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The United Nations convention on contracts for the international sale of goods (CISG) and the Common Law: the challenge of interpreting Article 7*

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Abstract

The interpretative methodology applied in Common Law CISG jurisprudence has driven a disparity of reasoning that hinders a uniform application of its provisions. This result is inconsistent with CISG Article 7 which mandates interpretation of the convention in accordance with its international character and the need to promote uniformity. This paper discusses the multiple aspects that have affected the uniform interpretation of CISG norms, including a reference to the case law in USA, Australia and Italy. Finally, the Unidroit principles are presented as an aid to overcome the difficulties in the application of CISG article 7.

Keywords: The United Nations Convention on Contracts for the International Sale of Goods (CISG), Common Law, Uniformity of International Trade Law.

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La convención de Viena sobre compraventa internacional de mercaderías y el *Common law*: el reto de interpretar el artículo 7

Resumen

La metodología interpretativa aplicada en la jurisprudencia del *Common Law* relativa a la Convención de Viena sobre Compraventa Internacional de Mercaderías ha conducido a una constante disparidad de razonamientos que obstaculizan una aplicación uniforme de sus disposiciones. Este resultado es inconsistente con el artículo 7 de la Convención, el cual establece que esta debe ser interpretada atendiendo a su carácter internacional y la necesidad de promover uniformidad. El presente texto explora los múltiples aspectos que han afectado la interpretación uniforme de las normas de la Convención, incluyendo una referencia a la jurisprudencia de Estados Unidos, Australia e Italia. Por último, el texto presenta los principios de Unidroit como una herramienta para superar las dificultades en la aplicación del artículo 7.

Palabras clave: Convención de Viena sobre Compraventa Internacional de Mercaderías (CISG), *Common Law*, Uniformidad del Derecho Mercantil Internacional.

A convenção de Viena sobre compra e venda internacional de mercadorias e o *Common law*: o desafio de interpretar o artigo 7

Resumo

A metodologia interpretativa aplicada na jurisprudência do *Common Law* relativa à Convenção de Viena sobre Compra-Venda Internacional de Mercadorias levou a disparidades constantes de argumentos que impedem uma aplicação uniforme das suas disposições. Este resultado é incompatível com o Artigo 7 da Convenção, que afirma que ele deve ser interpretado de acordo com o seu caráter internacional e a necessidade de promover a uniformidade. Este artigo explora os múltiplos aspectos que têm afetado a interpretação uniforme das normas da Convenção, incluindo uma referência à jurisprudência dos Estados Unidos, Austrália e Itália. Finalmente, o texto apresenta os princípios de Unidroit como uma ferramenta para superar as dificuldades na aplicação do artigo 7.

Palavras-chave: Convenção de Viena sobre Compra-Venda Internacional de Mercadorias (CISG), *Common Law*, Uniformidade do Direito Mercantil Internacional..

Introduction

It has been widely considered that 'the adoption of uniform rules' contributes to the reduction of legal obstacles in 'International Trade' and thereby, facilitates its 'development'[1]. To date, the Vienna Convention on the International Sale of Goods (CISG) is part of the legal regime of 79 states[2]. The adoption of the convention allows states to reassess their domestic law and to incorporate a normative framework that more favours the necessities of international trade[3]. The CISG is recognised worldwide as a success towards the achievement of international legal uniformity[4].

Success of the convention does not appear so evident when examining the Common Law jurisdictions where the CISG has been mostly 'neglected'[5]. The Common Law attitude for the CISG has been considered less than 'enthusiastic' in comparison to its reception by Civil Law countries[6]. Common Law case law has been constantly criticised and accused internationally of being in breach of the interpretative methodology of the CISG[7]; the predilection for domestic law during the interpretive process being a dominant cause[8]. This obstructs international

[1] United Nations Convention on Contracts for the International Sale of Goods, Opened for signature 11 april 1980, 1489 UNTS 3 (entered into force 1 january 1988) (Hereafter 'CISG') Preamble.

[2] UNCITRAL, Status: 1980 — United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html; http://www.cisg.law.pace.edu/cisg/countries/cntries.html

[3] *Jan m. Smits*, 'problems of uniform sales law–why the cisg may not promote international trade' 2013/1 *Faculty of Law Maastricht University* 5.

[4] Ibid.

[5] See Luke Nottage, 'Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan' (2005) 36 *Victoria University of Wellington Law Review* 815, 817; Monica Kilian, 'CISG and the Problem with Common Law Jurisdictions' (2001) 10 *Journal of Transnational Law and Policy.*

[6] See Mathias Reimann, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care, Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law*, Bd. 71, H. 1, The Convention on the International Sale of Goods –The 25th Anniversary: Its Impact in the Past– Its Role in the Future. German Society of Comparative Law–Private Law Division Conference 2005, 22–24, september 2005, Würzburg (januar 2007) 129.

[7] Franco Ferrari, Homeward Trend: What, Why and Why Not, in CISG Methodology / ed. by André Janssen, Olaf Meyer (2009) 171.

[8] André Janssen, Olaf Meyer Literal Interpretation The meaning of the words In CISG Methodology / ed. by (2009) 82.

uniformity and results in mounting inconsistent reasoning of CISG provisions which leads contractual parties to frequently exclude the CISG consciously due to concern of 'unpredictable outcomes'[9].

Although uniformity of application in a strict sense is unrealisable, a 'relative uniformity' must be pursed[10.] Multiple causes for the absence of uniformity have been identified with some of them being attributable to the design of the CISG itself[11]. However, the 'homeward trend'[12] in the Common Law CISG jurisprudence, the 'attachment' to domestic legal criteria and the 'reluctance' to be seduced by the CISG has primary impact upon the achievement of global uniformity[13].

The accelerated growth in international trade has forced a convergence of different legal traditions. The CISG constitute an important unification effort and provides many advantages compared to the possibility of being governed by the 'uncertainty of an unknown domestic legal system'[14]. Common Law Courts and their practitioners would be advised to embrace the methodology of interpretation of the CISG for the benefits it represents.

This paper begins by exploring the multiple aspects that have affected the uniform interpretation of CISG and continues drawing upon analysis of foreign literature to explain the main features of Common Law that have been asserted as interfering in an accurate interpretation of its provisions. A revision of the case law in USA, Australia and Italy is then presented and followed by a consideration of how a change in perception by lawyers and the courts can lead to a higher quality of CISG jurisprudence. The paper concludes with an analysis of how difficulties in the application of article 7 can be overcome through the aid of the Unidroit principles.

[9] Smits above n 3, 10.

[10] Peter J. Mazzacano, Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective, *Nordic Journal of Commercial Law,* Issue 2008-1, 1-33; Smits above n 3, 11.

[11] Smits above n 3, 9.

[12] John O Honnold, *Documentary History of the Uniform Law for International Sales* (1989). Honnold mentioned it expression.

[13] Kilian above n 5, 218.

[14] Lisa Spagnolo, "The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers", (2009) 10 *MJIL* 5.

Searching the obstacles for the correct application of article 7

The implementation of unified laws does not necessarily translate to uniform application[15]. The uniform application of the CISG is challenged by the practice of tribunals, practitioners and commercials parties[16]. When applying the CISG, tribunals produce diverging outcomes, causing uncertainty that has led commercial parties to exclude the CISG from their contracts[17]. As a consequence, such parties often choose to regulate their contracts under the predictability of a precise domestic legal system[18] however, in several cases, studies have illustrated that non incorporation is an automatic response to deficient knowledge of the CISG provisions[19].

The homeward trend and the CISG incompleteness

The absence of uniform application has been attributed to multiple causes[20]. It has been asserted that the inexistence of a unified court or 'an official administrative body'[21] results in inadequate interpretive guidance on the CISG provisions[22].

