

THE INTERPRETATION AND APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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Introduction

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG or Convention) was promulgated in 1980 to provide a uniform law for the international sale of goods. Since its enactment in 1988, the CISG has been ratified by over 60 countries, including the United States.¹ As Canada, Mexico and most of the European countries have also adopted the CISG,² the Convention now governs a majority of the foreign sales transactions conducted by the United States.³ Some countries have even adopted the CISG as their domestic sales law,⁴ and in the United States, the Permanent Editorial Board for the Uniform Commercial Code (hereinafter UCC) is using the Convention as a model in its efforts to revise the UCC.⁵

In general, the CISG governs contracts for the sale of goods between parties from different countries that have signed the Convention.⁶ It supersedes the domestic sales laws of each respective country in the formation of sales contracts and the rights and obligations of the parties to sales contracts.⁷ Thus, in the United States, for example, when the CISG was ratified by Congress in 1986, it became a self-executing treaty with the pre-emptive force of federal law.⁸ This means that, under the Supremacy Clause of the US Constitution, the CISG trumps all contrary domestic sales laws such as the UCC.⁹ Although US cases involving the CISG have

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- 1 United Nations Conference on Contracts for the International Sale of Goods, Final Act (10 April 1980), UN DOC A/CONF 97/18, reprinted in S Treaty Doc No 98-9, 98th Cong., 1st Sess., and 19 ILM 668 (1980) [hereinafter CISG or Convention].
 - 2 See Peter Winship, 'Changing contract practices in the light of the United Nations sales convention: a guide for practitioners', 29 *Int'l Law* 525 (1995), 527.
 - 3 See US Dept of Com, Statistical Abstract of the United States 1997, 803-06 (117th edn 1997).
 - 4 Norway has adopted the CISG wholesale; Finland and Sweden have altered their sales laws to conform with the CISG. See Peter Winship, 'Domesticating international commercial law: revising UCC Article 2 in light of the United Nations Sales Convention', 37 *Loy L Rev* 43 (1991), 46.
 - 5 See generally *ibid.*
 - 6 The Convention does allow reservations to be made in addition to other qualifications.
 - 7 CISG, Article 4.
 - 8 Richard E Speidel, 'The revision of UCC Article 2, sales in light of the United Nations Convention on Contracts for the International Sale of Goods', 16 *NW J Int'l L & Bus* 165 (1995), at 166.
 - 9 US Const Article VI, cl 2.

been quite scarce until recently, a number of US federal courts have struggled properly to apply and interpret the CISG where the Convention is the applicable law.¹⁰

This paper discusses the interpretive techniques which commentators suggest will enable courts to accurately interpret the CISG. The section headed Challenges to achieving an accurate interpretation identifies the current difficulties in interpreting the CISG which confront signatory courts and lawyers. The section headed A brief history of the Convention traces the history of the Convention to lend some perspective on its interpretive policy. The section headed The method of interpretation prescribed by the Convention examines those particular CISG provisions that prescribe the method of interpretation intended by the framers. The section headed The use of alternative sources to interpret the CISG considers those sources that may be consulted when the CISG itself does not directly resolve a legal issue presented. These latter two sections also present examples of judicial decisions which illustrate the methods of interpretation used by courts and tribunals to interpret the CISG.

Challenges to achieving an accurate interpretation

Before drafting any international sales contract, it is essential that counsel become aware of the challenges that await them in interpreting an unfamiliar sales code such as the CISG. An awareness of such difficulties will also enable counsel better to appreciate those techniques which will enable them to achieve a more accurate reading of the Convention. First, some of the rules contained in the CISG are notably different from those contained in domestic sales laws with which counsel may be more familiar.¹¹ For example, the CISG is more liberal toward the use of parol evidence in interpreting contracts of sale than is the UCC.¹² Similarly, the CISG provides restitution remedies which are broader than under those under the UCC.¹³ On the other hand, the CISG is more restrictive toward a party's right to revoke offers than is the UCC.¹⁴ Similarly, the CISG conditions a party's right to claim avoidance on a fundamental breach by the other party, while the UCC preserves the perfect tender rule for single delivery contracts.¹⁵ Moreover, there are certain terms contained in the CISG that counsel may find unfamiliar based on their regular use of domestic sales law.¹⁶ For example, the CISG contains articles that embrace certain European concepts such as the 'Nachfrist' notice, which was imported from German law but contains no equivalent in the UCC.¹⁷

10 See Rod Andreason, 'MCC-Marble Ceramic: the parol evidence rule and other law under the Convention on Contracts for the International Sale of Goods', 1999 *BYU L Rev* 351 (1999), 352 (discussing that of the 464 cases governed by the CISG only 32 have involved US companies; therefore, federal courts have not had a significant opportunity to interpret the CISG).

11 Mark B Wessman, *Practitioner's Guide to the Convention on Contracts for the International Sale of Goods (CISG) and the Uniform Commercial Code (UCC)*, by Henry Gabriel (New York: Oceana Publications Inc, 1994), 70 *Tul L Rev* 1783 (1996), 1791.

12 Henry Gabriel, *Practitioner's Guide to the Convention on Contracts for the International Sale of Goods (CISG) and the Uniform Commercial Code (UCC)*, (New York: Oceana Publications Inc, 1994), 29–32.

13 *Ibid*, 244–52.

14 *Ibid*, 49–51.

15 *Ibid*, 139–41, 185–87.

16 Wessman, *op cit*, fn 11, 1791.

17 Gabriel, *op cit*, fn 12, 134–36, 182–85.

Secondly, the organisational structure of the CISG varies considerably from that of domestic sales law such as the UCC.¹⁸ For example, the CISG addresses concisely in a single article the quality standards which are required of all contract goods, while the UCC devotes three separate sections to express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose.¹⁹ The CISG addresses systematically in a single section the standards required to avoid a contract and the consequences of avoiding a contract,²⁰ while the UCC addresses these same matters through a series of sections scattered throughout the Code.²¹

Thirdly, there are certain subjects involving international sales about which the CISG is ambiguous and inconsistent.²² For example, Article 1 says that the CISG applies to situations where the parties have places of business in different states which are signatories to the Convention, or where the rules of private international law require the application of the law of any such state.²³ However, Article 95 allows contracting states to opt out of the latter provision by declaring a reservation.²⁴ Article 46 appears to grant the buyer ample rights to the remedy of specific performance.²⁵ However, Article 28 allows the court to apply any restrictions to specific performance which apply under its own domestic laws.²⁶

Fourthly, there are certain aspects involving international sales that the CISG does not even address.²⁷ For example, the CISG nowhere provides any general definition of 'place of business', even though this term is essential in determining the applicability of the Convention.²⁸ Article 2 of the CISG excludes from application those transactions involving consumer goods, as well as those transactions involving money or investment securities.²⁹ Article 4 of the CISG excludes from application those issues concerning the validity of the contract, or the validity of any of its specific provisions.³⁰ The same article also excludes from coverage issues relating to property ownership in the goods sold.³¹ Article 5 excludes from application issues concerning liability for death or personal injury caused by the goods.³²

18 Wessman, *op cit*, fn 11, 1790.

19 Gabriel, *op cit*, fn 12, 104–09.

20 *Ibid*, 139–41, 185–92.

