

# THE LAST OUTPOST: AUTOMATIC CISG OPT OUTS, MISAPPLICATIONS AND THE COSTS OF IGNORING THE VIENNA SALES CONVENTION FOR AUSTRALIAN LAWYERS

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*Australian lawyers and courts have tried long and hard to ignore the CISG. However, this article argues that widespread exclusion of the CISG and its misapplication in Australian courts has had serious consequences: clients have been disadvantaged, professional obligations have been heavily glossed over, the administration of justice has been compromised, and client costs and judicial resources wasted. This article points out that CISG cases are disseminated and analysed throughout the world, and Australian misapplication of the CISG has not gone unnoticed. This reflects upon the reputation of the Australian legal profession, Australian courts, and Australia's viability as a location for international dispute resolution. It is argued that, while other jurisdictions are improving their track records, Australia still lags behind. This article explains why Australian lawyers should not routinely exclude the CISG. It outlines its advantages and provisions. The article provides arguments that barristers could run in future, references numerous freely available resources, and gives courts and lawyers guidance on the CISG's unique interpretive methodology and its effect in displacing local laws, both key elements in its proper application. It is argued that if Australian lawyers and courts do not rise to the challenge, Australia will be left behind as an outpost of CISG ignorance.*

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## I INTRODUCTION

The *Vienna Convention on Contracts for the International Sale of Goods*<sup>1</sup> ('*CISG*') is still in the Australian legal outback. To their clients' detriment, Australian lawyers have paid it inadequate attention.<sup>2</sup> While certainly not yet alone, Australia risks becoming increasingly isolated in this stance. Some jurisdictions with similarly poor track records have shown they are now starting to come to grips with the *CISG*'s unique nature as autonomous uniform law. Despite continued misapplications, they have at least begun to turn the corner. Unfortunately, this has not yet happened in Australia.

But how far behind is Australia, and why should practitioners and courts care? This article attempts to answer those questions by looking at the culture of *automatically* opting out of the *CISG* and by reviewing Australian court decisions. It argues that there is an ongoing failure to consider these advantages in choice of law advice, an absence of effective utilisation of the *CISG* in argument and a misapplication of the *CISG* by the Australian judiciary. This article suggests that not only are these trends detrimental to the best interests of clients and the proper administration of justice, but that taken together they could conceivably harm the competitiveness of the Australian legal profession, especially given the *CISG*'s growing importance in the Asia-Pacific region.

If Australia is not to be left behind as one of the last outposts of misunderstanding of the *CISG*, much less aspire to become a hub of regional dispute resolution, then our track record needs improvement in the eyes of the international legal community. This article aims to assist in that process as something of a roadmap: to identify resources on the *CISG*; to explain its advantages, features, proper application and effect in displacing domestic law; and to point out arguments available under the *CISG*. An Italian *CISG* case is then used to illustrate the manner in which Australian courts can in future approach the *CISG* as a truly international uniform law, and thus signal our jurisdiction's capacity to appropriately deal with international commercial matters. After all, legal insularity is no longer an option we can afford.

II WHEN DOES THE *CISG* APPLY?

Australia acceded to the *CISG* on 17 March 1988.<sup>3</sup> The *CISG* was legislatively implemented across Australia effective 1 April 1989.<sup>4</sup> In Australia,

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<sup>1</sup> Opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

<sup>2</sup> David Fairlie, 'A Commentary on Issues Arising under Articles 1 to 6 of the *CISG*' (Paper presented at the United Nations Commission on International Trade Law ('UNCITRAL') and Singapore International Arbitration Centre Joint Conference, 'Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods', Singapore, 22–3 September 2005) 40 <<http://cisgw3.law.pace.edu/cisg/biblio/fairlie.html>>. See also Bruno Zeller, Victoria University, *CISG Cases* (2004) <<http://www.business.vu.edu.au/cisg/Cases.htm>>; 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 (fn 8), 836 (fn 113) (noting German-trained lawyer Bjorn Gehle's discovery of ignorance of the *CISG* within a large Australian law firm in 2004).

<sup>3</sup> 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.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.

the *CISG* automatically applies whenever the *CISG*'s own internal rules of application are satisfied and a contract falls within its sphere of application.<sup>5</sup> This is confined to contracts predominantly involving goods,<sup>6</sup> and it does not of its own accord apply to contracts (inter alia) for electricity, goods bought for household use, or contracts that result from auctions.<sup>7</sup>

The internal rules of application greatly simplify the uncertainty of conflict of laws rules that might otherwise apply to resolve the governing law of the contract. Their effect is that the *CISG* will apply in the following four scenarios:

(a) Direct application by virtue of art 1(1)(a)

The *CISG* applies where parties have their places of business in different member states, described in the *CISG* as Contracting States.<sup>8</sup> Thus it will govern contracts of sale between parties from the United States and Australia, if this fact is apparent before conclusion of the contract.<sup>9</sup>

(b) Indirect application through art 1(1)(b)

The *CISG* might also apply if the forum's conflict of laws rules result in application of the law of a Contracting State.<sup>10</sup> Thus if the forum's conflict of laws rules result in Australian law as the proper law of an international sales contract, the *CISG* will apply as part of Australian law.<sup>11</sup> By art 95, a Contracting State can declare it is not bound by this second, indirect means of application. Thus, it is less than certain whether the *CISG* would govern

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<sup>4</sup> *Sale of Goods (Vienna Convention) Act 1987 (ACT)*; *Sale of Goods (Vienna Convention) Act 1986 (NSW)*; *Sale of Goods (Vienna Convention) Act 1987 (NT)*; *Sale of Goods (Vienna Convention) Act 1986 (Qld)*; *Sale of Goods (Vienna Convention) Act 1986 (SA)*; *Sale of Goods (Vienna Convention) Act 1987 (Tas)*; *Sale of Goods (Vienna Convention) Act 1987 (Vic)*; *Sale of Goods (Vienna Convention) Act 1986 (WA)*. See also *Trade Practices Act 1974 (Cth)* s 66A. In regard to the value of s 66A of the *Trade Practices Act*, see Marcus Jacobs, Katrin Cutbush-Sabine and Philip Bambagiotti, 'The CISG in Australia-To-Date: An Illusive Quest for Global Harmonisation?' (2002) 17 *Mealey's International Arbitration Report* 24, [4.7] <<http://cisgw3.law.pace.edu/cisg/biblio/jacobs2.html>>.

<sup>5</sup> *Sale of Goods (Vienna Convention) Act 1987 (ACT)* s 5; *Sale of Goods (Vienna Convention) Act 1986 (NSW)* s 5; *Sale of Goods (Vienna Convention) Act 1987 (NT)* s 5; *Sale of Goods (Vienna Convention) Act 1986 (Qld)* s 5; *Sale of Goods (Vienna Convention) Act 1986 (SA)* s 4; *Sale of Goods (Vienna Convention) Act 1987 (Tas)* s 5; *Sale of Goods (Vienna Convention) Act 1987 (Vic)* s 5; *Sale of Goods (Vienna Convention) Act 1986 (WA)* s 5.

<sup>6</sup> Rather than predominantly labour or other services: *CISG*, above n 1, art 3(2).

<sup>7</sup> Article 2 states that the *CISG* does not apply to sales of goods for personal or household purposes, goods sold by auction, shares, negotiable instruments, money, ships, aircraft or electricity.

<sup>8</sup> As at 1 June 2009, there are 74 Contracting States: UNCITRAL, *Status: 1980*, above n 3.

<sup>9</sup> *CISG*, above n 1, art 1(2). On the need for awareness of the transaction's internationality, see Franco Ferrari, 'The CISG's Sphere of Application: Articles 1–3 and 10' in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 21, 31; Jacob Ziegel, 'The Scope of the Convention: Reaching Out to Article One and Beyond' (2005) 25 *Journal of Law and Commerce* 59, 62–4 (on this and the issues posed by electronically concluded contracts and multipartite contracts).

<sup>10</sup> Ferrari, 'The CISG's Sphere of Application', above n 9, 40.

<sup>11</sup> Bridge notes that, on a strict linguistic approach, art 1(1)(b) simply makes the *CISG* applicable, not applicable as part of the law of the relevant Contracting State: Michael Bridge, 'Uniform and Harmonized Sales Law: Choice of Law Issues' in James J Fawcett, Jonathan M Harris and Michael Bridge (eds), *International Sale of Goods in the Conflict of Laws* (2005) 905, 908, 922.

a contract between US and United Kingdom traders, even if the forum finds US law applicable, since the US is one of the few to have declared such a reservation.<sup>12</sup> The UK was not a Contracting State at the time of writing.<sup>13</sup>

(c) By agreement between the Parties

Party autonomy is widely accepted in conflict rules,<sup>14</sup> and therefore an agreed choice of the law of a Contracting State will normally result in the *CISG*'s application as part of that Contracting State's law through art 1(1)(b).<sup>15</sup> By contrast, the *CISG* can apply where neither party is from a Contracting State, but parties have specifically agreed to apply the *CISG* (as opposed to an agreed choice of the law of a Contracting State). Specific *CISG* opt-ins are subject to mandatory domestic laws, as they effectively

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<sup>12</sup> Some argue that forums in non-reserving Contracting States should still respect an art 95 reservation by the Contracting State whose law is found to govern the contract: Ziegel, 'The Scope of the Convention', above n 9, 66. *Contra* Gary F Bell, 'Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 9 *Singapore Year Book of International Law* 55, 63–65; Bridge, 'Uniform and Harmonized Sales Law', above n 11, 980–1 (for an excellent discussion on this issue). Ferrari explores three possible outcomes: see Ferrari, 'The CISG's Sphere of Application', above n 9, 52; Franco Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG' (2005) 25 *International Review of Law and Economics* 314, 322 (fn 64), 328. The only Contracting States to have made art 95 declarations are China, the US, Singapore, Slovakia, St Vincent and the Grenadines, and the Czech Republic: UNCITRAL, *Status: 1980*, above n 3.

<sup>13</sup> However, it is rumoured that the UK is now poised to revisit the possibility of becoming a Contracting State of the *CISG*.

<sup>14</sup> See, eg, *Convention on the Law Applicable to Contractual Obligations*, opened for signature 19 June 1980, 80/934/ECC (entered into force 1 April 1991) art 3 ('1980 Rome Convention'), now replaced by *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)*, [2008] OJ L 177/6, art 3 (for contracts concluded from 17 December 2009, per art 24) ('*Regulation 593/2008*'); *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418; Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 *Vanderbilt Journal of Transnational Law* 381, 385 ('party autonomy has become the one principle in conflict of laws that is followed by almost all jurisdictions'); Symeon C Symeonides, 'General Report: XV<sup>th</sup> International Congress of Comparative Law Bristol, England 1998' in Symeon C Symeonides (ed), *Private International Law at the End of the 20<sup>th</sup> Century: Progress or Regress?* (2000) 3, 40; J H Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* (3<sup>rd</sup> ed, 2007) 171–2 (stating that the rule is wide but not absolute).

<sup>15</sup> UNCITRAL, *UNCITRAL Digest of Case Law on the Convention on the International Sale of Goods*, UN Doc A/CN.9/SER.C/DIGEST/CISG/<art no> (8 June 2004) 13. See also *NV AR v NVI* (Hof van Beroep, Belgium, 15 May 2002) <<http://cisgw3.law.pace.edu/cases/020515b1.html>> (the choice of French law led to *CISG* application); *ICC Award No 8324 of 1995* (1995) <<http://cisgw3.law.pace.edu/cases/958324i1.html>> (the choice of French law resulted in application of *CISG* via art 1(1)(b)); *Smits BV v Quetard* (Arrondissementsrechtbank Gravenhage, Netherlands, 7 June 1995) <<http://cisgw3.law.pace.edu/cases/950607n1.html>> (the choice of Dutch law if valid would result in application of *CISG* through art 1(1)(b)).

achieve application by the *CISG*'s incorporation into contractual terms.<sup>16</sup> This method of application can prove problematic in some jurisdictions.<sup>17</sup>

(d) Appropriate law determined by Arbitral Tribunal

Absent a choice of law clause, even if the *CISG* would not automatically apply due to arts 1(1)(a) or (b), arbitral procedural rules may allow a tribunal to deem that the *CISG* applies as the appropriate law, or as evidence of international usages.<sup>18</sup>

Thus the *CISG* can become governing law of the contract either by default or by agreement. Parties can opt out of its application through a suitable choice of law, as the *CISG* allows parties to derogate from its provisions in whole or in part.<sup>19</sup> This also gives parties the flexibility to mould the *CISG* to their own requirements.

### III AIM OF THE *CISG* AND WHY AUSTRALIAN LAWYERS SHOULD UNDERSTAND IT

#### A *Aim of the CISG and Its Impact in Our Region*

The aim of the *CISG* is to provide a neutral, uniform, harmonised sales law around the world to reduce the uncertainty and costs of transacting across

<sup>16</sup> Institute of International Commercial Law, Pace University Law School, *CISG Database: CISG by State* <<http://cisgw3.law.pace.edu/cisg/cisgintro.html>>. See also Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (2007) 66.

<sup>17</sup> Where neither party is from a Contracting State, application by agreement alone can be problematic because the *CISG* in such circumstances might be considered an 'a-national' law. Such a choice might not be permitted by some conflict of laws rules which require choice of the domestic law of a state: for example, the position under the *1980 Rome Convention*, above n 14, in Europe, now replaced by *Regulation No 593/2008*, above n 14 (which, for contracts concluded from 17 December 2009, allows the choice of non-state law: preamble [13]). A choice of arbitration normally avoids the problem. See 'UNCITRAL Model Law on International Commercial Arbitration' (as adopted by the UNCITRAL on 21 June 1985) in the *International Arbitration Act 1974* (Cth) sch 2, art 28, which enables the tribunal to apply 'rules of law' chosen by the parties. See Franco Ferrari, 'Choice of Forum and CISG: Remarks on the Latter's Impact on the Former' in Harry M Fletcher, Ronald A Brand and Mark S Walter (eds), *Drafting Contracts under the CISG* (2008) 103, 115–16 ('State courts will not recognize the choice of CISG as a choice of "law" ... when the forum's [conflict rules] are those laid down in the [1980 Rome Convention] or in the 1955 Hague Convention on the Law Applicable to International Sale of Goods'); Michael Joachim Bonell, 'Article 6 — Parties' Autonomy' in Cesare Bianca and Michael Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 51, 63–4. See also Dalhuisen, above n 14, 204.

<sup>18</sup> See Albert Kritzer, 'The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources' in Cornell International Law Journal (ed), *Review of the Convention on Contracts for the International Sale of Goods* (1995) 147, 153; Fan Yang, 'CISG in China and Beyond' (2008) 40 *Uniform Commercial Code Law Journal* 373, 383. See, eg, cases applying the *CISG* pursuant to arts 13(3) and 13(5) of the 1975 International Chamber of Commerce ('ICC'), *Rules of Arbitration: ICC Award No 8502 of 1996* (1996) <<http://cisgw3.law.pace.edu/cases/968502i1.html>>; *ICC Award No 5713 of 1989* (1989) <<http://cisgw3.law.pace.edu/cases/895713i1.html>>; Huber and Mullis, above n 16, 67. The current ICC *Rules of Arbitration* also provide for the tribunal to 'apply the rules of law which it determines to be appropriate': ICC, *Rules of Arbitration* (International Court of Arbitration, 1 January 2008) art 17(1).

<sup>19</sup> *CISG*, above n 1, art 6.

multiple jurisdictions.<sup>20</sup> It has been ratified by some 74 nations, including South Korea in 2005, and Japan in 2008.<sup>21</sup> Another of Australia's most important trading partners, China, has not only acceded to the *CISG*,<sup>22</sup> but has become the country from which *CISG* cases are emerging more quickly than any other in the world. The accession of South Korea and Japan has sparked renewed interest towards the *CISG* in a number of Association of Southeast Asian Nations countries, such as the Philippines, Thailand and Vietnam. Further, following academic proposals, there are also growing demands to adopt the *CISG* as the regional law of sales. This would unify sales law at both the global and at the regional level.<sup>23</sup> Thus, the *CISG* is significant law for international sales globally, and has become increasingly important for the Asia-Pacific region in particular.

### B *Reasons Why Australian Lawyers Need to Better Understand the CISG*

Why should Australian lawyers care about the *CISG*? Australian lawyers certainly appreciate the importance of standardisation of trade and investment laws,<sup>24</sup> but have simply not translated this into a good working knowledge of harmonised sales law in practice. The escalating significance of the *CISG* in our region underlines the importance of a better understanding of the *CISG* amongst Australian courts and lawyers in order to:

- 1 Ensure that the Australian legal profession remains competitive;
- 2 Provide clients with proper advice and representation;
- 3 Avoid actions for professional negligence;<sup>25</sup>
- 4 Aid the proper administration of justice in Australia;
- 5 Improve the way in which Australia is viewed by the international legal community; and
- 6 Help Australia actively engage in creation of international *CISG* jurisprudence.<sup>26</sup>

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<sup>20</sup> The *CISG* uniform sales law was intended to 'contribute to the removal of legal barriers in international trade and promote the development of international trade': *CISG*, above n 1, preamble. National laws have been described as 'the merchants' worst enemy': Franco Ferrari, 'Applicability and Applications of the Vienna Sales Convention (*CISG*)' (1998) 4 *International Legal Forum: English Language Edition* 137, 139; Errol P Mendes, 'The UN Sales Convention and US-Canada Transactions: Enticing the World's Largest Trading Bloc to Do Business under a Global Sales Law' (1988) 8 *Journal of Law and Commerce* 109, 112; Jacob S Ziegel, 'Commentary on Party Autonomy and Statutory Regulation: Sale of Goods' (1993) 6 *Journal of Contract Law* 123, 124.

<sup>21</sup> Japan acceded to the *CISG* on 1 July 2008, and the *CISG* will enter into force for Japan on 1 August 2009. In South Korea, the *CISG* entered into force on 1 March 2005. See UNCITRAL, *Status: 1980*, above n 3.

<sup>22</sup> China signed the *CISG* on 30 September 1981, acceded on 11 December 1986, and the *CISG* entered into force for China on 1 January 1988: *ibid*.

<sup>23</sup> See UNCITRAL Secretariat, *Technical Co-operation and Assistance*, UN Doc A/CN.9/627 (18 April 2007) [8]-[9].

<sup>24</sup> A survey of 100 Australian lawyers demonstrated that 70 per cent ranked standardisation of trade and investment law at an international level as very or 'extremely' important: LexisNexis, 'The Legal Profession around the World', *The 2003 LexisNexis-IBA Legal Survey* (2003) 5 <<http://www.lexisnexis.com/about/whitepaper/2003LexisNexisIBALegalSurveyFactSheet.pdf>>.

<sup>25</sup> See below Part IV.

It is argued that whether the matter is viewed from the individual or broader industry level, there are strong incentives for Australian lawyers to understand the *CISG*. The growing importance of the *CISG* in the Asia-Pacific means that increasingly, there will be occasions in which a counterparty to a deal prefers or insists on the *CISG* as a choice of law. It also means that there will be many more disputes in which the *CISG* applies by default, or is deemed applicable by an arbitral panel.<sup>27</sup> Whenever these situations arise, Australian lawyers and courts need a good grounding in the *CISG*. If a basic understanding of its provisions is lacking, the *CISG* will be incorrectly interpreted and applied. This will have adverse consequences for the quality of advice received by clients, the representation of clients by counsel in dispute resolution, the proper administration of justice in Australian courts,<sup>28</sup> and within the bigger picture, will fray the fabric of the international uniformity of the *CISG* itself.

Individually, Australian lawyers might care little for this bigger picture of international uniformity. However, unlike cases dealing with local laws, *CISG* decisions from all countries are collected, disseminated and analysed at the international level.<sup>29</sup> Our less-than-glowing track record in applying the *CISG* properly is clearly visible to the rest of the world and affects the way in which the Australian profession is viewed internationally. Whether we like it or not, Australians will be parties to contracts to which the *CISG* applies. Consequently, Australian lawyers and courts will be (and are being) called upon to respectively advise on and apply the *CISG* with gradually mounting frequency, but are perhaps unaware that the quality of our efforts is being viewed and assessed by lawyers, courts and arbitral panels from around the globe.

Encounters with the *CISG* as part of dispute settlement are in a sense involuntary. By then, application of the *CISG* is a *fait accompli*. However, at the drafting stage, a choice does exist. Should Australian lawyers utilise the *CISG* at the front end of transactions when they have a choice? The question can be answered on both macro- and micro-levels.

## 1 *Competitiveness of Australian Lawyers*

A broader, macro policy perspective is the prospect of developing Australia as a 'regional hub' for international commercial dispute resolution. Support for this initiative was recently indicated by the Federal Attorney-General.<sup>30</sup> While

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<sup>26</sup> This list owes much to Antonin Pribetic, who presented similar conclusions in regard to Canada, but far more concisely: Antonin I Pribetic, 'An "Unconventional Truth": Conflict of Laws Issues Arising under the CISG' (Paper presented at the Continuing Legal Education Program, Toronto, Canada, 10 March 2009) 62. The final point is discussed below in Part VIII.

<sup>27</sup> See above n 9 and accompanying text.

<sup>28</sup> See below n 123 and accompanying text; Part VIII.

<sup>29</sup> Of course, decisions on domestic law are sometimes referred to in other jurisdictions, within court decisions or in academic journals utilising comparative law. However, in interpreting the *CISG*, courts and tribunals from all jurisdictions are required to, *inter alia*, consider *CISG* decisions from other jurisdictions. For this reason, *CISG* decisions are made available on various websites, with accompanying commentary, and are often translated: see below n 128 and accompanying text.

<sup>30</sup> Robert McClelland, 'Simply Resolving Disputes' (Speech delivered at the International Commercial Arbitration Conference 'Making it Work for Business', Sydney, 21 November 2008), available from <<http://www.attorneygeneral.gov.au>>.

reform of laws governing arbitration are the main focus of attention for such developments, the quality of Australia's lawyers and courts in handling international trade disputes will obviously be an important ingredient for the success of such a policy. The ability to interpret and apply the *CISG* properly is indicative of the local profession's capabilities. If lawyers elsewhere in the Asia-Pacific deal with the *CISG* more frequently, we will have comparatively less experience and expertise in this field, and consequently a diminished overall ability to compete in the provision of international dispute resolution services and ancillary legal advice.<sup>31</sup> The impact of international law firms also needs to be considered, since such firms undoubtedly have *CISG* skill bases upon which to draw.<sup>32</sup> Australians are often involved in *CISG* disputes in other jurisdictions.<sup>33</sup> Competitive pressures will force Australian-based firms purporting to have international transaction expertise to acquire such skills eventually. In the meantime, the quality of Australian cases does not yet signal that Australian courts or lawyers have such expertise. One international observer has noted that better quality cases have been produced just across the Tasman than in Australia.<sup>34</sup>

By breaking the habit of automatically opting out,<sup>35</sup> and instead choosing the law of a Contracting State without exclusion of the *CISG* in cases where it is appropriate for the transaction, any Australian lawyer or firm can break the vicious circle of unfamiliarity by inevitably exposing other Australian lawyers to the *CISG*.

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<sup>31</sup> See Camilla Baasch Andersen, 'United Kingdom' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 303, 305 (reasoning that for UK lawyers involved in the trade sector, 'good (expensive) lawyers must know all the options to advise the best options'); see Bell, above n 12, 70–1 (similarly, for Singapore). A sobering thought is the extent to which our European counterparts are already exposed to the *CISG*. In his studies of 1168 lawyers from Germany, Austria and Switzerland, Justus Meyer found 70–78 per cent had dealt with *CISG* disputes at some stage: Justus Meyer, *The CISG in Attorneys' Every Day Work* (2009) 8–9, on file with author. These studies are available in German: see Justus Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 457; Justus Meyer, 'UN-Kaufrecht in der österreichischen Anwaltspraxis' (2008) 63 *Österreichische Juristen-Zeitung* 792; Justus Meyer, 'UN-Kaufrecht in der schweizerischen Anwaltspraxis' (2008) 104 *Schweizerische Juristen-Zeitung/Revue suisse de jurisprudence* 421.

<sup>32</sup> Harry M Flechtner, 'Changing the Opt-Out Tradition in the United States' (Paper presented at 'Modern Law for Global Commerce: Congress to Celebrate the 40<sup>th</sup> Annual Session of UNCITRAL', Vienna, Austria, 11 July 2007) 2 <<http://www.uncitral.org/pdf/english/congress/Flechtner.pdf>> (noting the pressures exerted on the US legal sector by globalisation of the legal services market). Australian lawyers seem relatively wary of global law firms. In a survey of 700 lawyers worldwide, they were the least likely to view the globalisation of the legal profession as an opportunity, and were amongst the least likely to view competition with international law firms as likely to improve local firms and markets for legal services: LexisNexis, 'Legal Professions', above n 24, 3; LexisNexis, 'Sarbanes-Oxley Disclosure and Confidentiality: Executive Summary', *The 2003 LexisNexis-IBA Legal Survey* (2003) 6 <[http://www.lexisnexis.com/about/whitepaper/LexisNexis\\_ExecSummary.pdf](http://www.lexisnexis.com/about/whitepaper/LexisNexis_ExecSummary.pdf)>.

<sup>33</sup> Albert H Kritzer, 'CIETAC Arbitration Awards: First 288 CISG Case Translation — Identification of 21 of These Cases Involving Australian Parties' (Working Document, 2009), on file with author.

<sup>34</sup> Ziegel, 'The Scope of the Convention', above n 9, 70 (fn 32) (stating that 'New Zealand courts also seem to have done a better job of coming to grips with the *CISG* provisions and case law than their peers in Canada and Australia').

<sup>35</sup> See below Part IV.

However, Australian lawyers and firms would need to be convinced that there is an advantage in negotiating such a choice of law — that the *CISG* is appropriate and in their client's best interest in a particular transaction.<sup>36</sup> The advantages of the *CISG* need to be understood at the micro-level before any macro snowballs can develop. Interestingly, the advantages of the *CISG* at the individual client level are themselves often systemic and strategic in nature rather than substantive.

## 2 *Systemic and Strategic Advantages of the CISG for Clients*

For most lawyers, the question of whether to use the *CISG* is a much narrower one: is the *CISG* a suitable choice of law for the transaction in question? The answer will be the same as for any law: sometimes. In many circumstances the *CISG* can be the best choice, but no law is ideal in every situation. Like any law, it has its shortcomings, some of which are mentioned below. Yet its benefits derive from the determination of its drafters<sup>37</sup> to replace the multitude of anachronistic, idiosyncratic localised sales laws around the world with one, relatively simple, pragmatic set of uniform laws designed specifically for international transactions. This affords the *CISG* three huge advantages over competing choices of law: uniformity, neutrality and simplicity.

These advantages pay off in various ways. First, they give a client the ability to standardise its preferred position on choice of law. As a neutral choice, the *CISG* might be more readily agreed upon by counterparties as a 'level playing field'. This reduces negotiation costs and delays.<sup>38</sup> As neither side need familiarise themselves with foreign domestic sales and ancillary laws, conclusion of the contract should in theory be quicker and cheaper. Over time, however, the real benefit is likely to be in reduced compliance costs. While standardisation of a client's suite of contracts can presently occur with other choices of law, in a trading zone that is increasingly pro-*CISG*, recommending a preference for the *CISG* whenever appropriate should ramp up the proportion of contracts under a single law for each client, and in turn maximise the benefits of reduced uncertainty in performance obligations and compliance costs. This advantage will be further heightened for multinational clients.

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<sup>36</sup> As Brand puts it, 'to have real value such rules must prove their worth to those who structure commercial transactions': Ronald A Brand, 'Article 79 and a Transactions Test Analysis of the CISG' in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 392, 392.

<sup>37</sup> The *CISG* was drafted by UNCITRAL Working Groups and adopted by the Diplomatic Conference on 10 April 1980: *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, UN Doc A/CONF.97/19 (11 April 1980). For a full legislative history, see John O Honnold, *Documentary History of the Uniform Law for International Sales* (1989).

<sup>38</sup> Thus it gives neither side a home-ground advantage: Joseph Lookofsky, 'Online with Al K' in Camilla Baasch Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday* (2008) 287, 291. In a recent survey, 26 per cent of Swiss lawyers believed that the *CISG* makes negotiations easier because it was more readily agreeable than national law. Another stated it reduced costs by 'avoid[ing] interminable discussions about legal details': Corinne Widmer and Pascal Hachem, 'Switzerland' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 281, 281, 286.

A second pay-off for the client is the reduced risk that the forum seized of a dispute arising from the contract will misapply the law chosen. If a court from country X determines it has jurisdiction and proceeds to apply the law of country Y, will the outcome be as expected by a client choosing law Y? This is of particular concern if X is a nation with a less developed or different legal system. Costs of litigation are amplified by the need for expert witnesses to prove foreign law, not to mention the attendant risk that, even then, it might not be applied correctly by a foreign court. However, if the *CISG* governs the contract, then the obligation of courts in X, Y and Z is the same:<sup>39</sup> to apply the *CISG* as uniform international law, having reference to cases decided on the *CISG* around the world and *CISG* scholarship.<sup>40</sup> Arbitral tribunals have little difficulty in applying the *CISG*.<sup>41</sup> It is not proposed that outcomes under the *CISG* are utopian or perfectly predictable. But more than any alternative choice of law, irrespective of the location or nature of the forum, the *CISG* stands a much better chance of being uniformly applied. In this sense, the *CISG* has relatively more stable, predictable outcomes for international sales than any choice of domestic sales law. Moreover, since no choice of forum clause is completely airtight, this is an important consideration. In light of quite different and sometimes unexpected interpretations of choice of forum clauses in some jurisdictions,<sup>42</sup> the *CISG* at least delivers a greater degree of certainty regarding substantive outcomes, regardless of forum. Additional stability is derived from the fact that the *CISG* is most likely to apply if the ‘battle of the forms’ results in neither parties’ choice of law prevailing.<sup>43</sup>

A third advantage is the simplicity and accessibility of the *CISG*. Not only is its text available in six official languages,<sup>44</sup> but it is simple to comprehend and therefore attractive to clients. Materials on the *CISG* are easily accessible around

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<sup>39</sup> This is true of any one of the 74 Contracting States that have acceded to the *CISG*. In countries that have not, interpretation in such a manner is not an obligation pursuant to the Convention, but one might expect that in many cases, if the court were to find the *CISG* governed the contract, that it would be sensible to be guided by the interpretive principles inherent in the *CISG*, with similar results.

<sup>40</sup> See below n 126 and accompanying text.

<sup>41</sup> Monica Kilian, ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 *Journal of Transnational Law and Policy* 217, 243 (noting that, in arbitration, the *CISG* found a much better home than in US courts); George V Philippopoulos, ‘Awareness of the CISG among American Attorneys’ (2008) 40 *Uniform Commercial Code Law Journal* 357, 369 (arguing that the *CISG* was more popular where arbitration clauses were used because arbitrators were more familiar with it than US judges); Michael Gordon, ‘Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State’s (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges’ (Part 2) (1998) 46 *American Journal of Comparative Law Supplement* 361, 369 (similarly, regarding the *UNIDROIT Principles of International Commercial Contracts*).

<sup>42</sup> See, eg, below n 412 and accompanying text, regarding the choice of forum clause in *Vetreteria Etrusca Srl v Kingston Estate Wines Pty Ltd* [2008] SASC 75 (Unreported, Duggan J, 14 March 2008) (‘*Vetreteria*’).

<sup>43</sup> See similarly William S Dodge, ‘Teaching the CISG in Contracts’ (2000) 50 *Journal of Legal Education* 72, 79.

<sup>44</sup> Official texts of the *CISG* are in Arabic, Chinese, English, French, Russian and Spanish. See UNCITRAL, 1980 — *United Nations Conventions on Contracts for the International Sale of Goods* <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html)>. For further (non-official) translations, see Pace Law School, *CISG Database: Texts of the CISG* <<http://cisgw3.law.pace.edu/cisg/text/text.html>>.

the world on internet sites dedicated to the dissemination of *CISG* cases and scholarship.<sup>45</sup> To a great extent, this means lawyers, clients, courts and tribunals around the world are effectively ‘working from the same page’. Compare this ease of accessibility to the problems facing anyone wishing to access the intricacies of specific points of any foreign law. Different legal cultures, languages and even writing systems makes proper access to multiple foreign laws impracticable for busy practicing lawyers.

The fourth reason for seriously considering the *CISG* as a choice of law is that it is designed specifically for international sales. Most domestic sales laws need to be carbon-dated in order to determine their exact age, but many are derived from earlier laws and principles that arose in the wake of the industrial revolution.<sup>46</sup> They were drafted with domestic sales in mind, and therefore incorporate principles unsuited to international trade, with its own special circumstances of distance, delays and interaction between different legal cultures. An American Bar Association address warned that outdated laws ‘not based on harmonized or transparent standards ... increase commercial risks and transaction costs and may seriously hamper the activities of commercial entities’.<sup>47</sup> The *CISG*, by contrast, is a flexible, *harmonised* uniform *international* sales law, in many cases better suited to the needs of clients transacting internationally.

The final reason why Australian lawyers should consider the use of the *CISG* is because it is increasingly viewed by our regional neighbours as a key choice of law, which is neutral and can be expected to be uniformly applied anywhere in the world.<sup>48</sup> Clients that insist on a choice of non-*CISG* domestic law might increasingly be made to pay a price for the privilege,<sup>49</sup> and need to be aware of this.

The better question seems to be: why would Australian lawyers *not* seriously consider the *CISG* as a potentially advantageous choice of law?

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<sup>45</sup> See below n 128.

<sup>46</sup> As to the derivation of the current *Sale of Goods Act 1979* (UK), its forerunner, the *Sale of Goods Act 1893* (UK) and continued influence of principles predating that, see Leonard S Sealy, ‘The Contract of Sale of Goods’ in Anthony G Guest (ed), *Benjamin’s Sale of Goods* (7<sup>th</sup> ed, 2006) 3, 4–8. In Australia and New Zealand, Sale of Goods Acts are derived from the 1893 UK legislation: Kenneth Sutton, *Sales and Consumer Law in Australia and New Zealand* (3<sup>rd</sup> ed, 1983) 3.

<sup>47</sup> Hans Corell, ‘The Business Lawyer and International Law: Reflections on the Lawyers Role with respect to Teaching International Law, the Global Compact and International Trade Law’ (Speech delivered at the Section of Business Law of the American Bar Association, 2004 Midwinter Council Meeting, Santa Barbara, US, 17 January 2004) 9 <[http://www.un.org/law/counsel/english/address\\_17\\_01\\_04.pdf](http://www.un.org/law/counsel/english/address_17_01_04.pdf)>.

<sup>48</sup> See discussion of growing acceptance of the *CISG* in the Asia-Pacific, above nn 21–23 and accompanying text. See also discussion of low opt out rates in China, below n 94 and accompanying text. For authors noting the importance of trade pressures on the US, see Kilian, above n 41, 242; Ziegel, ‘The Scope of the Convention’, above n 9, 73 (concluding that Chinese trade pressure might increase the frequency of US cases). See also, noting the benefit in negotiations of choosing the *CISG* as a neutral law, Alison E Butler, ‘The International Contract: Knowing When, Why, and How to “Opt Out” of the United Nations Convention on Contracts for the International Sale of Goods’ (2002) 76 *Florida Bar Journal* 24, 26.

