THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) — A LEAP FORWARD TOWARDS UNIFIED INTERNATIONAL SALES LAWS

Bruno Zeller†

CONTENTS

PREFACE

The character of international trade has greatly changed over the last ten years. Reduction of tariffs, the rise of multinational companies, on one hand, and the ever-increasing creation of new nations are some of the challenges facing international trade. Globalisation is another important aspect that irreversibly changed the way we used to do business. It has been pointed out that increasingly retail traders, traditionally operating in a

† Lecturer of Law, Victoria University of Technology, Melbourne. The author is grateful to Prfoessor A. Kritzer, Pace University for his generous help and constructive comments which helped to refine this article. I also wish to thank Professor G. Triggs, Melbourne University for her comments to earlier drafts.

"local" market, have embraced globalisation[1]. Significant structural changes make it imperative to understand that the importance of dealing with traditional long term trading partners has given way to a need to embrace new challenges with new economically emerging businesses, nations and trading blocks.

> International communication is now so swift and easy, trade and commerce between nations so routine . . . that the legal systems of nation states are being forced to come to terms with a new reality.[2]

The reality is that lawyers and the business community cannot rely on a knowledge of their own legal systems alone. It is unrealistic to expect a business to familiarize itself with the legal systems of all of its trading partners. The CISG solves the problem "by providing the parties with a common sales code which will apply regardless of whether action is brought in the country of the seller's or the buyer's place of business."[3]

Unfortunately, anecdotal evidence in Australia suggests that many lawyers still prefer to have the contracts of their clients governed by domestic law. As the uniform law is self-inclusive, they take advantage of Article 6 of the CISG, which allows the exclusion of the Convention in favor of domestic laws. The same observation is also made in the United States and Canada. For the U.S., Susan Cook observed that until 1997 only two cases interpreting the CISG had been reported. She feels that the reason for such an apparent reluctance "to embrace the Convention [is] because of the unpredictability of law in international sales transactions."[4] The enormous potential for the CISG to become a unified international sales law was at that stage not recognized. In Canada, Ziegel wrote that it is still safe to assume "that most Canadian and U.S. lawyers would much prefer to be governed by domestic sales law . . . than by the Convention."[5] In the Australian case of *Roder Zelt und Hal-*

---

[1] NEUE ZURCHER ZEITUNG, (Switzerland) 5 January 1999.

[2] Gleeson, M., *The State of the Judicature*, 12 LAW INST. J. 73 (Dec. 1999).

[3] Joseph Ziegel, *Canada's First Decision on the International Sales Convention*, 32 CANADIAN BUS. LAW J. 324 (1999).

[4] V. Susan Cook, *The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. COM. 257 (1997).

[5] Ziegel, *supra* note 3, at 318.

lenkonstruktionen GmbH v. Rosedown Park Pty Ltd,[6] von Doussa J. made the comment that Counsel for the Defense expressed themselves "in the language and concepts of the common law [and] not those of the Convention."[7] Such an attitude is not very helpful to harmonize international sales laws.

The CISG inevitably will gain momentum as seen by the ever-increasing volume of reported international cases. A further development, namely, the acceptance of many countries to treat foreign decisions as persuasive, will greatly contribute to the establishment of a truly international sales law. Ignorance of or trying to avoid the application of the CISG will prove to be detrimental to successful competition in the international trade environment. In my view, international lawyers and the business community must take note and adopt the CISG as it will reduce cross border legal risks. The CISG undoubtedly has created new concepts that may be foreign to many common law attorneys but it has also created a climate in which business can be conducted in a mutually beneficial way by observing good faith. Many countries have introduced concepts similar to good faith into their domestic law under different labels such as "misleading and deceptive conduct" which is successfully applied in consumer protection legislation. Some of these concepts rightly have been extended into the CISG but others, as further discussed below, have disappeared. As an example, the parol evidence rule has been trumped by Article 8 of the CISG.

The challenge is to come to terms with the new concepts as expressed in the CISG. This paper attempts to show that Article 7 is the key to fully understand the implications of new or different concepts as expressed in the CISG.

Article 7 reads:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in

---

[6] No. SG 3076 of 1993 Fed No. 275/95 Sale of Goods (1995) 13 ACLC 776 (extract) (1995) 17 ACSR 153

[7] *Id.*

the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

INTRODUCTION

If we would search for a description of Article 7 which would attract the least disagreement, we could not go past statements like: "This rule is one of the most discussed rules of the CISG"[8] or, "this Article is arguably the single most important provision in ensuring the future success of the Convention."[9] What conclusion can we draw from such statements? My view is that at least the suggestion can be made that without fully understanding Article 7, the application of the CISG cannot be made confidently: the possibility of flawed decisions by the judiciary and the parties to a contract are increased. Article 7 raises some conceptual issues and it is my view that an understanding of their meaning in a broader sense, that is, outside the literal confines of the CISG, must be attempted. It is recognized that there has been a divergence of opinions in interpreting international conventions. It has been argued that, as in Australia, conventions are not self-executing and are included within our domestic law; the interpretation and application of that law must be done according to domestic techniques and with the help of the domestic body of law. Others express a contrary view and advance the "autonomous" model, that is, "without making reference to the meaning one generally attributes to certain expressions within the ambit of a determined system, because otherwise the result would not only be a lack of uniformity, but also the promotion of forum shopping."[10]

I. DOMESTIC LAW

The first step is to see what domestic law contributes toward an understanding of interpretation of international conventions. An analysis of the concepts raised in Article 7 is the

---

[8] F. ENDERLEIN & D. MASKOW, INTERNATIONAL SALES LAW, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, at 54 (Oceana 1992).

[9] Phanesh Koneru, *The International Interpretation of the UN Convention on the Contracts for the International Sale of Goods: An approach based on General Principles*, 6 MIN. J. GLOBAL TRADE 105 (1997).

[10] *Id.*, at 187

second step. In such a way our understanding will be sharpened; this affords the possibility to understand the placement of the Article within the total Convention.

