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ARTICLE

# Internationality Overreach in the Interpretation of Uniform Private Law Conventions: The *Contra Proferentem* Rule and the CISG

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**Abstract**

This article argues that the rule of *contra proferentem* is not applicable to international sales contracts governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG). It further argues that the common recognition of the rule of *contra proferentem* under the CISG is an instance of a broader phenomenon which it calls 'internationality overreach'. 'Internationality overreach' is the tendency to project onto the provisions of a uniform private law instrument doctrines and concepts which are inaccurately presumed to constitute universally recognised principles of private law or the 'common core' of various legal systems. This article demonstrates that internationality overreach disrupts the goals underpinning the harmonisation of commercial law in two ways: first, it undermines uniformity in the application of international conventions; and, second, it leads to outcomes that fall short of the agreement reached by the Contracting States during the drafting process. While this article focuses on the CISG, the argument developed in this article is of equal relevance to other uniform private law conventions which follow the principle of autonomous interpretation.

**Keywords:** private international law; transnational commercial law; uniform private law; internationality overreach; homeward trend; *contra proferentem*; international sale of goods; autonomous interpretation

## 1. Introduction

The goal of the international harmonisation of commercial law is to achieve uniformity of legal rules within the participating countries. Nevertheless, formal uniformity following the approval and implementation of a single authoritative text by Contracting States cannot succeed without a uniform interpretation and application of the agreed rules. Thus far, the academic literature has focused primarily on situations in which the commentators and courts interpret the text of a uniform law instrument through the lens of solutions adopted in their home jurisdictions. This article explores a different phenomenon in the interpretation of uniform private law conventions: a situation

in which the enacted words are interpreted through the lens of doctrines that are perceived to be commonly recognised across legal systems. In so doing, the article employs the use of the rule of *contra proferentem* in the context of the United Nations (UN) Convention on Contracts for the International Sale of Goods[1] (CISG, Convention) as a case study of this phenomenon.

The rule of *contra proferentem* requires ambiguous contractual terms to be interpreted against the interests of the party who proposed them. Originating in Roman law, the rule has been recognised in some form in most modern civil and common law legal systems. The rationale for the *contra proferentem* rule is that the party who drafted or otherwise proposed a given contractual term should bear the risk of its ambiguity. In the context of consumer contracts, the principle is used additionally as a means to protect the party in a weaker bargaining position.

The CISG does not mention expressly the rule of *contra proferentem*. Yet the applicability of the rule under the Convention is considered by most commentators to be a type of dogma.[2] The CISG Advisory Council *Opinion on the Inclusion of Standard Terms under the CISG* simply states that *contra proferentem* 'is an internationally well known rule of interpretation and it is generally regarded by commentators to apply under the CISG as well'.[3] The Advisory Council only provided a few references to support this statement and did not analyse the basis on which the rule is applicable under the Convention. Both of the two major English language commentaries on the CISG consider the *contra proferentem* rule to be 'a logical consequence'[4] of the general method of contractual interpretation set out in Article 8(2) CISG or even to constitute an emanation of one of the general principles on which the Convention is based.[5] Some authors suggest that the *contra proferentem* rule is so commonly followed that it constitutes part of the modern *lex mercatoria* or an international trade usage.[6] References are often made to Article 4.6 of the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial

[1] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).

[2] See, e.g. J Lookofsky, 'In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and the Preëmption under the 1980 Vienna Sales Convention (CISG)' (2003) 13 DukeJComp&Int'lL 263, 284 ('[c]ourts and arbitrators should … feel free to supplement Article 8 with the *contra proferentem* principle, as that (non-CISG) "common core" principle is generally understood in both domestic and international commercial law'); M Schmidt-Kessel, 'Art 8' in I Schwenzer and UG Schroeter (eds), *Commentary on the UN Convention on the International Sale of Goods* (OUP 2022) 159, para 53; I Schwenzer and E Muñoz, *Global Sales and Contract Law* (OUP 2022) para 26.61 (stating that the application of the *contra proferentem* rule to CISG contracts is 'virtually undisputed'). Only a couple of authors have found the applicability of the rule under the CISG questionable: UG Schroeter, 'Rückkaufverpflichtungen und "contra proferentem"-Regel unter dem UN-Kaufrecht' (2014) 14 Internationales Handelsrecht 173, 176–79; F Ferrari, 'Auslegung von Parteierklärungen und -verhalten nach UN-Kaufrecht' (2003) 3 Internationales Handelsrecht 10, 15.

[3] CISG Advisory Council, *Opinion No 13: Inclusion of Standard Terms under the CISG* (20 January 2017) 18, https://cisgac.com/wp-content/uploads/2023/02/CISG_Advisory_Council_Opinion_No_13.pdf.

[4] AL Zuppi, 'Art 8' in S Kröll, L Mistelis and P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG): A Commentary* (CH Beck/Hart/Nomos 2018) 146, 156–57. Similarly, see Schmidt-Kessel (n 2) para 53.

[5] Schmidt-Kessel (n 2) para 53.

[6] CM Schmitthoff, 'International Trade Usages' *ICC Institute of International Business Law and Practice Newsletter* (September 1987) 47; J Lookofsky, *Understanding the CISG: A Compact Guide to*

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Contracts (UPICC)[7] and to Article 5:103 of the Principles of European Contract Law (PECL), authored by a group of European academics,[8] to support the view that the rule of *contra proferentem* is universally recognised and, therefore, should also apply under the CISG.[9]

A similar approach can be seen in case law applying the CISG. In all the CISG cases in which the rule of *contra proferentem* was applied, the relevant court failed to conduct even a brief analysis to establish the exact basis on which the rule is applicable under the Convention. For example, in 2014, the German Federal Court of Justice simply stated that:

> the clause in question needs to be interpreted based on Art. 8(2) CISG, according to which statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. In these cases, the internationally recognized rule that ambiguous statements are to be interpreted *contra proferentem* applies; meaning that ambiguities are to be resolved to the disfavour of the declaring party—in this case, the Buyer as the supplier of the standard form contract.[10]

This article makes two fundamental contributions. First, it argues that the rule of *contra proferentem* is not applicable under the CISG. Second, it argues that the references to the rule of *contra proferentem* under the CISG are an instance of a broader phenomenon which has not been identified in the literature thus far: 'internationality overreach' in the interpretation of uniform private law conventions. 'Internationality overreach' is defined in this article as the tendency to project onto the provisions of a uniform private law convention doctrines and concepts which are inaccurately presumed to constitute the 'common core' of legal systems or universally recognised principles of private law. This article demonstrates that internationality overreach disrupts the goals underpinning the harmonisation of commercial law in two ways:

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*the 1980 Convention on Contracts for the International Sale of Goods* (Kluwer Law International 2022) 66.

[7] International Institute for the Unification of Private Law (UNIDROIT), 'Principles of International Commercial Contracts' (2016) (UPICC) https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

[8] Commission on European Contract Law ('Ole Lando Commission'), 'Principles of European Contract Law' (2002) (PECL) https://www.trans-lex.org/400200#head_85.

[9] M Stanivukovic, 'Interpretation of the Contract: Editorial Remarks on the Manner in which the PECL May Be Used to Interpret or Supplement CISG Article 8' 272, 276–277 and JM Perillo, "Interpretation of the Contract: Editorial Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 8' 48, 50–51, both in J 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* (CUP 2007).

[10] *Bowling Alleys Case* (Federal Court of Justice, Germany, 28 May 2014) CISG-online 2513, para 21 (translation by W Euler https://cisg-online.org/files/cases/8427/translationFile/2513_10462260.pdf). See also *Used Repainted Car Case* (Court of Appeal, Stuttgart, Germany, 31 March 2008) CISG-online 1658; *Cysteine Case* (Award) (International Economic and Trade Arbitration Commission, China, 7 January 2000) www.trans-lex.org/250650/_/china-7-january-2000-cietac-arbitration-proceeding ('The Tribunal cannot locate a guide from the CISG … [however,] according to the basic principle of contract interpretation—*contra proferentem*—if contract terms supplied by one party are unclear, an interpretation against that party shall be adopted').

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first, it undermines uniformity in the application of international conventions; and, second, it leads to outcomes that fall short of the agreement reached by the Contracting States during the drafting process.

## 2. Defining the *contra proferentem* rule

### 2.1. *The scope of the* contra proferentem *rule*

The *contra proferentem* rule was established in the late Middle Ages and has its roots in Roman law. In the most general sense, the rule provides that ambiguous contractual terms should be interpreted against the interests of the party who proposed them. Most modern jurisdictions recognise the *contra proferentem* rule in some form. However, the substance of the rule varies across legal systems.

First, in some legal systems the applicability of the rule is limited to consumer contracts, while in other legal systems the rule also applies to commercial contracts. In the European Union (EU), for example, the *contra proferentem* rule has been recognised by all Member States in the context of consumer contracts, as required by Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts.[11] Meanwhile, some Member States have extended the scope of the rule to commercial contracts,[12] whereas other Member States have confined its applicability to consumer contracts.[13] This observation is particularly relevant in the context of the CISG. The CISG covers only commercial contracts.[14] Thus, in some jurisdictions the *contra proferentem* rule does not apply to the types of contracts governed by the Convention.

Second, while many jurisdictions limit the scope of application of the rule to standard terms, in other jurisdictions it is also applicable to bespoke contractual terms. The various approaches followed by domestic legal systems can be illustrated by reference to international soft law rules. Article 5:103 PECL reads: 'Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.'[15] Thus, under the PECL the applicability of the *contra proferentem* rule is confined to standard terms. A similar solution has been adopted in Article 75 of the Principles of Latin American Contract Law, authored by a group of Latin American academics.[16] On the other hand, the UPICC takes a wider approach. Article 4.6 UPICC provides that

[11] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95, art 5.

[12] See, e.g. Bürgerliches Gesetzbuch (BGB; German Civil Code) sections 305c(2), 310; Codice Civile (Italian Civil Code) art 1370; Allgemeines bürgerliches Gesetzbuch (ABGB; Austrian Civil Code) section 915; Código Civil (Spanish Civil Code) art 1288.

[13] See, e.g. A Moraitis, 'Case 5. National Report: Greece' in CJW Baaij, D Cabrelli and L Macgregor (eds), *Interpretation of Commercial Contracts in European Private Law* (Intersentia 2020) 270, 271 n 25; Burgerlijk Wetboek (BW; Dutch Civil Code) art 6:238(2).

[14] CISG (n 1) art 2(a).

[15] PECL (n 8) art 5:103.

[16] 'Principles of Latin American Contract Law' (2017) (PLACL) (translation by R Momberg and S Vogenauer https://www.trans-lex.org/400750/_/principles-of-latin-american-contract-law-translation-by-rodrigo-momberg-and-stefan-vogenauer/).

