

Prof. L.A. DiMatteo\* en Mr. A.U. Janssen\*\*

# Interpretive uncertainty: methodological solutions for interpreting the CISG

## 1. INTRODUCTION

Nowadays, writing about the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) requires justification due to the impressive number of publications in numerous languages dedicated to this issue.<sup>1</sup> Indeed, in reading the very long list of articles on the interpretation of the CISG one is reminded of a quotation from the famous German comedian Karl Valentin (1882-1948): ‘*Es ist schon alles gesagt, nur noch nicht von allen.*’<sup>2</sup> So why write another article on a subject when it seems that everything has already been said? Following Valentin’s reasoning, one could argue that the interpretation of the CISG has thus far not been reviewed by American and German legal scholars in a collaborative work. The list of authors who have written on this topic should therefore be slightly longer. In the best case, this collaboration will provide some ad-

ditional insights into the interpretation of the CISG and whether the interpretive methodologies differ between common and civil law countries. Despite some differences, it is likely that we will find similar interpretive methodologies being applied.<sup>3</sup>

Given the still evolving jurisprudence and unresolved issues relating to the CISG, CISG scholarship in the area of interpretation has not yet reached the level indicated by Valentin’s adage – not everything has already been said on the subject. A closer look at the scholarly literature on the CISG shows a surprising disconnect between the almost universal recognition of the interpretive aims and principles under Article 7(1) CISG (the so-called

\* Prof. L.A. DiMatteo, PhD, Huber Hurst Professor of Contract Law & Legal Studies, Warrington College of Business Administration, University of Florida (USA).

\*\* Mr. A.U. Janssen, PhD is a Senior Research Fellow at the Centre for European Private Law (CEP) in Münster (Germany). Currently, André U. Janssen’s research at the University of Turin (Italy) is supported by a Marie Curie Intra European Fellowship within the 7<sup>th</sup> European Community Framework Programme.  
Part A and B of this contribution are mainly written by André U. Janssen, part C and B by Larry A. DiMatteo.

- See especially on the interpretation of the CISG, Bonell, ‘L’interpretazione del diritto uniforme alla luce dell’art. della Convenzione di Vienna sulla vendita internazionale’, *Rivista di diritto civile* 1986-7, p. 221 et seq.; Cook, ‘The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods’, *U. Pitt. L. Rev.* 1988-50, p. 197 et seq.; De Ly, ‘Uniform Interpretation: What is Being Done? Official Efforts’, in: Ferrari (ed.), *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences*, Milan: Giuffrè/Munich: Sellier 2003, p. 335 et seq.; Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods as uniform sales Law*, Cambridge: Cambridge Univ. Press 2007; Eiselen, ‘Literal Interpretation: The Meaning of the Words’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 61 et seq.; Ferrari, ‘Uniform Interpretation of the 1980 Uniform Sales Law’, *Ga. J. Int’l & Comp. L.* 1994-24, p. 183 et seq.; Ferrari, ‘Gap-filling and Interpretation of the CISG: Overview of International Case Law’, *The Vindobona Journal* 2003-7, p. 63 et seq.; Ferrari, ‘Interpretation uniforme de la Convention de Vienne de 1980 sur la vente internationale’, *Revue internationale de droit compare* 1996, p. 813 et seq.; Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’, *Uniform Law Review* 2000-5, p. 683 et seq.; Gruber, ‘Legislative Intention and the CISG’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 91 et seq.; Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319 et seq.; Happ and Roth, ‘Interpretation of Uniform Law Instruments According to Principles of International Law’, *Uniform Law Review* 1997-2, p. 702 et seq.; Kramer, ‘Uniforme Interpretation von Einheitsprivatrecht – mit besonderer Berücksichtigung von Art. 7 UNKR’, *Österreichische Juristische Blätter* 1997, p. 137 et seq.; Koneru, ‘The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles’, *Minn. J. Global Trade* 1997-6, p. 105 et seq.; Magnus, ‘General Principles of UN-Sales Law’, *International Trade and Business Law Annual* 1997-3, p. 33 et seq.; Rizzi, ‘Interpretazione e integrazione della legge uniforme sulla vendita internazionale di cose mobili’, *Rivista di diritto privato* 1997, p. 237 et seq.; Schlechtriem, ‘Interpretation, gap filling and further development of the UN Sales Convention’, *Pace Int’l Law Review* 2004-16, p. 279 et seq.; Schmid, *Einheitliche Anwendung von internationalem Einheitsrecht*, Baden-Baden: Nomos 2004; van Alstine, ‘Dynamic Treaty Interpretation’, *University of Pennsylvania Law Review* 1998-146, p. 687 et seq.; Volken, ‘The Vienna Convention: Scope, Interpretation and Gap-Filling’, in: Sarcevic and Volken (eds.), *Dubrovnik Lectures 1985*, New York: Oceana 1986, p. 19 et seq.; Veneziano, ‘Uniform Interpretation: What is Being Done? Unofficial Efforts and Their Impact’, in: Ferrari (ed.), *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences*, Milan: Giuffrè/Munich: Sellier 2003, p. 325 et seq.; Zeller, ‘Four Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods’, available under [www.cisg.law.pace.edu/cisg/biblio/4corners.html](http://www.cisg.law.pace.edu/cisg/biblio/4corners.html).
- To be found under [www.karl-valentin.de/zitate/zitate.htm](http://www.karl-valentin.de/zitate/zitate.htm). The English translation would be: ‘everything has already been said, but not by everybody’.
- The German theologian and academic, Adolf von Harnack (1851-1930) noted some 115 years ago: ‘Geographically, America is for us (the Germans) among civilised countries the most distant; intellectually and spiritually, however, the closest and most like us.’ The quote can be found in Stern, *Einstein’s German World*, Princeton: Princeton University Press, 3rd edition, 1999, p. 4.

‘Auslegungsziele’ or ‘Auslegungsprinzipien’)<sup>4</sup> – the regard of the international character of the CISG, the need to promote uniformity and the observance of good faith in international trade – and the variety or divergence in the methods of interpretation (the so-called ‘Auslegungsmethode’) used in the application of the guiding principles of Article 7(1) CISG.<sup>5</sup> Since the CISG (unlike the ‘Auslegungsziele’) is silent about the ‘Auslegungsmethode,’ it appears that the majority of the authors analyse the application of these general principles in a similar way.<sup>6</sup> It is quite remarkable that while there are several outstanding contributions on the methods of interpretation at the national law level<sup>7</sup> and, in the meantime, also on a European level<sup>8</sup>, there is scant literature on the methodological aspects for interpreting the CISG.<sup>9</sup> It goes without saying that a lack of development and consensus over CISG interpretive methodologies endangers the interpretive aims of the CISG under Article 7(1) CISG and the functioning of the CISG as a whole.<sup>10</sup> Under the CISG, the absence of a fully developed and uniform basis of interpretation is especially problematic because of the lack of a unifying supranational appellate court system. In addition, the national courts have failed to develop autonomous interpretive methodologies for interpreting and

applying the CISG. Instead, they predominantly apply, without further consideration, their own national interpretive methods to disputes subject to the CISG.<sup>11</sup> Metaphorically speaking, one could also conclude: if one does not know the way to reach a particular (known) place it seems unlikely that this place can ever be reached. Or, if reached, the likelihood of finding it on a consistent basis becomes even more remote.

Thus, it becomes apparent from the foregoing that in contrast to Karl Valentin – and fortunately for every legal scientist – not everything has been said about interpretation of the CISG. This article will focus on the methodological questions relating to the interpretation of the CISG. Due to the fact that the authors are from the United States and Germany, and therefore have different legal backgrounds, it is clear that the CISG methodology will be viewed from different perspectives. Despite a conscious attempt to be detached, a certain degree of ‘methodological homeward trend’ will creep into the

4. Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 10 speaks of ‘interpretative principles of the CISG’; Schwenzler and Hachem, in: Schwenzler (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 para. 6 et seq. (‘guidelines for the interpretation of the Convention’ or ‘principles of interpretation’).
5. Other conventions, model rules or uniform law projects have the same or similar interpretive aims. See e.g. Article 2 of the 2008 UN Convention for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules); Article 2A(1) UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006); Article 6(1) of the 1988 UNIDROIT Convention on International Financial Leasing (Ottawa); Article 4(1) of the 1988 UNIDROIT Convention on International Factoring (Ottawa); Article 1.6(1) of the 2004 UNIDROIT Principles of International Commercial Contracts. See also the latest Article 4(1), annex 1, of the Common European Sales Law (CESL) which states that ‘The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.’ For further examples see Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’, *Uniform Law Review* 2000-5, p. 683, 685; Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen: Mohr Siebeck 2004, p. 119 et seq.; Schwenzler and Hachem, in: Schwenzler (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 6 footnote 14.
6. It is ‘common understanding’ that the CISG does not govern the methods of interpretation. See e.g. Ferrari, in: Schlechtriem and Schwenzler (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 8, 28; Ferrari, ‘Uniform Interpretation of the 1980 Uniform Sales Law’, *Ga. J. Int’l & Comp. L.* 1994-24, p. 183, 200: ‘this choice is not one of interpretative technique or method, but rather one of policy’; Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’, *Uniform Law Review* 2000-5, p. 683, 685; ‘the rule (Article 7(1) CISG) does not appear to answer any methodological question’; Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen: Mohr Siebeck 2004, p. 119; Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 322; Huber and Mullis, *The CISG*, Munich: Sellier 2007 p. 9 (‘guidelines’); Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier, 2009, p. 33, 40: ‘Taken seriously Art. 7(1) CISG formulates aims rather than a precise method of interpretation.’ Melis, in: Honsell (ed.), *Kommentar zu UN-Kaufrecht*, Heidelberg: Springer, 2nd edition, 2010, Article 7 CISG para. 3, 10; Schwenzler and Hachem, in: Schwenzler (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 20.
7. See for Austria, Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, Vienna et al.: Springer, 2nd edition, 1991; for England, Bennion, *Statutory Interpretation: A Code*, London et al.: Butterworth, 4th edition, 2002; for France, Gény, *Méthode d’interprétation et sources en droit privé positif*, 2 volumes, Paris: F. Pichon et Durand-Auzias, 2nd edition, 1919; for Germany, Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin et al.: Springer, 6th edition, 1991; for the Netherlands, Wiarda, *Drie typen van rechtsvinding*, Deventer: Tjeenk Willink, 1999; for Switzerland, Kramer, *Juristische Methodenlehre*, Berne: Stämpfli, 2nd edition, 2002; for the USA, Dickerson, *The Interpretation and Application of Statutes*, Boston, MA: Little Brown & Company 1975; Eskridge, *Dynamic Statutory Interpretation*, Cambridge, MA: Harvard University Press 1994. From a comparative law perspective, Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009; Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 45 et seq.; Lundmark and Suelmann, ‘Der Umgang mit Gesetzen im europäischen Vergleich’, *Zeitschrift für Rechtsvergleichung* 2011-52, p. 173 et seq.
8. See e.g. Langenbacher, ‘Europäische Methodenlehre’, in: Langenbacher (ed.), *Europarechtliche Bezüge des Privatrechts*, Baden-Baden: Nomos, 2nd edition, 2008, p. 3 et seq.; Riesenhuber (ed.), *Europäische Methodenlehre*, Berlin: De Gruyter 2010.
9. See, however, Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen: Mohr Siebeck 2004. Generally on the CISG methodology, Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009.
10. Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 59: ‘a uniform method of interpretation is indispensable in order to achieve and further the unification purpose of the Convention.’
11. This view is also shared by Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen: Mohr Siebeck 2004, p. 61.

analysis – hopefully, to a minimal extent.<sup>12</sup> This contribution will not be concerned with the interpretative aims under Article 7(1) CISG, nor will it analyse the interpretation of statements according to Article 8 CISG or the gap-filling mandate of Article 7(2) CISG. The focus here is the development, or lack of development, of CISG interpretive methodologies, or, put another way, the development or use of existing interpretive methodologies in the interpretation of the CISG. Even though Articles 7(1), 7(2), and 8 CISG may be relevant to this analysis, we are more interested in the different interpretive methodologies that can be applied to the CISG.

