

THE CISG IN AUSTRALIA – THE JIGSAW PUZZLE MISSING A PIECE

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1 INTRODUCTION

The *United Nations Convention on Contracts for the International Sale of Goods*, commonly known as the *Vienna Sales Convention* or *CISG*¹, came into force on 1 January 1988.² The Convention became effective in Australia on 1 April 1989.³ More than 20 years have now passed since the *CISG* became effective in Australia.⁴ The *Convention* has gained “worldwide acceptance”,⁵ yet experience to date in Australia

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¹ This paper will use the terms *CISG* or *Convention* as shorthand references to the *United Nations Convention on Contracts for the International Sale of Goods*.

² See generally Schlechtriem, P. and Schwenzer, I., “Introduction” in Schwenzer, I. (ed), *Slechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, New York, at pp. 1–3.

³ See UNCITRAL, Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods, available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

⁴ Australia deposited its instrument of accession with the United Nations on 17 March 1988; see generally Govey, I. and Staker, C., “Vienna Sales Convention takes effect in Australia next year” (1988) 23(5) *Australian Law News* 19 which provides some background as to Australia’s accession to the *CISG*.

⁵ Schlechtriem, P. and Schwenzer, I., “Introduction”, *supra* fn 2, at p. 1.

suggests it “is still in the Australian legal outback”.⁶ In contrast to the position in some other legal systems, where basic treatises on contracts include extensive reference to the *CISG*, “[t]his openness is regrettably by no means as well established in common law countries adhering to the English tradition”⁷, including Australia.⁸ Indeed, a recent review of Australian case law concerning the *CISG* suggested that “the *CISG* has not been understood fully”⁹ and at a recent conference Justice Finn of the Federal Court of Australia suggested “[i]t is fair to say that the *CISG* [is] scarcely known in this country”¹⁰.

In light of this, it is timely to give some thought as to how Australian practitioners, their clients and the courts can effectively navigate the boundaries between domestic and international sales law. This paper contends that the *CISG* in Australia resembles a jigsaw puzzle missing a critical piece – that piece being an authoritative, appellate level judicial decision clearly confirming the parameters within which the *CISG* operates in domestic Australian law. Part II of this paper first analyses the boundary between domestic and international sales law in Australia, by reviewing the rules relating to the *CISG*’s application. Part III of this paper examines how Australian courts have approached the *CISG*’s interaction with domestic law. Finally, it is concluded that, on the unhappy state of the present authorities, an authoritative, appellate level judicial decision clarifying the *CISG*’s place in domestic law is the ‘missing piece’ that the *CISG* jigsaw puzzle in Australia badly needs.

2 APPLICATION OF THE CISG TO CONTRACTS IN AUSTRALIA

In this Part, a question fundamental to the process of advising a client engaged in international trade is considered – when does the *CISG* apply? This question concerns the boundary between domestic and international sales law in Australia. As will be

⁶ Spagnolo, L., “The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers” (2009) 10 *Melbourne Journal of International Law* 141, at p. 142.

⁷ Finn, Justice P., “National Contract Law and Transnational Norms and Practices” (2010) presented at the “Cross-Border Collaboration, Convergence and Conflict” conference, Sydney, 9 February 2010, at p. 9.

⁸ For example, *Cheshire and Fifoot* contains references to the *CISG*, and Australia’s implementing legislation, in a mere three paragraphs; see Sneddon, N. C., and Ellinghaus, M. P., *Cheshire and Fifoot’s Law of Contract*, 9th Australian ed, 2008, LexisNexis Butterworths, at paras. 3.27, 10.43 and 16.7. Similarly, *Contract Law in Australia* contains references to the same sources in only nine paragraphs; see Carter, J. W., Peden, E. and Tolhurst, G. J., *Contract Law in Australia*, 5th ed, 2007, LexisNexis Butterworths, at p. lxxxiv for the list of references. *Carter on Contract* contains some reference to the *CISG*, but the emphasis is overwhelmingly on purely domestic Australian contract law; see LexisNexis Butterworths Australia, *Carter on Contract*, 2002 (service 26, 2009), LexisNexis Butterworths Australia, Sydney, at p. 437 for a list of references to the *CISG*, and paras. 01-160, 02-080, 09-060 – 09-100 and 09-140 for references to the implementing legislation.

⁹ Zeller, B., “Traversing International Waters” (2004) 78(9) *Law Institute Journal* 52, at p. 52.

¹⁰ Finn, Justice P., “National Contract Law”, *supra* fn 7, at p. 9.

seen, despite the large volume of literature concerning the *CISG*'s application,¹¹ the question is by no means simple, and carries with it several difficulties.

At the time of Australia's accession to the *CISG*, the Standing Committee of Attorneys-General agreed that the *Convention* would be implemented in Australia through State and Territory legislation, as opposed to a single and national Commonwealth Act.¹² Several reasons have been put forward to justify this decision. First, that it "reflects an acceptance of the allocation of the responsibility for the regulation of the sale of goods largely laying with the states / territories"¹³. Secondly, that it reflected a desire to avoid the confusion and complication that would arise from "a further tier of laws about the sale of goods" at the Federal level;¹⁴ and, thirdly, that it preserved the rights of the States to "amend [the] legislation from time to time" even though "[t]hat would happen only in the rarest of cases on Bills such as this"¹⁵.

Consequently, Victoria enacted the *Sale of Goods (Vienna Convention) Act 1987 (Vic)* and equivalent uniform legislation was enacted in the other Australian States and Territories.¹⁶ Under s. 5 of the uniform legislation, the *CISG* is given the force of law in each jurisdiction.¹⁷

¹¹ At a recent conference, Justice Finn of the Federal Court of Australia noted (after indicating he would be addressing "contract law both international or transnational and domestic") that "[f]orests have been laid bare on even small aspects of these" – see *Ibid.*, at p. 1. For a brief sample of literature addressing the *CISG*'s application, see generally Bell, K., "The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods" (1996) 8 *Pace International Law Review* 237; Loewe, R., "The Sphere of Application of the UN Sales Convention" (1998) 10 *Pace International Law Review* 79; Schlechtriem, P., "Requirements of Application and Sphere of Applicability of the CISG" (2005) 36 *Victoria University of Wellington Law Review* 781; Xiao, Y. and Long, W., "Selected Topics on the Application of the CISG in China" (2008) 20 *Pace International Law Review* 61.

¹² Govey, I. and Staker, C., "Vienna Sales Convention", *supra* fn 4, at p. 19; see also Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1987, at p. 172 (Kennan, J. H., Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 14 April 1987, at p. 1220 (Mr. Matthews, Minister for the Arts).

¹³ See Jacobs, M. S., Cutbush-Sabine, K., and Bambagiotti, P., "The CISG in Australia-to-date: An Illusive Quest for Global Harmonisation?" (2002) 17 *Mealey's International Arbitration Report* 24, at para. 4.6.

¹⁴ See Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1987, at p. 172 (Kennan, J. H., Attorney-General); see also Victoria, *Parliamentary Debates*, Legislative Assembly, 14 April 1987, at p. 1220 (Mr. Matthews, Minister for the Arts).

¹⁵ See Victoria, *Parliamentary Debates*, Legislative Assembly, 30 April 1987, at p. 1759 (Mr. Ross-Edwards, Leader of the National Party).

¹⁶ For the equivalent uniform legislation in other States and Territories, see the *Sale of Goods (Vienna Convention) Act 1987 (ACT)*; *Sale of Goods (Vienna Convention) Act 1986 (NSW)*; *Sale of Goods (Vienna Convention) Act (NT)*; *Sale of Goods (Vienna Convention) Act 1986 (Qld)*; *Sale of Goods (Vienna Convention) Act 1986 (SA)*; *Sale of Goods (Vienna Convention) Act 1987 (Tas)*; and *Sale of Goods (Vienna Convention) Act 1986 (WA)*. The *CISG* is also given effect at the Commonwealth level by virtue of the *Trade Practices Act 1974 (Cth)* s. 66A.

¹⁷ Note that the relevant section of the South Australian Act is s. 4, given that the South Australian legislation, unlike the uniform legislation in place in the other States and Territories, does not contain a section by which the Act binds the Crown.

The *CISG*'s own provisions set out the rules governing its application. We now turn to these provisions to analyse when the *CISG* will apply to contracts involving an Australian party. A proper understanding of the applicability of the *CISG*, of course, is necessary to make an informed choice of law.¹⁸ Loewe suggests that the *CISG* has “three dimensions” of applicability – its geographic, material, and temporal spheres of application.¹⁹ The following analysis adopts this general scheme of classification, and applies it specifically to the Australian context.

2.1 GEOGRAPHIC APPLICATION OF THE CISG

Geographic application has “two basic requirements” – internationality, and the existence of a prescribed relationship with a Contracting State.²⁰ Where both of these requirements are satisfied, the *CISG* applies automatically, or “by operation of law”²¹ – there is no need to “opt in”²², although this is something that parties may sometimes wish to do.

A proper awareness of these requirements is important because the *CISG* can potentially catch traders and their advisers “by surprise”²³. Authority in civil law States suggests that the *CISG*'s application “is to be assessed *ex officio*”²⁴, that is, its application is “not conditional on the parties claiming it”²⁵. While in common law systems such as Australia parties and the courts are generally limited by the pleadings,²⁶ it remains open even to an Australian court to apply the *CISG* indirectly by rejecting an argument based on an inapplicable domestic law. This occurred in the

¹⁸ Zeller, B., “Is the Sale of Goods (Vienna Convention) Act the Perfect Tool to Manage Cross Border Legal Risks Faced by Australian Firms?” 6(3) *Murdoch University Electronic Journal of Law*, at para. 29, available at: <<http://www.murdoch.edu.au/elaw/issues/v6n3/zeller63.html>>; Zeller, B., “The Vienna Convention 11 Years On” (1999) 73(3) *Law Institute Journal* 72, at p. 73.

¹⁹ Loewe, R., “The Sphere of Application”, *supra* fn 11, at p. 80; see also Schwenzer, I. and Hagem, P., “Introduction to Articles 1 – 6” in Schwenzer, I. (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, New York, at p. 19, para. 2.

²⁰ Honnold, J. O., *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed, 1999, Kluwer Law International, The Hague, at p. 29, para. 39.

²¹ *SO. M. AGRIS a.s. di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG*, Tribunale di Padova (Italy), 25 February 2004, available at: <<http://cisgw3.law.pace.edu/cases/040225i3.html>>.

²² Bridge, M., *The International Sale of Goods – Law and Practice*, 2nd ed, 2007, Oxford University Press, New York, at p. 540, para. 11.42.

²³ *Ibid.*

²⁴ See, e.g., 4 *Ob 179/05k*, Supreme Court (Austria), 8 November 2005, available at: <<http://cisgw3.law.pace.edu/cases/051108a3.html>>.

²⁵ Schwenzer, I. and Hagem, P., “Introduction to Articles 1 – 6”, *supra* fn 19, at pp. 19–20, para. 3.

²⁶ Jolowicz notes that two ideas “central to the adversary system” are “that it is for the parties to define the subject matter of their dispute”, and “that it is for them and for them alone to determine the information on which the judge may base [their] decision”, see Jolowicz, J. A., “Adversarial and Inquisitorial Models of Civil Procedure” (2003) 52 *International and Comparative Law Quarterly* 281, at p. 289.