21 See UCC 2-106(3) & (4), 2-601, 2-602, 2-608, 2-612, 2-703 – 2-710, 2-711 – 2-717, 2-602, 2-608 (1990).

22 Wessman, *op cit*, fn 11, 1788.

23 Gabriel, *op cit*, fn 12, 3.

24 *Ibid*, 5.

25 *Ibid*, 132.

26 *Ibid*, 83.

27 Wessman, *op cit*, fn 11, 1787.

28 Gabriel, *op cit*, fn 12, 6.

29 *Ibid*, 12–13.

30 *Ibid*, 19–20.

31 *Ibid*.

32 *Ibid*, 21.

Due in large part to the problems mentioned above, many international attorneys in the US have appeared reluctant to create or enforce contracts based on the CISG for over a decade.³³ In fact, according to some scholars, many US legal practitioners are suspicious about and even afraid of the CISG.³⁴ Hence, many US lawyers often advise their clients simply to opt out of the CISG, as is actually permitted under Article 6 of the Convention.³⁵ Consequently, until very recently, US courts have encountered 'surprisingly few cases' in which the CISG was even referred to.³⁶

Despite these problems, however, the CISG has significant potential to reduce the difficulties frequently encountered in international sales transactions by creating a uniform norm for international trade.³⁷ This is because simplification is the essence of the Convention.³⁸ Its fundamental characteristics are 'simplicity, practicality and clarity ... free of legal shorthand, free of complicated legal theory and easy for the businessman to understand'.³⁹ The uniform code of law established by the CISG greatly reduces the use of multiple documents and contract laws that would otherwise be necessary for parties to create international sales contracts.⁴⁰ Although the CISG had initially appeared to increase the complexity of international sales transactions, it is expected that the CISG will ultimately enable parties to achieve 'simplification and uniformity in the long term'.⁴¹ Ultimately, any apprehension which practitioners may have toward the CISG can be alleviated only through a better understanding of the Convention and the methods used to interpret it.⁴²

A brief history of the Convention

An examination of the Convention's drafting history will provide insight into the interpretive policy intended by the framers. The process of achieving agreement in international sales law evolved in three stages. The first stage of the project began in 1928 at the Sixth Session of the Hague Conference on Private International Law.⁴³

33 Andreason, *op cit*, fn 10, 352.

34 See John E Murray Jr, 'The neglect of CISG: a workable solution', 17 *JL & Com* 365 (1998), available at <http://www.cisg.law.pace.edu/cisg/biblio/murray1.html>. See also John P McMahon, *When the UN Sales Convention Applies and Some of the Reasons Why it Matters to You and Your Clients*, Pace Database on the CISG and Int'l Com L (1996), at <http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html>.

35 McMahon, *op cit*, fn 34.

36 Andreason, *op cit*, fn 10, 352.

37 See eg John O Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 47 (1982).

38 Larry A DiMatteo, 'An international contract law formula: the informality of international business transactions plus the internationalisation of contract law equals unexpected contractual liability', 23 *Syracuse J Int'l L & Com* 67 (1997), 78 (quoting Kuzuaki Sono, *The Vienna Sales Convention: History and Perspective*, in *International Sale of Goods: Dubrovnik Lectures*, 7 (Peter Sarcevic & Paul Volken (eds), 1986)).

39 *Ibid.*

40 Andreason, *op cit*, fn 10, 355.

41 *Ibid.*

42 *Ibid.*, 357.

43 See Arthur Rosett, 'Critical reflections on the United Nations Convention on Contracts for the International Sale of Goods', 45 *Ohio St LJ* 265 (1984), 267.

During this first stage, virtually all the participants came from the industrialised, capitalist countries of western Europe.⁴⁴ The draft which they produced was specific to the civil law tradition, to the neglect of the common law tradition and other world legal traditions.⁴⁵ Consequently, the first draft failed to gain worldwide approval.⁴⁶

The second stage of the project began in 1951 when the Government of the Netherlands convened a conference at The Hague which produced two drafts.⁴⁷ Encouraged by the favourable reactions which the drafts received, a Diplomatic Conference was convened at The Hague in 1964.⁴⁸ It led to the adoption of two Conventions: the Uniform Law of International Sale (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).⁴⁹ However, member states of the United Nations disapproved both the ULIS and the ULF, describing these sets of laws as too dogmatic, complex, and predominantly of the European civil law tradition.⁵⁰

The third and final stage of the project began in 1966, when the United Nations Commission on International Trade Law (UNCITRAL) set out to create a draft that would include the perspectives of a wider array of countries.⁵¹ This UNCITRAL body was widely represented, including nine countries from Africa, seven from Asia, six from Latin America, five from Eastern Europe, and nine from Western Europe.⁵² In all, representatives from 62 states and eight international organisations convened in Vienna in 1980.⁵³ The outcome of the Vienna Conference was the enactment of the CISG which today is the system of laws regulating international sales contracts in over 60 countries.⁵⁴ Indeed, the final draft of the Convention reflected a wide diversity in legal traditions.⁵⁵ However, this wider representation also required compromise among the various states in order to achieve consensus.⁵⁶ Therefore, it is important for courts to realise when interpreting the CISG that it is the product of diverse legal systems and laws, as well as the product of negotiations

44 Jeffrey S Sutton, 'Measuring damages under the United Nations Convention on the International Sale of Goods', 50 *Ohio St LJ* 737 (1989), 738.

45 Philip Hackney, 'Is the United Nations Convention on the International Sale of Goods achieving uniformity?', 61 *La L Rev* 473 (2001), 473.

46 *Ibid.*

47 Nives Povrzenic, *Interpretation and Gap-filling under the United Nations Convention on Contracts for the International Sale of Goods* (1997, Pace).

48 *Ibid.*

49 Of nine states which ratified ULIS and ULF only two were non-European: Gambia and Israel, others belonged to EEC: Belgium, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, San Marino and the United Kingdom.

50 At the 1964 Hague Conference, Latin America was represented only by Colombia, Asia by Japan and Africa by Egypt.

51 Povrzenic, *op cit*, fn 47.

52 John O Honnold, 'The United Nations Commission on international trade law: mission and methods', 27 *Am J Comp L* 201 (1979), 207.

