The Transnational Dimension of Statutory Interpretation – Tragically Overlooked in a Global Commercial Environment

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1. INTRODUCTION

Recently, we came across a very well written and thoroughly researched article by Dharmananda and Firios entitled "Interpreting statutes and contracts: A distinction without a difference?".[1] The article made many excellent points and was very thought provoking – but it overlooked an aspect of legal interpretation which is central to the modern legal landscape, namely internationalisation. In all areas of law – arguably, especially in our field of commercial regulation – the regulatory effects of globalisation and harmonisation necessitate a different perspective on both statutory and contractual interpretation.[2] We do not disagree with the paper's overarching conclusion that there are important parallels between contractual and legislative interpretation – but we posit that in the formula to establish this point it becomes increasingly important to include the international dimension. Not all domestic statues should be seen in a solely domestic light.

The reason for this is not purely academic. Sadly, the phenomenon of overlooking this in scholarship and judicial application is very common, so the authors feel compelled to address this, and to emphasize the significance of the interpretive variations which are the result of the internationalisation of law.

Model laws, legal transplants/legal diffusions and conventions have found their way into our legal system and form part of the Australian legal landscape. Importantly, many of the international documents include their own interpretive mandate and hence cannot be interpreted with the same tools as those who are entirely drafted by domestic legislators, thus creating a modern dualism of legal principles. Parliament is, in essence, the surrogate of the international diplomatic conference and hence Parliament's supremacy is subrogated.[3] As Corney put it, *"The intent is to create an independent legal regime that transcends national boundaries and applies uniformly among state parties"*.[4] The conclusion is that a dual system of interpretative approaches exists in Australia in order to give internal legal effect to all laws currently in force in Australia. But shared international laws, in convention format or springing from Model Laws, do not come just from parliament but from a shared international comity

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[1] Jacinta Dharmananda and Leon Firios, 'Interpreting Statutes and Contracts: A Distinction Without A Difference?' (2015) 89(8) *Australian Law Journal* 580.

[2] Camilla Baasch Andersen, 'A New Challenge For Commercial Practitioners: Making The Most Of Shared Laws And Their 'Jurisconsultorium" (2015) 38(3) *University of New South Wales Law Journal* 911, 912. Here Andersen emphasises the necessity for commercial lawyers to consider the application of law in different contexts in order to keep up with the increasing trend of globalisation.

[3] Graham Corney, 'Mutant Stare Decisis: The Interpretation of Statutes Which Incorporate International
Treaties into Australian Law' [1994] 18 *University of Queensland Law Journal* 50, 51.

[4] Ibid 50.

of states. Shared laws, like all things shared, have to be interpreted with an eye to how others are applying and interpreting them, so this cannot happen purely in domestic settings. This point has been raised in previous research on the global Jurisconsultorium of shared laws.[5] Applying such an angle to these unique forms of law would be to lend them a so-called "homeward trend" in interpretation, which frequently leads to non-uniform results[6] and therefore inconsistency in application on the transnational scale for which these laws are designed.

The frequency with which this added dimension of international interpretive aspects is overlooked in scholarship such as this is also mirrored in the legal profession and in the judiciary, which do not seem to appreciate the subtle differences in the interpretive mandate. Introspective and domestic interpretational guidelines become especially moot in the light of transnational conventions and Model Laws adopted into domestic legislation.

In Australia, examples of shared laws built on model laws are many, both at State level (like the West Australian Commercial Arbitration Act, which like many other State acts in this field is an adoption of the UNICTRAL Model Law) and the *Cross-Border Insolvency Act 2008* (Cth).[7] But we also see shared laws in the forms of implemented or adopted Conventions, such as the CISG. Hence in many statutes the authors' subjective intent is relevant such as in the CISG. Spiegelman – when defending the textual approach – did concede that "a business like" interpretation is an acceptable constraint on contractual interpretations.[8]

This inclusion of shared international laws in the domestic legal framework truly challenges any view that *"the interpretative task is an objective one"*.[9] The inclusion of model laws into domestic legislation further strengthens the international perspective of a less objective task.

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[5] Camilla Baasch Andersen, above n 2.

[6] Ibid 916.

