

ARTICLES

UNIFORM SALES LAW

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THE USE OF THE CISG IN DOMESTIC LAW*

The article gives an overview of the use of the CISG to aid the development of contract law in the major common law jurisdictions. The aim of the article is to explore whether there is cross fertilisation in regard to the use of the CISG – the idea being that the more the CISG is used in the domestic context to give content to domestic law the more familiar and comfortable courts and counsel get with it and might, therefore, ultimately apply the CISG more regularly in international sales.

Key words: *CISG. Interpretation. Development of domestic contract law jurisprudence.*

Generally, when the relationship between the CISG and domestic law is discussed, the principal focus is on stressing that domestic case law and doctrine may not be used to interpret CISG terms and that an autonomous international interpretation applied by all courts and tribunals is the ultimate aim.¹ Put another way, the fear expressed is that interpretation of the CISG by reference to domestic law concepts will taint the task of the

* This article started out as a contribution to the Uniform Sales Law Conference “The CISG at Its 30th Anniversary” in Belgrade in November 2010. In Belgrade, the paper specifically addressed the concepts of good faith and pre and post contractual conduct in contract interpretation from the common law perspective – in particular how domestic common law courts, and in particular New Zealand courts, have used those concepts to develop their own jurisprudence. This paper, incorporating the conference paper, takes a wider view.

¹ See I. Schwenzer, P. Hachem, “Art. 7”, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010³, paras 9 et seq; B. Zeller “The Challenge of a Uniform

domestic court in a CISG case, which is to search for and give effect to the universal, autonomous meaning of the particular CISG provision in issue.

This paper looks at the relationship between the CISG and domestic law in a completely different way. It seeks to explore the extent to which (if any) the CISG has influenced domestic contract law developments. The author has chosen to focus on four common law² countries — the United Kingdom,³ New Zealand,⁴ Canada,⁵ and Australia⁶ — in order to explore the hypotheses that the use of the CISG in interpreting and developing domestic law can result in a greater awareness and use of the CISG itself in the courts, and in turn thereby enable judges and counsel to become more familiar with and comfortable in working with the CISG.

A databases search revealed that the domestic case law in which the application of the CISG (either as the applicable law or the comparator) was a significant factor is sparse. To some degree this result was not surprising because anecdotal evidence suggests that the knowledge of the CISG, especially in common law countries, is minimal.⁷ The Australian/New Zealand database (AustLII) had the most entries under the used search term “international sale of goods”⁸ which is most likely due to the materials included in the database.

The research did not reveal over all evidence of cross fertilisation. The only country where a cross fertilisation can be ascertained is New Zealand: the country where the CISG has been used most to aid the development of domestic contract law. Since New Zealand had only one CISG case the evidence is probably too tenuous to support the hypothesis of this paper.

Application of the CISG – Common Problems and their Solutions”, *Macquarie Journal of Business Law (MqJBLaw)*, 2006, 14.

² Of interest and for a later paper is the question whether civil law courts also use the CISG to aid their argument in regard to domestic law and if they do how they do it.

³ The United Kingdom has not ratified the CISG.

⁴ CISG in force since 1 October 1995.

⁵ CISG in force since 1 May 1992.

⁶ CISG in force since 1 April 1989.

⁷ See overview of the standing of the CISG in various countries: F. Ferrari, *The CISG and its Impact on National Legal Systems*, Sellier, European Law Publishers, Munich 2009.

⁸ For relevant case law: search term “international sale of goods”: CanLII (49 entries legislation, academic articles, 12 cases in which the CISG had relevance); AustLII (296 entries, 14 Australian cases where the CISG had relevance; 3 New Zealand cases where the CISG had relevance); BaiLII (108 entries, 1 case where the CISG had relevance). The BaiLII entries included due to the search term numerous European Court of Justices decisions in regard to taxation or jurisdictional questions.

1. UNITED KINGDOM AND NEW ZEALAND

Articles 7 and 8 CISG hold a particular fascination for common law lawyers. They contain two concepts which were for a long time very foreign to common law: good faith (Article 7) and the use of pre- and post-contractual conduct as an aid to contract interpretation (Article 8). What is quite interesting is how the New Zealand courts and the House of Lords/the UK Supreme Court have actually used Article 7 and 8 CISG to develop their own jurisprudence in the area of contract interpretation. In addition, in New Zealand the CISG has been referred to in four cases to aid the development of domestic law other than in the area of Articles 7 and 8 CISG. Of the four jurisdictions examined, New Zealand has so far made the most use of the CISG as a reference point for the development of domestic law. To some degree this is a surprising result given the size of the country and its relative lack of exposure to international sale of goods litigation as compared to the other three, far larger jurisdictions. On the other hand it is perhaps not so surprising in that New Zealand courts are relatively open to foreign and international influences when shaping domestic law.⁹

The CISG has been in force in New Zealand since 1994.¹⁰ However, it was not until June 2010 that the first substantive judgment on the CISG was delivered.¹¹ Nine judgments that cite the CISG can be found on New Zealand judgment databases,¹² and anecdotal evidence suggests

⁹ P. Butler “The Use of Foreign Jurisprudence by the New Zealand Supreme Court”, *Festschrift for Ingeborg Schwenzer* (forthcoming 2011).

¹⁰ Sale of Goods Act (United Nations Convention) Act 1994, which annexes the CISG as a Schedule and provides that the CISG has the force of law as a code in New Zealand in place of other New Zealand laws (such as the Sale of Goods Act 1908).

¹¹ *Smallmon & Transport Sales & Anor* (High Court Christchurch, CIV 2009 409 000363, 30 July 2010, French J): The Smallmons operate a road transport and earthmoving business in Queensland. In 2006, they purchased four trucks to use in their business from a New Zealand company, Transport Sales Limited. The trucks were then shipped to Queensland where the Queensland authorities refused to register them on the grounds of alleged non compliance with Australian vehicle standards. Although an exemption was later granted, the trucks are registered only on a restricted basis. As the contract did not address registration requirements, the Smallmons contended for an implied term that the trucks must be fit for purpose.

