, tribunals and courts, despite the controversy, look for a solution within the CISG. The history of article 78 is not clear and it could be argued that the real reason for the existence of a problem is that those preparing the CISG have not contemplated a definite rule.[560] This lack of certainty is reflected in the opinions expressed by courts. All case law leads to the belief that there is a real appreciation that a gap exists and that it needs filling pursuant to article 7(2). The gap is not that interest has to be paid but how the "rate" has to be determined. Looking at the totality of article 7 and keeping in mind that the Convention must be interpreted as a whole, a general principle exists and a rate of interest should be applied accordingly. What makes the use of general principles difficult to defend is the fact that the same practical result can be achieved by either using domestic law or by analogy using other international laws such as PICC or PECL. But such an argument should not detract from the duty to interpret the CISG using principles and rules within the Convention unless directed differently. Uniformity is achieved not by the striking of a "rate" but from the fact that a "rate of interest" is applied.

10. Article 3 - Contracts of Service and Gap filling

Another problem, which needs to be examined, is the suggestion that: "a debilitating flaw in the Convention on Contracts for the International Sale of Goods usefulness is its limited application to service-related contracts."[561] This same author continues:

"Courts and lawyers could fulfill the framers' intention by expanding the reach of the CISG and determining first if its rules could apply rather than ignoring it because a contract deals with services."[562]

It is correct to say that the CISG would have increased its usefulness by not only governing the sale of goods but also services. However, the important question is whether the sale of services can be included into the application of the CISG. Do article 3 and other provisions with the aid of article 7(2) lend themselves to a discovery of another principle, namely the inclusion of services into the CISG? If that is so, then another gap in the CISG has been discovered which would need filling pursuant to article 7(2).

The argument is clear that as a result of globalization, services are no longer performed within a domestic arena. Increasingly they are delivered in an international setting. Furthermore simple contracts for the sale of goods are increasingly containing service-oriented provisions.

The starting point in this debate is article 3(2) the only article that uses the words "services or labor."

Article 3(2) states that:

> *"This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services."*[563]

As far as the "framers' intentions" are concerned, the Secretariat Commentary makes it clear that article 3(2) applies to contracts where service is rendered in addition to the supply of goods.[564] Nowhere is a suggestion made that services alone should be included in the CISG. This view is also confirmed in the Legislative History of the 1980 Vienna Diplomatic Conference.[565] However, as pointed out in other chapters, the history of the framers' intentions are only guidelines of a possible persuasive nature. In this context, it can be argued that the framers of article 3 did not include the provision of service as part of the CISG but it is not specifically excluded either. By implication, it can be argued that service must always be a part of movable tangible goods. In this context,. it must be mentioned that article 3(2) was innovative in respect to ULIS and also overcame the problem under the 1964 Hague Convention in respect of the supply and installation of goods.[566] In German law, these contracts are known as "*Werkvertrag*" or "*Lieferungen mit Montageverpflichtungen*."

At first glance, it appears that the suggestion by Gianuzzi goes beyond a mere filling of a gap. Indeed it goes beyond the provisions of article 7. The above suggestion amounts to "manufacturing" principles, which are not in the mandate of the CISG. Article 7(2) states that only the presence of a principle can give legitimacy to gap

filling. However, to come to a definite conclusion, doctrinal as well as jurisprudential evidence needs to be investigated.

a. The Jurisprudence of Article 3(2)

Before an analysis is undertaken, Giannuzzi's opinion must be put into context. The criteria to be considered are "the framers' intentions" and whether "a contract deals with service." Article 3(2) makes it clear that a contract that deals with service cannot be ignored. Such contracts would not test the limits of the CISG as they are clearly contained within the "Four Corners" of the CISG. It is a simple matter of applying article 3(2). However a contract, which exclusively deals with service, is another matter and will be analyzed below.

A German court was asked whether a research project investigating the market for express deliveries fell under the CISG by referring back to article 3(1).[567] The importance is that article 3(1) includes the supply and installation of goods (Werklieferungsverträge) into the sphere of the CISG. Simply stated, goods to be manufactured or produced are considered sales unless the other party supplies a substantial part of the necessary material. Article 3(1) and 3(2) are linked by the delivery of goods "Warenlieferung." The court concluded by looking at the French and English wording namely "supply of goods" and "fourniture de marchandises" that the CISG applies only to movable objects.[568] The court dismissed the claim of the plaintiff that the research project falls under the same category as computer programs, which are included into the sphere of the CISG. The Supreme Court of Austria took a similar view where the buyer provided some material for the seller to manufacture brushes and brooms.[569] The court held that the CISG was not applicable as the buyer supplied a substantial part of the goods and the obligation of the seller consisted mainly in the supply of labor.[570]

Computer programs are an interesting example as they have elements of intellectual property such as service components included. Interestingly some courts do make a distinction between programs off the shelf and specifically designed programs. Yet neither the CISG nor the Principles deal specifically with software licences.[571] Standard software items purchased at a fixed price fall under the CISG.[572] The interesting question is why are custom-made programs excluded? The court did not furnish an answer and it can only be assumed that in cases of that nature, the service component is the preponderant part of the obligation. In the above examples, the courts did specifically exclude contracts that are "service based" and not "goods based." How then can a distinction be drawn between "service or information based" and "goods based" contracts? The answer would need to be contained within the Four Corners of the CISG. It appears that "preponderant" is the key to such a distinction. In Australia, the question has not yet been resolved as to whether contracts relating solely to software would be classified as a sale of goods.[573] In Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd[574] the sale of hardware and software was termed a sale of goods. This represents the same view taken by courts interpreting article 3(2) of the CISG.

The Commercial Court of Zürich applied article 3(2) to determine whether the service component was preponderant in a purchase and installation of a container.[575] The question as to the meaning of preponderant was left open. It can be assumed that preponderant is in relation to the value and not the quantity as it is impossible to compare goods and services on any criterion other than value. This is confirmed in a decision in Marques Roque, Joaquim v. S.A.R.L. Holding Manin Rivie're.[576] The contract called for a purchase of a warehouse, which had to be dismantled and delivered. The cost of the warehouse was 381,000 francs and the cost of dismantling and delivering was noted at 118,800 francs. The contract fell within the scope of the CISG, as the preponderant part of the contract was not a service pursuant to article 3(2).

Considering the jurisprudence of article 3(2), the courts did not apply any principle or engage in gap filling but rather interpreted an article in the light of the purpose of the CISG. The suggestion that service contracts ought to be included into the sphere of the CISG has not been shown to be correct.

b. Doctrinal Discussion of "Service Contracts"

Giannuzzi contends that a contrary outcome is achievable by taking into account the flexibility that the CISG provides through article 7, especially in conjunction with articles 1, 2 and 3.[577] It is the correct approach to investigate whether the application of the CISG with article 7, supports the intention to include services into the

mandate of the CISG. As stated above, there is no debate as to the inclusion of services as an extension of "goods based" contracts. The question is whether service contracts as such are admissible under the CISG. Preliminary findings above have suggested that the courts so far have rejected that notion. Hence there are no gaps in article 3(2).

Article 1 provides that the CISG "applies to contracts of sale of goods." Admittedly the CISG does not define precisely and directly what is meant by the terms goods or sales. As pointed out above, article 7 encourages the interpretation of the CISG within the context of the "Four Corners." Hence goods can be defined in various ways. Most importantly, article 87 obliges the party who has to preserve the goods to deposit them in a warehouse and article 88, in general, obliges a party to preserve the goods. Hence, goods can be defined in addition to article 2 as being preservable and able to be deposited in a warehouse -- hardly characteristics attributable to services.

The CISG in article 2 lists excluded transactions. Service-oriented transactions are not excluded. In consequence an argument has been put forward that: "without a specific exclusion and under a plain meaning interpretation of the CISG, the Convention arguably applies to service-oriented transactions."[578] This statement is supported by dismissing the argument that goods by implication are defined in several articles notably article 30 and 53 as conclusions are drawn with respect to the scope of the CISG.[579] A similar argument in relation to computer software has been advanced by linking the exclusion of electricity pursuant to article 2 to the fact that there is no express reference made to software.[580]

Another argument needs to be considered seriously here. Article 3 links goods to be manufactured with finished goods, which are in essence movable tangible assets. Diedrich suggested logically that:

> *"A computer program, in the end, is just a new technical product that does not fit into the traditional categories of the domestic law of the contracting states, but is, in practice, bought and sold as any tangible movable."*[581]

If the emphasis is placed on "tangible movable" the computer programs off the shelf or custom made would be classed as goods and hence are included into the sphere of the CISG. If on the other hand the emphasis is on "preponderant" the above argument will fail. The real question is whether a view is taken on the "finished product" which is the object of the contract of sale or whether the process of arriving at the object of the sale is of importance. Article 3(2) is quite specific and cannot be ignored hence the process is still of importance in determining if a contract of sale is governed by the CISG.

Several shortcomings and inabilities to understand article 7 and therefore the CISG are evident in the above argument. First the "plain meaning interpretation" of the CISG is patently wrong. The CISG was written with the purpose of interlocking in the sense that provisions are not isolated but linked through general principles discoverable through article 7. To contend that individual provisions cannot address the scope of the CISG is wrong. Article 7 shows that general principles that are contained within individual provisions or are discoverable within the "Four Corners" pursuant to article 7 give meaning and life to the CISG as a whole.

It is doubtful and dangerous to argue that article 7(2) leads to the discovery of a general principle that sale of goods as expressed in article 1 and other articles by implication also includes services. The term "by implication" has to be used with caution and only with clear authority either from general principles or through interpretation of individual provisions. Looking, for example, at PECL it is clear that PECL has widened its scope by regulating contracts, thus including service based contracts within its sphere of application. It is a better argument to suggest that the framers of the CISG understood the difference between "contracts" and "sale of goods" and purposefully introduced the words "sale of goods." Therefore the CISG is applicable only to sale of goods with the exception of situations included in article 3(2).

12. Conclusion

In sum it has been demonstrated that article 7(2) has clarified the relationship between the CISG and domestic law. In article 7(1), the mandate of uniformity in international trade has established that the CISG does not compliment domestic law but rather replaces it. Fothergill has demonstrated that English courts in particular and

common law courts generally have recognized that a different method of interpreting uniform international laws is required.

The recognition that gaps exist within the Convention requires that a methodology be adopted that can fulfill the mandate of not only article 7(1) but also 7(2). It is important to understand that gaps are either internal gaps or external gaps. Such a distinction is important because only external gaps are areas where the CISG specifically declines to govern. It is therefore left to domestic law or any other unified international law to fill such gaps. Arbitration has taken up such a challenge and supplements the CISG with the application of PICC or PECL to fill gaps.

As soon as gaps or matters of uncertainty are encountered, gap filling through recourse to general principles is not necessarily the answer. The first step in a methodology of gap filling remains interpretation. It is possible that the uncertainty merely requires recourse to a particular provision within the Convention. The next step is an analogical extension of provisions within the CISG. Such an approach represents the closest possible connection to the CISG. It allows the linking of a solution or argument directly to a specific provision.

If no solution can be found and the gap has been identified as being an internal one, recourse to general principles must be had. The problem is to establish what are general principles and how are they discovered? As Brandner suggested general principles must be "pillars" of the Convention.[582] The difficulty is to isolate general principles in a uniform way. It is possible to do so only in a general way. Autonomy of contract or good faith are principles that are identifiable. However, as soon as an attempt is made to demonstrate in which particular provisions such a principle is found, variations of opinions occur. The solution is that the general principles must be understood in a broad rather than technical sense as containing "rules" as well as "principles."[583] It can be argued that if the promoters of the CISG wanted to and could have made specific expressions of principles, they would have drawn up specific provisions. As this was not done, general principles must be understood as being broad argumentations intended by the authors.

The practical example of the determination of the rate of interest has shown that the elaboration of general principles is not a simple issue. It appears that the right to interest as part of the process of compensation is not debated. However, the problem hinges on the determination of "full" compensation as expressed in a particular rate of interest. The determination of a particular rate is an external gap and must be filled by custom or through other domestic laws.

The second example dealing with the question of service is of no less importance. It examines the contention that the CISG would allow the inclusion of services into its sphere of influence. As service contracts are not mentioned specifically, their inclusion can only be through the discovery of a general principle or the existence of a gap. The discussion has shown that no such gap exists and therefore service contracts cannot be included into the sphere of the CISG despite the obvious usefulness of such an inclusion. It again highlights the fact that the CISG can and must be read within its "Four Corners."

CHAPTER 6

DEFINING THE "FOUR CORNERS" OF THE CISG

Overview

- The aim of this chapter is to develop an understanding of:
    - The problem of defining the Four Corners of the Convention in relation to the validity issue pursuant to article 4.
    - The influence of other international instruments on the interpretation of the CISG.
    - The definition of validity within the framework of provisions and general principles of the CISG.
    - The interplay between article 7 and article 4 in defining the Four Corners of the Convention with specific reference to article 35.

- The jurisprudence of article 4 which show that domestic courts have a tendency to support the CISG but do not always display the correct reasoning.

1. Introduction

To reiterate, the hypothesis of this thesis is that the court should look for a solution within the "Four Corners" of the CISG with the aid of article 7 rather than taking recourse to domestic law. Especially in the United States and Canada, earlier decisions showed that the judiciary was reluctant to depart from principles founded in domestic law and did not remain within the "Four Corners" of the CISG. However, subsequent decisions criticized the earlier ones and corrected the tendency to rely on domestic jurisprudence and doctrine. The parol evidence rule as explained in earlier chapters is a good example. *MCC Marble* [584] has definitely shown that article 8 of the CISG overrules the domestic principle of the parol evidence rule. It has been demonstrated that a non-application of rules contained within the "Four Corners" is an error of interpretation or wrongful application of articles rather than an unwillingness to depart from domestic law.

What remains to be done is to investigate how far the "Four Corners" of the Convention extend. The CISG does not clearly describe its sphere of influence due to the fact that the Convention never intended to be an exhaustive source of law. Article 7(2) by implication also admits that the corners of the CISG are "fluid", that is, discoverable through the application of general principles. Chapter 5 has demonstrated the problems of discovering and applying general principles necessary to fill internal gaps.

Several provisions such as article 4 indicate matters that are excluded from the sphere of the CISG. This immediately suggests that article 7 should not only be applied to what is included in the Convention but also to assist in defining what the CISG excludes explicitly or by implication. What should be discovered are the external gaps, which are not explicitly stated and could be filled by the CISG in preference to domestic law. What is the difference between a debate over the rate of interest as discussed in Chapter 5 and the validity issue? This thesis has tried to draw a clear distinction between external and internal gaps. Internal gaps such as the rate of interest are discoverable and a provision or general principle within the CISG will supply an answer. Article 4, on the other hand, is not a matter where the CISG attempts to govern the issue but rather tries to exclude matters from the sphere of application of the Convention. It identifies external gaps which need filling by domestic law.

The question is whether the Convention's terms such as validity are clear and definable or are they areas regulated within the "Four Corners" of the CISG which have "elastic" corners? If we discover such "elastic corners", does article 7 assist us in including matters into the CISG that appear to be excluded? A possible criticism is that laws are being fabricated and invented, which is not within the mandate of article 7 and the Convention as such. The real question is, where is the boundary between interpretation and the making of law? Ziegel noted that many commentators point to important gaps and ambiguities within the CISG such as the uncertain status of good faith as a behavioral norm and the meaning of validity in article 4.[585] Louis and Patrick Del Duca pointed out that of 142 reported cases, 52 involved disputed issues of law which had to be settled by domestic law.[586]

The answer to the above is that the CISG notes that where there are external gaps, they need to be resolved through domestic law. The real problem is not the existence of gaps and ambiguities but rather what the solution to these problems ought to be and whether these solutions are to be found within the CISG or domestic law.

The purpose of the CISG, simply stated, is to overcome the "awesome relics from the dead past"[587] by creating a law which overcomes the serious obstacles to free trade created by municipal laws. Predictability of outcome, and clear and simplified norms, the most important goals of any law, can be achieved through uniformity of application at an international level as opposed to a national one. The CISG, contrary to municipal law, has overcome the danger of a "parachute drop into the darkness".[588] Thus the CISG is well on the way to creating a jurisprudence that will achieve such uniform and predictable outcomes through the correct application of article 7. This statement so far has been applicable to interpretative problems and gap filling of internal matters within the "Four Corners" of the CISG. This chapter is attempting to find solutions to external problems through the interpretative tool, namely article 7. In other words, how far can the influence of domestic law be set aside in favor of an application of the CISG?

2. International Sales Laws

The conclusion has been reached that the autonomous mandate of article 7 prohibits the use of external factors such as functionally similar domestic laws to interpret the CISG. However, it has also been established - especially when examining the general principle of good faith - that domestic principles and other external sources can contribute towards an understanding of principles and concepts within the CISG. Care must be taken that the domestic principles or approaches are not transplanted into the CISG.

This thesis has rejected the application of external principles and concepts. Yet it is recognized that the socialization process - that is the way we reach an understanding of principles and concepts - can be used legitimately for the same purposes within the CISG. Predominantly, principles contained in domestic law have been used to draw out the common mutual denominator which underpins all systems of law.

Additionally, it is also important to look at international sales law restatements such as the UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL) to see how these principles can assist in filling external gaps. The UNIDROIT Principles are, according to its sponsors, useful tools in helping the CISG to interpret and fill gaps within the legislation.[589] It is not denied however that PICC and PECL could resolve many ambiguities and could fill gaps within the CISG. As already indicated, the writers of the above two sets of principles of contract law had the advantage of constructing their provisions by relying on the CISG, which was already in operation. The other advantage was that the sponsors of the two principles were not representatives of States but were eminent jurists not bound by political considerations. For that reason, they tried to overcome the perceived shortcomings of the CISG and, where possible, built on its strength.

At first glance, the two principles are similar to the CISG. Such an observation could lead to the assumption that the principles should be used as an aid to interpret and fill gaps of the CISG. However, such ambitions must be treated cautiously.

Arguably the CISG, PICC and PECL are so closely related that they are "blood relatives." To counter that argument, it is clear that they are not identical as there are differences and an automatic match is not possible. In the end, it all comes back to the question of how stringently article 7 needs to be interpreted? The purist would reject all involvement of external factors because solutions can be found only within the "Four Corners" of the CISG. On the other side of the debate, it can be argued that functionally similar rules can be used to interpret the CISG, at least by analogy. This thesis rejects this view with the help of jurisprudence as well as doctrine. There is, of course, a middle ground as already suggested in this thesis to look at the socialization process of functionally similar principles and adopt this method in the interpretation and filling of gaps.

To illustrate this point, an examination of article 1:101(4) of PECL is useful. This article states that: "These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so."[590] This is a clear mandate to use PECL, in the EU at least, on all aspects where the CISG is silent. PECL in article 1:103 goes further and notes that where the law otherwise applied so allows PECL by choice of parties may be given effect. If the parties chose to be bound by PECL, effect should be given to those rules as if they were applicable.[591]

What conclusion can be drawn from the above? It appears that PECL has solved the problem of where the "line is drawn in the sand." If there are matters that are unclear, any legal principles whether national, supranational or international, which could have application can be replaced by PECL. The CISG in article 7 has not done so. Despite the fact that PECL or PICC may provide an attractive solution to an interpretative problem, neither can be used unless the CISG fails to supply an answer. Ziegel recognized the temptation to use functionally similar rules to interpret the CISG. He stated:

> *"The post-CISG generation of lawyers may feel impatient with this fussy approach and may prefer to resolve ambiguities by going directly to the Principles. While I understand and sympathize with this means of bypassing the torturous process of seeking a formal revision of the CISG; it is nevertheless unacceptable.*[592]

Many scholars and judges have expressed similar views. As an example, Meagher J.A in *Kotsambasis v Singapore Airlines Ltd*.[593] considered that:

> *The interpretation of a particular phrase used in municipal law and the change over the years in that interpretation cannot guide an interpretation of the same phrase that might appear in an international agreement.*[594]

The above view is to be supported with the important proviso that PICC and PECL can only be used to discover the socialization process described above. When the flexibility of the corners of the CISG are tested it can be argued that PECL and PICC can be consulted to determine the outcome. With the path of the solution in mind, an attempt can be made to try and match the CISG through internal means with the achievements of PECL and the PICC. Such a view is defendable, as we know that both Principles "reflect a more rounded view of contractual principles."[595] It is conceivable that within the mandate of article 7, an interpretation of the CISG can be "stretched " as far as PECL and PICC have managed to legislate. At least the above international sales laws will assist and show the way or direction any possible interpretation can go without falling into the trap of "manufacturing" laws.

As an example, a 1997 Swiss decision should be noted.[596] The question was whether the one-year limitation period under article 210 of the Swiss Civil Code overruled the one stated under the CISG namely two years by applying article 4. Interestingly, the court invoked article 1(2) of the Swiss Civil Code, which allows a judge to lay down a law in case of ambiguities in the same way as if the judge were a legislator. The court extended the one-year period under Swiss law to two years and brought it in line with the CISG. Clearly, under common law as well as under the CISG such a decision would be classed as manufacturing law and is not allowable. However, as Swiss law allows such an action it is of significance that the Swiss court chose to bring Swiss law in line with the CISG. It can be implied that the judges viewed the CISG as more important in an international context than to resort to municipal law by restricting the application of domestic law in favor of the CISG. This decision bypassed the application of article 4.

3. Article 4; the Validity Issue

> *Article 4*
>
> *This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:*
>
> *(a) the validity of the contract or of any of its provisions or of any usage;*
>
> *(b) the effect, which the contract may have on the property in the goods sold.*

Article 4(b) does not appear to pose any problems and has been correctly applied. As an example, the *Oberlandesgericht* [Appellate Court] Koblenz ruled that retention of title clauses pursuant to article 4(b) are outside the scope of the CISG and must be ruled upon through domestic law.[597]

It is the question of validity pursuant to article 4(a) that creates problems. A total elimination of domestic laws will never eventuate, as not all nations are willing or capable to come to a compromise when discussing general principles of contract law. The general principle of validity of contract is such an example. Drobnig describes this by stating that:

> *"The difficulties in this area are due in part to the legal complexities and to divergent social policies, in part also to conceptual complications."*[598]

Because external gaps are inevitable, domestic law must be applied, and therefore the choice of law question can never be eliminated. Such a choice of law has no effect on the application of the unified parts of contract law

within the CISG. The choice of law will determine which municipal system of law must be used to fill external gaps. Generally speaking, article 4 has been described as a "contractual scheme [of] uncertain functional characteristics."[599] It is not surprising to see different views emerging in relation to the interpretation and also to the function of article 4.