It is important to commence our investigation with *Fothergill v. Monarch Airlines*[11] (*"Fothergill"*). This House of Lords decision dealt with the interpretation of the Warsaw Convention on the liability of air carriers. This case is of great importance as it is the foundation on which Australian courts can base their interpretation of international conventions and it is of sufficient persuasive authority that it cannot be ignored.

The facts are simple. The question centered around the interpretation of "damage." Pursuant to the Convention, notice must be given within seven days as to damage but no notice must be given in respect to loss of baggage. The loss in question was part of the contents of baggage. The airlines contended that it was "damage" and hence subject to the seven days notice. The Court of Appeal dismissed the airline's argument but the House of Lords reversed the decision. The plain meaning approach was rejected. Lord Diplock stated:

> It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co., Ltd v. Babco Forwarding & Shipping (U.K.) Ltd. [1978] A.C. 141, 152*, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.[12]

He went on to say that "the language . . . has not been chosen by an English draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges."[13] Attention was also drawn to the interpretative rules of the Law of Treaties, specially Articles 31 and 32, despite the fact that the Law of Treaties did not govern this case. It came into force subsequent to the Warsaw-Hague Convention.

Of significance was the opinion of the majority that consideration must be given to travaux préparatoires, foreign case law

---

[11] *See* Fothergill v. Monarch Airlines, 2 All E.R. 696 (H.L. 1980). It is also instructive to consult Air France v. Saks, 470 U.S. 392, 404 (1985) a U.S. Supreme Court Case where Justice Fortis stated that "the opinions of our sister signatories [to an international convention are] to be entitled to considerable weight."

[12] *Id.* at 706.

[13] *Id.*

and scholarly writing. The court correctly pointed to some of the shortcomings of the above aids of interpretation. Travaux préparatoires must be carefully chosen so they do not represent the views of a few. A parallel to this is the treatment of parliamentary debates. A speech of a member of parliament does not necessarily reflect the future outcome as expressed in the legislation. However, the collective arguments may shed some light as to the problems, which were debated and can be used as a persuasive argument, in a way no different from the submissions of counsel in court. The court also recognized the problems associated with foreign judgments. The reporting is not always accurate and there is difficulty in obtaining these judgments, and sometimes they are only available in summary forms. However "our courts will have to develop their jurisprudence in company with the courts of other countries from case to case, a course of action by no means unfamiliar to common law judges."[14] Careful attention was also given to scholarly writing. Lord Diplock was cautious when he said:

> It may be that greater reliance than is usual in the English courts is placed upon the writings of academic lawyers by courts of other European states [and] subsequent commentaries can have persuasive value only.[15]

Lord Scarman summed it all up when he stated:

> Rules contained in an international convention are the outcome of an international conference; if, as in the present case, they operate within the field of private law, they will come under the consideration of foreign courts; and uniformity is the purpose to be served by most international conventions, and we know that unification of the rules relating to international air carriage is the object of the Warsaw Convention. It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting states. The mischief of any other view is illustrated by the instant case. To deny them this assistance would be a damaging blow to the unification of the rules which was the object of signing and then enacting the Convention. Moreover, the ability of our judges to fulfill the purpose of the enactment would be restricted, and the persuasive au-

[14] *Id.* at 715.

[15] *Id.* at 708.

> thority of their judgments in the jurisdictions of other contracting states would be diminished.[16]

There are three important conclusions which can be drawn from the *Fothergill* case in relation to the CISG. Firstly, tribunals and courts are strongly persuaded to look for a solution within the four corners of the Convention, which supports the thrust of this article. Secondly, the *Fothergill* case also established that no recourse should be taken to principles and methods of interpretation which are developed within domestic law. The foundation upon which a correct application of the CISG in a manner contemplated by those preparing it has been laid in relation to unclear matters. Thirdly, courts are obliged to look for other sources such as travaux préparatoires, foreign case law and scholarly writings to come to a conclusion. What remains to be done is to gain an understanding of the internal workings of the CISG as prescribed by Article 7.

II. ARTICLE 7(1)

The conclusion, with specific reference to the interpretation of the CISG, which can be drawn from the above is that an "autonomous" interpretation resolves the problem of policy but not the one of interpretative techniques or methods. What methods or techniques do we choose as Article 7(1) has not been designed to solve problems of interpretation? Its purpose is describing the goals of interpretation.[17] It can be argued that the techniques or methods of interpretation must be chosen to achieve what the policy sets out to do, namely, to achieve "the international character of the Convention"

Article 7 contains basically three different rules.[18] Firstly, a general rule as to interpretation; secondly, a rule regarding filling of gaps; and thirdly, a rule regarding the relationship between the CISG and national law. This paper concentrates only on the first rule contained in Article 7.

The interpretation pursuant to Article 7 is limited to Parts I, II and III of the CISG but does not include Part IV (final pro-

---

[16] *Id.* at 715.

[17] *See* Koneru, *supra* note 9, at 105.

[18] Hellner, J., *Gap-Filling by Analogy* (last modified Jan. 31, 1998) <http://www.cisg.law.pace.edu.>.

visions).[19] The Vienna Convention on the Law of Treaties (Law of Treaties) regulates the mechanism through which States can enter into binding treaties with each other. The obligations of the Contracting States to each other are contained in Part IV of the CISG. Interpretation and construction of this Part should be undertaken within the confines of the Law of Treaties. This Law has created an awareness in the judiciary in the interpretation of Conventions. Section 3 of the Law of Treaties sets out the rules as to interpretation of treaties. Article 31(1) of this Law is of special interest as it states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Parts I to III of the CISG, on the other hand, deal with the obligations between parties to a contract of sales and are therefore excluded from the construction within the Laws of Treaties. The CISG through Article 7 has created its own rules of interpretation. In sum, Honnold puts the following argument:

> Article 7 of the Sales Convention embodies mutual obligations of the Contracting States as to how their tribunals will construe the Convention. Hence the Law of Treaties would be pertinent to a question concerning the construction of Article 7, but the Law of Treaties would not govern the interpretation of the articles dealing with the obligations of the parties to the sales contract, for these articles are to be construed according to the principles of Article 7.[20]

The fact that the interpretation has to be "international in character" stands out clearly. Such a demand to interpret legislation with an international view, in contrast to a national one, is not unique. It follows the economic trends of globalisation in the late twentieth century. Economic policy is designed to "transcend national borders in order to maximize the utilization of resources."[21] To assist such a development it has become imperative to regulate economic activities in international trade with a new law. It is worth arguing that we are seeing a repetition of

---

[19] JOHN HONNOLD, UNIFORM SALES FOR INTERNATIONAL SALES, 159 (Kluwer, 1991).

