

In Favour of Appropriate Dynamic Interpretation for the CISG's Legal Uniformity

Zuoli Jiang, Shandong University Law School, People's Republic of China

1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) aims at removing the trade barriers for the promotion of international trade by virtue of setting standard for the unification of commercial law in the post-war era. However, in order to create legal uniformity it is insufficient to merely create and enact uniform instruments,¹ because uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.² Thus, an appropriate uniform interpretation of the CISG is essentially important to its legal uniformity.

Article 7 of the CISG indicates that courts of countries should not read and interpret the CISG through the lenses of domestic law, but rather in an “autonomous” manner. In other words, in interpreting the CISG one should not resort to the meaning generally attached to certain expressions within the ambit of a particular legal system.³ However, due to the lack of a world international trade court with an exclusive authority in interpreting the CISG, domestic courts as the sole interpreter and the existence of numerous vague and ambiguous terms and gaps in the CISG as a result of complex international compromises negotiated by countries with extremely diverse economies and legal cultures and systems, the courts of different countries will inevitably interpret the CISG based upon their own economic, political, and legal orientations.⁴ Some commentators believe that these diverging interpretations are greater obstacles to uniformity than once thought and suggest that pessimistically the CISG might not be a success.⁵

The purpose of this paper is not to give a brief account of the discussions about Article 7, but rather, this paper examines the current difficulties and problems of the uniform interpretation of the CISG by domestic courts, analyses the justification of the dynamic interpretation as the best approach of and solution to the problems for legal uniformity, and offer some suggestions to UNCITRAL's work to promote unification of international trade law.

2. The main difficulties of the uniform interpretation of the CISG for its legal uniformity

The chief reason of the divergent interpretations by the courts of different countries is that there are numerous difficulties and the courts try to overcome them by reading and interpreting the CISG by virtue of their domestic laws and techniques.

¹ L. M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 *Tulane Journal of International and Comparative Law*, 99 (1995).

² Franco Ferrari, *The CISG's Uniform Interpretation by Courts — An Update*, 9 *Vindobona Journal of International Commercial Law & Arbitration*, 235 (2005).

³ J. O. Honnold, *Uniform Law for International Sales under the United Nations Convention* (Deventer, 3rd ed., 1999) at 89.

⁴ See, e.g., Arther Rosset, *Critical Reflections on the United Nations Convention on Contracts for the International Sales of Goods*, 45 *Ohio St. L. J.* 266 (1984); V. Susanne Cook, *Note, The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sales of Goods*, 50 *U. Pitt. L. Rev.* 197 (1988); See Ryan, *supra* note 1, at 101; Shani Salama, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application*, 38 *Inter-American Law Review*(U. Miami Inter-Am. L. Rev), 227 (2006); Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 *Pace International Law Review* (*Pace Int'L. Rev.*), 304 (1996); Edita Ubartaite, *Application of the CISG in the United States*, 7 *European Journal of Law Reform* (*Eur. J.L. Reform*), 281 (2005).

⁵ Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 *La. L. Rev.* 476 (2001); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 *Va. J. In'tl L.* 760 (1999); Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 *Va. J. In'tl L.* 672 (1999); Aneta Spaic, *Approaching Uniformity in International Sales Law through Autonomous Interpretation*, 11 *Vindobona J. Int'l Com. & Arb.* 38 (2007).

2.1. *There are so many vague and ambiguous terms and gaps in the CISG*

The CISG as the most successful attempt to unify international trade law is filled with countless vague and ambiguous standards and rules as result of compromises of so many countries.⁶ First, there are so many legal concepts difficult to define. For example, “reasonable”, “place of business”, “good faith”, “substantial”, etc. Secondly, some rules are vague, for example, Article 78 provides that if one party fails to pay the price or any other sum, the other party is entitled to interest on it, but it fails to give specific explanations. What is more important, there are certain aspects involving international sales that the CISG does not even address. For example, Article 2 excludes from application those transactions involving consumer goods, as well as those transactions involving money or investment securities, and the same article also excludes from coverage issues relating to property ownership in the goods though these issues are essential in determining the substantial rights of the parties.⁷

2.2. *The criteria of uniform interpretation under the CISG are vague*

It is common knowledge that in order to uniform interpretation the CISG must specify criteria of interpretation as guideline of judicial interpretations by different courts. However, the international character, uniform application and good faith as the criteria of interpretation of the CISG are also too vague and lack important provisions, for example, the CISG fails to define the concepts of international character, good faith and its scope of application and fails to spell out the role of general principles, etc. In addition, Article 7 fails to specify interpretation methodology.

