Judicial refusal to apply treaty law: domestic law limitations on the CISG's application

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Abstract

In numerous cases, courts have declined to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG) in litigation where the parties have pleaded domestic law, notwithstanding that the underlying contract satisfies criteria necessary for the CISG to serve as governing law. Courts that have reached this conclusion maintain that domestic procedural law permits exclusion of the CISG notwithstanding that it would otherwise be applicable. Other courts and numerous commentators maintain that the judicial refusal to apply to the CISG in these cases violates both the substantive provisions of the CISG and the law of treaties that governs the obligations of States that have adopted it. In this article, we maintain that courts that invoke domestic procedural doctrines to avoid application of the CISG are acting reasonably and consistently with the intent of Contracting States. In the first instance, the substantive provisions of the CISG do not preclude use of procedural doctrines in as broad of a set of cases as commentators who read the domain of the CISG more broadly maintain. More generally, the argument that States are obligated to subordinate domestic procedural doctrines where a treaty is silent about its effect on those doctrines fails to consider whether those States intended to displace domestic procedures. We conclude that in the case of many treaties, including the CISG, the appropriate default rule would consider the costs to the signatory State of displacing domestic procedures and that those costs would often lead a State to desire to allow its domestic procedural doctrines to prevail over the application of substantive treaty provisions.

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides governing law for disputes involving contracts for the sale of

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Unif. L. Rev., Vol. 22, 2017, 452–491
doi:10.1093/ulr/unx025

goods between parties whose places of business are in different signatory States (Contracting States).[1] By its own terms, however, the CISG permits parties to contracts that would otherwise be governed by it to derogate from any or all of its provisions.[2] The clearest case of derogation involves an express statement within the contract that it is to be governed by law other than the CISG. Rules concerning derogation in what were initially ambiguous cases, such as where a governing law clause refers to the law of a Contracting State without mentioning the CISG, have become standardized as courts have interpreted Article 6 to require evidence of an intent to opt out, even if they do not limit derogation to express statements.[3]

More controversial are cases in which the parties litigate a dispute that has arisen under a contract that satisfies the criteria of Article 1(1)(a), but proceed during that litigation to invoke only law other than the CISG. These cases involve not only the legal issues that the CISG addresses but also the expenditure of judicial resources and, hence, the possibility that what we refer to as procedural doctrines, rather than those embodied in substantive commercial law, govern the issue of applicable law. What we mean by 'procedure', others might refer to as 'choice of law.' We use the term to designate circumstances in which courts take into account conduct by the parties during litigation that makes the CISG inapplicable when it would otherwise apply. We understand procedural rules broadly to cover all rules other than those that define legal entitlements of the litigants, including the standards of their conduct. As such, procedural rules include statutes of limitation, rules of evidence, burdens, and standards of proofs, jurisdiction, rules of precedent, and *res judicata*. Of course, jurisdictions differ in the rules they consider procedural, and some deem burdens of proof or statutes of limitation substantive. For the present purposes, the broad understanding of 'procedure' suffices. Doctrines of waiver, judicial and equitable estoppel, and untimeliness, where available, give the court the power to refuse to apply the CISG when it otherwise applies. In an easily recognizable and probably uncontroversial sense, the rules that define this power are procedural, not substantive.

Rienzi & Sons v N. Puglisi & F. Industria Paste Alimentari provides an illustration.[4] In this case, the parties made no mention of the CISG in their pleadings, the plaintiff asserted a defence not recognized by the CISG, the plaintiff's attorney asserted during a pre-trial conference that it was comfortable with the application of New York law, and the plaintiff consistently framed arguments in terms of

[1] Convention on Contracts for the International Sale of Goods, 1980, 1489 UNTS 3, art 1(1)(a) (CISG). Art 1(1)(b) also provides that the CISG applies to contracts for the international sale of goods where rules of private international law requires application of the law of a Contracting State. The latter criterion does not apply when the Contracting State of the forum has exercised its right under the CISG to exclude that criterion as the basis for application of the CISG (see art 95). Most cases involving the CISG's application, however, arise under art 1(1)(a), in large part because the CISG has been adopted by 86 States including all major trading nations other than the United Kingdom and India.

[2] Ibid art 6.

[3] See eg *Honey Holdings I, Ltd v Alfred L Wolff, Inc*, 81 FSupp3d 543, 552 (SD Tex 2015).

[4] *Rienzi & Sons, Inc v N Puglisi & F Industria Paste Alimentari SpA*, 638 Fed Appx 87 (2d Cir 2016) (*Rienzi & Sons* 2016).

substantive New York law to the exclusion of the CISG. Three years after the litigation commenced, the plaintiff asserted for the first time that the CISG governed the dispute. The US Court of Appeals concluded that the conduct of the plaintiff and its attorneys constituted consent to the application of substantive New York law sufficient to exclude the CISG from the case. Other courts, primarily in the USA, have followed similar reasoning in similar cases.[5]

Most commentators and several courts find this result objectionable. They maintain that the CISG, when it applies, displaces domestic law, including local procedural doctrines that allow a court to refuse to apply the CISG.[6] In their view, a court in a Contracting State that allows domestic law to displace the CISG due to the inattention or ignorance of parties or their attorneys or judges violates both the terms of the CISG itself and the obligations that Contracting States have incurred under doctrines that determine the applicability of treaties like the CISG. Commentators who take this displacement view also maintain that the judicial refusal to apply the CISG is bad policy. These arguments have been adopted and promulgated in an opinion of the CISG Advisory Council, a group of scholars of international sales law who have combined to offer opinions concerning the interpretation of the CISG.[7]

In this article, we argue that the predominant critique of the judicial refusal to apply the CISG is overly broad. Even if it reflects a reasonable position, the critique does not reflect an inexorable one. Nothing in the CISG itself explicitly determines whether parties can derogate from its provisions through procedural devices such as waiver, estoppel, or laches. Nor does the law of treaties necessarily override procedural doctrines of the forum that have the effect of displacing the CISG. Judicial refusal to apply the CISG in these circumstances can be a reasonable policy choice, even if it is equally reasonable for courts to reject those same procedural doctrines.

Although our disagreement with the displacement view is primarily predicated on the language of the CISG and the law of treaties, our interpretation of that language and law reflects a different assessment of the CISG's scope than that inherent in the critique of judicial use of domestic procedures. We therefore begin with a comment about these assessments. The CISG is sufficiently prevalent, and its case law developed enough that a trend in the interpretation of its scope can be

[5] See eg *Eldesouky v Aziz*, 2015 US Dist LEXIS 45990 at *7 (SDNY 8 April 2015).

[6] See eg Ulrich G Schroeter, 'To Exclude, To Ignore or To Use? Empirical Evidence on the Courts', Parties' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)' in Larry A DiMatteo (ed), *The Global Challenge of International Sales Law* (Larry A. DiMatteo ed., 2014) 649, 655; Lisa Spagnolo, *Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole* <http://www.cisg.law.pace.edu/cisg/biblio/spagnolo1.pdf> accessed 1 May 2017. For an application of the displacement view to the recovery of attorney's fees under the CISG, see Peter Schlechtriem, 'Legal Costs as Damages in the Application of UN Sales Law' (2007) 26 *Journal of Law and Commerce* 71. For an instance of a displacement view of treaties outside the CISG, see Jordan J Paust, '*Breard* and Treaty-Based Rights under the Consular Convention' (1998) 92 *American Journal of International Law* 691, 692.

[7] See CISG Advisory Council, *Opinion No. 16: Exclusion of the CISG under Article 6* <http://www.cisg.law.pace.edu/cisg/CISG-AC-op16.html> accessed 1 May 2017 (CISG Advisory Council Opinion).

detected. Although the CISG governs the rights and obligations of the contracting parties arising from sales contracts that fall within its scope, it does not expressly address a number of issues that can arise in connection with these contracts. The question therefore arises as to whether the Convention governs issues not expressly addressed. Examples include warranty disclaimers, overlapping claims that can sound in contract or tort, good faith requirements, the coverage of computer software, the currency of payment, and financial hardship resulting from intervening events. At the procedural level, the CISG is almost entirely silent about the assignment of burdens of proof[8] and completely silent about the standard of proof governing the contracting parties' rights and obligations. 'Maximalists' tend to find, based on language in the CISG's provisions, or general principles underlying the CISG, that it controls many of these issues, notwithstanding textual silence. In this way, they find that the CISG's scope is very broad. Although a 'maximalist' could determine that the CISG covers only some of issues just mentioned, they often conclude that it covers all or most of them. In a similar way, maximalists tend to conclude that the CISG, when it applies, displaces a forum's procedural rules that interfere with the CISG's application. Underlying the maximalist approach, at least implicitly, is an affinity for uniform international commercial law, largely borne of what is seen as a subsequent reduction in transaction costs as parties avoid the need to learn and negotiate about multiple national legal regimes.

By contrast, a 'moderate' approach to scope issues is more demanding.[9] To conclude that the CISG governs an issue, moderates require fairly clear language or determinate and identified general principles underlying the CISG that address the issue. Similarly, clear language and determinate underlying principles are needed to bar operation of a forum's procedural rules. Moderates are less attracted to uniform international commercial law. They view national legal regimes as well-developed alternatives that permit parties to choose among competing doctrines, and express concern that uniform law reflects political compromises necessary to generate adoption rather than serving commercial interests.[10] As a result, commercial parties are likely to opt out of default rules that make undesirable international commercial law apply, with a consequent increase in transaction costs. Our approach is moderate. We argue that none of the CISG's provisions or its plausibly underlying general principles necessarily displaces local procedures, though we conclude that a court could exercise discretion to apply the CISG rather than domestic law under some circumstances.

This article is divided into six parts. The first part describes the category of cases in which some courts have relied on local procedural doctrine to refuse to apply

[8] The single exception is CISG (n 1) art 79(1).

[9] For examples of the moderate view, see Stefan Kröll, 'The Burden of Proof for the Non-Conformity of Goods under Art. 35 CISG' (2011) 59 *Belgrade Law Review* 162, 170; Joseph Lookofsky, 'Not Running Wild with the CISG' (2011) 29 *Journal of Law and Commerce* 141.

[10] See Clayton P Gillette and Steven D Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd edn, 2016) 7–8.

the CISG. The second to fourth parts critically examine the predominant view that the CISG displaces domestic law, including local procedural doctrine. The second part argues that policy arguments in favour of displacement fail. The third and fourth parts reject legal arguments for displacement. The third part argues that there is no textual basis in the CISG for the predominant view. The fourth part considers and rejects the possibility that an interpretive rule of treaty law displaces local procedural rules that interfere with a treaty's application. The fifth part defends an approach to partial displacements of procedural rules based on considerations identified in the fourth part. The sixth part concludes.

II. Refusal in national courts

Many national courts find that the CISG applies when the conditions of Article 1 are satisfied regardless of party conduct that might be thought to compel its exclusion.[11] Pleadings that reveal the parties' ignorance of the CISG often do not suffice.[12] An Italian court concluded that silence in the pleadings was immaterial because the CISG is applicable as a matter of law when Article 1's conditions are satisfied.[13] Other courts apply the CISG by relying on the rule, distilled in the maxim *jura novit curia*, that the court determines the law governing the dispute. This rule makes it immaterial that the parties in their pleadings or otherwise in litigation stipulate that domestic law controls. It is also irrelevant that a party has failed to argue that the CISG governs the contract. By contrast, some courts have decided that domestic law applies, based on the parties' pleadings or other information they supply in the course of the litigation, even when the CISG's conditions for its application are met

Courts that have refused to apply the CISG when it is applicable have done so in different settings that reflect different procedural doctrines. Although these doctrines share similarities, they also address different concerns and costs relating to the re-litigation of settled issues. We identify four doctrines that courts have applied, although frequently in terms that are different from those that we discuss.

1. Waiver

The simplest instance is one in which a party waives the right to rely on the CISG. Technically, a waiver requires a knowing relinquishment of a claim. Most of the cases that involve parties' failure to plead the CISG appear to involve parties who

[11] See eg Oberlandesgericht Hamm (Germany), 9 June 1995 <http://cisgw3.law.pace.edu/cases/950609g1.html> accessed 1 May 2017.

[12] At least one American court has joined this chorus. In *Metso Minerals Indus v JTL Mach, Ltd*, 2016 US Dist LEXIS 9113 (MD Pa, 27 January 2016), the parties litigated a motion to dismiss counter-claims under domestic law. The Court concluded that the CISG applied to the transaction and accordingly dismissed the motion to dismiss without prejudice on the grounds that domestic choice of law provisions are insufficient to exclude the CISG absent clear language that expressly rejects its application. The Court did not address the issue of whether the pleadings of the parties constituted a choice of domestic law.

[13] Tribunale di Padova, 25 February 2004 <http://cisgw3.law.pace.edu/cases/040225i3.html> accessed 1 May 2017.

were ignorant of the CISG's application. Although courts sometimes describe the parties' failure as a 'waiver',[14] the absence of knowledge means that these cases do not satisfy the knowledge requirement. Nevertheless, true waiver cases do exist. In an Australian case, *Perry Engineering v Bernold*, the plaintiff asked for damages based on the Australian Sale of Goods Act after getting a default judgment against the defendant for breach of a contract that satisfied the requirements of Article 1.[15] The breach of contract claim was addressed solely under the domestic law. The court determined that the CISG applied and requested the plaintiff's solicitors to address the issue. Remarkably, the plaintiff's solicitors failed to do so. The court ruled that the plaintiff was precluded from recovery because any award was properly based on the CISG and the plaintiff had failed to plead it: '[T]he Court cannot proceed to an assessment of damages based on the provisions of an Act of Parliament [incorporating the CISG] which the plaintiff acknowledges do not apply to the claim pursued by the plaintiff.'

