# THE CISG IN AUSTRALIA – THE JIGSAW PUZZLE THAT DOESN'T QUITE FIT

Benjamin Hayward and Patricia Perlen*

**CONTENTS**



## 1 INTRODUCTION

The *United Nations Convention on Contracts for the International Sale of Goods*[1] has an impressive[2] and growing[3] list of Contracting States. Australia is one such State, having acceded to the *CISG* on 17 March 1988, with the *Convention* entering into force locally on 1 April 1989.[4] Given that the *CISG* only entered into force

Benjamin Hayward is an Associate Lecturer in the School of Law at Deakin University, a former participant in the Willem C. Vis (East) International Commercial Arbitration Moot, and coach of the Deakin University Vis Moot and Vis (East) Moot teams. Patricia Perlen is an Associate Lecturer in the School of Law at Deakin University. The authors would like to thank their colleagues in the School of Law for their time in workshopping an earlier iteration of this paper, and would also like to thank Julian Hayden for his assistance in preparing this paper for publication. Any errors remain the authors' own.

While acknowledging that the acronym *CISG* is peculiar to the instrument's English text and perhaps not entirely within 'the spirit of internationalisation' – see Fawcett, J., Harris, J. and Bridge M., *International Sale of Goods in the Conflict of Laws*, 2005, Oxford University Press, Oxford, at p. 906 [fn 1] – this paper will refer to this instrument as the *CISG* or the *Convention* in order to avoid confusion with the *Vienna Convention on the Law of Treaties*, which is referred to as the *Vienna Convention*.

At the time of writing, there were 76 State parties to the *CISG*, including many of the world's major trading nations – see UNCITRAL, Status 1980 -- United Nations Convention on Contracts for the International Sale of Goods, available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

The two most recent accessions to the *CISG* are the Dominican Republic and Turkey, acceding to the *Convention* on 7 June 2010 and 7 July 2010, with the *CISG* to enter into force in those States on 1 July 2011 and 1 August 2011 respectively. See *Ibid.*

*Ibid.*

internationally on 1 January 1988, this timeframe places Australia squarely amongst the *Convention's* early adopters.[5]

Against this background, one might expect Australia's *CISG* jurisprudence to be highly developed. Unfortunately, to date, this has not been the case. Recent commentary has highlighted the often unsatisfactory treatment of the CISG in Australian case law.[6] In 'The CISG in Australia – The Jigsaw Puzzle Missing a Piece',[7] the CISG's place in Australian law was likened to a jigsaw puzzle missing an important piece – an authoritative, appellate level judicial decision clarifying, in a manner consistent with international jurisprudence and international commentary, the *CISG's* place in Australian law. This paper further develops the idea of the *CISG* in Australia resembling a jigsaw puzzle by considering the way in which the puzzle pieces fit together. Specifically, this paper considers the largely neglected but important issue of coherence between the *CISG* and the balance of Australian domestic law. In some respects, this boundary is clear and works well. In other respects, the boundary is fraught with inconsistencies and difficulty.

Part II establishes the context for this paper through an analysis of the *CISG's* dual character as both international and domestic law. In Part III, the role that Australian domestic law plays in supplementing the *CISG* is discussed, with the law of agency and the law relating to the limitation of action being used as examples. Finally, in Part IV, selected tensions in the interface between the *CISG* and Australian domestic law are explored with particular attention being given to the passage of property, the characterisation of software and the treatment of consumer contracts. It is concluded that despite the *CISG's* long-standing place in the Australian statute books, attention can usefully be given to the way in which the balance of Australian domestic law interfaces with the *CISG* – so that these two puzzle pieces can be brought together and the jigsaw puzzle rendered whole.

## 2 *THE CISG AS BOTH INTERNATIONAL & DOMESTIC LAW*

Discussing the 'boundary' between Australian domestic law and the *CISG* presupposes that these two bodies of law are separate and completely detached. Whilst this is generally the premise upon which discussion of the *CISG* proceeds,[8] in the case

---

5 Of the 76 States currently party to the *CISG*, Australia was the 16th State party – see Govey, I. and Staker, C., '*Vienna Sales Convention* Takes Effect in Australia Next Year' (1988) 23(3) *Australian Law News* 19, at p. 19.

Spagnolo, L., 'The Last Outpost: Automatic *CISG* Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers' (2009) 10 *Melbourne Journal of International Law* 141.

Hayward, B., 'The *CISG* in Australia – The Jigsaw Puzzle Missing a Piece' (2010) 14 *Vindobona Journal of International Commercial Law and Arbitration* 193.

Schlechtriem, P., 'Requirements of Application and Sphere of Applicability of *CISG*' (2005) 36 *Victoria University of Wellington Law Review* 781, at p. 788 – noting (in the context of the *CISG's* scope) that '[a]ll matters not governed by the formula of [Art.] 4 sentence 1 [...] are meant to be *excluded from the Convention* and have to be dealt with *in applying domestic law*' (*emphasis added*).

of Australia (and many other States) this is an oversimplification. In Australia, the *CISG* can be given a dual characterisation as both international and domestic law. This dual characterisation of the *CISG* provides the context against which the discussions of 'boundaries' and 'coherencies' in Parts III and IV of this paper proceed.

## *2.1 THE CISG AS INTERNATIONAL LAW*

First and foremost, the *CISG* is an international instrument and for this reason constitutes international law.

Efforts to unify sales law at an international level began in the 1920's under the newly established International Institute for the Unification of Private Law (**UNIDROIT**).[9] In 1928, scholar and academic Ernst Rabel suggested that UNIDROIT adopt, as one of its initial projects, the unification of the law of the international sale of goods.[10] A significant step towards unifying international sales law was taken when a Committee of European scholars,[11] prompted by Rabel, drafted a uniform law for the international sale of goods.[12] In 1934, the Committee submitted a preliminary draft, which after approval from the Governing Council of UNIDROIT, was submitted to the League of Nations[13] in order to solicit comments from Member States.[14] In 1939, after these comments had been received, the Governing Council of UNIDROIT adopted a revised version of the international sales law.[15] After interruptions due to the Second World War, work on the unification continued and in 1951 the Netherlands convened a conference in The Hague that appointed a Special Commission to further work on the draft.[16]

The Special Commission produced two draft laws, one being the *Uniform Law on the Formation of Contacts for the International Sale of Goods* and the other being the *Uniform Law on the International Sale of Goods*.[17] Encouraged by favourable

---

UNIDROIT was founded on 3 September 1926 and inaugurated on 20 May 1928. See Schlechtriem, P., and Schwenzer, I., 'Introduction' in Schwenzer, I. (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, Oxford, at p. 1.

Huber, P. and Mullis, A., *The CISG – A New Textbook for Students and Practitioners*, 2007, Sellier, München, at p. 2, para. 1.1.

This Committee was presided over by Cecil J.B. Hurst and included many eminent comparative lawyers of the time. See Bonell, M. J., 'Introduction to the *Convention*' in Bianca, C. M. and Bonell, M. J. (eds), *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, at p. 3, para. 1.2.

Kruisinga, S., *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?*, 2004, Intersentia, Antwerp, at p. 1.

The League of Nations being the predecessor to the United Nations, established in 1919 under the *Treaty of Versailles*.

Bonell, 'Introduction to the *Convention*', *supra* fn 11, at p. 3, at para. 1.2

Huber and Mullis, *The CISG*, *supra* fn 10, at p. 2, para. 1.1.

See Bonell, 'Introduction to the *Convention*', *supra* fn 11, at p. 3, para. 1.2; Huber and Mullis, *The CISG*, *supra* fn 10, at p. 2, para. 1.1.

See the *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods* (hereinafter '*ULF*') and the *Convention Relating to a Uniform Law on the International Sale*

reactions from the Member States, the Netherlands convened a diplomatic conference[18] where the two uniform laws were adopted, entering into force in 1972.[19] As Schlechtriem and Schwenzer note, '[m]easured against the expectation that they would bring about a worldwide unification of international sales law, the Hague Conventions were not a success' as they were only implemented by nine Member States.[20]

In 1966 the United Nations Commission on International Trade Law (**UNCITRAL**) was established, and in 1968 began working on the unification of sales law after the United Nations Secretariat concluded that the *ULF* and *ULIS* were not sufficient to receive 'global acceptance'.[21] In 1970, UNCITRAL commissioned a Working Group on the International Sale of Goods to revise the Hague Conventions, or alternatively to prepare a new draft text.[22] This drafting work occurred under the auspices of diplomatic negotiations carried out by delegates representing sixty-two States and non-government organisations.[23] By 1978, the Working Group had prepared a draft convention on sales law, the **New York Draft**, which dealt with both the formation of sales contracts and with the rights and obligations of the contracting parties.[24] The comments received from Member States in relation to the New York Draft formed the basis for the Vienna Conference in 1980.[25] The United Nations Conference on Contracts for the International Sale of Goods was held in Vienna from 10 March to 11 April 1980 and was attended by representatives of 62 States and 8 international organisations.[26] Of the 62 Member States in attendance, 42 voted in favour of the version of the *Convention* drawn up at the Conference.[27] Art. 99 *CISG* required the deposit of 10 instruments of ratification, acceptance, approval or accession, which was

---

*of Goods* (hereinafter '*ULIS*'). See also Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 1; Bonell, 'Introduction to the *Convention*', *supra* fn 11, at p. 3, para. 1.2; Huber and Mullis, *The CISG*, *supra* fn 10, at p. 2, para. 1.1.

The Conference took place at The Hague from 2 April 1964 to 25 April 1964 and was attended by 28 States, with 4 other States and 6 international organisations sending observers see Bonell, 'Introduction to the *Convention*', *supra* fn 11, at p. 3, para. 1.2.

9 Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 1.

0 *Ibid.* The nine Member States were Gambia, Israel, Belgium, Germany, Italy, Luxembourg, the Netherlands, the United Kingdom and San Marino; see also Bonell, 'Introduction to the *Convention*', *supra* fn 11, at p. 3, para. 1.2.

Andersen, C. B., *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*, 2007, Kluwer Law International, Alphen aan den Rijn, at p. 20. See also Honnold, J. O., *Uniform Laws for International Sales Under the 1980 United Nations Convention*, 3rd ed, 1999, Kluwer Law International, The Hague, at p. 6, para. 5(2).

Kruisinga, *(Non-)conformity*, *supra* fn 12, at p. 2.

3 Andersen, *Uniform Application*, *supra* fn 21, at p. 20.

4 See Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 2; Kruisinga, *(Non-)conformity*, *supra* fn 12, at p. 2.

5 Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 2.

26 Bonell, 'Introduction to the *Convention*', *supra* fn 11, at p. 6, para. 1.

7 Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 3.

achieved on 11 December 1986.[28] The *CISG* subsequently entered into force at international law, as an international convention, on 1 January 1988.

Importantly, as a piece of international law binding on Australia, Australia is required to give effect to the *CISG* according to its terms. This follows from the principle of *pacta sunt servanda*. According to Art. 26 *Vienna Convention*, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. In addition to being 'reflected' in the *Vienna Convention*, the principle of *pacta sunt servanda* 'is a fundamental principle of customary treaty law'.[29] This has important implications for the way in which imperfections in the boundary between the *CISG* and the balance of Australian domestic law can be redressed. Australian law makers can (within the boundaries of the *Commonwealth Constitution* and the State and Territory *Constitution Acts*) reform purely domestic law as required or desired. However with respect to the *CISG*, as a piece of international law binding on Australia, this freedom is restricted by the scope of the *CISG's* permitted reservations.

## 2.2 *THE CISG AS AUSTRALIAN DOMESTIC LAW*

The *CISG's* characterisation as international law can easily obscure its ability to also be characterised as domestic law in the Australian context.

As a matter of Australian constitutional law, treaty-making power lies with the Executive branch of the Federal Government pursuant to the *Commonwealth Constitution's* grant of Federal Executive power.[30] However, the legislative power of the Commonwealth lies with the Federal Parliament.[31] As a consequence, signature or ratification of treaties by the Federal Executive does not create binding obligations within the Australian legal system without the enactment of domestic legislation by Parliament implementing the relevant treaties. As stated by the High Court of Australia:

> *It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been*

---

28 *Ibid.*

29 Triggs, G., *International Law: Contemporary Principles and Practices*, 2006, LexisNexis Butterworths, Sydney, at p. 506, para. 9.9.

30 See generally the *Commonwealth Constitution* s 61

31 See generally *Ibid* s 1.

> *incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.*[32]

This position is reflective of Australia's characterisation as a 'dualist' (as opposed to a 'monist') State[33] with respect to the enforceability of international law.

The *CISG* contains four distinct Parts – Parts I to III,[34] which together act to confer and impose individual rights and obligations, and Part IV,[35] which contains the *Convention's* public international law provisions. Pursuant to the principle of *pacta sunt servanda*,[36] the public international law provisions in Part IV are binding on Australia by virtue of Australia's membership of the *CISG's* community of Contracting States.[37] However, Parts I to III of the *CISG* are incapable of conferring individual rights and obligations within the Australian legal system without implementation through domestic legislation.