<sup>49</sup> Flechtner, above n 32, 2 (arguing that clients might even lose deals as a result).

## 3 Substantive Advantages and Disadvantages of the CISG for Clients

Some might reject the CISG on substantive grounds. It is true that, like all international treaties, there were compromises made to ensure its passage, which left certain provisions ambiguous and its scope incomplete.<sup>50</sup> One example is the treatment of interest, whereby the obligation to pay interest on damages is located within art 78, but the rate of interest is not specified.<sup>51</sup> Another example is the issue of set-offs, which is not directly covered by the CISG.<sup>52</sup> A classic

<sup>50</sup> This is also listed as a legal 'rationale' for opting out by Ziegel: Jacob S Ziegel, 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 *New Zealand Business Law Quarterly* 336, 345–6. See also Ziegel, 'The Scope of the Convention', above n 9, 72; Patrick Thieffry, 'Sale of Goods between French and US Merchants: Choice of Law Considerations under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 22 *International Lawyer* 1017, 1033; Gilles Cuniberti, 'Is the CISG Benefiting Anybody?' (2006) 39 *Vanderbilt Journal of Transnational Law* 1511, 1515–16, 1518–19, 1544–7 (concluding that this negatively influences the CISG as a choice of law). Meyer's studies bear this out to some degree. Meyer suggests that the CISG's limited scope might play a part in opt outs in Germanic nations, since continued relevance of domestic law may complicate the legal structure: Meyer, *The CISG in Attorneys' Every Day Work*, above n 31, 8, 10.

<sup>51</sup> Franco Ferrari, 'Uniform Application and Interest Rates under the 1980 Vienna Sales Convention' (1995) 24 *Georgia Journal of International and Comparative Law* 467, 475–8 (concluding that the interest rate is an external gap (*lacuna intra legem*), outside CISG's scope of application, rather than an internal gap (*lacuna praeter legem*), governed by the CISG but not expressly settled within it). The majority agree: Volker Behr, 'The Sales Convention in Europe: From Problems in Drafting to Problems in Practice' (1998) 17 *Journal of Law and Commerce* 263, 296; Barry Nicholas, 'Article 78 — Interest' in Cesare Bianca and Michael Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 568, 570; Francesco G Mazzotta, 'CISG Article 78: Endless Disagreement among Commentators, Much Less among the Courts' (Essay, Pace Law School, 2004) <<http://cisgw3.law.pace.edu/cisg/biblio/mazzotta78.html>>. *Contra*, Christian Thiele, 'Interest on Damages and Rate of Interest under Article 78 of the UN Convention on Contracts for the International Sale of Goods' (1998) 2 *Vindobona Journal of International Commercial Law and Arbitration* 3, 24–7. Cases have predominantly applied the rate applicable under the jurisdiction whose contract law was displaced by the CISG: *Clothing, Household Linen Case* (Tribunal Cantonal Valais, Switzerland, 19 August 2003) <<http://cisgw3.law.pace.edu/cases/030819s1.html#cx>>; *G and B Sro v RT* (District Court in Dolný Kubín, Slovak Republic, 21 January 2008) <<http://cisgw3.law.pace.edu/cases/080121k1.html>>; *ICC Award No 9448 of 1999* (1999) <<http://cisgw3.law.pace.edu/cases/999448i1.html>>; *Coke Case* (Oberlandesgericht München, Germany, 2 March 1994) <<http://cisgw3.law.pace.edu/cases/940302g1.html>>. *Contra Rolled Metal Sheets Case* (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, 15 June 1994) <<http://cisgw3.law.pace.edu/cases/940615a4.html>>; *ICC Award No 6653 of 1993* (1993) <<http://cisgw3.law.pace.edu/cases/936653i1.html>>. See generally Behr, above this note, 294; Mazzotta, above this note.

<sup>52</sup> There is no general express provision on set-off, therefore most conclude that it is an issue outside the CISG: see, eg, Peter Schlechtriem, 'Sphere of Application and General Provisions: Sphere of Application: Arts 1–6' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 15, 72; Peter Schlechtriem, 'Sphere of Application and General Provisions: General Provisions: Art 7' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 93, 103; Huber and Mullis, above n 16, 30; Franco Ferrari, 'Interpretation of the Convention and Gap-Filling: Article 7' in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 138, 167–8. See also *Machines Case* (Schweizerisches Bundesgericht, Switzerland, 20 December 2006) §2.2.1 <<http://cisgw3.law.pace.edu/cases/061220s1.html>>; *Pizza Cartons Case* (Amtsgericht Duisburg, Germany, 13 April 2000) §II.1

ambiguity in the *CISG* is the notion of ‘good faith’.<sup>53</sup> However, there are three important points to be noted about these types of shortcomings.

First, a great deal of supporting material is now available. There are now numerous *CISG* cases to draw upon, and plentiful scholarship. The bare bones of the *CISG* are now fleshed out by much in the way of guidance, although naturally there are still some areas of disagreement. Australian lawyers are becoming increasingly comfortable with the notion of good faith, and within the *CISG* the meaning and practical effect of *CISG* good faith is debated and explained in numerous cases and articles.<sup>54</sup>

Second, the *CISG* allows parties to modify most of its rules.<sup>55</sup> Parties concerned about a certain issue can agree on the solution. The *CISG* also has an internal interpretive method that guides resolution of ambiguities within it.<sup>56</sup> For matters falling outside the *CISG*, the usual conflict rules determine the law applicable to the issue.<sup>57</sup>

The content of the *CISG* is no worse — and in fact often very much better — suited to international sales than an outmoded sales law oriented toward domestic trade.<sup>58</sup> Consideration is not required under the *CISG*. Contrary to domestic law in some jurisdictions, contracts need not be evidenced in writing. The *CISG* also removes the parol evidence rule.<sup>59</sup> In terms of formation, the

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<<http://cisgw3.law.pace.edu/cases/000413g1.html>>; *Rancid Bacon Case* (Landgericht München, Germany, 20 March 1995) §2, <<http://cisgw3.law.pace.edu/cases/950320g1.html>>. However, a limited right of set-off may exist under art 88(3), for preservation and sale costs from sale proceeds under restitution provisions: CISG Advisory Council, *Consequences of Avoidance of the Contract* (CISG-AC Opinion No 9, 15 November 2008) *Commentary* [2.7], [3.3], available from <<http://www.cisgac.com/default.php?sid=128>>.

<sup>53</sup> *CISG*, above n 1, art 7(1), and less obviously as a general principle applicable through art 7(2).

<sup>54</sup> There are too many to include here. For an overview and explanation of good faith in the *CISG*, see Lisa Spagnolo, ‘Opening Pandora’s Box: Good Faith and Precontractual Liability in the *CISG*’ (2007) 21 *Temple International and Comparative Law Journal* 261, 274–9. See also below nn 146, 188 and accompanying text; Butler, above n 48, 26 (arguing that the increasing number of decided cases around the world have reduced uncertainty).

<sup>55</sup> *CISG*, above n 1, art 6.

<sup>56</sup> See below n 131.

<sup>57</sup> On the preliminary need to determine whether an issue falls within or outside the *CISG*, see Spagnolo, ‘Opening Pandora’s Box’, above n 54, 308–9.

<sup>58</sup> Ziegel points out that the *CISG* was ‘not designed to offer a superior sales regime in place of inferior national regimes, although it may have that effect in some cases’. Instead, it was intended as a more accessible and ‘neutral’ alternative to ‘the multiplicity of frequently uncertain choice of law rules’: Ziegel, ‘Commentary on Party Autonomy’, above n 20, 124, 127–8 (noting that the *CISG* is better than British sale of goods models in some respects while being less preferable in others).

<sup>59</sup> *CISG*, above n 1, art 8(3), 11; CISG Advisory Council, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (CISG-AC Opinion No 3, 2004) §1, available from <<http://www.cisgac.com/default.php?sid=128>>; Kilian, above n 41, 231. See also Martin Schmidt-Kessel, ‘Sphere of Application and General Provisions: Arts 8, 9’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 111, 125; Huber and Mullis, above n 16, 13; Franco Ferrari, ‘Writing Requirements: Article 11–13’ in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 206, 208–12; Michael Bridge, ‘A Commentary on Articles 1–13 and 78’ in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 235, 254 (stating that

*CISG* is relatively traditional, with slight modifications.<sup>60</sup> It requires a matching of offer and acceptance before a contract exists, yet a non-identical acceptance can result in a contract, provided that any changes are non-material, and no prompt objection to the discrepancies is forthcoming.<sup>61</sup> However, most key terms are classified as material, including dispute resolution clauses.<sup>62</sup> Communication of acceptance is effective once it reaches the offeror, unless practices between the parties, usages or the offer itself indicate otherwise.<sup>63</sup> This differs somewhat from the domestic common law rule, which generally requires communication of acceptance subject to certain exceptions (including the postal rule exception).<sup>64</sup> There appears no substantive cause for concern in the difference of approach.

The *CISG* contemplates the inherent delays and difficulties in reversing international transactions.<sup>65</sup> To promote transactional efficiency in international trade, the *CISG* aims to keep transactions on foot,<sup>66</sup> and therefore favours the

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the parol evidence rule was ‘banished’ by art 8(3)); Harry M Flechtner, ‘Addressing Parol Evidence Issues in Contracts Governed by the CISG’ in Harry M Fletchner, Ronald A Brand and Mark S Walter (eds), *Drafting Contracts under the CISG* (2008) 257; Joseph Lookofsky, *Understanding the CISG* (3<sup>rd</sup> ed, 2008) 43–4. *Beijing Metals and Minerals v American Business Centre Inc* (US Circuit Court of Appeals (5<sup>th</sup> Cir), US, 15 June 1993) <<http://cisgw3.law.pace.edu/cases/930615u1.html>> (incorrectly holding that the parol evidence rule applied in *CISG* cases); *MCC-Marble Ceramic Center Inc v Ceramica Nuova D’Agostino SpA* (US Circuit Court of Appeals (11<sup>th</sup> Cir), US, 29 June 1998) <<http://cisgw3.law.pace.edu/cases/980629u1.html>> (rejecting this position). For the effects of art 96 reservations, see Ferrari, above this note, 213; Jerzi Rajski, ‘Article 96 — Declaration as to Written Form’ in Cesare Bianca and Michael Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 658, 658–60.

<sup>60</sup> *CISG*, above n 1, arts 14–19. Thus, the *CISG* implements the ‘last shot’ theory of formation as modified by art 19: Maria del Pilar Perales Viscasillas, ‘“Battle of the Forms” under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2–207 UCC and the UNIDROIT Principles’ (1998) 10 *Pace International Law Review* 97, 147–9 (explaining that a reply containing no material alterations is an acceptance and its modifications will be incorporated into the contract; but a reply containing material alterations amounts to a counteroffer that will dictate the terms of the contract if later acts of performance accept it). Ziegel argues from a Canadian perspective that the formation rules were ‘already dated’ when the *CISG* was created: Ziegel, ‘The Future of the International Sales Convention’, above n 50, 346; Huber and Mullis, above n 16, 91, 100.

<sup>61</sup> *CISG*, above n 1, art 19(2).

<sup>62</sup> *Ibid* art 19(3). This also specifies as material, terms relating to ‘price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability’.

<sup>63</sup> *Ibid* arts 18(2), 18(3). Acts such as dispatch of goods may indicate assent: Perales Viscasillas, above n 60.

<sup>64</sup> John W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (5<sup>th</sup> ed, 2007) 72–3.

<sup>65</sup> See, eg, Bridge, ‘A Commentary on Articles 1–13 and 78’, above n 59, 256 (commenting on the economic waste of prematurely ending international sales).

<sup>66</sup> For a discussion of the general principle of upholding contracts, ‘*favor contractus*’, see Schlechtriem, ‘Art 7’, above n 52, 105; Markus Müller-Chen, ‘Sale of Goods Obligations of the Seller: Remedies for Breach of Contract by the Seller: Arts 45–52’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 519, 592; Ferrari, ‘The CISG’s Sphere of Application’, above n 9, 138 168–9. On avoidance as a last resort, see *Inflatable Triumphal Arch Case* (Handelsgericht Aargau, Switzerland, 5 November 2002) §4(b)(a), (d)(aa) <<http://cisgw3.law.pace.edu/cases/021105s1.html>>; *Mittas v Solidea Srl* (Tribunale di Forlì, Italy, 11 December 2008) [3.2] <<http://cisgw3.law.pace.edu/cases/081211i3.html>>; *Globes Case* (Landgericht München, Germany, 27 February 2002) <<http://cisgw3.law.pace.edu/cases/020227g1.html>> (identifying as an underlying principle of the *CISG*, avoidance as *ultima ratio*). See also *Tombstones Case* (Oberster Gerichtshof, Austria, 7 September 2000) <<http://cisgw3.law.pace.edu/cases/000907a3.html>> (holding similarly).

remedies of price reduction and damages over termination.<sup>67</sup> It contains innovations that assist in this process, such as a right to performance, and an additional right to set extra (reasonable) time periods for performance where performance is late or non-conforming.<sup>68</sup> The CISG also provides an opportunity for the seller to cure its own breach within reason.<sup>69</sup> Damages measured by reference to a substitute transaction and the right to restitution are limited to

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<sup>67</sup> Price reductions are available pursuant to art 50 for non-conformity. Damages are generally available for non-conformity pursuant to art 74. On damages, see *Cooling System Case* (Oberster Gerichtshof, Austria, 14 January 2002) <<http://cisgw3.law.pace.edu/cases/020114a3.html>>:

[T]he obligee should be put as closely as possible in the economic position in which he would have been, had the contractual obligations been properly performed ... [as the] CISG is based on the principle of full compensation [including both reliance and expectation losses].

Lookofsky, *Understanding the CISG*, above n 59, 129–30; CISG Advisory Council, *Calculation of Damages under CISG Article 74* (CISG-AC Opinion No 6, 2006) §3, available from <<http://www.cisgac.com/default.php?sid=128>> (stating that art 74 encompasses ‘non-performance damages’ including market value of benefit lost due to breach, reasonable costs to restore the situation and ‘net gains prevented by breach’. The *Commentary* elaborates that lost goodwill is recoverable, provided that it is demonstrated with ‘reasonable certainty’: at [7.1]). See also *Meat Case* (Schweizerisches Bundesgericht, Switzerland, 28 October 1998) §5(b), <<http://cisgw3.law.pace.edu/cases/981028s1.html>> (stating that lost goodwill may be compensable); Huber and Mullis, above n 16, 279. For more detail on art 74, see below nn 234–244 and accompanying text. The buyer’s right to price reduction can be exercised unilaterally: see generally, *MCC-Marble Ceramic Center v Ceramica Nuova D’Agostino* (US Circuit Court of Appeals (11<sup>th</sup> Cir), US, 29 June 1998) <<http://cisgw3.law.pace.edu/cases/980629u1.html>>; Arnau Muriá Tuñón, *The Actio Quanti Minoris and Sales of Goods between Mexico and the US: An Analysis of the Remedy of Reduction of the Price in the UN Sales Convention, CISG Article 50 and Its Civil Law Antecedents* (1998) (fn 88 and accompanying text) <<http://www.cisg.law.pace.edu/cisg/biblio/muria.html>>; Lookofsky, *Understanding the CISG*, above n 59, 126–7; Erika Sondahl, ‘Understanding the Remedy of Price Reduction — A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods’ (2003) 7 *Vindobona Journal of International Commercial Law and Arbitration* 255, 260; Michael Will, ‘Article 50 — Reduction of Price’ in Cesare Bianca and Michael Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 368, 369 (wording changed to clarify that reduction could occur after price paid); *Canned Food Case* (Tampere Court of First Instance, Finland, 17 January 1997) <<http://cisgw3.law.pace.edu/cases/970117f5.html>>; *Live Sheep Case* (Oberlandesgericht Schleswig, Germany, 22 August 2002) <<http://cisgw3.law.pace.edu/cases/020822g2.html>>; *Coke Case* (Oberlandesgericht München, Germany, 2 March 1994) <<http://cisgw3.law.pace.edu/cases/940302g1.html>>; *Shoes Case* (Landgericht Aachen, Germany, 3 April 1990) <<http://cisgw3.law.pace.edu/cases/900403g1.html>>; *Frozen Pork Case* (Bundesgerichtshof, Germany, 2 March 2005) <<http://cisgw3.law.pace.edu/cases/050302g1.html>> (avoidance not declared, but the price was reduced to zero on non-conforming meat).

<sup>68</sup> CISG, above n 1, art 46, 62 (buyer/seller can require other party’s performance); arts 47, 63 (buyer/seller can set an additional reasonable time period for other party’s performance). Default terms on non-conformity are found in art 35. See, below nn 275, 279, 280, 283, 394 and 401. All can be modified by agreement: CISG, above n 1, art 6.

<sup>69</sup> CISG, above n 1, art 37 (before delivery date); art 48 (seller can remedy own breaches at own expense if this does not cause unreasonable delays, expense or inconvenience for the buyer). See also, *Inflatable Triumphal Arch Case* (Handelsgericht Aargau, Switzerland, 5 November 2002) §4(d)(aa) <<http://cisgw3.law.pace.edu/cases/021105s1.html>> (on the relationship between arts 48 and 49, concluding that if an objective fundamental breach can be cured by the seller without unreasonable delay or burden, then the buyer is obliged to accept the cure unless, for example, there is unreasonable uncertainty or the seller is obviously incapable).

cases where the contract is avoided.<sup>70</sup> Avoidance or termination is, in turn, only permitted in two serious circumstances: if the breach is fundamental, in the sense that it foreseeably and substantially deprives the innocent party of what they were entitled to expect under the contract; or alternatively, in cases of non-delivery, where the breaching party fails to deliver within an additional reasonable time period set by the innocent party, or declares that it will not do so within the additional time.<sup>71</sup> Unless timely delivery is an essential requirement of the

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<sup>70</sup> Damages measured by reference to an actual or theoretical substitute transaction are available pursuant to arts 75 and 76. See discussion of arts 74, 75 and 76, below nn 248–252 and accompanying text. Article 75 enables calculation of damages as the difference between contract price and substitute transaction price, but substitution must occur after avoidance was declared, within a reasonable time and in a reasonable manner, as determined by reference to a reasonably prudent business person. Abstract damages under art 76 are the difference between contract price and current market price at the time of avoidance: *Novia Handelsgesellschaft mbH v AS Maseko* (Tallinna Ringkonnakohus, Estonia, 19 February 2004) <<http://www.cisg-online.ch/cisg/urteile/826.pdf>> (stating that crucial to art 76 is proof of a current price). Article 75 usually ‘takes precedence’. However, if there is no substitute transaction or the substitute transaction was ‘unreasonable’, damages can be calculated pursuant to art 76 abstractly, or art 74 according to concrete actual loss: CISG Advisory Council, *Calculation of Damages under CISG Articles 75 and 76* (CISG-AC Opinion No 8, 15 November 2008), *Commentary* [4.1.1]–[4.1.5], available from <<http://www.cisgac.com/default.php?sid=128>>. To discourage ‘speculation on price movements’ by buyers that have ‘taken over’ the goods before avoidance, current price for art 76 is determined at the time the goods were ‘taken over’ pursuant to art 76: Victor Knapp, ‘Article 76 — Damages Based on Current Price’ in Cesare Bianca and Michael Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 552, 555–6; Hans Stoll and Georg Gruber, ‘Sale of Goods Provisions Common to the Obligations of the Seller and of the Buyer: Damages: Arts 74–77’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 745, 785; CISG Advisory Council, *Opinion No 8*, above this note, *Commentary* [4.4.2]. A futures market price (for performance date), current at time of avoidance for anticipatory breach, could be the most accurate measure for art 76: Peter Schlechtriem, *Calculation of Damages in the Event of Anticipatory Breach under the CISG* (2006) §III(2)(c) <<http://cisgw3.law.pace.edu/cisg/biblio/slechtriem20.html>>; CISG Advisory Council, *Opinion No 8*, above this note, *Commentary* [4.4.3]. Note art 76 delivers evidentiary advantages in avoiding disclosure of potentially sensitive internal information necessary to prove concrete damages: Schlechtriem, above this note, §I, III. The right to restitution arises pursuant to art 81(2). On the restitutionary provisions, see CISG Advisory Council, *Opinion No 9*, above n 52, *Commentary* [1.2], [3.6], [3.8], which characterises their effect as a ‘modified resale’ or ‘reverse sale’ designed to reverse gains rather than compensate losses.

<sup>71</sup> ‘Fundamental breach’ is defined in art 25 of the *CISG*. A buyer can avoid pursuant to art 49(1)(a) for a fundamental breach or art 49(1)(b) for failure of the seller to comply with additional time set under art 47(1) in cases of non-delivery. The seller can avoid pursuant to art 64(1)(a) for a fundamental breach or art 64(1)(b) for failure of the buyer to comply with additional time set under art 63(1). See also Leonardo Graffi, ‘Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention’ (2003) 3 *International Business Law Journal* 338; *Shoes Case* (Oberlandesgericht Düsseldorf, Germany, 24 April 1997) <<http://cisgw3.law.pace.edu/cases/970424g1.html>>; *Cutlery Case* (Handelsgericht Aargau, Switzerland, 26 September 1997) §2F(2)(a) <<http://cisgw3.law.pace.edu/cases/970926s1.html>> (stating that non-compliance with guaranteed exclusive supply was a fundamental breach). The procedure for setting an additional time for performance is often referred to as a ‘*Nachfrist*’. See also Peter Huber, ‘CISG — The Structure of Remedies’ (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 13, 16, 20–1 (explaining that ‘art 49(1)(b) allows the buyer to “upgrade” a non-fundamental breach to one which justifies avoidance by using the “*Nachfrist*”-procedure in art 47, [a] possibility ... limited to ... non-delivery’); Müller-Chen, above n 66, 580–1; John O Honnold, *Uniform Law for International Sales* (3<sup>rd</sup> ed, 1999) 205–9; *Model Locomotives Case* (Kantonsgericht

contract, breaches might be precluded from characterisation as fundamental if the seller makes a serious offer to cure a defect which will not cause the buyer unreasonable delay or inconvenience.<sup>72</sup> However, by agreement, parties can specify that certain breaches will be fundamental in nature.<sup>73</sup> The right to remedies for non-conformity, and the more drastic right to avoid the contract require the giving of notices and declarations to the breaching party.<sup>74</sup>

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Schaffhausen, Switzerland, 27 January 2004) §3(f) <<http://cisgw3.law.pace.edu/cases/040127s1.html>> (noting that a cure might not be expected if cure costs are disproportionate to defect).

<sup>72</sup> CISG Advisory Council, *The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents* (CISG-AC Opinion No 5, 7 May 2005) §3, *Commentary* [4.4] available from <<http://www.cisgac.com/default.php?sid=128>>; *Inflatable Triumphal Arch Case* (Handelsgericht Aargau, Switzerland, 5 November 2002) §4(b)(aa), (d)(aa) <<http://cisgw3.law.pace.edu/cases/021105s1.html>>; *Acrylic Blankets Case* (Oberlandesgericht Koblenz, Germany, 31 January 1997) <<http://cisgw3.law.pace.edu/cases/970131g1.html>>; Robert Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)' in Pace International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods 1998 (CISG)* (1999) 177, 254–5 (observing that serious offers to cure may preclude a fundamental breach, since in assessing the latter, both gravity of breach and willingness to cure are taken into account); Honnold, *Uniform Law for International Sales*, above n 71, 205–9; Graffi, above n 71, 344–5.

<sup>73</sup> Müller-Chen, above n 66, 580 (pointing out that parties can agree contractually to extend the availability of *Nachfrist* to cases beyond 'non-delivery' for purposes of fundamental breach).

<sup>74</sup> See *CISG*, above n 1, art 39 (notice of non-conformity), art 26 (declaration of avoidance). See further CISG Advisory Council, *Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39* (CISG-AC Opinion No 2, 7 June 2004), available from <<http://www.cisgac.com/default.php?sid=128>>; Ingeborg Schwenzer, 'National Preconceptions that Endanger Uniformity' (2007) 19 *Pace International Law Review* 103; *Mitias v Solidea Srl* (Tribunale di Forli, Italy, 11 December 2008) <<http://cisgw3.law.pace.edu/cases/081211i3.html>>; Audiencia Provincial de Navarra, Spain, 27 March 2000, available from <<http://www.unilex.info>>; *Saltwater Isolation Tank Case* (Handelsgericht Zürich, Switzerland, 26 April 1995) §III(4) <<http://cisgw3.law.pace.edu/cases/950426s1.html>> (holding that the counterclaim failed for failure to notify defect). Notice must be specific: see *Inflatable Triumphal Arch Case* (Handelsgericht Aargau, Switzerland, 5 November 2002) <<http://cisgw3.law.pace.edu/cases/021105s1.html>>; *Acrylic Blankets Case* (Oberlandesgericht Koblenz Germany, 31 January 1997) <<http://cisgw3.law.pace.edu/cases/970131g1.html>>; *Machinery Case* (Tribunale di Busto Arsizio, Italy, 13 December 2001) <<http://cisgw3.law.pace.edu/cases/011213i3.html>> (must specify defects but not causes); Harry M Flechtner, 'Buyer's Obligation to Give Notice of Lack of Conformity (Articles 38, 39, 40 and 44)' in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 377, 377; *Used Automobiles Case* (Tribunal Supremo, Spain, 17 January 2008) <<http://cisgw3.law.pace.edu/cases/080117s4.html>>; Camilla Baasch Andersen, 'Reasonable Time in Article 39(1) of the CISG — Is Article 39(1) Truly a Uniform Provision?' in Pace International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998* (1999) 63, 103–6 (fn 153). On specific periods of time, see below nn 487, 488. Regarding notice of avoidance, see Rainer Hornung, 'Sale of Goods: General Provisions: Art 26' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 299, 302–5; Samuel K Date-Bah, 'Article 26 — Notice of Avoidance' in Cesare Bianca and Michael Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 222, 222–5 (indirect notices to the press not sufficient); *Inflatable Triumphal Arch Case* (Handelsgericht Aargau, Switzerland, 5 November 2002) §4(b)(aa), (d)(aa) (avoidance declaration ineffective); *Italdecor Sas v Yiu's Industries (HK) Ltd* (Corte di Appello di Milano, Italy, 20 March 1998) <<http://cisgw3.law.pace.edu/cases/980320i3.html>> (cancellation of purchase order equivalent to notice of avoidance).

In keeping with the *CISG*'s design for international sales, the emphasis is on performance.<sup>75</sup> If goods are merely non-conforming,<sup>76</sup> but not so seriously as to constitute a fundamental breach, then, unless modified by agreement, the *CISG* will not allow them to be rejected. Instead, given the distances involved in international trade, the *CISG* sensibly requires delivery of non-conforming goods to be taken and paid for, with any non-conformity leading to either a self-help unilateral price reduction, subsequent claim for damages, or an additional time period to be set for the problem to be rectified.<sup>77</sup> If the contract is avoided, there is an obligation to preserve the goods pending restitution, and to sell them where potential rapid deterioration makes preservation impracticable.<sup>78</sup>

These features will sometimes be advantageous, and on other occasions disadvantageous for particular clients. One might argue that the requirement of notice of non-conformity specifying the nature of the defect within a reasonable time on pain of loss of remedies provides an advantage to the seller, who could escape liability for non-conformities if the transaction happens to be with a buyer who is lax in communication. The seller can also take comfort from the fact that under the *CISG*, the buyer cannot reject the goods and bring the contract to an end for minor non-conformities.<sup>79</sup> Of course a fundamental breach can trigger the end of the contract, but lesser non-conformities will simply result in a damages claim, price reduction, or a request to rectify the problem. The seller also benefits from a right to cure defects provided this does not cause unreasonable delay or inconvenience. Such a cure naturally does not remove the buyer's ability to seek damages.<sup>80</sup>

However, the buyer enjoys countervailing advantages. If the goods have still not arrived by the delivery date, the buyer can resolve the uncertainty as to when

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<sup>75</sup> Peter L Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation's Convention on the International Sale of Goods (*CISG*) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists and Legal Academics in the United States' (2008) 27 *Journal of Law and Commerce* (forthcoming) 24 <<http://ssrn.com/abstract=1127382>>. This emphasis differs from the common law position whereby specific performance is available only if damages are inadequate. But see *CISG*, above n 1, art 28.

<sup>76</sup> The common law allows for rejection of goods that are non-conforming, unless (in the case of quantity) the variance is trivial (*de minimis non curat lex*), even if no loss is caused; the latter would not amount to fundamental breach under art 25 of the *CISG*: Anthony G Guest, 'Performance of the Contract' in Anthony G Guest (ed), *Benjamin's Sale of Goods* (7<sup>th</sup> ed, 2006) 409, 432–4; Francis M B Reynolds, 'Terms as to Description and Quality Implied by the Sale of Goods Act' in Anthony G Guest (ed), *Benjamin's Sale of Goods* (7<sup>th</sup> ed, 2006) 535, 546–8; Sir Guenter Treitel, 'CIF Contracts' in Anthony G Guest (ed), *Benjamin's Sale of Goods* (7<sup>th</sup> ed, 2006) 1457, 1576 (fn 14). The buyer must clearly notify rejection, but then can either recover the price for total failure of consideration or defend an action for price by the seller: Francis M B Reynolds, 'Remedies in Respect of Defects' in Anthony G Guest (ed), *Benjamin's Sale of Goods* (7<sup>th</sup> ed, 2006) 613, 614, 640.

<sup>77</sup> *CISG*, above n 1, arts 50, 74, 47.

<sup>78</sup> *Ibid* arts 85–8. See CISG Advisory Council, *Opinion No 9*, above n 52. See also above n 70. At common law, the buyer after a valid rejection becomes a bailee with duties of care: Reynolds, 'Remedies in Respect of Defects', above n 76, 638; Ziegel, 'Commentary on Party Autonomy', above n 20, 130.

<sup>79</sup> CISG Advisory Council, *Opinion No 5*, above n 72, *Commentary* [2.2] (fns 18–22) (dealing specifically with the perfect tender rule, and noting that treatment differs in the case of certain commodity transactions); Butler, above n 48, 28; Ziegel, 'Commentary on Party Autonomy', above n 20, 124 (arguing that the buyer's right of rejection under the *CISG* is less generous than under UK sales law). See also above nn 71–72 and accompanying text.

<sup>80</sup> *CISG*, above n 1, art 48.

the failure becomes serious enough to warrant avoidance of the contract, by simply setting an additional reasonable time for delivery.<sup>81</sup> If the seller fails to comply, or declares that they will not, the buyer can then confidently declare the contract avoided.<sup>82</sup> The buyer is not left punting on whether time was ‘of the essence’. The buyer is also given the advantage of unilateral price reduction for non-conformity.<sup>83</sup> This self-help remedy is available for both mere non-conformity and fundamental breach, although in practical terms, it will be of little comfort if a letter of credit has already been provided.<sup>84</sup>

Overall, the substantive balance achieved is reasonably even,<sup>85</sup> and provisions are geared more closely to the needs of international transactions than domestic laws. Additionally, parties can always modify any of the provisions that do not suit their circumstances by agreement.<sup>86</sup> It clearly offers overriding systemic and strategic advantages for many clients. The question therefore remains, why do Australian lawyers currently appear to routinely advise to opt out, when in many cases this could be contrary to their clients’ interests?

#### IV THE CULTURE OF OPTING OUT AND WHY OPT OUTS SHOULD NEVER BE AUTOMATIC

To date, only 12 Australian cases mention the *CISG*.<sup>87</sup> The *CISG* was applicable law in only eight of those cases.<sup>88</sup> Although other reasons have been suggested,<sup>89</sup> the lack of *CISG* cases in Australia almost certainly reflects the

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<sup>81</sup> Ibid art 47.

<sup>82</sup> Ibid art 49(1)(b).

<sup>83</sup> See above n 67.

<sup>84</sup> Although art 50 does contemplate price reductions after the goods are paid for, a buyer who has already paid the price will be unable to effect the remedy as a self-help measure without either the cooperation of the seller (refund or credit note) or an independent right of set-off, sourced externally to the *CISG* itself. The common law position is that generally, the covenant to pay will be independent: Treitel, above n 76, 1580–97.

<sup>85</sup> It is therefore a ‘myth’ to state that the *CISG* generally favours either the buyer or the seller: Sandra Saiegh, ‘The Business Lawyer’s Perspective’ in Harry M Fletcher, Ronald A Brand and Mark S Walter (eds), *Drafting Contracts under the CISG* (2008) 257 (referring to the ‘myth’ amongst in-house counsel that the *CISG* favours buyers); Ingeborg Schwenzer, ‘The CISG: A Global Story of Success’ (Lecture delivered at Monash University, Melbourne, Australia, 5 February 2009) (advantages for buyers and sellers effectively cancel one another out such that the *CISG* favours neither); Mathias Reimann, ‘The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care’ (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 115, 125 (dismissing the substantive reasons for opt outs on the basis that the *CISG* is balanced); Widmer and Hachem, above n 38, 281, 297. *Contra* Ziegel, ‘Commentary on Party Autonomy’, above n 20, 129 (arguing that the *CISG* remedies favour sellers).

<sup>86</sup> *CISG*, above n 1, art 6.

<sup>87</sup> See Pace Law School, *CISG Database Country Case Schedule: Australia* (2009) <<http://www.cisg.law.pace.edu/cisg/text/casecit.html#australia>>, which lists 15 cases for Australia, but I have not counted appeals and preliminary applications as different cases. In four of the 12 Australian cases, the *CISG* is mentioned but does not apply.

<sup>88</sup> See below n 507.

<sup>89</sup> Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [2.3], suggest the reason for the small number of Australian cases is a combination of the prevalence of arbitration, mediation and expert determination, choice of law other than Australian law and the fact that [at the time of writing] two of Australia’s largest trading partners, Japan and the UK, have not acceded to the *CISG*. The first two are not unique to Australia. I would contend that Australian lawyers are equally (if not more) inclined to opt out as their Japanese or UK counterparts, although admittedly, an inclination on both sides is more likely to bring about an agreed opt out.

prevalent practice in Australia of avoiding the *CISG* at the drafting stage by opting out within choice of law clauses, as indicated by anecdotal evidence.<sup>90</sup>

Australian lawyers are not alone. Similar opt out cultures exist elsewhere. Although empirical evidence varies, there is sufficient evidence<sup>91</sup> to support a conclusion that opting out is prevalent in the US, probably less common but still frequent in Germanic nations, and less common again in China. In the US, one study reported that 71 per cent of lawyers generally opt out, although a more recent study put this at 55 per cent of US lawyers.<sup>92</sup> A large study showed that opt outs were 'normal' practice for 55 per cent of Austrian, 41 per cent of Swiss, and 42 per cent of German lawyers.<sup>93</sup> In China, the rate of lawyers preferring to opt out could be 37 per cent or lower, although this evidence is from a small sample size.<sup>94</sup> So from the front end of the legal process, it seems there is a range

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<sup>90</sup> See above n 2. The above anecdotal accounts also accord with my own experience in practice in Australia, and with that of colleagues.

<sup>91</sup> Therefore, although there are interesting anecdotal accounts of opting out and possible reasons for opt outs, these are not extensively cited in this article: see, eg, Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2007) 50 *American Journal of Comparative Law* 97, 111 (asserting that the parties often contract to exclude the application of the *CISG*); Pribetic, above n 26, 1; John E Murray, 'The Neglect of *CISG*: A Workable Solution' (1998) 17 *Journal of Law and Commerce* 365, 371–3; Ferrari, 'Choice of Forum and *CISG*', above n 17, 140; Ziegel, 'The Scope of the Convention', above n 9, 67–73; Kilian, above n 41, 225; Sonja Kruisinga, *(Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?* (2004) 9.

