

CAN THE CISG ADVISORY COUNCIL AFFECT THE HOMEWARD TREND?

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1 INTRODUCTION

The international character¹ of the *UN Convention on Contracts for the International Sale of Goods* ('CISG') 'implies that its overall purpose is the standardisation of law at a level above that of national law'². To achieve such standardisation, it is 'insufficient to merely create and enact uniform instruments'³. As R. J. C. Munday

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¹ Article 7(1) CISG.

² DiMatteo, L. A., Dhooge, L. J., Greene, S., Maurer, V. G., and Pagnattaro, M. A., *International Sales Law: A Critical Analysis of CISG Jurisprudence*, 2005, Cambridge U. P., Cambridge at pp. 8-9. As Enderlein and Maskow put it, conventions such as the CISG are different from uniform laws in that: '[T]here is a *difference with uniform laws* insofar as this incorporation elucidates the international character of the prospective rule, underlines its special position in domestic law, and furthers an interpretation and application which is oriented to the standardisation of law'. Enderlein, F. and Maskow, D., *International Sales Law*, 1992, Oceania, New York, at p. 8 (emphasis in original).

³ Ferrari, F., "The CISG's Uniform Interpretation by Courts – An Update" (2005) 9 *Vindobona Journal of International Commercial Law and Arbitration* 233 (*Vindobona Journal*). For variations on this often-expressed sentiment, see also Andersen, C. B., "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *Journal of Law and Commerce* 159, at p. 162 ('drafting uniform words is one thing; ensuring their uniformity is another'); Amisshah, R., "The Autonomous Contract: Reflecting the Borderless Electronic-Commercial Environment in Contracting" (1997), available at: <<http://www.jus.uio.no/lm/the.autonomous.contract.07.10.1997.amisshah/doc.html>>; Ryan, L. M., "The Convention on Contracts for the International Sale of Goods: Divergent Interpretations" (1995) 4 *Tulane*

stated, ‘even when outward uniformity is achieved, [...] uniform application of the agreed rules is by no means guaranteed as in practice, different countries almost inevitably come to put different interpretations upon the same enacted words’.⁴ If courts allow themselves to be influenced by their own national laws and modes of legal reasoning, infusing domestic notions into the CISG, they threaten the predictability of outcome that was the rationale for the CISG’s enactment.⁵ Some critics have even argued that the exhibition of such a ‘homeward trend’ by national courts nullifies the benefits a uniform sales law would theoretically provide.⁶

What is needed is a follow up mechanism to combat the homeward trend and to help bring the unruly mass of independent courts and tribunals into some common order.⁷ In domestic legal systems or institutions like the European Union, courts with final appellate authority help to enforce uniform interpretation.⁸ Otherwise, consultative bodies can promote uniformity, as the American Law Institute does in the United States and the International Law Commission does with respect to public international law. For the CISG, there is neither a supreme court nor a well-established consultative body. Instead, national courts, arbitral tribunals, scholarly commentators, and the UN Commission on International Trade Law (‘UNCITRAL’) all contribute to the international corpus of interpretive wisdom. This unorganised community of interpreters has been called the ‘global *jurisconsultorium* – the phenomenon of the meeting of minds across jurisdictions in the shaping of international law.’⁹

In 2001, the International Sales Convention Advisory Council (‘the CISG-AC’ or ‘the Advisory Council’) inserted itself into this *jurisconsultorium*. Composed of prominent international sales law scholars from around the world, the Advisory Council discusses and renders opinions on unsettled matters of CISG interpretation. An unofficial ‘private initiative’, the CISG-AC is jointly sponsored by the Institute of International Commercial Law at Pace University School of Law and the Centre for

Journal of International and Comparative Law 99, at p. 117 (‘textual uniformity [...] is insufficient’); Honnold, J. O., “The Sales Convention in Action – Uniform International Words: Uniform Application?” (1988) 8 *Journal of Law and Commerce* 207.

⁴ Munday, R. J. C., “The Uniform Interpretation of International Conventions” (1978) 27 *International and Comparative Law Quarterly* 450.

⁵ Rogers, V. M. and Kritzer, A. H., “A Uniform International Sales Terminology” in Schwenzer, I. and Hager, G. (eds) *Festschrift für Peter Schlechtriem*, 2003, Mohr Siebeck), at p. 224.

⁶ For a summary of such arguments (ultimately rejecting them), see DiMatteo et al., *supra* fn 1, at p. xi.

⁷ Interview with Professor Loukas Mistelis, former CISG Advisory Council Secretary and Clive M. Schmitthoff Professor of Transnational Commercial Law, Queen Mary, University of London, in London (4 June 2008) (hereinafter ‘Mistelis interview’).

⁸ Some have called for the establishment of a global court with final appellate authority over international conventions. See, e.g., Zweigert, K. and Kötz, H., *Introduction to Comparative Law*, Weir, T. (tr), 1998, Clarendon, Oxford, at p. 21: ‘The only sure way to avoid national divergences in the construction and development of uniform law is to grant jurisdiction to an international court’.

⁹ Andersen C.B., “The Uniform International Sales Law”, *supra* fn 3, at pp. 159-160; see also Rogers V. M. and Kritzer A. H., “A Uniform International Sales Terminology”, *supra* fn 5, at p. 228.

Commercial Law Studies at Queen Mary, University of London.¹⁰ As its members describe it, the Advisory Council has three main functions: to promote understanding and uniform interpretation of the CISG by publishing opinions on issues of interpretation, to promote the CISG generally, and to encourage and assist with the adoption and implementation of the CISG in jurisdictions that have not ratified it.¹¹

The focus of this article is on the Advisory Council's principal role: promoting uniform interpretation of the CISG.¹² As an unofficial body, it can be effective only if it persuades academic commentators and, in particular, courts and arbitral tribunals to adopt the interpretations it proffers. In its first few years of operation, it received little response, at least in the English-speaking world. However, in the last three years, a significant number of academic articles referring to the Advisory Council have been published and courts have begun to cite Advisory Council opinions as authoritative interpretations of CISG provisions.

2 THE CISG ADVISORY COUNCIL

In this Part, we first look at the formation and composition of the CISG Advisory Council (Section 2.1). We then consider the opinions that it has issued to date (Section 2.2).

2.1 FOUNDATION AND COMPOSITION OF THE ADVISORY COUNCIL

The idea of a CISG interpretive committee was debated over the course of several years in meetings of various international organisations, and in those of UNCITRAL in particular.¹³ Credit for first proposing an interpretive committee is given to Professor Michael Joachim Bonell, an Italian delegate to UNCITRAL, who in 1987 called for the creation of a 'permanent editorial board' composed of representatives from each of the CISG signatory states.¹⁴ Such composition would ensure that the member states would receive 'equal attention [...] without giving any State or region a

¹⁰ Mistelis, L., "CISG-AC Publishes First Opinion" (2003) 15 *Pace International Law Review* 453, at p. 455.

¹¹ Mistelis interview, *supra* fn 7. As the CISG-AC's Draft Charter states, an early idea was that the Advisory Council would work toward completion of a comprehensive commentary on the CISG. However, the Council eventually rejected this idea, as several members had already written or were in the process of writing their own commentaries. In addition, it was thought that a commentary should have a more individualised point of view.

