AN INTERNATIONALIST APPROACH TO INTERPRETING PRIVATE INTERNATIONAL LAW? ARBITRATION AND SALES LAW IN AUSTRALIA

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Important aspects of Australia's private international law — including its international commercial arbitration and international sales laws — have international origins. The instruments underlying these laws rely upon uniform interpretation to fulfil their trade promotion purposes. Yet Australia does not always fulfil its part of this bargain: internationally minded interpretations of these instruments' local implementations are not always evident in the case law. This article analyses the interpretative rules governing Australia's international commercial arbitration and international sales laws, identifying a legal requirement of internationalist interpretation. It assesses the extent to which their interpretations by Australian courts live up to this standard, demonstrating improvements over time in the case of arbitration law but ongoing deficiencies in the sales law field. As a result, recommendations are made as to how the reasoning of Australian courts in international sales cases can be improved. These recommendations are ultimately directed at aiding Australian merchants and their trading partners, the intended beneficiaries of these laws.

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I Introduction

> [W]e will decide, and we should decide who comes to this country and not allow the interpretations of others outside this place decide what our international obligations are.[1]

Private international law ('PIL'), broadly defined, is state law dealing with cases having a foreign element.[2] PIL is usually considered domestic law, even when having international origins.[3] This article examines judicial interpretations of internationally promulgated PIL in Australia. It argues, with reference to international commercial arbitration ('ICA') and international sales law, that these laws are legally required to be interpreted in an internationalist manner. It also demonstrates that interpretations of Australia's ICA laws have improved in the period following 2010 when measured against this standard, whilst simultaneously deteriorating in the sales law context.

This article defines internationalist interpretation as the interpretation of PIL legislation, by the courts, in a manner which pays due regard to its international nature and harmonising purposes.[4] Such interpretations may refer, for example, to foreign judicial or arbitral case law (notwithstanding its value is only persuasive) and international secondary sources (including *travaux préparatoires*: treaty negotiation records), with a view to interpreting laws consistently with their international understandings.[5] This article addresses internationalist interpretation by examining the interpretative rules applicable to select Australian-adopted PIL instruments, and the take-up of those rules in Australian case law.

[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 2014, 10,937 (Scott Morrison, Minister for Immigration and Border Protection) ('*Parliamentary Debates*').

[2] Lord Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) 3 [1-001].

[3] Gülüm Bayraktaroğlu, 'Harmonization of Private International Law at Different Levels: Communitarization v International Harmonization' (2003) 5(1) *European Journal of Law Reform* 127, 130–1. Instances where this is not the case, including EU regulations, are not relevant to this article's Australian analysis: see, eg, *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.

[4] This term appears in existing Australian ICA literature, though without definition: Luke Nottage, 'International Commercial Arbitration in Australia: What's New and What's Next?' (2013) 30(5) *Journal of International Arbitration* 465, 491. See also Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore* (Kluwer, 2016) 59, defining the phrase 'internationalist approach to interpretation' with reference to the United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments adopted in 2006* ('*Model Law 2006*').

[5] Lewis (n 4) 51, 55–6, 59.

Internationalist interpretation directly contrasts with the notion, reflected in this article's epigraph, that the interpretations of others do not 'decide what our international [treaty] obligations are'.[6] That comment arose in the highly-political migration law context, a subject matter not addressed by this article. However, this article's examination of judicial attitudes to commercial law instruments concerns the same fundamental issue: the law's interpretation. This article's epigraph reflects parochial interpretation, internationalist interpretation's polar opposite. Parochial interpretations draw upon Australian sources, and are limited in their scope by an Australian worldview.

As applied to ICA and international sales law, internationalist interpretation raises important policy considerations. Differences in private law between jurisdictions are believed to create barriers to trade[7] and increase the costs of doing business,[8] while harmonised laws seek to lower those costs.[9] Through harmonisation, ICA and international sales laws seek to promote international trade.[10] In times of rising trade protectionism, their task of lowering merchant-to-merchant transaction costs takes on additional significance.

[6] Commonwealth, *Parliamentary Debates* (n 1).

[7] Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Ian Fletcher, Loukas Mistelis and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, 2001) 3, 21–2 [1-047].

[8] David W Leebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27(1) *Canadian Business Law Journal* 63, 76–7.

[9] Ibid; Christopher Kee and Edgardo Muñoz, 'In Defence of the CISG' (2009) 14(1) *Deakin Law Review* 99, 102.

[10] See UNCITRAL Secretariat, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations, 2016) 4 [13]; *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN Doc A/RES/40/72 (11 December 1985) ('*Model Law*'); *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) Preamble ('*CISG*'). The legal rules governing the interpretation of these bodies of law, reflecting these purposes, are addressed below in Parts II–IV.

While simply adopting international instruments secures textual legal uniformity, judicial decisions are the means by which *applied* uniformity is secured,[11] which is what *really* matters for disputing merchants.[12] Though this article does not seek to validate the assumptions underpinning harmonised PIL,[13] instead taking them to be true, the practical importance of ensuring PIL's applied uniformity justifies its own analysis.[14] Diverging interpretations of harmonised PIL instruments still generate the transaction costs sought to be reduced.[15] Parochial interpretations thus risk incentivising the avoidance of these laws by the very merchants intended to be benefited, frustrating their reason for existence.[16]

[11] Camilla Baasch Andersen, 'Defining Uniformity in Law' (2007) 12(1) *Uniform Law Review* 5, 43–4; Camilla Baasch Andersen, 'A New Challenge for Commercial Practitioners: Making the Most of Shared Laws and Their "Jurisconsultorium"' (2015) 38(3) *University of New South Wales Law Journal* 911, 912–16 ('A New Challenge'); Camilla Baasch Andersen, 'Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through a Global Jurisconsultorium of the CISG' in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar, 2012) 30, 32–3 ('Applied Uniformity').

[12] See especially Andersen, 'Applied Uniformity' (n 11) 39.

[13] This matter is debated elsewhere in the literature: see, eg, Paul B Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) 39(3) *Virginia Journal of International Law* 743, 743–51; Bayraktaroğlu (n 3) 131–2. See also John F Coyle, 'The Role of the CISG in US Contract Practice: An Empirical Study' (2016) 38(1) *University of Pennsylvania Journal of International Law* 195; Gilles Cuniberti, 'Is the CISG Benefiting Anybody?' (2006) 39(5) *Vanderbilt Journal of Transnational Law* 1511; James Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32(2) *Cornell International Law Journal* 273; Mads Andenas, Camilla Baasch Andersen and Ross Ashcroft, 'Towards a Theory of Harmonisation' in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar, 2012) 572, 594.

[14] This is arguably so even where particular means of harmonisation, including model laws and some forms of European Union law, permit national variations: cf *Consolidated Version of the Treaty on the Functioning of the European Union* [2016] OJ C 202/47, arts 114(4)–(6); Eva J Lohse, 'The Meaning of Harmonisation in the Context of European Union Law: A Process in Need of Definition' in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar, 2012) 282, 287–8. This is because international commercial law is a field implicating 'immediate economic benefits to be had by removing barriers to trade': Andersen, 'Applied Uniformity' (n 11) 39.

[15] For example, one respondent to the Global Empirical Survey on Choice of Law cited the 'risk of different interpretation of the same rules in different jurisdictions' as justifying exclusion of the *CISG* (n 10): Gustavo Moser, *Rethinking Choice of Law in Cross-Border Sales* (Eleven International Publishing, 2018) 72–3 [1.2.4.5.1].

[16] Franco Ferrari, 'Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts' in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law Across National Boundaries* (Wildy, Simmonds & Hill Publishing, 2008) 134, 143 ('Have the Dragons of Uniform Sales Law Been Tamed?'); Andersen, 'Applied Uniformity' (n 11) 35. See also Andenas, Andersen and Ashcroft (n 13) 584.

This article addresses three ICA and sales law instruments: the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*'),[17] the *UNCITRAL Model Law on International Commercial Arbitration* in its 1985 ('*Model Law 1985*') and 2006 ('*Model Law 2006*') incarnations,[18] and the *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*').[19] All are locally adopted.[20] The incorporation of these instruments *into* Australian law,[21] otherwise adhering to precedent and containing its own statutory interpretation rules, lays the groundwork for the internationalist–parochial interpretative tension under investigation.[22]

This article's joint examination of ICA and international sales law is justified by the practical convergence of these fields: ICA is empirically confirmed as the principal forum for resolving international sales disputes.[23] Nevertheless, the *CISG*'s substantive law nature is a limitation of this article's analysis. Though it

[17] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*').

[18] *Model Law on International Commercial Arbitration of the United Nations Commission on International World Trade Law*, UN Doc A/40/17 (11 December 1985) annex 1 ('*Model Law 1985*'); *Model Law 2006* (n 4).

[19] *CISG* (n 10).

[20] The *New York Convention* (n 17) came into force in Australia on 24 June 1975: United Nations, 'Chapter XXII: Commercial Arbitration and Mediation: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958', *United Nations Treaty Collection* (Web Page, 2020) <https://.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en>, archived at <https://perma.cc/FBF2-6B4E>. The *Model Law 1985* (n 18) was adopted into Australian Law by the *International Arbitration Amendment Act 1989* (Cth) s 7, with the *Model Law 2006* given effect by the *International Arbitration Amendment Act 2010* (Cth) s 27 ('*Amendment Act*'). The *CISG* (n 10) entered into force for Australia on 1 April 1989: see below n 221 and accompanying text.

[21] Cf *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 32–3 [99] (McHugh and Gummow JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 531 [21] (French CJ).

[22] See Pilar Perales Viscasillas, 'Article 7' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (CH Beck, Hart and Nomos, 2nd ed, 2018) 112, 115 [7], regarding the *CISG* (n 10).

[23] André Janssen and Matthias Spilker, 'The Application of the CISG in the World of International Commercial Arbitration' (2013) 77(1) *Rabel Journal of Comparative and International Private Law* 131, 132–4; Ingeborg Schwenzer and Christopher Kee, 'International Sales Law: The Actual Practice' (2011) 29(3) *Penn State International Law Review* 425, 431–2, 437–8; Loukas Mistelis, 'Article 1' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (CH Beck, Hart and Nomos, 2nd ed, 2018) 21, 26 [18]; Loukas Mistelis, 'CISG and Arbitration' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 375, 386–91.

is PIL in the broadest, 'cases having a foreign element', sense,[24] the *CISG* does not address typical (procedural) PIL rules of jurisdiction, applicable law identification, or enforcement;[25] instead containing substantive contract law rules.[26] This article's comparison is thus not strictly like-with-like, a matter returned to in Part V, which partially explains the Australian courts' differing treatment of these two bodies of law.

This article's analysis is conducted in two stages. First, Part II analyses the abstract rules governing the *New York Convention*, *Model Law*, and *CISG*'s interpretations. It identifies a legal requirement of internationalist interpretation for each, though for differing reasons given their very different natures. Second, Parts III and IV address the interpretative impact of the adoption of these instruments into Australian law. For the *New York Convention* and *Model Law* (Part III) and the *CISG* (Part IV), the extent to which *Australian law* requires their internationalist interpretation is assessed. Case studies are used to evidence trends in Australia's actual interpretative experience. Both stages of inquiry are necessary to assess whether these instruments are fulfilling their harmonisation objectives in Australia. It is one thing for instruments to be governed by internationally minded interpretative rules, but another for Australian courts to embrace that methodology.[27]

Part V concludes that Australia's track record of internationalist interpretation has improved in the period following 2010 with respect to ICA law, but deteriorated regarding the *CISG*. Possible explanations are identified, with recommendations made as to how the *CISG* reasoning of Australian courts might

[24] Collins (n 2) 3 [1-001]. As Collins explains, a 'foreign element' simply means 'a contact with some system of law other than English [or any other relevant state's] law'. Such contact is inevitable where the *CISG* (n 10) applies as it regulates *international* sales, defined as sales where the buyer's and seller's residences are in different states: *CISG* (n 10) art 1(1).

[25] Collins (n 2) 4 [1-003]. The applicable law's identification is a procedural question, as distinct from its ultimate application (which is a matter of substance). Nevertheless, the *CISG*'s (n 10) application criteria are said to constitute 'a unilateral conflict norm': Erik Jayme, 'Article 1' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, 1987) 27, 28 [1.2]; cf *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* [2013] VSC 92, [23] (Davies J) ('*Castel v TCL 2013*'). For a description of Australia's common law rules addressing the applicable law's identification in contract cases: see Brooke Marshall, 'Australia' in Daniel Girsberger et al (eds), *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (Oxford University Press, forthcoming) [41.01], [41.06]–[41.14], [41.21]–[41.23], [41.41]–[41.43]; Michael Whincop and Mary Keyes, 'Putting the "Private" Back into Private International Law: Default Rules and the Proper Law of the Contract' (1997) 21(2) *Melbourne University Law Review* 515, 517–22.

[26] *CISG* (n 10) art 4.

[27] See Andersen, 'Applied Uniformity' (n 11) 51.

be improved. These recommendations (including legislative reforms) are directed at helping the *CISG* achieve its objects of benefiting local merchants and their international trading partners.

II Internationalist Interpretation as a Legal Requirement: The *New York Convention*, *Model Law*, and *CISG*

As a matter of law, and in the abstract, the *New York Convention*, *Model Law*, and *CISG* all require internationalist interpretation. These instruments (a procedural law treaty, template legislation, and a substantive law treaty) have very different characters, implicating distinct interpretative considerations. This Part's analysis of how these instruments are to be interpreted, in themselves, allows Parts III and IV to analyse the impact of their Australian adoption.

A *The* New York Convention

The *New York Convention* establishes uniform rules for the recognition and enforcement of arbitral agreements and awards.[28] It constitutes PIL as traditionally understood, addressing procedural questions of jurisdiction and enforcement.[29] As a treaty, public international law governs its interpretation. Relevant principles, reflected in the *Vienna Convention on the Law of Treaties* ('*VCLT*'), include that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

    (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

    (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[30]

[28] Gary B Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 106.

[29] Collins (n 2) 4 [1-003].

[30] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31 ('*VCLT*').

Article 32 of the *VCLT* establishes that 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' may be referred to when:

- confirming the ordinary meaning of treaty provisions; or
- Article 31 of the *VCLT*'s interpretation 'leaves the meaning ambiguous or obscure', or generates 'manifestly absurd or unreasonable' results.

Unsurprisingly, given their source, these rules facilitate the *New York Convention*'s internationalist interpretation.[31] Interpretation 'in light of its object and purpose'[32] implicates the pursuit of applied uniformity: the *Convention*'s harmonisation goals necessitate consideration of its international understanding. Similarly, consulting 'supplementary means of interpretation, including the preparatory work of the treaty'[33] (where permitted by the *VCLT*) allows decision-makers to better ascertain the *New York Convention*'s internationally-intended operation, by reference to the views of its internationally diverse drafters.

The attentive reader may note that the *VCLT* postdates the *New York Convention*'s entry into force.[34] While *VCLT* art 4 (its non-retroactivity provision) strictly precludes its application to the *Convention*, as its drafting pursued 'the codification and progressive development of the law of treaties',[35] 'those of its provisions which [are] codificatory will be of unlimited temporal application'.[36] The International Court of Justice's *Guinea-Bissau v Senegal* decision found that core principles of treaty interpretation were codified 'in many respects' by

[31] See Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer, 2016) 33; International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011) 13–14.

[32] *VCLT* (n 30) art 31(1).

[33] Ibid art 32.

[34] Benjamin Hayward, 'Pro-Arbitration Policy in the Australian Courts: The End of Eisenwerk?' (2013) 41(2) *Federal Law Review* 299, 308 ('Pro-Arbitration Policy').

[35] *VCLT* (n 30) Preamble para 7.

[36] Shabtai Rosenne, 'The Temporal Application of the Vienna Convention on the Law of Treaties' (1970) 4(1) *Cornell International Law Journal* 1, 3.