<sup>92</sup> Fitzgerald's study in 2006–07 of US practitioners showed that 55 per cent typically opt out. Note that only 47 respondents were in a position to answer this question: above n 75, 64. A study of 48 respondents from the US by Koehler in 2004–05 revealed that around 71 per cent of US lawyers generally or predominantly opt out: Martin F Koehler, *Survey regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of Its Application* (2006) <<http://cisgw3.law.pace.edu/cisg/biblio/koehler.html>>. See also Philippopoulos, above n 41. Philippopoulos surveyed 46 US lawyers (presumably in 2007), and found high opt out levels. However, the survey was focussed on litigation attorneys, and frequency of opt out practices and frequency of reasons for opting out are less specific than the Fitzgerald (above this note) and Koehler and Guo surveys (below n 94). While Philippopoulos states the 'overwhelming majority' opt out if advising a buyer, the number opting out is not reported. It appears opt out levels (amongst litigation lawyers) were around 61 per cent: Philippopoulos, above n 41, 361–2. However, comments elicited by the more open style survey used by Philippopoulos are quite revealing. See discussion below n 515. There was also a study conducted by Michael Gordon in 1997, confined to Florida: Gordon, above n 41. It found half of those with 'fairly strong' or 'reasonable' knowledge had opted in or out. The number of surveys distributed is specified (124 lawyers, at 368) but not the number of responses.

<sup>93</sup> Smaller surveys found this was true for 73 per cent of German lawyers and 62 per cent of Swiss lawyers: Widmer and Hachem, above n 38, 282, 285–6 (surveying 153 Swiss lawyers in 2008 involved in international sales); Koehler, above n 92 (surveying 33 respondents in 2004–05).

<sup>94</sup> The sample size was quite small, at 27 respondents: Martin F Koehler and Guo Yujun, 'The Acceptance of the Unified Sales Law (*CISG*) in Different Legal Systems: An International Comparison of Three Surveys on the Exclusion of the *CISG*'s Application Conducted in the United States, Germany and China' (2008) 20 *Pace International Law Journal* 45, 47–8. It indicated that 37 per cent, generally or predominantly opt out of the *CISG*; 7.4 per cent, about half of the time; 44.4 per cent, seldom; and 7.4 per cent, never opt out: see Martin Koehler and Guo Yujun, *Combined Charts (Survey: Germany USA China) — Frequency of Exclusion* (2008) (spreadsheet provided by Martin Koehler on 7 August 2008, on file with author). The small sample might in fact overstate the number of Chinese lawyers opting out. In 2008, Han reported Chinese lawyers 'seldom' opt out: Han Shiyuan, 'China' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 71, 71–2;

of frequencies of opt outs. Judging by the largest samples, the US is probably at the higher and China at the lower ends of the scale, with Germanic nations somewhere in the middle. While, of course, other explanations are also plausible, it is possible to argue that comparisons of US studies demonstrate a reduction in opt outs over time, consistent with one anecdotal account of front-end trends in the US.<sup>95</sup> There have been other recent reports of some movement away from opting out in other nations where opt outs are prevalent.<sup>96</sup>

At the other end of the legal process, Chinese arbitral tribunals and courts are working under a burgeoning *CISG* case load. Many Chinese cases have emerged in the last few years, and an enormous 342 have been translated into English.<sup>97</sup> By contrast, the number of cases in the (highly litigious) US is small, with only 93 cases.<sup>98</sup> Yang observes that there are almost as many *CISG* cases involving US parties in China as there are in the US.<sup>99</sup> Likewise, at least 21 Chinese *CISG* cases involve Australian parties — almost double the number of Australian *CISG* cases!<sup>100</sup> The story in Germany is quite different, with German *CISG* cases being quite numerous, at around 444.<sup>101</sup> Austria has produced 77 cases, and there are 35 Swiss cases. Of course, case numbers vary due to the costs and speed of litigation, dispute resolution culture, recoverability of litigation costs and level of

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see also, Lookofsky, 'Online with AI K', above n 38, 287, 291; Albert Kritzer, 'Application and Interpretation of the CISG in the PR of China — Progress in the Rule of Law in China' (2007) 40 *Uniform Commercial Code Law Journal* 261; Yang, above n 18, 376.

<sup>95</sup> Compare Koehler (2004) 71 per cent, Philipopoulos (presumably 2007) 61 per cent and Fitzgerald (2006–07) 55 per cent: see above n 92. Flechtner observed, in 2007, a 'change' in the queries that he received from practitioners regarding the *CISG* from purely litigious to front-end (drafting/choice of law) queries: Flechtner, above n 32, 3. Alternatively, differences could simply be due to survey design, sample composition (for example, Philipopoulos targeted litigators), but not sample size (48, 46 and 47 respectively).

<sup>96</sup> A recent anecdotal report is that while opting out is still prevalent in Italy, many specialist drafters are now choosing not to opt out: Marco Torsello, 'Italy' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 187, 189–90, 195–9. It seems a similar trend is appearing in Germany, where Magnus reports the impression that an increasing number of business associations no longer generally recommend opting out, and that opting out is no longer the norm for standard forms: Ulrich Magnus, 'Germany' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 143, 146.

<sup>97</sup> The Pace Law School website lists 342 translated Chinese *CISG* cases: Institute of International Commercial Law, Pace Law School, *CISG Database: Country Case Schedule* (2009) <<http://cisgw3.law.pace.edu/cisg/text/casecit.html#a06>>. For these and subsequent case numbers, I have utilised a count of the country case list for each country, but not counted appeals and preliminary applications as additional cases, therefore case numbers differ slightly from the summary available at Pace Law School, *CISG Database* (2009) <<http://cisgw3.law.pace.edu/cisg/new-features.html>>.

<sup>98</sup> According to the Pace Law School website, there have been 93 US *CISG* cases: Institute of International Commercial Law, Pace Law School, *CISG Database Country Case Schedule* (2009) <<http://cisgw3.law.pace.edu/cisg/text/casecit.html#a06>>.

<sup>99</sup> Yang, above n 18, 375 (reporting that there have been 74 Chinese *CISG* cases involving a party from the US, compared with 95 US *CISG* cases at the time).

<sup>100</sup> Kritzer, 'CIETAC Arbitration Awards', above n 33.

<sup>101</sup> Pace Law School, 'Germany' in *CISG Database: Country Case Schedule* (2009) <<http://cisgw3.law.pace.edu/cisg/text/casecit.html#germany>>.

economic activity.<sup>102</sup> Further, not all cases in these jurisdictions are reported internationally.<sup>103</sup>

What is irrefutable is that, all other things being equal, more frequent opt outs necessarily reduce the pool of potential *CISG* cases and contribute to unfamiliarity in the jurisdiction concerned through lack of exposure to *CISG* dispute work. This unfamiliarity then seems to often feed back into choice of law options, resulting in a vicious cycle.<sup>104</sup>

Unfamiliarity is indeed often nominated as a reason for opt outs in surveys.<sup>105</sup> Conversely, in China, where instances of opt outs appear lower, unfamiliarity is less important in opt out decisions.<sup>106</sup> In 2004, unfamiliarity was found to be a significant reason for opt outs in the US, Switzerland and Germany.<sup>107</sup> Arguably, levels of unfamiliarity with the *CISG* significantly influence opt out levels.<sup>108</sup> Baseline levels of unfamiliarity are much higher in the US than they are in

<sup>102</sup> See Reimann, above n 85, 125–6 (discussing the paucity of US cases and cost of US-style litigation); Ziegel, ‘The Future of the International Sales Convention’, above n 50, 343–4 (considering but ultimately dismissing differences between US and German incentives to litigate on opt outs, including US allowance of contingency fees compared to German regulation of litigation fees, party responsibility for own fees in the US (‘American Rule’) compared to possible partial recovery of fees from opponents in Germany (‘Loser-Pays Rule’)). In regard to recovery of attorney fees in *CISG* cases, see CISG Advisory Council, *Opinion No 6*, above n 67, §5; *Zapata Hermanos Sucesores SA v Hearthsides Baking Co* (US Circuit Court of Appeals (7<sup>th</sup> Cir), US, 19 November 2002) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html>>; Joseph Lookofsky and Harry M Flechtner, ‘Zapata Retold: Attorneys’ Fees Are (Still) Not Governed by the CISG’ (2006) 26 *Journal of Law and Commerce* 1; Stoll and Gruber, ‘Arts 74–77’, above n 70, 757; Lookofsky, *Understanding the CISG*, above n 59, 133.

<sup>103</sup> See above n 99.

<sup>104</sup> See also Lisa Spagnolo, ‘A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)’ (Paper presented at Moot Alumni Association (‘MAA’), ‘Issues on the CISG Horizon: Conference in Honour of Peter Schlechtriem (1933–2007)’, Vienna, Austria, 2 April 2009), to be published in (2009) *Vindobona Journal of International Commercial Law and Arbitration* (forthcoming).

<sup>105</sup> In Fitzgerald’s 2006–07 study, ‘lack of sufficient familiarity’ was the ‘principal’ reason for opting out for 16 per cent of US lawyers. However, Fitzgerald indicates that the number might in fact be higher: Fitzgerald, above n 75, 12 (fn 23), 65. The Koehler study found 53 per cent of US and German lawyers opted out, at least partly because the *CISG* was ‘generally not very well known’: Koehler, above n 92, Questionnaire and Chart: ‘Practical Reasons for Exclusion’. Unfamiliarity was not listed amongst options for respondents to select in the Meyer studies, in which the most frequent reason for opt outs given by German, Austrian and Swiss lawyers was ‘not enough legal certainty’. Meyer concludes from individual comments many lawyers and clients are unfamiliar with the *CISG*: Meyer, *The CISG in Attorneys’ Every Day Work*, above n 31, 8, Question 5, Tables 5A–5C.

<sup>106</sup> Only 30 per cent of Chinese lawyers surveyed gave the view that the *CISG* is ‘generally not very well known’ as a reason for opt outs: see, Koehler and Guo, above n 94, § IV (47.2 per cent or 51 of 108 US, German and Chinese respondents). See also, Koehler, above n 92, reporting that 53.1 per cent or 43 US and German respondents. Chinese respondents with this view therefore amount to 29.6 per cent (using the calculation  $(51 - 43) \div 27 = 29.6$  per cent).

<sup>107</sup> See Koehler’s results, and to a lesser extent, those of Fitzgerald in 2006–07, above n 105. See comment on Meyer study regarding unfamiliarity, above n 105. In Widmer and Hachem’s Swiss survey, 42 per cent responded that one reason for opt outs was ‘lack of certainty’ which the authors attribute in part to insufficient familiarity: Widmer and Hachem, above n 38, 285.

<sup>108</sup> Although this conclusion is based on empirical evidence, significant agreement is found in the commentary: see anecdotal accounts, above n 91; see also, Mathias Reimann, above n 85, 126 (agreeing that in the US context, unfamiliarity is significant in opt outs); Kilian, above n 41, 230, 238; Kruisinga, above n 91; Ziegel, ‘The Scope of the Convention’, above n 9, 70.

Germany, Switzerland or Austria.<sup>109</sup> It is probable that this also holds true for Australia,<sup>110</sup> where lack of coverage in compulsory law school courses is compounded by a paucity of cases<sup>111</sup> and a split of work between litigation and front-end (drafting) divisions within law firms, which ensures that most Australian lawyers have never once dealt with the *CISG*, unlike, by way of contrast, the vast majority of Germanic and Chinese lawyers.<sup>112</sup> This makes two things likely: that unfamiliarity with the *CISG* explains much of the opt out culture in Australia; and that opt out rates in Australia are probably equal to, or higher than, in the US, a conclusion which accords with anecdotal evidence of Australian practice.<sup>113</sup>

Are there any other reasons beside unfamiliarity for ‘automatically’ opting out of the *CISG*? As mentioned above, like every law, the *CISG* has certain substantive shortcomings.<sup>114</sup> At this stage, its substantive content probably plays a much less predominant role in determining opt out levels than does unfamiliarity. As discussed above, substantively the *CISG* presents a reasonably balanced law specifically designed for international transactions, combined with inherent flexibility to tailor the law to the parties’ needs. Further, in practice there are both systemic and strategic practical advantages that flow from the *CISG*. It follows that for many but not all clients, the *CISG* will be the best choice. However, this can only be appreciated when the issues are understood and considered. A knee-jerk reaction based on unfamiliarity cannot ensure the best interests of the client are met.

Arguably, practitioners that ‘automatically’ opt out of the *CISG* are vulnerable to claims of professional negligence. Since the *CISG* is part of Australian law, ethical and competent Australian lawyers advising clients dealing in international trade should be familiar with it before they advise clients to opt in or out.<sup>115</sup>

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<sup>109</sup> By baseline levels, I mean any familiarity with the *CISG* at all. Fitzgerald found 44 per cent of US lawyers were ‘not familiar with the *CISG* at all’: above n 75, 32. Fitzgerald’s survey can be contrasted to the work of Widmer and Hachem, above n 38, 284, 287 (finding that 93 per cent of Swiss lawyers had ‘basic’ or better knowledge of the *CISG*, and less than two per cent had not heard of it); Magnus, above n 96, 145 (commenting on the relatively high familiarity of German lawyers).

<sup>110</sup> No empirical data is yet available on the situation in Australia.

<sup>111</sup> Only 12 *CISG* cases exist in Australia. In Part VI, each is discussed in turn.

<sup>112</sup> In Germany, Austria and Switzerland, 70–78 per cent of lawyers have at least once encountered a *CISG* dispute: Meyer, above n 31. See also, Han, above n 94, 71–2 (reporting that the *CISG* is examinable within the National Judicial Examination for qualification as a lawyer).

<sup>113</sup> See above n 2.

<sup>114</sup> Ziegel lists certain substantive factors as ‘legal’ rationale: Ziegel, ‘The Future of the International Sales Convention’, above n 50, 345–6.

<sup>115</sup> See, in support, Franco Ferrari, ‘General Report’ in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 413, 427 (agreeing in extreme cases); Ronald A Brand, ‘Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law’ (2001) 34 *Vanderbilt Journal of Transnational Law* 1135, 1162–6; Sandra Saiegh, above n 85, 254:

Practitioners involved in advising their clients on commercial transactions have a professional obligation to know about the *CISG* and its application. The latest developments in international commercial transactions mandate that all commercial or business lawyers should be familiar with the *CISG*.

Advice should be based on a professional assessment of advantages and disadvantages of the *CISG* compared with alternative choices of law, not blind unfamiliarity. Like any other area, if the practitioner is unfamiliar with the *CISG*, expert help should be obtained or the client referred. Better still, lawyers should familiarise themselves with the *CISG*, which is, after all, Australian law. Although this involves an initial investment of time and effort, development of *CISG* expertise naturally gives the firm involved competitive advantages and ensures advice is based on a professional analysis case by case,<sup>116</sup> rather than a knee-jerk. It seems that this process of seriously considering *not* opting out, and investing in 'start up' costs to become familiar with the *CISG* has begun in the US, where market forces have forced lawyers to gain expertise in this area.<sup>117</sup> Those Australian firms that take this route earlier rather than waiting until they are compelled to do so could enjoy a head start over other local firms.<sup>118</sup>

While lawyers and law firms themselves must take responsibility for the quality of their professional advice, Australian lawyers and firms can also push for courses and seminars. The *CISG* needs to rate more than a mention in foundational law school courses, and should be specifically offered for Continuing Legal Education purposes.<sup>119</sup>

Likewise, Australian *CISG* cases reveal the current state of unfamiliarity of Australian lawyers through a dearth of argument on the *CISG*, even when both sides concede that the *CISG* governs the contract. Of course, there might be strategic reasons for this, but it is also possible that the omission is due to a reluctance to deal with the unfamiliar, including a disinclination to invest the time and effort to acquire enough knowledge of the *CISG* to argue its provisions, or to even determine whether there is any advantage in doing so.<sup>120</sup> It is hard to imagine this deplorable state of affairs being tolerated in relation to any other area of Australian law. Whatever the reason and consequences (or lack thereof) for the individuals involved,<sup>121</sup> the overall picture is that failure to engage with

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Dodge, above n 43, 73 (fn 5) (arguing that the failure 'to determine the law that governs a contract ... [is] probably malpractice'); *Contra* Baasch Andersen, above n 31, 305; Butler, above n 48, 26 (stating that there is an ethical duty to advise clients of the pros and cons of opting out even if clients insist on doing so).

<sup>116</sup> Interestingly, Meyer's studies showed the proportion of decisions on choice of law made on a 'case-by-case' basis was 32 per cent: Meyer, above n 31, Question 4, Tables 4A–4C.

<sup>117</sup> Flechtner, above n 32, 2 (commenting on a change in enquiries received from US lawyers from litigation queries to choice of law queries, and concluding that 'the change has already begun'). Although explicable on other bases such as sample size, study design etc, it is also interesting to note the shift from US data in 2004 (71 per cent opt out) to 2006–07 (55 per cent): above n 92.

<sup>118</sup> Flechtner, above n 32, 2 (noting 'start up' costs for expertise are of course, effectively amortised).

<sup>119</sup> Nottage, above n 2. See also Gordon, above n 41.

<sup>120</sup> Ziegel, 'The Future of the International Sales Convention', above n 50, 345 (arguing that economic rationales are more plausible than cultural factors); Meyer, *The CISG in Attorneys' Every Day Work*, above n 31, 8 ('many attorneys think it is not worthwhile to get into the *CISG* regime in detail').

<sup>121</sup> Counsel in Australia are immune from liability for negligence in regard to conduct of a case in court: *Giannarelli v Wraith* (1988) 165 CLR 543. Note that this immunity has now been overturned in England in the House of Lords: *Arthur J S Hall & Co v Simons* [2002] 1 AC 615. Discussing the US litigation, Reimann, above n 85, 122, observes that attorneys ignoring the *CISG* when applicable in litigation engage in malpractice. See also above n 115.

the *CISG* is prevalent in Australian litigation, and argument is predominantly modelled on the law that counsel would prefer to apply, rather than the applicable law.<sup>122</sup> A ‘misuse of judicial resources’ and decline in administration of justice has arisen<sup>123</sup> as increasingly, counsel’s approach has diverted the judiciary from the task of proper application of the *CISG* in Australia.<sup>124</sup>

## V REQUIREMENTS FOR PROPER APPLICATION OF THE *CISG*

Where the *CISG* is the governing law of the contract, it must be applied internationally and autonomously, in order to preserve its uniformity on a global scale. This requirement is imposed on courts by art 7(1) which demands that ‘[i]n the interpretation of [the *CISG*], regard is to be had to [its] international character and to the need to promote uniformity in its application’.<sup>125</sup> In essence, the *CISG* must be interpreted *autonomously*; that is, free from domestic preconceptions and in accordance with its own terms. Further, it must be applied with an *internationalist* perspective, that is, with reference to *CISG* sources from around the world. Therefore, for issues falling within the scope of the *CISG*, courts or tribunals should:

- avoid domestic legal terminology and concepts;<sup>126</sup>
- refrain from reference to non-*CISG* cases;
- avoid reference to inapplicable non-*CISG* provisions;<sup>127</sup>
- make reference to *CISG* cases from its own and other jurisdictions as persuasive authority;<sup>128</sup>

<sup>122</sup> See the discussion below in Part VI. Similarly, this trend has been noted in some US cases. For example, William Dodge notes that in one US case, plaintiff’s counsel’s lack of familiarity with the *CISG* caused a fatal delay in raising a defence to the argument of non-compliance with (displaced) Statute of Fraud writing requirements. Counsel’s unfamiliarity cost the plaintiff a *CISG* argument that was ‘a sure winner’: Dodge, above n 43, 74 (referring to *GPL Treatment v Louisiana-Pacific Corp*, 894 P 2d 470 (Or Ct App, 1995); aff’d 914 P 2d 682 (Or, 1996)); Harry M Flechtner, ‘Another CISG Case in the US Courts: Pitfalls for the Practitioner and Potential for Regionalized Interpretations’ (1995) 15 *Journal of Law and Commerce* 127, 130–3. On this trend in common law countries, see Ziegel, ‘The Scope of the Convention’, above n 9, 69; Kritzer, ‘CISG: Scope, Interpretation and Resources’, above n 18; Kilian, above n 41, 227, 242–3 (noting that US courts ‘go out of their way’ to avoid applying the *CISG* or taking account of foreign *CISG* cases). However, Kilian agrees that a change in approach was signalled in *Medical Marketing International Inc v Internazionale Medico Scientifica SRL* (US District Court (ED La), US, 17 May 1999) <<http://cisgw3.law.pace.edu/cases/990517u1.html>>.

<sup>123</sup> Fitzgerald, above n 75, 14; Pribetic, above n 26, 7 (fn 31); Reimann, above n 85, 125.

<sup>124</sup> Making an interesting observation about the difference in common law and civil judicial approaches and the principle of *iura novit curia*, whereby ‘the court is required to resort to its own knowledge to identify and apply the legal rules relevant to the case at hand, irrespective of the parties’ submissions’: Torsello, above n 96, 191–5 (fn 20), 209; see Reimann, above n 85, (fn 48) and accompanying text; Franco Ferrari, ‘Remarks on the UNICITRAL Digest’s Comments on Article 6 CISG’ (2005) 25 *Journal of Law and Commerce* 13, 30–1; Pribetic, above n 26, 27 (arguing that the *CISG* must be applied if applicable despite differences between common and civil law on this point). See discussion below in Part VIII.

<sup>125</sup> *CISG*, above n 1, art 7(1).

<sup>126</sup> *CISG* drafters carefully avoided such terms: see Honnold, *Uniform Law for International Sales*, above n 71, 15 (describing ‘[t]he effort ... to avoid legal idioms that have divergent local meanings and, instead to speak in terms of physical events that occur in international trade’), 89 (describing familiar domestic terms as *des faux amis*).

<sup>127</sup> See, eg, Sale of Goods legislative provisions: Ziegel, ‘The Scope of the Convention’, above n 9, 69.

- refer to CISG Advisory Council Opinions,<sup>129</sup> CISG scholarship, and CISG legislative history;<sup>130</sup>
- abandon domestic interpretive techniques, and instead utilise the CISG's own interpretive method and contractual construction rules;<sup>131</sup> and
- apply the CISG as exclusive law, pre-emptive of overlapping domestic law, subject to art 7(2).

Failure to do this is known as viewing the CISG through 'domestic lenses' or the 'homeward trend,'<sup>132</sup> and amounts to improper application of the CISG. It

<sup>128</sup> See the following excellent sources for CISG cases from around the world: Pace Law School, *CISG Database* <<http://cisgw3.law.pace.edu>>; UNILEX, *UNILEX on CISG and UNIDROIT Principles: International Case Law and Bibliography* <<http://www.unilex.info>>; UNCITRAL, *CLOUT Abstracts* <[http://www.uncitral.org/uncitral/en/case\\_law/abstracts.html](http://www.uncitral.org/uncitral/en/case_law/abstracts.html)>; Global Sales Law, Faculty of Law, University of Basel, *CISG-online.ch* <<http://www.cisg-online.ch>>. Another resource is the UNCITRAL *CISG Digest of Case Law*, which neutrally orders case law within provisions of the CISG, although one needs to refer to scholarly works for a critical view of cases: see UNCITRAL, *Digest of Case Law*, above n 15.

<sup>129</sup> Of persuasive but not binding authority are opinions issued by the CISG Advisory Council. This is a private body of internationally recognised experts on the CISG, and CISG-AC Opinions are designed to deal with controversial issues arising from the interpretation of the CISG. In the interests of furthering uniformity, this author suggests CISG-AC Opinions should be considered 'highly persuasive'. To date there have been nine CISG-AC Opinions, available from <<http://www.cisgac.com/default.php?sid=128>>. On the role of the CISG Advisory Council, see Lorraine de Germiny and Joshua Karton, 'Has the CISG Advisory Council Come of Age?' (2009) 27(2) *Berkeley International Law Journal* (forthcoming) <[http://works.bepress.com/joshua\\_karton/2](http://works.bepress.com/joshua_karton/2)>. The article concludes that the academic tendency is to treat CISG-AC Opinions as 'reliable sources of authority on controversial matters of interpretation': de Germiny and Karton, above this note, 41. Lookofsky and Flechtner take issue with the authority of the CISG Advisory Council to, in their view, override reliance of drafters on substantive-procedural distinctions in relation to the scope of the CISG for recovery of attorney fees. However, Lookofsky and Flechtner still treat CISG-AC Opinions as at least as important as 'the theories of a leading academic': de Germiny and Karton, above this note, 44 (citing Lookofsky and Flechtner, above n 102, 7).

<sup>130</sup> See, eg, Pace Law School, *CISG Database* <<http://cisgw3.law.pace.edu>>. One of the most authoritative texts on the CISG is Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005); see also Honnold, *Uniform Law for International Sales*, above n 71.

<sup>131</sup> See CISG, above n 1, arts 7–9. Matters 'governed by [the CISG] which are not expressly settled in it' — internal gaps must be filled by internal interpretive methodology. Liberal interpretation by analogy and use of general principles are hallmarks of this method. For internal gaps, recourse to the law applicable through conflict rules is permissible only as a last resort: art 7(2). For matters not governed by the CISG — external gaps — resolution is by the law determined by application of conflict rules. See Schlechtriem, 'Art 7', above n 52, 101–9; Honnold, *Uniform Law for International Sales*, above n 71, 88–114; Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 *Georgia Journal of International and Comparative Law* 183, 215–19. Whether an issue is external or internal to the CISG should be determined as a preliminary matter: see Spagnolo, 'Opening Pandora's Box', above n 54, 306–9. On relevance of statements and conduct of parties, usages and past practices in construction of contractual terms, see CISG, above n 1, arts 8 and 9, discussed below n 426 and above n 59 (on the parol evidence rule).

<sup>132</sup> See, Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law', above n 131, 202; Murray, above n 91, 369; John Honnold, 'The Sales Convention in Action — Uniform International Words: Uniform Application?' (1988) 8 *Journal of Law and Commerce* 207, 208; Franco Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law' (2009) *Vindobona Journal of International Commercial Law and Arbitration* (forthcoming);

raises a point of appeal, jeopardises the uniformity of the *CISG* worldwide, and undermines its aims of removing barriers to trade. It could also amount to a breach of treaty obligations undertaken by the Contracting State,<sup>133</sup> and certainly provides grounds for appeal.<sup>134</sup>

It is important to note that *CISG* cases (often fully translated), *CISG* scholarship and *CISG* Advisory Council Opinions are freely and readily available via the internet,<sup>135</sup> which makes the Australian trend even more puzzling.

## VI THE AUSTRALIAN TRACK RECORD

Although Swiss, Austrian and US lawyers share the Australian predilection for opt outs in drafting, the policy of ignoring the *CISG* is not always carried through to litigation. Germanic courts and tribunals have long shown awareness of the *CISG*. By contrast, US courts have looked at the *CISG* through ‘domestic lenses’.<sup>136</sup> One court even stated that *US Uniform Commercial Code* (‘UCC’) case law could be used to interpret the *CISG* where the language of the *CISG*

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Camilla Baasch Andersen, ‘The Uniform International Sales Law and the Global Jurisconsultorium’ (2005) 24 *Journal of Law and Commerce* 159, 159–61 (explaining the term jurisconsultorium as a ‘phenomenon of the meeting of the minds across jurisdictions in the shaping of international law’ and a product of compliance with the obligation in art 7(1), to interpret the *CISG* internationally and uniformly); Vikki M Rogers and Albert H Kritzer, ‘A Uniform International Sales Law Terminology’ in Ingeborg Schwenzer and Günter Hager (eds), *Festschrift für Peter Schlechtriem zum 70. Geburtstag* (2003) 223 (first coining the term) <<http://cisgw3.law.pace.edu/cisg/biblio/rogers2.html>>.

<sup>133</sup> Peter Schlechtriem, ‘The Borderland of Tort and Contract — Opening a New Frontier?’ (1988) 21 *Cornell International Law Journal* 467, 468–9; Honnold, *Documentary History*, above n 37, 89; Honnold, *Uniform Law for International Sales*, above n 71, 211; Bridge, ‘Uniform and Harmonized Sales Law’, above n 11, 922. Note that Bridge argues that where the forum would otherwise be obliged to apply the *CISG*, parties can post-contractually agree to apply non-*CISG* domestic law if, for example, art 3(2) of the *1980 Rome Convention* applies: at 917; Ziegel, ‘The Future of the International Sales Convention’, above n 50, 342 (fn 30) (agreeing); Baasch Andersen, ‘Global Jurisconsultorium’, above n 132, 166 (recourse to foreign *CISG* jurisprudence is a duty).

<sup>134</sup> Bruno Zeller, ‘Traversing International Waters’ (2004) 78(9) *Law Institute Journal* 52, 54–5.

<sup>135</sup> See above n 128.

<sup>136</sup> UCC cases and provisions relied upon in *Delchi Carrier SpA v Rotorex Corp* (US Circuit Court of Appeals (2<sup>nd</sup> Cir), US, 6 December 1995) <<http://cisgw3.law.pace.edu/cases/951206u1.html>>; *Beijing Metals v American Business Center* (US Circuit Court of Appeals (5<sup>th</sup> Cir), US, 13 June 1993) <<http://cisgw3.law.pace.edu/cases/930615u1.html>>; Kilian, above n 41, 232 (noting that *Beijing Metals* ‘treat[ed the] *CISG* as a mere extension of the UCC’); *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc* (US District Court (SD NY), US, 10 May 2002) <<http://cisgw3.law.pace.edu/cases/020510u1.html>>; *Schmitz-Werke GmbH & Co v Rockland Industries Inc* (US Circuit Court of Appeals (4<sup>th</sup> Cir), US, 21 June 2002) <<http://cisgw3.law.pace.edu/cases/020621u1.html>>; *Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 28 May 2003) <<http://cisgw3.law.pace.edu/cases/030528u1.html>>; *Chateau des Charmes Wines Ltd v Sabaté USA Inc* (US Circuit Court of Appeals (9<sup>th</sup> Cir), US, 5 May 2003) <<http://cisgw3.law.pace.edu/cases/030505u1.html>>; *Raw Materials Inc v Manfred Forberich GmbH* (US District Court (ND Ill), US, 6 July 2004) <<http://cisgw3.law.pace.edu/cases/040706u1.html>>; *Ajax Tool Works Inc v Can-Eng Manufacturing Ltd* (US District Court (ND Ill), US, 30 January 2003) <<http://cisgw3.law.pace.edu/cases/030129u1.html>>.

‘tracked’ that of the UCC, an error still echoed today.<sup>137</sup> Despite the continued predominance of poor decisions, US courts have shown recurrent signs they are beginning to come to terms with the *CISG*’s proper application as an autonomous and uniform law, either in relation to specific issues<sup>138</sup> or interpretative method.<sup>139</sup> The previously unremarkable track record of Italian

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- <sup>137</sup> *Delchi Carrier v Rotorex* (US Circuit Court of Appeals (2<sup>nd</sup> Cir), US, 6 December 1995) <<http://cisgw3.law.pace.edu/cases/951206u1.html>> (incorrectly stating that the use of UCC cases is sometimes permissible in the *CISG*), discussed above n 136, below nn 263–265 and accompanying text. Repeating the ‘tracking’ comment: *Schmitz-Werke GmbH & Co v Rockland Industries Inc* (US Circuit Court of Appeals (4<sup>th</sup> Cir), US, 21 June 2002) <<http://cisgw3.law.pace.edu/cases/020621u1.html>>; *Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 21 and 28 May 2003) <<http://cisgw3.law.pace.edu/cases/040521u1.html>> and <<http://cisgw3.law.pace.edu/cases/030528u1.html>> respectively; *Genpharm Inc v Pliva-Lachema AS* (US District Court (ED NY), US, 19 March 2005) <<http://cisgw3.law.pace.edu/cases/050319u1.html>>; *Raw Materials Inc v Manfred Forberich GmbH* (US District Court (ND Ill), US, 6 July 2004) <<http://cisgw3.law.pace.edu/cases/040706u1.html>>; *Macromex Srl v Globex International Inc* (US District Court (SD NY), US, 16 April 2008) <<http://cisgw3.law.pace.edu/cases/080416u1.html>>. For the correct approach, see below Part V. For an illustration of how this is applied in practice, see below Part VII. Harry M Flechtner, ‘The *CISG* in US Courts: The Evolution (and Devolution) of the Methodology of Interpretation’ in Franco Ferrari (ed), *Quo Vadis CISG: Celebrating the 25<sup>th</sup> Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* (2005) 91, 103 (calling the failure to cite foreign decisions a ‘sin of omission’).
- <sup>138</sup> *Chateau des Charmes Wines Ltd v Sabaté USA Inc* (US Circuit Court of Appeals (9<sup>th</sup> Cir), US, 5 May 2003) <<http://cisgw3.law.pace.edu/cases/030505u1.html>> (correctly rejecting domestic ‘in writing’ requirements and noting arts 8(3), 19 and 29 in formation); *MCC-Marble Ceramic Center v Ceramica Nuova D’Agostino* (US Circuit Court of Appeals (11<sup>th</sup> Cir), US, 29 June 1998) <<http://cisgw3.law.pace.edu/cases/980629u1.html>> (citing scholarship and rejecting the parol evidence rule). Flechtner, above n 137, 91–2, 98 (commenting that good US cases are ‘exceptions rather than the rule’).
- <sup>139</sup> For citation of foreign cases, see *Chicago Prime Packers Inc v Northam Food Trading Co* (US District Court (ND Ill), US, 21 May 2003) <<http://cisgw3.law.pace.edu/cases/040521u1.html>> (citing seven foreign cases from Italy, Germany and the Netherlands, and referring to *CISG* scholarship); *Usinor Industeel v Leeco Steel Products Inc* (US District Court (ND Ill), US, 27 March 2002) <<http://cisgw3.law.pace.edu/cases/020328u1.html>> (citing an Australian case); *St Paul Guardian Insurance Co v Neuromed Medical Systems and Support GmbH* (US District Court (SD NY), US, 26 March 2002) <<http://cisgw3.law.pace.edu/cases/020326u1.html>> (citing German cases from the commentary); *Medical Marketing v Internazionale Medico Scientifica* (US District Court (ED La), US, 17 May 1999) <<http://cisgw3.law.pace.edu/cases/990517u1.html>> (citing a German case); Kilian, above n 41, 241 (approving the use of foreign cases in *Medical Marketing*, but critical of such application to framework agreement without hesitation); *Amco Ukrservice v American Meter Co* (US District Court (ED Pa), US, 29 March 2004) <<http://cisgw3.law.pace.edu/cases/040329u1.html>> (German cases cited and followed, holding that the *CISG* does not apply to joint venture agreements); *Zapata Hermanos Sucesores SA v Hearthsides Baking Co* (US Circuit Court of Appeals (7<sup>th</sup> Cir), US, 19 November 2002) <<http://cisgw3.law.pace.edu/cases/021119u1.html>> (the reliance on foreign cases went unquestioned); Ziegel, ‘The Scope of the Convention’, above n 9, (fn 32) (citing *Zapata* as a ‘striking improvement’); Baasch Andersen, ‘Global Jurisconsultorium’, above n 132, 174–5 (on *Zapata*). Even a relatively poor US decision managed to cite *CISG* cases from a non-English speaking jurisdiction: *Barbara Berry SA de CV v Ken M Spooner Farms Inc* (US District Court (WD Wash), US, 13 April 2006) <<http://cisgw3.law.pace.edu/cases/060413u1.html>> (citing a Swiss case). Showing recourse to foreign scholarship: *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc* (US District Court (SD NY), US, 10 May 2002) <<http://cisgw3.law.pace.edu/cases/020510u1.html>>.

courts<sup>140</sup> has now been graced by an ‘enlightened minority’ of cases that are excellent examples of multi-jurisdictional case citation.<sup>141</sup> On the other hand, there is little to celebrate in Australia.