These failures make Article 7 the most problematic one in the CISG and lead to endless arguments between scholars and judges which result in inevitable divergent interpretations, and will not be helpful to the uniform interpretation of the CISG, and even become barriers to the unification of international trade law.⁸

2.3. *The CISG fails to expressly provide the sources for consideration*

Both jurisprudence and judicial practices demonstrate the importance of sources in the legal interpretation. Actually, the specific provisions of sources in the interpretation of international conventions are even more important than the national law because it is extremely difficult to unify the jurisprudence and judicial practices of different countries. However, the CISG does not provide specific guidance on the sources to be considered in interpretation. For example, foreign decisions interpreting the CISG are so important to national courts but the CISG fails to give any specific guidance.⁹

2.4. *The role of Vienna Convention on the Law of Treaties is limited*

In light of the fact that Article 7(1) of the CISG does not prescribe the theoretical methods of interpretation to be utilized, guidance on this matter would have to be obtained elsewhere. As uniform interpretation of the CISG is of utmost importance for its uniform application, regard must be had to universally accepted framework of interpretational guidelines. These guidelines are to be found in the Vienna Convention on the Law of Treaties (the Vienna Convention).¹⁰

⁶ Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 *Int'l Rev Of L. & Econ.* 474 (2005).

⁷ James P. Quinn, *The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods*, 9 *Int'l T, Bus L. Rev.* 4 (2004); Rod Andreason, *MCC-Marble Ceramic: The Parol Evidence Rule and Other Law under the Convention on Contracts for the International Sale of Goods*, 1 *Byu L. Rev.* 352 (1999).

⁸ Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and A Proposal for a New Uniform Global Code in International Sales Law*, 15 *Cardozo J. Int'l & Comp. L.* 472 (2007); James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 *Cornell. Int'l L. J.* 293 (1999).

⁹ See Cook, *supra* note 4, at 211.

¹⁰ Marlene Wethmar-Lemmer, *Regional Harmonization of International Sale Law via Accession to the CISG and the Importance of Uniform Interpretation of the CISG*, 47 *De Jure* 305 (2014).

There are long-time arguments between scholars on the application of the Vienna Convention to the interpretation of the CISG. Several scholars represented by Honnold hold that the CISG is an international convention only for sale of goods and the Vienna Convention applies to regulate only the relationships of its member countries, therefore, they contest the application of the Vienna Convention. The autonomous interpretation provided in the CISG excludes the application of both national laws and public international laws.¹¹ Other commentators support reference to the Vienna Convention to provide guidelines for the interpretation of the CISG because Article 1 of the Vienna Convention provides that it is applicable to treaties between states and that the CISG therefore falls under its scope of application. Also, the Vienna Convention is universally accepted as customary international law and should be applied to the interpretation of the CISG and there will be no conflicts in the process of interpretation.¹² There are also some scholars who neutrally advocate that both Article 7 of the CISG and the Vienna Convention are applicable but they must be divided into two parts: Articles 31-33 of the Vienna Convention should apply to interpret Articles 89-101 of the CISG, and Article 7 of the Convention should apply to interpret the other articles of the Convention. One argument in this regard is that Article 7 is the special law and Articles 31-33 of the Vienna Convention are common law, thus the former applies in priority, while the latter applies only Article 7.¹³

Clearly, the Vienna Convention can be guidelines for the interpretation of the CISG, but its role is rather limited.

3. *The recourse to the interpretation sources as the main practical problems in the interpretation of the CISG by courts of most countries*

The modern theories of interpretation and methods are mainly originated in the legal interpretation of ancient Roman law, and up to now, varied methods of interpretation already form such as literal interpretation, historical interpretation, purpose interpretation and dynamic (evolutional) interpretation. Broadly, these methods can be classified into static interpretation and dynamic interpretation. The historical development of legal interpretation demonstrate that several methods are usually comprehensively utilized in practical interpretations. The most important argument between scholars and judges in interpretation is the role of dynamic interpretation represented by the role and ranking of different sources of interpretation. The static interpretation emphasizes the text, preparatory materials, intent of drafters, legislative purpose, while the dynamic interpretation pays more attention to legal principles, foreign case law, academic writing, principles of public international law, national law, etc.