[20] *Id.*

[21] Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183 (1994-95).

history when in the middle ages the law of merchant was created to achieve in essence exactly the same as the CISG attempts to do today.

Enderlein and Maskow[22] have identified several elements or words which they believe are crucial in the understanding of CISG Article 7, namely, "Convention, International character, Uniformity of application, Good faith, and International trade". The commentary of the Secretariat[23] merges these elements into two broader headings, namely, the "International character of the Convention" and "Observance of good faith in international trade."

III. International Character of the Convention

The international character of the Convention and the observance of good faith dictate the policy of avoiding the application of domestic law. This becomes very important, especially in the case of Australia and the United States where domestic legislation tracks in part the CISG. The obvious temptation for courts would be to "read the Convention through the lenses of domestic law"[24] To ratify a convention indicates that the common will, as expressed in the convention, must prevail above the ones expressed within domestic law. In *Filanto S.p.A. v. Chilewich International Corp.* (Filanto)[25], the court acknowledged this but made the following interesting remarks:

> [The Uniform Commercial Code] does not apply to this case, because the State Department undertook to fix something that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways.[26]

Unfortunately the court missed the real significance of the CISG to respond to the international need of a uniform sales law. However, *Filanto* established clearly that there should be no room left to apply "functionally equivalent, but differently

---

[22] Enderlein & Maskow, *supra* note 8.

[23] This is the closest counterpart to an Official Commentary *available at* (last visited May 7, 2000) <http://www.cisg.pace.edu>.

[24] Ferrari, *supra* note 21, at 188.

[25] Filanto S.p.A. v. Chilewich International Corp., 789 F.Supp.1229, 1237 (S.D.N.Y. 1992).

[26] *Id.*

construed national rules.[27] The temptation for judges and the parties settling disputes is to look at what is familiar especially as it appears to be so at first glance. This is illustrated in *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd* (Calzaturificio) where the judge commented that "case law interpreting Article 2 of the Uniform Commercial Code may also be used to interpret the CISG where the provisions in each statute contain similar language."[28] Such a view is incorrect. To solve issues within the CISG by analogy with domestic law is contrary to the international character. As an example, within Australian laws 19 of the Goods Act (Vic) 1958 tracks Article 35 of the CISG. Therefore, great care needs to be taken that interpretation of the CISG is not attempted with the language or case law of s.19 in mind. In *Delchi Carrier S.p.A. v. Roterex Corp* (*Rotorex*),[29] the judge recognized that there is virtually no case law under the Convention. He went on to point out correctly that in such a case "we look to its language and to the general principles upon which it is based."[30] The court appeared to recognize the importance of avoiding the application of domestic law by pointing also to the fact that "the Convention directs that its interpretation be informed by its international character."[31] Despite the fact that *Rotorex* correctly understood the mandate of Article 7, the court went on to proclaim that "Case law interpreting analogous provisions of Article 2 of the UCC may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."[32] In this respect, *Rotorex* made the same misinterpretation as the court in *Calzaturificio*, with the difference that the *Rotorex* court, at least, recognized that "UCC case law is not per se applicable."[33] However, *Rotorex* went on to review exclusively UCC case law as an aid to interpret the CISG. *Rotorex* missed the point that

---

[27] *Id.*

[28] Calzaturificio Claudia S.n.c v. Olivieri Footwear, Ltd., No. 96 Civ. 8052 (HB)(THK) (S.D.N.Y. 1998).

[29] Delchi Carrier S.p.A. v. Roterex Corp., 71 F.3d 1024 (U.S. Ct. App. 2d. Cir. 1995).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

Article 7(1) sets the goal of the interpretation of the CISG and, thus, relates to unclear matters.[34]

The first Canadian decisions in 1998 are also not a good precedent for the application of the Convention. In *Nova Tool & Mold Inc. v. London Industries Inc (Nova Tool),*[35] the litigant as well as the judge ignored the CISG and applied domestic law despite the fact that the CISG would have been applicable. The second case, *La San Guiseppe v. Forti Moulding,*[36] is no less intriguing. The CISG was applied as the correct governing law. Although Swinton J. did apply the relevant articles, she failed to recognize the implication of Article 7. In a discussion where she states that the seller did not breach Article 35, she also added that the seller did not breach ss.14 to 16 of the Ontario Sale of Goods Act. It appears that Swinton J. was not aware of the mandate in Article 7, which clearly states that the CISG overrides domestic law. Domestic sales law cannot coexist with the provisions contained in the CISG. The failure of courts to correctly interpret and apply Article 7 can be attributed to a failure to recognize that the method of interpretation still remains a textual one with the addition that the purpose of the Convention, the legislative history, and the drafters' intent may be taken into account.[37]

The most important fact, as stated above, is that the CISG cannot be interpreted from national juridical constructions and terms.[38] *Rotorex* made the mistake to note that "The CISG requires that damages be limited by the familiar principle of foreseeability established in *Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).*"[39] The principle of foreseeability may well have been established in *Hadley v. Baxendale* but it is based on a domestic concept. The principle of foreseeability may well be

---

[34] *See* Thiele, C., *Interest on Damages and Rate of Interest Under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods*, (last visited May 7, 2000) <http://www.cisg.law.pace.edu/cisg/biblio>.

[35] Nova Tool & Mold, Inc. v. London Industries Inc., (Canada) (1998) O.J. No. 5381, 84 A.C.W.S. (3rd 1089.

[36] La San Giuseppe v. Forti Moulding, (Canada) Aug. 31,1999, O.S.C.J. <http://cisgw3.law.pace.edu/cases/990831c4.html>.