South Australian decision of *Perry Engineering v Bernold*²⁷, where Burley J noticed that the *CISG* applied to the parties' contract (and even wrote to the plaintiff's solicitors²⁸ to that effect). The *Sale of Goods Act 1895* (SA) had been pleaded and not the *CISG*, so Burley J declined to assess damages on the contract claim, stating "the Court cannot proceed to an assessment of damages based on the provisions of an Act of Parliament which the plaintiff acknowledges do not apply to the claim pursued by the plaintiff"²⁹.

2.1.1 INTERNATIONALITY – PARTIES' PLACES OF BUSINESS MUST BE IN DIFFERENT STATES

The "basic criterion"³⁰ underlying the *CISG*'s application is that the parties' places of business must be in different States.³¹ As suggested by the concept of internationality itself, the *CISG* is not applicable to sales between parties domiciled within a single State's different territorial units³² – such as the different 'states'³³ of Australia. Domestic law's hold over contracts of "a purely domestic nature" is not affected by the *CISG*.³⁴

Australian practitioners should be aware that this requirement is the *CISG*'s "single"³⁵ rule of internationality. While somewhat counter-intuitive (at least by reference to the ordinary meaning of 'international'),³⁶ provided that each party's place of business is located in a different State, it is immaterial whether the goods themselves cross national borders. For example, a contract of sale between a Melbourne-based seller and New York-based buyer, obliging the seller to deliver goods directly to a Melbourne-based sub-purchaser, would be captured by the *CISG*.³⁷ Conversely, the *CISG* has no application where the parties' places of business are within the same

²⁷ *Perry Engineering (Receiver and Manager Appointed) (Administrators Appointed) v Bernold AG* [2001] SASC 15 (Unreported, Burley J, 1 February 2001).

²⁸ See *ibid.*, at para. 6 for a reproduction of Burley J's assistant's correspondence.

²⁹ *Ibid.*, at para. 18.

³⁰ UNCITRAL Secretariat, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, UN Doc A/CONF.97/5, 1978, at p. 15; see also Jayme, E., "Article 1" in Bianca, C. M. and Bonell, M. J., *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, p. 27, at p. 29, para. 2.1.

³¹ Article I(1) *CISG*.

³² Enderlein, F. and Maskow, D., *International Sales Law*, 1992, Oceana, New York, at p. 29; see also Jayme, E., "Article 1", *supra* fn 30, at p. 30, para. 2.3.

³³ Used in the sense of territorial units within the Australian federation.

³⁴ Bonell, M. J., "Introduction to the Convention" in Bianca, C. M. and Bonell, M. J., *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, p. 1, at p. 7, para. 2.1.

³⁵ Honnold, J. O., *Uniform Law*, *supra* fn 20, at p. 30, para. 40; Bell, K., "The Sphere of Application", *supra* fn 11, at p. 244.

³⁶ See, e.g., Moore, B. (ed), *The Australian Oxford Dictionary*, 1999, Oxford, New York, at p. 685, which defines international as "existing, 'involving' or carried on between two or more nations".

³⁷ See generally the critiques noted in Bonell, M. J., "Introduction to the Convention", *supra* fn 34, at p. 8, para. 2.1.1.

State,³⁸ even if performance is effected from that State to another State³⁹ – thus if a Melbourne-based buyer and Melbourne-based seller contract, obliging the seller to deliver goods cross-border to a foreign sub-purchaser, the *CISG* does not apply.⁴⁰ In this sense, *CISG* internationality is a legal (rather than factual) concept. Article 10 *CISG* deals with the situation where a party has places of business in multiple States,⁴¹ or alternatively has no place of business – with the solution adopted referring decision-makers to the place of business having the “closest relationship to the contract and its performance”, or a party’s place of “habitual residence”, respectively.

It is important to note in relation to internationality that the focus is on ‘places of business’, so the actual ‘nationality’ of each party is irrelevant.⁴² This is an interesting facet of the *CISG*’s conception of internationality. For example, a contract between two Australian-registered corporations will still be international in the *CISG* sense if one is operating through a place of business - perhaps a branch - in Germany. Similarly, a contract between an Australian-registered corporation and a German-registered corporation will not be international in the *CISG* sense if the German-registered corporation is operating through a branch in Australia. The rule in Art. 1(3) *CISG* is therefore a sensible solution as nationality cannot be said to affect the ‘transaction’s’ international character, when the legal nature of *CISG* internationality is kept in mind.

One final observation concerning internationality is warranted. Pursuant to Art. 1(2) *CISG*, internationality is to be disregarded if it does not appear from the contract or any details between, or information disclosed by, the parties before or at the conclusion of the contract. As a final layer in the *CISG*’s conception of internationality, this provision “protect[s]” a party by “restricting the application of the *Convention* to cases in which both parties know of the foreign element”⁴³. This is likely to be in line with the expectations of Australian traders, who would not generally be expected to foresee that an international convention may apply to what appears to be a domestic transaction, even if it is not truly so.

2.1.2 THE REQUIRED RELATIONSHIP WITH A CONTRACTING STATE OR STATES

In addition to internationality, a prescribed relationship with a Contracting State is required for the *CISG* to apply. This relationship is identified through two

³⁸ UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 30, at p. 15.

³⁹ Schwenger, I. and Hachem, P., “Article 1” in Schwenger, I. (ed), *Schlechtriem & Schwenger – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, New York, p. 28, at p. 38, para. 26.

⁴⁰ See *supra* fn 37.

⁴¹ See, e.g., “Example 1B” in Honnold, J. O., *Uniform Law*, *supra* fn 20, at p. 30, para. 42, in which the seller has places of business in both State A and State B, while the buyer has a place of business only in State B.

⁴² Article 1(3) *CISG*.

⁴³ Jayme, E., “Article 1”, *supra* fn 30, at p. 31, para 2.4.

“[a]dditional criteria”⁴⁴ (both alternatives)⁴⁵ which are provided in Arts. 1(1)(a) and 1(b) *CISG*.

Under Art. 1(1)(a) *CISG*, the *Convention* applies if the two different States concerned are both Contracting States. This so-called “area of certainty” is said to render domestic rules of private international law “irrelevant”.⁴⁶ This might be true on a practical level, if the *CISG* governs all matters in dispute between two parties, as reference to further sources of law is rendered unnecessary.⁴⁷ Strictly speaking however, the correct legal analysis is broader and does not do away with private international law.⁴⁸ When a State gives effect to the *CISG*, it becomes part of that State’s body of private law.⁴⁹ The *CISG* therefore applies because it forms part of a given State’s law, that law is the governing law of the contract, and its own internal rules of application are fulfilled. Private international law is a necessary tool to determine which State’s law applies. Article 1(1)(a) *CISG* confirms that it is the *CISG* that applies, rather than that relevant State’s ordinary domestic sales law.⁵⁰ Regardless, it can be observed for present purposes that as Australia is a Contracting State,⁵¹ where an Australian buyer or seller is involved the *CISG* will apply where the counterparty has its place of business in any of the other 73 States that are Contracting States to the *Convention*.⁵²

Under the alternative in Art. 1(1)(b) *CISG*, private international law is expressly made relevant. The *CISG* applies here if both parties’ places of business are in different States and the relevant rules of private international law lead to the application of the

⁴⁴ UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 30, at p. 15.

⁴⁵ Honnold, J. O., *Uniform Law*, *supra* fn 20, at p. 34, para. 44. It is easy to envisage, however, cases where both alternatives would be satisfied; see, e.g., Fawcett, J., Harris, J. and Bridge, M., *International Sale of Goods in the Conflict of Laws*, 2005, Oxford University Press, New York, at p. 915, para. 16.20.

⁴⁶ Bell, K., “The Sphere of Application”, *supra* fn 11, at pp. 246–7.

⁴⁷ Of course, rules of private international law would still determine the law which governs matters outside the scope of the *Convention*, should such legal issues be relevant to a particular case; see Art. 4 *CISG*.

⁴⁸ It is interesting in this regard to note the (perhaps overly hopeful) observation made during the passage of the Sale of Goods (Vienna Convention) Bill 1987 (Vic) that “[w]ithout an adequate set of uniform laws and international rules, we are left to the complexity and uncertainty of private international law”; see Victoria, *Parliamentary Debates*, Legislative Assembly, 30 April 1987, at p. 1758 (Mr. John, Member for Bendigo East).

⁴⁹ See, e.g., *NV A.R. v NV I.*, Appellate Court Gent (Belgium), 15 May 2002, at para 5.2, available at: <<http://cisgw3.law.pace.edu/cases/020515b1.html>>.

⁵⁰ It has been suggested that domestic courts should apply the *CISG* pursuant to Art. 1(1)(a) as part of the forum’s law; see Fawcett, J., Harris J. and Bridge, M., *Conflict of Laws*, *supra* fn 45, at pp. 917–19, paras. 16.23–5. However, this paper’s methodology avoids a major complication of this approach arising in cases where issues outside of the *CISG*’s scope are in contention. In such cases, on the Fawcett, Harris and Bridge view, the *CISG* could be applied as part of the forum’s law, while the law governing issues beyond Art. 4 *CISG* could very well be foreign, pursuant to the forum’s conflict of laws rules.

⁵¹ UNCITRAL, Status: 1980 – *CISG*, *supra* fn 3.

⁵² See *ibid* for a complete list of Contracting States, and dates of entry into force in each of those States. While the Dominican Republic and Turkey acceded to the *CISG* on 7 June and 7 July 2010, the *Convention* does not enter into force in those jurisdictions until 1 July 2011 and 1 August 2011 respectively.

law of a Contracting State.⁵³ Article 1(1)(b) is “subsidiary”⁵⁴ – it has “ceded some of its importance” to Art. 1(1)(a) given the growing number of Contracting States⁵⁵ – but Australian practitioners would do well to keep it in mind, as it has the effect of widening the *CISG*’s ambit beyond simple cases where both States concerned have adopted the *Convention*.

As Australia is a Contracting State,⁵⁶ the *CISG* will apply where an Australian party contracts with a party from a non-Contracting State if Australian law is the governing law of the contract under the rules of private international law. This was the case in *Playcorp v Taiyo Kogyo*⁵⁷, where Playcorp (an Australian purchaser) contracted with Taiyo Kogyo (a Japanese manufacturer of radio controlled toys), at a time when Japan was not yet signatory to the *CISG*. While some aspects of the Court’s decision (analysed in Part III below) are problematic, the Court expressly noted the effect of Art. 1(1)(b) *CISG* in allowing application of the *Convention* where Victorian law was the proper law of the contract.⁵⁸

Article 1(1)(b) *CISG* has application both where litigation is conducted in Australia, and where it is conducted in non-Contracting States⁵⁹ such as the United Kingdom (UK) or India.⁶⁰ This necessarily follows from the proposition that the *CISG* forms part of a State’s private law. Even where litigation is conducted in a non-Contracting State, if the relevant rules of private international law require application of a Contracting State’s law, the *CISG* forms part of that State’s law and may therefore apply. The application of Art. 1(1)(b) *CISG* can, however, be complicated by the choice of forum. As conflict of laws rules are part of any given State’s private law, they necessarily have the capacity to differ from State to State.⁶¹ As a State court will

⁵³ Consistently with their analysis of Art. 1(1)(a) *CISG*, Fawcett, Harris and Bridge suggest that it is ‘preferable’ to conceive courts applying Art. 1(1)(b) *CISG* as applying the *Convention* as part of the forum’s law; see Fawcett, J., Harris, J. and Bridge M., *Conflict of Laws*, *supra* fn 45, at pp. 921 – 3, paras. 16.30 – 16.31. However, for the reasons given above in relation to Art. 1(1)(a) *CISG* (and the added reason that this understanding of Art. 1(1)(b) *CISG* cannot be sustained where non-Contracting States apply the *CISG* this way) it would appear that the conventional view advanced in this paper is more sound.

