

# Regional harmonisation of international sales law *via* accession to the CISG and the importance of uniform interpretation of the CISG\*

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## OPSOMMING

### **Streeksharmonisering van Internasionale Koopreg via Toetrede tot die Weense Koopverdrag en die Belangrikheid van Eenvormige Interpretasie van die Verdrag**

Internasionale unifisering of harmonisering van substantiewe reg is in die afgelope paar dekades primêr deur middel van internasionale verdrae teweeggebring. In die veld van internasionale koopkontrakte vir roerende goedere, is die Weense Koopverdrag 'n invloedryke internasionale verdrag wat die internasionale unifisering van die reg in dié veld ten doel het. Unifisering of harmonisering van substantiewe reg by wyse van 'n internasionale verdrag kan egter slegs bewerkstellig word indien die verdrag eenvormig in die verskillende lidlande geïnterpreteer word. Artikel 7(1) van die Weense Koopverdrag is die verdrag se interpretasieklausule en vereis dat, eerstens, die internasionale karakter van die Weense koopverdrag, tweedens, die noodsaaklikheid daarvan om eenvormigheid van die verdrag se toepassing na te streef en derdens, die behoud van goeie trou in internasionale handel, in die interpretasie van die verdrag in ag geneem moet word. Die eerste interpretasievoorskrif het tot inhoud dat daar aan die verdrag se bepalings 'n outonome betekenis geheg moet word – sonder verwysing na regs-konsepte en instellings van nasionale jurisdiksies. Die tweede interpretasievoorskrif bevestig die feit dat eenvormige toepassing van die verdrag slegs by wyse van eenvormige interpretasie van die verdragsbepalings bewerkstellig kan word. In hierdie verband is dit van kardinale belang dat jurisdiksies in die interpretasie van die verdrag se bepalings, interpretasies van ander jurisdiksies in ag neem. Op die wyse ontstaan daar 'n internasionale gesprek ten aansien van die interpretasie van die verdrag wat eenvormige interpretasie bevorder. Daar bestaan verskeie omvattende elektroniese databasisse waarop nasionale Weense Koopverdraguitsprake beskikbaar gestel word en hierdie feit maak dit daagliks makliker vir nasionale howe om relevante uitsprake van ander jurisdiksies in ag te neem. Die derde interpretasievoorskrif in artikel 7(1) vereis dat die verdrag se bepalings op so 'n wyse geïnterpreteer moet word dat die toepassing van die bepalings tot redelike en billike resultate lei. In lig van die feit dat artikel 7(1) van die Weense Koopverdrag nie 'n

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teoretiese interpretasietodologie voorskryf nie, is dit van belang dat daar na die relevante bepalings van die 1969 Verdragsregkonvensie verwys word. Die interpretasietodologie soos toegepas op die Weense Koopverdrag word in hierdie bydrae ontleed. Die gevolgtrekking word gemaak dat eenvormige interpretasie van die Weense Koopverdrag inderdaad moontlik is indien daar aan die vermelde interpretasie voorskrifte gehoor gegee word. Waar dit die geval is, sou die Weense Koopverdrag 'n geskikte instrument wees om internasionale en regionale harmonisering van die reg aangaande internasionale koopkontrakte teweeg te bring. Daar word dus aan die hand gedoen dat alle SAOG-lede lidlande van die Weense Koopverdrag word.

## 1 Introduction

The main criterion for evaluating the success of any instrument purporting to bring about international or regional harmonisation of legal norms within a certain field is the degree to which this instrument enhances certainty in the particular field.

A method of harmonising law employed frequently over the past several decades is the international convention.<sup>1</sup> There are advantages and disadvantages to harmonising or unifying substantive law *via* conventions. The main advantage is the fact that a contracting state is under an international law obligation to give effect to an international convention and it would require all contracting states to adapt their domestic law to comply with this obligation. This clearly promotes international or regional harmonisation of substantive law in a certain field. It is in this context that the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>2</sup> by all SADC states is supported in order to effect regional harmonisation of international sales law.

However, “the adoption of the CISG is only the preliminary step towards the ultimate goal of unification of the law governing the international sale of goods. The area where the battle for international unification will be fought and won, or lost, is the interpretation of the CISG’s provisions”.<sup>3</sup> Article 7(1) is the CISG’s interpretation provision and requires that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity

1 Diamond “Harmonization of Private International Law Relating to Contractual Obligations” *Recueil des Cours. Collected Courses of the Hague Academy of International Law* 1986 IV (1987) 241 243; Rose “The challenges for uniform law in the twenty-first century” 1996 *Revue de Droit Uniformel Uniform Law Review* 9 12.