3.1. *The general principles on which the CISG is based*

Article 7(2) provides that if questions are not expressly settled in the CISG, they shall be settled in conformity with the general principles on which the CISG is based. The ambiguous methodical interpretation of Article 7 results in the variant judicial interpretations.¹⁴

The static interpretation supporters insist that the CISG does not list specific general principles, that it is difficult, even impossible to find them, and are opposed to any dynamic interpretations. The dynamic interpretation supporters contend that general principles can be found through induction from two sources: the articles of the CISG and the process of legal development. In this way, the guidelines can be found for interpreting the CISG not to leave uncertainty which leads to national laws for interpretation by judges.¹⁵

¹¹ See Honnold, *supra* note 3, at 103.

¹² See Wethmar-Lemmer, *supra* note 10, at 305; Tom Allen, General Principles of International Law and the Autonomous Interpretation of the Convention on Contracts for the International Sale of Goods, 8 J. Islamic St. Prac. Int'l L. 94 (2012).

¹³ LiuYing, Study of Interpreting Problems of the United Nations Convention on Contract for the International Sale of Goods, 11th ed., Law Press China, 11(2009). See Wethmar-Lemmer, *supra* note 10, at 305.

¹⁴ See Sheaffer, *supra* note 8, at 462.

¹⁵ John O. Honnold, Documentary History of the Uniform Law for International Sales: the Studies, Deliberations, and Decisions that Led to the 1980 United Nations Convention with Introductions and Explanations, 198 Kluwer Law and Taxation Publishers (1989), at 20.

Comparatively, more scholars and judges agree to identify general principles more flexibly. Some argue that an international convention is a living maturing body of law, founded on certain fundamental values but capable of adapting new interpretations for changed environments.¹⁶ Therefore, a dynamic understanding of Article 7(2) is conducive to settle questions that the CISG failed to provide for definitely.¹⁷ Only an active judicial interpretation of a convention can “keep the ship afloat,” because there is little hope “that [legislative] rescue will arrive.”¹⁸

From the perspective of dynamic interpretation, several general principles can be deduced: the principle of protecting the injured party’s expectation interest from Articles 45(2), 47(2) and 48(1), the principle of protecting restitution property from Article 81(2), and the principle of reliance interest from Articles 85, 86(1) and 88(3), etc. One national court induced the principle of burden of evidence by the buyer who claims that the goods delivered are not in conformity with the contract.¹⁹

Certainly, the identifying and extracting many of the general principles through deduction is not unlimited, and it should be kept in mind that the CISG’s overall objective is to promote international trade by removing legal barriers that arise from different social, economic, and legal systems of the world. Namely, the present purpose of finding general principles from the text of the CISG and from its legislative history is to help produce at least the narrow effect of preventing interpretations of the CISG based on domestic law.²⁰

3.2. Foreign case law

Due to the failure of specific provisions of the CISG, the resort to foreign case law has been also highly controversial. Some contend the regard on the foreign case law, while others are in favour of the reference of foreign case law. Most scholars infer that the “international character” of the CISG requests the interpreters to break away from domestic legal concepts and interpreting techniques and consider international legal texts,²¹ “the promotion of uniform application” requires taking into account relevant foreign case law. Uniformity can only be achieved if one also considers foreign case law. One further points out that the interpreter must consider decisions rendered by judicial bodies of foreign jurisdictions, because it is possible that the same or similar questions have already been examined by other States’ courts.²²

Another feature of dynamic interpretation in this regard lies in the finding of general principles on which the CISG is based from foreign case law. For example, one German court stated that autonomy is one principle of the CISG,²³ and many courts indicated that “estoppel” is also the CISG’s principle.²⁴ It should be stressed that in the case where questions that cannot be settled according to the expressed rules

¹⁶ Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 783 (1998).

¹⁷ See Salama, *supra* note 4, at 242.

¹⁸ See Alstine, *supra* note 16, at 777.

¹⁹ See Case HG930138, (*Italy v. Switz.*), Handelsgericht Zürich (Sep. 9, 1993), available in UNILEX, A Comprehensive and “Intelligent” Data Base on the UN Convention on Contracts for the International Sale of Goods (CISG), Transnational Juris Publications, Inc. Irvington, N.Y.)