This point has been recognised in relation to international trade treaties generally (and in the context of an analysis of the governing law in international commercial arbitration) by Lew, who notes:

> *Substantive rules capable of application in different types of international commercial relations have been developed through multi-lateral conventions and uniform laws. These instruments have been referred to as 'international legislation' even though they are only binding within a sovereign State after and to the extent that they have been expressly adopted by such a State [...]*
>
> *Where a multi-lateral convention has entered into force or where a uniform law has been adopted by a particular sovereign State, the rules contained therein will become part of the national law of that country. Such rules may equally be considered rules of the national law of the States concerned by a national court and rules of international trade law by a non-national arbitration tribunal.*[38]

---

32 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286 – 287 (Mason CJ & Deane J).

See generally Sloss, D., 'Treaty Enforcement in Domestic Courts – A Comparative Analysis' in Sloss, D. (ed), *The Role of Domestic Courts in Treaty Enforcement – A Comparative Study*, 2009, Cambridge University Press, Cambridge, at pp. 17 – 24; Rothwell, D. R., 'Australia' in Sloss, D. (ed), *The Role of Domestic Courts in Treaty Enforcement – A Comparative Study*, 2009, Cambridge University Press, Cambridge, at pp. 128 – 130.

34 Part I is titled 'Sphere of Application and General Provisions'; Part II is titled 'Formation of the Contract'; Part III is titled 'Sale of Goods'.

35 Part IV is titled 'Final Provisions'.

36 See generally Art. 26 *Vienna Convention*; Triggs, *International Law*, *supra* fn 29, at p. 506, para. 9.9.

37 See generally UNCITRAL, Status 1980, *supra* fn 2.

38 Lew, J., *Applicable Law in International Commercial Arbitration*, 1978, Oceana Publications, Dobbs Ferry, at pp. 442 – 443.

While it would have been within the legislative competence of Federal Parliament (pursuant to the 'external affairs' head of legislative power)[39] to enact the *CISG* at the Commonwealth level, at the time of Australia's accession to the *CISG* it was agreed that the *Convention* would be implemented by way of uniform State and Territory legislation.[40] The rationale for this approach was that domestic sale of goods legislation has traditionally been within the province of the State and Territory legislatures;[41] thus implementation of the *CISG* also at the State and Territory level was seen as the preferable option.[42] During 1986 and 1987, each of the Australian States and Territories passed (largely) uniform legislation[43] giving effect to the *CISG*[44] – with the Commonwealth Parliament also giving the *CISG* precedence over the consumer protection provisions of the *Competition and Consumer Act 2010* (Cth).[45]

It can therefore be seen that the *CISG*, though being an international instrument at its core, can also be characterised as domestic law in Australia. Its implementation through domestic legislation reflects international observations that '[a] national law, into which the *CISG* has been incorporated by ratification, takes those *[C]onvention* stipulations concerning the international sales of goods into "national law"'.[46]

## 2.3 *THE IMPLICATIONS OF DUAL CHARACTERISATION*

This dual characterisation of the *CISG* as both Australian domestic law and also international law raises a number of interesting questions including questions relating to the interpretation of the *Convention*,[47] and the type of sources which might

---

39 See the *Commonwealth Constitution* s 51(xxix). See also Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1987, at p. 172 (J.H. Kennan, Attorney-General).

) Govey and Staker, '*Vienna Sales Convention* Takes Effect', *supra* fn 5, at p. 19.

See, eg, the *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1923* (NSW); *Sale of Goods Act* (NT); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Goods Act 1958* (Vic); and *Sale of Goods Act 1895* (WA).

See Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1987, at p. 172 (J.H. Kennan, Attorney-General).

While the substantive provisions of each State and Territory Act are uniform, there are small variations between the jurisdictions – for example, the *Sale of Goods (Vienna Convention) Act 1986* (SA) does not contain an 'Act binds the Crown' section, which is found in the equivalent legislation of all the other Australian jurisdictions.

See the *Sale of Goods (Vienna Convention) Act 1987* (ACT); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act* (NT); *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1987* (Tas); *Sale of Goods (Vienna Convention) Act 1987* (Vic); *Sale of Goods (Vienna Convention) Act 1986* (WA).

*Competition and Consumer Act 2010* (Cth), at Sch 2, s 68. Similarly, the *CISG* was also given precedence over the consumer protection provisions of the now-superseded *Trade Practices Act 1974* (Cth) (the consumer protection law in force at the time the *CISG* became operative in Australia) – see the *Trade Practices Act 1974* (Cth) s 66A.

See *NV AR v NV I*, Appellate Court Gent (Belgium), 15 May 2002, at para. 5.2, available at: <http://cisgw3.law.pace.edu/cases/020515b1.html>.

Hayward, 'The *CISG* in Australia', *supra* fn 7, at pp. 209 – 218.

be consulted when analysing a *CISG* problem.[48] However, most importantly for present purposes, it raises questions as to how the *CISG* should be conceptualised when discussing its interaction with other laws.

Because the *CISG* is (at its core) international law, it is legitimate to speak of the *CISG* as if it is distinct from Australian domestic law and this is largely the basis upon which this paper proceeds. However, because the *CISG's* application in Australia is legally grounded in domestic legislation, it is important to acknowledge that this separation is not strict. While on one hand this paper's analysis concerns the 'boundaries' between a body of international law and Australian domestic law, on the other hand it might also be understood as an analysis of the 'boundaries' between one discrete part of Australian law (having international origins) and the balance of Australian domestic law. In Parts III and IV of this paper, both of these conceptions of the *CISG* are drawn upon.

## 3 *AUSTRALIAN DOMESTIC LAW AS A SUPPLEMENT TO THE CISG*

As noted in Part II, it is the uniform State and Territory legislation giving effect to the *CISG* which formally gives the *Convention* the force of law in Australia.[49] This legislation also gives the *CISG* primacy over purely domestic Australian law which might otherwise apply to a contract of sale.[50] On a superficial reading of these provisions, it might be assumed that should the *CISG's* internal rules of applicability be satisfied,[51] one need look no further than the *Convention* itself in order to resolve questions concerning a contract for the international sale of goods.

However, in reality, Australian domestic law does play an important supplementary role in regulating *CISG* contracts. It does so in three distinct respects – the filling of external gaps, the filling of internal gaps, and the provision of supplementary rules where the *CISG* specifically requires. In this Part, this supplementary role played by Australian domestic law will be analysed. Reference will be made to examples drawn from the law of agency and the law relating to the limitation of actions (as two important branches of commercial law) in order to show that in some respects, the *CISG* and Australian domestic law integrate and operate together effectively.

### 3.1 *THE CISG AS BOTH INTERNATIONAL AND DOMESTIC LAW*

Australian domestic law plays a necessary supplementary role with respect to the *CISG* because the *CISG* is not a comprehensive instrument. On the contrary, the *CISG*

---

48 *Ibid*, at pp. 216 – 217.

49 See the *Sale of Goods (Vienna Convention) Acts*, *supra* fn 44 for: ACT s 5; NSW s 5; NT s 5; Qld s 5; SA s 4; Tas s 5; Vic s 5; and WA s 5.

See the *Sale of Goods (Vienna Convention) Acts*, *supra* fn 44 for: ACT s 6; NSW s 6; NT s 6; Qld s 6; SA s 5; Tas s 6; Vic s 6; and WA s 6. See also the *Competition and Consumer Act*, *supra* fn 45, at Sch 2, s. 68.

See Arts. 1 – 6 & 100 *CISG*.

'endorses an *eclectic model* in the field of uniform law'.[52] Rather than attempting to establish itself as a 'monolithic system', 'from the outset it [ie. the *CISG*] envisaged coexistence with other sources of law as well as with private self-regulation'.[53] Therefore, it is clear that the *CISG* 'does not and cannot live in a vacuum'.[54] Instead, '[i]t interacts with, and operates within, the framework of domestic law, and does so at many levels'[55]. Indeed, it has been said that 'the *CISG* cannot govern without domestic law'.[56] Essentially, the *CISG* contains a number of 'gaps', which Australian domestic law will necessarily 'fill', where it is the otherwise applicable law for an international contract.

### *3.1.1 THE CISG'S CONCEPTS OF EXTERNAL AND INTERNAL GAPS*

The role of Australian domestic law in supplementing the *CISG* largely revolves around the distinction drawn within the *CISG* itself between 'external' and 'internal' gaps.[57] The *CISG* establishes in Arts. 4 and 7 the parameters of these concepts and the roadmap for their consequences.

Article 4 *CISG* is the *Convention's* key provision with respect to the concept of external gaps. This provision has been referred to by Kazimierska as the *CISG's* 'table of contents'[58] – an apt descriptor given its function and purpose.

Article 4 *CISG* provides:

> *This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:*

---

52 De Ly, F., 'Sources of International Sales Law: An Eclectic Model' (2005 – 2006) 25 *Journal of Law and Commerce* 1, at p. 1.

53 *Ibid.*

54 Jacobs, M. S., Cutbush-Sabine, K. and Bambagiotti, P., 'The *CISG* in Australia-to-date: An Illusive Quest for Global Harmonisation?' (2002) 17 *Mealey's International Arbitration Report* 24, at para. 3.4.1.

*Ibid.* This 'increase of the legal regimes governing the contract' has been the source of criticism – see, eg, Cuniberti, G., 'Is The *CISG* Benefiting Anybody?' (2006) 39 *Vanderbilt Journal of Transnational Law* 1511, at p. 1516.

56 Zeller, B., 'The *CISG* – Getting Off The Fence' (2000) 74(9) *Law Institute Journal* 70, at p. 74.

57 This is the terminology adopted in Zeller, B., *Damages Under the Convention on Contracts for the International Sale of Goods*, 2005, Oceana Publications, Dobbs Ferry, at pp. 28 – 29; see also Flechtner, H. M., 'Selected Issues Relating to the *CISG's* Scope of Application' (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 91, at p. 93. The authors note their usage of the 'external gap' terminology differs from that in *Schlechtriem & Schwenzer* – see Schwenzer, I. and Hachem, P., 'Article 7' in Schwenzer, I. (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* 3rd English ed, 2010, Oxford University Press, Oxford, at pp. 133 – 134, para. 27.

Kazimierska, A., 'The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods' in Pace International Law Review (ed), *Pace Review of the Convention on Contracts for the International Sale of Goods*, 1999 – 2000, Kluwer Law International, The Hague, at p. 156.

> *(a) the validity of the contract or of any of its provisions or of any usage;*
>
> *(b) the effect which the contract may have on the property in the goods sold.*

Thus in essence, Art. 4 *CISG* establishes three things:

- first, and expressly, what the *CISG* is concerned with (i.e. the formation of international contracts of sale and the rights and obligations arising under them);
- second, also expressly, specific issues that the *CISG* is not concerned with (i.e. questions relating to the validity of contracts, contractual provisions and usages, and the passage of property in goods); and
- third, and impliedly, other matters that the *CISG* is not concerned with (i.e. everything else not relating to contractual formation or party rights and obligations).[59]

It is against these three functions of Art. 4 *CISG* that the concept of external gaps can be understood. External gaps refer to matters which are completely outside the scope of the CISG.[60] They are matters not dealt with by the *Convention* at all and expressly excluded from the *CISG's* scope by specification in Arts. 4(a) and (b) *CISG*. They are also matters impliedly excluded by virtue of the stipulation in the first sentence of Art. 4 *CISG* that the *Convention* governs 'only' contract formation, rights, and obligations.

Article 7(2) *CISG* is the *Convention's* key provision with respect to the concept of internal gaps, though it interacts in this respect with Art. 4 *CISG*.

Art. 7(2) *CISG* states:

> *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.*

Specifically relevant to the concept of internal gaps are the opening words of Art. 7(2) *CISG* – '[q]uestions concerning matters governed by this Convention which are not expressly settled in it [...]' These words advert to the reality that some matters coming within the external perimeter of the *CISG* (as delineated by Art. 4 *CISG*) may not be the subject of specific regulation. An internal gap is therefore a matter which is

---

59 It has been observed that the words 'in particular' contained in Art. 4 *CISG* 'show that the list of matters [...] not governed by the *Convention* [contained in Art. 4 *CISG*] is not exhaustive' – see Schlechtriem, P., 'Article 4' in Schlechtriem, P. and Schwenzer, I. (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed, 2005, Oxford University Press, Oxford, at p. 70, para. 19. See also Khoo, W., 'Article 4' in Bianca, C. M. and Bonell, M. J. (eds), *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, at p. 45, para. 2.4.