¹² This is not to minimise the importance of the other two goals. The main factor hindering the development of the CISG may well be that most lawyers are not sufficiently familiar with it, or even aware of its existence. As a result, in many cases in which the CISG potentially applies, it is not pled by either party.

¹³ Mistelis, L., "CISG-AC Publishes First Opinion", *supra* fn 10, at p. 454.

¹⁴ Mistelis interview, *supra* fn 7.

privileged position for political, economic or purely linguistic reasons¹⁵. The delegates would collect and report annually on court decisions from their home states interpreting the CISG and provide a comparative analysis of these decisions.¹⁶ They could also render non-binding advice regarding the interpretation of specific CISG provisions, either at the request of a court or parties to a dispute or of their own initiative.¹⁷

However, the UNCITRAL Commission (itself composed of representatives of the member states) rejected Professor Bonell's proposal calling it 'too ambitious or at least premature'¹⁸. In the Commission's eyes, the operation of such an institution would be 'unwieldy' in view of the large number of CISG signatories.¹⁹ It was also concerned that a national representative's analysis of a court's interpretation of a CISG provision would appear to 'represent an authoritative opinion of the member state'²⁰. More importantly, because the CISG becomes incorporated into a State's national laws upon ratification, the UNCITRAL Commission did not want to intervene in what would amount to national courts' interpretations of their own domestic laws.²¹ The prospect of countries surrendering even this small measure of sovereignty to an international institution made approval of a permanent advisory body unlikely.²²

No official CISG interpretive body has been established to date, but part of Professor Bonell's proposal did come to fruition with the establishment of the Case Law on UNCITRAL Texts ('CLOUT') program and the UNCITRAL Digest. Correspondents from the member states collect and report annually on relevant CISG decisions from

¹⁵ UNCITRAL, *Report on the work of its 21st Session*, (1988) 19 *UNCITRAL Yearbook* 1, UN Doc. A/43/17, at ¶ 107; see also Bazinas, S. V., "Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest" in *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* (Collation of Papers at UNCITRAL – SIAC Conference 22-23 September 2005, Singapore), at p. 20; Murray, J. E., "Neglect of the CISG: A Workable Solution" (1998) 17 *Journal of Law and Commerce* 365, at p. 374.

¹⁶ Bonell, M. J., "A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention" in UNIDROIT, *International Uniform Law in Practice*, 1988, at p. 241.

¹⁷ *Ibid.*, at p. 243.

¹⁸ UNCITRAL, *Report on the work of its 21st Session*, *supra* fn 15, at ¶ 107-109.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ The Secretariat Note contrasts such a convention with the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules which have been adopted by the Commission, but are not part of the national laws of states. It states that 'many of the objections to the performance of such a function with respect to conventions and model laws would not apply to the resolution of conflicting interpretations of these Rules.' Dissemination of decisions concerning UNCITRAL legal texts and uniform interpretation of such texts: UNCITRAL, "Note by the Secretariat" (1985) 16 *UNCITRAL Yearbook* 387, at pp. 389-90.

²² *Ibid.* See also Sim, D., "The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods" in Pace International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods* (2004), at p. 21.

their jurisdictions. However, these two initiatives are limited to reporting decisions, without analysis or commentary.

Despite UNCITRAL's rejection of an official advisory council, the need for a follow up mechanism to ensure uniform interpretation continued to trouble CISG commentators. In June 2001, a group of scholars were invited by Albert Kritzer of Pace University and Loukas Mistelis of Queen Mary to discuss the creation of a CISG interpretive council.²³ This became the first meeting of the CISG Advisory Council.²⁴

Although it is not an official body, the Council functions much like one. Indeed, while it emphasises that it is a private initiative, the Advisory Council has taken on something of an official appearance. For example, it drafted a 'Charter' containing a preamble describing its mission, as well as articles specifying its procedures, membership, sponsors, and the roles of the chair and secretary. In addition, as discussed below, its opinions also read more like official commentaries than scholarly publications. However, the role of the Charter and the other quasi-official characteristics of the Advisory Council should not be exaggerated. The Charter remains only a Draft Charter as it was never signed by the CISG-AC members; it functions as a 'gentlemen's agreement', followed voluntarily in such matters as the appointment of new members and chairs, but it is not binding.²⁵

While they do not formally represent their home or other countries, the Advisory Council Members inevitably bring to their discussions varied perspectives informed by the array of national, linguistic, and legal backgrounds from which they come. The mother tongues of past and current members include English, French, German, Italian, Japanese, Russian, Spanish, Greek, and Swedish. Four members may be described primarily as common law jurists²⁶ and the other eight may be described as civil law jurists.

The twelve current members of the Council are: Professor Eric Bergsten (Chairperson), Professor Michael Joachim Bonell, Professor Michael Bridge, Professor Alejandro Garro, Professor Sir Roy Goode, Professor John Gotanda, Professor Sergei Lebedev, Professor Jan Ramberg, Professor Ingeborg Schwenzer, Professor Hiroo Sono, Professor Pilar Perales Viscasillas, and Professor Claude Witz.²⁷

²³ Mistelis L., "CISG-AC Publishes First Opinion", *supra* fn 10, at p. 454.

²⁴ Mistelis interview, *supra* fn 7; Mistelis L., See "CISG-AC Publishes First Opinion", *supra* fn 10, at pp. 454-55 for a list of the founding members.

²⁵ Mistelis interview, *supra* fn 7.

²⁶ These are Professors Bergsten, Bridge, Goode, and Gotanda.

²⁷ All of the Advisory Council's current members have been members since its creation in 2001, except for Professors Perales and Schwenzer (members since 2003), Professor Gotanda (member since 2006) and Professor Bridge (member since 2007). Two of the founding members, Professor Allan Farnsworth and the first Chair, Professor Peter Schlechtriem, have passed away.

The Advisory Council members have predominantly academic backgrounds and experience, although some also perform significant work as arbitrators, expert witnesses, and counsel. In addition, several current members are involved with UNCITRAL, most notably Professor Bergsten, former UNCITRAL Secretary and Chief of the International Trade Law Branch of the United Nations Office of Legal Affairs; national UNCITRAL delegates Professors Bonell and Perales; and advisor to the Argentine delegation, Professor Garro.

This academic orientation may prove to be both a strength and a weakness. Certain CISG-AC members may not take the same pragmatic approach to the CISG that a practitioner would take when advising clients or deciding CISG cases. Thus, the opinions may risk sounding overly scholarly or propose abstract solutions that are out of touch with the realities of CISG disputes. Indeed, former Secretary Mistelis reports that at times, the CISG-AC has found itself divided between the more purely academic members and those with greater practical experience.²⁸ Since the foundation of the Advisory Council, its opinions have become increasingly scholarly, in the sense of being written in a more academic style and being more thoroughly footnoted.²⁹ (This is largely due to the opinions becoming more comprehensively researched, which is hardly a fault.)