The endeavored uniformity is undermined by the 'homeward trend,'[23] whereby judges, being 'a product of their background assumptions and conceptions,'[24] interpret the CISG through the introduction of criteria proper of domestic laws[25]. The homeward trend can also be manifested in the tendency to achieve results that

[15] Smits, above 3, 8.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] See, Ingeborg Schwenzer & ChistopernKee, Global Sales Law–Theory and Practice in Towards Uniformity: The 2nd Annual MAA Schechtriem CISG Conference (Eleven International Publishers,eds Ingeborg Schwenzer &lisa Spagnolo), pp 155-159; Spagnolo above 14, 10.

[20] Smits above n 3, 6 -9.

[21] Ibid 9.

[22] Ibid.

[23] Honnold above n 12 "homeward trend" mentions it expression.

[24] John O Honnold, *Uniform Law for International Sales* (3rd ed, 1999) 89.

[25] Ferrari above n 7, 171.

lend to the application of domestic laws[26]. The latter is exemplified through the invocation of Article 4(a) of the CISG which states that unless otherwise expressly provided, the Convention 'is not concerned with the validity of the contract'[27]. Through this vehicle, judges tend to identify validity issues, thereby providing grounds for the application of their domestic law[28].

Scholarly writing has outlined that there are other characteristics of the CISG that exacerbate the obstacles to a uniform interpretation[29]. The CISG is the result of diverse legal traditions and for this reason some terms are 'open ended'[30] and presents ambiguities[31] that confer too much freedom to tribunals[32]. An example is the expression, 'reasonable time' in article 39(1) CISG[33]. Additionally, the CISG is incomplete[34] for it only regulates the formation of the contract, obligation of the parties and contractual remedies[35]. The Convention is devoid of some important legal definitions including the concept of goods, the contract of sale of goods and the concept of good faith[36]. Incompleteness is further highlighted by the exclusion of validity questions[37], procedural law, taxation law, effects of the contract on the property and specification as to what rate of interest should be paid[38]. When faced with such gaps, solutions must be pursued in the underlying principles of the convention. The difficulty lies in that there is no express mention of general principles and therefore, they are often difficult to identify. Consequently, answers are often sought in domestic law[39].

[26] Bruno Zeller *The Black Hole: Where are the Four* Corners of the CISG? International Trade and Business Law Annual (2002), University of Queensland 261.

[27] Ibid ; Kilian above n 5, 227.

[28] Zeller above 26, 261.

[29] Smit above n 3, 6-9.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid; Ferrari above n 7, 184.

[36] Bruno Zeller, *The Observance of Good Faith in International Trade*, in above n 8, 133, 134-35.

[37] Zeller above n 26, 261.

[38] Ibid.

[39] Ibid; Ferrari above n 7, 181.

Some argue that the concept of freedom of contract underlying the CISG can constitute an obstacle to uniformity[40]. Article 6 allows parties to contract out of the CISG and any of its provisions[41]. Article 95 allows states, while adhering to the CISG, to 'not be bound'[42] by article 1 (1) (b)[43]. It allows exclusion of the CISG 'when only one party has its place of business in a contracting state'[44]. This reservation has been adopted by U.S.A., China and Singapore, amongst others[45].

Commentators argue that the principle of freedom of contract is incompatible with the objective of the Convention as stated in its preamble which, looks to promote 'equality and mutual benefit'[46]. Some go so far as to state that if it is possible to opt out of the Convention, its purpose is muted[47]. If application of the convention is optional it is more likely that the party with the least negotiation position is forced to consent to the law preferred by the stronger trading partner[48]. Opt outs logically limit the improvement in quality of the CISG jurisprudence towards uniformity.

The drafters of the CISG predicted the 'homeward trend'[49] and attempted to minimise it through use of a 'plain language'[50], 'using words of common content in the various languages'[51] but particularly with the incorporation of Article 7 (1) which mandates interpretation of the convention in accordance to '[its] international character and the need to promote uniformity in its application'[52]. The article does not detail the mode by which uniformity can be achieved[53] although; it has been understood as 'imperative' to not read the Convention using 'the lenses of

[40] Kilian above n 5, 224.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Davies & Snyder 74, 75.

[45] Ibid.

[46] Kilian above n 5, 224.

[47] Ibid.

[48] Ibid.

[49] Honnold above n 24, 89.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Killian above n 5, 226.

domestic law'[54]. In other words, domestic legal terms, non-*CISG* cases and non-*CISG* provisions should not been applied[55].

Article 7 has been vastly studied by academics concerned with providing efficient tools to ensure international and uniform application. It has been construed as an invitation to 'tribunals in one contracting state [to] consider the opinions of tribunals in other contracting states'[56], as 'persuasive authority'[57] which, has been denominated as 'global jurisconsultorium'[58]. However, there is consensus that there is no '*stare decisis*'[59] principle and therefore, they are no binding precedents[60]. It is considered that decisions must be analysed critically otherwise bad reasoning will be perpetuated[61]. Article 7 also invites invocation of the CISG legislative history[62] and scholarly opinions as an aid in the achievement of uniform outcomes[63].

However, in practice commentators have outlined that, "[v]ery rarely do decisions take into account the solutions adopted on the same point by courts in other countries"[64]. Barriers that stem from different legal traditions present challenges in the realization of this task[65] particularly, issues have been observed in Common Law countries[66].

The CISG is perceived as being reflective of a Civil Law background[67], grounded in part upon the fact that its predecessor, Ulis, was redacted by civilians[68].

[54] Ibid.

[55] Spagnolo above n 14, 25.

[56] Kilian above n 5, 227.

[57] Ibid.

[58] See, Camilla Baasch Andersen, 'The Uniform International Sales Law and the Global Jurisconsultorium' (2005) 24 *Journal of Law and Commerce* 159, 159–61.

[59] Ibid.

[60] Ibid.

[61] See Kilian above n 5.238.

[62] Honnold above n 24-89.

[63] Honnold above n 24 89.

[64] John Murray. Jr, '*The Neglect of CISG: A Workable Solution*' 17 Journal of Law and Commerce (1998) [365- 379]; Kilian above n 5, 226.

[65] Oduor, Fredrick Oduol '*Predilection for Domestic Law in the Interpretation of the CISG: Towards a More Uniform Interpretation and the Role of Article 7 in ... and the Role of Article 7 in Shedding the Homeward Trend Baggage*' (june 30, 2010). Available at SSRN, p. 4.

[66] Ibid; see above n 5.

[67] Ibid.

[68] See, Nottage above 5.

The Convention finds considerable acceptance in Civil Law jurisdictions[69] where voluminous CISG cases have been reported[70]. To date, the number of Common Law cases is relatively 'scarce'[71]. An obstacle to improving uniformity between Civil Law and Common Law is the UK's disinterest in ratifying the CISG[72]. Some commentators adduce that the reason could be that "the Convention would result in a diminished role for English Law within the international trade arena"[73]. Without the UK's adoption of the CISG, tribunals in countries that have typically adhered to English Law[74] are now without accustomed guidance when attempting to apply the Convention[75]. Some suggest that these jurisdictions have started to evolve their own CISG case law[76].

Features of the common law that may affect the application of the CISG

There are several distinctive features between Common Law and Civil Law jurisdictions that have been referred to as obstacles to uniform application. One is Common Laws 'attachment' to its legal history which makes difficult the incorporation of external concepts[77]. Furthermore, the notion of legal precedent does not have a 'global definition' and the differences in approach are intense amongst various jurisdictions[78].

[69] Ibid.

[70] Ibid.

[71] Kilian above n 5, 235.

[72] Ibid.

[73] See *Ahmad Azzouni*, The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom, 27 may 2002. Available at http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html; Nathalie Hofmann, *Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe*, 22 Pace Int'l L. Rev. 145 (2010) Available at http://digitalcommons.pace.edu/pilr/vol22/iss1/4; see also Fredrick above n 64.

[74] Ibid.

[75] Ibid.