2 United Nations Convention on Contracts for the International Sale of Goods, 1980-04-11, Vienna, UN Document A/CONF.97/18: 1489 UNTS 3; 1980 *International Legal Materials* 668.

3 Felemegas *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation* (2000) 13, available on the Pace CISG website at <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html> (accessed 2014-06-02).

in its application and the observance of good faith in international trade". In this contribution, article 7(1) of the CISG will be analysed in detail in the context of the fact that uniform interpretation of the Convention's provisions is necessary to bring about effective harmonisation of international sales law.

## 2 Article 7(1) of the CISG

### 2.1 General

Article 7(1) establishes the principle of autonomous interpretation<sup>4</sup> which requires the CISG to be interpreted "free from any preconceptions based on domestic law".<sup>5</sup> Article 7(1) of the Convention does not prescribe a method of interpretation, it merely provides aims<sup>6</sup> or goals and principles<sup>7</sup> of its interpretation.

According to one commentator, article 7(1) emphasises the fact that the CISG remains an autonomous body of law even after its incorporation into the different national legal systems of the contracting states.<sup>8</sup>

It has also been stated that article 7(1)'s principles create two rules of interpretation, namely that the "homeward trend" in interpretation should be eliminated and that foreign CISG precedents should be considered.<sup>9</sup>

### 2.2 International Character of the CISG

Firstly, article 7(1) requires that the international character of the CISG has to be taken into account when interpreting its provisions. This instruction refers to the autonomous interpretation requirement<sup>10</sup> of the CISG, the fact that the Convention "constitutes its own legal cosmos"<sup>11</sup> and is to be interpreted without reference to the concepts and legal institutions of domestic legal systems.<sup>12</sup> It has also been remarked that

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4 Eiselen in Janssen & Meyer (eds) *CISG Methodology* (2009) 61-74; Schwenzler and Hachem in Schwenzler (ed) *Schlechtriem and Schwenzler: Commentary on the UN Convention on the International Sale of Goods (CISG)* (2010) 120-122 (par 5).

5 Eiselen 74.

6 Magnus in Janssen & Meyer (eds) *CISG Methodology* (2009) 52.

7 Eiselen 74.

8 Bonell in Bianca and Bonell *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (1987) 65-73.

9 Eörsi in Galston & Smit (eds) *International Sales. The United Nations Convention on Contracts for the International Sale of Goods* (1984) 2-1-2-5.

10 Schwenzler & Hachem 123 (par 8).

11 Magnus 40.

12 Enderlein and Maskow *International Sales law. United Nations Convention on Contracts for the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods* (1992) 55.

this provision prohibits recourse to methodological theories of interpretation of domestic texts.<sup>13</sup>

Instead of having regard to domestic legal concepts for interpretation, taking the international character of the CISG into account entails that one should rather look to other international documents as interpretational aids.<sup>14</sup> In this regard, reference may be made to other relevant conventions as well as other international instruments such as the UNIDROIT Principles.<sup>15</sup>

Another aspect of the international character of the CISG is the fact that the Convention employs its own set of “neutral” or a-national terminology in order to enhance its autonomous interpretation.<sup>16</sup> This terminology reflects the fact that the CISG governs international transactions. An example of such terminology may be found in the CISG provision governing the transfer of the risk.<sup>17</sup> According to article 67(1), “the risk passes to the buyer when the goods are *handed over* to the first carrier for transmission to the buyer in accordance with the contract of sale”.<sup>18</sup>

Honnold argues that taking the international character of the CISG into account also requires one to have due regard to its legislative history.<sup>19</sup>

### 2.3 Promotion of Uniformity of the CISG’s Application

Secondly, article 7(1) mandates that the promotion of uniformity of the CISG’s application has to be borne in mind during its interpretation.

It is widely acknowledged that uniform application of the CISG is dependent on its uniform interpretation by various fora.<sup>20</sup> In turn, uniform interpretation of the CISG depends upon the extent to which fora take cognisance of foreign “precedents” in this regard.<sup>21</sup> Certain authors

13 Schwenger & Hachem 123 (par 8).

14 Enderlein & Maskow 55.

15 The current edition of the UNIDROIT Principles is the 2010 edition. An electronic copy may be accessed at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (accessed 2014-05-18).