Zeller, B., *Damages*, *supra* fn 57, at p. 29.

within the *CISG's* scope, as defined by Art. 4 *CISG*, but which is not expressly settled by its terms.[61]

The distinction between external and internal gaps is not purely academic.[62] Rather, the classification of a specific legal point as relating to an external or an internal gap has important practical consequences in relation to the sources from which supplementary rules may be drawn. As identified below, in the case of external gaps, domestic law (including Australian domestic law) plays a primary supplementary role. In the case of internal gaps, the role of domestic law (including Australian domestic law) in supplementing the *CISG* is secondary.

### *3.1.2 FILLING EXTERNAL GAPS – THE PRIMARY ROLE OF DOMESTIC LAW*

Where a matter is in dispute between two parties and it is not within the contemplation of Art. 4 *CISG*, gap-filling may legitimately occur through recourse to domestic law, as determined by the relevant conflict of laws rules.[63] Where Australian domestic law is the law otherwise applicable to an international sales contract, it plays a primary role in supplementing the *CISG* in the case of external gaps.

The reason why domestic law takes on a primary role in filling external gaps relates to the nature of external gaps themselves. These matters are not within the *CISG's* scope, therefore the *CISG* itself provides no answers. In fact, '[t]he emphatic statement that the *Convention* is concerned only with rights and obligations [...] arising from a contract of sale, is surely a *directive* to the users of the *Convention* to look elsewhere for solutions to other questions'.[64] Recourse to domestic law (including Australian domestic law, should it be applicable) is in such case a matter of 'necessity'.[65]

### *3.1.3 FILLING INTERNAL GAPS – THE SECONDARY ROLE OF DOMESTIC LAW*

By way of contrast, in the case of internal gaps, domestic law plays only a secondary role in supplementing the *CISG*. As noted above, internal gaps are within the *CISG's* scope – thus it is not always necessary to refer to domestic law in the same way that

---

61 *Ibid*, at pp. 28 – 29.

62 In New Zealand, it is interesting to note that the *Sale of Goods (United Nations Convention) Act 1994* (NZ) s 5 ('Convention to be a code') picks up the language of Art. 7(2) *CISG* by providing that the *CISG* takes precedence over any other New Zealand law to the extent '[t]hat the law is concerned with any matter that is *governed by the Convention*' (*emphasis added*) and to the extent that the *CISG* does not expressly permit application of the domestic law. In this manner, the New Zealand implementing legislation itself recognises the importance of the difference between external and internal gaps.

Schwenzer, I. and Hachem, P., 'Article 4' in Schwenzer, I. (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, Oxford, at p. 77, para. 6; Schlechtriem, 'Requirements of Application', *supra* fn 8, at p. 788.

64 Khoo, 'Article 4', *supra* fn 59, at p. 46, para. 3.1 (*emphasis added*).

65 *Ibid*, at p. 45, para. 2.4.

this is necessary in the case of external gaps. Rather, it is sometimes possible to seek a solution within the *Convention* itself noted in the approach adopted by Art. 7(2) *CISG* which requires that an answer be sought within the *Convention* (that is based on the *CISG's* general principles), and when unable to do so, it authorises recourse to domestic law.. To take one example amongst many, it has been suggested (on the basis of Arts. 25, 29 and 64 *CISG*) that one of the *Convention's* general principles is the upholding of contracts.[66]

Before moving on to consider some specific examples of the way in which Australian domestic law usefully and effectively supplements the *CISG*, it is interesting to note that the process of filling internal gaps set out in Art. 7(2) *CISG* more closely resembles the code tradition[67] rather than the common law tradition underpinning Australia's legal system.[68] Indeed, it stands in direct contrast to the way purely domestic legal questions are handled under the ordinary sale of goods legislation[69] of the Australian States and Territories. As is the case with other ordinary domestic Australian legislation, for matters not regulated within these Acts, a solution is always sought externally – either by reference to binding or persuasive case law,[70] or by reference to other legislation.[71] In settling a purely domestic dispute under the ordinary domestic sale of goods legislation of an Australian State or Territory, internal solutions formulated on the basis of the relevant instrument's general principles are not relevant. This point is emphasised by the language of the State and Territory *Sale of Goods Acts'* savings provisions – which (with one exception)[72] each preserve the common law except where inconsistent with 'the express provisions' of the Acts.[73]

---

66 Schwenzer and Hachem, 'Article 7', *supra* fn 57, at p. 138, para. 35.

67 New Zealand's implementing legislation expressly identifies the *CISG* as having the status of a code in that State – see *supra* fn 62.

Pearce and Geddes note that 'codification is not an activity that is engaged in at all commonly in common law countries' – see Pearce, D. C. and Geddes, R. S., *Statutory Interpretation in Australia*, 6th ed, 2006, LexisNexis Butterworths, Australia, at p. 272, para. 8.7.

69 See *Sale of Goods Acts* for the respective states at *supra* fn 41.

70 The *Sale of Goods Acts* of the States and Territories expressly preserve the application of the common law, insofar as it is not inconsistent with those *Acts* – see *Sale of Goods Act*, *supra* fn 41 for: ACT s 62(1); NSW s 4(2); NT s 4(2); Qld s 61(2); SA s 59(2); Tas s 5(2); Vic s 4(2); and WA s 59(2).

For example, a sale of goods transaction governed by the *Goods Act 1958* (Vic) could also conceivably raise competition law questions concerning resale price maintenance see the *Competition and Consumer Act*, *supra* fn 45, at ss. 48 (prohibiting the practice of resale price maintenance) & 96 (identifying the acts constituting the practice of resale price maintenance).

The single exception is the *Sale of Goods Act 1954* (ACT) s 62(1), which preserves the common law except where 'inconsistent' with the Act (omitting any reference to the Act's 'express provisions'). Given, however, the importance placed by the High Court of Australia on achieving consistency in the interpretation of 'uniform national legislation' – see *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, at p. 492 (Mason CJ, Brennan, Dawson, Toohey & Gaudron JJ) – it may be that this difference is ultimately of little consequence.

See *supra* fn 41, *Sale of Goods Act* for: NSW s 4(2); NT s 4(2); Qld s 61(2); SA s 59(2); Tas s 5(2); Vic s 4(2); and WA s 59(2).

### *3.1.4 GAP – FILLING IN RELATION TO THE LAW OF AGENCY*

Given that the *CISG* establishes a regime intended to work hand-in-hand with domestic law, it is not surprising that several examples can be identified whereby the *CISG* works together effectively with the domestic law of Australia. One such example is the *CISG's* interaction with Australia's domestic law of agency. The law of agency is an external gap vis-à-vis the *CISG*.[74] While agency is not expressly excluded from the *Convention's* scope in Art. 4 *CISG*, its exclusion is implicit given that the law of agency is not subsumed within the expressly included matters – the rules of contract formation and the rights and obligations of contracting parties.[75] Given that agency law is an external gap in the *CISG*, the relevant principles of agency in any particular case must be gleaned from the applicable domestic law.[76] Therefore, where Australian law is the governing law of a particular international contractual relationship otherwise subject to the *CISG*, Australian domestic law will provide the answers to any agency related questions.[77]

In Australia, the law of agency is primarily governed by the common law which provides comprehensive regulation regarding the creation of agency relationships, the rights and obligations which flow from agency agreements, and how agency relationships can be terminated. Bowstead and Reynolds defines the concept of agency as a fiduciary relationship where one person (the principal) 'expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties', and the agent 'consents so to act or so acts'[78]. Therefore, it can be concluded that at its most fundamental, an agency relationship exists where an agent has the authority to affect the principal's relationship with a third party. In this sense, it can be seen why agency is not a matter within the scope of the *CISG* as defined by Art. 4 *CISG* – while agency law may facilitate the conclusion of a sales contract, it is not connected to the process of offer[79] and acceptance[80] which underpins[81] the mechanics of *CISG* contract formation. While this much is clear, it is still nonetheless

---

74 Schwenzer, I. and Mohs, F., 'Old Habits Die Hard: Traditional Contract Formation in a Modern World' (6/2006) *Internationales Handelsrecht* 239, at p. 239; Honnold, *Uniform Law*, *supra* fn 21, at p. 68, para. 66.

Schlechtriem, 'Article 4', *supra* fn 59, at p. 70, para. 19 – referring to the importance of the words 'in particular' in Art. 4 *CISG* in demonstrating that the excluded matters expressly mentioned do not constitute an exhaustive list.

Honnold, *Uniform Law*, *supra* fn 21, at p. 68, para. 66.

For a general discussion of the law of agency in Australia, see Dal Pont, G. E., *Law of Agency*, 2nd ed, 2008, LexisNexis Butterworths, Chatswood.

Reynolds, F. M. B., *Bowstead and Reynolds on Agency*, 16th ed, 1996, Sweet & Maxwell, London, at p. 1.

79 See Arts. 14 – 17 *CISG*.

80 See Arts. 18 – 24 *CISG*.

Schwenzer and Mohs, 'Old Habits', *supra* fn 74, at p. 239.

important to appreciate that '[t]erminological difficulties beset discussions of agency'[82] as '[t]he term "agent" is found in law with a variety of meanings'.[83]

In the narrowest Australian legal definition of agency,[84] the High Court of Australia in *International Harvester Company v Carrigan's Hazeldene*[85] stated that the word agent is used 'to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties'[86]. However, the High Court expressed a broader conception of agency[87] in *Petersen v Moloney*[88] through the maxim '*[q]ui facit per alium facit per se*'[89] and explained that an agent 'is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties'[90]. More recently, the Supreme Court of Western Australia in *NT Power Generation Pty Ltd v Trevor*[91] stated that '[i]t is of the essence of an agency relationship that the agent act on the principal's behalf and in the principal's interests'[92], again broadening the concept of agency under Australian law. The difference between these approaches can be seen in comparing the creation of legal rights, the creation or affecting of legal rights and acting on behalf of another respectively. Regardless of the definition adopted the consequences in relation to Art. 4 *CISG's* application remain the same.

When ascertaining whether an agency relationship has been created under Australian common law, simply defining a relationship as being one of agency is not conclusive. Instead, a 'substance over form' approach is adopted[93] which can be seen as broadly consistent with the *CISG's* underlying philosophies as evidenced in Arts. 6, 8 and 11 *CISG*.

The common law also provides guidance as to the nature and scope of an agent's authority by differentiating between agencies involving actual authority, either express or implied, and apparent (ostensible) authority. Actual authority, as explained by Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties*[94] is:

---

82 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, at p. 384, para. 512 (Lindgren J).

83 *Nottingham v Aldridge* [1971] 2 QB 739, at p. 751 (Eveleigh J).

84 See Dal Pont, *Law of Agency*, *supra* fn 77, at p. 5, para. 1.2.

85 *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644.

*International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644, at p. 652 (Dixon CJ, McTiernan, Williams, Fullagar & Taylor JJ).

87 See Dal Pont, *Law of Agency*, *supra* fn 77, at p. 5, para. 1.2.

88 *Petersen v Moloney* (1951) 84 CLR 91.

89 *Ibid*, at p. 94 (Dixon, Fullagar & Kitto JJ).

90 *Ibid*.

91 *NT Power Generation Pty Ltd v Trevor* (2000) 23 WAR 482.

92 *Ibid*, at p. 489 para [28] (Ipp J).

93 See generally Dal Pont, *Law of Agency*, *supra* fn 77, at pp. 7 – 8, para. 1.5.

94 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

> *[A] legal relationship between principal and agent created by a consensual agreement to which they are alone parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.*[95]

This concept can be seen to be consistent with the *CISG*, given its basis in consent.[96]

In *Hely-Hutchinson v Brayhead Ltd*[97], apparent authority was described by Lord Denning MR as 'the authority of an agent as it "appears" to others',[98] Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties* described apparent authority as:

> *[A] legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract [...] The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contact. It is irrelevant whether the agent had actual authority to enter into the contract.*[99]

This concept too can be seen as consistent with the *CISG*, given that estoppel has been held to be a general principle underpinning the *Convention.*[100]

An agency relationship can also be 'constituted retrospectively by ratification, where the act has been done by one person [the agent] not assuming to act on his own behalf but for another [the principal] though without his precedent authority'[101] where the principal ratifies the acts of the agent, even though they were done outside the scope of any authority. This notion too is consistent with the *CISG's* emphasis on party autonomy.[102]

Along with defining the scope of agency relationships, the common law in Australia also prescribes the obligations which an agent owes to its principal, and the rights that an agent has against its principal. For example, as agency relationships are fiduciary in

---

95 *Ibid*, at p. 502.

96 See, Art. 6 *CISG*.

97 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549.

98 *Ibid*, at p. 584.

99 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503.

100 See, *Surface Protective Film Case*, Appellate Court Karlsruhe (Germany), 25 June 1997, at para. II.5.b, available at: <http://cisgw3.law.pace.edu/cases/970625g1.html> (also reported as CLOUT Case No. 230).