Hartnell suggests that the validity question poses a danger to the development of a coherent jurisprudence of international trade by giving courts and tribunals wide discretion to determine when to apply domestic law.[600] Such a view is far too narrow and ignores the application of article 7, which sets the boundaries between provisions within the CISG and where the CISG invokes the application of domestic law. If Hartnell's suggestion were true, the hypothesis of this thesis would collapse. It is implied in the hypothesis that courts and tribunals do not have a wide discretion as article 7 sets defined boundaries. It can be argued that principles such as good faith are nebulous and incapable of definition. However, it is not a question whether certain principles are capable of definition but how courts and tribunals apply these principles. The jurisprudence of article 7 has shown that there is a remarkable similarity between decisions of different national jurisdictions when applying the CISG.[601] If Hartnell applied the same stringent requirements to the principle of precedent in common law, the argument could be advanced that courts have wide discretion. History has shown that this is not correct.

Jurisprudence also does not support the views expressed by Hartnell. There are over 100 decisions worldwide applying article 4 and the majority deal with set-off, agency or distribution agreements. At first glance, article 4 in theory may give the impression of allowing courts wide discretion. In practice, however, article 4 has been limited consistently to very few concepts. Agency and distribution agreements are a point at hand. All tribunals and courts have recognized that distribution agreements or agency contracts are not covered within the CISG. In *Box Doccia Megius v. Wilux International BV* [602] the judge correctly pointed to the fact that the Convention would be applicable

> *"if the dispute between the parties concerned the individual contracts of sale under the 'frame agreement' [but is not applicable to disputes] concerning the frame contract itself."*[603]

The view expressed by the Dutch court is by no means isolated. The *Obergericht* [Appellate Court] Luzern [604] and the *Oberlandesgericht* [Appellate Court] Düsseldorf,[605] amongst others, reached the same conclusion.

The U.S. District Court in *Helen Kaminski Pty Ltd v. Marketing Australian Products, Inc. d/b/a Fiona Waterstreet Hats* [606] sums up the debate:

> *"[The defendant] maintains that the Distributor Agreement is merely a "frame work agreement" and that such agreements are not covered by the CISG. The Distributor Agreement requires the [defendant] to purchase a minimum quantity of total goods, but does not identify the goods to be sold by type, date or price. In contrast, the CISG requires an enforceable contract to have definite terms regarding quantity and price."*[607]

In other words, frame agreements or agency are a matter determined by domestic courts whereas sales of goods irrespective of their source are governed by the CISG. This point is confirmed by the German Bundesgerichtshof [Supreme Court] which reached the conclusion that it did not matter whether the franchise agreement violated German or European antitrust laws.[608] That was an issue to be determined by domestic laws. The important point was that each supply contract had to be examined under the mandate of the CISG and was considered to be valid, that is the buyer was obliged to pay the seller.[609]

The question is how committed are courts and tribunals to finding a solution within the CISG? Domestic law should be applied only as a last resort. Attitude and training of the legal profession will eventually have an important bearing on this issue.

In PECL, validity is defined in article 4:101 and reads, "[t]his chapter does not deal with invalidity arising from illegality, immorality or lack of capacity."[610] PICC not surprisingly is nearly identical as only questions of lack of capacity, lack of authority and immorality or illegality are excluded.[611] One could argue that PECL and PICC are an improvement on the CISG, as validity is defined.

When looking at article 4 with the aid of article 7, a tribunal or court could test validity of contract in two ways. First, validity could be interpreted and hence excluded along the same generally accepted criteria such as illegality, immorality and capacity. On the other hand, appropriately, validity can only be excluded from the Convention if through the gap filling procedure, recourse to domestic law must be sought.

Good faith and the international goals expressed in article 7(1) demand that article 4 be approached with a particular mind set that is conducive to uniformity of international laws. It is suggested that "the drafting history of CISG, article 4(a) demonstrates a clear concern for preserving the applicability of certain domestic laws."[612] The parochial interest is undoubtedly present and was intended to be there by the drafters of the CISG. However, it is not correct to draw the line between application of the CISG and domestic law at a point where "any provisions of the contract are inconsistent with the mandatory rules of the national law of the parties."[613] If that were the case, the interpretation of article 4 could vary from one domestic system to another. As a result, such a view would be in direct conflict with the mandate of article 7, namely uniformity of interpretation. Furthermore, the CISG proceeds on the assumption that "certain facts do not constitute a reason for nullifying a contract."[614] As an example, within the CISG, article 35(2)(a) could be used which states that goods are required to be fit for their purpose. Any breach of such a requirement will give the buyer the right to seek remedies such as avoidance of the contract due to a fundamental breach. As an option, the buyer can give the seller a "Nachfrist" pursuant to article 47. When that option is not taken up by the seller avoidance of contract becomes an option.

It could be argued that conformity of goods is an issue of validity and should be prima facie excluded from the Convention despite the fact that there are functionally equivalent solutions within the CISG. It is obvious that such a solution was not envisaged and so must be rejected. Enderlein and Maskow believe that "national law on validity will not apply when the CISG provides a functionally adequate solution to the problem which has been settled nationally by questioning the validity of the contract."[615] The broadest argument is that if there is a general principle contained in the CISG having a counterpart in domestic law, the CISG would prevail in case of conflict thus restricting the application of article 4 of the CISG as envisaged by Enderlein and Maskow.

In such an event, there is a need to interpret article 4 to determine its full meaning and impact on the whole of the CISG. Interpretation becomes the central part of the problem and as such can only be finalized through the application of article 7.

The drafting history is also important but it is only an opinion that is relevant at the time of drafting. Laws are never static. They are an evolving social instrument which regulates human behavior. As human behavior changes, so does the law. The biggest change in contract law is the recognition not only by the international community but also by trade blocs of the need to generate a common unified law of contract. Such a move away from municipal to international law of contract is an important fundamental change in thinking that has not yet exhausted itself. This means that the drafting history needs to be viewed with caution.

It is "fatal" for the CISG to remain static instead of evolving and moving with the needs of those for whom the CISG was written. At the same time, it is also inappropriate to "invent" areas of concern within the CISG where there are none. In other words, fabrication of law is not within the mandate of the CISG.

Article 4 of the CISG must be read in a different light than was first envisaged. The directives that the Convention governs the "rights and obligations of the seller and the buyer arising from such contract"[616] are important. It is arguable that anything expressed in article 4 is specifically provided for in the Convention and hence is not excluded through the question of validity. The argument that "... article 4(a) only applies to issues not governed by the CISG is tautological and contrary to the drafter's sentiment on the validity issue at and prior to the 1980 Vienna Diplomatic Conference"[617] is false on two counts.

First, as discussed above history is not put into context; that is, a validity argument in 1980 is not necessarily conclusive in 2001 as circumstances change. This is persuasive because as mentioned above the CISG has no supra-national body or committee that can change the Convention.

Secondly, there is no tautology in the argument of interpretation of article 4(a). Honnold correctly pointed out that

the "substance rather than the label" of the domestic rule of validity is relevant.[618] In Ste ISEA Industrie S.p.A./Companie d'Assurances Generali v. Lu S.A. et al [619] the court recognized this point and did not apply article 4 to an issue dealing with the validity of standard terms and conditions, which were printed on the reverse side of an order. The court stated that:

> *"in the absence of an explicit reference on the front side of the buyer's form to the sales conditions indicated on the reverse side, the seller could not be deemed to have accepted those conditions."*[620]

Pursuant to article 19(1) the document had to be interpreted as a counter-offer and was rendered inapplicable due to lack of acceptance by the seller and so was not an issue of validity. To further illustrate the point of "substance over label," let us return to the discussion about article 35.

4. Avoidance under Article 35

Article 35 deals with the buyer's rights arising out of a contract. A breach of these rights would in domestic law result in a breach of a condition. The contract can be avoided.[621] Swiss, German, French and Austrian law lead in essence to the same conclusion.[622] Strictly speaking we are dealing with the question of validity of a contract. If the validity proviso of article 4 were applicable, domestic law would need to be applied - in this case s 19a of the Goods Act. However, s 19a is in conflict with article 35 of the CISG. Pursuant to s 6 of the Sale of Goods (Vienna Convention) Act, the CISG takes precedence in case of conflict. It also has been suggested that as we are searching for a remedy for the buyer, such matters are covered by the CISG and hence take precedent over domestic law.[623] We are trapped in a circular argument.

Another result may be achieved if we re-examine article 4 with the aid of article 7. It can be argued that the important part of article 4 is that the Convention "only" governs the formation and "particularly excludes" the validity. It must be argued that "only" cannot be confused with "exclusively" as some writers have suggested.[624] Article 4 does not exclusively govern the formation as it also governs rights and obligations of buyers and sellers. Rights and obligations of buyers and sellers are covered by the CISG. An application of domestic law is contrary to the mandate of article 7(1). "Only" must be interpreted as a restrictive function that is applicable to the CISG as well as to domestic law. Validity is not excluded in total as article 4 clearly stipulates that domestic law applies only to validity issues, which are not expressly stated within the Convention, (except as otherwise expressly provided in the Convention). The answer is clear if article 7(2) in relation to gap filling is consulted. If the CISG governs matters but not exclusively, then general principles will aid in the construction and interpretation of these matters within the "Four Corners" of the CISG. Validity is only excluded if it is not related to either the formation or rights and obligations of buyers and sellers. Therefore, validity in relation to article 35 really is a question of a breach of contract, rather than validity. The above argument is supported by several decisions. In a Hungarian ruling the court rejected the buyer's argument that the seller's claim as to lack of conformity must be settled according to the Hungarian Civil Code.[625] The court held that the matter was covered by CISG and therefore applied article 39. Also a German decision came to the same conclusion namely that the "application of the CISG precludes recourse to domestic law regarding mistake as to the quality of goods as the matter is exhaustively covered by the CISG."[626] More telling is the opinion of an ICC arbitration ruling where the arbitrator found that:

> *"[t]he Convention applies ... also to the question whether or not a contract has been validly made [which] is apparent from the fact that the Convention contains a section entitled 'Formation of Contract'."*[627]

As stated earlier, the Convention only governs the formation of contracts and the rights and obligations of the seller and buyer arising from such a contract. This indicates that any breach of a contract or any direct contravention of any articles within the Convention is addressed by the CISG. However pursuant to article 4(a) the Convention does not concern itself with questions of validity of contract or its provisions or of any usage but validity as such is not excluded. The proviso does not extend to matters expressly provided for in the Convention. Simply stated and pursuant to article 7(2), if a matter is governed by the CISG then irrespective of its label the CISG is applicable to the exclusion of domestic law. The above mentioned ICC arbitral decision indicated that matters of conformity of goods are to be dealt with by the Convention. As a second point to its argument, the

tribunal ought to have mentioned article 7(2). This article in effect legitimizes the argument that validity is part of the rules as to the obligations of the seller and the buyer and a solution must be found within the Four Corners of the CISG.

It appears that validity is sometimes used synonymously with breach of contract, which is covered by the CISG. In other words if the matter is not covered through gap filling pursuant to article 7(2) and no general principles are discovered, then domestic law must be applied to solve the matter. However, whether domestic law labels any matter as an issue of validity of contract is of no consequence as far as validity pursuant to the CISG is concerned. To restate Honnold, substance rather than the label is of consequence.[628] Validity as a general principle is not governed by the CISG but validity must be carefully distinguished from breaches of contracts or actions which will render a contract void. Validity in the context of article 4, especially in view of the express proviso, must go to the root of the contract. This narrows the field considerably.

Drobnig suggested correctly that validity is one of the general principles of contract law and he recognized three issues; the binding effect of contractual promises, the defects of consent and lastly illegality and immorality.[629] In common law countries, the binding effect of contractual promises depends on an external factor namely consideration.[630] The formation of contracts pursuant to the rules contained within the CISG does not require consideration. Therefore, invalidity due to a lack of consideration is not an issue. This is another example of a case where the CISG "trumps" domestic laws.

The questions of consent, immorality and illegality are not covered in the CISG and hence will be affected by external gap filling. That is, they are subject to domestic law. Looking back at PECL it is evident that there is no difference except that the CISG by implication excludes factors which article 4:102 PECL explicitly excludes. Mistake is also expressly excluded as it is covered in article 4:103 PECL. However, mistake will be further investigated in chapter 7 in relation to the intent of parties pursuant to article 8 of the CISG.

It can thus be seen that "validity" is a misleading term and cannot be invoked merely because of its label. The CISG in article 4 alludes to the fact that not all issues connected to validity are excluded as they are part of the formation of a contract or part of the obligations of buyers and sellers arising out of contracts. The CISG and PECL are fundamentally addressing the same issues and are excluding the same matters; namely consent, illegality and immorality.

5. The Jurisprudence of Article 4

An examination of the jurisprudence of article 4 is important to test the above conclusions. The distributorship issue has already been discussed above. Another area frequently in dispute is the question of set-off. The interesting point to note is that courts in general tend to explain their disallowance of some set-offs with reference to article 4. The Oberlandesgericht [Appellate Court] Stuttgart [631] as well as the Amtsgericht [Lower Court] Frankfurt [632] noted that set-off was excluded due to article 4. The Oberlandesgericht [Appellate Court] München in addition held that both set-off and restitution are covered by article 4 and hence are excluded from the sphere of the CISG.[633]

a. Set-off

Set-off and restitution at first glance have nothing to do with validity of contract. It is a matter excluded by the CISG, as it is not mentioned in the Convention. Article 7(2) was correctly applied to reach the conclusion that domestic law must fill the gap.

It must be noted, however, that in the above cases domestic law was applied, which was the right decision. The problem, however. is not simply to come to the right decision but also to apply the appropriate law; in other words, application of the correct articles to reach a correct conclusion. In this sense, the above courts did make an error in their application of article 4. An examination of the jurisprudence of set-off reveals interesting decisions. In P.T. Van den Heuvel v. Santini Maglificio Sportivo de Santini P&C S.A.S,[634] the court distinguished between two types of set-off. One concerns overcharging, and the other concerns damages. In relation to a set-off for overcharging, the claim was allowed as neither party contested the value of the invoices. The court implied

that the set-off was allowable because the claims were subject to the CISG.[635] Damages due to a breach of the contract were considered to be outside the scope of the CISG and hence to be covered by domestic laws pursuant to article 7(2). However, in a later ICC Arbitration case the arbitrator held that the buyer was allowed a set-off for damages suffered due to the seller's breach of the contract pursuant to article 74.[636]

It appears that the Dutch court unlike the ICC arbitrator did not read article 74 correctly. Article 74 allows for damages due to a breach of the contract including loss of profit. Set-off therefore - as long as it pertains to damages due to a breach of contract or loss of profits - is within the scope of the CISG. A set-off due to other reasons, such as punitive damages not contained within the contract is outside the scope of the Convention. Domestic law, subject to article 7(2) must fill the gap. Some courts have misinterpreted article 4 as defining all those matters, which are not included in the CISG. These questions should be solved pursuant to article 7(2).

Careful attention must be given to set-off provisions if they are in breach of a domestic law, which could make them invalid. In such a case article 4 could be used to implement domestic law. However, in the cases described above the set-off was not a question of a breach of domestic laws but rather a misinterpretation of article 4.

A Swiss decision explains the issue well. The court of Freiburg stated that the only question in issue was the amount of set-off. The right of set-off was based on General Terms and Conditions and the question was whether these terms formed part of the sales contract. The court correctly noted that the question was one of validity and pursuant to article 4 was not governed by the CISG.[637] Domestic law and in this case German law had to be applied. Under German law the set-off was not excluded. The interesting part of the decision was the fact that in making its interpretation the court looked beyond one article and tried to solve the issue within the context of the CISG generally. Article 8 was consulted and it was found that if the statement made by the parties in relation to set-off corresponds with the intent of the parties then the CISG was applicable. "If the interpretation of statements made by both parties does not lead to a congruent result, the intent of the parties has to be elicited in accordance with the principles of domestic law."[638]

In conclusion, it can be said that rulings on set-off have produced the correct results but in some instances for the wrong reasons. Generally speaking, set-offs that are due to breaches of contract but not covered by article 74, have been recognized as being in contravention of article 4. All courts have recognized that gap filling pursuant to article 7(2) must be used if the matter is not governed by the CISG.

b. Other Issues

The application of article 4 shows that courts and tribunals confuse the application of article 7(2) with an application of article 4. Article 4 is not read correctly. Several issues ruled upon can be used to illustrate this point. This examination is restricted to the burden of proof, currency payments and assumption of debt. The Handelsgericht Zürich noted that the question concerning the burden of proof is not governed by the CISG.[639] This particular determination was repeated by the Bezirksgericht der Saane [640] and the Tribunale d'Appelo del Cantone del Ticino.[641]

All three courts decided basically that article 4 excludes a determination of the burden of proof however "due to its underlying systematic structure, certain principles may be inferred."[642] The three Swiss courts in the end came to the correct decision however they should have used article 7(2) to determine this issue. As the courts pointed out, burden of proof is not explicitly ruled upon within the CISG.[643]

However by applying article 7(2), a gap is discovered. The above courts expressed that a principle can be discovered via article 35, namely that the buyer must notify defects to the seller. Therefore, the burden of proof as to defects rests with the buyer. The Bezirksgericht der Saane came to an interesting conclusion.[644] As explained above, it ruled that the burden of proof as to the means of transportation is not settled in the CISG. Through the application of article 7(2), the court applied domestic law and as the buyer could not satisfy the burden of proof, article 32(2) was used.[645] It declares that the choice of the mode of transportation is left to the seller. This decision nearly reflects a correct application of the CISG. The only flaw is the use of article 4 declaring that the burden of proof is not settled in the CISG. The court should have bypassed article 4 and directly applied article 7(2).

In contrast, a decision by the Kantonsgericht Wallis demonstrates an undesirable approach to the CISG.[646] The ruling hinged on the currency in which the purchase price had to be paid. Again article 4 instead of article 7(2) was applied. Rather than discovering a general principle under article 54, which deals with the buyer's obligation to pay the price, the court applied Italian law, which incidentally led to the same conclusion as under the CISG. This approach is incorrect because the court did not follow article 7(2) and searched for a gap requiring filling. Validity as described in article 4 was confused with gap filling. Decisions of this kind however are rare and do not disprove the hypothesis of this thesis.

c. Concluding the Argument

How far has the understanding of article 4 been advanced? Most importantly, the above discussion has shown again that the CISG cannot be applied article by article. Rather it should be read in context. That is, a juridically holistic approach must be taken. Article 4 has two important parts, the expressions "in particular" and "except as otherwise expressly provided in this Convention." Ferrari in his commentary on OGH, April 24, 1997 came to the same conclusion that the above expressions delineate the sphere of influence between the CISG and domestic law.[647] The same is also achieved in article 7(2). Articles 4 and 7(2) are closely linked because article 7(2) spans the interpretation and gap filling of the CISG and article 4 merely rules on issues of validity of contract. Priority must be given in any interpretation or question of delineation to article 7(2).

Article 4 has been viewed by many commentators and some courts as dealing with one aspect only namely validity. This is a very narrow view. Understood correctly, article 4 has a much wider application as it assists courts and tribunals in a determination of the scope of the CISG. In Thermo King v. Cigna Insurance Company et al.,[648] the court had to deal with the question of privity of contract in an action by a sub-purchaser against the initial seller. The court directed its attention to article 4. Pursuant to article 4, the CISG only governs rights and obligations of buyer and seller arising out of their contract. As there is no contract between the sub-purchaser and the initial seller, the CISG is not applicable. In KSTP-FM,LLC v. Specialized Communications, Inc and Adtronics Signs, Ltd [649] the court had to rule on an application in which the plaintiff alleged that in Minnesota the UCC expressly allows certain parties the right to sue for breach of implied conditions in the absence of contractual privity. The court relied on article 4 and concluded, like the French court above, that the CISG is limited to the rights under the contract between buyer and seller. Furthermore the court held that the CISG is the supreme law of the land and hence the application of Minnesota law was barred.[650]

Courts have also taken the incorrect view and applied article 4 to "matters excluded" which is the domain of article 7(2). It can be argued that the expression "in particular" leads to such a conclusion as "it only serves to emphasize that, apart from matters listed in article 4(a) and (b), there are other matters not governed by the CISG."[651] As an example, article 5 can be cited. It excludes product liability as far as personal injury is concerned. At the same time, the other important expression "except as otherwise provided in this Convention" points to the fact that not all matters in relation to validity are excluded. Article 11, for example, lays down the principle of informality of contract, that is, contracts do not have to be evidenced in writing. Furthermore, courts have also discovered that validity issues such as in relation to quality have been dealt with in article 35 of the CISG.[652]

The concept of not allowing validity questions to be brought under article 4(a) if matters are covered by the CISG can be illustrated with an Israeli case.[653] It must be noted that the case was ruled under ULIS the forerunner of the CISG. An Israeli buyer bought steel from a German seller. The contract was improperly performed but due to lapse of time and lack of notice, as is also the case under the CISG articles 36 and 39, the buyer lost the litigation. After re-commencing action in Germany the restitutionary remedy contained in domestic law pushed aside the remedies available under the Convention. Schlechtriem commented that:

> *"the uniformity reached by the Convention would be in grave danger if ... national provisions could be applied [simply] because [their] application leads to invalidity or avoidance of a contract and thereby could be brought under article 4(a)."*[654]

It is obvious that the CISG specifically excludes issues to be brought under domestic laws when the matter is

regulated by the Convention. Article 4 therefore is only available if there is a gap needing filling. That is, the Convention is silent on the matter.

Looking at the list of matters excluded from the CISG through article 4 namely: statute of limitation, set-off, agency, distributorship and frame contracts, validity of penal clauses, assignment of receivables, assumption of debts, and others, the conclusion must be drawn that the above topics do not fall under the principle of validity.

Indeed agency and distributorship could be dealt with under article 3, which in brief excludes service contracts. This point can be illustrated by a decision of the Obergericht [Appellate Court] Luzern, which interpreted article 3(2) in a wider sense.[655] It noted that if other elements other than those relating to the contract of sale were preponderant then the CISG would not apply.[656] The court specifically referred to exclusive distribution or franchise contracts but noted that a single sale of goods pursuant to the franchise agreement would be governed by the CISG.[657]

The solution as indicated above is that article 7(2) must be consulted first and an examination of the CISG as a whole must be undertaken to see whether an "external gap" can be filled by the CISG or by domestic law. What then is the purpose of article 4? It can be argued that article 4 expressly "draws a line in the sand" where the CISG is not applicable. Validity of contract is excluded but "validity" requires definition and substance. By analogy with PICC and PECL, validity can be reduced to questions of illegality, immorality, mistake (in certain instances) or lack of capacity. The above court decisions demonstrate that despite the correct results, the path chosen was incorrect. Courts failed to grasp that validity of contract and not validity of issue is the key. Validity of issue is governed by article 7(2). Validity of contract is settled in article 4 only.

Returning the attention to the hypothesis, the conclusion is that courts have failed to understand the correct sphere of application of article 7(2) by taking a far too narrow view of its application. In defense of the courts and tribunals, it must be stated that the above discussion of the black hole in the CISG leads to the extreme corners of a permissible application of it. It is understandable for courts to stay within the "comfort zone" and find the "correct outcome" before considering the "correct approach." With extending jurisprudence future decisions can be approached with a stock of knowledge and doctrine, which will support courts in pushing the "elastic corners" of the CISG.