2.2 THE OPINIONS OF THE ADVISORY COUNCIL

The topic for an opinion of the Advisory Council may be suggested by a member or come via requests from international organisations, counsel, professional associations, or adjudicative bodies.³⁰ Despite there being no formal restrictions on who may submit requests,³¹ the Advisory Council considers requests only from institutions, not from individuals, so as to avoid taking sides in private disputes and because many of its members act individually as consultants and expert witnesses.³²

If it receives a request, the Advisory Council is not obligated to issue an opinion.³³ Since there are always more topics worthy of discussion than time available, the CISG-AC must prioritise. In practice, it tends to choose issues of broad interest that have some element of urgency, especially where significant diversity of opinion among national courts has arisen.³⁴

²⁸ Mistelis interview, *supra* fn 7.

²⁹ A development recognised by the members. *Ibid.*

³⁰ CISG-AC Charter Art. I(3).

³¹ *Ibid.*

³² Mistelis, interview, *supra* fn 7. The Advisory Council has discussed the possibility of submitting an *amicus curiae* brief in a relevant litigation, but a good opportunity to do so has not yet presented itself.

³³ CISG-AC Charter Art. I(4).

³⁴ Mistelis interview, *supra* fn 7.

Although Council members may express differing views, ultimately they attempt to reach a unanimous decision, and the Chair assists them in doing so.³⁵ The members may express differing views. The first nine opinions of the Advisory Council have been adopted without dissent, but the Advisory Council has on occasions struggled to reach a consensus.³⁶ Nevertheless, only a two-thirds majority is needed to adopt an opinion and dissenting views will be published.³⁷ Unanimity may not be necessary, but the CISG-AC members believe that it strengthens the positions adopted in an opinion and ultimately the status of the Council.³⁸

From August 2003 to March 2009, the Advisory Council issued nine opinions:

- Opinion 1: Electronic Communications under the CISG
- Opinion 2: Examination of the Goods and Notice of Non-Conformity Articles 38 and 39
- Opinion 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG
- Opinion 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)
- Opinion 5: The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents
- Opinion 6: Calculation of Damages under CISG Article 74
- Opinion 7: Exemption of Liability for Damages Under Article 79 of the CISG
- Opinion 8: Calculation of Damages Under CISG Articles 75 and 76
- Opinion 9: Consequences of Avoidance of the Contract

Of the nine opinions, the first five were written in response to requests, which came from the following bodies: the International Chamber of Commerce (Opinion No. 1),

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ See Yang, F., "CISG-AC – Offering Worldwide Authoritative Opinions For the Uniform Application and Interpretation of the CISG: Interview with Professor Jan Ramberg, Chair, CISG-Advisory Council, November 2005, Philadelphia, USA", available at: <<http://www.cisgac.com/default.php?ipkCat=129&ifkCat=136&sid=163>> (hereinafter 'Ramberg interview'). Although each member has a right to submit his or her dissenting opinion, it would erode the authority of the Council and the value of the opinions, if there were one or more dissenting opinions.

both the Utrecht Working Group on Sales Law of the Study Group on a European Civil Code (Opinion No. 2) and the Steering Committee of the Study Group on a European Civil Code (Opinion No. 4)³⁹ as well as the Association of the Bar of the City of New York Committee on Foreign and Comparative Law (Opinion No. 3) and the International Sales Committee of the International Law and Practice Section of the New York State Bar Association (Opinion No. 5). The sixth through ninth opinions were prepared at the Advisory Council's own initiative.

Nothing in the Draft Charter or opinions indicates how many requests the CISG-AC has received to date or what factors lead the Advisory Council to render an opinion on a given issue. Certain opinions however, seem oriented towards a specific audience within the international sales law community. For instance, the third opinion was issued in response to a request from an American body, the City Bar of New York. It addresses an issue that has been a source of confusion and divergent applications in the United States and other common law countries: the relationship between the parol evidence and plain meaning rules and the CISG. The civil law has no rules analogous to these doctrines, so the opinion is likely to be of primarily academic interest in civil law jurisdictions. However, most of the opinions relate to issues of global significance. For example, the question of timely examination and notice of non-conformity under the CISG has been of concern to a number of common and civil law jurisdictions and is the subject of a well-developed body of case law in Germany.

The structure and style of the opinions has evolved somewhat since the first opinion. The more recent opinions are all divided into two sections: 'opinion' and 'comments'. The opinion section, which some Advisory Council members have referred to as the 'blackletter' (as we do here to avoid confusion) is succinct and, starting with the third opinion, has become a bullet-point list of principles without citations or reasoning.⁴⁰ The blackletter reads like a code provision or an official comment to a code provision, proclaiming for example that 'punitive damages may not be awarded under Article 74 of the Convention'⁴¹ or that 'the Plain Meaning Rule does not apply under the CISG'⁴². In some opinions, it sets out a principle of interpretation for the adjudicator to follow, such as '[i]n interpreting the words 'preponderant part' under Article 3(2) CISG, primarily an 'economic value' criterion should be used'⁴³. Jan Ramberg explained that the blackletter is the most important part of the document; while the Council takes responsibility for the entirety of the opinion, it 'commits itself only to the blackletter text'⁴⁴.

³⁹ Advisory Council member Roy Goode is a member of the Steering Committee.

⁴⁰ Mistelis interview, *supra* fn 7; Ramberg interview, *supra* fn 38.

⁴¹ See Opinion 6, ¶9.B, *infra* fn 52.

⁴² See Opinion 3, ¶2, *infra* fn 52.

⁴³ See Opinion 4, ¶9, *infra* fn 52.

⁴⁴ Ramberg interview, *supra* fn 38.

The blackletter is the most important part of each opinion and is the most likely to be cited by a court or tribunal, but the bulk of each opinion is devoted to the ‘comments’ section. The comments contain a comprehensive discussion of the CISG provision at issue and the Advisory Council’s reasoning in reaching the opinion. Unlike the blackletter, the comments section reads much like an academic journal article, filled with citations to case law, academic writings, and legislative history. In addition to providing critical analysis of select case law, Opinions Nos. 2 and 6 (which focus on areas of particularly divergent applications of the CISG) include, as annexes, lengthy, detailed tables describing decided cases from a variety of jurisdictions.⁴⁵ A judge or arbitrator faced with a dispute over the timeliness of notice of non-conformity given under Art. 39, for instance, could turn to Opinion No. 2 for a concise survey and analysis of existing case law and doctrine. This background might help a judge inexperienced with the CISG to understand better the Advisory Council’s blackletter opinion. Splitting opinions into two sections undoubtedly gives the whole document a more official resonance. Had the Advisory Council chosen to render opinions without this structural and stylistic dichotomy, the opinions would have read more like any other academic commentary.

Most of the opinions address issues which have already led to divergent applications of the CISG. For example, Opinion No. 3 deals with ‘one of the most controversial matters in [the CISG’s] implementation’, namely the notice requirements under Arts. 38 and 39.⁴⁶ The opinion fully exposes the various positions regarding the interpretation of these provisions. Similarly, Opinion No. 4 highlights disagreements over the meaning of the term ‘materials’ in Art. 3(1) CISG⁴⁷ and whether ‘turnkey contracts’ fall under the scope of Art. 3(2).⁴⁸

While these opinions aim to correct past misunderstandings of the CISG, others seek to pre-empt possible future misinterpretations. Opinion No. 7 explains that relatively few cases have been litigated under Art. 79 (regarding excuses for non-performance such as force majeure); it therefore ‘focuses on a limited number of issues that are likely to provoke differences in interpretation in different jurisdictions’⁴⁹. It further emphasises that the wording and legislative history of portions of Art. 79 grant courts and arbitral tribunals ‘significant leeway’. Thus, the opinion ‘focuses on those issues because they are the most likely to be treated in light of the arbitrator’s or judge’s national law; or at least the most susceptible to provoke divergent approaches’⁵⁰.