[76] See, *Henning* Lutz, "*The CISG and Common Law Courts: Is There Really a Problem*?" [2004]. WW Law Review 28 Invercargill City Council v Hamlin (1996) 1 NZLR 513, 519 (PC) Lord Lloyd of Berwick.

[77] See Kilian above n 5, 235.

[78] See Baasch above n 64.

a. The concept of precedent

Under Common Law[79], judicial precedents are binding authorities[80] and central to the law making process[81]. In Civil Law jurisdictions 'rules are derived from statutes'[82] and judicial decisions are not technically a source of legal rules although, precedent can possess considerable persuasive value and therefore have great significance in the legislative process[83].

Of consideration is that in its tradition of applying precedents, Common Law has been limited to decisions made in respect of their own national law[84]. The precedent as a persuasive authority of the CISG more closely resembles that of Civil Law[85].

b. Different method of interpretation

Other aspect of distinctiveness is the different method of interpretation proper of Common Law countries. Under Civil Law, interpretative doubts are resolved with the application of principles whereas[86], under common law systems interpretation must be 'narrow' with the meaning of the legislation primarily deduced from the words of the statute and application of general principles seemingly unfamiliar[87].

Narrow interpretation does not favourably fit the international character of the Convention which, calls for identifying its underlying principles in order to fill gaps. A 'broader interpretation' can result in a more orthodox application of Article 7 (1)[88].

The understanding of Article 7 as invitation to consider international scholarly writing[89], historical background and preparatory materials of the CISG is 'familiar'

[79] Ibid; see also Hofman above n 72; Kilian above n 5; Lutz above n 75.

[80] Ibid.

[81] Ibid.

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Ibid.

[89] Ibid.

for civilians for whom doctrinal opinions have traditionally been an 'interpretative' aid and parliamentary material has habitually provided ideological approach to the purpose of legislations[90].

Wider interpretation of Article 7 is unaccustomed with the Common Law perspective where traditionally, 'parliamentary intention must appear in the text' of the statue and neither the legislative history nor the doctrine have regularly been consider as an appropriate aid for statutory interpretation[91]. However, there is some academic reference that modern Common Law interpretation has started to display a more encompassing approach[92].

c. Procedural differences 'iura novit curie'

Commentators have also made reference to procedural issues in Common Law countries[93]. In most Civil Law jurisdictions there is an 'inquisitorial system'[94] and there is application of the 'iura novit curie'[95] ('the judge knows the law')[96] whereby, the judges have an *'ex officio'*[97] duty to search for the correct precedent. In most Common Law countries the judge relies on the pleading of the parties[98]. For this reason, if the counsel omits to mention the CISG judges cannot apply it[99].

The reality is that even in 'jura noscit curia'[100] jurisdictions, for practical reasons, the judges often limit themselves to the material presented by counsel[101], with the duty being predominantly upon the party to look to international case law. For this reason some argue that the non-uniform CISG application is a consequence of the ignorance of the parties rather than that of the court[102]. However, Spagnolo

[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] See Baasch above n 58; Lutz above n 75.

[94] Ibid.

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Lutz above n 75, 21.

has pointed out that there is not a real barrier for judges to apply the 'jura noscit curia' in demand of the correct application of the CISG[103].

d. Different legal notions

Another difficulty is the differences between legal notions that are incorporated into the Common Law system and those of the CISG[104].

The absence of consideration

The requisite of 'consideration' pertaining to Common Law systems is not 'demanded' under CISG provisions [105]. Article 29 (1) of the CISG establishes that "[a] contract may be modified or terminated by the mere agreement of the parties"[106]. This provision has been understood to "overrule" the common law requirement of consideration[107]. The inapplicability of consideration in the CISG has been well recognised in some decisions. In *Shuttle Packaging Systems LLC v Jacob Tsonakis*[108] the Court stated that "under the Convention, a contract for the sale of goods may be modified 'without consideration for the modification'"[109]. However, some tribunals have made evident their misunderstanding of this distinction and show a clear 'homeward trend'[110], interpreting 'consideration' as a validity issue which, allows the application of CISG Art 4(a) and provides room to analyse the lack of consideration under domestic law[111].

[103] Lisa Spagnolo, Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole (December 16, 2010). In I. Spagnolo Schwenzer & L. (eds), Towards Uniformity: the 2nd Annual MAA Schlechtriem Conference (2011, Eleven International Publishing, The Hague). Available at SSRN: http://ssrn.com/abstract=2050215

[104] See also Hofman above n 72; Kilian above n 5; Lutz above n 75.

[105] Honnold above n 24, 234; Spagnolo above 14, 15; See also Hofman above n 72; Kilian above n 5; Lutz above n 75.

[106] Ibid.

[107] Ibid.

[108] See Kilian above n 5 235; *Shuttle Packaging Systems, LLC v Jacob Tsonakis, INA SA and INA Plastics Corporation* (17 December 2001) 1:01-CV-691 (WD Mich SD).

[109] See Kilian above n 5, 235.

[110] See Kilian above n 5, 235.

[111] See Kilian above n 5, 235, *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc.* (2002) 201 F Supp 2d 236 (SD NY).

In the formation of the contract, under the CISG its existence is dependent upon the correspondence between offer and acceptance[112]. This CISG provision allows that even if there is not a complete compatibility between offer and acceptance the contract can still exist although, just in those cases where the acceptance introduces changes that do not materially alter the terms of the offer[113]. However, in practice it is difficult to find contractual changes that do not materially affect the offer[114].

Under the CISG the 'acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror'[115]. Practices established by the parties that 'may indicate assent by performing an act'[116] can constitute acceptance[117]. This displays some distinctiveness from some Common Law regulations which generally require 'communication of acceptance'[118].

Absence of the parol evidence rule

The common law parol evidence rule does not allow 'the consideration of any agreement that contradicts a contemporary or subsequent writing intended by the parties as a final expression of their agreement'[119]. 'Oral or any other extrinsic evidence cannot be permitted to alter, contradict or explain terms of a written contract'[120]. This concept is inapplicable to the CISG[121]. Article 8 of the CISG refers to the interpretation of statements or other conduct of a party, stating in its subparagraph 3 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

[112] *CISG* Art 19 (2); see Spagnolo above 14, 12-15.

[113] Ibid.

[114] Ibid.

[115] *CISG* Art 18 (2), 18 (3); see Spagnolo above 14, 12-15.

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] *CISG* Art 8; See, Honnold above n 24, 121.

[120] Ibid.

[121] Ibid.

> the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties (Ibid).

This provision has been understood to supersede any domestic law that would prevent a tribunal from 'considering'[122] other agreements and it is therefore in direct contradiction to the parol evidence rule[123].

The notion of good faith

The concept of good faith is included within Article 7 (1) of the CISG although; it was the object of great discussion during the drafting period[124]. The different approaches amongst Common Law and Civil Law jurisdictions can make this concept 'vague'[125]. Under the German concept of good faith parties are expected 'to act in good faith before and after a contract'[126] and 'Italian law considers it an ethical obligation'[127] while in English law[128], the concept of good faith is not accepted as 'clarity on its exact meaning is considered difficult to determine'[129]. However, in other Common Law countries such *as the* United States the concept has been adopted, being defined as *'honesty in fact in the contract or transaction concerned'*[130]. It appears that the Australia legal system is moving nearer towards acceptance of the concept as illustrated in *Renard Constructions (ME) Pty v Minister for Public Works where it was stated, '*Australian law has reached a point where it should consider the implied inclusion of concepts similar to good faith in contracts as is done in the US'[131].

[122] Ibid.

[123] Ibid; see also Killian above 5, 231.

[124] Honnold above n 12.

[125] See, Hofman above n 72; Odur Fredick above n 64.

[126] Odur Fredick above n 64, 8.

[127] Ibid.

[128] Ibid; see also Hofman above n 72.

[129] Ibid; see also Bruno Zeller, *'Good Faith –The Scarlet Pimpernel'* (2001). 6 International Trade and Business Law Annual 227.