[37] *Id.*

[38] *See* ENDERLEIN & MASKOW, *supra* note 8, at 55.

[39] *See* Delchi, *supra* note 29.

similar to the one expressed in Article 74 of the CISG, but to tie *Hadley v. Baxendale* into Article 74 is patently wrong.

Rotorex is a good example of the danger that domestic courts could construct the CISG within their own experience and procedures. This is especially the case where a court relies heavily on a literal interpretation, that is, that solutions must be found within the statute as it is the only expression of parliament's wishes. However, in *Fothergill* the court clearly indicated that such an approach is incorrect. The second danger lies in the choice of precedents. It is well established in Australia that precedents are only found within Australia's own legal systems. Cases outside Australia's body of law are regarded at best as persuasive but certainly not binding. The CISG does not change this view. To "promote uniformity in its application"[40] indicates that the creation and application of case law extends beyond national boundaries and foreign case law must be paid attention to in a persuasive manner by domestic courts. Authority for such an approach is not only derived from the Convention but also from the *Fothergill* case. Most authorities have called for publications of cases,[41] which were identified by Prof. Will and are available on the Internet.[42] The problem of relying too much on cases may encourage domestic tribunals to "take their eyes off the principles and engage in distinguishing, overruling and even manipulating precedents"[43]

There is certainly the danger that some domestic tribunals, especially in countries which rely heavily on precedent, may engage in such approaches. In my view, Australian tribunals culturally try to find the answer within the CISG itself, and treat cases outside their jurisdiction only as secondary material in case guidance is required. In *Roder Zelt*, Von Doussa did not once refer to either CISG case law or scholarly writings. He followed Hillman's suggestion who maintains that tribunals should "try to find answers within the four corners of the Convention and to look to cases only in the unusual case where the Convention does not supply adequate guidance."[44] Such an ex-

---

[40] Art. 7(1).

[41] Hillman, *Cross Reference and Editorial Analysis, Article 7* (last modified Sept. 7, 1997) <http://www.cisg.law.pace.edu/cisg/text/hillman.html>.

[42] Via Pace Law School

[43] *Id.*

[44] *Id.*

treme view is fraught with danger. It assumes that all tribunals understand the principles contained within the CISG as well as use the same method of interpretation. It also assumes that concepts expressed in the CISG are understood by all. It appears to me that such an approach as advocated by Hillman leads to a fragmented approach rather than uniformity. Cases are still the only international expression of an interpretation of the CISG by a domestic court. It indicates to other tribunals how a particular principle has been interpreted and applied. The "Obergericht Luzern"[45] reviewed international case law to arrive at a determination of the terms "examination of the goods"[46] and "notice of lack of conformity."[47] The court came to the conclusion that German case law interpreted the above terms narrowly whereas the Dutch and American cases indicate a more liberal approach. The court observed that the gap between these two positions had to be narrowed in order to arrive at a uniform application of the CISG.[48] This case clearly demonstrates that the approach advocated by Hillman will not lead to uniformity, but most importantly, it will afford scholars the opportunity to critically analyze these decisions and if necessary point to errors. In my view, the first step is certainly to look within the four corners of the CISG but also to consult in a persuasive manner cases and scholarly writings as confirmed in *Fothergill*. In such a way, the international character and the promotion of uniformity is guaranteed. The inward looking view of a four corner approach appears to result in local decision rather than international ones.

The meaning of terms and rules certainly has to be concluded from the words within the CISG. But a construction is not only reliant on the words but also the context and the function the rules have within the CISG as well as other material which has a connection to the CISG.[49] This point can be illustrated by examining a term confined to the common law system, namely, the parol evidence rule. The mere fact that this rule is confined to the common law system would, at least at first

[45] *See* Case (Switzerland) Jan. 8, 1997, <http://cisgw3.law.pace.edu/cases/970108s1.html>.

[46] Art. 38(3) CISG.

[47] Art. 39(1) CISG.

[48] *See* Switzerland, *supra* note 45, at CLOUT abstract no. 192.

[49] *See* Hillman, *supra* note 41.

glance, bring it into conflict with "the international character and uniformity of application" of the CISG. In *Calzaturificio*[50] the court recognized this by stating that: "contracts governed by the CISG are freed from the limits of the parol evidence rule . . . [and] the standard UCC inquiry . . . has little meaning under the CISG."[51] U.S. Courts used "naturally and normally" as a test to determine the application of this rule. Flechtner[52]suggested that "The use of a test so firmly tied to our domestic law traditions without clear authorization in the text of the CISG would do violence to the directives of Article 7(1)."[53]

IV. Observance of Good Faith in International Trade

The principle of good faith that is applicable to contractual dealings can be found in most legal systems in one form or another. Article 7(1) at first glance proclaims that the principle of good faith only covers "the application of the Convention rather than the parties, rights and obligations."[54] In other words, good faith is not used to interpret the contract; rather it is an obligation to interpret the Convention in good faith.

This is in contrast with other conventions which specifically note that "each party must act in accordance with good faith and fair dealing in international trade"[55] or "in exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing."[56] Both principles further add that the parties may not exclude or limit this duty. Within the common law system the UCC in Section 1-203, in marked contrast with the CISG, states: "Every contract or duty

---

[50] *See* Calzaturificio Claudia S.n.c v. Olivieri Footwear, Ltd., *supra* note 28.

[51] *See id.* It is interesting to note however that, preceding the above statement, the court engaged in a detailed discussion documented with cases, on the parol evidence rule. The trumping of the parol evidence rule by Article 8 has been confirmed in a 1998 decision by the U.S. Circuit Court of Appeals for the eleventh circuit in MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A., <http://cisgw3.law.pace.edu/cases/980629u1.html>.

[52] H. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price under Article 50*, 14 J.L & Com. 156 (1995).

[53] *Id.*

[54] P. Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* Saggi, Conference e Seminari, (visited Jul. 29, 1997) <http://www.cnr.it/CRDCS/schlechtriem.htm> (Feb. 1997).

[55] Art. 1.7 of UNIDROIT Principles of International trade.

