THE LAST OUTPOST: AUTOMATIC CISG OPT OUTS, MISAPPLICATIONS AND THE COSTS OF IGNORING THE VIENNA SALES CONVENTION FOR AUSTRALIAN LAWYERS

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Australian lawyers and courts have tried long and hard to ignore the CISG. However, this article argues that widespread exclusion of the CISG and its misapplication in Australian courts has had serious consequences: clients have been disadvantaged, professional obligations have been heavily glossed over, the administration of justice has been compromised, and client costs and judicial resources wasted. This article points out that CISG cases are disseminated and analysed throughout the world, and Australian misapplication of the CISG has not gone unnoticed. This reflects upon the reputation of the Australian legal profession, Australian courts, and Australia’s viability as a location for international dispute resolution. It is argued that, while other jurisdictions are improving their track records, Australia still lags behind. This article explains why Australian lawyers should not routinely exclude the CISG. It outlines its advantages and provisions. The article provides arguments that barristers could run in future, references numerous freely available resources, and gives courts and lawyers guidance on the CISG’s unique interpretive methodology and its effect in displacing local laws, both key elements in its proper application. It is argued that if Australian lawyers and courts do not rise to the challenge, Australia will be left behind as an outpost of CISG ignorance.

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* Faculty of Law, Monash University. The author acknowledges the generosity of Martin Koehler and Justus Meyer for sharing details of their empirical work, including a translated overview by Professor Meyer. I am indebted to Dr Clyde Croft SC, Professor Al Kritzer, Luca Castellani, Michael Sifris SC and the anonymous reviewers who each kindly read drafts and provided comments. I would also like to thank the MJIL Editorial team for their ‘epic’ work. All views expressed within are entirely my own.
I

INTRODUCTION

The Vienna Convention on Contracts for the International Sale of Goods (‘CISG’) is still in the Australian legal outback. To their clients’ detriment, Australian lawyers have paid it inadequate attention. While certainly not yet alone, Australia risks becoming increasingly isolated in this stance. Some jurisdictions with similarly poor track records have shown they are now starting to come to grips with the CISG’s unique nature as autonomous uniform law. Despite continued misapplications, they have at least begun to turn the corner. Unfortunately, this has not yet happened in Australia.

But how far behind is Australia, and why should practitioners and courts care? This article attempts to answer those questions by looking at the culture of automatically opting out of the CISG and by reviewing Australian court decisions. It argues that there is an ongoing failure to consider these advantages in choice of law advice, an absence of effective utilisation of the CISG in argument and a misapplication of the CISG by the Australian judiciary. This article suggests that not only are these trends detrimental to the best interests of clients and the proper administration of justice, but that taken together they could conceivably harm the competitiveness of the Australian legal profession, especially given the CISG’s growing importance in the Asia-Pacific region.

If Australia is not to be left behind as one of the last outposts of misunderstanding of the CISG, much less aspire to become a hub of regional dispute resolution, then our track record needs improvement in the eyes of the international legal community. This article aims to assist in that process as something of a roadmap: to identify resources on the CISG; to explain its advantages, features, proper application and effect in displacing domestic law; and to point out arguments available under the CISG. An Italian CISG case is then used to illustrate the manner in which Australian courts can in future approach the CISG as a truly international uniform law, and thus signal our jurisdiction’s capacity to appropriately deal with international commercial matters. After all, legal insularity is no longer an option we can afford.

II

WHEN DOES THE CISG APPLY?

Australia acceded to the CISG on 17 March 1988. The CISG was legislatively implemented across Australia effective 1 April 1989. In Australia,
The CISG automatically applies whenever the CISG’s own internal rules of application are satisfied and a contract falls within its sphere of application. This is confined to contracts predominantly involving goods, and it does not of its own accord apply to contracts (inter alia) for electricity, goods bought for household use, or contracts that result from auctions.