In conclusion it can be observed that courts have not generally used domestic law in preference to the CISG and hence the hypothesis can still be supported with the proviso that a full understanding of the capacity of article 7(2) has not been achieved. However the further point must be made that uniformity pursuant to article 7(1) has been achieved through the application of article 7(2) as seen in decisions of the courts, which have tended towards a converging CISG jurisprudence.

CHAPTER 7

ARTICLE 8 - THE RELATIONS BETWEEN CONTRACTUAL PARTIES

Overview

- The aim of this chapter is to examine the mutual obligations of parties under a contract. In particular the following issues will be analyzed:
    - The influence of subjective and objective intent on the relations between contractual parties.
    - The need to review and abandon some domestic doctrines such as parol evidence rule and mistake.
    - The influence and usefulness of the UNIDROIT Principles and the Principles of European Contract Law to "map the territory."
    - The principles of subjective intent and party autonomy using a comparative analysis to highlight the differences between domestic and international law.

- The socialization process of eliciting the intent of parties in domestic law to help in an understanding of the mandate of article 8.
- The comparative analysis between the common law principle of mistake and articles 4 and 8 to show that an international methodology of interpretation requires a sophisticated grasp of the provisions of the CISG.
- Article 8 requires that trade usage is a guideline in establishing the intent of parties. Article 9 and its jurisprudence is therefore analyzed.
- The parol evidence rule as practiced in the United States is used as an example of the development of the influence of the CISG on domestic principles.

1. Introduction

The discussion so far has concentrated on the rules contained in article 7 namely the interpretation of the Convention and gap filling. It has been established that the principles contained in article 7 are not only restricted to the interpretation of the Convention as a whole but extend to the relations between contractual parties. The intent of the parties as to their mutual obligations under the contract is regulated under article 8, which states:

> *"(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was.*
>
> *"(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.*
>
> *"(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."*

This thesis argues that courts and tribunals should look for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it, rather than take recourse to domestic law. So far it has been demonstrated that courts and tribunals do interpret the CISG correctly, that is without recourse to domestic law and principles.

Article 8 in essence supplements article 7 as it assists in interpreting the relations between parties, which is only partially solved by article 7. Article 8 also touches on subtle and difficult issues especially as some domestic doctrines need to be reviewed or abandoned. Great care must be taken to isolate and discard principles within domestic law, which are in direct conflict and are not compatible with the interpretation of article 8 such as the parol evidence rule in the United States of America. It has generated sufficient controversy to justify discussion below. What is clear is that article 7(1) requires courts to develop a "shared international methodology for interpreting the CISG as well as a sophisticated grasp of its provisions."[658] International jurisprudence unfortunately reveals often that "a sophisticated grasp" of the CISG has not yet been achieved. This was especially apparent in the discussion of the application of article 4 in Chapter 6. However, this does not mean that the hypothesis of this thesis has been disproved. It merely indicates that courts and tribunals are not yet confident enough to apply the CISG in a "holistic" manner. A "sophisticated international methodology" of interpretation is not yet fully developed and applied.

Uniformity has been interpreted by an examination of the jurisprudence of the CISG which displays such unity that its decisions are repeated irrespective of jurisdiction. There is no question that the CISG must be interpreted free from domestic principles and doctrines. However, in the context of article 8, uniformity must be given a different meaning and has to be redefined. With the introduction of usage regulated in article 9, the possibility of diverse judgments from one country to the next is inevitable. Such diversity cannot be linked to article 7(1) but to the mandate of article 8(3). Usage is an important criterion to determine the intent of the parties. Therefore,

uniformity is not measured by looking at the outcomes but rather at the application of usage pursuant to article 8(3).

The INCOTERMS can be used to illustrate how the rule of uniformity should be extended. It is not only the desire of the CISG to create an international uniform jurisprudence; INCOTERMS have achieved this goal already. Arguably every court, irrespective of its jurisdiction, will administer and interpret the INCOTERMS uniformly. To achieve an internationally recognized understanding it is therefore permissible to consult jurisprudence of domestic courts. The ICC Court of arbitration had to interpret an INCOTERM.[659] They correctly looked to an 1954 English case and noted:

> *"Although the applicable law is not the English law but rather the Vienna Convention respectively Austrian law, the opinion in the mentioned English case may be taken as an expression of an internationally recognized understanding of the CIF clause."*[660]

Uniformity demands in this case an application of usage. The fact that "usage" is adopted fulfills that mandate and not the definition of substance given to usage, which may change depending on factual knowledge.

2. Functions of Article 8

In brief, article 8 governs the statements made by and other conduct of the parties in order to elicit their true intent. Such intent, in turn, will influence the contractual rights and obligations of the parties.

Another function of article 8 is to supplement article 6 which, in turn, deals with the principle of party autonomy. Article 8 indicates that the parties' intentions take priority over the provisions of the CISG.[661] The intention of articles 6 and 8 is to give parties the ability to import terms into the contract. It is therefore possible to substitute for the uniform laws contained in the CISG expressly or through usage or any other conduct which may influence the rights and obligations of the parties.

From the contracting parties' point of view, substitution for CISG terms only shifts the influence of the CISG to domestic law. From the point of view of uniform laws, an important question must be asked. What exactly has been substituted? Arguably, there has to be a point where substitution in effect would make the influence or application of the CISG meaningless. In other words, when do rules substituted by the parties nullify the CISG? Rhetorically speaking, at what point of cutting does a tree cease to be a tree?

A strong argument would be that as soon as articles 7 and possibly 8 are excluded, the CISG ceases to exist as an autonomous rule on the sale of goods.

Party autonomy conforms to articles 6, 7 and 8. It can be argued that uniformity and good faith pursuant to article 7 must always be present. It is implied in the CISG that party autonomy as a principle is expressed through the existence of articles 6 and 8. These in turn rely on article 7 for interpretation. If, for example, article 7 would be precluded from a contract, which tools would a court use to interpret the contractual rights and obligations of the parties?

Recourse to municipal doctrines and principles would be the possible outcome. In effect, the very foundation on which the CISG is built would collapse. It is not by accident that other uniform laws and principles have included in essence article 7 and therefore the importance of this article must not be underestimated.

What then is the relationship between articles 7 and 8? The most important observation is that article 8 closes the chain in the interpretation of the CISG. Like all other articles within the Convention, the interpretation of article 8 is guided and is subject to the mandate as expressed in article 7. However, unlike any other article within the Convention article 8 deals with the concept of interpretation. It can be argued that it supplements article 7. As stated earlier, article 7 has two functions. First, it interprets the CISG as a whole but secondly, it also regulates the behavior, that is, the rights and obligations of the contracting parties specifically in the application of good faith. As pointed out in Chapter 2, Ziegel suggested that while article 7(1):

> *"does not refer specifically to the observance of good faith in the formation of the contract, its language is sufficiently broad to admit its inclusion."*[662]

Such a conclusion is not supported universally by all scholars. Notably Professor Winship argued that article 7 only applies to the interpretation of the Convention as a whole.[663] Irrespective of the different views, special consideration must be placed on an autonomous interpretation, that is, without reverting to municipal doctrines and principles.

To assist in coming to a full understanding of the mandate of article 8, it is also essential to examine briefly the regulations of the closest counterpart to the CISG namely PECL and PICC. Such a comparison can assist in gaining an understanding of the intent of the parties.

3. Principles of UNIDROIT and European Contract Law

Both Principles in contrast with the CISG make a statement concerning the interpretation of intent and hence the contract. Arguably article 7 of the CISG has been written in such a way that a further narrower definitional aid to article 8 is not necessary. In view of the inclusion of definitional sections in PECL and PICC, the argument is strengthened that article 7 is not only addressing the Convention as a whole but also addresses the behavior of parties.

Both restatements were written when the CISG was already in place and without political interference.[664] The socialization process is important in understanding the CISG without transplanting principles into the Convention where the mandate pursuant to article 7 restricts such importation. If we analyze the restatements, such a socialization process may be discovered and by analogy may be applied to assist in the method of interpretation and gap filling of the CISG through article 8.

PICC in contrast to article 8 of the Convention, included an interpretational addendum in article 4.2. Article 4.1 (intention of the parties) and 4.2 (Interpretation of Statements and Other Conduct). PICC in essence contains the intent of article 8(1) and (2). Article 8(3) has been translated into article 4.3 (Relevant Circumstances) which is identical in intent. The major departure from the CISG is that PICC has added more guidelines. Article 4.4 provides that "terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear."[665] Articles 4.5 to 4.8 assist in determining that all terms are to be given effect rather than "deprive some of them of effect."[666] Furthermore, the contra proferentem rule is applicable and in case of linguistic discrepancies the interpretation "according to a version in which the contract was originally drawn up"[667] is to be given preference. If a term that is important to the determination of the parties' rights and obligations has been omitted, the court can pursuant to article 4.8 supply omitted terms taking into consideration amongst other things good faith and fair dealing.

The important difference is that PICC has a broader stated focus than the CISG. Where the Convention focuses on individual sales of goods, PICC "provides explicit guidance for the interpretation of commercial contracts."[668] However, in general PICC has tightened the interpretation of a party's intent and resolved some of the interpretational needs embodied within the CISG. PICC case law confirms this view.

In Societé Harper Robinson v Societé Internationale de Maintenance et de Réalisations Industrielles (SMRI) et autres,[669] the court had to determine whether general terms in a contract overruled the terms contained within the signed document. The court found it impossible to establish whether the plaintiff knew the general terms. The court simply relied on PICC article 4.6 and applied the contra proferentem rule preferring an interpretation against the party who inserted the terms. An ad hoc arbitration ruling from Argentina followed the same lines of reasoning.[670] It can be argued that it is easier for a common law lawyer to deal with the UNIDROIT Principles as the rules are clearly laid out. The CISG, on the other hand, does require an understanding of a method of interpretation, which is universally acceptable and relies on an ability to engage principles within the framework of the Convention, a method many common law lawyers have not yet come to appreciate. The above point can be illustrated with an arbitral award between a New Zealand and an Australian party.[671] The question hinged on the fact whether post-contractual conduct was admissible to resolve ambiguities in the contractual agreement. The arbitrator found that New Zealand law was "in a somewhat unsettled state."[672] The arbitrator referred to PICC

article 4.1, 4.2 and 4.3 and commented that:

> *" ... there could be no more definitive contemporary international statement governing the international interpretation of contractual terms than in the UNIDROIT Principles."*[673]

It is arguable that this is not the case, as the CISG through article 8 could also have established the intent of the parties. Furthermore, the CISG is more definitive than PICC as only the CISG can claim the status of a valid legislative law. However, it is understandable that Williams Q.C. referred to PICC. For a common law lawyer, presumably unfamiliar with the CISG, PICC is relatively familiar in its structure. There was no CISG jurisprudence in New Zealand or Australia at that time.

PECL as the most recent restatement arguably relied not only on the CISG and PICC but took also note of EU domestic legislation. The official comments assist in the interpretation of PECL and the notes identify civil law as well as common law antecedents and related documents.[674] PECL article 2:102 states that:

> *"The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party."*

If the intention of the parties are combined with the general rules of interpretation, that is, PECL articles 2:102 and 5:101, the difference from CISG article 8(1) and (2) is not great. The significant change is that, from a purely theoretical perspective, the black letter law is clearer and more logically laid out. The CISG, on the other hand, relies not only on an understanding of article 8 but also article 7. Like PICC, PECL introduced concepts such as the contra proferentum rule, which describes and rules on specific situations. The CISG, on the other hand, relies on article 7 specifically good faith and has the potential to arrive at exactly the same conclusions as PICC or PECL.

An analysis of PECL article 5:101, the general rules of interpretation, is important. This article states:

> *"(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.*
>
> *"(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.*
>
> *"(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that a reasonable person of the same kind as the parties would give to it in the same circumstances."*

PECL, in contrast with the CISG, introduces a concept of "common" intention whereas the CISG in article 8(1) describes the subjective intent of the parties. PECL, in line with the majority of EU law, combines the subjective method with the objective method expressed as the "common intention."[675] The common intention of the parties must always prevail over the letter of the contract but at the same time the judge must not under the guise of interpretation modify or change a clear meaning of the contract.[676] The CISG, in contrast, relies on article 7; namely, the principle of good faith as well as the intent of parties pursuant to article 8 to come to the conclusion that statements or conduct on which the other party relies must take precedence over the letter of the contract. Both PECL and the CISG rule that the judge should not interpret the intention of the parties in such a way that a solution is found at any price. The solution in both rules is the "reasonable person in the same circumstances" test.

The two restatements of contract law improved on the CISG by not only including the idea of intent of parties into their framework but also establishing clear guidelines based on specific instances to exercise the mandate of giving effect to the party's intentions. Confirmation of that which articles 7 and 8 intend to achieve must be derived from international jurisprudence. This is specially true in relation to the wording in article 8(3), the mandate to give consideration to "all relevant circumstances." However, due to its structure PICC and PECL have become restrictive. Their prescriptive nature does not allow much room to move whereas the CISG in this

particular instance is more flexible within a given framework.

4. Interpretation of Article 8 - a Comparative Analysis

Article 8 systematically sets out the steps and criteria by which statements and other conduct of a party need to be interpreted. Such statements and conduct are classified according to the knowledge which the other party has or ought to have. If a party knows or ought to know the intent of the other party, then article 8(1) is applicable. If that is not the case, the courts and tribunals will attempt to define such intent using the "reasonable person" test, which is described in article 8(2). Article 8(3) assists the courts in determining the intent of the party by listing matters to which the courts must direct their attention, such as "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."[677] Importantly, article 8(3) not only specifies some circumstances but also invites the court to give consideration "to all relevant circumstances."[678] The conclusion is that article 8 is relevant as soon as a question of intent arises. In other words, if there is a real or perceived misunderstanding between the parties, article 8 must be consulted to elicit the true intent and hence keep the contract afoot as much as possible.

Article 8 thus draws a distinction between subjective and objective intent. Article 8(1) logically deals with the subjective intent. The test is that the other party either knew or ought to have known the subjective intent of the other party. Article 8(2), on the other hand, covers the objective test of ascertaining the intent of the parties if the subjective intent cannot be ascertained.

In contrast to the CISG, common law lawyers do not favor the subjective test in ascertaining the actual intent of the parties. It is often stated that the interpretation of a legal text, including a contract must be based on its nature and context. "It cannot aim to discover what the parties to a contract ... subjectively intended."[679] Furthermore, the "subjective desires of the parties will be divergent."[680] Such a view may not be correct, as "subjective desires" are not always divergent. The question is, how can a "common subjective desire" be discovered? The CISG has overcome this problem by including in article 8 an important proviso that "the other party knew or could not have been unaware what the intent was."[681] It appears that the common law ignored such a possibility. This may not be the case, as such intent is referred to as the "meeting of the minds."[682]

Such an argument has some support if the views expressed by Blackburn J in Smith v Hughes [683] are considered. He noted:

> *"If, whatever, a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms as proposed by the other party, and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*[684]

Approaches of two authors to the problem of intent can be used to highlight perceptions and understandings amongst common law lawyers in relation to the CISG. The main difference between the two authors is that Murray views the CISG as the central legislation in the international sale of goods. Carter, on the other hand, in his analysis of English and American sale of goods legislation and the CISG appears to view the CISG as a mere "adjunct" to municipal law which on some occasions may need to be followed. He focuses his attention on party autonomy as a means to exclude the CISG. He notes that:

> *"[not to exclude the CISG is] a missed opportunity to adopt English law as the proper law [which] might prejudice a party's right and attract unwelcome legal consequences for the adviser."*[685]

However the importance of Carter's analysis lies more in the fact that he mistakenly analyses the CISG with the language and terminology of the common law in mind, which pursuant to article 7 has been rejected. Carter's analogy misses the point that the CISG must be read with the mandate of article 7 firmly in mind. He notes that:

> *"It appears that no one has yet considered the relation between [article 6] and the common law approach to the classification of terms. As will be explained the familiar treatment of terms in sale contracts as conditions is invariably justified on the basis of actual or presumed intention. In fact the reality is that most*

> *cases are justifiable only on the basis of presumed intention."*[686]

It is no wonder that no one has considered the classification of terms. Such a distinction is not within the mandate of the CISG. Carter, however, does indicate that "presumed intent" is an important criterion in determining contractual obligations. However, it must also be noted that Carter appears to link the "presumed intent" to conditions within the contract, which will decide the outcome of any possible litigation. The CISG, on the other hand, does not follow such a path. Party autonomy allows a party to introduce terms into the contract. How these terms are to be interpreted in case of a dispute is regulated by article 8. The question is not whether a term is or is not a condition. The question is: What is the intent of the parties? Such an approach appears to be far simpler than the one proposed by Carter.

Carter reviewed party autonomy and managed to discuss this issue without once mentioning article 8, which is specifically included in the CISG to clarify the intent of parties. Considering that his intention was to look at "Party Autonomy", the whole discussion in the paper reviews the regime for rejection and termination of contracts. It is puzzling that party autonomy is linked only to the above principle, which is well defined within the CISG. It is therefore not surprising to note that Carter wrote:

"[It] would throw the whole scheme of the Convention provisions on avoidance into total confusion if courts, in say Australia were to treat an implied agreement that a term is to be a condition as sufficient to exclude the operation of the fundamental breach requirement."[687]

Such an observation indicates that an attempt has been made to explain functions of the CISG with domestic principles in mind. The above observation is wrong on two counts. First, the CISG does not distinguish between conditions and warranties. A court unless it imports domestic principles into the CISG cannot "throw the whole scheme of the Convention ... into total confusion."[688] Secondly, the intent of parties, which Carter no doubt means by "an implied agreement", is regulated in article 8. If subjective intent cannot be ascertained, objective intent is determined by the court, taking all necessary evidence as described in article 8(3) into consideration.

In summary, Carter attempts to show that intention of the parties applies to the question whether particular terms are warranties and conditions, which misunderstands the Convention. The CISG has no principles expressed in such terminology. What Carter perhaps envisaged is that if the intent of parties cannot be established, the problem becomes one of validity. Except as otherwise expressly provided, validity is specifically excluded by the CISG and domestic law will govern the issue.

It appears that Carter's views are by no means isolated. Perhaps they represent a typical response based on Common Law culture and principles. A recent Australian Supreme Court decision in Queensland in essence repeats the above arguments. In Downs Investment Pty Ltd v Perwaja Steel SDN BHD,[689] the standard form contract stipulated that the seller must gain approval from the buyer before a ship can be chartered. In subsequent discussion the buyer said in effect that:

> "*Wanless had made so many shipments previously that it knew the nature of the vessel Perwaja wanted and that it was unnecessary for Wanless to worry about submitting to Perwaja for its approval vessel details."*[690]

Clearly article 8 is relevant but, instead of referring to article 8, Ambrose J. noted that "there was arguably [a] technical breach of the shipment clause." He dismissed the claim by pointing out that it was not a breach of an essential term.[691] As a matter of fact, there was no breach at all under the CISG and the question of "an essential term" is of no importance. Pursuant to article 8, the establishment of the intent of the parties is the only relevant consideration. Under article 8(1), the subjective intent of the parties is clear in that there is no need to submit vessel details to Perwaja for approval. The standard form clause has been substituted by subsequent events. Neither the parol evidence rule nor the question of terms is of relevance. The only question is, what is the intent of the parties?

Murray, on the other hand, shows a far better insight into the workings of the CISG. He dismisses that the subjective intent of parties is a "meeting of the minds". He explains that it "must be understood as requiring only

an objective manifestation of assent, as any one-month old student of contract law in the United States knows."[692] Murray supplies us with an interesting example where he notes:

> *"The first and Second Restatement of Contracts contain the following hypothetical: A says to B, I offer to sell you my horse for $100. B knowing that A intends to offer to sell his cow for that price, not his horse, and that the word 'horse' is a slip of the tongue, replies I accept. Restatement (First) of Contract article 71 illust. 2 (1932); Restatement (Second) of Contracts article 20 illus. 5 (1981). Neither Restatement finds a contract for the sale of the horse. The First Restatement also finds no contract for the sale of the cow, but the Second Restatement concludes that there is a contract for the sale of the cow."*[693]

If the same example would be analyzed under the CISG, article 8(1), would arrive at the same result, namely that there is a contract for the sale of the cow. Two principles, namely good faith and that "the other party was not unaware" what the intent was, would determine the issue. Despite previous manifestations that "the common law lawyer discarded any attempt to discover the subjective intent of a party,"[694] the United States legislation arrives at exactly the same conclusion as the CISG. Certainly "the meeting of the minds" test may be foreign to the common law but it is also not used in the CISG.

5. An Approach in Civil Law

The hypothetical or objective intention of contracting parties is also well known in civil law countries. This is illustrated by article 18 of the Swiss Commercial Code and articles 1362/1371 of the Italian Civil Code (*Codice civile*). In German law, the interpretation of the intent of the parties is regulated in articles 133 and 157 of the BGB.[695] Article 133 notes that in order to elicit the real intention of the parties, a court must look beyond the literal expressions contained within the contract.[696] The first step is to find out whether an intention has been expressed within the contract. Furthermore, the intention as expressed by the parties cannot be clear and unambiguous otherwise a subjective intent could be discovered. Secondly, there has to be a need for interpretation (auslegungsbedürftig) and also the expressed intention must be capable of being interpreted (*auslegungsfähig*).[697] The linkage of article 157 of the BGB to article 133 is interesting. Article 157 notes that: "Contracts are to be interpreted in good faith and with consideration to customary norms."[698] The precondition to apply this article is that a gap needs filling. However, there has to be a basis for gap filling. The hypothetical will of the parties has to be determined by taking into consideration the purpose of the contract by applying good faith and customary norms.[699] In essence, the Swiss Commercial Code reflects the German legal structure. Article 18 is also linked to article 2 of the Swiss Civil Code (ZGB) which notes that "everybody executing their rights has to act in good faith." Furthermore this mandate is strengthened by article 2(2), which states that "a misuse of a right is not supported by law."

The difference between the German law and the Swiss law is that article 18 of the Swiss Commercial Code notes that "in examining a contract not only is to its form but also as to its content, the true intent of the parties needs to be established." The legislator furthermore points out that only the true intent, and not one which is based on error of the parties, or by an expression that concedes the true intent, is to be taken into account. In effect, the Swiss Commercial Code invites the judge or arbitrator to elicit the "true will" of the parties instead of taking note of the wrong (*unrichtig*) terminology or expression of intent. The Swiss Commercial Code arguably defines the subjective as well as the hypothetical will of the parties and in conjunction with article 1 of the ZGB, which allows the courts in case of doubt to act like law makers, achieves the same result as the CISG. The German Commercial Code (BGB), on the other hand, is more "elegant" in its description and introduces in effect the same concepts. As pointed out above, article 8 correspond more closely with civil law practices than the common law in the interpretation of the intention and conduct of contractual parties.