Justice French held there was no question that the CISG applied to the contract. The question was whether the implied warranties of fitness for purpose in Article 35(2) of the CISG were breached. As an interpretative aid, both parties had sought to rely on domestic law; however, French J confirmed that such law was inapplicable. Instead, her Honour distilled the applicable principles from international cases and commentary. According to these authorities, a seller is not generally responsible for compliance with the buyer’s regulatory standards unless special circumstances applied. Here, none did. Thus, the claim failed.

¹² None of the cases undertook an in depth analysis of the CISG. In fact all those cases are used to back up a court’s interpretation of domestic law: compare P. Butler

that commercial law firms in New Zealand exclude the CISG in their contracts. The CISG is hardly taught in law schools and overall the apathy in regard to the CISG is such that not even an opposition against the CISG exists in New Zealand.¹³ In summary, the CISG has only limited presence in the New Zealand legal landscape.

As regards to the United Kingdom the obvious first point is that the CISG has not been adopted in the UK. Accordingly, its relevance to domestic litigation in any form is inevitably limited. That said, it has to be noted that the overall resistance to adopting the CISG appears to have decreased.¹⁴ Lord Sainsbury of Turville from the Department of Trade and Industry¹⁵ responded to a question by Lord Lester of Herne Hill QC in the House of Lords in 2005 that “[t]he UK intends to ratify the convention, subject to the availability of parliamentary time. There have been delays in the past for a number of reasons, but we propose to issue a consultation document in the course of the next few months to examine the available options”.¹⁶ However, more than five years later, no consultation document has yet been released.

While the level of opposition to the CISG in the UK has decreased, the remaining opposition is not insignificant. Much of the English resistance to ratification relates to scepticism about the practical effectiveness of the buyer’s remedies provided under the CISG compared to the available remedies under English law. Another commonly raised concern is that the CISG is less suitable to commodity sales than the

“New Zealand”, *The CISG and its Impact on National Legal Systems* (ed. F. Ferrari), Sellier, European Law Publishers, Munich 2009, 251, 254. Therefore, those cases will be dealt with under I.1. and I.2.

¹³ See for a general overview of the prevalence of CISG use and scholarship: P. Butler, *Ibid.*, 251.

¹⁴ When the United Kingdom Department of Trade and Industry published a consultative document on this issue in 1989, it identified three advantages for British accession to the convention: uniformity in international sales law was desirable and the convention’s rules would constitute “common ground” on which business might be transacted; secondly, a uniform law might reduce expensive litigation of preliminary issues as to the proper law of a contract; and, thirdly, accession would allow courts and arbitrators in the United Kingdom to have a market share in the resolution of disputes under the convention and to participate in the evolution of its jurisprudence [Department of Trade and Industry (UK), *United Nations Convention of International Sale of Goods: a consultative document*, Department of Trade and Industry, London 1989]. The Department of Trade and Industry issued another consultative paper in 1997 and based on the responses it received, the Department issued a position paper in February 1999 stating that the Convention should be brought into national law when there is time available in the legislative programme [Department of Trade and Industry (UK), *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention)*, position paper, Department of Trade and Industry, London February 1999].

¹⁵ Now called the United Kingdom Department for Business, Innovation and Skills (BIS).

¹⁶ 669 Parl Deb, HL (5th ser) (2005) WA 86.

English Sale of Goods Act 1979 due, in part, to the CISG's stricter provisions on contract avoidance in the case of non-conforming goods and documents.¹⁷ The hostility towards the CISG is common to both practitioners and academics working in the field in England.¹⁸ Other than concerns regarding the legal consequences of the ratification of the CISG, one of the sceptics' concerns seems to be that the ratification of the CISG in the United Kingdom might lead to a reduction in the number of international arbitrations coming to England. In other words, the resistance might stem from the fear that an increase in the uniformity of the rules of international trade law might increase the opportunities for arbitration of international trade disputes in fora outside traditional centres such as the City of London.¹⁹

Despite the rather gloomy picture in regard to the CISG in the UK and New Zealand the courts in both jurisdictions have not been unaware of the CISG. The decisions discussed in this paper show that the CISG has been used, albeit in a limited way, as an aid to domestic contract law development. Would courts and tribunals follow especially New Zealand's foot-steps in using the CISG in developing their domestic law that in turn would lead to a more unified approach by courts and tribunals when applying the CISG. It is a case of mutual fertilisation. However, based on the New Zealand and United Kingdom experience that fertilisation seems to be more likely to occur in the smaller jurisdiction.²⁰

1.1. Article 7(1) – Good faith

Article 7(1) states

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the *observance of good faith in international trade*. [emphasis added]

¹⁷ M. Bridge, "A Law for International Sales", *Hong Kong Law Journal (HKLJ)* 37/2007, 17, 22, 23, 40; B. Zeller "Commodity Sales and the CISG", *Sharing International Law Across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his 80th Birthday* (eds. C. B. Andersen, U. Schroeter), Wildy, Simmonds and Hill Publishing, London 2008, 627, 628.

¹⁸ See M. Bridge, *Benjamin's Sale of Goods*, Sweet & Maxwell, London 2010⁸, at 12 081 but for a Scottish take on the issue see A. Forte "The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom", *University of Baltimore Law Review* 26/1997 51 66.

¹⁹ Compare Hon. Justice J. Douglas "Arbitration of the International Sale of Goods Disputes under the Vienna Convention" (paper delivered at the Institute of Arbitrator and Mediators Australia National Conference 2006) available at <http://cisgw3.law.pace.edu/cisg/biblio/douglas.html> (last accessed 28.10.2010).

²⁰ See in regard to the willingness to use foreign jurisprudence by the New Zealand Supreme Court: P. Butler (forthcoming 2011). It also has to be noted, of course, that the CISG is in force in New Zealand since 1 October 1995.

As readers will be aware, there has been a robust debate on the proper interpretation of the phrase “observance of good faith in international trade”. Some authors and courts contend that Article 7(1) holds the contracting parties to a good faith standard in regard to their conduct.²¹ Others argue that Article 7(1) concerns the interpretation of the CISG only and cannot be applied directly to individual contracts.²² For present purposes it is not necessary to endorse one view over the other since what this paper is concerned with is whether and how “observance of good faith in international trade” has been used by New Zealand and UK courts.