²⁰ Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minn. J. Global Trade, 117 (1997).

²¹ See Wethmar-Lemmer, *supra* note 10, at 301.

²² Elizabeth H. Paterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 Stan. J. Int’l L. 263, 283(1986); Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?* 17 J. L. & Com. 254 (1998); C. B. Andersen, *Uniform International Sales Law and the Global Jurisconsultorium*, J. L. & Com. 159 (2005); Joseph Lookofsky, *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 3rd Edition, Kluwer Law International, 30 (2008).

²³ A. Kritzer, *Guide to Practical Application of the United Nations Convention on Contracts for the International Sale of Goods*, /Deventer, 1989, 114.

²⁴ Rechtbank Amsterdam, October 5, 1994, *Nederlands Internationaal Privaatrecht*, 1995, No. 231; Franco Ferrari, *Article 7*, in P. Schlechtriem (ed.), *Kommentar Zum UN-Kaufrecht-CISG*, Munich, 3rd ed., 2000, 134.

of the CISG and the general principles cannot be deduced in order to fill gaps, the courts must settle them by resort to foreign case law.²⁵

3.3. Domestic laws

Article 7(2) provides that if questions concerning matters governed by the CISG are not expressly settled in it, they shall be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. This indicates clearly that domestic law can be utilized to fill gaps in the CISG. However, there has been heated debate on whether regard shall be had on domestic law as interpretation source. Supporters believe interpreters are not only allowed to consider domestic law but also are obligated to do so.²⁶ Bonell further argues that the use of domestic law “represents under the ... uniform law a last resort to be used only if and to the extent a solution cannot be found either by analogical application of specific provisions or by the application of general principles underlying the uniform law as such.”²⁷ The last resort status of domestic sales law is meant to deter the threat of homeward trend. This is especially crucial in the case of the CISG due to the fact that its provisions were the product of intense debate and compromise.²⁸ One against the use of domestic law contends that the recourse to rules of private international law represents regression into doctrinal fragmentation and practical uncertainty. The relevant reference to such a method in Article 7(2) is unfortunate, as it does not assist the goal of uniformity. Recourse to the rules of private international law impedes and frustrates the unification movement and can reverse the progress achieved by the world-wide adoption of the CISG.²⁹

With respect to the use of domestic law by national courts, Honnold helplessly calls it “homeward trend” and points out that this is an inevitable phenomenon.³⁰ One scholar has examined some cases by some German courts and holds that an interpretation that is informed by national approaches may enhance the long-term legitimacy of the CISG.³¹

3.4. Academic writings

The important role of academic writings in judicial interpretation is originated from the ancient Roman law and is an important part of dynamic interpretation. In the years of the third century B. C., the ancient Roman law was not sufficient to regulate the prosperous contacts between Rome, Greece, Egypt etc., courts had to resort to academic writings to fill gaps of old laws. In the years of the first century A. D., academic writings became the first source and authority in the legal interpretation by courts: the agreed interpretation by jurists is binding to judges.³² The famous Law of Citations promulgated by the Roman Emperors required the courts of the Roman Empire to follow the opinions of five jurisconsults and determine which one of them was to be given priority in case they disagreed among themselves. It must be emphasized that the

²⁵ Many courts in their judicial practices have found out general principles from foreign case law to settle questions not explicitly settled in the CISG. (See Franco Ferrari, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law*, 2003 *Int'l. Bus. L. J.* 228, (2003).)

²⁶ M. J. Bonell, Article 7, in *Convezione di Vienna sui Contractti di Vendita Internazionale di Beni Mobili 25* (Cesare Massimo Bianca ed., 1991); John Felemegas, *The United Nations Convention on Contract for the International Sale of Goods*, Kluwer Law International, 163 (2000-2001).

²⁷ M. J. Bonell, Introduction to the Convention, in *Commentary on the International Sales Law 79* (Cesare M. Bianca & Michael. J. Bonell, eds. 1987); See Koneru, *supra* 20, at 105.

²⁸ Larry A. DiMatteo, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 *Northwestern Journal of International Law & Business* (Nw. J. Int'l & Bus), 314 (2004).