The above cannot be applied directly to the CISG due to the autonomous mandate pursuant to article 7(1). However, the socialization process must be elicited which can become a useful tool to understand article 8. The methodology of establishing "*auslegungsbedürftigkeit und auslegungsfähigkeit*" of the party's intentions is important. In other words, is there a need to interpret the expressed intention at all and is that intention capable of being interpreted?

As a summary, an arbitral case from Switzerland [700] is interesting. The award concerned the validity of the arbitration clause to "submit the dispute to an international and trade arbitration organization in Zürich, Switzerland."[701] One party contended that the Zürich Chamber of Commerce was the applicable institution. The other party argued that, as the name of the institution was not mentioned, the whole arbitration agreement was invalid. The arbitrator referred to article 18(1) of the Swiss Commercial Code, which lays down rules to elicit the true intent of the parties as well as to article 2 of the Swiss Civil Code which refers to the principle of good faith. The arbitrator interpreted the subjective as well as the objective intent of the parties and came to the conclusion that the arbitration clause was valid. However, to prove that the interpretation and conclusion reached through domestic law reflects an international consensus, the arbitrator also relied upon PICC articles 4.1 and 4.2. It can be said that the arbitrator recognized - and took into consideration - that PICC has been established "by a large international working party consisting of specialists in contract law selected from different parts of the world."[702]

6. The Common Law Principle of Mistake and the CISG

The common law treatment of the interpretation of intent is case law based and not readily distinguishable from rules of evidence and rules about mistake.[703] This may explain why Murray when he explained the objective vs. subjective manifestations also quotes Raffles v Wichelhaus.[704] In brief, the facts are that both parties made a mutual mistake. Cotton was to be sent by the SS Peerless from Bombay. In actual fact, there were two ships called Peerless and neither party was aware of this fact. The English court found that due to mutual mistake there was no contract, that is, existence of agreement cannot be presumed.[705] Murray notes that: "article 8 would certainly appear applicable to a 'Peerless' situation."[706]

Before analyzing the "SS Peerless" under the CISG, the principles involved must be first examined. Both examples quoted by Murray, as "any month-old student of contract law knows,"[707] fall under the principle of mistake. Mistake as discussed in Chapter 7 is a question of validity of contract and hence should be governed by article 4 and not 8. This observation is only partially correct. No doubt many common law lawyers have fallen into the trap of viewing the CISG through the lenses of municipal law. It is not a question of mistake that is of importance but the principle of intent. Mistake as such is not a principle of the CISG and, as seen in Chapter 6, is linked to article 4 if it affects only the formation of a contract. However, article 8 does not look only at the formation of a contract. The purpose of article 8 is to determine the intent of the parties. Whether the question of intent is in relation to the formation of a contract or whether it relates to terms within a contract is immaterial.

The importance of article 7 is again highlighted. The first mandate of article 7 is what is described as the autonomous approach to the interpretation of the CISG. That is, interpretation is done without recourse to domestic law or principles, which can be or are sometimes functionally similar. Article 7 contains the obligation to approach the interpretation of the CISG in a "holistic way". Simply put, every interpretation must first exhaust all possibilities of applying only the CISG. Only when such an endeavor becomes impossible, that is when an external gap is discovered or proved to exist, can domestic law be applied.

In relation to the "SS Peerless", article 8(1) would need to be consulted and is the starting point for any analysis. The facts of the case indicate that each party did not know the actual or subjective intent of the other. Hence, there is no subjective intent established. If a party's subjective intention is one-sided, that is, it does not coincide with the views of the other party, the objective meaning must be elicited. Article 8(2) prescribes that the statements or conduct in question must be interpreted by the courts and tribunals, using the "reasonable person" test. In other words, hypothetical or objective intention of the parties has to be elicited by the courts.

In the "SS Peerless," the intention of the parties needed to be interpreted, as the buyer was not and could not be aware what the intent of the seller was. The question whether the intent was capable of being interpreted must be answered in the negative. Applying the "reasonable person test" would indicate that the objective intent cannot be established either. Subjective intent of each party is clear but neither party knew nor could have been aware of the intent of the other. There is simply no commonality of intent, subjectively or objectively. As the intent cannot be established, article 8 is not applicable.

The inability to establish either a subjective or objective intent would result in a failure to form a contract. In such a case, article 4 must be consulted which states that the Convention is not concerned with the validity of a contract. Therefore, pursuant to article 7(2), municipal law must be applied.

The conclusion is if the intent is not clear, article 8 must be used to elicit such intent. If article 8 fails to do so a contract cannot be formed and article 4 applies. An examination cannot start with the common law principle of mistake in mind, as the CISG does not recognize such a principle.

If PECL is consulted it can be seen that mistake is listed under validity. Article 4:103 notes as heading; "Fundamental Mistake as to Facts or Law." The article basically declares that a party may avoid a contract for mistake but only under certain circumstances. The most obvious one is when both parties make the same mistake or when a mistake was caused by information given by the other party.[708] However a party can avoid the contract if:

> *"the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error" and; "had the mistaken party known the truth [it] would not have entered into the contract or would have done so only on fundamentally different terms."*[709]

There are some fundamental differences emerging between PECL and the CISG. This should be viewed as a reminder that the CISG must be interpreted autonomously. There have been views expressed that instruments such as PECL and PICC can be used by analogy to interpret the CISG. This discussion shows that reliance on articles outside the CISG should be rejected. In both the cases, article 8(1) could be used to determine the intent of the parties because in both situations the other party "knew or could not have been unaware what the intent was." However, PECL affords one of the parties the ability to avoid the contract. If we consider again the discussion in Chapter 6, we must add that article 4 should only be used in the case of mistake where no intent can be established.

An examination of mistake as a principle in common law establishes that there is no general right to be released from a contract on the basis of mistake and courts are reluctant to set aside a contract merely because one or both parties made a mistake.[710]

As far as a common mistake is concerned, the matter is clear. In general terms, the parties make the same mistake - usually about the subject matter. In such a case, the contract is declared void. Under the CISG, this would be a good example where article 8 is not applicable despite the fact that both parties are fully aware of their intent. The contract cannot be performed, as it is impossible to do so. Article 4 becomes applicable and will determine that domestic law must solve the issue.

As far as mutual mistake is concerned, the matter becomes more complicated. Again it must be highlighted that the courts must establish and give effect to the intent of the parties. In mutual mistake, the parties are at cross-purposes. It appears that this area allows for a considerable scope for judicial creativity in common law. However such a statement must be tempered with the observation that the common law "objectifies intention by erecting barriers to evidence of what parties really intended as opposed to what they said or wrote."[711] It is that particular "barrier to evidence" which sets the common law apart from the CISG. Article 8(3) allows a court to take into consideration "all relevant circumstances of the case" whereas the common law is more restrictive. In Smith and Hughes[712] where the question was whether new oats or old oats were the subject of the contract; the court rejected mistake by noting:

> *" ... all that can be said is that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them."*[713]

The above case shows the scope for judicial creativity as a contract was declared valid despite the fact that the objective intent as to the quality of oats was never established. Under PICC or PECL, this matter could have been resolved under the contra proferentem rule unless the court through customary practices established between the parties could have established a hypothetical intention. A similar outcome could also have been achieved through article 8(3) of the CISG.

In summary, either through the CISG, PICC or PECL a greater uniformity could be achieved as the question of intention of parties is regulated. Common law deals with mistake in a "creative" way, which unfortunately could be interpreted as lacking predictability.

7. Intention of Parties - Jurisprudence of the CISG

As the above discussion suggests, ascertaining the true intention of the parties is the "key stone" in the understanding and application of article 8. The first question the courts would ask is, What is each party's understanding of the statements or conduct of the other party? The court in M. Caiato Roger v La Societe Francaise de factoring international factor France SA [714] looked at the prolonged dealings between the parties and found it impossible for the seller to deny knowledge that the goods were destined for the French market and hence had to comply with French marketing regulations.[715] The Oberlandesgericht [Appellate Court] München applied article 8(1) in the correct way. The German buyer insisted that he could pay a reduced price as arranged in the contract. However, the court noted that by ordinary interpretation the parties had agreed to a discounted payment only if the buyer met certain terms. As he failed to do so, the full price became due.[716]

Not all intentions are expressly stated. Silence can also amount to an expression of intent. Article 8(1) not only includes statements made, but also conduct by parties as constituting intent. A Swiss decision illustrates this point.[717] A German supplier filled an order for a Swiss buyer regarding a summer cloth collection. Because the buyer did not pay on time the seller did not supply the winter collection. The purchaser, after part payment, sent a letter to the seller setting out a payment schedule for the outstanding amount as well as delivery dates for the winter collection. The seller refrained from delivering and was sued for damages arising from the failure to deliver the winter collection. The question was whether the seller's silence constituted an acceptance of the content of the letter. The court inquired into the intention of the parties and found that silence in this case did not constitute acceptance of the amendment to the contract.[718] The other party, that is, the Swiss buyer, must have been aware that through silence the seller did not accept the variations as proposed by the buyer. In other words, the buyer could not have been unaware of the true intention of the seller.[719]

Silence is an excellent example to illustrate the point of "true intent". In Ste Calzados Magnanni v. SARL Shoes International [720] the buyer placed an order for shoes but the seller denied ever having received such an order and furthermore relied on article 18(1) which states that silence "does not in itself amount to acceptance." Article 18 through its terminology does not indicate that silence as such is always insufficient. "In itself" indicates that unless otherwise shown silence does not constitute acceptance. The court therefore again looked at article 8 and found that the practice in previous years indicated that the seller always fulfilled the orders without formal acceptance. In addition, the seller was asked to manufacture samples and he was left with the original material in his possession.[721] The court found that this fact alone should have prompted the seller to question the buyer how an absence of an order should have been interpreted. Such an obligation is founded on the general principle of good faith pursuant to article 7(1).

Silence as such is a part of several articles notably 14 and 18. Article 14(1) allows for indications of silent intentions (stillschweigende Festsetzung). The Austrian Supreme Court noted that price, quantity and character of goods can be ascertained by "a reasonable person similarly situated" through a construction of the objective intent pursuant to article 8(2).[722] Silence as expressing the intent of parties in relation to the offer and acceptance of a contract can be summarized though by Inta SA v MCS Officina Meccanica S.p.A,[723] where the Argentine judge noted:

> *"It is certain that in this framework the Convention provides that silence or inactivity in itself will not constitute acceptance, but in this case there were repeated acts that were taken to conclude the contract and, by the standards discussed above ... there was no disagreement with the clause and, even less, abuse of a dominant position by one party over the other."*[724]

The interaction between article 7 concerning good faith and article 8 is highlighted in the above cases. The conduct of the parties is measured on the principle of good faith and hence plays a role in the elaboration of the courts on the true intent of the parties.

The conclusion of a Swiss court explains the interaction between article 8 and good faith.[725] A company and its subsidiary bought for many years granular plastic from a French seller. The subsidiary company was incorporated into the overall structure of the parent company and renamed. Employees of the old subsidiary still ordered material under the old company name. The new company, which in effect was the buyer, claimed that it was not liable. The court ruled that article 7 concerning good faith had to be applied and in all the circumstances, pursuant to article 8, the buyer was liable to pay for the purchases.[726] The reason given was that the buyer could not have been unaware of the seller's intentions.

An important area where the intention of the parties is not always easily to ascertain is found in the inclusion of general terms and conditions into contracts. Schlechtriem in a lecture pointed out that:

> *[As the CISG lacks] provisions on the control on standard form contracts, I think the one tool that may come to grips with standard contracts is Art. 8(2). It enables the court to ignore fine print, which is contradictory, vague, or difficult to understand by using a "reasonable person similarly situated" standard. And it is also possible that fine print in a language which under normal circumstances could not be expected to be understood by the other party will not determine the content of the contract."*[727]

Schlechtriem alludes to two points namely the treatment of standard form contracts and the choice of a foreign language.

The mere fact that by mutual consent a foreign language has been chosen does not in itself bring article 8(2) into play. It is settled law that there is an obligation on the other party to have the contract translated. If in doubt, the principle of good faith would dictate that the party in question would ask for clarifications from the other party or gain understanding through expert translations. A party who agrees to contract in a particular language is bound generally not only by the standard form terms but also by an expectation that the language is understood.[728]

Schlechtriem also argues that a term in a foreign language cannot necessarily be relied upon if the choice of communicating a term in a foreign language is unilateral.[729] Again, the principle of good faith as well as the reasonable person test pursuant to article 8(3) will determine this issue.

As far as the inclusion and treatment of standard terms and conditions is concerned, the matter appears to be settled. The Oberlandesgericht [Appellate Court] Zweibrücken confirmed the views held by Schlechtriem. It noted that the CISG does not provide specific requirements for the incorporation of standard form contracts. "Whether such terms become part of the contract must be determined by the application of article 8."[730] The court tested the subjective intent first and found that there were no negotiations, which could have helped to establish the subjective intent. Recourse to article 8(3) also established that there was no prevailing customary practice. Therefore the objective intent could not be established. As far as the validity of the exemption clause was concerned the court relied on article 4 and decided the matter by having recourse to national law.[731]

A decision by the Kantonsgericht [District Court] Freiburg is relevant. It stated that the rules in article 8 coincide with corresponding principles under German and Swiss domestic law.[732] As seen above this observation is correct and the court noted that the rules correspond to "principles" and not "rules" of domestic law. If we assume that the choice of words was deliberate it would indicate that the court was aware of the autonomous mandate of the CISG. However the court further noted that if the subjective or objective intent of the parties cannot be established "the intent of the parties has to be elicited in accordance with the principles of Swiss domestic law."[733] This is rather puzzling. If, on one hand, the principles of the CISG and Swiss domestic law correspond with each other, one principle cannot solve the problem if the other one cannot. Hopefully, the possibility of a problem in translation contributed to such a mistake. One would assume that the court said that as no intent could be established, the principles of validity, which are not governed within the CISG, make it mandatory to invoke Swiss law.

What then is the mandate of article 8? The Landgericht [District Court] Heilbronn pointed to the fact that article 8 is not only concerned with communications. The question is what can a reasonable person in the same circumstances expect to have understood and hence how do they interpret the communication.[734] The

Landgericht [District Court] Zwickau put it similarly by pointing out that in a communication between parties "the wording was clear and unambiguous and furthermore the meaning given to the words corresponds with those a 'reasonable person' would attribute to those words."[735] Such intent is in line with the desire of the CISG to keep the contract afoot as long as there is a possibility to perform contractual obligations. This principle conforms with the attempt of uniform laws to overcome problems of distance, expense and time to have a contract terminated where in fact a contract can be executed if the principle of good faith is applied.

Article 8 seeks to direct the courts or tribunals to take into consideration the actual intention of the parties. This is manifest in article 8(1) where it is stated that "statements made by and other conduct of a party are to be interpreted according to his intent."[736] Failing this, the court will establish the objective intent of the parties pursuant to article 8(2) Such mandates do not pose any problems as seen by the above jurisprudence.

Article 8(3) however does need further careful analysis. This article has recognized that to establish the intent of a party certain tools or events must be consulted such as the negotiations, any practices the parties may have established, usage as well as subsequent conduct of the parties.[737] The intention of this article is to find out the state of mind or the belief of the parties in relation to the execution of their contractual obligations. The ICC Court of Arbitration correctly connected article 8(1) to 8(3).

> *"When parties have concluded a contract ... the agreement of the parties has to be analyzed in first instance by interpreting the wording of the contract itself. According to art. 8(3) ... usages of trade constitute guidelines only to establish what a reasonable person had to understand in view of the wording of the contract."*[738]

8. Article 9

Through the application of establishing usage, article 8 is linked to article 9 which states that:

> *"(1) The parties are bound by any usage to which they have agreed and by any practices, which they have established between themselves.*
>
> *"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."*[739]

Usage is defined in two ways. Article 9(1) points to the usage and practices which parties have established between themselves which means practices which will influence a parties perception of the other's intent. The court in Societé Harper Robinson v Societé Internationale de Maintenance et de Réalisations Industrielles (SMRI) et autres [740] took into consideration that the seller had been supplying the buyer for a long time without showing any concerns for his insolvency. Therefore, the other firm established pursuant to article 9 a long-standing practice.[741] There is, however, an important overlap between article 8(1) and article 9. Article 8 regulates "other conduct" whereas article 9 directs the court to take usage into consideration. Usage denotes an ongoing activity thus creating a habit whereas conduct is linked to a "once only" occurrence. It can be argued that the difference between usage and conduct is only a semantic one and is of no practical value. This may be so but it is still necessary to appreciate that there is such a difference, despite the fact that the outcome does not differ.

To illustrate this point, a German decision is relevant.[742] The seller entered into negotiations over the lack of conformity and discussions were held over the amount of damages and the manner in which damages had to be paid. These negotiations were conducted over a period of 15 months and the buyer did not reserve the right to rely on article 38 and 39 of the CISG. The court relied on article 8 to note that the sellers' conduct could only indicate that he would not at a later stage rely in his defense based on articles 38 and 39.[743]

The Supreme Court of Austria combined the requirements of article 8 with article 9 and illustrated how that particular relationship works. The parties initially intended to enter into a "basic skeleton agreement" containing the general conditions, which would constitute the trade usage between the parties.[744] However they could not

reach an agreement. Nevertheless, a singular contract went ahead with the conditions that a letter of credit had to be obtained and that the goods were not to be sold in the "Benelux" countries.[745] The court made the observation in line with established jurisprudence that the CISG does not have special provisions regulating the inclusion of general conditions of sale. Article 8 will rule on this matter but the notice

> *"to include general conditions of sale which are not part of the offer, has to be so explicit that a reasonable prudent person from the perspective of the recipient can understand this notice."*[746]

Deviations from this observation are possible if the parties have developed customs between themselves, which implicitly explain the intent of the parties. The question arose whether the conditions in the attempted negotiations of a skeleton contact apply to the single contract in question. The court, relying on article 8 and 9, rejected such a conclusion. The mere allusion to "usual conditions" does not mean that the buyer was referring to the general conditions of sale of the seller which were discussed in the framework of the skeleton contract which was ultimately not agreed upon.[747] The buyer therefore could not know and it could not be assumed that he ought to know that the seller intended to make his conditions the basis for subsequent contracts. Furthermore, pursuant to article 9 there were no customary practices evident between the buyer and the seller, which could shed any light on the true intent of the parties.

So far attention has been focused on the application of article 8 and 9 but it must be said that the sophisticated grasp of international uniform laws does not end with an understanding of applicable articles. An understanding of the purpose of the CISG as a whole will also influence any outcomes. The focal point is the contractual obligations of the parties. In sum, we need to be reminded that:

> *"... where the provisions of the contract and of [custom] do not provide specific answers, the rules of the Convention and in a subordinate way, rules of its underlying principles and, even in a more subordinate way, the rules of [domestic] law are determining for defining the mutual obligations of the parties based on their contract."*[748]

The above observation demonstrates a sophisticated understanding of the methodology required to interpret and apply international instruments such as the CISG. It must be added that "under the rules of the Convention," article 7 is the most important one since without it, the Convention could not stand uniform. The treaties and declarations of the EU do not contain interpretational instruments but rather rely on a supranational court, the European Court of Justice. As the CISG has no such body, reliance on article 7 must take on that function. Article 7 arguably goes beyond a mere instrument of interpretation - it is actually taking on metaphorically the mantle of a supranational tribunal or court.

The hypothesis of this thesis implicitly includes such a notion and it appears that courts and tribunals have viewed the importance of article 7 and 8 in such a light. This statement is based on the jurisprudence available, which supports the thesis that courts interpret the CISG uniformly without taking recourse to domestic law. Mistakes in the application of the CISG are a result of inexperience and appear in cases which require a more sophisticated approach. In simple cases, there is no deviation from the hypothesis of this thesis. In support of this statement, we need only to look at the jurisprudence of the first cases in each country to understand that the judiciary is not "tuned in" to the international methodology. Canada, Australia and the United States provide excellent case studies. To illustrate this point the parol evidence rule will be discussed below in detail.

9. Parol Evidence Rule

The first observation of the parol evidence rule is that there is no uniform international rule in existence. The rule varies between Australia and the Unites States and even within the United States it is not uniform. In the United States, it has both statutory and varied common law manifestations and is either expressed in the Uniform Commercial Code article 2 or the Restatement (Second) of Contracts.[749] These facts alone appear to justify the argument that it is difficult to maintain that the parol evidence rule conforms to the international uniformity rule of article 7. More to the point, such observations would lead to the conclusion that unified laws should replace the parol evidence rule.

The parol evidence rule in identifying the content of a written contract determines which evidence is applicable in the circumstances. "The Corbin approach instructed courts to look at all relevant evidence surrounding the agreement to decide whether the parties actually intended the writing to be complete and exclusive."[750] The crucial point, it appears, is that the courts must determine whether the writing is a partial or a complete integration or statement of the contract.

a. Developments in the United States Courts

In Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr. Inc.[751] (Beijing Metals), the court presumed that the writing evidencing the contract was intended to be a complete and final statement of the contract. This decision contradicted the one reached in Filanto SpA v. Chilewich Int'l Corp.[752] One of the parties in Beijing Metals claimed that they were also relying on oral terms that were not included in the agreement. The parol evidence rule would lead to the conclusion that the oral terms, even if proven, are not applicable and only the written contract is of significance. The Beijing Metals court invoked the parol evidence rule ignoring article 8(3). MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.[753] (MCC-Marble) took a completely different view. MCC-Marble's opinion

> *"reveals a court striving to transcend its background in domestic U.S. law, energetic in pursuing an international perspective on the Convention's meaning, and informed, thoughtful and coherent in its grasp of CISG provisions and their meaning."*[754]

The court stated that, "contrary to the result of the objective approach which is familiar practice in United States courts,"[755] the CISG appears to permit a "substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent."[756] The court rejected the Beijing Metals opinion as not being particularly persuasive. In MCC-Marble, the judge made it perfectly clear that article 8(3) "trumps" the parole evidence rule. The clearest indication is expressed in the following statement:

> *"Moreover, article 8(3) of the CISG expressly directs courts to give due consideration ... to all relevant circumstances of the case including the negotiations ... to determine the intent of the parties. ... article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent."*[757]

The jurisprudence of article 8 has shown that most cases need determination in relation to standard form contracts, lack of knowledge of foreign language, silence and the elucidation of subjective or objective intent of the parties. MCC-Marble exhibits all the problems except silence. To speculate as to the outcome in MCC-Marble, taking the international jurisprudence into consideration, it is foreseeable that foreign language problems are dismissed as not relevant but that the negotiations would be treated as establishing subjective intent. Failing that, objective intent would need to be established.