[130] See, Hofman above n 72; Odur Fredick above n 64.

[131] Renard Constructions (ME) Pty v Minister for Public Works (1992) 26 NSWLR 234, 268.

Article 7 of the CISG states that in the interpretation of the Convention regard is to be given to the 'observance of good faith in international trade'[132]. The plain text of this provision appears to provide insufficient clarity as to the exact meaning of the good faith notion in the CISG ambit. The main discussion has been whether the concept of good faith is to be understood as a contractual duty of the parties or as an interpretative tool of the convention[133]. In this regard Korenu has expressed that good faith cannot be said to exist exclusively as an interpretative tool as 'it is not possible to interpret the Convention without also affecting the contract'[134]. In practice it seems that the concept has been understood as a principle of interpretation and not as a duty[135]. However, some courts and arbitral panels have implied a general duty of good faith to dealings between contracting parties[136].

The non application of the 'perfect tender rule'

The 'perfect tender rule'[137] proper of the Anglo American Law provides the buyer with a 'broad right'[138] to reject the goods if they are nonconforming to the contract in any aspect however; this concept is not applicable under the CISG[139]. Given the long distances that are implicated in international trade, the CISG requires buyers to accept delivery of nonconforming goods in most situations[140]. This is intended to prevent the detrimental economic costs that may be involved if the goods were to be returned[141]. Where there is nonconformity, the CISG provides the remedies of 'unilateral price reduction'[142] and 'subsequent claim for damages'[143].

[132] Cisg Art 7 (2); See Odur Fredick above n 64.

[133] See Nottage above n 5.

[134] Hofman above n 72; Odur Fredick above n 64.

[135] Ibid.

[136] See, see Larry DiMatteo et al., *The Interpretive Turn in International Sales Law*: An Analysis of Fifteen Years of CISG Jurisprudence p. 27.

[137] Larry DiMatteo et al., *The Interpretive Turn in International Sales Law*: An Analysis of Fifteen Years of CISG Jurisprudence 24.

[138] Ibid.

[139] Ibid; see Spanolo above n 14, 16.

[140] CISG Art 35; see Spanolo above n 14, 16.

[141] Spanolo above n 14, 16.

[142] CISG Art 50; Spanolo above n 14, 20.

[143] CISG Art 74; Spanolo above n 14, 20.

Furthermore, the option exists for an additional reasonable period of time to be fixed by the buyer for the seller to perform his obligations[144].

The CISG also provides for the remedy of avoidance which requires a fundamental breach that 'foreseeably and substantially deprives the innocent party of what they were entitled to expect under the contract[145]; or alternatively, in cases of non-delivery, where the seller does not deliver within the 'additional period of time fixed'[146].

The CISG regulates the right to compel performance from both the buyer and seller[147] which is a right not ordinarily admissible in the Common Law system[148].

The application of article 7; an overview of the tendecies in the USA, Australia and Italy

United States

The attitude of U.S. practitioners and courts towards the CISG has drawn much criticism from scholars[149]; exclusion of the Convention is common with many U.S. practitioners[150]. Rather than apply the CISG, some U.S. courts prefer to arrive at outcomes exclaiming '*the CISG is not the law of the contract*'[151]. A minimal reference to CISG foreign case law has been displayed by the U.S. courts although, the majority have relied on domestic cases and authors[152]. Some federal decisions have incorrectly stated that 'there is little CISG case law'[153] while the truth is that to date, the CISG website of Pace University Law School has reported 161 cases

[144] CISG, Arts 47, 63; Spanolo above n 16.

[145] CISG Art 25, 49 (1) (a), Art 64; Spanolo above n 14, 16.

[146] CISG Art 49 (1) (b); Spagnolo above n 4, 18.

[147] CISG Article 46, 62; Honnold above n 24, 306.

[148] Ibid.

[149] Kilian, above n 5, 240.

[150] Schwenzer above n 19, 155, 159.

[151] Kilian, above n 5, 240.

[152] See Alain A. Levasseur, 'United States' in Franco Ferrari (ed), The CISG and Its Impact on National Legal Systems (2008) 313, 334.

[153] Levasseur above n 152, 313.

in the U.S. alone[154]. However, the homeward trend is fragrantly evident[155]. Many U.S. decisions erroneously have asserted that the UCC case law can constitute an aid for interpretation '*where the language of the relative CISG provision tracks that of the UCC*'[156] which, clearly contradicts the mandate of Article 7 of interpreting the Convention in accordance with its international character and its derived suggestion to refer to international case law[157].

In Delchi Carrier s.p.A. v Rotonex Corp the Court, when applying *Article 79 of the CISG,* relied on case law interpreting 2-615 of the UCC, asserting similarity between the provisions. This argument has been reproduced in subsequent cases[158]. In *Genpharm Inc v Pliva- Lachema*[159] the Federal District Court of New York stated that:

> The result of the case would also be appropriate if analysed under the UCC. The Second Circuit has recognised that case law interpreting analogous provisions of Article 2 of the Uniform Commercial Code… may also inform a court where the language of the relevant CISG provisions tracks that of the CISG (Ibid).

Very little reference has been made to foreign doctrinal writing[160]. In Barbara Berry, S.A.de C.V. v. Ken M. Spooner Farms, Inc.[161], a brief reference was made to the author Franco Ferrari however, in a footnote only[162].

Despite, the U.S. courts still having much to do in order to achieve at least a relative uniformity, some decisions have shown that there is a consciousness of the obligation to construe the convention in an international manner. The incorporation of domestic law concepts in CISG cases is still a constant but some improvements

[154] See Pace Law School, CISG Case country; Fredick above n 64.

[155] Levasseur above n 152, 313-334.

[156] *Delchi Carrier v Rotorex* (US Circuit Court of Appeals (2nd Cir), US, 6 december 1995); see Spagnolo above n 14, 30.

[157] See, Kilian, above n 5, 240.

[158] *Delchi Carrier v Rotorex* (US Circuit Court of Appeals (2nd Cir), US, 6 december 1995).

[159] *Genpharm Inc. v. Pliva-Lachema A.S.*United States 19 march 2005 Federal District Court [New York].

[160] See Levasseur above n 152.

[161] *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.* United States 8 november 2007 Federal Appellate Court [9th Circuit].

[162] See Levasseur above n 152.

have been observed[163]. Some decisions have given light to the understanding of the inapplicability of some Common Law concepts in the scope of the CISG. One particular example can be seen below: *In Beijing Metals & Minerals v American Business Centre Inc. [164],* the Court stated that the 'parol evidence rule' would apply 'regardless of whether Texas Law or the CISG applied'[165]. Commentators[166] criticised the fact that the 'CISG was treated as a mere extension of the UCC'[167]. However, *In MCC-Marble Ceramic Centre Inc v Ceramica Nouva D'Agostino SpA[168]* the U.S. Court of Appeals, while reversing a District Courts judgment[169], considered the doctrine in this matter, finally concluding that[170] CISG Article 8 (3) displaces the parol evidence rule and furthermore dismissed the opinion in *Beijing Metals* as inadequately persuasive on the issue. This position was confirmed in subsequent decisions[171].

Some cases, although not being a majority, have been considered a correct application of the CISG interpretative methodology, particularly because of their reference to foreign cases[172]. In *Medical Marketing International Inc. v. Internazionale Medico Scientifica,* S.R.L[173] the Eastern District Court of Louisiana confirmed an arbitral award which granted damages to the plaintiff because the defendant had delivered units that failed to comply with U.S. safety standards[174]. The court took into account a German Supreme Court case for the statement that under Article 35 of the CISG a 'seller is generally not obligated to supply goods that conform to

[163] See, Kilian, above n 5, 240.

[164] *Beijing Metals v. American Business Center*, United States 15 june 1993 Federal Appellate Court [5th Circuit]; See, Kilian, above n 5, 232.