²⁹ John Felemegas, *The United Nations Convention on Contract for the International Sale of Goods*, Kluwer Law International, 165 (2000-2001); See Koneru, *supra* 20, at 123.

³⁰ John O. Honnold, *Documentary History of the Uniform Law for International Sales: the Studies, Deliberations, and Decisions that Led to the 1980 United Nations Convention with Introductions and Explanations*, 198 Kluwer Law and Taxation Publishers (1989), at 26.

³¹ See Karen Halverson Cross, *Parol Evidence Under the CISG: The “Homeward Trend” Reconsidered*, 68 *Ohio St. L. J.* 158 (2007).

³² Chaobi Chen, *Fundamentals of Roman Law*, Law Press China, 2006, p. 19; Edgar Bodenheimer, *Doctrine as a Source of the International Unification of Law*, 34 *American Journal of Comparative Law*, 71, 72 (1986).

Roman glossators construed only the meaning of the legal texts in the early years, but later they began to make comments to adapt to the changed circumstances. The commentaries by jurists of the Justinian Code as the main body of the famous Digest is highly creative and binding, and also a good example of dynamic interpretation in Roman Law to adapt to new social changes.³³ Obviously, dynamic interpretation developed in line with and acted as important impetus to the Roman Law

Generally, the Roman Law exerts an influence both on the civil law and common law, but more on civil law and less on common law. As a result, courts in both common law and civil law nations do give consideration to scholarly writings, albeit in different degrees. Specifically, differences exist between the national courts involving the issue of what constitutes primary and secondary sources of legal authority.³⁴ While a US judge would likely refer to prior CISG case law in his efforts to render a uniform interpretation of the CISG, a French judge would likely refer to scholarly commentary in place of the judicial decisions themselves.³⁵

One scholar concludes that among civil law jurisdictions, reliance on scholarly articles has long been utilized in interpretation of the law. Although courts of common law jurisdictions, by contrast, have been reluctant to confer the same weight to academic opinion when resolving disputes, there is evidence that common law courts are beginning to shift their approach, especially when faced with legal complexities involving international disputes.³⁶

4. *The justification of the dynamic interpretation in the CISG's uniform interpretation*

Conventional interpretation can be broadly classified into static interpretation and dynamic interpretation. The former is basically based on the original intent of the legislature and asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute.³⁷ Comparatively, dynamic interpretation pays more attention to the dynamic nature of statutes, stating that statutes have different meanings to different people, at different times, and in different legal and societal contexts and that courts should interpret statutes in light of their current as well as historical context. That is, this view rejects the notion that “the meaning of a statute is set in stone on the date of its enactment.” Rather, it is argued, in the event of an evolution in the relevant public values, federal courts have the authority to develop new legal standards and even to adapt otherwise clear statutory text to accommodate a changed societal and legal environment.³⁸ Dynamic interpretation is most appropriate when the statute is old yet still the source of litigation, is generally phrased, and faces significantly changed societal problems or legal contexts.³⁹

Dynamic interpretation as a new method of conventional interpretation is undoubtedly the product of exploration by scholars and judges to settle new problems, due to the fact the traditional methods of literary interpretation, purpose interpretation provided for by the Vienna Convention failed to meet the requirements of the current economic globalization. Although this new method of interpretation may still lead to criticism, relevant legal theories in favour of it are to mature and so many courts and tribunals have already resorted to it in their judicial interpretation. Therefore, it is now an independent method of conventional interpretation.⁴⁰

³³ See Chen, *supra* note 32, at 20.

³⁴ See Honnold, *supra* note 3, at 47.

³⁵ See Quinn, *supra* note 7, at 15.

³⁶ See Sheaffer, *supra* note 8, at 493.

³⁷ Richard Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817-22 (1983).

³⁸ William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 1483 (1990).

³⁹ *Id.* at 1555; Michael P. Van Alstine, Dynamic Treaty Interpretation, 146 U. Pa. L. Rev. 774 (1998).

⁴⁰ Shipo Jiang, the Dynamic Interpretation of International Conventions, 14 Legal Methodology, 314, (2013).