The court's request placed the plaintiff on notice of the CISG's applicability, so that the plaintiff's subsequent failure to plead it constituted a knowing waiver of the applicable law. The court in the *Rienzi* case discussed earlier may also have been expressing its conclusion in terms of a waiver when it concluded that the plaintiff had 'consented' to the application of New York law throughout the earlier stages of litigation. The court concluded that because the CISG was mandatory without an express opt-out, 'Rienzi had notice of the potential applicability of the CISG at the time it filed the Complaint in New York State court and certainly during the entire litigation in this Court'.[16] While 'notice' may include a reason to know, but not necessarily knowledge, the court may have assumed that Rienzi's notice was sufficient to qualify as a waiver of the CISG.

Knowing consent, however, may also imply that the CISG did not, in fact, apply to the contract in the first instance. American courts, for example, conclude that parties can consent to application of specific law by their conduct during litigation even though that law contravenes an express choice-of-law clause in the contract being litigated.[17] The appellate decision in *Rienzi* appeared to embrace this rationale, as well as concerns about timeliness, when it concluded that 'the district court did not err, much less abuse its discretion, in finding that Rienzi had consented to application of New York law to the contract claims at issue *before* its untimely 2011 invocation of the CISG'.[18] Where a court concludes that parties

[14] See eg *Eldesouky v Aziz*, 2015 WL 1573319 at *2 (SDNY, 8 April 2015). A finding of waiver without knowledge is not peculiar to litigation under the CISG. For similar, informal uses of the notion, see eg, *Kamen v Kemper Fin Serv, Inc*, 500 US 90, 100, n 5 (1991): 'We do not mean to suggest that a court of appeals should not treat an unasserted claim as waived or that the court has no discretion to deny a party the benefit of favorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments.'

[15] Supreme Court of South Australia (Australia), 1 February 2001 <http://cisgw3.law.pace.edu/cases/010201a2.html> accessed 1 May 2017 (*Perry Engineering*).

[16] See *Rienzi & Sons, Inc, v N Puglisi & F Industria Paste Alimentari SpA*, 2013 WL 2154157 at *7 (EDNY 13 May 2013) (*Rienzi & Sons* 2013).

[17] See *Cargill, Inc v Charles Kowsky Res, Inc*, 949 F2d 51, 55 (2d Cir 1991); *Walter E Heller & Co v Video Innovations, Inc*, 730 F2d 50, 52 (2d Cir 1984).

[18] *Rienzi & Sons* 2016 (n 4) 90 n 4 (emphasis in original).

have consented to the application of domestic law other than the CISG, however, they are not necessarily deploying a procedural doctrine of waiver to refuse application of the CISG although it is applicable. Rather, a court that relies on the parties' consent to apply other law is implicitly concluding that the parties have, by their conduct, exercised their right under Article 6 to derogate from the CISG. We discuss below whether consent through conduct in litigation properly qualifies as the exercise of the Article 6 right.

2. *Equitable estoppel*

In a second setting, the parties in their pleadings and motions initially rely on domestic law. Later in their litigation, one of the parties invokes the CISG as being applicable to the disputed contract. Courts in these cases may deny this party the ability to change its theory of the case on the grounds that the other party had relied on the original pleadings and that it would impose too great of a cost on that party to require it to alter its position. The district court in *Rienzi* explicitly relied on this rationale.[19] The court's refusal to apply the CISG was based on the parties' reliance on domestic law and the concern that the later invocation of the CISG could be used for strategic purposes: 'The selection of the governing law upon which a plaintiff proceeds is not an ace of spades to be held in counsel's hand until discovery has closed and then sprung on a unsuspecting adversary. ... It would be unduly prejudicial to Defendants to [allow pleading of the CISG at this point in the litigation].'[20]

On similar facts, another American court concluded that '[w]hile application of the CISG may have been appropriate, the plaintiff by its actions had consented to the application of the NY U.C.C. and it was far too late to withdraw that consent without undue prejudice to defendant'.[21] Although the court spoke in terms of the plaintiff's 'consent' to apply domestic law, the concern for the defendant's reliance on earlier pleading indicates that the case is more accurately one in which the court refused to apply the CISG based on 'equitable estoppel,' not consent. Reliance also appeared to motivate a decision in which the Supreme Court of New South Wales declined to allow the plaintiff to amend its pleadings to make a claim under the CISG after litigating under a domestic Sale of Goods Act. The court reached that conclusion, in part, 'because if the point had been raised in the Court below the defendant might have conducted its case differently at trial'.[22]

[19] See *Rienzi & Sons* 2013 (n 16). Cf Corte Suprema (*Jorge Plaza Oviedo v Sociedad Agricola Sacor Limitada*) (Chile), 22 September 2008 <http://cisgw3.law.pace.edu/cases/080922ch.html> accessed 1 May 2017 (the CISG is 'tacitly inapplicable' when parties failed to plead the CISG in their complaint and answer).

[20] Ibid *7. The Court of Appeals followed similar reasoning in affirming the district court decision: 'While application of the CISG may have been appropriate, plaintiff by its actions had consented to the application of the N.Y.U.C.C. and it was far too late to withdraw that consent without undue prejudice to defendant.' *Rienzi & Sons* 2016 (n 4) 90, n 4.

[21] See *Ho Myung Moolson, Co Ltd v Manitou Mineral Water, Inc*, 2010 US Dist LEXIS 127869 (SDNY 2 December 2010).

[22] See *Perry Engineering v Bernold* (n 15).

3. Untimeliness

A third setting involves a party's tardy reliance on the CISG in litigation. This occurred in *GPL Treatment v Louisiana-Pacific Corp*.[23] In this case, the parties disputed the enforceability of the sales contract that did not satisfy the Statute of Frauds under Oregon's version of Article 2 of the Uniform Commercial Code. Late in the proceedings, the plaintiff argued that the CISG, which applied to the contract, eliminated a 'writing' requirement for sales contracts within its scope. The trial court barred the plaintiff's reliance on the CISG as untimely under a local procedural rule.[24] On appeal, the majority did not mention the CISG's application to the contract, while the dissent would have scrutinized the trial court's finding of untimeliness. Both the majority and dissent implicitly agree that a court need not consider the CISG if the parties untimely raise it as applicable law. Unlike waiver and equitable estoppel, untimeliness does not require knowledge or detrimental reliance on domestic law by the opposing party. The policies underlying those doctrines may be lurking in the background, but the doctrines themselves are analytically distinct.

4. Judicial estoppel

The fourth setting is one in which a party relies on the CISG in a later proceeding after having relied on domestic law in an earlier proceeding involving the same contract. Reliance on the CISG in the later proceeding is inconsistent with reliance on domestic law in the earlier proceeding, notwithstanding that, as a technical matter, the CISG governs the disputed issue in both proceedings. The doctrine of judicial estoppel, which is part of the procedural law of some national legal systems, bars a party from taking a position in a legal proceeding that is inconsistent with the position it has previously taken in the same or earlier proceeding.[25]

For example, assume the buyer argues in the earlier lawsuit that the goods the seller delivered did not conform to the contract description. The buyer makes a claim for a breach of an express warranty under Article 2 of the Uniform Commercial Code. In fact, the CISG applies to the contract, and Article 35(1) determines whether the seller delivered conforming goods. Assume also that in a later lawsuit, filed after the buyer discovers a further defect in the goods, the buyer relies on the CISG to argue that the seller further breached the same sales contract that was in dispute in the earlier lawsuit. Judicial estoppel, where applicable, prevents the buyer from relying on the CISG in its later lawsuit, even though the CISG determines whether the goods conformed to the contract. While there

[23] 894 P2d 470 (Or Ct App 1995).

[24] See ibid 477, n 4.

[25] See eg *Edwards v Aetna Life Ins Co*, 690 F2d 595 (6th Cir 1982), 626 F2d 933 (DC Cir 1980), 18 James Moore et al, Moore's Federal Practice § 134.30 (3d ed 2015). Cf *Helfand v Gerson*, 105 F3d 530, 535 (9th Cir 1997): 'The greater weight of federal authority, however, supports the position that judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion.'

may be a concern for reliance, judicial estoppel also reflects an interest in the economy of judicial proceedings and the consequences of re-litigation for unrelated litigants who incur the costs of delay in the disposition of their own cases. Although no reported cases to date have refused to apply the CISG based on judicial estoppel, nothing in principle prevents a court willing to rely on waiver, equitable estoppel, or untimeliness to refuse to apply the CISG based on judicial estoppel.

Waiver, equitable estoppel, untimeliness, and judicial estoppel are procedural rules of some national courts. Common to all four doctrines is a grant of discretion to the court to apply domestic law when the CISG otherwise would apply. Clearly, in some cases, a court may wrongly exercise that discretion. The court in *Perry Engineering*, for instance, might have abused its discretion in refusing to apply the CISG when the plaintiff refused to amend its complaint to request damages under the CISG after being invited by the court to do so. But the more basic question is whether the CISG displaces a court's procedural rules that allow it to refuse to apply the CISG, even when that discretion is properly exercised. The CISG does not address the procedures of the national courts that enforce its provisions. This is unsurprising because the CISG's provisions are devoted almost entirely to defining the rights and obligations of the parties to the sales contract governed by it. Do the forum's procedural rules that, if applied, limit the CISG's application survive the CISG's adoption by a Contracting State in which the forum is located? Although this question arises in connection with the CISG, it is a general question about treaty implementation. The general question asks about the effect of enactment of a treaty into domestic law on the procedures of courts that apply the treaty. There are two possible answers: either the enactment of the treaty displaces at least some procedures that interfere with the treaty's implementation or the procedures are unaffected by the treaty's enactment except to the extent that the treaty or implementing legislation explicitly displaces these procedures. Focusing on the CISG, we argue that the latter is the correct view of the relation between treaty law and domestic procedures.

III. Policy arguments for displacement

The view that the CISG displaces national procedural rules that prevent its application could be based on policy or legal arguments or both. A familiar policy argument maintains that the CISG's broad application is a good thing. Procedural rules that make the CISG inapplicable impair the CISG's broad implementation, whether or not the CISG expressly displaces them. The benefits resulting from the CISG's wide and consistent application argue for treating these rules as inoperative when they prevent the CISG's application. This familiar policy recommendation is weak. It seems to be supported by either of two arguments. The first is that broad application of the CISG will increase the body of internationally uniform law, which is of itself assumed to be desirable. This is a working assumption

of the conventions produced by the United Nations Commission on International Trade Law (UNCITRAL), not just the CISG.[26]

Maximum uniformity, however, is not of itself desirable in the commercial context. The CISG itself recognizes that uniformity has its limits. It omits provisions on various issues that are likely to arise in a commercial context, such as validity or the intersection of torts and contracts. The omissions in large part reflect the concern that national rules governing these issues are sufficiently diverse to suggest either the absence of a single efficient solution or a commitment to historical or cultural legal principles that uniform rules could be overcome only at great cost. Moreover, the benefits of uniformity must be balanced against other factors that suggest commercial actors would reject a default of uniform rules. We have contended elsewhere that there are structural reasons within the CISG's creation that make it unlikely that the CISG contains majoritarian default rules and that competition among legal systems, like competition among products, is likely to serve the interests of users.[27] If that is the case, increasing the scope of uniform law may force commercial parties either to adopt rules that they do not prefer or to incur costs to exercise their Article 6 right to derogate from the CISG. In either case, the application of uniform law may prove to increase, rather decrease, the costs of international sales transactions.

The second argument, explicit in Lisa Spagnolo's work, is that broad application of the CISG is desirable in order to generate authoritative opinions that clarify the meaning of the CISG's provisions.[28] Thus, the failure to use the CISG when it is applicable by its terms deprives all commercial actors the benefit of clarifying applicable law. We agree that opinions that construe the CISG are public goods that create interpretive benefits even for commercial actors who are not party to the litigation or arbitration that generates the opinion. This is because the information produced by the CISG's application helps resolve uncertainty among prospective contracting parties as to how the Convention would be applied should they litigate under it. But it proves too much to suggest that the positive externalities of dispute resolution justify the broad application of the CISG. All judicial opinions that clarify the law have the positive effects that Spagnolo attributes to opinions that interpret the CISG. If the decision at issue were not rendered under the CISG, it would presumably be rendered under some other law. Thus, when the court applies and interprets the CISG, it may be adding

[26] The promotion of uniformity in application is one of United Nations Commission on International Trade Law (UNCITRAL)'s mandates. See *A Guide to UNCITRAL* (2013) 2. It is reflected in a standard provision included in UNCITRAL conventions calling for uniform interpretation and application. See eg United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea, Doc A/RES/63/122 (2008) art 2; United Nations Convention on the Use of Electronic Communications in International Contracts, UN Doc A/RES/60/515 (2005) art 5(1); United Nations Convention on Independent Guarantees and Standby Letters of Credit (2000) art 5; CISG (n 1) art 7(1) (1980); Convention of the Limitation Period in the International Sale of Goods, 1974, 13 ILM 952 (1974) art 7.

[27] See Gillette and Walt (n 10) 7–8; Clayton P Gillette and Robert E Scott, 'The Political Economy of International Sales' (2005) 25 *International Review of Law and Economics* 446.