VCLT arts 31–2.[37] These rules thus remain applicable to the *Convention*'s interpretation, even if the *VCLT* is not.[38]

Hence, the *New York Convention*'s internationalist interpretation is required by public international law.

B *The* Model Law

The *Model Law*, being 'prototype' domestic law,[39] has a very different legal nature to the *New York Convention*. Whilst addressing (in part) the same procedural PIL issues of jurisdiction and enforcement, it inspires state development of arbitration legislation, rather than binding states at public international law as treaties do.[40] Some states adopt the *Model Law* verbatim, and others subject to major or minor amendment.[41] That the *Model Law*'s text may be varied or supplemented by states in their discretion makes the case for its internationalist interpretation less compelling from the outset,[42] notwithstanding its adoption by 83 states in 116 individual jurisdictions.[43]

Despite its international origins, the *Model Law*'s soft law character attracts very different interpretative considerations as compared to treaties. When implemented, it always constitutes domestic legislation,[44] making the *VCLT* (and equivalent customary public international law rules) inapplicable. In principle, the *Model Law* is on equal interpretative footing with ordinary state legislation,

[37] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)* [1991] ICJ Rep 53, 70 [48] (The Court). See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 294 (Kirby J) ('*Applicant A*'); *Ackers v Saad Investments Company Ltd (in liq)* (2010) 190 FCR 285, 295 [45] (Rares J).

[38] See also *VCLT* (n 30) art 4: 'Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention …'

[39] Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (Kluwer, 4th ed, 2019) 18.

[40] See generally Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 63 [1.219].

[41] Binder (n 39) 25–6.

[42] See Lewis (n 4) 27.

[43] United Nations Commission on International Trade Law, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006', *Texts & Status* (Web Page) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>, archived at <https://perma.cc/4RRY-AHXU>.

[44] See generally Ingeborg Schwenzer, 'Who Needs a Uniform Contract Law, and Why?' (2013) 58(4) *Villanova Law Review* 723, 728.

reinforced by the absence of any interpretative rules in the *Model Law 1985*'s original text.[45]

The *Model Law*'s 2006 amendments significantly changed this in principle position, however, adding an interpretative provision requiring its internationalist interpretation. Pursuant to the *Model Law 2006*:

> In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.[46]

Having regard to the instrument's 'international origin' and 'the need to promote uniformity in its application' requires decision-makers to 'look beyond the local jurisdiction to see how courts, commentators and arbitrators may have interpreted the provisions in question around the world', taking into account the drafting histories of both *Model Law* versions.[47] Article 2A(1) of the *Model Law 2006*'s own drafting history refers to *CISG* art 7(1) (its predecessor)[48] as 'designed to facilitate interpretation by reference to internationally accepted principles',[49] and discloses its purpose as promoting the *Model Law 2006*'s 'more uniform understanding'.[50] This provision thus requires the *Model Law 2006*'s internationalist interpretation,[51] not otherwise *necessarily* required of state legislation.

As the *Model Law 2006* is template legislation, *Model Law 2006* art 2A(1) only requires its internationalist interpretation if that specific provision is adopted by implementing states. The *Model Law*'s revision does not automatically make this provision operative in states previously adopting the *Model Law*

[45] Cf *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1995] 1 HKLR 300, 304–7, 313 (Kaplan J); *Arbitration Ordinance* (Hong Kong) cap 341, s 2(3); United Nations Commission on International Trade Law, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) 15 [2].

[46] *Model Law 2006* (n 4) art 2A(1).

[47] Howard M Holtzmann et al, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 2015) 25.

[48] Ibid 24.

[49] Ibid 27.

[50] Binder (n 39) 60, quoting *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session*, UN Doc A/61/17 (14 July 2006) 29 [175].

[51] Holtzmann et al (n 47) 24–5. See also Bruno Zeller and Camilla Andersen, 'The Transnational Dimension of Statutory Interpretation: Tragically Overlooked in a Global Commercial Environment' [2019] (1) *Nordic Journal of Commercial Law* 5, 11 n 23.

1985,[52] and states adopting the 2006 revisions may still vary or omit it. Notwithstanding reservations expressed as to this rule's suitability for model legislation, as opposed to treaties where states 'have a certain interest in maintaining a joint standard of interpretation',[53] almost all *Model Law 2006* adoptions include this provision.[54] Those jurisdictions' *own laws* therefore require the *Model Law 2006*'s internationalist interpretation. Most importantly, for present purposes, Australia is amongst them.[55]

In summary, the *Model Law 2006*'s internationalist interpretation is required not because of its nature, but despite its nature, because of its own terms.

C *The* CISG

Returning to *CISG* art 7(1), this provision enshrines a legal requirement of internationalist interpretation for that *Convention*:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.[56]

This article is the direct predecessor to *Model Law 2006* art 2A(1), and numerous similar provisions in other PIL instruments.[57]

The *CISG*'s substantive law nature, addressed above in Part I, has important interpretative implications alongside *CISG* art 7(1)'s existence. Since the *Convention*'s terms are mostly directed to private parties, rather than comprising state-to-state obligations, the *VCLT*'s application is marginalised.[58] Ordinary *VCLT* interpretation is principally confined to the *CISG*'s pt IV public international law provisions.[59] Its *VCLT* interpretation is otherwise exceptional: *VCLT*

[52] See, eg, Binder (n 39) 13, noting that notwithstanding the 2006 amendments, 'most adopting jurisdictions' arbitration laws are still based on the 1985 original'.

[53] Ibid 59.

[54] Ibid 60.

[55] As explained below in Part III, the *International Arbitration Act 1974* (Cth) sch 2 ('*IAA*') reproduces the *Model Law 2006* (n 4), including art 2A(1). Section 16(1) of the *IAA* (n 55) gives the *Model Law 2006* (n 4) 'the force of law in Australia'.

[56] *CISG* (n 10) art 7(1).

[57] Ingeborg Schwenzer and Pascal Hachem, 'Article 7' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4th ed, 2016) 119, 121 [6] n 14 ('Article 7').

[58] But see Camilla Baasch Andersen, 'Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and Other Uniform Sources' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 207, 255–8.

[59] Schwenzer and Hachem, 'Article 7' (n 57) 130 [23].

art 33, for example, might complement *CISG* art 7(1) in reconciling the *Convention*'s multiple authentic languages,[60] while *CISG* art 7(1) might be subject to *VCLT* interpretation since that provision 'cannot interpret itself'.[61]

Putting aside long-running debates over good faith obligations under the *Convention*,[62] *CISG* art 7(1) binds decision-makers interpreting it to take note of three directives.[63] Most importantly, for present purposes, decision-makers must consider the *CISG*'s international character and uniform application. These directives, being 'functionally interrelated and interdependent',[64] establish a requirement of autonomous interpretation and *CISG* art 7(1) is not a provision from which contracting states[65] (or arguably parties)[66] may depart. All major *CISG* texts endorse this reading of *CISG* art 7(1),[67] said to require interpretation of the *CISG* 'independently from any domestic preconception'.[68] Article 7(1) of the *CISG* displaces local interpretative rules, reflecting the more

[60] Ibid. Pursuant to the *CISG*'s (n 10) witness clause, the Arabic, Chinese, English, French, Russian, and Spanish texts of the *Convention* are equally authentic.

[61] Zeller and Andersen (n 51) 13.

[62] See generally Schwenzer and Hachem, 'Article 7' (n 57) 121 [6], 126–7 [16]–[17]; Perales Viscasillas (n 22) 122–6 [24]–[34]; Troy Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 3(1) *Vindobona Journal of International Commercial Law and Arbitration* 15; Troy Keily, 'Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods' [2003] (1) *Nordic Journal of Commercial Law* 3:1–21, 11.

[63] Schwenzer and Hachem, 'Article 7' (n 57) 121–2 [7]; Perales Viscasillas (n 22) 117 [16].

[64] Perales Viscasillas (n 22) 117 [16].

[65] *CISG* (n 10) art 98.

[66] Perales Viscasillas (n 22) 114 [3].

[67] See, eg, ibid 118 [18]; Michael Joachim Bonell, 'Article 7' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, 1987) 65, 74–5 [2.2.2]; 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* (Oceana Publications, 1992) 55–6 [3]–[4]; John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, ed Harry Flechtner (Kluwer, 4th ed, 2009) 118–19 [87]–[88]; Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier European Law Publishers, 2007) 7. Given their international reputations and frequently-cited status, the authors suggest that this list (along with the *Schlechtriem & Schwenzer* commentary cited immediately below at n 68) represents a reasonable, though not definitive, list of major *CISG* (n 10) texts. See also Permanent Bureau of the Hague Conference on Private International Law, 'Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a Focus on Sales): Consolidated Draft', *Hague Conference on Private International Law* (Preliminary Document, 16 January 2020) 27 [127]–[129]. Contrary authorities are certainly outliers: see, eg, Karen Halverson Cross, 'Parol Evidence under the CISG: The "Homeward Trend" Reconsidered' (2007) 68(1) *Ohio State Law Journal* 133, 138; Fariba Aghili, 'A Critical Analysis of the CISG as Australian Law' (2007–8) 21(4) *Commercial Law Quarterly* 15, 20–5.

[68] Schwenzer and Hachem, 'Article 7' (n 57) 122 [8].

general principle that the *CISG* displaces non-harmonised state law to its scope's extent.[69] Failure to interpret the *CISG* autonomously, as *CISG* art 7(1) requires, is known as the 'homeward trend'.[70]

The *CISG*'s autonomous interpretation corresponds with internationalist interpretation as defined by this article, while the homeward trend equates to parochial interpretation. However, this article uses its previously-established terminology of 'internationalist interpretation' and 'parochial interpretation' for consistency across its discussion of the *New York Convention*, *Model Law*, and *CISG*.[71] In summary, while the *CISG* (like the *New York Convention*) is a treaty, its internationalist interpretation is required by its own terms rather than public international law.

III The Internationalist Interpretation of Australian ICA Law

The *New York Convention*, *Model Law 2006*, and *CISG* all require internationalist interpretation in the abstract, albeit for different reasons. What, then, is the specific legal position in Australia?

When adopted by Australia and incorporated into local law, the *New York Convention*, *Model Law 2006*, and *CISG*'s texts interact with the broader body of Australian law, affecting their interpretation. This Part (addressing Australia's ICA law) and Part IV (addressing the *CISG*) analyse Australian laws affecting their local interpretations. Case studies are also presented, illustrating recent trends in their interpretation which are analysed and explained below in Part V.

[69] See Ingeborg Schwenzer and Pascal Hachem, 'Introduction to Articles 1–6' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4th ed, 2016) 17–21 ('Introduction').

[70] Franco Ferrari, 'Homeward Trend and Lex Forism despite Uniform Sales Law' (2009) 13(1) *Vindobona Journal of International Commercial Law and Arbitration* 15, 23 ('Homeward Trend').

[71] The term 'autonomous interpretation' is sometimes used in relation to non-*CISG* (n 10) instruments: in respect of the *New York Convention* (n 17), see International Council for Commercial Arbitration (n 31) 13–14; in respect of international commercial law instruments, see Andersen, 'A New Challenge' (n 11) 923–5. Similarly, the term 'homeward trend' is sometimes used in a more general sense: Andenas, Andersen and Ashcroft (n 13) 592.

A *Internationalist Interpretation and Australian Arbitration Law*

The *International Arbitration Act 1974* (Cth) ('*IAA*') attaches the *New York Convention* and *Model Law 2006* (including *Model Law 2006* art 2A(1)) as schedules. The *IAA* s 16(1) gives the *Model Law 2006* (as set out in sch 2) direct legislative force, making it Australian statutory law in accordance with Part II's analysis.[72] Australia's obligations under the *New York Convention* are discharged, by way of contrast, via 'paraphrasing'[73] into the *IAA*'s body.[74] These *IAA* provisions, rather than the *New York Convention*'s original text, operate in Australia. Nevertheless, as the *IAA* intends to implement the *New York Convention*,[75] case law interpreting its local provisions routinely refers to the *Convention* (as set out in sch 1) for contextual purposes.[76]

1 *Common Law Interpretation*

Australia's common law requires the internationalist interpretation of legislation giving effect to treaties. As explained by Brennan CJ in *Applicant A v Minister for Immigration and Ethnic Affairs* ('*Applicant A*'):

> If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.[77]

[72] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 543–4 [1]–[2] (French CJ and Gageler J) ('*TCL v Judges*'). See also *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* (2014) 314 ALR 299, 305 [10] (Pagone J) ('*Emerald Grain*').

[73] Nottage (n 4) 471, 493.

[74] *IAA* (n 55) ss 3–14.

[75] Ibid s 2D(d); *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, 421 [21] (Foster J) ('*Uganda Telecom*').

[76] See, eg, *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 330–1 [16] (Croft J) ('*Robotunits*'); *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 377–8 [59] (Allsop CJ, Middleton and Foster JJ) ('*TCL v Castel 2014*'); *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161, 173–4 [50]–[51] (Foster J) ('*Norden*'); *Uganda Telecom* (n 75) 420–1 [20]; *ESCO Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282, 293 [58]–[61] (Foster J). See also *International Relief and Development Inc v Ladu* [2014] FCA 887, [49] (Kenny J) ('*Ladu*').

[77] *Applicant A* (n 37) 230–1 (citations omitted). Though Brennan CJ was in the minority, all five Justices agreed on this general interpretative principle: at 239–40 (Dawson J), 251–3 (McHugh

Part II demonstrated that public international law requires the *New York Convention*'s internationalist interpretation. As the *IAA* transposes the *New York Convention* into Australian law, *Applicant A* confirms this requirement at common law. Though addressing treaties, *Applicant A*'s reasoning has also been applied to the *Commercial Arbitration Act 2011* (Vic),[78] which adapts the *Model Law 2006* (not a treaty) for domestic commercial arbitration. This was justified by s 2A(3) of that *Act* 'expressing in legislative terms' the *Applicant A* principles.[79] As the *IAA* contains an equivalent provision,[80] there is good reason to believe *Applicant A* also requires the *Model Law 2006*'s internationalist interpretation in the ICA context, notwithstanding its soft law nature (addressed above in Part II).

2 *The Purposive Approach*

The *IAA*, however, goes further than the common law, and also further than the ordinary purposive approach to statutory interpretation. Following passage of the *International Arbitration Amendment Act 2010* (Cth) ('*Amendment Act*'), the *IAA* now declares:

> The objects of this *Act* are:
>
> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards …; and
>
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration …[81]

J), 277 (Gummow J), 292, 294–5 (Kirby J). Differences arose, however, in its application: Penelope Mathew, 'Applicant A v Minister for Immigration and Ethnic Affairs: The High Court and "Particular Social Groups"' (1997) 21(1) *Melbourne University Law Review* 277, 297–9.

78 *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49, 58 [29], 60–1 [34]–[38] (Maxwell P) ('*Subway*'); *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* (2017) 52 VR 198, [10] (Croft J).

79 *Subway* (n 78) 61 [38]. Cf Zeller and Andersen (n 51) 13.

80 *IAA* (n 55) s 17(1).

81 Ibid s 2D.

Ordinarily, the *Acts Interpretation Act 1901* (Cth) s 15AA requires Commonwealth legislation to be interpreted so as to best achieve its purposes. Even if this rule is displaced in favour of public international law via *Applicant A*,[82] *VCLT* art 31(1) permits reference to treaty purposes in any event. Internationalist interpretation is required if the *IAA* is to give effect to the *New York Convention* (d) and *Model Law 2006* (e), as these instruments require it. Promoting arbitration (a), arbitration agreements (b), and the recognition and enforcement of arbitral awards (c) also requires an international outlook, as these objects link to the global arbitration law system which depends upon applied uniformity for its effectiveness.[83]

Nevertheless, the *Amendment Act* gives the *IAA* its own dedicated interpretative provision.[84] When courts interpret the *IAA*,[85] they must now have regard to:

> (a) the objects of the Act; and
>
> (b) the fact that:
>
> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
>
> (ii) awards are intended to provide certainty and finality.[86]

Courts are thus required to take two *statutory facts* into account, in addition to the *IAA*'s objects. As explained in Part I, this article does not seek to validate the assumptions underpinning harmonised PIL. Nevertheless, these statutory facts further solidify the *IAA*'s legal requirement of internationalist interpretation. Taking them as true, realising arbitration's intended advantages is again

[82] *Applicant A* (n 37) 230–1 (Brennan CJ).

