

Boundaries for *Expansive Interpretations* of the CISG?

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Summary

This paper is an adaption of the presentation for the panel: 'The Extensive Interpretation and Application of the CISG beyond the Contracts of Sale' held at the International Conference "35 Years of CISG – Present Experiences and Future Challenges" organized by the UNCITRAL Secretariat and the University in Zagreb, Faculty of Law on December 1-2, 2015.

It takes a critical view on the current trend favouring expansive interpretations of the CISG. Drawing on insight from 'project management', the paper questions whether such practices actually further the goals of the CISG. It is submitted that the current trend lacks general support, leads to unpredictability and uncertainty, and may have an adverse effect on harmonisation.

Keywords: 'CISG', 'Interpretation', 'Expansive interpretation' 'Harmonisation', 'CISG Advisory Council'

1. Introduction

This paper is an adaption of my speaker's notes for the panel in the morning session on the second day of the conference: 'The Extensive Interpretation and Application of the CISG beyond the Contracts of Sale'. As in my presentation, I will also here focus on the bigger picture and not on individual cases. The topic appears simple and is premised on two basic facts: 1) The text of the CISG was fixated in 1980 and is unlikely to change in the foreseeable future, and 2) the world continues to evolve and the international trade develops accordingly.

Whenever the text of the CISG is surpassed by external developments, one must consider whether or not the text should be interpreted *dynamically* to address the new situation.

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To illustrate with an example: The advancements in electronic distance communications since the time of the CISG's drafting have rendered it somewhat outdated. Today, we use several means of communications that did not have a similar prevalence in 1980, e.g. telefax, e-mails, and EDI.¹ So when Article 13² describes that the definition of *writing* in the CISG includes 'telegram and telex', it is – per a dynamic interpretation – generally accepted that the provision also encompasses current, equivalent forms of communication.³

Some degree of dynamic interpretation *is* necessary to maintain the relevance of the CISG in a changing world. The question is just: How far can (and should) we go in that respect? The conference session addressed a narrow and specific aspect of dynamic interpretation, namely *expansive* or *extensive* interpretation.⁴ That is, whether – *by interpretation* – the scope of the CISG should be extended to apply beyond contracts for the sale of goods and to issues that were left out.

This topic raises a number of questions. Why would one seek to expand the scope of the CISG? Is extensive interpretation a viable means of harmonisation? How would an expansive interpretation be communicated to the contracting states? Would their courts be receptive and adopt a new interpretation?

Laws with a limited scope will see their boundaries challenged and that may lead to expansive interpretation. And while one could choose to cross that bridge as the need arises – on a case by case basis – one could also seek to employ extensive interpretation without external developments as the driving force.⁵ The current trend appears to favour the latter. With an air of proactivity, the many advocates of extensive interpretation continue to push the boundaries of the CISG. The more reserved,

¹ E.g. ANSI X12 or EDIFACT.

² References to articles without a specification of a law is the CISG.

³ See, e.g. *CISG-AC Opinion No. 1, Electronic Communications under CISG*. Rapporteur: Christina Ramberg, 2003, cmt. 13.1; Perales Viscasillas in: Kröll, Stefan, Mistelis, Loukas, and Perales Viscasillas, María del Pilar (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG), Commentary*, C.H. Beck, Munich, 2011, Art 13, Paras 68. Schlechtriem/Schmidt-Kessel in: Schwenzler, Ingeborg and Schlechtriem, Peter (Eds.), *Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG)*, 3rd ed., OUP, Oxford, 2010, Article 13, paras. 57; Honnold, John O., *Uniform Law for International Sales under the 1980 United Nations Convention*, Flechtner, Harry M. (Ed.), 4th ed., Kluwer Law International, Alphen aan den Rijn, 2009, Article 13, para. 130; compare also United Nations Convention on the Use of Electronic Communications in International Contracts, 2007.

⁴ The terms 'expansive interpretation' and 'extensive interpretation' are used interchangeably in this paper.

⁵ For example, sale of 'money' is excluded by Article 2(d) CISG, but does that exclusion also cover the sale of commemorative coins to be circulated? One arbitral tribunal did apply the CISG in such a sale: Award from CIETAC from 2000, available at <http://cisgw3.law.pace.edu/cases/000000c1.html> [24 February 2016].

critical voices have instead been portrayed as reactionary and outdated.⁶ But we all share the wish for a successful CISG, and the (uniform) answer to a question may very well be that the issue is unregulated.

The remainder of this presentation will address the question of extensive interpretation in general and in relation to ‘penalty clauses’ and ‘set-off’. The two examples are illustrative of the complications that ‘too much’ extensive interpretation may bring.

2. ‘Scope Creep’

The presentation began with the story of ‘Regalskeppet Vasa’ – a Swedish battle ship that sank on its maiden voyage in 1628 and after sailing less than a mile. It capsized at a light breeze due to a faulty, top-heavy construction. As the story goes, the seaworthiness suffered from a number of late changes to the building plans – changes that had not been thought through.⁷ Information about the Vasa is available at the *Vasa Museum* in Stockholm’s website: <http://www.vasamuseet.se/>.

The story of Vasa’s demise illustrates a well-known problem in *project management*, namely ‘scope creep’. Scope creep is a name for the possible downside caused by *unexpected changes* or *additions* to the requirements of already planned projects. If a project is planned to achieve objective ‘A’, it may not be without repercussions if the scope of the project is later expanded to also encompass objectives ‘B’ and ‘C’ – pursuing new objectives may turn out to be at the expense of the original goal.