⁵⁴ Bridge, M., *The International Sale of Goods*, *supra* fn 45, at p. 513, para. 11.12.

⁵⁵ Schlechtriem, P., “Article 1” in Schlechtriem, P. and Schwenzer, I. (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed, 2005, Oxford University Press, New York, at p. 35, para. 40; cited in Schwenzer, I. and Hachem, P., “Article 1”, *supra* fn 39, at p. 40, para. 30.

⁵⁶ UNCITRAL, Status: 1980 – *CISG*, *supra* fn 3.

⁵⁷ *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003).

⁵⁸ *Ibid.*, at paras. 237 – 245.

⁵⁹ Though in such cases, the *CISG* (and Art. 1(1)(b) *CISG* specifically) will be applied as foreign law rather than as part of the forum’s law; see Schwenzer, I. and Hachem, P., “Article 1”, *supra* fn 39, at p. 40, para. 31.

⁶⁰ The UK and India are “[t]he two notable abstentions” in relation to the *CISG*’s adoption amongst Australia’s major trading partners; see Finn, Justice P., “National Contract Law”, *supra* fn 7, at p. 4.

⁶¹ Stone, P., *The Conflict of Laws*, 1995, Longman, London, at p. 2; see also Fawcett, J., Harris, J. and Bridge, M., *Conflict of Laws*, *supra* fn 45, at p. 906, para. 16.02.

apply the conflict of laws rules of the forum, it is possible that, in circumstances where those rules differ from the rules of the other potential forum States, the *CISG*'s application (or non-application) could turn on the choice of forum.⁶²

However, this is not the only way in which Art. 1(1)(b) *CISG* may be engaged. Australian private international law permits the parties to choose a contract's governing law.⁶³ For example, if an Australian seller and a UK buyer contract and specify that Victorian law will govern the contract, the *CISG* and 'not' domestic Victorian law will regulate the transaction.⁶⁴ As noted by Bridge, "[t]he case law seems to be hardening in favour of the view that choice of law clauses in favour of the law of a Contracting State do not exclude the *CISG*"⁶⁵. This has not been the conclusion reached in all reported cases. In the *Leather/Textile Wear Case*⁶⁶ a choice of law in favour of a Contracting State was treated as an Art. 6 *CISG* derogation. Further, in *Nuova Fucinati*⁶⁷ it was held that Art. 1(1)(b) *CISG* had no application in the context of a choice of law, as opposed to the application of a conflict of laws rule. Such decisions have however been criticised⁶⁸ and the view propounded by Bridge seems now to be well accepted and well founded in reason.

Article 1(1)(b) *CISG* may also be engaged in one final - and perhaps "abnormal" - manner; where the parties' respective places of business are in different non-Contracting States, but the forum's private international law leads to the law of a

⁶² See Fawcett, J., Harris, J. and Bridge, M., *Conflict of Laws*, *supra* fn 45, at p. 920, para. 16.27 for an example where this could occur. It should be noted that even rules which seem similar on their face (or rules that are based on similar principles) can differ in their detail. For example, the test applicable to contracts in Australia as set out in *Bonython v The Commonwealth* (1950) 81 CLR 486, at p. 498 (Lord Simonds) asks which system of law has the "closest and most real connection" with a contract. On the other hand, while adopting a closest connection theory, the *Rome Convention* and the *Rome I Regulation* adopt a closest connection test with a presumption that a contract, in the case of a contract of sale, is most closely connected with the seller's law; *Convention on the Law Applicable to Contractual Obligations*, Arts. 4(1), (2) and (5); and *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)*, Arts. 4(1)(a) and (3).

⁶³ *Akai Pty Ltd v The People's Insurance Company Ltd* (1996) 118 CLR 418, at p. 442 (Toohey, Gaudron & Gummow JJ).

⁶⁴ See, e.g., UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 30, at p. 15.

⁶⁵ Bridge, M., *The International Sale of Goods*, *supra* fn 45, at p. 541, para. 11.43. Ferrari has similarly suggested that treating the *CISG* as excluded by choice of a Contracting State's law, as opposed to a Contracting State's purely domestic law, is an "overly simplistic interpretation of Art. 6 *CISG*"; see Ferrari, F., "Homeward Trend and Lex Forism Despite Uniform Sales Law" (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 15, at p. 36. Bridge points out that "ultimately the issue turns upon whether the parties have sufficiently clearly expressed their intention to exclude the *CISG* under Article 6, and intention is a creature of circumstance"; see Bridge, M., *The International Sale of Goods*, *supra* fn 45, at p. 541, para. 11.43.

⁶⁶ *Leather/Textile Wear Case*, Ad Hoc Arbitral Tribunal Florence (Italy), 19 April 1994, available at: <<http://cisgw3.law.pace.edu/cases/940419i3.html>> (also reported as CLOUT Case No. 92).

⁶⁷ *Nuova Fucinati S.p.A. v Fondmetall International A.B.*, District Court di Monza (Italy), 14 January 1993, available at: <<http://cisgw3.law.pace.edu/cases/930114i3.html>> (also reported as CLOUT Case No. 54).

⁶⁸ See, e.g., Zeller, B., "The CISG – Getting Off The Fence" (2000) 74(9) *Law Institute Journal* 70.

Contracting State.⁶⁹ In such a case the *CISG* forms part of the governing law, and Art. 1(1)(b) *CISG* directs the forum's court to apply its terms even though the *CISG* does not form part of the private law of either party's State. The *CISG*'s potential to be activated this way in cases involving an Australian party is likely to be rare, given that Australia is a Contracting State, but not impossible, should an off-shore place of business be a relevant *CISG* place of business under Art. 10 *CISG*.

2.1.3 OPTING INTO THE CISG

One final question that remains with respect to the *CISG*'s geographic sphere of application is the question of 'opting in' to the *CISG*. Parties may seek to opt in to the *CISG* through, for example, a choice of law clause specifically nominating the *CISG* as the contract's governing law, rather than the national law of a State which has adopted the *CISG*.⁷⁰

When such matters are resolved by litigation, determining the validity of such a choice depends primarily upon the forum's conflict of laws rules. Article 1 *CISG*'s geographic application rules pose no problem to the *Convention*'s application in such a case, as the parties would likely be treated as derogating from this provision pursuant to Art. 6 *CISG*.⁷¹ The key question will be whether or not the forum's conflict of laws rules permit the parties to choose a non-national body of rules (i.e. to choose the *CISG* 'in the abstract') as opposed to a national system of law.

The analysis is somewhat different in the context of arbitration. Conflict of laws provisions in arbitral laws and arbitral rules differentiate between 'law' (i.e. national systems of law) and 'rules of law' (which may include non-national rules).⁷² Where the applicable arbitral law or rules permit the parties to choose only 'law',⁷³ then a

⁶⁹ Schwenger, I. and Hachem, P., "Article 1", *supra* fn 39, at p. 41, para. 31.

⁷⁰ This exact scenario was posited in the problem for the 13th Willem C. Vis International Commercial Arbitration Moot and also the 3rd Vis (East) Moot. In that problem, the parties chose the *CISG* as their contract's governing law. The parties had also concluded an arbitration agreement, and through the exercise of their right to choose rules of procedure in Art. 19(1) *UNCITRAL Model Law on International Commercial Arbitration* the parties had adopted the *CIDRA Arbitration Rules*. As Art. 32(1) *CIDRA Arbitration Rules* only permits the parties to make a choice of 'law' as opposed to 'rules of law' (a matter canvassed below), strictly speaking this choice would be invalid. Although, as a practical matter, the law of one of the parties' States would be likely to apply as a result of the application of a relevant conflict of laws rule, and through this conflict of laws analysis the *CISG* would apply by virtue of Art. 1(1)(a) *CISG* in any event.

⁷¹ The parties in such a case would also likely be treated as derogating from the *CISG*'s rules on temporal application, discussed briefly below.

⁷² See, e.g., Gaillard, E. and Savage, J. (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 1999, Kluwer Law International, The Hague, at p. 32, para. 51, p. 791, paras. 1431-2, p. 802, para. 1444, p. 807, para. 1448, p. 878, para. 1554, p. 879, paras. 1555-6.

⁷³ See, e.g., Art. 33(1) *UNCITRAL Arbitration Rules* (1976 version); Art. 34.1 *ACICA Arbitration Rules*; Art. 32(1) *CIDRA Arbitration Rules*.

choice of the *CISG* in the abstract would be invalid; whereas provisions granting parties the power to choose ‘rules of law’⁷⁴ would support such a choice.

Alternatively, it is always open to parties to opt in to the *CISG* by incorporating some or all of its provisions - expressly or by reference - into their agreement as contractual terms. Indeed, the *CISG* has been suggested to provide “a wonderful source of off-the-shelf provisions which can be incorporated into a contract”⁷⁵. Provided the provisions are validly incorporated by reference to the contract’s governing law, and that they do not infringe any non-derogable provisions of that governing law, there is no obstacle to parties opting in to the *CISG* in this way.

2.2 MATERIAL APPLICATION OF THE CISG

The *CISG* is limited in its transactional scope. Not all contracts (and not even all sales of goods) are covered by the *Convention* – nor are all potential legal issues in a sales dispute. Care is required when navigating the boundaries between domestic and international sales law with respect to this sphere of the *CISG*’s application.

2.2.1 CONTRACT FOR THE SALE OF GOODS

Notwithstanding that it is a prerequisite for the *CISG*’s application, the *Convention* does not define ‘contract of sale’.⁷⁶ However, the essence of such a contract can be identified indirectly through the provisions setting out each party’s obligations.⁷⁷ For the purposes of the *CISG*, a contract of sale “is a contract in which one party is obliged to deliver the goods, possibly to hand over any documents relating to them, and to transfer the property in the goods, and the other party is obliged to pay the price for the goods and to co-operate in the manner required by the contract”⁷⁸.

In addition, the *CISG* lacks a definition of the term ‘goods’.⁷⁹ According to Schlechtriem, goods should be defined as “basically only moveable, tangible objects”⁸⁰. However, not all authorities agree on what this means and Schlechtriem’s

⁷⁴ See, e.g., Art. 28(1) *UNCITRAL Model Law on International Commercial Arbitration*; Art. 35(1) *UNCITRAL Arbitration Rules* (2010 version); Art. 17(1) *ICC Rules of Arbitration*; Art. 22.3 *LCIA Arbitration Rules*; Art. 22(1) *SCC Arbitration Rules*.

⁷⁵ Finn, Justice P., “National Contract Law”, *supra* fn 7, at p. 12.

⁷⁶ See, e.g., Schwenger, I. and Hachem, P., “Article 1”, *supra* fn 39, at p. 31, para. 8; Bridge, M., *The International Sale of Goods*, *supra* fn 45, at p. 517, para. 11.16; Ziegel, J., “The Scope of the Convention: Reaching Out to Article One and Beyond” (2005 – 2006) 25 *Journal of Law and Commerce* 59, at p. 60.

⁷⁷ Schlechtriem, P. “Article 1”, *supra* fn 55, at p. 26, para. 14; see also Enderlein, F. and Maskow, D., *International Sales Law*, *supra* fn 32, at p. 27.

⁷⁸ Schlechtriem, P., “Article 1”, *supra* fn 55, at p. 26, para. 14.

⁷⁹ Bridge, M., *The International Sale of Goods*, *supra* fn 45, at p. 517, para. 11.16, p. 519, para. 11.18.