[56] Art 1:106 of Principles of European Contract Law.

within this Act imposes an obligation of good faith in its performance or enforcement."[57] Such a statement is not isolated within the American legal system as a similar declaration can be found in Section 205 in the Restatement (Second) of Contracts which declares that: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

Two aspects have emerged: namely, the application of good faith to the Convention only; and an application of good faith to the interpretation of a contract, that is, to dealings between parties. From the above, we concluded that Article 7(1) is not applicable to dealings between parties. We have also established that articles must be interpreted and read within the context of the CISG. The question is: Can Article 7, specifically, the application of good faith, be read outside the context of the CISG? In my view, this is not the case as such an application is contrary to the very purpose of this article which could be stated as "uniformity must be promoted and good faith must be applied and observed in international trade." Two crucial points need to be observed, namely, "uniformity" and "good faith." Such a combination suggests that recourse to domestic definitions of good faith is contrary to the autonomous interpretation of the CISG. This was confirmed in *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd y Seolia Confectionery Co.(Dulces Luisi)*[58] where the court stated that the principle of good faith must be interpreted internationally without "resorting to its meaning under Mexican law."[59] If we have to apply Article 7 within the context of the CISG, it would have to be considered a "general principle" on which the Uniform Sales Law is based.[60] We find support for this in the comments by the Secretariat, which are the closest counterpart to an Official Commentary. The Secretariat Commentary states: "There are numerous applications of this principle in the particular provisions of the Convention. Among the manifestations of the requirement of

---

[57] J. Klein, *Good Faith in International Transactions* (last updated Jul. 28, 1997) <http://www.cisg.law.pace.edu/cisg/biblio/Klein.html>.

[58] Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. y Seolia Confectionery Co., (Mexico) Nov. 30, 1998 <http://cisgw3.law.pace.edu/cases/981130m.1.html>.

[59] *Id.*

[60] *See* Ferrari, *supra* note 21, at 191.

the observance of good faith are the rules contained in [several] articles."[61] To restrict the principal of good faith to the examples,[62] as listed by the Secretariat, may be too narrow. The principle of good faith applies to all aspects of the CISG, that is, to interpretation and application of the Convention and to relations between contractual parties. An important point must be added at this stage. If we carefully consider the articles listed by the Secretariat, we come to the conclusion that good faith is linked to specific instances. Take Article 40 as an example. It states: "The seller is not entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer." The drafters of the CISG indicated a particular situation, which is not considered to be within the principle of good faith. The court therefore is relieved of the burden to discover what good faith means. A German case illustrates that principle.[63] The court noted that the seller can rely on Article 39. The buyer did not show a breach of Article 40 by the seller. Bad faith (*Bosglaubigkeit*) is only shown if the seller ignores faults, which are obvious to the eye and which could have been discovered by the seller through simple care and attention.

At this point a question should be posed, namely, if courts instead of promoting good faith, take the negative view and discourage bad faith, do we come up with the same view or is the result somewhat different? The first point to note is that Article 7 does not promote such an approach, however, it does not explicitly discourage it either. I would think that such an approach should only be used as an additional tool if everything else does not produce a clear outcome. A starting point to the investigation is found in American domestic law where a debate as to the meaning of good faith has resulted in three different approaches. Professor Robert Summers stated that good faith is a term without a general positive meaning of its own but functions as "excluders."[64] He asks the question what type of behavior does the judge intend to rule out and he lists a number of

---

[61] Guide to CISG Article 7, Secretariat Commentary, (last updated Sept. 2, 1998) <http://www.cisg.lawpace.edu>.

[62] Arts. 16(2)(b), 21(2), 29(2), 37-40, 49(2), 64(2), 82, 85-88.

[63] OLG München, 7. Zivilsenat, Mar. 11, 1998, 7 U. 4427/97.

[64] A.E. Farnsworth, *The Concept of 'Good Faith' in American Law*, Saggi, Conferenze e Seminari (Apr. 1993) at 3.

types of bad faith such as evasion of the spirit of the deal, lack of diligence and slacking off.[65] Professor Farnsworth and Professor Steven Burton, on the other hand advocated the positive approach. Professor Burton criticized the theory by stating that courts "typically use the doctrine to render agreed terms unenforceable or to impose obligations that are incompatible with the agreement reached at formation," rather than "to effectuate the intentions of the parties."[66] The answer to this question needs to be found within the CISG. If we search the Articles which are affected by good faith, we can discover that some articles describe bad faith behavior and therefore to be excluded. A good example of bad faith can be discovered in Article 40 which brings us back to the start of the argument. The only conclusion that may be drawn is that bad faith and good faith can be used cumulative and are consistent with the goal of Article 7.

The dual role of "good faith" to interpret the Convention as well as the behavior of contractual parties, is not recognized by all. The drafting history supports Professor Winship's argument to the contrary.[67] He is also supported by *ICC Arbitration Case No 8611.*[68] The arbitrator stated that "since the provisions of Art. 7(1) CISG concern only the interpretation of the Convention, no collateral obligation may be derived from the promotion of good faith."[69] However the presence of good faith as an obligation of the parties is impressive. In *Filanto*[70] the court by implication applied the principle of good faith. Specifically, the court noted that *Filanto* "cannot rely on the contract when it works to their advantage and repudiate it when it works to their disadvantage."[71] In *Dulces Luisi,*[72] Article 7 was used to impose a standard of behavior upon the parties. The behavior of the Korean buyer was contrary to the principle of good faith. A Buda-

---

[65] *Id.*

[66] *Id.*

[67] *See* Koneru, *supra* note 9, at 120.

[68] *ICC Arbitration Case No. 8611,* Jan. 23, 1997 Vhttp://cisgw3.law.pace.edu/cases/978611i1.html>.

[69] *Id.*

[70] *See* Filanto S.p.A. v. Chilewich International Corp., *supra* note 25.