Substantial changes warrant a proper *impact assessment* and careful consideration of how they integrate with the project goal. From an informed basis, one has to decide if it is possible to integrate the change into the project, whether more resources must be allocated, and ultimately if the change is worth the drawbacks. A creeping scope may pose a threat to project success if it is not handled properly.

3. The CISG’s objective?

It is not exactly rocket science that the consequences should be considered before fundamental changes are executed.⁸ Expanding the scope of the CISG through

⁶ Schwenger, Ingeborg and Hachem, Pascal, *The CISG – A Story of Worldwide Success*, in: Kleinemann, Jan, *CISG Part II Conference – Stockholm, 45 September 2008*, Stockholm Centre for Commercial Law, Stockholm, 2009, 119, 140 (‘At the end of the day all criticism boils down to the aforementioned saying of the old dog unwilling to learn new tricks’ on the reasons for opting out of the CISG); compare also Schwenger, Ingeborg and Mohs, Florian, *Old Habits Die Hard: Traditional Contract Formation in a Modern World*, IHR, 2006, 239–46.

⁷ Historians debate whether this narrative is entirely accurate, but I am not one to ruin a good story – especially if it teaches a reasonably sound lesson.

⁸ The late addition of Part II CISG in the drafting process would probably qualify as scope creep but it did not turn out to hinder the completion of the project. See ‘Report of the

interpretation is such a situation. The CISG was put into this world with certain geographical and substantive boundaries, and it may come at a price if these restraints are relaxed. One must therefore identify the consequences and weigh them against the possible gain before resorting to expansive interpretation.

In order to assess the impact of expanding the scope of the CISG, it is necessary to identify the objective that it is meant to accomplish. The CISG does not expressly state a goal, but the preamble describes its underlying considerations:

'[T]he adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.'

This somewhat general and vague statement reveals two ambitions, namely the promotion of international trade and removal of legal barriers. In essence, the CISG's objective is to provide a harmonised law that facilitates trade and makes it easier for businesses to operate internationally.⁹

It is all but impossible to measure the level of CISG's 'promotion' of international trade. It would, for example, take a considerable effort to calculate the monetary value of the CISG for the world trade and it is, in any event, well beyond the limits of this presentation.

A more operable yardstick in this sense would, perhaps, be to look at whether the 'users' – the businesses and their advisors – actually want the CISG to apply. In other words, whether they consider the CISG the natural, obvious, and safe choice for their international contracts.¹⁰

Today, parties routinely opt out of the CISG – and many lawyers actively recommend this practice.¹¹ A choice of law is, of course, both a matter of taste and

Eighth Session of the Working Group', (1977) UNCITRAL Yearbook VIII, 7390; 'Report of the Ninth Session of the Working Group', (1978) UNCITRAL Yearbook IX, 6183; reprinted in: Honnold, John O., *Documentary history of the uniform law for international sales: The studies, deliberations, and decisions that led to the 1980 United Nations Convention with introductions and explanations*, Kluwer Law and Taxation Publishers, Deventer, 1989, 27491, 293315.

⁹ Cf. Mistelis in: Kröll, Mistelis, and Perales Viscasillas, 2011, Preamble; Honnold, John, *The United Nations Commission on International Trade Law: Mission and Methods*, Am. J. Comp. L., Vol. 27, 1979, 201-11.

¹⁰ Usage of the CISG is not an accurate parameter in itself, though, as the CISG applies by default in the contracting states. When contracts are silent on the choice of law, it may mean that the parties want the CISG to apply as the default law, that they do not want to weigh in on the issue, or even that they are oblivious to the CISG's existence.

¹¹ Cf. Meira Moser, Luiz Gustavo, *Parties' preferences in international sales contracts: An empirical analysis of the choice of law* in: Unif. L. Rev., Vol. 20, 2015, 19, 45; Queen Mary University of London, *International Arbitration Survey: Choices in International Arbitration*, 2010, 15 ('As for the more concrete international rules and laws, the majority of respondents have never used the UCP and the CISG in their contracts: 57% and 53% respectively. However, the

dependent on the actual circumstances, but opt-outs will, generally speaking, leave the CISG short of its goals. This leads me to conclude that the CISG will be a success and fulfil its objectives when the 'users' abandon the thoughts of opting out, and the CISG becomes the *de facto* standard for international contracts.

4. What do business seek in a law?

What would make the CISG the obvious choice for international sales? To answer that, one must consider what the 'users' require of a law. This was addressed in Queen Mary University's 2010 survey of practices in international arbitration:

'We also asked respondents to explain why they choose their most frequently chosen law. Most respondents referred to "familiarity" and "predictability", "foreseeability" or "certainty". They also referred to the existence of a "well developed jurisprudence" and "international acceptance".'¹²

These findings are corroborated by other surveys.¹³ 'Internationality' and 'neutrality' are usually also mentioned as important, but they are found further down the list.

'Familiarity', 'predictability', 'foreseeability', 'certainty', and a 'well developed jurisprudence' all speak to a need for making an *informed choice of law*.¹⁴ The 'users' want their contract governed by rules that allow them to anticipate their legal position in a given situation.¹⁵ They will not take the risk of an unfavourable result under an unpredictable law – or pay the additional costs of ascertaining its content.¹⁶

The wish for predictability is probably even more pronounced in lawyers. They may be held responsible for inadequate legal advice, and if a law is likely to produce unpredictable results, any lawyer worth his salt will have a natural inclination to recommend choosing another – more certain – law.

remaining 43% and 47% have used them at least "sometimes"); compare also, Schwenzer, Ingeborg and Kee, Christopher, *International Sales Law—The Actual Practice*, Penn St. Int'l L. Rev., Vol. 29, 2010/11, 425, 434/36.

¹² *International Arbitration Survey: Choices in International Arbitration*, 2010, 19.