⁸⁰ Schlechtriem, P., “Article 1”, *supra* fn 55, at p. 28, para. 20. This proposition is restated in the 3rd English edition of the *Slechtriem & Schwenger* text, though the qualifier ‘basically’ is omitted; see Schwenger, I. and Hachem, P., “Article 1”, *supra* fn 39, at p. 35, para. 16.

use of the qualifier ‘basically’ is important, particularly in relation to the conceptually difficult question of whether software is a ‘good’ for the purposes of the *CISG*.⁸¹

2.2.2 SERVICES CONTRACTS

The *CISG* does not, however, strictly limit itself to governing pure sales of goods. While the *CISG* “does not go so far as to cover sales of services only”⁸², Art. 3 enables the *Convention* to regulate transactions containing service elements.

Article 3(1) *CISG* deals with contracts where goods are to be manufactured or produced, and provides:

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

This provision’s rationale is reasonably simple. Where buyers undertake to supply sellers with ‘a substantial part’ of the materials necessary for the manufacture of goods, “such contracts are more akin to contracts for the supply of services or labour than to contracts for sale of goods”⁸³. This is because, in substance, there is no sale of goods; the ‘buyer’ already owns the materials and what they pay for is the transformative process. The difficult question is, of course, what constitutes a ‘substantial part’, given that “[t]he language is a bit vague”⁸⁴. While Art. 3(1) clearly excludes contracts where all materials are supplied by the buyer,⁸⁵ the test for substantiality where both parties contribute materials is “controversial”.⁸⁶

⁸¹ While a detailed treatment of this issue is beyond the scope of this paper, it can be noted that Schwenger and Hachem suggest software is ‘goods’ for the purposes of the *CISG*; see Schwenger, I. and Hachem, P., “Article 1”, *supra* fn 39, at pp. 35–6, para. 18. This assertion is supported by the limited case law which (to date) has directly considered the issue; see *Silicon Biomedical Instruments B.V. v Erich Jaeger GmbH*, District Court Arnhem (Netherlands), 28 June 2006, available at: <<http://cisgw3.law.pace.edu/cases/060628n1.html>>, at para. 3.1. In contrast, there is domestic UK authority that suggests (for the purposes of the UK’s ordinary sale of goods legislation) a distinction between software delivered by means of a physical object the subject of a sale, and software delivered by other means; see *St Albans City & District Council v International Computers Ltd* [1996] 4 All ER 481, at pp. 492–3 (Sir Iain Gildewell).

⁸² Zeller, B., “The Perfect Tool”, *supra* fn 18, at para. 39.

⁸³ UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 30, at p. 17; see also Khoo, W., “Article 3” in Bianca, C. M. and Bonell, M. J., *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, p. 41, at p. 42, para. 2.1.

⁸⁴ Loewe, R. “The Sphere of Application”, *supra* fn 11, at p. 84.

⁸⁵ Schwenger, I. and Hachem, P., “Article 3” in Schwenger, I. (ed), *Schlechtriem & Schwenger – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, New York, p. 61, at p. 63, para. 4; see also Zeller, B., “The Perfect Tool”, *supra* fn 18, at para. 39.

⁸⁶ See generally Schwenger, I. and Hachem, P., “Article 3”, *supra* fn 85, at p. 64, para. 5; see also Bridge, M., *The International Sale of Goods*, *supra* fn 45, at p. 517, para. 11.16, who describes the language “substantial” as “inherently vague”. The relevant percentage to be used in the ‘criteria of value’ test is

Article 3(2) *CISG*, on the other hand, deals with contracts where both goods and services are to be supplied. A good example is the sale of machinery, where the seller undertakes to install it or supervise such installation.⁸⁷ Art. 3(2) provides:

(2) *This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.*

Article 3(2) *CISG* does not regulate the question of whether a set of obligations comprise one or two contracts.⁸⁸ Indeed, the authorities are divided as to whether the matter is resolved by applying Art. 8 *CISG*'s rules of interpretation⁸⁹ or by falling back on domestic law⁹⁰ – yet another factor complicating the *CISG*'s applicability. There are theoretical difficulties in applying Art. 8 *CISG* to the question, as it potentially involves the application of the *CISG*'s contractual interpretation rules to a contract (the services contract) not within its scope. On the other hand, the *CISG*'s underlying purpose of uniformity tends to support such an approach. It remains to be seen which view ultimately will prevail.

In the case of one contract for both goods and services, the contract as a whole is either entirely or not at all governed by the *CISG*, depending on the 'preponderant part' analysis.⁹¹ Where there are two separate contracts, the *CISG* governs the sale of goods contract while the separate services contract is governed by domestic law.⁹² The 'preponderant part' analysis is generally considered to involve comparing the goods' and services' economic values,⁹³ with a fifty per cent threshold.⁹⁴ It is, however, sometimes suggested that the weight the parties attribute to each obligation should be considered instead or as well.⁹⁵ Schlechtriem gives the interesting example (if perhaps

also a matter of debate; see generally Enderlein, F. and Maskow, D., *International Sales Law*, *supra* fn 32, at p. 36; Honnold, J. O., *Uniform Law*, *supra* fn 20, at p. 57, para. 59.

⁸⁷ UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 30, at p. 16.

⁸⁸ *Ibid.*

⁸⁹ See, e.g., Schwenger, I. and Hachem, P., "Article 3", *supra* fn 85, at p. 68, para. 12 (citing Schlechtriem, P., "Article 3" in Schlechtriem, P. and Schwenger, I. (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed, 2005, Oxford University Press, New York, p. 53, at pp. 58–59, paras. 5-6).

⁹⁰ See, e.g., UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 30, at pp. 16–17.

⁹¹ Honnold, J. O., *Uniform Law*, *supra* fn 20, at pp. 58–9, para. 60.1.

⁹² See Schwenger, I. and Hachem, P., "Article 3", *supra* fn 85, p. 69, para. 16 (citing Schlechtriem, P., "Article 3", *supra* fn 89, at p. 60, para. 7).

⁹³ See generally Khoo, W., "Article 3", *supra* fn 83, at p. 42, para. 2.3, who uses the phrase "major part"; see also Bridge, M., *The International Sale of Goods*, *supra* fn 45, at p. 518, para. 11.17; Loewe, R., "The Sphere of Application", *supra* fn 11, at p. 84.

⁹⁴ Zeller, B., "The Perfect Tool", *supra* fn 18, at para. 42.

⁹⁵ Schlechtriem, P., "Article 3" in Schlechtriem, P. and Schwenger, I. (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2005, Oxford University Press, New York, p. 53, at pp. 60–1, para. 7a.

unlikely to arise in practice) of a car being repainted in gold as an example where the value test's strict application could be misleading.⁹⁶

2.2.3 CONTRACTS EXCLUDED

Article 2 *CISG* sets out a number of sales excluded from the *Convention*. By virtue of Art. 2 *CISG*, the *Convention* does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

By excluding these classes of contract, Art. 2 *CISG* “helps to delineate the respective spheres of application of the *Convention* and of domestic law”⁹⁷.

The range of exclusions contained in Art. 2 *CISG* raises some interesting issues. There is a degree of overlap; for example, many (though not all) sales by auction under paragraph (b) will be consumer sales under paragraph (a) and thus would be excluded anyway. Particularly good examples are business-to-consumer and consumer-to-consumer auctions conducted online through eBay and other similar services which commonly cross borders. In fact, the interaction of Art. 2(b) *CISG* with other provisions delineating the *CISG*'s application is quite interesting in the eBay context – eBay auction pages indicate an item's location, meaning the mandate to disregard internationality in Art. 1(2) *CISG* where internationality is not apparent would not come into play if auction sales were not otherwise excluded.

Another noteworthy issue raised by the Art. 2 *CISG* exclusions is the exclusion of sales of electricity in paragraph (f). This exclusion is interesting because its rationale is that “in many legal systems electricity is not considered to be goods and, in any case, international sales of electricity present unique problems that are different from those presented by the usual international sale of goods”⁹⁸. However, given that the *CISG* treats goods as “basically only moveable, ‘tangible’ objects”⁹⁹ and given the

⁹⁶ *Ibid.* This example is repeated by Schwenger and Hachem in the 3rd English edition of the *Schlechtriem & Schwenger* text; see Schwenger, I. and Hachem, P., “Article 3”, *supra* fn 85, at p. 71, para. 19.

⁹⁷ Khoo, W., “Article 2” in Bianca, C. M. and Bonell, M. J., *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, p. 34, at p. 39, para. 3.1.

⁹⁸ UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 30, at p. 16.

⁹⁹ Schlechtriem, P., “Article 1”, *supra* fn 55, at p. 28, para. 20; see also Schwenger, I. and Hachem, P., “Article 1”, *supra* fn 39, at p. 35, para. 16.

observation made in the context of domestic UK law that, at its most basic level, electricity is the transfer of electrons,¹⁰⁰ it is at least arguable that electricity would constitute goods for the purposes of the *CISG* if it were not otherwise excluded.

Another remarkable exclusion is the consumer contracts exclusion contained in Art. 2(a). This exclusion raises interesting issues because of its potential to interface imperfectly with domestic law, should the *CISG*'s definition of 'consumers' differ from that concept's treatment under domestic law. In such circumstances, the objective of Art. 2(a) *CISG* (ensuring that the *CISG* does not intrude into the realm of domestic consumer protection legislation)¹⁰¹ could potentially be defeated, depending on the priority given to the *CISG* vis-à-vis domestic law in any given State.

2.2.4 ISSUES INCLUDED AND EXCLUDED

Articles 1 – 3 *CISG*, considered above, "identify the *transactions* that are subject to the *Convention*"¹⁰². However, even if a transaction is within the *CISG*'s scope, it is easy to overlook the fact that the *CISG* is not a comprehensive instrument. This is demonstrated by the mere existence of the *CISG*'s "sister convention",¹⁰³ the *UN Limitation Period Convention*,¹⁰⁴ which regulates limitation periods in the international sale of goods.¹⁰⁵ De Ly summarises the point well by noting that "from the outset [the *CISG*] envisaged coexistence with other sources of law"¹⁰⁶.

Therefore, only 'certain issues' are regulated by the *CISG*,¹⁰⁷ with those issues defined by Art. 4 *CISG*.¹⁰⁸ According to that provision:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

¹⁰⁰ *Watford Electronics Ltd v Sanderson CFL Ltd* [2000] 2 All ER (Comm) 984, at p. 1003 (Judge Thornton QC).

¹⁰¹ Schwenzer, I. and Hachem, P., "Article 2" in Schwenzer, I. (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, New York, p. 48, at p. 54, para. 16.

¹⁰² Honnold, J. O., *Uniform Law, supra* fn 20, at p. 63, para. 61.

¹⁰³ Sono, K., "The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility", available at: <<http://www.cisg.law.pace.edu/cisg/biblio/sono3.html>>, at para I.A.

¹⁰⁴ *United Nations Convention on the Limitation Period in the International Sale of Goods*.

¹⁰⁵ The prevailing view considers limitation periods as outside the *CISG*'s scope, as delineated by Art. 4 *CISG*; see generally Hayward, B., "New Dog, Old Tricks: Solving a Conflict of Laws Problem in CISG Arbitrations" (2009) 26 *Journal of International Arbitration* 405, at pp. 407–410.

¹⁰⁶ De Ly, F., "Sources of International Sales Law: An Eclectic Model" (2005) 25 *Journal of Law and Commerce* 1, at p. 1.

¹⁰⁷ The question of which issues are regulated by the *CISG* once it applies to a transaction has been described as "an extremely broad and important subject"; see Flechtner, H. M., "Selected Issues Relating to the *CISG*'s Scope of Application" (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 91, at p. 92.