[7] *Commercial Arbitration Act 2012* (WA) based on the *UNCITRAL Model Law on International Commercial Arbitration,* GA Res 40/72, UN GAOR, 40th sess, 11th plen mtg (11 December 1985) amended in 2006 GA Res 61/33, UN GAOR, 6th Comm, 61st sess, 64th plen mtg, Agenda Item 77, UN Doc A/RES/61/33 (18 December 2006) and *Cross-Border Insolvency Act 2008* (Cth) based on the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*, GA Res 52/158, UN GAOR, 6th Comm, 52nd Sess, 72nd plen mtg, Agenda Item 148, UN Doc A/RES/52/158 (30 January 1998) annex I ('*Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*').

[8] Hon James Spigelman, 'From text to context; Contemporary Contractual Interpretation,' (2007) 81 *Australian Law Journal* 322, 330.

[9] Jacinta Dharmananda and Leon Firios, above n 1, 581.

The starting point is the observation made by the House of Lords in *Fothergill v. Monarch Airlines*[10] interpreting the Warsaw Convention. Lord Diplock rejected the plain meaning approach and stated:

> It should be interpreted, as Lord Wilberforce put it *in James Buchanan & Co., Ltd v. Babco Forwarding & Shipping (U.K.) Ltd.* [1978] A.C. 141, 152, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.[11]

He went on to say that *"the language […] has not been chosen by an English draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges."*[12]

Lord Scarman sums it all up when he states:

> Rules contained in an international convention are the outcome of an international conference; if, as in the present case, they operate within the field of private law, they will come under the consideration of foreign courts; and uniformity is the purpose to be served by most international conventions, and we know that unification of the rules relating to international air carriage is the object of the Warsaw Convention. It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting states, The mischief of any other view is illustrated by the instant case. To deny them this assistance would be a damaging blow to the unification of the rules which was the object of signing and then enacting the Convention. Moreover, the ability of our judges to fulfill the purpose of the enactment would be restricted, and the persuasive authority of their judgments in the jurisdictions of other contracting states would be diminished.[13]

This paper will demonstrate that interpretive rules do not all the time depend on the domestic rules but depend on the interpretive mandate which is included in many model laws and conventions. Hence due care must be taken to follow the mandate and avoid an ethnocentric approach. It will be demonstrated that good faith and the subjective approach do play an important role and simply cannot be ignored. In addition, this paper will also argue that - depending on the subject matter - there is a difference between the rules of interpretation of statutes and contracts.

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[10] [1980] 2 All ER 696.
[11] Ibid 706.
[12] Ibid.
[13] Ibid 715.

2. INTERPRETATION OF STATUTES AND CONTRACTS

As Justice Kirby observed; the work of judges and lawyers involves the interpretation of statutes and contracts.[14] Dharmananda and Firios note that Professor Carter said that *"the time has been reached where reliance on cases interpreting statutes is rarely necessary or helpful when construing contracts."*[15] On the other hand, Justice Kirby noted that there are: *"differences between the way in which judges approach the construction of written contracts and the way that they approach the interpretation of legislation"*[16] It is argued that Justice Kirby's astute observation is correct. There are two situations where the application of purely domestic law is disturbed. Hence we challenge the four broad propositions put forward by Dharmananda and Leon Firios; the objective approach that the text is paramount, that purpose and context inform the meaning of the text and that courts can fill gaps in the text, are not in every case applicable.[17] A soon as transnational legal texts are to be interpreted, the propositions change, firstly in transplantations and secondly with model laws and conventions.

The first situation is best explained by Kirby J in *Air Link Pty Ltd v Paterson.*[18] The *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) in essence is nearly identical to the Warsaw Convention and hence is a transplant. Kirby J noted:

> In accordance with established principles of interpretation governing Australian legislation, designed to give effect to the language of international law to which Australia has subscribed, the expression in the Carriers' Act must, if possible, be given the same interpretation as has been adopted by equivalent courts of other states parties. No differentiation could be drawn on the basis that it was not obligatory for Australia to apply the language of the Warsaw Convention to domestic carriage by air within Australia. Having elected to do so, it must be assumed that an interpretation consistent with any given to the treaty provisions should be adopted, in so far as the treaty language was borrowed.[19]

Kirby J noted that to give effect to the language of the Warsaw convention, as it is enacted in the Carriers' Act, the purposive approach

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[14] Hon Michael Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24(2) *Statute Law Review* 95.