[28] See Spagnole (n 6) 185.

to the body of law that interprets the CISG, but it simultaneously detracts from the body of law that interprets the otherwise applicable law. There is little reason to conclude that the benefit of clarifying the CISG law is greater than the lost opportunity of clarifying the alternative law. Certainly that would be the case if the alternative law were domestic law that is not well developed, say in a relatively new nation that has a limited body of judicial decisions. But it is also likely true where the alternative body of law is well developed. That is because if the proper resolution of the issue under the CISG is ambiguous, it will typically be because the issue is relatively novel and has not been commonly litigated even in nations that have a relatively developed body of law.

Take, for example, the case of *Ho Myung Moolsan, Co. Ltd. v Manitou Mineral Water, Inc.*[29] Although the parties had their places of business in different Contracting States, the Court concluded that by relying on New York law through the discovery period of litigation, the plaintiff had consented to the application of New York law and could not plead under the CISG. One of the issues in the case involved whether the contract at issue was an instalment contract. Breaches of instalment contracts for goods are treated differently than breaches of other contracts under both domestic New York law and the CISG. The contract at issue in this case involved complicated arrangements for the sale of bottles of mineral water over a five-year period. The Court determined that, under New York law, the contract constituted a 'hybrid installment-requirements contract'. By rendering the decision under New York law, it is true that the Court deprived interested commercial actors of a reasoned opinion concerning the scope of an instalment contract under Article 73 of the CISG. But had the decision been rendered under the CISG, it would have deprived interested commercial actors of a reasoned opinion concerning the scope of an instalment contract under section 2-512 of the New York Uniform Commercial Code. There is little reason to contend that the external benefits of a clarifying opinion would be greater in one case than in the other.

Assume, however, that there is net value in generating clarifying opinions about the CISG. The policy of increasing the number of such opinions is, therefore, worth pursuing. Failure to apply the CISG to a case that, but for procedural rules, falls within Article 1(1) certainly conflicts with that policy. But clarification of the CISG remains only one of the policies at issue in litigation. Other policies include the preservation of judicial economy, which would disfavour re-litigation. Additionally, one might embrace a policy that induces attorneys to learn and deploy relevant law. Spagnolo contends, correctly, that we should be concerned about the rule of law when an inapplicable law is applied.[30] But attorneys have their own incentives to ensure that they are using law that best serves their clients, since both their reputations and their malpractice carriers are implicated when they fail to plead law that would be helpful to their clients. One would think that the best way to motivate attorneys to learn and apply the CISG, therefore, is to

[29] *Ho Myung Moolson* (n 21).
[30] Ibid.

make the attorney who fails to do so bear the full cost of its error rather than to allow a second bite of the apple after imposing the costs of faulty pleading on the legal system.

Other things being equal, wide application of the CISG could be valuable, even if it were inefficient, and allowing national procedural rules to render it inapplicable to a sales transaction to which it otherwise would apply makes the CISG less uniform in application. Article 7(1)'s injunction to interpret the CISG uniformly is not just an interpretative requirement of the CISG (and UNCITRAL conventions generally). It also reflects a policy preference for the CISG's broad implementation.

However, this policy argument assumes that the CISG's widespread application is the appropriate test of success. The assumption is unsound; the CISG's implementation does not always justify displacing national procedural rules that impair its application. This is because the CISG's application can saddle parties with terms they do not want to control their contract, even when they have not bothered to contract around the CISG. This is exemplified by 'waiver' cases. In these cases, the parties prefer not to have the CISG apply even when their contract has not opted out of the CISG. Although the parties have not agreed to have domestic law apply in litigation over the contract, their preference is revealed by their independent reliance on that law in their pleadings and related materials. Applying the CISG in this setting imposes default terms on the parties they do not want. By contrast, a domestic law rule allowing for the waiver of the CISG gives the parties the law they prefer to have govern the contract in litigation. The policy of wide and uniform application makes the CISG applicable, while frustrating the parties' demonstrated preferences. The frustration of party preferences might be justified in implementing a public law treaty, where these preferences constitute only some of the interests properly considered. It is harder to justify overriding the preferences of parties whose contract is governed by a private law treaty consisting almost wholly of default rules which are designed to advance the parties' interests.

Similarly, where the CISG's application displaces rules of equitable estoppel, timeliness, or judicial estoppel, judicial or litigation resources are expended that these rules otherwise would conserve. Thus, within a range, there is a tradeoff required in these cases between the CISG's application and other values protected by these procedural rules. Different Contracting States reasonably can accommodate these values differently. Making inoperative procedural rules that otherwise make the CISG inapplicable forces the contracting parties to send a clear signal that they are opting out of the CISG by agreement. A rule to this effect judges the CISG's wide application to be more important than respecting the parties' preferences or conserving judicial or litigation resources. Contracting States might sensibly disagree with this resolution. A reasonable policy choice might judge that respecting party preferences or savings in judicial or litigation resources trumps the CISG's wide application.

Consider in this regard equitable estoppel and the 'untimeliness' limitation on the CISG's application. Inconsistent or untimely positions taken on the law applicable to the litigated contract increase the cost of determining governing law.

Inconsistent positions confuse the information pleadings, and other submissions provide the court with information about the issue, while tardy reliance on applicable law increases the costs of resolving the issue for both the parties and the court. In taking inconsistent positions or delaying disclosure of a position, the litigating parties do not bear the full cost of determining applicable law. Equitable estoppel and untimeliness limitations, in different ways, force parties to internalize some of these costs. The estopped party loses the right to rely on an inconsistent position it took earlier, and the party loses the right to rely on a tardily raised legal position. A Contracting State could value the savings in judicial or litigation costs produced by these rules more than the value of accurately determining the CISG's application.

IV. Textual arguments for the displacement of domestic procedural rules

Separate from policy arguments are the legal arguments that the CISG displaces domestic procedural rules that impair its application. Even if the CISG's wide application is inefficient, these arguments maintain that courts in ratifying countries are legally obligated to ignore these procedural rules. The legal arguments are of two sorts. One is based on the CISG's own provisions. The other relies on the law of treaties to conclude that the CISG displaces procedural rules when they impair the CISG's enforcement. This part of the article addresses provision-based arguments, and the next part addresses the argument for displacement based on the law of treaties.

1. The provision-based case

Some of the legal arguments for the displacement of domestic procedural rules arise from the CISG's text. One argument is that CISG creates the exclusive conditions for opting out and that these conditions do not include the procedural doctrines that courts have invoked to avoid applying the CISG. The argument begins from the reasonable proposition that 'once a contract is prima facie governed by the CISG by virtue of Art. 1, the adjudicator must look to its provisions alone to decide if there has been an exclusion, since until such time as Art. 6 is satisfied, the CISG remains the governing law of the contract'.[31] In short, the conditions that control the issue of exclusion are found within the CISG itself. Article 6 permits parties to exclude the CISG from their contract, but, in the view of those who would displace procedural rules, can do so only by agreement. Since inadvertent exclusion of the CISG fails to satisfy the requirements of an agreement, it cannot qualify as an opt-out under Article 6. An alternative argument is that Article 7 obligates the enforcing court to apply the CISG whenever it is applicable by its own terms. This article mandates that courts interpreting the CISG must give regard to its international character and the need to promote

[31] CISG Advisory Council Opinion (n 7) para 2.3.

uniformity in its application.[32] The requirements of 'regard' and 'application' make procedural rules inoperative when they prevent the CISG's enforcement. Neither argument is convincing.

2. *Article 6*

The argument from Article 6 assumes that procedural rules inconsistent with the CISG's enforcement remain applicable only if the parties exclude the CISG (when the CISG otherwise would apply). Article 6 authorizes exclusion, and the need to interpret the CISG autonomously implies that Article 6 also determines the form of an effective exclusion. Unfortunately, Article 6 does not indicate how parties can derogate from the CISG. The issue then becomes what measures parties must take in order to effect an Article 6 exclusion. There are in fact two different questions here. One is whether the exclusion of the CISG must be explicit. The other question is whether, explicit or implicit, the exclusion must be by an agreement of the contracting parties.

Nothing in Article 6 requires that exclusion of the CISG be explicit. Both the CISG's treaty predecessor and the CISG's diplomatic history allow the exclusion to be either express or implied.[33] Whether the parties have opted out of the CISG is a matter of their intent. If the parties have been explicit about their intent, such as where they have included a clause in their contract that expressly excludes application of the CISG, there is little need to look further. But outside of that situation, intent is not directly observable and some interpretation, typically attended by the use of proxies, is necessary. Although there is some support for the proposition that Article 6 requires an explicit opt out in the courts,[34] numerous courts and commentators have concluded that some forms of implicit opt-out can be effective if it reveals the requisite intent.[35] Indeed, even the CISG's

[32] See CISG (n 1) art 7(1). See Lisa Spagnolo, 'Exclusion by Conduct of Legal Proceedings: *Iura Novit Curia* and Opting Out of the CISG' (2014) 17 *International Trade and Business Law Review* 477, 494.

[33] See Convention Relating to a Uniform Law on the International Sale of Goods, 1964, 834 UNTS 107, art 3 (ULIS): 'Such exclusion may be express or implied'; *Fourth Committee Meeting (13 March 1980)*, Doc A/CONF.97/19 (1991) 238, para 4 (Committee chairman statement of his understanding that then-Article 5 permitted exclusion of the CISG could be either express or implied); 'Secretariat Commentary on the Draft Convention on Contracts for the International Sales of Goods Article 5 [Article 6]' in ibid 17, para 2 (noting that ULIS art 3's allowance of express or implied exclusion 'might encourage courts to conclude, *on insufficient grounds*, that the Convention had been wholly excluded' [emphasis added]) (249–50, para 18) (statement of Japanese delegate to the same effect).

[34] See *Hanwha Corp v Cedar Petrochemicals, Inc*, 760 F Supp2d 426, 430 (SDNY 2011): 'The intent to opt out of the CISG must be set forth in the contract clearly and unequivocally'; *Easom Automation Systems v Thyssenkrupp Fabco Corp*, 64 UCC Rep Serv2d 106 (EDMich 2007) (opt out must be express); cf International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, 218y/2011 (Ukraine), 23 January 2012, CLOUT Abstract no 1405 <http://cisgw3.law.pace.edu/cases/120123u5.html> accessed 1 May 2017 (intention to exclude the CISG must be express and clear).

[35] See Oberster Gerichtshof (Austria), 22 October 2001 <http://cisgw3.law.pace.edu/cases/011022a4.html> accessed 1 May 2017; Cour de Cassation (France), 26 June 2001 <http://cisgw3.law.pace.edu/cases/010626f2.html> accessed 1 May 2017; Audiencia Provincial de Alicante (Spain), 16 November 2000 <http://cisgw3.law.pace.edu/cases/001116s4.html> accessed 1 May 2017; Tribunale di Vigevano (Italy), 12 June 2000 <http://cisgw3.law.pace.edu/cases/

Advisory Council opinion on opting out so concludes.[36] Allowing implicit opt-outs appears to be the better result, since the CISG itself creates rules for discerning party intent, and nothing in these rules suggests that the intent that is attributed to a party can only be inferred from that party's explicit statements. Instead, Article 8 provides the CISG's requirements for discerning intent. The basic rules of Article 8 provide that a party's intent can be inferred from all of the circumstances surrounding its statements or conduct. This broad provision belies the notion that inferences of intent require express statement. In addition, Article 8(2) provides that, where Article 8(2) applies, the intent that is attributed to a party is the intent that the other party would infer if it were acting reasonably. The appeal to inferences rather than to express statements suggests that intent with respect to an issue, including derogation under Article 6, can be implicit.

The general guidelines of Article 8 do not answer all of the questions of intent. Thus, some proxies for identifying unobservable intentions are necessary. A majority of opinion, including our own, is that reference in the original contract to the domestic law of a Contracting State is insufficient to constitute exclusion because the CISG is part of that domestic law.[37] But even this inquiry must be made against the background of Article 8, so that the choice of domestic law of a Contracting State along with other indicia of intent could amount to an effective Article 6 derogation. Article 8(3) requires that intent be discerned by consideration of 'all relevant circumstances of the case including ... any subsequent conduct by the parties'. The pleading of specific domestic law principles in an active case constitutes such 'subsequent conduct' that is at least relevant to the *ex ante* intentions of the parties. It seems common ground, for example, that if the parties in their original contract had included a governing law clause that incorporated 'the Uniform Commercial Code of the State of New York,' then the CISG would be implicitly excluded by agreement, notwithstanding that New York's general domestic law incorporates the CISG.[38] Thus, it seems that if the pleadings of the parties, during litigation, referred only to the Uniform Commercial Code of New York State that could also evince the requisite intent to exclude the CISG by agreement.

Nevertheless, for those commentators who reject the application of domestic procedural rules for failure to plead the CISG, the possibility of implicit opt-out is accompanied by a requirement that the parties' intent to exclude the CISG be 'clear,' a presumption that embodies the maximalist view by increasing the cost of

000712i3.html; Oberlandesgericht Dresden (Germany), 27 December 1999 <http://cisgw3.law.pace.edu/cases/991227g1.html> accessed 1 May 2017; Oberlandesgericht Munich (Germany), 29 May 1995 <http://cisgw3.law.pace.edu/cases/950529g1.html> accessed 1 May 2017; Ingeborg Schwenzer and Pascal Hachem, 'Article 6' in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on International Sale of Goods (CISG)* (4th edn, 2016) 101, 102.