Aside from specific types of contracts, insurance being the notable example, there is no recognised extra-contractual duty in UK law on one party to disclose facts that may turn out to be of importance to another. This can be contrasted with the position in other countries including Australia and Canada where the notion of good faith is more readily accepted.²³

1.1.1. New Zealand

In *Bobux Marketing v. Raynor Marketing*²⁴ the New Zealand Court of Appeal examined the question whether the express wording of a contract made it impossible to imply a term giving a party the right to terminate the agreement on reasonable notice. The majority held that a deviation from the express wording of the contract was not possible.²⁵ Thomas J, dissenting on that point, examined the development of the concept of good faith in common law, including references to the CISG and the UNIDROIT principles.²⁶ His Honour found that good faith was perceived “as loyalty to a promise”²⁷ and that there should be an obligation

²¹ See OLG Brandenburg (18 Nov 2008) CISG online 1734; OLG Oldenburg (5 Dec 2000) CISG online 618; compare: N. Hofmann “Interpretation Rules and Good Faith as Obstacles to the UK’s Ratification of the CISG and to the Harmonization of Contract Law in Europe”, *Pace International Law Review (Pace Int’l LRev)* 22/2010, 145, 165.

²² I. Schwenzer, P. Hachem, para 17; P. Schlechtriem, *Internationales UN Kaufrecht*, Mohr, Tuebingen 2008, para 44; U. Schroeter “Freedom of contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the Principles of European Contract Law”, *Vindobona Journal* 6/2002, 257, 261.

²³ J.M. Paterson “Duty of good faith”, *Law Institute Journal* 2000, 47; J.W. Carter, E. Peden “Good Faith in Australian Contract Law”, *Australian Construction Law Newsletter* 94/2004, 6.

²⁴ [2002] 1 NZLR 506 (CA).

²⁵ *Bobux Marketing v. Raynor Marketing* [2002] 1 NZLR 506 [72] [77] per Blanchard J.

²⁶ *Bobux Marketing v. Raynor Marketing* [2002] 1 NZLR 506 [39].

²⁷ *Bobux Marketing v. Raynor Marketing* [2002] 1 NZLR 506 [41].

to perform in good faith, at least in long-term contracts. Thomas J relied solely on the language of good faith in Article 7(1) of the CISG to support his argument; he did not engage in a substantive discussion of Article 7(1) and the literature and jurisprudence outlined earlier. Thus His Honour ignored thereby the debate whether Article 7(1) is applicable in regard to the conduct of the parties in the individual contract or “just” stipulates a general interpretation method in regard to the CISG itself,²⁸ preferring to assert that Article 7(1) directly applied to the contractual relationship of the parties.²⁹

1.1.2. United Kingdom

At this point various database searches have not revealed case law which analyses Article 7(1) CISG to aid argumentation in regard to the role of good faith in English contract law. An optimist would argue that this is because the enlightened English judiciary and legal profession adhere to the view that Article 7(1) CISG stipulates a general interpretation principle in regard to the CISG and is, therefore, of no assistance in the discussion of whether there is a place for “good faith” in English contract law. The pessimist (or realist) will argue that unfamiliarity with the CISG is the reason for its non-use in examining the issue!

1.1.3. Conclusion

“Good faith” is probably such an amorphous concept which received much attention outside sales contracts, for example, in regard to insurance contracts or employment contracts that it is not necessarily surprising that courts do not rely on Article 7(1) of the CISG. There are other more familiar domestic sources that can be referenced instead. Further, domestic courts dealing with domestic sales law would probably consider that there is only minimal use for Article 7(1) if they follow the view that Article 7(1) concerns the interpretation of the CISG only and is not intended to imply a duty of good faith as part of individual contracts. Therefore, the academic and jurisprudential analysis of good faith in Article 7 is not necessarily suitable or the strongest argument to make the CISG palatable to common law countries.³⁰

As can be seen from the following analysis of Article 8 of the CISG, the interpretation principles of Article 8 of the CISG are the more promising legal concepts to prove the thesis advanced in this paper.

²⁸ I. Schwenzer, P. Hachem, para. 16 et seq.

²⁹ However, compare Justice French in *Smallmon & Transport Sales & Anor* (High Court Christchurch, CIV 2009 409 000363, 30 July 2010) [87] concurring with the view that Art 7(1) promotes an autonomous CISG interpretation principle.

³⁰ Compare also N. Hofmann, 145.

1.2. Article 8 – Pre- and Post-contractual Party Conduct

Article 8(3) of the CISG reads

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including *the negotiations*, any practices which the parties have established between themselves, usages and *any subsequent conduct of the parties*. [emphasis added]

The interpretation of a contract with reference to *negotiations* and *any subsequent conduct of the parties* is prima facie contrary to the common law doctrine of the parol evidence rule. According to the parol evidence rule the written agreement is the exclusive record of the intention of the parties;³¹ accordingly, the legal recognition of additional oral agreements between the parties has traditionally been denied and the use of extrinsic material or conduct to ascertain parties' intention has been eschewed.³² In contrast, Article 8 and especially Article 8(3) of the CISG, invite the court or the arbitral tribunal to make use of any surrounding circumstances – including pre- and post- contractual conduct of the parties. However, it also has to be acknowledged that commentators on the CISG have agreed that written agreements will be afforded special consideration under it.³³

1.2.1. United Kingdom

The orthodox English position was that even if the written contract is an incomplete or an inaccurate record of what the parties agreed, the parties are stuck with what was written: extrinsic evidence of terms which were agreed but which were, by accident or design, omitted from the

³¹ It is acknowledged that (a) that for the purposes of this paper the analysis of contract interpretation has been simplified and (b) there is no uniform parol evidence rule in existence among common law countries or even among the states in the United States, see: B. Zeller "The Parol Evidence Rule and the CISG – a Comparative Analysis", *Comparative Law Journal of South Africa* 36/2003, available under <http://cisgw3.law.pace.edu> (last accessed 2 Jan 2011); see also CISG Advisory Council Opinion No 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (23 Oct 2004), Rapporteur: Professor Richard Hyland); compare Lord Morris in *Bank of Australasia v. Palmer* [1897] AC 540, 545.