[15] JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, Oxford, 2013) [1-54].

[16] Hon Michael Kirby, above n 14, 106.

[17] Jacinta Dharmananda and Leon Firios, above n 1, 581.

[18] [2005] HCA 39.

[19] Ibid [49] (Kirby J).

must be taken by also relying on Lord Diplock's statements in *Fothergill v Monarch Airlines Ltd*.[20] Tellingly, Kirby J noted that the error of the Court of Appeal was

> In effect, the error of the Court of Appeal, in concluding otherwise, was the result of failing to give the language of s 34 a purposive construction. Particularly so when its origin, and operation, within the Warsaw Convention language is to be considered, in all of its differing applications in different countries by different decision-makers.[21]

In sum, it is argued that the interpretation of transplanted statutes is not only different from domestic statutory interpretation, but may also challenge the theory that it is essentially the same as interpreting contracts. The interpretation of a statute is an essential element in the judging of a contract, but it will first require conflicts of laws analysis to ensure the correct contractually interpretive framework is applied.

A far as model laws or conventions are concerned, the clearest distinction is supplied by the CISG which not only includes an article to interpret the convention but also how to interpret the contract. Article 7 – interpreting the convention - notes: *"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."*[22]

The text of this article is clear; it talks about the interpretation of the convention and supplies two principles under which the CISG must be interpreted; namely to promote uniformity and the interpretation of any contract under the CISG must be guided by observing the principle of good faith. This interpretive rule is used in a number of UNCITRAL model laws and instruments, and not just the CISG, as an interpretive tool which assures uniform and international applications of law.[23]

Both ahead of their time in 1980, Lord Diplock and Lord Scarman displayed their understanding of the principle of uniformity when commenting on the question of how a Convention must be interpreted. Specifically, Lord Diplock stated that an interpretation of international documents must be *"unconstrained by technical rules of English law, or by*

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[20] Ibid [78]-[79] (Kirby J).

[21] Ibid [84] (Kirby J).

[22] *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) (hereby referred to as the *United Nations Convention on Contracts for the International Sale of Goods*).

[23] See, for instance, the UNCITRAL Model Law on International Commercial Arbitration (MAL) and its interpretive guideline. The success of this is analysed extensively in Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration* (Alphen aan den Rijn, The Netherlands Kluwer Law International, 2016).

English legal precedent."[24] The significance of article 7 of the CISG is demonstrated by the fact that it has found its way into many other conventions and model laws. As an example, the Cape Town Convention notes in article 5: *"In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application."*[25]

The Cross-Border Insolvency Act similarly notes in article 8: *"In the interpretation of the present Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."*[26]

There is no doubt that many conventions and model laws incorporated an article setting out the interpretative requirements which do not involve ethnocentric considerations at all. Simply put, a court or legal practitioner must be aware of the application of good faith when required, but foremost, any interpretation of the text must be made *"unconstrained by technical rules of [domestic law] or by [domestic] legal precedent."*[27]

A further problem arises as several instruments are at the judge's disposal when interpreting statutes which are international in character but are not devised by domestic draftsman. Generally speaking, there is the Vienna Convention on the Law of Treaties, specifically articles 31 and 32;[28] the statute specific interpretative article and the domestic law, such as the Acts Interpretation Act and the Parol Evidence rule. They all have a place within the interpretative landscape but must be used in a correct and appropriate manner. A good example to illustrate this point is the Cross-Border Insolvency Act. The court in *Ackers and Others v Saad Investments Company Ltd and Another*[29] clearly demonstrates that there was a lack of understanding around the interpretative mandate. Rares J had to interpret an article within the model law and he correctly noted the importance of article 8; the interpretative article. The court did question if extrinsic material can be used to assist in the interpretation of ambiguities.[30]

However, Rares J proceeded to rely on the *Vienna Convention* by noting *"[it] is an authoritative statement of customary international law for the*

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[24] *Fothergill v. Monarch Airlines* [1980] 2 All E.R. 696, 706.

[25] *Convention On International Interests In Mobile Equipment*, opened for signature 16 November 2001, 2307 UNTS 285 (entered into force 1 March 2006) ch 24 available at http://dgca.nic.in/int_conv/Chap_XXIV.pdf.