101 *Jones v Peters* [1948] VLR 331, at p. 335 (Herring CJ).

102 See Art. 6 *CISG*.

nature,[103] an agent is under a number of duties including a duty to act in the best interests of their principal, a duty to avoid conflicts of interest (without full disclosure to the principal), and a duty not to profit from their position.[104] As the rights and obligations arising through an agency relationship under Australian law operate as between the principal and agent, they do not intrude into the rights and obligations relating to substantive sales law matters regulated by the *CISG*[105] which operate as between a seller and buyer (one or both of which may be acting through agents).

It can therefore be seen that in the context of agency law, the Australian common law and the *CISG* interface in a consistent and effective manner.

### *3.1.5 GAP – FILLING IN RELATION TO THE LIMITATION OF ACTIONS*

Like agency, the limitation of actions is not a subject-matter within the ambit of the express exclusions from the *CISG's* scope in Art. 4 *CISG*. In fact, a cursory reading of the *Convention* and in particular Art. 39(2) *CISG* may suggest that the limitation of actions is in fact a matter that is both within the *CISG's* scope (making external gap-filling irrelevant), and also a matter that is specifically regulated (making internal gap-filling irrelevant). Art. 39 *CISG* provides as follows:

> *(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.*
>
> *(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.*

Superficially, Art. 39(2) *CISG* has the appearance of a limitation period. It identifies a two year time period and (if activated) will bar an aggrieved buyer from pursuing otherwise arguable legal rights. However, on a closer analysis, Art. 39(2) *CISG* has a distinct function and character and is not a limitation period provision.

Limitation periods require an aggrieved party to initiate legal proceedings (which could include litigation before a State court or arbitration pursuant to an arbitration agreement)[106] within an identified period of time,[107] and provide for either the barring

---

103 Dal Pont, *Law of Agency*, *supra* fn 77, at p. 10, para. 1.[6]

104 *Ibid.*

105 See Part III *CISG*.

106 See, the *United Nations Convention on the Limitation Period in the International Sale of Goods* (the '*UN Limitation Period Convention*') – which in its Art. 1(3)(e) defines 'legal proceedings' to include 'judicial, arbitral and administrative proceedings'.

While, at the international level, Art. 8 *UN Limitation Period Convention* establishes a limitation period of four years and Art. 10.2(1) *UNIDROIT Principles 2004* establishes a limitation period of three years,

of the aggrieved party's right or the extinguishment of that right should they fail to do so.[108] Art. 39(2) *CISG* requires an aggrieved buyer to give notice to the seller of an alleged lack of conformity within two years of physical receipt of the goods[109] (and prevents the buyer from relying on that specific lack of conformity if they do not do so). Thus, Art. 39(2) *CISG* does not require the initiation of legal proceedings within the two year period identified, nor does it negate the ability to pursue the totality of an aggrieved buyer's claim. In line with this analysis, the literature universally recognises that Art. 39(2) *CISG* is not in fact a limitation of actions provision;[110] rather it is a provision embodying notions of *déchéance*, which is a legally distinct issue.[111]

While it is universally recognised that Art. 39(2) *CISG* does not set out a limitation period, there is no universal agreement on whether the limitation of actions falls within the scope of Art. 4 *CISG* and is thus an internal gap or falls outside the scope of Art. 4 *CISG* and is thus an external gap. The generally held view is that the limitation of actions is not within the *CISG's* scope.[112] However, there is a small amount of authority to the contrary (despite suggestions that there is 'unanimity' in relation to

---

it has been observed that the time period laid down by limitation periods varies widely around the world 'from six months or one year for claims for breach of warranties, to up to 15, 20 or even 30 years for other claims' – see International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts*, 2nd ed, 2004, UNIDROIT, Rome, at p. 314, Art. 10.2, comment 1.

)8 At common law in Australia, these effects were traditionally the basis for distinguishing between limitation periods of procedural and substantive natures – see *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, at p. 41 (Brennan, Dawson, Toohey & McHugh JJ).

)9 It is important to note that Art. 39(2) *CISG* uses physical receipt of the goods as the two year period's starting point, rather than the time of delivery – which pursuant to Arts. 31 & 33 *CISG* may occur at a place and time before physical receipt.

0 Schwenzer and Hachem, 'Article 4', *supra* fn 63, at p. 95, para. 50; Schwenzer, I., 'Article 39' in Schwenzer, I. (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, Oxford, at p. 637, para. 28; Sono, K., 'Article 39' in Bianca, C. M. and Bonell, M. J. (eds), *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, at pp. 306 – 307, para. 1.9; Enderlein, F. and Maskow, D., *International Sales Law*, 1992, Oceana, New York, at p. 161; Honnold, *Uniform Law*, *supra* fn 21, at p. 276, para. 254.2a & pp. 285 – 286, para. 261.1E; Girsberger, D., 'The Time Limits of Article 39 *CISG*' (2005 – 2006) 25 *Journal of Law and Commerce* 241, at p. 248; Schwenzer, I. and Manner, S., 'The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration' (2007) 23 *Arbitration International* 293, at p. 294.

Sono, K., 'Commentary on the *Convention on the Limitation Period in the International Sale of Goods*' in United Nations Commission on International Trade Law, *Yearbook X – 1979*, 1981, United Nations, New York, at p. 149 (distinguishing *déchéance* from the limitation of actions in the context of the *UN Limitation Period Convention*).

Schlechtriem, P., *The UN Convention on Contracts for the International Sale of Goods*, 1986, Manz, Vienna, at p. 72; Schwenzer and Hachem, 'Article 4', *supra* fn 63, at p. 95, para. 50; Schwenzer, 'Article 39', *supra* fn 110, at p. 637, para. 28; Müller-Chen, M., 'Article 45' in Schwenzer, I. (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, Oxford, at p. 702, para. 33; Honnold, *Uniform Law*, *supra* fn 21, at p. 276, para. 254.2a; Kazimierska, 'The Remedy of Avoidance', *supra* fn 58, at p. 130; Zeller, B., 'Four Corners – The Methodology for Interpretation and Application of the *UN Convention on Contracts for the International Sale of Goods*' (Working Paper, Pace Law School, 2003) at para. 2.8a, available at: <http://eprints.vu.edu.au/88/1/4corners.html>.

the limitation of actions being governed by domestic law).[113] In relation to *CISG* commentary, Williams argues that limitation periods can be brought within the folds of the *Convention* and that through an application of Art. 7(2) *CISG*, the *UN Limitation Period Convention* should be applied as representing (or being consistent with) the general principles upon which the *CISG* is based.[114] In relation to case law, a 2001 decision of the Paris Court of Appeal, *Traction Levage SA v Drako Drahseilerei Gustav Kocks GmbH*[115] and a 2005 decision of the Regional Court in Bratislava, *L & C GmbH v VVD*[116] also employ reasoning based on Art. 7(2) *CISG*.

The *Traction Levage* decision was a dispute involving the sale of lift cables to be ultimately used by 'a [third party] French company responsible for the maintenance of the lifts in the Eiffel Tower'[117] where it was held (in relation to the governing limitation period) that 'the time-barring of the right to bring action was a matter governed by the *Convention*, but not settled in it' and as a consequence, 'French private international law, applicable under [Art. 7] *CISG*, referred for matters of time-barring to the law by which the contract was governed'.[118] The Paris Court of Appeal was therefore explicit in its conception of Art. 7(2) *CISG* as regulating the manner in which the governing limitation period was to be determined, and thus (by implication) must have been of the opinion that limitation periods represent an internal gap in the *Convention*. In the *L & C GmbH* decision, a case involving the sale of muskrat furs, fox furs and 'ancillary material',[119] the Regional Court in Bratislava's reasoning was less explicit. While stating that '[t]he *Convention* does not regulate the issue of limitation' (and going on to apply its own private international law), the Court did so directly after referring to Art. 7(2) *CISG*.[120] This decision is thus also capable of being read as implicitly suggesting that the limitation of actions constitutes an internal gap with respect to the *CISG*.

Both decisions ultimately applied private international law to determine the governing limitation period, however used (in the case of the Paris Court of Appeal) or appear to have used (in the case of the Regional Court in Bratislava) Art. 7(2) *CISG* and the mechanism of the internal gap to reach this solution. Nevertheless, the problematic

---

113 Schlechtriem, 'Article 4', *supra* fn 59, at p. 71, para. 21; see also Schwenzer and Hachem, 'Article 4', *supra* fn 63, at p. 95, para. 50.

See Williams, A., 'Limitations on Uniformity in International Sales Law: A Reasoned Argument for the Application of a Standard Limitation Period Under the Provisions of the *CISG*' (2006) 10 *Vindobona Journal of International Commercial Law and Arbitration* 229, at pp. 244 – 259.

*Traction Levage SA v Drako Drahtseilerei Gustav Kocks GmbH*, Cour d'appel Paris (France), 6 November 2001, available at: <http://cisgw3.law.pace.edu/cases/011106f1.html> (also reported as CLOUT Case No. 482).

116 *L & C GmbH v VVD*, Regional Court in Bratislava (Slovakia), 11 October 2005, available at: <http://www.cisg.sk/en/26cb-114-1995.html> (also reported as CLOUT Case No. 946).

117 See CLOUT Case No. 482.

118 See CLOUT Case No. 482.

119 See *L & C GmbH v VVD*, *supra* fn 116.

120 *Ibid.*

aspect of this reasoning is that if an internal gap analysis is to be undertaken, Art. 7(2) *CISG* requires recourse to the *Convention's* general principles before private international law. Neither court followed this line of inquiry before falling back on domestic law. Ultimately, whilst referring to Art. 7(2) *CISG*, both courts actually proceeded as if the limitation of actions was an external gap. This view accords with the weight of authority in relation to the limitation of actions and the *CISG*, and is the preferable way to conceptualise the issue.[121]

Where the governing law is Victorian, the limitation of actions for claims is set out in the *Limitation of Actions Act 1958* (Vic). The relevant period for contractual and tort claims under that Act is six years.[122] Similarly, six year limitation periods apply in the other Australian States and Territories,[123] with the exception of the Northern Territory where the relevant period is three years.[124]

With respect to both the three year limitation period applicable in the Northern Territory and the six year periods applicable in the other Australian States and Territories, there is no conflict with the *CISG*. Importantly, while there has been academic discussion relating to circumstances where the relevant national limitation period is shorter than the two year *déchéance* stipulation in Art. 39(2) *CISG*,[125] even the shortest limitation period applicable in Australia does not involve this potential conflict. Therefore, it can be seen that Australia's limitation of actions legislation effectively supplements the *CISG* in relation to this external gap.

### *3.2 THE USE OF DOMESTIC LAW WHERE SPECIFICALLY REQUIRED BY THE CISG*

As the above discussion has shown, Australian domestic law has a supplementary role to play in regulating *CISG* contracts through the filling of both external and internal gaps. In addition, Australian domestic law supplements the *CISG* where specifically required by the *CISG* itself.

The use of Australian domestic law in this way is raised in the context of the remedy of specific performance. Under the *CISG*, an aggrieved buyer or seller may 'require' performance by their contracting counterparty. In the case of an aggrieved buyer's rights, Art. 46(1) *CISG* provides that:

> *The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.*

---

121 See generally Hayward, B., 'New Dog, Old Tricks: Solving a Conflict of Laws Problem in *CISG* Arbitrations' (2009) 26 *Journal of International Arbitration* 405, at pp. 407 – 410.

122 *Limitation of Actions Act 1958* (Vic) s 5(1)(a).

123 See the *Limitation Act 1985* (ACT) s 11(1); *Limitation Act 1969* (NSW) s 14(1); *Limitation of Actions Act 1974* (Qld) s 10(1); *Limitation of Actions Act 1936* (SA) s 35; *Limitation Act 1974* (Tas) s 4(1); *Limitation Act 1935* (WA) ss 38(1)(c)(v) & (vi).

124 *Limitation Act* (NT) s 12(1).

125 Schwenzer, 'Article 39', *supra* fn 110, at pp. 637 – 638, para. 29

Similarly, in the case of an aggrieved seller, Art. 62 *CISG* provides that:

> *The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.*

However, when considering the positive enforcement of contractual promises under the *CISG*, Art. 28 *CISG* specifically qualifies these rights by reference to domestic law:

> *If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.*

Thus, where an Australian court is faced with a claim for specific performance of a contract otherwise governed by the *CISG*, that court will be required to (in accordance with Art. 28 *CISG*) use the Australian domestic law of specific performance as a supplementary source of law.