The internal rules of application greatly simplify the uncertainty of conflict of laws rules that might otherwise apply to resolve the governing law of the contract. Their effect is that the CISG will apply in the following four scenarios:

(a) Direct application by virtue of art 1(1)(a)

The CISG applies where parties have their places of business in different member states, described in the CISG as Contracting States. Thus it will govern contracts of sale between parties from the United States and Australia, if this fact is apparent before conclusion of the contract.

(b) Indirect application through art 1(1)(b)

The CISG might also apply if the forum’s conflict of laws rules result in application of the law of a Contracting State. Thus if the forum’s conflict of laws rules result in Australian law as the proper law of an international sales contract, the CISG will apply as part of Australian law. By art 95, a Contracting State can declare it is not bound by this second, indirect means of application. Thus, it is less than certain whether the CISG would govern

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6 Rather than predominantly labour or other services: CISG, above n 1, art 3(2).

7 Article 2 states that the CISG does not apply to sales of goods for personal or household purposes, goods sold by auction, shares, negotiable instruments, money, ships, aircraft or electricity.

8 As at 1 June 2009, there are 74 Contracting States: UNCITRAL, Status: 1980, above n 3.


10 Ferrari, ‘The CISG’s Sphere of Application’, above n 9, 40.

11 Bridge notes that, on a strict linguistic approach, art 1(1)(b) simply makes the CISG applicable, not applicable as part of the law of the relevant Contracting State: Michael Bridge, ‘Uniform and Harmonized Sales Law: Choice of Law Issues’ in James J Fawcett, Jonathan M Harris and Michael Bridge (eds), International Sale of Goods in the Conflict of Laws (2005) 905, 908, 922.
(c) By agreement between the Parties

Party autonomy is widely accepted in conflict rules, and therefore an agreed choice of the law of a Contracting State will normally result in the CISG’s application as part of that Contracting State’s law through art 1(1)(b). By contrast, the CISG can apply where neither party is from a Contracting State, but parties have specifically agreed to apply the CISG (as opposed to an agreed choice of the law of a Contracting State). Specific CISG opt-ins are subject to mandatory domestic laws, as they effectively


13 However, it is rumoured that the UK is now poised to revisit the possibility of becoming a Contracting State of the CISG.


achieve application by the CISG’s incorporation into contractual terms.\textsuperscript{16} This method of application can prove problematic in some jurisdictions.\textsuperscript{17}

(d) **Appropriate law determined by Arbitral Tribunal**

Absent a choice of law clause, even if the CISG would not automatically apply due to arts 1(1)(a) or (b), arbitral procedural rules may allow a tribunal to deem that the CISG applies as the appropriate law, or as evidence of international usages.\textsuperscript{18}

Thus the CISG can become governing law of the contract either by default or by agreement. Parties can opt out of its application through a suitable choice of law, as the CISG allows parties to derogate from its provisions in whole or in part.\textsuperscript{19} This also gives parties the flexibility to mould the CISG to their own requirements.

### III AIM OF THE CISG AND WHY AUSTRALIAN LAWYERS SHOULD UNDERSTAND IT

#### A Aim of the CISG and Its Impact in Our Region

The aim of the CISG is to provide a neutral, uniform, harmonised sales law around the world to reduce the uncertainty and costs of transacting across


\textsuperscript{17} Where neither party is from a Contracting State, application by agreement alone can be problematic because the CISG in such circumstances might be considered an ‘a-national’ law. Such a choice might not be permitted by some conflict of laws rules which require choice of the domestic law of a state; for example, the position under the 1980 Rome Convention, above n 14, in Europe, now replaced by Regulation No 593/2008, above n 14 (which, for contracts concluded from 17 December 2009, allows the choice of non-state law: preamble [13]). A choice of arbitration normally avoids the problem. See ‘UNCITRAL Model Law on International Commercial Arbitration’ (as adopted by the UNCITRAL on 21 June 1985) in the International Arbitration Act 1974 (Cth) sch 2, art 28, which enables the tribunal to apply ‘rules of law’ chosen by the parties. See Franco Ferrari, ‘Choice of Forum and CISG: Remarks on the Latter’s Impact on the Former’ in Harry M Fletcher, Ronald A Brand and Mark S Walter (eds), Drafting Contracts under the CISG (2008) 103, 115–16 (‘State courts will not recognize the choice of CISG as a choice of “law” … when the forum’s [conflict rules] are those laid down in the [1980 Rome Convention] or in the 1955 Hague Convention on the Law Applicable to International Sale of Goods’); Michael Joachim Bonell, ‘Article 6 — Parties’ Autonomy’ in Cesare Bianca and Michael Bonell (eds), Commentary on the International Sales Law: The 1980 Vienna Sales Convention (1987) 51, 63–4. See also Dalhuisen, above n 14, 204.