¹⁰⁸ Honnold, J. O., *Uniform Law, supra* fn 20, at p. 63, para. 61.

(a) *the validity of the contract or of any of its provisions or of any usage;*

(b) *the effect which the contract may have on the property in the goods sold.*

As the *Convention* is “only ‘apparently’ a comprehensive sales law system”¹⁰⁹, it must be considered to be integrated with other applicable international instruments and the otherwise applicable domestic law.

2.3 TEMPORAL APPLICATION OF THE CISG

Last but not least, the temporal application of the *CISG* is (subject to one complication) perhaps the easiest.¹¹⁰ It “follows from Article 100”¹¹¹ of the *Convention*, which establishes that the *CISG* “is not retroactive”¹¹². While this may not seem like an important contemporary issue given that the *CISG* entered into force in 1988, it may be important in practice given that the *CISG* continues to attract new Contracting States.¹¹³ Japan, one of the world’s major trading nations,¹¹⁴ only acceded to the *Convention* on 1 July 2008, with the *Convention* coming into force in Japan on 1 August 2009.¹¹⁵ In the case of the Dominican Republic and Turkey, which acceded to the *CISG* on 7 June and 7 July 2010, the *CISG* is not yet in force.

The one complication noted above arises from the fact that, in applying the *CISG*’s geographic application criteria, it may have the ‘appearance’ (if not the reality) of retrospectivity. For example, if a UK court applied the *CISG* to a dispute between a French buyer and a German seller pursuant to Art. 1(1)(a) *CISG*,¹¹⁶ it would be effectively applying the *CISG* “before adoption by the United Kingdom”¹¹⁷.

¹⁰⁹ Bonell, M. J., “Introduction to the Convention”, *supra* fn 34 at p. 10, para. 2.2.1.

¹¹⁰ Loewe, R., “The Sphere of Application”, *supra* fn 11, at p. 80.

¹¹¹ Enderlein, F. and Maskow, D., *International Sales Law*, *supra* fn 32, at p. 25.

¹¹² Loewe, R., “The Sphere of Application”, *supra* fn 11, at p. 80. While an analysis of the specifics of Art. 100 *CISG* is beyond the scope of this paper, for further details see Loewe, R., “The Sphere of Application”, at pp. 80–1.

¹¹³ For an indication of the *CISG*’s commencement dates in each Contracting State, see UNCITRAL, Status: 1980 – CISG, *supra* fn 3.

¹¹⁴ In the 2008 – 2009 period, Japan was Australia’s number one trading partner in terms of Australian exports, Australia’s number three trading partner in terms of Australian imports, and Australia’s number two ‘two-way’ trading partner; see Australian Government (Department of Foreign Affairs and Trade), Composition of Trade Australia 2008 – 2009, available at <http://www.dfat.gov.au/publications/stats-pubs/cot_fy_2008_09.pdf>, at p. 29 (Table 4).

¹¹⁵ UNCITRAL, Status: 1980 – CISG, *supra* fn 3. In the context of Australian – Japanese trade, see generally Keily, T. and Hayward, B., “Good News for Japanese Trade” (2010) 84(6) *Law Institute Journal* 48.

¹¹⁶ France and Germany being Contracting States, while the UK is not; see UNCITRAL, Status: 1980 – CISG, *supra* fn 3.

¹¹⁷ Fawcett, J., Harris, J. and Bridge, M., *Conflict of Laws*, *supra* fn 45, at p. 915, para. 16.19.

3 THE CISG'S PLACE IN THE AUSTRALIAN LAW – AN INCOMPLETE JIGSAW PUZZLE

As can be seen from Part II, the *CISG*'s rules of applicability can be problematic. Some issues remain unresolved; however the basics of the *CISG*'s applicability provisions are well established and generally well understood internationally.

Against this background, it is perhaps surprising that the *CISG*'s place in Australian law remains unclear. In particular, it can be likened to a jigsaw puzzle missing a piece – a vital piece, perhaps the last piece, that is necessary for the *CISG*-in-Australia 'picture' to be complete.

This missing piece is an authoritative, appellate level judicial decision clearly confirming the parameters within which the *CISG* operates in Australia. While some Australian case law to date has been positive, such as *Perry Engineering v Bernold*¹¹⁸, other cases have failed to properly appreciate the *CISG*'s place in Australian law. Given the importance placed by Australian courts on achieving consistency in the interpretation of "uniform national legislation"¹¹⁹, it would be desirable that this situation be rectified soon.

The number of Australian decisions concerning the *CISG* is quite small, compared to other jurisdictions such as Germany,¹²⁰ and cases heard under the auspices of the China International Economic and Trade Arbitration Commission.¹²¹ For present purposes though, a small number of key Australian decisions can be identified and examined, with this paper's attention being focussed on the issues of the *CISG*'s interpretation and its separation from domestic Australian law.

3.1 INTERPRETING THE CISG

3.1.1 DOMESTIC PRINCIPLES OF STATUTORY INTERPRETATION

Principles of statutory interpretation in Australia are well established and are covered in any good introductory legal text,¹²² as well as being the subject of many specific works.¹²³

¹¹⁸ *Perry Engineering (Receiver and Manager Appointed) (Administrators Appointed) v Bernold AG* [2001] SASC 15 (Unreported, Burley J, 1 February 2001).

¹¹⁹ See, e.g., *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, at p. 492 (Mason CJ, Brennan, Dawson, Toohey & Gaudron JJ).

¹²⁰ At the time of writing, there were 297 German court cases and 6 German arbitral awards translated into English on the Pace University CISG Database; see Pace Law School, The Queen Mary Case Translation Programme, available at: <<http://www.cisg.law.pace.edu/cisg/text/queenmary.html>>.

¹²¹ Similarly, at the time of writing there were 333 CIETAC arbitral awards translated on the Pace University CISG Database; see *ibid*.

¹²² See, e.g., Cook, C. *et. al.*, *Laying Down The Law*, 7th ed, 2009, LexisNexis Butterworths, Australia, at chapters 8–12.

In Victoria for example, the general approach to statutory interpretation is set out in the *Interpretation of Legislation Act 1984* (Vic) s. 35. Those rules require first that a construction promoting “the purpose or object underlying the Act” be preferred over one that does not.¹²⁴ Secondly, those rules allow “any matter or document that is relevant” to be consulted in the interpretative process, including, among other things, Explanatory Memoranda and Parliamentary reports.¹²⁵ Equivalent legislation exists in other Australian States and Territories as well as at the Commonwealth level,¹²⁶ though with some variation between the jurisdictions.¹²⁷

The *CISG*, on the other hand, should not generally be interpreted in the same way as an ordinary Australian Act of Parliament. As outlined above, the *CISG* technically has the force of law in Australia¹²⁸ and in this sense forms part of Australia’s private law, with Schedules to the uniform implementing Acts giving it legislative foundation in each Australian jurisdiction.¹²⁹ But the *CISG* should not be interpreted in accordance with ordinary domestic interpretative principles because it contains its own internal interpretative rules.

3.1.2 THE CISG’S INTERNAL RULES FOR INTERPRETATION

The *CISG*’s interpretative rules are set out in Art. 7 *CISG* which states:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

¹²³ See, e.g., Pearce, D. C. and Geddes, R. S., *Statutory Interpretation in Australia*, 6th ed, 2006, LexisNexis Butterworths, Australia; Hall, K. and Macken, C., *Legislation and Statutory Interpretation*, 2nd ed, 2009, LexisNexis Butterworths, Australia.

¹²⁴ *Interpretation of Legislation Act 1984* (Vic), s. 35(a).

¹²⁵ *Ibid.*, s. 35(b).

¹²⁶ See *Acts Interpretation Act 1901* (Cth) ss. 15AA-15AB, *Legislation Act 2001* (ACT) ss. 139, 141–142; *Interpretation Act 1987* (NSW) ss. 33-34; *Interpretation Act* (NT) ss. 62A-62B; *Acts Interpretation Act 1954* (Qld) ss. 14A-14B; *Acts Interpretation Act 1915* (SA) s. 22 (note that South Australia does not have a provision specifically dealing with the use of extrinsic material to assist interpretation); *Acts Interpretation Act 1931* (Tas) ss. 8A-8B; *Interpretation Act 1984* (WA) ss. 18-19.

¹²⁷ The principal differences between the different Australian jurisdictions’ approaches are that South Australia does not have a specific provision dealing with extrinsic material, and that Victoria and the ACT (in contrast to the other jurisdictions) do not have a threshold test limiting the circumstances in which extrinsic material may be consulted – see generally Cook, C. *et. al.*, *Laying Down The Law*, *supra* fn 122, at pp. 256–7.

¹²⁸ See s. 5 of the uniform implementing Acts (and s. 4 of the South Australian legislation).

¹²⁹ See *Sale of Goods (Vienna Convention) Act 1987* (ACT) Sch. 1; *Sale of Goods (Vienna Convention) Act 1986* (NSW) Sch. 1; *Sale of Goods (Vienna Convention) Act* (NT) Sch.; *Sale of Goods (Vienna Convention) Act 1986* (QLD) Sch.; *Sale of Goods (Vienna Convention) Act 1986* (SA) Sch.; *Sale of Goods (Vienna Convention) Act 1987* (Tas) Sch. 1; *Sale of Goods (Vienna Convention) Act 1987* (Vic) Sch. 1; *Sale of Goods (Vienna Convention) Act 1986* (WA) Sch. 1.

Article 7(1) *CISG* “excludes recourse to methodological theories of interpretation of domestic texts”¹³⁰. This interpretative rule mandates that interpretation instead be cognisant of ‘three directives’:¹³¹

- having regard to the *CISG*’s international character;
- promoting uniformity in the *CISG*’s application; and
- promoting the observance of good faith in international trade.

3.1.3 IMPLICATIONS OF THE CISG’S INTERPRETATIVE RULES

As a consequence of Art. 7 *CISG*, a different interpretative mindset to the traditional common law approach is needed when interpreting the *Convention* in Australia. While (at least internationally accepted) domestic principles “may also help in interpreting the Convention” when those principles are not in conflict with Art. 7(1),¹³² that provision’s rules are an interpreter’s primary reference point. In light of this, three implications of the required international mindset are analysed below.

3.1.3.1 AUTONOMOUS INTERPRETATION

First and foremost, the prevailing view is that giving effect to the *CISG*’s international character requires it to be given an autonomous interpretation.¹³³

The concept of autonomous interpretation requires the *CISG*’s terms to be interpreted as part of a legal order separate from domestic law, with interpretation not influenced by domestic preconceptions.¹³⁴ Put simply, the *CISG* must be “interpreted exclusively on its own terms” and “recourse to the understanding of these words and the like in domestic systems [...] must be avoided”¹³⁵. Adopting “an ethnocentric approach” is legally “excluded”.¹³⁶

While the prevailing view favours giving the *CISG* an autonomous interpretation, this view is not universal. For example, Aghili, writing specifically in the Australian

¹³⁰ Schlechtriem, P., “Article 7” in Schlechtriem, P. and Schwenzer, I. (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed, 2005, Oxford University Press, New York, p. 93, at p. 96, para. 12.

¹³¹ Schlechtriem, P., “Requirements of Application”, *supra* fn 11, at p. 789.

¹³² Schlechtriem, P., “Article 7”, *supra* fn 130 at p. 101, para. 19; cited in Schwenzer, I. and Hachem, P., “Article 7” in Schwenzer, I. (ed), *Slechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, New York, p. 120, at p. 130, para. 20.