[165] *Beijing Metals v. American Business Center*, United States 15 june 1993 Federal Appellate Court [5th Circuit].

[166] See, Kilian, above n 5, 231.

[167] Ibid.

[168] *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, United States 29 june 1998 Federal Appellate Court [11th Circuit]; see, Kilian, above n 5, 231.

[169] Ibid.

[170] Ibid.

[171] *Mitchell Aircraft Spares Inc v European Aircraft Service AB* (1998) 23; see, Kilian, above n 5, 231.

[172] *Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 28 may 2003).

[173] *Medical Marketing v. Internazionale Medico Scientifica*, United States 17 may 1999 Federal District Court [Louisiana] 'Editorial Remarks' in Pace Law School, *CISG Case Presentation*'.

[174] Ibid.

public laws and regulations enforced at the buyers place of business'[175]. The court considered that the arbitrators gave correct application to the German case and that the situation fitted within an exception recognised by the German Supreme Court[176].

Chicago Prime Packers Inc v Northam Food Trading Co[177] is considered a correct application of Article 7 (1) of the Convention. The U.S. District Court, Northern District of Illinois, Eastern Division recognised the duty of interpreting the convention in accordance to its international character. The Court cited seven foreign cases[178]. In this case the seller purchased from another 'U.S. company 40 500 pounds of frozen pork ribs'[179] that 'it immediately'[180] 'resold to a Canadian meat wholesaler (the buyer)'[181] who 'entrusted'[182] a U.S. party to process the meat. When receiving the goods the processor expressed that 'they were in good condition with the exception of 21 boxes that had holes gouged in them'[183]. Just 9 days later when starting to 'process the ribs,'[184] the processor 'noticed their poor condition'[185]. A USDA inspector established the poor condition and ordered them to be destroyed[186]. 'Buyer informed Seller that it was not willing to pay'[187] and the Seller, who

[175] Ibid.

[176] Ibid.

[177] *Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 28 may 2003).

[178] See *Annabel Teiling,* a note on the decision in *Chicago Prime Packers v. Northam Food Trading* CISG: U.S. Court Relies on Foreign Case Law and the Internet [21 may 2004] United States District Court, N.D. Illinois, Eastern Division.

[179] See, 'Editorial Remarks' in Pace Law School, *CISG Case Presentation' Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 28 may 2003); see UNCITRAL CLOUT Abstract.

[180] *Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 28 may 2003); see UNCITRAL CLOUT Abstract.

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] Ibid.

[185] Ibid.

[186] Ibid.

[187] See, 'Editorial Remarks' in Pace Law School, *CISG Case Presentation' Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 28 may 2003); see UNCITRAL CLOUT Abstract; *Annabel Teiling,* a note on the decision in *Chicago Prime Packers v. Northam Food Trading* CISG: U.S. Court Relies on Foreign Case Law and the Internet [21 may 2004] United States District Court, N.D. Illinois, Eastern Division.

had already paid its own supplier for the goods 'brought a law suit against Buyer for breach of contract'[188].

Leading issues to be identified were whether Buyer was dutiful in examining the goods within a reasonable period once receiving them and whether Buyer informed Seller of the 'alleged'[189] non-conformity within a reasonably acceptable term of time[190].

In explaining that 'the buyer bears the burden of proving that the goods were inspected within a reasonable time'[191] the Court relied on *Fallini Stefano & Co. S.n.c. v. Foodic BV*[192], a case from the Netherlands. In elaborating on 'reasonable time'[193] in the identifying and informing of defects or non-conformity under the CISG, the U.S. District Court looked at a number of foreign cases related to distinct circumstances[194], concluding that Buyer could not provide suitable evidence that proved it examined the goods or had them examined in a 'reasonable time'[195].

The case *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc*[196]. Is an example of how lawyers can contribute to the improvement of the CISG jurisprudence[197]. It involved a purchase of chemical compound for 'consignment'[198] which, amounted to a discussion concerning the meaning of this term. The buyer argued that this means that the sale only occurred when the compound is used. The supplier argued that according to the dealing between the parties it means that there is purchase

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] Ibid.

[192] *Fallini Stefano & Co*. S.N.C. v. Foodic BV, 90036, dec 19, 1991 (Netherlands, Arrondissementsrechtbank Roermond), UNILEX 1994, CLOUT, abstract n 98.

[193] See, 'Editorial Remarks' in Pace Law School, *CISG Case Presentation' Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 28 may 2003); see UNCITRAL CLOUT Abstract; *Annabel Teiling,* a note on the decision in *Chicago Prime Packers v. Northam Food Trading* CISG: U.S. Court Relies on Foreign Case Law and the Internet [21 may 2004] United States District Court, N.D. Illinois, Eastern Division.

[194] Ibid.

[195] Ibid.

[196] *Treibacher Industrie*, A.G. v. *Allegheny Technologies*, *Inc*. United States 12 september 2006 Federal Appellate Court [11th Circuit].

[197] Levasseur above n 152, 318.

[198] *Treibacher Industrie, A.G. v. Allegheny Technologies*, *Inc*. United States 12 september 2006 Federal Appellate Court [11th Circuit]; Case law on UNCITRAL texts (CLOUT) abstract n 777; Levasseur above n 152, 318.

but the buyer 'would not be billed until the product was used'[199]. The court in the first instance determined that the buyer was obligated to pay for the compound delivered even when it was not used, in accordance 'with evidence of the parties interpretation of the term in the course of dealing'[200]. The buyer appealed and the decision was confirmed during the appeal[201]. The supplier's lawyers submitted a 'brief' supported by exhaustive references to pertinent CISG foreign cases highlighting that CISG Article 8 (3) mandates that in determining the parties intent, all the circumstances surrounding the transactions, including the conduct of the parties must be considered[202]. These arguments helped to support the Court of Appeal's decision[203].

Australia

The unfamiliarity of Australian lawyers and Courts in regard to the CISG has been strongly critised by scholars[204]. The ignorance of the CISG by practitioners has been evidenced through a significant number of automatic exclusions of the Convention and with untrained behaviour at times when the CISG arises in litigation[205]. Court decisions have also shown an intense homeward trend, an unduly return to domestic law, inclusion of Common Law concepts incompatible with the CISG and an almost inexistence of references to International case law[206].

To date, the website of Pace University Law reports 25 CISG Australian cases with earlier decisions having received positive reviews by scholars although, there is criticisms of little progress since[207]. In *Renard Constructions (ME) Pty Ltd v Minister for Public Work*[208], although this case did not imply application of the CISG,

[199] Ibid.

[200] Ibid.

[201] Ibid.

[202] Ibid.

[203] Ibid.

[204] See Spagnolo above n 14.

[205] Playcorp Pty Ltd v Taiyo Kogyo Limited [Australia 24 april 2003 Supreme Court of Victoria]; see Spagnolo above n 14, 51.

[206] See Spagnolo above n 14.

[207] Ibid, 31.

[208] (1992) 26 NSWLR 234 *Renard Constructions (ME) Pty Ltd v Minister for Public Work*; see Spagnolo above n 14, 31; see, Spagnolo 'Editorial Remarks' in Pace Law School.

there was a reference in the obiter to CISG provisions[209]. The case coming from an arbitral award to the New South Wales Court of appeals centred on a to 'show cause'[210] notice with 'subsequent termination of the contract'[211]. Priestley J drew from 'scholarship,'[212] the '*UNCITRAL Model Law on Arbitration'*[213] and 'Article 7 (1) of the *CISG'*[214] while referring to notions of good faith and concluded that the acceptation of the concept of good faith in Australia could be fast 'approaching'[215].