53 Povrzenic, *op cit*, fn 47.

54 Dr Bruno Zeller, *The Development of Uniform Laws – A Historical Perspective*, 14 *Pace Int'l L Rev* 163 (2002), 163.

55 Sutton, *op cit*, fn 44, 739.

56 *Ibid.*

where specificity was sometimes compromised in order for an agreement to be reached.⁵⁷ The draftsmen were aware that different countries would inevitably come to put different interpretations on the same enacted words.⁵⁸ This is why they inserted provisions into the Convention to help minimise the danger of divergent interpretations,⁵⁹ a subject to be explored in the following section.

The method of interpretation prescribed by the Convention

Among the primary objectives for the CISG draftsmen was to achieve uniformity in the application of international sales law. This purpose is evidenced by the Convention's preamble which states, 'Being of the opinion that the adoption of uniform rules which ... take into account the different social, economic and legal systems (will) contribute to the removal of legal barriers in international trade and promote the development of international trade'.⁶⁰ To achieve their goal of uniformity in the application in international sales law, the draftsmen inserted a key provision to guide the practitioner in his interpretation of the CISG: Article 7 of the Convention.

Reference to specific provisions of the CISG: Article 7(1)

Article 7(1) governs the rules of interpretation of the text of the Convention. This article provides that when interpreting the CISG, '...regard is to be had to its international character and to the need to promote uniformity in its application ...'.⁶¹ According to legal scholars, this means that when interpreting the CISG, one should always consider the fact that it is the product of international unification efforts, and that it was not created with any particular legal system in mind.⁶² When interpreting the Convention, courts must consider such factors as the difference between the common law and the civil law, the East and the West, the third-world countries and the industrialised countries, and the socialist countries and the free-market countries.⁶³ The tendency to resort to domestic sales law to interpret the CISG should be avoided.

However, the draftsmen apparently realised that while an 'autonomous' interpretation would likely encourage uniformity, it would not necessarily guarantee it. Therefore, they provided that, in addition to having 'regard to the Convention's international character', one should also have regard 'to the need to promote uniformity in its application'.⁶⁴ In their analysis of Article 7(1), some legal

⁵⁷ *Ibid.*

⁵⁸ RJC Munday, Comment: The Uniform Interpretation of International Conventions, 27 *Int'l & Comp LQ* 450 (1978).

⁵⁹ It has often been stated that it is only possible to reduce the danger of diverging interpretations; it is not possible to eliminate them altogether; see, eg, Joseph M Lookofsky, *Consequential Damages in Comparative Context* 294 (1989).

⁶⁰ CISG, *op cit*, fn 1, preamble.

⁶¹ CISG, art 7(1).

⁶² Werner Melis, art 7, in *Kommentar zum UN-Kaufrecht* 87 (Heinrich Honsell (ed), Zurich 1997); Roland Loewe, *Internationales Kaufrecht* 32 (Vienna, 1989).

⁶³ See Sara G Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 *NC J Int'l L & Com Reg* 109 (1988).

⁶⁴ Hackney, *op cit*, fn 45, 477.

writers have deduced that anyone interpreting the CISG has the obligation to adopt solutions which are tenable on an international level, that is, solutions which can also be taken into consideration in other contracting states.⁶⁵ Other legal scholars have deduced that Article 7(1) requires that in applying the CISG, courts must consider relevant decisions in other states.⁶⁶ Despite the differing views among interpreters of the CISG, there does seem to be a consensus that the common law approach of judicial interpretation through case law should be used, together with the civil law 'positivist' approach of looking to the text of the Convention to find solutions.⁶⁷

Although Article 7(1) provides clear guidance on the criteria to be considered when reading the Convention in order to promote uniformity of interpretation, it nonetheless leaves unanswered the precise method by which uniformity of interpretation is to be achieved.⁶⁸ Based on a comprehensive reading of sub-sections (1) and (2) of Article 7, legal scholars have inferred that in cases which involve the CISG, a judge should first refer to the CISG text itself to see whether there is a particular provision that applies directly to the legal question at issue.⁶⁹ For example, if a case involves a question of whether a party may avoid its contractual obligations without giving prior notice to another contracting party, the first step a judge must take is to refer to the CISG itself. Article 26 of the CISG is directly applicable, providing that 'a declaration of avoidance is effective only if made by notice to the other party'.⁷⁰ Thus, the judge makes his finding of law based on Article 26 of the CISG.

While the CISG is intended to govern fully the rights and obligations of parties involving international sales contracts, situations often arise where an issue cannot be resolved by direct reference to the text of the Convention.⁷¹ In this case, the judge must resort to other means of finding an answer to the problem presented. When the CISG does not directly address a problem at issue involving the parties' contractual terms and performance, then one should decide the case in conformity with general principles derived from the Convention, a subject to be explored in below.

65 Ulrich Magnus, *Wiener UN-Kaufrecht (CISG)* 153 (Berlin 1999), 155.

66 *Ibid.*

67 Franco Ferrari, *Interpretation uniforme de la Convention de 1980 sur la vente internationale*, *Revue internationale de droit compare* 813 (1996), 831–32.

68 Sunil R. Harjani, 'The Convention on Contracts for the International Sale of Goods in United States courts', *23 Hous J Int'l L* 49 (2000), 62.

69 Monica Kilian, 'CISG and the problem with common law jurisdictions', *10 J Transnat'l L & Pol'y* 217 (2001), 226.

70 Harjani, *op cit*, fn 68, 62

71 CISG, *op cit*, fn 1, art 26

72 See Convention arts 1 and 7(2). Specific questions within the realm of formation of the contract and the obligations of the parties to a sale are prescribed by the Convention.???AQ: where is this in the text, relates to fn 71. fn renumbering 64 – 72 correct???

Handelsgericht Zurich (Commercial Court of the Canton of Zurich)
(Parties Unknown)

A Swiss buyer and an Italian seller entered into a contract for the sale of furniture that was to be manufactured by the seller. The buyer paid only part of the purchase price, and then some time later alleged that the furniture was defective. The buyer also refused to accept the seller's offer to remedy any defects in the furniture delivered. The Italian seller sued the Swiss buyer for payment of the purchase price.

The court correctly determined that the CISG was the applicable law. It found that, based on Article 1(1)(a), the contract was governed by the CISG because the parties had their places of business in different contracting states. As further grounds for the CISG's applicability, the court noted that this dispute involved a contract for the supply of goods to be manufactured or produced pursuant to Article 3(1). Citing Articles 7(2), 38, and 39, the court stated that it is implicit in the Convention that the buyer must prove the existence of defects and that it must notify the seller of any such defects within a reasonable time. The court then held that the buyer had lost its right to base its argument on a defect in the goods because it neither provided evidence of any defects nor gave notice of any defects within a reasonable time. The court ordered the buyer to pay the purchase price plus interest at the statutory interest rate of the applicable Italian law pursuant to Article 78.⁷³

This case provides a good illustration of how a national court in the first instance correctly looked to the CISG as the governing law. It resisted the temptation to resort to its familiar domestic sales law and instead based its findings by reference to particular CISG provisions. It observed the directive of Article 7(1) in applying the plain language of the Convention, and thereby furthered the goal of uniformity and consistency in the interpretation of contracts under the CISG.