¹³ Cf. e.g. Meira Moser, 2015, 2627, 42, 4345; Vogenauer, Stefan, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, Eur. Rev. Priv. L., Vol. 21, 2013, 13, 4850, 52.

¹⁴ Vogenauer, 2013, 4950 ('Legal certainty is closely linked to familiarity: there will be no certainty about the legal position under an unfamiliar law.').

¹⁵ Cf. Meira Moser, 2015, 4953, on the reasons for excluding the application of the CISG indicated by the respondents of the survey; Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sales of Goods*, Harv. L. Rev., 97, 1983-84, 1984, 1998/99.

¹⁶ Meira Moser, 2015, 2022.

In essence, for the CISG to become the preferred law for the international trade community, the CISG must seek to provide the certainty and predictability that the users seek in a law.

5. Uniform interpretation of the CISG

The question is then how these sought-after qualities – certainty, predictability, etc. – are affected by expansive interpretation. This has to do with a *uniform* application of the law; i.e. predictability arises from similar cases being treated similarly.¹⁷

The contracting states to the CISG form a heterogeneous group with different legal traditions and methodologies.¹⁸ For example, some jurisdictions have centuries-old civil codes and have had to adopt somewhat activist interpretation styles that allow them to read more into the text than a strict reading of wording would suggest (and thereby make their ‘old’ texts relevant today). Other jurisdictions put more emphasis on case law and exhibit a greater degree of reservation towards written legislation. They stay truer to the wording of the text. The domestic laws may also attribute different weight to the (possible) sources of law such as, for example, *travaux préparatoires*, case law, and doctrine.

These differences in domestic law should not, however, affect the interpretation of the CISG. The courts should set aside their domestic methodology and interpret the CISG on its own terms. The CISG must, according to Article 7(1), be interpreted *uniformly, autonomously*, and in accordance with *good faith*.¹⁹ Under the *CISG regime*, the principal source of law is the CISG text and the primary means of interpretation is *textual*.²⁰ Other sources of law should, of course, also be consulted to ensure uniformity.

However, a uniform interpretation does not follow automatically from directions stating so. Uniformity is developed in practice when the courts, lawyers, etc. consistently interpret the CISG in the same way. It is almost impossible to develop and maintain a uniform law if everyone attempts to pull in different directions.

An important factor in the interpretation of the CISG is the fact that it was drafted as a compromise to bridge the differences among the (now) contracting states. The drafters took care to produce a comprehensive contract and sales act to offer a har-

¹⁷ Cf. Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sales of Goods*, Harv. L. Rev., Vol. 97, 1983-84, 1984-2000.

¹⁸ See, e.g., Eiselen, Sieg, *Literal Interpretation: The Meaning of the Words*, in: Janssen, André and Meyer, Olaf (Ed.), *CISG Methodology*, Sellier, 2009, 61, 6374; Honnold, 2009, Article 7, paras. 8693.

¹⁹ E.g. Perales Viscasillas, in: Kröll, Mistelis, and Perales Viscasillas, 2011, Article 7, paras. 3334.

²⁰ Perales Viscasillas, in: Kröll, Mistelis, and Perales Viscasillas, 2011, Article 7 paras. 3334; Eiselen, 2009, 7488; compare Articles 3133 Vienna Law of Treaties, 1969; Schwenger/Hachem, in: Schwenger and Schlechtriem, 2010, Article 7, para. 21.

monised framework for the world trade. But some issues were beyond agreement, and they were left for the underlying domestic law to regulate. Also, issues pertinent to international sales contracts, to which a harmonised solution would have been welcome, were left outside the scope of the CISG.

The contracting states signed up for this compromise, and interpretation of the CISG must, therefore, respect the compromise – *and its limits*.²¹ Any compromise carries an inherent obligation to ensure that most (if not all) of the parties to the agreement understand and accept changes that affect everyone. Everyone should take care not to break the compromise by importing overly extensive – or restrictive for that matter – interpretation practices from domestic law.

This also applies to expansion through creative gap-filling.²² Silence on an issue does not necessarily mean that there is a gap in the CISG and it is not a *carte blanche* to construct a new solution. The different domestic laws know of many concepts that are not found in the CISG, and one should be careful not to see and construct gaps where the uniform answer is that the invoked concept simply does not exist under the CISG.²³ Gap-filling should also respect the compromise and its limits. If courts (and academics) begin to fill gaps, whose existence is uncertain or disputed, with domestic concepts, whose international applicability is questionable, it may also challenge uniformity.

The question also relates to acceptance: How ‘much’ of an activist interpretation style did the countries accept when they signed and ratified the CISG?²⁴ Can issues that were too controversial for an agreement in Vienna later be regulated by expansive interpretation by academics and courts? In my opinion, subsequent interpretation should not be used as a second attempt to introduce already dismissed ideas into the CISG. Expansive interpretation simply does not carry the same democratic mandate as a negotiated compromise.

²¹ Honnold, 2009, Article 7, para. 103.2 (‘Fidelity to these choices is the essence of the commitment that Contracting States make to each other: We will apply these uniform rules in place of our own domestic law on the assumption that you will do the same.’).

²² Cf. Schlechtriem, Peter, *Non-Material Damages under the CISG*, Pace Int’l L. Rev., Vol. 19, 2007, 89, 89 (‘[T]here are limits to the creative development of a Convention, for it might not only be contrary to the drafters’ views and policies, but also – and in some instances more importantly – contrary to the intentions of national legislators who have ratified the Convention. The national legislators might not have done so if certain issues left open or decided in a certain way – although not very definite and, therefore, open to interpretation – were regulated the way later proposed by scholars as a matter of development of the Convention by interpretation and gap-filling.’).