\textsuperscript{19} CISG, above n 1, art 6.
multiple jurisdictions.\textsuperscript{20} It has been ratified by some 74 nations, including South Korea in 2005, and Japan in 2008.\textsuperscript{21} Another of Australia’s most important trading partners, China, has not only acceded to the \textit{CISG},\textsuperscript{22} but has become the country from which \textit{CISG} cases are emerging more quickly than any other in the world. The accession of South Korea and Japan has sparked renewed interest towards the \textit{CISG} in a number of Association of Southeast Asian Nations countries, such as the Philippines, Thailand and Vietnam. Further, following academic proposals, there are also growing demands to adopt the \textit{CISG} as the regional law of sales. This would unify sales law at both the global and at the regional level.\textsuperscript{23} Thus, the \textit{CISG} is significant law for international sales globally, and has become increasingly important for the Asia-Pacific region in particular.

\section*{B Reasons Why Australian Lawyers Need to Better Understand the \textit{CISG}}

Why should Australian lawyers care about the \textit{CISG}? Australian lawyers certainly appreciate the importance of standardisation of trade and investment laws,\textsuperscript{24} but have simply not translated this into a good working knowledge of harmonised sales law in practice. The escalating significance of the \textit{CISG} in our region underlines the importance of a better understanding of the \textit{CISG} amongst Australian courts and lawyers in order to:

1. Ensure that the Australian legal profession remains competitive;
2. Provide clients with proper advice and representation;
3. Avoid actions for professional negligence;\textsuperscript{25}
4. Aid the proper administration of justice in Australia;
5. Improve the way in which Australia is viewed by the international legal community; and
6. Help Australia actively engage in creation of international \textit{CISG} jurisprudence.\textsuperscript{26}


\textsuperscript{21} Japan acceded to the \textit{CISG} on 1 July 2008, and the \textit{CISG} will enter into force for Japan on 1 August 2009. In South Korea, the \textit{CISG} entered into force on 1 March 2005. See \textsuperscript{23} See UNCITRAL Secretariat, Technical Co-operation and Assistance, UN Doc A/AC.9/627 (18 April 2007) [8]–[9].

\textsuperscript{22} China signed the \textit{CISG} on 30 September 1981, acceded on 11 December 1986, and the \textit{CISG} entered into force for China on 1 January 1988: ibid.


\textsuperscript{24} See below Part IV.
It is argued that whether the matter is viewed from the individual or broader industry level, there are strong incentives for Australian lawyers to understand the *CISG*. The growing importance of the *CISG* in the Asia-Pacific means that increasingly, there will be occasions in which a counterparty to a deal prefers or insists on the *CISG* as a choice of law. It also means that there will be many more disputes in which the *CISG* applies by default, or is deemed applicable by an arbitral panel.\(^{27}\) Whenever these situations arise, Australian lawyers and courts need a good grounding in the *CISG*. If a basic understanding of its provisions is lacking, the *CISG* will be incorrectly interpreted and applied. This will have adverse consequences for the quality of advice received by clients, the representation of clients by counsel in dispute resolution, the proper administration of justice in Australian courts,\(^{28}\) and within the bigger picture, will fray the fabric of the international uniformity of the *CISG* itself.