Before MCC-Marble was decided, an interesting attempt was made to show that the parol evidence rule actually "is essentially an expression of the CISG article 8 and serves the international uniformity goal of article 7."[758] If what Moore contend is true then indeed the parol evidence rule should be applied. Furthermore MCC-Marble would be incorrect in its ruling. However, the contentions have not only been rejected by scholars, but the court in MCC-Marble itself noted that the contentions as expressed by Moore are incorrect. The argument was that the parol evidence rule serves and complies with international uniformity. It has been weakened by Moore in his statement that "unfortunately the United States version of the rule is not uniform."[759] It is irrelevant whether the United States' version of the parol evidence rule is the only one which is not uniform. The fact remains the same, namely that the parol uniform rule is not internationally uniform and hence is not fulfilling the mandate of article 7. What is meant by this argument is that the parol evidence rule due to its diversity is not and cannot be considered as being a universally acceptable principle. As stated previously, principles that are universally acceptable are "a-national" that is not belonging to a defined system of law but used by all. As such, uniformity is of the essence.

Another point to be considered is what happens if a particular domestic law does not recognize the parol evidence rule within its domestic system? It is obvious that international uniformity cannot be achieved. Such an argument

presupposes that the parol evidence rule is different from the rule prescribed in article 8(3). It can be taken as a given and will be explained further below that there is a difference. Moore notes in his argument that article 8(3) admits extrinsic evidence consistent with the parol evidence rule. However, he goes on to argue that alternatively, the parol evidence issues are not expressly settled but as a gap filling conform with general principles of the CISG.[760] The question is how can there be two alternatives to the same debate, which supposedly needs to confirm uniformity in the application of the CISG? In the end, Moore is defeated by the simple fact that "a wide number of other States party to the CISG have rejected the rule in their domestic jurisdiction."[761] Moore is only left with one argument, that there is a gap in article 8(3) which needs filling, and the CISG allows the application of domestic law to fill such a gap. In this case, parol evidence can fill that gap. Moore linked that argument to the words of "due consideration" within article 8(3). However, the argument is false as the CISG needs to be interpreted within the "Four Corners" of the Convention and not with domestic interpretative tools in mind. Such a tool being the literal interpretation. If we read "due consideration" within the context of the CISG many linkages to principles can be discovered such as good faith and the "reasonable person test" embedded within article 8 itself.

b. The Court Ruling in MCC-Marble

MCC-Marble is important because most of the contentious issues governed in article 8 had to be ruled on in this case. In brief, the President of MCC-Marble negotiated at a trade fair with D'Agostino. The negotiations took place in Italian with the help of a translator, as the American buyer did not speak any Italian. The documentation included the standard form clauses in Italian. The buyer did not request a translation and signed the contract. The signing took place after the parties agreed orally on price, quantity and other key terms. Printed in Italian beneath the signature of the buyer was a clause stating that the buyer was aware and approved of the clauses printed on the reverse side of the order form. In the months that followed MCC-Marble submitted several orders using the Italian order form.

The court predictably dispensed with the argument of signing a document containing terms in a foreign language by stating:

> *"We find it nothing short of astounding that an individual ... would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the position that parties who sign contracts will be bound by them regardless of whether they have read them or understood them."*[762]

This opinion mirrors those in international jurisprudence as well as academic writing. It appears that the above views are settled law not only in the CISG but in all other legal systems as well.

The court noted and agreed with the magistrate judge's report that "no interpretation of the contract's terms could support the buyers position."[763] However the Circuit Judge correctly pointed out that the CISG allows an inquiry into the parties' subjective intent even if the parties did not "engage in any objectively ascertainable means of registering this intent."[764] The whole purpose of article 8 in simple terms can be narrowed down to the above observations. It follows therefore that there has to be a difference between domestic law and international law in ascertaining the intent of the parties.

The MCC-Marble decision is also remarkable as the Circuit Judge recognized the importance of the CISG and its implementation by courts.

> *"One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. Courts applying the CISG cannot, therefore upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of [its articles]."*[765]

It is obvious that the mandate of article 7 has been recognized. Such views support the argument that courts do take note of the mandate of article 7 rather than take recourse to domestic law. The fact that some errors will be noted such as in Beijing Metals is inevitable and can be viewed as "teething problems" in the introduction of a law which does require some change of one's "mind set" and training.

The international legal methodology, which is necessary to interpret the CISG has been recognized and MCC-Marble certainly did not fall into the trap of Delchi Carriers, which despite proclaiming to follow international methodology quoted exclusively common law authorities.[766] In this regard, it is significant that the court also consulted and cited treaties by scholars from outside the Anglo-American tradition.[767] It is also interesting to observe that the court in a footnote noted that they also searched for foreign case law. In so doing they also noted that:

> *"the parties have not cited us any persuasive authority from the courts of other States Party to the CISG. Our own research uncovered a promising source for such a decision at [an internet site]."*[768]

This decision therefore forms a solid foundation to further interpretations of the CISG in the Anglo-American legal tradition as it is built on the recognition of the importance of article 7. It must be acknowledged that it is not easy for a court trained and indoctrinated by domestic law to suddenly embrace a new methodology not only in an interpretive sense but also in substantive law. The fact that under article 8(1) a shared subjective intent is binding despite the fact that the parties signed documents, which show the contrary intent. Furthermore, such subjective intent is not "blocked by that ancient pillar of common law tradition, the parol evidence rule."[769] However, it should also be noted that the parol evidence rule is merely a particular way of ensuring that the parties' intentions as stated in or as elicited from the written contract are binding.

Article 8(3) is an expression of party autonomy pursuant to article 6. If an agreement contains a properly drafted merger clause stating that the written contract contains all prior agreements and understandings article 8(3) would not be applicable as the intent of the parties is a subjective one and hence contained in article 8(1).

The court in MCC-Marble raised an important point about the limits of the CISG that the Convention is only applicable to rule on substantive questions of law but not on procedural ones. "[A] Federal district court cannot simply apply the parol evidence rule as a procedural matter ... regardless of the source of the substantive rule of decision."[770]

CHAPTER 8

CONCLUSION

Overview

- The aim of this chapter is to set out the methodology of interpretation of the CISG. In particular the following rules have been established:
    - That *Fothergill v Monarch Airlines* as a precedent has made it mandatory for domestic courts to interpret international trade laws free from domestic principles.
    - That the travaux préparatoire are viewed with caution as they have only historical significance.
    - That the general rule of interpretation considers the mandate of the international character of the Convention and therefore interprets the CISG only within its Four Corners.
    - That the rule regarding the purpose of good faith is considered in two ways - as a mental construct and as a principle defined by particular events.
    - That the intent of the parties is considered in a subjective as well as an objective light and hence will take precedence over domestic rules which are not compatible with article 8 and 9.

- That gaps are filled on the basis that general principles are given clear preference over domestic law. Recourse to domestic law is taken only if the CISG is either silent or expressly allows its influence.
- That the relationship between the CISG and national laws is not only dictated by article 7(2) but by interaction of all articles within the CISG.

1. Introduction

This thesis demonstrates that the CISG is a successful international instrument, which has achieved uniformity in the application of international sales laws. A key factor in the need to develop uniform international laws is globalization. Technology transfers, the amalgamation of regions and countries into common markets, the demographic shift between old technology countries and new emerging markets as well as the increasing cost differentiation between global industries and national industries have been key points in globalization.

Attempts at creating an international sales law can be traced back to the early 1930's when Ernst Rabel and other academics and legal professionals created the first serious model of an international sales law. By 1935, Rabel already recognized that an international sales law, or any international law for that matter, will only be successful if it is applied uniformly. Such a mandate is of importance as otherwise the essential criterion for any successful law, namely consistency, could be lost. Rabel foresaw such a problem and introduced article 11 into the Model Law which states:

> *"Questions which this [model] law fails to govern expressly - and recourse to domestic law is not explicitly envisaged - courts are to settle this questions in conformity with the general principles on which this [model] law is based."*[771]

In his explanations, Rabel commented that article 11 is considered to be of importance to fill gaps. The greatest danger to international uniformity comes from deviation of interpretation by the courts insofar as their training would lead them to fill gaps according to domestic laws.[772] It is of interest to note that Rabel did not completely rule out the creation of a supranational court. He remarked that national courts are not completely essential to maintain uniformity, however absolutely essential are common principles and a common interpretation.[773] If Rabel's views are compared with the ones expressed in the CISG important lessons can be learned. Recurring themes can be discovered, which are drawn by analogy from various domestic laws. These themes, or principles, were labeled by Rabel as "principes généraux," that is general principles. These principles are "ageless" and in a true sense fundamental principles. It is therefore not surprising to find these general principles embodied in the CISG and specifically in article 7. Fundamental principles therefore are timeless as they are not linked to specific values or systems but are general in nature.

To achieve this goal, the CISG in its structure is a self-executing treaty that is a Convention:

> *"where legal rules arising from the Convention are open for immediate application by the national judges and living persons in a Contracting State are entitled to assert their rights or demand fulfillment of another person's duty by referring directly to the legal rules of the treaty."*[774]

It must be recognized that national judges apply the CISG. The greatest impediment to uniformity therefore is the possible recourse to domestic laws and principles as well as to functionally similar principles found within domestic law. The hypothesis of this work looks at this problem. The "keystone" to achieving uniformity and hence avoid ethnocentricity is article 7 which introduced the necessary principles by which a successful international interpretation of the CISG can be achieved. Without a full understanding and implementation of concepts contained in article 7, the CISG could not claim to be a uniform international law. Karollus in a different way pointed to the CISG as being: "well on the way to becoming the Magna Carta of international trade."[775] It is important to restate the hypothesis.

> *This thesis seeks to show that tribunals and courts will look for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it rather than take recourse to domestic law. A non-application of rules contained within the "Four Corners" is an error of interpretation rather than an*

unwillingness to depart from domestic laws.

If the hypothesis is proven to be false, the claim of the CISG to be truly an international sales law would be equally false. However, in sum it can be argued that the hypothesis has been shown to be correct.

The CISG has introduced article 7, the interpretative article that embodies many of the "principes généraux". Obviously this is not the only way to achieve consistency and uniformity. An international court could also achieve such a mandate as seen in Europe. The EU has opted for the Court of Justice instead of incorporating an interpretative article into the treaty. It can be argued that such a solution would not have been acceptable to States as part of ratifying a treaty or Convention. It would mean that judicial domestic independence would need to be given up to an international body. There are views advanced that in practice this may eventually be the case, however, one cannot ignore political reality, which is intrinsically linked to legal issues. For example, the Swiss decision not to join the EU was based on the fact that legal independence would be lost. Only when bilateral agreements between the Swiss government and the EU were signed has there been any progress in the movement towards an integration of Switzerland into the EU. The agreements indicate that Switzerland still has legal independence.

Jurisprudence has shown that uniformity has been achieved in the application of the CISG by various domestic courts. It can be argued that a supranational court is not needed. Article 7 is the reason why domestic courts are interpreting the CISG uniformly and without recourse to domestic law and its associated methodology.

It has long been accepted that "mere textual uniformity ... is insufficient"[776] as interpretation must have a common philosophical base or objectives, which cannot be expressed in the text itself but are reflected in the preamble.

Two important objectives are contained in the preamble and should to be taken into consideration when applying the CISG. First the importance of developing "international trade on the basis of equality and mutual benefit"[777] which not only will promote friendly relations between States but also reduce legal uncertainties. This is expressed in the fact that the choice of law question is not a "parachute drop into darkness" as the CISG is truly a neutral law favoring neither party. Secondly, the adoption of uniform rules contributes "to the removal of legal barriers in international trade."[778] This objective is achieved by the very act of ratifying the Convention and hence replacing domestic law with a uniform international one, thus assisting in achieving predictability and removing legal uncertainties.

What then is the importance of article 7 as an interpretative tool? Article 7 regulates the method by which the CISG needs to be applied internationally. The practical solution to an international uniform application of the CISG is by means of the "interpretation ladder". As noted above, functionally similar principles and methods must not be used, otherwise there is a real danger of the loss of international uniformity. There are many examples mainly in common law countries where the courts did not fully understand this mandate. A good illustrative example is Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd where the judge commented "case law interpreting article 2 of the Uniform Commercial Code may also be used to interpret the CISG where the provisions in each statute contain similar language."[779] Case law illustrating article 2 of the UCC captures the development in the United States but not in any other countries. It follows logically that using such case law may not contribute usefully to a uniform international jurisprudence.

An additional problem of international law is to overcome not only the meaning attributable to words in different social and legal systems but also the effect of translation. Because of distinct cultural, linguistic and social limitations any legal community will translate any text within that particular social reality. This can be a threat to the uniform application of the CISG. Kastely states:

> *"[W]ords used in one language . . . carry implications different from those in another ...The terms 'offer' and "acceptance" provide powerful examples of this. In English these words carry a rich heritage of legal doctrine, and their equivalents in the Western European languages have similar depth. . . Yet the translations of these words used in the other official versions, such as Chinese and Arabic, do not carry similar implications. . ."*[780]

It can be argued that there is simply no answer to the problem of words and the effect of translation on their meaning. However such a view does not offer solutions where they are needed and is overtly pessimistic.

Any court confronted with transnational issues must take into consideration that the drafters of the CISG attempted to solve this particular problem by consciously "rooting out" words with domestic legal connotations in favor of non-legal earthy words to refer to physical acts. Certain languages have been stipulated as being official languages namely Arabic, Chinese, English, French, Russian and Spanish.

The impact of these decisions on any interpretation is that words cannot be given a literal meaning nor could a meaning of these words be based on domestic law. As far as different languages are concerned, one has to keep in mind that the official languages are given priority whereas the "other languages" carry only secondary significance. A court faced with a problem of translation needs to look at official languages and through a comparative analysis come to a conclusion as to the "correct" text. If the problem is still not resolved recourse to article 33 of the Vienna Convention on Treaties will show that the intention of the final diplomatic conference as expressed in the *Travaux préparatoires* is to be applied. As that conference presented its final text in French and English these two languages must be given priority.

An example quoted in Chapter 1 can be used to illustrate the above. In question is the word "substantial" as used in article 3. It was compared with the French as well as the German translations. French being an official language has more than persuasive authority whereas German - not being an official language - would at best be persuasive. However it is important to compare unclear words in different languages to understand the true meaning of crucial expressions within the CISG.

Terms such as "title of goods" are not used in the CISG as many systems and cultures are not aware of such terms or their meaning. Another example in the simplification of words is the term "warranty" which is not used in the CISG or PICC. Quality and therefore warranties are regulated in article 35 the counterpart of UCC 2-313. As such the CISG "determines quality by what the contract requires and provides in article 35(2)."[781]

Hence the CISG sought to use "earthy" words devoid of legalistic meaning. Interpretation of the CISG should and can be undertaken by giving the word the ordinary meaning attributable through the common English language and not through meanings derived using legal concepts. The approach taken by the CISG avoids many of the complexities evidenced in domestic law. In comparison with article 2 UCC and article 35, Speidel noted that "the power to reach these agreements [as set out in article 2 UCC but not expressly noted in the CISG] exists, it is just not particularized."[782]

Domestic courts in general have recognized that international conventions cannot be interpreted with domestic principles or meanings in mind. In common law, precedent has been created by Fothergill v. Monarch Airlines where the most important ratio, as expressed by Lord Diplock states:

> *"It should be interpreted ... unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation ... [as] it is neither couched in the Conventional English legislative idiom nor designed to be construed exclusively by English judges."*[783]

This precedent indicates that English law and legislative idioms are not to be used and therefore article 7 will supply the method required to implement and interpret the CISG.

Consulting the *Travaux préparatoires* of article 7, it becomes clear that this article has been a controversial one as it represents rather a "least disliked" option than a "liked one". However, looking at a more contemporary use of article 7 it is becoming clear that the decisions of the original drafters of the CISG have been vindicated. Article 7 appears to have become the blue print for interpretative articles in many conventions and treaties.

Some conventions and drafts of conventions have introduced parts of article 7 into their regime of interpretation such as the Factoring Convention and the Leasing Convention. The proposed Hague Convention on Jurisdiction and Enforcement of Judgments also copied article 7(1) in parts but added in its article 38 that the courts of each

State shall "take due account of the case law of other Contracting States."[784] The standing of foreign court decisions is a point debated by many scholars in relation to the CISG. It is wrongly noted as a criticism of article 7(1). In Ferrari's view, "a problem ... often arises in connection with article 7(1) of the CISG; that of the value to attribute to foreign court decisions and arbitral awards."[785] This thesis demonstrates that courts and tribunals have successfully overcome the perceived problem that "legal writers could even think of asking for the creation of a supranational stare decisis"[786] by attributing persuasive standing to foreign case law. The Tribunale di Vigevano, which referred to no fewer than 42 foreign cases in support of its decision, demonstrated successfully that a de facto supranational or stare decisis is in existence.[787] Tribunale de Vigevano is not an isolated case as demonstrated by the Tribunale di Rimini.[788] Though one has to be careful to use the term of stare decisis as it is not possible, nor desirable to follow in an international sense precedent.

Comity is the term suggested by Professor Kritzer, thinking in terms of a global jurisconsultorium similar to the domestic jurisconsultorium in effect for the Uniform Commercial Code in the United States. Flechtner and Hackney are in accord. Flechtner states that article 7(1) of the CISG

> *"[p]roperly understood ... requires a process or methodology involving awareness of ... interpretations of the CISG from outside one's own legal culture - an approach not unlike the treatment U.S. courts accord decisions of other jurisdictions when applying the Uniform Commercial Code."*[789]

Hackney states that:

> *"when interpreting the Convention, a court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries" and that "[t]he use in the U.S. of case law to interpret the Uniform Commercial Code (UCC) can serve as a model for courts using case law to interpret the Convention. No state within the U.S. is bound by an interpretation of the UCC from another state, but the interpretations of the UCC from other jurisdictions are extremely persuasive. While this method does not achieve exact uniformity, the U.S. has achieved a level of uniformity of sales law that is useful to companies transacting business in many states."*[790]

This is similar to the approach advocated by Jürgen Schwarze in his comments on "The Role of the European Court of Justice (ECJ) in the Interpretation of Uniform Law among the Member States of the European Communities". When evaluating decisions of other courts, he states that the "integrative force of a judgment" should be "based on the persuasive reasoning which the decisions of the court bring to bear on the problem at hand."[791]

Other Conventions such as the Draft Convention on Assignment in Receivables Financing have incorporated article 7(1) in total which is considered to be a positive development as it will create "one international uniform commercial law through a uniform methodology and, where possible, a body of uniform concepts."[792] Interestingly, Ferrari criticized this approach. He feels that the interpretative articles ought to include affirmatively that the preamble should be taken into consideration when interpreting the Convention as a whole.[793] It is difficult to ague against such a proposition. The fact remains that the CISG did not include the preamble into the interpretative article. It is therefore left to courts and tribunals to keep the objectives of the CISG in mind when engaging in interpretation of the CISG. The objectives of the preamble are not lost as a tool to interpretation merely because they are not affirmatively included into the interpretative article.

However, in the interpretation of provisions such as article 7 an exclusively textual reference is not appropriate. If it were appropriate, literal interpretation of the Convention could be an acceptable tool of interpretation. This would lead to a "literal deconstruction," a phrase coined by Honnold. In addition to the text of article 7, four other tools can be taken into consideration to successfully apply and interpret the CISG.

The Preamble, as indicated above, has an impact on the interpretation as it strengthens the internationality and uniformity of an application of the CISG in order to promote friendly relations amongst States through equality and mutual benefit.[794]

Travaux préparatoires should also to be taken into consideration if there is doubt as to the intention of the

promoters to the CISG. Such aids to interpretation have found their way into domestic law via the Vienna Convention on Treaties as well as through Fothergill v Monarch Airlines. It is now well established that domestic courts have authority in interpreting Conventions to use *Travaux préparatoires*.[795] However this thesis has also indicated that it is not always appropriate to use these documents just because there is doubt as to the exact meaning of certain principles. They reflect the views taken by the participants in drafting the CISG but circumstances change. This necessitates a different view of established principles of law. In controversial articles, the views expressed in the *Travaux préparatoires* often do not reflect the consensus view but rather the views of individuals. The consensus of all the individual views is the article itself. It is therefore argued that *Travaux préparatoires* must only be given at best persuasive status. Otherwise the Convention as a whole would be a document frozen in time and would very quickly lose its relevance in today's economic environment. This argument is supported by the preamble, which clearly states that legal barriers in international trade must be removed and the development of international trade must be promoted. Such a task is only achievable with a relevant and up-to-date Convention.

The next tool to be taken into consideration is the impact of domestic law on the application of the CISG. This is perhaps a rather controversial view as it is indisputable that there can be no recourse to domestic laws and functionally similar domestic principles. However, what is advanced is the argument that the socialization process of understanding these principles may by analogy be applied. This is especially important when the concept is arguably controversial such as the meaning and application of good faith. Support for such a view is found in the fact that the CISG as noted in the Preamble has taken "into account the different social, economic and legal systems."[796] In other words the CISG is not an entirely new system of law. Its uniqueness lies in the fact that the CISG successfully married principles found in all systems of law into one coherent unit.

Restatements are a further resource for interpretative tools. The most important restatements of contract law are PICC and PECL. Despite its closeness - or because of it - the temptation to use principles founded on these two model laws is problematic. The restatements had scope to use the CISG as their own foundation and build on its shortcomings. Significantly the restatements are not solely for the sale of goods but for contracts, which widens their application considerably. A further reason for the improvement is that the promoters of the restatements were eminent legal academics, who could build on the CISG free from political constraints. The restatements are useful tools to realize where boundaries are to be set in relation to interpretation of concepts where the CISG is silent or where the issues are not clearly defined.

2. Rules as to Interpretation

The promoters of the Convention were aware of two problems as to the interpretation of the CISG: first, the effect different languages can have on the meanings of principles; and secondly, the choice of words to be included into the CISG. The solution is that any words which are ambiguous or unclear, can be looked at in another language as long as the translation is an official one. The interpreter must be aware that words chosen by the promoters are not to be taken as having a meaning "rooted" in domestic law. With the above in mind, our attention can now be directed to an interpretation of the Convention as expressed in article 7.

Broadly speaking, interpretation of the CISG is regulated on two levels, namely the Convention as a whole, and the relationship, or the contractual obligations, between the two parties. Article 7 contains elements, which govern both aspects, whereas article 8 only governs the relationship between the two parties. The relationship between parties is also affected by article 9 which imports customs either externally derived or internally established into the sphere of the Convention.

Another point needs to be kept in mind. Article 7 not only regulates the interpretation on two levels as described above, but also contains basically three different rules:[797] first, a general rule as to interpretation; secondly, a rule regarding filling of gaps and thirdly a rule regarding the relationship between the CISG and national law.

a. General Rule as to Interpretation

The CISG has achieved its mandate that the Convention must be applied autonomously, that is, without reference to domestic laws and similar principles. However this mandate describes the policy of the interpretation, not

simply the goals or principles on which the interpretation is based. The key words to formulating the principles can be summarized under two headings, the "International Character of the Convention" and "Observance of Good Faith in International Trade."