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an interpretation against the party who supplied an ambiguous contractual term is preferred regardless of whether the term was individually negotiated.[17]

Third, while most jurisdictions theoretically treat the *contra proferentem* rule as a supplementary rule of contractual interpretation, the courts in some countries are more ready to apply the rule than in others. In some jurisdictions the rule is only referred to by the courts as a tie breaker, namely when a contractual term remains ambiguous after the general methods of interpretation have been exhausted.[18] Normally, the words used by the parties, the context in which the contract was concluded and commercial common sense are sufficient to ascertain the meaning of a clause.[19] This approach minimises the relevance of the rule to a negligible group of cases in which a court considers the relevant circumstances and establishes that two interpretations of a given term are equally plausible. One author pointed out that this approach 'is so narrow' that it could be regarded 'as not applying the rule at all'.[20]

In other legal systems, the courts are ready to apply the *contra proferentem* rule as soon as more than one interpretation of a term supplied by a party is possible.[21] Under this approach, any ambiguity in a clause is resolved against the interests of the party who proposed it. This approach moves away from the search for the parties' (subjective or objectively inferred) intention in the process of contractual interpretation and focuses on policy goals instead.[22]

### 2.2. *The rule of* favor debitoris

When analysing the relevance and content of the rule of *contra proferentem* across jurisdictions, one also needs to consider another, related rule, namely the rule of *favor debitoris*. Like the rule of *contra proferentem*, the rule of *favor debitoris* (or, conversely, *contra creditorem*) derives from Roman law. It provides that, in cases of ambiguity, a contractual term should be interpreted in a way which is less onerous to the debtor, regardless of which party drafted the term.

The rule of *favor debitoris* has been recognised, in particular, in the Romanistic legal systems, often alongside the rule of *contra proferentem*.[23] For example, Article 1190 of the French Civil Code states that 'Dans le doute, le contrat de gré à gré s'interprète contre le créancier et en faveur du débiteur, et le contrat d'adhésion contre celui qui

[17] UPICC (n 7) art 4.6.

[18] See, e.g. A Las Casas, 'Case 5. National Report: Italy' in Baaij, Cabrelli and Macgregor (n 13) 272–73; FP Patti, 'Unfair Terms Control in Business-to-Business Contracts' (2019) 5 ItalianLJ 581, 589–90; E Peel, 'Whither *Contra Proferentem*?' in A Burrows and E Peel (eds), *Contract Terms* (OUP 2007) 53, 57.

[19] *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, para 68 (Lord Neuberger).

[20] MB Rappaport, 'The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed against the Drafter' (1995) 30 GeorgiaLRev 171, 183.

[21] CJW Baaij, D Cabrelli and L Macgregor, 'Case 5. Editorial: Comparative Observations' in Baaij, Cabrelli and Macgregor (n 13) 284, 285.

[22] Rappaport (n 20) 186.

[23] See, e.g. Code Civil du Québec (Civil Code of Quebec) art 1432; E Muñoz, *Modern Law of Contracts and Sales in Latin America, Spain and Portugal* (Eleven International Publishing 2010) 250; S Vogenauer, 'Interpretation of Contracts and Control of Unfair Terms in Asia: A Comparison' in M Chen-Wishart and S Vogenauer (eds), *Contents of Contracts and Unfair Terms* (OUP 2020) 477, 498–99.

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l'a proposé.'[24] Beyond the Romanistic legal tradition, the rule of *favor debitoris* has been recognised in some jurisdictions as applicable in the interpretation of unilateral contracts.[25]

Applied simultaneously, the rules of *contra proferentem* and *favor debitoris* may lead to the opposite results in cases in which the ambiguous terms are supplied by the debtor. In such a case, the rule of *contra proferentem* requires an interpretation against the debtor whereas the rule of *favor debitoris* requires an interpretation in favour of the debtor. This observation is relevant to attempts to claim that the *contra proferentem* rule constitutes the 'common core' of contract laws across jurisdictions. To illustrate this point, one may refer to Article 4.6 UPICC, which states: 'If contract terms supplied by one party are unclear, an interpretation against that party is preferred.'[26] This provision applies to both standard and bespoke contractual terms. This means that the *contra proferentem* rule included in the UPICC would also apply in cases in which, for example, the French Civil Code provides for an interpretation *in favorem debitoris*.[27]

This short survey demonstrates that, although the *contra proferentem* rule is recognised in most legal systems,[28] its content, scope of application and the way in which it is applied by courts vary across jurisdictions. It follows that there is no commonly recognised understanding of the *contra proferentem* rule shared across jurisdictions that is sufficiently precise to be applied uniformly at the international level.

## 3. The *contra proferentem* rule and the CISG

### 3.1. Contractual interpretation under the CISG

The CISG does not include a provision dealing expressly with the interpretation of contracts. Article 8 CISG refers to the interpretation of individual 'statements' and the

[24] Code Civil des Français (French Civil Code) modified by the 'Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, de régime général et de la preuve des obligations', JORF no 0035 of 11 February 2016, (translation by J Cartwright, B Fauvarque-Cosson and S Whittaker https://www.trans-lex.org/601101/_/french-civil-code-2016/), art 1190: 'in case of ambiguity, a bespoke contract is interpreted against the creditor and in favour of the debtor [*favor debitoris*] and a standard form contract is interpreted against the person who put it forward [*contra proferentem*]'.

[25] See, e.g. Austrian Civil Code (n 12) section 915. For an overview, see Schwenzer and Muñoz (n 2) para 26.62 (including n 116).

[26] UPICC (n 7) art 4.6.

[27] The rule of *favor debitoris* is not recognised in common law jurisdictions. However, analogous problems arise in these jurisdictions in the context of the various formulations of the *contra proferentem* rule. Lewison indicates two main formulations of the rule in English law: (i) a formulation focusing on the party who put the clause forward; and (ii) a formulation focusing on the party who benefits from the clause. See K Lewison, *The Interpretation of Contracts* (Sweet & Maxwell 2024) paras 7.83–7.85. In *North v Marina* [2003] NSWSC 64, para 69, Campbell J pointed out: 'When there are these different strands of principle recognised in the case law concerning the application of the maxim, those strands could themselves come into conflict. A common example is … that a conveyance of land is commonly prepared by the transferee, yet it is a grant made by the transferor.'

[28] The *contra proferentem* rule is not recognised in all jurisdictions. See, e.g. M Okino, 'The Interpretation of Contracts under Japanese Law' in Chen-Wishart and Vogenauer (n 23) 161, 180–82.

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'conduct' of a party.[29] However, the legislative history of the Convention[30] clearly shows that this provision is equally applicable to the interpretation of the contract as a whole.[31]

Article 8 sets out the steps and criteria which a court needs to follow to ascertain the meaning of the parties' statements and conduct. Under Article 8(1) the court should first seek to determine the subjective intention of the declaring party, i.e. the party issuing the communication,[32] but only to the extent that the other party knew or could not have been unaware of that intention. Thus, if the declaring party uses the language in an unusual sense, they are required to make it clear to the addressee.[33]

The practical relevance of Article 8(1) CISG is limited because, once a dispute arises, it is very difficult for the party concerned to prove that the other party knew or could not have been unaware of their intention to attach a particular, unusual meaning to the issued communication. Nevertheless, this provision constitutes an important statement—it underlines the significance of party autonomy in the process of interpretation of the parties' communications under the CISG.[34] Party autonomy is one of the general principles on which the CISG is based.[35] In the context of contractual interpretation, this principle requires courts to refrain from giving a contractual term a meaning that the parties did not intend it to have.[36]

If the meaning of the communication cannot be ascertained in the way described in Article 8(1) CISG, a court is required to elicit its objective meaning in accordance with the understanding of a reasonable person in the position of the addressee (Article 8(2) CISG).[37] The need to resort to the objective test does not mean that the search for

[29] CISG (n 1) art 8.

[30] *Yearbook of the United Nations Commission on International Trade Law*, Vol IX (1978) 33–34; EA Farnsworth, 'Art. 8' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law—The 1980 Vienna Sales Convention* (Giuffrè 1987) 95, para 1.1.

[31] UNGA, 'Text of a Draft Convention on Contracts for the International Sale of Goods approved by the United Nations Commission on International Trade Law together with a Commentary prepared by the Secretariat' (14 March 1979) UN Doc A/CONF.97/5, art 7, para 2 (Secretariat Commentary). This draft provision is the current CISG (n 1) art 8.

[32] See, e.g. *Okuma MA-400 Machine Case* (District Court, Limburg, the Netherlands 2 February 2022) CISG-online 5832; *Ölflex Solar XLSv Cables Case* (Opinion of the Advocate General, Supreme Court of the Netherlands, 5 February 2021) CISG-online 5602; *Chinese Wire Rod Case II* (Federal Supreme Court, Switzerland, 2 April 2015) CISG-online 2592; *Shuttle Packaging Systems LLC v Jacob Tsonakis INA SA* (District Court for the Western District of Michigan, US, 17 December 2001) CISG-online 773.

[33] CISG (n 1) art 8(1) states: 'For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.'

[34] See also S Vogenauer, 'Art. 4.1' in S Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015) 575, para 13.

[35] See, e.g. U Magnus, 'Allgemeine Grundsätze im UN-Kaufrecht' (1995) 59 Rabels Zeitschrift für ausländisches und internationales Privatrecht 469, 480; UG Schroeter, 'Contract Validity and the CISG' (2017) 22 UnifLRev 47, 56–57; *Design of Pagers Case* (Court of Appeal, Ghent, Belgium, 15 May 2002) CISG-online 746; *Natural Stone Case I* (District Court, Stendal, Germany, 12 October 2000) CISG-online 592.

[36] Vogenauer, 'Art. 4.1' (n 34).

[37] CISG (n 1) art 8(2) states: 'If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.'

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the parties' intention is irrelevant under Article 8(2) CISG. Statements and conduct by contracting parties are their attempts to communicate their intention to each other. To ensure that accurate beliefs are formed about this intention, the declaring party must choose the language that conveys a particular meaning to the reasonable person of the same kind as the addressee.[38] This reveals yet another feature of the principle of party autonomy: for their private autonomy to be truly effective, the party must evaluate the relevant environment and shape their communication accordingly; but, at the same time, the party can expect that, if they do so, their intention will be accurately identified, and given effect to, by a court.[39]

The need to search for the parties' intention in the process of contractual interpretation is also visible in Article 8(3) CISG, which indicates the range of circumstances that must be considered by a court in the process of ascertaining the meaning of a contractual term. Article 8(3) CISG states:

> 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.[40]

The significance of the parties' intention is highlighted in two ways in this provision. First, the provision does not invite a court 'to interpret' the statement or conduct, but rather to 'determine the intent' of a party or the understanding of a reasonable person.[41] Second, the provision requires the adjudicator to review the entire contracting process, including the pre-contractual negotiations and any conduct of the parties subsequent to the conclusion of the contract. The evidence of pre- and post-contractual conduct is usually inadmissible in common law jurisdictions, which prioritise the contractual document in the process of interpretation.[42] The admissibility of such evidence under the CISG is meant to give a court a better understanding of what the parties intended the contractual term to mean.