³² See P. Butler "The Doctrine of Parol Evidence Rule and Consideration – A Deterrence to the Common Law Lawyer?", *Celebrating Success; 25 Years United Nations Convention on Contracts for the International Sale of Goods*, SIAC, Singapore 2006, 54, 56. It has to be noted that Art 11 explicitly states that a contract of sale need not to be concluded in or evidenced by writing and is not subject to any other requirement as to form.

³³ See M. Schmidt Kessel "Art. 11", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010³, para 14.

written agreement, could not as a general rule be relied upon for the purposes of contract interpretation.³⁴ Not surprisingly, English courts found quickly that the strict adherence to the rule could lead to unjust results. Therefore, the parol evidence rule has many exceptions and its ambit is quite unclear.³⁵ A separate issue, however, has been the interpretation of the written contract. In regard to the latter the plain meaning rule applied: the chosen language had to be taken as representing the intention of the parties. Extrinsic evidence was not admissible in order to find a different meaning, for “that would amount to the Court holding that the parties really meant something different from what they chose to say”.³⁶ Where the language of the contract was ambiguous the courts could consult the factual background.³⁷

In regard to the interpretation of a contract, unlike the New Zealand Supreme Court, the House of Lords, as it then still was, in *Chartbrook Ltd v. Persimmon Homes Ltd* reaffirmed the traditional rule that pre-contractual negotiations are inadmissible as evidence of the parties’ contractual intentions. The rule excluding evidence of pre-contractual negotiations did not, however, exclude use for the purpose of establishing facts relevant as background which were known to the parties.³⁸ Lord

³⁴ See *Evans v. Roe et al* (1872) LR 7 CP 138; see also Law Commission, *Law of Contract – The Parol Evidence Rule* (Working Paper No 70, London 1986), 6 et seq. The Law Commission Report excluded the consideration of interpretation rules. It should be noted that where a term was mistakenly included or omitted the equitable doctrine of rectification could be invoked to reverse the mistake – but it is important to note that rectification is not a doctrine concerned with contract interpretation, but rather contract documentation and that the modern English approach to interpretation does away in many cases with the need to seek rectification.

³⁵ See for an overview of the exceptions and the case law: also Law Commission, *Law of Contract – The Parol Evidence Rule* (Working Paper No 70, London 1986), 6 et seq; P. Butler, (2006), 54, 56

³⁶ See D. McLauchlan, “Plain Meaning and Commercial Construction: Has Australia Adpoted the ICS Principles?”, *Journal of Contract Law* 25/2009, 7, 8 citing *Benjamin Developments Ltd v. Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189, 203 (CA, per Hardie Boys J) – summarising the position in detail.

³⁷ *Prenn v Simmonds* [1971] 1 WLR 1381, 1384 (Wilberforce LJ). Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912, 913 summarised the English contract interpretation principles.

³⁸ *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [42] per Lord Hoffmann. The case involved a developer (C) who entered into an agreement with a house builder (P) for the development of a site which C had recently acquired. Under the agreement P agreed to obtain planning permission for C’s land and, pursuant to a licence from C, enter into possession and construct a mixed residential and commercial development and sell the properties on long leases. C agreed to grant the leases at the direction of P, which would receive the proceeds for its own account and pay C an agreed price for the land. Under the agreement the price was the aggregate of the total land value

Hoffmann considered not only comparative but also international material – dismissing both due to the different framework they were working under which could not be transposed into English law. His Lordship stated³⁹

Both the *Unidroit Principles of International Commercial Contracts* (1994 and 2004 revision) and the *Principles of European Contract Law* (1999) provide that in ascertaining the “common intention of the parties”, regard shall be had to prior negotiations.... The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law...

Nonetheless, Lord Hoffmann in *Chartbrook*⁴⁰ acknowledged that giving effect to what a reasonable person would have understood the parties to have meant, when using the language they did, might sometimes require to give the particular language a different meaning. His Lordship emphasised that there was no barrier to applying a contextual interpretation.⁴¹ Plain and unambiguous ordinary meanings could be displaced by context and background although, as is also emphasised in *Chartbrook*, there must be a strong case to persuade the court something has gone wrong with the contractual language.⁴² However, Professor McLauchlan points out that there is no need to get too enthusiastic about his Honour’s

(TLV) and the balancing payment. The balancing payment was defined as the additional residential payment (ARP) and was ‘23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives’. After the development was built a dispute arose over the correct amount of the ARP. It was C’s case that the meaning of the definition was that from the price achieved, the Minimum Guaranteed Residential Unit Value (MGRUV) and the Costs and Incentives (C&I) would be deducted and 23.4% of the result had to be taken. That figure was the price to be paid for an individual unit that, together with the figures for similar calculations on all the other units, made up the ARP. Accordingly that and the TLV was the price. On the agreed figures, C’s calculation produced a TLV of 4,683,565 and an ARP of 4,484,862, making 9,168,427 in all. C commenced proceedings for that unpaid amount. P claimed that the purpose of dividing the price into TLV and ARP was to give C a minimum price for its land, calculated on current market assumptions, and to allow for the possibility of an increase if the market rose and the flats sold for more than expected. The definition meant that the C&I was deducted from the realised price to arrive at the net price received by P, then calculate 23.4% of that price. The ARP was the excess of that figure over MGRUV. On that calculation the ARP was 897,051. P sought to rely on documents which formed part of the pre contractual negotiations in aid of its construction. In the alternative, P counterclaimed for rectification of the agreement.

³⁹ *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [39].

⁴⁰ [2009] UKHL 38, [2009] AC 1101.

⁴¹ *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [21]; [25].

⁴² *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [14], [15].

statement (unlike some of the New Zealand Supreme Court Justices in *Vector Gas Ltd v. Bay of Plenty Energy Ltd*⁴³) since it only re-states what has been the law in England since Lord Wilberforce's judgment in *Prenn v Simmonds*⁴⁴ and which had not resulted in a real shift towards what one could describe as all-encompassing contextual contract interpretation.⁴⁵

In summary, despite being aware of the use of pre-contractual negotiations as an interpretive tool in regard to the interpretation of contracts governed by the CISG, the House of Lords has dismissed any approximation of English contract interpretation in line with CISG interpretation principles, on the broad basis that the latter reflect the French, and therefore not English, philosophy of contract interpretation.