¹³³ Schlechtriem, P., “Requirements of Application”, *supra* fn 11, at pp. 789–90; see also Enderlein, F. and Maskow, D., *International Sales Law*, *supra* fn 3, at p. 15 who use the phrase “original interpretation of the Convention” and note that terms “get a new meaning by the *CISG*”.

¹³⁴ Schlechtriem, P., “Requirements of Application”, *supra* fn 11, at pp. 789–90.

¹³⁵ *Ibid.*

¹³⁶ Zeller, B., “Traversing International Waters”, *supra* fn 9, at pp. 52–3.

context, challenges the necessity to interpret the *CISG* autonomously.¹³⁷ However, as Justice Finn points out, the *CISG* “transcend[s] the common law – civil law divide”¹³⁸, a divide where “significant – some would say unbridgeable – gulfs exist” in the area of contract law.¹³⁹ The better view is that the autonomous interpretation of the *CISG* is essential, given its character as a uniform law instrument intended to be acceptable to States of all legal traditions.¹⁴⁰

It can be admitted that the principle of autonomy is not absolute. However, the ‘only’ exception to the principle, adverted to by Schlechtriem, is where “it can be shown that a particular term was chosen [for inclusion in the *CISG*] precisely in view of its meaning under domestic law”¹⁴¹. Such circumstances would arise rarely and thus in the vast majority of cases the principle of autonomous interpretation should be observed.

Autonomous interpretation of the *CISG* is one area in which Australian courts have not adequately addressed the *CISG*’s place in Australian law. Indeed, some Australian courts have shown a tendency to refer back instinctively to domestic preconceptions when interpreting the *CISG*, contrary to Art. 7(1). One such case was the Queensland Court of Appeal decision in *Downs Investments v Perwaja Steel*.¹⁴² In that case, the Court considered among other things¹⁴³ the measure of damages a party is entitled to recover under the *CISG* following a breach of contract. This is governed by Art. 74 *CISG*, however in the course of its decision, the Court drew on domestic principles of contractual damages and concluded that “Article 74 reflects the common law derived from *Robinson v Harman* (1848) 1 Ex 850 [...] and *Hadley v Baxendale* (1854) 9 Ex 341”¹⁴⁴.

The problematic nature of this kind of analysis has been well documented. Strictly, the rule in *Hadley v Baxendale*¹⁴⁵ differs in several respects from the principles in Art. 74

¹³⁷ See Aghili, F., “A Critical Analysis of the CISG as Australian law” (2007 – 2008) 21(4) *Commercial Law Quarterly* 15.

¹³⁸ Finn, Justice P., “National Contract Law”, *supra* fn 7, at p. 2.

¹³⁹ *Ibid.*, at p. 9.

¹⁴⁰ See, e.g., UNCITRAL Secretariat, Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, available at: <<http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>>, at para. 3, noting that “UNCITRAL decided to study the [*Hague Conventions*] to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption [of the *CISG*]”.

¹⁴¹ Schlechtriem, P., “Article 7”, *supra* fn 130, at p. 97, para. 13. As pointed out by Schwenger and Hachem, however, even here it is the rule that “domestic doctrine and case law may not simply be used” and “each individual case must [instead] be carefully examined”; see Schwenger, I. and Hachem, P., “Article 7”, *supra* fn 132, at p. 124, para. 9.

¹⁴² *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD* [2002] 2 Qd R 462.

¹⁴³ For a comprehensive analysis of the decision as a whole, see Spagnolo, L., “The Last Outpost”, *supra* fn 6, at pp. 176–84.

¹⁴⁴ *Downs Investments v Perwaja Steel*, *supra* fn 142, at p. 484 (Williams JA).

¹⁴⁵ *Hadley v Baxendale* (1854) 9 Ex 341.

CISG. First, the inquiry’s perspective differs in that “[t]he common law examines the ‘contemplation’ of both parties, while the *CISG* looks only at the breaching party’s perspective”¹⁴⁶. Secondly, whilst *Hadley v Baxendale* refers to ‘contemplation’, Art. 74 *CISG* uses the less demanding standard of ‘foreseeability’.¹⁴⁷ In addition, the foreseeability standards diverge, with *Hadley v Baxendale* requiring foreseeability as a ‘probable’ result of a breach, and Art. 74 *CISG* requiring foreseeability only as a ‘possible’ result of a breach.¹⁴⁸ Recent analysis of the ‘homeward trend’ with respect to Art. 74 *CISG* indeed suggests the analogy between Art. 74 *CISG* and *Hadley v Baxendale* is seriously flawed,¹⁴⁹ although the seriousness of the offence in this case was perhaps tempered by the Court’s use of the words ‘derived from’. What is important, however, for present purposes is not so much the extent of the analogy’s inaccuracy, but rather the fact that an analogy based on a system of domestic law was made at all.

Another case where this danger was realised was the Victorian Supreme Court decision of *Playcorp v Taiyo Kogyo*.¹⁵⁰ In that case, the breach of contract pleaded was based on either Art. 35 *CISG* or ss. 19(a) & (b) of the *Goods Act 1958* (Vic). Article 7(1) *CISG*’s requirement of autonomous interpretation requires that Art. 35 *CISG* not be read against the background of domestic Victorian law, including the *Goods Act 1958* (Vic). However, that is not the way in which the pleadings were drawn. Hansen J stated:

*It will be recalled that Playcorp relied on [Art. 35 CISG] to establish the implied conditions of fitness for purpose and merchantable quality. It is also to be noted that under s 6 the provisions of the Convention prevail over any other law in force in Victoria to the extent of any inconsistency. It was not suggested that there was any material difference or inconsistency between the provisions of Art 35 and s 19(a) and (b) and because of that and the way the case was conducted, it is unnecessary to consider whether there is. As I understood it, counsel proceeded on the basis that there was no material difference or inconsistency. As a matter of logic, the provision in s 6 would lead one to consider the Convention before the Goods Act. Nothing turns on the fact that I have reversed that order in the present discussion. I have simply followed the order in the pleadings.*¹⁵¹

¹⁴⁶ Spagnolo, L., “The Last Outpost”, *supra* note 6, at p. 178.

¹⁴⁷ Ferrari, F., “Homeward Trend and Lex Forism”, *supra* fn 65, at p. 30.

¹⁴⁸ See, e.g., Cook, S., “The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity” (1997) 16 *Journal of Law and Commerce* 257, at p. 260, commenting with specific reference to the US case of *Delchi Carrier SpA v Rotorex Corporation* 71 F 3d 1024 (2d Cir. 1995).

¹⁴⁹ See Ferrari, F., “Homeward Trend and Lex Forism”, *supra* fn 65, at pp. 27–31.

¹⁵⁰ *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003).

¹⁵¹ *Ibid.*, at para. 235.

The approach this decision takes to interpreting s. 6 of the *Sale of Goods (Vienna Convention) Act 1987* (Vic) is addressed below. However, for present purposes, it can be seen that this case allowed domestic conceptions based on ss. 19(a) & (b) of the *Goods Act 1958* (Vic) to influence its interpretation of Art. 35 *CISG*. The phrases ‘implied condition’ and ‘merchantable quality’, for example, do not even appear in Art. 35 *CISG*.¹⁵² While strictly, and in accordance with the passage quoted from Hansen J’s judgment, the Court was merely following the approach taken in the pleadings, it is disturbing that this approach and its evident problems escaped adverse comment from the Court.

As the *Playcorp* case demonstrates, it is not just the judiciary who have taken an ethnocentric view of the *CISG* in Australia. The common law biases of counsel ‘were’ (unlike in *Playcorp*) the subject of specific comment by von Doussa J in the Federal Court decision of *Roder v Rosedown*¹⁵³, where his Honour held:

*[T]he contract for the sale of goods is one to which the [CISG] applies [...] The pleadings, and the claims for relief in the statement of claim and in the counterclaim, are expressed in the language and concepts of the common law, not in those of the Convention. Counsel made only passing reference to the Convention at trial.*¹⁵⁴

Thus with examples of both counsel and courts in Australia failing to observe Art. 7(1) *CISG*’s directive of autonomous interpretation, it can be seen that in this respect the jigsaw puzzle depicting the *CISG*’s place in Australian law is not yet complete.

3.1.3.2 USE OF CASE LAW

The second implication of Art. 7(1) *CISG*’s interpretative directives considered here is the fact that, in promoting uniformity, a de-facto international doctrine of precedent should be observed.¹⁵⁵ Even if they are not treated as “fully binding”, international decisions from “all contracting states” should at least be accorded “persuasive authority”.¹⁵⁶ Australian courts, of course, do refer to international case law where the circumstances require.¹⁵⁷ It has been noted in the High Court that:

In a matter that is so connected with the operation of the type of legal system which we follow and is not likely to be affected by varying social conditions,

¹⁵² Spagnolo, L., “The Last Outpost”, *supra* note 6, at p. 191. Specifically in the context of the *CISG*, Morrissey has emphasised the importance of a careful reading of the text; see Morrissey, J. and Graves, J., *International Sales Law and Arbitration*, 2008, Aspen Publishers, at p. 51.

¹⁵³ *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd & Eustace* (1995) 57 FCR 216.

¹⁵⁴ *Ibid.*, at p. 220.

¹⁵⁵ Schlechtriem, P., “Requirements of Application”, *supra* fn 11, at p. 790.

¹⁵⁶ *Ibid.*; see also Jacobs, M. S., Cutbush-Sabine, K. and Bambagiotti, P., “The *CISG* in Australia-to-date”, *supra* fn 13, at para. 6.5.

¹⁵⁷ A recent example is *R v Momcilovic* (2010) 265 ALR 751, where the Victorian Court of Appeal referred to international human rights jurisprudence in its consideration of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

*there are sound reasons for paying attention to expressions of the common law in courts of high authority in countries such as England, New Zealand, Canada and Ireland.*¹⁵⁸

However, in the case of the *CISG* and in light of the uniformity directive, decisions from a much wider range of jurisdictions than those traditionally cited should be considered, and in a much more frequent manner. Given Art. 7(1) *CISG*, there is no reason why a decision of, say, CIETAC concerning the *CISG* should be treated as any less relevant or persuasive than a UK decision would be if a court was considering a question concerning the common law of contract.

Australian practitioners and courts are blessed with a wealth of readily available resources to assist them in this task. Several excellent and freely available on-line sources of case law exist, including:

- The Pace University *CISG* Database¹⁵⁹ – which at the time of writing contains either English texts or translations of over 1,700 cases and also contains nearly 1,400 full texts of scholarly writings on the *CISG*;
- *CISG*-Online,¹⁶⁰ now part of the Global Sales Law Project¹⁶¹ – which similarly includes a body of searchable case law;
- Unilex,¹⁶² an international case law and bibliography collection featuring both full text decisions and abstracts concerning the *CISG* and also the *UNIDROIT Principles*; and
- UNCITRAL's Case Law on UNCITRAL Texts project (CLOUT),¹⁶³ which is a collection of case abstracts concerning UNCITRAL's legal texts (including the *CISG*).

Despite this vast array of accessible international case law, it seems that Australian courts have been reluctant to make use of these resources. For example, both Arts. 1 & 35 *CISG* arose for consideration in the *Playcorp* case, and despite many cases being reported (for example) on the Pace University *CISG* Database in relation to each,¹⁶⁴

¹⁵⁸ *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, at p. 85 (Kirby J).

¹⁵⁹ Pace Law School, Electronic Library on International Commercial Law and the *CISG*, available at: <<http://www.cisg.law.pace.edu>>.