Reference to general principles of the CISG: Article 7(2)

While the draftsmen provided rules in Article 7(1) to govern the interpretation of the text of the CISG, they also provided rules to govern in situations where a legal issue does not fall squarely within any of the articles of the Convention. Article 7(2) provides that issues not expressly settled by the CISG '... 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 rules of private international law'.⁷⁴ Therefore, when the CISG does not answer a question directly, then one should first apply general principles derived from the Convention to fill the gap.⁷⁵ When searching the CISG text for general principles, one must do so while observing the requirements of 'international character', 'uniformity of application', and 'observance of good faith in international trade'.⁷⁶ Certain general principles may be

73 Handellsggericht Zurich, Switzerland, No HG930138.U/HG93, 9 September 1993, CLOUT No 97.

74 CISG, *op cit*, fn 1, Article 7(2).

75 Hackney, *op cit*, fn 45, 478.

76 *Ibid*.

derived from the CISG to help the interpreter to fill gaps, such as: keeping the deal together; enforcing the parties' intentions; ensuring that each party receives the fruits of the exchange; and awarding damages to compensate aggrieved parties and not to punish breaching parties.⁷⁷ Other general principles which can be gleaned from the CISG include: the freedom of contract; the duty to act reasonably; and the duty to perform in good faith.⁷⁸

***Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft
(Arbitral Tribunal, Vienna) (Parties Unknown)***

A German buyer and an Austrian seller entered into a series of contracts for the sale of rolled metal sheets. The initial contracts provided that the goods were to be delivered 'FOB Hamburg'. When the buyer later encountered financial difficulties, the seller allowed the buyer to take delivery in instalments. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause contained in the sales contract, the seller commenced arbitral proceedings, demanding payment of the price. In addition, the seller demanded damages, including those arising from his substitute sale of certain goods which the buyer had earlier refused to accept.

The arbitrator noted that the parties had chosen Austrian law, a state which was a contracting party to the Convention. This meant that their contracts were governed by the CISG as the international sales law of Austria pursuant to Article 1(1)(b) of the Convention. The arbitrator held that, according to Articles 53 and 61, the seller was entitled to payment for the goods which he delivered to the buyer. He further held that, according to Article 77, the seller was entitled to damages for the cover sale that he made for the rejected goods. In calculating these damages, the arbitrator held that the seller was also entitled to interest as provided under Article 78, but noted that the CISG did not define a precise method for calculating the interest rate. Since the calculation of interest was a matter that was governed but not expressly settled by the CISG, the arbitrator ruled that it was to be settled in conformity with the general principles on which the CISG is based as provided in Article 7(2). Referring to Articles 74 and 78, the arbitrator found that full compensation is one of the general principles underlying the CISG. In relations between merchants, it is common for the seller to resort to bank credit at the interest rate prevailing in his own country when the buyer is late on payment. Consequently, the interest rate awarded was the average prime rate in the seller's own country, being Austria.⁷⁹

This case provides a good example of how a national tribunal correctly looked to the general principles underlying the Convention to resolve an issue not expressly governed by any particular CISG provision. It resisted the temptation immediately to consult alternative sources, and instead confined its search to the four corners of

⁷⁷ Robert A Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, Cornell Review of the Convention on Contracts for the International Sale of Goods 21 (1995), 26–27.

⁷⁸ Hackney, *op cit*, fn 45, 478.

⁷⁹ Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Austria), SCH-4318, 15 June 1994, CLOUT No 94.

the Convention itself to glean general principles that applied to the issue. It observed the directive of Article 7(2) by consulting the Convention's general principles when its text supplied no answers, thereby promoting the goal of uniformity and consistency in the interpretation of contracts under the CISG.

The use of alternative sources to interpret the CISG

Reference to Private International Law: Article 7(2)

It is reasonable to assume that the Convention draftsmen anticipated situations where the CISG would not clearly indicate the responsibilities that parties had to each other, and where even its general principles would be inadequate to resolve the matter.⁸⁰ Without providing an alternative source of reference when general principles are lacking, practitioners would find themselves without any basis on which to perform under a contract, or to make a claim for its breach.⁸¹ In those rare situations where the interpreter is unable to derive general principles from the CISG in order to fill gaps, the Convention allows a further recourse by reference to private international law. Article 7(2) requires that the judge resolve any gaps by using general principles first, but if there is an 'absence of such principles, (then) in conformity with the law applicable by virtue of the rules of private international law'.⁸²

Reference to UNIDROIT Principles

One form of private international law that may be used to interpret the CISG is the general principles of private international law set forth in the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles were formulated by a Working Group made up of judges, academics and civil servants.⁸³ The purpose of the UNIDROIT Principles is to provide general rules for international commercial contracts.⁸⁴ The Principles were intended to codify communal principles of existing legal systems and to recommend those solutions that are best suited to the special requirements of international commercial contracts.⁸⁵ The UNIDROIT Principles resemble the CISG provisions and may occasionally provide a more detailed guide to the court.⁸⁶

80 Andreason, *op cit*, fn 10, 377.

81 Paul Amato, Recent Developments: CISG, UN Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts, 13 *JL & Com* 1 (1993), at 22 (quoting International Contract Manual: Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods at Detailed Analysis 139 (Albert H Kritzer (ed), 1992) (stating that 'the contract drafter should designate a "receptive domestic sales law" as the gap-filling law')).

82 CISG, *op cit*, fn 1, art 7(2).

83 The UNIDROIT Principles of International Commercial Contracts, reprinted in Burton & Eisenberg, *Contract Law: Selected Source Materials* (1999).

84 The UNIDROIT Principles of International Commercial Contracts, reprinted in Burton & Eisenberg, *Contract Law: Selected Source Materials* (1999).

85 *Ibid.*

86 See Alejandro M Garro, 'The gap-filling role of the UNIDROIT principles in international sales law: some comments on the interplay between the principles and the CISG', 69 *Tul L Rev* 1149 (1995), 1152.