In Australia, specific performance 'is a remedy to compel the execution *in specie* of a contract which requires some definite thing to be done before the transaction is complete and the parties rights are settled and defined in the manner intended'.[126] In determining a claim for specific performance an Australian domestic court will first consider the adequacy of damages, as 'the Court of Equity will not decree specific performance of a contract where a money payment, or in other words damages, will afford an adequate remedy for the breach'.[127] There are, however, numerous situations where courts will not order specific performance, even where it is ascertained that damages would be inadequate. For example, where granting a remedy of specific performance would require the provision of personal services,[128] the performance of the contract would require ongoing supervision by the courts,[129] and where there is a lack of mutuality between the parties,[130] courts have declined to order specific performance. The courts will also look to discretionary factors including the willingness and readiness of the plaintiff in an action to perform their side of the

---

126 *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, at p. 297 (Dixon J).

127 *Dougan v Ley* (1946) 71 CLR 142, at p. 153 (Williams J).

128 *Maiden v Maiden* (1909) 7 CLR 727, at p. 737 (Griffith CJ) – holding that '[s]uch an agreement, involving the rendering of personal services by the defendant as consideration for the sale, was not one of which specific performance could be granted'

129 *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, at pp. 297 – 298 (Dixon J) – explaining that '[s]pecific performance is inapplicable when the continued supervision of the Court is necessary in order to ensure the fulfilment of the contract'. Cf *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, at pp. 46, paras. 78 – 47, 80 (Brennan CJ, McHugh, Gummow, Kirby & Hayne JJ).

130 *Ibid*, at p. 298 (Dixon J) – explaining that specific performance is not available if it requires the parties' 'continual co-operation'.

bargain,[131] misrepresentation or mistake,[132] undue delay by the plaintiff,[133] or undue hardship or unfairness on the defendant,[134] to determine whether an order of specific performance is suitable in the circumstances.

What is interesting about the supplementary role of Australian domestic law under Art. 28 *CISG*, as opposed to supplementation in the case of external and internal gaps, is that Art. 28 *CISG* requires application of the law of the forum.[135] When a court is using domestic law to fill an external or internal gap, it will apply the 'proper' domestic law governing the dispute, as indicated by its relevant rules of private international law. Thus, an Australian court will apply Australian law to gap-fill where the parties have chosen Australian law as applicable,[136] or (absent a choice) where the contract's 'closest and most real connection' is with the Australian legal system.[137] Equally, a European court would gap-fill using Australian law if that law had been chosen,[138] or (absent party choice) if the seller had their habitual residence in Australia.[139] As a court will apply its own conflict of laws rules to determine the governing (gap-filling) law,[140] what is important is the law indicated by those rules, rather than the location of the court.[141]

By way of contrast, where supplementation of the *Convention* under Art. 28 *CISG* is in issue, the location of the court is entirely determinative. This follows from the language of Art. 28 *CISG* itself – 'unless the court would do so under its own law'. Australian domestic law will therefore only play a supplementary role under Art. 28 *CISG* where a dispute is heard by an Australian court. Irrespective of its rules of

---

131 *Fitzgerald v Masters* (1956) 95 CLR 420, at p. 434 (Dixon CJ & Fullagar J).

132 *Tamplin v James* (1880) 15 Ch D 215, at pp. 217 – 218 (Baggallay LJ).

133 *Fitzgerald v Masters* (1956) 95 CLR 420, at p. 433 (Dixon CJ & Fullagar J).

134 *Dowsett v Reid* (1912) 15 CLR 695, at pp. 705 – 706 (Griffith CJ).

135 Lando, O., 'Article 28' in Bianca, C. M. and Bonell, M. J. (eds), *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, at p. 237, para. 2.1 – noting that a court applying Art. 28 *CISG* has 'the power to refuse a decree for specific performance if *under its own law* it would not render such a decree in respect of similar contracts of sale' (*emphasis added*).

136 *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, at p. 442 (Toohey, Gaudron & Gummow JJ).

137 *Bonython v The Commonwealth* (1950) 81 CLR 486, at p. 498 (Lord Simonds).

138 See Art. 3(1) *Convention on the Law Applicable to Contractual Obligations* (the '*Rome Convention*' – applicable to contracts formed before 17 December 2009); Art. 3(1) *Regulation (EC) No 593 / 2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* (the '*Rome I Regulation*' – applicable to contracts formed from 17 December 2009).

139 See Arts. 4(1) & (2) *Rome Convention*; Arts. 4(1) & (4) *Rome I Regulation*.

140 Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, 1994, Quorum Books, Westport, at p. 124 (contrasting the requirement of judges in national courts to apply their national conflict of laws rules with the differing approach taken in international commercial arbitration).

Of course, as conflict of laws rules differ between jurisdictions – see Stone, P., *The Conflict of Laws*, 1995, Longman, London, at p. 2 – the location of the court matters in the sense that it determines which conflict of laws rules will apply.

private international law, a court of another State will apply its own law of specific performance when faced with a similar question.[142]

As was the case with the agency and limitation of actions examples discussed above, the Australian domestic law concerning specific performance effectively supplements the *CISG's* provisions. In this specific performance context, this is likely due to the way in which the supplementation is structured within Art. 28 *CISG* as it requires a court to consider how it would treat a similar contract of sale not governed by the *Convention*, pursuant to its own law. It does not presuppose that domestic law will or will not employ any particular ideas or concepts in allowing a court to make that decision. In fact, the existence of Art. 28 *CISG* reflects widely diverging national approaches and the difficulty in achieving uniformity on point, though whether or not uniformity was truly unattainable has been questioned.[143] Thus, Australian domestic law interfaces with the *CISG* on this point well.

## 4 *SELECTED TENSIONS IN THE INTERFACE BETWEEN THE CISG AND AUSTRALIAN DOMESTIC LAW*

Evident from the analysis in Part III above, in many respects the *CISG* and Australian domestic law are happily married together. From a gap-filling context, agency law and the limitation of actions are good commercial examples of the two bodies of law interfacing effectively. In the case of the *CISG* specifically requiring the use of domestic norms, the Australian domestic law of specific performance poses no obstacle to the effective operation of the *CISG's* remedial regime due to the neutral way in which Art. 28 *CISG* makes use of those rules.

That said, not all legal issues involve a happy unison of the *CISG* and the balance of Australian domestic law. In several respects, there is a noticeable lack of coherence in the boundary between the two. This leads to a situation which can be likened to a jigsaw puzzle with two puzzle pieces that do not quite fit together. The pieces may all be there but the image depicted (in this case, the *CISG* in Australia) is still not complete.

In this Part, selected areas of tension in the interface between the *CISG* and the balance of Australian domestic law will be explored. These areas have been selected for analysis because of their commercial relevance. In particular, attention is given to the passage of property, the classification of software, and the regulation of consumer contracts. In each of these three contexts, it will be seen that coherence between the *CISG* and Australian domestic law is generally lacking.

---

142 *Watches Case*, Commercial Court Bern (Switzerland), 22 December 2004, at para [IV.B.1], available at: <http://cisgw3.law.pace.edu/cases/041222s1.html> – where a Swiss court looked to the *Swiss Law of Obligations* in determining whether its domestic law placed any restrictions on the remedy of specific performance.

143 See generally Lando, 'Article 28', *supra* fn 135, at p. 232, para. 1.1 to p. 127, para. 1.3.

## *4.1 THE PASSAGE OF PROPERTY IN GOODS*

The passage of property in goods is a matter outside the scope of the *CISG*. Art. 4(b) *CISG* expressly identifies that 'the effect which the contract may have on the property in the goods sold' is a matter beyond the *Convention's* external perimeter. For this reason, the passage of property constitutes an external gap.

As the topic's express mention in Art. 4(b) *CISG* suggests, the omission of rules regulating the passage of property from the *CISG* was not accidental. As a matter of legislative history, this was a consequence (in part) of diverging domestic approaches, leaving little prospect of agreement on uniform rules when the *CISG* was drafted.[144] Given that the passage of property constitutes an external gap, the applicable law must be ascertained through the relevant rules of private international law[145] and the domestic law indicated will determine 'the time and conditions of such passing of title'.[146] Where the supplementary domestic law is the law of an Australian State or Territory, the rules governing the passage of property in the goods sold will be found in the relevant jurisdiction's domestic *Sale of Goods Act*.

If the relevant conflict of laws rules point in the direction of Victorian law, the matter will be settled by s 22 of the *Goods Act 1958* (Vic).[147] This provision establishes that:

> *22. Property passes when intended to pass*
>
> *(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*
>
> *(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract the conduct of the parties and the circumstances of the case.*

This section (and its counterparts in the other Australian States and Territories) are further complemented by the five 'rules' which assist in 'ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer'[148] where the parties' intentions are otherwise unclear.[149]

---

144 UNCITRAL Secretariat, *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat*, at p. 17, UN Doc A/CONF.97/5 (1978); Schwenzer and Hachem, 'Article 4', *supra* fn 63, at pp. 75 – 76, para. 3; Khoo, 'Article 4', *supra* fn 59, at p. 46, para. 2.8.

145 Schlechtriem, 'Article 4', *supra* fn 59, at pp. 69 – 70, para. 18.

146 Enderlein and Maskow, *International Sales Law*, *supra* fn 110, at p. 45.

147 For the equivalent provisions in the other Australian States and Territories, see *supra* fn 41, *Sale of Goods Acts* for: ACT s 22; NSW s 22; NT s 22; Qld s 20; SA s 17; Tas s 22; and WA s 17.

148 *Goods Act 1958* (Vic) s 23.

149 See *supra* fn 41, *Sale of Goods Acts* for: ACT s 23; NSW s 23; NT s 23; Qld s 22; SA s 18; Tas s ? Vic s 23; WA s 18.

The difficulty in applying the *Goods Act 1958* (Vic) ss. 22 and 23 (and their equivalents in the other Australian States and Territories) to *CISG* contracts lies in their employment of the 'specific', 'ascertained' and 'unascertained' classification concepts for goods. While these concepts are used for multiple purposes under Australia's domestic *Sale of Goods Acts*,[150] they are not concepts known to the *CISG*. An element of incoherency can therefore be identified in the way in which this external gap is filled with Australian domestic law -- a series of domestic concepts foreign to the *CISG* are effectively enlivened for the purpose of the single issue of the passage of property in goods.

## 4.2 *THE CLASSIFICATION OF SOFTWARE – DEFINING THE CONCEPT OF A 'GOOD'*

This paper's analysis of the passage of property in goods provided an example of incoherency in the context of gap-filling – where the *CISG* and Australian domestic law are required to work together in order to solve an issue arising in a single contract for the international sale of goods (and where they do so imperfectly). Incoherency also exists by virtue of the *CISG* and Australian domestic law each proposing different solutions to the same legal problem (on the international and national planes respectively). This kind of incoherency is evident in the *CISG's* and Australian domestic law's respective classifications of software. At the root of this issue is the way in which each body of law conceives of and defines the concept of 'goods'.

The 'key issue' that has emerged in relation to the term 'goods' under the *CISG* is the question of correctly classifying software.[151] The *CISG* is 'silent on the issue and [the] extent to which it applies to software contracts', as naturally at the time the *CISG* was drafted 'the countries [participating] could not have anticipated the impact of the software industry or the Internet'.[152] At that time, 'software had just not entered the agenda of every day international commercial transactions'.[153] An interesting contemporary application of this problem and one the authors suggest warrants further consideration, is the question as to whether downloadable music, movies and television shows constitute 'software' and therefore come within the scope of the following analysis. If 'software' is defined as a set of instructions interpreted by a

---

150 For example, under the domestic *Sale of Goods Acts* of some of the Australian States and Territories, a buyer is compelled to treat a breach of condition as a breach of warranty where the goods are specific and property has passed to the buyer – see *supra* fn 41, *Sale of Goods Acts* for: NT s 16(4); Qld s 14(3); Tas s 16(3); Vic s 16(3); WA s 11(3).

Ziegel, J., 'The Scope of the *Convention*: Reaching Out to Article One and Beyond' (2005 – 2006) 25 *Journal of Law and Commerce* 59, at p. 61.

Cox, T., 'Chaos versus Uniformity: The Divergent Views of Software in the International Community' (2000) 4 *Vindobona Journal of International Commercial Law and Arbitration* 3, at p. 5.

Diedrich, F., 'The *CISG* and Computer Software Revisited' (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration, Electronic Supplement* 55, at p. 55.

computer (or smart phone, tablet computer, or other electronic device),[154] the authors suggest there is no reason why they should not be encompassed within the scope of the analysis which follows.[155]

To reduce the problem to its most basic elements, it can be observed that the *CISG* does not define the term 'goods'.[156] Rather, the question is one of interpretation. As Schlechtriem and Schwenzer point out, the question of what constitutes goods 'cannot be decided by recourse to national viewpoints' – the interpretation of the *CISG* in this respect (as in others) must be autonomous.[157] Therefore the question as to whether software constitutes goods for the purposes of the *CISG* is distinct from whether software constitutes goods for the purposes of (say) the *Goods Act 1958* (Vic) or any of the other Australian jurisdictions' domestic legislative regimes.[158]

Schlechtriem suggests that under the *CISG* goods are 'basically only moveable, tangible objects'.[159] However, Schlechtriem also suggests[160] that the term goods 'should be understood [...] as widely as possible so as to cover all objects which form the subject-matter of commercial sales contracts'.[161]

Following on from these propositions, in the 2010 edition of the *Schlechtriem & Schwenzer* text, Schwenzer and Hachem suggest that software should be classified as goods under the *CISG*. They explain:

> *If software is permanently transferred to the other party in all respects except for the copyright and restrictions to its use by third parties and becoming part*

---

154 See *St Albans*, *infra* fn 181, at p. 492, a passage cited by the Supreme Court of New South Wales in *Gammasonics*, *infra* fn 176, at para. 27, Sir Iain Gildewell quoted Scott Barker J at first instance who relevantly noted that '[p]rograms are the instructions or commands that tell the hardware what to do'.