[83] See also *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 209 [24] (Croft J) ('*Gutnick*').

[84] As a specific interpretative rule, and not one 'generally applicable to the interpretation of domestic statutes', it is not displaced by *Applicant A*: *Applicant A* (n 37) 230–1.

[85] *IAA* (n 55) s 39(1)(b). It is noted, for completeness, that s 39(1) also applies to non-statutory interpretation judicial functions including exercising certain powers under the *IAA* (n 55), and interpreting arbitration agreements and awards.

[86] *IAA* (n 55) s 39(2). Though having regard to the *IAA*'s (n 55) objects appears to be a different thing to applying those objects, 'this probably makes little practical difference': Justice Clyde Croft, 'The Development of Australia as an Arbitral Seat: A Victorian Supreme Court Perspective' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years* (Kluwer, 2012) 227, 241. See also Justice Clyde Croft and David Fairlie, 'The New Framework for International Commercial Arbitration in Australia' (Conference Paper, International Commercial Arbitration: Efficient, Effective, Economical?, 4 December 2009) 15–16.

contingent upon the applied uniformity of arbitration laws based upon the *New York Convention* and *Model Law*.

3 *Extrinsic Materials*

The *IAA* similarly extends Australia's ordinary extrinsic materials rules. Such materials are particularly rich interpretative sources for internationally promulgated PIL. By definition, these instruments are developed with international input. Sources such as *travaux préparatoires* and official or quasi-official commentaries of the United Nations Commission on International Trade Law ('UNCITRAL') are apt to assist decision-makers in understanding an instrument's internationally-intended operation.[87] Albert Jan van den Berg's seminal *New York Convention* text, for example, draws upon *travaux préparatoires* references to support its analysis of the *Convention*'s uniform interpretation.[88] Interpreting the *New York Convention* and *Model Law 2006* in light of such materials genuinely facilitates their internationalist understanding.

Australia's federal statutory interpretation rules, like *VCLT* art 32, only permit reference to extrinsic materials in two specific circumstances:

- when seeking to 'confirm' legislation's 'ordinary meaning'; or
- to 'determine the meaning' where provisions are 'ambiguous or obscure', or their ordinary meaning 'leads to a result that is manifestly absurd or unreasonable'.[89]

Without affecting their application to the *New York Convention*, the *Amendment Act* expands these rules for the *Model Law 2006*. Pursuant to the *IAA*:

> For the purposes of interpreting the Model Law, reference may be made to the documents of:
>
> (a) the United Nations Commission on International Trade Law; and
>
> (b) its working group for the preparation of the Model Law;
>
> relating to the Model Law.[90]

Thus when interpreting the *Model Law 2006*, and referring to UNCITRAL materials in particular, neither of the threshold conditions ordinarily applicable

[87] They do, however, have their limits: Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer, 1981) 4–5.

[88] Ibid.

[89] *Acts Interpretation Act 1901* (Cth) s 15AB(1). Victoria's corresponding provision, the *Interpretation of Legislation Act 1984* (Vic) s 35(b), is not so limited (though being state legislation, it does not apply to the *IAA* (n 55)).

[90] *IAA* (n 55) s 17(1).

under Australia's federal statutory interpretation rules need exist. UNCITRAL materials may be used by Australian courts to determine the *Model Law 2006*'s meaning even if there is no ambiguity, obscurity, absurdity, or unreasonableness. As demonstrated by the case studies set out below, UNCITRAL materials have been used in Australian judicial decision-making.

Australia's post-2010 ICA laws thus reflect the legal requirement of internationalist interpretation applicable to the *New York Convention* and *Model Law 2006* in the abstract. Three case studies now consider the extent to which such interpretations are actually evidenced in Australian case law.

At this point, an important limitation of this article's analysis must be acknowledged. Like the *IAA* provisions addressed above, the following cases all postdate 2010.[91] Australian ICA cases predating the *Amendment Act*, and in particular the earlier Full Federal Court decision in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* ('*Comandate Marine*'),[92] are renowned for their parochial analysis.[93] Such decisions actually precipitated the *Amendment Act*'s passage.[94] Though the case studies presented in Parts III(B)–(D) below illustrate recent *IAA* interpretative trends, their temporal context must be appreciated. It should also be noted that even post-2010, these cases are a non-random sample and omit some problematic outliers analysed elsewhere.[95] However, for

[91] On the temporal application of various provisions of the *Amendment Act* (n 20): see Richard Garnett and Luke Nottage, 'What Law (if any) Now Applies to International Commercial Arbitration in Australia?' (2012) 35(3) *University of New South Wales Law Journal* 953.

[92] (2006) 157 FCR 45.

[93] Cf Chief Justice TF Bathurst, 'Judicial Support for Arbitration: A Reprise' (2015) 162 (May–June) *Australian Construction Law Newsletter* 6, 7.

[94] See Robert McClelland, 'International Commercial Arbitration in Australia: More Effective and Certain' (Speech, International Commercial Arbitration: Efficient, Effective, Economical?, 4 December 2009) ('More Effective and Certain'). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12,791 (Robert McClelland, Attorney-General).

[95] *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1; *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108; *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63; *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219. See Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2016/2017 in Review' (2018) 28(4) *Australasian Dispute Resolution Journal* 215, 216–18; Albert Monichino, 'Enforcement of Arbitration Agreements Against Non-Signatories: Which Law (the Chicken and the Egg)?' (2017) 5(2) *Australian Centre for International Commercial Arbitration Review* 43; Hayward, 'Pro-Arbitration Policy' (n 34) 315–21; Albert Monichino, 'International Arbitration in Australia: 2010/2011 in Review' (2011) 22(4) *Australasian Dispute Resolution Journal* 215, 219–20, 223–5; Benjamin Hayward, 'Eisenwerk Reconsidered (Twice): A Case Note on Cargill International SA v Peabody Australia Mining Ltd, and Wagners Nouvelle Caledonie SARL v Vale Inco Nouvelle Caledonie SAS' (2010) 15(2) *Deakin Law Review* 223, 234–41. See also Michael Douglas, 'Trina Solar (US)

this article's purposes, they do illustrate an improving internationalist interpretation of the *IAA* since 2010.

B *Case Study 1:* Altain Khuder

The *Amendment Act* entered into force on 6 July 2010,[96] with the first *Altain Khuder* decision handed down shortly afterwards in January 2011.[97] *Altain Khuder*'s trial decision was also notably situated within the then-newly-created Arbitration List of the Supreme Court of Victoria,[98] the first specialist arbitration list in Australia and among the first in the world.[99]

Altain Khuder was an enforcement dispute between Altain Khuder LLC, a Mongolian mining company, and IMC Aviation Solutions Pty Ltd (formerly IMC Mining Solutions Pty Ltd), incorporated in Australia.[100] The parties' substantive dispute related to an Operations Management Agreement, including an arbitration clause, listing its parties as Altain Khuder and IMC Mining Inc (a separate British Virgin Islands entity).[101] An award was rendered against *both* IMC Mining and IMC Mining Solutions in Mongolian arbitral proceedings,[102]

Inc v Jasmin Solar Pty Ltd [2017] FCAFC 6' (2017) 91(3) *Australian Law Journal* 201, 201–3; Michael Douglas, 'A Consideration of Current Issues in Private International Law' (2017) 44(3) *Australian Bar Review* 338, 349; Albert Monichino, Luke Nottage and Diana Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' (2012) 19 *Australian International Law Journal* 181, 208–9.

96 *Amendment Act* (n 20) s 2(1).

97 For the various decisions: see *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733 ('*Altain Khuder Trial*') (Supreme Court enforcement decision); *Altain Khuder LLC v IMC Mining Inc [No 2]* [2011] VSC 12 ('*Altain Khuder [No 2]*') (Supreme Court costs decision); *Altain Khuder LLC v IMC Mining Inc [No 3]* [2011] VSC 105 (Supreme Court application for the stay of ancillary orders); *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 ('*Altain Khuder Appeal*') (Court of Appeal).

98 See Justice Clyde Croft, 'Commercial Arbitration in Australia: The Past, the Present and the Future' (Speech, Chartered Institute of Arbitrators, 25 May 2011) 36–7. See generally Supreme Court of Victoria, 'Arbitration List', *Specialist Lists of the Court* (Web Page, 2020) <https://www.supremecourt.vic.gov.au/law-and-practice/specialist-lists-of-the-court/arbitration-list>, archived at <https://perma.cc/NS7Y-KVG5>; Chief Justice Marilyn Warren, 'The Victorian Supreme Court's Perspective on Arbitration' (Speech, International Commercial Arbitration: Efficient, Effective, Economical?, 4 December 2009) 6–7.

99 Justice Clyde Croft, 'The Temptation of Domesticity: An Evolving Challenge in Arbitration' in Neil Kaplan and Michael J Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (Kluwer, 2018) 57, 57 ('Evolving Challenge').

100 *Altain Khuder Trial* (n 97) 735 [1]–[2] (Croft J).

101 Ibid 735 [2], 741 [20], 743 [31].

102 Ibid 741–2 [21]–[22]. The award did not, however, explain the Tribunal's basis for asserting jurisdiction over IMC Mining Solutions as a non-signatory to the arbitration agreement: Monichino, Nottage and Hu (n 95) 198, 200.

was enforced in Mongolia's Khan-Uul District Court, and ex parte orders were made by Croft J for its Victorian enforcement.[103] Litigation followed, with IMC Mining Solutions seeking the setting aside of those orders. That litigation required interpretation of the *IAA*'s enforcement provisions given that enforcement was sought against both IMC entities, whilst IMC Mining Solutions was not a listed party to the arbitration agreement.

International understandings of the *New York Convention* suggest that 'party-hood' (a term used by Warren CJ to describe the question of whether an award debtor is party to an arbitration agreement)[104] is to be disproved by the award *debtor* as a defence under *New York Convention* art V(I)(a).[105] On this view the award *creditor*'s burden is limited to *New York Convention* art IV's requirements: furnishing the award (or copy), arbitration agreement (or copy), and certified translations (if necessary).[106] Those requirements are reflected, in Australian law, in the *IAA* s 9.

At first instance, the Supreme Court rejected the enforcement objections of IMC Mining Solutions, in line with these understandings.[107] Justice Croft's decision embraced international commentary and case law addressing the relative burdens of proof of the parties,[108] issue estoppel,[109] and arbitrations involving non-signatory parties,[110] and was perceived of as balancing the Victorian court's role with that of the seat's courts[111] and the tribunal itself.[112] Indemnity costs were subsequently awarded against IMC Mining Solutions.[113] Departing from Australia's usual party–party costs rule,[114] where only a proportion of a

[103] *Altain Khuder Trial* (n 97) 736 [5].

[104] *Altain Khuder Appeal* (n 97) 317 [49].

[105] See generally van den Berg (n 87) 287–91: lack of consent as falling within the scope of *New York Convention* (n 17) art V(1)(a). See also van den Berg (n 87) 247, 262; Monichino, Nottage and Hu (n 95) 199.

[106] Born (n 28) 3399–405.

[107] *Altain Khuder Trial* (n 97) 782–3 [98], 791 [117].

[108] Ibid 748–60 [40]–[59], 760–7 [61]–[69].

[109] Ibid 767–9 [70]–[75], 781 [94].

[110] Ibid 773–5 [81]–[83].

[111] The seat of the arbitration is the place at which it is juridically grounded: Blackaby et al (n 40) 172–3 [3.55].

[112] See Saloni Kantaria, 'We're Not a Party to the Arbitration Agreement' (2011) 15(1) *Vindobona Journal of International Commercial Law and Arbitration* 171, 173–4.

[113] *Altain Khuder [No 2]* (n 97) [22] (Croft J).

[114] Ibid [6], [22]. See also *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189, [6]–[12] (Harper J).

party's own costs are recoverable,[115] Croft J considered enforcement proceedings to involve special circumstances.[116] His Honour's costs decision embraced the position taken in Hong Kong case law,[117] where indemnity costs are awarded if an enforcement challenge fails.[118] This rule is intended to discourage 'unmeritorious challenges', given that arbitral awards are supposed to be final and binding.[119]

Nevertheless, the subsequent appeal by IMC Mining Solutions was unanimously allowed. A joint judgment was delivered by Hansen JA and Kyrou AJA, alongside Warren CJ's separate opinion.

Breaking from the *New York Convention*'s international understandings, the joint judgment found its *IAA* implementation placed an evidentiary (but not legal) onus upon an award creditor.[120] This required courts to be 'satisfied on a prima facie basis that the award debtor was a party to the arbitration agreement in pursuance of which the award was made'.[121] Chief Justice Warren went further, finding party-hood to be a threshold enforcement issue, the *award creditor* bearing a full legal onus of proof.[122] On this view, an award creditor must affirmatively prove that an award debtor was party to the arbitration agreement, pursuant to which an award was made. Either view imposes an additional burden upon an award creditor where the award debtor has not signed an arbitration agreement, given that the *New York Convention*'s international understanding requires the *award debtor* litigate this issue.[123]

Both Court of Appeal judgments focused closely on the *IAA*'s language, divorced from its *New York Convention* origins. As Part III(A) explained, the *IAA*'s body transposes the *New York Convention*'s substance, rather than giving it direct force of law. Thus the joint judgment described itself as analysing whether 's 8(3A), (5) and (7) are subject to s 8(1)' (award creditor's legal

115 Michael Pryles, 'National Report for Australia (2020)' in Lise Bosman (ed), *International Council for Commercial Arbitration International Handbook on Commercial Arbitration* (Kluwer, 2020) 1, 49.

116 *Altain Khuder [No 2]* (n 97) [20]–[21].

117 Ibid [9]–[21].

118 *A v R* [2009] 3 HKLRD 389, 400–1 [67]–[72] (Reyes J).

119 Albert Monichino, 'When High Risk Strategies Are "Worth a Go"' (2013) 5(2) *Australian Centre for International Commercial Arbitration News* 23, 24–5. See also *IAA* (n 55) s 39(2)(b)(ii).

120 *Altain Khuder Appeal* (n 97) 346–52 [153]–[187] (Hansen JA and Kyrou AJA). On the nature of an evidentiary onus: see *Black's Law Dictionary* (online at 27 March 2020) 'burden of proof' (def 1).

121 *Altain Khuder Appeal* (n 97) 349 [173].

122 Ibid 317 [48].

123 Monichino, Nottage and Hu (n 95) 199.

onus),[124] or the other way around (award debtor's onus),[125] when those rules actually derive from *New York Convention* art V. The allocation of proof was treated exclusively as an Australian statutory interpretation issue,[126] their Honours describing the *IAA* as a 'carefully enacted statutory scheme'.[127] International authorities were only consulted regarding the *IAA* s 8(5)(b) defence (equivalent to *New York Convention* art V(1)(a)), as to whether party-hood objections are included within that enforcement challenge ground.[128]

In an even more domestically focused judgment, Warren CJ opined:

> Ultimately, this court is required to construe an Australian statute. That process must be performed in accordance with established principles of Australian statutory interpretation. International case law may be useful and instructive, but it cannot supersede the words used in the Act. The weight to be accorded to such authority will depend upon the similarity of the language used in foreign statutes being construed to the terms of the Act.[129]

To the extent that Warren CJ directly addressed foreign (English) enforcement cases, her Honour focused on differences in the *IAA*'s wording as compared to the *Arbitration Act 1996* (UK) and distinguished them,[130] even though both Acts implement the *New York Convention*. In rationalising party-hood's threshold status, as distinct from other *New York Convention* art V(1) enforcement objections, Warren CJ suggested this position was 'not anomalous' and reflected 'a sensible policy decision by the legislature' whose scheme involved 'a legislative presumption of regularity founded upon documentary proof'.[131] Though acknowledging courts will construe treaty legislation consistently, 'so far as they are able', with an instrument's 'international understanding',[132] Warren CJ ultimately regarded the *IAA*'s language as controlling.