²³ Cf. also, Henschel, Rene Franz, *Varens kontraktsmæssighed i international køb*, Ph.d. dissertation, 2003, 43-47.

²⁴ Cf. Posner in *Zapata Hermanos v. Hearthside Baking* 313 F.3d 385, 389 (7th Cir. 2000) (‘And how likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule?’).

If expansive interpretation ‘runs wild’ it may actually jeopardize the success of future uniform laws. Some states are sure to be more reluctant to agree to new conventions if they perceive a risk of having their reservations as to the scope, the boundaries of the scope itself, etc., overruled by expansive interpretations.

6. Impact assessment – how does extensive interpretation affect certainty?

The previous sections tell us that the ‘users’ seek predictability and certainty and that this, in principle, is accommodated if the CISG is interpreted uniformly as intended. But how does an extensive interpretation influence the uniformity – and consequently certainty and predictability – of the law?

Extensive or *expansive* interpretation entails going beyond the borders of the text and applying the law to issues that – from a strict reading – would fall outside its scope. All other things being equal, such expansions render the textual interpretation unreliable.²⁵ ‘New’ boundaries may arguably be developed through extensive interpretation, but if they presuppose an activist approach that is unfamiliar to a significant number of the contracting states, they may not see general acceptance. That may disrupt the compromise and uniformity of the law. For the ‘users’, it may become difficult to discern whether an issue is governed or not.

Some parties may choose a law in the ‘blind’, but some actually seek to make an informed choice of the CISG – and they should be protected. The ‘users’ must, if anything, be able to trust the text of the CISG. Whether sitting in Beijing, Bogota, Boston, or Berlin, a business or a lawyer should not experience that the text has been superseded by a (perhaps over-theoretical) expansive interpretation dreamt up on the other side of the globe. Certainty and predictability become elusive phantoms if the textual interpretation cannot be trusted, and the allure of the CISG as a vehicle of harmonisation diminishes.

The discussion in one of the other panels at the conference featured an example of questionable extensive interpretation, namely a suggestion to let CISG govern certain services contracts.²⁶ Not only is that well beyond CISG’s scope of ‘contracts for the sale of goods’, but it is also the polar opposite of the wording of Article 3(2) CISG, which draws a line between sales of goods and contracts on provision of services. The latter are *not* governed. Service providers naturally and reasonably rely on the fact that they operate outside CISG’s sphere of application. To include service contracts under the ambit of the CISG could very well lead to unintended (and possibly unfortunate) consequences for the service providers who, according to the text, have nothing ‘to fear’.

²⁵ Cf. Kropholler, Jan, *Internationales Einheitsrecht*, J.C.B. Mohr, Tübingen, 1975, 30104.

²⁶ See also Tripodi, Leandro, *Towards a New CISG. The Prospective Convention on the International Sale of Goods and Services*, Brill, 2015, for a discussion on the need for a convention to deal with service contracts.

The core of the issue concerns uniformity, and the challenges of achieving uniformity under international Conventions are well-known. The lack of a mechanism to assist the development of a uniform practice under the CISG was compared by Schlechtriem to that of an orchestra attempting to play in time without a conductor.²⁷ A feat that requires a monumental level of discipline.

Some international agreements come with an overarching interpretative authority, for example, the *European Court of Human Rights* and the *Court of Justice of the European Union*. These two courts do not feel bound by a strict literal interpretation of the relevant law(s) if it would lead to a result that goes against the fundamental purposes of protecting human rights or furthering the integration of the European Union. They may be judicially activist – but they *have a mandate to do so*.

The *CISG regime* does not have an institution with a *legal* or a *democratic* mandate to assume the role of law maker through authoritative interpretations. The national courts, of course, interpret the text and create case law, but they are bound by the limits of the CISG and its underlying principles. The courts should first and foremost strive for uniformity within the boundaries of the CISG – as prescribed by Article 7(1) CISG.

One thing to remember is that while an extensive interpretation may render a perfectly reasonable result under the circumstances of the concrete case, it leaves a precedent for the future. And the ‘new’ boundary may not fit the circumstances of the next case, which, in turn, may lead to unwanted results.

The academic community should also have regard for the boundaries of the CISG. (Well-argued) suggestions of extensive interpretation may resonate with the more receptive courts, but be dismissed by others as *de lege ferenda*. The differences in the level of acceptance may lead to a fracture in the uniform application – i.e. uncertainty and unpredictability; exactly what the ‘users’ are trying to avoid when choosing a law. Such uncertainty will persist until full penetration of the new interpretation has been reached, if ever.

One might argue that more harmonisation is good for the world trade, and that an expansive interpretation – by including more issues under the ambit of the CISG – is conducive to it. But, despite the good intentions, if a proposed expansive interpretation lacks *general acceptance* it will most likely only lead to harmonisation in name (if even that) and not in fact. It may create uncertainty under the CISG and may ultimately cause potential ‘users’ to flee, and consequently lead to less harmonisation instead of more. A uniform application includes uniform boundaries.²⁸

Expansive interpretation should be reserved to situations where it is driven by a need due to ‘external developments’. It is challenging enough as it is to achieve a uniform application, and unless it is to address an actual need, there are no com-

²⁷ Schlechtriem, Peter, *Einheitskaufrecht in der Rechtsprechung des Bundesgerichtshofs*, in: Canaris, Claus-Wilhelm et al. (Eds.), *50 Jahre Bundesgerichtshof: Festgabe aus der Wissenschaft*, Vol. I, C. H. Beck, München, 2000, 407, 408.