The UNIDROIT Principles provide several advantages as compared to other alternative sources used to interpret the CISG. First, the Principles were created by a group of legal scholars representing various countries.⁸⁷ Secondly, because the Principles were not drafted as an international treaty, the draftsmen avoided the need for compromise and generality that characterise international conventions such as the CISG.⁸⁸ Thirdly, the Principles share many of the same general principles that are also be found in the CISG, such as the principle of good faith, the recognition of party autonomy, and the freedom of form, among others.⁸⁹ Due to the complementary nature of the Principles, they are especially useful to help explain the meaning behind the CISG text while maintaining the international character of the interpretation.⁹⁰ One legal scholar argues that seeking reference to the UNIDROIT Principles is an effective way to interpret the CISG in order to resolve gaps.⁹¹ Moreover, he insists that using the UNIDROIT Principles to supplement the CISG is the best way of achieving consistency, uniformity and fairness in the application of the Convention.⁹²

Filanto SpA v Chilewich Int'l Corp

A Russian enterprise and a US enterprise entered into a master agreement for the sale of footwear. The master agreement contained a clause which required disputes to be arbitrated in Moscow. To fulfil the terms of the agreement, the US buyer entered into multiple contracts with an Italian supplier of footwear. Under one of the contracts, the Italian seller delivered shoes but the US buyer made only partial payment. The Italian seller sued the US buyer in a US Federal District Court to recover the price. Arguing that their contract incorporated the master agreement containing the arbitration clause, the US buyer sought a stay of proceedings to permit arbitration in Moscow. In order to grant the stay for arbitration, the court had to determine whether a written agreement to arbitrate existed between the parties.

Initially, the judge determined that the CISG was the applicable law pursuant to Article 1(1)(a), since both parties had their place of business in different states which were signatories to the Convention. The court concluded that an agreement to arbitrate existed based on the Italian seller's failure to object to the arbitration clause in a timely fashion. The court held that because of their extensive course of prior dealings, the Italian seller was obligated to alert the US buyer to its objections in a timely manner. In reaching its determination, the court relied primarily on CISG Article 18(1), which allowed it to consider conduct as an acceptance, and Article 8(3), which allowed it to consider the course of prior dealings. Thus, the court

87 *Ibid*, 1160.

88 *Ibid*.

89 *Ibid*, 1164–65.

90 Harjani, *op cit*, fn 68, 69.

91 See Garro, *op cit*, fn 86, 1152 (discussing the fact that a practical use of the UNIDROIT principles is to interpret or supplement uniform law instruments such as the CISG).

92 *Ibid*, 1153 (proposing that enhancement of an international instrument like the CISG with the UNIDROIT principles has the advantage of improving consistency and fairness in the adjudication of international commercial disputes).

allowed prior dealings accompanied by silence to the transaction to indicate an acceptance. To support this rule of law, the court relied on the Restatement (Second) of Foreign Relations, as well as two US federal court cases. It noted that the Southern District of New York has held that the CISG allows silence to indicate an acceptance if this is the parties' prior course of dealings. However, this finding is contrary to Article 18(1), which explicitly excludes silence as a form of acceptance.⁹³

However, if the court had consulted the UNIDROIT Principles, it would have found that Article 2.6(1) requires conduct of the offeree to indicate acceptance.⁹⁴ Furthermore, Article 2.6(3) provides that as a result of the parties' course of conduct, the offeree may indicate acceptance by performing an act without notice to the offeror.⁹⁵ Therefore, according to the UNIDROIT Principles, mere silence is inadequate as a form of acceptance. Instead, a specific act is necessary to indicate assent.⁹⁶

Reference to domestic sales law

Domestic law is arguably another form of private international law that may be used to render a more accurate interpretation of the Convention. Throughout history, domestic sales laws have often been used in private international agreements.⁹⁷ However, one of the greatest concerns for the Convention's draftsmen was that 'national courts (would) place a "domestic gloss" on CISG cases', thereby preventing uniform application of the CISG.⁹⁸ Judges are apt to view issues through the legal lenses that they have created within their own legal systems.⁹⁹ This tendency can result in a mechanical application of domestic laws in preference to the CISG, which was a major concern for the Convention's draftsmen.¹⁰⁰ However, such a tendency is understandable when one considers that the CISG is entirely new to most court systems around the world.¹⁰¹ This means that those less familiar with the CISG may find themselves performing more work in their efforts to render an autonomous interpretation of the Convention.¹⁰² Not only must they scrutinise those provisions relevant to the contract at issue, but they also must carefully examine the entire Convention to find analogous provisions or overarching principles.¹⁰³ In the process, they must comprehend and utilise different systems of legal thinking under the Convention.¹⁰⁴

93 *Filanto SpA v Chilewich Int'l Corp*, 789 F Supp 1229 (SDNY 1992).

94 *Burton & Eisenberg, op cit*, fn 83, 336.

95 *Ibid.*

96 See *ibid.* (relying on UNIDROIT art 2.6(1), 2.6(3)).

97 *Andreason, op cit*, fn 10, 377.

98 DiMatteo, *op cit*, fn 38, 96 (quoting Amato, *op cit*, fn 81, 26). Timothy N. Tuggey, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods: will a homeward trend emerge?', 21 *Tex Int'l LJ* 540 (1986), 542.

99 *Andreason, op cit*, fn 10, 374.

100 *Ibid.*

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

Nevertheless, there are some situations that may warrant recourse to domestic law. According to one prominent legal scholar, the interpreter should begin with any applicable CISG provisions, after which he should take 'a measured response to the Convention's invitation to consider its "general principles", before turning to domestic law'.¹⁰⁵ Moreover, he asserts that there are some situations in which 'the tribunal must seek (via the rules of private international law) some rule of domestic law dealing with' the legal question at issue.¹⁰⁶ Therefore, there are some instances where domestic law can serve a vital function in interpreting the Convention. This means that when there are no relevant general principles to be found in the Convention, the court may look to the country's conflict-of-laws rules and apply the proper domestic legislation.¹⁰⁷

Thus, it is evident that domestic law may serve a role in interpreting the CISG in certain instances. When a gap appears, Article 7(2) requires that it be resolved 'in conformity with' the Convention's underlying principles.¹⁰⁸ This means that if a domestic law satisfies the uniformity requirement of Article 7(1), and also conforms to the general principles underlying the CISG, then that law may be applied to resolve issues left unsettled by the Convention.¹⁰⁹ Therefore, any interpretation should begin with an analysis of the CISG text itself. If its provisions do not directly apply to the issue in dispute, then the Convention's general principles should govern any other applications.¹¹⁰ However, in those rare instances where these two sources prove inadequate, practical necessity and the text of the CISG itself permit the interpreter to resort to domestic sales law.¹¹¹

ICC International Court of Arbitration (Paris) (Parties Unknown)

A US buyer and a Dutch seller entered into a contract for the sale of four cargoes of *Coke Breeze*. The parties agreed that the contract was to be governed by the 'laws of Switzerland', and that any dispute arising out of their contract would be resolved by arbitration. When the buyer took delivery of the cola he claimed that it did not conform to the terms of their agreement and sued the seller for damages, including lost sales, costs, and interest.