16 Felemegas in Felemegas (ed) *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 1 20-21.

17 Felemegas (2007) 20.

18 Own emphasis.

19 Honnold *Uniform Law for International Sales under the 1980 United Nations Convention. Edited and updated by Harry M Flechtner* (2009) § 88 (hereinafter referred to as Honnold–Flechtner).

20 Bonell 866; Magnus 41; Note “Unification and certainty: The United Nations Convention on Contracts for the International Sale of Goods” 1983/1984 *Harvard Law Review* 1984 1998.

21 Note 1998; see Andersen “Uniform international sales law and the global *jurisconsultorium*” 2004/2005 *Journal of Law and Commerce* 159 for a general discussion in this regard.

are of the opinion that the latter does not and will not happen.<sup>22</sup>

However, article 7(1) of the CISG directs that in its interpretation, “regard is to be had to its international character and to the need to promote uniformity in its application”. Several authors deduce from this provision that fora in contracting states are under a treaty obligation to take foreign CISG jurisprudence into account when interpreting the Convention.<sup>23</sup> Lookofsky states more broadly that contracting states are under the obligation to interpret the CISG with regard to its international character.<sup>24</sup>

It has been stated that, in taking foreign decisions into account, a forum “engages in an international dialogue”<sup>25</sup> on the CISG which will promote uniform interpretation and application of the Convention. In order to take foreign decisions into account, it will require willingness by fora to discard the sanctity of their national legal precedents.<sup>26</sup> There exists no international rule of *stare decisis*, however, foreign CISG decisions should at least be regarded by courts as of persuasive value.<sup>27</sup>

An analysis of reported case law on the CISG shows that very few courts up to date have analysed and taken the decisions of foreign courts into account.<sup>28</sup> Fora in CISG contracting states should be encouraged to take cognisance of relevant foreign decisions, since this would be the only manner in which the aim of uniform application of the CISG can be reached. Online CISG databases are expanding on a daily basis and make an ever-growing number of judgments available to judges at the click of a button. Mention may be made of UNCITRAL’s case law information system, known under the acronym CLOUT (Case Law on UNCITRAL

22 See, for example, Bridge “Unification and certainty: The United Nations Convention on Contracts for the International Sale of Goods” 1983/1984 *Harvard Law Review* 55 77 and Note 1998.

23 Bridge 87 points out that CISG contracting states have committed themselves to uniform application of the Convention. See also Magnus 41.

24 Lookofsky *Understanding the CISG. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (2008) 30.

25 Cook “The UN Convention on Contracts for the International Sale of Goods: A mandate to abandon legal ethnocentricity” 1996/1997 *Journal of Law and Commerce* 257 262.

26 Bridge 78 states that “[t]he skill lies in being able to stand outside one’s national legal culture when applying the CISG”. Cook 263 states in this regard that the CISG requires courts to “abandon legal ethnocentricity”.

27 Felemegas (2007) 16.

28 Two examples of cases that refer to foreign case law extensively are the decisions by the *Tribunale Civile di Monza* (Italy), 1993-01-14: case number 21 (UNILEX) and the *Tribunale di Vigevano* (Italy), 2000-07-12: case number 387 (UNILEX). In this article reference will be made to UNILEX CISG cases. It is, however, not possible to search the UNILEX CISG case law database by UNILEX case number only. The following Uniform Research Locator needs to be utilised: <http://www.unilex.info/case.cfm?pid=1&do=case&id=387&step=Fulltext>. The “387” in the URL refers to the UNILEX case number. The UNILEX cases referred to in this article may be accessed by substituting the “387” in the URL provided with the relevant case number.

Texts). CLOUT functions on the basis of reporting offices in CISG contracting states transmitting decisions to the Commission's Secretariat. The original decisions are then made available at the Secretariat and an abstract of the decision is translated into all the CISG's working languages. The CLOUT information system may be accessed online<sup>29</sup> and the *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* was first published in 2004 – updated versions were subsequently published in 2008 and 2012. The completeness of this information system depends on the input of the national reporters. A possible suggestion for ensuring that all relevant decisions are submitted to the Secretariat is including a Protocol in the CISG akin to Protocol II to the Lugano Convention,<sup>30</sup> imposing a treaty obligation upon contracting states to provide details of CISG judgments to the Commission.<sup>31</sup>

Several other comprehensive CISG case law databases are also available online. The UNILEX database also deserves mentioning.<sup>32</sup> The advantage of UNILEX is the fact that most decisions are available in full text in their original language. The Pace University CISG website<sup>33</sup> provides translations of a large and constantly growing number of CISG decisions through the Queen Mary Case Translation Programme.<sup>34</sup> Lastly, mention may be made of CISG-online,<sup>35</sup> the referencing system used in the Schlechtriem/Schwenzer<sup>36</sup> commentary.