The principle of the international character of the Convention does not pose any problems any more. In the "infancy" of the CISG, many domestic courts were certainly not aware of the international mandate. Two major problems emerged which now seem to have been overcome. The first problem is to resort to domestic law to solve functionally similar problems. The second problem is one of choice of law

The first problem is illustrated in *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd* (*Calzaturificio*) where the judge commented that "case law interpreting article 2 of the Uniform Commercial Code may also be used to interpret the CISG where the provisions in each statute contain similar language."[798]

As far as the choice of law is concerned, only a few courts still view a choice of a domestic court as in and of itself an implied exclusion of the CISG.[799] This thesis argues that such a view is not correct as the CISG as part of domestic law overrides all domestic laws, which are in conflict with the provisions of the CISG. Assante Technologies v PMC-Sierra has supported the above view and can now be taken as being the leading U.S. case in relation to article 1.

b. A Rule Regarding the Purpose of Good Faith

Observance of good faith in international trade posed definitional problems. The first problem is that the CISG does not define good faith. This thesis maintains that it is permissible to view principles in domestic law and by analogy apply the socialization process through which these principles were derived. It is not a transplantation of substantive law or principles into the CISG. It is a process through which a certain decision can be reached. Once the socialization process has been isolated, it can be applied either directly or through analogy to any new sets of principles as it is a methodology of application not an application of principles of substantive issues of laws.

Domestic law has pointed to the existence of good faith as operating on two levels: first, as a subjective view which is expressed as a state of mind; and secondly, as an objective construction which acquires substance from the particular events that take place and to which it is applied."[800] However as Finn J. noted in South Sydney District Rugby League Football Club Ltd v. News Ltd: [801]

> *"Australian law has not yet committed itself unqualifiedly to the proposition that every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement.*"

This can be contrasted with the CISG where good faith has been established as a principle to not only regulate the interpretation of the Convention but also as a principle to be enforced in dealings between parties. This thesis argues that the approach or methodology taken by domestic courts appears to be an internationally accepted one. It could be argued that good faith is becoming an international custom. Hence, not only by analogy can the socialization process be transplanted, but through article 9 good faith must be applied to the CISG. As article 9 is linked to article 8, parties must negotiate in good faith. The intent of the parties is the linkage between articles 7, 8 and 9 and good faith is thus regulating the behavior and conduct of parties to each other.

The jurisprudence confirms that, as far as the contract performance of parties is concerned, there is no debate that courts are aware of the need to invoke good faith. As an example the court in Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc. stated that:

> *"The CISG, intended to ensure the observance of good faith in international trade, CISG Art.7(1), embodies a liberal approach to contract formation and interpretation, and a strong preference for enforcing obligations and representations customarily relied upon by others in the industry."*[802]

The enforcement of good faith is a different problem. Punitive actions under the principle of good faith are not within the mandate of he CISG as seen in Bonaventure.[803] However, this should not be confused with a clear mandate to interpret refusal to fulfill contractual obligations with good faith in mind. Despite technically correct

legal grounds, good faith will take precedence. Lando & Beale used examples to explain good faith as applied in PECL, which are equally applicable in the CISG.[804] The following representative example illustrates the point.

> In a contract the provision provides that legal action must be commenced within two years from final performance. A wants to sue B and B on several occasions assures A that there is no concern at all and that the matter will be investigated. After the two-year limit, A finally loses patience and wishes to sue B; B can no longer rely on the time limit, as he acted in bad faith.[805]

Good faith is a powerful tool in the sale of goods to create confidence in international sales that the intentions of the parties are respected and enforced. For that particular purpose, the CISG also introduced article 8 which not only introduces the concept of objective intent but also subjective intent.

c. A Rule Regarding the Intent of Parties

Article 8 introduces big changes to domestic principles and law. These changes affect common law countries more than civil law ones. The common law countries must begin to understand the concept of subjective intent, which is claimed to be contrary to domestic legal practices. In the United States, it is now well established that the parol evidence rule is "trumped" by article 8. It certainly makes the rule as to what evidence is applicable clearer and more concise by inquiring into the intent of the parties and not just merely relying on a contract as evidenced in writing. In international trade, a clear and simple rule is of the essence. As shown above, the formalistic approach of the CISG allows a conclusion to be reached in a clear and more predictable manner. Such a methodology is justified in international trade where finality in a simple form is important. Cost considerations of the "tyranny of distance" require simple solutions. In domestic sales, on the other hand, rules must "capture the complex developments [of domestic law] over [many] years."[806] If one would look at the jurisprudence in common law on the principle of mistake and the parol evidence, it is no wonder that the international business community has great difficulty understanding the "complex developments" in this area. International trade in a global environment cannot function effectively without predictable and clear rules. MCC-Marble illustrates this point well. Despite the signing of a contract, the clauses contained within that written document were not considered to be binding to the extent that the parties could demonstrate that a contrary subjective intent was established. While establishing the intent of the parties, article 8 also suggests that trade custom is important. Article 9 therefore is interlocked into the regime of interpretation.

Customs can be classified into two categories. The first is those customs, which are internationally accepted or at least are widely known within an industry. INCOTERMS are such an example. It can be argued that custom as expressed in article 9 has also been used to explain or interpret other articles within the CISG such as article 35(2)(a) where the question of the definition of "ordinary purpose" of goods is of importance. The courts interpret public law provisions and or administrative practices in the same light as if they were international customs.[807]

The second possibility is to define customs as those activities in which practices between contractual parties have become habitual or the parties are relying on an agreed practice, which may become habitual if continued. It is obvious that these customary practices are not bound by the international uniform character of the interpretation of the CISG. Uniformity is defined as applying and using customary practices as they may appear in all applicable circumstances to elicit the true intent of the parties pursuant to article 8.

Party autonomy, a general principle under the CISG, dictates that parties are free to negotiate terms to govern their contractual relationship. The true intent of the parties is expressed in the contract itself. However, such intent needs to have an interpretative rule in case of divergent views. Article 8, and to a lesser degree, article 9, govern the elucidation of intent.

Article 8 therefore is an interpretative article, which rules on the behavior of parties. It regulates the contractual relationship between parties. Yet, article 8 must always be subordinate to the mandate of article 7.

The important point in article 8 is that statements made and the conduct of a party need to be interpreted not only with a subjective view in mind but also with an objective one. There is not much controversy as far as the investigation of objective intent is concerned as such investigations are common in most legal systems. However,

the subjective intent is not a criterion used in the common law when assessing contractual intent. However, it ought to be pointed out that subjective intent is not totally unknown as it is widely used in criminal law to ascertain the intent of the accused.

d. A Rule Regarding Filling of Gaps

For obvious reasons, the CISG was never intended to be a complete statement of law regarding the sale of goods. Some concepts were never intended to be included into the CISG such as consumer protection, whereas others are merely "not expressly settled."[808] Any such gaps are to be filled in "conformity with the general principles on which it is based."[809]

The first problem therefore is how are general principles discovered. Secondly, what mechanism is to be used to apply these general principles to the process of filling gaps?

The problem can be divided logically into two categories, namely external gaps and internal gaps. Internal gaps are those where a discoverable general principle will supply the answer. External gaps are those where the CISG either expressly or by implication does not govern the matter and hence domestic law needs to be applied. A further point must be added. Just because the CISG is silent on a particular matter does not automatically indicate that we are dealing with an external gap. Diedrich suggested that we distinguish between obvious and hidden gaps. (offensichtliche and versteckte Regelungslücke.)[810] Obvious gaps, generally speaking, indicate that an external gap is in existence and therefore the application of article 7 is not warranted. There is nothing to interpret. That gap will be regulated through domestic law and hence domestic interpretative methods. Where a hidden gap exists, article 7 must be applied in conjunction with the relevant discoverable general principle. To suggest that all hidden gaps can be filled with principles contained in the CISG is too optimistic and can lead to error. If the process of discovering a general principal does not yield any results, such a gap must be filled with domestic law irrespective of whether we are looking at an obvious or hidden gap.

The central problem in filling gaps is the discovery or presence of general principles. Another point cannot be overlooked, namely the difference between interpretation and gap filling. The fact that the CISG is silent on a particular point does not indicate that the only solution in filling gaps lies in discovering general principles. It is also conceivable that interpretation will deliver the solution. The distinction between gap filling and interpretation basically lies in the fact that interpretation merely gives meaning to words. Gap filling, on the other hand, goes beyond a search for words.

How are general principles applied? Such a question must be answered with another question, namely what are general principles?

There are many attempts to define exactly what is meant by general principles such as they have to be pillars of the Convention without which the Convention as a whole might crumble.[811] The best working definition of general principles is one devised by Drobnig, who points out that:

> *"it is almost of the essence of general principles of law that they are not laid down by any legislative action. They are nowhere readily formulated - rather they have to be elaborated."*[812]

The elaboration of general principles must commence with the interpretative article 7 where the mandate of uniformity in international trade is of paramount importance. This mandate is confirmed in the preamble to the CISG. The logical extension of such a mandate is that the purposive approach to a discovery of general principles can only be undertaken within the "Four Corners" of the CISG. If we would extend such a search beyond the "Four Corners" into domestic laws, uniformity could not be guaranteed. However it must be pointed out again that looking for solutions within domestic law is not discouraged as valuable lessons can be learned from the discovery of the socialization process. The arbitrators in a proceeding in the Netherlands Arbitration Institution [813] followed the path as described above. The arbitrators had to interpret article 35(2)(a) specifically the question of "fitness for purpose". They noted that the first step is to consult article 7(1). "The need to ensure uniformity" did not permit to use the merchantability or average quality argument as they are not uniformly used.[814]Therefore a gap existed and pursuant to article 7(2) they referred to general principles and though the

"open-textured provisions"[815]applied the general principle of "reasonableness" to interpret article 35(2)(a).

General principles are not merely restricted to the CISG as they are found in all systems in the world. Texaco[816]is especially illustrative, as it is contrary to the CISG, a public international law dispute. The arbitrator commented that:

> *"The recourse to general principles is [not only] to be explained by the lack of adequate legislation in the State considered. [It] plays ... an important role in the contractual equilibrium intended by the parties."*[817]

The general principles which are imported into the CISG are not "newly found or manufactured" principles. They are transplants or hybrids from other systems. The only difference is that the purpose of their application has changed. By analogy, the seed has been transplanted into a different climate with different growing conditions. It follows that the process of discovery can be duplicated but not the purpose of the general principles. The importance of this discussion shows that through article 7, the application of domestic methods and solutions is barred because principles within domestic law are founded on years of developments within a system, which has a particular purpose. Within the CISG such developments have no bearing at all. In fact, they are a hindrance to the development of international trade and as such are outside the mandate as expressed in article 7.

Unfortunately, it is not absolutely established how general principles are to be discovered. It would not matter if the "label" given to principles may be different but as this thesis has shown Magnus and Hillman could not establish principles which are in "content" or within a given context identical. The only conclusion which can be drawn from this is that it is impossible to draw up a list of uniform and uniformly acceptable general principles. However, such a discovery is not surprising nor does it detract from the usefulness of the CISG. What can be said, however, is that the discovery of general principles is an evolutionary process. Some general principles such as party autonomy and good faith are discovered and applied whereas others still need to be "teased out." Such a process will take time, as only effectively through case law will general principles be discovered and become accepted principles within the CISG.

This illustrates the importance of establishing an international jurisprudence or a global jurisconsultorium, which no doubt will contribute to the existing stock of general principles. Such an expectation is important as with such a stock of knowledge and practice in place the CISG has the ability to develop and does not become frozen in time. If that were the case the CISG would lose its significance in international trade. It is perhaps by good fortune that the promoters of the CISG were not able to write the CISG "tightly," that is more like a code. Yet the presence of general principles allows some "fluidity" within the CISG. There is room left to adjust the interpretation of the CISG to changing circumstances as long as the mandate of article 7 is closely followed.

Some disputes such as the question of interest rates will need to be discussed for some time before a clear solution emerges. The solution in this case is not whether the interest rate is to be filled by domestic law or whether a general principle within the CISG exists and therefore the application of domestic law is excluded. Both arguments - as this thesis has shown - have merit and the practical solution must be found in a pragmatic sense through jurisprudence. Simply put, how will the majority of courts and tribunals apply the problem of gap filling in relation to the rate of interest? It is not a "pretty" legal argument, which will decide the outcome but the sheer weight of decisions one way or the other. At this stage it appears that the solution will be in favor of applying domestic law to determine the rate of interest.

Another problem is how are principles, which are discovered within the CISG applied in order to solve interpretative problems of individual articles? The tool, which is universally accepted, is the one of analogy. It is recognized that article 7 does not mention or direct the use of analogy. But at the same time, there is also no indication that article 7 prohibits such a use. The question, of course, is whether an analogical extension is directed to general principles or merely to certain provisions. Analogical extension must not be confused with interpretation. Arguably, from a practical point of view such a distinction is of little value as it merely cogitates on a particular academic point. Enderlein and Maskow have alluded to this and offered a solution, which from a practical point of view is acceptable. They note:

> *"But it seems as though the Convention goes one step further permitting decisions which themselves go beyond analogy and reach into the area of a creative continuation of the development of the law. It also appears to be admissible under the Convention that decisions can be the result of principles which the Convention itself formulates and which do not necessarily have to be reflected in individual rules."*[818]

The point is that the most important criteria of any methodology applied to gap filling is that it must achieve uniformity. Whether the aim is achieved by an extension of provisions or by general principles is of no practical consequence.

e. A Rule Regarding the Relationship between the CISG and National Law

This thesis has pointed out that there are two distinct relationships between the CISG and domestic law both discoverable in article 7(2). The first one deals with the filling of gaps where there are no discoverable general principles. In such a case, these gaps must be filled through domestic laws. The second important relationship is best described in a question. How far can the CISG extend its influence where the boundary between domestic law and the Convention is not firmly set? Article 4 and to a lesser extent article 3 are relevant.

Article 4 governs the validity of contracts. It excludes questions of validity from the sphere of the CISG. The importance of the discussion is highlighted by the discovery that courts and tribunals have taken a much too narrow view. Article 4 has two significant parts namely the expressions "in particular" and "except as otherwise expressly provided in this Convention." Such expressions do not indicate that article 4 is confined to deal with matters which are excluded from the CISG. Such matters are dealt with under article 7(2). The term "in particular" leads to the view that apart from matters listed in article 4(a) there are other matters, which are not governed by the CISG.

The expression "except as otherwise provided for in this Convention" suggests that not all matters dealing with validity are excluded. Article 11, which describes the principle of informality of contract, is an example as is article 35. A breach of what is termed in domestic law "implied conditions" is not a matter of validity to be ruled under article 4. By analogy with principles to be found in PICC and PECL, this thesis has argued that validity, which is excluded from the Convention, is only restricted to immorality, illegality and lack of capacity and mistake when applicable. Unfortunately, this is one area where this thesis maintains courts have not understood the interplay between article 7 and the CISG as a whole. The holistic approach advocated by many commentators should have alerted courts and tribunals to the fact that set-off, distribution agreements and agency - just to mention some disputes - should not have been ruled through article 4. The solution should have been found through article 7(2), which in effect would rule that a gap exists, which needs filling through the application of domestic law.

3. Concluding Argument

> *This thesis seeks to show that tribunals and courts will look for a solution within the "Four Corners" of the Convention in a manner contemplated by those preparing it rather than take recourse to domestic law. A non-application of rules contained within the "Four Corners" is an error of interpretation rather than an unwillingness to depart from domestic laws.*

The discussion has shown with the help of international jurisprudence that the CISG in most countries had "teething problems." Courts and tribunals were not ideologically trained or used to the need to adopt and adapt to an international methodology of interpretation. Such a methodology is founded on article 7 and the preamble. However, as the volume of available jurisprudence and academic writing increased so has the confidence of courts and tribunals. Especially in Europe and now also in the United States the CISG is applied with confidence in a manner anticipated by its promoters. In other words the hypothesis has been proven to be correct. It is specially so in consideration of "incorrect" decisions where it has been demonstrated that courts attempt to exclude the interference of domestic law however in doing so misinterpreted article 7.

It has by no means been the purpose to show that the CISG is a superior international Convention. However, it is demonstrated that article 7 has proven its value and usefulness by appearing as a model for other Conventions and

restatements.

The ideal situation of an international contract would be the application of the CISG with an added clause that gaps are to be filled by either PICC or PECL. As a result, domestic law should only be used as a last resort. The reason for such a statement has its foundation in the interpretive articles, which in the views expressed in this thesis is the single most important contributor to achieving uniformity and consistency in international trade without losing sight of good faith.

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KSTP-FM,LLC v Specialized Communications, Inc and Adtronics Signs, Ltd., 9 March 1999, Minnesota District Court CT 98-013101 [http://cisgw3.law.pace.edu/cases/990309u1.html] last update January 12, 2000

MCC-Marble Ceramics Center Inc. v Ceramico Nuovo D'Agostino, S.P.A., 144 F.3d 1384 (11th Cir. (Fla.) 1998) [http://cisgw3.law.pace.edu/cases/980629u1.html] last update February 27, 2001

Medical Marketing International, Inc. v Internazionale Medico Scientifica, S.r.l. U.S. district Court, Eastern District of Louisiana, 17 May 1999

The Amiable Isabella, 19 U.S. 1, 32, 6 Wheat. 1,17 (1821)

Calzaturificio Claudia S.n.c. v Olivieri Footwear Ltd. 96 Civ. 8052 (HB)(THK) 1998 [http://cisgw3.law.pace.edu/cases/980406u1.html] last update September 26, 2000

FOOTNOTES

1. United Nations Conference on Contracts for the International Sale of Goods, final Act (April 11, 1980) U.N. Doc. A/Conf. 97/18 (1980) reprinted in S. Treaty Doc. No 98-9 (1983), 98th Cong., 1st Sess., and 19 I.L.M. (1980) 668.

2. The original States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia. Currently in March 2003, 62 States have adopted the CISG.

3. The parol evidence rule is discussed in detail in chapter 6.

4. United States, Appellate Court, 144 F.3d 1384 (11th Cir. (Fla.) 1998) [http://cisgw3.law.pace.edu/cases/980629u1.html] last update February 27, 2001.

5. United States, Appellate Court, 993 F.2d at 1183 n.9 (5th Cir. (Tex.) 1993 [http://cisgw3.law.pace.edu/cases/930615u1.html].

6. German, Swiss and Austrian courts do not generally disclose the parties to a dispute. In these cases only the court of the relevant country is listed. Also common law decisions are generally highly discussed whereas civil law decisions are mixed: some are also highly discussed (see, for example, many of the decisions of the Supreme Court of Austria) whereas in others the analysis may be sparse (see, for example, the typical ruling of the Supreme Court of France).

7. For a collection of Australian literature and case law see Australian CISG web-site [http://www.business.vu.edu.au/cisg].

8. Amongst many instructive books consult R. Gilpin, "*The Challenge of Global Capitalism"* (2000), BS. Markensis, "*Foreign Law and Comparative Methodology*," 1997, J. Braithwaite& P. Drahos, *"Global Business Regulation*" (2000), C. Arup, "*The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*," (2000).

9. J. Delbrück, "Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization" (2001) 1 *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1, 13.

10. *Ibid* 14. For a comprehensive analysis see D. Held, A. McGrew, D. Goldblatt, J Perraton, *"Global Transformation*," (1999) Chapter 1.

11. *Ibid* 2.

12. Germany, *Bundesgerichtshof* [Federal Supreme Court], March 8, 1995, Index No. VIII ZR 159/94 [http://cisgw3.law.pace.edu/cases/950308g3.html].

13. *Ibid*.

14. The discussion is limited to the UNIDROIT Principles of International Commercial Contract Law and the European Principles of International Contract Law.

15. E. Rabel, "Der Entwurf eines einheitlichen Kaufgesetzes" (1935) 9 *Rabels Zeitschrift*, 1.

16. H. Kötz, "Allgemeine Rechtsgrundsatze als Ersatzrecht" (1970) 34 *Rabels Zeitschrift* 663.

17. *Ibid* 667.

18. *Ibid* 672.

19. *Ibid* 677.

20. J. Delbrück, above n 9, 15.

21. *Neue Zürcher Zeitung*,(Zürich), Donnerstag, January 16, 1998, NZZ online dossier [http://www.nzz.ch/]

22. M.L. Cattaui, "The Global Economy - an Opportunity to be Seized." July 1997 *Business World*, Electronic Journal of ICC [http://www.iccwbo.org/html/globalec.htm]

23. R. Amissah, "Revisiting the Autonomous Contract", 2000 [http://www.jus.uio.no/lm/autonomous.contract.2000.amissah/doc.html] [2]

24. *Ibid*.

25. *Neue Zürcher Zeitung* (Zürich), January 6, 1988, NZZ online Dossier [http://www.nzz.ch/].

26. *Ibid*.

27. B. Nicholas, "The United Kingdom and the Vienna Sales Convention: Another case of Splendid Isolation?" (Paper presented at Saggi, conferenze e Seminari, centro di studi e recherché di diritto comparato e straniero), Series No 9, 3 [http://www.cnr.it/CRDCS/Nicholas.htm].

28. *Ibid*.

29. K. Zweigert and H. Kötz, "*An Introduction to Comparative Law*", (3rd ed, 1998) 15.

30. Rabel reporting on the first draft of the international sales law notes that the Chairman of that committee was Sir Cecil J.B. Hurst who was also the President of the International Court of Justice in the Hague. A further member Professor Gutteridge of Cambridge University also attended all meetings together with two members from France, two from Sweden and two from Germany assisted from time to time by two Professors from Italy, one from Denmark and Professor Llewellyn from Columbia University. Rabel furthermore noted specifically that the English Sales of Goods Act (1893) was an example that it is possible to create from divergent municipal laws a unified sales law. England was also active in the creation of the CISG.

31. Nicholas, above n 27.

32. K. Zweigert & H. Kötz, above n 29, 19.

33. *Ibid*.

34. E. Stein, "Uses, Misuses - and Nonuses of Comparative Law," (1977) *72 Northwestern University Law Review* 198, 202

35. M.J. Raff, "*German Real Property Law and The Conclusive Land Title Register'*, PhD Thesis (Law) The University of Melbourne, (1999) 15.

36. For example see Lord Bingham, " A New Common Law for Europe" in B. Markesinis (ed),"*The Clifford Chance Millenium Lectures, the Coming Together of the Common Law and the Civil Law*" (2000) 28.

37. Capelletti (ed), "*New Perspectives for a Common Law of Europe"* (1978) 164.

38. A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974) 21.

39. A. Watson, "Comparative Law and Legal Change" (1978) 37 *Cambridge Law Journal* 313, 321.

40. B. Markenisis (ed), above n 36, 31.

41. E. Kramer, "Uniforme Interpretation von Einheitsprivatrecht - mit besonderer Berücksichtigung von Art 7 UNKR, *Juristische Blätter*, Heft 3, März 1996, 137, 137.