Individually, Australian lawyers might care little for this bigger picture of international uniformity. However, unlike cases dealing with local laws, *CISG* decisions from all countries are collected, disseminated and analysed at the international level.\(^{29}\) Our less-than-glowing track record in applying the *CISG* properly is clearly visible to the rest of the world and affects the way in which the Australian profession is viewed internationally. Whether we like it or not, Australians will be parties to contracts to which the *CISG* applies. Consequently, Australian lawyers and courts will be (and are being) called upon to respectively advise on and apply the *CISG* with gradually mounting frequency, but are perhaps unaware that the quality of our efforts is being viewed and assessed by lawyers, courts and arbitral panels from around the globe.

Encounters with the *CISG* as part of dispute settlement are in a sense involuntary. By then, application of the *CISG* is a fait accompli. However, at the drafting stage, a choice does exist. Should Australian lawyers utilise the *CISG* at the front end of transactions when they have a choice? The question can be answered on both macro- and micro-levels.

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*Competitiveness of Australian Lawyers*

A broader, macro policy perspective is the prospect of developing Australia as a ‘regional hub’ for international commercial dispute resolution. Support for this initiative was recently indicated by the Federal Attorney-General.\(^{30}\) While

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26 This list owes much to Antonin Pribetic, who presented similar conclusions in regard to Canada, but far more concisely: Antonin I Pribetic, ‘An “Unconventional Truth”: Conflict of Laws Issues Arising under the CISG’ (Paper presented at the Continuing Legal Education Program, Toronto, Canada, 10 March 2009) 62. The final point is discussed below in Part VIII.

27 See above n 9 and accompanying text.

28 See below n 123 and accompanying text; Part VIII.

29 Of course, decisions on domestic law are sometimes referred to in other jurisdictions, within court decisions or in academic journals utilising comparative law. However, in interpreting the *CISG*, courts and tribunals from all jurisdictions are required to, inter alia, consider *CISG* decisions from other jurisdictions. For this reason, *CISG* decisions are made available on various websites, with accompanying commentary, and are often translated: see below n 128 and accompanying text.

reform of laws governing arbitration are the main focus of attention for such developments, the quality of Australia’s lawyers and courts in handling international trade disputes will obviously be an important ingredient for the success of such a policy. The ability to interpret and apply the CISG properly is indicative of the local profession’s capabilities. If lawyers elsewhere in the Asia-Pacific deal with the CISG more frequently, we will have comparatively less experience and expertise in this field, and consequently a diminished overall ability to compete in the provision of international dispute resolution services and ancillary legal advice. The impact of international law firms also needs to be considered, since such firms undoubtedly have CISG skill bases upon which to draw. Australians are often involved in CISG disputes in other jurisdictions. Competitive pressures will force Australian-based firms purporting to have international transaction expertise to acquire such skills eventually. In the meantime, the quality of Australian cases does not yet signal that Australian courts or lawyers have such expertise. One international observer has noted that better quality cases have been produced just across the Tasman than in Australia.

By breaking the habit of automatically opting out, and instead choosing the law of a Contracting State without exclusion of the CISG in cases where it is appropriate for the transaction, any Australian lawyer or firm can break the vicious circle of unfamiliarity by inevitably exposing other Australian lawyers to the CISG.


32 Harry M Flechtner, ‘Changing the Opt-Out Tradition in the United States’ (Paper presented at ‘Modern Law for Global Commerce: Congress to Celebrate the 40th Annual Session of UNCITRAL’, Vienna, Austria, 11 July 2007) 2 <http://www.uncitral.org/pdf/english/congress/Flechtner.pdf> (noting the pressures exerted on the US legal sector by globalisation of the legal services market). Australian lawyers seem relatively wary of global law firms. In a survey of 700 lawyers worldwide, they were the least likely to view the globalisation of the legal profession as an opportunity, and were amongst the least likely to view competition with international law firms as likely to improve local firms and markets for legal services: LexisNexis, ‘Legal Professions’, above n 24, 3; LexisNexis, ‘Sarbanes-Oxley Disclosure and Confidentiality: Executive Summary’, The 2003 LexisNexis–IBA Legal Survey (2003) 6 <http://www.lexisnexis.com/about/whitepaper/LexisNexis_ExeSummary.pdf>.