Australian courts made a promising start, especially in *Roder Zelt*<sup>142</sup> and *Perry*<sup>143</sup> (discussed below), but things took a turn for the worse, as courts across Australia perpetuated the unfortunate tendency to cite non-applicable domestic legislation, case law or concepts in cases where the *CISG* was the governing law, often due to the reluctance of counsel to engage with the *CISG*.<sup>144</sup> Thus, the opt out culture has flowed through to litigation in Australia. After a hopeful beginning, we have for too long resorted to the blinkered notion that ‘ignorance is bliss’.

(a) *Renard Constructions (ME) Pty Ltd v Minister for Public Works*<sup>145</sup>

The first mention of the *CISG* came in a widely discussed decision in the New South Wales Court of Appeal. The case came before the Court on appeal from an

<sup>140</sup> See, eg, *Italdecor Sas v Yiu’s Industries (HK) Ltd* (Corte di Appello di Milano, Italy, 20 March 1998) <<http://cisgw3.law.pace.edu/cases/980320i3.html>> (failure to utilise *CISG* cases); Larry A Di Matteo et al, ‘The Interpretive Turn in International Sales Law: An Analysis of 15 Years of *CISG* Jurisprudence’ (2004) 34 *Northwestern Journal of International Law and Business* 299, 341.

<sup>141</sup> Torsello describes them as ‘an “enlightened minority” within a vast majority of low-quality Italian decisions’: Torsello, above n 96, 215, 219; Ferrari, ‘General Report’, above n 115, 420. The Italian ‘enlightened minority’ includes: *Sport d’Hiver di Genevieve Culet v Ets Louys et Fils* (Tribunale Civile di Cuneo, Italy, 31 January 1996) <<http://cisgw3.law.pace.edu/cases/960131i3.html>> (citing Swiss and German cases); *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) <<http://cisgw3.law.pace.edu/cases/000712i3.html>> (40 foreign decisions from Austria, France, Germany, the Netherlands, Switzerland and the US); *Al Palazzo Srl v Bernardaud di Limoges SA* (Tribunale Rimini, Italy, 26 November 2002) <<http://cisgw3.law.pace.edu/cases/021126i3.html>> (citing 30 cases from nine countries); *So M Agri Sas v Erzeugerorganisation Marchfeldgemüse GmbH & Co KG* (Tribunale di Padova, Italy, 25 February 2004) <<http://cisgw3.law.pace.edu/cases/040225i3.html>> (citing numerous decisions from Germany, France, Switzerland, Austria, Belgium and an ICC arbitral award); *Scatolificio La Perla Snc di Aldrigo Stefano e Giuliano v Martin Frischdienst GmbH* (Tribunale di Padova, Italy, 31 March 2004) available from <<http://cisgw3.law.pace.edu/cases/040331i3.html>> (many foreign decisions); *Ostroznik Savo v La Faraona Soc Coop ARL* (Tribunale di Padova, Italy, 11 January 2005) <<http://cisgw3.law.pace.edu/cases/050111i3.html>>; *Pessa Luciano v WHS Saddlers International* (Tribunale di Padova, Italy, 10 January 2006) <<http://cisgw3.law.pace.edu/cases/060110i3.html>>; *Mitias v Solidea Srl* (Tribunale di Forli, Italy, 11 December 2008) <<http://cisgw3.law.pace.edu/cases/081211i3.html>>. Note Italian courts cannot refer to scholarship: Torsello, above n 96, 208.

<sup>142</sup> *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216 (‘*Roder Zelt*’). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/950428a2.html>>; available from CISG-online, *Search for Cases* (Case No 218) <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>; available from UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT)* (Case No 308) <[http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)>; available from UNILEX, <<http://www.unilex.info>>.

<sup>143</sup> *Perry Engineering Pty Ltd v Bernold AG* [2001] SASC 15 (Unreported, Burley J, 1 February 2001) (‘*Perry*’).

<sup>144</sup> Failure of US judges to apprehend applicability and content of the *CISG* is probably the product of the bar’s own unfamiliarity with it, and subsequent failure to properly present argument accordingly: Fitzgerald, above n 75, 14.

<sup>145</sup> (1992) 26 NSWLR 234 (‘*Renard*’). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/920312a2.html>>; available from CISG-online, *Search for Cases* (Case No 44) <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>; available from UNILEX, <<http://www.unilex.info>>.

arbitral award on a question of law, in a dispute that centred on a 'show cause' notice and subsequent termination of the contract.

Priestley J concluded that 'reasonableness in performance' was implied in the contract concerned.<sup>146</sup> His Honour then likened this to notions of good faith in Europe and the US, and noted that, although such a concept was not yet fully accepted in Australia 'the time may be fast approaching'.<sup>147</sup> In the 16 years since those words, Australia has indeed moved down the path of an implied duty of good faith in performance, and although the issue has not yet been settled in the High Court,<sup>148</sup> the Australian position now seems closer to the US view than that in the UK, at least for commercial contracts.<sup>149</sup>

However, at the time, this was still groundbreaking territory for Australia. Therefore Priestley JA makes extensive use of scholarship, cases and statutes from a number of jurisdictions, the *UNCITRAL Model Law on Arbitration*,<sup>150</sup> and various provisions such as s 51A of the *Trade Practices Act 1974* (Cth),<sup>151</sup> and art 7(1) of the *CISG*.<sup>152</sup> Thus the *CISG* was not directly relevant.<sup>153</sup> Nonetheless, it signalled a promising level of judicial cognisance of the *CISG* in Australia, and was overwhelmingly and widely hailed as such in international circles.<sup>154</sup>

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<sup>146</sup> *Renard* (1992) 26 NSWLR 234, 263 (Priestley JA).

<sup>147</sup> *Ibid* 263–4.

<sup>148</sup> The High Court majority left the matter open in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289, 301, 327.

<sup>149</sup> See, eg, *Alcatel Australia Ltd v Scarcella & Ors* (1998) 44 NSWLR 349, 368–9; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR ¶41-703, 43-014; *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 568; *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17, [62]; *Pacific Brands Sport and Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 (Unreported, Finkelstein J, 22 March 2005). *Contra*, eg, *Service Station Association Ltd v Berg Bennett and Associates Pty Ltd* (1993) 117 ALR 393, 406 (Gummow J).

<sup>150</sup> UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* (1985); see also *International Arbitration Act 1974* (Cth) s 16 (recognising the *Model Law* as having the force of law in Australia). The laws governing arbitration in Australia are currently under review.

<sup>151</sup> *Renard* (1992) 26 NSWLR 234, 268.

<sup>152</sup> *Ibid* 264.

<sup>153</sup> *Ibid*.

<sup>154</sup> E Allan Farnsworth, 'The Concept of "Good Faith" in American Law' (Speech delivered at the Centre for Comparative and Foreign Law Studies, Rome, Italy, April 1993) <<http://servizi.iit.cnr.it/~crdcs/crdcs/farnswrt.htm>> (praising Priestley J's 'wide-ranging scholarship' as an example that should inspire 'reciprocal curiosity' from common lawyers everywhere); Schlechtriem, 'Art 7', above n 52, 104 (fn 50); Honnold, *Uniform Law for International Sales*, above n 71, 101; Dianne Madeline Goderre, 'International Negotiations Gone Sour: Precontractual Liability under the United Nations Sales Convention' (1997) 66 *University of Cincinnati Law Review* 257, 276 (fn 145–8); Peter Jones, 'Reasonableness, Honesty and Good Faith' (1995) *International Sales Quarterly* 8, 8–9; Ferrari, 'Applicability and Application', above n 20, 148 (fn 90), 165 (fn 264); Phanesh Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6 *Minnesota Journal of Global Trade* 105, 141 (fn 157) (arguing that the 'role of good faith in international trade is evolving and moving towards an international concept'); Paul 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, 341 (fn 52), 347 (fn 101–2); Bruno Zeller, 'The UN Convention on Contracts for the International Sale of Goods (CISG) — A Leap Forward towards Unified International Sales Laws' (2000) 12 *Pace International Law Review* 79, 100 (fn 92);

(b) *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*<sup>155</sup>

By Australian standards, *Roder Zelt* was a relatively enlightened decision by von Doussa J in the Federal Court. It involved a retention of title clause in a contract for large tent marquees and accessories. The parties were a German seller and Australian buyer, to which an administrator was appointed after delivery. The parties agreed that the *CISG* was the governing law of the contract.<sup>156</sup> Despite this, '[c]ounsel made only passing reference to the [*CISG*] at trial', and the pleadings were all couched in 'the language and concepts of the common law, not in those of the [*CISG*]'.<sup>157</sup>

The Court correctly pointed out that interpretation of the *CISG* was not a matter for expert evidence, since it was part of domestic law and 'not to be treated as a foreign law which requires proof as a fact'.<sup>158</sup>

As the main issue was property in the goods, von Doussa J rightly referred to art 4(b) which excludes the *CISG* from concern with regard to 'the effect the contract may have on property in the goods sold'.<sup>159</sup> The parties accepted that the issue was therefore governed by the law applicable upon application of German conflict of law rules, since Germany was identified as the place in which the contract was concluded. Yet, as the analysis of von Doussa J demonstrates, identification of Germany as the place the contract was made was itself only determinable by reference to arts 18 and 24 of the *CISG* on the effect and timing of acceptance of an offer.<sup>160</sup>

German rules of private international law resulted in the applicability of Australian property law on the question of ownership once the goods were in Australia. But was there an agreed retention of title clause? This question was still a matter for the *CISG* and von Doussa J made extensive reference to the provision on contractual interpretation in art 8, to art 11 on formalities, arts 15 and 18 on effectiveness of offers and acceptance, and art 29 on modification.<sup>161</sup>

After finding that a retention of title clause formed part of the contract, von Doussa J turned to the fundamental breach and remedy provisions of the *CISG*.<sup>162</sup> His Honour held fast to *CISG* terminology and concepts, and found that both the appointment of an administrator to the buyer, and denial of the retention of title clause amounted to fundamental breaches because they 'substantially ... deprive[d] [the seller] of what it was entitled to expect under the contract'.<sup>163</sup> Under the *CISG*, a buyer's fundamental breach allows an innocent seller to avoid the contract pursuant to art 64, but declaration of avoidance is required by art 26 before it becomes effective.<sup>164</sup> Thus von Doussa J correctly concluded that the

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Bruno Zeller, 'Good Faith — The Scarlet Pimpernel of the CISG' (Essay, Pace Law School, May 2000) pts 1(i), 2(i) <<http://cisgw3.law.pace.edu/cisg/biblio/zeller2.html>>; Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [9.6] (fn 36).

<sup>155</sup> (1995) 57 FCR 216.

<sup>156</sup> *Ibid* 220.

<sup>157</sup> *Ibid*.

<sup>158</sup> *Ibid* 222.

<sup>159</sup> *Ibid*.

<sup>160</sup> *Ibid* 222–3.

<sup>161</sup> *Ibid* 224, 230.

<sup>162</sup> Reference was made to arts 25, 26, 53, 61, 63 and 64 of the *CISG*: *ibid* 233–4.

<sup>163</sup> *Ibid* 234 (using the language of art 25 of the *CISG*).

<sup>164</sup> On arts 25 and 26 of the *CISG*, see above nn 71, 74.

contract was still on foot when the administrator was appointed, as ‘no declaration of avoidance had been notified to Rosedown’ at that stage.<sup>165</sup> Attention was then turned to insolvency provisions in Part 5.3A of the *Corporations Law*,<sup>166</sup> which the Court concluded did not prevent ‘Roder from notifying a declaration of avoidance’.<sup>167</sup>

Perhaps the common law-centric state of the pleadings<sup>168</sup> prompted a momentary slip in which his Honour enquired what might have ‘constitute[d] the “acceptance of the ... repudiation”’.<sup>169</sup> This is a common law concept with no place in the *CISG*. His Honour quickly returned to appropriate *CISG* terminology by equating this with notification of declaration of avoidance,<sup>170</sup> although the two are not related. His Honour eventually concluded that the declaration occurred in the form of the statement of claim.<sup>171</sup>

Article 72(1) on anticipatory breach enables avoidance of the contract where it is clear that a party will commit a fundamental breach. As Ziegel observes, this might have provided a more appropriate basis for the Court’s decision,<sup>172</sup> but was not considered. Ziegel also argues that the Court misconstrued art 63(1), which allows the seller to set an additional time for performance.<sup>173</sup> In this way, the seller can convert an uncertain fundamental breach into a definitive right of avoidance.<sup>174</sup> It is submitted the Court did not fall into error on this point. The reference to art 63 was by way of clarification, not as a prerequisite to avoidance. Perhaps a little awkwardly, the Court was effectively saying the failure to pay interest was not a fundamental breach per se, nor did a right of avoidance arise by notice pursuant to art 63.<sup>175</sup>

Ultimately, it held the seller was entitled to enforce the Romalpa clause pursuant to domestic law, and was entitled to damages pursuant to arts 74–6. It also indicated that the buyer was entitled to restitution of payments made under art 81.<sup>176</sup> However, examination of those provisions was cut short because there was insufficient evidence before the Court.<sup>177</sup> The matter was set down for re-listing, but presumably settled.

Additionally, von Doussa J determined that damages for conversion, and interest would be available. Unfortunately, like the other Australian cases that

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<sup>165</sup> *Roder Zelt* (1995) 57 FCR 216, 234.

<sup>166</sup> *Corporations Law* (Cth) pt 5.3A; amended by *Corporations Act 2001* (Cth) pt 5.3A.

<sup>167</sup> *Roder Zelt* (1995) 57 FCR 216, 234.

<sup>168</sup> *Ibid* 219–20.

<sup>169</sup> *Ibid* 235.

<sup>170</sup> *Ibid*

<sup>171</sup> *Ibid*.

<sup>172</sup> Jacob S Ziegel, ‘Comment on *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*’ in Pace International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998* (1999) 53, 61. But see Peter Schlechtriem, ‘Sale of Goods: General Provisions: Art 25’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 281, 298 (insolvency normally constitutes fundamental breach).

<sup>173</sup> Ziegel, ‘Comment on *Roder Zelt*’, above n 172, 60.

<sup>174</sup> See *CISG*, above n 1, arts 64(1), 63(1). On ‘upgrading’ (in this case, non-payment of price) to fundamental breach, see above n 71.

<sup>175</sup> *Roder Zelt* (1995) 57 FCR 216, 234.

<sup>176</sup> *Ibid* 239.

<sup>177</sup> *Ibid*.

followed,<sup>178</sup> the comments were made without regard for the interrelation of domestic tort actions with the operation of the *CISG*.<sup>179</sup>

The judgment shows a reasonable level of cognisance of the *CISG* provisions and their effect. It has been criticised as providing ‘little future guidance’.<sup>180</sup> Yet the Court did successfully navigate the interface between the *CISG* and the law applicable to property in the goods.<sup>181</sup> In *Roder Zelt*, the *CISG* was correctly applied to arrive at the construction and meaning of the retention of title clause,<sup>182</sup> and then, since property in goods is an issue external to the *CISG*, it fell to the law applicable on that issue to determine the effect of the clause. Similar interactions between the *CISG* and other laws on external issues have not been as well handled in subsequent Australian cases.

As *Roder Zelt* did not refer to any *CISG* cases from other jurisdictions or *CISG* scholarship,<sup>183</sup> it can hardly be described as internationalist. These would have alerted the Court to the above issues. It must be remembered, however, that the judgment was rendered in 1995, before the advent of websites that now abound with sources of guidance.<sup>184</sup>

*Roder Zelt* still stands out amongst Australian cases in which the *CISG* actually applied, because it treated the *CISG* autonomously. It displayed a willingness to engage in the challenge of interpreting the *CISG* free of domestic preconceptions, an admirable effort given the pleadings. The case attracted copious international attention,<sup>185</sup> and is still cited in *CISG* cases in other

<sup>178</sup> Including *Perry and Ginza Pte Ltd v Vista Corp Pty Ltd*, discussed below nn 192 and 268 respectively, and accompanying text.

<sup>179</sup> The *CISG* may pre-empt certain tortious and other actions: see generally Schlechtriem, ‘The Borderland of Tort and Contract’, above n 133; Joseph Lookofsky, ‘In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)’ (2003) 13(3) *Duke Journal of Comparative and International Law* 263; Spagnolo, ‘Opening Pandora’s Box’, above n 54, 302.

<sup>180</sup> Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.9].

<sup>181</sup> See, in support, Fairlie, above n 2, 51–2. *Contra*, Ziegel, ‘Comment on *Roder Zelt*’, above n 172, 56–9 (arguing that *CISG* remedies should not apply to security aspects of instalment sales contracts). Fairlie notes that Ziegel’s point is relevant in those jurisdictions where the effects of such clauses fall within personal property securities legislation.

<sup>182</sup> See also Schmidt-Kessel, above n 59, 114.

<sup>183</sup> Zeller, ‘A Leap Forward’, above n 154, 90, and accompanying text.

<sup>184</sup> See above n 130.

<sup>185</sup> Schlechtriem ‘Arts 1–6’, above n 52, 70; Schmidt-Kessel, above n 59, 114, 125; Schlechtriem, ‘Art 25’, above n 172, 298; Hornung, above n 74, 303; Günter Hager, ‘Sale of Goods Obligations of the Buyer: Remedies for Breach of Contract by the Buyer: Arts 61–65’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 652, 663; Peter Schlechtriem, ‘Requirements of Application and Sphere of Applicability of the CISG’ (2005) *Victoria University Wellington Law Review* 781, 789; Di Matteo et al, above n 140, (fn 840); Ferrari, ‘Applicability and Applications’, above n 20, 226 (fn 787); Honnold, *Uniform Law for International Sales*, above n 71, 212, 390, 508; Koch, above n 72, 246–7; Ziegel, ‘Comment on *Roder Zelt*’, above n 172; Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.9]; Fairlie, above n 2, 51–2; Bruno Zeller, ‘Is the Sale of Goods (Vienna Convention) Act the Perfect Tool to Manage Cross Border Legal Risks Faced by Australian Firms?’ (1999) 6(3) *E Law — Murdoch University Electronic Journal of Law* [77] <<http://www.murdoch.edu.au/elaw/issues/v6n3/zeller63.html>>; Herbert Bernstein and Joseph Lookofsky, *Understanding the CISG in Europe* (2<sup>nd</sup> ed, 2002) 26–7 (fn 82); see also Bridge, ‘A Commentary on Articles 1–13 and 78’, above n 59, 235 (fn 30); Franco Ferrari, ‘Interpretation of Statements: Article 8’ in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 172, 179 (fn 47).

jurisdictions.<sup>186</sup> There have been other *CISG* cases dealing with retention of title clauses since *Roder Zelt*. These would be relevant to any future Australian court's interpretation of the *CISG* on this aspect.<sup>187</sup>

(c) *South Sydney District Rugby League Football Club Ltd v News Ltd*<sup>188</sup>

Like *Renard* some five years earlier, this case did not really involve the *CISG*, since the dispute was between a rugby league organisation and a club that had been unsuccessful in seeking admission to the competition. The dispute did turn to some degree on the existence or otherwise of contractual duties of good faith in the performance and enforcement of contracts. While noting that Australia had not at that time committed itself in an unqualified manner to such duties, Finn J observed in passing that the 'supposed uncertainty with "good faith" terminology has not deterred every state and territory legislature in this country from enacting into domestic law the provisions of art 7(1) of the [*CISG*]'.<sup>189</sup>

Notably, in both *South Sydney* and *Renard*, the heightened level of awareness of the *CISG* was displayed by members of the Court who had each previously written extrajudicially on comparative law issues and participated in international uniform law efforts.<sup>190</sup> As the *CISG* was not applicable, the case attracted little comment by *CISG* writers.<sup>191</sup>

<sup>186</sup> See, eg, *Milk Packaging Equipment Case* (Foreign Trade Court of Arbitration, Serbian Chamber of Commerce, Serbia, 15 July 2008) <<http://cisgw3.law.pace.edu/cases/080715sb.html>>; *Usinor Industeel v Leeco Steel Prods Inc* (US District Court (ND Ill), US, 28 March 2002) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020328u1.html>>.

<sup>187</sup> See *Usinor Industeel v Leeco Steel Prods Inc* (US District Court (ND Ill), US, 28 March 2002) <<http://cisgw3.law.pace.edu/cases/020328u1.html>>. See also *Motor Yacht Case* (Oberlandesgericht Koblenz, Germany, 16 January 1992) <<http://cisgw3.law.pace.edu/cases/920116g1.html>>; *St Paul Guardian Insurance Co v Neuromed Medical Systems and Support GmbH* (US District Court (SD NY), US, 26 March 2002) <<http://cisgw3.law.pace.edu/cases/020326u1.html>>. See also, CISG Advisory Council, *Opinion No 9*, above n 52, *Commentary* [3.6] (confirming that the effect of retention of title clauses is not covered by the *CISG*).

<sup>188</sup> (2000) 177 ALR 611 ('*South Sydney*'). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/001103a3.html>>; available from CISG-online, *Search for Cases* (Case No 586) <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>; available from UNILEX, <<http://www.unilex.info>>.

<sup>189</sup> *Ibid* 696.

<sup>190</sup> See Lancelot John Priestley, 'A Guide to Comparison of Australian and United States Contract Law' (1989) 12 *University of New South Wales Law Journal* 4; Paul Finn, 'The Fiduciary Principle' in Timothy Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1. See also UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2004* (2004) x (acknowledging Finn J as Rapporteur for art 1.8); UNIDROIT, *Annual Report 2002* (2003) 10 (acknowledging Priestley J's involvement in a UNIDROIT Working Group) <<http://www.unidroit.org/english/documents/2003/cd82-02-e.pdf>>.

<sup>191</sup> In the *CISG* context, see Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [9.6]. In terms of Australian commentary on good faith in contract more generally, it received greater attention: see, eg, Jeannie Paterson, Andrew Robertson and Peter Heffey, *Principles of Contract Law* (2<sup>nd</sup> ed, 2005) 309.

(d) *Perry Engineering Pty Ltd v Bernold AG*<sup>192</sup>

This case involved a contract for the manufacture and supply of steel tunnelling formworks between an Australian engineering firm and a Swiss manufacturer.<sup>193</sup> Apparently, there were some four earlier appearances in the matter. Zeller notes that it was surprising that the plaintiff's failure to argue on the basis of the *CISG* was not rejected on these earlier occasions.<sup>194</sup>

Default judgment had already been entered for the plaintiff. The hearing on assessment of damages came before Burley J. It was only after this was complete that his Honour, in preparing to hand down orders, realised that in fact the *CISG* was the applicable law, but that no *CISG* arguments had been made. The judge promptly invited further submissions on that basis. Incredibly, counsel for the plaintiff declined. Instead, in response to Burley J's specific invitation, the submission simply contended that it was unnecessary to address the *CISG* specifically, citing *Roder Zelt* in support, and did not seek to present argument on the basis of the *CISG* in the alternative.<sup>195</sup> This interpretation of *Roder Zelt* was quickly rejected by Burley J.

Damages on the basis of contract were denied. In what might be termed a 'warning' to those who would ignore the *CISG* at any cost, including that of 'unnecessary expenses for clients',<sup>196</sup> Burley J stated that the failure to address the *CISG* in pleadings or argument was 'fatal' to the plaintiff's (uncontested) claim.<sup>197</sup>

The plaintiff's alternative claims were founded on negligence and ss 51A and 52 of the *Trade Practices Act 1974* (Cth). Although these were ultimately unsuccessful, the preliminary question as to whether these causes of action were pre-empted by the *CISG* should have been considered.<sup>198</sup>

Burley J's insistence on the need to address the law of the contract shows that an alert bench can lead counsel in regard to the *CISG*.<sup>199</sup> It also highlighted the need for counsel to understand the *CISG* in order to serve the client's best interests. However, the prospect of a *Perry*-like result has not been enough to prevent a pattern of *CISG*-phobia in Australian *CISG* cases since.

*Perry Engineering* gained some attention from Australian authors writing internationally.<sup>200</sup>

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<sup>192</sup> [2001] SASC 15 (Unreported, Burley J, 1 February 2001). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/010201a2.html>>; available from CISG-online, *Search for Cases* (Case No 806), <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>.

<sup>193</sup> *Ibid* [2].

<sup>194</sup> Zeller, *CISG Cases*, above n 2, 1.

<sup>195</sup> The plaintiff contended that 'it was not necessary to plead the specific provisions of the *Sale of Goods (Vienna Convention) Act*' in reliance on the earlier case of *Roder Zelt* (1995) 57 FCR 216: see *Perry* [2001] SASC 15 (Unreported, Burley J, 1 February 2001) [17].

<sup>196</sup> Zeller, *CISG Cases*, above n 2, 1.

<sup>197</sup> *Perry* [2001] SASC 15 (Unreported, Burley J, 1 February 2001) [16].

<sup>198</sup> The *CISG* may pre-empt certain tortious and other actions: see above n 179.

<sup>199</sup> See discussion above n 124.

<sup>200</sup> Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.17]–[7.25]; Fairlie, above n 2, 40; Zeller, 'Traversing International Waters', above n 134, 54; Bruno Zeller, 'Editorial Remarks' in Pace Law School, *CISG Case Presentation: Perry Engineering v Bernold* <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/010201a2.html>>.

(e) *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd*<sup>201</sup>

This case involved scrap metal sold by an Australia seller to a Malaysian buyer. The buyer failed to open the letter of credit as required by the contract. At first instance,<sup>202</sup> Ambrose J held that there had been a failure of the obligation to pay the price,<sup>203</sup> amounting to a fundamental breach in accordance with art 25, thereby enabling the seller to declare the contract avoided pursuant to art 64(1). The fact that the buyer had undergone a change in management structure was no excuse.<sup>204</sup> Ambrose J assessed damages in accordance with arts 74 and 75, and accepted that sub-charter of the ship fulfilled the obligation to mitigate.<sup>205</sup> Resale of the scrap within two months was considered a substitute transaction for the purposes of assessing damages, since it was done within a 'reasonable time' as required under art 75.<sup>206</sup> Article 72 on anticipatory breach was also considered.<sup>207</sup>

The quality of the trial decision was undermined by domestic terms such as 'acceptance of repudiation', reference to a domestic definition of repudiation, and two passing references to non-CISG cases.<sup>208</sup> CISG formation provisions were not mentioned, despite extensive discussion of the facts of formation and modification.<sup>209</sup> While far from ideal, the trial decision did encouragingly manage a reference to one US CISG case and one CISG text.<sup>210</sup> At the international level, the trial decision was discussed widely, generally as a step in

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<sup>201</sup> [2002] 2 Qd R 462 ('Downs'). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/011012a2.html>>; available from CISG-online, *Search for Cases* (Case No 955) <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>; available from UNILEX, <<http://www.unilex.info>>.

<sup>202</sup> *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd* [2000] QSC 421 (Unreported, Ambrose J, 17 November 2000). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/001117a2.html>>; available from CISG-online, *Search for Cases* (Case No 587/859) <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>; available from UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT)* (Case No 631) <[http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)>.

<sup>203</sup> CISG, above n 1, art 54.

<sup>204</sup> *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd* [2000] QSC 421 (Unreported, Ambrose J, 17 November 2000). Non-performance can be excused for certain impediments beyond a party's control pursuant to art 79 of the CISG.

<sup>205</sup> *Ibid* [93]. The Court omitted to identify art 77 as the source of the mitigation obligation. The Court of Appeal agreed with this mitigating step: *Downs* [2002] 2 Qd R 462, 484 (Williams JA).

<sup>206</sup> Resale of the 30 000 metric tonnes of scrap metal was effected in four transactions, including some sales domestically: *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd* [2000] QSC 421 (Unreported, Ambrose J, 17 November 2000) [95]–[99]. Discussed further, below n 246–256 and accompanying text.

<sup>207</sup> *Ibid* [60].

<sup>208</sup> *Ibid* [61], [62], [107].

<sup>209</sup> Bruno Zeller, '*Downs Investment Pty Ltd v Perwaja Steel Sdn Bhd* [2000] 402 QSC 421 (17 November 2000)' (2001) 5 *Vindobona Journal of International Law and Arbitration* 124. Arguably the Court should have utilised provisions on offer and acceptance: CISG, above n 1, arts 14–24, art 29 (modification).

<sup>210</sup> *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd* [2000] QSC 421 (Unreported, Ambrose J, 17 November 2000) [62], citing John O Honnold, *Uniform Law for International Sales* (2<sup>nd</sup> ed, 1991) and *Helen Kaminski Pty Ltd v Marketing Australian Products Inc* (US District Court (SD NY), US, 21 July 1997) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970721u1.html>> (failure to open letter of credit would have been a fundamental breach, but no CISG contract was created). But see Zeller, '*Downs Investment*', above n 209, 127 (arguing that the *Helen Kaminski* case dealt with validity).

the right direction on certain points, and is still cited today,<sup>211</sup> particularly regarding awards for additional costs associated with substitute transactions under art 75.<sup>212</sup>

Unfortunately, the appeal decision was far more disappointing. To some extent, one might have sympathised with the Court of Appeal's references to domestic law.<sup>213</sup> Part of the appeal case was that failure to plead *CISG* provisions should have precluded the seller from reliance on the *CISG* at trial.<sup>214</sup> Astoundingly, like *Perry*, the *CISG*'s importance 'only became obvious at a late stage in the trial',<sup>215</sup> and counsel was recalled 44 days after the hearing.<sup>216</sup> For the purposes of determining prejudice, comparison of the *CISG* with the *Sale of Goods Act 1896* (Qld) was conceivably relevant.<sup>217</sup>

However, absence of similarity between the laws would not have constituted prejudice of the relevant kind. The Court of Appeal correctly concluded that no prejudice had been suffered, not because of similarities between provisions, but in light of the manner in which proceedings were conducted.<sup>218</sup> According to the Court, arguments at trial and during the leave application made it 'obvious' that the seller's case rested on something other than the *Sale of Goods Act*.<sup>219</sup> Further, the buyer had been afforded an opportunity to address the *CISG* in further argument,<sup>220</sup> and written submissions had been received.<sup>221</sup>

Given this conclusion, it is difficult to maintain the above sympathy. *Roder Zelt's* autonomous, if not internationalist, approach was ignored. Instead, without reference to relevant authority, the Court decided there was no material difference 'between art 25 and the common law',<sup>222</sup> and that the *CISG* 'adopts, at least to some extent, the common law concept of repudiation'.<sup>223</sup> Such statements are not only incorrect, but are, at best, dangerous examples of viewing the *CISG* through 'domestic lenses'.<sup>224</sup>

<sup>211</sup> Djakhongir Saidov, 'Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods' (2002) 14 *Pace International Law Review* 307, 354 (fns 249–50) (asserting the case as support for the proposition mitigation per art 77 does not oblige an aggrieved party to incur 'unreasonably high expenses and risks'); Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.26]–[7.31]; Bernstein and Lookofsky, above n 185, 159 (fn 295); Di Matteo et al, above n 140, (fn 507) (fundamental breach); Stoll and Gruber, 'Arts 74–77', above n 70, 777–8 (art 75); Ingeborg Schwenzer and Christiana Fountoulakis (eds), *International Sales Law* (2007) 414 (art 54); Graffi, above n 71, 341, (fn 58); Schlechtriem, *Calculation of Damages*, above n 70, (fn 9); CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [3.1] (fn 41). *Contra* Zeller, 'Downs Investment', above n 209 (mixed review of the trial decision).

<sup>212</sup> CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [3.1] (fn 41) (costs of chartering new vessel for substitute transaction).

<sup>213</sup> See, eg, Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.40] (coining the term 'domestication').

<sup>214</sup> *Downs* [2002] 2 Qd R 462, 472 (Williams JA).

<sup>215</sup> *Ibid* 474.

<sup>216</sup> Mentioned in argument by O'Reilly SC for the appellant: *ibid* 464.

<sup>217</sup> *Ibid* 472.

<sup>218</sup> *Ibid* 472–5.

<sup>219</sup> *Ibid* 474–5.

<sup>220</sup> *Ibid* 472–5.

<sup>221</sup> *Ibid* 474.

<sup>222</sup> *Ibid*. On fundamental breach, see above n 71 and accompanying text.

<sup>223</sup> *Downs* [2002] 2 Qd R 462, 481.

<sup>224</sup> See also Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.33]–[7.39].

Unperturbed, the Court embarked upon the slippery slope of ‘domestication’,<sup>225</sup> all the while chipping away at the uniformity of a law intended to be applied in the same way around the world. Despite efforts of *CISG* drafters to avoid such terms,<sup>226</sup> it described the seller’s entitlement to ‘rescind’,<sup>227</sup> and cited two non-*CISG* (and therefore irrelevant) UK cases in support.<sup>228</sup> The term ‘avoidance’ would have been more appropriate. As discussed above, art 64 allows the seller to avoid the contract when there is either a fundamental breach,<sup>229</sup> or the buyer fails to pay the price or take delivery within an additional period set by the seller under art 63(1).<sup>230</sup> The Court considered the latter basis satisfied,<sup>231</sup> but determined a fundamental breach had already arisen in any event, due to the failure to open a letter of credit.<sup>232</sup> While the relevant provisions were considered, *CISG* cases and commentary on this very issue were ignored.<sup>233</sup>

Again, without reference to relevant authority,<sup>234</sup> the Court concluded the ‘only possible difference between the [*Sale of Goods*] Act and [the *CISG*] for present purposes is with respect to the calculation of damages’.<sup>235</sup> Rather than seek guidance on those differences, it instead simply equated the right to consequential damages in art 74 with the common law test in *Hadley v Baxendale*.<sup>236</sup>

In doing so, the Court disregarded the subtle differences between the *Sale of Goods Act* and the *CISG*. The common law examines the ‘contemplation’ of both parties, while the *CISG* looks only at the breaching party’s perspective.<sup>237</sup>

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<sup>225</sup> Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.40].

<sup>226</sup> See above n 126.

<sup>227</sup> *Downs* [2002] 2 Qd R 462, 480 (Williams JA).

<sup>228</sup> *Ibid* 479.

<sup>229</sup> *CISG*, above n 1, art 64(1)(a). On art 25, see above n 71.

<sup>230</sup> *CISG*, above n 1, art 64(1)(b). See also above n 71 and accompanying text.

<sup>231</sup> By an agreed variation, the letter of credit was due on 1 August 1996. On 5 August, the seller’s solicitor wrote to request it by 7 August 1996: *Downs* [2002] 2 Qd R 462, 201, 476–8.

<sup>232</sup> *Downs* [2002] 2 Qd R 462, 480 (Williams JA).