[36] CISG Advisory Council Opinion (n 7) para 3.7.

[37] See Gillette and Walt (n 10) 66–8.

[38] CISG Advisory Council Opinion (n 7) para 4.4.

exercising Article 6. The Article 6 issue for displacement, therefore, is whether failure to plead the CISG evinces a sufficient intent to satisfy the requirements of that provision. For those who adopt the displacement view, at least as embodied in the Advisory Council opinion, Article 8 applies to determine the parties' intent, but with two caveats. First, the intent to exclude the CISG as discerned under Article 8 must be 'clearly manifested'.[39] Second, the availability of Article 6 is restricted to situations in which the parties have (i) reached an agreement to exclude and (ii) that agreement complies with Articles 6, 11, 14–24, and 29.[40] These limitations on exclusion are at least questionable as a matter of construction of the CISG itself, and those questions arise with greatest force where the litigation strategy allegedly implies the exclusion of the CISG.

The requirement of a clear manifestation of intent to exclude is supported by both case law and commentary. It is rooted, however, not in the language of either Article 6 or Article 8 but, instead, in a desire to apply the CISG broadly. This desire is a manifestation of the maximalist stance to the CISG's interpretation. Once one admits that uniform international commercial law is a positive good, it follows that broad application of a document that creates uniformity is desirable. But nothing in Article 8's rules for interpreting intent provide a presumption one way or the other with respect to the application of the CISG. Instead, the only presumption that Article 8 entertains is that where a party has an intent of which the other party neither is nor should be aware, the intent that applies is the one that would be inferred under the circumstances by a reasonable person in the position of the other party. Indeed, the Advisory Council opinion admits that '[i]t is true that this [the clear manifestation standard] sets the threshold for intent to exclude at a higher level than is otherwise generally required for intent under the CISG'.[41] The assumption that exclusion must be clear rests not on anything within the CISG but, rather, on an underlying policy motivating it. For those who take a more moderate view of the CISG's desirability, that condition requires additional justification.

That is particularly true if one treats Article 8(2) as embodying a transaction costs perspective to the question of intent. On that theory, the reason why the intent attributed to a party under that provision is the intent of a reasonable person of the same kind as the other person in the circumstances is that doing so reduces the costs of communicating intent explicitly. If intent is determined objectively by reference to the intent of most parties in the circumstances, unless one knows of a party's subjective intent, then parties can deal with each other safe in the knowledge that they will not be bound by hidden intentions. Parties are required, therefore, to incur the cost of signalling intent only in the atypical case when their intent varies from the intent that most parties would have in

[39] Ibid para 3.
[40] See ibid paras 2.5, 2.6.
[41] Ibid para 3.5.

the circumstances. The alternative requires contracting parties to engage in a potentially costly inquiry into their counterparty's subjective intent.

What, then, is the intent of most parties who do not explicitly opt out of the CISG, but who plead domestic law in litigation involving a contract that would otherwise be governed by the CISG? The answer to this question is unclear, but observations about the practices of commercial parties with respect to the CISG may be relevant. The litigation that has addressed the 'failure to plead' argument seems to arise in cases where the parties were, at least at the time of their contract, unaware of the CISG's applicability. Thus, it would be difficult to assert that they intended to opt out of a body of law whose existence was unknown to them. Some courts have used that rationale to prevent exclusion.[42] But the tendency of those ignorant of the CISG to plead alternative governing law suggests that the parties intended the application of some law other than the law of which they were unaware. Perhaps the practice of those commercial actors who are actually aware of the CISG can serve as a proxy for determining which of those arguments about intent is more persuasive. For better or worse, virtually all studies of the practices of commercial parties with respect to the CISG reveal substantial opting out by those aware of its existence, even if the rate of opt out is dropping.[43] If that is the case, then perhaps the understanding that a reasonable person of the same kind as the other party would infer from a failure to plead the CISG is that it was not intended to apply.

Consider next the relationship between exclusion and the requirement of an 'agreement'. The language of Article 6 authorizes 'parties' to 'exclude the application of this Convention or ... derogate from or vary the effect of any of its provisions'. Nothing in that language limits the conduct that constitutes exclusion or derogation to the creation of an agreement.[44] If each party excludes the CISG independently of the other, they have not agreed on the exclusion. Nonetheless, their shared expression of exclusion suffices for 'the parties' to evince an Article 6 intent to exclude the CISG.[45] This logical argument is supported by a textual one that refutes the need for an 'agreement' to derogate under

[42] See eg Tribunale di Padova, Sezione Distaccata di Este (Italy), 25 February 2004 <http://cisgw3.law.pace.edu/cases/040225i3.html> accessed 1 May 2017.

[43] See Luiz Gustavo Meira Moser, 'Parties' Preferences in International Sales Contracts: An Empirical Analysis of the Choice of Law' (2015) 20 *Uniform Law Review* 19, 45; Schroeter (n 6) 659–60; Ingeborg Schwenzer and Christopher Kee, 'Global Sales Law: Theory and Practice' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Toward Uniformity: The 2d Annual MAA Schlechtriem CISG Conference* (2011) 151, 159–60; Peter L Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists and Academics in the United States' (2008) 27 *Journal of Law and Commerce* 1, 14.

[44] Nor did ULIS (n 33) art 3, CISG (n 1) art 6's template: 'The parties to a contract of sale shall be free to exclude.' For assertion to the contrary, see Schwenzer and Hachem (n 35) 105.

[45] Cf Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177, art 3: 'A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract *or the circumstances of the case*' (emphasis added).

Article 6. When the CISG requires an agreement, it says so. Article 29(1) allows for a modification of the contract by the 'mere agreement' of the parties.[46] Article 9 limits binding usages to those to which the parties 'have agreed', except that usages widely known and observed within the trade are binding 'unless otherwise agreed'.[47] Article 35 dictates the characteristics of a good that conforms to the contract except 'where the parties have agreed otherwise'. A seller is absolved of its obligation to deliver goods free from competing claims and rights unless the buyer has 'agreed' to take the goods subject to the claim or right.[48] Article 6 does not use the term. The fair inference from Article 6's failure to mention 'agreement' is that the CISG is inapplicable to the contract if each party excludes the CISG, even if they do so without mutual assent.

Consider next the case in which the original contract falls within Article 1 and contains no Article 6 exclusion. As a consequence, the CISG provides the governing law of the contract. Any subsequent application of some other law would require the parties to modify the original contract. As the Advisory Council opinion concludes, Article 29 governs this modification, and Article 29 does require an agreement, albeit a 'mere agreement'.[49] However, especially in light of the qualifying adjective, there is less reason to conclude—as the Advisory Council opinion does[50]—that any such agreement is subject to the requirements of formal offer and acceptance of Articles 14–24. These articles certainly dictate the process of contract formation, or agreement, when the parties purport to conclude a contract through offer and acceptance. But there is little reason to conclude that they constitute the exclusive means of contract formation. Indeed, one way to resolve the conundrum of Article 55's reference to 'a contract [that] has been validly concluded but does not expressly or implicitly fix or make provision for determining the price'—a contract that appears inconsistent with the requirements of Article 14—is to recognize that Article 55 applies to contracts that are formed through means other than offer and acceptance.[51] More to the point, there is nothing in the CISG that precludes parties from forming an agreement through conduct, such as mutual pleading of alternative law during litigation. Paragraph 5.15 of the Advisory Council's opinion appears to grant as much, although it would restrict finding such an agreement to 'rare' or even 'very exceptional cases'. But once one grants the possibility that conduct can constitute an implied agreement, the notion that Article 29 necessarily requires more disappears.

The possibility that parties could intend to derogate from the CISG without an explicit agreement is supported by considering the analogous case of parties'

[46] See also CISG (n 1) art 55 (agreement validity concluded without expressly or implicitly fixing price).

[47] Ibid art 9(1), (2).

[48] Ibid art 41.

[49] See CISG Advisory Council Opinion (n 7) para 2.6.

[50] Ibid paras 2.6, 6.3.

[51] See Gillette and Walt (n 10) 107–8.

abandoning, or derogating from, a contract. At least under the law in some US jurisdictions, parties to an otherwise effective contract may be deemed to have abandoned their obligations to each other. Abandonment requires mutual assent by the parties, but this assent 'need not be manifested expressly'.[52] Instead, it can be inferred from conduct. True, that conduct must be so inconsistent with an intent to be bound by the contract as to demonstrate that the parties have abandoned it.[53] But, importantly for our argument with respect to Article 6, mutual intent to abandon may be implied where only one party engages in the conduct that is inconsistent with the contract and the other party merely acquiesces.[54] In these cases, no formal explicit agreement is required for parties to be deemed to have abandoned their obligations. Instead, parallel conduct that is inconsistent with the contract is sufficient. Similarly, the parties to a contract otherwise governed by the CISG may act in a parallel fashion that is sufficiently inconsistent with application of the CISG as to constitute mutual derogation from it, even without formal agreement.

More important, even if opting out of the CISG requires formal agreement between the contracting parties, only the procedural rule of waiver would be affected. The procedural rules that depend on judicial economy rather than on party intent could still apply to make the CISG inapplicable, notwithstanding the parties' failure to exclude it. For example, a court may refuse to apply the CISG simply because one or both of the parties have been tardy in raising the issue of applicable law. The untimeliness bar applies without regard to whether they have agreed to make the CISG applicable to their contract. For its part, a 'waiver' involves the setting in which the litigating parties independently rely in the course of litigation on domestic law only. An independent reliance on domestic law is not an agreement to derogate from the CISG.

3. *Article 7*

Nothing in Article 6 or other provisions defines all circumstances in which a court must apply the CISG to the sales contract if the parties do not opt out. This is because, with a single exception, the CISG's articles define only the rights and obligations of the contracting parties.[55] Its provisions do not address the enforcing court or define its obligations to apply the CISG. Thus, the CISG says nothing about the court's obligations, including whether its procedural rules become inoperative when the parties have not derogated from the CISG. The single exception is with respect to the enforcing court's privilege to refuse to enforce the remedy of specific performance.[56] This exception is limited to a particular remedy and does not extend to the exercise of procedural rules available to the enforcing

[52] *Jones v Hirschfeld*, 348 FSupp2d 50, 59 (SDNY 2004).

[53] See *Armour & Co v Celic*, 294 F2d 432, 435–6 (2d Cir 1961).

[54] See *Reives v Lumpkin*, 2015 WL 404683 at *8 (SDNY 30 January 2015); *C3 Media & Mktg Grp v Firstgate Internet, Inc*, 419 FSupp2d 419, 433 (SDNY 2005).

[55] See CISG (n 1) art 4.

[56] Ibid art 28: '[T]he court . . . may refuse.'

court.[57] Since the CISG is silent as to the court's procedural rules, its provisions do not determine whether these rules continue to operate when the parties have not opted out of the CISG. The CISG's limited scope does not allow the inference.

The argument that Article 7 requires application of the CISG is unconvincing. The claim derives from the assumption that because Article 7 requires courts to have regard to its international character when interpreting it, 'the domestic law *directs* the court to honour the international obligations of the Contracting State pursuant to the CISG in relation to individual cases'.[58] However, all that Article 7(1) requires is that courts have regard to the standards of internationality and uniformity when they interpret the CISG. This obligation is triggered, therefore, when interpreting the CISG in a case to which it applies. Nothing in Article 7 addresses the issue of when the CISG applies if there is conflict with other domestic doctrine. Of course, the CISG contains some doctrine about when it applies, and Article 7 would be relevant in those cases. Article 7 presumably applies to the interpretation of Articles 1–5, which explicitly address the CISG's scope. But the procedural displacement cases do not arise to resolve disputes about whether the CISG applies to the facts before the court. Instead, those cases arise when there is agreement that, had the CISG claim been raised in a timely manner, it would have applied. Nothing in Article 7's mandate addresses that issue.

Indeed, even if it did apply, Article 7 would not mandate displacement of procedural doctrines. Suppose that all courts that had addressed the issue agreed that procedural doctrines were not displaced. Next, assume that a court addresses the issue for the first time in its jurisdiction. Would that court, in order to satisfy its obligations of having regard to internationality and uniformity, not be required to adhere to the existing cases that concluded that displacement of procedural doctrines was inappropriate? Article 7(1)'s language seems to require this conclusion. Thus, Article 7 does not mandate a particular substantive result. It mandates only that courts pay attention and perhaps exercise deference to the decisions of other courts on the same issue.

V. The international law argument for displacement

A different argument for displacement relies on the law of treaties. Unlike the argument based on the provisions of a treaty that, by their terms, makes operative the forum's rules of procedure, the argument based on international law does not

[57] Whether art 28 limitation on the availability of specific performance counts as a procedural rule depends on whether the limitation is procedural in character. National law divides over the characterization. In the USA, remedies are considered substantive, not procedural rules. See Douglas Laycock, 'How Remedies Became a Field: A History' (2008) 27 *Review of Litigation* 161, 166. A limitation on specific relief therefore is treated as a substantive rule. By contrast, English courts retain the more traditional view that remedies are procedural in character. See eg *Harding v Wealands*, [2006] UKHL 32, para 30 (Woolf L). Even if art 28's limitation is procedural in nature, the limitation affects only one procedural rule and does not extend to waiver, judicial estoppel, equitable estoppel, or untimeliness—the rules considered in the text.