²⁸ Cf. Kropholler, 1975, 30104, on the boundaries for legal development.

elling reasons to add to the uncertainty. The term ‘external developments’ is, of course, not a legal term with a defined content. It would, though, serve as a signal not to develop the CISG in isolation from the problems of the ‘real world’.

It is difficult to decide if and when it should become necessary to reconsider a solution. A guiding principle could, for example, be to wait for the development to have reached a stage where a ‘new’ interpretation is so natural and obvious that it could develop simultaneously in more contracting states. To illustrate, this was the case with the new forms of electronic communication and Article 13 CISG. The communication practices at present are fundamentally different than they were in 1980, and the dynamic interpretation on the issue is natural and obvious. While such a restrictive guideline would not eliminate divergent case law, it could probably lessen the strain on uniformity.

In conclusion, the possible adverse impact on the predictability and certainty of extensive interpretation of the CISG should cause the more dynamically inclined courts and commentators to restrain from overly expansive interpretations.

6.1. A few remarks on the role of the CISG Advisory Council

The lack of instruments to assist the development of a uniform practice led to the institution of the so-called ‘CISG Advisory Council’ in 2001. The Council is a private initiative that operates by giving ‘opinions’ and ‘declarations’ on different topics.²⁹ It was intended to provide ‘a “follow-up mechanism” to police divergent applications and to help bring the unruly mass of independent courts and tribunals into some common order’.³⁰ The idea was a ‘permanent editorial board’ with representatives from the different contracting states,³¹ not unlike the *Permanent Editorial Board for Uniform Commercial Code*.³²

As such, the Advisory Council operates without a democratic mandate and it, therefore, furnishes its opinions with an appropriate ‘disclaimer’.³³

‘The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sa-

²⁹ The bylaws that lay out the different aspects of the Council’s *modus operandi* are available at <http://cisgac.com/default.php?ipkCat=225&sid=225> [24 February 2016].

³⁰ Karton, Joshua D. and de Germigny, Lorraine, *Has the CISG Advisory Council Come of Age*, Berkeley J. Int’l L., Vol. 27, 2009, 448, 450, referring from an interview with the Council’s first Secretary, Loukas Mistelis.

³¹ See Karton and de Germigny, 2009, 45257; Mistelis, Loukas, *CISG-AC Publishes First Opinion*, Pace Int’l L. Rev., Vol. 15, 2003, 453, 45456; CISG Advisory Council, ‘More About Us’, <http://www.cisgac.com/default.php?ipkCat=149&sid=149> [24 February 2016].

³² See <http://www.uniformlaws.org/Committee.aspx?title=Permanent%20Editorial%20Board%20for%20Uniform%20Commercial%20Code> [24 February 2016].

³³ Herber, Rolf, *Eine neue Institution: Der CISG Advisory Council*, IHR, 2003, 201, 202.

les Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.³⁴

The Council has, however, chosen to carry a very 'official-sounding' name. The label 'Advisory Council' is usually reserved for bodies that have been appointed and bestowed with certain powers – and more so than an editorial board. An Advisory Council to a UN Convention may, thus, by its *name* alone demand more authority than it warrants in substance. It is, at least, likely to appear as an official authority to CISG 'newcomers'.

Having claimed this authority, the Council should lead the way in developing a viable uniform interpretation, as it set out to do. Its practice appears inconsistent, however. The first opinions were – in accordance with the premise of a 'follow-up mechanism' – prompted by external requests and dealt with pressing issues that had already arisen.³⁵ The first opinion was, for example, on electronic communication, which as mentioned above had undergone considerable technical development.³⁶

At some point, however, the Council appears to have strayed from its original role and assumed a more activist role. Recently, it has sought to extend the scope of the CISG to include 'new' questions concerning issues in the (generally accepted) non-governed periphery of the CISG. And it presents even the most activist opinions as *lex lata*. One example is the opinion on 'penalty clauses', which is addressed in section 7.1 below.³⁷

The Council's recent practice is difficult to reconcile with the fact that the drafters of the CISG were unable to resolve all problems and therefore left some questions to be governed by domestic law. A private body without a mandate to do so, should not – at least not without an extremely firm basis – extend the reach of the CISG to cover such issues.

In Schlechtriem's 'orchestra' example, the CISG Advisory Council has evolved from the *conductor* of the orchestra to the *composer* – but without approval from all the musicians. Its new tones bring disharmony. As the (probably) most prominent group of interpreters of the CISG, the Advisory Council should take care to safeguard what we have instead of forcing development through overly expansive interpretations.

It makes one recall the words of Justice Story from almost 200 years ago on the powers of the U.S. Supreme Court to interpret an international treaty:

³⁴ The 'disclaimer' says how the council started but does not give any information about the current status. It would be less ambiguous to the CISG 'newcomer' if the disclaimer stated that the Council *is* a private initiative.

³⁵ Karton and de Germiny, 2009, 46970.

³⁶ CISG-AC Opinion No. 1, *Electronic Communications under CISG*, 2003.

³⁷ CISG-AC Opinion No. 10, *Agreed Sums Payable upon Breach of an Obligation in CISG Contracts*. CISG-AC Opinion No. 10, *Agreed Sums Payable upon Breach of an Obligation in CISG Contracts*. Rapporteur: Pascal Hachem, 2012.

‘In the first place, this Court does not possess any treaty making power. That power belongs by the Constitution to another department of the government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this Court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter, and having found that, our duty is to follow it as far as it goes, and to stop where that stops – whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the [agreement]. It is a high act of sovereignty – as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the governments. The treaty does not leave it to the discretion of either party to annex the [agreement]; it requires it to be the joint act of both, and that act is to be expressed by both parties in the only manner known between independent nations [. . .].’³⁸

Although this quote is old and too dismissive of dynamic interpretation (from a modern-day perspective), it still contains grains of wisdom. If the courts question their mandate *to develop* the law – and settle for *finding* and *applying* the law, what claim can a private body make?