The fundamental problem with both appeal judgments is their assumption that Australian legislative intent exists independently of the *New York Convention*'s original drafting. While the *IAA* is Australian legislation, this is a false assumption. The *IAA* intends to implement the *New York Convention*, rather

[124] *Altain Khuder Appeal* (n 97) 346 [153].

[125] Ibid 347 [161].

[126] Ibid 349 [169]–[170].

[127] Ibid 349 [170].

[128] Ibid 349–51 [171]–[184].

[129] Ibid 314 [37].

[130] Ibid 315 [42]. Cf at 311 [26], 314 [36], 319 [56].

[131] Ibid 317–18 [50].

[132] Ibid 313 [35].

than establish an independent award enforcement regime.[133] Thus, as explained in two near-contemporaneous Federal Court decisions, the *IAA* must be interpreted 'in light of' the *New York Convention*.[134] *Applicant A* identifies *this* as the prima facie Australian legislative intent.[135]

Seeking out local legislative intent ignores the fact that '[t]he language of an international convention has not been chosen by [a local] parliamentary draftsman' and 'is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law'.[136] As the House of Lords has explained, while treaties owe their enforceability to local legislation, they owe their 'origin and … actual wording to some prior law-preparing process in which Parliament has not participated'.[137] If the *IAA* intends to implement the *New York Convention*, seeking out local legislative intent erodes the internationalist interpretation that Australian law requires.

Though occasionally defended as decided on its own facts,[138] the Australian arbitration profession's general reaction to *Altain Khuder* recognises this problem. As explained by Albert Monichino QC, notwithstanding the appropriate ultimate result, 'what is unsatisfactory about this decision is the parochial approach to the interpretation of the domestic legislation implementing Australia's obligations under the *New York Convention*'.[139] Reflecting this concern,

[133] *IAA* (n 55) s 2D(d).

[134] *Uganda Telecom* (n 75) 421 [21] (Foster J); *Norden* (n 76) 174 [52] (Foster J).

[135] *Applicant A* (n 37) 230–1 (Brennan CJ), 239 (Dawson J). Cf *Al-Kateb v Godwin* (2004) 219 CLR 562, 577–8 [63]–[65] (McHugh J); *Coleman v Power* (2004) 220 CLR 1, 27–8 [19] (Gleeson CJ).

[136] *Fothergill v Monarch Airlines Ltd* [1981] 1 AC 251, 281–2 (Lord Diplock) ('*Fothergill*') regarding the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933); as amended by the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 28 September 1955, 478 UNTS 371 (entered into force 1 August 1963); given effect in the UK by the *Carriage by Air Act 1961* (UK) 9 & 10 Eliz 2, c 27.

[137] *Fothergill* (n 136) 281. See also Zeller and Andersen (n 51) 9.

[138] See, eg, John Digby, 'Is Australia Unfriendly to Arbitration?' (2012) 7(1) *Construction Law International* 38, 40; Jaclyn Smith, 'The Enforcement of International Arbitral Awards in the Asia-Pacific Region: A Comparative Study of Recent Cases' (2014) 30(3) *Building and Construction Law Journal* 148, 156–7. See also Monichino, Nottage and Hu (n 95) 200.

[139] Alison Ross, 'Australian Court Forges Own Path on Enforcement', *Global Arbitration Review* (Web Page, 31 August 2011) <https://globalarbitrationreview.com/article/1030621/australian-court-forges-own-path-on-enforcement>, archived at <https://perma.cc/9R4U-3HEP>. See also Monichino, Nottage and Hu (n 95) 199.

reversing *Altain Khuder*, and realigning the *IAA*'s text with the *New York Convention*,[140] recent amendments now clarify that foreign awards are binding 'on the parties to the *award*'[141] rather than (as originally) 'the parties to the arbitration agreement in pursuance of which it was made'.[142]

C *Case Study 2: The TCL/Castel Saga*

The TCL/Castel saga involved a dispute between a Chinese air conditioner manufacturer and its Australian exclusive distributor.[143] An Australian-seated tribunal found that TCL had breached the parties' exclusivity agreement by selling air conditioners in Australia.[144] TCL sought the award's annulment, and resisted Castel's Federal Court enforcement application.[145] TCL's grounds were identical in both contexts, asserting failure to accord procedural fairness by the arbitrators, making enforcement also contrary to Australian public policy.[146]

1 *The TCL Constitutional Challenge*

TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia[147] was decided by the High Court shortly after the Victorian Court of Appeal decision in *Altain Khuder*. In addition to resisting enforcement and seeking annulment, TCL mounted a 'collateral constitutional challenge',[148] alleging Australia's implementation of *Model Law 2006* arts 35–6 was invalid.[149] Given the sums often at issue in arbitration, the likelihood of such a challenge had

[140] Revised Explanatory Memorandum, Civil Law and Justice Legislation Amendment Bill 2018 (Cth) 68–9 [419]–[421].

[141] *IAA* (n 55) s 8(1) (emphasis added), as amended by *Civil Law and Justice Legislation Amendment Act 2018* (Cth) sch 7 cl 2.

[142] *IAA* (n 55) s 8(1), as at 25 October 2018.

[143] *TCL v Castel 2014* (n 76) 366 [2] (Allsop CJ, Middleton and Foster JJ).

[144] Ibid 366 [3]–[4].

[145] Ibid 366–7 [5], 367 [9].

[146] Ibid 367 [6]. *New York Convention* (n 17) art V(2)(b) refers to the public policy of the place where recognition and enforcement is sought, with *Model Law 2006* (n 4) art 34(2)(b)(ii) similarly referring to the seat's public policy in the setting aside context. Though these provisions defer to local public policy, the defence's general nature has an internationalist understanding, as explored below in Part III(D)(2). As a result, nothing turns on its localisation for the purposes of this article's analysis. See generally Blackaby et al (n 40) 597–9 [10.81]–[10.85], 641–7 [11.105]–[11.122].

[147] *TCL v Judges* (n 72).

[148] Nottage (n 4) 468.

[149] *TCL v Judges* (n 72) 544 [3]–[4] (French CJ and Gageler J). These provisions deal (respectively) with recognition and enforcement, and the grounds for refusing recognition and enforcement: see at 543–4 [2], 547–8 [12].

previously been identified in the literature.[150] The constitutional invalidity of these provisions would have answered Castel's application, though at considerable systemic cost.

Australian constitutional law maintains a strict separation of Commonwealth-level judicial power, only being exercisable by judges of courts created pursuant to Ch III of the *Commonwealth Constitution*.[151] TCL argued 'that to avoid contravening Ch III of the *Constitution* courts *must* be able to determine whether an arbitrator applied the law correctly'.[152] As explained in Part III(D), errors of law do not ground recourse under the *Model Law 2006* (or the *New York Convention*). This constitutional challenge was rejected. The High Court conceptualised the award enforcement process as holding parties to their arbitration agreement, rather than rubber-stamping the legal analysis of arbitrators.[153] The validity of Australia's *Model Law 2006* implementation was thereby confirmed,[154] and 'the death knell for international arbitration in Australia' avoided.[155]

This case is interesting, for present purposes, as it was widely reported as an arbitration-friendly decision.[156] The arbitration friendliness of jurisdictions is a

[150] Jesse Kennedy, 'Arbitrate This! Enforcing Foreign Arbitral Awards and Chapter III of the Constitution' (2010) 34(2) *Melbourne University Law Review* 558, 561. Kennedy's analysis considered the constitutionality of the *IAA*'s (n 55) implementation of the *New York Convention*'s (n 17) enforcement provisions, though its conclusions were described as likely to be 'equally relevant' to the *Model Law 2006* (n 4).

[151] See generally *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court of Australia), affd *A-G (Cth) v The Queen* (1957) 95 CLR 529 (Privy Council).

[152] *TCL v Judges* (n 72) 564 [67] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis in original).

[153] Ibid 555–6 [31]–[34] (French CJ and Gageler J), 566–7 [75]–[79] (Hayne, Crennan, Kiefel and Bell JJ). Cf Kennedy (n 150) 571–81. See also Chief Justice James Allsop, 'The Role of Law in International Commercial Arbitration' (Speech, Chartered Institute of Arbitrators Australia Inaugural Annual Lecture, 15 October 2018) 13.

[154] *TCL v Judges* (n 72) 544–5 [5] (French CJ and Gageler J), 558 [44] (Hayne, Crennan, Kiefel and Bell JJ).

[155] Albert Monichino, 'The Future of International Arbitration in Australia' (2015) 5(1) *Victoria University Law and Justice Journal* 60, 65 ('The Future of International Arbitration').

[156] See, eg, ibid; Albert Monichino, 'International Arbitration: Sheep, Wolves and Vegetarianism' (2013) 8(3) *Construction Law International* 33, 33–4, 36; Albert Monichino, 'High Court Unanimously Rejects Constitutional Challenge to International Arbitration Act 1974 (Cth)', *CommBar Matters* (Web Page, 25 March 2013) <http://www.commbarmatters.com.au/2013/03/25/high-court-unanimously-rejects-constitutional-challenge-to-international-arbitration-act-1974-cth/>, archived at <https://perma.cc/RGU9-6FYG>; Richard Midgley, 'High Court Confirms Recognition and Enforcement in Australia of Arbitral Awards', *Moray & Agnew Lawyers* (Web Page, 14 August 2013) <https://workplace.moray.com.au/publication/high-court-confirms-recognition-and-enforcement-in-australia-of-arbitral-awards/>, archived at <https://perma.cc/TU2Q-GJJ8>. See also 'Court Delivers Landmark

widely discussed (though frequently misused) concept.[157] Nevertheless, it closely aligns with the pro-arbitration and pro-enforcement attitudes of courts.[158] In turn, these attitudes intersect with this article's analysis. This is because international understandings of the *New York Convention* and *Model Law 2006* advocate their 'pro-arbitration' and 'pro-enforcement' interpretation.[159]

Though heralded as arbitration-friendly, it is more accurate to describe this case as a constitutional decision undertaking incidental analysis of Australia's ICA law. Indeed, Robert French, Chief Justice in the case, expressed his surprise at this description during oral remarks delivered at the Australian Disputes Centre's 2018 Melbourne Symposium. French stated that in his view courts are not friendly to anyone, their role being to apply the law; *Parliament* sets the law's terms, and determines its underlying policy.[160] The true measure of arbitration friendliness, according to one of Australia's leading arbitration judges, is the extent to which courts support (or intervene in) arbitration matters.[161]

Judgment for Australian Arbitration', *Clayton Utz* (Web Page, 13 March 2013) <https://www.claytonutz.com/knowledge/2013/march/court-delivers-landmark-judgment-for-australian-arbitration>, archived at <https://perma.cc/ZK42-2QGB>; Justice Clyde Croft, 'Promoting Australia as Leader in International Arbitration' (Seminar Paper, Law Institute of Victoria Professional Development Intensive: Commercial Law, 26 March 2015) 14–15 ('Promoting Australia'); Chief Justice James Allsop and Justice Clyde Croft, 'Judicial Support of Arbitration' (Conference Paper, Asia Pacific Regional Arbitration Group Conference, 26–8 March 2014) 8; Nottage (n 4) 468.

157 For a well-reasoned critique: see 'S02 Episode 01: The Arbitration Friendly Season Opener', *The Arbitration Station* (Brian Kotick and Joel Dahlquist, 20 February 2018) 00:40:44 <https://www.thearbitrationstation.com/blog/2018/1/18/season-2-episode-1-the-arbitration-friendly-season-opener>, archived at <https://perma.cc/8PG4-HAKY>. For similar comments in the Australian context specifically: see Bathurst (n 93) 6–7, 16; Monichino, 'The Future of International Arbitration' (n 155) 67.

158 See, eg, Koki Yanagisawa and Takiko Kadono, 'Setting Aside Arbitral Awards before Japanese Court: Consolidating Japan's Position as an Arbitration-Friendly Jurisdiction?', *Kluwer Arbitration Blog* (Blog Post, 22 January 2018) <http://arbitrationblog.kluwerarbitration.com/2018/01/22/post-2/>, archived at <https://perma.cc/9Y33-5DVZ>.

159 See, eg, Born (n 28) 107; Blackaby et al (n 40) 616 [11.37], 623–4 [11.61], 642 [11.107], 643–4 [11.111]; International Council for Commercial Arbitration (n 31) 37, 65. See also *Uganda Telecom* (n 75) 436 [128]–[129] (Foster J).

160 See generally Australian Disputes Centre, 'ADC Symposium Series 2018: Melbourne' (Web Page, 2018) <https://www.disputescentre.com.au/events/adc-symposium-series-2018-melbourne/>, archived at <https://perma.cc/4F94-UW4A>.

161 Chief Justice James Allsop in Chief Justice James Allsop and Justice Clyde Croft, 'The Role of the Courts in Australia's Arbitration Regime' (Seminar Paper, Commercial Continuing Professional Development Seminar Series, 11 November 2015) 1–2 [1] <https://www.supremecourt.vic.gov.au/the-role-of-the-courts-in-australias-arbitration-regime>, archived at <https://perma.cc/J9UX-TEB9>.

Strictly speaking, the *TCL* constitutional challenge does not implicate this description.[162]

It does, however, still evidence internationalist *IAA* interpretation, to the limited extent its context permits. Chief Justice French and Gageler J, for example, referred to extrinsic UNCITRAL materials, pursuant to the *IAA* s 17(1),[163] when analysing *Model Law 2006* art 28 (regarding the applicable substantive law)[164] and *Model Law 2006* art 35's enforcement power.[165] That material informed the Court's interpretation of the instrument,[166] and provided context as to the internationally-understood implications of awards being binding.[167]

Against the general trend of commentary, this case's mere existence has been described by one analyst as 'unhelpful for Australia's efforts to make up lost ground as a viable venue for international arbitration'.[168] However, to the limited extent of its *IAA* analysis, subtle differences emerge vis-a-vis *Altain Khuder*, with the *IAA*'s international context being appreciated.

2 *TCL's Final Enforcement Decision*

The TCL/Castel saga's final Australian instalment comprises the *TCL* enforcement decision.[169] At first instance, TCL's annulment application and enforcement objections were rejected, with orders made enforcing Castel's award.[170] Upholding that decision, the Full Federal Court criticised TCL's challenges as 'a

[162] Cf Croft, 'Promoting Australia' (n 156) 15.

[163] *TCL v Judges* (n 72) 545 [6].

[164] Ibid 548–9 [13]–[14].

[165] Ibid 551 [19]–[20].

[166] Ibid 549 [14].

[167] Ibid 551–2 [20]–[22].

[168] Nottage (n 4) 469. See also Smith (n 138) 153; Monichino, Nottage and Hu (n 95) 210; Albert Monichino and Luke Nottage, 'Blowing Hot and Cold on the International Arbitration Act: Three Waves of Litigation in the Castel v TCL Air Conditioner Dispute' (2013) 51(4) *Law Society Journal* 56, 59. There are, nevertheless, other reasons as to why Australia might prove less attractive as an arbitral seat than regional alternatives: Luke Nottage and Nobumichi Teramura, 'Australia's (In)Capacity in International Commercial Arbitration', *Kluwer Arbitration Blog* (Blog Post, 20 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/20/australias-incapacity-international-commercial-arbitration/>, archived at <https://perma.cc/5SAQ-DXKQ>.

[169] *TCL v Castel 2014* (n 76). As a practical matter, it must be noted that Castel has faced significant and ongoing difficulties in 'collect[ing] the fruits of the award': David Bailey, 'International Commercial Arbitration: A Critique' (2015) 43(4) *Australian Business Law Review* 344, 345. See also Fan Yang, '"How Long Have You Got?" Towards a More Streamlined System for Enforcing Foreign Arbitral Awards in China' (2017) 34(3) *Journal of International Arbitration* 489, 491–6; Nottage (n 4) 467–71.