155 It is noted that many 'everyday' downloads of this nature would constitute consumer contracts and thus be excluded from the *Convention's* scope in any event by Art. 2(a) *CISG* – however this question would nonetheless have relevance to commercial transactions otherwise captured by the *CISG*.

156 Bridge, M., *The International Sale of Goods – Law and Practice*, 2nd ed, 2007, Oxford University Press, Oxford, at p. 517, para. 11.16 and p. 519, para. 11.18.

Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 11; see also Zeller, B., 'Is the *Sale of Goods (Vienna Convention) Act* the Perfect Tool to Manage Cross Border Legal Risks Faced by Australian Firms?' 6(3) *Murdoch University Electronic Journal of Law*, at para. 60, available at: <http://www.murdoch.edu.au/elaw/issues/v6n3/zeller63.html>.

158 Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 11; *contra* Enderlein and Maskow, *International Sales Law*, *supra* fn 110, at p. 29 who assert that 'the common-law tradition sets great store by noting that they [ie. the goods] have to be corporeal'.

159 Schlechtriem, P., 'Article 1' in Schlechtriem P. and Schwenzer, I. (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed, 2005, Oxford University Press, Oxford, at p. 28, para. 20. This position is re-stated in the 2010 edition of *Schlechtriem & Schwenzer*, although the qualifier 'basically' is omitted see Schwenzer, I. and Hachem, P., 'Article 1' in Schwenzer, I. (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, Oxford, at p. 35, para. 16.

160 Referring to a change in the French text of the *CISG* as compared to its predecessor, the *ULIS*.

161 Schlechtriem, 'Article 1', *supra* fn 159, at p. 28, para. 21; Schwenzer and Hachem, 'Article 1', *supra* fn 159, at p. 34, para. 16.

> *of the other party's property [...] it can be the object of a sales contract governed by the CISG. In this case, the situation is comparable to the sale of a machine, where the seller retains the intellectual property rights necessary for the operation of the machine (patents etc).*[162]

Schwenzer and Hachem go on to propose that '[t]he mode in which software is delivered (eg via disc or electronically via the internet) is irrelevant'.[163] Schlechtriem, in the 2005 edition of the text, provides the following explanation:

> *The application of the CISG to software, which is 'materialized' as a tangible object (hard drives, discs etc.) does not cause problems in the application of the CISG [...] Malfunctions will be non-conformity (in most cases) as in the case of a machine or a vehicle not functioning properly because of a problem with its internal software. But the application of the CISG's provisions on the rights and remedies of the parties is less simple in cases of software to be transferred electronically to the customer, who downloads it on to a hard drive: Since a number of provisions of the CISG [...] are tailored to the handling of tangible objects, it could be argued that the CISG altogether is ill suited to such contracts. However, it is advocated here that even these transactions should be governed by the CISG, since the core provisions on rights and remedies can be applied, if necessary with appropriate accommodation in the light of the directive for the Convention's interpretation in Article 7(1) [...].*[164]

Bridge comes to a similar conclusion noting that '[t]here is much to be said for giving "goods" a broad meaning' and that 'the tendency to press the *CISG* too far is checked by the various exclusions to be found in Article 2'[165], Bridge advocates for goods to be 'broadly interpreted' for 'it would be understandable if the *CISG* case law developed in favour of the view that the supply of software is a sale of goods for the purpose of the *Convention*'.[166] There is certainly force in the observation that including the supply of software embedded in a corporeal object such as a disk but excluding software downloaded directly into a computer system over the Internet 'appears to be driven more by form than by substance and to be undesirable on that account'.[167] One author has drawn a colourful analogy to beer sold in the bottle and

---

162 Schwenzer and Hachem, 'Article 1', *supra* fn 159, at p. 35, para. 18.

163 *Ibid.*

164 Schlechtriem, 'Article 1', *supra* fn 159, at p. 29 and p. 30, para. 21.

165 Art. 2 *CISG* excludes a range of contracts from the scope of the *Convention's* regulatory reach, namely consumer contracts (discussed in detail in Part IV(C) below), sales by auction, sales on execution or by authority of law, the sale of certain intangibles (stocks, shares, investment securities, negotiable instruments and money), the sale of certain vehicles (ships, vessels, hovercraft and aircraft) and the sale of electricity.

166 Bridge, *The International Sale of Goods*, *supra* fn 156, at p. 519 and p. 520, para. 11.18.

167 *Ibid*, at p. 520, para. 11.18.

beer sold from the tap (suggesting that the medium in both cases is 'irrelevant'),[168] though this argument has been the subject of critique as a 'false analogy' given that beer itself 'is clearly tangible'.[169]

This is certainly not a unanimously held opinion as Honnold is of the view that the concept of goods 'refers to moveable, *corporeal* things'.[170] Similarly, Ziegel states 'it seems best to continue to distinguish between a sale of software imbedded in a tangible thing and a sale not so imbedded'.[171] The important point for the purposes of this paper is however that even though '[t]he classification of computer software has led to controversy',[172] it is arguable on the present state of commentary that software can and should be classified as goods[173] under the *CISG*.[174] The *CISG* case law available to date does support this view.[175]

The starting point for a corresponding analysis of the position under the domestic Australian State and Territory *Sale of Goods Acts* is their legislative definitions of 'goods': demonstrated by the reasoning in *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd*,[176] that any argument over the classification of software as goods or otherwise under Australian domestic law centres around these definitions.[177]

---

168 Diedrich, 'The *CISG* and Computer Software Revisited', *supra* fn 153, at p. 64.

169 Sono, H., 'The Applicability and Non-Applicability of the *CISG* to Software Transactions' in Anderson, C. B. and Schroeter, U. G. (eds), *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, 2008, Wildy Simmonds and Hill, London, at pp. 520 – 521.

170 Honnold, *Uniform Law*, *supra* fn 21, at p. 49, para. 53 (*emphasis added*); see also p. 51, para. 56.

171 Ziegel, 'The Scope of the *Convention*', *supra* fn 151, at p. 62.

172 Honnold, *Uniform Law*, *supra* fn 21, at p. 51, para. 56.

173 For an interesting argument, and the corresponding counter-argument, that electronically delivered software constitutes electricity and is therefore excluded from the *Convention* in any event by Art. 2(f) *CISG*, see Mowbray, J., 'The Application of the *United Nations Convention on Contracts for the International Sale of Goods* to E-Commerce Transactions: The Implications for Asia' (2003) 7 *Vindobona Journal of International Commercial Law and Arbitration* 121, at pp. 129 – 130.

'4 Though naturally, as Fairlie points out, an Advisory Opinion on the topic would 'help clarify' the issue – see Fairlie, D., 'A Commentary on Issues Arising Under Articles 1 to 6 of the *CISG* (With Special Reference to the Position in Australia)' (Paper presented at the UNCITRAL – SIAC Conference, Singapore, 22 23 September 2003), published in Singapore International Arbitration Centre, *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods*, 2005, SIAC, Singapore, at p. 46.

See, eg, *Silicon Biomedical Instruments BV v Erich Jaeger GmbH*, District Court Arnhem (Netherlands), 28 June 2006, available at: <http://cisgw3.law.pace.edu/cases/060628n1.html> (noting at para. 3.1 that '[s]oftware is goods' for the purposes of the *CISG*). It remains to be seen whether Australian courts applying the *CISG* would follow this approach, in light of software's treatment under Australian domestic law (see below) and the many instances of 'homeward trend' decisions in Australia (for the most recent example, see *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] FCA 1028 (Unreported, Federal Court of Australia, Ryan J, 28 September 2010), at para. 123).

'6 *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd* [2010] NSWSC 267 (Unreported, Fullerton J, 9 April 2010).

*Ibid*, at paras. 11 – 15.

The statutory definitions of 'goods' found in the Australian *Sale of Goods Acts* derive from definitions found in the sale of goods legislation of the United Kingdom.[178] As a representative example, the *Goods Act 1958* (Vic) defines the term 'goods' in its section 3(1) as follows:

> ***goods*** *includes all chattels personal other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale [...]*

Similar legislative definitions (with minor variations) can be found in the *Sale of Goods Acts* of the other Australian States and Territories.[179]

The classification of software under United Kingdom domestic law was considered in *obiter dicta*[180] by the English Court of Appeal in *St Albans City and District Council v International Computers Ltd*,[181] a decision described as 'likely to be persuasive in Australia'.[182] In that case, Sir Iain Gildewell stated:

> *'Is software goods?' [...] In order to answer the question [...] it is necessary to distinguish between the program and the disk carrying the program [...] Clearly, a disk is within [the legislative] definition [in the Sale of Goods Act 1979 (UK)]. Equally clearly, a program, of itself, is not [...]*[183]
>
> *Suppose I buy an instruction manual on the maintenance and repair of a particular make of car. The instructions are wrong in an important respect. Anybody who follows them is likely to cause serious damage to the engine of his car. In my view, the instructions are an integral part of the manual. The manual including the instructions, whether in a book or a video cassette, would in my opinion be 'goods' within the meaning of the 1979 Act [...]*[184]
>
> *If this is correct, I can see no logical reason why it should not also be correct in relation to a computer disk onto which a program designed and intended to*

178 *Ibid*, at para. 24 where it was noted by the Court that 'the English Act [ie. the *Sale of Goods Act 1979* (UK)] defines "goods" in effectively the same terms as the *Sale of Goods Act 1923* (NSW)'.

179 See *supra* fn 41, *Sale of Goods Acts* for: ACT s 2 & Dictionary; NSW s 5(1); NT s 5(1); Qld s 3(1); SA s A2(1); Tas s 3(1); WA s 60(1). The ACT, South Australian, Tasmanian and Western Australian definitions deviate from the Victorian definition by virtue of incorporating an express reference to 'industrial growing crops'.

180 That Sir Iain Gildewell's discussion of the classification of software was *obiter dicta* was noted by the Supreme Court of New South Wales in *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd* [2010] NSWSC 267 (Unreported, Fullerton J, 9 April 2010), at para. 30.

181 *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481.

182 Fairlie, 'A Commentary', *supra* fn 174, at p. 44.

183 See *St Albans, supra fn 181,* at pp. 492 – 493.

184 *Ibid*, at p. 493.

> *instruct or enable a computer to achieve particular functions has been encoded.*[185]

The Court is clearly of the view that the sale of software through the means of a physical medium constitutes a sale of goods. This has indeed been confirmed by the Supreme Court of New South Wales in the earlier decision of *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd*[186] where it had been held that the sale of a 'computer system' that comprised 'both hardware and software' was a sale of goods.[187] However, on the facts of the case in *St Albans City and District Council*, it was held that in circumstances where an employee of the vendor attended the purchaser's premises (taking with him a disk containing the program) and 'himself performed the exercise of transferring the program into the computer' (without also transferring the disk), there was no sale of goods since '[a]s I have already said, the program itself is not "goods" within the statutory definition'.[188] The only logical conclusion that can be drawn from this analysis is that on the basis of this (persuasive) authority, an electronic transfer of software would not be captured by the English or Australian domestic sale of goods regimes.

A similar conclusion was reached in Australia by the Commonwealth's Administrative Appeals Tribunal in *Re Amlink Technologies*[189] though not directly in the sale of goods context. The question arose as to whether software supplied on CD-ROM was: 'eligible goods', 'eligible software' or 'eligible know-how' under the *Export Market Development Grants Act 1997* (Cth). Since that Act did not include a statutory definition of the term 'goods', the Administrative Appeals Tribunal was required to consider the meaning of 'goods' at common law.[190] While not without critique of *St Albans City and District Council*,[191] McCabe SM concluded:

> *If the program had been commissioned by the purchaser and written (or even modified) to its specifications, the contract of supply is likely to be a supply of know-how or intellectual property rather than goods. The situation is different once the product is sold as a tangible commodity after being copied or mass-produced. At that point, the products cease to be know-how and become goods.*[192]

---

185 *Ibid.*

186 *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48.

187 *Ibid*, at p. 54 (Rogers J).