<sup>233</sup> See, eg, *Helen Kaminski Pty Ltd v Marketing Australian Products Inc* (US District Court (SD NY), US, 21 July 1997) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970721u1.html>>; *Vital Berry Marketing v Dira-Frost* (Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995) <<http://cisgw3.law.pace.edu/cases/950502b1.html>>; *ICC Award No 7585 of 1992* (1992) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/927585i1.html>>. See also Di Matteo et al, above n 140, 383.

<sup>234</sup> *Downs* [2002] 2 Qd R 462, 473 (Williams JA) (stating that the ‘difference between the contract price and the resale price was essentially the formula provided in Article 75 of the [*CISG*]’. This does not misdescribe art 75, but one imagines, had the Court been interpreting any other Australian legislation, that it would have referred to case law on the provision, and perhaps scholarship.

<sup>235</sup> *Ibid* 475.

<sup>236</sup> [1854] 9 Ex 341; 156 ER 145. Also cited: *Robinson v Harman* [1848] 1 Ex 850; 154 ER 363.

<sup>237</sup> See, in support, G H Treitel, *Remedies for Breach of Contract: A Comparative Account* (1988) 159; Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.40]; Arthur F Murphey Jr, ‘Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley’ (1989) 23 *George Washington Journal of International Law and Economics* 415, 435–9 (arguing that this widens the scope of recovery); Stoll and Gruber, ‘Arts 74–77’, above n 70, 764–5, stating that in

Timing of foreseeability for both is at contractual conclusion, but the threshold for liability is expressed differently: *Hadley*'s limitation refers to 'probable' results, while art 74 directs attention to 'possible' consequences.<sup>238</sup> *Hadley* has two rules: the first is objective foreseeability by a reasonable person in the same position. The second makes the 'defendant liable for loss which could have been foreseen by a reasonable person *with the same knowledge* of special circumstances as the defendant had',<sup>239</sup> thus containing 'mixed' subjective and objective elements.<sup>240</sup> Article 74 more clearly maintains the distinction between subjective and objective elements, by specifying that liability depends on whether the breaching party 'foresaw or ought to have foreseen' the loss, 'in the

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Anglo-American law, the 'contemplation' of both parties is decisive. *In contrast*, for the purposes of Article 74, the foreseeability of the loss must be judged from the viewpoint of the party in breach at the time of the conclusion of the contract ... taking into account the circumstances of which he was aware or ought to have been aware (emphasis added) (citations omitted).

Saidov, 'Methods of Limiting Damages', above n 211, 334, 339 (notes this difference, but also acknowledges that since an aggrieved party almost always knows their own situation better than the breaching party, divergent results are unlikely).

- <sup>238</sup> Murphey, above n 237, 439–40 (arguing that this makes the *CISG* more generous for injured parties); Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 *Law Quarterly Review* 201, 230 (stating that the difference might mean the art 74 requirement is 'weaker'); V Susanne Cook, 'The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity' (1997) 16 *Journal of Law and Commerce* 257, 260; Dodge, above n 43, 91–2. See also *Cooling System Case* (Oberster Gerichtshof, Austria, 14 January 2002) <<http://cisgw3.law.pace.edu/cases/020114a3.html>>, stating that

foreseeability [refers to] possible consequence of a breach of contract. The foreseeability of a breach ... does not matter ... [f]oreseeability in art 74 ... refers ... only to losses that at the time of the conclusion of the contract were an assessable consequence of a possible breach of obligation ... According to prevailing opinion, art 74 ... does not require precise and detailed foreseeability of losses ... It is necessary that the obligor could recognize that a breach of contract would produce a loss essentially of the type and extent that actually occurred (citations omitted).

*Re Siskiyou Evergreen Inc (Debtor)* (US Bankruptcy Court (D Or), US, 29 March 2004) <<http://cisgw3.law.pace.edu/cases/040329u2.html>> (rejection of third party contracts unforeseeable and therefore lost profits could not have been claimed pursuant to art 74).

- <sup>239</sup> Treitel, above n 237, 155; Saidov, 'Methods of Limiting Damages', above n 211, 341. It has been argued *Hadley* contained anywhere between one to three rules: Murphey, above n 237, 429–34.

- <sup>240</sup> Trietel, above n 237, 155; Saidov, 'Methods of Limiting Damages', above n 211, 341. On the issue of objective and subjective elements in art 74, see *Cooling Systems Case* (Oberster Gerichtshof, Austria, 14 January 2002) <<http://cisgw3.law.pace.edu/cases/020114a3.html>>: 'Generally an objective standard is applied for foreseeability. The obligor must reckon with the consequences that a reasonable person in his situation (art 8(2) *CISG*) would have foreseen ... . Whether he actually did foresee this is ... insignificant'. On the subjective elements, the Court stated:

Yet, subjective risk evaluation cannot be completely ignored: if the obligor knows that a breach ... would produce unusual or unusually high losses, then these consequences are imputable to him. [It is necessary] to determine to what degree a reasonable person ... in ... circumstances known to [the Seller] at the time of the conclusion of the contract could (or should) foresee such problems and expenses; and if need be ... were actually foreseeable for [Seller] ... [Here, the Seller] knew at the conclusion of the contract [the conditions and places of installation and] therefore must have foreseen ... a loss in the amount claimed could arise ... [The fact that the Seller] was informed of threaten[ed] damages claims of [the Buyer]'s customer, would only be of ... importance ... if this information was given prior to or during the conclusion of the contract.

light of the facts and the matters ... he ... knew or ought to have known'.<sup>241</sup> Then there is the debate over the level of certainty required for substantiation of loss under the *CISG*, and the availability of 'loss of a chance' damages,<sup>242</sup> issues recently considered by the CISG Advisory Council.<sup>243</sup> Such subtle differences could alter outcomes in marginal cases, thus many *CISG* scholars warn against the use of the *Hadley* test in the *CISG*.<sup>244</sup> In any event, irrespective of whether any practical difference in outcome ensues, reference to *Hadley* preconceptions contravenes the overriding prohibition on domesticated interpretations of the *CISG*, and erodes the *CISG*'s uniformity by way of the 'homeward trend'. For all of these reasons, it would have been best not to refer to *Hadley* at all.

However, momentum on the precarious slopes in *Downs* had inexorably gathered. Some scrap metal used by the seller in the substitute transactions was

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<sup>241</sup> Saidov, 'Methods of Limiting Damages', above n 211, 341. See also Nicholas, above n 238, 230 (stating that art 74 embraces both rules).

<sup>242</sup> Substantive-procedural classifications of issues regarding burden and standard of proof vary across jurisdictions: Djakhongir Saidov, 'Standards of Proving Loss and Determinating the Amount of Damages' (2006) 22 *Journal of Contract Law* 27, 51–2. It is submitted that, regardless of any difference in domestic classification, the *CISG* can govern procedural rules indirectly: *contra Sunflower Oil Case* (Handelsgericht Zürich, Switzerland, 5 February 1997) <<http://cisgw3.law.pace.edu/cases/970205s1.html>> (domestic law determines whether future loss estimates are sufficiently definite). Stoll and Gruber maintain 'loss of a chance' damages are unavailable under the *CISG* due to a high level of certainty required in proof of loss: Stoll and Gruber, 'Arts 74–77', above n 70, 759. *Contra* Saidov argues that 'loss of a chance' damages are governed by the *CISG* and should be awarded on the basis of a reasonable level of certainty, emphasising flexibility rather than 'all or nothing': Saidov, above this note, 51–2; see also Joseph Lookofsky, 'Consequential Damages in CISG Context' (2007) 19 *Pace International Law Review* 63, 84 (agreeing with Saidov, but ultimately favouring limitation of consequential damages by reference to domestic law proportionality tests, by treating the issue as an external gap).

<sup>243</sup> In regard to standard of proof, the CISG Advisory Council considers that 'reasonable certainty' is required rather than 'mathematical precision'. Concerning 'loss of a chance', unless the contract itself was such that the chance of profit was an asset acquired pursuant to the contract, the CISG Advisory Council comments that 'loss of a chance' damages are typically unavailable under art 74, because the profit was dependent on a contingent event, and thus cannot be proven with 'reasonable certainty': CISG Advisory Council, *Opinion No 6*, above n 67, §2, *Commentary* [3.16]. It is submitted that Saidov's approach to 'loss of chance' is preferable in the interests of promoting uniformity and fairness: see Saidov, 'Standards of Proving Loss', above n 242.

<sup>244</sup> See, eg, Zeller, 'A Leap Forward', above n 154, 89–90 (fn 39) and accompanying text (stating that foreseeability in *Hadley v Baxendale* is a domestic concept, and should not be used in the interpretation of art 74); Murphey, above n 238, §I (warning that 'US judges should try to divorce themselves from the influence of *Hadley* as much as possible; its rules are not the same as ... the *CISG*'); Dodge, above n 43, 91–2 (agreeing, but noting that this is 'easier said than done'). See also Stoll and Gruber, 'Arts 74–77', above n 70, 764–5; Cook, above n 238, 260; Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.55]; Saidov, 'Methods of Limiting Damages', above n 211, (fn 148). *Contra* Honnold, *Uniform Law for International Sales*, above n 71, 447; Ken Shiu, 'The Exclusion of the *CISG* in Technology Contracts: Fear of the Unknown?' (2005) 61 *Computers and Law* 19; Lookofsky, *Understanding the CISG*, above n 59, 130 [6.15]; *Meat Case* (Schweizerisches Bundesgericht, Switzerland, 28 October 1998) §5(b) <<http://cisgw3.law.pace.edu/cases/981028s1.html>>. See also, Jacob Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Nina Galston and Hans Smit (eds) *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984) [9-1], [9-38] (uncertainty as to whether the test is identical to *Hadley*).

not identical to that designated to the original contract.<sup>245</sup> Two further (non-*CISG*) US cases were cited in support of the notion that this was acceptable ‘where fungibles are involved ... as the sale is commercially reasonable’.<sup>246</sup> The US decisions related to the UCC, not art 75 of the *CISG*.<sup>247</sup>

Numerous decisions on art 75 itself were available, had counsel checked relevant sources.<sup>248</sup> These make clear the need to declare the contract avoided before entry into the substitute transaction.<sup>249</sup> Substitute transactions must be entered within a reasonable time, as the Court correctly noted. However, *CISG* cases should have guided the Court on what constituted a reasonable time period under art 75,<sup>250</sup> and on reasonableness of resale terms,<sup>251</sup> which need not be

<sup>245</sup> Despite a contrary position at trial (see references to steel ‘held’ for the buyer: *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd* [2000] QSC 421 (Unreported, Ambrose J, 17 November 2000) [22], [93]), it seems that on appeal it was accepted that some of the steel used for the substitute transactions was not the exact same steel that would have been supplied to the original buyer: *Downs* [2002] 2 Qd R 462, 483–4 (Williams JA).

<sup>246</sup> *Downs* [2002] 2 Qd R 462, 470.

<sup>247</sup> Specifically, UCC §2–706.

<sup>248</sup> See above n 128. See above n 70, regarding damages under arts 75 and 76 of the *CISG*, which are triggered only upon avoidance. Fisher notes the more limited sphere of arts 75 and 76 of the *CISG* compared to provisions in the *Sale of Goods Act 1923* (NSW) ss 52(3), 53(3): Simon Fisher, ‘International and Domestic Sale of Good Remedies’ (1994) 8 *Commercial Law Quarterly* 19, 32.

<sup>249</sup> Arguably, if the other party has made it clear that they will not perform the contract, a substitute transaction before avoidance is declared might be sufficient for the purposes of art 75, on the basis that good faith in art 7(1) may make the need to declare avoidance beforehand unnecessary: *Iron Molybdenum Case* (Oberlandesgericht Hamburg, Germany, 28 February 1997) §(c) <<http://cisgw3.law.pace.edu/cases/970228g1.html>>; see also Stoll and Gruber, ‘Arts 74–77’, above n 70, 776 (stating that a party making it clear that it would not perform could not in good faith complain of failure to declare avoidance by the other party). *Contra ICC Award No 8574 of 1996* (1996) <<http://cisgw3.law.pace.edu/cases/968574i1.html>> (purchases by aggrieved buyer before it had avoided contract not substitute transactions under art 75); *Fabric Case* (Oberlandesgericht Bamberg, Germany, 13 January 1999) <<http://cisgw3.law.pace.edu/cases/990113g1.html>> (buyer’s cover purchase made before avoidance declared, so art 75 calculation inappropriate, and buyer failed to satisfy art 74); see also the recent statement by the CISG Advisory Council, *Opinion No 8*, above n 70, §1.2, *Commentary* [2.3.3] (contrary the *Iron Molybdenum Case* and Stoll and Gruber, ‘Arts 74–77’, above this note; concluding that even if the obligor ‘unambiguously declared that it would not perform’, it would be ‘inconsistent with the explicit language of Article 75’ to allow damages calculated on the basis of art 75 for a substitute transaction was entered before declaration of avoidance).

<sup>250</sup> This will vary depending on the nature of the goods: *Iron Molybdenum Case* (Oberlandesgericht Hamburg, Germany, 28 February 1997) §(c) <<http://cisgw3.law.pace.edu/cases/970228g1.html>> (2 weeks for a highly speculative transaction); Stoll and Gruber, ‘Arts 74–77’, above n 70, 776–7; *Shoes Case* (Oberlandesgericht Düsseldorf, Germany, 14 January 1994) <<http://cisgw3.law.pace.edu/cases/940114g1.html>> (given location of markets and seasonality, two months is adequate). In *GmbH Lothringer Gunther Grosshandels-gesellschaft für Bauelemente und Holzwerkstoffe v NV Fepco International*, (Hof van Beroep Antwerpen, Belgium, 14 April 2006) §A.4 <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/060424b1.html>>, the Court determined that six months was an unreasonable delay for the seller’s resale, and consequently damages should be reduced for failure to mitigate per art 77; CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [2.3.2] (stating that ‘duration of the reasonable time window’ depends ‘on the existence and variability of a market for the goods’ with a ‘relatively short’ period appropriate for goods with a fluctuating market price, and a ‘longer period’ possibly acceptable for ‘seasonal or unique’ goods). Time begins upon declaration of avoidance: see the *Secretariat Commentary* on draft art 71 in the *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, UN Doc A/CONF.97/5 (14 March 1979) 60 [5] (‘*Secretariat Commentary*’).

completely identical.<sup>252</sup> Despite clearly being troubled about whether the resale was truly in substitution, the Court was not in a position to assess any proper alternative basis for damages because it failed to consult *CISG* doctrine or cases.

The Court was aware that abstract damages could have been calculated under art 76 if there had been no reasonable or true substitute transaction.<sup>253</sup> Yet contrary to the Court's opinion that 'there is no justification for limiting the operation of art 75 to contracts involving the sale of specific goods',<sup>254</sup> there is a strong view among scholars that art 76 is more appropriate than art 75 when the 'promisee is continuously "in the market" and therefore a specific substitute transaction cannot be attributed' for art 75 purposes.<sup>255</sup> As the price of scrap metal was falling rapidly, a smaller award of damages would have ensued, since

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<sup>251</sup> See, eg, *Shoes Case* (Oberlandesgericht Düsseldorf, Germany, 14 January 1994) <<http://cisgw3.law.pace.edu/cases/940114g1.html>> (seasonal goods (shoes) reasonably resold at lower cost recovery per art 75); *Frozen Bacon Case* (Oberlandesgericht Hamm, Germany, 22 September 1992) <<http://cisgw3.law.pace.edu/cases/920922g1.html>> (bacon resold at 25 per cent of market price was unreasonable and therefore damages was based on art 76); *Industrial Raw Material Case* (China International Economic and Trade Arbitration Commission ('CIETAC'), China, 4 June 1999) <<http://cisgw3.law.pace.edu/cases/990604c1.html>> (resale ex-warehouse was 'hard', therefore lower price reasonable). See also, Schlechtriem, *Calculation of Damages*, above n 70, §II(1).

<sup>252</sup> Terms of cover contract should correspond 'more or less' to the contract breached: Schlechtriem, *Calculation of Damages*, above n 70, §II.2. Although terms need not be identical, an adjustment might need to be made to account for saved or additional costs of the substitute transaction CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [2.3.4]; see below n 262 (discussion of damages for extra costs through art 74 'further damages').

<sup>253</sup> *Downs* [2002] 2 Qd R 462, 482 (Williams JA). Although art 75 'ordinarily takes precedence if [its] requirements ... are met', where the substitute transaction is not 'reasonable', damages should be calculated in accordance with either art 76 or art 74: CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [2.4.2], [2.4.3], [4.1.2] (accepting art 76 abstract calculation 'as if no substitute transaction had taken place' or art 74 concrete calculation of actual losses, and rejecting an alternative approach involving art 75 calculation with adjustment for 'the factor(s) that made it unreasonable'); Knapp, above n 70, 553–4 [2.3]; *Frozen Bacon Case* (Oberlandesgericht Hamm, Germany, 22 September 1992) <<http://cisgw3.law.pace.edu/cases/920922g1.html>> (supporting the use of art 76 and ignoring the unreasonable substitute transaction); *Secretariat Commentary*, above n 250, 60 [6] (if substitute transaction took place after unreasonable time or in unreasonable manner, calculation should proceed under art 74 or 76 as if no substitute occurred). *Contra* Stoll and Gruber, 'Arts 74–77', above n 70, 778 (supporting the use of art 75 plus adjustments for unreasonable substitution).

<sup>254</sup> *Downs* [2002] 2 Qd R 462, 484.

<sup>255</sup> It is noteworthy that the commentary of Knapp and Honnold, below this note, was available at the time *Downs* was decided. *Jewelry Case* (Oberster Gerichtshof, Austria, 28 April 2000) 190 <<http://cisgw3.law.pace.edu/cases/000428a3.html>> (stating that: 'Where the party regularly concludes similar transactions, the abstract calculation of damages under art 76 is excluded only if it identifies one of them as a specific substitute transaction'). Stoll and Gruber, 'Arts 74–77', above n 70, 781 (and authors referred therein); Knapp, above n 70, 554 [2.4] (arguing 'where it is impossible to determine with certainty whether a substitute transaction has been entered into ... if the injured party is consistently in the market for goods of the type in question, it may be difficult or impossible to determine which of the many contracts ... was in replacement. In such a case ... Article 76 will apply'); Honnold, *Uniform Law for International Sales*, above n 71, 450. A similar conclusion was reached in the commentary of a recent CISG Advisory Council Opinion: CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [2.3.4] (concluding that where an aggrieved party 'often deals in contracts similar to the avoided one', identification of 'a single transaction as a substitute may be difficult', leaving the party with three options: (1) to identify the 'substitute transaction [before] engaging in it' and proceed under art 75; (2) 'choosing the first transaction after avoidance as the substitute' and proceed under art 75 (this would product similar results to art 76); and (3) proceed 'abstractly under Article 76').

art 76 fixes the price at the time of avoidance,<sup>256</sup> whereas art 75 uses the substitute price actually obtained, in this case, some two months later.

Alternatively, the Court could have awarded net profits lost on the avoided sale pursuant to art 74. Lost volumes are recoverable under art 74 by sellers, on the basis that the ‘resale’ transaction would have happened anyway, thus the true loss was the net profit lost on the terminated sale, recovery of which places the seller in the position it would have been in had both sales occurred.<sup>257</sup> The claim needs to be proven with reasonable certainty.<sup>258</sup> This might involve showing capacity to supply both transactions, and proof the subsequent transaction was an independent event.<sup>259</sup> In this case, the seller went to special lengths to find alternative buyers, thus the buyer could argue the replacement sales would not have occurred irrespective of avoidance of the first contract, and were therefore not truly independent events. The seller could counter that in a falling market, a buyer should not be allowed in good faith to reap the advantage of its own fundamental breach.<sup>260</sup> The seller could not have recovered both lost volume profits under art 74 nor damages under arts 75 or 76, or it would have received double recovery,<sup>261</sup> which would go beyond the general principle of ‘full compensation’ inherent in the *CISG*.<sup>262</sup>

<sup>256</sup> Current price when the buyer ‘took over’ goods is used if this occurred before avoidance, to prevent speculation: see above n 70.

<sup>257</sup> CISG Advisory Council, *Opinion No 6*, above n 67, §3C, *Commentary* [3.10]–[3.22]; *Bielloni Castello SpA v EGO SA* (Corte di Appello di Milano, Italy, 11 December 1988) <<http://cisgw3.law.pace.edu/cases/981211i3.html>> (seller’s lost sales volume was argued but dismissed on the evidence, and damages were awarded under art 75); *Jewelry Case* (Oberster Gerichtshof, Austria, 28 April 2000) <<http://cisgw3.law.pace.edu/cases/000428a3.html>> (awarding damages to a seller for lost sales volume under art 76 on the basis that the second sale would have occurred in any event). See also Honnold, *Uniform Law for International Sales*, above n 71, 454 (arguing lost volume of sales under art 74); Stoll and Gruber, ‘Arts 74–77’, above n 70, 779 (favouring compensation for lost profits due to loss of volume if the promisor is aware or ought to have been aware the promisee continuously deals in the goods concerned); Ziegel, ‘Remedial Provisions in the Vienna Sales Convention’, above n 244, [9–41] (agreeing lost volume claims covered by art 74); Saidov, ‘Methods of Limiting Damages’, above n 211, 318–26; Huber and Mullis, above n 16, 335–6 (available pursuant to art 74 or combination of arts 74 and 75).

<sup>258</sup> CISG Advisory Council, *Opinion No 6*, above n 67, §2, *Commentary* [2.9].

<sup>259</sup> See Saidov, ‘Methods of Limiting Damages’, above n 211, 323–6 (outlining considerations to take into account in lost sales volume cases to prevent overcompensation); CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [3.4] (describing ‘true lost volume’ situations enabling art 74 claims as ‘where the subsequent transaction would have occurred regardless of avoidance’). Some of these sources were not available to the Court when *Downs* was decided. The Court in *Downs* did not consider the following, even though they were available to the Court at the time of the decision: *Bielloni Castello*, Ziegel, Knapp and Honnold.

<sup>260</sup> Article 7(1) requires interpretation of the provisions of the *CISG* to promote good faith. Further, good faith is a gap-filling general principle of the *CISG* pursuant to art 7(2).

<sup>261</sup> CISG Advisory Council, *Opinion No 6*, above n 67, *Commentary* [3.22]. *Contra* Saidov, ‘Methods of Limiting Damages’, above n 211, 318–26 (arguing in favour of recovery of lost volume profits of sellers pursuant to art 74 in addition to arts 75, 76 damages); Huber and Mullis, above n 16, 335 (similarly splitting damages between arts 74 and 75).

<sup>262</sup> CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [3.2]–[3.4], [6.4] (asserting that lost profits could not be claimed as ‘further damages’ under art 74 if a substitute transaction had enabled the preservation of those profits in third party transactions, since this would place the aggrieved party in ‘a better economic position than if the contract had been performed’). Thus parties, having made a substitute transaction, must generally choose between a lost profit claim under art 74 and art 75 damages. In the case of

Either analysis makes the question of ‘fungibles’ redundant. Unfortunately, the Court referred to only one relevant authority, *Delchi v Rotorex*,<sup>263</sup> itself the subject of much criticism for its own poor application of the CISG,<sup>264</sup> a matter easily established from commentary on CISG websites.<sup>265</sup> In summary, *Downs* itself is an excellent example of ‘legal ethnocentricity’.<sup>266</sup> It is interesting that the appeal decision, unlike the trial decision, was met almost unanimously with a diplomatic, or perhaps, stunned silence from international CISG academics.<sup>267</sup>

(f) *Ginza Pte Ltd v Vista Corp Pty Ltd*<sup>268</sup>

A contract for the supply of contact lens solution required that the goods complied with requirements of the Australian Therapeutic Goods Administration (‘TGA’) and that the goods were sterile. After the TGA found bacterial contamination, it ordered a recall of the goods. The Singaporean seller sued for

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a ‘true lost volume seller’, where no true substitution occurs, the CISG Advisory Council’s *Commentary* suggests calculation under either art 74 or art 76. In ordinary non-‘true lost volume’ situations, the CISG-AC Opinion concludes that lost profits exceeding art 76 damages might additionally be claimed under art 74): CISG Advisory Council, *Opinion No 6*, above n 67, §1. See also Stoll and Gruber, ‘Arts 74–77’, above n 70, 779; *Furniture Case* (Landgericht München, Germany, 6 April 2000) <<http://cisgw3.law.pace.edu/cases/000406g1.html>>. However, note that, in accordance with the earlier decision by Ambrose J, additional, incidental and consequential costs required to make the aggrieved party whole again are available pursuant to art 74 in addition to art 75 concrete damages. See, Huber and Mullis, above n 16, 335; Stoll and Gruber, ‘Arts 74–77’, above n 70, 778–9 (interest, currency change, unsuccessful tender costs, storage); *Shoes Case* (Landgericht Krefeld, Germany, 28 April 1993) <<http://cisgw3.law.pace.edu/cases/930428g1.html>> (dealing with interest, currency devaluation and attorney fees), although see *Zapata Hermanos Sucesores SA v Hearthside Baking Company* (US Circuit Court of Appeals (7<sup>th</sup> Cir), US, 19 November 2002) <<http://cisgw3.law.pace.edu/cases/021119u1.html>>; *ICC Award No 8128 of 1995* (1995) <<http://cisgw3.law.pace.edu/cases/958128i1.html>> (aggrieved buyer’s expenses replacing sacks for substitute transaction); *Cutlery Case* (Handelsgericht Aargau, Switzerland, 26 September 1997) <<http://cisgw3.law.pace.edu/cases/970926s1.html>> (compensation associated with effort involved with substitute transactions); *Delchi Carrier SpA v Rotorex Corp* (US Circuit Court of Appeals (2<sup>nd</sup> Cir), US, 6 December 1995) <<http://cisgw3.law.pace.edu/cases/951206u1.html>> (customs, shipping costs). The latter four cases had been decided by the time *Downs* was heard.

<sup>263</sup> *Delchi Carrier, SpA v Rotorex Corp* (US Circuit Court of Appeals (2<sup>nd</sup> Cir), US, 6 December 1995) <<http://cisgw3.law.pace.edu/cases/951206u1.html>>.

<sup>264</sup> Murray, above n 91, 369–70; Cook, above n 238, 258; Dodge, above n 43, 92.

<sup>265</sup> See, eg, the sources listed in Pace Law School, <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951206u1.html>> (giving the case citation, details, access to abstract and full text, and listing at ‘Citations to Comments on Decision’ a number of commentaries on the case, including hypertext links to many articles). See, eg, Zeller, ‘A Leap Forward’, above n 154, 89 (fn 39) and accompanying text (arguing that the Court in *Delchi* made a mistake in noting that CISG damages were to be limited by *Hadley v Baxendale* foreseeability principles); and Saidov, ‘Methods of Limiting Damages’, above n 211, (fn 148) (arguing that there was a ‘misapplication’ of art 74 in *Delchi*, as the Court applied the *Hadley* test).

<sup>266</sup> Cook, above n 238, 263 (coining the term).

<sup>267</sup> Other than staunch criticism by Zeller: see Zeller, ‘Traversing International Waters’, above n 134, 52; Bruno Zeller, ‘*Downs Investments Pty Ltd (in liq) v Perwaja Steel Sdn Bhd* [2002] 2 Qd R 402’ (2005) 9 *Vindobona Journal of International Commercial Law and Arbitration* 43. Most recently, Ambrose J’s decision was again cited (but not that of the Court of Appeal) in the CISG Advisory Council, *Opinion No 8*, above n 70, *Commentary* [3.1] (fn 41). Contrast this with numerous and continuing citations of trial decision, above nn 211, 212.

<sup>268</sup> [2003] WASC 11 (Unreported, Barker J, 11 January 2003) (‘*Ginza*’). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/030117a2.html>>; available from CISG-online, *Search for Cases* (Case No 807) <<http://www.global-saleslaw.org/index.cfm?pageID=29>>; available from UNILEX, <<http://www.unilex.info>>.

the price. The Australian buyer claimed the price should be reduced to zero for non-conformity. The buyer also counterclaimed damages for non-conformity and for negligence<sup>269</sup> claiming lost profits, costs of recall and loss of goodwill.<sup>270</sup>

The buyer relied on express terms relating to TGA compliance and sterility, but relied in the alternative upon implied terms of ‘merchantable quality and fitness for purpose’ pursuant to the *Sale of Goods Act 1895* (WA) or the *CISG*.<sup>271</sup> Remarkably, unlike most Australian cases, the pleadings in *Ginza* referred to the *CISG*. However, grouping such claims is undesirable. It gives the impression that no difference exists, and results in domestic terms like ‘merchantable quality’ being inappropriately used in *CISG* contexts.

Indeed, the Court remarked that fitness for purpose and merchantable quality ‘find expression in both’ regimes.<sup>272</sup> The Court interpreted the *CISG* through comparisons with domestic legislation.<sup>273</sup> While equating the *CISG* with familiar law affords comfort for lawyers from all backgrounds, this tendency must be curbed if the *CISG* is to remain uniform.<sup>274</sup> As a truly autonomous body of law, only *CISG* authorities should guide its interpretation.<sup>275</sup> Unfortunately, such resources were not utilised in *Ginza*.<sup>276</sup>

Barker J correctly identified that art 35 relating to non-conformity was crucial.<sup>277</sup> However, contrary to the Court’s view, art 35(2) says nothing of ‘merchantability’.<sup>278</sup> It requires goods be fit for their ordinary purposes, or purposes made known to the seller, unless reliance on the seller’s skill and

<sup>269</sup> Ibid [12]–[13], [16]–[18]. A related action between *Ginza* and a corporation related to Vista, Kontack Pty Ltd was consolidated with this action. Counterclaimed commission fees were admitted and are not relevant to the current discussion: see *ibid* [20].

<sup>270</sup> Ibid [21], [214]. On damages for loss of goodwill under art 74, see above n 67.

<sup>271</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [13], [16].

<sup>272</sup> Ibid [190].

<sup>273</sup> Ibid [191] (comparing s 14 of the *Sales of Goods Act 1895* (WA) with the *CISG* art 35(1)), and [195], [197], [259] (comparing art 50 with s 52 of the *Sales of Goods Act 1895* (WA)).

<sup>274</sup> Graffi, above n 71, 338 (civil and common law domestic concepts have no place in *CISG* interpretation).

<sup>275</sup> Such as *CISG-AC Opinions*, *CISG* cases, *CISG* scholarship, and *CISG* legislative history: see, above n 130 and accompanying text. On art 35, see generally René Franz Henschel, *Conformity of Goods in International Sales* (2005); Kruisinga, above n 91, 162, 172, 180; Ingeborg Schwenzer, ‘Sale of Goods: Obligations of the Seller: Conformity of the Goods and Third Party Claims: Arts 35–43’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 410, 410ff; Thomas Neumann, ‘Features of Article 35 in the Vienna Convention; Equivalence, Burden of Proof and Awareness’ (2007) 11 *Vindobona Journal of International Commercial Law and Arbitration* 81; *New Zealand Mussels Case* (Bundesgerichtshof, Germany, 8 March 1995) <<http://cisgw3.law.pace.edu/cases/950308g3.html>>; *Condensate Crude Oil Mix Case* (Netherlands Arbitration Institute, Netherlands, 15 October 2002) <<http://cisgw3.law.pace.edu/cases/021015n1.html>>; *Person of Greece v Ed Fruit and Vegetables BV* (Rechtbank Breda, Netherlands, 16 January 2009) [3.12] <<http://cisgw3.law.pace.edu/cases/090116n1.html>>.

<sup>276</sup> Although the above sources on art 35 were not available to the Court in *Ginza* (with the exception of the *New Zealand Mussels Case*), dozens of cases and commentary were available at the time. For a chronological overview and updated list of cases dealing with art 35, see Pace Law School, <<http://cisgw3.law.pace.edu/text/anno-art-35.html>> (including year-by-year case law and link to UNCITRAL, *Digest of Case Law*, above n 15). Similarly, for scholarly texts and annotations to art 35, see Pace Law School, *Annotated Text of CISG: Article 35* <<http://cisgw3.law.pace.edu/cisg/text/e-text-35.html>>.

<sup>277</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [188]–[189].

<sup>278</sup> Ibid [190].

judgement in such matters was unreasonable or there was no reliance.<sup>279</sup> An autonomous view of art 35(2)(a) fitness for ordinary purposes requires the goods be of reasonable quality.<sup>280</sup>

His Honour determined that the goods did not comply with express terms,<sup>281</sup> and therefore did not conform to art 35(1), which requires compliance with the contractual ‘quality, quantity and description’. The Court’s findings that the ‘the whole of the goods supplied were contaminated’ rested on an inference from evidence of ‘widespread and serious’ contamination,<sup>282</sup> supported by reference to a (non-*CISG*) English case. Rather than refer to non-*CISG* cases, *CISG* cases dealing with non-conformity with express requirements for goods could have been consulted.<sup>283</sup> The Court should also have addressed *CISG* cases concerning contamination and the general rule that sellers need not comply with regulations in the buyer’s country.<sup>284</sup> The express term concerning TGA requirements would fit within exceptions to this rule, ultimately leading to the conclusion that art 35(1) and (2) were breached. As to evidentiary matters, *CISG* cases on burden of proof would have provided guidance.<sup>285</sup>

After its determination that the *CISG* applied,<sup>286</sup> the Court should have refrained from further reference to non-*CISG* sources. The process of

<sup>279</sup> *CISG*, above n 1, arts 35(2)(a), 35(2)(b). *EP SA v FP Oy* (Helsinki Court of Appeal, Finland, 30 June 1998) <<http://cisgw3.law.pace.edu/cases/980630f5.html>> (reliance on seller skill in ensuring vitamin levels within agreed range); *New Zealand Mussels Case* (Bundesgerichtshof, Germany, 8 March 1995) <<http://cisgw3.law.pace.edu/cases/950308g3.html>> (regulation on cadmium levels in shellfish not mentioned to seller); *Medical Marketing v Internazionale Medico Scientifica* (US District Court (ED La), US, 17 May 1999) <<http://cisgw3.law.pace.edu/cases/990517u1.html>> (circumstances such that seller should have been aware of safety standards); *Machinery Case* (Tribunale di Busto Arsizio, Italy, 13 December 2001) <<http://cisgw3.law.pace.edu/cases/011213i3.html>> (non-conformity with purpose made known to seller).

<sup>280</sup> Some courts, reflecting the ‘homeward trend’, have used ‘merchantable’ quality (common law) and ‘average’ quality (civil law), but see the autonomous approach favouring ‘reasonable’ quality in *Condensate Crude Oil Mix Case* (Netherlands Arbitration Institute, Netherlands, 15 October 2002) <<http://cisgw3.law.pace.edu/cases/021015n1.html>>; Di Matteo et al, above n 140, 397–8; Zeller, ‘Traversing International Waters’, above n 134, 54. See also *Frozen Fish Case* (Oberster Gerichtshof, Austria, 27 February 2003) <<http://cisgw3.law.pace.edu/cases/030227a3.html>> (standard if quality not clearly described); *Model Locomotives Case* (Kantonsgericht Schaffhausen, Switzerland, 27 January 2004) <<http://cisgw3.law.pace.edu/cases/040127s1.html>>; *Mitias v Solidea Srl* (Tribunale di Forlì, Italy, 11 December 2008) [3.1] <<http://cisgw3.law.pace.edu/cases/081211i3.html>>.

<sup>281</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [124], [153].