Spagnolo signaled *Roder Zelt Und Hallenkonstruktionen Gmbh V Rosedown Park Pty Ltd*[216] as one of the best CISG cases 'by Australian standards'[217]. Roder Zelt, a German company had sold tent hall structures to the Australian buyer, Rosedown[218]. The later was required to pay for the goods by installments and came in arrears with the company later being placed under administration[219]. Roder sued Rosedown and the administrator, claiming that it had retained ownership of the goods by virtue of a retention of title clause in the sales contract[220]. Von Doussa J correctly considered Article 4 (b) which states that the CISG is not concerned with 'the effect the contract may have on property in the goods sold'[221] and applied Australian property law to support the effect of the Article[222]. No reference was given to foreign CISG case law[223].

[209] Ibid.

[210] Ibid.

[211] Ibid.

[212] Ibid.

[213] Ibid.

[214] Ibid.

[215] Ibid.

[216] Roder Zelt-und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd et al, 19950428 (28 april 1995); Spagnolo above 14, 33; Case law on UNCITRAL texts (CLOUT) abstract n 308.

[217] Ibid.

[218] Ibid.

[219] Ibid.

[220] Ibid.

[221] Ibid.

[222] Ibid.

[223] Ibid.

Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd[224] was concerned with scrap metal sold by an Australia seller to a Malaysian buyer[225] in which the latter failed in its obligation to open a the letter of credit. In this case it was decided that the failure constituted a fundamental breach in accordance with art 25[226]. This enabled the seller to declare the contract void pursuant to art 64 (1)[227]. In this decision, the only foreign case cited was Delchi Carrier S.p.A v. Rotorex Corp. which, has been strongly criticised for its poor quality[228].

In *Guang Dong Zhi Gao Australia Pty Limited v Fortuna Network Pty*[229] Limited the court recognised that under CISG 8 (2) the parol evidence rule is not applicable stating that, *In determining what are the terms of contract that is partly written and partly oral, surrounding circumstances may be used as an aid to finding what the terms of the contract are*[230].

Notwithstanding this reasoning, the court omitted the application of art 9 and relied upon domestic case law in its decision[231].

In *Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd*[232] the court recognised the application of art 35[233] but the claimant "invoked, further or alternatively, the warranties of fitness for the purpose and merchantable quality implied by section 19 (a) and (b) of the Goods Act 1958 (Vic)"[234] and the Court considered that this provision has been:

> Treated by Australian courts as imposing, effectively, the same obligations as the implied warranties of merchantable quality and fitness for purpose arising under section 19 of the Goods Act; see Playcorp Pty Ltd v Taiyo Kogyo Ltd [2003] VSC

[224] See [2002] 2 Qd R 462, *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd*; Spagnolo above 14, 38; Pace Law School CISG-online Case n 955.

[225] Ibid.

[226] Ibid.

[227] Ibid.

[228] Ibid.

[229] *Guang Dong Zhi Gao Australia Pty Limited v Fortuna Network Pty [*2009] NSWSC 1170 (4 november 2009); see Zeller, Bruno. The CISG and the Common Law; Australian Experience.

[230] Ibid at 5.

[231] See Zeller, Bruno. The CISG and the Common Law; Australian Experience.

[232] Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd, 2010 FCA 1028 (28 september 2010).

[233] Ibid para 122; Zeller above n 231, 15.

[234] Ibid.

108 at [235], Ginza Pte Ltd v Vista Corp Pty Ltd [2003] WASC 11, at [189]-[191] and Summit Chemicals Pty Ltd v Vetrotex Espana SA [2004] WASCA 109 (Ibid).

The decisions cited by the Court had been previously criticised for ignoring the non-alternative application amongst the CISG and the Sale of Goods Act as well as the differences between provisions[235].

Other jurisdictions; the italian example

A glance at the reported cases on the Pace website allows the inference that application of the CISG by Civil Law traditions has been higher compared to those of Common law jurisdictions. Germany has registered 493 cases, China 432, Netherlands 242 and Switzerland 186. Although, Italy has reported only 52 decisions its cases will be analysed due to important scholarly writings and decisions that have been produced by this country which, has contributed to the notion of 'uniform interpretation'.

Italy has produced laudable CISG decisions with International implications. The 'Cuneo case'[236] has the merit of being the first CISG case to refer to foreign jurisprudence[237]. In 1996 the Italian District Court judge in Cuneo considered German and Swiss CISG jurisprudence when analysing a case that involved a French seller and an Italian buyer[238]. The seller shipped clothes in French sizes rather than Italian and the Court determined that the notice of non-conformity sent by the buyer 23 days after delivery was not within an acceptable time frame[239]. After this outcome, several Italian cases have invoked International Case Law[240]. Prominent cases that followed include *Al Palazzo Srl v Bernardaud di Limoges SA*

[235] Zeller above n 231, 15.

[236] *Sport d'Hiver di Genevieve Culet v Ets Louys et Fils* (Tribunale Civile di Cuneo, Italy, 31 january 1996); see, Camilla Baasch 'Editorial Remarks' in Pace Law School, *CISG Case Presentation*'; see above n 58.

[237] Ibid.

[238] Ibid.

[239] Ibid.

[240] Ibid.

Tribunale Rimini[241] in which 30 cases were cited from nine states[242]. *M Agri Sas v Erzeugerorganisation Marchfeldgemüse GmbH & Co KG*[243] cited numerous decisions from Germany, France, Swizerland, Austria, Belgium and an ICC arbitral award[244].

Of particular relevance is the '*Vigevano* case'[245] in which an Italian seller delivered vulcanized rubber to a German buyer for the production of shoe soles, after which the seller claimed lack of conformity[246].

The Court cited 40 foreign decisions from Austria, France, Germany, the Netherlands, Switzerland and the US as well as arbitral awards[247]. When analysing the expression 'reasonable time' for notice contained within Article 39 (1) CISG, it was determined that it should established case by case. On this point the court took into account decisions from German, Italy and the Netherlands[248]. When outlining the importance of the nature of the goods in establishing the 'reasonable time' the judge relied on Dutch, Swiss and German cases[249]. Again consulting German case law, the Court outlined the necessity of taking into account the time when the buyer was required to examine the goods which, is regulated in Article 38 (1)[250]. The Court relied on Swiss and German CISG in clarifying the necessity to specify 'the nature of the defect' when arguing non-conformity[251.] The expression "caused problems" or "are defective" were deemed insufficient[252].

The Court stated that the burden of proof is a matter governed by the CISG but is "not expressly settle by it" rather, being 'resolved' through its underlying principles[253]. The Court outlined that Article 79 (1) CISG requires that the party in

[241] *Al Palazzo Srl v Bernardaud di Limoges SA* (Tribunale Rimini, Italy, 26 november 2002); see Baasch above n 58.

[242] See Baasch above n 58.

[243] *M Agri Sas v Erzeugerorganisation Marchfeldgemüse GmbH & Co KG* Trib. di Padova, 25 feb. 2004, n 40522 (Italy).

[244] See Baasch above n 58.

[245] District Court Vigevano, Italy, 12 july 2000, (*Rheinland Versicherungen v. Atlarex*); see Case abstract Charles Sant 'Elia available at: http://cisgw3.law.pace.edu/cases/000712i3.html; see Baasch above n 58.

[246] Ibid.

[247] Ibid.

[248] Ibid.

[249] See Baasch above n 58.

[250] Ibid.

[251] Ibid.

[252] Ibid.

[253] Ibid.

breach 'must prove that its failure was due to an impediment beyond his control'[254] which allows the deduction that one CISG principle is that 'the burned of proof rests upon the one who affirms'[255].

The challenge for courts and lawyers in the improvement of the CISG

Analysis conducted thus far indicates the marginal relevance of the CISG in Common Law countries and outlines the low quality of case law amassed through its courts. A lack of understanding of art 7 of the CISG has undoubtedly been one of the main obstacles to consistent application[256]. The achievement of at least a 'consistent' uniformity is mostly dependent upon the aptitude of practitioners, tribunals and commercial parties[257]. The way forward is for lawyers to divorce from their prejudices in relation to the CISG and to permit greater familiarity with its 'advantages and fundamental issues'[258]. The accusation of uncertainty in the CISG can be overcome if more parties consider its application to their contracts thereby, adding to the production of CISG jurisprudence and in turn allowing for greater improvement of the case law[259].