In light of the ready availability of CISG case law, it is possible to cultivate and enhance uniform interpretation and application of the CISG.<sup>37</sup>

29 The internet address is [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html) (accessed 2014-05-14).

30 Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The text of the Lugano Convention and its protocols are available at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm> (accessed 2014-05-15).

31 Bridge 76.

32 Available at <http://www.unilex.info> (accessed 2014-05-15). The editor-in-chief is Prof MJ Bonell. UNILEX is based on a research project started in 1992 by the Centre for Comparative and Foreign Law Studies – a joint venture of the Italian National Research Council, the University of Rome I La Sapienza and the International Institute for the Unification of Private Law (UNIDROIT). The project has been financed by the Italian National Research Council. Printed versions of UNILEX are available from Transnational Publishers.

33 Accessible at <http://www.cisg.law.pace.edu> (accessed 2014-05-14).

34 Accessible at <http://www.cisg.law.pace.edu/cisg/text/queenmary.html> (accessed 2014-04-14).

35 Accessible at <http://www.cisg-online.ch> (accessed 2014-05-15). It is currently edited by Prof Ingeborg Schwenzer of the University of Basel, Switzerland.

36 See 4 *supra*.

37 De Ly *International Business Law and the Lex Mercatoria* (1992) 12 remarks that the CISG is in the process of maturing “into a more reliable and more self-contained system where uniform patterns of interpretation and application prosper”.

Uniform interpretation and application of the CISG would be greatly aided by the creation of a supranational commercial court charged with the task of interpreting the Convention. Unfortunately, there exists no realistic chance of such a court ever coming into being.<sup>38</sup>

Several commentators argue that it is not only case law that has a part to play in uniform interpretation of the CISG. Academic literature, even though not a formal source of law and not mentioned in article 7(1), is also influential.<sup>39</sup> In this regard, special reference needs to be made to the work of the CISG Advisory Council,<sup>40</sup> which has set itself the aim of promoting uniform interpretation of the CISG.

#### **2 4 Observance of Good Faith in the CISG's Interpretation**

Thirdly, article 7(1) requires the observance of good faith in the interpretation process. It is a matter of controversy whether good faith in the context of the CISG refers only to its interpretation<sup>41</sup> or whether it constitutes a general principle underlying the CISG and places a general duty of good faith upon parties.<sup>42</sup> Furthermore, the meaning and use of the principle of good faith differ in common law and civil law jurisdictions.<sup>43</sup> Therefore it is all the more important that good faith should be awarded an "autonomous" meaning in the context of the CISG. It has been stated that the good faith requirement in article 7(1) "is the commandment to interpret the provisions of the CISG in a way that their application leads to reasonable and fair solutions".<sup>44</sup> Several authors regard this requirement as being linked to the "pervasive Convention standard of reasonableness"<sup>45</sup> – in other words, the observation of goods faith in the Convention's interpretation requires a reasonable interpretation.

### **3 The Role of the Vienna Convention on the Law of Treaties in the Interpretation of the CISG**

In light of the fact that article 7(1) of the CISG does not prescribe the theoretical method of interpretation to be utilised, guidance on this

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38 Bridge 75.

39 Bridge 77-78; Felemegas (2007) 18; Honnold–Flechtner § 92; Schwenger and Hachem 125 (par 12).

40 The CISG Advisory Council is a group of CISG scholars, first established in 2001. The Council publishes opinions on certain CISG matters in order to promote proper understanding and uniform interpretation of the CISG. More information may be accessed on the Council's website, <http://www.cisgac.com> (accessed 2014-04-16).

41 This view is supported by Honnold–Flechtner § 94; Schwenger and Hachem 127 (par 16).

42 A view supported by Bonell 84-85; Enderlein and Maskow 54-55; Lookofsky 37.

43 Magnus 43.

44 *Ibid.*

45 See Lookofsky 37 for this phrase.

matter would have to be obtained elsewhere. Bearing in mind that uniform interpretation of the CISG is of utmost importance for its uniform application, regard must be had to a universally accepted framework of interpretational guidelines. These guidelines are to be found in the Vienna Convention on the Law of Treaties.<sup>46</sup>