The first part of the contribution will begin with the use, from a civil law perspective, of the ‘traditional’ domestic methods for the interpretation of statutes: (1) grammatical (or literal) interpretation, (2) systemic interpretation, (3) historical interpretation, and (4) teleological (or purposive/dynamic) interpretation. In addition, the relative ‘weight’ of these four methods and their appropriateness in interpreting the CISG will be analysed. The second part will then leave the area of the four aforementioned traditional methods of interpretation and focus on further methodological tools for interpreting the CISG, including analogical reasoning, comparative law analysis, economic analysis, contextualism, use of scholarly commentary, reasoning from soft law, good faith interpretation and interpretation from party-generated rules. The contribution finishes with a short conclusion.

## 2. THE USE OF THE TRADITIONAL NATIONAL METHODS FOR THE INTERPRETATION OF THE CISG

### 2.1. The Need for a ‘Blend’ of Different National Methodologies

Article 7(1) CISG requires an autonomous interpretation of the CISG.<sup>13</sup> From this it follows that the applied method of interpretation within the sphere of application of the CISG must be autonomous, too.<sup>14</sup> Thus, it is not possible to directly resort to national methodology to interpret the CISG even if this often seems (mostly unwittingly) to be the case in jurisprudence and legal doctrine. As the CISG remains silent on *how* to reach the autonomous interpretation and considering the fact that a uniform and common international methodology for the interpretation has not yet been completely developed,<sup>15</sup> the question arises as to what parameters are relevant in order to interpret the CISG. Despite what has been said before there is no ‘*tabula rasa*’ concerning the methodology found within the CISG. The user of the CISG does not have to fear being left alone in the labyrinth of international sales law with no guidance whatsoever. Even though it is accepted that direct recourse by a judge to his own national methodology is prohibited, it is, however, acknowledged that the *sum* of the national methodologies can be used as an ‘*Erkenntnisquelle*’ (‘source of insight’) and ‘*Orientierungshilfe*’ (‘aid to orientation’) for the development of an international CISG methodology.<sup>16</sup> The reasoning is that despite all the differences between the national methodologies (e.g. with regard to the different terminology or the value of a particular interpretative method) they follow a similar logical basic

12. See for this ‘methodological homeward trend’ Janssen and Meyer, ‘Foreword’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009: ‘Although Art. 7 of the CISG underscores this “need to promote uniformity in its application”, the CISG itself gives very little guidance as to how to reach this goal. Without such guidance, however, each lawyer might be guided by the methodological rules that he is familiar with from his home jurisdiction.’
13. Sometimes, instead of the word ‘interpretation’, one can find the term ‘construction’. They are often used synonymously. See more detailed and with further references Garner (ed.), *Black’s Law Dictionary*, St. Paul, MN: West, 9th edition, 2009, p. 355. The dictionary says that construction is ‘(t)he act or process of interpreting or explaining the sense or intention of a writing (usu. a constitution, statute, or instrument) (...)’ Thus ‘(t)here is no explanation of the distinction between interpretation and construction (...), nor can it be inferred from the matters dealt with under each head. The distinction (...) lacks an agreed basis.’ (Garner (ed.), *Black’s Law Dictionary*, St. Paul, MN: West, 9th edition, 2009, p. 355 quoting Cross, *Statutory Interpretation*, 1976, p. 18). For this article the term ‘interpretation’ will be used as it is much more common under the CISG.
14. Ferrari, in: Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 29; Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen: Mohr Siebeck 2004, p. 60 (‘*Postulat einer eigenständigen Methodenlehre*’), 80; Gruber, ‘Legislative Intention and the CISG’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 91, 95; Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84; Schwenger and Hagem, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 20.
15. The same opinion is also shared by Ferrari, in Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 29. See also Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84.
16. Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen: Mohr Siebeck 2004, p. 67. See also Ferrari, in: Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 29; Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84; Schwenger and Hagem, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 20: ‘They (the national methods to be used for interpretation) may (...) help in interpreting the Convention, unless they conflict with the maxims of Article 7(1).’

rule of reasoning.<sup>17</sup> If there appears to be a form of ‘methodological minimum common understanding’<sup>18</sup> among national laws in the world, there is no reason not to make use of this common understanding for interpretation of the CISG, as long as one does not just use one’s own national methodology. The use of traditional national methodologies for interpreting the CISG derives from the principle of the *Natur der Sache* (‘nature of things’).<sup>19</sup> Or, to express it in a nutshell using the words of Professor De Ly: ‘Uniform interpretation creates a new methodology in which different interpretation techniques from different legal traditions are being blended.’<sup>20</sup> But what would such a ‘blend’ of different national methodologies look like? What ingredients can be taken from national legal systems for a useful international methodological tool for the interpretation of the CISG?

## 2.2. The National Methodologies in a Nutshell

Indeed, it would exceed the scope of this contribution to undertake in-depth research on the different national methods regarding the interpretation of statutes and to ‘filter’ their similarities to prepare the optimal ‘blend’ for the CISG.<sup>21</sup> Thus, a very short illustration must be sufficient. The ancient roots of legal interpretive methodology – at least in continental Europe – can be found in Roman law.<sup>22</sup> The reception of Roman law allowed for its interpretive rules to play an important role in the development of national methodologies in civil law countries. However, in talking about the interpretive rules of Roman law, one should not be deceived: it is true that the Roman jurists developed ‘the fine art of law finding’, and it is also true that the interpretation of statutes under Roman law contained grammatical and systemic elements, too.<sup>23</sup> Nonetheless, it would go too far to say that the

Romans had a fully developed methodology to interpret legal statutes like the Western legal systems have today.<sup>24</sup> The foundation for the modern interpretive methodology in Germany was laid down by Friedrich Carl von Savigny, perhaps Germany’s most famous legal scholar, in the early to mid-nineteenth century. Von Savigny developed the so-called *Viererkanonlehre*<sup>25</sup> which is (with some later variations) still by far the most influential and leading methodology used in Germany to interpret legal statutes. Thus, in German law (even though the draftsmen of the *Bürgerliches Gesetzbuch* refrained from drawing up special rules on statutory interpretation) one can find four different methods of interpretation: grammatical (textual), historical, systemic and teleological.<sup>26</sup> Teleological interpretation can be divided into subjective-teleological and objective-teleological interpretation methods.<sup>27</sup> Subjective-teleological interpretation is based upon the uncovering of legislative intent at the time of drafting and to a certain extent overlaps with the historical interpretation method. In Germany, the more popular objective-teleological interpretation looks instead at the intention of the article and statute in question and, lastly, at the intention of the whole legal system or a subpart (such as contracts, torts and so forth). A comparative law approach as a ‘fifth interpretive method’ for interpreting German law – as proposed by Konrad Zweigert<sup>28</sup> and other scholars<sup>29</sup> – has so far not been recognised as an

17. Ferrari, in Schlechtriem and Schwenzler (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 29; Schwenzler and Hachem, in: Schwenzler (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 20; ‘their methods no longer fundamentally differ from each other’; van Alstine, ‘Dynamic Treaty Interpretation’, *University of Pennsylvania Law Review* 1998-146, p. 687, 740: ‘substantial agreement’.

18. E.g. it would be very difficult to find a national methodology on interpretation whereby the grammatical or the systemic interpretation has no meaning whatsoever (even though there might be differences in the value of the different interpretive methods).

19. Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84.

20. De Ly, ‘Uniform Interpretation: What is Being Done? Official Efforts’, in: Ferrari (ed.), *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences*, Milan: Giuffrè/Munich: Sellier 2003, p. 335, 344. Another question is whether the Vienna Convention on the Law of Treaties from 1969 can be applied to interpret the CISG beside the aforementioned ‘blend’ of different national methodologies (for more detail, see part C. V. of this contribution).

21. For in-depth research about the different methodologies see Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009; Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 45 et seq; Torsello, *Common Features of Uniform Commercial Law Conventions- A Comparative Study Beyond the 1980 Uniform Sales Law*, Munich: Sellier 2004, p. 157 et seq. More general on the interpretation of international uniform law Linhart, *Internationales Einheitsrecht und einheitliche Auslegung*, Tübingen Mohr Siebeck 2005, p. 33 et seq.

22. See, for more details, Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 5 et seq.; Zimmermann, ‘Europa und das römische Erbe’, *Archiv für die civilistische Praxis* 2002-202, p. 243, 303 et seq.

23. Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 12.

24. Lundmark and Suelmann, ‘Der Umgang mit Gesetzen im europäischen Vergleich’, *Zeitschrift für Rechtsvergleichung* 2011-52, p. 173, 184; Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent, Volume I*, Tübingen: Mohr Siebeck 2001, p. 433 et seq.

25. von Savigny, *System des heutigen Römischen Rechts, Volume I*, Berlin: Veit und Comp. 1840, p. 212 et seq.

26. Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 54 et seq.; Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin et al.: Springer, 6th edition, 1991, p. 320 et seq.

27. Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 322; Gruber, *Methoden des internationalen Einheitsrechts*, Tübingen: Mohr Siebeck 2004, p. 183 et seq.; Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin et al.: Springer, 6th edition, 1991, p. 328 et seq.