This does not mean that the CISG must always be included[260]. The exclusion of the CISG is not always negative as it does not pretend to substitute domestic sale of goods regimes[261]. The CISG must be understood as an available option for the parties with its application not being appropriate in all cases[262] however; the CISG is specifically designed for international trade and for that reason it can be

[254] Ibid.

[255] Ibid.

[256] See Zeller above n 231; Spanolo above n 14.

[257] Ibid.

[258] Ibid.

[259] Ibid.

[260] See, Spagnolo above n 14, 11-20.

[261] Ibid.

[262] Ibid.

a more neutral and simple option in many circumstances[263]. Furthermore, some counsels can find strategic advantages for clients when considering the CISG as a choice off law[264]. The CISG can minimise the legal risk of misapplication of the law chosen by a jurisdiction with a different legal system[265].

Spagnolo has observed situations in which the CISG can be substantially advantageous for some clients. For example, in the instance where there is 'non-conformity' in the goods, the seller may find removal from liability where the buyer is not prompt in communicating the defects as the CISG requires the notice of non-conformity within a reasonable time[266].

Notwithstanding, the CISG application has evidenced some difficulties in national courts. The relevance of the CISG in international trade is highlighted by the number of signatory states which is still growing[267]. Many countries have shown a great acceptance and often include the Convention in their contracts, being China an important example[268]. The CISG has proven successful in arbitration which is a considerable merit acknowledging that the majority of international contractual disputes are being arbitrated[269]. The freedom conferred to the arbitrator to apply the law it considers more appropriate to the dispute[270] has led to the application of the CISG to international sale contracts without consideration as to whether either party in the dispute is an adhering state or regardless of the site of arbitration[271]. If a country is to be a leader centre of arbitration it must obviously be well versed and practiced in the CISG[272]. The considerations mentioned above emphasise the necessity of Common Law countries to overcome their neglect of the CISG[273].

[263] Ibid.

[264] Ibid.

[265] Ibid.

[266] Ibid.

[267] See, Spagnolo above n 14, 12; Kilian above 5, 234.

[268] Ibid.

[269] See, Spagnolo above n 14, 11-20; Kilian above 5, 234.

[270] See, Spagnolo above n 14, 7; Kilian above 5, 224.

[271] Ibid.

[272] Ibid.

[273] Ibid.

Overcoming the incompleteness of the CISG; the aid of the unidroit principles

Taking into account the importance of the Convention, the search for solutions towards at least a consistent uniform application must be provided. As previously explained, the CISG Article 7 invites an international interpretation rather than a parochial approach. However, one of the main interpretative difficulties is that the CISG 'is unable to regulate every issue'[274] and contains some gaps which scholars have differentiated as 'internal' and 'external gaps'[275]. 'External gaps'[276] refer to the matters which the CISG definitely does not deal with while 'internal gaps' are matters that are regulated but not expressly[277]. Article 7(2) provides a guide to conduct the gap filling process:

> 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 (CISG Art 7 (2)).

This provision has been understood to 'clarify the role of domestic law as the final resource in the interpretation of the CISG'[278]; provisions and principles of the CISG having been found 'unable to provide answers'[279]. In order to achieve the international interpretation predicated in article 7 (1) the use of domestic law in the gap filling process must be limited[280]. Scholarly writing in this field explains that domestic law should be restricted to matters that qualify as 'external gaps'[281].

[274] Bruno Zeller, *'Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods'* http://www.cisg.law.pace.edu/cisg/biblio/4corners.html

[275] Ibid.

[276] Ibid.

[277] Ibid.

[278] Troy Keily, *'How Does the Cookie Crumbles? Legal Costs Under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods'* (2003). 1 Nordic Journal of Commercial Law http://www.cisg.law.pace.edu/cisg/biblio/keily2.html

[279] Ibid.

[280] Ibid.

[281] Ibid.

A correct application of article 7 (2) is indeed for the achievement of the international interpretation demanded by article 7 (1).

In practice, the application of the interpretive methodology of the CISG has proven challenging[282] with a prominent point of difficulty being the ability to accurately identify which gaps are internal and which are external[283]. The CISG does not regulate procedural matters however, it has not provided a test to determine which are procedural matters[284]; often resulting in the obstacle of differentiation between substantial and procedural gaps[285]. Article 4 states that the Convention is not 'concerned with validity issues'[286] although, in many cases there is confusion in establishing whether a particular issue characterises a validity question[287]. Some argue[288] that validity has often been misleading and invoked merely because of its label[289]. A point that poses an even bigger challenge is compliance with the requirement to discern the principles underlying the CISG, a task for which the Courts and practitioners can feel unaided[290]. In practice, the Courts make little attempt to search for the general principles either through study of legal doctrine or international jurisprudence[291]. This cumulative disorientation results in an over-classification of external gaps and a subsequent excessive return to domestic law which, obviously impacts the uniform application of the Convention[292].

Although gap filling is a complex matter, each day more supportive doctrinal material is produced. International case law in some matters has become abundant and a deeper study of the material available can allow for a laudable result. It may be accurate to state that the most difficult task for common law practitioners is the identification of underlying CISG principles[293], not only because this activity

[282] Zeller above n 275, 254.

[283] Ibid.

[284] Ibid.

[285] Ibid.

[286] Ibid.

[287] Ibid.

[288] Ibid.

[289] Ibid, 257.

[290] Ibid.

[291] Zeller above n 275, 7.

[292] Ibid 263.

[293] Peter Huber and Alastair Mullis, *The CISG: A new textbook for students and practitioners* (Sellier, 2007) 33-34.

is unfamiliar with the accustomed interpretation method of Common Law as has been previously mentioned[294], but also because it can be difficult to find a complete answer in the case law, with the finding of principles being mostly an independent interpretative exercise that is made case by case[295].

The difficulties mentioned previously have led some to argue that the CISG Article 7 does not contain a detailed system of rules corresponding to a 'true methodology for interpretation', and simply constitutes an aim[296]. For this reason it has been further proposed that the principles of UNIDROIT can constitute a means of 'interpreting and supplementing the CISG'[297]. The preamble of the UNIDROIT Principles explicitly stipulates the possibility of its application in the interpretation and supplementation of 'international uniform law instruments'[298].

The arguments to support application of the UNIDROIT Principles have been various. Some scholars suggest that in accordance with article 7 (2), the UNIDROIT Principles can be employed to fill CISG gaps as they 'constitute principles of international contract law upon which the Convention is based'[299]. Others assert that when they hold sufficient similarity, the provisions of the UNIDROIT Principles can be used to 'interpret or supplement'[300] CISG provisions providing that the general principles underlying the CISG are expressed[301]. A third and probably more extreme view considers that they can be invoked even when the principle cannot be inferred directly from the Convention[302] as the expression

[294] Ibid.

[295] Ibid.

[296] See, Di Matteo above n 137, 19-31; John Y. Gotanda *'Using The Unidroit Principles To Fill Gaps In* The CISG'. Contract Damages: Domestic & International Perspectives, Hart Publishing, 2007, 15.

[297] Michael Joachim Bonell, *The Unidroit Principles of International Commercial Contracts and CISG - Alternatives or Complementary Instruments? Uniform Law Review* (1996) 26-39.

[298] See Preamble Unidroit Principles.

[299] *See* M.J. Bonell, "General Report," in *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts, XVth International Congress of Comparative Law, Bristol, 26 july-1 august 1998,* pp. 12-13 (1999); see Gotanda above n 298.

[300] Michael Joachim Bonell, *The Unidroit Principles of International Commercial Contracts And Cisg - Alternatives Or Complementary Instruments? Uniform Law Review* (1996) 26-39; see Gotanda above n 298, 15.