[170] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [No 2]* (2012) 232 FCR 311, 359 [190]–[191] (Murphy J).

disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice'.[171]

In analysing procedural fairness under the *IAA*, the Court addressed international commentary, legislation, and case law.[172] The following critical passage is worth recounting at length:

> Contrary to the submission of the appellant, it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand. Such is a reflection of the growing recognition of the harmony of what can be seen as the 'law of international commerce'. Such an approach accords with the objectives of the IAA in s 2D and with the interpretive approach referred to in s 17 of the IAA. It is also an approach required by Art 2A of the Model Law, and by the highest authority when dealing with treaties. This approach should not be confined to treaties proper to which there are contracting state parties. Where, as with the Model Law, there has been extensive discussion and negotiation of a model law under the auspices of a United Nations body, such as UNCITRAL, and where the Model Law has been adopted by the General Assembly of the United Nations with recommendation of 'due consideration' by member states to advance uniformity of approach, the same appropriate respect for, and, where necessary, sensitivity or deference to, reasoned decisions of other countries, should be shown. This is especially so in the field of international commerce.[173]

From the perspective of the authors, this internationalist interpretation endorsement is almost beyond critique. The only possible criticism could be the Court's specific reference to three Asia-Pacific jurisdictions. Given the *IAA*'s legal requirement of internationalist interpretation, the Court's willingness to embrace persuasive international precedent is welcome, although there does not seem to be any reason to privilege the jurisprudence of Singapore, Hong

[171] *TCL v Castel 2014* (n 76) 376 [54] (Allsop CJ, Middleton and Foster JJ).

[172] Ibid 380–6 [64]–[80].

[173] Ibid 383–4 [75] (citations omitted).

Kong, and New Zealand.[174] At only six years old, this passage is already frequently cited in Australian case law.[175]

From this internationalist perspective, the Full Federal Court considered the 'no evidence' review ground under United Kingdom ('UK') and Australian administrative law[176] in light of ICA's differing context: 'the exercise of private power through an agreement and a tribunal to which the parties have consented under a regime wherein errors of fact or law are not legitimate bases for curial intervention'.[177] Arbitration's natural justice rules were found to require investigation of 'whether an international commercial party has been treated unfairly or has suffered real practical injustice in the dispute', a matter depending on the circumstances of each case.[178] The Court thus acknowledged the *New York Convention* and *Model Law 2006*'s international natures, rendering a decision compatible with their policy frameworks and internationally-accepted understandings.[179]

D *Case Study 3: Parties Resisting Enforcement Based on the Legal Analysis of Arbitrators*

The *TCL* enforcement decision is one of several recent cases where parties have sought to resist award enforcement based on a tribunal's factual findings[180] or legal analyses. Post-2010, Australian courts have invariably rejected such arguments, in line with international authority confirming that errors of law do not ground recourse under the *New York Convention* or *Model Law 2006*.[181] This differs to the courts' pre-*Amendment Act* approach, where (contrary to the *New*

[174] Albert Jan van den Berg's seminal *New York Convention* text, for example, draws upon case law from around the world in order to assess the *New York Convention*'s (n 17) uniform interpretation: van den Berg (n 87) 5.

[175] See, eg, *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] 1 Qd R 245, 255 (Jackson J) ('*Mango Boulevard*'); *Liaoning Zhongwang Group Co Ltd v Alfred Group Pty Ltd* [2017] FCA 1223, [96] (Gleeson J); *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452, 470 [101] (Foster J); *Amaysa Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [23] (Croft J) ('*Amaysa*'); *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [19] (Croft J) ('*Cameron*'); *Ladu* (n 76) [169] (Kenny J); *Robotunits* (n 76) 328–9 [13] (Croft J); *Gutnick* (n 83) 207–8 [20] (Croft J); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick [No 2]* [2015] VSC 770, [13] (Croft J) ('*Gutnick [No 2]*').

[176] *TCL v Castel 2014* (n 76) 386–92 [81]–[104] (Allsop CJ, Middleton and Foster JJ).

[177] Ibid 392 [105]. See also at 393 [109].

[178] Ibid 393 [110].

[179] Bathurst (n 93) 10.

[180] See, eg, *Emerald Grain* (n 72) 305 [10], 313 [20] (Pagone J).

[181] van den Berg (n 87) 269; Born (n 28) 3340–1; Blackaby et al (n 40) 591 [10.64], 591–2 [10.67]–[10.69], 622 [11.56]. See also *Model Law 2006* (n 4) art 5.

York Convention's international understandings)[182] a general discretion to refuse enforcement was identified under the *IAA*.[183]

Since 2010, including with reference to this very issue, Croft J's decisions and extra-curial writings have strongly cautioned against the 'temptation' of 'domesticity'.[184] This caution directly supports the *IAA*'s internationalist interpretation, warning that domestically focused reasoning (even if superficially attractive) stands to damage Australia's (and the world's) ICA legal systems.[185] Unsurprisingly, given the *IAA*'s legal requirement of internationalist interpretation, this caution itself is almost a legal rule: one case cited the risk of succumbing to this temptation as justifying rejection of a particular *Model Law 2006* interpretation.[186] Judicial attitudes towards the *IAA* thus arrive at a point diametrically opposite those underpinning Australia's problematic pre-*Amendment Act* case law.

1 Uganda Telecom v Hi-Tech Telecom

An early example of this judicial attitude shift appears in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* ('*Uganda Telecom*'),[187] decided by Foster J (later sitting on the *TCL* enforcement appeal). In 2007, the parties contracted for Uganda Telecom to supply telecommunications services and facilities to Hi-Tech Telecom, an Australian company.[188] Following Hi-Tech's failure to provide an irrevocable bank guarantee and pay invoices,[189] Uganda Telecom commenced arbitral proceedings, receiving an award in its favour in 2009.[190]

Uganda Telecom applied for the award's enforcement in the Federal Court.[191] Among the eight grounds raised in Hi-Tech's defence, it was argued

[182] Blackaby et al (n 40) 622 [11.57].

[183] *Re Resort Condominiums International Inc* [1995] 1 Qd R 406, 426–7 (Lee J).

[184] *Amaysa* (n 175) [43]; *Robotunits* (n 76) 329 [14]; *Gutnick* (n 83) 209 [24]; *Cameron* (n 175) [48], [55]; Justice Clyde Croft, 'The "Temptation of Domesticity" and the Role of the Courts in Australia's Arbitration Regime' (2015) 89(10) *Australian Law Journal* 684; Justice Clyde Croft in Allsop and Croft (n 161) 12 [4]; Croft, 'Evolving Challenge' (n 99) 58. See also *Mango Boulevard* (n 175) 256–7 [20] (Jackson J). Justice Croft has recently retired from the Supreme Court of Victoria: Supreme Court of Victoria, 'Past Judges and Associate Judges', *Our Judiciary* (Web Page, 2020) <https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary/past-judges-and-associate-judges>, archived at <https://perma.cc/X9ME-WSHC>.

[185] *Gutnick* (n 83) 209 [24].

[186] *Robotunits* (n 76) 344–5 [42].

[187] *Uganda Telecom* (n 75).

[188] Ibid 423 [25].

[189] Ibid 425 [32]–[35].

[190] Ibid 428 [51].

[191] Ibid 429 [61].

that the damages and interest awarded were affected by 'errors of law'.[192] Justice Foster bluntly described this as 'quintessentially the type of complaint which ought not be allowed to be raised as a reason for refusing to enforce a foreign award'.[193] In arriving at this conclusion, his Honour embraced the *IAA*'s internationalist understanding, referring to United States jurisprudence and distancing himself from the suggestion that any residual discretion to refuse enforcement now existed.[194]

2 Indian Farmers Fertiliser Cooperative v Gutnick

In *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* ('*Gutnick*'),[195] an award's enforcement was resisted on public policy grounds under the *IAA*'s implementations of both the *New York Convention* and *Model Law 2006*.[196] The Singapore-seated arbitration involved a share purchase contract governed by English law.[197] The Tribunal found that fraudulent misrepresentations had induced share purchases worth USD40.4 million.[198] After Singaporean enforcement orders were not complied with,[199] Victorian proceedings were commenced.

The award debtors argued that 'a purported substantive element of the Award — namely the assertion that it allows for double recovery — enlivens the public policy ground for refusing enforcement'.[200] It was argued that the award, ostensibly providing for rescission, actually allowed the award creditors 'to have their money back and keep the shares'.[201] The award made consequential orders for returning the purchase price, though no such orders were made regarding the shares.[202]

This case implicates more nuanced arguments than *Uganda Telecom*. In a carefully-reasoned judgment, Croft J explained that errors of law do not themselves ground curial intervention, though it remains permissible to consider the

[192] Ibid 422 [22].

[193] Ibid 439 [133].

[194] Ibid 436–9 [127]–[133].

[195] *Gutnick* (n 83). See also *Gutnick [No 2]* (n 175) (application for stay order pending appeal); *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732 (refusing leave to appeal for insufficient prospects of success).

[196] *Gutnick* (n 83) 202 [3] (Croft J).

[197] Ibid 202–3 [7]–[8].

[198] Ibid 203 [9].

[199] Ibid 203–4 [10]–[11].

[200] Ibid 210 [30].

[201] Ibid 214 [38].

[202] Ibid 214–15 [40].

legal analysis of arbitrators in addressing specific public policy challenges.[203] Errors of law do not *themselves* infringe public policy, but might underpin another public policy objection, framed (in this case) around double recovery.[204]

Unlike typical enforcement decisions, *Gutnick* addressed both procedural (enforcement) law *and* the substantive law (English rescission law) applied in the arbitration. To complicate matters further, as English rescission law is part of the common law, Australian and Singaporean judgments on point were also considered.[205] Though implicating foreign cases, this analysis does not bear upon the *IAA*'s internationalist interpretation, given its substantive law context.

Gutnick was, however, otherwise internationalist. The *TCL* passage quoted in Part III(C) was cited,[206] as were Hong Kong and Singaporean cases addressing policies of minimum curial intervention.[207] In addition, as described in this Part's opening remarks, Croft J forcefully rejected the legitimacy of domestically focused *IAA* interpretation:

> [A]dopting a domestic approach may be attractive in the short-term, but ultimately has the potential to interfere with broader, longer-term objectives. Chief among these … is the promotion of international uniformity in international commercial arbitration practice referred to in TCL.[208]

In addition to international case law, his Honour referred to United Nations extrinsic materials concerning the *Model Law 1985*, those materials citing 'the desirability of uniformity of the law of arbitral procedures'.[209] Justice Croft also affirmed *TCL*'s analysis that 'public policy' must be understood in its international context, and is 'not to be given a broad interpretation that might pick up particular national domestic policy manifestations'.[210] Even at this exacting standard, which is consistent with international commentary[211] and the *New*

[203] Ibid 216 [46].

[204] Ibid [44]–[46]. See also Justice Clyde Croft, 'Recent Developments in Arbitration: At Home and Abroad' (Seminar Paper, Arbitration Special Interest Group, Resolution Institute, 16 October 2017) 13 ('Recent Developments').

[205] *Gutnick* (n 83) 216–17 [47].

[206] Ibid 207–8 [20].

[207] Ibid 208–9 [21]–[23].

[208] Ibid 209 [24].

[209] Ibid 205 [14], quoting *Model Law* (n 10) annex I [2]. Justice Croft did not expressly rely on the *IAA* (n 55) s 17(1) in doing so, although that provision addresses UNCITRAL materials in particular (and not those of the United Nations generally).

[210] *Gutnick* (n 83) 211 [32], quoting *TCL v Castel 2014* (n 76) 380–1 [64] (Allsop CJ, Middleton and Foster JJ).

[211] Born (n 28) 3651–2. See also Blackaby et al (n 40) 643–4 [11.111]–[11.114].

York Convention's drafting history,[212] double recovery was found to 'likely' violate public policy, though was not substantiated on the facts.[213]

This case is remarkable as one *actually enquiring* into a tribunal's application of the law, but doing so *consistently* with the *IAA*'s internationalist interpretation.

3 *The* Sauber *Decisions*

Though attracting significant attention for other reasons (being the speed with which they were delivered),[214] the *Sauber* decisions[215] are an interesting place to conclude this Part's analysis.

Their circumstances, and the irony of their situation within a Formula One racing context, are addressed in detail elsewhere.[216] For present purposes, it is sufficient to note that they concern an urgent award enforcement application ahead of the 2015 Formula One season. Both the Victorian Supreme Court and Court of Appeal's judgments implicate internationalist analysis by insisting that awards are not subject to merits review, an internationally accepted understanding of the *New York Convention* and *Model Law 2006*. However, interestingly, both cases put this position *without citing* international materials. At first instance, merits review is simply disavowed (without citing any authority) on two occasions.[217] The Court of Appeal referred only to *TCL*.[218]

This article's definition of internationalist interpretation encompasses having regard to an instrument's international nature. Ironically, both *Sauber* decisions reflect the *IAA*'s internationalist interpretation without referring to international sources, by treating the internationally accepted rule against merits review as a mainstream principle of Australian ICA law.[219] Prior cases such as

[212] Born (n 28) 3648–9.

[213] *Gutnick* (n 83) 214 [39].

[214] See, eg, Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2014/2015 in Review' (2015) 26(4) *Australasian Dispute Resolution Journal* 192, 197–9; James Morrison and Mary Flanagan, 'Recent Developments in International Arbitration in Australia 2015/2016' (2016) 33(6) *Journal of International Arbitration* 723, 734–5.

[215] *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792 ('*Sauber Trial*'); *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786 ('*Sauber Appeal*').

[216] See generally Christoph Müller and Sabrina Pearson, 'Waving the Green Flag to Emergency Arbitration Under the Swiss Rules: The Sauber Saga' (2015) 33(4) *Swiss Arbitration Association Bulletin* 808. For the trial judge's own extra-curial comments on the cases: see Croft, 'Promoting Australia' (n 156) 3–13.

[217] *Sauber Trial* (n 215) 796 [12], 799 [27] (Croft J).

[218] *Sauber Appeal* (n 215) 789 [7]–[8], 790 [17] (Whelan, Beach and Ferguson JJA).

[219] Cf *Sauber Trial* (n 215) 799 [33], where the judgment's brevity was a consequence of its fast delivery.

TCL and *Uganda Telecom* appear to have done the 'hard work' of international analysis, paving the way for *Sauber*'s application of non-controversial reasoning, consistent with internationally accepted principles. After *Altain Khuder*'s shaky restart, and subject to some outlier cases not addressed in this article,[220] the *IAA*'s internationalist interpretation has therefore improved post-*Amendment Act*.

IV The Internationalist Interpretation of Australian International Sales Law

Nevertheless, the doctrine of precedent's influence on the *CISG* interpretations of Australian courts has been much less constructive. The opposite interpretative trend is seen regarding the *CISG*.

A *Internationalist Interpretation and Australian International Sales Law*

The *CISG*'s internationalist interpretation is a legal requirement, derived from *CISG* art 7(1). This requirement, in principle, directly translates into Australian law. This is because state and territory legislation attaches the *CISG* as a schedule,[221] and gives its original English language text (including *CISG* art 7(1)) the 'force of law'.[222]

Nevertheless, complications arise from an additional section contained within Australia's *CISG* Acts, providing that the *CISG* prevails over other state and territory laws 'to the extent of any inconsistency'.[223] This provision *might* be interpreted as allowing non-harmonised Australian law to prevail over the

[220] See n 95 and accompanying text.