28. Zweigert, ‘Rechtsvergleichung als universelle Interpretationsmethode’, *Rabelszeitung* 1949/1950-15, p. 1, 8.

29. See e.g. Häberle, ‘Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – zugleich zur Rechtsvergleichung als “fünfter” Auslegungsmethode’, *Juristenzeitung* 1989, p. 913, 916 et seq.

appropriate interpretive methodology.<sup>30</sup> In addition, other nations of the German legal tradition, such as Austria (see §§ 6, 7 ABGB) and Switzerland (see Article 1 Swiss ZGB),<sup>31</sup> follow, in principle, the four aforementioned interpretative methods.<sup>32</sup> However, comparable methods for the interpretation of legal statutes can also be found in countries with a Roman legal tradition. Some countries from the non-German, Roman legal tradition have explicit rules on the method of statutory interpretation which lay down similar rules to those aforementioned countries with a German legal tradition (such as Italy in Article 12 of the Disposizioni sulla legge in generale of the Codice civile of 1942<sup>33</sup> and Spain in Articles 3 and 5 of the Código civil of 1889).<sup>34</sup> Other countries, such as France, do not foresee any explicit rule on interpretative methodology. However, even in these countries, the four traditional methods are an important part of legal reasoning, although sometimes shrouded in different terminology.<sup>35</sup>

Traditionally, the biggest difference in interpretive methodology exists between the civil law and common law systems, as compared to differences across civil law countries. Nonetheless, in spite of these differences, it seems that the gap between them is not as large as it appears. Often, differences in terminology and approaches hide the fact that the final results are often the same or at least similar.<sup>36</sup> Unlike in the civil law system, the

common law world does not possess a comprehensive codification or civil code. Contract law is primarily the product of case law, along with some statutory regulation. Comparing the interpretive methodology in England (which is not a Member State of the CISG), there is a similar starting point with continental European methodology – an examination of the wording of the article. Interpretation based upon ordinary meaning of the words is known in England as the ‘literal rule’ or ‘plain meaning rule’.<sup>37</sup> The literal rule also requires that consideration be given to the context in which the ambiguous article was written or applied.<sup>38</sup> Ultimately, the literal rule combines the grammatical and the systemic interpretation methodologies found in civil law countries.<sup>39</sup> Beginning in the middle of the last century, the purposive approach has gained more weight amongst English judges.<sup>40</sup> Even though the literal rule is still the most important interpretative tool, English courts now attach more importance to the purpose of a statute. The purposive approach is similar to continental teleological interpretation. For many years, consideration of the *travaux préparatoires* for the interpretation of statutes was the domain of civil law. In England, such a practice was forbidden by the so-called *exclusionary rule*.<sup>41</sup> However, this changed in 1993 with the famous House of Lords decision *Pepper v. Hart*.<sup>42</sup> In principle, England has now accepted the possibility

30. See, for more details on the subject, Janssen and Schulze, ‘Legal Cultures and Legal Transplants in Germany’, *European Review of Private Law* 2011-19, p. 225, 246 et seq.
31. See, for more detail and with further references, Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 76 et seq. (for Switzerland), 100 et seq. (for Austria). Also in Dutch law (where it is hard to say after the introduction of the Nieuw Burgerlijk Wetboek in 1992 whether it belongs to the German or Roman legal tradition) the four interpretative methods (*spraakgebruik, systeem, wetsgeschiedenis* and *ratio*) are accepted and applied (see in more detail and with further references Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 176 et seq.).
32. However, in particular in Switzerland, the comparative law approach has a much stronger case for being the ‘fifth interpretative method’ than in Germany. It is also interesting to note that some national codifications, such as the German Bürgerliches Gesetzbuch or the Dutch Nieuw Burgerlijk Wetboek, refrained from drawing up rules on statutory interpretation, while other codes contain provisions in this point (e.g. Austria, Italy, and Spain). See on this subject Vogenauer, ‘Statutory interpretation’, in Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham: Edward Elgar 2006, p. 677, 682 et seq.
33. See, for more details and with further references, Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 168 et seq.
34. See, for more details and with further references, Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 149 et seq.
35. Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 322 et seq. (with further references). See, for more details and with further references, Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 113 et seq. For the situation in the Scandinavian countries see Henninger, *Europäisches Privatrecht und Methode*, Tübingen: Mohr Siebeck 2009, p. 113 et seq.; Lundmark and Suelmann, ‘Der Umgang mit Gesetzen im europäischen Vergleich’, *Zeitschrift für Rechtsvergleichung* 2011-52, p. 173, 190 et seq.
36. Furthermore, the border between common and civil law sometimes becomes blurred as there are also mixed jurisdictions, such as South Africa or Scotland.
37. Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 323; Lundmark/Suelmann, ‘Der Umgang mit Gesetzen im europäischen Vergleich’, *Zeitschrift für Rechtsvergleichung* 2011-52, p. 173, 188 et seq.
38. See Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 323; Ingman, *The English Legal Process*, Oxford: Oxford University Press, 13th edition, 2010, 8.10.2.4: ‘The statute must be read as a whole.’
39. Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 323.
40. See, for more details and with further references, Lundmark and Suelmann, ‘Der Umgang mit Gesetzen im europäischen Vergleich’, *Zeitschrift für Rechtsvergleichung* 2011-52, p. 173, 189.
41. Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 323; Lundmark and Suelmann, ‘Der Umgang mit Gesetzen im europäischen Vergleich’, *Zeitschrift für Rechtsvergleichung* 2011-52, p. 173, 189.
42. *Pepper v. Hart* [1993] A.C. 593. In this see also Gruber, ‘Legislative Intention and the CISG’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 91, 93 et seq.: ‘Therefore, the previously assumed gap between the Civil Law methods of interpretation and the methods used in England seems to have somewhat decreased or even, as some say, almost diminished.’

of an historical interpretation of statutes.<sup>43</sup> A different and in some respects an opposite development – especially with regard to the use of legislative history and purposive interpretation – can be observed in the United States. Both methods have been allowed and used for more than one hundred years by American judges.<sup>44</sup> Though, since the late 1980s both have been applied with more reluctance due to the rise of the *new textualism approach*; an approach that merely focuses on the text of the statute and fails to give regard either to legislative history or to the legislative purpose.<sup>45</sup> Therefore, one methodological difference between common and civil law countries is that civil law countries rely much more on the historical and teleological interpretation methods than common law courts, which primarily rely on plain meaning interpretations of statutory of the articles.<sup>46</sup>

Thus, there are differences between national methodologies, but the differences are also reflected in the use of different terminology (such as teleological, dynamic or purposive interpretation). Despite the differences real or unreal (similarities that are masked by differences in terminology), most of the traditional methodologies exist in some form in civil and common law countries. In practice, the differences are often found in the relative weight given to the different methodologies by the common and civil legal systems. However, this brief review has shown that despite perceived differences, the four interpretative elements – wording, system, history and purpose or teleos – can be observed in every national methodology.<sup>47</sup> It is a rational extension to use these methodologies to interpret the CISG. The starting point for interpreting the CISG and rendering autonomous interpretations would be some sort of blend of these traditional methodologies.<sup>48</sup> Subsequent sections of this article will take a closer look at each of these methodologies before suggesting the right mixture of the four different methods in the quest for the appropriate ‘interpretative cocktail’ to apply to the CISG. The last part of the article will explore more controversial or non-traditional inter-

pretive methodologies that may be appropriate to add to the interpretive cocktail. The CISG embraces the modern trend in the legal interpretation of contracts by adopting liberal evidentiary rules. It borrows from the interpretive methodologies of the civil and common law systems. However, in vital ways, the CISG interpretive methodology is more akin to the one found in the civil law system. The liberal evidence rules, along with the CISG’s adoption of the subjective theory of contracts, and its recognition of the importance of contextual evidence in determining the true understanding of the parties (agreement-in-fact). The agreement-in-fact model of the CISG is aligned with civil law and, to a lesser extent, the American Uniform Commercial Code’s (UCC) concept of contract. In this model the external manifestations of the promising party is only a part of the interpretive process. The external manifestations of the parties need to be placed in their proper contexts in order to determine the agreement-in-fact. This model logically leads to the conclusion that, to understand the written words of a contract an analysis of the contextual background of the contract is required. The same can be said of statutory interpretation. So, under the CISG interpretive methodology, the plain meaning of the statutory language is only the starting point and invites the use of other interpretive methodologies.

### 2.3. Grammatical (Textual) Interpretation

There is no doubt that the starting point and object of every interpretation of the CISG is – as in domestic law – the wording of the articles.<sup>49</sup> The wording has to be given its ‘ordinary meaning’. Ordinary meaning is not necessarily identical to the dictionary or plain meaning approach found in common law. An ordinary meaning can be defined as the meaning that is normally used and

43. However, one has to admit that the travaux préparatoires are still seldom used in England to interpret statute law.

44. Gruber, ‘Legislative Intention and the CISG’, in Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 91, 94; Manning, ‘Textualism as a Nondelegation Doctrine’, *Columbia Law Review* 1997-97, p. 673, 674.

45. Gruber, ‘Legislative Intention and the CISG’, in Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 91, 94. For more details see Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton: Princeton University Press 1997.

46. See also Eiselen, ‘Literal Interpretation: The Meaning of the Words’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 61, 63; Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 53.

47. See also in this regard Vogenauer, ‘Statutory interpretation’, in Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham: Edward Elgar 2006, p. 677, 683 (with further references): ‘(...) comparative studies for a long time emphasized the difference between legal systems, especially between the civil law and the common law world. Recently, it has been shown that such differences exist but that they primarily concern the terminology and the classifications used in scholarly writings, rather than the substance of statutory interpretation.’

48. See also Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 323; Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84 et seq.; Huber and Mullis, *The CISG*, Munich: Sellier 2007, p. 9: ‘In the author’s opinion the following matters may be relevant when interpreting the Convention (...): the wording of the provision (...); the drafting and negotiating history, in particular the ‘Travaux Préparatoires’; the purpose of the provision and the underlying policy; the position of the provision within the framework of the Convention (systemic approach); Perales Viscasillas, in Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 8: ‘(...) the scholars are in agreement as to the way (method) in which interpretation is to be done: a wide interpretation of the CISG that is to be complemented by a literal (grammatical), teleological, systemic and historical interpretation (...); Schwenzler and Hachem, in Schwenzler (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 20 et seq., but, without reference to the teleological interpretation.

49. On the importance of the literal interpretation for the CISG, see especially Eiselen, ‘Literal Interpretation: The Meaning of the Words’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 61 et seq.

understood in the 'CISG Community'.<sup>50</sup> An example is the question of whether Article 13 CISG ('writing') also includes electronic communication. Does the ordinary use of the word 'writing' also cover, for example, e-mails or is this a gap under Article 7(2) CISG?<sup>51</sup> As another example one can refer to a German case decided in 1994 in which the Court of Appeal of Cologne held that a market analysis is not covered by the ordinary meaning of the word 'goods' and thus falls outside the scope of the CISG.<sup>52</sup> As is true with all international treaties, the text of the CISG itself is also an 'outcome of extended discussions and often a well-balanced compromise where each single word counts.'<sup>53</sup> Thus, the extrapolation of meaning based on the words chosen in the CISG is the primary focus of the interpretive undertaking.<sup>54</sup> However, the literal interpretation of the CISG's wording is complicated due to the fact that there are six different official language versions of the CISG (English, French, Russian, Arabic, Spanish and Chinese). They each have the same weight in the interpretation of the CISG. In practice, it is not plausible to think a national judge could or would consider all the language versions when interpreting the CISG. There has evolved an implicit recognition of English as the 'official' language of interpretation. As English was the main working language of the drafting committee, it can be assumed that, in case of discrepancies

between the different language versions, the English text expresses the intention of the Conference better than any other official language versions.<sup>55</sup> Thus, in order to promote the CISG's uniformity, in case of discrepancies the English language interpretation should be favoured. Another problem is the common use of non-official language translations, such as German or Dutch. So in Germany, for example, the non-binding language version (German) is regarded as a 'de facto official language'. This is regrettable as divergences can arise between the non-binding and the official versions of the CISG. This could be avoided by comparing the non-binding language interpretation with an interpretation given by use of an official language version.<sup>56</sup> However, a translation problem still exists when comparing interpretive meanings across the official languages. A best practice would be to research and understand the variant meanings caused by translation and to use the other interpretive methodologies to determine the most appropriate CISG interpretation.