A judge or arbitrator looking for assistance in the interpretation of a CISG provision can easily access the Advisory Council opinions. The Advisory Council decided early

⁴⁵ See Opinions 2 and 6, *infra* fn 52.

⁴⁶ See Opinion 2, Comments, ¶1, *infra* fn 52.

⁴⁷ See Opinion 4, Comments, ¶2.12, *infra* fn 52.

⁴⁸ *Ibid.*, at ¶3.5.

⁴⁹ Opinion 7, Comments ¶4, *infra* fn 52.

⁵⁰ *Ibid.*, at Comments ¶5: calling the issue of turnkey contracts ‘highly controversial’.

on not to copyright its opinions or otherwise limit access to them.⁵¹ It has made the opinions available in all six of the official UN languages (Arabic, Chinese, English, French, Russian, and Spanish) as well as in German and Japanese.⁵² The opinions have been disseminated through a number of media, primarily by publication in academic journals, including the *Pace International Law Review*, the French-language *Journal du Droit International*, and the German-language *Internationales Handelsrecht* (which publishes the opinions in the original English and in translation). A number of online databases host Advisory Council opinions, including the Pace Law School database on International Commercial Law,⁵³ a host of other websites forming part of the Autonomous Network of CISG Websites,⁵⁴ and more recently through the Advisory Council's own site.⁵⁵

At the time of writing, the Advisory Council is working on two new opinions which will be entitled 'Claims for Damages Caused by Defective Goods or Services Under the CISG' and 'Issues pertaining to Article 35 (conformity of goods)'. Acting as *rapporteurs* are, respectively, Council member Hiroo Sono and former Secretary Loukas Mistelis.

3 THE POTENTIAL IMPACT OF THE CISG ADVISORY COUNCIL ON THE HOMEWARD TREND

In this Part, we consider what impact the Advisory Council has had on the development of CISG doctrine and that it is likely to have on the promotion of uniform interpretation. Here, we assess the legal status of the Advisory Council opinions in the abstract (3.1), then examine their reception by adjudicators and by the CISG academic community (3.2).

3.1 THE LEGAL STATUS OF ADVISORY COUNCIL OPINIONS

A variety of national and international bodies, official and unofficial, render advisory

⁵¹ Mistelis interview, *supra* fn 7.

⁵² The opinions are available at: <<http://www.cisgac.com>>. It should be noted that not all opinions are as yet available in all of these languages. Translation of the opinions into German and Japanese has been courtesy of Professors Schwenzer and Sono, respectively.

⁵³ Available at: <<http://www.cisg.law.pace.edu/cisg/CISG-AC.html>>.

⁵⁴ The Autonomous Network of CISG Websites is a consortium of national and regional databases maintained by educational institutions and law firms. See *Charter for the Autonomous Network of CISG Websites*, available at: <<http://cisgw3.law.pace.edu/cisg/charter.html>>. The Network 'supports the efforts and work of the CISG Advisory Council that is aimed at promoting the uniform interpretation of the CISG'. *Ibid.*, at Section 3, Principle 6. Among the Network partners which cite to the Advisory Council Opinions are CISG Switzerland (<<http://www.cisg-online.ch/cisg/cisgac.html>>), CISG France (<<http://www.cisg-france.org/avis/avisCVIM.htm>>), CISG Denmark (<<http://www.cisg.dk/>>), and CISG Spain and Latin America (<<http://www.uc3m.es/cisg>>) websites.

⁵⁵ See *supra* fn 52.

opinions. As a general rule, these opinions are authoritative but not binding.⁵⁶ The CISG Advisory Council's opinions are no exception: they have zero binding power. However, they do undoubtedly possess some measure of authority and thus help to diminish the homeward trend. To understand the Advisory Council's potential influence in this regard, we consider the legal weight of its opinions. To do this, the advisory opinions must first be placed in the context of the array of sources of legal authority on the CISG that affect how a court or arbitral tribunal will rule on a disputed issue.

When a court interprets a provision of the CISG and the plain language of the provision does not yield an obvious answer, the court must turn to some other source of authority. The only authority truly binding on it is the prior decision of a superior court in its jurisdiction on the same issue. However, except in a handful of countries (in particular Germany and China), few appellate decisions have considered the CISG, so there is unlikely to be any binding authority, except on the most frequently litigated issues.⁵⁷ For their part, there is no binding precedent among arbitral tribunals. We can therefore expect adjudicators to turn to non-binding (persuasive) authority in a majority of disputes arising under the CISG.

Various persuasive authorities on the CISG exist and are available to courts and arbitral tribunals. These sources of authority include the CISG's *travaux préparatoires*, foreign court and arbitral decisions, the Secretariat Commentary, and scholarly writings.⁵⁸ Even common law judges, who traditionally discount references to academic writings, appear to be more likely to refer to them when called upon to interpret the CISG.⁵⁹

⁵⁶ Schmid, J. C., "Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory" (2006) 16 *Duke Journal of Comparative and International Law* 415, at p. 415.

⁵⁷ For example, the only issue of CISG interpretation on which there is significant precedent in the US is the interpretation of contracts governed by the CISG, in particular the applicability of the parol evidence and plain meaning rules. See, e.g., *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998); *Shuttle Packaging Sys. v. Jacob Tsonakis, INA, S.A.*, No. 1:01-CV-691, 2001 US Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001).

⁵⁸ Spaic, A., "Approaching Uniformity in International Sales Law through Autonomous Interpretation" (2007) 11 *Vindobona Journal* 237, at p. 253-54. See also Honnold, J. O., *Uniform Law for International Sales under the United Nations Convention*, 1999, Kluwer, The Hague, at p. 183, stating that: 'This massive outpouring of writing about the Convention [is a] testimonial to the world-wide interest in international legal unification'.

⁵⁹ Many, if not most, of the US decisions interpreting the CISG have relied on publications by CISG scholars. See, e.g., *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, No. 99 C 4040, 2001 WL 1000927, at p. *4 (N.D. Ill., Aug. 29, 2001) (citing Peter Schlechtriem and John Gotanda); *MCC-Marble*, 144 F.3d 1384, at p. 1389 (citing Allen Farnsworth); *TeeVee Toons, Inc. and Steve Gottlieb, Inc. v. Gerhard Schubert GmbH*, No. 00 Civ. 5189 (RCC), 2006 WL 2463537, at p. *3 (citing Allen Farnsworth) (hereinafter '*TeeVee Toons*'); *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880, 885 (N.D. Ill., 2002) (citing John Honnold); *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, No. 1:05-CV-00702, 2006 WL 2924779, at p. 3 (S.D. Ohio, Oct. 10, 2006) (citing Joseph Lookofsky); *Valero Marketing & Supply Company v. Greeni Oy*, No. Civ. 01-5254(DRD), 2006 WL 891196, at p. 8, fn 3 (D.N.J. Apr. 10, 2006) (citing Bruno Zeller).