To add some transparency to the Council’s practices and methodology, I would encourage it to render an opinion on how it envisions that a uniform interpretation of the CISG can be achieved.

7. Examples of (too) extensive interpretations

Now we turn to two examples of extensive interpretation that, in my opinion, go too far. They are not intended as in-depth analyses but as examples of the creeping scope of the CISG and its drawbacks.

7.1. Penalty clauses

Some sales contracts contain a clause that entitles one of the parties to a fixed sum if the other party breaches the contract. Such clauses are divided into two categories distinguished by whether the clause contains a genuine estimate of the possible loss (‘liquidated damages’), or whether the clause aims to deter a breach (‘penalties’). Focus is here on the latter: the ‘penalty clauses’.

A famous penalty clause is the usurer Shylock’s entitlement to ‘a pound of flesh’ in *Shakespeare’s ‘The Merchant of Venice’*. When payment was late, Shylock demanded – in accordance with the contract – his fine: a pound of flesh (from the Mer-

³⁸ *The Amiable Isabella*, 19 U.S. 1, 7172 (1821); cited by Justice Scalia in: *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989).

chant, Antonio's breast). This marks one of the play's ethical conundrums: does the (contractual) right to property go before the right to human existence? Most would agree, of course, that it would be absurd to kill a man over a breach of a loan contract. In this play, *Shakespeare* takes the concept of contractual penalties to the extreme, but he illustrates the necessity of (some) policing of these clauses.

The different domestic laws show varying acceptance of clauses that stipulate that a fixed sum is payable in case of a breach. Clauses on liquidated damages are generally acceptable. Clauses with punitive elements are, as a rule, enforced in civil law jurisdictions (within certain boundaries), while courts in common law jurisdiction normally refuse to enforce clauses that act *in terrorem*, e.g. Section 2-718(1) UCC.³⁹

Penalty clauses can also be found in CISG contracts. It was, however, already established in the Secretariat Commentary that the reasonableness aspect of penalty clauses is characterised as concerning *validity*:

'All legal systems appear to recognize the validity and social utility of a clause which estimates future damages, especially where proof of actual damage would be difficult. However, while some legal systems approve of the use of a "penalty clause" to encourage performance of the principal obligations, in other legal systems such a clause is invalid. Article 42 [Article 46 CISG] does not have the effect of making such clauses valid in those legal systems which do not otherwise recognize their validity.'⁴⁰

This characterisation – as a validity question outside the scope of the CISG – was so certain after the conference in Vienna that UNCITRAL sought to remedy the shortcoming by preparing the 'Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance' in 1983.⁴¹ However, these rules have not seen wide-spread prevalence.

Although the relation between penalty clauses and the CISG was very clear from the outset,⁴² it was later challenged by scholars.⁴³

³⁹ See, e.g. Graves, Jack, *Penalty Clauses and the CISG*, *J.L. & Com.*, Vol. 30, 2012, 153, 166-71; Honnold, 2009, Article 74, para. 408.1, for comparative analyses of the problem.

⁴⁰ Secretariat, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, UN DOC. A/CONF. 97/5 (Reprinted *Official Records*, 1466), 1979, Article 42, para. 10.

⁴¹ See 'Report of the Secretary-General: revised text of draft uniform rules on liquidated damages and penalty clauses', UNCITRAL Yearbook XIV, 1983, 2231, 20274; 'Report of the United Nations Commission on International Trade Law on the work of its sixteenth session' UN Doc No. A/CN.9/243, 1983, 620, Annex I and II.

⁴² Đorđević, in: Kröll, Mistelis, and Perales Viscasillas, 2011, Article 4, para. 26, with references to case law; Honnold, 2009, Article 74, para. 408.1; Ferrari, in: Ferrari, Franco, Flechtner, Harry and Brand, Ronald A. (Eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, Seiller, München, 2004, 106, with references to case law.

⁴³ E.g. Zeller, Bruno, *Penalty Clauses: Are they Governed by the CISG?*, *Pace Int'l L. Rev.*, Vol. 23, 2011, 1; Hachem, Pascal, *Fixed Sums in CISG Contracts*, *Vindobona J. Int'l Comm. L. & Arb.*,

In 2012, the CISG Advisory Council weighed in on the issue, and the opinion they gave is illustrative of the possible issues and concerns with an expansive interpretation.⁴⁴ The Advisory Council began with the conventional wisdom: that the CISG governs the incorporation and interpretation of penalty clauses.⁴⁵ On the question of validity, it stated:

‘The CISG does not exclude provisions on the protection of the obligor of the otherwise applicable law or rules of law, except for form requirements.’⁴⁶

This would lead one to imagine that all is well in the garden. But the Advisory Council went further – and onto thin ice:

‘Provisions on the protection of the obligor of the otherwise applicable law or rules of law relying on notions such as reasonableness, excessiveness or proportionality must be applied in accordance with an international standard. This standard must be developed from the underlying principles of the CISG.’⁴⁷

It does make perfectly good sense to include the international nature of the contractual relationship as a parameter in the assessment of the clause’s reasonableness. But it has to happen in the manner and to the extent envisioned under the applicable domestic law.⁴⁸

The Advisory Council essentially says that the CISG has a deciding influence on the interpretation of domestic validity rules. In other words, when the contract itself is off limits, the CISG can instead decide the interpretation of the rule(s) in domestic law, under which the contract is assessed. There is simply no sufficient legal basis for this – it is too far.