### 3.2. *Article 8 CISG and the rule of* contra proferentem

The above analysis shows that the ultimate objective of the process of interpretation set out in Article 8 CISG is to elicit the subjective or the objectively inferred intention of the parties.[43] As such, Article 8 promotes the principle of party autonomy. Accordingly, Article 8 has a very different purpose to the rule of *contra proferentem*. The rule of *contra proferentem* does not serve to identify the meaning that the parties intended to give to the contract, nor even the meaning that would have been assigned to the

[38] G Leggatt, 'Making Sense of Contracts: The Rational Choice Theory' (2015) 131 LQR 454, 465–67.

[39] See D Wielsch, 'Contract Interpretation Regimes' (2018) 81 MLR 958, 962.

[40] CISG (n 1) art 8(3).

[41] B Zeller, 'Interpretation of Article 8: Is It Consistent with the Function of the Global Jurisconsultorium?' (2013) 13 Internationales Handelsrecht 89, 90.

[42] For a more detailed analysis see, e.g. G McMeel, *McMeel on the Construction of Contracts* (OUP 2017) paras 5.61–5.123. For a comparison of the objective approach adopted in art 8(2) CISG and the objective approach followed in common law jurisdictions, see B Zeller, 'Determining the Contractual Intent of Parties under the CISG and Common Law—A Comparative Analysis' (2002) 4 EuropeanJLReform 629.

[43] See also Zeller (n 42) 635; Zuppi (n 4) 152–54.

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contract by a reasonable person.[44] The application of the rule does not involve an examination of the parties' intentions. Instead, *contra proferentem* is a rule of policy which applies when the subjective or objectively inferred intention of the parties cannot be identified.

A similar conclusion was reached by the drafters of the UPICC. The drafters briefly examined the possibility of including the *contra proferentem* rule as one of the factors to be considered by the adjudicator when determining the parties' intention in Article 4.3 UPICC, a provision analogous to Article 8(3) CISG. However, there was a common understanding among the drafters[45] that *contra proferentem* is 'a different kind of rule'[46] which has 'nothing to do with the real or constructed intention of the parties'.[47]

Yet the view that the *contra proferentem* rule can be derived from the content of Article 8 CISG is common. This view can be traced back to John Honnold. In his influential text published shortly after the CISG entered into force, Honnold stated:

> Article 8(2) places the burden on one who prepares a communication or who drafts a contract to communicate clearly to a reasonable person in the same position as the other party. This provision has roots in the classic rule that doubts are to be resolved against the drafter (*contra proferentem*), but the application of this principle has special significance in international sales.[48]

Arguably, this statement laid the foundations for a widely followed approach, which associates the *contra proferentem* rule with the need to respect the recipient's understanding of a communication under Article 8 CISG.[49] In accordance with this approach, one of the current leading commentaries on the CISG states:

> The internationally known rule that unclear terms are to be interpreted *contra proferentem* … also applies under the Convention. In a reverse of genealogy, the rule is in the Convention as a consequence of the authoritative character of the addressee's understanding.[50]

Yet when one looks at the examples given by Honnold to explain the practical relevance of the rule set out in Article 8(2) CISG, these were not in accordance with the classic understanding of the rule of *contra proferentem*. Honnold admitted this himself when he stated 'but the application of this principle has special significance in

[44] See, e.g. AL Corbin, *Corbin on Contracts* (LexisNexis 1998) vol 5, 306; KN Llewellyn, 'Book Review: O Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (Sweet & Maxwell 1937)' (1939) 52 HarvLRev 700, 703.

[45] The members of the working group who initially suggested adding the authorship of contractual terms as one of the factors indicated in the UPICC (n 7) art 4.3 eventually supported the position that there is no relationship between the *contra proferentem* rule and the rules on objective interpretation of contracts. See Working Group for the Preparation of Principles for International Commercial Contracts, 'Summary Records of the Meeting Held in Rome from 30 April to 4 May 1990' (UNIDROIT Secretariat, April 1991) www.unidroit.org/english/documents/1991/study50/s-50-misc-15-e.pdf 38–40 (Summary Records).

[46] ibid 39 (D Tallon).

[47] ibid 40 (EA Farnsworth).

[48] JO Honnold and HM Flechtner, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention* (Wolters Kluwer 2021) para 136.

[49] See, e.g. Zuppi (n 4) 156–7; *Bowling Alleys Case* (n 10).

[50] Schmidt-Kessel (n 2) para 53.

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international sales'. He explained that 'when the parties are based in different language and legal settings' they should 'avoid using expressions that are obscure, or even worse, are "false friends" … with one "clear" meaning to the one who writes and a different "clear" meaning to the one who reads'.[51] He pointed out that particular legal terms, such as 'warranty', 'condition' or 'trust', may have different meanings in different legal cultures. Furthermore, there may be 'wide disparities between modes of expression … in the different areas and types of enterprises that may meet in international trade'.[52] Honnold finished his analysis by stating: 'it will at least be prudent for a party in formulating a proposal or other statement to take care that it not be given a different understanding by "a reasonable person of the same kind as the *other* party"'.[53]

The clarifications offered by Honnold, in fact, illustrate the operation of the objective test set out in Article 8(2) CISG rather than the rule of *contra proferentem* as traditionally understood. He argues that the declaring party should consider that certain words may have different meanings in different languages, legal systems or areas of trade and should formulate their communication accordingly. On the other hand, the case law in which the *contra proferentem* rule has been applied under the CISG concerns very different types of ambiguity, ones that do not concentrate on the diversity of the parties involved in a given transaction but arise from the ordinary use of language. In one case, for example, the court had to determine whether the English phrase 'or otherwise dispose of' should be understood as 'to sell' or whether it should also include leasing an object to another person.[54] This type of situation is not addressed in Honnold's analysis.

### 3.3. The understanding of the addressee

In every process of interpretation, one can seek to identify the meaning of the speaker and the meaning of the listener. The meaning of the listener depends upon their background and beliefs. Article 8 CISG makes it clear that background knowledge available only to the speaker should be eliminated from the exercise of interpretation. Accordingly, the provision requires the declaring party to either convey their intention in such a way that it is understandable to a reasonable person of the same kind as the addressee (Article 8(2)) or to clarify their intent to the addressee if they use the language in an entirely different sense from that which would be attached to it by a reasonable person (Article 8(1)). If the declaring party satisfies one of these standards, their intent, rather than that of the addressee, will prevail.[55]

What seems to be understated by the authors associating the test set out in Article 8(2) CISG with the rule of *contra proferentem* is that this provision refers to the understanding of a hypothetical (as opposed to the actual) addressee, one who satisfies the standard of reasonableness that can be expected of a person of the same kind. The reasonable person test in Article 8(2) CISG is 'strongly individualised and

[51] Honnold and Flechtner (n 48) para 136.
[52] ibid para 137.
[53] ibid (emphasis in original).
[54] *Bowling Alleys Case* (n 10).
[55] Farnsworth (n 30) paras 2.3–2.4.

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contextualised'.[56] This test does not rely on the 'reasonable meaning' of a contract term as such.[57] Instead, it focuses on the meaning that would have been assigned to a given term by a reasonable professional[58] in the relevant branch of business, a person with the same technical expertise, linguistic background,[59] knowledge of world markets, general business experience and experience in similar types of transactions as the addressee.[60] Thus, the addressee of the communication is expected to show qualities typical of a reasonable professional of the same kind.

Examples from the case law show that the application of the standard of reasonableness set out in Article 8(2) CISG often leads to an interpretation that is unfavourable to a party because of special characteristics, knowledge or skill that the court expects the reasonable person of the same kind to have. One example is a decision of the Swiss Federal Supreme Court of 22 December 2000.[61] Both the buyer and the seller were traders in textile machinery. The contract involved the sale of a 14 year old used textile machine. The contract contained a clause stating: 'The parties agree to the sale of 1 piece rotary printing machine, brand *Stork*, Type RD-IV Airflow A 640.000, Rapport equipment 641 mm–1,018 mm.'

The rapport length indicated in the contract clause was the same as one that the seller indicated in a document sent to the buyer prior to the conclusion of the contract. After delivery, the buyer realised that the machine was only equipped for a rapport length of 641 mm. The buyer claimed that the machine did not correspond to the sales contract because the stencil holders for a rapport length of 1,018 mm were missing.

The seller claimed that the clause in the contract was only meant as technical information in respect of the possible rapport length; it was not meant as a promise that the relevant equipment would be included. Applying the reasonableness standard set out in Article 8(2) CISG, the Swiss Federal Supreme Court emphasised that the buyer was an expert in the field and, therefore, they ought to have known that the equipment sold with the used machine would not conform to the latest technical specifications. The court held that, given the buyer's expertise, the seller 'was entitled to expect that the Buyer had concluded the contract in full knowledge of the technical possibilities of the machinery and its equipment'.[62] Consequently, the contractual clause was interpreted by the court as having merely an informative function rather than requiring the machine to be delivered with a full rapport length.

The Court referred to the phrase 'the understanding of the reasonable person of the same kind' in Article 8(2) CISG in order to ascertain the parties' intention. The Court did not view the phrase as giving an advantage to one of the parties. The intent of the seller prevailed in this case because it aligned with the understanding of the contractual

[56] Vogenauer, 'Art. 4.1' (n 34) para 5.

[57] ibid.

[58] Given that the scope of application of the CISG is limited to commercial sales, the addressee of a statement will always be a commercial party.

[59] Schmidt-Kessel (n 2) paras 46–49.

[60] Farnsworth (n 30) para 2.4. See also Official Comment to art 4.1, UPICC (n 7) 138; Vogenauer, 'Art. 4.1' (n 34) para 5.

[61] *Roland Schmidt GmbH v Textil-Werke Blumenegg AG* (Federal Supreme Court, Switzerland, 22 December 2000) CISG-online 628.

[62] ibid para 22.

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clause that a reasonable person of the same kind as the buyer would have given to it. The application of the *contra proferentem* rule in this instance would arguably lead to the opposite result, finding no support in the text of Article 8(2) CISG.