4.1. The economic globalization is the utmost impetus to the dynamic interpretation

Along with the end of the Cold War, more and more countries have started to get involved in economic development, resulting in the unprecedented economic globalization that has naturally hastened the legal globalization under which the different interests of different countries are allocated. Recent years have witnessed the emergence of a whole new generation of international conventions designed to unify the law governing international commercial transactions. As national economies continue toward global integration, so too is the law progressing toward unification on an international level. New and broader perspectives on interpretation are required to accommodate the dynamics of this process.⁴¹

4.2. The dynamic nature of Article 7 of the CISG requires dynamic interpretation

In accordance with Article 7, international character is free from the influence of national legal concepts and terminology and even from the domestic interpretive techniques themselves, to promote uniform application requires cooperation among the formally independent national courts, questions left unresolved in a convention's express provisions must be settled in conformity with the general principles on which it is based. Each of these three elements of Article 7 carries an animating spirit of the interpretative paradigm. These norms have operated to give the codes the flexibility necessary to adapt to circumstances unforeseen at the time of their adoption. Dynamic interpretation is also compelled by the needs of international uniformity. Without a means for adaptation, the inevitable social and technological changes in the relevant field of commerce will make any formal unification of legal standards fleeting.⁴²

4.3. Articles 31-33 of the Vienna Convention demonstrate obvious dynamism

As is mentioned above, the Vienna Convention can be utilized partly to interpret the CISG, and its Articles 31-33 have obvious dynamism. Firstly, the words' ordinary meaning can change with time because the Vienna Convention fails to define the "ordinary meaning". Secondly, the words such as "good faith", "object and purpose" should be interpreted dynamically. Thirdly, all the phrases of "subsequent agreements", "subsequent practice" and "relevant rules of international law" permit to be interpreted in accordance with changed circumstances. Finally, the phrases of "preparatory works" and "circumstances of a treaty's conclusion" manifest dynamism.⁴³ Haopei Li concluded that general international convention should be interpreted according to their social purposes and developments and the relevant interpretation can exceed the original intents of drafters.⁴⁴

4.4. So many legal theories are in support of dynamic interpretation

In ancient times, the Roman glossators began to observe the relationship between literary interpretation and the changed circumstances and resort to dynamic interpretation to fill legal gaps. Grothius argued that due attention has to be paid to the true meaning of the drafters in conventional interpretation, however, if such interpretation leads to absurd or illegal outcome, true meaning can be speculated.⁴⁵ The mechanical jurisprudence of the late nineteenth century posits that law consists of rules promulgated by the sovereign legislature and mechanically applied by judges. In 1908, Pound questioned the mechanical jurisprudence and argued that judges should not only resort to precedents, rather should concern the social development so as to promote rather than impede the social development.⁴⁶ Another advocates that interpretation is not static, but dynamic. Interpretation is not an archaeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning

⁴¹ See Alstine, *supra* note 39, at 694.

⁴² *Id* at 733.

⁴³ Sondre Torp Helmersen, *Evolutionary Treaty Interpretation: Legality, Semantics and Distinctions*, 6 EJLS, 131 (2013).

⁴⁴ Haopei Li, *Introduction to Law of Conventions*, Law Press China, 2003, p. 361.

⁴⁵ Dongli Huang, *Interpretation of international Convention needs certain flexibility*, 3 International Trade, 34, (2005).

⁴⁶ Roscoe Pound, *Mechanical Jurisprudence*, 8 Columbia Law Review 605, (1908).

to current problems and circumstances.⁴⁷ In 1920, Judge Cardozo confessed that the nature of the judicial process is “uncertainty”, rather than objective answers, and that “the process in its highest reaches is not discovery, but creation.”⁴⁸ Dworkin’s theory of statutory interpretation is part of his general theory of “law as integrity”, in which he argues that all law, including common law, statutes, and the Constitution, is a continuous process of interpretation. Dworkin has in an important way challenged scholars and judges to think about statutory interpretation as an ongoing process focusing on the present, and has linked his theory of statutory interpretation with a comprehensive theory of law.⁴⁹ Judge Posner also as a leading scholar of economics of law has suggested reasons for reading generally worded statutes dynamically, stating that when Congress has basically dropped a problem into the collective judicial lap, with imprecise and only general directions, then it makes sense for courts to develop that statute in accordance with contemporary, rather than purely historical policy.⁵⁰

Clearly, dynamic interpretation is justified by current jurisprudence though may still lead to criticism.