[71] *Id.*

[72] *See* Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. y Seolia Confectionery Co., *supra* note 58.

pest Arbitration proceeding[73] applied Article 7(1) as a standard to be observed by the parties. The arbitrator noted that the issuance of a bank guarantee which had already expired was contrary to the principle of good faith.[74] In *SARL BRI Production "Bonaventure" v. Societe Pan African Export*[75] the seller was insistent to know where the jeans were being sent. It was specified that the jeans were to be sent to South America and Africa. The purchaser, however, despite assurances to the contrary, sent the jeans to Spain. The plaintiff claimed 10,000 francs as compensation for abuse of process. The court agreed with the plaintiff's position and found that the buyer acted contrary to the principles of good faith in international trade pursuant to Article 7(1). This is a very interesting position. On the one hand, the court applied Article 7(1) to the relations between parties but it also used the principle of good faith as a tool to levy, in essence, a fine. Whether the principle of good faith can be used in such a way remains to be seen, especially as the court also awarded damages of a further 10,000 francs under Article 700 of the French code of civil procedure.

More conventionally, good faith performs a dual role: one, directed to the parties; the other, to the judiciary. "The former role arises from the textual provisions and the general principles of the Convention, and the latter role comes from the legislative history of the Convention."[76] As a final example, Professors Ziegel should be quoted. He states that although Article 7(1) "does not refer specifically to the observance of good faith in the formation of the contract, its language is sufficiently broad to admit its inclusion."[77]

Article 7(1) is a prime example of the workings of the CISG. Textual interpretation of an article leads to the discovery of its primary role, in our case, to interpret the Convention. Thus it affords us the possibility to discover that such an obligation cre-

---

[73] Budapest arbitration proceeding (Hungary), Vb 94124, Nov. 17 1995 <http://cisgw3.law.pace.edu/cases/951117h1.html>.

[74] *Id.*

[75] CA Grenoble, (France) Feb. 22, 1995 <http://cisgw3.law.pace.edu/cases/950222f1.html>.

[76] *Id.*

[77] J.S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on contracts for the International Sale of Goods*, (last modified Apr. 23, 1999) <http://www.cisg.law.pace.edu/cisg/text/ziegel7.html>.

ates a principle of "good faith". As there is an obligation to read and interpret the articles within the context of the CISG, such a principle must be applied to the relationship of the parties as subsequent articles regulate such a relationship. However, an important point to note is that the CISG does not interfere with the contractual intentions of the parties despite the fact that some clauses may not fit into the principle of good faith. In *Diepeveen-Dirkson BV v. Niewenhoven Veehandel GmbH,*[78] the buyer signed a contract which contained a penalty clause. The seller contended that the penalty was disproportionate to the harm suffered by the buyer; that on grounds of good faith and fairness the penalty ought to be decreased to a more appropriate level. The court found that the principle of good faith does not extend to terms willingly entered into by parties and found no basis within the CISG to reduce the penalty. After all, the question as to penalty clauses is governed under domestic law.

At this stage there are not enough cases to come to a conclusion whether the courts have interpreted the principle of good faith correctly. The principle of good faith still needs to be developed. The CISG itself does not offer much help when trying to determine what god faith actually means. There is a possibility that the debate as to the standard of good faith is not needed in relation to the CISG. Conceivably, the drafters of the CISG by design or good luck have avoided the need for courts to "adopt a doctrine of good faith . . . to improve contract enforcement"[79] by tying good faith to specific situations. To come to a more informed conclusion, a brief analysis of what good faith means through the eyes of domestic law would be of value.

V. Interpretation of Good Faith

As the CISG, in contrast with other domestic and international laws, has introduced good faith as a principle that covers the application of the Convention, it has introduced a new powerful and irresistible way of interpreting international laws.

The easiest and by far safest way to achieve international uniformity in applying the CISG would be the accessibility of a

[78] Diepeveen-Dirkson BV/Niewenhoven Veehandel Gmbh, (Netherlands) Aug. 22, 1995 <http://cisgw3.law.pace.edu/cases/950822n1.html>.

[79] D. Stack, *The Two Standards of Good Faith in Canadian Contract Law*, 62 Saskatchewan L.R. 223 (1999).

common set of rules explaining how good faith is to be applied. But "it will be impossible to satisfy this hope, because there is, in fact, no such common stock of concrete rules."[80] Such an outcome is not surprising. To have such a common stock of concrete rules would mean that it is possible to span different legal systems, that is, to work from a common conceptual basis. It is exactly this problem namely the desire of the Convention "not to identify itself with any legal system but to conjugate with all"[81] which gave rise to the need to introduce a tool to interpret the application of the Convention. As only certain issues are regulated in the CISG and others such as validity are excluded, gap filling together with the principle of good faith must overcome this problem as well.

As there is no common set of rules, how do we give meaning to "good faith" as the CISG does not give a definition? One possible way of interpreting good faith is to resort to principles which are developed in specific legal systems. There are arguments to suggest that the principle of good faith as developed in the relevant domestic system ought to be applied. However, such an argument is dangerous as it could lead to the use of domestic law and not fulfill the international character as stipulated by Article 7(1). Such a view is neither new nor unique to the CISG. The House of Lords, in a 1962 decision, stated that "it would be deplorable if the nations should, after protracted negotiations, reach agreement . . . and that their several courts should then disagree as to the meaning of what they appeared to agree upon."[82] This statement of persuasive nature certainly contradicts the domestic view traditionally held by common law courts that the meaning of legislation is deduced solely from the words of the statute.[83] As "good faith" is not defined in the CISG, a brief review of what good faith means in domestic law, provides an indication as to its meaning. It is most important to keep in mind that whatever is found cannot be automatically transplanted into the CISG. As stated above, the CISG cannot be interpreted using national judicial constructions and terms.

---

[80] Schlechtriem, *supra* note 54, at 3.

[81] F. Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 187 (1994-95) [hereinafter *Uniform Interpretation*].

[82] Scruttons Ltd. v. Midlands Silicones Ltd., [1962] A.C. 446, 471.

[83] *See Uniform Interpretation*, *supra* note 81, at 221.