To conclude, Article 8(2) CISG is not based on the idea that the understanding of the addressee is determinative and it cannot justify the rule of *contra proferentem*. This provision merely introduces a standard that the declaring party needs to satisfy for their intention to prevail. In this context, it is also worth pointing out that even Article 8(1) CISG, which refers to the declaring parties' subjective intent, does not place the entire burden of ensuring the clarity of communication on that party. This provision states that a statement should be interpreted in accordance with a party's subjective intent where the other party 'could not have been unaware' of that intent. The phrase 'could not have been unaware' means that, even where the addressee does not have positive knowledge of the intent of the other party, this intent can prevail if the addressee has been particularly careless.[63] In cases in which the declaring party's intent is easy to recognise because of the special expertise of the addressee or where the circumstances unambiguously require an inquiry, the addressee is expected to reveal the discrepancy between the suspected intent of the declaring party and the reasonable understanding of the issued communication.[64] If the addressee remains passive, the subjective intent of the declaring party prevails.

## 4. The *contra proferentem* rule as a usage

### 4.1. *The* contra proferentem *rule under Article 9(2) CISG*

It has been suggested that the rule of *contra proferentem* is applicable under the CISG because it is so commonly recognised that it constitutes an international trade usage.[65] The CISG regulates the issue of usages in Articles 8(3) and 9. The concept of usage under the Convention is interpreted autonomously from domestic laws.[66] Article 8(3) CISG indicates usage as one of the circumstances which the court should refer to in order to determine the party's intention or the understanding of a reasonable person.[67] In this sense, usage can serve as an aid to the interpretation of a contract by supplying evidence of the commercial background in which the contract was concluded. As explained in Section 3.2, the *contra proferentem* rule cannot be relevant under Article

[63] The formulation 'could not have been unaware' requires a high degree of carelessness: see, e.g. Schmidt-Kessel (n 2) para 18.

[64] *Italian Clothes Case I* (District Court, Kassel, Germany, 15 February 1996) CISG–online 190.

[65] See, e.g. Lookofsky (n 6) 66, who suggests that the applicability of the *contra proferentem* rule under the CISG can be justified by reference to '*lex mercatoria* and the like'. The concept of *lex mercatoria* is ambiguous. Nevertheless, in the literature on the CISG it is often used in the context of art 9, regulating the relevance of international usages, in particular by authors who support the normative understanding of usage under the Convention. See, e.g. P Perales Viscasillas, 'Art. 9' in Kröll, Mistelis and Perales Viscasillas (n 4) 162, para 17.

[66] P Hellwege, 'Understanding Usage in International Contract Law Harmonisation' (2018) 66 AmJCompL 127, 137; F Ferrari, 'Relevant Trade Usage and Practices under UN Sales Law' (2002) EurLegalF 273, 273–74; G Saumier, 'Trade Usages in the Convention on Contracts for the International Sale of Goods' in F Gélinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration* (OUP 2016) 125, 134–5.

[67] CISG (n 1) art 8(3).

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8(3) CISG because it is not meant to help identify what the parties had intended the contract to mean.

Article 9(1) CISG concerns usages agreed upon by the parties and practices established between them. The provision that is relevant in the context of the rule of *contra proferentem* is Article 9(2) CISG, which reads:

> The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.[68]

Article 9 CISG adopts the contractual understanding of usage,[69] meaning that usages derive their binding force only from the parties' agreement (be it explicit or implied). The requirement that the usage must be one 'of which the parties knew or ought to have known' is intended to ensure that there is a link between the application of a particular usage and the parties' (explicit or constructed) intention.[70] Where the criteria set out in Article 9(2) CISG are satisfied, the usage becomes part of the sales contract; it is not incorporated into the Convention itself.[71] Thus, in the sense accepted in Article 9(2) CISG, usage is a source of an implied contractual term. Schmidt-Kessel explains:

> Article 9 is not concerned with the acknowledgment of legal norms or of customary law, or even a *lex mercatoria*, but rather with the determination of the content of the parties' agreement. Thus, Article 9(2) does not establish any normative validity of the respective international trade usages, it only establishes terms implied by usage.[72]

The fact that the CISG adopts the contractual rather than normative understanding of usage is of significance to the question of whether the rule of *contra proferentem* should be incorporated as a usage under the Convention. If a usage is regarded as applicable by express or implied agreement, then arguably only rules concerning the formation[73] and performance of a contract can qualify as a usage. This is because only such rules can depend for their efficacy on mercantile conduct and practices rather than taking effect as broadly based rules of law. The rule of *contra proferentem*, where applicable, is a tool in the hands of the adjudicator to be used where the intentions of the parties are unclear. In this sense, the *contra proferentem* rule is addressed to the

[68] CISG (n 1) art 9(2).

[69] See, e.g. R Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 ICLQ 1, 7–8; D Saidov, 'Trade Usages in International Sales Law' in D Saidov (ed), *Research Handbook on International and Comparative Sale of Goods Law* (Elgar 2019) 96, 103; G Eörsi, 'General Provisions' in NM Galston and H Smit (eds), *International Sales* (Bender 1984) para 2.06; Honnold and Flechtner (n 48) para 155; WP Johnson, 'Analysis of Incoterms as Usage under Article 9 of the CISG' (2013) 35 UPaLRev 379, 405–6; S Bainbridge, 'Trade Usages in International Sale of Goods: An Analysis of the 1964 and 1980 Sales Conventions' (1984) 24 VaJInt'lL 619, 651–52, 661.

[70] Goode points out that the reference to usages which the parties 'ought to have known' is consistent with the objective test for the interpretation of contracts. See Goode (n 69) 8.

[71] Honnold and Flechtner (n 48) para 155.

[72] M Schmidt-Kessel, 'Art 9' in I Schwenzer and UG Schroeter (eds), *Commentary on the UN Convention on the International Sale of Goods* (OUP 2022) 200, para 3.

[73] CISG (n 1) art 9(2) explicitly recognises the relevance of usages at the stage of formation of a contract.

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court and not to the parties and, therefore, cannot be seen as an implied contractual term.[74]

### 4.2. *The rule of* contra proferentem *and the normative understanding of usage*

Even though the contractual approach to usage results from a deliberate choice taken during the CISG drafting process,[75] some authors have argued that it is the normative understanding of usage that is relevant under the Convention.[76] This would mean that a trade usage should be seen under the CISG as a source of law rather than being applicable by virtue of the parties' implied agreement. Yet even if the normative understanding of usage were adopted in the CISG, this would not support incorporating the rule of *contra proferentem* as a usage. One major reason is the lack of agreement, at the international level, as to the exact content of the *contra proferentem* rule.

Is the rule of *contra proferentem*, as an international usage, to be confined to the interpretation of standard terms, or does it also cover bespoke contractual terms?[77] Does the usage always operate against the party who drafted a given term or are there also cases in which it requires interpretation against the creditor, irrespective of who supplied the term?[78] Is the usage limited to the interpretation of contracts, as provided by the UPICC, or does it also apply to the interpretation of unilateral statements covered by Article 8 CISG?[79] Finally, does this usage only cover consumer contracts or also commercial contracts? If the former, then such a usage would be irrelevant under the CISG because the Convention governs only commercial contracts.

It is submitted that there is no evidence of a uniform international usage with regards to the rule of *contra proferentem* that would be valid for the types of contracts governed by the CISG. Some decisions have recognised the UPICC as evidencing

[74] As pointed out by Mindy Chen-Wishart, '[w]hile the parties are masters of their contracts, it is for the *courts* to determine the meaning of contractual terms': see M Chen-Wishart, *Contract Law* (OUP 2022) 414 (emphasis added). Commercial parties sometimes explicitly exclude the applicability of the *contra proferentem* rule in a contract or include other clauses concerning contractual interpretation. Such contractual clauses can be seen as a guidance to the court. These types of clauses do not refer to the parties' expected conduct that could constitute a usage.

[75] Secretariat Commentary (n 31) art 8, para 5 (currently CISG (n 1) art 9); *Yearbook of the UN Commission on International Trade Law* Volume I (1968–70) 183; *Yearbook of the UN Commission on International Trade Law* Volume II (1971) 46, 57–58 (in particular 58, para 76); P Schlechtriem, *Uniform Sales Law—The UN Convention on Contracts for the International Sale of Goods* (Manz 1986) 40; Bainbridge (n 69) 633, 638, 653–57.

[76] See, e.g. MJ Bonell, 'Art. 9' in Bianca and Bonell (n 30) 103, para 2.2.1; Perales Viscasillas (n 65) para 24. For a detailed analysis of this approach, see Hellwege (n 66) 133–37.

[77] Schmidt-Kessel states that, under the CISG, the rule of *contra proferentem* applies also to bespoke contractual terms: see Schmidt-Kessel (n 2) para 53.

[78] Schmidt-Kessel states that the relevance of the rule of *favor debitoris* under the CISG is 'still an open question. However, the objective approach to interpretation under Article 8(2) argues strongly against it': ibid para 59. It is not clear why the author thinks that the rule of *favor debitoris* goes against the objective interpretation set out in art 8(2) but the rule of *contra proferentem* does not.

[79] The drafters of the UPICC deliberately excluded the applicability of the *contra proferentem* rule to statements and conduct which do not form part of a contract: see Summary Records (n 45) 42. However, under the CISG, the rule has been interpreted as covering also unilateral statements: see the examples given by Schmidt-Kessel (n 2) para 54.

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an international trade usage.[80] It is often emphasised that the UPICC contains both provisions which introduce new rules and provisions which restate preexisting rules or usages.[81] Article 4.6 UPICC, which regulates the rule of *contra proferentem*, clearly belongs to the former category. The text of the provision was the subject of lengthy discussion during the drafting process. The drafting materials show that the drafters of the UPICC themselves believed that Article 4.6 regulates the rule of *contra proferentem* in a way that goes beyond its traditional understanding.[82] One major reason for this is that Article 4.6 extends the rule to individually negotiated terms, whereas many jurisdictions limit the rule to standard terms. One issue that raised doubts during the drafting process was the relevance of the rule of *favor debitoris*. Professor Crépeau, a delegate from Québec, pointed out that the interpretation in favour of the debtor (rather than the rule of *contra proferentem*) is 'the basic rule of interpretation' in some jurisdictions belonging to the Romanistic tradition; he proposed that this rule should apply under the UPICC as well, at least in some instances.[83] At the most basic level, some members of the drafting committee believed that the *contra proferentem* rule should not be included in the UPICC at all. Professor Drobnig, for instance, a delegate from Germany, argued that the rule was too mechanical, strict and concerned only with certain aspects of a given case. He believed that 'the modern approach was to have a general formula for interpretation' focused on the intentions of the parties and the understanding of a reasonable person.[84] Throughout the drafting process, no mention was made of merchants' perceptions regarding the rule of *contra proferentem*, nor trade usages or practices relating to the interpretation of contracts more broadly. The final text of Article 4.6 UPICC is a result of policy choices made by the drafters who tried to find 'the best rule'; the provision was never meant to reflect a trade usage existing at the time of its drafting.