[221] *Sale of Goods (Vienna Convention) Act 1987* (ACT) sch 1 ('*Vienna Convention Act ACT*'); *Sale of Goods (Vienna Convention) Act 1987* (NI) sch ('*Vienna Convention Act NI*'); *Sale of Goods (Vienna Convention) Act 1986* (NSW) sch 1 ('*Vienna Convention Act NSW*'); *Sale of Goods (Vienna Convention) Act 1987* (NT) sch ('*Vienna Convention Act NT*'); *Sale of Goods (Vienna Convention) Act 1986* (Qld) sch ('*Vienna Convention Act Qld*'); *Sale of Goods (Vienna Convention) Act 1986* (SA) sch ('*Vienna Convention Act SA*'); *Sale of Goods (Vienna Convention) Act 1987* (Tas) sch 1 ('*Vienna Convention Act Tas*'); *Goods Act 1958* (Vic) sch ('*Goods Act Vic*'); *Sale of Goods (Vienna Convention) Act 1986* (WA) sch 1 ('*Vienna Convention Act WA*').

[222] *Vienna Convention Act ACT* (n 221) s 5; *Vienna Convention Act NI* (n 221) s 5; *Vienna Convention Act NSW* (n 221) s 5; *Vienna Convention Act NT* (n 221) s 5; *Vienna Convention Act Qld* (n 221) s 5; *Vienna Convention Act SA* (n 221) s 4; *Vienna Convention Act Tas* (n 221) s 5; *Goods Act Vic* (n 221) s 86; *Vienna Convention Act WA* (n 221) s 5.

[223] *Vienna Convention Act ACT* (n 221) s 6; *Vienna Convention Act NI* (n 221) s 6; *Vienna Convention Act NSW* (n 221) s 6; *Vienna Convention Act NT* (n 221) s 6; *Vienna Convention Act Qld* (n 221) s 6; *Vienna Convention Act SA* (n 221) s 5; *Vienna Convention Act Tas* (n 221) s 6; *Goods Act Vic* (n 221) s 87; *Vienna Convention Act WA* (n 221) s 6.

CISG where no inconsistency arises. This potential construction, inviting comparisons between the *CISG* and non-harmonised Australian law, stands to adversely affect the *CISG*'s internationalist interpretation. Differing scholarly views about this section have been expressed by Aghili[224] and Spagnolo,[225] with the judicial decision in *Playcorp Pty Ltd v Taiyo Kogyo Ltd* ('*Playcorp*')[226] also addressing this matter.

Aghili argues that the law 'limits' the *CISG*'s Australian autonomy.[227] Her reasons include these inconsistency provisions, understood as preserving the application of non-harmonised Australian law where 'consistent' with the *CISG*'s effect.[228] In Aghili's view, *CISG* art 7(1)'s vague and undefined terms do not overcome this construction to establish the *CISG*'s autonomy.[229] Spagnolo, on the other hand, considers *CISG* art 7(1)'s autonomous interpretation rule decisive, as it makes the entire *CISG* necessarily inconsistent with non-harmonised Australian law.[230] The *CISG* cannot be read in light of Australian law, thus whenever it is applicable, local laws addressing its subject-matters are not.[231] Spagnolo views the inconsistency provisions as having clarificatory, rather than limiting, effect.[232]

Spagnolo's analysis is the orthodox view. No other Australian commentary has been identified supporting Aghili's contention. The authors prefer Spagnolo's view as giving full effect to *CISG* arts 1 and 7(1), the presumption against redundant legislative provisions,[233] and Kirby J's endorsement (in the High Court) of observing other countries' treaty interpretations.[234] Spagnolo's view also pays due regard to the context and purposes of Australia's *CISG* Acts,

224 Aghili (n 67).

225 Lisa Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers' (2009) 10(1) *Melbourne Journal of International Law* 141.

226 [2003] VSC 108 ('*Playcorp*').

227 Aghili (n 67) 16.

228 Ibid 20.

229 Ibid 20–5.

230 Spagnolo (n 225) 190–1.

231 Ibid.

232 Ibid 191.

233 See, eg, *Karanfilov v Inghams Enterprises Pty Ltd* [2001] 2 Qd R 273, 281 [13] (McPherson JA). Aghili's reading of Australia's *CISG* Acts (see above n 221) renders their force of law provisions otiose, while Spagnolo's view gives them effect *and* explains the existence of the inconsistency provisions as clarificatory in nature.

234 *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283, 301 [40] (Kirby J). See also *Parkes Shire Council v South West Helicopters Pty Ltd* (2019) 266 CLR 212, 226 [36] (Kiefel CJ, Bell, Keane and Edelman JJ), 236 [70] (Gordon J).

rather than just their text.[235] Indeed, Aghili's contention is an example of the situation described by Michael Kirby 'where the apparent will of the legislature would be frustrated by excessively narrow and literal interpretations'.[236] Nevertheless, the mere existence of these inconsistency provisions has generated uncertainty as to the *CISG*'s Australian operation, evidenced by *Playcorp* and explained in Part IV(B).

B *Case Study 1: Selected Pre-2009 Decisions*

This article's two *CISG* case studies divide at 2009, a date approximating the *Amendment Act*'s passage in the ICA context and marking the publication of Spagnolo's comprehensive analysis of all 14 then-existing Australian *CISG* cases.[237] Select pre-2009 cases are briefly addressed here, providing context for Part IV(C)'s analysis of more recent jurisprudence. Of Australia's early cases, *Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* ('*Roder Zelt*')[238] and *Perry Engineering Pty Ltd (rec, mgr and admin apptd) v Bernold AG* ('*Perry Engineering*')[239] are typically identified as more effectively embracing the *CISG*,[240] in contrast to most other cases (including *Playcorp*).

1 Roder Zelt

Roder Zelt involved a German seller and Australian buyer's dispute regarding goods delivered but not paid for in full when the buyer was placed into administration. Roder Zelt attempted to retake possession pursuant to a retention of title clause, rather than queue as a creditor. The *CISG* governed the parties' contract as both Germany and Australia are contracting states.[241]

[235] See generally Justice John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) *Melbourne University Law Review* 626, 632, 639, 655–6; Michael Kirby, 'The Never-Ending Challenge of Drafting and Interpreting Statutes: A Meditation on the Career of John Finemore QC' (2012) 36(1) *Melbourne University Law Review* 140, 158–63 ('Never-Ending Challenge'); Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35(1) *Melbourne University Law Review* 113, 116, 131.

[236] Kirby, 'Never-Ending Challenge' (n 235) 162.

[237] Spagnolo (n 225) 167–207. Spagnolo's analysis omits *South State Food & Beverage Pty Ltd v Chanda Kaur* [2005] FCA 587 ('*South State*'), decided before 2009 but (at the time of her analysis, and also at the time of writing) not recorded on the Albert H Kritzer *CISG* Database. See generally Pace Law School, '*CISG* Database', *Albert H Kritzer CISG Database* (Web Page) <http://www.iicl.law.pace.edu/cisg/cisg>, archived at <https://perma.cc/W77R-XAGB> ('*CISG* Database').

[238] (1995) 57 FCR 216 ('*Roder Zelt*').

[239] [2001] SASC 15 ('*Perry Engineering*').

[240] See, eg, Spagnolo (n 225) 169, 171, 212.

[241] *Roder Zelt* (n 238) 222 (von Doussa J).

The Federal Court's *Roder Zelt* judgment demonstrates sensitivity to the *CISG*'s international origins and its incorporation into Australian law. The Court noted that the pleadings were 'expressed in the language and concepts of the common law' with counsel making 'only passing reference' to the *CISG* at trial, but that since the *CISG* applied, 'the issues to be addressed [were] somewhat different to those stated'.[242] The Court observed, for example, that the common law repudiation concepts relied upon were 'replaced' by the *CISG*,[243] indicating it did not feel constrained by the parties' (incorrect) pleadings, notwithstanding Australia's adversarial court system. As to the *CISG*'s effect, addressed in affidavit evidence, the Court confirmed the *CISG* (being 'part of' Australian law) 'is not to be treated as a foreign law which requires proof as a fact'.[244] Finally, on the retention of title clause ultimately at issue, the Court identified the *CISG* as not governing property matters, but covering whether or not such clauses are agreed (and their contents).[245] These aspects of *Roder Zelt*'s reasoning are all consistent with internationally accepted understandings of the *CISG*.[246] The case does not, however, engage with international materials. While such materials were less accessible in 1995,[247] *CISG* art 7(1)'s interpretative rules are not expressed as being conditional upon convenience. From this perspective, *Roder Zelt* may be better described as respecting the *CISG*'s autonomy than internationalist.[248]

2 Perry Engineering

Perry Engineering concerned the assessment of damages following a plaintiff's default judgment obtained absent a foreign defendant's appearance. The plaintiff's claim had several bases, including breach of contract, tort, and the now-

242 Ibid 220.

243 Ibid 233.

244 Ibid 222. On proving foreign law, see generally James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31(2) *Melbourne University Law Review* 400. Cf *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18L; Firew Tiba, 'The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia' (2016) 14(1) *Loyola University Chicago International Law Review* 31, 49; Marilyn Warren and Clyde Croft, 'An International Commercial Court for Australia: An Idea Worth Taking to Market' (Conference Paper, Challenges and Opportunities for Asia-Pacific International Arbitration Symposium, 15 November 2019) 21–2.

245 *Roder Zelt* (n 238) 222–4.

246 See, eg, Schwenzer and Hachem, 'Introduction' (n 69) 18–19 [3]; Ingeborg Schwenzer and Pascal Hachem, 'Article 4' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4th ed, 2016) 73, 92–3 [47].

247 Spagnolo (n 225) 173.

248 Ibid.

superseded *Trade Practices Act 1974* (Cth). After default judgment, but prior to assessing damages, Judge Burley 'noticed' the *CISG*'s South Australian operation, communicated this to the plaintiff, and invited amendment to its pleadings as 'if … the Convention applies, the Court may conclude that it is not possible to [otherwise] assess damages'.[249] When no amendment was made, this was deemed 'fatal' to the contractual damages claim,[250] since 'the Court cannot proceed to an assessment of damages based on the provisions of an Act of Parliament which the plaintiff acknowledges do not apply'.[251] No international materials were cited, though none were necessary: the Court did not actually apply the *CISG*. Nevertheless, its autonomous nature, incorporation into Australian law, and relationship with non-harmonised Australian law all appeared understood.

Neither *Roder Zelt* nor *Perry Engineering* addressed the inconsistency provisions contained in the Australian *CISG* Acts. A different approach was taken, however, in *Playcorp*.

3 Playcorp

In that case, a dispute between a Japanese toy seller and its Australian buyer arose out of a distributorship arrangement.[252] Individual sales contracts formed within that arrangement's framework did not contain choice of law clauses. The Victorian Supreme Court identified Victorian law as governing them,[253] including the *CISG*. However, unlike in the cases addressed above, the Court deferred to the parties' pleadings concerning the *CISG*. On its potential application, Hansen J reasoned:

> [U]nder s 6 the provisions of the Convention prevail over any other law in force in Victoria to the extent of any inconsistency. It was not suggested that there was any material difference or inconsistency between the provisions of art 35 and s 19(a) and (b) [of the *Goods Act 1958* (Vic)] and because of that and the way the case was conducted, it is unnecessary to consider whether there is. As I understood it, counsel proceeded on the basis that there was no material difference or inconsistency. As a matter of logic … s 6 would lead one to consider the Convention before the *Goods Act*. Nothing turns on the fact that I have reversed that

249 *Perry Engineering* (n 239) [6].

250 Ibid [16].

251 Ibid [18].

252 *Playcorp* (n 226) [1] (Hansen J).

253 Ibid [244].

> order in the present discussion. I have simply followed the order in the pleadings.[254]
>
> …
>
> [E]ither the *Goods Act* or the Convention applied to the sales contract. … As I have stated, the Convention has the benefit of paramountcy over the *Goods Act* in the event of any inconsistency between the two. As I have said, no such inconsistency was suggested, and having regard also to the way in which the case was conducted, it is appropriate to proceed on the basis that there is none.[255]

Playcorp's approach, equating the *CISG* with domestic Australian sales law, ignored the *CISG*'s autonomous character and failed to realise its internationalist interpretation. Justice Hansen's failure to consult international case law and commentary, though consistent with the Supreme Court's more general citation practices,[256] ignores *CISG* art 7(1)'s specific requirements. Notably, the Albert H Kritzer *CISG* Database existed in 2003,[257] has open access availability, and could easily have been referred to. Other pre-2009 cases evidence similar parochial tendencies.[258] What, then, is the position now, just over one decade on?

C *Case Study 2: Selected Post-2009 Decisions*

Spagnolo predicted, in 2009, that the Federal Court would be 'willing and prepared to take the next step, should a case to which the *CISG* directly applies come before it'.[259] Unfortunately, four recent decisions instead confirm Australia's disengagement from the *CISG*'s internationalist interpretation. *Playcorp*'s parochial reasoning has become entrenched under multiple layers of precedent, colouring Australia's post-2009 *CISG* experience as very different to its contemporary *IAA* approach.

254 Ibid [235]. The *Sale of Goods (Vienna Convention) Act 1987* (Vic) s 6, referred to in *Playcorp* (n 226), was the former Victorian inconsistency provision that now exists as the *Goods Act Vic* (n 221) s 87.

255 *Playcorp* (n 226) [245].

256 See Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31(3) *Melbourne University Law Review* 733, 757–61. See also at 801–2. It is noted that this study considered reported cases only: at 743–4; *Playcorp* (n 226) is an unreported decision. For citation data concerning Hansen J's own reported judgments: see Fausten, Nielsen and Smyth (n 256) 790–1, 796–7.

257 Pace Law School, '*CISG* Database' (n 237): referring (as at 27 March 2020) to the Database's establishment 'over twenty-years ago'.

258 See generally Spagnolo (n 225) 167–207.

259 Ibid 207. This optimism followed Finn J's reference to international jurisprudence in *Hannaford v Australian Farmlink Pty Ltd* [2008] FCA 1591, [5], [43], [233], [242] ('*Hannaford*').

1 *The* Castel v Toshiba *Cases*

The first instance and appellate *Castel v Toshiba* cases concerned the cross-border sale of defective electronic products.[260] After consensually terminating their relationship, the parties litigated to address several unresolved matters.[261] The Federal Court and Full Federal Court's decisions both evidence multiple instances of parochial *CISG* reasoning.[262] This article, however, focuses on just one: their interpretations of *CISG* art 35's conformity obligations, also at issue in *Playcorp*.

The Federal Court explained its view of *CISG* art 35's operation (citing *Playcorp* alongside two other Australian authorities) as follows:

> Those provisions have been treated by Australian courts as imposing, effectively, the same obligations as the implied warranties of merchantable quality and fitness for purpose arising under s 19 of the *Goods Act* …[263]

This assertion was endorsed on appeal.[264] Though departing from *Playcorp's* article-by-article inconsistency analysis, and avoiding any reference to the inconsistency provisions contained in the *CISG* Acts, these cases perpetuate *Playcorp*'s problematic equation of *CISG* art 35 with the *Sale of Goods Acts*' implied terms,[265] and employ that case as precedential authority.

2 Fryer Holdings

Fryer Holdings Pty Ltd (in liq) v Liaoning MEC Group Co Ltd ('*Fryer Holdings*'),[266] decided shortly after *Castel v Toshiba*, involved the purchase of bottle-

[260] *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] FCA 1028 ('*Castel Trial*'); *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* (2011) 192 FCR 445 ('*Castel Appeal*'). An application for special leave to appeal to the High Court of Australia was refused, given its insufficient prospects of success: *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] HCASL 208, [5] (Gummow and Kiefel JJ).

[261] *Castel Trial* (n 260) [50] (Ryan J).

[262] See, eg, counsel for Castel invoking the *Goods Act Vic* (n 221) 'further or alternatively' to the *CISG* (n 10): at *Castel Trial* (n 260) [53]; the conclusion that the parties' contract (governed by the *CISG* (n 10)) did not exclude implied warranties of merchantable quality or fitness for purpose arising under the *CISG* (n 10) or under the *Goods Act Vic* (n 221): at *Castel Trial* (n 260) [119]; and the calculation of damages: at *Castel Trial* (n 260) [166]–[232]. See also *Castel Appeal* (n 260) 455–6 [51], [55] (Keane CJ, Lander and Besanko JJ) referring to UK case law on the measure of damages; with respect to *CISG* (n 10) art 35(3): *Castel Appeal* (n 260) 492–3 [309]–[314]; and regarding *CISG* (n 10) arts 74, 77: *Castel Appeal* (n 260) 493–5 [315]–[330]. See generally Zeller and Andersen (n 51) 17.