<sup>282</sup> *Ibid* [131]. Similarly, in regard to sterility, see *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [152] (concluding the ‘extent and level’ of the contamination meant the ‘only proper inference to be drawn’ was that ‘as a whole, the product supplied ... was, on the balance of probabilities, not sterile’).

<sup>283</sup> See, eg, *ICC Award No 6653 of 1993* (1993) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/936653i1.html>> (22 per cent of steel bars outside specified weight tolerances); *Engines for Hydraulic Presses and Welding Machines Case* (Landgericht Düsseldorf, Germany, 23 June 1994) <<http://cisgw3.law.pace.edu/cases/940623g1.html>>; *ICC Award No 8740 of 1996* (1996) <<http://cisgw3.law.pace.edu/cases/968740i1.html>> (coal contained 20 per cent rather than specified 32 per cent dry matter).

<sup>284</sup> See, eg, *New Zealand Mussels Case* (Bundesgerichtshof, Germany, 8 March 1995) <<http://cisgw3.law.pace.edu/cases/950308g3.html>>; *Medical Marketing v Internazionale Medico Scientifica* (US District Court (ED La), US, 17 May 1999) <<http://cisgw3.law.pace.edu/cases/990517u1.html>>.

<sup>285</sup> See UNCITRAL, *Digest of Case Law*, above n 15, [15] and cases cited therein.

<sup>286</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [188]–[189], [196].

comparison with domestic law and cases blinded it to significant differences, and entire provisions with which it should have dealt were simply bypassed.

For example, the *CISG* requires inspection and notification of non-conformity within a reasonable time, failing which, the buyer's right to damages for non-conformity or price reduction can be lost.<sup>287</sup> Yet in *Ginza*, arts 38 and 39 were ignored.<sup>288</sup> Consequently, it is unclear from the judgment exactly when the seller was notified.

Despite omission of these crucial prerequisites,<sup>289</sup> the Court found the buyer was entitled to rely on arts 50 and 74.<sup>290</sup> Article 50 enables the buyer to reduce the price for non-conformity, whether or not the price is still unpaid. The reduction permitted is the difference between the value of goods delivered and the value conforming goods would have had at that time.<sup>291</sup> It reflects the principle inherent in the *CISG* that, where possible, contracts should be kept on foot, given the delays and expenses in reversing international contracts for goods.<sup>292</sup>

The seller argued that not all the goods were contaminated, so any price reduction pursuant to art 50 should be partial only, given the restriction on price reduction in art 51(1) where some goods conform and others do not. The Court rejected the argument,<sup>293</sup> but without reference to any *CISG* authority.<sup>294</sup>

Had the Court been directed to art 51(2) and *CISG* cases,<sup>295</sup> it might have paused to consider two very important issues. First, conforming goods need to be 'separable' from non-conforming goods for art 51 to have any relevance.<sup>296</sup> The recall and/or extensive level of contamination might have justified a conclusion that it was not possible to truly separate goods in this case, since not every bottle of saline could be tested. Rejection of art 51 on this basis would have 'fitted' *Ginza* with existing *CISG* cases.

<sup>287</sup> A maximum time of two years for notice is imposed by art 39(2) of the *CISG*. However, normally a much shorter period is imposed by the requirement that notice be given within a 'reasonable' time: see discussion below nn 479–480 and accompanying text (cases on period for notice of non-conformity); *Model Locomotives Case* (Kantonsgericht Schaffhausen, Switzerland, 27 January 2004) §3c <<http://cisgw3.law.pace.edu/cases/040127s1.html>> (reasonable time in art 39 depends on the type of goods); *Person of Greece v Ed Fruit and Vegetables BV* (Rechtbank Breda, Netherlands, 16 January 2009) [3.12] <<http://cisgw3.law.pace.edu/cases/090116n1.html>> (watermelons subject to decay, inadequate notification if not within days). See also for general discussion of time limits, CISG Advisory Council, *Opinion No 2*, above n 74; Schwenger, 'National Preconceptions', above n 74, 121–24, Baasch Anderson, 'Reasonable Time in Article 39(1)', above n 74. Although some of these materials post-date *Ginza*, many cases and commentaries existed at the time of the decision.

<sup>288</sup> Zeller, *CISG Cases*, above n 2, 2. On arts 38 and 39, see above n 74, below n 381 and accompanying text.

<sup>289</sup> See, in support, Bruno Zeller, 'Editorial Remarks' in Pace Law School, *CISG Case Presentation: Ginza Pte Ltd v Vista Corporation Pty Ltd* (2005) <<http://cisgw3.law.pace.edu/cases/030117a2.html#ce>>.

<sup>290</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [188]–[189], [193]–[196].

<sup>291</sup> See also discussion, above n 67, on art 50 of the *CISG*.

<sup>292</sup> The general principle of '*favor contractus*', see above n 66. On art 50, see above n 67.

<sup>293</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [199]–[200].

<sup>294</sup> *Ibid* [200]. On art 50, see above n 67.

<sup>295</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [200]. See also Pace Law School Website, <<http://cisgw3.law.pace.edu/cisg/text/anno-art-50.html>> and cases cited therein.

<sup>296</sup> See UNCITRAL, *Digest of Case Law*, above n 15 and cases cited therein.

Second, and far more grave, was the failure to consider fundamental breach, described in art 25.<sup>297</sup> Given contamination was ‘widespread and serious’, it could have foreseeably and substantially deprived the buyer of what it was entitled to expect. If a partial non-conformity is so serious as to amount to a fundamental breach, then not only does art 51(2) remove the restriction on price reduction in art 51(1), but the contract can be avoided by declaration pursuant to art 26. The possibility of fundamental breach was never discussed by the Court.<sup>298</sup>

Interest was awarded without reference to art 78, the source of the obligation to pay interest.<sup>299</sup> Although this does not provide interest rates, it should not have been overlooked. The rate and timing of interest arguably comprise an ‘external gap’ in the *CISG*,<sup>300</sup> and therefore require application of conflict rules to determine another law to fill the gap.<sup>301</sup> Ultimately, perhaps the *Supreme Court Act*<sup>302</sup> rates were appropriate, but the solution must be reached by proper means rather than serendipity.

A related entity, Kontack Pty Ltd, argued that it too had contracted with the seller. Incredibly, in its analysis of the facts relating to this possibility, the Court did not refer to *CISG* formation provisions.<sup>303</sup> It rejected the argument but held the seller liable to Kontack for negligence.<sup>304</sup> The seller was also liable to the buyer for negligence, but conceded damages were identical to art 74 damages.<sup>305</sup> As mentioned earlier, whether the *CISG* pre-empted the claim in tort should have been considered as a preliminary question.<sup>306</sup>

Sadly, *Ginza* is not the worst of the Australian *CISG* cases. At least the pleadings referred to the *CISG* and the Court was alerted to some of the relevant provisions like art 50. However, it fell far short of an autonomous interpretation, let alone an internationalist one. It needed to address all relevant provisions, utilise *CISG* resources, refrain from reverting to domestic influences, and deal with pre-emption.

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<sup>297</sup> See further above nn 71 and 72.

<sup>298</sup> Additionally, the Court would have to question whether, pursuant to art 82(1), the right to avoid (if found to exist) had been lost because the goods could not be restored in substantially the same condition, although the answer would probably lie in art 82(2)(c), since the goods were sold in the normal course of business before the non-conformity was known. On art 25, see above n 71.

<sup>299</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [265]. On art 78, see above n 51.

<sup>300</sup> See above n 51 for full discussion.

<sup>301</sup> See above n 131 and accompanying text. On the importance of first considering whether an issue falls within an internal or external gap and the effect of failing to do so, see Spagnolo, ‘Opening Pandora’s Box’, above n 54, 306–9. Although the majority of authors consider it an external gap, there is a minority view to the contrary: see above n 51.

<sup>302</sup> *Supreme Court Act 1935* (WA) s 32.

<sup>303</sup> *Ginza* [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [38]–[59].

<sup>304</sup> *Ibid* [38]–[59], [209]–[211].

<sup>305</sup> *Ibid* [212]–[213].

<sup>306</sup> The *CISG* may pre-empt certain tortious and other actions: see above n 179.

*Ginza* received some attention,<sup>307</sup> but was criticised as disappointing for its ‘basic lack of understanding’ of the *CISG*.<sup>308</sup>

(g) *Playcorp Pty Ltd v Taiyo Kogyo Ltd*<sup>309</sup>

The sale in this case was between an Australian buyer and Japanese seller of radio controlled toys. The Court held their distribution agreement had been rescinded by the buyer following the seller’s repudiation when it wrongfully refused to continue supplying the buyer pursuant to that agreement. This determination appropriately drew on domestic law. The distribution agreement in this case contained a choice of Australian law. Choice of Australian law (or indeed a specific state or territory law) in sales contracts leads to application of the *CISG*, because it is part of Australian law.<sup>310</sup> The application of non-*CISG* domestic law to the distribution agreement in this instance was correct because distribution agreements are generally outside the *CISG*’s scope.<sup>311</sup>

By contrast, individual sales made pursuant to distribution agreements can fall within the *CISG*’s scope, so if the sales had involved a choice of Australian law the *CISG* would have applied to them.<sup>312</sup> However, the individual sales in this case did not themselves involve any express choice of law. Thus the *CISG* could apply to the sales if both parties were from Contracting States (art 1(1)(a)), or because the law of a Contracting State applied pursuant to the conflict rules of the forum, in this case, Australian conflict rules (art 1(1)(b)). The seller’s arguments centred on art 1(1)(a).

Under art 1(1)(a), the *CISG* applies if each party is from a Contracting State.<sup>313</sup> The seller therefore argued that the *CISG* was not applicable to the sales

<sup>307</sup> Francesco G Mazzotta, *Endless Disagreement among Commentators, Much Less among Courts* (2004), (fn 67) <<http://cisgw3.law.pace.edu/cisg/biblio/mazzotta78.html>>; Shiu, above n 244; Zeller, ‘Traversing International Waters’, above n 134, 54; Henschel, above n 275, 205.

<sup>308</sup> Zeller, ‘Traversing International Waters’, above n 134, 54; Zeller, ‘Editorial Remarks: *Ginza*’, above n 289.

<sup>309</sup> [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) (*Playcorp*). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/030424a2.html>>; available from CISG-online, *Search by Cases* (Case No 808) <<http://www.global-saleslaw.org/index.cfm?pageID=29>>.

<sup>310</sup> See above n 4. Note the difference between a choice of law of a Contracting State and a specific choice of the *CISG*: see discussion above nn 10–17 and accompanying text.

<sup>311</sup> CISG-AC, *Opinion No 9*, above n 52, *Commentary* [3.4]; Schlechtriem, ‘Arts 1–6’, above n 52, 27–8; Huber and Mullis, above n 16, 48; Bridge, ‘Uniform and Harmonized Sales Law’, above n 11, 959; Ferrari, ‘Applicability and Applications’, above n 20, 186. See, eg, *Mineral Water and Wooden Pallets Case* (Foreign Trade Court of Arbitration, Serbian Chamber of Commerce, 13 November 2007) <<http://cisgw3.law.pace.edu/cases/071113sb.html>>; *Instruments Case* (Fovárosi Biróság, Hungary, 19 March 1996) <<http://cisgw3.law.pace.edu/cases/960319h1.html>>; *Vidamed AG v A Schmidt* (Arrondissementsrechtbank Gravenhage, Netherlands, 2 July 1997), available from <<http://www.unilex.info>>. Only a minority of cases have applied the *CISG* to a distribution agreement: *Imperial Bathroom Company v Sanitari Possi SpA* (Corte di Cassazione, Italy, 14 December 1999) <<http://cisgw3.law.pace.edu/cases/991214i3.html>>. See also Ziegel, ‘The Scope of the Convention’, above n 9, 60–1 (clarifying the definition of distribution contract for this purpose). See also *Medical Marketing v Internazionale Medico Scientifica* (US District Court (ED La), US, 17 May 1999) <<http://cisgw3.law.pace.edu/cases/990517u1.html>>.

<sup>312</sup> See above Part II.

<sup>313</sup> Parties are to have ‘places of business’ in Contracting States, but this fact must be apparent before the contract is concluded: *CISG*, above n 1, art 1(2). See also above n 9.

on the basis that Japan was not, at the time, a signatory to the *CISG*.<sup>314</sup> Strategically, the argument seemed to suit the seller's position that there were no terms relating to quality in the sales contracts at all. It argued that there were no express terms as to the quality of the product, and further, implied terms did not arise because the *CISG* was inapplicable, nor did they arise under the *Goods Act 1958* (Vic) because of past practices between the parties, since no defect claims had been made in the previous nine years.<sup>315</sup>

Unfortunately, the seller's strategy ignored art 1(1)(b), discussed above,<sup>316</sup> which makes the *CISG* applicable where the forum's conflict rules indicate the law of a Contracting State, such as Australian law, governs the contract.<sup>317</sup> The seller's counsel submitted that the proper law was the law of the place of performance, but was less than definitive as to which law fitted that description.<sup>318</sup> The buyer's counsel submitted that Victorian law applied, since sales 'took place under the aegis of the distribution agreement', which contained an express choice of Australian law, and the sales had their 'closest and most real connection' with Victoria.<sup>319</sup> As required by art 1(1)(b), Hansen J correctly applied conflict rules to determine Victorian law applied.<sup>320</sup>

Regrettably, the effect of this conclusion was not fully appreciated. As discussed above, if Australian law applies as the proper law of an international sale, then (unless excluded), the *CISG* is applicable as part of Australian law.<sup>321</sup> Yet the Court concluded it meant that 'either the *Goods Act* or the Convention applied' and although the *CISG* enjoyed 'paramountcy' over the *Goods Act*, that this was only 'in the event of any inconsistency between the two'.<sup>322</sup> In other words, the Court considered that the local enabling Act required the *CISG* to be considered 'before the *Goods Act*',<sup>323</sup> however, if there were no 'material differences or inconsistencies' between the two, it would be acceptable to apply the local *Goods Act* provisions, since '[n]othing turn[ed] on the fact that I have reversed that order'.<sup>324</sup> Effectively, the Court was stating that the *CISG* would only be applied if the paramountcy provision was enlivened by an inconsistency.<sup>325</sup>

With respect, this is not the way the *CISG* works. The enabling Act gives the *CISG* the force of law.<sup>326</sup> The *CISG*'s own terms require that it be applied in its entirety when it is the governing law of the contract, not just to the extent of

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<sup>314</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [211]. Japan has since become a Contracting State: see above n 21.

<sup>315</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [211].

<sup>316</sup> See above n 10 and accompanying text.

<sup>317</sup> See also Bruno Zeller, 'Editorial Remarks' in Pace Law School, *CISG Case Presentation: Playcorp Pty Ltd v Taiyo Kogyo Limited* (2003) <<http://cisgw3.law.pace.edu/cases/030424a2.html#ce>>.

<sup>318</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [212].

<sup>319</sup> *Ibid* [242], [243].

<sup>320</sup> *Ibid* [244].

<sup>321</sup> See above n 9 and Part II.

<sup>322</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [235], [245].

<sup>323</sup> *Ibid* [235].

<sup>324</sup> *Ibid*.

<sup>325</sup> A similar statement was made in *Ginza* [2003] WASC 11 (Unreported, Barker J, 17 January 2003) [188].

<sup>326</sup> *Sale of Goods (Vienna Convention) Act 1987* (Vic) s 5.

inconsistency.<sup>327</sup> In other words, when the *CISG* applies, the *Goods Act* is displaced by it. The *CISG* applies exclusively, to the extent of its scope. Were it not so, it would be incapable of achieving its purpose of unifying sales laws around the world for international sales. One cannot rely upon seemingly familiar provisions to conclude it is ‘consistent’ with local sales provisions, and therefore no harm flows from their application. The interpretive method demanded by art 7 for the autonomous interpretation of the *CISG*’s provisions will *always* render the *CISG* inconsistent with domestic law regardless of any surface similarities.<sup>328</sup> In any event, neither ss 5 or 6 confines the *CISG*’s operation to only those situations in which it differs from domestic law. The reference to the *CISG* prevailing in the event of ‘inconsistency’ in s 6 of the enabling Act is a mere clarification. It should not usurp the force of law granted by s 5, but instead be interpreted as underlining the pre-emptive effect of the *CISG* on local laws which *overlap* with its scope. The latter construction enables ss 5 and 6 to be read not only consistently with one another, but also in harmony with the *CISG*’s legislative history, purpose and jurisprudence.

The misunderstanding meant that yet another court had succumbed to viewing the *CISG* through ‘domestic lenses’. The Court openly applied domestic law rather than the actual law of the contract, the *CISG*. Hansen J compared s 19 of the *Goods Act 1958* (Vic) with art 35, and concluded that because it ‘was not suggested that there was any material difference or inconsistency between [them] and because of ... the way the case was conducted, it is unnecessary to consider whether there is’.<sup>329</sup>

It would have been preferable for the Court to have taken the tough stance evident in *Perry*. Instead, the Court allowed itself to be led astray. Counsel’s approach led the Court to apply the wrong law. Consequently, vital issues were omitted, and domestic law and common law language crept into the judgment.

The Court did not concentrate on art 35. Clearly, it was persuaded that this was unnecessary. The pleadings referred to ‘implied conditions’, despite the fact the *CISG* does not distinguish between conditions, warranties,<sup>330</sup> or intermediate terms.<sup>331</sup> Instead, the *CISG* elevates certain breaches as fundamental breaches which enable avoidance of the contract by the aggrieved party.<sup>332</sup> The pleadings attributed implied terms of fitness for purpose and merchantability to s 19 of the *Goods Act 1958* (Vic) and art 35,<sup>333</sup> although merchantability is not a word used by the *CISG*. The Court ultimately disregarded merchantability, but not because

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<sup>327</sup> See *CISG*, above n 1, art 1(1), and the hierarchy inherent in art 7(2).

<sup>328</sup> See discussion on requirements for proper application of *CISG* as governing law, above n 123 and accompanying text. This conclusion is further supported by arts 8 and 9.

<sup>329</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [235].

<sup>330</sup> Zeller, *CISG Cases*, above n 2, 3. An Italian court recently commented on this aspect of the *CISG*: *Mitias v Solidea Srl* (Tribunale di Forli, Italy, 11 December 2008) [3.4] <<http://cisgw3.law.pace.edu/cases/081211i3.html>> (observing that the *CISG* does not distinguish between fundamental or non-fundamental terms, therefore even breach of an ancillary term could be a fundamental breach if it met the very strict criteria in art 25).

<sup>331</sup> See *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115.

<sup>332</sup> On art 25, see above nn 71, 72 and accompanying text.

<sup>333</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [199], [235]. See also text at [203], [211], [230].

it was applying the *CISG*.<sup>334</sup> Hansen J referred to the buyer's reliance on the seller's skill and experience,<sup>335</sup> also pertinent to art 35(2)(b), but did not refer to *CISG* cases on this aspect.<sup>336</sup>

Again, like *Ginza*, the need for both buyer examination and notice of non-conformity within a reasonable time were overlooked.<sup>337</sup> In the haste to distance the case from the *CISG*, valuable argument on these points never surfaced. There was an ambiguous reference to 'timely notice' in the seller's pleadings, but apparently the matter was not pressed as a pre-condition to damages.<sup>338</sup>

The issue was certainly alive on the facts. Notification of the defects seems to have been given in August 1994,<sup>339</sup> or perhaps February 1995.<sup>340</sup> For some of the goods, non-conformities dated back to January 1994.<sup>341</sup> It was therefore possible to argue that the buyer had lost its right to damages, because it took between seven and 13 months to notify the seller, and that this was 'unreasonable' within the meaning of art 39(1). Of course, what is reasonable will depend on a number of factors which can be gleaned from *CISG* cases and scholarship. The nature of the goods is of obvious importance to this question. Depending on the goods, *CISG* cases indicate that anything from 25 days to four months has been held to be unreasonably long in the context of art 39(1).<sup>342</sup> There is also an important *CISG* Advisory Council Opinion on interpretation of arts 38 and 39.<sup>343</sup>

Counter-argument on the point was also available to the buyer. The seller had 'strung Playcorp along'<sup>344</sup> in an attempt to create a pretext to end the distribution agreement. In interpretation of what constitutes a 'reasonable' period under art 39(1), the Court might, in light of this behaviour, have accepted a longer period than usual. Article 7(1) directs interpretation of the *CISG* to promote good faith in international trade.<sup>345</sup> The Court's negative view on the potential under domestic law for good faith duties in the distribution agreement<sup>346</sup> would have no bearing on the sales contracts, which were governed by the *CISG*.

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<sup>334</sup> Ibid [209]–[214], [229]–[230], stating that despite the absence of an express provision on quality, that the goods should be fit for purpose was 'obvious' or 'plain'. However, the Court should have adopted the *CISG* interpretive methodology, rather than resort to domestic interpretive techniques: see above Part V, above n 137 and below n 431 and accompanying text.

<sup>335</sup> *Playcorp* [2003] VSC 109, [229], [249] (Hansen J).

<sup>336</sup> On art 35, see above nn 275, 279, 280, 283, and below n 394.

<sup>337</sup> See Zeller, 'Editorial Remarks: *Playcorp*', above n 317 (stating that: 'It is also interesting to note that the defence never explored articles 38 and 39'). On art 39, see further above n 74.

<sup>338</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [200].

<sup>339</sup> Ibid [250].

<sup>340</sup> Ibid [249]–[254].

<sup>341</sup> Ibid [257].

<sup>342</sup> See discussion below nn 483, 484, 486–489 and *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) <<http://cisgw3.law.pace.edu/cases/000712i3.html>>, discussed below n 488. On art 39 of the *CISG*, see above n 74.

<sup>343</sup> See discussion below n 494. See further above n 74.

<sup>344</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [265].

<sup>345</sup> Further, a general principle of good faith underlying the *CISG* is also applicable via art 7(2), where the *CISG* governs but does not expressly deal with an issue.

<sup>346</sup> *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [267].

Additionally, past practices on returns and repairs held relevance to interpretation of a 'reasonable' notice period.<sup>347</sup> Finally, it could be strongly argued that in fact no notice was required, since the seller 'knew or could not have been unaware' of the defect pursuant to art 40. As the Court pointed out, the seller was aware of high levels of returns elsewhere.<sup>348</sup>

The buyer's claim to damages was calculated on wholesale prices for the goods.<sup>349</sup> Hansen J rejected this approach as inappropriate.<sup>350</sup> Yet this could only be evaluated in light of the applicable law.<sup>351</sup> Like *Ginza*, a failure to focus on the *CISG* meant fundamental breach was never canvassed,<sup>352</sup> thus questions as to whether the buyer was substantially deprived of what it was entitled to expect, and whether there was a declaration of avoidance went unanswered.<sup>353</sup> These were important, since, if the contract was validly avoided, a different measure of damages might have been appropriate.<sup>354</sup>

Comment on *Playcorp* has been mostly confined to local observers interested in good faith as a domestic contractual duty or interpretive aid.<sup>355</sup> In the *CISG* context, it was described as yet another Australian case in which the *CISG* was 'in essence ignored'.<sup>356</sup>

(h) *Summit Chemicals Pty Ltd v Vetrotex Espana SA*<sup>357</sup>

An Australian company (the buyer) was being sued by its customer for faults in pools allegedly caused by defective fibreglass that it had bought from a Spanish supplier. It therefore joined the Spanish seller, its Australian agent and related parties as third parties to the proceeding. The buyer then applied for leave to amend the third party statement of claim to include, inter alia, a pleading that the alleged defects amounted to breaches of terms implied by the *CISG*. If the *CISG* claim became statute-barred after the third party notice was issued on 2 July 1999, a grant of leave to amend would have precluded a limitations defence.

At the initial leave hearing, McKechnie J decided that the matter turned on the ambit of the third party notice.<sup>358</sup> This set out the principal claim made against

<sup>347</sup> See *CISG*, above n 1, arts 8(3), 9(1). See also *ibid* [265] (referring to the seller 'shun[ning] its prior manner of dealing').

<sup>348</sup> See, eg, *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [249]–[253].

<sup>349</sup> *Ibid* [378].

<sup>350</sup> *Ibid*.

<sup>351</sup> See also Zeller, *CISG Cases*, above n 2, 3.

<sup>352</sup> *CISG*, above n 1, art 25. On art 25, see above n 71 and accompanying text.

<sup>353</sup> *CISG*, above n 1, art 26. See above nn 71, 72, 74 and accompanying text.

<sup>354</sup> See, eg, *CISG*, above n 1, art 76.

<sup>355</sup> See, eg, Adam Wallwork, 'A Requirement of Good Faith in Construction Contracts?' (2004) 20 *Building and Construction Law Journal* 257; Trevor Thomas, 'Alliance Contracts: Utility and Enforceability' (2007) 23 *Building and Construction Law Journal* 329, 341. Commenting on *Playcorp* as a *CISG* case: Zeller, 'Traversing International Waters', above n 134, 54 (arguing that the case demonstrates a misunderstanding of the *CISG*).

<sup>356</sup> See Zeller, 'Editorial Remarks: *Playcorp*', above n 317.

<sup>357</sup> [2004] WASCA 109 (Unreported, Miller and EM Heenan JJ, 27 May 2004) ('*Summit*'). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/040527a2.html>>; available from UNILEX, <<http://www.unilex.info>>; available from CISG-online, *Search for Cases* (Case No 860) <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>.

<sup>358</sup> *Aqua Technics (WA) Pty Ltd v Summit Chemicals Pty Ltd* [2003] WASC 182 (Unreported, McKechnie J, 19 September 2003) [24].

the buyer, and sought indemnity from the seller on the basis that the fibreglass caused 'swimming pools ... to blister and need replacement,' because it was 'contaminated and thereby not fit for purpose, or of merchantable quality' due to its moisture content.<sup>359</sup> It stated the claim against the seller 'will be based upon your breach of the terms of sale ... and in particular concerning the merchantable quality and fitness for the purpose of the [fibreglass]' as well as negligence and *Trade Practices Act 1974* (Cth) provisions.<sup>360</sup> It also alleged the buyer had queried the moisture content and been reassured by the seller's Australian agent.<sup>361</sup>

The third party notice did not refer to the *Sale of Goods Act 1895* (WA) or *CISG*.<sup>362</sup> McKechnie J held that it was wide enough to encompass the *CISG* claim in addition to the claims under the *Sale of Goods Act 1895* (WA) already pleaded in the original statement of claim.<sup>363</sup> His Honour encouragingly acknowledged that the two laws were different, but did not elaborate beyond saying the *CISG* imposed 'like' obligations on the seller.<sup>364</sup>

The Court of Appeal observed that, strictly speaking, since this was a claim for indemnity, the third party's liability would not arise until judgment was awarded in the primary action.<sup>365</sup> In other words, time did not start to run until the principal matter was complete.

Nonetheless, the Court of Appeal's primary focus was on local procedural rules. It asked whether the proposed amendments could be characterised as radically altering the facts pleaded rather than the legal conclusions or causes of action to be drawn from those facts.<sup>366</sup> After noting that parties were not compelled to plead legal conclusions, but could argue any causes of action open on the facts pleaded,<sup>367</sup> the Court of Appeal concluded that the *CISG* claims could have been drawn from the facts indorsed in the original third party notice, and granted leave to amend. The decision rendered nugatory the question as to whether the *CISG* action became time-barred after the third party notice, because the Court essentially held that this was not a new cause of action at all.<sup>368</sup>

However, Zeller argues that leave to amend the statement of claim 'created a new claim contrary to the view expressed by the court',<sup>369</sup> and the period of

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<sup>359</sup> Ibid [23].

<sup>360</sup> Ibid.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid [24].

<sup>364</sup> Ibid.

<sup>365</sup> *Summit* [2004] WASCA 109 (Unreported, Miller and EM Heenan JJ, 27 May 2004) [66] (EM Heenan J).

<sup>366</sup> See *ibid* [42] (EM Heenan J, noting the Court's discretion to allow amendments arising out of substantially the same facts advanced in the originating process or statement of claim), [58] (EM Heenan J, relying on Wheeler J's judgment in *Morgan v Banning* (1999) 20 WAR 474, 485–6, endorsing, pursuant to *Rules of the Supreme Court 1971* (WA) O 21 r 5(5), amendments which amount to a 'change in the legal categorisation' as opposed those involving a 'change of facts').

<sup>367</sup> *Summit* [2004] WASCA 109 (Unreported, Miller and EM Heenan JJ, 27 May 2004) [74]. See, in support, Butterworths, *Civil Procedure Victoria* (1987) vol 1 (at 232) [13.02.30] ('Williams').

<sup>368</sup> *Summit* [2004] WASCA 109 (Unreported, Miller and EM Heenan JJ, 27 May 2004) [68].

<sup>369</sup> Zeller, *CISG Cases*, above n 2, 3.

limitation should have been two years pursuant to art 39, not six years under domestic law.<sup>370</sup>

The reasoning in *Summit* should be understood in context. Certainly, the case betrays a level of misunderstanding about the operation of the *CISG*. Buyer's counsel sought to plead, inter alia, both the *CISG* and *Sale of Goods Act* as alternatives. Clearly, the *CISG*'s application excludes that of the *Sale of Goods Act*, and had the seller's counsel made such an application, the *Sale of Goods Act* claims should have been struck out. However, the Court was never asked to consider the issue. Thus, unlike in *Playcorp*, its task was not to determine which law applied, but simply whether the *CISG* claim could be added to original pleadings.

These were interlocutory proceedings, concerned only with procedural rules on pleading amendments. The rule in *Weldon v Neal*, that prohibited amendments to add actions that had become statute-barred after proceedings commenced, has now been abrogated.<sup>371</sup> Pleadings can now be amended at any time with leave, provided any prejudice can be met by adjournments or cost orders. While case management powers and specialised list Practice Directions can intrude, leave is usually granted to ensure the real controversy between the parties is addressed, in some circumstances, even after the close of evidence.<sup>372</sup> Before trial, leave is normally refused only if the amendment involves substantial incurable prejudice, *mala fides*, or is so 'obviously futile' that it would be vulnerable to being struck out.<sup>373</sup> The new cause of action is deemed included in the original pleading, and loss of the time-bar defence is not a relevant prejudice.<sup>374</sup> An arguable claim is not futile even if it does 'not have much chance of success'.<sup>375</sup>

The focus in *Summit* on whether the *CISG* claim was supported by pleaded facts followed a line of authority that restricts the abrogation of *Weldon v Neal*,<sup>376</sup> perhaps due to the particular wording of rules in certain jurisdictions.<sup>377</sup> A more relaxed view might be found elsewhere, however some

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<sup>370</sup> Ibid 3–4. See also *Protocol Amending the Convention on the Limitation Period in the International Sale of Goods*, opened for signature 11 April 1980, 77 UNTS 85 (entered into force 1 August 1988) ('*Protocol*'), which was adopted at the same time as the *CISG*. The *Protocol* would have introduced a limitation period of four years, however, the Convention and its *Protocol* have attracted only 28 and 20 Contracting States respectively, excluding Australia: see UNCITRAL, *Status: 1980*, above n 3.

<sup>371</sup> See *Weldon v Neal* (1887) 19 QBD 394; *Federal Court Rules 1979* (Cth) O 13, r 2(3); *Court Procedures Rules 2006* (ACT) r 503(1); *Uniform Civil Procedure Rules 1999* (Qld) r 376(4); *Supreme Court Civil Rules 2006* (SA) r 54(7)(a); *Supreme Court Rules 2000* (Tas) r 427(2A); *Rules of the Supreme Court 1971* (WA) O 21, r 5(2); *Supreme Court Rules 1987* (NT) r 36.01(6); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 36.01(6); *Civil Procedure Act 2005* (NSW) ss 64, 65(2).

<sup>372</sup> *Williams*, above n 367, [36.01.120], [36.01.150].

<sup>373</sup> Ibid [36.01.110], [36.01.155], [36.01.180].

<sup>374</sup> Ibid [36.01.230].

<sup>375</sup> Ibid [36.01.180].

<sup>376</sup> See *Morgan v Banning* (1999) 20 WAR 474.

<sup>377</sup> Some rules refer to actions arising from the same or substantially similar facts as those originally pleaded: see, eg, *Federal Court Rules 1979* (Cth) O 13, r 2(7)(a); *Civil Procedure Act 2005* (NSW) s 65(2)(c); *Court Procedures Rules 2006* (ACT) r 503(4)(b); *Rules of the Supreme Court 1971* (WA) O 21, r 5(5); *Supreme Court Civil Rules 2006* (SA) r 54(7)(a); *Uniform Civil Procedure Rules 1999* (Qld) r 376(4)(b).

rules require statutory provisions,<sup>378</sup> or legal conclusions to be pleaded.<sup>379</sup> In those cases, *CISG* provisions and *CISG*-styled conclusions may need to be pleaded in any event.

Clearly, an art 35(2) argument could be derived from the facts originally pleaded on contamination, blistering and moisture. In accordance with local rules and cases properly applicable to the procedural issue of pleadings, the ability to derive *CISG* claims from facts pleaded supported a conclusion that the *CISG* claim was not 'new.' This finding meant limitation periods fell into two categories, with commencement of third party proceedings as the dividing line. Those expiring afterwards were irrelevant altogether, and those expiring before were best left to a full hearing, since an interlocutory court will be slow to determine a limitation period has expired.<sup>380</sup>

Had the claim been 'new', or had a court of a different jurisdiction been seized of the matter, issues of futility might have been at stake, and therefore late notice might have been relevant. Deliveries occurred between October 1996 and May 1997. It is unclear whether the seller was notified before third party proceedings commenced in July 1999, so the right to rely on non-conformity might have been lost for late notice or due to the two year maximum in art 39(2). But was the claim 'obviously futile'? The *CISG* Advisory Council has stated that time pursuant to art 38 for inspection commences when 'signs of latent non-conformity become evident',<sup>381</sup> that is, when the buyer ought to have been aware. The pools were manufactured in 1997–98.<sup>382</sup> Principal proceedings commenced in April 1999. While it is unclear from the judgment, if the buyer did not become aware of the issue until late 1998–99, the period in art 39(1) might not have commenced until then. Thus it would be possible to argue notice to the seller was not late, even if comprised of the third party process in July 1999.

Seen in its procedural and interlocutory context, the decision was not so flawed as it might seem. Unlike *Perry*, the decision in *Summit* anticipated a full hearing. Argument on expiry of limitations was still open *before* third party proceeding commenced.<sup>383</sup> Periods of limitation per se fall outside the *CISG*'s ambit,<sup>384</sup> thus mention of domestic limitations legislation was appropriate, although it should have been arrived at by means of a determination to that

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<sup>378</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 149(1)(e); *Supreme Court Rules 1987* (NT) r 13.02(1)(b); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 13.02(1)(b); *Supreme Court Civil Rules 2006* (SA) rr 99(1)(b), 100(1)(d); *High Court Rules 2004* (Cth) r 27.04(c); *Court Procedures Rules 2006* (ACT) r 406(1)(e).

<sup>379</sup> *Supreme Court Civil Rules 2006* (SA) r 99(1)(a); *Federal Court Rules 1979* (Cth) O 12, r 10; *Court Procedures Rules 2006* (ACT) r 407(1). See also *Supreme Court Rules 2000* (Tas) r 227(3).

<sup>380</sup> *Summit* [2004] WASCA 109 (Unreported, Miller and EM Heenan JJ, 27 May 2004) [68] (EM Heenan J).

<sup>381</sup> *CISG* Advisory Council, *Opinion No 2*, above n 74, art 38, §3.