It appears that there are signs in many common law countries to suggest that the notion of good faith has taken a foothold. In Australia, good faith was used in an obiter in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[84] and in Canada, Ziegel suggests that a "growing number of common law precedents in Canada . . . support its [good faith] adoption."[85] The Canadian experience is of great interest as it is in contrast with the English development, or lack of, good faith. Canada is in the process of developing a distinct duty of good faith applicable to contract enforcement, whereas England still has not found "that good faith has any concrete meaning in the context of contract law."[86] Good faith without a concrete meaning would threaten the important principles of certainty and predictability.

These observations are supported by the view expressed by Goode[87] who suggested that "we in England find it difficult to adopt a general concept of good faith' and "we do not know quite what it means."[88] This leads to the belief that a common law country like Australia would find it difficult to search domestic law and come up with principles of good faith which could be used to interpret the CISG. This does not mean that the principle of good faith is totally unknown in the Australian legal system. It can be said that there is no direct reference of good faith as a principle, but good faith as an expression of mutual confidence is indirectly expressed in various legislation. As an example, s.52(1) of the Trade Practices Act states that "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." It is important to note that Fox J[89] said:

> Section 52 is a comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It

---

[84] Renard Constructions (ME) Pty. Ltd. v. Minister for Public Works, 26 NSWLR 234 (1992).

[85] Ziegel, *supra* note 77.

[86] Stack, *supra* note 79, at 202.

[87] Roy Goode, Norton Rose Professor of English Law at St. John's College, Oxford.

[88] Roy Goode, *The Concept of "Good Faith" in English Law*, Saggi, Conferenze e Seminari, 1992 <http://www.cnr.it/CRDCS/goode.htm>.

[89] Brown v. Jam Factory Pry Ltd., 53 FLR 340, 348 (1981).

> does not purport to create liability at all; rather it establishes a norm of conduct . . . .

There could be disagreement that good faith is expressed indirectly within Australia's domestic law. However, it is of significance that Fox J expressed the view that our system shows an ability to change or accommodate changes despite the fact that they do not "adopt the language of any common law cause".[90] The conclusion which can be drawn is that good faith can be imported into domestic law as a principle. This is specially important as otherwise aliens receive greater protection under the CISG than nationals would under domestic law. Goode, as late as 1992, still expressed the view that:

> The last thing we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable, and if that means that the outcome of disputes is sometimes hard on a party we regard that as an acceptable price to pay in the interest of the great majority of business litigants.[91]

At this stage it can be said that Professor Goode's comments are wrong and only if the judiciary fails to grasp the significance of Article 7 and fails to implements its principles would good faith be a "vague concept of fairness". If we contrast another comment in the same year, this time in Australia, a completely different view can be found. Justice Priestly argued:

> The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith with are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognized as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.[92]

---

[90] *Id.*

[91] *See* Goode, *supra* note 88.

[92] Renard Constructions (ME) Pty. Ltd. v. Minister for Public Works, *supra* note 84, at 234.

To be noted is the fact that Justice Priestly believes that good faith is already an implied tool to solve contractual disputes. If the fact that he used the words "an orthodox technique" is considered, it can argue that a recognition of good faith is well established within Australia and it gives weight to the argument that as an example the Trade Practices Act uses implicitly good faith.

More importantly, even if there are rules and phrases of good faith developed in a particular system, they must be able to be transplanted into the CISG. Conceivably they could have been written to satisfy a particular need which is not apparent in the CISG. Rules are only meaningful within a particular context. As an example, it can be said that most of the common law countries do not recognize a duty of good faith in negotiations, that is, in pre-contractual relations.[93] There is also the danger in this approach that rules or principles which were developed with the facts of a given case in mind are applied as a reference to other cases or developed as a source of more general rules and hence implemented into a normative text.[94]

VI. Good Faith and the CISG

Good faith, as discussed above, covers the application of the Convention as well as the parties' rights and obligations. Basically, it is a "general duty" based on judicial interpretation of community standards, reasonableness and fair play.[95] So far the discussion only centered around the application of good faith, that is, when and where it is to be applied. What has not been done is to attempt to determine what good faith actually means within the context of the CISG. A brief examination of domestic law and its treatment of good faith opened a small window of understanding. Most importantly, it showed two things: namely, that there is no universally accepted definition of good faith; and that each country treats the principle of good faith differently. One fact emerges clearly, namely, that domestic interpretation and definitions of good faith cannot be transplanted into the CISG as explained in *Dulces Luisi*.

---

[93] Farnsworth, *supra* note 64, at 10.

[94] *Id.*

[95] *See* Stack, *supra* note 79, at 201

The best starting point is to go back to "basics". The CISG pursuant to Article 4 only "governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." Article 7(1), as far as good faith is concerned, applies to the interpretation of the totality of the CISG. Such a mandate is primarily directed to the judiciary to interpret the CISG in good faith. Such an interpretation covers the formation of the contract and the right and obligations of the buyer and seller. Article 7 also created a principle of good faith to be found through the CISG, such as in Article 40. As such, it is not only directed to the judiciary but also to the parties as noted by the Court d'appel Grenoble in *Bonaventure*. The language of Article 4 also supports such a conclusion. The question is, as far as the parties are concerned, whether good faith extends beyond the specific instructions to be found within the Convention? Put in other words, the question could read: Is the mandate in Article 7 broad enough to allow the judiciary as well as the parties to the contract to rely on a general principle of good faith and apply it to any conduct not in line with good faith?

There is no controversy in stating that Article 7(1) urges the judiciary and the parties to the contract to observe good faith in international trade. As far as the judiciary is concerned, Article 7(1) is rather a "mind set" than a concrete regulation. No direct penalties or remedies flow from the principle of good faith as applicable to the Convention as a whole. The same applies to the parties. In my view, if a party fails to exhibit good faith and is not in direct breach of any other articles within the Convention, the CISG through Article 7(1) does not allow the court "to manufacture" remedies or principles as shown in *Bonaventure*. The Australian Trade Practices Act in s.52 also applied a similar mandate in stating that a corporation shall not engage in conduct that is misleading or deceptive. Fox J[96] states that s.52 "does not purport to create liability at all; rather it establishes a norm of conduct." However, unlike the CISG, the Trade Practices Act introduced consequences for failure to observe s.52 "elsewhere in the same statute, or under general law."[97] As the CISG does not provide for failure to observe Article 7 and hence

[96] *See* Brown, *supra* note 89.
[97] *Id.*

creates a gap, the courts are free to apply domestic law as shown in *Bonaventure* where the court applied French domestic law to compensate the plaintiff for abuse of process.