1.2.2. New Zealand

In New Zealand a comparatively greater shift has occurred in regard to the use of pre-and post-contractual conduct as an aid to contract interpretation. In recent years academic and extra-judicial writing has challenged the traditional rationalisation of why pre-contractual (and post-contractual) material is treated as irrelevant.⁴⁶ Sitting in New Zealand's highest court, the Supreme Court, Mc Grath J recently noted in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* that “[o]ver the past 40 years the common law has increasingly come to recognise that the meaning of a contractual text is clarified by the circumstances in which it was written and what they indicate about its purpose”⁴⁷ (it is not quite clear though whether his Honour is only referring to New Zealand or also, slightly overenthusiastically, to England). An impact of the CISG can be felt in regard to the question of the extent to which pre- and post-contractual conduct can be taken into account when interpreting a contract.⁴⁸

The Court of Appeal in *Attorney-General v. Dreux Holdings Ltd*⁴⁹ had to construe an agreement for the sale of a large number of parcels of land found to be surplus to requirements on the restructuring of the railways. Counsel for Dreux urged the Court when construing the contract to

⁴³ [2010] 2 NZLR 444 (SC).

⁴⁴ [1971] 1 WLR 1381 (HL).

⁴⁵ D. McLauchlan, “Contract Interpretation in the Supreme Court Easy Case, Hard Law?”, *New Zealand Business Law Quarterly* 16/2010, 229, 253.

⁴⁶ Compare D. McLauchlan, “Contract Interpretation: What Is It About?”, *Sydney Law Review* 31/2009, 5; *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [72](SC) per McGrath J.

⁴⁷ [2010] 2 NZLR 444 [77] (SC).

⁴⁸ It has to be noted that McGrath J dismissed the idea that prior negotiations could form part of the factual matrix .

⁴⁹ (1996) 7 TCLR 617.

take into account subsequent conduct of the parties in its implementation. The majority of the Court was in the end able to construe the contract without considering the parties' subsequent conduct. Nevertheless, the Court did express views as to whether recourse to subsequent conduct was permissible. While not expressing a firm view, the majority looked at Article 8(3) CISG. The majority noted that there was something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice.

In *Yoshimoto v. Canterbury Golf International Ltd*⁵⁰ a commercial contract was at issue. A particular clause might be said to have a plain meaning, and was held to have such a plain meaning by the Judge at first instance. The context, the commercial objective of the contract and its contractual matrix, however, pointed away from that meaning. In addition, reliable extrinsic evidence was available which confirmed that this plain meaning was not what the parties actually intended. The question of interpretation, therefore, involved an examination of the contract, the commercial objective of the contract and the contractual matrix. The extrinsic evidence of prior negotiations and the admissibility of that evidence had to be considered. Thomas J made extensive reference to Article 8 CISG as a tool to interpret the contract: "It would, of course, be open to this Court to seek to depart from the law as applied in England on the basis of this country's implementation in 1994 of the United Nations Convention on Contracts for the International Sale of Goods. Liberal provisions for the interpretation of international sales contracts are included in this Convention."⁵¹ His Honour also cited *Dreux* to emphasise the idea that the court should follow the best international practice. (Interestingly, Lord Hoffmann relied on Thomas J's statements in *Yoshimoto* to illustrate the contrary view to the one his Lordship advanced in *Chartbrook*.⁵²)

In *Thompson v. Cameron*⁵³ (a case arising out of bankruptcy proceedings) the issue concerned the interpretation of a settlement agreement. A particular issue was how far pre-contractual negotiations and post-contractual conduct could be taken into account to determine the meaning of a contractual term. The Court discussed *Dreux* and the reference therein to the CISG, but did not refer to *Yoshimoto*. The Court found that the state of the law was still unclear as to whether pre-contractual negotiations and post-contractual conduct could be taken into account and, therefore, concentrated on analysing only the "factual matrix"—

⁵⁰ [2001] 1 NZLR 523 (CA): the decision was appealed to the Privy Council no consideration of the CISG.

⁵¹ *Yoshimoto v. Canterbury Golf International Ltd* [2001] 1 NZLR 523 [88].

⁵² *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [32] et seq.

⁵³ HC Auckland (27 Mar 2002) AP117/SW99 (Chambers J).

having no regard to pre-contractual negotiations or post-contractual conduct.⁵⁴

The Supreme Court (New Zealand's highest Court since 2003) finally, in *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* held that evidence of subsequent conduct was admissible.⁵⁵ Even though there was no direct reference to the Sale of Goods (United Nations Convention) Act 1994 or the CISG Tipping J referred to Blanchard J's judgment in *Dreux* where his Honour said that taking into account subsequent conduct would accord with general international trade practice.⁵⁶

In 2010 in *Vector Gas Ltd v. Bay of Plenty Energy Ltd*⁵⁷ the Supreme Court was asked to decide the question whether pre-contractual negotiations could be taken into account. *Vector Gas* concerned parties that had a long-term agreement whereby Vector Gas Ltd supplied gas to Bay of Plenty Energy Ltd. Vector gave notice of termination of the agreement. The lawyers representing the parties reached agreement that pending the determination of litigation concerning the validity of the termination, Vector would supply Bay of Plenty with gas. There was an exchange of correspondence which referred to a cost per gigajoule (GJ) plus transmission costs and the figure of \$6.50 per GJ was discussed, but a final letter from Bay of Plenty's lawyer referred to a price of \$6.50 per GJ without referring to transmission costs. This was accepted by Vector's lawyer. Dispute then arose as to the meaning of the agreement. Vector's lawyer argued that the price of \$6.50 per GJ meant a price for gas only, not including transmission costs; Bay of Plenty argued that the price of \$6.50 per GJ did include transmission costs.

Five different judgments were delivered, with each reflecting, as McLauchlan points out, to varying degrees, different understandings of the principles of contract interpretation.⁵⁸ Their Honours could not even agree on whether the agreement was ambiguous. However, all judges agreed that Vector's appeal should succeed but differed on how to justify this result conceptually. Four of the judges in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* in line with the Supreme Court in *Chartbrook* held that it was not necessary for there to be an ambiguity in the wording of a contract before the Court could resort to reading pre-contractual materials as an aid to establishing the factual background. Reference could be made to

⁵⁴ *Thompson v. Cameron* HC Auckland (27 Mar 2002) AP117/SW99 (Chambers J).