34 Ziegel, ‘The Scope of the Convention’, above n 9, 70 (fn 32) (stating that ’New Zealand courts also seem to have done a better job of coming to grips with the CISG provisions and case law than their peers in Canada and Australia’).

35 See below Part IV.
However, Australian lawyers and firms would need to be convinced that there is an advantage in negotiating such a choice of law — that the CISG is appropriate and in their client’s best interest in a particular transaction. The advantages of the CISG need to be understood at the micro-level before any macro snowballs can develop. Interestingly, the advantages of the CISG at the individual client level are themselves often systemic and strategic in nature rather than substantive.

2 Systemic and Strategic Advantages of the CISG for Clients

For most lawyers, the question of whether to use the CISG is a much narrower one: is the CISG a suitable choice of law for the transaction in question? The answer will be the same as for any law: sometimes. In many circumstances the CISG can be the best choice, but no law is ideal in every situation. Like any law, it has its shortcomings, some of which are mentioned below. Yet its benefits derive from the determination of its drafters to replace the multitude of anachronistic, idiosyncratic localised sales laws around the world with one, relatively simple, pragmatic set of uniform laws designed specifically for international transactions. This affords the CISG three huge advantages over competing choices of law: uniformity, neutrality and simplicity.

These advantages pay off in various ways. First, they give a client the ability to standardise its preferred position on choice of law. As a neutral choice, the CISG might be more readily agreed upon by counterparties as a ‘level playing field’. This reduces negotiation costs and delays. As neither side need familiarise themselves with foreign domestic sales and ancillary laws, conclusion of the contract should in theory be quicker and cheaper. Over time, however, the real benefit is likely to be in reduced compliance costs. While standardisation of a client’s suite of contracts can presently occur with other choices of law, in a trading zone that is increasingly pro-CISG, recommending a preference for the CISG whenever appropriate should ramp up the proportion of contracts under a single law for each client, and in turn maximise the benefits of reduced uncertainty in performance obligations and compliance costs. This advantage will be further heightened for multinational clients.

36 As Brand puts it, ‘to have real value such rules must prove their worth to those who structure commercial transactions’: Ronald A Brand, ‘Article 79 and a Transactions Test Analysis of the CISG’ in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention (2004) 392, 392.


A second pay-off for the client is the reduced risk that the forum seized of a dispute arising from the contract will misapply the law chosen. If a court from country X determines it has jurisdiction and proceeds to apply the law of country Y, will the outcome be as expected by a client choosing law Y? This is of particular concern if X is a nation with a less developed or different legal system. Costs of litigation are amplified by the need for expert witnesses to prove foreign law, not to mention the attendant risk that, even then, it might not be applied correctly by a foreign court. However, if the CISG governs the contract, then the obligation of courts in X, Y and Z is the same: to apply the CISG as uniform international law, having reference to cases decided on the CISG around the world and CISG scholarship. Arbitral tribunals have little difficulty in applying the CISG. It is not proposed that outcomes under the CISG are utopian or perfectly predictable. But more than any alternative choice of law, irrespective of the location or nature of the forum, the CISG stands a much better chance of being uniformly applied. In this sense, the CISG has relatively more stable, predictable outcomes for international sales than any choice of domestic sales law. Moreover, since no choice of forum clause is completely airtight, this is an important consideration. In light of quite different and sometimes unexpected interpretations of choice of forum clauses in some jurisdictions, the CISG at least delivers a greater degree of certainty regarding substantive outcomes, regardless of forum. Additional stability is derived from the fact that the CISG is most likely to apply if the ‘battle of the forms’ results in neither parties’ choice of law prevailing.

A third advantage is the simplicity and accessibility of the CISG. Not only is its text available in six official languages, but it is simple to comprehend and therefore attractive to clients. Materials on the CISG are easily accessible around

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39 This is true of any one of the 74 Contracting States that have acceded to the CISG. In countries that have not, interpretation in such a manner is not an obligation pursuant to the Convention, but one might expect that in many cases, if the court were to find the CISG governed the contract, that it would be sensible to be guided by the interpretive principles inherent in the CISG, with similar results.