#### 2.4. Systemic Interpretation

Alongside the indispensable grammatical interpretation, systemic interpretation is a widely accepted method of interpreting domestic law and the CISG.<sup>57</sup> In some situations, the systemic interpretation can serve as an important interpretative tool, while in others it is of little help.<sup>58</sup>

50. Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 53.
51. See, for more details, Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 13 CISG para. 6 et seq.; Schlechtriem and Schmidt-Kessel, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 13 CISG para. 5 et seq.
52. See Germany *Appellate Court Cologne*, 26 August 1994, CISG-Online 132. The court furthermore stated that 'the right to utilize an intellectual product of work is in the foreground; the work is embodied in a written form solely to make it intellectually graspable, and the form of the embodiment is of secondary importance to the commissioner of the study.'
53. Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 53 (with further references).
54. Ferrari, in: Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 30; Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 53; Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 33 ('primary method for the interpretation of the CISG'); Schwenger and Hachem, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 21.
55. Ferrari, in: Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 35; Hager, 'Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden', in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 324; Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84; Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 53; Melis, in: Honsell (ed.), *Kommentar zu UN-Kaufrecht*, Heidelberg: Springer, 2nd edition, 2010, Article 7 CISG para. 10; Schwenger and Hachem, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 21. See also *Swiss Supreme Court*, 13 November 2003, CISG-online 840 (considering primarily the English version and secondly the French text in regard to the German non-binding translation of the CISG). For a different opinion see Perales Viscasillas, in: Kröll, Mistelis, and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 34 ('no prima facie preference for the English version').
56. However, there are also positive examples from the German legal tradition. See e.g., Switzerland, *Swiss Supreme Court*, 13 November 2003, CISG-online 840 or from Germany, *Appellate Court Cologne*, 26 August 1994, CISG-online 132.
57. Ferrari, in: Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 37 et seq.; Hager, 'Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden', in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 324; Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84 et seq.; Melis, in: Honsell (ed.), *Kommentar zu UN-Kaufrecht*, Heidelberg: Springer, 2nd edition, 2010, Article 7 CISG para. 11; Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 54 et seq.; Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 8.
58. Hager, 'Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden', in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 324; Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84 et seq.; Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 54.

There are two kinds of systemic interpretation that can be applied to the CISG. On the one hand, traditional systemic interpretation – for CISG interpretive purposes we will call it ‘intraconventional’ systemic interpretation – draws conclusions from the positioning of a provision within a statute or convention in order to deduce the meaning of that particular provision.<sup>59</sup> For example, the positioning of Article 78 CISG in a separate section of its own shows that the exemption provision of Article 79 CISG does not apply to Article 78 CISG.<sup>60</sup> The other, albeit less frequently discussed, version of systemic interpretation considers the particularities of the CISG being a part of a fast-growing international body of uniform law<sup>61</sup> – the so-called ‘interconventional’ systemic interpretation.<sup>62</sup> Interconventional systemic interpretation recognises that uniform law conventions often share many common terms and underlying general principles. Therefore, a settled meaning under one convention could be used to support the interpretation of another convention. This means, in essence, that the meaning of the basic terms of uniform law such as, ‘contract’, ‘breach of contract’ or ‘damages’ should be the same in all uniform law conventions.<sup>63</sup> Interconventional systemic interpretation implies that uniform law may gain a ‘genuine’ uniform interpretation that is not limited to a single convention. That said, it should be pointed out that there is a difference between conventions and soft law. The use of soft

law as an interpretive methodology for the CISG will be discussed later in this article.

## 2.5. Historic Interpretation

Despite the existing differences regarding the value of the legislative history between common law and civil law countries, it is widely accepted that an historic interpretation on the basis of the legal history of the CISG (which is well documented and easily accessible) is a viable interpretive methodology.<sup>64</sup> However, overall it seems that the historic interpretation has less weight than the systemic and, in particular, the literal interpretation; it serves a secondary or rather supplementary function.<sup>65</sup> The common reasons for this reluctance to apply the historic interpretation are: (1) the draftsmen of the CISG simply could not foresee every legal and technical development in a fast-growing international trade environment, (2) the legal history itself is not always clear and can be interpreted differently, and finally (3) the older the CISG gets, the less the user of the CISG is bound to the will of the draftsmen of the CISG.<sup>66</sup> Despite the foregoing, historic interpretation remains an accepted method of interpretation in the field of international sales law. This method is especially useful in cases where the wording of the provision is in question and the system in which it is situated does not give enough guidance to reach a final conclusion. For instance, the *travaux préparatoires* are used frequently when interpreting the two open terms of ‘short

59. Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 54.

60. The example in this context is given by Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33 (54). Thus, the debtor cannot rely on Article 79 CISG in order to claim an exemption from the obligation to pay interest (e.g. if he is unable to pay because of a ban on the acquisition of foreign currency) (Bacher, in: Schlechtriem and Schwenger, *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 78 CISG para. 3, 17). For further examples of a systemic interpretation see Hager, ‘Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden’, in: Baums et al. (eds.), *Festschrift für Huber zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2006, p. 319, 324 and Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 84 et seq. (use of Article 36(2) CISG for the interpretation of Article 66 CISG).

61. E.g. the Limitation Convention, the Convention on the Contract for the International Carriage of Goods by Road (CMR), the Montreal Convention, the Ottawa Conventions on International Financial Leasing and International Factoring.

62. Ferrari, in Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 38; Ferrari, ‘I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e la necessità di un’interpretazione interconvenzionale’, *Rivista di diritto internazionale privato e processuale* 2000, p. 669 et seq.; Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 54 et seq.; Magnus, ‘Konventionsübergreifende Interpretation internationaler Staatsverträge privatrechtlichen Inhalts’, in: Basedow et al. (eds.), *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut*, Tübingen: Mohr Siebeck 2001, p. 571 et seq.

63. For further examples see Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 54 et seq.

64. There is a general agreement that the legislative history can and should be used for the interpretation of the CISG. See, for instance, Ferrari, in: Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 36; Gruber, ‘Legislative Intention and the CISG’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 91 et seq.; Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 85; Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 56; Melis, in: Honsell (ed.), *Kommentar zu UN-Kaufrecht*, Heidelberg: Springer, 2nd edition, 2010, Article 7 CISG para. 11; Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 35; Schwenger and Hachem, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 22; van Alstine, ‘Dynamic Treaty Interpretation’, *University of Pennsylvania Law Review* 1998-146, p. 687 et seq.

65. Ferrari, in: Schlechtriem and Schwenger (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, Munich: C.H. Beck, 5th edition, 2008, Article 7 CISG para. 36; Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 56; Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 35; Schwenger and Hachem, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 22.

66. Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 36.; Schwenger and Hachem, in: Schwenger (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 3rd edition, 2010, Article 7 CISG para. 22.



period' and 'reasonable time' in Articles 38(1) and 39(1) CISG. While several legal systems (especially countries of the German legal tradition) recognise such an obligation, others do not.<sup>67</sup> It follows from the drafting history of both articles that these provisions were intended as a compromise between these two views.<sup>68</sup> In particular, the drafters sought to avoid a too rigid interpretation, in particular in countries of the German legal tradition. Thus, it was primarily their task 'to convince the German courts to abandon their rigid time limits and slowly move towards the other legal systems that had not previously stipulated any [fixed] notice requirements.'<sup>69</sup> The goal was achieved because the German courts looked to CISG legislative history, leading to significantly different interpretations of the requirements found in Articles 38 and 39 CISG as compared to the corresponding German provision in the German Commercial Code.<sup>70</sup>

## 2.6. Teleological Interpretation

The final 'traditional' interpretative method is referred to as the teleological, dynamic, or purposive interpretation.<sup>71</sup> Even though this method of interpretation is generally accepted in common and civil law countries to interpret their domestic statutes, it is the most 'obscure' tool for the interpretation of the CISG. On the one hand, teleological interpretation is indispensable for the development of the CISG.<sup>72</sup> As in all commercial and civil codes, the drafters of the CISG could not foresee every future legal and technical development in international trade. Thus, some issues fall within the scope of the CISG but textual analysis, supplemented by systemic and historical analyses, cannot reach a conclusion. Under such conditions, the objective-teleological (or dynamic-purposive) method seeks an answer through an analysis of the spirit and purpose of the CISG in its entirety. This way, the CISG remains flexible and is able to refresh when faced with novel cases produced by legal-transactional or technical changes. The clarity of thought possessed by

lawmakers is unlikely to be fully captured by the statutory text. Statutes and codes will inevitably have gaps, yet the applicable statute, in civil law tradition, is seen as providing every answer that comes within its scope. The German legal scholar Gustav Radbruch (1878-1949) concluded that, in these kinds of situations, '*Das Gesetz ist klüger als der Gesetzgeber*'.<sup>73</sup>

On the other hand, the necessary result of using teleological interpretation is a transfer of considerable power to the presiding judges. The teleological interpretation is the vaguest 'canon' of the traditional interpretative methods and provides considerable discretion to judges. Nonetheless, national courts using this interpretative method for the interpretation of domestic statutes do not, in general, abuse their power. However, in the world of international trade law, a particular danger emerges – that the teleological method could lead to *homeward-trend* interpretations.<sup>74</sup> More specifically, national courts may assume that the purposes of CISG rules are identical to the purposes of similar rules under their domestic laws. This increases the chances of divergent interpretations. In addition, one has again to bear in mind that there is no international appellate court system to unify divergent interpretations of the CISG. In sum, teleological interpretation is a reasonable method for interpreting the CISG; in some situations, it is indispensable in finding a solution to an interpretive problem. However, due to the particular dangers associated with using this method for international sales law, it should be used with caution.<sup>75</sup> If this method is applied, it is of great importance that the homeward trend bias be avoided. Judges using the teleological approach must focus on the general goals and purposes of the CISG, especially those enunciated in Article 7(1) CISG.<sup>76</sup> One of the underlying goals of the CISG is to minimise transaction costs and to allocate the remain-

67. For a comparative analysis see Janssen, *Die Untersuchungs- und Rügepflichten im deutschen, niederländischen und internationalen Kaufrecht – Eine rechtsvergleichende Darstellung der Gemeinsamkeiten und Unterschiede*, Nomos: Baden Baden 2001.

68. See, for more detail, Kröll, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 38 CISG para. 10 et seq., Article 39 CISG para. 4 et seq.; Reitz, 'A History of Cutoff Rules as a Form of Caveat Emptor: Part I – the 1980 U.N. Convention on the International Sale of Goods', *American Journal of Comparative Law* 1988-36, p. 437 et seq.

69. See Schwenzer, 'The Noble Month (Articles 38, 39 CISG) – The Story Behind the Scenery', *European Journal for Law Reform* 2006-8, p. 353, 358.

70. See § 377 Handelsgesetzbuch (HGB). The same opinion is shared by Gruber, 'Legislative Intention and the CISG', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 91, 106 et seq. For further examples of the historic interpretation, see Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 85 (Article 68 CISG); Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 56 (Article 28 CISG).

71. See materially Barak, *Purposive Interpretation in Law*, Princeton: Princeton University Press 2005.

72. Hager, *Rechtmethoden in Europa*, Tübingen: Mohr Siebeck 2009, p. 85; Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 56; Melis, in: Honsell (ed.), *Kommentar zu UN-Kaufrecht*, Heidelberg: Springer, 2nd edition, 2010, Article 7 CISG para. 11; Perales Viscasillas, in: Kröll, Mistelis and Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich: C.H. Beck 2011, Article 7 CISG para. 8; Piltz, *Internationales Kaufrecht*, Munich: C.H. Beck, 2nd edition, 2008, § 2-185; van Alstine, 'Dynamic Treaty Interpretation', *University of Pennsylvania Law Review* 1998-146, p. 687 et seq.

73. The English translation would be 'The law is wiser than the legislator.'

74. See, for more details, Ferrari, 'Homeward Trend: What, Why and Why Not', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 171 et seq.; Ferrari, 'Homeward Trend: What, Why and Why Not?', *Internationales Handelsrecht* 2009-11, p. 8 et seq.