⁵⁵ [2008] 1 NZLR 277 (SC).

⁵⁶ *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* [2008] 1 NZLR 277 [55].

⁵⁷ [2010] 2 NZLR 444 .

⁵⁸ D. McLauchlan, "Common Intention and Contract Interpretation", *Lloyd's Maritime and Commercial Law Quarterly* 2011, forthcoming for an in depth discussion on *Vector*.

the negotiations in order to establish the commercial context, the market in which the parties were operating and the subject-matter of the contract if it showed objectively what the parties intended their words to convey.⁵⁹ Only Tipping J stated clearly that evidence of prior negotiations was admissible.⁶⁰ Unfortunately, none of the judges took account of the discussions of their brethren in earlier case law referring to international practice of the CISG which would have given them valuable assistance in their reasoning.

Therefore, there is an indication that the Supreme Court will not follow the House of Lords in *Chartbrook* was not surprising given its earlier decision in *Gibbons* where the Supreme Court had refused to follow their Lordships' decisions that subsequent conduct was inadmissible as an aid to interpretation.⁶¹ Their Honours' analysis, however, could have been strengthened by referring to the CISG (an argument not open to the House of Lords in the same way) and international best practice. Given that the judges in previous decisions used reference to the CISG and international best practice as embodied by, for example, the UNIDROIT principles to strengthen their argument is unfortunate since it would have again emphasised that connectedness between international and domestic sale of goods law.

However, in summary it has to be noted that the Supreme Court has set New Zealand on the path to interpret its domestic contracts in line with Article 8(3) of the CISG, the issue of prior negotiations yet to be finally decided.

1.3. Miscellaneous New Zealand decisions

As already mentioned, New Zealand courts have referred most often of all surveyed jurisdictions to the CISG: mostly to illustrate a legal concept the court applied.

In *Tri Star Customs and Forwarding Ltd v. Denning*⁶² the respondents had entered into a written agreement with the appellant whereby they granted a lease of a commercial building to the appellant together with an option to purchase the building. There were various offers and counter-offers before final agreement was reached. The various offers and the fi-

⁵⁹ *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [4], [13], [14], [23], [27], [62], [151]. See also a detailed discussion of the judgment: D. McLauchlan "Contract Interpretation in the Supreme Court Easy Case, Hard Law? 16 (2010) New Zealand Business Law Quarterly, p. 229.

⁶⁰ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [29] per Tipping J;

⁶¹ *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* [2008] 1 NZLR 277.

⁶² [1999] 1 NZLR 33 (CA).

nal agreement specified that the annual rental was “plus GST”. However, the purchase price was recorded \$720,000 with no mention of GST. It was clear that unless the agreement specified otherwise the purchase price was inclusive of GST. The respondents maintained that they understood that they would receive \$720,000 out of the transaction. The High Court had awarded the respondents relief under the Contractual Mistakes Act 1977 finding that there was a qualifying unilateral mistake in terms of s 6(1)(a) (i). The High Court found that though the appellant had no actual knowledge of the mistake it should have been aware of the existence of the mistake. An argument that the contract should be rectified because it did not record the true intentions of the parties was rejected. On appeal the Court had to decide whether the respondents’ undertaking of what they would get out of the transaction between respondent and claimant would qualify as a unilateral mistake under section 6(1)(a)(i) of the Contractual Mistake Act 1977. To decide that, the Court had to determine whether for that section the appellant had to have had actual knowledge of the respondent’s mistake or whether constructive knowledge was sufficient. The Court of Appeal held that the section in question required actual knowledge citing Articles 2(a), 9(2), 38(3), and 49(2) CISG as examples of legislation where the concept of “knew or ought to have known” was frequently captured but by the use of those express words.⁶³

The question whether a contract (between the parties) contained an implied term as to the merchantable quality of the goods arose in *International Housewares (New Zealand) Ltd v. SEB SA*.⁶⁴ The Court observed:

The insertion of an implied term as to merchantable quality could hardly be described as radical. Contracts for the supply of goods have for many years had such a term implied into them by statute in many jurisdictions. The desirability of such a term is also recognised internationally by the United Nations Convention which forms the basis for one of the plaintiff’s claims in this proceedings.⁶⁵

It is of course interesting to note that “merchantability” is not what is necessarily required under Article 35 CISG.⁶⁶

Similarly, in *Integrity Cars (Wholesale) Ltd v. Chief Executive of New Zealand Customs Services & anor* the Court laudably considered the CISG. However, unfortunately incorrectly, the Court said, that the CISG would apply between New Zealand and Japan and in regard to agency. At the time Japan had not ratified the CISG and agency is not dealt with in the CISG.

⁶³ [1999] 1 NZLR 33, 37 (CA).

⁶⁴ HC Auckland (31 March 2003) CP 395 SD01 (Master Lang).

⁶⁵ HC Auckland (31 March 2003) CP 395 SD01 (Master Lang) [59].

⁶⁶ See CLOUT case No 123 (Germany) (8 March 1995) <http://cisg3.law.pace.edu/cases/950308g3.html> (last accessed 12 Jan 2011); compare Arbitration Institute (Netherlands) case No 2319 (15 October 2002) <http://cisg3.law.pace.edu/cases/021015n1.html> (last accessed 12 Jan 2011).

1.4. Conclusion

In summary, the only issue where the CISG has had an impact can be felt is in regard to the question to what extent pre-contractual negotiations and post-contractual conduct can be taken into account when interpreting a contract. The New Zealand courts, in particular Justice Thomas, have used Article 8 of the CISG as an aid to advance pre- and post-contractual conduct as part of the contract interpretation canon. The openness to include international negotiated principles has influenced a shift in New Zealand's contract interpretation law. Justice French in *Smallmon & Transport Sales & Anor* (New Zealand's first judgment regarding a contract to which the CISG applied) emphasised that on the basis of Article 7(1) CISG recourse to the domestic system had to be avoided when interpreting and applying the CISG. Her Honour took recourse to Articles 8 and 8(3) of CISG when interpreting the contract between the parties.⁶⁷ Even though her Honour stressed the autonomous interpretation of the CISG it certainly must have helped that the New Zealand domestic law on contract interpretation was akin to that of the CISG.