Still, the rule expressed in Article 4.6 UPICC could have *become* a trade usage if, after the enactment of the UPICC, the rule were consistently followed by parties involved in international sales transactions. Yet it seems that this has not been the case. The Unilex database, which collects international case law on the UPICC,[85] includes only two cases involving an international contract for the sale of goods in which Article 4.6

[80] See, e.g. Case No 229/1996 (Award) (International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, 5 June 1997). For a summary, see Unilex, *UNIDROIT Principles: Case 669* www.unilex.info/principles/case/669. The use of the UPICC as a whole as evidence of a trade usage is unfounded. The principles are drawn from various solutions adopted in domestic laws and in international law, whereas usages are created through business practices. See, e.g. R Michaels, 'Preamble I: Purposes, Legal Nature and Scope of the PICC; Applicability by Courts; Use of the PICC for the Purpose of Interpretation and Supplementation and as a Model' in Vogenauer (n 34) 32, para 79; E Muñoz, 'Soft Law Instruments as Usages of Trade in CISG Contracts and International Commercial Arbitration' (2021) 50 UniformCommercialCodeLJ 1, 6–7, 20–22. See more generally Goode (n 69) 19–25.

[81] Michaels (n 80) paras 1, 3–4.

[82] Summary Records (n 45) 43 ('the scope of the provision had been considerably broadened').

[83] ibid 30–31.

[84] ibid 33, 38. See also the statement by AS Hartkamp, ibid 37, emphasising that the rules on interpretation based on the reasonable person test are 'much more important nowadays' than the 'old rules', such as *contra proferentem*.

[85] The editors of the Unilex database emphasise that it may not be complete. Nonetheless, this database is the most comprehensive collection of case law on the UPICC that is currently available.

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was applied. In one of these cases, the contract was governed by English law. The sole arbitrator referred to Article 4.6 UPICC because, in their view, this provision was 'to a large extent identical to the English canons of construction'.[86] In the second case, the parties agreed to the tribunal applying the UPICC *in toto* because there was uncertainty as to the applicable law.[87] Thus, Article 4.6 was one of several provisions of the UPICC referred to in that case. It follows that the reported decisions do not offer sufficient evidence of common recognition of the *contra proferentem* rule, as expressed in Article 4.6 UPICC, in the types of contracts governed by the CISG.

### 4.3. *Undefined usages and* faux amis

Both the comparative law literature and the literature on the interpretation of uniform private law conventions often warn against the risk of *faux amis*, that is, 'false friends'. The concept of *faux amis* has been used to describe terms which seem familiar to an interpreter but which, in fact, are defined differently in another jurisdiction or in the uniform law instrument than in the legal system with which the interpreter is familiar.[88] In essence, the problem of *faux amis* shows that similarities may be misleading. For example, *Hadley v Baxendale*,[89] the leading English case on remoteness of damage in contract law, resembles Article 1231-3 French Civil Code. The French provision, however, includes an exception to the rule, which is not known in English law. The provision states: 'Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qui pouvaient être prévus lors de la conclusion du contrat, sauf lorsque l'inexécution est due à une faute lourde ou dolosive.'[90] Under English law, on the other hand, the rule also applies to intentional breaches.

While in comparative law the consequences of the problem of *faux amis* are visible primarily at the analytical level—that is, in the literature examining the operation of certain doctrines in different jurisdictions—in uniform private law this problem often affects decisions made by courts in specific cases. For example, the English case of *Hadley v Baxendale* has also gained recognition in the United States (US).[91] The CISG also includes a foreseeability rule in Article 74, which states that 'damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract'.[92] In the US case of *Delchi Carrier SpA v*

[86] *Case No 11869* (Award) (International Chamber of Commerce International Court of Arbitration, date unknown) www.unilex.info/principles/case/1659.

[87] (Award) (Arbitration Court of the Lausanne Chamber of Commerce and Industry, 17 May 2002) www.unilex.info/principles/case/861.

[88] See, e.g. C Baasch Andersen, 'Uniformity in the CISG in the First Decade of its Application' in IF Fletcher, LA Mistelis and M Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) 289, 293–95; Honnold and Flechtner (n 48) 111; K Kryla-Cudna, 'Adequate Assurance of Performance under the UN Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code' (2021) 70 ICLQ 935, 956–57.

[89] *Hadley v Baxendale* (1854) 156 ER 145.

[90] French Civil Code (translation by Cartwright, Fauvarque-Cosson and Whittaker) (n 24): 'A debtor is bound only to damages which were either foreseen or which could have been foreseen at the time of conclusion of the contract, except where non-performance was due to a gross or dishonest fault'.

[91] See, e.g. MA Eisenberg, 'The Principle of *Hadley v Baxendale*' (1992) 80 CalLRev 563.

[92] CISG (n 1) art 74.

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*Rotorex Corp*, when applying Article 74 CISG, the Court simply stated that the rule set out in that provision resembled the 'familiar principle of foreseeability established in *Hadley v Baxendale*'.[93] Consequently, instead of examining the specific meaning of the foreseeability rule under the CISG, the Court confined its analysis to materials concerning a similar rule from its own jurisdiction.

Accepting that a rule such as *contra proferentem*, whose exact content is undefined at the international level, can constitute an international trade usage would lead to precisely the same problems as the issue of *faux amis*. It could arguably have even more far-reaching consequences. In the typical *faux amis* scenario, the applicable foreign law or international convention is interpreted by the court with reference to a concept that it knows from its own legal system. In the case of a vaguely defined international trade usage, the court's decision would be detached from any specific legal system. This means that both the general contours of the rule as well as the specific conditions for its application would need to be determined by the national court in each individual case. Transnational law lacks a comprehensive framework which the courts could refer to in case of doubt.[94] Therefore, an attempt by a court to determine the exact content of an unclear international usage may undermine commercial certainty to an even greater extent than cases in which the court interprets a uniform law instrument against the background of their nationally coined preconceptions.

## 5. The rule of *contra proferentem* and the general principles of the CISG

Some authors have suggested that the applicability of the *contra proferentem* rule under the CISG is justified by the general principles underlying the Convention.[95] Article 7(2) CISG states that 'matters governed by the Convention' but 'not expressly settled in it are to be settled in conformity with the general principles on which' the Convention is based.[96] The general principles underlying the CISG are either expressly stated in its provisions or can be extracted from provisions dealing with individual issues. It has also been argued that some general principles can be drawn from sources 'external' to the Convention,[97] in particular from the UPICC.[98] The UPICC was drawn up after the entry into force of the CISG. It is thus recognised that only those rules contained in the UPICC that restate preexisting principles may be used to supplement the Convention. As explained in Section 4.2, Article 4.6 UPICC which regulates the rule of *contra proferentem,* does not constitute a restatement of a preexisting principle. Therefore, it cannot be used to fill a gap in the CISG.

[93] *Delchi Carrier SpA v Rotorex Corp* 71 F 3d 1024 (United States Court of Appeals for the Second Circuit) 1995, 1029.

[94] See, e.g. J Basedow, *Uniform Law. Legal Responses to Globalisation* (Mohr Siebeck 2024) 95–97.

[95] See, e.g. Lookofsky (n 6); Schmidt-Kessel (n 2) para 53.

[96] CISG (n 1) art 7(2).

[97] M Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' (2000) 5 UnifLRev 683, 695–97.

[98] UNGA, 'Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a Focus on Sales): Note by the Secretariat' (17 March 2020) UN Doc A/CN.9/1029, paras 350–352. For a more detailed analysis, see M Bridge, 'The CISG and the UNIDROIT Principles of International Commercial Contracts' (2014) 19 UnifLRev 623.

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Notably, most of the authors asserting that the *contra proferentem* rule derives from the general principles underlying the CISG fail to indicate the exact general principle that justifies the rule. One exception is Martin Schmidt-Kessel who, in a leading commentary on the CISG, briefly suggests that the general principle justifying the rule of *contra proferentem* is related to the overall distribution of risk between the parties adopted in the Convention and can be extracted from Article 8 as well as Articles 14, 35(2)(b), 39(1) and 43(1).[99] Referring to these provisions, Schmidt-Kessel states that the party who 'drafted or otherwise supplied' a given formulation 'must bear the risk of its possible ambiguity'.[100] This suggestion is unconvincing for a simple reason. The indicated provisions of the CISG regulate specific instances of communication between the parties: an offer to conclude a contract (Article 14), information provided to the seller about a special purpose for which the goods are purchased (Article 35(2)(b)), a notice to the seller about the non-conformity of the goods (Article 39(1)) and a right or claim of a third party regarding the goods (Article 43(1)). These instances of communication are subject to interpretation in accordance with Article 8. This means that the party issuing a communication is merely required to shape it in such a way that it is understandable to a reasonable person of the same kind as the addressee.

Thus, for example, Article 35(2)(b) requires the buyer who wishes to use the goods for a particular purpose to inform the seller of that purpose. Otherwise, the seller is not liable if the goods are unfit for that purpose. A line of case law relating to this provision concerns a situation in which the buyer informed the seller that they intended to use the goods in a specific country but did not inform the seller about public law regulations existing in that country with which the goods had to comply.[101] Although courts have accepted that, in principle, the buyer must convey to the seller information about the public law requirements of the importing country, they have also recognised that, even if the buyer does not do so, the seller will be liable for the goods' non-compliance with those regulations if the circumstances suggest that the seller should have known of them. This can be the case, for example, if the same regulations exist in the seller's country, or if the seller maintains a branch in the importing country or often exports to that country. In other words, the seller is expected to satisfy the standard of a reasonable professional of the same kind, a person who has similar expertise and experience in the relevant kind of transactions.

The basic weakness of Schmidt-Kessel's suggestion is that it is based on an attempt to fill a 'gap' in the CISG rules on interpretation through the lens of provisions that are, in a sense, subordinate to those rules. Articles 14, 35(2)(b), 39(1) and 43(1) could only operate in accordance with the rule of *contra proferentem* if that rule were incorporated into Article 8.

[99] Schmidt-Kessel (n 2) para 53 (including n 334).

[100] ibid.

[101] *Smallmon v Transport Sales Limited* (Court of Appeal of New Zealand, 22 July 2011) CISG-online 2215; *New Zealand Mussels Case* (Federal Court of Justice, Germany, 8 March 1995) CISG-online 144; *Caiato v Factor France S.A.* (Court of Appeal, Grenoble, France, 13 September 1995) CISG-online 157; *Medical Marketing Int'l, Inc. v Internazionale Medico Scientifica, S.r.l.* (District Court for the Eastern District of Louisiana, USA, 17 May 1999) CISG-online 387.