75. See also Melis, in: Honsell (ed.), *Kommentar zu UN-Kaufrecht*, Heidelberg: Springer, 2nd edition 2010, Article 7 CISG para. 11; Piltz, *Internationales Kaufrecht*, Munich: C.H. Beck, 2nd edition, 2008, § 2-185. For a less critical view regarding the use of the dynamic interpretation, see Kropholler, *Internationales Einheitsrecht*, Tübingen: Mohr Siebeck, 1975, p. 276.

76. Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 57.

ning costs to the most efficient avoider.<sup>77</sup> These transactions costs play an important role under the CISG as international trade is generally more costly than doing business domestically. For instance, the restrictive interpretation of fundamental breach under Article 25 CISG is a result of teleological interpretation. In order to avoid transportation costs and the wasting of non-conforming goods caused by avoidance or substitute delivery,<sup>78</sup> the restrictive approach to Article 25 CISG that has been taken by courts and legal scholars so far is needed.

## 2.7. The Relative Weight of the Different Interpretative Methods

It does not suffice just to be aware of the interpretative methods that can be applied when interpreting the CISG. It is also vital to be aware of the relative weight of the four abovementioned methods. There is neither a general or strict rule of priority, nor a clear ranking of the interpretative methods. The CISG is a broad enough statute or code to justify a flexible system of interpretative methods or techniques.<sup>79</sup> The applicability of one interpretative method should not exclude another. In the search for the 'right' interpretive outcome, all four methods should be applied and not be considered in isolation of one another. Such an approach is more like a bouquet of 'interpretative flowers' than a 'Highlander principle'. However, the wording of the CISG is – and will always be – the starting point for its interpretation (grammatical interpretation). The interpretive methodologies work as 'extenders' to flush out the 'inner' meaning of CISG rules, especially when confronted by novel or hard cases. Traditional methods of interpretation provide the context for a better understanding of the CISG – the history and context of the process of its drafting (historical interpretation) and the context of a specific rule or article in the context of the entire CISG (systemic interpretation). Objective-teleological interpretation should be used with care because, if applied incorrectly, it could lead to homeward trend biased interpretation. Its use should be restricted to cases where the other three interpretative methods do not yield a clear and efficient result.

## 3. OTHER INTERPRETIVE METHODOLOGIES: THE SEARCH FOR GUIDANCE

This part will examine a number of methodologies, some inherent in CISG interpretive methodology, and others that are at least plausible supplementary methodologies. The former types include analogical reasoning within the CISG and in the surrounding case law, as well as the development of underlying principles. Other methodologies reviewed include the use of scholarly commentary and soft law as aids in interpreting the CISG. Finally, a survey

of a number of schools of interpretation is undertaken, including contextualism, comparative law, the economic analysis of law, good faith interpretation and party-generated rules of interpretation.

### 3.1. CISG Interpretive Methodology

The earlier part of this article focused on the use and appropriateness of traditional interpretive methodologies and techniques in the interpretation of the CISG. However, it is useful now to re-state expressed CISG interpretive methodology before reviewing other techniques that can be used to interpret the CISG.<sup>80</sup> The CISG provides an interpretive methodology for interpreting and applying its substantive rules, including those dealing with the interpretation of intent. The spirit of this methodology is that of excluding recourse to domestic legal methodologies. This is implicit in the view that the CISG directs decision-makers to develop *autonomous interpretations* of CISG provisions. It is only in this way that the CISG can rise above the inherent differences between national contract laws and legal systems. The next four sections will consider core methodologies at least implicitly acknowledged as legitimate pieces of CISG interpretive methodology.

### 3.2. Creative Interpretation: Self-Generation of Underlying Principles

Ronald Dworkin famously rejected the 'argument from vagueness' that holds that the vagueness of legal or statutory language means that there cannot be one, true interpretation of a statutory provision. A more nihilistic view of the 'argument from vagueness' is that statutory language is open to many equally plausible interpretations. Dworkin rejects this argument based upon the role of underlying principles. He states that:

'[T]he impact of the statute on the law is determined by asking which interpretation, of the different interpretations admitted by the abstract meaning of the term, best advances the set of principles and policies that provide the best (...) justification for the statute at the time it was passed.'<sup>81</sup>

Because of its use of neutral terminology, mandate of autonomous interpretations, and express embrace of traditional interpretive methodologies, CISG jurisprudence has moved to address the interpretive methodological shortcomings stemming from the argument from vagueness. This interpretive challenge falls into two areas: (1) the recognition of underlying or implied principles to justify interpretations of the CISG, whether autonomous or not, and (2) the creation of implied default rules where an issue is within the scope of CISG coverage, but which the CISG fails to directly address.

77. See, for an economic analysis of the CISG, Cenini and Parisi, 'An Economic Analysis of the CISG', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 151 et seq.

78. See Articles 46(2) and 49(1) lit. b CISG.

79. Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation', *Uniform Law Review* 2000-5, p. 683, 704 et seq.; Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 33, 58.

80. See generally, Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009.

81. Dworkin, *A Matter of Principle*, Cambridge, MA: Harvard University Press 1985, p. 129.

An example of courts projecting general principles into the CISG or fabricating more specific default rules was demonstrated by a Finnish court's implication of a principle of loyalty. The Helsinki Court of Appeals recognised the importance of continuation of contract within the principle of loyalty. It reasoned that the so-called principle of loyalty has been recognised in scholarly writings. According to the principle, the parties to a contract have to act in favour of the common goal; they have to reasonably consider the interests of the other party.<sup>82</sup> In essence, each party owes a duty of loyalty to the other party to preserve the viability of the transaction. From such a duty, the court recognised an implied default rule of a duty to continue a sales relationship beyond the discrete individual sales transactions. The case involved a buyer who purchased carpets for resale on an ad hoc basis. The seller abruptly ended its relationship with the buyer. The court held that on the basis of a two-year business transaction, the buyer's operations cannot be based on the risk of an abrupt ending of a contract.<sup>83</sup> Therefore, the seller was restricted in its right to not sell to the buyer despite the fact that there was no agency or long-term supply contract in place. The court reasoned that the buyer had obtained de facto exclusive selling rights.<sup>84</sup> Such implied rights, based upon good faith and trade usage, make the seller of multiple discrete transactions susceptible to damage claims under Article 74.<sup>85</sup> In essence, the court held that principles of reasonableness and trade usage require an extended notice of termination where damages to a buyer are foreseeable, regardless of the fact that the discrete contract failed to require such notice.<sup>86</sup> The need for creative interpretation is made a necessity due to the open-ended nature of CISG rules.<sup>87</sup> Many of the CISG's rules are open-ended and allow application of contextual situations such as trade usage and custom. For example, it makes repeated use of the 'reasonableness standard' in its gap-filling provisions. Open-

ended rules derive their content from post-hoc application to real world transactions and practices.<sup>88</sup>

### 3.3. Analogical Reasoning within the CISG

The importance of analogical reasoning within the CISG and amongst its articles is not expressly stated in the Convention. However, a number of arguments can be given that the need for such reasoning is implied in the CISG. First, the role of general principles, either express<sup>89</sup> or implied,<sup>90</sup> underlies all CISG articles. Article 7 CISG states that interpretive issues 'are to be settled in conformity with the general principles on which it is based.'<sup>91</sup> The role of the general principles that underlie all CISG articles implies that the individual articles should be interpreted to conform to the spirit of those principles. It is not an illogical step to acknowledge that the individual articles should be interpreted with reference each other, especially when one of them has been more fully interpreted and can act as a guide to underlying principles. The case for analogical reasoning has been made by numerous scholars including John Honnold,<sup>92</sup> Michael Bonell,<sup>93</sup> Phanesh Koneru<sup>94</sup> and Mark Rosenberg.<sup>95</sup> Their argument is a straightforward one – reasoning by analogy is an extremely useful interpretive methodology, especially when an issue in one article or provision is analogous to an issue found in another.<sup>96</sup> It is true that the CISG is not a comprehensive code in the civilian sense, but it is code-like nonetheless. As such, analogical reasoning is intuitively needed to make sure that the articles within the CISG do not conflict with one another through the interpretive process, or stated in Dworkinian terms, each part should be made to fit the whole.<sup>97</sup> The use of analogical or systemic interpretation of code or statute provisions is not as well developed under common law. Clearly, common law statutes are filled with cross-references to other sections within the statute and courts will look at the referenced sections in determining the meaning of a statutory

82. *Helsinki Court of Appeals* (Finland 2000), available at [cisgw3.law.pace.edu/caes/001026f5.html](http://cisgw3.law.pace.edu/caes/001026f5.html).

83. *Id.* at 12 of 14.

84. *Id.*

85. A party must pay damages 'in the light of the facts and matters of which he knew or ought to have known, as a possible consequence of the breach of contract.' (see Article 74 CISG).

86. DiMatteo, et al., *International Sales Law: A Critical Analysis of the CISG*, New York, NY: Cambridge University Press 2005, p. 24-25. A French court held that the principle against abrupt discontinuance is applied through an inter-party business usage as permitted under Article 9 CISG: '[B]y virtue of Article 9 CISG, [a party is] liable for abrupt discontinuance of business relations between parties bound by long-standing practices.' CLOUT Case No. 202 (Court of Appeal of Grenoble, France 1995).

87. For an explanation of open-textured rules see Collins, *Regulating Contracts*, Great Britain: Oxford University Press 1999, p. 266-74.

88. DiMatteo, et al., *International Sales Law: A Critical Analysis of the CISG*, New York, NY: Cambridge University Press 2005, p. 25-26. The cases reviewed were taken from abstracts, summaries, and commentaries provided mainly in 'CISG Case Presentations' in the Pace Law School website at [cisgw3.law.pace.edu/cases](http://cisgw3.law.pace.edu/cases), the UNILEX database at [unilex.info/case](http://unilex.info/case) and CLOUT abstracts at [A/CN.9/SER.C/ABSTRACTS](http://A/CN.9/SER.C/ABSTRACTS) or at the UNCITRAL website at [www.un.or.at/uncitral](http://www.un.or.at/uncitral). UNCITRAL regularly releases abstracts of CISG court and arbitral decisions under the name CLOUT.

89. Article 7(1) CISG (international character, promotion of uniformity, and observance of good faith).

90. See part C. II. of this article.

91. Article 7(2) CISG.

92. Honnold, *Uniform Law for International Sales*, Cambridge, MA: Kluwer Law International 1991, p. 3.

93. Bonell, 'Introduction to Convention', in Bianca and Bonell (eds.), *Commentary on the International Sales Law*, Milan: Giuffrè 1987, p. 79.

94. Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles', *Minnesota J. Global Trade L.* 1997-6, p. 105.

95. Rosenberg, 'The Vienna Convention: Uniformity Interpretation for Gap-Filling – An Analysis and Application', *Australian Bus. L. Rev.* 1992-20, p. 442.

96. DiMatteo, et al., *International Sales Law: A Critical Analysis of the CISG*, New York, NY: Cambridge University Press 2005, p. 21.

97. Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985).

provision. However, common law lacks the tradition of a grand civil code. Civil law tradition centres on going directly to the relevant code – civil or commercial – to get the answer to the issue of law in dispute, while common law judges often seek guidance from existing case law relating to the provision in question. The body of easily acceptable case law relating to the UCC is immense. So, instead of personally conducting an analogical analysis of code provisions, judges will generally go directly to the case law to find an existing decision that relates to the legal issue being disputed. If the case law provides a consensus as to the proper interpretation or meaning of the statutory provision, then the search for meaning is often terminated without any first-hand analysis of the code as a whole. Such a truncated analysis preempts the use of analogical reasoning within the code to see if a ‘better’ meaning can be found. If case law fails to provide an answer to the issue in question then a return to the code to perform analogical reasoning would seem to be the next logical approach. The judicial arbiter would attempt to answer the following question: do other provisions of the code or the code as a whole provide insight or guidance to determine a reasonable interpretation of the meaning of the provision in question? However, due to traditional training in common law or a lack of training in statutory interpretation,<sup>98</sup> the courts will often avoid such analogical reasoning and determine the meaning of a statutory provision by extrapolating from existing case law. It is possible that such analogical reasoning was performed by the earlier case law. It can then be argued that even though the analogical reasoning was not performed first hand, it is found, covertly, in case law. This may be wishful thinking. In sum, despite the UCC being America’s greatest and most successful attempt at a unifying code, it should be recognised that it is still a code embedded in a common law system. As such, the unification of commercial law began to diminish soon after the enactment of the UCC. UCC law is rarely a direct application of a UCC provision to a case. It involves a search for cases of mandatory or persuasive precedent to provide the needed interpretation.<sup>99</sup> The proof of this proposition is found in the variant meanings given by different state court systems to the same provisions of the Urchin regards to the CISG. It would seem, given the lead role of the civil law countries in interpreting CISG articles (provisions), the use of analogical reasoning within the CISG would be a matter of standard practice. The fact is, the use of various CISG articles to help interpret other articles has been uneven in practice. For example, in

*Italdecor SAS v. Yiu Industries*,<sup>100</sup> the court determined there was a fundamental breach supporting the remedy of avoidance without referring to Article 25’s discussion of fundamental breach.<sup>101</sup> The buyer is allowed to avoid a contract if the seller’s performance amounts to a fundamental breach<sup>102</sup> and can require the seller to send substituted goods, but only if the delivered goods are in fundamental breach of the goods as specified in the contract.<sup>103</sup> A reciprocal article is provided in the case of a buyer’s breach: ‘The seller may declare the contract avoided if the failure by the buyer to perform any of his obligations under the contract amounts to a fundamental breach of contract.’<sup>104</sup> To look directly at the avoidance provisions to determine fundamental breach based solely on the facts of the case is antithetical to analogical reasoning which would require reference to Article 25 CISG which provides a definition and standards to be used in making the fundamental breach determination.<sup>105</sup> This can be explained in two ways – ignorance of the existence of Article 25 CISG or its use without expressly referencing the article. The latter explanation is not sufficiently plausible – why would a court use an article to help in the interpretation of another article without directly referencing the article? At the least, this lack of referencing is poor practice. More worrisome is if it is an example of courts’ failure to use analogical reasoning within the CISG. In this instance, the analogical reasoning connecting Article 25 CISG in the determination of fundamental breach is a complete abdication of CISG and traditional interpretive methodologies.

### 3.4. Analogical Reasoning using CISG Case Law

The use of foreign case law by analogy to interpret the CISG has been mixed and, mostly nation-specific. Despite the fact that the Pace Institute of International Commercial Law’s CISG Database provides easy access to more than 2,700 CISG cases, many national courts fail to use or cite foreign case law as an interpretive guide to interpreting the CISG. There are a number of plausible explanations, including the courts going ‘directly’ to the CISG and applying CISG general principles in rendering an interpretation. In the alternative, the lack of foreign case law citation may be a reflection of the avoidance of CISG interpretive methodology in favour of nation-specific legal reasoning and legal traditions. One thing that is clear, and it is not a controversial statement to make, is that the predominant force in shaping and interpreting the CISG has been the German court system. The sheer number of cases applying the CISG in Germany compa-

98. Justice Scalia has noted that ‘there are few law-school courses on the subject.’ Scalia, *A Matter of Interpretation*, Princeton, N.J.: Princeton University Press 1997, p. 14.

99. In the area of precedent, one state court has no obligation to follow the judicial decisions of another state’s courts. In practice, however, American courts often cite cases from other states as persuasive precedent to support their decisions. For an historical analysis of stare decisis see Cross, *Precedent in English Law*, 3rd ed., Oxford, UK: Oxford University Press, 1977.

100. *Italdecor SAS v. Yiu Industries*, CA Milano, Mar. 20, 1998, available at [cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html1#ct](http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html1#ct).

101. See Romito and Sant’ Elia, ‘Case Comment, CISG: Italian Court and Homeward Trend’, *Pace Int’l L. Rev.* 2002-14, p. 179.

102. Article 49(1)(a) CISG.

103. Article 46(2) CISG.

104. Article 64(1)(a) CISG. See also, Article 72(1) CISG (‘prior to the date for performance it is clear that one of the parties will commit a fundamental breach’); Article 73(1) CISG (fundamental breach of installment); Article 73(2) CISG (‘in respect to any installment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future installments, he may declare the [entire] contract avoided’).

105. Article 25 CISG provides a ‘substantial deprivation’ standard with a limitation of lack of foreseeability.

red to other countries is simply astonishing. When other European national courts cite foreign case law, invariably at least one reference is to German case law. The problem is that the 'international character' can be questioned given the overwhelming amount of CISG jurisprudence that comes from a half-dozen or so European civil law countries. Of the 2,718 reported cases, 1364 came from eight European countries: Germany (477), the Netherlands (203), Switzerland (182), Belgium (142), Austria (128), France (100), Spain (83) and Italy (49). By contrast, common law countries yielded only 200 cases in total, including the United States (151), Australia (19), Canada (16), New Zealand (11) and the United Kingdom (3). Ultimately, the analogical use of foreign cases is a powerful interpretive device. Foreign case law on the whole often provides in-depth analysis of the issues before the court or arbitral panel. The application of foreign case law by analogy is a powerful and multifaceted interpretive methodology. It can provide a matrix of factors or rationales that may have gone unnoticed by the present court. It can provide evidence of consensus relating to the interpretation of CISG articles or it can offer a number of divergent – reasonable and unreasonable – interpretations. In the latter case, the case at bar offers the presiding court the opportunity to help harmonise the divergences by creating a compromise interpretation or to argue the superiority of one of the divergent interpretations over another. The use of foreign case law serves two important purposes – it is a valuable resource for a court attempting to write a well-reasoned decision and it advances the core CISG principle of promoting uniformity in its application. There has been a debate as to what the founding principle of promoting uniformity means in practice.<sup>106</sup> In order to accomplish a relative uniformity of application, despite the lack of a supranational appellate court system, it would seem common sense that courts would have to look to prior decisions from other jurisdictions on the issue in question in order to create at least a penumbra of uniformity. Professors Ferrari and DiMatteo have debated the issue as to what the praxis of the uniformity principle should entail. Part of this is a pseudo-debate caused by issues of semantics. DiMatteo asserted that '[t]he Convention envisioned the use of an *informal system of stare decisis* to help ensure uniformity of interpretation.'<sup>107</sup> Ferrari responded that 'the suggestion to create a *supranational stare decisis* (...) must be criticized, since it does not take into account the rigid hierarchical structure of various countries court systems.'<sup>108</sup> DiMatteo responded that Ferrari did not use the full phrase coined; that this would be an '*informal system*' which was meant to imply the use of foreign case law as persuasive, not mandatory precedent. *Stare decisis* in the United States

encompasses both mandatory and persuasive precedents. An example is the citation to Delaware corporate law by other states as persuasive precedent. Additionally, the sentence, used by DiMatteo, preceding the one using the term informal *stare decisis* states: 'The most apparent problem with the[CISG's] attempt to unify commercial law is that it is applied through a nonunified court system.'<sup>109</sup> The Ferrari-DiMatteo positions can be rectified by moving away from the terminology of *stare decisis* to more substantive propositions. The first proposition is that the hierarchy of courts systems within countries should be recognised. Decisions by a country's highest court should have greater (persuasive) precedential value despite the differences in the common and civil legal systems on this issue. Precedential value aside, it is hoped that the highest courts will provide better reasoned decisions given the quality of the justices on the highest courts. The second proposition is that poorly reasoned opinions, even if rendered by the highest national courts, should be largely ignored in favour of better reasoned opinions. Alternatively stated, poorly reasoned cases avoid the use of CISG interpretive methodology and show homeward trend bias reasoning. The characteristics of better reasoned cases are those that avoid premature reliance on national legal concepts and traditions in interpreting the CISG. Such cases often look to foreign cases decisions or scholarly commentary in guiding the interpretive process and to support their eventual interpretation. It should be noted that the role of higher courts is not always the same in the different national legal traditions. This poses a danger of misinterpreting a foreign decision by a reader from another tradition. For example, French court decisions are often misinterpreted or ignored by other court systems because of the lack of reasoned opinions, especially by its highest court – the *Cour de cassation*. A long-standing tradition has left the interpretation of contracts to the lower courts.<sup>110</sup> A 2000 *Cour de cassation* decision left the issue of 'reasonable time' for a buyer to give notice of lack of conformity of goods pursuant to Article 39(1) CISG to the discretion of the lower court judge.<sup>111</sup> Another source of misunderstanding is the brevity of the decision of the *Cour de cassation*. But, this is more a matter of style than substance. The judicial reasoning behind a decision can be found outside the formal court opinion. Commentaries include the recommendations of the reporting judge (*Conseiller rapporteur*), the recommendations of the *Avocat Général*, and commentaries prepared by scholars in the specialised law reviews. These various commentaries go into detail into relevant cases and scholarly writings that were the likely basis of the court's decision.<sup>112</sup>

106. Article 7(1) CISG.

107. DiMatteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings', *Yale J. Int'l L.* 1997-22, p. 111, 136 (emphasis added).

108. Ferrari, 'Ten Years of the U.N. Convention: CISG Case Law – A New Challenge for Interpreters?', *J. L. & Commerce* 1998-17, p. 245 (emphasis added).

109. DiMatteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings', *Yale J. Int'l L.* 1997-22, p. 111, 136.

110. Id.

111. Witz, 'Un arrêt regrettable: le délai de dénonciation des défauts prévu par la Convention de Vienne laissé à l'appréciation souveraine des juges du fond', *Recueil Dalloz* 2000, p. 788.

112. The material in this paragraph was generously provided by Professor Claire Germain.

### 3.5. Secondary Legal Sources in Interpreting the CISG

Support for the use of scholarly literature and Opinions of the CISG Advisory Council can be found in public international law's foundational treaties, such as the Vienna Convention on the Law of Treaties (Law of Treaties)<sup>113</sup> and the Statute of the International Court of Justice (ICJ). Even though the Law of Treaties has been primarily used in public international law, since it is directed at country to country treaties, its rationales are equally applicable to the CISG.<sup>114</sup> In the area of interpretation, the Law of Treaties can be applied by analogy to the CISG. Its Article 26 states obligations under the Treaty should be 'performed in good faith' and a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' Articles 31 and 32 provide general rules of interpretation: (1) it shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose and (2) recourse may be had to supplementary means of interpretation, including the preparatory work of the Treaty when its meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. The ICJ statute provides a list of sources that could be used in the interpretation process. Article 38 states that sources of interpretation include international conventions, international custom, evidence of a general practice, the general principles of law recognised by civilised nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations. Once again, these treaties are not directly applicable to the CISG, but they do provide an interpretive methodology that could be applied to the CISG. This methodology includes methods expressly stated in the CISG, such as, the importance of good faith in its interpretation and application. From there, an interpretive template can be constructed and would include use of general principles ('in the light of its object and purpose'), autonomous interpretations ('ordinary meaning to be given to the terms in their context and in the light of its object and purpose'), *travaux préparatoires* ('preparatory work'), purposive or consequence-based interpretation ('leads to a result which is manifestly absurd or unreasonable'), trade usage ('international custom' and 'general practice'), foreign case law ('judicial decisions') and secondary sources ('teachings of the most highly qualified publicists'), as well as a disdain for homeward trend analysis ('party may not

invoke the provisions of its internal law as justification for its failure to perform a Treaty').