On this issue, see Ferrari, F. "Uniform Interpretation of the 1980 Uniform Sales Law" (1994) 24 *Georgia Journal of International and Comparative Law* 183, at p. 209, fn 141: citing Honnold, *supra* fn

When faced with a dispute arising under the CISG, a court or arbitral tribunal may look to all of these persuasive sources of authority, as well as to any relevant Advisory Council opinions.

Four core observations regarding the legal status of the Advisory Council opinions may be made. First, any authority the Advisory Council possesses is due to ‘the stature of its members’⁶⁰. As it is composed of scholars well-known in the CISG academic community, its opinions carry significant weight. Even those critical of the Advisory Council tend to acknowledge the prominence of its members.⁶¹ Second, the opinion of a body of scholars speaking with a single voice should carry more weight than that of one scholar speaking alone. Third, the Advisory Council is constituted and acts as if it were an official body. Although it is careful always to disclaim any official status, its official-seeming title and procedures and the code-like concision of the blackletter parts of its opinions give it an air of authority, which may be especially effective in convincing a judge or arbitrator unfamiliar with CISG jurisprudence and doctrine.⁶² Fourth, and on the other hand, the opinions would undoubtedly carry more weight if they were the product of an official UNCITRAL body. Many references in the academic literature to Advisory Council opinions contain caveats to this effect. For example, Sim notes that, ‘[s]ince the CISG Advisory Council is a private initiative, its opinions would not carry the imprimatur of UNCITRAL’⁶³.

The best way to test these propositions about the authority of the CISG Advisory Council is to imagine situations in which its opinions conflict with other sources of persuasive authority. For the reasons described, if an Advisory Council opinion conflicts with a scholarly writing on the CISG, a judge or arbitrator is more likely to follow the Advisory Council opinion because it is more likely to represent a scholarly consensus and appears to have an official imprimatur. Slightly more uncertain would

3, at p. 208, that; ‘[t]raditional barriers to the use of scholarly writing in legal development broke down a long time ago in this country and is breaking down in citadels of literalism in other parts of the common law world, especially in the handling of international legal materials’. On the use of academic writings to interpret uniform laws, see generally Bodenheimer, E., “Doctrine as a Source of the International Unification of Law” (1986) 34 *American Journal of Comparative Law (Supplement)* 67, at p. 71: asking ‘whether doctrinal writings may be considered primary authorities of law on a par with legislation and (in some legal systems) court decisions, or whether they must be relegated to the status of secondary sources’.

⁶⁰ See *supra* fn 22.

⁶¹ See Lookofsky, J. and Flechtner, H., “Zapata Retold: Attorneys’ Fees are (Still) not Governed by the CISG” (2006-2007) 26 *Journal of Law and Commerce* 1, at p. 7: questioning the Advisory Council’s role and authority but conceding that it ‘is certainly a distinguished group of scholars.

⁶² This is not coincidental; indeed, it was ‘a matter of conscious decision to opt for a certain authoritative style’. Mistelis interview, *supra* fn 7.

⁶³ See *supra* fn 22; Lookofsky F., and Flechtner J., *supra* fn 61, at p. 7, stating that: the fact that the Advisory Council is a private body ‘gives [its] opinions no more inherent authority concerning the meaning of the CISG than the opinions of other scholars’; Sheaffer, C., “The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law” (2007) 15 *Cardozo Journal of International and Comparative Law* 461, at p. 483; arguing that ‘it would be necessary to expand the current council and establish a “Permanent Editorial Board”’.

be a conflict between an Advisory Council opinion and the decision of a foreign or non-superior domestic court. The result would depend on the practice of the jurisdiction in which the court sits and the circumstances surrounding the prior decision of the foreign or non-superior court – for instance, whether it is an isolated decision, from a foreign or domestic court and from an appellate or lower court.

Ultimately, such determinations will necessarily be made on a case-by-case basis. This underlines the essential truth about the Advisory Council's authority and the status of its opinions: they depend on their reception. As Oliver Wendell Holmes famously put it, 'the law is what judges do'⁶⁴, so the authority of the Advisory Council exists only to the extent that courts and tribunals rule according to its interpretations of the CISG. This may occur directly in the form of citations to Advisory Council opinions in judgments or arbitral awards, or indirectly, where the Advisory Council shapes the academic debate, helping to form an academic consensus that presumably will in turn, shape the decisions of adjudicators.

3.2 RECEPTION OF THE ADVISORY COUNCIL OPINIONS

The primary means by which the CISG-AC may affect homeward trend is by direct influence on adjudicators – courts and arbitral tribunals. To the authors' knowledge, only courts in Germany and in single instances, courts in the United States and Poland have cited CISG-AC opinions.⁶⁵ Since Germany is known as a particularly CISG-friendly and CISG-savvy country, we are forced to conclude that citation of Advisory Council opinions by German courts does not necessarily augur a wider acceptance. Consequently, we will focus here on the American and Polish opinions.

A central issue in *TeeVee Toons, Inc. and Steve Gottlieb, Inc. v. Gerhard Schubert GmbH* ('*TeeVee Toons*') was whether provisions in the 'Terms and Conditions' attached to the contract effectively disclaimed any applicable warranties.⁶⁶ The plaintiffs claimed that the parties had reached an 'express oral understanding' that the boilerplate disclaimers in the Terms and Conditions would not apply.⁶⁷ Under American contract law, such an oral agreement would be inadmissible parol evidence.⁶⁸ However, the court found that the CISG requires the admission of this type of evidence.⁶⁹ To this end, it discussed some of the few American precedents decided

⁶⁴ Holmes Jr., O. W., "The Path of the Law" (1897) 10 *Harvard Law Review* 457.

⁶⁵ *TeeVee Toons*, *supra* fn 59, at p. *1; *Spoldzielnia Pracy "A" v. M.W.D. GmbH & Co. KG*, 11 May 2007 [V CSK 456/06].

⁶⁶ *TeeVee Toons*, *supra* fn 59, at p. *1.

⁶⁷ *Ibid* at p. 6.

⁶⁸ Farnsworth, E. A., *Contracts*, 1999, Aspen, New York, at § 7.3.