[58] Spagnolo (n 32) 495 (emphasis in original).

rest on treaty provisions. Instead, it relies on the law of treaties. According to the argument, the law of treaties obligates a court not to apply domestic procedural rules that prevent enforcement of the treaty. Under Article 1(1)(a) of the CISG, the CISG governs sales of goods contracts concluded between parties whose places of business are in different Contracting States. The CISG controls the contract unless the parties have excluded its application. Accordingly, the treaty-based argument for displacement maintains that treaty law obligates courts in a Contracting State to ignore its procedural rules to the extent that these rules would otherwise allow the courts to refuse application of the CISG. The courts violate international law if they rely on their procedural rules to refuse to apply the CISG in this circumstance.

1. The argument

The displacement argument from international law consists of four steps: (i) treaties obligate States party to them to enforce treaty provisions according to their terms; (ii) the obligation to enforce treaty provisions does not allow a ratifying State that has made the treaty part of its domestic law to rely on its procedural rules to refuse to apply the treaty; (iii) in ratifying States, as organs of these States, courts are obligated to enforce treaties that are part of domestic law; and (iv) courts in ratifying States are therefore obligated to apply a treaty that is part of domestic law without regard to procedural rules that prevent its enforcement. Waiver, equitable estoppel, judicial estoppel, and untimeliness, where in force, permit a court in certain circumstances to refuse to apply the CISG when the CISG is otherwise applicable. Thus, courts in States that have incorporated the CISG into their domestic law are not permitted to rely on these procedural rules to refuse to apply the CISG. Many, and perhaps most, commentators appear to accept the argument from international law and its conclusion.[59] We contend below that the argument fails.

Initially, two points about the argument are worth noticing. First, the argument and its conclusion are not limited to the CISG or national procedural rules. Its conclusion about displacement holds generally. If courts in ratifying States are obligated to enforce treaty provisions without regard to domestic law that would prevent enforcement, the same obligation holds whatever the character of the treaty or the specific domestic law. As far as the argument from international law goes, the fact that domestic law rules may be procedural or non-procedural is irrelevant. Unless the treaty itself allows domestic law to operate, the obligation to enforce treaty provisions displaces domestic law when it prevents enforcement. A frequently litigated question in European Union (EU) law is the continuing application of national procedural rules in the face of EU treaty provisions or directives that are silent about them.[60] The European Court of Justice apparently

[59] See Spagnolo (n 6) 190–1; Spagnolo (n 33) 491; CISG Advisory Council Opinion (n 7) (with qualification); Schroeter (n 6).

[60] See S Prechal, 'Europeanization of National Administrative Law' in JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanization of Public Law* (J.H. Jans, S. Prechal & R.J.G.M.

views EU instruments as part of a single legal order whose foundational principles determine the relation between EU and national law.[61] On this conception, the principles are constitutional rules, not rules of international law, and treaty law does not determine the obligations of Member States with respect to EU instruments. An alternative view considers EU treaty provisions to determine the relations between the Member States. Considered in this way, treaty law sets the obligations that EU treaties put on EU Member States and their courts. Whether EU law displaces national law is a matter of international law, not domestic law, and that law prevents Member States and their courts from relying on domestic law when it impairs the enforcement of EU law.

The second point about the argument is that it does not depend on a controversial or very precise notion of what counts as a procedural rule. Rules of procedure are rules that organize and administer the conduct of judicial proceedings; substantive rules define the legal entitlements determined or recognized in those proceedings. The distinction between procedural and substantive rules obviously can be drawn in different ways. It can be made in a categorical, *a priori* fashion or functionally according to the purpose or purposes served by a specific rule. Because the argument from international law applies to domestic law generally, the character of domestic law rules is irrelevant. If the argument is sound, treaty law displaces these rules, whether they are procedural or substantive. Thus, a narrow and more precise notion of a procedural rule is unnecessary.

The important premises of international law in the argument are the first and second steps, and both recite acknowledged rules of treaty law. According to Article 26 of the Vienna Convention on the Law of Treaties (VCLT), a treaty in force is binding on the parties to it.[62] The first step states the same requirement. Under Article 27 of the VCLT, a party to a treaty may not rely on provisions of its 'internal law' as justification for its failure to perform the treaty.[63] Because 'internal law' refers, without qualification, to all of the domestic law of the ratifying State, it apparently includes the rules of procedure of the ratifying State's courts.[64] The obligation described in the second step therefore is an instance of Article 27's

Widdershoven eds., 2nd edn 2016) 39; Michael Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (2nd edn 2011) 407.

[61] See Richard E Gardner, *Treaty Interpretation* (2nd edn 2015) 136–7; Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Craig and de Burca (n 60) 323, 328–9; Eric Stein, 'Lawyers, Judges, and the Making of the Transnational Constitution' (1981) 71 *American Journal of International Law* 1; see generally Taris Tridimas, *The General Principles of EU Law* (2nd edn 2006).

[62] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 art 26 (VCLT): 'Every treaty in force is binding upon the parties to it.'

[63] Ibid art 27: 'A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.' The statement in the text omits art 27's qualification 'without prejudice to Article 46,' which is irrelevant to the present discussion.

[64] Cf Annemie Schaus, Article 27, in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 688, 691–2; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn 1984) 84.

more general prohibition. If Article 27 does not allow a ratifying State to rely on its internal law to refuse to enforce the treaty, the article does not allow that State to rely on its rules of procedure to refuse enforcement. It is usually understood that the VCLT's provisions reflect rules of customary international law.[65] As customary international law, Article 26 and 27 create treaty obligations binding on a State party to the treaty, even if the State has not ratified the VCLT.

The displacement argument from international law succeeds only if either treaty provisions make inoperative national procedural rules that otherwise would allow a court to refuse to enforce the treaty's terms (first step) or treaty law does so when the treaty is silent as to its impact on these rules (second step). However, neither step guarantees that treaty provisions displace procedural rules. The first step does not do so when the treaty expressly conditions enforcement of its provisions on these rules. The second step does not guarantee displacement when the treaty, although silent about procedure, is fairly interpreted to leave national procedural rules unaffected.

Where a treaty deals with domestic procedural rules, it determines whether, and the extent to which, these rules continue to operate. Article 26 of the VCLT requires States party to a treaty to comply with its terms.[66] If a ratified treaty that is part of domestic law makes enforcement subject to domestic rules of procedure, the treaty is not violated when a court relies on these rules to refuse to enforce the treaty. If the treaty's provisions do not allow domestic rules of procedure to prevent its enforcement, the court's refusal of enforcement based on these rules is a treaty violation. In each case, the terms of the treaty, not an independent rule of international law, displace or preserve domestic procedural rules. Applying those principles to the CISG has the following effect. If we are correct that Article 6 itself permits courts to consider domestic procedural rules such as a waiver, estoppel, and so on, then courts do not violate treaty law when they deploy these doctrines. That is because, if failure to plead the CISG qualifies as an Article 6 derogation, then a jurisdiction that recognizes a doctrine of exclusion through a waiver would still be 'performing' the treaty as required by Article 27 of the VCLT. On the other hand, if the CISG, properly understood, affirmatively excludes use of domestic procedural law as a means of derogating from Article 6, then the CISG falls within those treaties that address procedural matters and resolves the failure to plead issue against its incorporation in disputes concerning a contract governed by the CISG.

[65] See *Fujitsu Ltd v Fed Exp Corp*, 247 F2d 423, 433 (2d Cir 2001) (court applies 'the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties'); *Chubb & Son, Inc. v Asiana Airlines*, 214 F3d 301, 308, n 5 (2d Cir 2000): 'We therefore treat the Vienna Convention as an authoritative guide to the customary international law of treaties'; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 24 (noting Vienna Convention's general 'tendency' to be declarative of customary international law; and art 27 codifies customary international law (375).

[66] See VCLT (n 62) art 26: 'Every treaty in force is binding upon the parties to it and must be performed in good faith.'

Some treaties are unclear about the extent to which they displace or preserve these rules, even when they address the matter. For example, both the Warsaw and Montreal Air Transportation Conventions[67] provide that the law of courts in ratifying countries governs questions of procedure in litigation over a carriage contract under the conventions.[68] At the same time, both of these conventions confer subject matter jurisdiction on these courts.[69] These provisions, in combination, leave unresolved whether the conventions preserve a court's discretionary power under local law to dismiss a case over the conventions that give it jurisdiction.[70] Another example is the Vienna Convention on Consular Relations, a provision of which creates the uncertainty.[71] Article 36(2) of this Convention expressly provides that rights given by the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State'.[72] However, the article adds as a proviso that these laws and regulations must 'enable full effect to be given to the purposes for which' these rights are accorded.[73] The proviso makes it uncertain whether domestic rules of procedural default remain applicable to rights created by the Convention.[74] In general, treaty provisions that address procedural rules unclearly make it hard to determine the extent to which the treaty displaces these rules. Nonetheless, the provisions address the treaty's impact on such rules, and interpretations of the treaty aim to construe what they say about the continued operation of domestic procedural rules.

Other treaties are different. They do not address the procedural rules of courts even ambiguously. These treaties instead are completely silent about their impact on these rules. They say nothing about whether, or the extent to which, their provisions displace or preserve procedural rules.[75] If one rejects our contention that Article 6 necessarily permits incorporation of domestic procedural rules, then the most plausible position is that the CISG is such a treaty. Certainly, it is not the case that the CISG expressly excludes consideration of domestic procedural rules. Its provisions govern only the rights and obligations of the

[67] Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929, 137 LNTS 11 (Warsaw Convention); Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1999, 2242 UNTS 309 (Montreal Convention).

[68] See Warsaw Convention (n 67) art 28(2); Montreal Convention (n 67) art 33(4).

[69] See Warsaw Convention (n 67) art 28(1); Montreal Convention (n 67) art 33(1).

[70] Courts have divided over the question. Compare *In re Air Crash Disaster Near New Orleans*, 821 F2d 1147 (5th Cir 1987) with *Hosaka v United Airlines, Inc*, 305 F2d 989 (9th Cir 2002) (Warsaw Convention); *In re West Caribbean Airways*, 2012 US Dist LEXIS 74149 (SD Fla 16 May 2012) with Cour de Cassation (France), 7 December 2011, No 10-30919 (Montreal Convention).

[71] Vienna Convention on Consular Relations, 1963, 596 UNTS 261.

[72] Ibid art 36(2).

[73] Ibid ('subject to').

[74] See *Avena and Other Mexican Nationals (Mexico v US)* [2004] ICJ 12, paras 138–9, 142–3; *Sanchez-Llamas v Oregon*, 548 US 331 (2006).

[75] A treaty that restricts the grounds on which enforcement may be refused enforcement but says nothing about its impact on procedural rules may or may not displace procedural rules. See eg Hague Convention on Choice of Court Agreements, 2005, 44 ILM 1294 (2005). It will depend on the construction on the treaty's enforcement provision.

contracting parties that arise from the sales contract within the CISG's scope. Even with respect to contracts within its scope, the CISG leaves to other applicable law a range of issues.[76] Only at one point does the CISG explicitly address a matter that might be deemed procedural—the allocation of the burden of proof with respect to proving an impediment.[77] Since the CISG's provisions define only the rights and obligations of the contracting parties, it does not regulate the judicial administration of these entitlements.[78] As Judge Posner succinctly puts it, 'the Convention is about contracts, not about procedure'.[79] Under Article 1(a)(1), the CISG applies to contracts for the sale of goods between parties whose places of business are in different Contracting States. However, the CISG's limited scope implies the possibility that its provisions by themselves do not displace procedural rules that, if applied, make Article 1(1)(a) inapplicable. Nothing in Article 1(1)(a) by itself therefore obligates a court to ignore these rules.

2. *Treaties and background rules*

A treaty whose provisions are silent about procedural rules still could displace procedural rules that prevent its enforcement. Although not part of a treaty, there could be a rule of treaty law in force that specifies the legal effect of treaty provisions on procedural rules when the treaty otherwise does not address these rules. Call this a 'background rule.' If such a background rule were in force, domestic procedural rules would not operate when they impair enforcement of a treaty.[80] To the extent that it does not rely solely on provisions of the VCLT, the displacement argument from international law assumes that this background rule is in force. This background rule supports the argument's claim that a ratifying State that has made the treaty part of its domestic law may not rely on its procedural rules to refuse to apply the treaty. However, it is not self-evident that the background rule is in force.[81] It is as plausible that the relevant background rule is that a treaty that is silent about procedure does not displace domestic procedural rules.

[76] See CISG (n 1) arts 4, 7(2).

[77] Ibid art 79(1).

[78] With the single exception of art 28, which regulates a court's order of specific performance.

[79] *Zapata Hermanos Sucesores v Hearthside Baking Co*, 313 F3d 385, 388 (7th Cir 2002).

[80] European Union (EU) law appears to come close to adopting this background rule. The European Court of Justice (ECJ) has held that if EU law is silent as to procedure, national procedural law applies, subject to two conditions. One is that the procedural law not be less favorable to claims arising under EU law than to similar claims arising under national law (the 'principle of equivalence'). The second condition is that the national procedural rules must not make enforcement of rights under EU law impossible or excessively difficult (the 'principle of effectiveness'). See generally Monica Claes, *The National Courts' Mandate in the European Constitution* (2006) 119–36. Although the ECJ case law interpreting and applying the principles of equivalence and effectiveness is evolving and somewhat unpredictable, the principles operate to displace national procedural rules when the rules impair EU law. See de Witte (n 61) 323; Michal Bobek, 'Why There Is No Principle of "Procedural Autonomy" of the Member States' in Hans-Wolfgang Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (2012) 305.