2. AUSTRALIA

As Lisa Spagnolo points out in her comprehensive article on Australia's relationship with the CISG, Australian courts, even though they made a promising start in *Roder Zelt-und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd*⁶⁸ and *Perry Engineering Pty v. Bernold AG*⁶⁹, have now cultivated the tendency "to cite non-applicable domestic legislation, case law, or concepts where the CISG was the governing law, often due to the reluctance of counsel to engage with the CISG."⁷⁰ The extensive review of the eleven Australian CISG cases by Lisa Spagnolo reveals that courts and counsel do seem to be more comfortable with domestic contract law paradigms than an autonomous interpretation of the CISG.⁷¹

The CISG's notion of good faith was mentioned in two Australian cases. In *Renard Constructions (ME) Pty Ltd v. Minister for Public Works*⁷²

⁶⁷ *Smallmon & Transport Sales & Anor* (High Court Christchurch, CIV 2009 409 000363, 30 July 2010) [87] et seq.

⁶⁸ (1995) 57 FCR 216 (Federal Court South Australia).

⁶⁹ *Perry Engineering Pty v. Bernold AG* [2001] SASC 15 (unreported, Burley J, 1 Feb 2001)

⁷⁰ L. Spagnolo "The Last Outpost: Automatic CISG opt outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers", Melbourne Journal of International Law 10/2009, 1, 29.

⁷¹ *Ibid.*, 1, 27 et seq.

⁷² (1992) 26 NSWLR 234 (CA).

Priestley JA mentioned Article 7(1) CISG in passing when discussing whether there was a notion of good faith in Australian contract law.⁷³ Again, it was mentioned in passing in *South Sydney District Rugby League Football Club Ltd v. New Ltd* Finn J when discussing good faith.⁷⁴

Article 8 CISG has also been an Article drawn upon in Australian jurisprudence.⁷⁵ The New South Wales Court of Appeal in *Franklins Pty Ltd v. Metcash Trading Ltd* observed:⁷⁶

Much ink has been spilt over the last 30 years on this topic [contract interpretation]. It is intimately connected in analysis with the applicable underpinning theory of the determination of contractual rights and liabilities. If, as the above references make clear, the governing theoretical framework as to the determination of contractual rights and obligations is the objective theory, it is difficult to see how later conduct has a place in the ascertainment of the parties' objectively assessed intentions.

The Court further observed, relying on the High Court in *Pacific Carriers v. BNP Paribas*,⁷⁷ *Equuscorp v Glengallan*,⁷⁸ and *Toll v. Alphapharm*⁷⁹ that the construction of a written contract is to be determined by what a reasonable person in the parties' position would have understood it to mean in the circumstances and context in question. Therefore, the Court pointed out how parties later acted, was probative of what they themselves thought their obligations were, since that was difficult to reconcile with the objective paradigm.⁸⁰ The Court observed that it would not be difficult to take the parties' later actions into account if the paradigm in place would resemble Articles 4.1–4.3 of the UNIDROIT Principles of International Commercial Contracts since it gives a primary role to the ascertainment of the actual common intention of the parties.⁸¹ The Court noted that Article 8 CISG is to similar effect to Art 4.2 of the UNI-

⁷³ *Renard Constructions (ME) Pty Ltd v. Minister for Public Works* (1992) 26 NSWLR 234, 264 (CA).

⁷⁴ (2000) 177 ALR 611, 696. See extensive discussion of this case and *Renard* in L. Spagnolo, 1, 34, 35 pointing out that both judges had each written extensively extrajudicially on comparative law issues and participated in international uniform law issues.

⁷⁵ See in regard to "good faith" in Australian law J.W. Carter, E. Peden "Good Faith in Australian Contract Law", *Australian Construction Law Newsletter* 94/2004, 6; J.M. Paterson, 47. Carter and Peden argue that "good faith" is part of Australian contract law (at 6) which might explain why judgments do not need to rely (rightly or wrongly) on Article 7; L. Spagnolo, 1, 30.

⁷⁶ [2004] HCA 35.

⁷⁷ (2005) 218 CLR 471.

⁷⁸ [2004] HCA 52.

⁷⁹ [2009] NSWCA 407 [40]

⁸⁰ [2009] NSWCA 407 [6].

⁸¹ [2009] NSWCA 407 [7].

DROIT Principles. However, following from its earlier observation, the Court concluded that it was unnecessary to discuss the effect, if any, which the adoption of the CISG by all States and Territories will have on the primacy of the objective theory since as Lord Hoffmann had pointed out in *Chartbrook Ltd v. Persimmon*⁸² the UNIDROIT Principles and the CISG reflected civil law principles.⁸³ The Court, therefore, followed the House of Lords, rejecting the influence of the CISG on domestic contract law due to its perceived origin in the civil law.

In *Limit (No 3) Ltd v. ACE Insurance Ltd*⁸⁴ the New South Wales Supreme Court held that the respondent, an insurance company, was required to indemnify a joint venture under a policy for some portion of liability incurred by a joint venture. The applicants, a Lloyds syndicate and other Lloyds insurers, had made payments to the joint venture as per another policy. The Court found that it was just and equitable to order recoupment of any liability of which the respondent was relieved by the applicants. One of the issues arising was the proper construction of one of the clauses in the insurance contract. The Court⁸⁵ referred to the Singapore Court of Appeal decision in *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd*⁸⁶ where the Singapore Court had mentioned Article 8 CISG in passing.

Contract interpretation was also at the heart of the High Court of Australia's decision in *Koompahtoo Local Aboriginal Land Council v. Sanpine Pty Ltd*.⁸⁷ The litigation arose from a joint venture agreement between the appellant and respondent. When the joint venture came into financial difficulties and the appellant's administrator terminated the agreement the respondent commenced proceedings seeking a declaration that the termination was invalid and that the agreement was still on foot. The issue was whether contractual terms could be classified as "intermediate" and what consequence the breach of such term had.⁸⁸ Kirby J, agreeing with the majority, albeit disagreeing with the classification of contract terms as "intermediate", referred to the CISG as an example of a general codification of contractual remedies law adopted in some common law countries that had not adopted the concept of "intermediate" contract terms.⁸⁹

⁸² [2009] AC 1101 [39].

⁸³ [2009] NSWCA 407 [8], [9].