Articles 39(1) and 43(1) could also be considered from a different, albeit related, angle. These provisions require the buyer to notify the seller of non-conformity or the right or claim of a third party regarding the goods within a reasonable time. Some authors have derived from these provisions a general duty to communicate information that is needed by a trading partner.[102] In the context of the rule of *contra proferentem*, a general duty to inform could imply that the party who supplies a contract term bears the risk of not conveying all information needed to ensure its full clarity. However, the attempts to formulate a general duty to inform under the CISG have been convincingly criticised.[103] In the commercial context, the parties should be able to determine directly from the provisions of a given piece of legislation when and what information they are obligated to share. A general duty to inform would blur the parties' legal situation.[104]

One principle that requires closer analysis in the context of the rule of *contra proferentem* is the principle of good faith. The relevance of the principle of good faith under the CISG is not without controversy.[105] A detailed analysis of this issue is, however, beyond the scope of this article. What needs to be examined here is whether the principle of good faith, assuming that it can be seen as a general principle underlying the CISG, could justify the inclusion of the *contra proferentem* rule among the CISG rules on interpretation.

There is no generally acknowledged definition of good faith at the international level nor, more specifically, under the CISG.[106] In general terms, good faith is concerned with moral standards of conduct, including honesty, candour and loyalty.[107] In the realm of contract law, good faith is understood objectively 'as a norm for the conduct of contracting parties'[108] rather than as a subjective state of mind. The standard of good faith is usually explained as a duty of the parties to take each other's interests into account.[109] While the rule of *contra proferentem* has been associated with the duty to act in good faith in some jurisdictions,[110] in others it has been seen as going against the principle of good faith. For example, the drafters of the Polish Code of Obligations of 1933 thought that the *contra proferentem* rule led to unjust results. The drafters of the code believed that the rule unduly punished one of the parties even though it was often not possible for that party to express themselves more clearly.[111]

[102] Honnold and Flechtner (n 48) 128; F Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 GaJInt'l&CompL 183, 226.

[103] Magnus (n 35) 484.

[104] ibid.

[105] For an overview of the different approaches to the issue of good faith under the CISG, see R Goode, H Kronke and E McKendrick, *Transnational Commercial Law. Texts, Cases and Materials* (OUP 2015) 228–44.

[106] G Cordero-Moss, *International Commercial Contracts* (CUP 2023) 92–96. The meaning of the principle of good faith varies significantly even within civil law jurisdictions. For a broader analysis see, e.g. SG Long, 'Towards a Formalistic Approach of Good Faith in Comparative Contract Law' (2024) 35 EurBusLRev 947.

[107] M Hesselink, 'The Concept of Good Faith' in AS Hartkamp et al (eds), *Towards a European Civil Code* (Kluwer Law International 2010) 619, 620.

[108] ibid 619.

[109] ibid 620–21.

[110] See, e.g. G Tomás, 'National Report: Spain' in Baaij, Cabrelli and Macgregor (n 13) 126, 127–28.

[111] E Till, *Polskie Prawo Zobowiązań (Część Ogólna) Projekt Wstępny z Motywami* (Komisja Kodyfikacyjna RP 1923) 73; R Longchamps de Bérier, *Zobowiązania* (Księgarnia Wydaw. Gubrynowicz i Syn 1939) 140.

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It is submitted that the principle of good faith cannot support the rule of *contra proferentem*, at least not in the commercial context. First, it is widely accepted nowadays that the *contra proferentem* rule should not be used to enforce unambiguous but grossly unfair contract terms—an area where the principle of good faith has often been seen as relevant.[112] In the past, it was common for the courts in some jurisdictions to use the *contra proferentem* rule as a means to cut down unfair terms even where the content was perfectly clear. It is now broadly recognised that the substantive fairness of contractual terms should be controlled directly rather than under the guise of contractual interpretation.[113]

Second, the principle of good faith and the rule of *contra proferentem* are of a fundamentally different character. Although it is sometimes said that the *contra proferentem* rule has a 'quasi-penal' character, meaning that it 'sanctions the negligent or intentional supply of an unclear term',[114] this categorisation of the rule is doubtful. The application of the rule of *contra proferentem* does not normally involve an examination by the court of the exact reasons which caused a party to include a given clause in the contract. Rather, the rule operates on the basis of a simple risk allocation: it allocates the risk of any ambiguity to the party who supplied a given contractual term.[115] The rule does not operate on the basis of a standard of conduct expected of the parties. A decision to interpret a contractual clause against the interests of the party who proposed it is a policy choice.

There are a number of reasons why a contractual term may be unclear. Contracts often include ambiguities because the parties could not reasonably anticipate an issue, overlooked an interpretation that would favour one of them or found potential ambiguities too costly to eliminate. The degree of precision in contractual language must always be balanced against reasonable drafting costs. The CISG uses the reasonableness test as a general standard for evaluating the parties' conduct where a specific regulation is missing.[116] The *contra proferentem* rule, however, does not rely on this standard: it implies that an unclear clause should be interpreted against the interests of the party who proposed it regardless of whether they could have been reasonably expected to avoid the ambiguity.

The principle of good faith, on the other hand, sets an objective standard of conduct which the parties are expected to follow. The principle is often expressed as a duty to act in good faith, which places emphasis on the parties' actions and omissions. A court referring to the principle of good faith (be it in pre-contractual liability cases, cases regarding the content or performance of a contract or the exercise of remedies for a breach of contract) needs to assess the parties' actual and expected conduct. Unlike the rule of *contra proferentem*, the principle of good faith does not operate on the basis of risk allocation. This fundamental difference between the character of the two rules

[112] See, e.g. H Beale et al, *Cases, Materials and Text on Contract Law* (Hart 2019) 829–833.

[113] S Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in A Burrows and E Peel (eds), *Contract Terms* (OUP 2007) 123, 149.

[114] S Vogenauer, 'Art 4.6' in Vogenauer (n 34) para 2.

[115] See, e.g. Official Comment to art 4.6, UPICC (n 7) 146–47 which states that the party who supplied a contractual term 'should bear the risk of possible lack of clarity of the formulation chosen'.

[116] MJ Bonell, 'Art 7' in Bianca and Bonell (n 30) 65, para 2.3.2.2.

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excludes the possibility of extracting the rule of *contra proferentem* from the principle of good faith.

This conclusion is further strengthened by the fact that the rule of *contra proferentem* and the principle of good faith may lead to different outcomes in a specific case. If indeed the parties did not anticipate an issue or overlooked an interpretation, the application of the *contra proferentem* rule would overcome their mistake by automatically deciding against the declaring party. On the other hand, an interpretation in accordance with the principle of good faith would instead require the mistake to be corrected by ascertaining the parties' subjective or objectively inferred intent. Similarly, if the parties did anticipate an issue but decided that addressing it would be too costly, inquiring into what the parties would reasonably have intended would better respond to the idea of good faith than an arbitrary decision against the interests of the party who proposed a given contractual term.

To conclude, the general principles underlying the CISG do not justify the incorporation of the rule of *contra proferentem* into the Convention. Conversely, the principles of party autonomy and reasonableness require a court, in the case of doubt, to elicit the objective intentions of the parties rather than base its decision on a policy choice.

## 6. Is there a gap in the CISG?

The preceding sections of this article have shown that the provisions of the CISG do not justify incorporating the *contra proferentem* rule as part of the test for the interpretation of contracts. Does this therefore represent a gap in the Convention?

The concept of a gap under the CISG refers to matters which are 'governed by [the] Convention' but are 'not expressly settled in it'.[117] These gaps are often referred to as 'internal gaps' in the CISG.[118] Matters which are outside of the CISG's coverage (so-called 'external gaps') do not constitute a gap in the sense provided in the Convention.

Interpretation of contracts is a matter governed by the CISG. It follows that questions related to interpretation of contracts which are not expressly settled in the Convention can constitute an internal gap in the sense of Article 7(2) CISG. An internal gap in the Convention should be filled by reference to the applicable domestic law in cases in which a relevant general principle underlying the CISG cannot be found.[119] However, it is submitted in this article that the lack of a provision addressing the rule of *contra proferentem* does not constitute an internal gap in the CISG.

In Section 2, it was pointed out that the relevance of the *contra proferentem* rule in a given legal system may vary depending on a court's readiness to apply the rule. In some jurisdictions, the rule is invoked by the courts only where the general methods of contractual interpretation have been exhausted and two interpretations of a given clause remain equally plausible. In other jurisdictions, the courts are ready to apply the *contra proferentem* rule whenever more than one interpretation of a term supplied

[117] CISG (n 1) art 7(2).
[118] P Perales Viscasillas, 'Art. 7' in Kröll, Mistelis and Perales Viscasillas (n 4) 112, para 51.
[119] CISG (n 1) art 7(2).

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by one party is possible. The latter approach could not be followed under the CISG because it would directly contradict the general methods of interpretation set out in Article 8. It would also go against the principle of party autonomy—one of the general principles underlying the Convention—which requires the court to ascertain the parties' (subjective or objectively inferred) intent in the process of interpretation.

In jurisdictions in which the former approach is followed, the *contra proferentem* rule is seen as of almost no significance in commercial cases. English law can serve as an example. In the leading case of *Investors Compensation Scheme v West Bromwich Building Society*, Lord Hoffmann declared that '[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.[120]

Lord Hoffmann's approach was based on the assumption that a reasonable person having the relevant background knowledge ought to be able to identify the meaning of contractual terms without any ambiguity.[121] If the context of the contract does not provide sufficient information as to the meaning of the words, a reasonable person would accept the meaning that is required by business common sense.[122] This approach does not leave much (if any) room for the principle of *contra proferentem* to apply. In *K/S Victoria Street v House of Fraser (Stores Management) Ltd*, Lord Neuberger MR emphasised that:

> "rules" of interpretation such as *contra proferentem* are rarely decisive as to the meaning of any provisions in a commercial contract. The words used, commercial sense, and the documentary and factual context are, and should be, normally enough to determine the meaning of a contractual provision.[123]

Similar reasoning is followed in jurisdictions which explicitly limit the applicability of the *contra proferentem* rule to consumer contracts.[124] This shows that the *contra proferentem* rule is not indispensable in the commercial context. The general methods of contractual interpretation are normally sufficient to elicit the parties' subjective or objectively inferred intent. Notably, this is even more true under the CISG than it is under English law. Article 8(3) CISG allows the adjudicator to consider prior negotiations and the subsequent conduct of the parties in the search for the meaning of the words used. These circumstances are excluded from consideration under English law even where they could shed light on what the parties intended.[125]

In the rare cases in which the meaning of a contractual term cannot be determined based on Article 8 CISG, it must be accepted that there simply is no commonality of intent. Where a common intent of the parties cannot be established, a contract cannot

[120] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912.

[121] ibid 913.

[122] *Rainy Sky SA v Kookmin Bank* [2001] 1 WLR 2900, 2908.

[123] *K/S Victoria Street* (n 13) para 68. See also *Nobahar-Cookson v Hut Group* [2016] EWCA Civ 573, para 12 (Briggs LJ).