[81] For an author who finds the rule self-evident, see Andre Nollkaemper, *National Courts and the International Rule of Law* (2011) 41: '[I]t is hard to accept that where a treaty does not so provide [for 'full effect'], states would not be obligated to provide full effect.'

So there must be some basis for thinking that the particular background rule relied on by the displacement argument operates.

As far as we can see, a background rule can have either of two sources: customary international law or principles of contract interpretation that apply with equal force to those contracts that constitute treaties. If customary international law displaces domestic procedures when a treaty says nothing about them, a ratifying State and its courts might be obligated not to rely on procedural rules to refuse to enforce the treaty.[82] However, proponents of the argument from international law give no reason for thinking that the rule is one of customary international law. Without such a reason, the argument from international law begs the question as to a ratifying State's (and its courts') obligations. Clearly, Article 27 of the VCLT does not reflect the rule, even if it states a rule of customary international law.[83] The article merely provides that a ratifying State may not rely on its internal law to justify its refusal to perform the treaty. However, it says nothing about the content of the ratifying State's treaty obligations. As far as Article 27 goes, a treaty that is silent as to procedure could leave unaffected domestic procedural rules. If so, a State ratifying such a treaty could rely on its domestic procedural rules while still performing the treaty. In relying on its procedural rules, the State would not breach its obligation of treaty performance under Article 27. Thus, Article 27 is neutral as to the relevant background rule about procedures in force. For this reason, an argument based on principles of contract interpretation is needed to establish that the likely background rule displaces procedure. We argue in the next section that the background rule does not do so. Instead, the likely contract-based background rule is a rule of contract interpretation that leaves procedures unaffected when the treaty is silent about them.

3. *Background rules and principles of treaty interpretation*

A treaty is an intergovernmental agreement. It is a contract.[84] As a contract, the treaty obligations of ratifying States are determined by their agreement. As with any contract, the meaning of treaty provisions is the meaning intended by the ratifying States as expressed in the provisions.[85] So determining the parties'

[82] 'Might' depending on the content and normative force of customary international law. See Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (2006); Jorg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 *European Journal of International Law* 523; J Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 *Virginia Journal of International Law* 449.

[83] See text accompanying note 63 above.

[84] See VCLT (n 62) art 2(1)(a); *BG Group PLC v Republic of Argentina*, 134 S Ct 1198, 1208 (2014) (*BG Group PLC*); *Santovincenzo v Egan*, 284 US 30, 40 (1931): As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations'; DP O'Connell, *International Law* (2nd edn 1970) 54; Lord McNair, *The Law of Treaties* (1961) 744; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn 1992) 1267.

[85] See *BG Group PLC* (n 84) (treaty interpretation a matter of determining the parties' intent); *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658, 675 (1979): 'A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations . . . Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties.'

obligations under the treaty requires determining the meaning they intend to express in agreeing to the terms of the treaty's text. For this reason, the (correct) interpretation of the treaty's text must construe the intended meaning of treaty provisions.[86] The VCLT's principal provisions dealing with interpretation are consistent with this objective. Article 31(1), for instance, requires interpretation in accordance with good faith, the ordinary meaning of treaty terms, context, and the treaty's aim and purpose. The article also requires that additional materials be taken into account, such as subsequent agreements or practices of the parties. Those additional materials are probative of the parties' intent when they entered into the treaty. Finally, Article 31(4) requires the interpretation be in accord with a 'special meaning' of the treaty text that was intended by the parties to it.[87] This last requirement suggests that, while the other mentioned materials are means of treaty interpretation, the aim of interpretation is to determine the intended meaning of the treaty provisions.[88] It is debatable whether the VCLT's principles ('rules') exclude canons of interpretation created under domestic law.[89] However, Article 31's objective of interpretation is the same as the aim of interpretation of contracts generally: to determine the meaning the parties intended to express in using the terms of their contract.

In treaties that do not address procedural rules, such as the CISG, the parties do not attach a special meaning to treaty provisions that cover these rules. The intended meaning of the treaty text in the case of the CISG is its literal or ordinary meaning (or special meaning that does not cover these rules). Again, this text does not refer to procedural rules. There is no diplomatic history or other extrinsic source that suggests that the parties intended the treaty's language to deal with procedural rules.[90] Otherwise, the treaty merely would be opaque with respect to

[86] See Ulf Linderfalk, *On the Interpretation of Treaties* (2007) 29–30; McNair (n 84) 366; Ian Brownlie, *Principles of Public International Law* (6th edn 2003) 602. For US Supreme Court statements to the same effect, see *Air France v Saks*, 470 US 392, 399 (1983): '[O]ur responsibility is to give the specific words of the treaty a meaning consistent with the shared expectations of the parties'; *United States v Stuart*, 489 US 352 (1989) (Scalia J, concurring); *Valentine v United States*, 299 US 5 (1936) (treaties are to be liberally construed to give effect to the apparent intent of the parties); *Chow Heong v United States*, 112 US 536, 540 (1884) (same).

[87] VCLT (n 62) art 31(4).

[88] See Eirik Bjorge, 'The Vienna Rules: Evolutionary Interpretation, and the Intention of the Parties' in Andrea Blanchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (2015) 189, 198–9; Lindkerfalk (n 86) 40.

[89] See Michael Waibel, 'Principles of Treaty Interpretation' in Helmut Philipp Aust and Goerg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016) 9, 12; Mark E Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission' in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (2011) 105.

[90] Some of the commentary in favour of the displacement view relies on statements in the drafting history of the CISG in which reference to implied exclusion was omitted out of concern that courts might otherwise 'conclude, on insufficient grounds, that the [CISG] had been wholly excluded.' See CISG Advisory Council Opinion (n 6) para 3.5, n 21; Spagnolo (n 33) 512, n 140. The cited language, however, does not prevent implied exclusion, but suggests only that courts should not find it 'on insufficient grounds'. The purpose of the comment was to explain why the CISG draft under discussion omitted the language of the prior ULIS that explicitly permitted implied exclusion. See ULIS (n 33) 17. Our argument is not that implied exclusion should be permissible 'on

the intended meaning of its provisions, as with the Warsaw and Montreal Conventions and the Vienna Convention on Consular Relations. The question then is whether an implied term of the treaty leaves unaffected procedural rules not addressed in the treaty. There are two possibilities: a default rule addresses the matter or a rule of contract interpretation based on the parties' presumptive intent does so.

We maintain that a rule of contract interpretation determines the effect of a treaty that is silent about its impact on domestic procedural rules. To see this, notice first that default rules supplement the terms of an agreement when the agreement does not otherwise provide for a contingency. They fill gaps in the agreement. Since default rules are gap-fillers, they apply only if the agreement fails to address a matter. Whether the agreement deals with the matter in turn requires interpretation of the agreement. For example, if the agreement calls for the delivery of 'widgets,' a default rule concerning the colour of widgets to be delivered applies only if the agreement does not specify or restrict colour. If the parties reveal their intent that 'widgets' means 'blue widgets,' there is no gap in the agreement concerning colour. For this reason, rules of contract interpretation are conceptually prior to default rules in the sense that a default rule is required only if the agreement, interpreted according to these rules, does not address a contingency. If interpretation of the agreement finds that the agreement covers a matter, there is no gap and there is no gap to fill. The same is true with respect to treaties.

Given that interpretation is prior to gap filling, the question is whether a treaty that explicitly addresses matters other than procedural rules can presumptively be interpreted as reflecting an intent to displace these rules. We argue that it cannot. Initially, there is a familiar distinction between the literal or ordinary meaning of a sentence and the meaning the speaker intends to express in using the sentence with its literal or ordinary meaning. The distinction is between the sentence's meaning and the speaker's meaning. Where the speaker intends to express only the literal meaning of the utterance, the sentence's and the speaker's meaning are the same. On other occasions, however, in using a sentence with its literal meaning, a speaker can intend to express (and be understood as expressing) a meaning that is more than the sentence's literal meaning. In these cases, the speaker meaning adds to the literal meaning. What the sentence as used says is the sentence's literal meaning and what the speaker's intended meaning adds to its literal meaning.[91] For instance, the speaker's use of a sentence can add information to the sentence's literal meaning. A speaker might utter the sentence: 'Only two students know the capital of Latvia,' intending to refer to the students in a particular

insufficient grounds.' To the contrary, our argument is that the application of domestic procedural rules is sometimes a 'sufficient' and justifiable basis for exclusion.

[91] For slightly different accounts, see Kent Bach, 'Conversational Impliciture' (1994) 9 *Mind and Language* 124; Scott Soames, *Philosophical Essays: Natural Language: What It Means and How We Use It* (2008) 403.

class.[92] The speaker's intended meaning implicitly qualifies the meaning of the sentence, restricting the subject of the sentence to students in the class. In this case, the speaker uses the sentence to assert that 'only two students in the class know the capital of Latvia'. Listeners infer the speaker's intended meaning based on the context in which the sentence is used and assumptions about the speaker.

This account of communicative intent might be open to objection as a general account of the meaning of legal language. After all, the speaker's intended meaning in general does not create a legal obligation or determine its content. The intended meaning may or may not be part of the obligation created by an authoritative legal act. Whether the speaker's meaning is relevant to legal reasons for compliance depends on a theory of legal obligation, not legal meaning. However, the account is plausible in the case of contracts. Unlike other legal obligations, contractual obligations are created by agreement, and the parties' intended meaning in using contract language sets out what they have undertaken to do. What the parties have agreed to is determined by what their agreement provides, and what the agreement provides is the meaning the parties intend the provisions to have. Interpreting the agreement according to the parties' intended meaning is completely consistent with the traditional aim of contract interpretation: to construe the contract's terms according to their intended meaning.

4. Procedural rules and treaty scope

These considerations about language use can be brought to bear on a treaty that is silent about domestic procedural rules. Because a treaty is a contract, interpreting what the parties mean by its terms requires determining the meaning the parties intend to express in agreeing to the treaty's text. The literal or ordinary meaning of the text by assumption does not deal with procedural rules, either displacing or leaving them unaffected. In agreeing to the treaty text, are the parties nonetheless declaring that domestic procedural rules are inoperative to the extent that they impair the treaty's enforcement? Put another way, if the parties were asked to make explicit what they are declaring in agreeing to the treaty, would they respond that their agreement displaces procedural rules? Or, instead, would they respond that their agreement leaves procedural rules unaffected? Two different inferences as to what the parties are declaring are possible. One is that, absent literal language that suggests otherwise, the treaty leaves unaffected domestic procedural rules. The other inference is that, absent literal language that suggests otherwise, the treaty displaces these rules to the extent that they impair the treaty's application. The sounder inference is that the treaty leaves domestic procedural rules unaffected.

An inference about what the parties are declaring in agreeing to the treaty's text rests in part on assumptions about the parties and their likely intentions. We assume that parties to treaties negotiate as rational actors. Inferences about what States, as rational actors, intend depend in part on their preferences for their

[92] The example is Kent Bach's; see Kent Bach, 'Quantification, Qualification, and Context: A Reply to Stanley and Szabo' (2000) 15 *Mind and Language* 262, 265.

judicial practices. We maintain that States prefer to retain some or most of their procedural rules. As a rational actor, a State intends that the treaty's effect on procedural rules be one that balances the benefits and costs related to the treaty.[93] A major consideration that is appropriate to apply when determining the appropriate inference to draw about rational parties' intended declarations involves transaction costs. Parties to treaties prefer to avoid the costs of negotiating treaties, as this increases the net benefit from entering into treaties. Thus, parties will intend that interpretation of a treaty be consistent with the inference that reduces the cost of negotiating the treaty in the first instance. There are two considerations in setting the appropriate inference from the perspective of transaction costs: (i) the cost of opting out of the default in an individual case and (ii) the frequency with which opting out is anticipated. If the inference from silence is that the treaty leaves domestic procedural rules unaffected, then a party that desires domestic procedural rules to be displaced must negotiate whether all of the procedural rules are to be displaced and, if not, must specify which rules are to be displaced. If the inference from silence is that the treaty displaces these rules to the extent that they impair the treaty's application, then a party that desires not to have its rules displaced must negotiate to have its procedural rules apply and, where it only desires certain rules to apply, must specify which rules qualify.

We cannot say conclusively that the costs related to opting out of one inference are greater than the costs related to opting out of the other. Our assumption, therefore, is that the costs of opting out of each of the inferences are equal to the costs of opting out of the other. Nevertheless, we maintain that the frequency of opting out will be different for the inferences and that frequency favours an inference that parties to a silent treaty intend to leave their domestic procedures unaffected. This conclusion is justified because most parties to treaties probably will want to retain at least some, and likely most, of their procedural rules and, therefore, intend that the treaty permit the application of those procedural rules. Thus, an inference that displaces all rules requires more frequent and more costly opting out than an inference that displaces no rules. An inference that allows parties to retain their procedural rules reduces the frequency of opting out and thus reduces transaction costs.