⁸⁴ [2009] NSWSC 514.

⁸⁵ [2009] NSWSC 514 [147].

⁸⁶ [2008] SGCA 27 [62].

⁸⁷ [2007] HCA 61.

⁸⁸ [2007] HCA 61 [106] et seq per Kirby J.

⁸⁹ [2007] HCA 61 [108].

Article 8 CISG which facilitated a shift in contract interpretation in New Zealand has not done the same in Australia. Australia followed the English approach which results in a split contract law paradigm— international sale of goods to which the CISG is applicable will have to be interpreted in accordance with Article 8 whereas domestic sale contracts will be more anchored in the written contract. Article 7(1) CISG was mentioned as an example of the notion of good faith in contract law before good faith became an established legal principle in Australia. However, it was rather mentioned in passing without any analysis and by judges with considerable experience in comparative law analysis. Therefore, it cannot be concluded that cross-fertilisation has taken place.

3. CANADA

Interestingly neither Articles 7 nor 8 CISG have been drawn upon to develop Canadian contract law. Good faith is an established principle in Canadian contract law,⁹⁰ and it is, therefore, not surprising that Article 7 has not been called upon (rightly or wrongly) to develop that principle. Similarly, Article 8 has not been used to dispel the parol evidence rule. Canadian jurisprudence has not followed the parol evidence rule in the strict sense for a long time.⁹¹ However, the CISG has been cited in four cases in which the Courts applied common law.⁹² Twenty CISG cases can be found on the CanLII database. Genevieve Saumier’s summary about the state of CISG jurisprudence in Canada mirrors that of Lisa Spagnolo’s for Australia. She observes that the understanding of the CISG is not very high.⁹³

Article 3(1) CISG was used by the Respondent as an example to illustrate the meaning of “sale” in *Cherry Stix Ltd v. Canada Border Services Agency*.⁹⁴ The issue was whether there was a transfer of title of goods by Cherry Stix to Wal-Mart prior to their importation into Canada and subsequently whether pursuant to the Customs Act, the CBSA was correct in applying the transaction value to determine the value for duty of the

⁹⁰ J. Swan, *Canadian Contract Law*, LexisNexis, Canada 2006, 243 et seq.

⁹¹ Compare Lambert JA in *Gallen v. Allstate Grain Co Ltd* (1984) 9 DLR (4th) 496, 506; J. Swan, 509 et seq.

⁹² See in regard to an overview of Canadian CISG jurisprudence: G. Saumier “International Sale of Goods Law in Canada: Are we missing the Boat?”, *Canadian International Lawyer* 7/2007, 1; R. Sharma “The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience”, *Victoria University of Wellington Law Review* 36/2005, 847.

⁹³ G. Saumier, 1 et seq.

⁹⁴ 2010 CanLII 38689.

goods in issue. The Canadian International Trade Tribunal in its decision did not draw on the CISG.

*Brown & Root Services Corp v. Aerotech Herman Nelson Inc*⁹⁵ concerned a contract for the sale of portable heaters between a Manitoba vendor and a Texas buyer. Even though the CISG would have applied to the contract the Court failed to recognise its applicability and resolved all of the issues with exclusive reference to Manitoba statute law, common law and domestic cases. However, the defendant relied on Articles 38 and 40 to enhance its position in that the claimant took too long if it was intending to assert a fundamental breach or repudiation of the contract. The Court accepted the principle stipulated by Articles 38 and 40 but rejected the argument on the facts.

A contract for Styrofoam-making equipment was at the centre of *Mansonville Plastics (BC) Ltd v. Kurtz GmbH*⁹⁶ (German seller, British Columbian buyer). In resolving the various “warranty” claims raised by the buyer, the Court submerged the CISG within domestic sales law and did not give it any autonomous role or interpretation. The defendant had relied on Article 71 CISG which provides that a party to a contract may suspend the performance of his/her obligations if it becomes apparent that the other party will not perform a substantial part of his/her obligations. The Court did not rely on Article 71 in its discussion of whether the defendant was entitled to suspend performance.

Similarly, in *Diversitel v. Glacier*⁹⁷ the determination that a fundamental breach had occurred was made on the basis of Ontario common law precedents, despite the fact that CISG case law had been cited to the Court extensively by the plaintiff in regard to what constitutes a fundamental breach.⁹⁸ However, the Court stated that “the plaintiff submits that regardless of this Court’s interpretation of the International Sale of Goods Act, it has met the common law test in establishing a fundamental breach of contract.”⁹⁹

In summary, the Canadian example shows that the CISG can aid the discussion in a wider range of domestic contract law issues than good faith and contract interpretation. Canada counts more CISG cases than New Zealand or Australia which might be due to the United States (which is also a CISG member state) being its most important trading partner. However, unfortunately the found case law is probably too sparse to support a hypothesis of cross-fertilisation.

⁹⁵ 2002 MBQB 229.

⁹⁶ [2003] BCJ 1958.

⁹⁷ [2003] OJ No 4025 (Ont Sup Ct).

⁹⁸ [2003] OJ No 4025 (Ont Sup Ct) [26] [28].

⁹⁹ [2003] OJ No 4025 (Ont Sup Ct) [29].

4. CONCLUSION

It is often emphasised by CISG commentators that courts and arbitral tribunals have to embark on a “domestic law free” analysis of the CISG. That must be, generally speaking, correct. However, the CISG was not created in vacuum. In fact, it has been heralded as a successful amalgamation of civil and common law. In practice, as also evidenced by the commentaries, often a comparative analysis is employed when interpreting a CISG provision. It might be the case that the success of the CISG lies partly in the influence it has (has had) on domestic legal systems. A fertilisation between the domestic and international sale of goods law might in the end lead to greater consistency in the application of the CISG.

New Zealand (of the countries surveyed in this article) has made use of the persuasive precedent character of the CISG the most. Probably partly due to being a small jurisdiction with a certain lack of precedent New Zealand counsel and courts are more quickly willing to look to overseas jurisprudence, legislation and international law to aid their argument and/or development of the domestic legal system.

It will be for a more comprehensive research project to examine what the experience of civil law countries is, some of which have, when revising their domestic contract law, incorporated CISG concepts into their new contract law.¹⁰⁰

¹⁰⁰ For example Germany.