### 3.6. Use of Soft Law in the Interpretation of the CISG

Much has been written on the use of other bodies of law as sources to be used in the interpretation of the CISG.<sup>115</sup> The soft laws most often discussed in this regard are the Unidroit Principles of International Commercial Contracts (*Principles*) and the Principles of European Contract Law (PECL). More recent examples include the Draft Common Frame of Reference (DCFR) and the proposed Common European Sales Law (CESL). Use of the *Principles* in the interpretation of the CISG is mostly found in arbitral decisions. In fact, a brief, unscientific review of 45 arbitral decisions shows that one in three cited the *Principles* in interpreting the CISG.<sup>116</sup> The rationale being that the *Principles* are very similar to related articles of the CISG. The application of soft law to interpret similarly worded rules in the CISG, at first blush, seems like a reasonable interpretive methodology.

The more important question is the normative one of whether soft law should be used in the interpretation of the CISG? The somewhat counter-intuitive answer is no. If the interpretation and application of the CISG is to be truly autonomous, referencing soft law, commentary of soft law, and its use by courts and arbitral panels is more an obstacle than a facilitator to autonomous interpretation. There is no practical reason to look outside the deep body of CISG case law and scholarly commentary. A more important recognition is the use of the CISG in the revision of hard laws (German BGB, New Dutch Civil Code (BW), and potentially in the revisions of the French Code civile and the Japanese Civil Code), as well as on other (soft) laws (PECL and CESL).

### 3.7. Contextualism: Internal-External Exchange

A method of interpretation, often discussed in Anglo-American legal literature, is the notion of contextualism. The concept is part of the long-term debate over formalist<sup>117</sup> versus contextual means of interpretation.<sup>118</sup> Formalism is associated with a direct application of closed, fixed rules to the case at bar; a plain meaning interpretation of the words of a contract; a four-corner analysis in which the contract (much as the formal rules of contract) provides answers to all possible issues of dispute or interpretation; and a hard parole evidence rule barring most extrinsic evidence that contradicts the contract, even when

113. Vienna Convention on the Law of Treaties, 23 May 1969. Entered into force on 27 January 1980; United Nations, Treaty Series, vol. 1155, p. 331.

114. See Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations', in Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 46-52.

115. See Janssen, 'Die Einbeziehung von allgemeinen Geschäftsbedingungen in internationale Kaufverträge und die Bedeutung der UNIDROIT und der Lando-Principles', *Internationales Handelsrecht* 2004-6, p. 194 et seq.; Perales Viscasillas, 'The Role of UNIDROIT Principles and the PECL', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 287 et seq. See generally, Gabriel, 'The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL and the Hague Conference', *Brooklyn Journal of International Law* 2009-34, p. 655 et seq.; Gopalan, 'A demandeur-centric approach to regime design [hard law vs. soft law] in transnational commercial law', *Georgetown Journal of International Law* 2008-39, p. 327 et seq.

116. DiMatteo, 'Case Law Precedent and Legal Writing', in Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 113.

117. See DiMatteo, 'Reason and Context: A Dual Track Theory of Interpretation', *Penn State L. Rev.* 2004-109, p. 397; DiMatteo, 'A Theory of Interpretation in the Realm of Idealism', *DePaul Business & Commercial L. J.* 2006-5, p. 17.

118. For a general review of formal and contextual interpretive methodologies see Mitchell, *Interpretation of Contracts*, Great Britain: Routledge-Cavendish 2007.

such evidence would uncover the contracting parties' true understanding. Contextualism is closely aligned with legal realism that holds that there is no such thing as plain meaning; the meaning of a word can only be determined by analysing the background context behind its use. The strong version of this proposition was given by Arthur Corbin who, along with Samuel Williston, are considered the two greatest American contract law scholars of the first half of the twentieth century.<sup>119</sup> Corbin asserted that 'a word has no meaning apart from these [contextual] factors; much less does it have an objective meaning, one true meaning.'<sup>120</sup>

Although contextual evidence plays an important role in American and English case law, it is more openly embraced in American jurisprudence. English interpretive jurisprudence continues to espouse the virtues of formalism while at the same time avoiding formalistic interpretation when contextual evidence shows that the plain meaning of the words being interpreted is not the meaning intended. Although often focused upon the interpretation of contracts and not statutes or conventions, it is important to review contextual interpretation for the purpose of interpreting the CISG. Inductive interpretive methodology is necessary to give content to the CISG's many rules of reasonableness.<sup>121</sup> The use of reasonableness as a standard in numerous CISG rules requires the use of extrinsic evidence of reasonableness in giving content to the rule in its application to a particular case. The CISG's reasonableness standard directs the interpreter to the world of law in fact – the law of the merchant embodied in trade usage, commercial practice and business custom. Thus, any plausible interpretive methodology relating to the CISG must account for or incorporate the primary directive that the content of CISG rules is to be found outside of the CISG in the world of business. The recognition of trade usage as providing guidance in interpreting the reasonableness standard in the CISG is an example of the use of contextualism in giving content to formal rules.<sup>122</sup>

### 3.8. Use of Comparative Law in the Interpretation of the CISG

It would seem that when a court determines the need to make use of the last resort interpretive methodology of national law, a comparative analysis of various national laws on the issue is most appropriate.<sup>123</sup> A comparative law interpretive methodology makes especially good sense given the fact that the CISG is a mixture of civil

and common law traditions.<sup>124</sup> A comparative approach is closely aligned to the 'international character' of the CISG and its 'need to promote uniformity in its application'.<sup>125</sup> Comparative law analysis has historically involved two approaches – the common core and the better rules approach. The common core approach searches for commonalities found within different legal systems.<sup>126</sup> Generally, many differences in legal systems, especially in the areas of contract and sales law, are differences in degree and not differences in kind. Often the difference in degree is the product of the different legal terminology found in legal systems, as well as differences in emphasis. However, there remain real differences in domestic law regimes. It would be remiss not to note the difficulty of the comparative law approach.

The nuances captured by the above references to differences in degree and not in kind will be difficult for someone outside the legal tradition being compared to understand. A comparative analysis, even by those knowledgeable of the laws being compared, may be affected by a subconscious subjective determination due to the comparativist inability to be objectively detached from his or her own legal tradition.<sup>127</sup> The CISG and its application reflect all three types of difference. In the area of legal terminology, the CISG provides national legal system neutral concepts. Comparing CISG terminology to the common law, the CISG uses avoidance instead of cancellation or voiding; anticipatory breach instead of anticipatory repudiation; impediment instead of impossibility or frustration. Differences in emphasis can be seen at work in the application of the duty of good faith in the interpretation and enforcement of CISG contracts. The concept is found across legal systems, but its role varies dramatically. Good faith is viewed as *the* meta-principle in most civil law countries, especially in Germany, that must be satisfied in rendering solutions to interpretive disputes. In contrast, good faith plays a much lesser role in common law, especially in English law.

Finally, there are two types of rules that reflect actual differences between civil and common law – adoption and selection. Adoption relates to a number of CISG concepts and rules taken from one legal system that do not have a counterpart in another legal system. The civil concept of *Nachfrist* notice and price reduction remedy is not found in common law. In this case, a resort to comparative national private law would be confined to the use and application of these concepts among different civil law countries. The idea of selection refers to cases

119. Williston was the Chief Report and Corbin a Special Advisor for Restatement (First) of Contracts which was issued by the American Law Institute in 1932.

120. Corbin, 'The Interpretation of Words and the Parol Evidence Rule', Cornell L.Q. 1965-50, p. 161, 187.

121. See Articles 8, 18(2), 25, 27, 33(c) 34, 35(b), 37, 38(1), 39, 43(1), 44, 46(2), 46(3), 47(1), 48(1), 48(2), 55, 60, 63(1), 64(2), 65(1), 65(2), 68, 75, 76(2), 77, 79(1), 79(4), 85, 86(1), 86(2), 87, 88(1) CISG.

122. Article 7(2) CISG.

123. See Lord Denning's assertion of the importance of comparative in interpretation in *Corocraft v. Pan Am Lloyd's* 1968-2, p. 459, 467. See generally, Zweigert and Kötz, *An Introduction to Comparative Law*, New York: Oxford University Press, 3rd edition, 1998. See generally about the importance of comparative law in interpretation Kropholler, *Internationales Einheitsrecht*, Tübingen: Mohr Siebeck, 1975, p. 281 et seq.

124. Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods', *Int'l Lawyer* 1989-23, p. 443.

125. Article 7(1) CISG.

126. See Bussani and Mattei, 'The Common Core Approach to European Private Law', *Columbia J. European L.* 1997/1998-3, p. 339.

127. Von Nessen, *The Use of Comparative Law in Australia*, Sydney: Thomson Learning 2006.

where there are contrary or competing rules found in the different legal systems. In some of these cases, the drafters simply made a choice between the two competing rules. One would assume that the drafters used the comparative law's better rules approach to select the best rule. An example would be the difference between the common law dispatch rule and the civil law receipt rule for the effectiveness of acceptance. An economic analysis argument could be made that the civil law rule is the better rule because it places the risk of faulty transmission on the party in the best position to insure delivery of the acceptance. The idea of better rules is replicated in a later part of this article dealing with the economic analysis of law. In that part, the question is not the selection of the better or more efficient rule, but the selection of the most efficient interpretation of CISG rules. Before leaving this part, an analysis of the common core approach will be analysed as an interpretive methodology that can be applied to the interpretation of the CISG. The common core approach has been associated with the 1960s work of Rudolph Schlesinger in the United States<sup>128</sup> and, more recently, in the work of Ole Lando in the drafting of the Principles of European Contract Law.<sup>129</sup>

In interpreting the CISG, the resort directly to national law would increase the likelihood of homeward trend bias. It takes much less intellectual effort to simply rely on the law that you know, than to do a broader analysis. This has been the case in a number of US cases where CISG interpretive methodology was ignored and UCC rules applied by analogy. The intellectual benefit of a comparative analysis in the context of the CISG is that it forces the evaluator to critically assess numerous nation-specific rules. Under a common core interpretive methodology, relative agreement across legal systems would provide powerful interpretive guidance when CISG interpretive methodology fails to bring clarity to an ambiguous rule or term, or fails to adequately fill a gap in the CISG (in an area within the scope of the CISG). However, a comparative analysis may uncover diametrically opposed rules. In this case, the better rules analysis would need to be undertaken in the selection of one of the rules or borrowing from a number of nation-specific rules to create a new rule that is deemed to be a better fit for the CISG. A better fit interpretive methodology would be guided by the general principles of the CISG. Which rule or rule creation best honours the inter-

national character of the CISG? Which rule would advance the promotion of uniformity; which rule would be more acceptable to the various legal systems?