Article 7(1) CISG prescribes that the CISG must be interpreted *autonomously*; i.e. isolated from domestic law. Most domestic laws would probably adopt the same scepticism toward being interpreted by the rules of the CISG.⁴⁹

A few courts have hinted at the existence of limits to the party autonomy under the CISG. The leading case appears to be from the Supreme Court of Austria, which stated that a contractual clause may not derogate from the ‘core values (‘Grundwer-

Vol. 13, 2009, 217; Hachem, Pascal, *Agreed Sums in CISG Contracts*, Belgrade L. Rev., Vol. 59, 2011, 140; Schwenger/Hachem, in: Schwenger and Schlechtriem, 2010, Article 4, para. 44.

⁴⁴ *CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts*, 2012.

⁴⁵ *Ibid.*, para 1.

⁴⁶ *Ibid.*, para 3.

⁴⁷ *Ibid.*, para 4(a).

⁴⁸ Cf. *ibid.*, cmnt 4.2.1 (‘Thus, where purely domestic provisions are needed to supplement this part of the law it makes sense to interpret them in a way so as to reflect the international dimension of this area of the law.’)

⁴⁹ *Accord Graves*, 2012, 15960.

tungen") of the CISG'.⁵⁰ If the CISG limits party autonomy, it does only that – it sets boundaries. It does not necessarily create a CISG standard that overrules domestic validity rules in general.⁵¹

Nevertheless, if an 'international standard' purportedly applicable under domestic law was not enough, the Advisory Council continues:

'In an international context, agreed sums do not fail such provisions on the sole grounds that they compel the obligor to perform.'⁵²

So, the Advisory Council not only claims that the CISG influences the interpretation of domestic law. It effectively dismisses the significance of the common law's general dismissal of penalty clauses and creates a new 'rule'. To substantiate this rule, the Council offers a comparative analysis arriving at the result that the common law position has been toned down in recent years.⁵³ According to the Council, the common law position should therefore count with less or no weight in the 'global discord'. And, when one leaves out the common law position, there appears to be international agreement on the civil law approach.⁵⁴

But the CISG Advisory Council lacks the authority to proclaim the death of domestic laws or to discount their significance – and even more so when it is based on a perceived tendency.⁵⁵ Moreover, the premise for the argument is not persuasive. When, in the face of criticism, the courts in common law jurisdictions continue to strike down clauses with punitive elements, it speaks more to the vitality of the position than to its death.

One cannot help getting the feeling that the Council was determined that these clauses should be included under the ambit of the CISG and then worked its way 'backwards' to find justification for that position. But a solution is not to be found in the CISG, and the Council's argumentation is, accordingly, unpersuasive.

What is, then, the impact of the Advisory Council's opinion on the 'predictability' under the CISG? That could be tested by asking the following question: What lawyer would feel comfortable in advising a US client that her penalty clause is certain to be enforced if the CISG applies? I would not – it is simply too unpredictable. So, instead of having uniform acceptance that the issue is outside the scope of the CISG, we now

⁵⁰ Oberster Gerichtshof 7 September 2000, Translation by Arensmann, Florian and Nagel, Daniel available at <http://cisgw3.law.pace.edu/cases/000907a3.html> [24 February 2016].

⁵¹ *Contra* Oberlandesgericht Zweibrücken 31 March 1998.

⁵² *CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts*, 2012, para. 4(b).

⁵³ *Ibid.*, cmnt 4.3.36.

⁵⁴ *Ibid.*, cmnt 4.3.78.

⁵⁵ Lookofsky, Joseph and Flechtner, Harry, *Zapata Retold: Attorney's Fees Are (Still) Not Governed by the CISG*, J.L. & Com., Vol. 26, 200607, 1, 57; compare Schwenger/Hachem, in: Schwenger and Schlechtriem, 2010, Article 4, para. 5.

learn from a prominent source that this is no longer the case. This expansion of the scope does not further harmonisation, instead it brings ‘unpredictability’.

To conclude in the words of *Graves*, who has expressed it so elegantly:

‘The issue of fixed sums is an important one in international transactions in goods. As such, it seems quite reasonable to suggest that a uniform approach to the treatment of agreements for fixed sums is desirable. However, a single uniform approach across divergent legal systems today remains elusive, and any effort to bridge this divide by reference to the CISG is quite simply “a bridge too far.”’⁵⁶

7.2. Set-off

The question of balancing opposing claims – ‘set-off’ – may appear straightforward at first glance. It is, however, an *extremely* different concept around the world and basically impossible to harmonise. The vast majority has therefore traditionally considered the issue as not ‘governed’ by the CISG.⁵⁷ Nevertheless, academics have since developed a *full set-off regime* from the CISG and its underlying principles (though only to set-off within the CISG regime).⁵⁸

The differences among the world’s jurisdictions run as deep as the characterisation of the problem. It is, for example, considered a procedural issue in the UK and substantive in Germany, France and the Nordic countries. In France, set-off generally happens automatically depending on the circumstances – while set-off must be declared under German law, where it takes effect *ex tunc*. It must also be declared under the Nordic laws, but there it operates *ex nunc*.

It would seem impossible to bridge these differences as they are, and if we add the international setting, we may also face issues of jurisdiction over the (counter) claim and different currencies.

But such global disagreement is apparently not a hindrance to constructing a solution – if the resolve is strong enough. The set-off regime under the CISG is constructed differently than the ‘rule’ on penalty clauses described above. Instead of building on (perceived) international consensus, the solution is developed from the CISG itself and its underlying *general principles*.

⁵⁶ Graves, 2012, 172.