The reverse is true if good faith or bad faith is exhibited in direct conflict with articles where the principle of good faith is included, such as Article 40. In these circumstances, a breach of these articles requires the court to invoke the principle of good faith but the court is not required to embark on a great "philosophical dissertation" to discover the meaning of good faith. Good faith is linked directly to prescribed situations and hence is explained. Article 40 is used to illustrate this point. *Beijing Light Automobile Co., Ltd v. Connell Limited Partnership* (Beijing Metals)[98] is a leading case. It revolves around the fact whether Article 40 was applicable. A lock plate, which was installed in a machine, broke four years after installation. Pursuant to Article 39(2) the buyer loses the right to rely on a lack of conformity of goods after two years. Article 40 states: 'The seller is not entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer." Article 40 is a "safety valve" which allows a buyer to overcome Articles 38 and 39 if the reason for his late discovery of non-conformity is based on the seller exhibiting bad faith (or not exhibiting good faith). The first comment the tribunal made is that Article 40 is only to be applied in special circumstances. The tribunal must be convinced that a fact of which the seller had knowledge of, or ought to have had in its mind, resulted in a loss to the buyer. Such conduct can be described as an awareness of bad faith. "The requisite state of awareness that is the threshold criterion for the application of Article 40 must in the tribunal's opinion amount to a least a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity."[99] The court has not resolved an issue of conceptual nature, but rather put a practical interpretation to a conceptual issue.

---

[98] *See* Stockholm Chamber of Commerce Arbitration Award of June 5, 1998 <http://cisgw3.law.pace.edu/cases/980605s5.html>.

[99] *Id.*

VII. CONCLUSION

In sum, Article 7(1) explains the concept or policy under which the CISG needs to be interpreted. Because uniformity needs to be promoted, regard must be had to international case law and scholarly writing. The use of domestic law and functionally similar rules which are tied to domestic system of law cannot be used in the interpretation of the CISG. It is very rare to see any judicial decisions which do not refer to cases and writings in an extensive way. German cases specifically rely extensively on scholarly writing whereas case law is not as extensively used. However such practices are changing. A very important point ought to be kept in mind when deciding whether to accept the CISG as a governing law or opt out pursuant to Article 6 of the CISG. The Convention has taken on an important aspect. It has become the de facto sales law of many regional trading blocks. The EU and the NAFTA account for a large amount of international transactions and all of the member states have ratified the CISG. The Asian-Pacific area creates a different picture. Japan, Indonesia, South Korea and Malaysia have not ratified the CISG. However China is one of the oldest members and with its emergence as a major trading nation will influence this area significantly. The fact is that CISG jurisprudence will be dominated by decisions involving transactions between members of regional trading groups.[100] Smaller trading nations such as Australia will be forced to accept a jurisprudence developed within trading blocks.

Whether this leads to regionalized decisions needs to be seen. Article 7 does expect that the CISG is interpreted with a view to its international character, hence, creating uniformity. Above all, good faith must be observed, not only in the interpretation of the Convention, but it should also be used correctly by courts to set a standard of behavior between parties.

Australian courts can derive authority to follow Article 7(1) through two sources. Firstly, and most importantly, the CISG itself obliges Australian courts to follow the mandate because ratification of the Convention obliges Australia to give meaning

[100] Flechtner, *Another CISG Case in the U.S. Courts; Pitfalls for the Practioner and the Potential for Regionalized Interpretations* (last updated May 12, 1998) <http://www.cisg.law.pace.edu/cisg/text/html>.

to the CISG. Secondly, the *Fothergill* case clearly established a persuasive precedent and in its ratio gave life to the interpretation of international conventions. As far as the question of good faith is concerned, Australian courts should not encounter any problems as by analogy the Trade Practices Act (TPA) has introduced pursuant to s.52 a principle not dissimilar to good faith. The problem domestic courts must be aware of is that the TPA, which is functionally similar in certain rules, cannot be used to interpret good faith under the CISG. However, what is clear is that good faith is not a concept which is "brand new" in Australian domestic law, hence, it should not be difficult to master within the context of the CISG.

Importantly, Article 7(1) also leads to the discovery of tools or methods to interpret the CISG which are different to the ones used to interpret domestic law. The international character of the Convention is a mandate to consider the effects of translation on the meaning of unclear words. It is not only permissible to look at foreign language texts but it is obligatory.[101] The *Fothergill* case also recognized that interpretation of an international convention, which spans different legal, economic and social systems, must be "unconstrained by technical rules". Words therefore must be read within the context of the CISG, hence, promoting uniformity in the application of the CISG.

Case law using Article 7(1) is sparse. However taking the nature of Article 7 into consideration one would not expect to see many decisions, as it appears to be natural to apply uniformity and international trade and good faith in international contracts. It is an article which is of an excluding nature such as the avoidance of anything connected directly to domestic law. There is no real need to invoke the article unless something of dubious or difficult nature emerges. The CISG, as well as the contract between the parties, needs the reassurance that the approach or policy of interpretation is correctly used or, alternatively, has been misused by contractual parties. It can be said that so far we have looked for an explicit application of Article 7(1). Article 7(1) as stated above invites courts to take a much more liberal and flexible attitude when interpreting the CISG compared to domestic law. In particular, courts ought to "look,

[101] *See* Fothergill v. Monarch Airlines, *supra* note 11, at 699.

whenever appropriate, to the underlying purposes and policies of individual provisions as well as the Convention as a whole."[102] Considering such a mandate, it can be argued that Article 7(1) is also implicitly used in interpreting individual provisions.

The speed of globalisation and other associated factors affect increasing sectors of business. This development makes it imperative to understand the CISG as it can provide added certainty and help minimize cross border legal risks.

---

[102] C.M. BIANCA & M.J. BONNELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION, at 78 (Guiffre 1987).