<sup>382</sup> *Aqua Technics (WA) Pty Ltd v Summit Chemicals Pty Ltd* [2003] WASC 182 (Unreported, McKechnie J, 19 September 2003) [3].

<sup>383</sup> The Court made this point: *Summit* [2004] WASCA 109 (Unreported, Miller and EM Heenan JJ, 27 May 2004) [62] (EM Heenan J).

<sup>384</sup> See, eg, *Tombstones Case* (Oberster Gerichtshof, Australia, 7 September 2000) <<http://cisgw3.law.pace.edu/cases/000907a3.html>>; *Windows Elements Case* (Oberlandesgericht Hamm, Germany, 9 June 1995) §II(2)(d) <<http://cisgw3.law.pace.edu/cases/950609g1.html>>.

effect, followed by application of conflicts rules, at least for the *CISG* claims.<sup>385</sup> One might say that the controversy regarding late notice should have been aired in argument on futility, but, in any event, the futility question was made redundant by the Court's interpretation of its own procedural rules and its view of timing of liability for indemnity.<sup>386</sup>

Perhaps most remarkable is that there was no application to have alternative domestic sales law claims struck out at the interlocutory stage. The decision barely rated a mention internationally.<sup>387</sup>

(i) *Italian Imported Foods Pty Ltd v Pucci Srl*<sup>388</sup>

The case involved an Italian seller of preserved vegetables and an Australian importer. The seller sought to recover the price. The buyer argued the goods had been defective.<sup>389</sup> A magistrate held the relevant time for assessing quality was upon delivery to the buyer's shipping agent in Italy,<sup>390</sup> and that the buyer had not discharged its onus of proof regarding 'merchantable quality'.<sup>391</sup>

Incredibly, neither side nor the Magistrate were aware that the *CISG* applied, and the trial case was argued and decided on the basis of the wrong law.<sup>392</sup>

On appeal in the Supreme Court, buyer's counsel applied to amend pleadings to base the claim on the *CISG*.<sup>393</sup> Despite realising the error, argument was still inadequate. In support of its contention that the Magistrate erred regarding the point in time for measurement of quality, rather than refer to arts 35–44 and relevant *CISG* case law which could have properly guided the decision,<sup>394</sup> the Court was directed to non-*CISG*, and therefore irrelevant, English case law.<sup>395</sup>

However, leave was refused, thus the *CISG* could not be relied upon on appeal. Unlike *Summit*, where more latitude to amend pleadings was shown, in *Italian Imported*, the arguments sought to be raised on appeal had not previously

<sup>385</sup> Again, whether or not a specific issue falls within an internal or external gap in the *CISG* was an important preliminary step skipped by the Court: see above n 301 and accompanying text (similar comments regarding interest rates in *Ginza*).

<sup>386</sup> *Summit* [2004] WASCA 109 (Unreported, Miller and EM Heenan JJ, 27 May 2004) [66], [68] (EM Heenan J).

<sup>387</sup> Bruno Zeller, 'Editorial Remarks' in Pace Law School, *CISG Case Presentation: Summit Chemicals v Vetrotex Espana* (2006) <<http://cisgw3.law.pace.edu/cases/040527a2.html#ce>>.

<sup>388</sup> [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) ('*Italian Imported*'). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/061013a2.html>>; available from CISG-online, *Search by Cases* (Case No 1494) <<http://www.globalsaleslaw.org/index.cfm?pageID=29>>.

<sup>389</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [3].

<sup>390</sup> *Ibid* [11] (setting out the reasons of Sweeney LCM).

<sup>391</sup> *Ibid* (referring to the reasons of Sweeney LCM).

<sup>392</sup> See *ibid* [7], [11].

<sup>393</sup> *Ibid* [14].

<sup>394</sup> See, eg, *Bedial SA v Paul Muggenburg & Co GmbH* (Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995) <<http://cisgw3.law.pace.edu/cases/951031a1.html>> (deterioration during shipping); *Person of Greece v Ed Fruit and Vegetables BV* (Rechtbank Breda, Netherlands, 16 January 2009) [3.9] <<http://cisgw3.law.pace.edu/cases/090116n1.html>> (watermelons subject to decaying during transportation). On art 35 of the *CISG*, see above nn 275, 279, 280, 283. *Bedial* and many of the cases and commentaries were available at the time.

<sup>395</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [12] (noting citation in argument of *Lambert v Lewis* [1981] 2 WLR 713).

been heard at trial.<sup>396</sup> The discretion to grant leave is not exercised as easily in such circumstances.<sup>397</sup> The Court gave two reasons for the refusal. The first was that the seller ‘might have conducted its case differently at trial’.<sup>398</sup> As a rule, appellate courts refuse leave where an issue was not litigated at trial.<sup>399</sup> The second reason given was that the amendment would be futile in any event.<sup>400</sup> Thus *Italian Imported* differs from *Summit* because futility formed part of the basis for the procedural decision.

With respect, on this second point, the Court fell into error. The futility of the amendment to include a *CISG* claim could not be gauged without examination of its viability in light of arts 35–44. This was not undertaken. Instead, the Court discussed lack of proof that the goods were not ‘merchantable’ at any time,<sup>401</sup> and the buyer’s denial of responsibility for testing and consequent lack of evidence.<sup>402</sup> The buyer’s case might still have been weak, but its prospects could not be resolved by evaluation under domestic sales law, itself pre-empted by the *CISG*’s application.

Even if leave had been granted, Zeller argues the buyer had probably ‘lost any chance’ by its refusal to inspect the goods,<sup>403</sup> since art 38 requires buyers to ‘examine the goods ... within as short a period as is practicable in the circumstances’. Further, notice of non-conformity was not given until five months after delivery,<sup>404</sup> so the right to damages was probably lost pursuant to art 39(1).<sup>405</sup> This conclusion is underscored by the unlikelihood on the facts that the buyer could have argued that there was a reasonable excuse for delay in giving notice.<sup>406</sup> There also seemed to have been little prospect of an argument under art 40 that the seller was already aware of the non-conformity.

The best that can be said about the case is that on appeal, the Court acknowledged that local sales law and the *CISG* ‘are not the same’.<sup>407</sup> Yet this mild encouragement pales against the Court’s worst miscalculation. After refusing to allow *CISG* arguments to be raised on appeal, it treated the *Sale of Goods Act* as an alternative, fallback law. There is no second bite of the cherry. If a *CISG* claim fails for lack of proof of non-conformity or late notice, or for procedural reasons, the applicability of domestic sales law is not revived. The

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<sup>396</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [17].

<sup>397</sup> *Williams*, above n 367, [36.01.210].

<sup>398</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [19].

<sup>399</sup> *Williams*, above n 367, [36.01.145], [36.01.210].

<sup>400</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [19].

<sup>401</sup> *Ibid* [21]. On art 35 of the *CISG*, see above nn 275, 279, 280, 283, 394.

<sup>402</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [11], [21]–[25].

<sup>403</sup> ‘Editorial Remarks’ in Pace Law School, *CISG Case Presentation: Italian Imported Foods Pty Ltd v Pucci Srl* (2006) <<http://cisgw3.law.pace.edu/cases/061013a2.html#ce>>.

<sup>404</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [1], [24].

<sup>405</sup> On art 39 of the *CISG*, see above n 74. On interrelation between arts 38 and 39, see below n 496 and accompanying text

<sup>406</sup> *CISG*, above n 1, 44. On art 44, see *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; *Person of Greece v Ed Fruit and Vegetables BV* (Rechtbank Breda, Netherlands, 16 January 2009) [3.12] <<http://cisgw3.law.pace.edu/cases/090116n1.html>> (no excuse for delay in notification of non-conformity).

<sup>407</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [16].

matter must stand or fall on the *CISG* when it is applicable law,<sup>408</sup> since it displaces domestic sales law. To uphold a lower court's decision based on inapplicable law perpetuates an error of law that is borne of a misunderstanding of the *CISG*'s pre-emptive effect.

Perhaps because the quality of *CISG* interpretation had stepped up considerably elsewhere, or possibly because this was now the standard anticipated from Australian shores, the case barely raised an eyebrow internationally.<sup>409</sup>

(j) *Vetreria Etrusca Srl v Kingston Estate Wines Pty Ltd*<sup>410</sup>

*Vetreria* does not awaken new hope. This case involved the supply of wine bottles from an Italian manufacturer to an Australian company. The bottles allegedly broke repeatedly during bottling processes. The seller claimed the price and damages for breach in an Italian court. The buyer sought damages for contractual breach on the basis the bottles were not fit for purpose and did not match the sample in an Australian court.

The seller sought interlocutory orders to stay the Australian proceedings on the basis of a clause purporting to grant an Italian court exclusive jurisdiction. At trial, the parties did not dispute that the *CISG* was the governing law.<sup>411</sup> The Supreme Court upheld the refusal to stay on appeal. Despite the undisputed fact that the *CISG* governed the contract, seller's counsel argued that 'Australian' law should be used to construe the choice of forum clause.<sup>412</sup> This led the Supreme Court, like the Court below, to ignore the *CISG*. The law of contract — the *CISG* — was not applied on appeal. Worse still, it was not mentioned in the judgment at all.

At trial in the South Australian District Court<sup>413</sup> the choice of forum was considered ambiguous. It covered disputes arising from 'interpretation, execution or application' of the contract, but Muecke J determined that this did not include performance. The judge further declined exercise of the discretion to stay proceedings due to the location of witnesses, experts and physical evidence.

The *CISG* applies to contractual formation and therefore the predominant view is that the *CISG* governs incorporation of choice of forum (jurisdiction)

<sup>408</sup> For matters within its sphere of applicability, subject to the interpretive hierarchy of art 7(2), see, eg, *Asante Technologies Inc v PMC-Sierra Inc* (US District Court (ND Cal), US, 27 July 2001) <<http://cisgw3.law.pace.edu/cases/010727u1.html>> (similarly commenting that the 'availability of [domestic] contract law ... action[s] would frustrate the goals of ... the *CISG*').

<sup>409</sup> The only international comment has been from Zeller, 'Editorial Remarks: *Italian Imported*', above n 403.

<sup>410</sup> [2008] SASC 75 (Unreported, Duggan J, 14 March 2008). Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/080314a2.html>>.

<sup>411</sup> *Kingston Estate Wines Pty Ltd v Vetreria Etrusca Srl* [2007] SADC 102 (Unreported, Muecke J, 12 October 2007) [27]. Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/071012a2.html>>.

<sup>412</sup> *Vetreria* [2008] SASC 75 (Unreported, Duggan J, 14 March 2008) [9].

<sup>413</sup> *Kingston Estate Wines Pty Ltd v Vetreria Etrusca Srl* [2007] SADC 102 (Unreported, Judge Muecke, 12 October 2007).

clauses.<sup>414</sup> It is true that special local prerequisites to validity of forum clauses are not within the *CISG*'s scope.<sup>415</sup> Likewise, international treaties on jurisdiction will prevail over the *CISG*.<sup>416</sup> Nevertheless, the *CISG* often resolves questions raised by such treaties, such as place of performance, or prima facie incorporation.<sup>417</sup> The better view is that the *CISG* not only determines formation and incorporation, but also the meaning and content of forum clauses, subject to local validity laws or superimposed treaty requirements. This view is indicated by the approach taken in most *CISG* cases and is consistent with mention of dispute resolution clauses in certain *CISG* provisions.<sup>418</sup>

Admittedly, issues surrounding the *CISG*'s scope regarding choice of forum clauses are not simple. However, to ignore the *CISG* cases and commentary on the issue amounts to placing one's head in the sand. As the *CISG* governed the contract, the question should have been confronted.

The Court could have taken its lead from *Roder Zelt*. The disputed clause there involved an issue falling outside the *CISG*, that is, property in the goods.<sup>419</sup> As the *CISG* governed the contract, formation and interpretation of content and meaning of the contract were determined by the *CISG*.<sup>420</sup> Once the existence and meaning of the clause are established, its effect can be determined in accord with

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<sup>414</sup> *SA Gantry v Société de Droit Suisse* (Tribunal de commerce Nivelles, Belgium, 19 September 1995) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950919b1.html>> (*CISG* not domestic law determines inclusion of forum clause); *Synthetic Window Parts Case* (Landgericht Trier, Germany, 8 January 2004) <<http://cisgw3.law.pace.edu/cases/040108g1.html>>; *Chateau des Charmes Wines Ltd v Sabaté USA, Inc* (US Circuit Court of Appeals (9<sup>th</sup> Cir), US, 5 May 2003) <<http://cisgw3.law.pace.edu/cases/030505u1.html>>; *Chateau des Charmes Wines Ltd v Sabaté USA, Inc* (Superior Court of Justice, Ontario, Canada, 28 October 2005) <<http://cisgw3.law.pace.edu/cases/051028c4.html>> (related proceeding); Ferrari, 'Choice of Forum and CISG', above n 17, (fn 6). *Contra* Alejandro M Garro, 'The UN Sales Convention in the Americas: Recent Developments' (1998) 17 *Journal of Law and Commerce* 219, 237. See also *Inta SA v MCS Officina Meccanica SpA* (Cámara Nacional de Apelaciones en lo Comercial, Argentina, 14 October 1993) <<http://cisgw3.law.pace.edu/cases/931014a1.html>> (validity outside *CISG*'s scope but referring to art 18 in regard to formation); Schmidt-Kessel, above n 59, 138 (neutral).

<sup>415</sup> *CISG*, above n 1, art 4(a); Schmidt-Kessel, above n 59; Ferrari, 'Choice of Forum and CISG', above n 17, 130.

<sup>416</sup> *CISG*, above n 1, art 90.

<sup>417</sup> *Generators Case* (Oberlandesgericht Düsseldorf, Germany, 30 January 2004) <<http://cisgw3.law.pace.edu/cases/040130g1.html>> (the *CISG* still determined incorporation and interpretation of clause); *Synthetic Window Parts Case* (Landgericht Trier, Germany, 8 January 2004) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040108g1.html>> (still referring to *CISG* to extent not overridden); *Tannery Machines Case* (Oberlandesgericht Köln, Germany, 8 January 1997) <<http://cisgw3.law.pace.edu/cases/970108g1.html>> (determining the jurisdiction in accordance with the international treaty, but the place of performance for that purpose was determined pursuant to art 31 of the *CISG*). See also Torsello, above n 96, 219–20) (referring to role of the *CISG* in the context of the *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] OJ L 12/1, concerning jurisdiction and predecessor *Brussels Convention 1968*).

<sup>418</sup> See above nn 414, 417. Article 19(3) of the *CISG* refers to clauses for 'settlement of disputes' in relation to formation, and art 81(1) similarly in the context of avoidance.

<sup>419</sup> This is an issue excluded from the *CISG*'s scope by art 4(b).

<sup>420</sup> See also Ziegel, 'Comment on *Roder Zelt*', above n 172, 55, 60.

the law applicable to the external issue on the basis of conflicts rules.<sup>421</sup> In *Roder Zelt*, this was Australian property law. In *Vetzeria*, the existence of the choice of forum clause and its construction should have been determined pursuant to the *CISG* as the first step. The clause should then have been subject to the secondary step of Australian procedural principles concerning stay of proceedings.

The Court itself identified that its first task was to ‘determine the agreement of the parties as to jurisdiction’.<sup>422</sup> Since the *CISG* applied, its proper application required exclusive use of its own interpretive provisions and methodology for this task. In particular, the Court needed to heed arts 7, 8 and 9. An examination of *CISG* cases on choice of forum clauses would therefore be necessary, in order to interpret the *CISG*’s terms internationally and uniformly.<sup>423</sup> The contract needed to be construed in light of all relevant circumstances, including pre-contractual negotiations and post-contractual conduct in accordance with art 8(3), a stance quite contrary to ordinary Australian principles of contractual construction.<sup>424</sup> Article 8(1) and (2) directs the Court in construing statements and conduct of parties, and art 9 controls the impact on construction of international usages and practices between the parties.<sup>425</sup> The parol evidence rule

<sup>421</sup> See also, Ferrari, ‘Choice of Forum and CISG’, above n 17, 143 (*lex fori* determines effectiveness or enforceability of choice of forum). See Ved P Nanda and David K Pansius, *Litigation of International Disputes in US Courts* (2005–2007) vol 2, [12:9] (must determine whether disclaimers form part of the contract under *CISG* before assessing domestic enforceability); *Chateau des Charmes Wines Ltd v Sabaté USA Inc* (US Circuit Court of Appeals (9<sup>th</sup> Cir), US, 5 May 2003) <<http://cisgw3.law.pace.edu/cases/030505u1.html>> (recognising *CISG* formation issues are antecedent to validity and enforceability issues)

<sup>422</sup> *Italian Imported* [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [16].

<sup>423</sup> See, eg, *Generators Case* (Oberlandesgericht Düsseldorf, Germany, 30 January 2004) <<http://cisgw3.law.pace.edu/cases/040130g1.html>> [(1)]. See above n 412.

<sup>424</sup> The Australian position was confirmed recently in *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57 (Unreported, Gummow, Kirby, Hayne, Heydon and Kiefel JJ, 11 December 2008) [35] (Gummow, Hayne and Kiefel JJ), citing *Whitworth Street Estates v Miller* [1970] AC 583, 603 (Lord Reid); *contra* [115] (Kirby J), holding that such matters can sometimes be taken into account and *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 (Unreported, Spigelman CJ, Basten JA and Handley AJA, 6 September 2007) [111], [126] (Spigelman CJ). See also *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* (Court of Appeal, UK, 18 December 2006), available from <<http://www.unilex.info>>; Bridge, ‘A Commentary on Articles 1–13 and 78’, above n 59, 254 (commenting that UK law bars ‘post-contractual behaviour as a guide to interpreting the contract’).

<sup>425</sup> Statements or conduct are to be given their subjective meaning if the addressee knew or could not have been unaware of the intent of that subjective intent: *CISG*, above n 1, art 8(1). However, only rarely can knowledge of intent can be proven, and ‘gross negligence’ is necessary before the ‘objective filter’ within art 8(1) of ‘could not have been unaware’ is satisfied. Thus, normally, the objective test of intent, being the understanding of ‘a reasonable person in the [addressee’s] shoes’ will prevail per art 8(2). In both cases, the matters directed by art 8(3) should be taken into account: Huber and Mullis, above n 16, 12–13; Schmidt-Kessel, above n 59, 118 (preferring ‘easy to discern’ rather than ‘gross negligence’); Ferrari, ‘Interpretation of Statements’, above n 185, 179–80 (noting that art 8(2) attributes knowledge of trade to the reasonable person). See also Bridge, ‘A Commentary on Articles 1–13 and 78’, above n 59, 254 (stating art 8(1) is an ‘empty statement’ while art 8(2) is the ‘controlling rule’). For an example of art 8(1) in practice, see *Glass Bottles Case* (Bundesgerichtshof, Germany, 27 November 2007) [14], [15] <<http://cisgw3.law.pace.edu/cases/071127g1.html>>. See also discussion above n 347 and accompanying text. Ferrari, ‘Interpretation of Statements’, above n 185, 177, remarks upon an observation by Burghard Piltz, that, provided subjective intent is manifested, then art 8(1) will bind the addressee to that intent if it is unclearly expressed yet understood, and further, will still bind if clearly expressed but not understood by the addressee.

is not applicable.<sup>426</sup> Article 7 precludes resort to domestic methods of interpretation and construction, to the extent of the *CISG*'s scope.<sup>427</sup> Unfortunately, the Court was diverted from the task of construing the clause in accordance with the (undisputed) law of the contract by the unanimous preference of counsel for an inapplicable law.

What might have happened had the Court applied the *CISG*? Arguably, the result might have been the same. The Court might have still maintained that the clause would be viewed as deliberately limited in scope, and that 'execution' is a term that a 'reasonable person' under art 8(2)<sup>428</sup> would take to mean the signing of the contract rather than its performance. The idea that an ambiguous standard clause should be construed against its author (*contra proferentem*) might have been relevant.

However, the *CISG*'s application might have encouraged a more generous construction of the words 'interpretation, execution or application'. In interpreting the *CISG* to promote good faith, the Court might have concluded that a reasonable person would give more holistic weight to the preceding words 'any disputes, none excluded'<sup>429</sup> as indicative that this was an absolute choice of forum,<sup>430</sup> rather than one limited on technical grounds relating to common law definitions of the single word 'execution'. A reasonable business person rather than a lawyer might have understood a dispute over performance to involve 'application' and/or 'interpretation' of the contract. Notably, under the *CISG*, the parol evidence rule does not apply and the court is directed to construe contractual intent in light of both prior and subsequent conduct of the parties.<sup>431</sup> The court would need to construct the clause in light of any international usages that should have been known to both parties or past practices developed between them.<sup>432</sup>

It should be of no comfort that the recent Canadian decision of *Linamar* upheld a similar error.<sup>433</sup> The decision immediately attracted criticism.<sup>434</sup> The Canadian Court determined the point of formation of the contract without any reference to the *CISG*, applying common law principles rather than the *CISG*'s own rules regarding the 'battle of the forms'.<sup>435</sup> It consequently determined that

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<sup>426</sup> *CISG*, above n 1, arts 8(3), 11. See above n 59.

<sup>427</sup> See above n 131.

<sup>428</sup> See above n 425 for further discussion.

<sup>429</sup> See *Vetzeria* [2008] SASC 75 (Unreported, Duggan J, 14 March 2008) [8].

<sup>430</sup> The view of a reasonable party is relevant in the interpretation of the words and conduct of the party under art 8(2).

<sup>431</sup> See above nn 59, 425.

<sup>432</sup> *CISG*, above n 1, art 9. See also *ibid*.

<sup>433</sup> *Linamar Holdings Inc v IGM USA Inc* [2008] ONCA 256.

<sup>434</sup> The decision of the Court of Appeal and that of the Supreme Court was criticised for failure to refer to the *CISG* in the formation and construction of a dispute resolution clause, and reference to domestic law and cases rather than *CISG* cases: James M Klotz, Peter Mazzacano and Antonin I Pribetic, 'Case Comment: All Quiet on the *CISG* Front — *Guiliani v Invar Manufacturing*, the Battle of the Forms, and the Elusive Concept of *Terminus Fixus*' (2008) 46 *Canadian Business Law Journal* 430.

<sup>435</sup> *CISG*, above n 1, art 14–19. *Guiliani v Linamar Holdings Inc* (2007) 52 CPC (6<sup>th</sup>) 129. On formation provisions, see above n 60.

forum clauses had not been incorporated, but on the basis of the wrong law. The decision was upheld on appeal, with similar disregard for the *CISG*.<sup>436</sup>

In the Canadian decision, the party attempting to uphold the forum clauses was Italian, and, of the various forum clauses dealt with in that case, one bore an uncanny resemblance to the clause in *Vetreria*. As it held that the clause was not incorporated, the Court did not deal with its construction. Strangely, there was no mention of any alternative argument that performance was not encompassed by ‘interpretation and execution’, despite the fact that the underlying dispute related to performance, and the clause was arguably less emphatic than the one in *Vetreria*.<sup>437</sup> If such wording is prevalent in trade with Italian counterparties, an interesting argument could be run regarding the objective understanding of such clauses by parties frequently importing or exporting from Italy.<sup>438</sup>

Had the Court in *Vetreria* adopted a more liberal interpretation of the clause pursuant to the *CISG*, it could still have declined to stay Australian proceedings. The discretion is exercised according to Australian procedural principles, which, in situations where a choice of forum clause exists, dictate an inclination to hold parties to their bargain, unless there is sufficient cause not to do so.<sup>439</sup> In this case, all physical evidence, relevant experts and witnesses were located in Australia.

Exercise of the discretion to order or refuse a stay is a matter for domestic procedural law. Conversely, if there is a choice of forum clause in a contract governed by the *CISG*, then construction of the bargain upon which the discretion rests is a matter for the *CISG*. The discretion cannot be properly exercised without preliminary interpretation of the bargain in accordance with applicable law. While it might not have ultimately altered the outcome, *Vetreria* stands as another example of counsel steering the bench away from that course.

The sole good news from *Vetreria* was that the original statement of claim actually referred to the *CISG*. This points to early awareness of the *CISG*, a rarity by Australian standards.

(k) *Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd*<sup>440</sup>

A recent case to mention the *CISG* was another judgment of Finn J. An Australian grower, TVO, sold cherries through Farmlink, an Australian exporter of fruit, to buyers in Hong Kong and Singapore. The latter buyers were not party

<sup>436</sup> *Linamar Holdings Inc v IGM USA Inc* [2008] ONCA 256.

<sup>437</sup> ‘For every dispute regarding the interpretation and execution of the present contract the Court of Ravenna, Subsection of Faenza, will be the only an exclusive competent court’: *ibid* [13].

<sup>438</sup> On the basis of arts 8(2) and (3) of the *CISG*. See *Pribetic*, above n 26, 3 (discussing the difference between jurisdiction simpliciter and discretion on the grounds of ‘strong cause’ in Canada).

<sup>439</sup> See *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418; *The Eleftheria* [1969] 2 All ER 641. The *forum non conveniens* test was applied in *IGM USA Inc v Linamar Holdings Inc* [2008] ONCA 256, because the Court held the forum clause had not been incorporated.

<sup>440</sup> [2008] FCA 1591 (Unreported, Finn J, 24 October 2008) (*‘Hannaford’*). Also reported internationally on: Pace Law School, <<http://cisgw3.law.pace.edu/cases/081024a2.html>>; available from CISG-online, *Search for Cases* (Case Nos 1743/1782) <<http://www.global-saleslaw.org/index.cfm?pageID=29>>; available from UNILEX, <<http://www.unilex.info>>.

to the proceedings. Due to defects, Farmlink claimed to be entitled to pass on price reductions made by the overseas buyers to TVO.

Finn J determined that the relationship between TVO and Farmlink was one of sale, not of agency.<sup>441</sup> This meant that the *CISG* did not apply to the dispute before the Court. Had the opposite conclusion been reached, then the contracts of sale would have been between TVO and the overseas buyers. The *CISG* would have applied to the Singapore contracts, as Singapore is a *CISG* Contracting State under art 1(1)(a). However, the Hong Kong contracts might not have been governed by the *CISG*. Certainly, the *CISG* would not be applicable through art 1(1)(a); as Finn J observed, China has not yet taken the necessary steps to make Hong Kong a Contracting State. Notably, in reaching this conclusion, Finn J referred to relevant *CISG* sources, including scholarship and a French case.<sup>442</sup> Given the hypothetical nature of the question, the Court understandably did not explore the (unlikely) possibility the *CISG* might apply through art 1(1)(b).

Although the *CISG* was not directly applicable, Finn J made a number of references to its provisions, and in particular, the need for buyers to notify lack of conformity in a timely fashion pursuant to art 39, the right to unilaterally effect a price reduction pursuant to art 50, and art 9 on the influence of usages on contractual terms.<sup>443</sup> Not only this, but his Honour also cited relevant *CISG* authority in doing so.<sup>444</sup>

The *CISG* is treated in *Hannaford* as an autonomous body of law, and interpretation of it was conducted by reference to international *CISG* decisions and scholarship. Finn J makes it clear that, although the *CISG* did not apply in the dispute before the Court, if it had, different questions would have arisen, and a very different result might have ensued. Certainly the decision demonstrated proper interpretation of the *CISG*, guided by *CISG* sources alone. Although the case properly required application of local sales law rather than the *CISG*, the *CISG*, *UNIDROIT Principles* and comparative law were still used to illuminate global trends in relation to issues pertinent under local sales law.

Finally, Australia has produced a case in which the *CISG* is treated autonomously and in an internationalist spirit, albeit it a case in which the *CISG* was inapplicable. Nonetheless, *Hannaford* stands as a lonely but bright beacon for future Australian courts applying the *CISG*.

(1) *Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA (No 4)*<sup>445</sup>

In the most recent decision by the Federal Court, the contract involved the supply of production line equipment for olive oil production. Logan J determined

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<sup>441</sup> Ibid [7], [181].

<sup>442</sup> Ibid [5], citing *Société L v CM Ltd* (Cour de Cassation, France, 2 April 2008) <<http://cisgw3.law.pace.edu/cases/080402f1.html>>; Ulrich G Schroeter, 'The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods' (2004) 16 *Pace International Law Review* 307.

<sup>443</sup> *Hannaford* [2008] FCA 1591 (Unreported, Finn J, 24 October 2008) [5], [43], [56], [190], [197], [233], [242], [276]. See also above n 67.

<sup>444</sup> Ibid [5], [43], [56], [233], citing Peter Schlechtriem and Ingeborg Schwenzer, above n 130, *UNIDROIT, UNIDROIT Principles*, above n 190, and a German *CISG* case in relation to art 39 on perishables: *Flowers Case* (Oberlandesgericht Saarbrücken, Germany, 3 June 1998) <<http://cisgw3.law.pace.edu/cases/980603g1.html>>.

<sup>445</sup> [2009] FCA 522 (Unreported, Logan J, 20 May 2009) ('*Olivaylle*') Also reported internationally at: Pace Law School, <<http://cisgw3.law.pace.edu/cases/090520a2.html>>.

that the *CISG* was excluded by the words ‘Australian law applicable under exclusion of UNCITRAL law’.<sup>446</sup> The case is almost chameleon-like in its approach to the *CISG*.

The Court reasoned that, although the *CISG* was ‘part of the relevant Australian law’, reference to exclusion of UNCITRAL law was sufficient to evince an intention to exclude the *CISG*.<sup>447</sup> The buyer contended that the exclusion related only to property issues, since the exclusion followed a sentence amounting to a retention of title clause.<sup>448</sup> Logan J correctly pointed out, with reference to *Roder Zelt*, that such a construction was unlikely to have been intended, given that the *CISG* does not deal with property issues anyway, pursuant to art 4(b).<sup>449</sup> Unfortunately, no reference to other *CISG* cases was made.<sup>450</sup>

The Court analysed the formation and interpretation of the choice of law clause by reference to domestic law concepts alone. By doing so, it acted as though the *CISG* did not have a priori application. In this sense, the Court fell into the same error as did the Court in *Vetzeria*. Had application of the *CISG* to the questions of formation and construction resulted in a conclusion that the *CISG* was excluded, then resort to domestic law on formation and interpretation would have been entirely appropriate. But if the same process had led to the conclusion that the *CISG* was *not* properly excluded, recourse to domestic law would have been prohibited. The Court could only ever be in a position to know the right course of action by proper application of the *CISG*, at least up to the point at which exclusion was determined.

In fact, Logan J’s application of domestic interpretive rules was rather liberal. Prior communications were examined, as well as the written ‘contract’,<sup>451</sup> and his Honour thus determined that the parties placed a high level of importance upon the written terms.<sup>452</sup> The *CISG* also deems such communications relevant, but would additionally deem subsequent communications of relevance in relation to interpretation of the parties’ contractual intent.<sup>453</sup> Logan J took into account of the nature of the contract, the fact that the seller was known to trade internationally, and the position and context of the clause within the document. These would also be relevant under a *CISG* approach.<sup>454</sup> The biggest difference in construction would be the imperative to take an internationalist approach. The Court in *Olivaylle* should have looked at decisions on *CISG* exclusion clauses from around the world, and scholarly material on the issue. The need to look at such material is obvious when one considers that, in determining the question of exclusion, one is effectively interpreting art 6 of the *CISG*. Therefore, language

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<sup>446</sup> Ibid [28].

<sup>447</sup> Ibid.

<sup>448</sup> Ibid [29] (summarising the buyer’s contention).

<sup>449</sup> Ibid [30].

<sup>450</sup> See above text accompanying n 187.

<sup>451</sup> *Olivaylle* [2009] FCA 522 (Unreported, Logan J, 20 May 2009) [21].

<sup>452</sup> Ibid [20]. See also ibid [21] (Email from Dr Paterson, Flottweg, to Mr De Moya, Olivaylle, 7 October 2004, stating that ‘none of these discussions can take precedence over written communications’).

<sup>453</sup> *CISG*, above n 1, art 8(3).

<sup>454</sup> Ibid arts 8(2), 8(3).

that is dispositive under domestic law ‘acquires a different meaning under the Convention’.<sup>455</sup>

Obviously, the Court appreciated that a choice of Australian law would not have excluded the *CISG*.<sup>456</sup> Express exclusion is clearly permissible pursuant to art 6. Legislative history indicates, and most cases have held, that implicit exclusion is also possible,<sup>457</sup> but it requires ‘clear’ indications of ‘real’ rather than ‘theoretical’<sup>458</sup> intent. For example, a choice of ‘American law as laid down in the UCC’ would suffice.<sup>459</sup> Although clumsy, the words in question in *Olivaylle* under a *CISG* construction would probably amount to implicit, if not express exclusion. Yet, without further analysis, one cannot be certain that the sloppily chosen words even formed part of the contract, at least in *CISG* terms.

The exclusion clause was contained within the seller’s quotation of 8 February 2005. Logan J conducted a purely common law analysis of formation.<sup>460</sup> His Honour concluded that after the buyer’s handwritten alterations to the seller’s document of 1 October 2004, there were further discussions, and then the seller’s quotation of 8 February 2005, which ‘took up such of [the buyer’s] alterations as [the seller] was prepared to adopt’.<sup>461</sup> The Court then considered various common law characterisations of formation. However, for the purposes of determining exclusion pursuant to art 6, formation should be analysed, at least initially, according to the *CISG*. There would need to be a ‘sufficiently definite’ offer.<sup>462</sup> As for the final document containing only some of the buyer’s alterations,<sup>463</sup> the *CISG* would have had no difficulty classifying this as an acceptance if the terms omitted by the seller were immaterial, provided that

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<sup>455</sup> E Allan Farnsworth, ‘Review of Standard Forms of Terms under the Vienna Convention’ (1988) 21 *Cornell International Law Journal* 439, 442.

<sup>456</sup> This has been upheld in many cases. See, eg, *Tinned Cucumbers Case* (Oberlandesgericht Düsseldorf, Germany, 8 January 1993) <<http://cisgw3.law.pace.edu/cases/930108g1.html>>.

<sup>457</sup> For a summary of supporting cases and the minority holding to the contrary, see UNCITRAL, *Digest of Case Law*, above n 15, art 6. The Drafters did not want courts jumping to the conclusion of implied exclusion too quickly, see *Official Records*, above n 37, 17 (stating that the words ‘such exclusion may be express or implied’ were eliminated from art 5 because they ‘might encourage courts to conclude, on insufficient grounds, that the [*CISG* was] excluded’).

<sup>458</sup> Honnold, *Uniform Law for International Sales*, above n 71, 80 (requiring ‘real’ and not ‘theoretical’ intent). See also Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary* (1992) 48 (stating that there must be ‘clear indications’); Franco Ferrari, ‘Specific Topics of the *CISG* in the Light of Judicial Application and Scholarly Writing’ (1996) 15 *Journal of Law and Commerce* 1, 88 (fn 614).

<sup>459</sup> Ferrari, ‘Specific Topics of the *CISG*’, above n 458, 89 (fn 626); see also Enderlein and Maskow, above n 458, 49.

<sup>460</sup> *Olivaylle* [2009] FCA 522 (Unreported, Logan J, 20 May 2009) [22]–[23].

<sup>461</sup> *Ibid* [22].

<sup>462</sup> *CISG*, above n 1, art 14(1).