⁶⁹ The court's actual statement, while correct, misses the point: 'Unlike American contract law, the CISG contains no statute of frauds.' 2006 WL 2463537, at p. *7 (citing *Atla-Medine v. Crompton Corp.*, No. 00 Civ. 5901 (GB), 2001 WL 1382592, at p. *5, fn 6 (S.D.N.Y. Nov. 7, 2001)). For the more general proposition that the CISG does not require a writing to create an enforceable contract, the court also cited a scholarly article, DiMatteo, L., *et al.*, "The Interpretive Turn in International Sales Law: An Analysis of 15 Years of CISG Jurisprudence" (2004) 24 *Northwestern Journal of International Law and Business*, 229, at p. 437, fn 872.

under the CISG⁷⁰ but distinguished these cases on their facts. The court then stated that it ‘thus turns to the text of the CISG, as interpreted by the CISG Advisory Council’⁷¹, proceeding to quote the CISG-AC to the effect that the CISG requires that all relevant facts and circumstances be considered in interpreting a contract.⁷²

More recently, the Supreme Court of Poland referred to the Advisory Council in its 2007 decision in *Spoldzielnia Pracy v. M.W.D. GmbH & Co. KG* (*‘Spoldzielnia’*).⁷³ In that dispute, a central issue was the circumstances in which the CISG permits a buyer to suspend payment when faced with delivery of non-conforming goods by the seller. With respect to Art. 71 CISG, which regulates the right to suspend performance in case of an anticipatory breach of contract, the court looked to the CISG Advisory Council’s Opinion No. 5. Specifically, it wrote that ‘it is important to note’ the Advisory Council’s conclusions regarding the right to suspend payment. The court also noted that the Advisory Council’s ‘view has been shared by some Contracting States’ courts’, and cited as an example a recent decision of the Austrian Supreme Court.⁷⁴

In both decisions, the courts provided no justification for their reliance on Advisory Council opinions. Indeed, they seem to have treated the opinions as they might any other authoritative academic source. While a ringing endorsement of the Advisory Council’s prominent position in the CISG *jurisconsultorium* might have been more satisfying to the Advisory Council and its supporters, they should still take heart in these decisions. In the long run, implicit acceptance of the CISG-AC’s authority may be the best foundation for interpretive legitimacy. This is particularly true when it comes to American courts which have historically been hostile to foreign judicial and academic opinion.

In addition to direct influence on adjudicators, the CISG-AC can also contribute to uniform interpretation by helping shape academic opinion. Thus far, the academic community has taken greater notice of the CISG-AC than have the courts. This may be unsurprising, given that the CISG-AC members are themselves prominent in the CISG scholarly community. However, academic reaction to the CISG-AC has been, for the most part, neither explicitly positive nor explicitly negative. No article that we know of has been published in English specifically about the CISG-AC. (One article has been published in German, but in 2003, just after the first CISG-AC opinion was promulgated, and it is very brief.)⁷⁵ Only four articles published in English include any actual discussion or analysis of a CISG-AC opinion.⁷⁶ However, at least ten

⁷⁰ *Usinor Industeel*, 209 F. Supp. 2d 880, at p. 884; *MCC-Marble*, 144 F.3d 1384, at p. 1391.

⁷¹ *TeeVee Toons*, *supra* fn 59, at p. *8.

⁷² *Ibid.* fn 2: quoting CISG-AC Opinion no. 3 ¶ 4.5 (Oct. 23, 2004)).

⁷³ *Spoldzielnia Pracy "A" v. M.W.D. GmbH & Co. KG*, 11 May 2007 [V CSK 456/06].

⁷⁴ Opinion of 8 November 2005, 4 Ob 179/05k (cited in *Internationales Handelsrecht* 2006 No. 2, p. 87).

⁷⁵ Herber, R. “Eine neue Institution: Der CISG Advisory Council” (September/October 2003) 3 *Internationales Handelsrecht*, at p. 201.

⁷⁶ Coetzee, J., “Securing the Future of Electronic Sales in the Context of International Sales” (2007) 11 *Vindobona Journal* 11; Zuppi, A. L., “The Parol Evidence Rule: A Comparative Study of the Common

articles and one book chapter mention the CISG-AC, largely without further comment (although several of these are published presentations from a single symposium).⁷⁷ More significantly, at least sixteen articles in academic journals cite a CISG-AC opinion for a point of law,⁷⁸ as do the best-known treatise on the CISG,⁷⁹ a textbook

Law, the Civil Law Tradition, and Lex Mercatoria” (2007) 35 *Georgia Journal of International and Comparative Law* 233; Lookofsky and Flechtner, *supra* fn 61; Hahnkamper, W., “Acceptance of an Offer in Light of Electronic Communications” (2005) 25 *Journal of Law and Commerce* 147.

⁷⁷ Felemegas, J., “Introduction” in Felemegas, J., (ed) *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods as Uniform Sales Law*, 2007, Cambridge U. P., at p. 8, fn 25; describing the CISG-AC and characterising its establishment as a ‘significant development’, Sheaffer, *supra* fn 63, at p. 482; arguing for the establishment of a robust ‘official’ council on the CISG and noting that ‘a limited council for international sales law is already in existence and has been issuing advisory opinions for a number of years under the guidance of UNCITRAL.’; Giuliano, A. M., “Nonconformity in the Sale of Goods Between the United States and China: the New Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods” (2006) 18 *Florida Journal of International Law* 331, at p. 332, fn 3; describing CISG-AC Opinion No. 2 as a source of authority on CISG articles 38 and 39; Dubovec, M., “CISG and the Unification of International Trade Law” (2008) 14(2) *International Trade Law Review*, at p. 45; reviewing Zeller, B., *CISG and the Unification of International Trade Law*, 2006, Routledge-Cavendish, London; observing that a weakness of Zeller’s book is that it does not ‘refer[] to the Opinions of the International Sales Advisory Council (CISG-AC) that provide useful interpretation of various provisions of the CISG, contributing to the uniformity of interpretation and application of the Convention.’; Schlechtriem, P., “Requirements of Application and Sphere of Applicability of the CISG” (2005) 36 *Victoria University of Wellington Law Review* 781, at p. 782: noting the discussion in CISG-AC Opinion No. 4 of the ‘preponderant part’ standard in CISG article 3; Whittington, N., “Comment on Professor Schwenzer’s Paper” (2005) 36 *Victoria University of Wellington Law Review* 809, at p. 809 fn 9 (2006), citing CISG-AC Opinion No. 2 for its observation that many courts interpreting CISG articles 38 and 39 have analogised from provisions of domestic law; Nottage, L., “Who’s Afraid of the Vienna Sales Convention (CISG)? A New Zealander’s View from Australia and Japan” (2005) 36 *Victoria University of Wellington Law Review* 815, at p. 839: simply noting the establishment of the CISG-AC; Andersen, “The Uniform International Sales Law”, *supra* fn 3, at p. 162, fn 12: referring the reader to the discussion of reasonable time for giving notice in CISG-AC Opinion No. 2; De Ly, F., “Sources of International Sales Law: An Eclectic Model” (2005) 25 *Journal of Law and Commerce* 1, at p. 7, fn 12: noting the discussion in CISG-AC Opinion No. 4 of difficulties in interpretation relating to the delivery of goods for construction or infrastructure projects; Gillette, C. P. and Scott, R. E., “The Political Economy of International Sales Law” (2005) 25 *International Review of Law and Economics* 446, at p. 460, fn 40 (noting the discussion in CISG-AC Opinion No. 2 of the debate at the Vienna Diplomatic Conference between representatives of countries with strict notice requirements and those that had no notice requirements); Lookofsky, J., “Digesting CISG Case Law: How Much Regard Should We Have?” (2004) 9 *Vindobona Journal* 181, at p. 194, fn 99: describing the CISG and noting that, as a private initiative and unlike the UNCITRAL digesters, the CISG-AC ‘is afforded the luxury of being critical).