188 See *St Albans, supra* fn 181, at p. 493.

189 *Re Amlink Technologies Pty Ltd and Australian Trade Commission* (2005) 86 ALD 370.

190 See *Gammasonics, supra* fn 176, at para [31].

191 See *Re Amlink Technologies Pty Ltd and Australian Trade Commission* (2005) 86 ALD 370, at p. 37

192 *Ibid*, at p. 377.

*St Albans City and District Council* was also critiqued in the 2000 UK decision of *Watford Electronics v Sanderson.*[193] Judge Thornton QC suggested the logic of Sir Iain Gildewell's distinction 'is hard to divine since a program does not exist in a vacuum'.[194] Indeed, it was observed that the *St Albans City and District Council* scenario would at least involve, at its most basic level, a transfer of the program via the physical means of electrons.[195] However, ultimately the Court concluded that since the software in that case was 'licensed rather than sold' it did not come within the statutory sale of goods regime in any event, and the Court expressly declined to 'decide whether it is appropriate to seek to distinguish or depart from the judgment of Gildewell LJ'.[196]

More recently, in April 2010, the question as to the classification of software for the purposes of Australia's domestic *Sale of Goods Acts* directly arose in the New South Wales Supreme Court case of *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd.*[197] That case involved the sale of software by Comrad to Gammasonics, 'by means of a remote internet download onto the Gammasonics' server'.[198] One issue arising for consideration by the Court was whether or not this direct download of software constituted a sale of goods, thus attracting the protection of the statutorily implied terms found within the *Sale of Goods Act 1923* (NSW).

Fullerton J referred to the statutory definition of goods contained in the *Sale of Goods Act 1923* (NSW) s 5(1) and reviewed the existing case law on point. Despite expressly disagreeing with elements of Sir Iain Gildewell's reasoning in *St Albans City and District Council*[199] and acknowledging the attraction (particularly from a consumer protection point of view) of capturing software sales within the statutory sale of goods regimes,[200] Fullerton J held that extending the statutory definition of 'goods' to

---

193 *Watford Electronics Ltd v Sanderson CFL Ltd* [2000] 2 All ER (Comm) 984. The case was subsequently heard on appeal by the Court of Appeal in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, though not on points relevant to the present discussion.

194 *Watford Electronics Ltd v Sanderson CFL Ltd* [2000] 2 All ER (Comm) 984, at p. 1002.

195 *Ibid*, at p. 1003.

196 *Ibid*.

197 *See Gammasonics*, *supra* fn 176.

198 *Ibid*, at para. 3.

199 *Ibid*, at para. 26, Fullerton J, discussing Sir Iain Gildewell's analogy with an instruction manual, noted that '[t]he flaw in the reasoning, as I see it, lies in the proposition that a software program cannot be separated from the disk upon which it is transferred if it is to remain a "good" for statutory purposes [...] While it may be self evident that "instructions are an integral part of [a] manual", for the simple reason that one cannot exist without the other, the same cannot be necessarily said of software that is transferred via an online download without means of any disk or other hardware'.

200 *Ibid*, at para. 44 where Fullerton J noted, in relation to an example drawn from D Svantesson and L Bygrave, 'Jurisdictional Issues and Consumer Protection in Cyberspace: The View from Down Under' (Paper presented at the Cyberspace Regulation: E-Commerce and Content Conference, Sydney, 2001) concerning the different ways in which an encyclopaedia may be purchased, that 'it seems to me that the approach of the commentators and their analysis generally has merit, especially insofar as it serves to afford protection to the consumer irrespective of the means by which the software is delivered'

include software was ultimately a matter for the legislature rather than the courts.[201] As such, the Court held that the sale of software in question was not captured within the regulatory regime of the *Sale of Goods Act 1923* (NSW) and thus did not attract the protection of the statutorily implied terms under that Act.[202]

Thus, on the basis of the most recent Australian authority on point, it appears that software in and of itself is not likely to constitute goods for the purposes of Australia's domestic sale of goods regimes. As such, an interesting incoherency is revealed. International transactions involving the sale of software entered into by an Australian party will be subject to the *CISG*, should the *CISG's* other internal rules of applicability[203] be satisfied. On the other hand, comparable sale of software transactions occurring within the confines of Australia are not subject to statutory regulation. Such transactions would not exist in a vacuum[204] – they would still be subject to legal regulation – but that regulation would take the form of the common law of contract rather than regulation tailored to and targeted at the specific context of the sale of goods.[205] Practically, this means that unlike in sales governed by the *CISG*,[206] the protection of implied terms in domestic sale of software contracts must be found 'in fact' rather than 'in law'.

## *4.3 THE REGULATION OF CONSUMER CONTRACTS*

This paper's discussion of the passage of property identified an incoherency existing in the context of Australian domestic law supplementing the *CISG*. Its discussion of the classification of software has highlighted further incoherency manifested in potentially diverging approaches under both the *CISG* and domestic law to the same problem. An analysis of the regulation of international consumer contracts under Australian law discloses a third incidence of incoherence – where diverging rules relating to the same legal concept (the 'consumer') under each regime ultimately risk frustrating the intentions of both the international and domestic legislatures.

Consumer contracts are excluded from the *CISG's* scope by Art. 2(a) *CISG* which provides that the *Convention* does not apply to sales 'of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use' The *CISG* is thus limited in its application '*de facto* to commercial

---

201 See *Gammasonics*, *supra* fn 176, at para. 45.

202 *Ibid*, at para. 47.

203 See Arts. 1 – 6 & 100 *CISG*.

204 Indeed, it has been observed that contracts 'are incapable of existing in a legal vacuum' – see *Amin Rasheed Shipping Corp v Kuwait Insurance Co (the Al Wahab)* [1984] 1 AC 50, at p. 65 (Lord Diplock).

205 This is in fact reflected in *Gammasonics, supra* fn 176, where Fullerton J (after analysing the position under the *Sale of Goods Act 1923* (NSW) and determining that the Act did not apply) went on to consider the position at common law.

206 Art. 35(2) *CISG*.

sales'[207] – in other words, '[t]he *CISG* [...] is a law for merchants and not for consumers'.[208] The rationale for the exclusion in Art. 2(a) *CISG* is entirely reasonable – in several countries (including Australia) consumer contracts are subject to various types of consumer protection laws and the *CISG* did not intend to intrude into that territory.[209]

A tension however exists in this division of regulatory responsibility between the *CISG* and Australian domestic law. The *Convention's* definition of consumer contracts in Art. 2(a) *CISG* is consistent with the definition of consumer contracts found in the *UN Limitation Period Convention*[210] and is also broadly consistent with the Consumer Contracts Articles adopted at the 14th Session of the Hague Conference.[211] Despite the consistency between these instruments on an international level the exception in Art. 2(a) *CISG* is 'not completely successful, because the sphere of application of domestic consumer protection laws is not always defined in the same way'.[212] Indeed, this problem is borne out when Australian domestic law is considered, as the way in which the *CISG* and Australian domestic consumer protection laws define the concept of the consumer differs.[213] As the *CISG* prevails over domestic law,[214] it is possible that some contracts considered 'consumer' in character for domestic purposes[215] will actually be treated as 'non-consumer' for the

---

207 Schwenzer, I. and Hachem, P., 'Article 2' in Schwenzer, I. (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd English ed, 2010, Oxford University Press, Oxford, at p. 50, para. 4.

208 Bridge, *The International Sale of Goods*, *supra* fn 156, at p. 511, para. 11.09.

209 UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 144, at p. 16; see also Schwenzer and Hachem, 'Article 2', *supra* fn 208, at p. 54, para. 16; Honnold, *Uniform Law*, *supra* fn 21, at p. 47, para. 50; Bell, K., 'The Sphere of Application of the *Vienna Convention on Contracts for the International Sale of Goods*' (1996) 8 *Pace International Law Review* 237, at p. 251. In addition, as Loewe quite effectively illustrates with a hypothetical merchant / consumer exchange, applying the *CISG* to consumer contracts involving foreigners abroad would be simply impractical – see Loewe, R., 'The Sphere of Application of the *UN Sales Convention*' (1998) 10 *Pace International Law Review* 79, at p. 82.

210 See Art. 4(a) *UN Limitation Period Convention*.

211 Article 1 of the Consumer Contracts Articles states that '[t]his Convention shall apply to certain contracts for the international sale of goods bought primarily for personal, family or household use, where the seller acts in the course of his business or profession and where at any time before the contract was entered into, he knew or ought to have known that the goods were being bought primarily for any such use.' Art. 2 goes on to explain that 'a person who buys goods primarily for personal, family or household use, is hereinafter referred to as the consumer', and Art. 3 confirms that the burden of proof is on the seller in relation to knowledge of the purpose of the purchase.

212 Schwenzer and Hachem, 'Article 2', *supra* fn 208, at p. 54, para. 16.

213 Fairlie, 'A Commentary', *supra* fn 174, at p. 40. Fairlie makes this observation in relation to the now-superseded *Trade Practices Act 1974* (Cth), however as demonstrated below it is equally applicable to the *Competition and Consumer Act 2010* (Cth).

4 See the *Sale of Goods (Vienna Convention) Acts*, *supra* fn 44 for: ACT s 6; NSW s 6; NT s 6; Qld s 6; SA s 5; Tas s 6; Vic s 6; and WA s 6. See also the *Competition and Consumer Act*, *supra* fn 45, at Sch 2, s. 68.

The following discussion is confined to Australia's consumer protection legislation as it relates to implied terms, given that 'rights and obligations' are clearly within the *CISG's* scope – see Art. 4 *CISG*.

purposes of the *CISG*, leading to a situation where the *CISG's* regulatory regime prevails over Australian domestic law. Such a result is inconsistent with the intentions of the *CISG's* drafters in the formulation of Art. 2(a) *CISG* but can nonetheless be seen as possible with the aid of some simple examples.

### *4.3.1 DEFINING CONSUMER CONTRACTS BY PURPOSE*

One aspect of the identified incoherency lies in the differing natures of the relevant purpose each regime makes use of in defining consumer contracts. The *CISG* looks to the actual purpose[216] for which the goods were purchased – in the words of Schlechtriem, 'it is the buyer and his intention of use that are decisive'.[217] If that actual purpose was for personal, family or household use then the *Convention* will not apply. Moreover, it is the intended use and not a different later actual use which is relevant for the purposes of Art. 2(a) *CISG*[218] – 'late changes in purpose are irrelevant'.[219]

As noted by Honnold, for example, 'the *Convention* applies to the international purchase of furniture for a business office even though this type of furniture is customarily bought by consumers'.[220] Bridge also notes that the sale of a car to a company for business uses may come within the *CISG* while the sale of the exact same car to an individual for private use would not.[221] In contrast to the *CISG*, the *Australian Consumer Law*[222] looks to the ordinary purpose of the goods in question.

---

It should be noted that other parts of Australia's consumer protection legislation can co-exist with the *CISG*, such as provisions relating to unfair terms in consumer contracts, since the *CISG* does not deal with matters of validity – see Art. 4(a) *CISG* and Schlechtriem, 'Article 4', *supra* fn 59, at p. 68, para. 12.

6 It is interesting to note that a formulation using the words 'ordinarily', which would have brought the *CISG's* definition of consumer contracts closer to (though still not exactly the same as) that contained in Australian law, was contained in early drafts but later abandoned – see generally Khoo, W., 'Article 2' in Bianca, C. M. and Bonell, M. J. (eds), *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, at p. 35, para. 1.4.

Schlechtriem, P., 'Article 2' in Schlechtriem, P. and Schwenzer, I. (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed, 2005, Oxford University Press, Oxford, at p. 44, para. 8a.