The reason that most parties will want to retain at least part, and likely most, of their domestic procedural rules is the significant value that treaty parties place on those rules. Whether for fiscal or political reasons, parties prefer to retain some or most of their judicial practices. Unlike substantive rules addressed by the treaty, they do not want a uniform set of procedures to apply. A treaty that displaces procedural rules therefore creates potentially significant costs for ratifying States. We refer to these costs as 'sovereignty costs'. Some of these costs are financial costs produced by removing domestic decision-making authority over judicial

[93] States do not have intentions, preferences or other psychological states; only their citizens and other individual stakeholders do. We take a State's attitudes to represent those of its citizens or particular stakeholders according to a (unspecified) measure of social welfare.

decisions.[94] Procedural rules such as waiver, equitable and judicial estoppel, and untimeliness vest in courts authority to control certain aspects of litigation. This control affects the cost of litigation. By harmonizing applicable law, the treaty reduces the cost to prospective litigants of vindicating their rights. Displacing procedural rules further reduces the costs to litigants of litigating rights created by a treaty. This is because procedural barriers that otherwise would apply under domestic law are no longer applicable. However, because the removal of procedural barriers makes litigation cheaper for litigants, it increases the demand for litigation. This increases the burden on domestic courts and governments. For States that are centres of litigation, the increased burden could be significant. The increased burden represents a financial sovereignty cost that may or not be efficient.

The financial impact of displacing domestic procedural rules is hard to gauge. Plausibly, some rules have a less significant effect, others a more significant effect (for example, pleading rules and rules of evidence). In addition, their effects are unlikely to be the same across jurisdictions. It is unclear that ratifying States that bear significant costs would have been willing to agree to displacement when other ratifying States would bear very limited costs from that same doctrine. Instead, ratifying States may have been reluctant to agree to the treaty at all if they bore a disproportionate cost from its implementation.

A second type of sovereignty cost concerns what we refer to as institutional costs. Procedural rules do not exist in a vacuum. Rather, at least as an ideal, they are adopted to fit with the efficient operation of a State's institutional structure for resolving disputes. An inquisitorial system, for example, may operate best with different procedural rules than an adversarial one, simply because inquisitors operate with objectives that vary from those of advocates. Rules for jury trials may vary, in practice if not formally, from rules for trial before a single adjudicator. Procedural rules for courts of general jurisdiction may vary from rules for courts with expertise in a subject matter. Procedural rules for jurisdictions with substantial litigation backlogs may vary from procedural rules for jurisdictions that have more expeditious resolution of disputes. The imposition of a procedural rule that fits well within the institutional design of one system into an alternative system threatens inefficiencies that ratifying nations were unlikely to intend. Indeed, *jura novit curia* is itself easily formulated as a procedural rule of the forum. It is understood as an integral part of European legal systems, whereas the American system recognizes a principle under which parties have sufficient control over the choice of law that they can consent to by their conduct to deviate from law that would otherwise apply.[95] The point here is not simply that

[94] For the notion of sovereignty costs generally, see Jack Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organizations* 421, 436–7; for uses of the notion for different purposes than ours, see Curt A Bradley and Mitu Gulati, 'Withdrawing from International Custom' (2010) 120 *Yale Law Journal* 202, 262–3; Oona A Hathaway, 'International Delegation and State Sovereignty' (2008) 71 *Law and Contemporary Problems* 115, 119–20.

[95] See *Walter E Heller & Co v Video Innovations, Inc*, 730 F2d 50 (2d Cir 1984); *MBIA Ins Corp v Royal Bank of Canada*, 958 NYS2d 62 (Supr Ct Westchester County 2010).

imposing a *jura novit curia* rule on the latter jurisdictions would not only constitute a misfit with other principles of that jurisdiction's system. The point also demonstrates that the application of a procedural rule—and one that is not found in the CISG—is inevitable in CISG cases.

Of course, the displacement view might respect all of these domestic procedural rules to the extent that they do not interfere with the 'performance' of the treaty. But judicial refusals to apply the CISG for procedural systems both interfere with the performance of the treaty and raise institutional sovereignty costs. Domestic procedural rules that allow courts to dismiss tardy claims of the CISG's applicability have the objectives of avoiding the re-litigation of issues, inducing attorneys to consider which legal principles are most beneficial to their clients, and bringing prompt resolution to disputes before evidence disappears and memories fade. These rules are more relevant to a system of adversarial dispute resolution in a jurisdiction with substantial litigation than in systems that rely on courts, especially specialist courts, as much as attorneys to find applicable law and in which the external costs of delay—such as deferring adjudication of unrelated cases—are lower.

The third type of sovereignty costs involves the political costs of reducing domestic judicial control over litigation. In some instances, displacement of such control might even raise constitutional difficulties.[96] For these reasons, States will have different views about the importance of their own procedural rules. Although they might be willing to trade off some of these rules for the benefit of treaty provisions, States are likely to find the sovereignty costs of forsaking their procedural rules wholesale unacceptably high. The US might well have refused to ratify the CISG had it thought that the CISG would allow the prevailing party to recover its attorney's fees.[97] States are less likely to find forsaking wholesale their procedural rules an acceptable price for agreeing to a treaty. Consider the range of different procedural rules, from rules of evidence, standards of proof, and statutes of limitation to rules of precedent and *res judicata*. Some of the rules significantly affect the cost of judicially administering litigation. In some circumstances, these rules make a treaty inapplicable when, by its terms, the treaty would otherwise apply. States do not want to risk the financial impact of a treaty displacing these

[96] The issue of recognition of arbitration awards under New York Convention (n 103) is an example. Art III of the Convention requires Contracting States to recognize and enforce arbitral awards 'in accordance with the procedure of the territory where the award is relied on'. US courts have ruled that art III's requirement of enforcement and recognition is conditioned on the court having personal jurisdiction over the award debtor. Construing the art to require enforcement or recognition without personal jurisdiction raises a due process concern. See *Frontera Res Azerbaijan Corp v State Oil of Azerbaijan*, 582 F3d 393, 396–98 (2d Cir 2009); *Glencore Grain Rotterdam BV v Shivnath Fai Harnariain Co*, 294 F3d 1114, 1121 (9th Cir 2002); see text accompanying note 110 below.

[97] See *Zapata Hermanos Sucesores* (n 79) 393: 'And how likely is that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule?'; accord Harry Flechtner and Joseph Lookofsky, 'Viva Zapata! American Procedure and CISG Substance in a US Circuit Court of Appeal' (2003) 7 *Vindobona Journal of International Commercial Law and Arbitration* 93, 98. For discussion of recovery of attorney's fees under the CISG, see Gillette and Walt (n 10) 352–5.

rules even if the circumstances of wholesale displacement are remote. Therefore, they will prefer to bargain away their procedural rules on a provision-by-provision or somewhat tailored basis. A willingness to displace procedural rules wholesale in a multilateral treaty is likely to be the rare exception. The perceived high sovereignty costs of displacing procedural rules suggests that, in agreeing to a treaty that is silent about procedural rules, States do not declare that their procedural rules are inapplicable. An inference to the contrary therefore is unsound.

This same rationale supports a default rule that leaves procedural rules unaffected. If parties prefer to retain some of their procedural rules and specifying such rules is costly, a default that supplements a silent treaty with domestic procedural rules saves negotiation costs. Nonetheless, the rationale above suggests that the parties' agreement does not require supplementation by a default term. Although the literal language of the treaty or inferences from that language does not cover procedural rules, the parties, in ratifying the treaty, intend to leave their procedural rules unaffected. Were transaction costs zero, the parties would include in the treaty language that expressly preserves their procedural rules. In agreeing to the treaty when the transaction costs of agreement are positive, they in fact declare that treaty provisions do not displace these rules.

The US Supreme Court also maintains that treaty provisions, without more, do not displace procedural rules. In *Breard v Greene*, it relied on the general proposition that, unless the treaty clearly and expressly provides otherwise, 'the procedural rules of the forum State govern the implementation of the treaty in that State'.[98] The Court stated the proposition as a rule of treaty construction, not one that fills gaps in the treaty. Although disputing *Breard*'s 'clear statement' rule's foundation in case law, Justice Breyer in dissent in *Sanchez Llamas v Oregon* agreed that the rule is one of treaty interpretation.[99] The Court's supposition therefore is that its task is to construe the treaty's terms when the treaty is silent as to procedure. However, the Court provides no basis for its rule of construction. The rule could be grounded on either a free-standing policy or the meaning the parties likely attach to treaty provisions. The treaty parties' preferences with respect to procedural rules suggest that the rule is based on the latter.

Proponents of displacement implicitly assume that parties to treaties want the treaties to be applicable without regard to the sovereignty cost of their implementation. The assumption grounds the displacement argument from international law when the treaty is silent as to procedure as well as a 'clear statement' rule that favours application of the CISG when some evidence takes the sales contract outside of the CISG's scope. The implicit assumption is mistaken. Ratifying States do not want to make a treaty applicable without regard to the costs of doing so. In ratifying the treaty, they instead take into account

[98] 523 US 371, 375 (1998); see also *Medillan v United States*, 552 US 491, 517 (2008) (invoking as support *Breard*'s general proposition, described as *Breard*'s 'holding').

[99] 548 US 331, 391 (2006) (Breyer, J, dissenting); cf *Trans World Airlines, Inc v Franklin Mint Corp*, 466 US 243, 262 (1984) (Stevens, J, dissenting): '[I]t is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters.'

implementation costs, including the cost of forsaking domestic law procedural rules, to maximize their expected net benefit of becoming a party to the treaty. Both the treaty provisions and the intended meaning of its provisions reflect this choice.

Proponents of the displacement argument find it hard to acknowledge the argument's full implication for the implementation of treaties that do not address domestic procedures. They allow limits on the extent to which these treaties displace procedural rules. In the course of advocating the argument, the CISG Advisory Council acknowledges that the CISG does not displace waiver—the setting in which the parties rely only on domestic law in their pleadings and other litigation documents. It nonetheless maintains that the CISG, not the domestic law of the waiver, 'autonomously controls' the CISG's application. [100] The displacement argument does not support the Advisory Council's position on waiver. If the CISG does not displace domestic procedural rules when they operate to make it inapplicable, the waiver doctrine applies in these circumstances too. As far as the displacement argument goes, there is no difference between a waiver and other domestic procedural rules. Similarly, Spagnolo recommends that where rules of appellate procedure allow for the consideration of law not raised by the parties, an appellate court should apply the CISG even when it is not relied on by the parties.[101] However, as far as the displacement argument goes, there is no reason for the qualification in the recommendation. The argument does not just limit the exercise of discretion otherwise permitted by a procedural rule. It also displaces a rule that prohibits recourse to the CISG when the parties do not rely on it in the lower court or appellate court. A restriction that prevents an appellate court from considering legal arguments not raised by parties is a rule of appellate procedure. If the CISG displaces procedural rules that impair its application, it makes that rule inoperative as well.

VI. Extensions of the argument

To this point, we have directed our analysis of the effects of treaties on domestic procedural rules to the consequences of interpreting the CISG. This analysis, however, informs the interpretation of any treaty that is silent about the displacement of domestic procedural rules. Our analysis suggests that the infrequency of treaties that are enforceable in national courts and explicitly displace their procedural rules is consistent with an intent to retain domestic procedures. The occasional provision in such treaties that expressly reserves domestic procedures is cautionary only.[102] As with certain provisions in non-treaty agreements, it serves to send a clear interpretive signal. This reduces the risk of an *ex post*

[100] See CISG Advisory Council Opinion (n 7) para 6.3.

[101] See Spagnolo (n 6) 204: 'A view inclining to allowing new argument will support the aims of the CISG and more closely align them with its application in practice.'

[102] See eg Paris Convention on the Protection of Industrial Property (1883) art 2(3).

interpretive error by tribunals or treaty counter-parties in finding breach when the treaty is refused enforcement.

An extension of our analysis also informs the proper interpretation of treaties that partially displace or limit certain domestic procedures. There are two sorts of cases of partial displacement. Where the treaty's terms expressly deal with specific procedures, the literal or ordinary meaning of the treaty provisions determine the procedures covered by the provisions and the procedures left unaffected by them. In the second case, treaty provisions either displace particular sorts of procedural rules rather than specific ones or state the exclusive grounds for refusing enforcement without expressly displacing procedures. In construing these provisions, the question is whether a specific procedure is within the sort of procedures displaced. Where treaty provisions state the exclusive grounds for refusing enforcement, the question is whether the provisions displace procedural rules that allow or require non-enforcement.

Our analysis to this point indicates that, in agreeing to the treaty, the parties intend the provisions to have a particular scope, including provisions that might cover procedures. Structural aspects of treaty provisions, diplomatic history, or subsequent practice, where present, obviously can inform this intent. Inferences based on the sovereignty costs identified in the fourth part of this article can do so too. For example, when a particular procedure has a likely significant impact on the course of litigation in a State, displacement increases the financial burden on the State. Unless the treaty provides a significant offsetting benefit to it, the State will want to retain that procedure. If the procedure is common to all ratifying States, the treaty parties likely do not intend the treaty's provisions to be construed to displace it. By contrast, if a procedure likely has a modest impact on litigation in a State or is unknown in the majority of States, the financial cost of abandoning the procedure will be slight. In this case, the ratifying States probably intend to have the treaty's provisions displace the procedure.

Since the size of sovereignty costs associated with abandoning a particular procedure can be difficult to gauge, the inferences of probable intent often will be inconclusive. Nonetheless, sometimes estimates of sovereignty costs can be informative. As an example, consider whether the New York Convention makes inoperative procedural rules in the recognition forum that prevent recognition of a foreign arbitral award.[103] According to the courts, Article V of the Convention states the exclusive grounds for not recognizing a foreign arbitral award. None of these grounds refer to procedures. Under Article III of the Convention, a ratifying State must recognize and enforce a foreign arbitral award 'in accordance with the rules of procedure of the territory where the award is relied on.' Legislation implementing the Convention in the USA requires a court to confirm the award unless it finds a ground to refuse recognition in the Convention.[104] US courts

[103] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 330 UNTS 38 (New York Convention).