[26] *Cross-Border Insolvency Act 2008* (Cth) sch 1.

[27] *Fothergill v. Monarch Airlines* [1980] 2 All E.R. 696, 706.

[28] The application of the Vienna Convention on the Law of Treaties to issues of private law instruments is debated by some, but see Bruno Zeller, *Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Good* (19 May 2003) CISG Database <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

[29] [2010] FCA 1221.

[30] Ibid.

purposes of construing a convention."[31] Although this may be correct, the Model Law is not a convention. The Model Law has its own interpretative article and hence recourse to the *Vienna Convention* is not allowed. It must be noted that Rares J did arrive at the correct result as he did consult the *travaux préparatoires*. Logan J in *Tannenbaum v Tannenbaum*[32] incorrectly noted that:

> […] even where an international convention or model law is adopted by Parliament in an Australian enactment, that enactment and the adopted convention or model law must be interpreted in accordance with Australian principles of statutory construction.[33]

The point is that the model law must be interpreted using article 8. However, the domestically drafted part of the *Cross-Border Insolvency Act* indeed must be interpreted in accordance with Australian principles of statutory interpretation. Simply put, the Vienna Convention is not to be used, as it only deals with the interpretation of convention.[34]

If we turn our attention to the CISG article 7, the matter is different. Again, the Convention must be interpreted using article 7. However, if article 7 should be interpreted – as it cannot interpret itself – recourse to the *Vienna Convention* will resolve the issue which will point to the use of *travaux préparatoires*. A comment must be made in relation to the *Vienna Convention*, specifically article 31.[35] It describes the rule of interpretation of a treaty, which was put correctly by Corney as follows:

> The terms of article 31 indicate a moderate textualist approach with supplementary teleological assistance. It is not exclusively textualist in that it allows consideration of contemporaneous and subsequent related documentation as well as object and purpose. It has thus avoided the difficulties associated with an extreme plain meaning interpretation while at the same time properly emphasising the centrality of text.[36]

In sum, the interpretation of statutes which contain model laws or are the result of the ratification of a Convention domestic interpretative tools have no place in determining the meaning of the statute. Professor Goode put it succinctly by stating: *"The first point to note is that international interest [as defined by the Cape Town Convention] is the creature of the Convention*

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[31] Ibid [295].

[32] [2012] FCA 904.

[33] Ibid [37].

[34] For further elaboration on this point see Bruno Zeller, 'Statutory Interpretation – The Two Step Approach,' (2014) 1 *Curtin Law and Taxation Review* 36.

[35] *United Nations Convention on Contracts for the International Sale of Goods* art 31.

[36] Graham Corney, see above n 3, 60.

and in principle does not derive from or depend on national law."[37] It follows that applying the Cape Town Convention and any other convention for that matter by Australian Domestic law courts will by definition be subject to different interpretive tools. In essence, Justice Kirby was correct on this point, namely that the interpretation of statutes and contracts require different tools. Hence it is not possible to interpret transnational statues objectively as manifested by the words used in the document and not search for the actual or subjective intention of the author.[38] The use of *travaux préparatoires* is an essential part of the interpretative process as applied by Kirby J in *Air Link* and Rares J in *Ackers and Others v Saad Investments Company Ltd and Another.*[39]

3. INTERPRETATION OF CONTRACTS

The first point to make is that the purpose of contract interpretation is to elicit evidence which supports a party's arguments, to ascertain the true intention and to assess the parties' basis for the bargain struck. The issue again is; does the instrument, namely the statute, contain rules as to the interpretation of contracts? In common law based contract law, the common law has mandated that the parol evidence rule is to be applied if a term is ambiguous.[40] However, under the CISG the situation is different. In addition to Article 7, Article 8 of the CISG states:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the

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[37] Roy Goode, 'International Interests in Mobile Equipment: A Transnational Juridical Concept' (2003) 15 *Bond Law Review* 9, 12.

[38] Jacinta Dharmananda and Leon Firios, above n 1, 581.

[39] Camilla Baasch Andersen, above n 2, 915. Professor Andersen mentions how the available *travaux préparatoires* of the CISG have expressed the need to interpret conventions with the 'goal of uniformity'.