¹⁶⁰ *CISG*-Online was originally hosted at <<http://www.cisg-online.ch>>, though that address now redirects to the *CISG*-Online section of the Global Sales Law Project's webpage.

¹⁶¹ Global Sales Law Project, *CISG*-Online, available at: <<http://www.globalsaleslaw.org/index.cfm?pageID=28>>.

¹⁶² Bonell, M. J. (ed), *Unilex on CISG & UNIDROIT Principles*, available at: <<http://www.unilex.info>>.

¹⁶³ UNCITRAL, Case Law on UNCITRAL Texts (CLOUT), available at: <http://www.uncitral.org/uncitral/en/case_law.html>.

¹⁶⁴ So many Art. 1 *CISG* cases, in fact, that they are not individually listed in the Database's schedule of cases by article number; see Pace Law School, Article 1, available at: <<http://www.cisg.law.pace.edu/cisg/text/digest-cases-01.html>>.

no international case law was consulted on either issue. In this way, too, the jigsaw puzzle depicting the *CISG*'s place in Australian law is not yet complete.

3.1.3.3 CONSULTATION OF INTERNATIONAL RESOURCES

The third incidence of Art. 7(1) *CISG* considered here, in keeping with the directives of international character and uniformity, is that a wide range of international resources should be consulted when interpreting the *CISG*. In addition to foreign case law, there are thousands of scholarly treatises and articles on the *Convention*,¹⁶⁵ as well as extensive legislative histories¹⁶⁶ and Secretariat Commentary on the 1978 *Draft Convention* which (although not an official Commentary on the final text) can be a useful tool given the general correlation between the *CISG*'s draft and final versions.¹⁶⁷ Opinions of the CISG Advisory Council,¹⁶⁸ a private initiative comprised of a number of the world's foremost experts on the *CISG*,¹⁶⁹ could very usefully shed light on the *Convention* if considered by an Australian court.¹⁷⁰ Further, the UNCITRAL Digest¹⁷¹ represents a "tool specifically designed to present selected information on the interpretation of the *Convention* in a clear, concise and objective manner"¹⁷². By presenting "a synopsis of the relevant case law, highlighting common views and reporting any divergent approach[es]"¹⁷³ the Digest would be an extremely useful reference tool for any Australian court's consideration of the *CISG*. At the same time, those interpreting the *CISG* should refrain from relying on "non-*CISG* cases" and avoid referring to "inapplicable non-*CISG* provisions".¹⁷⁴

Experience in Australia to date shows that Australian courts have refrained from making use of the wide range of secondary sources available, and have also referred to

¹⁶⁵ See Pace Law School, Electronic Library, *supra* fn 159 for a large, freely available collection (approaching 1,400 entries).

¹⁶⁶ See Bonell, M. J., "Introduction to the Convention", *supra* fn 34, at p. 20, para. 3.2.

¹⁶⁷ Cf Enderlein, F. and Maskow, D., *International Sales Law*, *supra* fn 32, at p. 6, noting that the Secretariat's Commentary "do[es] not always reflect the views of the Commission's Member States".

¹⁶⁸ See CISG AC, Opinions, available at: <<http://www.cisgac.com/default.php?sid=128>> for the 9 currently available opinions.

¹⁶⁹ See generally CISG AC, Welcome to International Sales Convention Advisory Council (CISG-AC), available at: <<http://www.cisgac.com>>.

¹⁷⁰ For a recent discussion of the CISG AC's role in formulating interpretations of the *CISG*, as well as its potential to affect the 'homeward trend', see Karton, J. and de Germiny, L., "Can the CISG Advisory Council Affect the Homeward Trend?" (2009) 13 *Vindobona Journal of International Commercial Law* 71.

¹⁷¹ See UNCITRAL, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2008 Revision, available at: <http://www.uncitral.org/uncitral/en/case_law/digests/cisg2008.html>.

¹⁷² UNCITRAL, Introduction to the Digest of Case Law on the United Nations Sales Convention, available at: <http://www.uncitral.org/pdf/english/clout/digest2008/note_by_secretariat.pdf>, at para. 15.

¹⁷³ *Ibid.*, at para. 17.

¹⁷⁴ Spagnolo, L., "The Last Outpost", *supra* fn 6, at p. 165.

both non-*CISG* cases¹⁷⁵ and non-*CISG* provisions.¹⁷⁶ Evidently, this is a third respect in which the jigsaw puzzle depicting the *CISG* in Australian law is not yet complete.

3.1.4 COMPLETING THE JIGSAW PUZZLE – THE WAY FORWARD

As has been demonstrated, the *CISG* jigsaw puzzle in Australia is missing a vital piece with respect to its interpretation by Australian courts. In particular, the requirements to regard the *CISG*'s international character and promote uniformity in its application have gone largely unobserved in Australia.

It is interesting to note that the *CISG* is not a unique instrument in these respects. UNCITRAL has made use of the 'international character' and 'uniformity' directives in other instruments. Some of these instruments pre-date the *CISG*, such as the *UN Limitation Period Convention*¹⁷⁷ and the *Hamburg Rules*,¹⁷⁸ which use those directives in Arts. 7 and 3 respectively. Others post-date the *Convention*. For example, the 2006 amendments to the *UNCITRAL Model Law on International Commercial Arbitration* introduced a new Art. 2A which contains equivalents to all three directives found in Art. 7(1) *CISG*, while the *Rotterdam Rules*¹⁷⁹ also contain a similar interpretative rule in Art. 2.

Until very recently, the *CISG* was the only UNCITRAL instrument containing the 'international character' and 'uniformity' directives found in Australian law. However, this has now changed. The International Arbitration Amendment Bill 2010 in part sought to amend the *International Arbitration Act 1974* (Cth) to incorporate most of the 2006 amendments to the *UNCITRAL Model Law*, including the new Art. 2A.¹⁸⁰ Indeed, as disclosed in the Bill's Explanatory Memorandum, "[t]here was widespread support expressed during the Review of the Act for incorporating Article 2A [in] the Act"¹⁸¹. The Bill passed both Houses of Federal Parliament on 17 June 2010 and after receiving Royal Assent on 6 July 2010, became law as Act No. 97 of 2010. Further, while a "generally negative response" has so far been shown towards the *Rotterdam Rules* by the Commonwealth Government, support for the *Rules* from several of Australia's trading partners will exert "considerable pressure [on Australia] to reconsider the stance adopted to this point"¹⁸².

¹⁷⁵ For example, *Hadley v Baxendale* in *Downs Investments v Perwaja Steel*, *supra* fn 142.

¹⁷⁶ For example, the *Goods Act 1958* (Vic) ss. 19(a)-(b) in *Playcorp v Taiyo Kogyo*, *supra* fn 150.

¹⁷⁷ *United Nations Convention on the Limitation Period in the International Sale of Goods*.

¹⁷⁸ *United Nations Convention on the Carriage of Goods by Sea*.

¹⁷⁹ *United Nations Convention on the International Carriage of Goods Wholly or Partly by Sea*.

¹⁸⁰ The new Art. 2A was contained in the new Schedule 2 to the *International Arbitration Act 1974* (Cth) which replaces the existing Schedule 2 (containing the original 1985 version of the *UNCITRAL Model Law*); see International Arbitration Amendment Bill 2010 (Cth) Sch. 1 (Encouraging International Arbitration), Part 1 (Amendments).

¹⁸¹ *Explanatory Memorandum*, International Arbitration Amendment Bill 2009 (Cth), at p. 10, para. 66.

¹⁸² DLA Phillips Fox, Trade & Transport Bulletin, "Welcome to the Rotterdam Rules: Will The Sky Fall In?" available at: <[http://www.dlaphillipsfox.com/content/upload/files/T&T_Bulletin_DPF1881_-_8_Oct_2009_\(L\).pdf](http://www.dlaphillipsfox.com/content/upload/files/T&T_Bulletin_DPF1881_-_8_Oct_2009_(L).pdf)>. This pressure may very well be magnified by recent encouragement of EU

Given the reality that the interpretative directives of ‘international character’ and ‘uniformity’ now play a greater role in Australian law (and may play an even greater role in the near future), it may be hoped that the current tendencies of Australian courts with respect to the *CISG*’s interpretation have limited days.

3.2 SEPARATING THE *CISG* & DOMESTIC LAW

Another way in which the *CISG* jigsaw puzzle misses a piece in Australia relates to the way in which Australian courts have approached the *CISG*’s separation from domestic law.

It is true that the *CISG*, through Australia’s uniform implementing Acts, has become “part of” Australian domestic law, making the task of differentiating between the *CISG* and “the balance of the domestic law [...] a complex and delicate challenge”¹⁸³. The position was put well in the Belgian case of *NV AR v NV I*, where it was observed that “[a] national law, into which the *CISG* has been incorporated by ratification, takes those convention stipulations concerning the international sales of goods into ‘national law’”¹⁸⁴.

While it is, therefore, not technically correct to speak of the *CISG* as if it were separate from Australian law, it is necessary to do so in practice. First, as demonstrated above, the *CISG*’s own terms (including its interpretative directives) establish it as a body of rules with a distinct legal character. Secondly, and as a practical matter, it is necessary to do so to assist in the task of delineating between the application of the *CISG* and domestic sales rules.

This view is not universally accepted. For example, Aghili, writing specifically in the Australian context, challenges the *CISG*’s autonomous character¹⁸⁵ on bases that include:

- the fact that the *CISG* was often a product of compromise rather than consensus;¹⁸⁶
- the High Court of Australia’s observation in *Shipping Corporation of India v Gamlen*¹⁸⁷ that there is a “high probability that when such words and expressions [i.e. those consistently given a particular meaning in domestic systems] have been

Member States by the European Parliament “speedily to sign, ratify and implement the [*Rotterdam Rules*]”; see European Parliament, Strategic Goals and Recommendations for the EU’s Maritime Transport Policy until 2018, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0128&language=EN>>.

¹⁸³ Jacobs, M. S., Cutbush-Sabine, K. and Bambagiotti, P., “The *CISG* in Australia-to-date”, *supra* fn 13, at para. 5.8.

¹⁸⁴ *NV AR v NV I*, Appellate Court Gent (Belgium), 15 May 2002, available at: <<http://cisgw3.law.pace.edu/cases/020515b1.html>>, at para. 5.2.

¹⁸⁵ See Aghili, F., “A Critical Analysis of the *CISG* as Australian law”, *supra* fn 137.

¹⁸⁶ *Ibid.*, at p. 16.

¹⁸⁷ *Shipping Corporation of India Limited v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142 (*‘Gamlen’*).

incorporated in a convention, they have been incorporated with knowledge of the meaning which has been given to them by national courts”¹⁸⁸;

- the nature of the *CISG* as a “supplementary” regime vis-à-vis pre-existing domestic law;¹⁸⁹
- the lack of provisions “explicitly exclud[ing]” the use of domestic law in interpreting the *CISG*;¹⁹⁰ and
- the fact that the prevailing scholarly view favouring autonomous interpretation “is at odds with Australian case law on the *CISG*”¹⁹¹.