[263] *Castel Trial* (n 260) [123] (citations omitted).

[264] *Castel Appeal* (n 260) 460 [89].

[265] See, eg, *Goods Act Vic* (n 221) s 19; *Sale of Goods Act 1923* (NSW) s 19.

[266] [2012] NSWSC 18 ('*Fryer Holdings*').

washing and bottling lines (alongside glass bottles) required by the buyer for a third-party contract. A conformity dispute arose when glass fragments appeared in that third party's bottled products. As in *Castel v Toshiba*, the Court did not address the inconsistency provisions, but as to the *CISG*'s effect it explained:

> The Convention provides that there is an implied term of a contract for the sale of goods (to which the Convention applies), that the goods must be fit for the purposes for which such goods would ordinarily be used, and for any particular purpose made known by the buyer to the seller either expressly or by implication when the contract is made. See art 35(2).[267]
>
> …
>
> Were the goods fit for purpose? The test which has been applied in this country is that fitness for purpose equates to being of merchantable quality. See, for example, [*Castel v Toshiba*]. It seems to me that I should follow that test, particularly since it has been applied in other common law jurisdictions.[268]

Merchantable quality was discussed with reference to *Australian Knitting Mills Ltd v Grant*,[269] a common law authority, and damages were assessed without reference to the *CISG*.[270]

Despite their brevity, five problematic issues arise from just these two passages. First, *Playcorp*'s interpretative error is now protected by an additional layer of precedent. Both *Castel v Toshiba* decisions cite *Playcorp*, while *Fryer Holdings* instead cites *Castel v Toshiba* at first instance. Second, after equating *CISG* art 35's effect with non-harmonised sales law, *Fryer Holdings* refers to domestic Australian case law, which is by definition inapplicable. Third, the Court justifies its position by reference to other unidentified common law jurisdictions, cites no authority in doing so, and leaves it unclear as to whether fitness for purpose is being referred to in its *Sale of Goods Act* or *CISG* sense. Article 7(1) of the *CISG* does not differentiate between common and civil law states, and if the Court's reference to common law jurisdictions means states following

[267] Ibid [16] (McDougall J).

[268] Ibid [19].

[269] (1933) 50 CLR 387. See *Fryer Holdings* (n 266) [20]. See also Zeller and Andersen (n 51) 16.

[270] *Fryer Holdings* (n 266) [23]–[34].

the UK's sales law tradition, it must be noted that the UK is not a *CISG* contracting state.[271] The common law of contract and the UK's *Sale of Goods Act* iterations are irrelevant to the *CISG*'s interpretation in any event.[272]

Fourth, *Fryer Holdings* describes *CISG* art 35 as providing for implied terms. Article 35(2) of the *CISG*'s conformity obligations actually apply by the *Convention*'s own force, not by contractual implication.[273] Far from being a matter of syntax, this language reflects a failure to engage with the *CISG* according to its own (autonomous) terms.[274]

Finally, and most interestingly, is the Court's description of its test as being the one 'applied in this country'.[275] These words echo the first instance *Castel v Toshiba* judgment, referring to *CISG* art 35's interpretation 'by Australian courts',[276] and reflect the idea captured in this article's epigraph that Australia does not allow the interpretations of others to decide what its international obligations are. Such reasoning is incompatible with *CISG* art 7(1), which requires the *Convention*'s uniform application and not interpretation based on individual (parochial) national views.

3 NT Beverages

The Federal Court's decision in *NT Beverages Group Pty Ltd v PT Bromo Tirta Lestari* ('*NT Beverages*')[277] is an interesting postscript to the three post-2009 cases already addressed.

NT Beverages did not directly apply the *CISG*, instead dealing with a company's application to set aside a creditor's statutory demand under the *Corporations Act 2001* (Cth). The *CISG* had incidental relevance, however, as it governed the Indonesian and Australian parties' underlying contract for the sale of bottled water. Substantive remedies were sought in other proceedings pursuant to the *Sale of Goods (Vienna Convention) Act 1986* (NSW) and the *Australian*

[271] See generally Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, 'The CISG and the United Kingdom: Exploring Coherency and Private International Law' (2018) 67(3) *International and Comparative Law Quarterly* 607.

[272] Schwenzer and Hachem, 'Article 7' (n 57) 122 [8].

[273] See, eg, the obligation to deliver the goods 'as required by the contract *and the Convention*': *CISG* (n 10) art 30 (emphasis added); and the entitlement to remedies '[i]f the seller fails to perform any of [its] obligations under the contract *or this Convention*': *CISG* (n 10) art 45 (emphasis added).

[274] This same error is evident in party submissions as summarised in a Victorian decision, also handed down in 2012: *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* [2012] VSC 548, [6] (Daly AsJ) ('*Castel v TCL 2012*').

[275] *Fryer Holdings* (n 266) [19] (McDougall J).

[276] *Castel Trial* (n 260) [123] (Ryan J).

[277] [2017] FCA 775 ('*NT Beverages*').

Consumer Law ('*ACL*').[278] That those proceedings concerned both the *CISG* and *ACL* illustrates their potential overlap, identified in existing scholarship.[279] Notwithstanding *CISG* art 2(a)'s consumer contracts exclusion, since these bodies of law define consumer transactions differently, a contract may be both an *ACL* consumer supply and a non-consumer *CISG* sale. Foreseeing this, the *ACL* s 68 assigns priority to the *CISG* over its own (otherwise mandatory) consumer guarantees.

It is therefore noteworthy that the *NT Beverages* decision describes the plaintiff as arguing that 'the contractual limitation is inapplicable to the … claim based on the Vienna Convention, or to any similar or corresponding liability under ss 18, 29, 33, 54 or 55 of the [*ACL*]',[280] without reference to the *ACL* s 68. This provision is important, even in the statutory demand context, as the *CISG* is legally incapable of concurrent operation with the *ACL* ss 54 (acceptable quality) and 55 (fitness for disclosed purpose). Though not implicating internationalist interpretation per se, it is hard to imagine Australia fulfilling its *CISG* art 7(1) obligations if the *CISG*'s interface with non-harmonised Australian law is not properly understood.

V Analysis and Conclusion

Though taking quite different forms, the *New York Convention*, *Model Law 2006*, and *CISG* are all internationally promulgated PIL instruments. They all seek to harmonise the law, for the benefit of merchants and their cross-border trade. Internationalist interpretation is key to the achievement of these objectives in all three cases, and is legally required in the abstract and under Australian law. Yet Australia's lived experience is mixed.

Internationalist interpretation of the *IAA*, incorporating the *New York Convention* and *Model Law 2006*, has improved in the post-*Comandate Marine* and post-*Amendment Act* eras. The opposite trend is seen, however, regarding the *CISG*. Ironically, the doctrine of precedent has entrenched the *IAA*'s interna-

[278] Ibid [4]–[5], [33]–[34] (Gleeson J). The *Australian Consumer Law* is contained in the *Competition and Consumer Act 2010* (Cth) sch 2. At the time of writing, the authors have been unable to identify any reported or unreported judgments relating to these separate proceedings.

[279] Benjamin Hayward, 'CISG as the Applicable Law: The Curious Case of Australia' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *Contracts for the International Sale of Goods: A Multidisciplinary Perspective* (Sweet & Maxwell, 2019) 167, 177–80 [10.26]–[10.33] ('CISG as the Applicable Law'); Benjamin Hayward and Patricia Perlen, 'The CISG in Australia: The Jigsaw Puzzle That Doesn't Quite Fit' (2011) 15(1) *Vindobona Journal of International Commercial Law and Arbitration* 119, 149–54.

[280] *NT Beverages* (n 277) [38].

tionalist interpretation whilst perpetuating parochial *CISG* analysis. This is curious given the existence of *CISG* art 7(1), and the enthusiastic response of Australian courts to its adaptation in *Model Law 2006* art 2A(1).

This concluding Part offers suggestions as to why this might be the case, and makes recommendations as to how the *CISG* reasoning of Australian courts might be improved, including with reference to New Zealand's *CISG* case law and legislation.

A *Australia's* CISG *Legislation and Lessons from New Zealand*

Australia's *CISG* experience can be contrasted with New Zealand's, reflected in the 2010 (trial) and 2012 (appeal) *Smallmon* decisions.[281] These were New Zealand's first cases directly applying the *CISG*,[282] and coincidentally involve an Australian party. Both are lauded for their internationally minded approach to the *CISG*.[283] Two particular passages from the Court of Appeal's judgment are indicative of its tenor, mirroring French J's views[284] at trial:

> Counsel for the Smallmons properly acknowledged that resort to authorities dealing with domestic law is not permissible. This follows from the requirement in art 7, dealing with the interpretation of the Convention, to have regard to 'its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. Thus the Convention is to be given an autonomous interpretation requiring the Convention to be interpreted exclusively on its own terms and applying Convention-related decisions in overseas jurisdictions.[285]
>
> …
>
> We therefore propose to consider only the international authorities and articles in interpreting art 35(2).[286]

[281] *Smallmon v Transport Sales Ltd* [2010] NZHC 1367 ('*Smallmon Trial*'); *Smallmon v Transport Sales Ltd* [2012] 2 NZLR 109 ('*Smallmon Appeal*').

[282] Petra Butler, 'The Use of the CISG in Domestic Law' (2011) 15(1) *Vindobona Journal of International Commercial Law and Arbitration* 15, 28; Katrina Winsor, 'CISG Applied' [2011] (September) *New Zealand Law Journal* 281, 281.

[283] See, eg, Petra Butler, 'New Zealand' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 539, 541, 544–6; Bruno Zeller, 'The CISG and the Common Law: The Australian Experience' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 57, 76; Zeller and Andersen (n 51) 17–18.

[284] *Smallmon Trial* (n 281) [88].

[285] *Smallmon Appeal* (n 281) 121 [39] (Stevens J).

[286] Ibid 121 [41].

Smallmon's approach is diametrically opposite to Australia's problematic *CISG* jurisprudence, with *CISG* art 35(2) also at issue in *Playcorp*, *Castel v Toshiba*, and *Fryer Holdings*. Why does this significant interpretative divide exist between two close neighbour states? And why has *Smallmon* not been influential in Australia, given *TCL*'s endorsement of New Zealand case law in the ICA context and *TCL*'s broader reference to international commercial law?[287]

As explained above in Part IV, Australia's recent, and problematic, *CISG* cases take root in *Playcorp*. *Playcorp*'s own reasoning was affected by the inconsistency provisions contained in Australia's *CISG* Acts. New Zealand's legislation, however, is cast in very different terms:

> The provisions of the Convention, in relation to contracts to which the Convention applies, have effect in place of any other law of New Zealand that relates to contracts of sale of goods to the extent–
>
> (a) that the law is concerned with any matter that is governed by the Convention; and
>
> (b) that the application of the law is not expressly permitted by the Convention.[288]

This provision addresses the *CISG*'s New Zealand operation with significant precision compared to Australia's Acts. It defines the displacement of local law by reference to the *CISG*'s subject-matter scope, picking up *CISG* art 7(2)'s language[289] and recognising that the *CISG* itself sometimes defers to non-harmonised domestic law.[290] Inconsistency is not mentioned, avoiding any suggestion (as *Playcorp* entertained) that the *CISG* should be compared with local legislation. The wording used in Australia's *CISG* Acts, failing to capture the 'precision and clarity'[291] of their New Zealand counterpart, emerges as one possible explanation for Australia's *CISG* status quo.

B *Other Reasons*

This wording is likely not the sole contributor. Its relevance at all actually presupposes some familiarity with the *CISG* and Australia's implementing Acts,

[287] *TCL v Castel 2014* (n 76) 383–4 [75] (Allsop CJ, Middleton and Foster JJ).

[288] *Contract and Commercial Law Act 2017* (NZ) s 205. See also at s 345(1)(j), repealing *Sale of Goods (United Nations Convention) Act 1994* (NZ) s 5.

[289] Hayward and Perlen (n 279) 129 n 62.

[290] *CISG* (n 10) arts 7(2), 28.

[291] See generally Middleton (n 235) 633.

which anecdotal evidence (though not yet any empirical study) gives reason to doubt.[292]

Putting this to one side, Australia's small number of *CISG* cases is a further candidate. Only 33 exist at the time of writing, despite the *CISG* being Australian law for more than 30 years.[293] Even this figure overstates its presence. Some of these cases are appeal decisions,[294] several mention but do not apply the *CISG*,[295] and still others involve parties opting out.[296] The few genuine Australian *CISG* cases, and consequent lack of 'an authoritative, appellate level judgment clearly explaining the *CISG*'s interaction with Australian domestic law',[297] might explain judicial tendencies to seek guidance from familiar yet inapplicable sources. They do not, however, reflect a paucity of *CISG* material elsewhere in the world. A treasure trove of case law exists outside of Australia which our courts and practitioners could benefit from using, if so inclined.[298]

Another explanation might be found in Australia's statutory *CISG* architecture. As of 2009, Kee and Muñoz identified the absence of any reference to the *CISG* in Australia's non-harmonised *Sale of Goods Acts*.[299] This remains the case

[292] Spagnolo (n 225) 163, 213. See also Kee and Muñoz (n 9) 100.

[293] The Albert H Kritzer *CISG* Database records 28, determined by searching for 'Australia' under the jurisdiction field, using the case law search form: Pace Law School, *CISG* Database (n 237). A further five cases were identified via searches of the Lexis Advance database: *Luo v Windy Hills Australian Game Meats Pty Ltd [No 3]* [2019] NSWSC 862; *Fletcher v Capstone Aluminium SDN BHD* [2016] FCA 1459; *Castel v TCL 2013* (n 25); *Castel v TCL 2012* (n 274); *South State* (n 237). UNCITRAL's CLOUT database records 12 Australian *CISG* decisions, all of which also appear on the Albert H Kritzer *CISG* Database: United Nations Commission on International Trade Law, 'Case Law on UNCITRAL Texts (CLOUT)', *Library and Research Resources* (Database) <https://uncitral.un.org/en/case_law> ('CLOUT').

[294] See, eg, *Castel v TCL 2013* (n 25); *Castel Appeal* (n 260); *Vetreria Etrusca SRL v Kingston Estate Wines Pty Ltd* [2008] SASC 75; *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD* [2002] 2 Qd R 462.

[295] See, eg, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Valve Corporation v Australian Competition and Consumer Commission* (2017) 351 ALR 584.

[296] See, eg, *Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA [No 4]* (2009) 255 ALR 632; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd [No 2]* (2012) 201 FCR 535.

[297] Benjamin Hayward, 'The CISG in Australia: The Jigsaw Puzzle Missing a Piece' (2010) 14(2) *Vindobona Journal of International Commercial Law and Arbitration* 193, 222.

[298] See generally United Nations Commission on International Trade Law, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations, 2016) ('*CISG Digest*'); United Nations Commission on International Trade Law, 'CLOUT' (n 293); Pace Law School, '*CISG* Database' (n 237); 'UNILEX on UNIDROIT Principles & CISG: International Case Law & Bibliography', *UNILEX* (Web Page) <http://www.unilex.info/>, archived at <https://perma.cc/9NKK-CR2E>. See also Camilla Baasch Andersen, 'Furthering the Uniform Application of the CISG: Sources of Law on the Internet' (1998) 10(2) *Pace International Law Review* 403, 407–8.