[40] *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 186 ALR 289.

> parties have established between themselves, usages and any subsequent conduct of the parties.[41]

As it can be seen, article 8 is structured in two ways, first the subjective approach is to be used and only if it does not yield any result will the court use the objective approach. In essence, the parol evidence rule is at odds with the contract interpretation of the CISG.[42] The first question is; how do articles 7 and 8 interrelate? As indicated above, article 7 CISG is, in cases of uncertainties, interpreted with the aid of the *Vienna Convention*. However, article 8 is only subject to article 7. The debate is whether article 7 therefore also includes the interpretation of the conduct of the parties. There are two main views on this matter. First that article 7 does not inform on the conduct of the parties[43] and the second view argues that at least impliedly the two articles are linked.[44]

The reason is that article 7 mandates that good faith must be applied. Good faith is a general principle of the CISG and hence will also influence article 8. This mandate is explained in article 7(2) which states:

> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to 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.[45]

As the CISG is not a code, gaps - as noted in article 7(2) - must be filled by domestic law. Hence, a court must resort to domestic rules of interpretation on that issue only but must also be careful not to overstep "the mark", as otherwise article 7 and 8 would be breached. However, the problem in Australia is not how the dual system coexists but the lack of understanding how article 8 influences the gathering of evidence to support claims form the parties in the dispute. A very good example is *Fryer Holdings v Liaoning MEC Group*.[46] The question was whether the goods were fit for the purpose and what damages can be claimed. The court did mention article 35 CISG but neglected to consult article 74 in relation to damages. The problem was twofold, first article 7 was not

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41 *United Nations Convention on Contracts for the International Sale of Goods* art 8.

42 See generally Bruno Zeller, 'The Parol Evidence rule and the CISG – a Comparative Analysis' (2003) 36 *Comparative and International Law Journal of South Africa* 308.

43 See John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation* (5 November 2002) CISG Database <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html>.

44 See Bruno Zeller, *Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods* (19 May 2003) CISG Database <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

45 *United Nations Convention on Contracts for the International Sale of Goods* art 7(2).

46 [2012] NSWSC 18.

consulted, otherwise the court would have realised that to rely on domestic jurisprudence and domestic law is wrong. In para 19 the court stated:

> Were the goods fit for purpose? The test which has been applied in this country is that fitness for purpose equates to being of merchantable quality. See, for example, Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd [2010] FCA 1028 at [123]. It seems to me that I should follow that test, particularly since it has been applied in other common law jurisdictions.[47]

To compound the error, the court noted in para 20:

> The test of merchantable quality requires that the goods should be in such an actual state that a buyer fully acquainted with both latent and patent defects within them, and not limited to their apparent condition, would buy them without abatement of the price that would be paid if they were in fact in reasonably sound order and condition. See Dixon J in *Australian Knitting Mills Ltd v Grant* [1933] HCA 35.[48]

To start with the CISG, article 35 does not include merchantability and even then, the test applied by common law jurisdictions is not to be used pursuant to article 7. In his article on statutory interpretation involving international treaties, Corney argued correctly that:

> A particular English word used in an international convention may have a meaning different from the same word used in a domestic statute. It is not appropriate to apply prior domestic meaning to a word in a convention.[49]

To put it differently, the mandate of "international character" and to "promote uniformity" has been interpreted by international jurisprudence as not reverting to domestic principles and jurisprudence but to consult international jurisprudence, which can be found on the CISG Pace website.[50] The problem with Australian jurisprudence is the fact that most of the Australian decisions are not correct but via the principle of precedent the errors have persisted,[51] as also evidenced by the *Castel* case below.

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[47] Ibid [19].

[48] Ibid [20].

[49] Graham Corney, above n 3, 58 at fn 3.

[50] See Pace Law School Institute of International Commercial Law, *Albert H. Kritzer Cisg Database,* <http://www.cisg.law.pace.edu/> (last updated29 January 2016).