42. K. Zweigert & H. Kötz, above n 29, 20.

43. H.S. Burman, "Symposium - Ten Years of the United Nations Sales Convention: Building on the CISG: International Commercial Law developments and trends for the 2000'C", 17 *Journal of Law & Commerce*. 355, 364 [http://cisgw3.law.pace.edu/cisg/biblio/burman.html].

44. R. Amissah, "The Autonomous Contract, reflecting the borderless electronic-commercial environment in contracting" (1997) *Electronic Handel - rettslige aspekter* - Oslo [http://www.cisg.law.pace.edu/cisg/biblio/amissah2.html], 10, 15.

45. New Issue Paper - International Electronic Commerce- by the Administrative and Private International Law Section, Commonwealth Attorney-General's Department, Robert Garron Offices, [http://law.gov.au/publications/hagueissues3.html] 32.

46. *Ibid*.

47. K. Zweigert & H. Kötz, above n 29, 17.

48. Their findings on the project for a European Contract Code should be published shortly.

49. F. Blase, "Leaving the Shadow for the Test of Practice - On the Future of the Principles of European Contract Law" (1999) 3 *Vindobona Journal* 3, 5 [http://cisgw3.law.pace.edu/cisg/biblio/blase.html].

50. *Ibid* 10.

51. H.S. Burman, above n 43, 364.

52. R. Amissah, above n 44, 15.

53. R. David, comments in "*International Encyclopedia of Comparative Law"* (1971)Vol II, Chap. 5, 24 and 25.

54. B. Nicholas, above n 27.

55. R.B. Schlesinger, *Comparative Law*, (2nd ed, 1960) 188.

56. *Pelly v Royal Exchange Assurance Co*. [1757] Burr. 341, 347.

57. F. Blase, above n 49, 4.

58. See for example R. Amissah, above n 23.

59. R. Amissah, above n 44, 13.

60. J. Honnold, "*Goals of Unification - Process and value of the unification of commercial law: lessons for the future drawn from the past 25 years*." (1992) 25th UNCITRAL congress, 11, 11.

61. *Ibid*.

62. R. Amissah, above n 44, 16.

63. Australian Law Reform Commission 80, (ALRC) [http://www.austlii.edu.au/] 12.

64. M. Gleeson, "The State of the Judicature", (1999) *The Law Institute Journal*, 74.

65. R. Amissah, above n 44, 14.

66. Preamble to CISG.

67. Australian Treaty Series, 11 April 1980 [1988] ATS No. 32, 19 ILM 671.

68. G.A. Moens, L. Cohn and D. Peacock, in M.J. Bonell, (ed), "*A New Approach to International Contracts, International Academy of Comparative Law* " (1999) 25.

69. M. Will, (ed), *Rudolf Meyer zum Abschied: Dialog Deutschland-Schweiz VII*, Faculté de Droit, Université de Genève (1999) 147.

70. *Ibid.*

71. E. Kramer, above n 41, 137.

72. J. Bonell, "*An International Restatement of Contract Law*" (2nd ed., 1997) 236 et seq.

73. M. Williams, "An Introduction to General Principles and Formation of Contracts in the New Chinese Contract Law," (2001) *17 Journal of Contract Law* 13, 20.

74. [1995] 17 ACSR 153.

75. *Ibid* 12.

76. See Australian Website, above n 7.

77. R. Amissah, above n 44, 18.

78. C. M. Schmitthoff, "*Legal Aspects of Export Sales*" (1978) 1.

79. F. Diedrich, "Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG", (1996) 8 *Pace International Law Revue* 303, 303 [http://cisgw3.law.pace.edu/cisg/biblio/Diedrich.html].

80. L. Réczei, "Process and Value of the Unification of Commercial Law: Lessons for the Future Drawn from the Past 25 years (1992) in *25th UNCITRAL Congress* 5, 6.

81. E. Rabel, above n 15. Rabel, in his article included the full text of the proposed unified law. It is instructive to compare the CISG with the original proposal.

82. *Ibid* 6.

83. E. De Wet, "Judicial Review of the United Nations Security Council and General Assembly through Advisory Opinions of the International Court of Justice" (2000) 3 *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 237,270.

84. L. Réczei above n 80, 13.

85. U. Magnus, "General Principles of UN-Sales Law" (1995) 59 *Rabels Zeitschrift* 469, 469; in English

translation at [http://cisgw3.law.pace.edu/cisg/biblio/magnus.html].

86. For an interesting discussion on this point see F. Ferrari, "The Relationship Between the UCC and the CISG and the Construction of Uniform Law " (1996) 29 *Loyola of Los Angeles Law Review* 1021-1033 [http://cisgw3.law.pace.edu/cisg/biblio/ferrari2.html].

87. ALRC 80, above n 59, 15.

88. Germany, *Bundesgerichtshof* [Federal Supreme Court], 24 March 1999, Index No. VIII ZR 121/98 [http://cisgw3.law.pace.edu/cases/990324g1.html].

89. *Ibid.*

90. Bundesgerichtshof, Civil Panel VIII, March 8, 1995, Index no VIII ZR 159/94. [http://cisgw3.law.pace.edu/cases/950308g3.html]

91. *Ibid.*

92. *Ibid.*

93. U.S. district Court, Eastern District of Louisiana, May 17, 1999 [http://cisgw3.law.pace.edu/cases/990517u1.html] Last updated May 14, 2001.

94. Parol evidence and the principle of mistake are discussed in detail in Chapter 6.

95. *Roder Zelt* above n 74, 9.

96. *Ibid* 12.

97. *Ibid* 13.

98. J. Waincymer, "Bringing Transparency to the Transparency Debate within the Legal Regime of the World Trade Organisation" (Paper presented at CITER 4, Conference on International Trade Education and Research, Melbourne, September 18, (1999) 2.

99. *Att.-Gen for Canada v. Att.-Gen. For Ontario* (1937) A.C. 326 Judicial Committee of the Privy Council.

100. *Roder Zelt* above n 74, 19.

101. *Sale of Goods (Vienna Convention) Act 1987* (Vic) s 6.

102. *Ibid* articles 1 to 6.

103. ICC Arbitration Case No. 7399 of 1993 [http://cisgw3.law.pace.edu/cases/937399i1.html]

104. J.J Callaghan, "U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-filling role of two French decisions" (1995) 14 *Journal of Law and Commerce*, 188 [http://cisgw3.law.pace.edu/cisg/wais/db/articles/p183.html].

105. France (1993), Cour d'Appel de Grenoble, Chambre des Urgences, No 92/4223 (Fr) [http://cisgw3.law.pace.edu/cases/930616f1.html] last update February 22, 2000.

106. J.J. Callaghan above n 104, 188.

107. Both Spain and Germany are contracting parties to the Convention.

108. Only Germany is a contracting party to the Convention.

109. ICC Arbitration Award 8611/HV/JK of 1997 [http://cisgw3.law.pace.edu/cases/978611i1.html] last update September 26, 2000.

110. Switzerland, Zürich Chamber of Commerce, Arbitration award ZHK 273/95 of May 31, 1996 [http://cisgw3.law.pace.edu/cases/960531s1.html].

111. Italy, Ad hoc Arbitral Tribunal - Florence, [http://cisgw3.law.pace.edu/cases/940419i3.html].

112. Italy, Tribunale Civile di Monza, January 14, 1993 [http://cisgw3.law.pace.edu/cases/930114i3.html].

113. Austria June 15, 1994, Vienna Arbitration proceeding SCH-4318 [http://cisgw3.law.pace.edu/cases/940615a4.html].

114. P. Schlechtriem, (ed), "*Commentary on the UN Convention on the International Sale of Goods (CISG)"*, (2nd ed, 1998) 31.

115. Austria, *Oberster Gerichtshof* [Supreme Court], 10 Ob 1506/94, February 11, 1997 [http://cisgw3.law.pace.edu/cases/970211a3.html] last update July 10, 2000.

116. Germany, *Landgericht* [District Court] Köln, 5.Zivilkammer, November 16, 1995, 5 O 189/94 [http://cisgw3.law.pace.edu/cases/951116g1.html] last update June 15, 1999.

117. P. Schlechtriem, above n 114, 31.

118. Yugoslav Chamber of Economy, Case T-23/97 [http://cisgw3.law.pace.edu/cases/990415y1.html].

119. MirJanuarya Cukavac, Arbitraza, No 1, 2000, at 149 - 151, translation supplied by Maja Stanivukovic, PhD. Associate Professor, Novi Sad School of Law, Yugoslavia, e-mail mailto:tanivuk@Eunet.yu (June 15, 2001).

120. P. Schlechtriem, above n 114, 39.

121. Germany, *Landgericht* [District Court] Mainz, 2. Kammer für Handelssachen, November 26, 1998, 12 HK O 70/97 [http://cisgw3.law.pace.edu/cases/981126g1.html] last update November 6, 2000.

122. *Ibid.*

123. P. Schlechtriem, above n 114, 43.

124. CISG above n 1, article 6.

125. There are many rulings on this matter, which are similar. For a good representative sample see Benetton II, Germany, *Oberlandesgericht* [Appellate Court] Frankfurt, March 15, 1996, VIII ZR 134/96.

126. May 29, 1995, 21 O 23363/94 [http://cisgw3.law.pace.edu/cases/950529g1.html] last update October 24, 2000.

127. P. Schlechtriem, above n 114, 70.

128. CISG above n 1, article 8(3).

129. *Ibid* Preamble.

130. M. Karollus, "Judicial Interpretation and Application of the CISG in Germany 1988-1994," (1995) *Cornell Review of the Convention on Contracts for the International Sale of Goods*) 51, 68

[http://cisgw3.law.pace.edu/cisg/biblio/karollus.html].

131. The same translation was used in M.J. Raff, above n 35. (translation of German Civil Code concerning the words "*wesentliche Bestandteile*").

132. F. Diedrich, above n 79, 318.

133. A.H. Kastely, "Unification and Community Rhetorical Analysis of the United Nations Sales Convention" (1988) 8 *Northwestern Journal of International Law and Business* 574,593 [http://cisgw3.law.pace.edu/cisg/biblio/kastely.html].

134. R.M. Goode, "Reflections on the Harmonization of Commercial Law" (1991) 1 *Uniform Law Review* 71, n 36.

135. E. Rabel, above n 15, 7.

136. J. Honnold, "Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth", (1995) *1 International Trade and Business Law Journal* 1, fn 6 [http://cisgw3.law.pace.edu/biblio/honnold3.html].

137. *Ibid* 2.

138. CISG above n 1, Chapter IV.

139. *Ibid* article 67(1), 68.

140. *Ibid* article 69(1) and (2).

141. *Hamilton v. Mendes* (1761), 2 Bur. 1214.

142. Woellner, Barkoczy, Murphy, "*2000 Australian Taxation Law*" (10th ed, 1999) 24.

143. *Ibid.*

144. CISG above n 1, Article 35.

145. *Ibid* Article 46(3).

146. G. Waincymer, above n 98.

147. CISG above n 1, Article 4.

148. *Selected Works of China International Economic and Trade Arbitration Commission Awards (1963-1988) updated to 1993*" (authorized English Version 1995) 302 (CIETAC awards No 73)

149. B. Zeller, CISG and China, Theory and Practice in M.R. Wills (ed), "*Schriftenreihe Deutscher Jura-Studenten in Genf* (1999) 15 [http://cisgw3.law.pace.edu/cisg/biblio/zeller.html].

150. *Ibid.*

151. P. Koneru, "The International Interpretation of the UN Convention on the Contracts for the International Sale of Goods: An Approach based on General Principles" (1997) 6 *Minnesota Journal of Global Trade* 105, 105 [http://cisgw3.law.pace.edu/cisg/biblio/koneru.html].

152. *Neue Zürcher Zeitung*, "Gleichwertigkeit der Rechtssysteme, Die Bilateralen Abkommen mit der EU" September 16, 1999 [http://www.nzz.ch/]

153. *Ibid.*

154. *Neue Zürcher Zeitung*., "Die Bilateralen Verträge im Vergleich zum EWR-Beitritt." November 8, 2000 [http://www.nzz.ch/].

155. *Ibid.*

156. H.S. Burman, above n 43, 355.

157. See Uniform Law review published by UNIDROIT or their website [http://www.unidroit.org/].

158. F. Enderlein. and D. Maskow, "*International Sales Law, United Nations Convention on Contracts for the International Sale of Goods*" (1992) 54 [http://cisgw3.law.pace.edu/cisg/biblio/enderlein1.html].

159. P. Koneru, above n 151, 105.

160. Article 6 UNIDROIT Convention on International Factoring.

161. Rome, February 12, 1999 article 6(2).

162. M. Gebauer, "Uniform Law, General Principles and Autonomous Interpretation" (2000) 4 *Uniform Law Review* 683, 696.

163. Witz, Salger, Lorenz, "*International Einheitliches Kaufrecht*" (2000) 80.

164. *Ibid.*

165. J. Honnold, above n 98, 187.

166. B. Markesinis, above n 36, 80.

167. *Ibid.*

168. see above n 111 and 112.

169. F. Diedrich, above n 79, 310.

170. U. Magnus, "Währungsfragen im Einheitlichen Kaufrecht. Zugleich ein Beitrag zu seiner Lückenfüllung und Auslegung" (1989) 53 *Rabels Zeitschrift* 116, 117.

171. *Ibid* 120.

172. *Ibid.*

173. F. Diedrich, above n 79, 312.

174. M. Gebauer, above n 162, 684.

175. F. Diedrich, above n 79, 313.

176. M. Gebauer, above n 162, 687.

177. M. Roth and R. Happ, "Interpretation of the CISG According to Principles of International Law" (1999) vol IV *International Trade and Business Law Annual*, 1, 3.

178. M. Gebauer, above n 162, 691.

179. *Ibid* 690.

180. *Ibid* 693.

181. *Ibid.*

182. Witz, Salger, Lorenz, above n 163**,** 83.

183. See *Acts Interpretation Act 1901* (Cth) s 15AA. This theme will also be further developed in this chapter under the discussion of *Fothergill v. Monarch Airlines* [1980] 2 All E.R. 696.

184. In Germany (as an example) look at article 20 III, 97 I GG, [34 Bverf. GE 269]

185. F. Diedrich, above n 79, 311.

186. *Ibid.*

187. [1980] 2 All E.R. 696.

188. *Ibid* 696.

189. *Ibid* 698 also Carriage by Air Act 1961, Sch 1, art. 26(2).

190. *Ibid* 696.

191. *Fothergill* v Monarch Airlines [1977] 3 All ER 616.

192. [1979] 3 All ER 445.

193. *Ibid* 448.

194. *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 3 All ER 1048.

195. [1979] 3 All ER 445, 454.

196. *Ibid* 451.

197. *Ibid* 451.

198. *Ibid* 450.

199. *Ibid* 459.

200. *Ibid* 457.

201. *Ibid* 457.

202. *Ibid* 457.

203. *Ibid* 452.

204. *Ibid* 455.

205. *Ibid* 705.

206. *Inland Revenue Comrs v. Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637, 641.

207. *Fothergill*, above n 192, 713.

208. *Ibid.*

209. *Ibid* 696.

210. [1975] 1 All ER 810.

211. *Ibid* 835.

212. *Ibid* 707.

213. *Ibid* 713.

214. *Ibid* 715.

215. *Ibid.*

216. *Ibid* 708.

217. *Ibid.*

218. [1979] 3 All ER 445, 453.

219. 490 U.S. 122,135 (1989) quoting *The Amiable Isabella*, 19 U.S. 1, 32, 6 Wheat. 1,17 (1821).

220. *Ibid.*

221. *Ibid.*

222. M.P. Van Alstine, "Dynamic Treaty Interpretation" (1998) 146 *University of Pennsylvania Law Review* 687, 688 [also available at http://cisgw3.law.pace.edu/cisg/biblio/alstine2.html].

223. Australian Treaties Series, 1974 No 2.

224. *Fothergill* above n 192, 718 and 719.

225. [1983] 158 CLR 1.

226. *Ibid* 223.

227. *Tasmanian Dam case*, above n 225, 224.

228. 190 CLR [1997], 225.

229. *Ibid* 251.

230. *Ibid* 253.

231. (1975) 1 EHRR 524.

232. *Applicant "A"* above n 228, 254.

233. No submission was advanced in this case that calls for the consideration to be given to article 31(2), (3) or (4).

234. *Applicant "A"* above n 228, 256.

235. *Ibid.*

236. *Tasmanian Dam case*, above n 225, 224.

237. *Great China Metal Industries Co Limited v Malaysian International Shipping Corporati* [1998] 196 CLR 161, 186.

238. BGE 97 I 359, February 17, 1974 [http://www.bger.ch/] last visited October 22, 2001.

239. *Ibid* 364. The original French text in E. de Vattel, "Le droit des gens ou principes de la loi naturelle," 1758, 263 reads "qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation."

240. *Ibid* 364.

241. *Great China Metal Industries*, above n 237.

242. *Ibid* 187.

243. *Ibid* 187.

244. (1980) 147 CLR, 142.

245. *Ibid* 159.

246. See above n 237.

247. [1993] A.C. 593 (H.L.).

248. *Ibid* 602. See also *Acts Interpretation Act 1901* (Cth) s 15AB.

249. *Ibid* 617.

250. *Ibid.*

251. B. Markesinis, above n 36, 85.

252. *Ibid.*

253. *Ibid* 88.

254. P. Koneru, above n 151, 105.

255. *See* discussion above n 79.

256. J. Hellner, "Gap-Filling by Analogy" [http://www.cisg.law.pace.edu/] last update January 31, 1998

257. J. Honnold, above n 136, fn 5.

258. F. Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law" (1994-95) 24 *Georgia Journal of International and Comparative Law* 183, 183 [http://cisgw3.law.pace.edu/cisg/biblio/franco.html].

259. F. Enderlein, and D. Maskow, above n 158.

260. Closest counterpart to an Official Commentary [http://www.cisg.law.pace.edu/].

261. F. Ferrari, above n 258, 188.

262. As stated before ratification in Australia does not give Conventions legal status, only enactment by Parliament will do so.

263. April 14, 1992 U.S. Dist.Ct. [http://cisgw3.law.pace.edu/cases/920414u1.html].

264. *Ibid.*

265. *Ibid.*

266. U.S. District Court, 96 Civ. 8052 (HB)(THK) 1998 [http://cisgw3.law.pace.edu/cases/980406u1.html] 2.

267. *Ibid.* [It should be noted that the court picked up this language from the Delchi case.]

268. Matter No CA 40154/96 (August 13, 1997) [http://www.austlii.edu.au/]

269. [1980] 147 CLR 142.

270. *Ibid* 159.

271. U.S. Circuit Court of Appeals (2d. Cir) December 6, 1995 [http://cisgw3.law.pace.edu/cases/951206u1.html]

272. *Ibid.*

273. *Ibid.*

274. *Ibid.*

275. *Ibid.*

276. C. Thiele, "Interest on Damages and Rate of Interest Under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods (1998) 3 *Vindobona Journal of International Commercial Law and Arbitration* [http://www.cisg.law.pace.edu/cisg/biblio/thiele.html] last updated April 27, 1999.

277. [1998] O.J. No. 5381, 84 A.C.W.S. (3rd) 1089.

278. Canada August 31, 1999 Ontario Superior Court of Justice [http://cisgw3.law.pace.edu/cases/990831c4.html]

279. *Ibid.*

280. *Ibid.*

281. F. Enderlein and D. Maskow, above n 158, 55.

282. *Rotorex*, above n 271.

283. CISG, above n 1, article 7(1).

284. R.A. Hillman, "Cross Reference and Editorial Analysis, Article 7" [http://cisgw3.law.pace.edu/cisg/biblio/hillman1.html] last update September 1997.

285. Via Pace Law School and other sources; see, e.g., Autonomous Network of CISG Websites [http://cisgw3.law.pace.edu/network.html] and Unilex [http://www.unilex.info/].

286. R.A. Hillman, above n 284.

287. *Ibid.*

288. Switzerland, January 8, 1997 [http://cisgw3.law.pace.edu/cases/970108s1.html]

289. CISG, above n 1 article 38(3).

290. *Ibid* article 39(1).

291. Switzerland, *Obergericht* [Appellate Court] Luzern, above n 288 CLOUT abstract no 192.

292. See for example Tribunale di Vigevano 12 July 2000 [http://cisgw3.law.pace.edu/cases/000712i3.html] and Tribunale di Rimini 26 November 2002 [http://cisgw3.law.pace.edu/cases/021126i3.html]

293. T. Keily, "Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG) (1999) *3 Vindobona Journal of International Commercial Law and Arbitration 15* [http://cisgw3.law.pace.edu/cisg/biblio/keily.html].

294. *Ibid.*

295. *Calzaturificio*, above n 267.

296. *Ibid.* It is interesting to note that, preceding the above statement, the court engaged in a detailed discussion documented with cases, on the parol evidence rule.

297. H. Flechtner, "More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price under article 50 (1995) 14 *Journal of Law and Commerce* 153, 156 [http://cisgw3.law.pace.edu/cisg/biblio/flechtner.html].

298. U.S. District Court, Eastern District of Louisiana, May 17, 1999 [http://cisgw3.law.pace.edu/cases/990517u1.html] Last updated May 14, 2001.

299. *Roder Zelt*, above n 74.

300. M. Williams, above n 73, 17.

301. Promulgated in the Second Session of the Ninth National People's Congress on March 15, 1999.

302. *Ibid* New Chinese Contract Law,.

303. P.J Powers, "Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods" (1999) 18 *Journal of Law and Commerce* 333, 334 [http://cisgw3.law.pace.edu/cisg/biblio/powers.html].

304. P. Schlechtriem, "Good Faith in German Law and in International Uniform Laws" *Saggi, Conference e Seminari, February 1997*, [http://www.cnr.it/CRDCS/schlechtriem.htm] visited 29/07/1999. P1.

305. Art. 1.7 of UNIDROIT Principles of International Trade.

306. Art 1:106 of Principles of European Contract Law.

307. J. Klein, "Good Faith in International Transactions" (1993) 15 *Liverpool Law Review* 115 [http://www.cisg.law.pace.edu/cisg/biblio/Klein.html] last update July 28, 1999.

308. Section 205 Restatement (Second) of Contract.

309. P.J Powers, above n 303, 338.

310. Mexico, November 30, 1998 [http://cisgw3.law.pace.edu/cases/981130m.1.html]

311. *Ibid.*

312. F. Ferrari, above n 258, 192.

313. Guide to CISG Article 7, Secretariat Commentary, [http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html] last update September 2, 1998.

314. CISG, above n 1, Articles 16(2)(b), 21(2), 29(2), 37 and 38, 39,40, 49(2), 64(2) and 82, 85 to 88.

315. Germany, *Oberlandesgericht* [Appellate Court] München, 7. Zivilsenat, March 11, 1998, 7 U 4427/97, [http://cisgw3.law.pace.edu/cases/980311g1.html].