### 3.9. Economic Interpretation of the CISG

The economic analysis of law or law and economics (LAE) has been applied to many different areas of law in the United States, and to a lesser extent in Europe.<sup>130</sup> There is also sizeable literature applying LAE to contract law. Most of that literature focuses on the crafting of efficient rules of contract law (default rules) and the writing of efficient contracts (incomplete contracts and contract design). More recently, LAE has been applied to the CISG mostly to assess the efficiency of its rules.<sup>131</sup> The application of LAE to interpretation is relatively sparse. Nonetheless, there is sufficient research in this area to support economic interpretation of the CISG.

In the interpretation of the CISG, instead of analysing the efficiency of its rules, the focus here is analysing the relative efficiencies of different interpretations of a given CISG rule. One of the key tenets of LAE is reducing transactions costs (making contracting and interpretation more efficient). One way to lower transaction costs is through information sharing. Information sharing leads to truer mutual consent and should lead to more efficient contracts and fewer misunderstandings, and lower back-end costs related to breach, litigation and alternative dispute resolution. The importance of information sharing underlies the contextual rules, such as the reasonableness standard, of the CISG. At some level, most rules or principles are incomplete or vague. This leads to problems of over- and under-enforcement. Over-enforcement occurs when contract law rules lead courts to enforce contracts that were never subjectively agreed to or to under-enforce contracts by refusing to enforce agreements that were subjectively understood at the time of agreement. Allowing contextual information to be used in the interpretation of the CISG reduces the cases of over- or under-enforcement.

Kronman and Posner argue that one way of reducing transaction costs is for contract law to offer default rules (standard terms), that reduce the need to negotiate.<sup>132</sup> In essence, the CISG, as well as the UCC, do just that. They provide a list of 'gap-filling' terms that can be used to fill gaps found in a contract. For this to be truly effective, interpretations of these rules should focus on the construc-

128. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, New York: Oceana 1968.

129. Lando, 'The Common Core of European Private Law and the Principles of European Contract Law', *Hastings Int'l & Comparative L. Rev.* 1988-21, p. 809.

130. The European Association of Law and Economics (EALE) is the institutional response to the increasing importance of the economic analysis of law in Europe. EALE was founded in 1984 with the purpose of providing assistance to law and economics scholars and bringing their scholarship to a wider audience, including policy makers, legislators and judges. There is evidence that LAE appeared in continental scholarship at an earlier time. See, e.g., Schäfer and Ott, *The Economic Analysis of Civil Law*, Northampton, MA: Edward Elgar 2004; Pardolesi and Bellantuono, 'Law and Economics in Italy', available at [encyclo.findlaw.com/0345book.pdf](http://encyclo.findlaw.com/0345book.pdf) (asserting that LAE can be traced to the 1960 work of Pietro Trimarchi on strict liability). More recently, see Winkler, 'Review, Some Realism and Rationalism: Economic Analysis of Law in Germany', *German L. J.* 2005-6, p. 1 (discusses the publication in German of American LAE classics); Montagné, 'Law and Economics in France', in: Bouckaert and De Geest (eds.), *Encyclopedia of Law and Economics*, 1, Northampton, MA: Edward Elgar 1999, p. 150. See generally, Mattei, *Comparative Law and Economics*, Ann Arbor, MI: Michigan University Press 1997. For a review of the uneven reception of LAE in Europe and elsewhere in the late 1980s see Kirchner, 'The Difficult Reception of Law and Economics in Germany', *Int'l J.L. & Economics*, 1991-11, p. 277; Santos Pastor, 'Law and Economics in Spain', *Int'l J.L. & Economics* 1991-11, p. 309; Ota, 'Law and Economics in Japan: Hatching Stage', *Int'l J.L. & Economics*, 1991-11, p. 301.

131. Cenini and Parisi, 'An Economic Analysis of the CISG', in: Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009, p. 151; DiMatteo and Ostas, 'Comparative Efficiency in International Sales Law', *American University International L. Rev.* 2011-26, p. 371.

132. Kronman and Posner, *The Economics of Contract Law*, Boston, MA: Little Brown & Company 1979.



tion of the most efficient rules. Put simply, in interpreting CISG articles, the better interpretation between divergent or alternative possible interpretations is the one that produces the most efficient interpretive outcome. The question then becomes how one determines the more efficient of two divergent interpretations of a CISG rule? A device often used in the transaction cost analysis is that, unless expressly stated otherwise, risk should be allocated to the most efficient insurer, contractor, auctioneer, and so forth. For example, the CISG's fundamental breach rule and the allocation of risk of defective goods are placed on the buyer because the buyer is the most efficient auctioneer. The buyer is in the best position to obtain value for the defective goods and to prevent waste. The maximising of value and the prevention of waste act as surrogates for lower transaction costs.

### 3.10. Good Faith Interpretation

The German legal system provides an interpretive methodology based upon a single meta-principle – the principle of good faith. Through the prism of good faith, a judge may not only measure whether a party acted in bad faith in the performance of a contract, but also determine a good faith interpretation of a contract term and of contract law rules. This approach applied to the CISG would simply ask: what is a good faith interpretation of a CISG term or rule? The *Treu und Glauben* doctrine is used primarily to interpret a contract or the performance or enforcement of the contract by one of the contracting parties. But such a tool can be used in the interpretation of the CISG or the UCC, which are essentially template contracts that provide gap-fillers (terms) for private contracts. In fact, the good faith principle found in Article 7(1) of the CISG says exactly that – in interpreting the CISG, regard is to be made to the ‘observance of good faith in international trade.’ Instead, many courts and arbitral panels have expanded this restrictive use of good faith to imply good faith obligations in international sales contracts. This is the good faith principle found in the UCC and the BGB which states that ‘every contract or duty imposes an obligation of good faith in its performance and enforcement’<sup>133</sup> – although interpreted as such, this is not the principle of good faith found in the CISG which is directed at statutory (CISG) interpretation. In sum, this more restrictive use of good faith is a methodology of statutory interpretation.

### 3.11. Party-Generated Rules of Interpretation

There is an ongoing debate in American legal scholarship as to whether contracting parties should be able to expressly agree to the rules of interpretation to be applied to their contracts. Should the parties be able to contract out of CISG interpretive methodology? Should the parties be able to preempt the application of the traditional interpretive methodologies in the interpretation of CISG rules and in the interpretation of their contracts? One answer to the above questions is that parties can avoid the uncertainty of judicial interpretation by writing better contracts. The diminution of interpretive uncertainty is

obtainable by writing clear and more complete contracts. But as is often the case, clarity is in the eye of the interpreter and not the writer of the contract. And contracts can never be fully complete due to the bounded rationality of the negotiating parties, the loss in translation between business deals and legal contracts, and increasingly high transaction costs. Assuming a certain level of ambiguity and incompleteness, the parties’ last recourse is to provide rules of interpretation in their contracts.

Professors Schwartz and Scott have argued that in business-to-business contracts, parties should be able to incorporate rules of interpretation in which their contracts are to be interpreted by third parties, such as judges and arbitrators. They further assert that businesspersons prefer formal, anti-contextual methods of interpretation since they prize certainty and predictability.<sup>134</sup> Schwartz and Scott argue that the use of contextual evidence to uncover meaning is antithetical to the type of interpretation that parties to business contracts would want. Business contractors are willing to trade off an occasional misinterpretation for the certainty of formalistic interpretation. If taken to the extreme, the Schwartz-Scott thesis would support the existence of specialised rules of interpretation for business contracts. That is, even if parties do not incorporate rules of interpretation into their business contract, the default rules of interpretation of contract law should be formalistic in nature and seek a direct interpretation of the words of the statute and of the contract, only rarely resorting to extrinsic evidence. The issue for this article is whether contracting parties should have the power to place rules of interpretation into their contract that would bind a future court in how it applies the CISG to the contract? In the case of an express contractual provision providing rules of interpretation, the core premise that contracts are exercises of private autonomy, at first blush, supports the enforcement of such rules of interpretation. But, like any other term in a contract, the context of the bargaining process should also be assessed. Not all businesspersons are as sophisticated or possess the equality of bargaining power that the Schwartz-Scott thesis assumes. Also, just like any term in a contract, business or otherwise, contextual influences will still be relevant in a court’s determination of the true meaning CISG rules as applied to the parties’ rules of interpretation. Even if business parties intend to adopt formalistic rules of interpretation it would still ‘take a contextual (...) approach to determin[e] whether formalist principles apply’ to a certain issue.<sup>135</sup> Furthermore, in the case of gaps in the contract, prohibiting the use of contextual evidence or CISG gap-fillers becomes nonsensical. Finally, simply focusing on the incorporation of similar rules of interpretation in a series of contracts fails to reflect the relational nature of transactions between repeat contractors. A better theory to explain the relationships between businesspersons is relational con-

133. § 2-304 UCC.

134. Schwartz and Scott, ‘Contract Theory and the Limits of Contract Law’, Yale Law Journal 2003-113, p. 541, 544-48.

135. Miller, ‘Contract Law, Party Sophistication and the New Formalism’, Missouri Law Review 2009-75, p. 493, 535-36.

tract theory, which is contextual in nature.<sup>136</sup> Over a long-term contractual relationship, the formalism of such rules is unlikely to reflect the intent of the parties or the nature of the relationship.

#### 4. CONCLUSION

This article reviews the traditional methods used in the interpretation of statutes – grammatical (textual), systemic, historical and purposive. The move from formalism to contextualism in Anglo-American law is also examined, as well economic interpretive methodology. These methods of interpretation are reviewed with the hope of providing insights into the interpretation of an international convention – United Nations Convention on Contracts for the International Sale of Goods (CISG). More cynically, these methods can be seen as techniques of justification for a court or arbitrator's subjective interpretation of the CISG. In the words of Stephen Smith, 'it is difficult to say when interpretation ends and creation begins.'<sup>137</sup> This article, albeit mostly descriptive in nature, is based upon a more positive view. It sees these traditional and non-traditional methods as tools for an appropriate interpretation of statutes in general and the CISG in particular. They are useful in checking subjective interpretations of the CISG. This is especially important for an international convention that uses non-domestic legal terminology in the hope that interpretations will be autonomous in nature. This does not mean domestic or traditional methods of interpretation are to be ignored, but that they should be used in the search for autonomous meanings. The various methods of statutory interpretation act not only as a check on subjectivity, but also as checks on themselves.

The methods of interpretation reviewed in this article have a place in the interpretation of the CISG. But, because of the nature of the CISG as an international instrument, certain methods are more useful than others. Ultimately, their usefulness comes within the domain of the arbiter of interpretation. It also depends upon the particular article or provision of the CISG being subjected to interpretation. As a matter of best practice, it would seem that the more methods used in the interpretive process, the better the interpretive outcome. If all methods point to a certain interpretation, then judges and arbitrators can be more confident in their rulings and bolder in their exposition of the interpretation. In other instances, the methods might point in different interpretive directions. Hopefully, in such cases, the neutrality of the CISG language, being truthful to CISG's interpretive methodology,<sup>138</sup> and the proper use of the other methods of interpretation will lead to the most reasonable autonomous interpretation.

---

136. Macneil, 'Relational Contract Theory: Challenges and Queries', *Northwestern University Law Review* 2000-94, p. 877, 881.

137. Smith, *Contract Theory*, New York, NY: Oxford University Press 2004, p. 270.

138. See generally, Janssen and Meyer (eds.), *CISG Methodology*, Munich: Sellier 2009.