Several scholars contest the application of the 1969 Vienna Convention's provisions to the CISG. One argument in this regard is that articles 31–33 of the 1969 Convention only apply in respect of the interpretation of articles 89–101 of the CISG, but that the interpretation of the remainder of the Convention is governed by article 7.<sup>47</sup>

However, article 1 of the Treaties Convention provides that it is applicable to treaties between states and that the CISG therefore falls under its scope of application. Contracting states to both the 1969 Convention and the CISG are therefore certainly bound by the provisions of the Treaty Convention when interpreting the CISG. Furthermore, numerous non-contracting states to the 1969 Convention also adhere to its provisions. It has been argued that the Treaties Convention codifies principles of customary international law.<sup>48</sup> Indeed, several decisions handed down by the International Court of Justice regard the principles embodied in articles 31–32 of the Treaties Convention as customary international law.<sup>49</sup> A number of commentators also support reference to the 1969 Treaties Convention to provide guidelines for the interpretation of the CISG.<sup>50</sup>

Articles 31–33 of the 1969 Treaties Convention therefore provides the “outer frame” of the method to be employed in interpreting the CISG.<sup>51</sup>

Article 31 of the Treaties Convention contains the general rule of interpretation. According to article 31(1), “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. This provision contains three elements to be considered in the interpretation of a treaty: its text, context and object and purpose.<sup>52</sup> It may be assumed that the ordinary meaning of words most likely reflects what the parties intended – unless the contrary is proven.<sup>53</sup> The ordinary meanings of terms are to be established in the context of the treaty and in light of its object and purpose. According to Aust, the good faith requirement for interpretation entails that, if the ordinary meaning of the

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46 Vienna Convention on the Law of Treaties, 1969-05-23, Vienna, 1155 UNTS 331, 1969 *International Legal Materials* 679.

47 Volken in Volken & Šarčević (eds) *International Sale of Goods: Dubrovnik Lectures* (1986) 19 34-35.

48 Aust *Modern Treaty Law and Practice* (2007) 12-13; Magnus 47.

49 See Aust 232 n 10 for references to ICJ cases regarding articles 31–32 of the Treaties Convention as an embodiment of customary international law.

50 Eiselen 62; Lookofsky 32; Magnus 47.

51 Magnus 52.

52 Aust 234.

53 *Idem* 235



words seems clear, but its application would lead to a result that would be “manifestly absurd or unreasonable”, another interpretation needs to be found.<sup>54</sup> Article 31(1) refers to two methods of interpretation: the literal or textual method and the purposive or teleological method.

Article 31(2) provides more information on the context of the treaty to be taken into account during the interpretation process. The important principle in this regard is the fact that one must look at the treaty as a whole, including its preamble and annexes.<sup>55</sup>

Article 31(4) allows for a special meaning to be attached to a term if it is proved that the parties intended a certain term to bear a special meaning instead of its literal meaning.

Article 32 authorises the use of supplementary means of interpretation in cases where following the rules in article 31 leaves the meaning ambiguous or obscure or if it leads to a result which is manifestly absurd or unreasonable. Such supplementary means of interpretation include, but are not limited to, *travaux préparatoires* and the circumstances of the treaty’s conclusion. The CISG has a well-documented legislative history, which may therefore be consulted as a supplementary means of interpretation.

Article 33(1) provides that the text of a treaty authenticated in two or more languages is equally authoritative in each language, unless the treaty contains a provision to the contrary. The CISG has six official languages, which are all equally authoritative.<sup>56</sup>

#### **4 A “CISG-specific”<sup>57</sup> Interpretation – a Method of Interpretation for the CISG**

The Treaties Convention provides general rules of interpretation that may be used in respect of any convention. It remains necessary to contextualise and individualise these general rules for purposes of the CISG’s interpretation.

It is argued that article 7(1) of the CISG takes precedence over articles 31–33 of the Treaties Convention in matters concerning the CISG’s interpretation.<sup>58</sup> However, it has been noted that article 7(1) of the CISG does not specify a method for interpretation.

It is generally accepted that, in the interpretation of the CISG, the starting point is the wording of the disputed provision or term.<sup>59</sup> At the

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54 *Idem* 234.

55 *Ibid.*

56 The official languages of the CISG are Arabic, Chinese, English, French, Russian and Spanish. See the declaration at the end of the official CISG text.