218 Schwenzer and Hachem, 'Article 2', *supra* fn 208, at p. 50, para. 4.

219 Enderlein and Maskow, *International Sales Law*, *supra* fn 110, at p. 33.

220 Honnold, *Uniform Law*, *supra* fn 21, at p. 47, para. 50.

221 Bridge, *The International Sale of Goods*, *supra* fn 156, at p. 522, para. 11.19.

222 *Competition and Consumer Act 2010* (Cth), at Sch 2 (the '*ACL*'). As of 1 January 2011, the *ACL* replaces the consumer protection provisions previously contained in the *Trade Practices Act 1974* (Cth), as a result of amendments made by the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth). It is administered by the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, and each State and Territory consumer protection agency. It also replaces previous State and Territory consumer protection legislation with a unified national law to be implemented at both the Federal and State levels. For the previous legislation, see the *Trade Practices Act 1974* (Cth); *Fair Trading Act 1987* (NSW); *Fair Trading Act 1999* (Vic); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Consumer Transactions Act 1972* (SA); *Fair Trading Act 1987* (WA); *Consumer Affairs Act 1971* (WA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1987* (ACT); *Fair Trading (Consumer Affairs) Act 1973* (ACT); *Consumer Affairs and Fair Trading*

Under the *Competition and Consumer Act 2010* (Cth) Sch 2, s 3(1)(b), a contract is consumer in nature if goods 'were of a kind ordinarily acquired for personal, domestic or household use or consumption'.[223]

Australian case law has emphasised the importance of the term 'ordinarily' – and has held that goods which are *ordinarily* acquired for personal, domestic or household use are captured even if the *actual* purpose of a particular purchase is commercial. This domestic approach stands in stark contrast to the position under the *CISG*, as illustrated by the examples given by Honnold and Bridge. Thus in *Carpet Call v Chan,*[224] a carpet purchased for use in a nightclub, in spite of having a commercial rating, was nonetheless held to constitute goods of a kind 'ordinarily' acquired for personal, domestic or household use. It can therefore be seen that whilst the *CISG* excludes sales where goods are *actually* bought for personal, family or household use, the *ACL* includes sales where goods of the relevant kind are *ordinarily* bought for personal, domestic or household use.[225]

### *4.3.2 DEFINING CONSUMER CONTRACTS BY PRICE*

The *ACL* does not, however, use the ordinary purpose of goods as the sole defining feature of consumer contracts. In addition to the requisite ordinary purpose, the *ACL* also captures (in the alternative) contracts of sale where the price does not exceed $40,000.[226] Therefore, in practice, it is only necessary under domestic consumer protection legislation to consider the ordinary purpose of goods where the threshold of $40,000 has been reached.[227] Conversely, the *CISG* contains no equivalent criterion (based on price) in Art. 2(a) *CISG*. Regardless of the particular goods' price, it is the buyer's actual purpose which is determinative in assessing whether a transaction is a consumer contract for the purposes of the *CISG*.

---

*Act 1990* (NT). The *ACL* does not significantly alter rights and obligations in relation to previous consumer protection law and it is likely that existing case law will remain relevant in applying the *ACL*.

223 See also the definition of 'consumer' in the *Competition and Consumer Act, supra* fn 45, at s. 2(1).

224 *Carpet Call Pty Ltd v Chan* (1987) ATPR (Digest) 46-025. While this case was decided under the now-superseded *Trade Practices Act 1974* (Cth), there is no reason to believe a different approach will be taken under the *ACL*.

225 In addition to diverging on the basis of purpose, it is noted that the uses referred to in each regime differ – the *CISG* referring to 'personal, family or household use' and the Australian domestic regime referring to 'personal, domestic or household use'. Despite adopting slightly different formulations in this respect, it is not envisaged that this aspect of the consumer concept's definition would in itself cause any significant incoherencies between the *CISG* and Australian domestic law.

226 See *Competition and Consumer Act, supra* fn 45, at Sch 2, s. 3(1)(a)(i). Sub-paragraph (ii) provides for the regulatory prescription of a higher monetary threshold, but to date no such regulations have been made.

227 This reality is reflected in the drafting of the *ACL* definition which sets out a two stage inquiry in determining whether a contract is consumer in nature (ie. first asking whether the price does not exceed $40,000, and only if this is not so then asking whether the goods were of a kind ordinarily acquired for personal, domestic or household use).

### *4.3.3 ILLUSTRATING THE INCOHERENCY – TWO EXAMPLES*

The incoherency in the definition of consumer contracts under the *CISG* and Australian domestic law may ultimately lead to a situation where the intention of both the domestic and international legislatures is defeated. That is, irrespective of the intention underlying the Australian domestic consumer protection provisions of establishing a mandatory consumer protection regime,[228] and an intention underlying the *CISG* not to intrude into the realm of domestic consumer contract regulation,[229] circumstances can be identified where (in the Australian context) a consumer contract would in fact be governed by the *CISG* rather than Australian domestic law. Two simple examples can be given which illustrate this point well.

First, suppose that University Oz (an Australian university) purchases a $20,000 piece of medical equipment from a foreign supplier.[230] The intention of University Oz is to use the equipment as a teaching tool in its highly regarded Medical School. In this situation, the contract would be a consumer contract for the purposes of the *ACL* as the goods in question (the piece of medical equipment) are sold for $20,000 – less than the $40,000 threshold.[231] Ordinarily, under the *ACL* a range of consumer protection guarantees would potentially be implied into the contract.[232] Importantly, these guarantees are non-excludable.[233] However, the contract would not be a consumer contract under the *CISG* as Art. 2(a) *CISG* is not enlivened for University Oz's actual purpose is not 'personal, family or household' related. Therefore the *CISG*'s rules of applicability being satisfied, the *Convention* applies; by virtue of its domestic implementing Acts[234] the *Convention* applies and prevails over the implied guarantee regime in the *ACL*; thereby defeating the drafters' intention that the *CISG* would not intrude into the realm of consumer contracts.[235] More importantly, and in contrast to the consumer protection guarantees set out in the *ACL*, the *CISG's*

---

228 See the *Competition and Consumer Act*, *supra* fn 45, at Sch 2, ss. 64 (which voids terms that seek to contract out of the *ACL*) & 67 (which renders choice of law clauses ineffectual in excluding the *ACL*).

229 UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 144, at p. 16; see also Schwenzer and Hachem, 'Article 2', *supra* fn 208, at p. 54, para. 16; Honnold, *Uniform Law*, *supra* fn 21, at p. 47, para. 50; Bell, 'The Sphere of Application', *supra* fn 210, at p. 251.

230 It is assumed (for the purposes of this example) that the requirements for the applicability of the *CISG*, excluding for the moment a consideration of Art. 2(a) *CISG*, are met.

231 See the *Competition and Consumer Act*, *supra* fn 45, at Sch 2, s 3(1)(a)(i).

232 *Ibid*, at Sch 2, ss. 54 – 57.

233 *Ibid*, at Sch 2, ss. 64 & 67.

234 *Ibid*, at Sch 2, s. 68. With respect to the exclusion of State and Territory legislation; also see the *Sale of Goods (Vienna Convention) Acts*, *supra* fn 44 for: ACT s 6; *Sale* NSW s 6; NT s 6; Qld s 6; SA s 5; Tas s 6; Vic s 6; and WA s 6.

235 See UNCITRAL Secretariat, *Commentary on the Draft Convention*, *supra* fn 144, at p. 16; see also Schwenzer and Hachem, 'Article 2', *supra* fn 208, at p. 54, para. 16; Honnold, *Uniform Law*, *supra* fn 21, at p. 47, para. 50; Bell, 'The Sphere of Application', *supra* fn 210, at p. 251.

selection of implied terms in Art. 35(2) *CISG* are less extensive and are also subject to contractual modification or exclusion.[236]

Second, suppose that University Oz now purchases a $42,000 gold chain from a foreign vendor.[237] The intention of University Oz is for the chain to be worn by its Chancellor at the university's annual graduation ceremonies. In this situation, the chain's price exceeds the $40,000 threshold. It is therefore not a *per se* consumer purchase under the *ACL's* price criteria.[238] Per the reasoning in *Carpet Call v Chan*,[239] it is arguable that the *ordinary purpose* of a decorative chain is to be worn – a 'personal' use. The contract is therefore arguably a consumer contract under the *ACL* on the basis of the gold chain's ordinary purpose.[240] As was the case in the first example, ordinarily a range of non-excludable[241] consumer protection guarantees[242] would potentially be implied. However, as was also the case in the first example, the contract would not be a consumer contract for the purposes of the *CISG*. As the actual purposes of University Oz are not 'personal, family or household' purposes,[243] Art. 2(a) *CISG* does not apply. This enables the *CISG* to prevail over the *ACL's* implied guarantees and once again the *CISG* has successfully intruded (against its drafters intentions) into the realm of domestic consumer protection legislation.

These two simple examples demonstrate that a degree of incoherency does exist between the *CISG* and Australian domestic law concerning the division of responsibility for the regulation of international consumer contracts.

## 5 *CONCLUSION*

In its analysis of the *CISG's* interaction with Australian domestic law, this paper has considered three main issues. First, in order to provide the context for this paper's analysis, the dual character of the *CISG* as both international and Australian domestic law has been considered. Second, in Part III, Australian domestic law's role in supplementing the *CISG* through gap-filling, and also where specifically required by the *CISG*, has been analysed. Examples relating to the law of agency, the limitation of actions and the law of specific performance have been considered to demonstrate that

---

236 See Art. 32(2) *CISG* ('[e]xcept where the parties have agreed otherwise [...]'); see also Art. 6 *CISG* ('[t]he parties may [...] derogate from or vary the effect of any of [the *Convention's*] provisions').

237 Again, it is assumed (for the purposes of this example) that the *CISG* is applicable, excluding for the moment a consideration of Art. 2(a) *CISG*.

238 See *Competition and Consumer Act 2010*, *supra* fn 45, at Sch 2, s. 3(1)(a)(i).

239 *Carpet Call Pty Ltd v Chan* (1987) ATPR (Digest) 46-025.

240 See *Competition and Consumer Act*, *supra* fn 45, at Sch 2, s. 3(1)(b).

241 *Ibid* at Sch 2, ss. 64 & 67.

242 *Ibid* at Sch 2, ss. 54 – 57.

243 It is noted that at face value, the conclusion that a gold chain's ordinary purpose is personal (to be worn) appears inconsistent with this conclusion. However (importantly) it is the actual use of University Oz (the purchaser) rather than the Chancellor which is determinative, and as University Oz's actual use for the gold chain will be as a prop in a ceremony connected to the public / commercial activities of the university, it is appropriate to characterise this actual use as other than 'personal, family or household'.

in many respects, the *CISG* effectively interfaces with Australian domestic law in order to provide comprehensive solutions to international sale of goods problems. In Part IV, selected tensions in the interface between the *CISG* and Australian domestic law have been explored. Examples relating to the passage of property, the classification of software and the regulation of consumer contracts have been identified in order to show that just as the *CISG* and Australian domestic law effectively interface in some respects, their boundaries are incoherent in others. On balance, there is not in fact a perfect relationship between these two bodies of law.

The *CISG* has been described as having obtained 'worldwide acceptance'[244] and has been 'irreversibly [established] as the *de facto* international sales law'.[245] Despite its long-standing place in the Australian statute books, spanning a period exceeding 20 years, attention can still usefully be given to the way in which the balance of Australian domestic law interacts with the *CISG*. Ultimately, the jigsaw puzzle depicting the *CISG* in Australia suffers from a fundamental problem – its pieces do not quite fit together.

Australia is bound at international law through the principle of *pacta sunt servanda*[246] to implement the *CISG* faithfully and according to its terms. It has done so primarily through State and Territory legislation which enacts the *CISG* in its entirety,[247] giving it the force of law[248] and precedence over other State or Territory laws.[249] For this reason, any amelioration of the incoherencies identified in this paper cannot occur by tweaking the *Convention's* terms. The only deviations permitted by the *CISG* are reservations concerning the application of Parts II and III of the *Convention*,[250] declarations concerning the *CISG's* application in different territorial units of a single State,[251] declarations concerning the *CISG's* non-applicability as between Contracting States having the same or closely related legal rules on the matters governed by the *Convention*,[252] reservations concerning the application of Art. 1(1)(b) *CISG*[253] and declarations concerning writing requirements for contracts.[254] The *CISG* specifically stipulates in Art. 98 *CISG* that '[n]o reservations are permitted except those expressly

---

244 Schlechtriem and Schwenzer, 'Introduction', *supra* fn 9, at p. 1.

245 Zeller, 'The *CISG* – Getting Off The Fence', *supra* fn 56, at p. 74.

246 Art. 26 *Vienna Convention*; Triggs, *International Law*, *supra* fn 29, at p. 506, para. 9.9.

247 See the *Sale of Goods (Vienna Convention) Acts*, *supra* fn 44 for: ACT Sch 1; NSW Sch 1; NT Sch; Qld Sch; SA Sch; Tas Sch 1; Vic Sch 1; and WA Sch 1.

248 See the *Sale of Goods (Vienna Convention) Acts*, *supra* fn 44 for: ACT s 5; NSW s 5; NT s 5; Qld s 5; SA s 4; Tas s 5; Vic s 5; and WA s 5.

249 See the *Sale of Goods (Vienna Convention) Acts*, *supra* fn 44 for: ACT s 6; NSW s 6; NT s 6; Qld s 6; SA s 5; Tas s 6; Vic s 6; and WA s 6. See also the *Competition and Consumer Act*, *supra* fn 45, at Sch 2, s. 68.

250 Article 92(1) *CISG*.

251 Article 93(1) *CISG*.

252 Article. 94(1) *CISG*.

253 Article 95 *CISG*.

254 Article 96 *CISG*.

authorized in this *Convention*' and none of those permitted reservations would address the incoherencies identified in this paper. Instead, attention can usefully be given to the body of law that is within the capacity of Australian law-makers to change, the balance of Australian domestic law, to ensure that international sale of goods contracts are subject to one coherent and not two mismatched legal regimes.