[299] Kee and Muñoz (n 9) 100.

today in all Australian jurisdictions except Victoria, where the *Sale of Goods (Vienna Convention) Act 1987* (Vic) was repealed by the *Consumer Affairs Legislation Amendment (Reform) Act 2010* (Vic), which incorporated its provisions into the *Goods Act 1958* (Vic) pt IV. This can only be a partial explanation, however. Many jurisdictions implement the *CISG* via standalone legislation, including (until recently) New Zealand.[300] Nevertheless, it remains one possible reason for general *CISG* unawareness amongst Australian lawyers and judges.

Yet another possible contributor is the status of the *Sale of Goods Act 1893* (UK) as the model for Australia's non-harmonised sales law. This factor sits atop English law's significant influence on Australia's general law of contract.[301] More than a century of precedent is bound to generate established interpretative habits that are difficult to break.[302] This too cannot be a complete explanation given New Zealand's similar legislative framework.[303] While Australia's commercial arbitration laws also have English ties,[304] the *IAA* successfully jettisoned its own historical baggage post-*Amendment Act*.[305] Courts now push back against counsel entertaining the temptation of domesticity in ICA litigation,[306] a resolve mostly lacking in Australia's *CISG* case law.

Additional explanatory factors appear when reversing our frame of enquiry to consider possible reasons for the more-effectively-internationalist *IAA* reasoning of Australian courts. First, some courts employ arbitration-specific architecture via specialist court lists and/or expert judges,[307] recognised as being better attuned to ICA law's international sensitivities.[308] No equivalent structures exist for international sales disputes; thus it appears that Australia's *CISG*

[300] The *Sale of Goods (United Nations Convention) Act 1994* (NZ) operated until 2017: see *Contract and Commercial Law Act 2017* (NZ) s 345(1)(j).

[301] Martin Vranken, 'The Relevance of European Community Law in Australian Courts' (1993) 19(2) *Melbourne University Law Review* 431, 433.

[302] Hayward, 'CISG as the Applicable Law' (n 279) 186 [10.46]. See also Michael Lambiris, 'Reform of the Law of Sale in Australia' (1996) 20(3) *Melbourne University Law Review* 690, 694.

[303] *Sale of Goods Act 1908* (NZ), as repealed by *Contract and Commercial Law Act 2017* (NZ) s 345(1)(i).

[304] Vranken (n 301) 436 n 40.

[305] Cf Nottage (n 4) 478. See also Lewis (n 4) 125–6.

[306] See, eg, *Robotunits* (n 76) 344–5 [42] (Croft J). See also Croft, 'Evolving Challenge' (n 99) 58.

[307] Croft, 'Evolving Challenge' (n 99) 57; Croft, 'Promoting Australia' (n 156) 15–18.

[308] Barry Leon, 'To Specialize or Not: How Should National Courts Handle International Commercial Arbitration Cases?', *Kluwer Arbitration Blog* (Blog Post, 2 September 2010) <http://arbitrationblog.kluwerarbitration.com/2010/09/02/to-specialize-or-not-how-should-national-courts-handle-international-commercial-arbitration-cases/>, archived at <https://perma.cc/L2D4-3EH6>.

cases are not specifically allocated to judges based on their internationalist expertise.[309]

Second, focusing in on the *CISG*'s substantive law nature, Australian courts perform very different roles under the *IAA* and *CISG*. Courts only exercise supervisory jurisdiction in ICA matters, but resolve substantive disputes under the *CISG*. As Part I above explains, the *CISG* constitutes PIL only in the widest sense, making its comparison with the *IAA* not strictly like-with-like. As substantive law, the *CISG* represents a comparatively deeper penetration into the Australian legal system and thus Australia's sovereignty. This may explain the Australian judiciary's reluctance to push back against domestically oriented *CISG* argument. By way of contrast, the *New York Convention* and *Model Law 2006* might be less susceptible to parochial interpretation given their traditional (procedural) PIL subject-matters.

Contemporary Australian ICA thinking accepts that sovereignty considerations do not justify parochial attitudes towards the *IAA*.[310] This does not yet seem accepted in the sales law field, and potentially represents a bigger sovereignty concession in that context. At the same time, it is commonly observed that jurisdictions (including Asia-Pacific states) overtly compete for arbitration business in a law market described as 'rather fierce'.[311] While some jurisdictions also consider themselves competing regarding their substantive laws,[312] Australia is not amongst them. Its status as an arbitration law market participant[313] incentivises the *IAA*'s internationalist interpretation, while no equivalent market forces operate on the *CISG*.

[309] *Hannaford* (n 259) and *South State* (n 237) were decided by Finn J of the Federal Court of Australia. His Honour was renowned for taking a scholarly interest in transnational contract law. There is no evidence, however, as to whether this factor determined the assignment of those cases.

[310] Chief Justice James Spigelman, 'International Commercial Arbitration Conference, Sydney, 10 August 2007' in Tim Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998–2008* (CS2N Publishing, 2008) 277, 278; Chief Justice James Spigelman, 'International Commercial Litigation: An Asian Perspective, 20th Biennial LAWASIA Conference, Hong Kong, 7 June 2007' in Tim Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998–2008* (CS2N Publishing, 2008) 260, 261–3.

[311] Loukas A Mistelis, 'Arbitral Seats: Choices and Competition' in Stefan Kröll et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer, 2011) 363, 377–8.

[312] Stefan Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 21(1) *European Review of Private Law* 13, 30–5. See also Lord Burnett, 'English Law on the World Stage' (Speech, London International Disputes Week, 8 May 2019) 2 [2]–[3], 4 [9]–[10], 5 [13], 8 [23].

[313] See, eg, Croft, 'Recent Developments' (n 204) 1–2.

C *The Way Forward*

Australia's parochial *CISG* interpretations are not unique amongst the *CISG*'s 94 contracting states.[314] Homeward trend interpretations are also observed in other jurisdictions.[315] However, as with the *New York Convention*,[316] Australia has a public international law obligation to properly apply the *CISG*. But more importantly, from a practical perspective, Australian law might be creating (rather than removing) barriers to trade without consistently internationalist *CISG* interpretations, a state of affairs antithetical to the *CISG*'s very existence.[317] Correcting Australia's homeward trend is also timely, given the ongoing co-ordinated efforts being undertaken by UNCITRAL, the International Institute for the Unification of Private Law, and the Hague Conference on Private International Law, in the international sales law field:[318] this issue is topical at the international level.

It is difficult to see how this status quo can be improved with so few *CISG* cases coming before the courts. A vicious cycle seems to exist here. Another complicating factor is the possibility that Australia's low case load is interconnected with automatic opt-out practices amongst local merchants.[319] Absent further study of that matter, and on the basis of this article's analysis, legislative reform and cultural change might both have important roles to play in aligning Australia's *CISG* treatment with that of the *IAA*.

The *Amendment Act*'s passage was instrumental in improving the *IAA*'s internationalist interpretation. With the federal government then actively seeking to establish Australia as a regional dispute resolution hub, it was recognised that legislative amendments were necessary but in themselves insufficient to achieve

[314] For the *CISG*'s (n 10) adoption statistics: see United Nations, 'Chapter X: International Trade and Development: *United Nations Convention on Contracts for the International Sale of Goods*, Vienna, 11 April 1980', *United Nations Treaty Collection* (Web Page, 2020) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en>, archived at <https://perma.cc/2YCU-Y7QJ>.

[315] See, eg, Ferrari, 'Have the Dragons of Uniform Sales Law Been Tamed?' (n 16) 142–3; Ferrari, 'Homeward Trend' (n 70); Andersen, 'Applied Uniformity' (n 11) 34–5.

[316] International Council for Commercial Arbitration (n 31) 29–30. See also *TCL v Judges* (n 72), referring to 'Australia's obligation as a Contracting State under Art III of the New York Convention': at 551 [21] (French CJ and Gageler J).

[317] Cf *CISG* (n 10) Preamble. See also Moser (n 15) 72–3 [1.2.4.5.1].

[318] Permanent Bureau of the Hague Conference on Private International Law (n 67) 1–2 [3]–[9].

[319] See generally Spagnolo (n 225) 159–60; *CISG* (n 10) art 6. An Australian automatic opt-out culture is yet to be empirically confirmed.

that goal: broader cultural change at all levels of the profession was also required.[320] Ten years on, this cultural change seems to have come to pass.[321] Could Australia's *CISG* Acts benefit from similar law reform initiatives?

Being a treaty, Australia cannot unilaterally amend the *CISG*.[322] However, additional provisions contained within the body of Australia's *CISG* Acts *are* a matter for local legislative judgment. Legislative amendments could seek to improve the quality of Australia's *CISG* interpretations by eliminating our implementing Acts' inconsistency provisions. If the *CISG* is to apply according to its internationalist understanding, as is legally required, there is no reason for their existence. Their repeal only stands to remove one possible source of misunderstanding. Reforms could also proactively support the *CISG*'s internationalist interpretation by introducing an extrinsic materials provision into Australia's implementing Acts, similar to the *IAA* s 17(1), permitting reference to UNCITRAL materials in all cases. This would explicitly draw the attention of non-specialists to the existence of international interpretative materials such as the Secretariat Note,[323] the 1978 draft's Secretariat Commentary,[324] the 1980 Vienna Diplomatic Conference proceedings,[325] the *CISG Digest*,[326] and the Case Law on UNCITRAL Texts project.[327] All of these UNCITRAL sources are freely available online. Explicit endorsement of internationalist interpretation in Hansard (and in relevant explanatory memoranda) would also be useful, given the limitations of existing parliamentary materials addressing Australia's *CISG* adoption.[328] New Zealand's legislation, extracted in Part V(A) above, is a model

320 McClelland, 'More Effective and Certain' (n 94).

321 Cf Croft, 'Promoting Australia' (n 156) 21. *Contra* Nottage (n 4) 466, 476. See generally 'S02 Episode 10: The First From ICCA', *The Arbitration Station* (Brian Kotick and Joel Dahlquist, 25 April 2018) 00:36:34 <https://www.thearbitrationstation.com/blog/2018/4/24/season-2-episode-10-the-first-from-icca>, archived at <https://perma.cc/P9WF-WJDE>.

322 *CISG* (n 10) art 98.

323 UNCITRAL Secretariat, 'Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods' (United Nations, 2010) 33–42.

324 CISG-online, '1978 Secretariat Commentary', *Materials–Commentary* (Web Page, 2017) <http://cisg-online.ch/index.cfm?pageID=644>, archived at <https://perma.cc/QX5S-UVE7>.

325 Institute of International Commercial Law, 'Legislative History: 1980 Vienna Diplomatic Conference', *Albert H Kritzer CISG Database* (Web Page, 2015) <http://www.iicl.law.pace.edu/cisg/page/legislative-history-1980-vienna-diplomatic-conference>, archived at <https://perma.cc/P4SZ-CWGB>.

326 United Nations Commission on International Trade Law, *CISG Digest* (n 298).

327 United Nations Commission on International Trade Law, 'CLOUT' (n 293).

328 For an analysis of *CISG* (n 10) parliamentary materials in Victoria and New South Wales, see Hayward, 'CISG as the Applicable Law' (n 279) 172–4 [10.12]–[10.17].

for further amendment which would ensure Australia's *CISG* Acts better support the *Convention*'s intended operation. While law reform on all three counts would require state and territory co-operation, this obstacle is not insurmountable, as evidenced by the adoption of new uniform domestic commercial arbitration legislation across the States and Territories between 2010 and 2017.[329]

Should assumptions as to Australian opt-out practices be correct, there is also much to be considered from a cultural perspective. With judges typically appointed from the senior bar, the profession's general *CISG* attitude requires attention if parochial interpretative tendencies are to be reversed. Descriptions of lawyers' approaches to the *CISG* in *Roder Zelt*, *Perry Engineering*, and *Playcorp* evidence reluctance to engage with the *CISG* on an internationalist basis (or at all). Consistently internationalist case law might be expected if parties' arguments are themselves internationally-informed, particularly where courts defer to their pleadings.[330] A vicious cycle might also be at play here: internationalist argument is more likely if (as in *Smallmon*) it is judicially insisted upon.[331] The Full Federal Court's *TCL* decision, in the ICA context, evidences the impact that even one high quality appellate judgment can have on future case law. While a future Australian International Commercial Court might result in a concentration of judicial expertise from which *CISG* interpretations could benefit,[332] this initiative is (at present) a proposal only.[333]

Deputy Chief Justice McClelland, Australia's former Attorney-General, was a driving force behind the *Amendment Act*. His Honour put out a call to arms to the profession ahead of its passage,[334] and ten years later the ICA field is experiencing the benefit of that determination. Australia remains in dire need of leaders in the profession to similarly champion the *CISG*.[335] In some quarters the profession *is* hard at work promoting UNCITRAL's broader mandate, via

329 In order of entry into force: *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2012* (Qld); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2017* (ACT). Passage of the Australian Capital Territory's Act did involve some delay: Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2015/2016 in Review' (2016) 27(4) *Australasian Dispute Resolution Journal* 211, 211–12.

330 Andersen, 'Applied Uniformity' (n 11) 50.

331 Cf ibid 40, 42.

332 Cf Tiba (n 244) 31–2, 47, 51–2; Warren and Croft (n 244) 10–11, 25.

333 See generally Warren and Croft (n 244).

334 McClelland, 'More Effective and Certain' (n 94).

335 See Michael Bridge, 'Avoidance for Fundamental Breach of Contract Under the UN Convention on the International Sale of Goods' (2010) 59(4) *International and Comparative Law Quarterly* 911, 940.

the UNCITRAL National Coordination Committee for Australia.[336] Hopefully its message can break through, promoting the *CISG*'s internationalist interpretation in the process.[337]

Justice Heydon's dissenting judgment in *Westport Insurance Corporation v Gordian Runoff Ltd* ('*Gordian Runoff*')[338] is a useful place to conclude this article's analysis. That case was a High Court decision resolving inconsistent state interpretations of the standard of arbitral reasons required under the former domestic *Commercial Arbitration Acts*.[339] Addressing arbitration's 'merits' in his Honour's concluding remarks, the following highly critical observations were made:

> The arbitration proceedings began on 15 October 2004 … . This appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy. … [S]peed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater *relevant* expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous.[340]

The reason for *Gordian Runoff*'s four tiers of adjudication arguably had nothing to do with arbitration, but everything to do with the *Commercial Arbitration*

[336] See generally UNCITRAL National Coordination Committee for Australia, 'Welcome to UNCCA' (Web Page) <https://www.uncca.org>, archived at <https://perma.cc/7C4A-SC7D>.

[337] Hayward, 'CISG as the Applicable Law' (n 279) 187 [10.48]. It is noteworthy in this respect that the UNCITRAL National Coordination Committee for Australia's UN Day Seminar, held on 26 October 2020, specifically addressed the *CISG* (n 10) to mark the 40th anniversary of its conclusion at the 1980 Vienna Diplomatic Conference.

[338] (2011) 244 CLR 239, 275–88 [73]–[112] ('*Gordian Runoff*').

[339] *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346, 366 [54] (Buchanan, Nettle and Dodds-Streeton JJA); *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74, 114 [220] (Allsop P, Spigelman CJ agreeing at 76 [1], MacFarlan JA agreeing at 126 [305]); *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94, [39]–[40] (Martin J); *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139, [54]–[58] (Croft J). See generally Benjamin Hayward and William KQ Ho, 'Balancing the Scales: The Standard of Reasons Required in Commercial Arbitration and Litigation in Australia' (2012) 78(4) *Arbitration* 314, 314–18.

[340] *Gordian Runoff* (n 338) 288 [111] (emphasis in original).

Acts' inconsistent interpretations.[341] Though intended to highlight arbitration's shortcomings, Heydon J's remarks actually emphasise the importance of harmonised law's applied uniformity. This reflection applies equally, perhaps especially, to harmonised PIL. The *New York Convention*, *Model Law 2006*, and *CISG* all rely on internationalist interpretation to benefit Australian merchants, their international trading partners, and cross-border trade, as they intend. There is certainly nothing melancholy about *these* very practical and very worthy ideals.

[341] PA Keane, 'The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House, Our Rules' (2013) 79(2) *Arbitration* 195, 206. Cf David Bailey (n 169) 349.