40 See below n 126 and accompanying text.

41 Monica Kilian, ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 Journal of Transnational Law and Policy 217, 243 (noting that, in arbitration, the CISG found a much better home than in US courts); George V Philippopoulos, ‘Awareness of the CISG among American Attorneys’ (2008) 40 Uniform Commercial Code Law Journal 357, 369 (arguing that the CISG was more popular where arbitration clauses were used because arbitrators were more familiar with it than US judges); Michael Gordon, ‘Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State’s (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges’ (Part 2) (1998) 46 American Journal of Comparative Law Supplement 361, 369 (similarly, regarding the UNIDROIT Principles of International Commercial Contracts).

42 See, eg, below n 412 and accompanying text, regarding the choice of forum clause in Vetreria Etrusca Srl v Kingston Estate Wines Pty Ltd [2008] SASC 75 (Unreported, Duggan J, 14 March 2008) (‘Vetreria’).


the world on internet sites dedicated to the dissemination of CISG cases and scholarship.\textsuperscript{45} To a great extent, this means lawyers, clients, courts and tribunals around the world are effectively ‘working from the same page’. Compare this ease of accessibility to the problems facing anyone wishing to access the intricacies of specific points of any foreign law. Different legal cultures, languages and even writing systems makes proper access to multiple foreign laws impracticable for busy practicing lawyers.

The fourth reason for seriously considering the CISG as a choice of law is that it is designed specifically for international sales. Most domestic sales laws need to be carbon-dated in order to determine their exact age, but many are derived from earlier laws and principles that arose in the wake of the industrial revolution.\textsuperscript{46} They were drafted with domestic sales in mind, and therefore incorporate principles unsuited to international trade, with its own special circumstances of distance, delays and interaction between different legal cultures. An American Bar Association address warned that outdated laws ‘not based on harmonized or transparent standards … increase commercial risks and transaction costs and may seriously hamper the activities of commercial entities’.\textsuperscript{47} The CISG, by contrast, is a flexible, harmonised uniform international sales law, in many cases better suited to the needs of clients transacting internationally.

The final reason why Australian lawyers should consider the use of the CISG is because it is increasingly viewed by our regional neighbours as a key choice of law, which is neutral and can be expected to be uniformly applied anywhere in the world.\textsuperscript{48} Clients that insist on a choice of non-CISG domestic law might increasingly be made to pay a price for the privilege,\textsuperscript{49} and need to be aware of this.

The better question seems to be: why would Australian lawyers not seriously consider the CISG as a potentially advantageous choice of law?

\textsuperscript{45} See below n 128.


\textsuperscript{49} Flechtner, above n 32, 2 (arguing that clients might even lose deals as a result).
Some might reject the **CISG** on substantive grounds. It is true that, like all international treaties, there were compromises made to ensure its passage, which left certain provisions ambiguous and its scope incomplete.\(^50\) One example is the treatment of interest, whereby the obligation to pay interest on damages is left certain provisions ambiguous and its scope incomplete.\(^50\) One example is the issue of set-offs, which is not directly covered by the **CISG**.\(^52\) A classic


ambiguity in the CISG is the notion of ‘good faith’.53 However, there are three important points to be noted about these types of shortcomings.