The tribunal initially found that the parties had expressly made their contract subject to the 'laws of Switzerland'. According to the tribunal, the CISG was incorporated into Swiss law in accordance with that country's ratification of the Convention. Therefore, the contract was found to be governed by the CISG pursuant to Article 1(1)(b). The tribunal then examined the seller's obligations under Article 35, as well as the buyer's remedies under Articles 45 and 74. It concluded that the buyer had proved that the seller had delivered to it a product which could not be considered to be *Coke Breeze*. The court therefore ordered the seller to indemnify the buyer to cover all losses sustained by the buyer, including loss of profit.

¹⁰⁵ Honnold, *op cit*, fn 37, 133.

¹⁰⁶ *Ibid*, 129.

¹⁰⁷ Hackney, *op cit*, fn 45, 478.

¹⁰⁸ CISG, *op cit*, fn 1, art 7(2).

¹⁰⁹ *Ibid*.

¹¹⁰ Andreason, *op cit*, fn 10, 378.

¹¹¹ *Ibid*.

As to the question of interest rate and the method of calculating interest, the tribunal noted that the Convention is silent, since neither Article 74 nor Article 78 expressly settled the issue. The tribunal then considered the general principles underlying the Convention as required under Article 7(2). After finding that the CISG contained no general principles that directly resolved the issue, the tribunal considered the rules of private international law as required under the same article. Observing that the parties had made their contract subject to the laws of Switzerland, the tribunal concluded that the interest rate had to be determined under Swiss law. The tribunal explained its holding by stating that 'as general principles do not settle the matter (...) and the parties have referred to the laws of Switzerland, it seems justified to refer to Article 73 of the Swiss Code of obligations whereby, in the absence of a determination of the rate of interest by agreement or law or usages, that rate shall be 5% per annum'.¹¹²

This case demonstrates that domestic law certainly does have a place in interpreting the CISG. Indeed, the CISG text itself should always be the first point of analysis. Its general principles should take priority over any alternative sources, and resort to domestic laws cannot diminish the actual provisions of the CISG or disregard its principles. However, when neither the CISG text itself nor any of its general principles are adequate to resolve a matter at issue, the court may seek recourse to domestic law.

Reference to other sources when private international law is inapplicable

Reference to foreign case law interpreting the CISG

Case law from foreign jurisdictions is another source of law that may be used to interpret the CISG when private international law sources are inapplicable.¹¹³ Although it may be argued that the method of consulting foreign case law utilises more of a common law approach than a civil law approach,¹¹⁴ the goal of promoting uniformity of interpretation may lead a court to consult foreign decisions in some instances. Article 7 directs the interpreter to have 'regard' to uniformity when interpreting the CISG. There is some debate among legal scholars as to whether this term requires courts to treat such law as binding or simply persuasive.¹¹⁵ The argument for making it binding is that it would help courts to promote the 'uniformity of interpretation' sought by the Convention.¹¹⁶ However, the term

112 ICC International Court of Arbitration, No 7565 (1994), Bull ICC, Vol 6/No 2, November 1995, p 64-67.

113 Franco Ferrari, 'CISG case law: a new challenge for interpreters?', 17 *JL & Com* 245 (1998), 247.

114 See Honnold, *op cit*, fn 37, 143.

115 Hackney, *op cit*, fn 45, 479.

116 *Ibid*.

'regard' does not seem to require that judges consider such foreign decisions as binding.¹¹⁷ Instead, a more accurate interpretation of this term would probably be that it is simply urging courts to use such precedent as a persuasive source of law.¹¹⁸ This would mean that a court should consider foreign decisions for their persuasive value in their own efforts to render uniform decisions.¹¹⁹

Medical Marketing International Inc v Internazionale Medico Scientifica Srl

A US buyer and an Italian seller entered into an agreement granting the US buyer the exclusive right to market certain radiology devices in the United States. After the buyer had purchased some units, the US Food and Drug Administration determined that the devices failed to comply with federal safety standards. The buyer declared that the seller was in breach of their agreement due to the defective units and cancelled the contract. The parties disagreed as to which was responsible for complying with the federal regulations. When they were unable to work out their differences, the buyer submitted their dispute to an arbitration panel pursuant to their contract.

The tribunal initially determined that the CISG was the applicable law. However, the tribunal found that the CISG did not explicitly address the issue of responsibility for meeting the federal regulations. At the request of the seller's counsel, the arbitrators referred to a German Federal Supreme Court interpretation of Article 35. In this German case, a German buyer purchased mussels from a Swiss seller. More than a month after delivery of the mussels the buyer notified the seller that the mussels were of poor quality. When the buyer refused to pay for the mussels, the seller brought an action to recover the payment he should have received. The German court found that, under Article 39(1), the buyer had failed to notify the seller of the defective mussels within a reasonable time. The court also found that, under Article 35, the seller is normally not responsible for meeting the regulations in a buyer's country. Upon a closer examination of Article 35, however, the tribunal found that this case also fitted into an exception contained in subsection (3) of that same article, where the seller may be liable in instances where he knew or should have known of the non-conformity.

The tribunal concluded that the seller was aware of the federal regulations from its prior sales of the devices in the United States. The arbitrators noted that the seller had made prior statements to the buyer that its equipment complied with all federal safety regulations, leading the buyer reasonably to rely on these statements. The arbitrators held, therefore, that the seller was responsible for meeting the federal safety regulations. On appeal to US District Court, the seller argued that the tribunal improperly applied the CISG by not following the German court's holding. The district court held that the tribunal properly followed the German holding, but that this case met the exception contained in Article 35(3).

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

This case is significant because it represents one of the few cases internationally that actually cites case law from another country. The fact that the tribunal consulted a foreign tribunal's decision in its efforts to interpret a CISG article appears justified. Following this method of analysis comports with Article 7's directive to have regard for the Convention's international character and its need to be applied in a consistent manner.

Reference to domestic case law interpreting the CISG

Reference to cases within the same jurisdiction that have interpreted the CISG could also serve as an effective method in achieving uniformity in the application of the Convention.¹²⁰ For example, a court could examine the reasoning of another court within the same jurisdiction and comment on its persuasive value when rendering its own decision.¹²¹ In this way, the use of domestic case law interpreting the CISG could serve as a check within that jurisdiction, ensuring a uniform and accurate application of the CISG among its various courts.¹²² It may be argued that such a method would allow bad decisions to be followed by other courts that are unwilling to perform the research required to find analogous CISG decisions.¹²³ However, this problem would probably occur only in a minority of cases.¹²⁴ Instead, it is more likely that opposing counsel would refer to the flawed reasoning of bad decisions that weakened their positions, and judges would comment on the flawed reasoning used by these bad decisions when issuing their opinions.¹²⁵ This source of interpretation is perhaps most useful to courts within the common law system.¹²⁶

Mitchell Aircraft Spares Inc v European Aircraft Service AB

A US buyer and a Swedish seller entered into a contract for the sale of certain aircraft parts. After the parts were delivered, there arose a dispute between the parties as to whether the seller had falsely represented the goods which were delivered. The parties disagreed as to the substance of earlier communications between them. The buyer brought suit to recover damages for breach of the alleged misrepresentation, claiming that the goods did not conform to contract specifications.