However, on a close inspection, these factors do not detract from the *CISG*’s autonomous character and the need to interpret it accordingly. First, in relation to the *CISG*’s character as a creature of compromise, there is no reason in principle why compromise negates the *Convention*’s autonomy as an entire body of law. Secondly, Mason and Wilson JJ’s comments in *Gamlén* were made in the context of words used in a convention after having a particular meaning ‘consistently assigned’ to them by national courts. The *CISG*’s drafters sought to use “neutral” terminology within the *CISG*.¹⁹² For this reason, the High Court’s observations in *Gamlén* are unlikely to be of assistance in interpreting the *CISG*; and in addition, the instrument being considered in that case (the *Hague Rules*)¹⁹³ differs from the *CISG* in that it did not contain an interpretative directive equivalent to Art. 7. Autonomous interpretation flows from the requirements of Art. 7 *CISG*, rather than the nature of the *CISG* per se, and the basic principle of Parliamentary sovereignty requires that rules effectuated by legislation - which include, through Australia’s uniform implementing Acts, Art. 7 *CISG* - take precedence over an approach which otherwise would apply at common law.

Thirdly, the *Convention* has as its nature the regulation of the formation of international sales contracts, as well as the rights and obligations of parties under them.¹⁹⁴ The *CISG* is not an exhaustive code, but because it regulates the core components of an international sales transaction it is better to characterise domestic law as supplementing the *CISG* – rather than the other way around. Fourthly, the absence of any express indication of domestic law’s irrelevance to interpretation in the *Sale of Goods (Vienna Convention) Acts* means, as Aghili rightly points out, that “it

¹⁸⁸ *Ibid.*, at p. 159 (Mason & Wilson JJ); see Aghili, F., “A Critical Analysis of the CISG as Australian law”, *supra* fn 137, at p. 19.

¹⁸⁹ See Aghili, F., “A Critical Analysis of the CISG as Australian law”, *supra* fn 137, at p. 20.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, at p. 21.

¹⁹² UNCITRAL, Introduction to the Digest, *supra* fn 172, at para. 3.

¹⁹³ *Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*.

¹⁹⁴ Article 4 *CISG*.

falls to the *CISG* itself to establish its autonomy”¹⁹⁵. The *CISG* does so through the interpretative directives of Art. 7(1).

Finally, it is certainly correct that autonomous interpretation of the *CISG* has not been the norm in Australian courts. However, this does not mean that the *CISG* should not be given an autonomous interpretation or treated as having an autonomous character. Rather it is an indication that, to the extent Australian cases have interpreted the *CISG*, they have largely not approached the issue in line with Art. 7(1) and internationally accepted thinking on the subject.

It can therefore be seen that the *CISG*'s interaction with the balance of Australian domestic law is an interesting issue – and an issue whose treatment by Australian courts to date has not been entirely satisfactory.

The starting point for an analysis of the issue is Australia's uniform implementing legislation. As a general principle, the *CISG* “takes precedence over the national law of the Contracting States”¹⁹⁶. This is legally recognised through, for example, s. 6 of the *Sale of Goods (Vienna Convention) Act 1987* (Vic), which provides that the *CISG* “prevail[s] over any other law in force in Victoria to the extent of any inconsistency”. Equivalent provisions are found in the other State and Territory implementing Acts.¹⁹⁷ The *CISG* takes precedence federally too, through s. 66A of the *Trade Practices Act 1974* (Cth), a provision described as “remarkable” given that Act's consumer protection focus.¹⁹⁸ In sum, the *CISG* replaces in part each State and Territory jurisdiction's domestic sale of goods legislation, the federal *Trade Practices Act 1974* (Cth) and the common law of contract.¹⁹⁹ Those laws only apply to the extent that “contracts or parts of contracts [...] are not covered by the *CISG*”²⁰⁰.

This approach to the *CISG*'s separation from domestic law is and should be reasonably straightforward. However, the matter was confused somewhat by the Victorian Supreme Court decision of *Playcorp v Taiyo Kogyo*.²⁰¹ The confusion was evident on the pleadings²⁰² and seems to have been contagious, with the Court making

¹⁹⁵ See Aghili, F., “A Critical Analysis of the CISG as Australian law”, *supra* fn 137, at p. 20.

¹⁹⁶ Enderlein, F. and Maskow, D., *International Sales Law*, *supra* fn 32, at p. 11; see also Bridge, M., *The International Sale of Goods*, *supra* fn 22, at p. 506, para. 11.01.

¹⁹⁷ See the *Sale of Goods (Vienna Convention) Act 1987* (ACT) s. 6; *Sale of Goods (Vienna Convention) Act 1986* (NSW) s. 6; *Sale of Goods (Vienna Convention) Act* (NT) s. 6; *Sale of Goods (Vienna Convention) Act 1986* (Qld) s. 6; *Sale of Goods (Vienna Convention) Act 1986* (SA) s. 5; *Sale of Goods (Vienna Convention) Act 1987* (Tas) s. 6; *Sale of Goods (Vienna Convention) Act 1986* (WA) s. 6.

¹⁹⁸ Jacobs, M. S., Cutbush-Sabine, K. and Bambagiotti, P., “The CISG in Australia-to-date”, *supra* fn 13, at para. 4.7.

¹⁹⁹ Zeller, B., “Getting Off The Fence”, *supra* fn 68, at p. 72.

²⁰⁰ Zeller, B., “The Perfect Tool”, *supra* fn 18, at para. 15. Informal discussions between the author and an Australian-based practitioner have suggested that only 40 – 50% of the legal issues potentially arising in contractual (sale of goods) disputes between parties are likely to be left unregulated by either the *CISG* or specific terms in the contract that derogate from, particularise or supplement the *CISG*'s terms.

²⁰¹ *Playcorp v Taiyo Kogyo*, *supra* fn 150.

²⁰² See *ibid.*, at para. 199.

the observations already extracted in the discussion of autonomous interpretation above and going on to add:

*[E]ither the Goods Act or the Convention applied to the sales contract. It is thus unnecessary to consider the earlier submissions as to the proper law of the contract. As I have stated, the Convention has the benefit of paramountcy over the Goods Act in the event of any inconsistency between the two. As I have said, no such inconsistency was suggested, and having regard also to the way in which the case was conducted, it is appropriate to proceed on the basis that there is none.*²⁰³

This passage suggests the Supreme Court failed to appreciate the way in which s. 6 of the *Sale of Goods (Vienna Convention) Act 1987* (Vic) should operate. The *CISG* ‘as a whole’ replaces the *Goods Act 1958* (Vic), *Trade Practices Act 1974* (Cth) and common law of contract to the extent of its scope. The task of delineating domestic and international sales law in Australia does *not* involve assessing whether ‘inconsistency’ exists on a section-by-section, article-by-article level. To the contrary, the requirement of autonomous interpretation “will *always* render the *CISG* inconsistent with domestic law regardless of any surface similarities”²⁰⁴. Therefore, the preferable view is that the *CISG*’s application brings with it a regime entirely different from Australia’s domestic sale of goods rules. It would have been open to the Supreme Court to consider the Victorian implementing legislation’s legislative history in seeking to resolve this question,²⁰⁵ and there is nothing in that legislative history supporting the Court’s approach.²⁰⁶ Absent such authority, the Court ought to have taken an approach consistent with internationally accepted principles and, in particular, Art. 7(1) *CISG*.

The analysis of the *CISG*’s interaction with Victorian law undertaken by the Court in *Playcorp* undeniably proceeds from the difficult way in which the pleadings were drawn. The Court made it very clear that no inconsistency between Art. 35 *CISG* and

²⁰³ *Ibid.*, at para. 245.

²⁰⁴ Spagnolo, L., “The Last Outpost”, *supra* fn 6, at p. 191.

²⁰⁵ *Interpretation of Legislation Act 1984* (Vic) s. 35(b).

²⁰⁶ By way of example, in Victoria’s Legislative Council, the proposition that “the provisions of the [C]onvention prevail over any inconsistent laws in Victoria to the extent of the inconsistency” was put forward, without any explanation as to what ‘inconsistency’ means; see Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1987, at p. 172 (Kennan, J. H., Attorney-General). The same proposition was put forward in the Legislative Assembly, also without the provision of any further detail or explanation; see Victoria, *Parliamentary Debates*, Legislative Assembly, 14 April 1987, at p. 1221 (Mr. Matthews, Minister for the Arts). Similarly, when the *Sale of Goods (Vienna Convention) Bill 1987* (Vic) was being debated in the Legislative Council, clause 6 (which became section 6 of the *Sale of Goods (Vienna Convention) Act 1987* (Vic)) was agreed to without any specific discussion recorded on the ‘inconsistency’ point; see Victoria, *Parliamentary Debates*, Legislative Council, 9 April 1987, at p. 851. The passage of the Bill through the Legislative Assembly was similar in this respect; see Victoria, *Parliamentary Debates*, Legislative Assembly, 30 April 1987, at p. 1759. The Victorian Bill’s Explanatory Memorandum is equally uninformative, simply noting that “*Clause 6* sets out how the Convention is to apply in the event of inconsistency with any law in force in Victoria”; see Explanatory Memorandum, *Sale of Goods (Vienna Convention) Bill 1987* (Vic), at p. 1.

ss. 19(a) & (b) of the *Goods Act 1958* (Vic) had been “suggested”, and apparently proceeded on the assumption that “there is none”, implying that there was no need to invoke s. 6 of the Victorian implementing Act. However, it was open to the Court to comment on this issue and correct the erroneous assumption underlying the pleadings. It failed to do so, and given the way in which it proceeded, it has left a crucial piece missing in the jigsaw puzzle depicting the *CISG*’s place in Australian law.

4 CONCLUSION

In its analysis of the *CISG*’s interaction with domestic law, this paper has considered two main issues. First, in Part II, the *CISG*’s rules of applicability have been considered. Secondly, in Part III, the interaction of the *CISG* with Australian domestic law, predicated upon the boundaries discussed in Part II, has been analysed.

This paper’s analysis has shown that the *CISG* in Australia is like a jigsaw puzzle missing a piece – an important piece, and perhaps the last piece. That ‘missing piece’ is an authoritative, appellate level judgment clearly explaining the *CISG*’s interaction with Australian domestic law. Australian case law to date has failed in its exploration of this issue in at least two related respects: interpretation of the *CISG* in accordance with Art. 7(1) *CISG*; and the way in which the *CISG* and the balance of Australian domestic law are separated under the *Sale of Goods (Vienna Convention) Acts* of the different States and Territories. An authoritative pronouncement of the *CISG*’s place in Australian law is indeed an ‘important’ missing piece given that one of motives underlying Australia’s adoption of the *CISG* was to “add greater certainty to transactions for the sale of goods involving Australians”²⁰⁷.

After obtaining “worldwide acceptance”,²⁰⁸ the *CISG* has been “irreversibly [established] as the de facto international sales law”²⁰⁹. It is hoped that this paper will clarify some of the many issues relating to the interface between the *CISG* and Australian domestic law. Like any work of this nature, and indeed like the *CISG* itself, this paper is by no means an exhaustive treatment of its subject matter, but it is hoped that it will serve as a platform for further inquiry into what is an important area of Australian and international law.²¹⁰

²⁰⁷ Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1987, at p. 171 (Kennan, J. H., Attorney-General); see also Victoria, *Parliamentary Debates*, Legislative Assembly, 14 April 1987, at p. 1220 (Mr. Matthews, Minister for the Arts).

²⁰⁸ Schlechtriem, P. and Schwenzler, I., “Introduction”, *supra* fn 2, at p. 1.

²⁰⁹ Zeller, B., “Getting Off The Fence”, *supra* fn 68, at p. 74.

²¹⁰ By way of postscript, the author notes that the Federal Court of Australia handed down its most recent *CISG* decision in late September 2010, as this paper was being finalised for publication – see *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] FCA 1028 (Unreported, Ryan J, 28 September 2010). As the treatment of the *CISG* in this first instance decision is broadly consistent with the patterns evident in Australia’s pre-existing case law (and discussed in this paper), the search for the missing jigsaw puzzle piece continues unabated.