57 See Magnus 52 for this wording.

58 Magnus 51.

59 *Idem* 53, Lookofsky 31.

outset, the wording should be accorded its “ordinary meaning”<sup>60</sup> – “the meaning generally used and understood in the CISG Community”.<sup>61</sup> If it is possible to establish the “ordinary meaning” of such a term or provision, several commentators regard the task of interpretation as having been completed.<sup>62</sup> It has been argued that, only if literal interpretation provides no answer, should one attempt to establish the purpose of the provision and this should be done with reference to the *travaux préparatoires*.<sup>63</sup>

However, there are authors who criticise the strict literalist approach and argue that compliance with article 7(1) requires that interpreters approach the text of the CISG “with as many interpretational aids as possible to ensure that they take sufficient notice of the international context of the Convention and the underlying purposes”.<sup>64</sup>

When taking the context of the CISG into account, the text of the Convention as a whole needs to be considered. In doing so, the interpreter would, *inter alia*, examine the preamble of the CISG, which contains the Convention’s object and purpose. In this way, the teleological method of interpretation is also applied.<sup>65</sup>

In the context of the CISG, supplementary means of interpretation would primarily include the Convention’s documentary history and relevant case law on the provision to be interpreted. It is submitted that, in light of the obligation placed on the interpreter by article 7(1) to take the CISG’s international character and the need to promote uniformity in its application into account, international CISG jurisprudence is elevated to a primary source of interpretation. Other relevant international conventions<sup>66</sup> and instruments also form part of the CISG’s context and constitute important supplementary means for its interpretation. It has been argued that contextual interpretation of the CISG should even allow reference to the UNIDROIT Principles.<sup>67</sup>

## 5 Exclusion of Article 7(1)

Bonell<sup>68</sup> raises the question whether the provisions of article 7(1) may be

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60 Compare article 31(1) of the Treaties Convention.

61 Magnus 53.

62 *Ibid.*, Schwenzler & Hachem 130 (par 21).

63 Schwenzler & Hachem 130 (par 22).

64 Eiselen 88-89.

65 Also referred to in article 31(1) of the Treaties Convention alongside the literalist approach.

66 Magnus 55 refers to an “interconventional” interpretation that is helpful when interpreting uniform law conventions on private law.

67 Magnus 55.

68 Bonell 93.

derogated from or excluded in terms of article 6.<sup>69</sup> Bonell argues that derogation from or exclusion of article 7(1) should not be allowed. He advances the argument that, allowing parties to agree on rules of interpretation applicable to domestic legislation disregards the CISG's international character and would detract from the Convention's main aim of providing uniform rules for the international sale of goods.<sup>70</sup>

Article 6 permits derogation of any provision except article 12 (if applicable). At first glance it therefore seems as though article 7(1) may indeed be excluded or its effect varied by the parties. However, even if this is done, the preamble to the CISG echoes the goals and aims enunciated in article 7(1). It is submitted that, if the CISG is applicable and parties exclude or vary article 7(1), a forum charged with the interpretation of the contract is still bound to interpret the CISG in line with its purpose of providing uniform rules for the international sale of goods.

## 6 Conclusion

It is submitted that article 7(1) indeed requires the interpreter to venture beyond a narrow literalist approach. An integrated approach to the interpretation of the CISG is supported in which the wording, object and purpose and context of the provision are analysed before a conclusion is reached. This approach to interpretation would enhance uniform application of the CISG.

Magnus remarks "that under an overall perspective a rather far-reaching, self-induced uniformity of application of the CISG of reasonable quality has been achieved".<sup>71</sup>

It is reasonable to conclude that the future uniform interpretation and application of the CISG seems decidedly possible in view of the CISG's well-documented history, constantly growing body of case law and abundance of commentaries and the fact that most jurisdictions regard these aids as admissible in interpreting conventions.<sup>72</sup>

Accession to the CISG by all jurisdictions in a certain region would certainly improve regional harmonisation of international sales law. As has been argued previously, all states in the SADC region should therefore be encouraged to accede to the CISG.<sup>73</sup> However, regional harmonisation of international sales law by accession to the CISG will

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69 Article 6 of the Convention provides that the parties may exclude the application of the CISG or, subject to article 12, derogate from or vary the effect of any of its provisions. See Wethmar-Lemmer "Party autonomy and international sales contracts" 2011 *TSAR* 431 for an analysis of article 6.

70 Bonell 94.

71 Magnus 38.

72 Eiselen 89.

73 Wethmar-Lemmer "The important role of private international law in harmonising international sales law" 2014 *SA Merc LJ* 93 94.

only be achieved if the Convention's provisions are interpreted uniformly in the relevant jurisdictions. It is concluded that, if heed is paid to the interpretation directives in the CISG, harmonised or possibly even uniform interpretation is indeed possible.