Initially, the judge determined that the CISG was the applicable law pursuant to Article 1(1)(a), since both parties had their place of business in different states which were signatories to the Convention. The court found that the contract was ambiguous as to the specific type of aircraft parts that were to be delivered. The court then addressed the issue as to whether the parol evidence rule was applicable to cases governed by the CISG. If the parol evidence rule were found to apply, it

120 *Medical Marketing International Inc v Internazionale Medico Scientifica SRL*, No 99-0380, 1999 US Dist LEXIS 7380 (ED La, 17 May 1999).

121 Hillman, *op cit*, fn 77, 22.

122 *Ibid.*

123 Richard B Cappalli, 'At the point of decision: the common law's advantage over the civil law', 12 *Temp Int'l & Comp LJ* 87 (1998), 92.

124 Harjani, *op cit*, fn 68, 69.

125 *Ibid.*

126 *Ibid.*

would effectively bar the evidence of any prior oral communications between the parties that contradicted the terms of their contract. After finding that there 'was virtually no case law under the Convention', the court referred to US case law. Citing the decision in *MCC Marble*, the court stated that Article 8(1) requires the court to consider evidence of the subjective intent of the parties, and that to determine this subjective intent, Article 8(3) requires the court to examine all the relevant circumstances surrounding the case.

Consequently, the court found that the CISG requires that it examine the contract, together with any evidence concerning negotiations, agreements, or statements made prior to the issuance of the purchase order. Thus, the court denied summary judgment to both parties because it found, based on the parol evidence of prior communications, that there was an issue of material fact as to whether the seller had agreed to supply the buyer with certain aircraft parts.¹²⁷

The *Mitchell* case is significant because the court based its decision on another US case applying the CISG. While referring to domestic case law interpreting the UCC is generally not advisable, this method of interpreting the CISG can provide some uniformity in the application of its provisions. Therefore, federal courts should follow the example of *Mitchell* and look outside their circuits to achieve a uniform application of the Convention within the United States.

Reference to scholarly writings

General international law recognises treaties and commentary by noted legal scholars as a source of law. Article 38 of the Statute of the International Court of Justice (ICJ) provides that 'the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.¹²⁸

Courts in both common law and civil law nations do give consideration to scholarly writings, albeit in different degrees. Specifically, differences exist between the national courts involving the issue of what constitutes primary and secondary sources of legal authority.¹²⁹ For example, while a US judge would likely refer to prior CISG case law in his efforts to render a uniform interpretation of the Convention, a French judge would likely refer to scholarly commentary in place of the judicial decisions themselves.¹³⁰ This is because civil law courts generally regard scholarly commentary as a highly valued source of law, while common law courts

127 Hillman, *op cit*, fn 77, 22.

128 *Mitchell Aircraft Spares Inc v European Aircraft Service AB*, 23 F Supp 2d 915 (ND Ill, 1998). Statute of the International Court of Justice, 59 Stat TS No 993, art 38 (1945).

129 Honnold, *op cit*, fn 37, 144.

130 Vivian Grosswald Curran, 'Romantic common law, enlightened civil law: legal uniformity and the homogenisation of the European Union', 7 *Colum J Eur L* 63 (2001), 67.

generally regard such commentary as less reliable because it is perceived as tainted by the scholar's interpretive subjectivity.¹³¹ Considering the major differences which exist between legal systems in the sources of law they prefer to consult, achieving a uniform application of the CISG may be compromised by reference to scholarly writings.¹³²

MCC Marble v Ceramica Nuova d'Agostino

A US buyer and an Italian seller made an oral agreement on the terms for the purchase of ceramic tiles. After the parties recorded the terms of their agreement on the seller's standard, preprinted order form, the buyer's president signed the form on behalf of his company. The order form was printed in the Italian language and contained terms stating that the buyer had agreed to the terms printed on the back of the form. Four months later the parties entered into a requirements contract providing that the seller was to supply the buyer with tiles at discounted prices so long as the buyer purchased sufficient quantities of tiles. The buyer brought suit against the seller claiming that it had breached the requirements contract for failing to deliver the tiles ordered. In its defence, the seller pointed to the preprinted terms contained in the order form, which authorised it to suspend deliveries if the buyer failed to make payment. The seller argued that it was under no obligation to fulfil the buyer's orders because the buyer had defaulted on payments for previous contracts. In turn, the buyer argued that it had never intended to be bound by the terms printed on the reverse side of the order form.

The court correctly referred to the CISG as the applicable law, and based its entire findings on the language contained in Article 8(1) and Article 8(3). The court stated that Article 8(1) required it to consider the subjective intent of the parties. In making its determination, the court stated that Article 8(3) required it to consider all relevant circumstances involving the case. Thus, the court was required to consider the affidavits submitted by the buyer indicating that the buyer did not intend to be bound by the terms printed on the reverse side of the order form. The court recognised that its holding was in contrast with the parole evidence rule adopted by US domestic law. The court stated, however, that its rejection of the parole evidence rule was 'in accordance with the great weight of academic commentary on the issue'. The court relied on commentary from nearly a dozen commentators, including John O Honnold, David Moore, Louis F Del Duca, Henry D Gabriel, Herbert Berstein, Joseph Lookofsky, Harry M Fletchner, John E Murray, Jr, Peter Winship, Ronald A Brand, and Albert Kritzer.

To support its assertion that Article 8(3) was a rejection of the parole evidence rule, the court made direct reference in its opinion to the works of John O Honnold and David Moore. Honnold argued that: '[T]he language of Article 8(3) that "due consideration is to be given to all relevant circumstances of the case" seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements ... Article 8(3) relieves tribunals from domestic rules that might bar them from "considering" any evidence between the parties that

¹³¹ *Ibid.*

¹³² Christian Kirchner, 'A "European Code": potential, conceptual, and methodological implications', 31 *U C Davis L Rev* 671 (1998), 676.

is relevant.' Moore argued that the parol evidence rule often permits the admission of evidence discussed in Article 8(3). He also argued that: 'the parol evidence rule, by limiting the incentive for perjury and pleading prior understandings in bad faith, promotes good faith and uniformity in the interpretation of contracts and therefore is in harmony with the principles of the CISG, as expressed in article 7.'¹³³

MCC-Marble is a significant decision, due in large part to the court's reference to scholarly studies on this issue, a typical civil law practice.¹³⁴ The decision is also remarkable because it took into account scholarly authority, rather than domestic sales law, in formulating its decision. The scholarly authorities referenced by the court support the proposition that the CISG eliminates the parol evidence rule.¹³⁵ The *MCC-Marble* decision is now precedent for US case law on the CISG and its method of analysis will encourage other courts to refer to the studies of noted scholars to guide their interpretation of the CISG.