[124] See Dutch Civil Code (n 13) art 6:238(2); E Hondius, 'Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law' (2016) 24 EurRevPrivL 457, 463; N Kornet, 'Case 5. National Report: The Netherlands' in Baaij, Cabrelli and Macgregor (n 13) 274–75; Moraitis (n 13).

[125] *Investors Compensation Scheme* (n 105) 913.

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be formed. This result does not mean that there is a gap in the Convention—a similar outcome would have been reached under many national laws.[126]

One final point that needs to be made concerns the exclusion and limitation of liability clauses. Such clauses tend to be interpreted narrowly in domestic law. This narrow interpretation, however, is not necessarily based on the rule of *contra proferentem*[127] because it does not depend on which party supplied a given term.[128] Furthermore, contrary to the rule of *contra proferentem*, the strict treatment of exclusion and limitation clauses does not presuppose an ambiguity.[129] The reason why these types of clauses are interpreted narrowly is a presumption that a reasonable person would not normally intend to restrict the remedies available to them in the case of a breach of contract by the other party, unless this was justified by particular circumstances. The general formula of contractual interpretation set out in Article 8 CISG leads to analogous reasoning.

The above analysis has shown that the *contra proferentem* rule is not applicable under the CISG. However, it has also demonstrated a broader problem: there is a common perception that the rule *is* applicable under the Convention, despite the foundations of this perception being very shallow. Commentators and courts tend to accept that the *contra proferentem* rule is part of the objective test set out in Article 8 CISG merely on the basis that the rule is 'internationally recognised'. Those who proclaim that the rule constitutes an international trade usage in the sense of Article 9 CISG do not address the inconsistency of the rule with the contractual approach to usage adopted in the CISG, nor do they specify the content of the alleged usage, despite the varied formulations of the rule across jurisdictions. The view that the *contra proferentem* rule can be extracted from the general principles underlying the CISG is commonly followed, without any analysis of which of the general principles justifies the rule. Both commentators and courts appear to share the perception that the *contra proferentem* rule is part of the 'common core' of contract law, and this warrants its applicability under the CISG.

## 7. Internationality overreach

The interpretation of uniform private law conventions may be affected by a number of biases, three of which have been identified in the literature thus far. For instance, the interpreter may operate under the influence of a 'homeward trend'. A 'homeward trend' is understood as a tendency of the interpreter to project domestic law, with which they are familiar, onto the interpreted transnational set of rules.[130] The normative understanding of the concept of usage under Article 9(2) CISG supported

[126] See Zeller (n 42) 635.

[127] Under English law, for example, the *contra proferentem* rule and the rule requiring a narrow interpretation of exclusion clauses are often considered to constitute two separate rules: see, e.g. *Youell v Bland Welch & Co (No 1)* [1992] 2 Lloyds Rep 127, 134; J McCunn, 'The *Contra Proferentem* Rule: Contract Law's Great Survivor' (2019) 39 OJLS 483, 484–85.

[128] See, e.g. the English case of *Nobahar-Cookson v Hut Group Ltd* (n 123) (Briggs LJ).

[129] See a comparative analysis in Beale et al (n 112) 820–26.

[130] F Ferrari, 'Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG Case Law' (2017) 22 UnifLRev 244, 249.

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by commentators from certain jurisdictions[131] is an example of the homeward trend.[132]

The interpreter may also show an 'outward trend', defined as a tendency 'to project foreign law onto the provisions of an international instrument where these provisions refer to legal concepts unknown in the system in which the interpreter is trained'.[133] An example of the outward trend can be found in the decision of the Court of Appeal of Koblenz, in which the court stated that:

> The standard of a 'reasonable person', which originates in the English and Anglo-American common law, is referred to in numerous provisions of the UN Sales Convention (e.g. in Article 8(2) and Article 25 CISG) and constitutes one of the Convention's general principles … Since the legal concept of the 'reasonable man' is not used in this form in continental European law, the Court considers it essential to resort to principles established in the English and Anglo-American law.[134]

Finally, the interpreter may be affected by an 'expansion bias'. An expansion bias is understood as a tendency to apply a private law convention to aspects of a transaction that are not clearly within its scope.[135] For example, even though the CISG is largely silent on the matter of the burden of proof,[136] some courts have held that the Convention assigns the burden of proof implicitly.[137] Under this approach, domestic law should not be referred to in this context. A direct consequence of this bias is the expansion of the CISG's coverage.

The problem of the *contra proferentem* rule examined in this article cannot be easily categorised under any of the biases identified in the literature thus far. It does not constitute an instance of the homeward trend. Both adjudicators and commentators who recognise the relevance of the *contra proferentem* rule do so not because they are familiar with the rule from their home jurisdictions but because the rule is 'internationally well known'. There is a presumption that the rule needs to be followed because it is universally recognised across different legal systems. Moreover, when describing the alleged boundaries of the *contra proferentem* rule under the CISG, commentators tend to go beyond solutions adopted in their home jurisdictions. For example, German authors writing about the rule of *contra proferentem* under the CISG

[131] See Section 4.2. The argument that commentators from different legal systems have interpreted CISG art 9(2) in light of their domestic background is made by Hellwege (n 66) 137, 145.

[132] For other examples of the homeward trend, see cases discussed in Baasch Andersen (n 88) 293–95.

[133] Ferrari (n 130) 252.

[134] *Clay Case* (Court of Appeal, Koblenz, Germany, 24 February 2011) CISG-online 2301 (translation by Ferrari (n 130) 252–53).

[135] S Walt, 'The CISG's Expansion Bias: A Comment on Franco Ferrari' (2005) 25 Int'lRevL&Econ 342, 343.

[136] With the exception of CISG (n 1) art 79(1), which regulates the issue of exemption from liability for damages and expressly places the burden of proof on the party claiming the exemption.

[137] See, e.g. *Milk Powder Case* (Federal Court of Justice, Germany, 9 January 2002) CISG-online 651; *Cables and Wires Case* (Federal Supreme Court, Switzerland, 7 July 2004) CISG-online 848; *Chicago Prime Packers, Inc. v Northam Food Trading Co.* (United States Court of Appeals for the Seventh Circuit, 23 May 2005) CISG-online 1026; *Blank CDs Case* (Supreme Court, Austria, 12 September 2006) CISG-online 1364.

often state that it also applies to bespoke contract terms,[138] whereas the German Civil Code limits the applicability of the rule in the commercial context to standard terms.[139]

The phenomenon discussed in this article also cannot be seen as an instance of the outward trend. The courts and commentators claiming that the *contra proferentem* rule is applicable under the CISG are normally familiar with a version of the rule used in their home jurisdiction; they do not need to reach for a foreign concept which is not recognised in the legal system in which they are trained.

Finally, the recognition of the *contra proferentem* rule under the CISG does not result from expansion bias. As pointed out in Section 6, contractual interpretation is a matter governed by the CISG. Therefore, issues regarding interpretation of contracts which are not expressly settled in the Convention should be considered as 'internal gaps' rather than 'external gaps' in the CISG. It was argued in Section 6 that Article 8 CISG comprehensively addresses the issue of contractual interpretation, including cases to which the *contra proferentem* rule could apply. The lack of a provision expressly addressing the rule of *contra proferentem* therefore does not constitute a gap in the CISG and, even if it were considered as such, it could only constitute an 'internal gap'. Thus, the applicability of the *contra proferentem* rule under the CISG would not expand the Convention's coverage.

It is submitted in this article that the common acceptance of the rule of *contra proferentem* under the CISG is an example of another phenomenon that has not been identified in the literature thus far, one that can be called internationality overreach. Internationality overreach can be defined as the tendency to project onto the provisions of a uniform private law instrument doctrines and concepts which are inaccurately presumed to constitute universally recognised principles of private law or the 'common core' of various legal systems.

The problem of the rule of *contra proferentem* examined in this article is not the only example of internationality overreach that can be identified in the interpretation of the CISG. The possibility of demanding the renegotiation of a contract in the case of hardship can be seen as another example. The Belgian Supreme Court, dealing with a case involving a significant price fluctuation after the conclusion of a contract, found a gap in Article 79(1) CISG which addresses the issue of a failure to perform a contract due to an unforeseeable and insurmountable event. The alleged gap concerned the lack under Article 79 CISG of remedies which are available in some jurisdictions in cases of hardship. The Court stated that to fill that gap:

> in a uniform manner adhesion should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated *inter alia* in the UNIDROIT Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance … is also entitled to claim renegotiation of the contract.[140]

[138] See, e.g. Schmidt-Kessel (n 2) para 53; M Schmidt-Kessel and L Meyer, 'Allgemeine Geschäftsbedingungen und UN-Kaufrecht' (2008) 8 Internationales Handelsrecht 177, 180; P Huber, 'Some Introductory Remarks on the CISG' (2012) 6 Internationales Handelsrecht 228, 237.

[139] German Civil Code (n 12) section 305c(2).

[140] *Scafom International v Lorraine Tubes SAS* (Supreme Court, Belgium, 19 June 2009) CISG-online 1963 (translation by K Cox https://cisg-online.org/files/cases/7880/translationFile/1963_18923774.pdf).

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Similarly to cases in which the rule of *contra proferentem* has been applied, the Belgian Supreme Court did not conduct any further analysis to ascertain whether the UPICC's provisions on hardship indeed reflect a general principle of international trade; nor did it explain on what basis this principle should be relevant under the CISG. Notably, Article 7(2) CISG requires gaps in the Convention to be filled by reference to 'the general principles on which the Convention is based' rather than the 'general principles which govern the law of international trade'.[141]

The doctrine of hardship clearly does not constitute an internationally recognised principle. One obvious reason is that it has not been recognised in most common law jurisdictions.[142] Many civil law jurisdictions do recognise the doctrine of hardship; however, only a few provide for a right to claim renegotiation of a contract when circumstances change.[143] Some commentators have argued that the approach taken by the Belgian Supreme Court is an example of a homeward trend.[144] However, at the time of that decision Belgian law did not recognise the doctrine of hardship.[145] The Court applied the right to claim renegotiation of a contract in that case not because it was attempting to apply a doctrine with which it was familiar from its home jurisdiction, but because it perceived it as an internationally recognised rule.

Internationality overreach raises problems on three fronts. First, it undermines uniformity in the application of a private law convention. As the example of the *contra proferentem* rule has shown, the similarities between the rules recognised in various legal systems may be present only at a very general level. With 97 CISG Contracting

[141] To a similar effect, some commentators have claimed that the UPICC's provisions on hardship reflect an international trade usage and should be applicable under the CISG based on art 9(2). See, e.g. Y Atamer, 'Art 79' in Kröll, Mistelis and Perales Viscasillas (n 4) 1039, 1074. As in the discussions of the rule of *contra proferentem*, these claims involve no investigation of the actual recognition of the hardship rule included in the UPICC among commercial parties nor its relevance in the context of the contractual approach to usages adopted in the CISG. For example, Yeşim Atamer points out that the recognition of art 6.2.3(4) UPICC as a usage under art 9(2) CISG would allow the court to terminate or modify a contract: Atamer, ibid 1074. However, it is difficult to see how the right of a party to request the court to terminate or modify a contract could constitute an implied contractual term.