316. *Ibid.*

317. A.E. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963) 30 *U. Chicago Law Revue* 666, 669.

318. *Ibid.*

319. R.S. Summers, "The General Duty of Good Faith - its Recognition and Conceptualization" 67 *Cornell Law Revue* 810, 826.

320. *Ibid.*

321. P. Koneru, above n 151, 120. [*Note, however, Winship's conclusion: He states "I am convinced by the persistence of the critics who seek to expand the operation of a good faith concept that over time a general obligation on contracting parties to act in good faith will be accepted."*]

322. January 23, 1997 [http://cisgw3.law.pace.edu/cases/978611i1.html]

323. *Ibid.*

324. Powers, above n 303, 345.

325. *Ibid.*

326. J. Felemegas, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation," [http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html], 71.

327. *Ibid* 343.

328. J. Honnold, "*Documentary History of the Uniform Law for International Sales*" (1989) 299.

329. *Ibid* 370.

330. *Ibid* 298.

331. *Filanto*, above n 263.

332. *Ibid.*

333. *Dulces Luisi*, above n 310.

334. Budapest arbitration proceeding Vb 94124 November 17, 1995

[http://cisgw3.law.pace.edu/cases/951117h1.html]

335. *Ibid.*

336. France, Court d'Appel Grenoble, February 22, 1995 [http://cisgw3.law.pace.edu/cases/950222f1.html]

337. *Ibid.*

338. L.S. Ziegel, "Report to the Uniform Law Conference of Canada on Convention on contracts for the International Sale of Goods" [http://www.cisg.law.pace.edu/cisg/text/ziegel7.html] last update April 23, 1999.

339. Netherlands, August 22, 1995 [http://cisgw3.law.pace.edu/cases/950822n1.html]

330. A.E. Farnsworth, above n 317, 679.

341. *Applicant "A"*, above n 228, 253.

342. U. Magnus, above n 85.

343. P.J. Powers, above n 302, 337.

344. D. Stack, "The Two Standards of Good Faith in Canadian Contract Law" (1999) *62 Saskatchewan Law Review* 210, 223.

345. P. Schlechtriem, above n 304, 3.

346. F. Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law" (1994-95) 24 *Georgia Journal of International and Comparative Law* 183, 187 [http://cisgw3.law.pace.edu/cisg/biblio/franco.html].

347. *Scruttons Ltd. V Midlands Silicones Ltd*., [1962] A.C. 446, 471.

348. F. Ferrari, above n 346, 221.

349. F. Diedrich, above n 79, 313.

350. (1992) 26 NSWLR 234.

351. J.S. Ziegel, above n 338.

352. D. Stack, above n 344, 202.

353. [1997] 2 All ER 215.

354. *Ibid* 218.

355. R. Goode, "The Concept of "Good Faith" in English Law", *Saggi, Conferenze e Seminari*, 1992 [http://www.cnr.it/CRDCS/goode.htm]

356. *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] 1 QB 433, 439.

357. *Brown v Jam Factory Pry Ltd* (1981) 53 FLR 340, 348.

358. *Ibid.*

359. R. Goode, above n 355.

360. *Renard Constructions v Minister for Public Works* (1992), 26 NSWLR, 234.

361. [1998] 44 NSWLR 349.

362. *Ibid* 369.

363. [1999] WASC 157.

364. *Ibid* 31.

365. [1995] 36 NSWLR 709.

366. *Ibid* 716.

367. *Wilford v. Miles* [1992] 2 AC 128, 138.

368. *Ormiston J in Vroon BV v Foster's Brewing Group Ltd*. [1994] 2VR 32, 67.

369. Gummow j in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* [1993] 45 FCR 84, 96.

370. *Garry Rogers Motors (Aust) Pty Ltd v. Subaru (Aust) Pty Ltd* [1999] FCA 903 (July 2, 1999), 35

371. *Ibid.*

372. [1997] 146 ALR 1.

373. *Renard Construction*, above n 360, 268.

374. *Hughes Aircraft*, above n 372, 36.

375. *Ibid.*

376. Supreme Court of Tasmania File No. FCA 6/1997 Judgment No. 101/1997, (unreported) September 4 1997 [http://www.austlii.edu.au/].

377. *Ibid* 12.

378. *Aiton v. Transfield* [1999] NSWSC 996 (October 1, 1999) [http://www.austlii.edu.au/cgi-bin/disp]

379. *Ibid.*

380. J. Stapleton, "Good Faith in Private Law" (1999) *Current Legal Problems* 1, 6.

381. *Aiton v. Transfield*, above n 378.

382. *Ibid.*

384. A.E. Farnsworth, "The Concept of "Good Faith" in American Law" in Saggi, Conferenze e Seminari, 10 [http://soi.cnr.it/-crdcs/farnswrt.htm].

384. *Ibid.*

385. *Aiton,v Transfield*, above n 378, 37.

386. [2000] FCA 1541 (November 3, 2000).

387. *Ibid* 393.

388. *Ibid.*

389. [2000] VSC 310 (August 18, 2000).

390. *Ibid* 119.

391. *Ibid* 120.

392. *Advance Fitness v. Bondi Diggers* [1999] NSWSC 264 (March 30, 1999), 123.

393. *Forklift Engeneering Australia Pty Ltd v. Powerlift (Nissan) Pty Ltd & Ors* [2000] VSC 443 (December 12, 2000), 91.

394. P. J. Powers, above n 303, 341.

395. H. Houtte, "The UNIDROIT Principles of International Commercial Contracts" (1996) Vol II *International Trade and Business Law Annual* 1, 1.

396. M.J. Bonell, "*An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (2nd ed., 1997), 65.

397. Article 1.7 PICC.

398. H. Houtte, above n 395, 12.

399. Noted in *Aiton v Transfield,* above n 378, 118.

400. *Ibid.*

401. U. Magnus, " Editorial Remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement CISG Article 7", [http://www.cisg.law.pace.edu/cisg/principles/uni7.html] last update March 3, 1998.

402. *Ibid.*

403. Official Comments on Articles of the UNIDROIT Principles [http://www.cisg.law.pace.edu/cisg/principles/uni7.html] last update March 3, 1998.

404. P. J. Powers, above n 303, 335.

405. T. Keily, above n 293, fn 64.

406. A.H. Kastely, above n 133, 597.

407. *Ibid* (specifically referring to CISG articles 85 to 88).

408. See P. Winship, "Commentary on Professor Kastely's Rhetorical Analysis" (1988) *8 Northwestern Journal of International Law & Business* 623 [http://cisgw3.law.pace.edu/cisg/biblio/1winship.html].

409. *Ibid* 631.

410. D. Stack, above n 342, 201.

411. J. Honnold, above n 328, 369.

412. See above n 333.

413. See above n 336.

414. Germany, *Oberlandesgericht* [Appellate Court] Koblenz, January 31, 1997, [http://cisgw3.law.pace.edu/cases/970131g1.html]

415. *Ibid.*

416. November 25, 1998, [http://cisgw3.law.pace.edu/cases/981125g1.html]

417. *Ibid.*

418. Columbia May 19, 2000, Sentencia C-529/00; referencia: expediente LAT-154, [http://cisgw3.law.pace.edu/cases/000510c7.html] translated by Queen Mary Case Translation Programme.

419. See above n 336.

420. *Brown v Jam Factory Pty Ltd*, above n 314.

421. *Ibid.*

422. See fn 313 where the Secretariat Commentary listed several articles containing the principle of good faith. Jurisprudence especially in article 29(2) is not conducive to prove that good faith is a principle contained in this particular article.

423. Stockholm Chamber of Commerce Arbitration Award of June 5, 1998 [http://cisgw3.law.pace.edu/cases/980605s5.html].

424. F. Enderlein and D.Maskow, above n 158, 163.

425. *Ibid.*

426. See above n 315.

427. F. Limbach and B. Ahearn, Case commentary "Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Award, June 5th, 1998" [http://cisgw.law.pace.edu/cisg/biblio/limbach.html] last update January 27, 2000.

428. *Ibid.*

429. *Ibid.*

430. August 13, 1991, 16 S 40/91 [http://cisgw3.law.pace.edu/cases/910813g1.html] last update May 14, 2001.

431. CISG, above n 1, article 49(2)(a).

432. *Ibid* article 49(2)(b).

433. J. Honnold, above n 328.

434. Germany, *Bundesgerichtshof* [Federal Supreme Court], VIII. Zivilsenat, June 25, 1997, VIII ZR 300/96 [http://cisgw3.law.pace.edu/cases/970625g2.html] last update October 24, 2000.

435. *Ibid.*

436. Arbitration case 11/1995, February 12, 1998, http://cisg.law.pace.edu/cgi/cases/2/980212bu.html] 198.

437. Spain, Audiencia de Barcelona, seccion 16a (T, SA v. E) November 3, 1997 [http://cisgw3.law.pace.edu/cases/971103s4.html].

438. CISG, above n 1, article 29(2).

439. United States September 22, 1994 U.S. District Ct. [http://cisgw3.law.pace.edu/cases/940922u1.html].

440. France March 29, 1995 Court d'Appel Grenoble [http://cisgw3.law.pace.edu/cases/950329f1.html].

441. Germany, *Oberlandesgericht* [Appellate Court] Köln, 22. Zivilsenat February 22, 1994, 22 U 202/93 [http://cisgw3.law.pace.edu/cases/940222g1.html].

442. Germany, Kammer für Handelssachen 99, September 16, 1992, 99 O 29/92. [http://cisgw3.law.pace.edu/cases/920916g1.html] last update October 27, 2000.

443. *Ibid.*

444. Germany, *Amtsgericht* [Lower Court] Riedlingen, October 21, 1994, 2C 395/93 [http://cisgw3.law.pace.edu/cases/941021g1.html] last update October 30, 2000.

445. *Ibid.*

446. This has been discussed at length by Camilla Baasch Andersen in "Reasonable time in article 39(1) of the CISG - Is Article 39(1) Truly a Uniform Provision?" [http://cisgw3.law.pace.edu/cisg/biblio/andersen.html].

447. The principle of good faith is not expressly noted but implied in all the above three German cases.

448. Germany, VIII ZR 287/98, November 3, 1999 [http://cisgw3.law.pace.edu/cases/991103g1.html] last update May 10, 2001.

449. P. Schlechtriem, Case Commentary "Comments on Bundesgerichtshof VIII ZR 287/98", November 3, 1999 [http://cisgw3.law.pace.edu/cases/991103g1.html] last update May 2, 2000.

450. *Ibid.*

451. see U. Magnus, above n 170.

452. *Ibid.*

453. C.M. Bianca, and M.J. Bonell, "*Commentary on the International Sales Law - The 1980 Vienna Sales Convention*" (1987) 78.

454. Italy, *Nuovo Fucinati S.p.A. v. Fondmetal International A.B., Tribunale Civile di Monza*, January 14, 1993. [http://cisgw3.law.pace.edu/cases/930114i3.html].

455. *Wilford v. Miles* [1992], see fn 367.

456. Enderlein & Maskow, above n 158, 57.

457. E. Rabel, above n 15, 55.

458. Switzerland, HG 930634/O, November 30, 1998 [http://cisgw3.law.pace.edu/cases/981130s.1.html] update February 24, 2000.

459. B. Audit, "The Vienna Sales Convention and the Lex Mercatoria" in T.E. Carbonneau, (ed.rev.de.), "*Lex Mercatoria and Arbitration*" (1998) 173 [http://cisgw3.law.pace.edu/cisg/biblio/audit.html].

460. Germany, *Oberlandesgericht* [Appellate Court] Stuttgart, February 28, 2000, 5 U 118/99 [http://cisgw3.law.pace.edu/cases/000228g1.html] update March 23, 2001.

461. *Ibid.*

462. Germany, *Oberlandesgericht* [Appellate Court] Celle, November 11, 1998, 9 U 87/98 [http://cisgw3.law.pace.edu/cases/000228g1.html] update January 12, 2001.

463. F. Diedrich, "Lückenfüllung im Internationalen Einheitsrecht, Möglichkeiten und Grenzen Richterlicher Rechtsfortbildung im Wiener Kaufrecht" (1995) *Recht der Internationalen Wirtschaft* 353, 353 and 354.

464. F. Enderlein. & D. Maskow, above n 158, 57.

465. U. Magnus, above n 170.

466. F. Enderlein. & D. Maskow, above n 158, 58.

467. R.A. Hillman, above n 289, 2.

468. *Ibid.*

469. R. Happ, "Anwendbarkeit Völkerrechlicher Auslegungsmethoden auf das UN-Kaufrecht." (1997) *Recht der Internationalen Wirtschaft* 376, 379.

470. R.A. Hillman, "Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal for Uniformity" (1995) *Cornell Review of the Convention on Contracts for the International Sale of Goods* 21, 24 [http://cisgw3.law.pace.edu/cisg/biblio/hillman/html] last update August 11, 1998.

471. Eiselen, *"Electronic commerce and the CISG*" [http://www.cisg.law.pace.edu/cisg/biblio/].

472. Germany, *Landgericht* [District Court] Heidelberg, 2. Kammer fur Handelsachen, October 2, 1996, O 37/96 KfH II [http://cisgw3.law.pace.edu/cases/961002g1.html] last update April 16, 2001.

473. Germany, *Oberlandesgericht* [Appellate Court] Karlsruh, 1. Zivilsenat, June 25, 1997, 1 U 280/96 [http://www.cisg-online.ch/cisg/urteile/263.htm]

474. Germany, *Bundesgerichtshof* [Federal Supreme Court], VIII. Zivilsenat, November 25, 1998, VIII ZR 259/97 [http://cisgw3.law.pace.edu/cases/981125g1.html] last update October 25, 2000.

475. Germany, *Landgericht* [District Court] Heidelberg, above n 472.

476. *Ibid.*

477. Germany, *Oberlandesgericht* [Appellate Court] Karlsruhe, above n 473.

478. *Ibid.*

479. Bundesgerichtshof, above n 474.

480. Vienna Arbitration proceeding, SCH-4318, June 15, 1994 [http://cisgw3.law.pace.edu/cases/940615a4.html] update September 8, 1999.

481. G. Brandner, "Admissability of Analogy in Gap-filling under the CISG", [http://www.cisg.law.pace.edu/cisg/biblio/brandner.html] last update April 13, 2000.

482. M. Gebauer, above n 162, 697.

483. G. Brandner, above n 481, 7.

484. Switzerland, HG930138 U/HG93, September 9, 1993 [http://cisgw3.law.pace.edu/cases/930909s1.html] update July 6, 1999.

485. ICC Arbitration Award No 8611/HV/JK, January 23, 1997, [http://cisgw3.law.pace.edu/cases/978611i1.html] update September 8, 1999.

486. *Ibid.*

487. E. Visser, "Gaps in the CISG: In General and with Specific Emphasis on the Interpretation of the Remedial Provisions of the Convention in Light of the General Principles of the CISG." Pace essay submission, June 1998 [http://www.cisg.law.pace.edu/cisg/biblio/visser.html] last update September 24, 1998.

488. C.M. Bianca and M.J. Bonell, above n 453, 77.

489. *Ibid.*

490. J. Honnold, above n 98, 149.

491. [1978] A.C. 141 (H.L.).

492. *Ibid.*

493. J. Honnold, above n 60, 4.

494. G. Brandner, above n 481, 2.

495. F. Enderlein & D. Maskow, above n 158, 58.

496. *Ibid.*

497. *Ibid* 59.

498. M. Gebauer, above n 162, 693.

499. G. Brandner, above n 481, 5.

500. C. Kern, Leistungsverweigerungsrechte im UN-Kaufrecht, in M. Will (ed), *Rudolf Meyer zum Abschied: Dialog Deutschland-Schweiz* VII, (1999).

501. *Ibid* 85.

502. Bonell J. above n 453. 80.

503. See U. Magnus, above n 170.

504. 17 U73/93, July 2, 1993 [http://cisgw3.law.pace.edu/cases/930702g1.html] last update August 11, 1999.

505. France, Cour d'appel de Grenoble, 23 October 1996 [http://cisgw3.law.pace.edu/cases/961023f1.html] update September 8, 1999.

506. U.S. Federal District Court, 92 Civ. 3253 (CLB) [http://cisgw3.law.pace.edu/cases/920414u1.html] update September 8, 1999.

507. *Ibid.*

508. C.M. Bianca and M.J. Bonnell, above n 453, 80.

509. J. Hellner, above n 256.

510. R.A. Hillman, above n 470, 3.

511. Bundesgerichtshof, above n 477.

512. Vienna Arbitration proceedings, above n 482.

513. 201 F. Supp. 2d 236, (S.D.N.Y. 2002)

514. *Ibid* 287.

515. Netherlands October 5, 1994, *Arrondissementsrechtbank* [District Court] Amsterdam [http://cisgw3.law.pace.edu/cases/941005n1.html] last update September 9, 1999.

516. *Ibid.*

517. G. Brandner, above n 481, 11.

518. U. Drobnig, "General Principles of European Contract Law" in P. Sarcevic and P. Volken, (eds), *International Sale of Goods, Dubrovnik Lectures* (1985) 306 [http://cisgw3.law.pace.edu/cisg/biblio/drobnig.html].

519. *Ibid* 310.

520. M. Gebauer, above n 162, 694.

521. E. Lauterpacht (ed), "*International Law Reports*" Vol 53, (1976).

522. *Ibid* 452.

523. *Ibid* 452-453.

524. M. Gebauer, above n 162, 695.

525. As an example see ICC Award No. 8817, December 1997 [http://cisgw3.law.pace.edu/cases/978817i1.html] or ICC Award No. 8502 November 1996 [http://cisgw3.law.pace.edu/cases/968502i1.html].

526. R.A. Hillman, above n 470, 2.

527. See U. Magnus, above n 164.

528. *Ibid.*

529. R.A. Hillman, above n 470, 4.

530. U. Magnus, above n 170.

531. R.A. Hillman, above n 470, 4.

532. U. Magnus, above n 170.

533. J. Honnold, above n 98, 213.

534. *Geneva Pharmaceutical* [http://cisgw3.law.pace.edu/cases/020510u1.html], refers to article 16(2)(b)'s estoppel-like features.

535. U. Huber, "Der UNCITRAL Entwurf eines Übereinkommens über Internationale Warenverkaufsverträge" (1997) *Rabels Zeitschrift* 432, 433.

536. Austria June 15, 1994, Vienna Arbitration proceeding SCH-4318, above n 420.

537. *Ibid.*

538. See U. Magnus, above n 170.

539. Italy January 30, 1997, Pretura di Torino [http://cisgw3.law.pace.edu/cases/970130i3.html]

540. See M. Karollus, above n 130.

541. Germany February 28, 1996, 12 O 2943/94, *Landgericht* [District Court] Oldenburg, 12.Zivilkammer - 2. Kammer für Handelssachen [http://cisgw3.law.pace.edu/cases/960228g1.html] last update October 31, 2000.

542. Argentina, *Juzgado National de Primera Instancia en lo Comercial* No 7 of May 20, 1991. [http://cisgw3.law.pace.edu/cases/910520a1.html] last update October 23, 2000 and No 10 of October 6, 1994 [http://cisgw3.law.pace.edu/cases/941006a1.html] last update February 22, 2000.

543. Switzerland December 21, 1992, Zivilgericht Basel [http://cisgw3.law.pace.edu/cases/92122s1.html]

544. For further and more comprehensive coverage see Honnold, *Documentary History* or directly from Report of plenary sessions such as U.N. Doc. A/Conf.97/SR 11 etc.

545. ICC Arbitration case No. 8128 of 1995 and 1994 Vienna Arbitration proceeding SCH-4366 [http://cisgw3.law.pace.edu/cases/958128i1.html and http://cisgw3.law.pace.edu/cases/940615a3.html].

546. Professor Kritzer of Pace University is of the opinion that the case law on article 78 leads to the following conclusions:

> (1) Rate of interest is determined by the otherwise applicable gap-filling law. *The* majority, the great majority of the cases, so hold.
>
> (2) An aggrieved person can have two bites at the apple (this theory turns on art. 78's "without prejudice" proviso).
>
> > - He can go the article 78 route in which event, unlike a damages route, he does not have to prove a loss that entitles him to a specified rate of interest; you simply get the rate the otherwise applicable gap-filling law specifies; or
> >
> > - If that rate is not adequate, he can seek a larger rate under article 74, in accordance with its "full compensation" principle; in this event, one must satisfy the standards applicable to any recovery under article 74.]
>
> (3) One can read "full compensation" into art. 78 à la the 1994 Vienna arbitration proceedings. Although some see logic in this approach, it does not seem to have been adopted by many courts or arbitral tribunals.]

547. ICC Arbitration case No. 7331 of 1994 [http://cisgw3.law.pace.edu/cases/947331i1.html].

548. *Ibid.*

549. R.A. Hillman, above n 470, 7.

550. See arbitration proceeding SCH-4318, above n 480.

551. J. Honnold, above n 328, 525-526.

552. *Ibid.*

553. Russia March 3, 1995 Arbitration proceeding 304/1993 [http://cisgw3.law.pace.edu/cases/950303r2.html].

554. Germany, *Oberlandsgericht* [Appellate Court] Frankfurt a.M., 5. Zivilsenat, June 13, 1991, 5 U 261/90 [http://cisgw3.law.pace.edu/cases/910613g1.html].

555. *Ibid.*

556. ICC Case No. 7153, 1992; see (1995) 14 *Journal of Law and Commerce* 217-224 [http://cisgw3.law.pace.edu/cases/927153i1.html].

557. *Ibid.*

558. Germany, 11 U 206/93 [http://cisgw3.law.pace.edu/cases/950208g3.html]

559. Netherlands August 22, 1995, *Hof* [Appellate Court] Arnhem, Netherlands, [http://cisgw3.law.pace.edu/cases/950822n1.html]

560. For an alternative approach using by analogy article 76 but reaching similar conclusions see: Cortier A., "A New Approach to Solving the Interest Rate Problem of Art 78 CISG," vol 5, *International Trade and Business Law Annual*, (2000) 33-42.

561. K.B. Giannuzzi, "The Convention on Contracts for the International Sale of Goods; temporarily out of 'service'? (1997) 28 *Law and Policy in International Business* 991, 991.

562. *Ibid.*

563. CISG, above n 1, article 3(2) CISG.

564. Guide to Article 3, Secretariat Commentary, closest counterpart to an Official Commentary, [http://www/cisg.law.pace.edu/cisg/text/secomm/secomm-03.html]

565. Prepared by the Secretary-General, document A/CONF.97/9. [http://www.cisg.law.pace.edu/cisg/Fdraft.html]

566. F. Ferrari, above n 253.

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597. Germany, January 16, 1992, 5 U 534/91 [http://cisgw3.law.pace.edu/cases/920116g1.html] last update February 15, 2000.

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