[301] Michael Joachim Bonell, *The Unidroit Principles of International Commercial Contracts And Cisg - Alternatives Or Complementary Instruments? Uniform Law Review* (1996) 26-39.

[302] Salama, "Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application," 28 *U. Miami Inter-Am. L. Rev.,* pp. 225-241 (2006); Michael Joachim Bonell,

"general principles"[303] in CISG Article 7 includes the 'evolving' and 'following transitions in international commerce'[304].

The arguments outlined below have been subject to great debate. A considerable group of academics argue the impossibility of supplementing the CISG with the Principles of UNIDROIT as they are not an exact reflection of the principles of international contract law[305]. Reasoning eludes that the Principles as a whole do not mirror the general principles that underlay the Convention[306] as they "reflect concepts found in many... legal systems... [and] also embody what are perceived to be best solutions, even if not yet generally adopted"[307]. This description is clearly established in the introduction of the UNIDROIT Principles[308]. This argument is further grounded with the fact that the UNIDROIT Principles are the work of the 'International Institute for the Unification of Private Law'[309] but not of the 'UNCITRAL and therefore [they] cannot represent a formal source of law for the purpose of supplementing the Vienna Convention'[310].

Furthermore, a more formalist view denies the supplementary and interpretative role of the UNIDROIT Principles upon the argument that they were adopted post CISG. Application of the Principles of UNIDROIT requires parties consent otherwise its application is 'ilegitimate'[311] as it is in contradiction of article 7(2) which mandates reliance upon the principles of the CISG[312]. UNIDROIT Principles are not the base of the CISG[313], they were merely construed from the CISG[314].

The Unidroit Principles Of International Commercial Contracts And Cisg - Alternatives Or Complementary Instruments ? Uniform Law Review (1996) 26-39; See Gotanda above n 298, 15.

[303] Ibid.

[304] Gotanda above n 298, 16.

[305] Ibid.

[306] J. Fawcett, J. Harris & M. Bridge, *International Sale of Goods in the Conflict of Laws,* p. 933; Gotanda above n 298, 17.

[307] Ibid.

[308] Ibid.

[309] Ibid.

[310] Ibid.

[311] Gotanda above n 298, 19; see also Zeller above n 275, 252, 253.

[312] Ibid.

[313] Ibid.

[314] Ibid.

Some suggest[315] that in order to avoid the vicissitudes caused by the introduction of a national legal system the parties can agree to incorporate the following choice of law clauses on their contract: "*This contract shall be governed by CISG, and with matters not covered by this Convention, by the Unidroit Principles of International Commercial Contracts*"[316].

In this regard it is important to consider that one primary reason to reject the UNIDROIT Principles as a source for gap-filling is that its character of source of law has been questioned and is not considered of a 'legal nature'[317]. They were authored by private persons and have not been ratified by any State and therefore, possess no legislative power[318].

Many domestic legal systems restrict the choice of law clause to the 'law of a country'[319] which thereby excludes any possibility of using the UNIDROIT Principles as a choice of law[320]. For this reason it has been asserted that the clause suggested probably will be considered by courts as an agreement into the contract which will be only apply if they do not affect provisions of the domestic law[321].

The truth is that in fact the UNIDROIT Principles have been applied in the arbitral process as a gap-filler for the CISG. A very renowned case has been the application of Article 7.4.9 of the UNIDROIT Principles to determine the rate at which interest accrues,[322] resolving the questions not addressed by Article 78 of the CISG[323].

Bonell MJ has exemplified how the UNIDROIT Principles can assist judges and arbitrators in the task of finding the proper principles for the interpretation of the CISG in matters in which the CISG does not provide a particular answer[324]. He highlights that the principle of 'reasonableness'[325] is a base of the CISG and

[315] M.J. Bonell above n 303, 115.

[316] Ibid.

[317] See Bridge above n 308; Gotada above 298.

[318] Ibid.

[319] M.J. Bonell above n 303, 116.

[320] Ibid.

[321] Ibid.

[322] *See* ICC Award n 8.128 of 1.995, http://cisgw3.law.pace.edu/cases/958128i1.html; Gotanda, above n 298, 14;

[323] Ibid.

[324] M.J. Bonell above n 303, 110.

[325] Ibid.

for this reason the response to the question 'if a seller is entitled to pay by cheque or by other similar instruments or by a funds transfer' can be found in Art. 6.1.7 of the UNIDROIT Principles whereby, 'the obligor may pay in any form used in the ordinary course of business at the place for payment, but cheques or other similar instruments are accepted by the obligee on condition that they will be honoured'[326].

On the other hand, academics have suggested the possibility of invoking the UNIDROIT Principles, relying on CISG Article 9[327]; considering them as 'usages or practices'[328] established among the parties. In this regard, scholarly writing argues that trade usages are activities of commerce regularly observed by those involved in a particular industry or marketplace[329]. Therefore, 'general contract rules' per se do not constitute a trade usage[330]. In order to apply CISG Article 9(2), all of the articles of the UNIDROIT Principles would have to prove to be regularly observed and widely known[331]. It is possible that in some cases a provision of the UNIDROIT Principles can be considered as a trade usage[332] although, this requires an 'individualised factual analysis'[333].

The afore mentioned makes clear that the possibility of using the UNIDROIT Principles to supplement the CISG does not seem a simple issue considering the assumption that they are not law in a strict sense. However, there are compelling reasons to consider that they can play an important role as an interpretative tool[334], assisting in the confirmation of a principle that has previously been deduced from the Convention[335].

Some[336] may consider it fair to argue that both the UNIDROIT Principles and the CISG draw their principle 'policy reasoning's from shared 'common ground' and it might therefore naturally occur that the Principles identify an underlying

[326] Ibid.

[327] See Gotanda above n 298, 23; Bridge above n 308, 935-936.

[328] Ibid.

[329] Ibid.

[330] Ibid.

[331] Ibid.

[332] Ibid.

[333] Ibid.

[334] Ferrari, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 169; Peter Huber and Alastair Mullis, *The CISG: A new textbook for students and practitioners* (Sellier, 2007) 36.

[335] Ibid.

[336] Ibid.

principle of the CISG[337]. However, in order to support this argument it would be necessary to infer 'the principle in question' from the text of the CISG[338].

The UNIDROIT principles have been gaining much importance in the global sphere where they have been a model for lawmakers in states such as Russia, China, and Spain and have been cited in several domestic decisions[339]. Its incorporation as interpretative criteria in the CISG can assist towards the construction of the notion of 'international interpretation' and a uniform interpretation not just of the CISG but also of other international instruments. The UNIDROIT principles can provide equality; reducing the unduly return to domestic law that often leads to an advantage for the local party.

Concluding remarks

The practical skepticism of Common Law countries in the acceptance of the CISG has been translated in a strong 'homeward trend' in the CISG case law, constituting a breach of Article 7 which demands interpretation of the Convention in accordance to its international character and the need to promote uniformity.

Relevance of the CISG in the International arena justifies the necessity that Common Law practitioners and Courts learn about the CISG and understand why it can be a good legal instrument to regulate international sales. Only the reduction of automatic exclusion and thereby, an increase in the application of the CISG can contribute to an improvement in the case law which, brings about greater certainty and predictability in outcomes.

The incompleteness of the CISG gives rise to the necessity to follow a gap filling process which, in some cases, can prove troublesome. There is abundant scholarly writing and case law that can assist in this process with the Principles of UNIDROIT constituting an appropriate guide in the identification of the CISG underlying principles although, its character as a first source in gap filling is doubtful.

[337] Ibid.

[338] Ibid.

[339] See in this sense, *Hideo Yoshimoto V Canterbury,* Golf International Limited [2000] Nzca 350 (27 november 2000); *Christine M. Whited*, International Commercial Contracts: An Overview Of Their Utility And The Role They Have Played In Reforming Domestic Contract Law Around The World.

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