⁷⁸ Schill, S. W., “Enabling Private Ordering: Function, Scope, and Effect of Umbrella Clauses in International Investment Treaties” (2009) 18 *Minnesota Journal of International Law* 1: citing CISG-AC Opinion No. 7 as authority on whether the CISG permits a party to withdraw its obligations when faced by non-performance by the other party; Whitlock, A. J. and Abbey, B. S., “Who’s Afraid of the CISG? – Why North Carolina Practitioners Could Learn a Thing or Two About the 1980 United Nations Convention on Contracts for the International Sale of Goods” (2008) 30 *Campbell Law Review* 275 (stating that the Advisory Council ‘expressly rejected the parole evidence rule’); Singh, L. and Leisinger, B., “A Law for International Sale of Goods: A Reply to Michael Bridge” (2008) 20 *Pace International Law Review* 161 (citing various portions of CISG-AC Opinion No. 5); Perea, T., “*Treibacher Industrie A.G. v Allegheny Technologies, Inc.*: A Perspective on the Lackluster Implementation of the CISG by American Courts”, (2008) 20 *Pace International Law Review* 191 (citing CISG-AC Opinion No. 3 to the effect that the CISG does not include the parole evidence rule); Martin, C. H., “The Electronic Contracts

aimed at students of international sales law,⁸⁰ a multi-volume loose leaf manual intended for practitioners,⁸¹ three practitioner guidebooks written by academics and

Convention, the CISG, and New Sources of E-Commerce Law” (2008) 17 *Tulane Journal of International and Comparative Law* 467 at pp. 471, 475: describing the conclusions of CISG-AC Opinion No. 1 and stating that it will survey ‘the current sources of international electronic contract rules, including the rules of the CISG as interpreted by its Advisory Council’; Schlechtriem, P., “Non-Material Damages – Recovery Under the CISG?” (2007) 19 *Pace International Law Review* 89, at p. 90 (citing CISG-AC Opinion No. 6 to the effect that the Advisory Council ‘has confirmed’ the ‘prevailing view [that] non-pecuniary damages cannot be compensated under the damages provision of the CISG’); Schwenzer, I., “National Preconceptions that Endanger Uniformity” (2007) 19 *Pace International Law Review* 103, at pp. 120-123 (describing CISG-AC Opinion No. 2 in detail but avoiding any characterisations as to the opinion’s legal status); Mazzotta, F. G., “Notes on the United Nations Convention on the Use of Electronic Communications in International Contracts and its Effects on the United Nations Convention on Contracts for the International Sale of Goods” (2007) 33 *Rutgers Computer and Technology Law Journal* 251, at p. 271, fn 99: citing CISG-AC Opinion No. 1 for the proposition that contracts under the CISG may be negotiated and concluded entirely by electronic means; Cross, K. H., “Parol Evidence under the CISG, the ‘Homeward Trend’ Reconsidered” (2007) 68 *Ohio State Law Journal* 133, at pp. 137, fns 19, 148 and 68: citing CISG-AC Opinion No. 3 for its characterisation of the *MCC-Marble* case as a ‘leading’ American decision under the CISG and its assertion that the CISG drafters rejected any application of the parol evidence rule; Scherer, M and Schneider, M. E., “International Construction Contracts under Swiss Law” (2007) 23(8) *Construction Law Journal* 559, at p. 560 (noting that CISG Advisory Opinion No. 4 contradicts some recent case law in Switzerland); Green, S. and Saidov, D., “Software as Goods” (March 2007) *Journal of Business Law*, at p. 172 (citing CISG-AC Opinion No. 4 for its interpretation of the ‘preponderant part’ requirement in article 3 CISG for the applicability of the CISG); Lautenschlager, F., “Current Problems Regarding the Interpretation of Statements and Party Contracts under the CISG – the Reasonable Third Person, Language Problems and Standard Terms and Conditions” (2007) 11 *Vindobona Journal* 259, at p. 261, fn 13 (citing CISG-AC Opinion No. 3 as representing the ‘dominant opinion’ on the non-applicability of the parol evidence rule under the CISG); Huber, P. “CISG – The Structure of Remedies” (January 2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 13, at p. 31, fn 70 (citing CISG-AC Opinion No. 5 for its statement that fundamental breach doctrine under the CISG adequately covers situations where the commercial background of the transaction requires clear criteria for the decision on whether to terminate the contract), available at: <<http://www.cisg.law.pace.edu/cisg/CISG-AC-op5.html#1>>; Schlechtriem, P., “Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods”, Fox, T. (tr) (2006) 18 *Pace International Law Review* 83, at p. 83, fn 3 (citing CISG-AC Opinion No. 5, *inter alia*, for its explanation of why the standard for avoidance of the contract under the CISG is stricter than under German domestic law); Cañellas, A. M., “The Scope of Article 44 CISG” (2005) 25 *Journal of Law and Commerce* 261, at p. 264: quoting CISG-AC Opinion No. 2 to the effect that CISG article 44 is not necessary, as articles 38 and 39 ‘contain language that can fairly be interpreted to reach any result that article 44 was intended to reach’.

⁷⁹ Schlechtriem, P. and Schwenzer, I. (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2005, Oxford U. P.: This work, the only major, comprehensive CISG treatise to have published a new edition since the Advisory Council was established, contains multiple citations to CISG-AC Opinions. This is however, unsurprising to the extent that it was edited by two members of the Advisory Council and that several relevant sections of the treatise were written by Professors Schlechtriem and Schwenzer.

⁸⁰ Huber, P. and Mullis, A., *The CISG – A New Textbook for Students and Practitioners*, 2007, Sellier, London, at p. 235, fn 68: citing CISG-AC Opinion No. 3 to the effect that the common law parol evidence and plain meaning rules have no place in the CISG.

⁸¹ Kritzer, A. H., Eiselen, S., Vanto, J. and Vanto J. J., *International Contract Manual*, 2009, West, Eagen, Minn. (last updated May 13, 2009). This frequently-updated manual is produced primarily under the direction of two Advisory Council members and under the auspices of the Professor Kritzer’s Pace Institute of International Commercial Law.

published by West,⁸² and a 2007 American Bar Association-sponsored Continuing Legal Education lecture, also published by West.⁸³

Taken together, this record of commentary indicates that the CISG academic community is not only aware of the CISG-AC and its opinions, but also considers them to be reliable sources of authority on controversial matters of interpretation. Some scholars, such as Lookofsky and Flechtner, have been highly critical of the Advisory Council, but are at least willing to grapple with its opinions as they would the theories of a leading academic.⁸⁴ Meanwhile, other commentators already consider CISG-AC opinions to be ‘the applicable’ interpretations in the areas which they discuss.⁸⁵ On the whole, CISG-AC opinions seem to carry considerable weight in the academic community and therefore serve to shape the discussion of controversial CISG provisions and promote uniformity of academic opinion.

4 THE CISG ADVISORY COUNCIL'S ROLE IN COMBATING THE HOMEWARD TREND

The nine published CISG-AC opinions form the nucleus of a significant new source of authority on the CISG. By addressing unsettled issues and criticising wrongly-decided judicial and arbitral decisions, the Advisory Council can play an important role in reducing the homeward trend and promoting the uniform application of the CISG. The opinions’ thorough discussion of the primary persuasive sources of law: legislative history, case law, and doctrine, should prove a useful tool for adjudicators and practitioners.