⁵⁷ Đorđević, in: Kröll, Mistelis, and Perales Viscasillas, 2011, Article 4, paras. 3839; Ferrari, in: Ferrari, Flechtner, and Brand, 2004, 10708, both with references to case law.

⁵⁸ Magnus, Ulrich, *Staudinger*, 2013, Article 4 CISG, paras. 4647; *Compare* Đorđević, in: Kröll, Mistelis, and Perales Viscasillas, 2011, Article 4, paras. 4041; Schwenzer/Hachem, in: Schwenzer and Schlechtriem, 2010, Article 4, paras. 2728; *compare also* Fountoulakis, Christiana, *Possibilities of Deduction and Set-off Under the CISG*, presentation available at http://www.cisgbasel2015.com/index_htm_files/11_ppt¬es_Christiana%20Fountoulakis_Possibilities%20of%20Deduction%20and%20Set-off%20Under%20the%20CISG.pdf [24 February 2016].

I shall not go into detail with the specific requirements for set-off under the CISG here.⁵⁹ In short, the procedural/substantive divide is solved by the fact that the CISG does not govern procedural issues – and consequently, since set-off “must be” governed by the CISG, it can only be characterised as a substantive problem (a somewhat circular reasoning). The content of the CISG set-off regime can then be deduced from a number of articles in the CISG (that appear cherry-picked for the occasion) that a set-off must be *declared* under the CISG and that it takes effect *ex nunc*.⁶⁰

What are my reservations to including set-off under the ambit of the CISG? First of all, the CISG is not a legal system that must be able to produce an answer to all questions – it is a sales act with the limitations that this entails. The CISG does not mention set-off. It is therefore unlikely that a business, a lawyer, or a judge would arrive at this solution from reading the CISG text – or even imagine that it is there and begin to look for it. And did the contracting states agree to this when they signed and ratified the CISG? It requires *considerable constructive effort* to arrive at the proposed set-off regime, and that in itself is problematic. A law can hardly be classified as predictable if it takes a professor to tell it.

Second, a set-off does not only have effects *inter partes*, it may also have implications for third parties and in other areas of law. And considering the different concepts of set-off in domestic laws around the world, it can be hard to foresee the interplay. Set-off affects, for example, the order of priority in insolvency proceedings. The test is again: would a lawyer feel comfortable advising a client that a French or UK bankruptcy court is going to recognise that set-off is a substantive issue governed by the CISG and that it requires a declaration?

Most would not. But today, German lawyers actually might – if the suit is brought in Germany. The German Supreme Court has recently accepted the proposed *set-off regime* in the CISG.⁶¹ Now the previously (uniform) exclusion of the issue has been disrupted, and it is uncertain whether or not a court in another country will follow the approach.

The CISG Advisory Council is currently working on an opinion on ‘set-off’.⁶²

8. Conclusions and perspectives

The CISG is a *contract and sales act*. It is not a full ‘law of obligations’ – it is simply not meant to regulate everything. So while the text of the CISG may show enough

⁵⁹ See Magnus, Ulrich, *CISG and Set-off*, in: Andersen, Mads Bryde and Henschel, René Franz (Eds.), *A Tribute to Joseph M. Lookofsky*, DJØF Publishing, Copenhagen, 2015, 25369.

⁶⁰ This relies on arguably comparable mechanisms found in Articles 58(1), 81(2), and 88(3) CISG.

⁶¹ Bundesgerichtshof 24 September 2014 (CISG-Online 2545); 14 May 2014 (CISG-Online 2493); 21 January 2015 (CISG-Online 2596).

⁶² CISG Advisory Council, ‘Schedule of Work’, <http://www.cisgac.com/default.php?ipkCat=133&sid=133> [24 February 2016].

flexibility to address ‘foreign’ issues, the question is whether it should. Dynamic interpretation is one thing, and it definitely has its uses, but expanding the scope of the CISG is another.

The lesson from project management is that one should consider whether changes that cause the scope to ‘creep’ actually end up sacrificing the main objective in favour of the new goals. The potential ‘users’ of the CISG generally seek certainty and predictability, but extensive interpretation often causes the opposite. One may argue that businesses still choose, for example, Swiss law even though it may produce less predictable results than the CISG – but that is not an argument for adding to the uncertainty under the CISG.

The two examples in the preceding section – penalty clauses and set-off – show that the current development is driven by the more activist voices. But if part of the CISG community sets a pace that leaves everyone else lagging behind, the unity is jeopardized. Right now, not only the ‘slowest’ are affected – the vast majority of contracting states appear to be. In that sense, it is problematic that a prominent group of commentators in the form of the Advisory Council is at the forefront of extensive interpretation and sometimes acts on less than a firm foundation.

If the current trend continues, we may see the global uniformity diminish in favour of *regional* predictability (decided by whether or not the courts are receptive to ‘new’ solutions) – and the *forum shopping* that invariably follows.⁶³ The academic accomplishment of a theoretically expanded harmonisation may end up reducing the practical usability of the CISG (except for those who fail to opt out).

It may be, for lack of a better word, ‘outdated’ or ‘boring’ to stick closer to the wording of the CISG. But the ‘users’ cannot be satisfied with a situation where a professor spends several years to develop an answer to a problem that is tangential to the CISG. It is uncertain whether the ‘new’ solution will resonate with the courts, and again the predictability of the law suffers.

I would therefore recommend that the more dynamically inclined ones show a bit of restraint. Essentially, if you have to look hard to find a solution within the boundaries of the CISG, it is probably not there.

⁶³ See, e.g., Steensgaard, Kasper, *A Comparative View on “Battle of the Forms” under the CISG and in the German and US American Experiences*, *Nordic J. Com. L.*, #1, 2015, on how the issue of *battle of the forms* has spawned regional solutions.