[104] See 9 USC § 207.

have had to determine whether they may refuse to recognize a foreign arbitral award when they lack personal or *quasi in rem* jurisdiction over the award debtor.

The requirement of personal or property jurisdiction is a procedural rule of the recognition forum. Federal appellate courts in the US that have considered the issue have ruled that a court must refuse to recognize the award when it lacks jurisdiction over the person or property of the award debtor. They have done so on different bases. Although all of the courts have held that the Due Process Clause of the Fifth Amendment requires personal jurisdiction, the constitutional requirement plays different roles in their rulings.[105] Some circuits, finding that Article V of the New York Convention states the exhaustive grounds on which recognition of a foreign arbitral award can be refused, conclude that the Convention does not allow a refusal based on a lack of personal or *quasi in rem* jurisdiction. However, to refuse recognition, they rely on the domestic law rule that constitutional requirements take precedence over treaty obligations.[106] Other circuits interpret Article V's grounds to be limited to substantive bases for the refusal to recognize an award. They construe this article as leaving unaffected the forum's procedural rules, including its rules about personal jurisdiction.[107] Accordingly, Article III of the New York Convention permits the forum to refuse enforcement 'in accordance with' its rules of procedure. Yet other appellate courts, in testing the enforcement of an arbitration award, simply assume that personal jurisdiction is required.[108]

Consideration of sovereignty costs suggests that the parties to the New York Convention likely did not intend its provisions to displace a requirement of jurisdiction over person or property. A requirement of personal jurisdiction restricts initial access to the courts in a State. Although other procedural rules affect the cost of litigating there (for example, pleading rules and rules of evidence), the requirement can dramatically increase a plaintiff's litigation costs. The absence of a requirement makes litigating in the forum State more attractive for the plaintiff and increases the expected administrative and fiscal burden on that State from increased litigation. States probably want to control this burden, either to allocate their limited resources to improve aspects of litigation in their courts, or to concentrate on cases that they deem preferable, or simply to reduce their budget.[109]

[105] See *Frontera Resources* (n 96); *Base Metal Trading, Ltd v OJSC 'Novokuznetsky Aluminium Factory*, 283 F3d (4th Cir 2004); *First Investment Corp v Fujian Mawei Shipbuilding Ltd*, 703 F3d 742 (5th Cir 2012); *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co*, 284 F3d 1114 (9th Cir 2002); *GSS Group Ltd v National Port Authority*, 680 F3d 805 (DC Cir 2012).

[106] See eg *First Investment Corp* (n 105) 749–50; *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co*, 284 F3d 1114, 1121 (9th Cir 2002).

[107] See *Frontera Resources* (n 96) 397.

[108] See *S & Davis International Inc v Republic of Yemen*, 218 F3d 1292, 1304 (11th Cir 2000).

[109] Thus, a jurisdiction's desire to control the burden of litigation is not inconsistent with a view that legislators may desire to attract litigation. Frequently when legislators have that view, perhaps at the behest of the state law revision commission or the jurisdiction's attorney general, it is to attract certain types of litigation, not all litigation. Eg, the New York statute that allows New York courts to exercise jurisdiction over cases in which parties have agreed that New York law governs their transaction, but that otherwise have no connection with the State, applies only to cases in which the consideration is at least $1,000,000. NY General Obligation Law § 5-1402; cf Cal Civ Code §

Most States presumptively have this preference, even if they do not consider personal jurisdiction a constitutional requirement. Because surrendering the requirement has a significant cost for them, States are unlikely to agree to surrender a personal jurisdiction requirement in agreeing to a treaty that does not explicitly displace the requirement.[110] For this reason, it is appropriate to infer that ratifying States do not intend the New York Convention's provisions to displace the requirement.

The Second Circuit reasons that the New York Convention does not displace the requirement because Article V refers only to the substantive grounds on which recognition of a foreign arbitral award can be refused.[111] A personal jurisdiction requirement is a procedural rule and, therefore, according to the court, unaffected by Article V. The Court's reasoning is open to the fair objection that Article V does not distinguish between substantive and procedural rules.[112] Procedural rules are not among the exhaustive grounds on which recognition may be refused. The rationale of sovereignty costs is different. The high sovereignty costs incurred by eliminating jurisdictional requirements make it unlikely that ratifying States intended Article V to displace them. It is irrelevant that Article V does not distinguish between substantive and procedural rules. The requirement of jurisdiction over person or property falls outside of the intended meaning of Article V's terms.

The conclusion is different with respect to the doctrine of *forum non conveniens*. Courts generally conclude that the New York Convention permits a court to refuse to recognize a foreign arbitral award based on the doctrine.[113] The rationale for this conclusion is not particularly persuasive. Since Article V's grounds for refusing recognition are exhaustive, construing the article as dealing only with substantive grounds seems arbitrary.[114] Article III, which requires recognition 'in accordance with' the forum's procedures, does not allow the forum to refuse recognition of a foreign arbitral award in accordance with a procedural rule that is not among the grounds referred to by Article V. The ordinary meaning

1646.5. Presumably, the State is more interested in high stakes commercial litigation than in litigation generally.

[110] See International Commercial Disputes Committee of the Association of the Bar of New York, 'Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards' (2004) 15 *American Review of International Arbitration* 407, 424–5.

[111] See *Frontera Resources* (n 96) 397 (quoting *Monegasque du Reassurances SAM v Nak Naftogaz of Ukraine*, 311 F3d 488, 496 (2d Cir 2002)).

[112] Cf William W Park and Alexander A Janos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration' (2006) 58 *Hastings Law Journal* 251, 263–4 (the Convention's drafters 'did not expect the recognition forum would establish outright procedural bars to award confirmation').

[113] See eg *Figueiredo Ferraz v Engenharia de Projecto Ltd v Republic of Peru*, 665 F3d 384, 392 (2d Cir 2011); *Monegasque du Reassurances* (n 111) 496; *GBaseMetal Trading Ltd v OJSC Novokuznetsky Aluminium Factory*, 283 F3d 208, 215–16 (4th Cir 2002); *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co*, 284 F3d 1114, 1127–8 (9th Cir 2002); *Termorio SA ESP v Electrificadora del Atlantico SA ESP*, 421 FSupp2d 87 (DDC 2006); *CHS Europe SA v El Attal*, 2010 US Dist LEXIS 76619 (SDNY 22 July 2010).

[114] See *Figueiredo Ferraz* (n 113) 392; *Monegasque du Reassurances* (n 111) 496.

of Articles V and III's language does not allow *forum non conveniens* as a basis for refusing recognition. At the same time, the Convention's goal of unifying the standards for recognizing and enforcing foreign arbitral awards does not justify the conclusion that *forum non conveniens* is inconsistent with the Convention.[115] The justification proves too much. As we noted above, American courts have concluded that the New York Convention does not prevent a forum from relying on a lack of personal jurisdiction as grounds for refusing the recognition of an award, notwithstanding that standards of personal jurisdiction differ among legal systems. If reliance on *forum non conveniens* interferes with the uniformity of the Convention's application, so does reliance on the requirements of personal jurisdiction.

Consideration of the sovereignty costs of bargaining away *forum non conveniens* offers a more persuasive account of why the doctrine likely is inconsistent with the Convention. Two reasons suggest that these costs are likely to be modest for the parties to the Convention. First, a State can control access to its courts through requirements of personal and property jurisdiction. Although *forum non conveniens* gives its courts further control over a plaintiff's access to the State's courts, the doctrine's impact on that access is limited. *Forum non conveniens* gives courts the discretion to decline jurisdiction only in a restricted range of cases—cases that are connected to more than one State. In addition, it is a discretionary doctrine with highly imprecise contours. An unbiased court therefore is as likely to deny as to accept jurisdiction over the range of cases.[116] For both reasons, the doctrine's contribution to controlling access to a State's legal system is modest. Thus, unlike the requirement of personal jurisdiction, the marginal cost to a ratifying State of bargaining away *forum non conveniens* is also modest. Second, many legal systems do not have a doctrine of *forum non conveniens*.[117] For these States, there is no sovereignty cost in agreeing to a treaty that displaces the doctrine.

The implication of these considerations for the doctrine of *forum non conveniens* under the New York Convention is straightforward. Since ratifying States incur either no sovereignty costs or modest ones from relinquishing the doctrine, they probably would bargain away the doctrine in exchange for benefits the Convention brings. This suggests that the ratifying States, in agreeing to Article

[115] See *Firgueredo Ferraz* (n 113) 397 (Lynch, J, dissenting); cf *Owusu v Jackson*, C-281/02 [2005] EUECJ (1 March 2005) (*forum non conveniens* inconsistent with Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1972] OJ L299; its recognition would undermine predictability of the Convention). Most commentary sides with courts that find that *forum non conveniens* is inapplicable; see eg Gary B Born, *International Commercial Arbitration* (2nd edn 2014) 2985; International Commercial Disputes Committee of the Bar of New York (n 110) 427–8; Park and Yanos (n 112).

[116] Cf Donald Earl Childress III, 'Forum Conveniens: The Search for a Convenient Forum in Transnational Cases' (2012) 50 *Virginia Journal of International Law* 157, 168–9 (reporting overall dismissal rate of about 50 per cent in federal courts between 1990 and 2005).

[117] See Pamela K Bookman, 'Litigation Isolationism' (2015) 67 *Stanford Law Review* 1081, 1096; Ronald A Brand, 'Hague Convention on Jurisdiction and Judgments' (2002) 37 *Texas International Law Journal* 467, 468; cf Ronald A Brand, 'Challenges to *Forum Non Conveniens*' (2013) 45 *New York University Journal of International Law and Politics* 1003, 1009 (*forum non conveniens* inconsistent with civil law understanding of judicial role).

V of the Convention, intended to displace *forum non conveniens*. The distinction between substantive and procedural rules does not underlie the different treatment of personal jurisdiction and *forum non conveniens* under Article V. Rather, the different estimated financial impact on ratifying States of bargaining away these rules does so. Although both are procedural rules, parties to the Convention are presumptively willing to relinquish one of the rules and not the other. This informs the intended meaning of Article V. Although the ordinary meaning of Article V's terms does not distinguish between personal jurisdiction and *forum non conveniens*, in agreeing to the article the parties intend it to displace the latter while leaving the former unaffected.

VII. Conclusion

Uniform rules in commercial law treaties usually define the entitlements of the transacting parties in different jurisdictions. Enforcement of these rules implicates the judicial procedures of jurisdictions and creates costs (and benefits) for their legal systems. As a result, the interests of the jurisdictions in which the treaty is enforced and those of the private parties whose transactions are governed by the treaty can diverge. The enforcing jurisdictions might prefer to retain their procedural rules even when these rules make the treaty inapplicable. It is therefore unsurprising that commercial law treaties typically have a restricted scope. Their rules are limited to substantive rules, which reflect the interests of commercial parties. Where treaty parties prefer to retain their procedural practices, agreement on a uniform set of procedures to accompany these substantive rules is unlikely. Significantly, the parties want their own procedures to continue to apply. The difference between divergent substantive rules that uniform law replaces and procedural rules that uniform law leaves unaffected does not turn on the legal character of the rules. It turns instead on the preference of the treaty parties to preserve their procedural rules and not their substantive ones.

From this perspective, the failure to displace domestic procedural rules, which a reasonable interpretation of Articles 6, 7, and 8 of the CISG implies, need not be a defect in the treaty. Instead, it represents the treaty parties' judgment that, for fiscal or broadly political reasons, the cost of displacing their procedural rules is unacceptably high. Treaties such as the CISG whose provisions deal only with the substantive rights of private parties are common. None of the CISG's provisions by their terms displace domestic procedural rules, and none can be construed to make inoperative procedural rules that impair the CISG's application. The treaty is about substance, not procedure.[118] Since the CISG does not deal with procedural rules at all, the inference to displacement from Article 7(1)'s requirement of a uniform interpretation is unsound. The safer inference is simply that the CISG's silence permits the enforcement jurisdiction to decide the extent to which its procedural rules survive in a specific case. The provisions of the CISG that are

[118] See *Zapata Hermanos Sucesores* (n 79); see text accompanying note 83 above.

often cited as precluding such a result, primarily Articles 6, 7, and 8, do far less work on this score than is attributed to them.

The remaining question is whether treaty parties, in agreeing to a treaty that deals only with substantive entitlements, intend the treaty's provisions to displace their domestic procedural rules. This is a question of what the treaty has been designed to cover. It is a matter of treaty interpretation. As with any other contracting problem, treaty parties elect the scope and effect of treaty provisions, including their impact on procedural rules, to maximize the net gain from the treaty. Parties to treaties presumptively prefer to leave their procedural practices unaffected. Where parties find it beneficial to bargain away particular rules, treaty provisions reflect the mutual concession. In agreeing to a treaty that is silent on procedural rules, parties presumptively intend the meaning of the treaty's provisions not to displace these rules. There is no more reason to think that a treaty displaces substantive provisions outside its scope than that it displaces procedural rules outside its scope. It is a mistake to infer that a treaty that is silent as to procedure, such as the CISG, displaces procedural rules and obligates courts to apply it. Neither treaty law nor the rules of treaty interpretation do so. The case for displacement therefore must be made on a provision-by-provision basis.