[51] Camilla Baasch Andersen, above n 2, 932; The point is made as to whether CISG cases heard in Australia often cite US cases either to pertain to the international character of the CISG pursuant to article 7. Otherwise, it may simply be the case of following 'the common law tradition of sharing persuasive precedents among the

Reverting back to *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd*,[52] the argument by counsel in relation to damages indicates that the interpretive mandate has not been grasped, which is astonishing, as a simple reading of article 74 would already have alerted that the following stamtent is not correct. Counsel argued:

> Counsel argued Castel's expectation of the profit to be derived by it from sales of each consignment of goods should have been ascertained objectively at the time of the "conclusion" of the sales contract related to that consignment.[53]

Article 74 clearly notes that the

> party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

This suggests that article 8 needs to be consulted and a cursory read would also lead to the conclusion that the phrase *"knew or ought to have known"* would at least suggest that either the subjective approach is to be used or an argument must be mounted that the subjective approach does not yield a result and hence the objective approach is to revert to article 8.

Unlike the Australian courts, the New Zealand High Court have understood the interrelationship of the application of the CISG and hence the interpretative mandate. In *RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller*[54] French J noted that the CISG applies but that *"counsel for both parties nevertheless sought to rely on domestic sale of goods law. However, in my view, recourse to domestic law is prohibited by Article 7"*.[55] French J went on to explain that:

> The requirement imposed by Article 7(1) namely to have regard 'to the international character of the convention and to the need to promote uniformity in application' is generally accepted as establishing what has been called a principle of autonomous interpretation. That means the Convention must be applied and interpreted exclusively on its own terms, having regard to the principles of the Convention and

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Commonwealth' and whether this is just incidental in the pursuit of international uniformity.

[52] Source.

[53] *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] FCAFC 55, [202].

[54] *RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller* [2011] NZCA 340 (30 July 2010).

[55] Ibid.

> Convention-related decisions in overseas jurisdictions. Recourse to domestic case law is to be avoided.[56]

The court also referred to academic writing[57] and was right to correct counsel who attempted to justify the use of domestic law by referring to article 7(2). French J correctly stated that article 7(2) *"only authorises reference to domestic law in order to fill gaps in interpretation"*.[58] As there is no gap, domestic law is not applicable and in applying article 35 the court relied on article 8.

The case went on appeal to the Court of Appeal[59] which dismissed the case. Of real interest is the fact that the court relied on academic writing and jurisprudence from many countries. It is indeed a model of how the CISG needs to be interpreted and applied.

4. CONCLUSION

This paper has demonstrated that the transnational interpretive mandate in general has not yet been understood in Australia; the prerequisite paradigm shift has not yet eventuated. The effects of relying on learned domestic principles in isolation is one which does not accord with harmonisation, uniform laws and the increasing role of internationalisation.

An ethnocentric approach, or 'homeward trend,'[60] is far too prevalent. Despite a promising start, specifically in the area of the CISG, no judgement has been delivered where either counsel or the courts were aware and hence applied the correct interpretive tool.[61]

The issue is that a convention does not only bind nations internationally, *"it is also necessary for the treaty to have internal legal effect."*[62] This paper has also demonstrated that Corney was correct when already in 1994 made the observation that:

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[56] Ibid.

[57] Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG* (2005) 36 *Victoria University of Wellington Law Review* 781, 789-790.

[58] *RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller* [2011] NZCA 340 (30 July 2010).

[59] Ibid.

[60] Camilla Baasch Andersen, above n 2, 916.

[61] Ibid 931 as mentioned earlier, it is still uncertain whether the courts follow established CISG case law out of respect of following the tradition of commonwealth common law or whether there is truly the goal of uniform application of the convention in mind. Whatever the case, it is still too early to tell without further jurisprudence. Furthermore, with the availability of online databases such as the Pace Law School Institute of International Commercial Law, *Albert H. Kritzer Cisg Database,* available at < http://www.cisg.law.pace.edu/> there is no need for practicing counsel or even courts to ignore the international jurisprudence and information they have at their fingertips at any given moment.

[62] Graham Corney, above n 3, 50.

> The executive and legislative branches, having fulfilled their respective roles by concluding the treaty and enacting its terms, have signalled to the judiciary the need to restock its interpretative armoury to meet a hitherto seldom confronted challenge. If the judiciary fails to develop the means to interpret treaties, the attempt to create an international regime will flounder for want of a basic tenet: uniform application of uniform laws.[63]

[63] Ibid 51.