<sup>463</sup> *Olivaylle* [2009] FCA 522 (Unreported, Logan J, 20 May 2009) [22]. In dealing with the long period of negotiations, Logan J concludes that after the buyer’s handwritten alterations to the seller’s document of 1 October 2004, there were further discussions, and then the seller’s quotation of 8 February 2005, which ‘took up such of [the buyer’s] alterations as [the seller] was prepared to adopt’.

the buyer did not object to the modification.<sup>464</sup> Alternatively, if they were material omissions, it would amount to a counteroffer<sup>465</sup> accepted by the buyer's subsequent conduct, a conclusion similar to Logan J's less preferred construction.<sup>466</sup> Further, if, as suggested by Logan J, an earlier contract existed, possibly in October 2004,<sup>467</sup> then subsequent modification by agreement would have been permissible under art 29. On a *CISG* analysis, the clause would have been incorporated and the *CISG* excluded. Ultimately, the Court applied the correct law, although navigation to that conclusion might have been through much safer waters.

However, perhaps the Court's sensitivity to the *CISG* had been heightened, because later in the judgment, Logan J returned to the *CISG* as an aid to interpretation of certain contractual provisions. The welcome chameleon-like change in approach was driven by contractual provisions containing the 'civil law' concepts of 'reasonable period of grace' and 'reduction in price'.<sup>468</sup> Logan J sensibly returned to the *CISG* as a guide to construction, and drew upon arts 46, 47, 48 and 50.<sup>469</sup> Admirably, the Court looked at the concept of *Nachfrist* and some English scholarship on the *CISG*.<sup>470</sup> Had the Court looked beyond English scholars to other scholars and cases decided on the relevant *CISG* provisions, it would have found much greater guidance still. The usefulness of the *CISG* also prompts the question: why did the parties exclude the *CISG* in the first place?

Beside *Hannaford*, *Olivaylle* flickers intermittently. Through the darkness, it now appears that the Federal Court is willing and prepared to take the next step, should a case to which the *CISG* directly applies come before it.

## VII TURNING THE CORNER: AN EXAMPLE OF WORLD'S BEST PRACTICE

If Australia were a racehorse, our track record would make us an 'outsider'. Despite a promising maiden run, on each of our subsequent starts we have not done well, at least in cases where the *CISG* was applicable. Yet, for reasons discussed below,<sup>471</sup> Australia might yet prove 'good value for money'. Australia

<sup>464</sup> *CISG*, above n 1, art 19(2). Notably, art 19(3) lists changes to 'price, payment, quality and quantity ... delivery ... liability and [dispute settlement]' as material alterations. The document dated 8 February 2005 purported to be an 'offer' rather than an 'acceptance'. This would not necessarily be fatal, but would need to be dealt with by the Court, as indeed Logan J did in regard to common law construction.

<sup>465</sup> *Ibid* art 19(1).

<sup>466</sup> *Olivaylle* [2009] FCA 522 (Unreported, Logan J, 20 May 2009) [23]. The first, and least preferred characterisation of formation was that the 8 February 2005 document was an offer, the buyer's acceptance of which was to be 'inferred from its acquiescence' and subsequent conduct. However, Logan J preferred the second characterisation, which was that the handwritten alterations and subsequent discussions amounted to the buyer's counteroffer, and the 8 February 2005 document amounted to an acceptance of the counteroffer as it had 'come to be formulated', presumably after the intervening discussions.

<sup>467</sup> *Ibid* [23]. Logan J concluded that '[t]he effect of what occurred is that, whatever acceptance [had previously occurred] ... the parties agreed wholly to replace that agreement by an agreement set out in the terms of the quotation of 8 February 2005'.

<sup>468</sup> *Ibid* [203].

<sup>469</sup> *Ibid* [203]–[209].

<sup>470</sup> *Ibid* [206]–[207], citing Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 *Law Quarterly Review* 201; and at [204] and [209], citing Anthony G Guest (ed), *Benjamin's Sale of Goods* (7<sup>th</sup> ed, 2006).

<sup>471</sup> See discussion below n 509 and accompanying text.

is capable of producing better quality outcomes by reaching out to international jurisprudence on the *CISG*, and perhaps contributing to it. Naturally, this requires judges and practitioners to shed their ‘domestic lenses’. We need, indeed are obliged, to take an international view.<sup>472</sup>

Fortunately, since the *CISG* is an international body of law, plenty of help is at hand. As *Hannaford* shows, Australia can learn from the experiences of courts from other jurisdictions. We should look carefully to jurisdictions that have overcome their initial difficulties with the *CISG*. In a case that ‘turned the corner’, Rizzieri J in the *Tribunale di Vigevano* on 12 July 2000<sup>473</sup> altered the international perception of Italian *CISG* decisions drastically. The case was lauded as ‘remarkable’<sup>474</sup> in numerous articles and now stands as a shining example of how the *CISG* should be applied.<sup>475</sup>

The case involved an Italian seller and a German buyer of rubber for the soles of shoes. The Italian judge showed a willingness to ‘apply the provisions of the *CISG* faithfully to the letter and spirit of the uniform law’.<sup>476</sup> Not only did his Honour show great restraint through a conspicuous absence of ‘references to civilian commentaries and treatises’,<sup>477</sup> but the judgment employed *CISG* cases decided in the US, Austria, Netherlands, France, Germany, Italy and Switzerland, as well as arbitral decisions.<sup>478</sup>

Like *Ginza*, *Playcorp*, *Summit* and *Italian Imported*, the case involved non-conformity, and the *CISG* was the governing law. However, the manner in which the Court interpreted the *CISG* differs markedly from those cases. The Court examined art 35(2),<sup>479</sup> and the need for quite specific notice of the nature of the non-conformity within a reasonable time.<sup>480</sup> It later noted that this enabled the seller to determine how to proceed, an important matter since the *CISG* provides sellers with the means to rectify non-conformities in certain

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<sup>472</sup> See above n 133 and accompanying text.

<sup>473</sup> *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) <<http://cisgw3.law.pace.edu/cases/000712i3.html>>.

<sup>474</sup> Charles Sant ‘Elia, ‘Editorial Remarks’ in *CISG Case Presentation: Rheinland Versicherungen v Atlarex* (2000) <<http://cisgw3.law.pace.edu/cases/000712i3.html>>. The decision ‘immediately became a widely acclaimed model’ and has been translated ‘into many other languages, including English, French and German, and ... commented on by many scholars in several different jurisdictions’: Torsello, above n 96, 216 (fn 122).

<sup>475</sup> Franco Ferrari, ‘Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With’ (2001) 20 *Journal of Law and Commerce* 225; Franco Ferrari, ‘Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000’ (2001) *Revue de Droit Uniforme* 203; CISG Advisory Council, *Opinion No 2*, above n 74, *Commentary* addendum 1; Di Matteo et al, above n 140, (fns 340, 402, 408, 567, 582, 589, 788, 866); Schlechtriem, ‘Arts 1–6’, above n 52, 38 (fn 74), 71 (fn 34), 92 (fn 63), 99 (fn 33); Schwenger, ‘Arts 35–43’, above n 275, 452 (fn 33b); Stoll and Gruber, ‘Arts 74–77’, above n 70, 771 (fn 175); Francesco G Mazzotta, *The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example* (2003) <<http://cisgw3.law.pace.edu/cisg/biblio/mazzotta.html>>; Saidov, above n 211, (fns 351, 353, 355, 357); Perales Viscasillas, above n 60, (fn 23); Kruisinga, above n 91, 172, 180; Henschel, above n 275, 58, 158; Graffi, above n 71, (fn 65).

<sup>476</sup> Sant ‘Elia, above n 474.

<sup>477</sup> *Ibid.*

<sup>478</sup> *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) <<http://cisgw3.law.pace.edu/cases/000712i3.html>>.

<sup>479</sup> *Ibid.* 214. On art 35 of the *CISG*, see above nn 275, 279, 280, 283, 394 and 401.

<sup>480</sup> *Ibid.* 215. On this point, see above n 74.

circumstances.<sup>481</sup> The Court drew on Swiss and German *CISG* cases to conclude that it insufficient to simply state goods were ‘causing problems’ or ‘defective’.<sup>482</sup>

The Court then considered the definition of ‘reasonable time’ pursuant to art 39(1), and determined that art 39 should be read consistently with art 38(1), so that the ‘reasonable time’ for notice begins to run from the time when goods ought to have been inspected.<sup>483</sup> In this conclusion it relied on an Italian *CISG* case.<sup>484</sup> The Court observed that, in some cases, it might not be ‘practicable’ to discover defects until further processing or incorporation into other goods.<sup>485</sup> Arguably, this was true also of the fibreglass in *Summit*, but unfortunately, the attention of the bench was apparently not drawn to the *Tribunale di Vigevano* decision of four years earlier.

As to the length of time that would be reasonable for notice of non-conformity, the Court considered German and Italian *CISG* cases to conclude this was to be determined on a case-by-case basis.<sup>486</sup> Drawing on *CISG* cases from the Netherlands and Germany, the Court noted the importance of the nature of the goods, with perishability generally resulting in a shorter timeframe for notice of non-conformity.<sup>487</sup> It reviewed a series of *CISG* cases in which four, three and two months — and in one case, 25 days — were not considered reasonable,<sup>488</sup> and determined that four months was not reasonable for

<sup>481</sup> Ibid 218–19 (in reference to art 47 of the *CISG*). See also *CISG*, above n 1, art 48. More recently, comment on the purpose of notice of non-conformity under art 39 were made in a Dutch case: *Person of Greece v Ed Fruit and Vegetables BV* (Rechtbank Breda, Netherlands, 16 January 2009) [3.11] <<http://cisgw3.law.pace.edu/cases/090116n1.html>> (holding that prompt notice enables the seller to make an investigation and acquire proof).

<sup>482</sup> *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) 218–19 <<http://cisgw3.law.pace.edu/cases/000712i3.html>> (citing *Tinned Cucumbers Case* (Oberlandesgericht Düsseldorf, Germany, 8 January 1993) <<http://cisgw3.law.pace.edu/cases/930108g1.html>>; *T SA v R Établissement* (Handelsgericht Zürich, 30 November 1998) <<http://cisgw3.law.pace.edu/cases/981130s1.html>>).

<sup>483</sup> Ibid 215.

<sup>484</sup> Ibid (citing *C and M Srl v D Bankintzopoulos* (Pretura di Torino, Italy, 30 January 1997) <<http://cisgw3.law.pace.edu/cases/970130i3.html>>).

<sup>485</sup> Ibid 217–18.

<sup>486</sup> Ibid 215, (citing *Shirts Case* (Oberlandesgericht Düsseldorf, Germany, 10 February 1994) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940210g1.html>>; *Sport d’Hiver di Genevieve Culet v Ets Louys et Fils* (Tribunale Civile di Cuneo, Italy, 31 January 1996) <<http://cisgw3.law.pace.edu/cases/960131i3.html>>; *Plastic Granulate Case* (Oberlandesgericht München, Germany, 8 February 1995) <<http://cisgw3.law.pace.edu/cases/950208g2.html>>).

<sup>487</sup> Ibid 216 (citing: *CME Cooperative Maritime Etaploise SACV v Bos Fishproducts Urk BV* (Arrondissementsrechtbank Zwolle, Netherlands, 5 March 1997) <<http://cisgw3.law.pace.edu/cases/970305n1.html>>; *Fallini Stefano & Co SNC v Foodik BV* (Arrondissementsrechtbank Roermond, Netherlands, 19 December 1991) <<http://cisgw3.law.pace.edu/cases/911219n1.html>>; *Shoe Case* (Amtsgericht Augsburg, Germany, 29 January 1996) <<http://cisgw3.law.pace.edu/cases/960129g1.html>>; *Knitware Case* (Amtsgericht Kehl, Germany, 6 October 1995) <<http://cisgw3.law.pace.edu/cases/951006g1.html>>; see also *Flowers Case* (Oberlandesgericht Saarbrücken, Germany, 3 June 1998) <<http://cisgw3.law.pace.edu/cases/980603g1.html>>).

<sup>488</sup> Ibid 216 [13] (citing: *WMJM Bronneberg v Ceramica Belvédère SpA* (Hoge Raad, Netherlands, 20 February 1998) <<http://cisgw3.law.pace.edu/cases/980220n1.html>>; *Shirts Case* (Oberlandesgericht Düsseldorf, Germany, 10 February 1994) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940210g1.html>>; *Gruppo IMAR SpA v Protech Horst* (Arrondissementsrechtbank Roermond, Netherlands, 6 May 1993),

non-perishable goods.<sup>489</sup> This was especially so because upon discovery of the defects after processing, the buyer attempted to sell them rather than notify the seller. The Court appeared to attribute the delay to this conduct, observing that the seller was only notified after retailers forced the buyer to accept returns of the shoes.<sup>490</sup> This demonstrates the relevance of behaviour in calculation of a 'reasonable time' for notice, as suggested above in relation to *Playcorp*.<sup>491</sup>

The Court held that the buyer had lost the right to rely on non-conformity on two grounds: notice of non-conformity was insufficiently specific; and further, notice was late.<sup>492</sup> The buyer also failed to show that the seller already knew or could not have been unaware of the defect pursuant to art 40, or that there was a justifiable excuse for the delay pursuant to art 44. These might have relieved the buyer from the need to provide notice, or at least timely notice.<sup>493</sup>

The careful reasoning and internationalist spirit of this decision was subsequently confirmed by the CISG Advisory Council which dealt with arts 38 and 39 in much the same way.<sup>494</sup> The CISG Advisory Council stated that there are two relevant periods of time: the period for examination of the goods per art 38, and the period for giving notice under art 39. The latter commences upon expiry of the former, at the end of the time when the buyer 'ought to have discovered' the defect, or upon actual discovery.<sup>495</sup> Like the *Tribunale di Vigevano*, the CISG Advisory Council noted that perishability was highly relevant.<sup>496</sup> The CISG Advisory Council echoed the Court's comments on practicability of examination, noting that sometimes, particularly with complex goods, 'it may not be commercially practicable to examine the goods ... until they can be used in the way intended'; that often, sub-purchasers conduct the examination, and that time begins to run for latent defects only when signs of

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<<http://cisgw3.law.pace.edu/cases/930506n1.html>>; *Textiles Case* (Oberlandesgericht Düsseldorf, Germany, 12 March 1993) <<http://cisgw3.law.pace.edu/cases/930312g1.html>>; *Electrical Goods Case* (Audiencia Provincial de Navarra, Spain, 27 March 2000) <<http://cisgw3.law.pace.edu/cases/000327s4.html>> (holding that 4–6 months was too long). For general discussion of time limits, see CISG Advisory Council, *Opinion No 2*, above n 74; Schwenger, 'National Preconceptions', above n 74, 121–4, Baasch Anderson, 'Reasonable Time in Article 39(1)', above n 74.

<sup>489</sup> *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) 216 <<http://cisgw3.law.pace.edu/cases/000712i3.html>>.

<sup>490</sup> *Ibid* 217–18.

<sup>491</sup> See *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003); see also above n 335 and accompanying text (in relation to seller's behaviour having 'strung along' the buyer).

<sup>492</sup> *Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina SpA* (Tribunale di Vigevano, Italy, 12 July 2000) 219 <<http://cisgw3.law.pace.edu/cases/000712i3.html>>.

<sup>493</sup> *Ibid* 219–20. See further above n 406.

<sup>494</sup> CISG Advisory Council, *Opinion No 2*, above n 74. CISG-AC Opinions are persuasive but not binding.

<sup>495</sup> *Ibid*.

<sup>496</sup> *Ibid* (stating that any calculation of 'reasonable time' should take account of the 'nature of the goods, the nature of the defect, the situation of the parties and relevant trade usages'). CISG cases also highlight seasonality as a factor: *Italdecor Sas v Yiu's Industries (HK) Ltd* (Corte di Appello di Milano, Italy, 20 March 1998) <<http://cisgw3.law.pace.edu/cases/980320i3.html>> (dealing with knitted goods required for Christmas sales). On longer periods for complex machinery, see *Engines for Hydraulic Presses and Welding Machines Case* (Landgericht Düsseldorf, Germany, 23 June 1994) <<http://cisgw3.law.pace.edu/cases/940623g1.html>>. Compare this to 'a few days' in the recent case of *Person of Greece v Ed Fruit and Vegetables BV* (Rechtbank Breda, Netherlands, 16 January 2009) [3.12] <<http://cisgw3.law.pace.edu/cases/090116n1.html>> (dealing with watermelons).

non-conformity 'become evident'.<sup>497</sup> Finally, it also emphasised the need for specificity. The CISG Advisory Council stated that notice should describe at least the 'symptoms' where the buyer is unable to be more specific.<sup>498</sup>

One cannot help but think that Australian courts might have benefited from such persuasive authority. In fairness, the CISG Advisory Council *Opinion No 2* was not available until after *Summit* was decided, but all *CISG* decisions post-*Roder Zelt* could have made reference to the *Tribunale di Vigevano* decision, as a relevant source of guidance on arts 35–44.

Perhaps even more relevant than its legal conclusions, the *Tribunale di Vigevano* decision is demonstrative of the correct interpretive approach to the *CISG* in any jurisdiction. Thus it was praised as a significant contribution to global jurisprudence on the *CISG*: a 'classic' case.<sup>499</sup> The key was its reference to a wide range of *CISG* cases from various jurisdictions including arbitral decisions, and its careful avoidance of domestic legislation, cases and principles in interpreting the *CISG*. In addition to clear reasoning, these qualities have made the case highly persuasive for courts or tribunals around the world.

As noted above, many Italian courts are still prone to viewing the *CISG* through 'domestic lenses'.<sup>500</sup> Yet, the brilliance of cases like those in the *Tribunale di Vigevano* is that they show that some Italian courts have turned the corner — it has to be said — with style. This was again recently demonstrated in the *Tribunale di Forli*.<sup>501</sup> While 'enlightened' cases are far from prevalent, Italian courts are recognisably at the forefront of *CISG* interpretation.<sup>502</sup> Improvement in the US courts has been more modest, but there is evidence that recent efforts by US litigators have vastly improved.<sup>503</sup> No jurisdiction can claim a perfect record, but the situation in Australia is worse than most.

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<sup>497</sup> CISG Advisory Council, *Opinion No 2*, above n 74, art 38 §3.

<sup>498</sup> *Ibid.* See also *Inflatable Triumphal Arch Case* (Handelsgericht Aargau, Switzerland, 5 November 2002) <<http://cisgw3.law.pace.edu/cases/021105s1.html>>; *Acrylic Blankets Case* (Oberlandesgericht Koblenz, Germany, 31 January 1997) <<http://cisgw3.law.pace.edu/cases/970131g1.html>>; *Machinery Case* (Tribunale di Busto Arsizio, Italy, 13 December 2001) <<http://cisgw3.law.pace.edu/cases/011213i3.html>>. On specificity of notice, see above n 74).

<sup>499</sup> Bruno Zeller, 'The UN Convention on Contracts for the International Sale of Goods (CISG) — A Leap Forward towards Unified International Sales Laws' (Essay, Pace Law School, 1 May 2000) (fn 48) and accompanying text <<http://cisgw3.law.pace.edu/cisg/biblio/zeller3.html>>; Sant 'Elia, above n 474. See also above n 475; Mazzotta, above n 307, 1 (noting the high quality of recent Italian cases).

<sup>500</sup> See above n 140.

<sup>501</sup> *Mitias v Solidea Srl* (Tribunale di Forli, Italy, 11 December 2008) <<http://cisgw3.law.pace.edu/cases/081211i3.html>>. Baasch Andersen explains that the recent excellence of Italian decisions seems to be largely due to the fact that many of the judges involved were former students of noted *CISG* scholar, Franco Ferrari: Baasch Andersen, 'Global Jurisconsultorium', above n 132, (fn 50).

<sup>502</sup> See above n 499.

<sup>503</sup> Excellent depth of analysis and impressive citation of scholarship and foreign caselaw appears in briefs of counsel presented in *Treibacher Industrie AG v TDY Industries Inc* (US District Court (ND Ala), US, 27 April 2005) <<http://cisgw3.law.pace.edu/cases/050427u1.html>> (the Appellant's Opening Brief cites the works of 10 authors worldwide, four foreign *CISG* cases and legislative history; the Appellee's Brief cites five scholarly works, four foreign *CISG* cases and the *Secretariat Commentary*); see also *La Delizia Friulani la Delizia, SCARL v Columbia Distributing Co Inc* (US District Court, US (WD Wash), 9 September 2004) <<http://cisgw3.law.pace.edu/cases/040909u1.html>> (in which the Plaintiff's Brief cited two CISG-AC Opinions within clearly *CISG* oriented-argument on

VIII CONCLUSION: THE WAY AHEAD — MORE CONTINENTAL DRIFT OR RETURN TO THE COMMUNITY OF *CISG* JURISPRUDENCE?

Since *CISG* decisions are reported on the global stage, poor national form becomes a matter of international public record.<sup>504</sup> The quality of Australian decisions has not gone unnoticed, and is rightfully the subject of concern at the international level. In the application of the ‘Magna Carta’ of international trade,<sup>505</sup> our efforts have been conspicuously less than world-class.

A pattern has emerged. Australian lawyers not only avoid the *CISG* in drafting, but when, against the odds, the *CISG* does govern a contract, counsel prefer to avoid it. However, ignorance is far from bliss. Counsel’s approach almost invariably misleads the bench in one of two ways: the court is either lulled into application of the wrong law, or fails to grasp the *CISG*’s preemptive quality and the need to interpret the *CISG* autonomously and internationally. As the rest of the world removes or at least peers over their ‘domestic lenses’ Australia risks becoming an increasingly isolated island of *CISG* ignorance.

We can make excuses. It is true that some perceived inadequacies of Australian *CISG* cases spring from their largely interlocutory nature, as was true of *Summit*. But it is submitted that once procedural issues are stripped away, application of the *CISG* by most Australian courts still leaves much to be desired. Not since *Roder Zelt* and *Perry* have we seen a serious attempt at real engagement with the *CISG* in any case where the *CISG* was applicable.

Courts have been misled into treating the *CISG* as a variant of local sales statutes. In all cases post-*Perry* where the *CISG* should have been applied, domestic cases and concepts have been used to interpret it, or domestic law has been openly applied, despite acknowledgement that the *CISG* was applicable.<sup>506</sup> This endangers Australia’s compliance with treaty obligations, and seriously undermines the international spirit of the *CISG*.

Written comments on the poor quality of Australian decisions are few. The parlous state of our decisions has seen very few of them drawn into *CISG* jurisprudence as sources cited by other courts, a sure sign of the regard in which they are held. The situation is one commonly discussed informally at conferences, especially when Australians are in attendance.

What has led us to this point? As discussed above, the *CISG* has substantive pros and cons, but also many overriding and invaluable practical benefits, and

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notice of non-conformity and latent defects, pointing out the opponent’s failure to cite any *CISG* cases and the opponent’s attempt, in reliance on domestic cases, ‘to avoid the result mandated by the *CISG*’. The case was ultimately settled). See Alain A Levasseur, ‘United States of America’ in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 313, 317–18 (fn 10), 320 (praising the briefs in *Treibacher* and *Delizia*, and also observing that lawyers in *Barbara Berry* presented a very thoroughly researched brief that cited five foreign cases from four nations and three scholars). See also *Barbara Berry SA de CV v Ken M Spooner Farms, Inc* (US District Court (WD Wash), US, 13 April 2006) <<http://cisgw3.law.pace.edu/cases/060413u1.html>>.

<sup>504</sup> International reports for each Australian *CISG* case are noted, above nn 145, 155, 188, 192, 201, 268, 309, 357, 388.

<sup>505</sup> Martin Karollus, ‘Judicial Interpretation and Application of the *CISG* in Germany 1988–1994’ in Cornell Law Review (ed), *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995) 51, 77.

<sup>506</sup> See especially the application of pre-empted domestic law in *Playcorp* [2003] VSC 108 and *Italian Imported* [2006] NSWSC 1060.

plenty of flexibility. At this stage in Australia, it seems much of the disconnect can be attributed to a lack of familiarity with or even awareness of the *CISG* by Australian practitioners. Symptomatic of this is the failure to plead the *CISG* in 63 per cent of Australian cases in which it was governing law.<sup>507</sup> Even taking into account variations in pleadings rules, this shows that all too often, the exclusively applicable law is a mere afterthought. It is at least heartening to see that recently in *Vetzeria*, the *CISG* was referred to in original pleadings.

Australia has the capacity to turn the current continental drift around, in the same way as Italy and, to a lesser extent, the US. A demand for Continuing Legal Education on the *CISG* would be a rallying point for this process amongst practitioners. Of course, better incorporation of *CISG* into the undergraduate study of contract law also has a part to play,<sup>508</sup> but it should be remembered Australian law schools have produced some of the finest student advocates in the Willem C Vis International Commercial Arbitration Moot over the last 16 years.<sup>509</sup> Their familiarity and expertise in the *CISG* will perhaps endure and filter through to more considered advice in the contract drafting stage, and proper argument on the *CISG* in litigation. We have produced a small number of *CISG* academics.<sup>510</sup> Encouragingly, great sensitivity toward and proper interpretation of the *CISG* has been demonstrated just recently by Finn J in *Hannaford*, despite the inapplicability of the *CISG* in that case.

Commercial pressures could force Australia to improve its track record. Although other pockets of *CISG*-phobia still exist in the world,<sup>511</sup> the *CISG* now frequently serves as a model for the revamp of many domestic laws.<sup>512</sup> Lawyers in the US are starting to respond to commercial pressure.<sup>513</sup> Our close trading ties with China and the Asia-Pacific region will eventually force Australian

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<sup>507</sup> The *CISG* was inapplicable in *Renard* (1992) 26 NSWLR 234; *South Sydney* [2000] FCA 1541 (Unreported, Finn J, 3 November 2000); and *Hannaford* [2008] FCA 1591 (Unreported, Finn J, 24 October 2008), and of the remaining eight cases, the *CISG* was only pleaded in *Ginza* [2003] WASC 11 (Unreported, Barker J, 17 January 2003); *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003); and *Vetzeria* [2008] SASC 75 (Unreported, Duggan J, 14 March 2008).

<sup>508</sup> See above n 501, on how legal education largely influenced the improvement of Italian decisions.

<sup>509</sup> Australian teams have performed remarkably well. The Vis moot, which now attracts 203 teams from 52 countries, has been won by The University of Queensland (1997 and 2000), Deakin University (1999) and Monash University (2001), with Australian teams often placing second (Deakin University, 1996; The University of Queensland, 1998 and 2002) and third (Deakin University, 1994, The University of New South Wales, 1999; The University of Notre Dame, 2005). Australian individual student advocates have finished: first (The University of Queensland, 2002; Deakin University, 2003; The University of New South Wales, 2005); second (Deakin University, 1996; Monash University, 2006) and third (Deakin University, 1996; The University of Queensland, 1998–2000; Monash University, 2008 and 2009). Team results from the Hong Kong-based Vis East Moot include first (Griffith 2008) and second (Deakin 2006).

<sup>510</sup> Namely, Bruno Zeller and John Felemegas. Luke Nottage is a New Zealander based in Sydney.

<sup>511</sup> Klotz, Mazzacano and Pribetic, above n 434, 1 (commenting on the slow pace of development of a body of *CISG* cases in Canada).

<sup>512</sup> See, eg, the Netherlands, Germany, Czech Republic, Russia, Yugoslavia, China and others: Peter Schlechtriem, 'Introduction' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> ed, 2005) 10.

<sup>513</sup> Flechtner, 'Changing the Opt-Out Tradition', above n 32.

lawyers into closer contact with the *CISG*. Where the Chinese counterparty has superior bargaining strength, the option of opting out is less likely to be available.<sup>514</sup> Not only do surveys confirm the lower frequency of opting out of the *CISG* by Chinese practitioners, but individual comments reveal an undercurrent of pressure to use the *CISG* when Chinese counterparties are involved.<sup>515</sup> Further, as statistics demonstrate,<sup>516</sup> Australian counterparties can expect to be more frequently involved with arbitrations in China, in forums highly familiar with the *CISG* and predisposed to its application.<sup>517</sup>

In any case, we should be motivated to improve our track record on purely professional grounds. We do our clients a disservice by contracting out of the *CISG* automatically. As part of Australian law, the *CISG* is a legal tool like any other. Its content should be assessed, and utilised where it provides the best outcome for the client.<sup>518</sup> There is no other area of Australian law which would be excluded without an understanding of its content.

Likewise, court resources and client costs are wasted when all involved are oblivious to either the *CISG*'s application, the need to interpret it autonomously and internationally, or its pre-emption of domestic law. Australia has a disproportionate number of cases where *CISG* applicability is not raised until the late stages of hearings, or worse still, after trial decisions. If counsel are cognisant of its applicability, any residual reluctance to properly engage with the *CISG* will not serve clients or the administration of justice well, since viable and sometimes vital arguments are likely to be overlooked. Australian courts have decided cases on the basis of inapplicable law, or descended into impermissible 'domestication' of the *CISG* by interpreting it by reference to familiar but irrelevant concepts and authorities. Further, important provisions have been simply overlooked or misunderstood. The potential for appeals and wasted judicial resources is obvious.

Our prolonged ignorance and underperformance can no longer be excused, either commercially or professionally. We now have easy access to *CISG* materials with the advent of excellent free internet sites that comprehensively index and hyperlink translated texts of *CISG* cases from around the world, as well as significant commentary.<sup>519</sup>

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<sup>514</sup> See above n 95.

<sup>515</sup> See, eg, a response to the Fitzgerald survey, where one US practitioner commented that '[p]articularly in Chinese transactions, the *CISG* will apply to the international contract' Fitzgerald, above n 75, 106. In the Philippopoulos survey, a response to the question, 'Have you found lawyers or firms in a specific country that are particularly insistent on *CISG* as the governing law?' by a US practitioner stated that 'he prefers the *CISG* when contracting with Chinese firms because *CISG* is more easily understandable than the Chinese law alternative': Philippopoulos, above n 41, 364. See also Yang, above n 18, 376 (noting that '[w]hile the US trend has been for contracting parties frequently to opt out of the *CISG* ... the trend in China goes the other way'). See Han, above n 94, (Chinese lawyers 'seldom' opt out).

<sup>516</sup> Kritzer, 'CIETAC Arbitration Awards', above n 33 (identifying 21 Chinese *CISG* arbitration decisions involving Australian counterparties). The underreporting of Chinese cases means that the actual figure is likely to be substantially higher.

<sup>517</sup> Yang, above n 18, 384–5 (as applicable law, or gap-filler).

<sup>518</sup> See, in support, Shiu, above n 244 (an Australian practitioner recommending the advantages of the *CISG* should be considered on a case-by-case basis for international software contracts).

<sup>519</sup> See above n 128.

Australian lawyers can use these resources to turn the corner by improving their awareness of the *CISG*, which will enable them to plead appropriately. In formulating arguments where the *CISG* applies, counsel must consult *CISG* resources in *CISG* interpretation, and refrain from citing domestic cases for that purpose.<sup>520</sup> In the *CISG*, counsel will find a rich new vein of argument. Front-end lawyers will find a sound choice of law with systemic and strategic advantages for many clients, including fundamentally predictable outcomes irrespective of dispute settlement forum, or jurisdiction, other than those jurisdictions in which courts have not yet come to terms with the *CISG*. Consequently, until Australian courts have turned the corner, any Australian party making a choice of law utilising the *CISG* would be well advised to include an arbitration clause.<sup>521</sup>

However, Australian courts can take steps to become *CISG* friendly. A harder line can be taken in regard to the reluctance of counsel to properly address the governing law of the contract. Appropriate concern from the bench regarding citation of non-*CISG* cases and legislation, coupled with suggestions that pleadings be amended to address the *CISG* where necessary, should be enough to sway counsel to properly formulate argument on the basis of the applicable law. Where reluctance persists, a tough *Perry*-like stance is to be preferred.<sup>522</sup>

Courts should not allow themselves to be persuaded to apply inapplicable law, nor to incorrectly refer to non-*CISG* sources in interpreting the *CISG*. Despite the preferences of counsel to the contrary, courts need to fully appreciate the pre-emptive effect of the *CISG*, that is, domestic law which overlaps with issues within the *CISG*'s scope will be excluded if the *CISG* is applicable,<sup>523</sup> irrespective of the failure of the claim pursuant to *CISG* provisions, and will remain inapplicable despite denial of leave to plead the *CISG*. Internal gap-filling methods and *CISG* cases and scholarship are vital to proper interpretation of the *CISG*. It is essential that each of these aspects of *CISG* interpretation and application be seen for what it is; a requirement of Australian law. To ignore any of them would be an error of law.

Moreover, proper application of the *CISG* offers a rare opportunity for our courts to draw upon and help build an international jurisprudence<sup>524</sup> in which consideration of views from courts, tribunals and scholars around the world is not only legitimate, but required, and in which the value of a decision or opinion owes more to its clarity of reasoning than its hierarchical status. This global

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<sup>520</sup> Ibid.

<sup>521</sup> Arbitral tribunals have generally better understood and applied the *CISG*: see above n 41.

<sup>522</sup> See the discussion above n 124. It is important to note that in three 'enlightened' decisions of Italy faced similar hurdles, and the Court had to resort to the principle of *iura novit curia*: Torsello, above n 96, 187, 191–5 (fns 20, 22), 209; Franco Ferrari, 'CISG Rules on Exclusion and Derogation: Article 6' in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 114, 131. I would argue that the imperative to apply the *CISG* uniformly and internationally prevails over domestic procedural rules, at least to the extent such rules allow the application of non-applicable law: see, above n 242. Common law courts may need to therefore adopt an attitude approaching *iura novit curia* to fulfil the obligation under the *CISG*. See also Pribetic, above n 26.

<sup>523</sup> This is subject to art 7(2) of the *CISG*. See above n 131.

<sup>524</sup> See above n 132.

'jurisconsultorium'<sup>525</sup> is already a reality, but currently almost bereft of judicial input from Australia.<sup>526</sup>

Given the escalating competitiveness of international trade, and rapidly growing importance of the *CISG* in the Asia-Pacific region,<sup>527</sup> Australia cannot afford to continue to ignore the *CISG*. Australian lawyers need to obtain the skills to utilise this valuable legal tool and to improve their own competitiveness in the international legal market. Our courts need to shed the comfort of familiar terms and precedents in order to abide by Australian treaty obligations, as well as observe the spirit of uniformity and international jurisprudence that has been fostered by the *CISG*. We should also pause to consider the perception of those doing business with Australia if we fail to turn the corner: their perception of Australian law firms, and of the suitability of Australia courts for the resolution of international sales disputes, and by extension, Australia as a hub for international commercial dispute resolution.

Our track record should pose as a glaring red flag. Australia has become an international example of a country that still fails to apply the *CISG* properly. *Hannaford* illuminates the way ahead. From it we must take our cue and replicate the lead of the *Tribunale di Vigevano*, if we are to avoid the fate of being characterised as an outpost of *CISG* ignorance.

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<sup>525</sup> Baasch Andersen, 'Global Jurisconsultorium', above n 132. For evidence of activity within the jurisconsultorium, one need only check the cases and commentaries added every month on the Pace Law School website: Pace Law School, *Recently Added Cases, Case Translations and Commentaries* <<http://cisgw3.law.pace.edu/cisg/new-cases.html>>.

<sup>526</sup> As *Hannaford* did not involve a direct application of the *CISG*, we are left with *Roder Zelt* and the first instance in *Downs* as the only Australian *CISG* cases still attracting any international attention.

<sup>527</sup> See above n 23 and accompanying text.