Reference to legislative history of the Convention

The historical background of a treaty can also be considered when seeking to interpret an ambiguous provision. The legislative history surrounding a treaty can provide insight into the draftsman's intent with regard to the proper scope and application of its provisions.¹³⁶ In fact, the use of legislative history is generally regarded as an accepted source of law in many civil law countries.¹³⁷ However, courts should proceed with caution when consulting legislative history as a source of law. This is because the commentary of delegates from various countries is often conflicting. Moreover, statements by one representative should not necessarily be considered as reflecting worldwide consensus.¹³⁸ Furthermore, delegates to a convention may propose legislation which is never ultimately enacted.¹³⁹ The primary benefit of using legislative history is that it provides insight into the meaning of the final text of a document.¹⁴⁰

Delchi Carrier SpA v Rotorex Corp

A US seller and an Italian buyer entered into a contract for the purchase of 10,800 compressors to be delivered in three instalments. The seller delivered the first instalment and the buyer made the required payment. Before the second instalment arrived, however, the buyer discovered that the compressors from the first shipment

133 *MCC Marble Ceramic Ctr Inc v Ceramica Nuova d'Agostino*, 144 F 3d 1384 (11th Cir, 1998).

134 Kilian, *op cit*, fn 69, 233.

135 See *MCC Marble*, *op cit*, fn 134, 1390–91 (citing numerous prominent legal scholars, including John Honnold, Harry M Flechtner, John E Murray, Peter Winship). See also Henry D Gabriel, 'A primer on the United Nations Convention on the International Sale of Goods: from the perspective of the Uniform Commercial Code', 7 *Ind Int'l & Comp L Rev* 279 (1997), 281. ('Subjective intent is given primary consideration [Article 8] allows open-ended reliance on parol evidence.')

136 Harjani, *op cit*, fn 68, 64.

137 In European civil law systems, legislative history is known as *travaux préparatoires*. See Honnold, *op cit*, fn 37, 138.

138 Michael P van Alstine, 'Dynamic treaty interpretation', 146 *U Pa L Rev* 687 (1998), 717–18.

149 *Ibid*, 714–15.

140 Honnold, *op cit*, fn 37, 142.

were defective. The buyer thereupon rejected the shipment and cancelled the contract. The buyer then brought suit in the US District Court to recover damages suffered due to the seller's breach. After awarding summary judgment to the buyer, the seller appealed to the Second Circuit to contest the amount of damages awarded.

On appeal, the Second Circuit affirmed the award of damages, holding that the district court was correct in concluding that the case was governed by the CISG. The Second Circuit stated that since there was virtually no case law under the Convention, it was necessary to look to 'the language of the Convention and to "the general principles" upon which it is based'. One of the general principles underlying the CISG is that of 'full compensation' for any losses caused by a party's breach. After recognising the importance of considering general principles of the Convention, however, the Second Circuit resorted to domestic sales law. The court stated that the CISG did not precisely define the method by which lost profits should be calculated. It further explained that 'in the absence of a specific provision in the CISG for calculating lost profits, the District Court was correct to use the standard formula employed by most American courts and to deduct only variable costs from sales revenue to arrive at a figure for lost profits'.¹⁴¹

A large portion of the award in *Delchi* consisted of damages for lost profits arising from the seller's lost sales of air conditioners. Indeed, Article 74 explicitly allows for recovery of lost profits.¹⁴² However, the CISG does not specifically address whether a party is entitled to recover interest on lost profits, or how that rate of interest should be calculated. To resolve the issue, the court quickly resorted to the domestic tradition of granting discretionary awards of prejudgment interest without looking to the legislative history of the Convention.¹⁴³ During the drafting of the CISG, there was much debate over Article 78, making it one of the most controversial articles.¹⁴⁴ The final language of Article 78 entitling a party to interest on 'any ... sum ... in arrears', reflects a compromise among the States.¹⁴⁵ Thus, due to the general language of this provision, it is not clear that the draftsmen of the CISG intended that interest on lost profits be awarded and calculated at the rate of the debtor's country.¹⁴⁶

141 *Delchi Carrier SpA v Rotorex Corp*, 71 F 3d 1024 (2nd Cir, 1995).

142 CISG, *op cit*, fn 1, art 74.

143 Joanne M Darkey, 'A US court's interpretation of damage provision under the UN Convention on Contracts for the International Sale of Goods: a preliminary step towards an international jurisprudence of CSIG of a missed opportunity?', 15 *JL & Com* 139 (1995), 148-49.

144 Honnold, *op cit*, fn 37, 422.

145 Darkey, *op cit*, fn 144, 148.

146 It is unclear under US law whether interest on consequential damages should be awarded. Honnold remarks that an interpretation of the Restatement (Second) of Contracts provision for allowance of interest in cases 'as justice provides' could support such an award: Honnold, *op cit*, fn 37, at 422 (citing restatement (Second) of Contracts section 354, 12, cmt d).

However, if the court had looked to the legislative history of the Convention, it could have gleaned insight into the framers' intent regarding the proper interest rate to be applied to lost profits. Earlier drafts of the CISG omitted any rules involving interest.¹⁴⁷ However, a 1976 draft included a provision granting the seller the right to recover interest at the rate of the country where the seller maintains his principal place of business.¹⁴⁸ Under Article 78, both the buyer and the seller are entitled to recover interest on any unpaid amounts.¹⁴⁹ Thus, it may be analogised from earlier drafts that the appropriate rate of interest would be the interest rate of the country where the injured party has its place of business, since this is the cost of credit.¹⁵⁰

Conclusion

The CISG has tremendous potential to minimise confusion and litigation involving international sales transactions. In establishing a system of laws to govern international sales contracts, its draftsmen intended that national bias would be displaced by promoting uniformity in international sales transactions. In order to achieve a useful level of uniformity, however, there must develop a consistent application of case law that promotes the Convention in harmony with its text and principles. National courts have made significant progress in achieving uniformity of the CISG. In general, courts have shown a preference for consulting secondary sources to interpret the CISG, particularly domestic case law and scholarly writings. In order correctly to apply the CISG, however, courts must begin to look at primary sources of interpretation, such as general principles underlying the CISG, general principles of private international law, foreign cases interpreting the CISG, and the Convention's legislative history. Careful application of the interpretive methods discussed in this paper will further the international character and uniformity of the CISG while providing decisions in accordance with the rules of the Convention.

147 See Sutton, *op cit*, fn 44, 749 (citing Comments by Governments and International Organisations on the Draft Convention on the International Sale of Goods [1977] VIII YB INT'L L COMM'N 109, UN Doc A/CN 9/125).

148 *Ibid.*

149 CISG, *op cit*, fn 1, art 78.

150 See Sutton, *op cit*, fn 44, 750.