[142] The US Uniform Commercial Code, section 2-615 regulates the doctrine of impracticability, which shares some similarities with the doctrine of hardship. However, the doctrine of impracticability does not provide a right to claim renegotiation of a contract nor a modification of a contract by the court. For an analysis, see HM Flechtner, 'The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court' (2011) 59 BelgradeLRev 84, 91, 99.

[143] For example, Dutch Civil Code (n 13) art 6:258 and German Civil Code (n 12) section 313 only allow the disadvantaged party to seek an adaptation of the contract by the court or a termination of the contract. A right to claim renegotiation of a contract has been introduced in more recent regulations, such as, e.g. French Civil Code (n 24) art 1195 (introduced in 2016); Civil Code of the People's Republic of China, art 533 (introduced in 2020); and Burgerlijk Wetboek, België (BW; Belgian Civil Code) art 5.74 (introduced in 2023).

[144] See, e.g. Flechtner (n 142) 99.

[145] The doctrine of hardship was introduced into Belgian law in 2023. See, e.g. S van Loock, 'The Introduction of Change of Circumstances (Hardship) in the Belgian Civil Code and Arbitration' (2024) b-ArbitraBelgianRevArb 15. In the analysed case, the applicable law was French law. At the time when the decision was issued, French law did not formally recognise the doctrine of hardship. The doctrine of hardship was introduced into the French Civil Code (n 24) in 2016. See S Rowan, *The New French Law of Contract* (OUP 2022) 181–91.

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States, it is unreasonable to assume that there are private law doctrines which are recognised and applied in an identical way across all the relevant jurisdictions. Even a seemingly small difference in the way in which a given rule operates across legal systems raises the *faux amis* problem. There is no method available at the international level to determine the exact content of a given rule. This means that it would be left to domestic courts dealing with individual cases to establish the precise conditions of the application of the rule in question. Such a situation would inevitably lead to discrepancies in the case law and, consequently, cause undesirable uncertainty in commercial transactions.

Second, interpretation affected by internationality overreach is likely to fall short of the agreement reached by the Contracting States in the process of drafting a uniform private law convention. In the decision of the German Federal Court of Justice cited in the introduction to this article,[146] the *contra proferentem* rule was applied instead of the objective test set out in Article 8 CISG. Thus, by applying the 'internationally recognised' rule, the court failed to apply the rule that was actually included in the CISG.

Finally, references to the principles which allegedly constitute the 'common core' of private laws disregard the decisions that were made during the CISG drafting process. The relevance of such principles was a subject of discussion during the early stages of the harmonisation of international sales law. The first draft of the Uniform Sales Law of 1935 included the following provision: 'If this Statute does not expressly settle a question and does not formally provide for application of a national law, the court decides in conformity with the general principles on which this Statute is based.'[147] Despite the apparent similarities of this wording to that of the current Article 7(2) CISG, this provision was understood much more broadly. Ernst Rabel explained it in the following terms:

> this Article states that cases not expressly settled in this statute nevertheless are subject to it and thus have to be resolved in the spirit of the statute in conformity with the principles permeating it. These principles are called *principes généraux*, an expression which resembles the famous Article 38 of the Statute of the Permanent Court of International Justice at The Hague and refers, with the same generosity but considerably fewer difficulties, to the common features of legal doctrines, which are to be found through comparative legal analysis, as a source of law.[148]

A similar approach was followed under the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS),[149] the predecessor of the CISG. Article 17 ULIS stated: 'Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on

[146] *Bowling Alleys Case* (n 10). In this case, the court referred to the literal and contextual interpretation of the clause in question but eventually based its decision on the rule of *contra proferentem*.

[147] League of Nations, 'Draft of an International Law of the Sale of Goods' (1935) art 11 www.unidroit.org/english/documents/1935/lon/lon-upl-draft01-e.pdf.

[148] E Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes' (1935) 9 Zeitschrift für ausländisches und internationals Privatrecht 1, 54 (translation author's own).

[149] Convention Relating to a Uniform Law on the International Sale of Goods (adopted 1 July 1964, entered into force 18 August 1972) 834 UNTS 107.

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which the present law is based.' Article 2 ULIS explicitly excluded the application of the rules of private international law, subject to any provision to the contrary.

Many authors interpreted these provisions to mean that the ULIS was a self-contained body of law and gaps in it should be filled exclusively by reference to the underlying general principles.[150] It was accepted that, if such principles could not be extracted from the provisions of the ULIS, they should be developed through a survey of comparative law.[151] It was argued that a more extensive use of general principles as a method of gap filling could help develop uniform solutions to issues that were not expressly addressed in the ULIS. On the other hand, recourse to domestic law applicable by virtue of the rules of private international law would undermine uniformity.[152]

The drafters of the CISG decided that this approach should not be followed because of the uncertainty that could be created by the search for such broadly defined general principles.[153] Consequently, although Article 7(2) CISG recognises the relevance of the general principles underlying the Convention in the process of gap filling, it also acknowledges that such principles may not always be possible to find. Accordingly, the provision states that, 'in the absence of such principles', gaps in the Convention should be filled 'in conformity with the law applicable by virtue of the rules of private international law'. As pointed out by Peter Schlechtriem, the possibility of referring to the applicable domestic law to fill a gap in the CISG effectively 'closes off the path … of using a survey of comparative law to develop general principles that cannot be derived from [the Convention] itself'.[154]

## 8. Conclusion

This article has made two core contributions. First, it has argued that the rule of *contra proferentem* is not applicable to contracts governed by the CISG. Second, it has demonstrated that the references to the rule of *contra proferentem* under the CISG are an instance of a broader phenomenon, which has not been identified in the literature thus far: internationality overreach in the interpretation of uniform private law conventions. Internationality overreach has been defined in this article as the tendency to project onto the provisions of a uniform private law instrument doctrines and concepts which are inaccurately presumed to constitute the 'common core' of various legal systems or universally recognised principles of private law. Similarly to the previously identified biases in interpretation of uniform private law instruments (the homeward trend, the outward trend and expansion bias), internationality overreach disrupts the process of unification of commercial law and creates uncertainty in commercial transactions.

[150] For discussion, see Schlechtriem (n 75) 38; Magnus (n 35) 474.

[151] Schlechtriem (n 75) 38.

[152] *Yearbook of the UN Commission on International Trade Law* Volume I (n 75) 181–83; *Yearbook of the UN Commission on International Trade Law* Volume II (n 75) 62; Honnold and Flechtner (n 48) para 124.

[153] Official Records, A/CONF.97/19, 254–57; Schlechtriem (n 75) 38.

[154] Schlechtriem (n 75) 38.

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*Contra proferentem*, as a rule of contractual interpretation, offers a particularly good illustration of the possible consequences of internationality overreach. Interpretation of contracts has traditionally been the subject of extensive litigation in commercial transactions.[155] Lack of clarity as to the rules which a court will apply to determine the meaning and legal effect of a contract is unacceptable in the commercial context. On a broader scale, lack of clarity in a matter as important as the rules governing contractual interpretation goes against the purposes of harmonisation of private law, which are to reduce legal uncertainty for private actors and to encourage parties to engage in cross-border transactions.

This article has focused on the CISG, which is commonly seen as the most successful international instrument for the unification of substantive private law.[156] However, the argument developed in this article is of equal relevance to other uniform private law conventions. The principle of autonomous interpretation laid down in Article 7 CISG has been routinely included in modern uniform law instruments.[157] Furthermore, the objective of autonomous interpretation has been commonly recognised even in regard to those conventions which do not address it explicitly.[158] This article has demonstrated that internationality overreach goes against the principle of autonomous interpretation. The interpreter affected by internationality overreach relies on concepts that are external to a particular convention. Meanwhile, the autonomous interpretation requires the interpreter to focus on the convention's own system and the objectives that it is meant to achieve.[159]

[155] See, e.g. EG McKendrick, 'Express Terms' in HG Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell 2023) vol 1, para 16-001, para 16–047.

[156] UG Schroeter, 'Has the UN Sales Convention Achieved Its Key Purpose(s)?' in D Saidov (ed), *Research Handbook on International and Comparative Sale of Goods Law* (Edward Elgar 2019) 59.

[157] See, e.g. Convention on the Carriage of Goods by Sea (adopted 31 March 1978, entered into force 1 November 1992) 1695 UNTS 3 (Hamburg Rules) art 3; Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, not yet in force) (Rotterdam Rules) art 2; Convention Concerning International Carriage by Rail (COTIF) (adopted 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, entered into force 1 July 2006) 2883 UNTS 63, art 8(1); Convention on International Factoring (adopted 28 May 1988, entered into force 1 May 1995) 2323 UNTS 373, art 4; Convention on International Bills of Exchange and International Promissory Notes (adopted 9 December 1988, not yet in force) art 4; Convention on International Financial Leasing (adopted 28 May 1988, entered into force 1 May 1995) 2321 UNTS 195, art 6; Convention on Independent Guarantees and Stand-By Letters of Credit (adopted 11 December 1995, entered into force 1 January 2000) 2169 UNTS 163, art 5; UNCITRAL Model Law on Cross-Border Insolvency (adopted 30 May 1997) art 8 (legislation based on, or influenced by, the Model Law has been adopted in in 60 States: see UNCITRAL, *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status; Convention on the Assignment of Receivables in International Trade (adopted 12 December 2001, not yet in force) art 7; Convention on International Interests in Mobile Equipment (adopted 16 November 2001, entered into force 1 March 2006) 2307 UNTS 285, art 5; Convention on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) UNTS Registration No 53483, art 23; Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019, entered into force 1 September 2023) UNTS Registration No 58036, art 20.

[158] J Basedow, 'International Economic Law and Commercial Contracts: Promoting Cross-Border Trade by Uniform Law Conventions' (2018) 23 UnifLRev 1, 7.

[159] Gebauer (n 97) 686–87.

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This article has also shed a new light on the relevance of comparative law in interpreting uniform private law instruments. It has shown that the autonomous interpretation of an international convention does not leave space for comparative enquiries into the legal systems of participating countries, nor for a search for a 'common core' of various jurisdictions. Comparative law studies are normally conducted as part of the process of drafting an international agreement; States are unlikely to ratify a uniform private law instrument which strays too far from solutions accepted in their domestic laws, unless it offers a reasonable compromise. However, once the drafting process is completed, an international convention operates autonomously, as a separate layer of rules, and its interpretation must be detached even from those doctrines and concepts which are recognised across numerous Contracting States.

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