5. *Some suggestions to UNCITRAL’s practical work to encourage the reasonable dynamic interpretation*

There are at least three main reasons for the divergent interpretations by different national courts of the CISG. First, the CISG is too old to settle the questions arising from the unprecedented unification of international trade law pushed forward by the economic globalization. Second, the CISG is filled with numerous vagueness, ambiguities, and gaps from which national judges cannot find relevant rules to settle problems and have to resort to their own national laws and interpretative techniques. Third, historically and jurisprudentially, dynamic interpretation is the most usual and effective method of interpretation to fill gaps in old laws to settle new questions in changed environment. Accordingly, there are at least three approaches for UNCITRAL to encourage dynamic interpretation by national courts. First, substantive revision should be made to the CISG to improve its rules and fill gaps. Second, a guide to or a standard for the CISG must be enacted to make detailed rules of dynamic interpretation. Third, recommendations should be made to dynamic interpretation to national legislatures, courts and law practitioners.

Comparatively, the first approach can solve the problem more thoroughly but difficult to put into practice currently because the revision of international convention is a lot difficult than national laws. The third approach sounds reasonable but it may not be persuasive enough to settle substantive questions. The second approach is, by contrast, the most effective and practical way to improve substantively the CISG as an old law to settle new problems of the economic globalization.

It is true that UNCITRAL has established both the CLOUT system and the Digest as important strategic tools to assist in uniform interpretation, however, the lack of substantive progress can only be an indication that additional efforts are required.⁵¹ Accordingly, I suggest that UNCITRAL enact the guide to the CISG that should contain the following points:

5.1. *The guide should have an emphasis of the standards for the dynamic interpretation of the CISG*

It must be kept in mind that the dynamic interpretation concerns the misuse of judges’ judicial initiative if it is resorted to without any reasonable limitations. As a result, the guide should lay emphasis on the three interpretative standards provided for in Article 7: international character, uniform application and good faith. In other words, the dynamic interpretation of the CISG must be done under the guidelines of the three standards. Also the guide should provide for specific interpretative methods to refrain from unreasonable divergent interpretations.

⁴⁷ William N. Eskridge Jr, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1482 (1987).

⁴⁸ *Id* 1507.

⁴⁹ *Id* 1550.

⁵⁰ *Id* 1517.

⁵¹ Renaud Sorieul, Emma Hatcher, & Cyril Emery, *Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat*, 58 Vill. L. Rev. 503 (2013).

5.2. *The guide should specify relevant rules and fill the gaps of Article 7*

As is mentioned above, the numerous vagueness, ambiguities and gaps of Article 7 are the chief hidden danger of divergent interpretations and the guide should define specifically the words such as “regard”, “the need”, “good faith”, “general principles” and “by virtue of”, and add up to new rules such as the specific sources of law that judges must resort to, and the way to find out general principles.

5.3. *Due attention should be paid to academic writings and the CISG cases by different courts and tribunals*

In order to provide guidance as to the correct interpretation of the texts and identify and fill any gaps to contribute more to the uniform interpretation of the CISG, UNCITRAL should examine and analyse carefully the academic writings and the CISG cases of different courts and tribunals. In this way, the guide can achieve bigger powers of persuasion and application.

5.4. *The guide has to be more persuasive but not be necessarily binding*

In order to lead to less criticism arising from sovereignty and other possible issues, the guide should at best be persuasive, but not binding, on courts.⁵²

This approach could inadvertently bring about criticism of scholars and judges, however, as the economic globalization is developing more and more rapidly, the CISG has been accepted by more and more states and parties who recognize the importance of uniform application of the CISG and the significant achievements of UNCITRAL. What is more, UNCITRAL has gathered so much experience by having enacted so many model laws, guides and established the Case Law on UNCITRAL Texts (CLOUT) and the UNCITRAL Digest of case law as great contribution to the unification of international trade law.⁵³ In this connection, this approach is of bright future and worth trying.

⁵² UNCITRAL has considered several proposals such as establishing a permanent editorial board and the Digest that should provide more detailed guidance as to the interpretation of the CISG. Neither of these proposals was adopted. (See Sorieul, *supra* note 51, at 504.

⁵³ Spiros V. Bazinas, Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest, presented in “Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods” (Collation of Papers at UNCITRAL-SIAC Conference 22-23 September 2005, Singapore)(available at <http://www.cisg.law.pace.edu/cisg/biblio/bazinas.html>).