Since the Advisory Council is a private initiative that has received no imprimatur from UNCITRAL, its authority can only come internally, *i.e.*, from the prestige of its members, the prestige of the Advisory Council itself and most importantly from the persuasiveness of its opinions. The international sales law community is becoming more familiar with the CISG-AC’s opinions, as evidenced by their increasing appearances in academic publications as well as the decisions in *TeeVee Toons* and *Spoldzielnia*. Such familiarity should breed reliance, leading to progressively increased interpretive legitimacy.

Nevertheless, it would be premature to say that the CISG-AC is already having an impact on the homeward trend, since the community which has taken notice of it is, as yet, too narrow. Thus far, the institutions that have submitted requests for opinions

⁸² *The West Guide to the International Sale of Goods Convention*, 2008, at § 1:32, § 18.21, § 18.30, § 18.32; *Laws of International Trade*, vol. 2, 2008, at § 66:32; *Modern Law of Contracts*, 2008, at § 23:22.

⁸³ Boss, A. H., “American Law Institute - American Bar Association Continuing Legal Education, ALI-ABA Course of Study: Current Developments in Sales of Goods Under Article 2 and in International Sales of Goods Under CISG” (7-8 June 2007).

⁸⁴ Lookofsky, F., and Flechtner, J., *supra* fn 61.

⁸⁵ Hahnkamper, W., *supra* fn 76, at p. 148.

have been those with direct personal or professional connections to Advisory Council members. For instance, two requests came from committees of the New York State and City Bars, shortly after they co-organised a conference with the Advisory Council.⁸⁶ The International Chamber of Commerce (an institution well known to the many Advisory Council members who sit as arbitrators in ICC tribunals) also runs an academic enterprise, the Institute of World Business Law, with which several Advisory Council members are or were affiliated.

When it comes to the Advisory Council's membership, it too, cannot yet be said to be representative of the broad range of states which have ratified the CISG. While the Advisory Council members (and the *rapporteurs* who are not members) represent a variety of legal backgrounds, they still come from a handful of economically developed CISG signatory states. The lack of members from developing countries, especially China (where more cases are litigated under the CISG than in any other country) hurts the Advisory Council's credibility as a global interpretive body. Moreover, the presence in the CISG-AC of members from developing countries would make courts in those countries more likely to follow the recommendations of the CISG-AC. The members are keenly aware of this and have sought to add additional members from developing countries. The difficulty has been in finding people from such countries who are both sufficiently fluent in English (which is the *lingua franca* of Advisory Council meetings) and well-versed in the CISG.⁸⁷

Finally, while scholarly publications that mention the Advisory Council or cite its opinions have increased greatly in number over the last three years, their range remains limited. To date, of the academic articles published in English that mention the Advisory Council, five were written by Advisory Council members themselves. Furthermore, more than a third of the total was published in the three English-language journals that have a particular remit to publish scholarship related to the CISG: the *Journal of Law and Commerce*, the *Pace International Law Review*, and the *Vindobona Journal of International Commercial Law and Arbitration*. These publications are undoubtedly followed closely by those interested in CISG doctrine, but do not have a particularly wide readership outside this community.

To a certain extent, these connections simply reflect the small, 'clubby' world of international sales law. However, the CISG-AC cannot be considered a truly authoritative body (and thus will not have a significant effect on the homeward trend) until its members are drawn from a wider range of backgrounds and its opinions are solicited by institutions not directly connected with it, are addressed by the wider

⁸⁶ It should be noted that for the first of these, Opinion No. 3, the Bar Committee first approached Allen Farnsworth in his individual capacity, and he suggested that the Committee approach the Advisory Council; Mistelis interview, *supra* fn 7.

⁸⁷ *Ibid.* In addition, appointment of new members from these regions or elsewhere would have to be done gradually, since both funding considerations and a desire to keep debate sharp prevent the Advisory Council from expanding beyond fifteen members.

scholarly community, and – most importantly – are applied by adjudicators in a significant number of CISG signatory states.

In the continued absence of an official interpretive body, the Advisory Council has stepped forward. Even without a mandate from UNCITRAL, the Advisory Council can and does hold a singular place in the global *jurisconsultorium*. Through its opinions, it offers courts and tribunals an additional tool to interpret the CISG. Reference to the CISG-AC opinions is likely to continue to grow as scholars and decision-makers familiarise themselves with these opinions and as the number of opinions grow. Such dissemination of its opinions will increase the Advisory Council's ability to affect the homeward trend.

The question then arises of how the Advisory Council ought to best proceed, given that it is just one actor in the global CISG *jurisconsultorium*. While an official interpretive body, presumably organised by UNCITRAL, would probably be the most effective in reducing homeward trend, it could also squelch the free flow of judicial and academic opinion that might over time lead to better and more responsive interpretations of the CISG. Indeed, there is little advantage to being 'locked into a foolish interpretation of the Convention for the sake of uniformity'⁸⁸. As Flechtner puts it, Art. 7(1) 'does not mandate a doomed quest for an unobtainable [and ...] ultimately harmful ideal'⁸⁹.

The lack of any official, centralised interpretive body means that there is currently little danger that diversity of opinion will be stifled. The CISG-AC has avoided taking on even a quasi-official role, being careful in each of its publications to reiterate that it is a 'private initiative'. However, as courts and commentators increasingly cite CISG-AC opinions as authoritative, the CISG-AC must be careful to maintain its private identity and to refrain from intimating that its opinions ought to bind any tribunal.

At the same time, it is clear that the Advisory Council speaks with greater authority than does any individual academic. The same logic which dictates that the consensus opinion of many courts is more likely to be 'correct' than that of a single court leads to the conclusion that the consensus opinion of the CISG-AC members, each of them separately an expert on the CISG, is likely to be better (both in the quality of the interpretation and its persuasiveness) than the commentary of any scholar writing alone. In addition, while CISG-AC members are not intended to represent any jurisdiction or legal tradition, they were trained in a variety of legal systems. Perhaps most importantly, the CISG-AC's seemingly official title and the various accoutrements of officialdom with which it presents itself mean that courts are more

⁸⁸ Hackney, P., "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?" (2001) 61 *Louisiana Law Review* 473, at p. 479.

⁸⁹ Flechtner, H., "The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)" (1998) 17 *Journal of Law and Commerce* 187, at p. 205.

likely to pay attention to a CISG-AC opinion than to any other article in a scholarly journal, especially the courts of the common law countries.

We suggest that the most advantageous role for the CISG-AC is to mediate between the other participants in the global *jurisconsultorium*, such that the free flow of ideas is preserved but uniform interpretation is also promoted. Consequently, the CISG-AC is most helpful when it points to the better interpretation in areas where different courts or commentators disagree, when it describes an emerging consensus or *jurisprudence constante* and when it elucidates CISG provisions on which there is little or no relevant case law.

Most concretely, the CISG-AC should work to remove the barriers that might deter or hinder reference by courts and arbitral tribunals to relevant foreign decisions and academic commentaries. It can do this by collecting, describing and discussing relevant cases and scholarly publications. Even more, it does the judicial community a service by distilling its opinion into the easily-understood and easily-cited format of an official comment.