First, a great deal of supporting material is now available. There are now numerous CISG cases to draw upon, and plentiful scholarship. The bare bones of the CISG are now fleshed out by much in the way of guidance, although naturally there are still some areas of disagreement. Australian lawyers are becoming increasingly comfortable with the notion of good faith, and within the CISG the meaning and practical effect of CISG good faith is debated and explained in numerous cases and articles.54

Second, the CISG allows parties to modify most of its rules.55 Parties concerned about a certain issue can agree on the solution. The CISG also has an internal interpretive method that guides resolution of ambiguities within it.56 For matters falling outside the CISG, the usual conflict rules determine the law applicable to the issue.57

The content of the CISG is no worse — and in fact often very much better — suited to international sales than an outmoded sales law oriented toward domestic trade.58 Consideration is not required under the CISG. Contrary to domestic law in some jurisdictions, contracts need not be evidenced in writing. The CISG also removes the parol evidence rule.59 In terms of formation, the

53 CISG, above n 1, art 7(1), and less obviously as a general principle applicable through art 7(2).
54 There are too many to include here. For an overview and explanation of good faith in the CISG, see Lisa Spagnolo, ‘Opening Pandora’s Box: Good Faith and Precontractual Liability in the CISG’ (2007) 21 Temple International and Comparative Law Journal 261, 274–9.
55 See below n 131.
56 See below n 131.
57 Ziegel points out that the CISG was ‘not designed to offer a superior sales regime in place of inferior national regimes, although it may have that effect in some cases’. Instead, it was intended as a more accessible and ‘neutral’ alternative to ‘the multiplicity of frequently uncertain choice of law rules’: Ziegel, ‘Commentary on Party Autonomy’, above n 20, 124, 127–8 (noting that the CISG is better than British sale of goods models in some respects while being less preferable in others).
CISG is relatively traditional, with slight modifications. It requires a matching of offer and acceptance before a contract exists, yet a non-identical acceptance can result in a contract, provided that any changes are non-material, and no prompt objection to the discrepancies is forthcoming. However, most key terms are classified as material, including dispute resolution clauses. Communication of acceptance is effective once it reaches the offeror, unless practices between the parties, usages or the offer itself indicate otherwise. This differs somewhat from the domestic common law rule, which generally requires communication of acceptance subject to certain exceptions (including the postal rule exception). There appears no substantive cause for concern in the difference of approach.

The CISG contemplates the inherent delays and difficulties in reversing international transactions. To promote transactional efficiency in international trade, the CISG aims to keep transactions on foot, and therefore favours the


60 CISG, above n 1, arts 14–19. Thus, the CISG implements the ‘last shot’ theory of formation as modified by art 19: Maria del Pilar Perales Viscasillas, ‘“Battle of the Forms” under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2–207 UCC and the UNIDROIT Principles’ (1998) 10 Pace International Law Review 97, 147–9 (explaining that a reply containing no material alterations is an acceptance and its modifications will be incorporated into the contract; but a reply containing material alterations amounts to a counteroffer that will dictate the terms of the contract if later acts of performance accept it). Ziegel argues from a Canadian perspective that the formation rules were ‘already dated’ when the CISG was created: Ziegel, ‘The Future of the International Sales Convention’, above n 50, 346; Huber and Mullis, above n 16, 91, 100.

61 CISG, above n 1, art 19(2).

62 Ibid art 19(3). This also specifies as material, terms relating to ‘price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability’.

63 Ibid arts 18(2), 18(3). Acts such as dispatch of goods may indicate assent: Perales Viscasillas, above n 60.


65 See, eg, Bridge, ‘A Commentary on Articles 1–13 and 78’, above n 59, 256 (commenting on the economic waste of prematurely ending international sales).

remedies of price reduction and damages over termination.\textsuperscript{67} It contains innovations that assist in this process, such as a right to performance, and an additional right to set extra (reasonable) time periods for performance where performance is late or non-conforming.\textsuperscript{68} The \textit{CISG} also provides an opportunity for the seller to cure its own breach within reason.\textsuperscript{69} Damages measured by reference to a substitute transaction and the right to restitution are limited to

\textsuperscript{67} Price reductions are available pursuant to art 50 for non-conformity. Damages are generally available for non-conformity pursuant to art 74. On damages, see \textit{Cooling System Case} (Oberster Gerichtshof, Austria, 14 January 2002) <http://cisgw3.law.pace.edu/cases/020114a3.html>:

\begin{quote}
[\textit{The obligee should be put as closely as possible in the economic position in which he would have been, had the contractual obligations been properly performed ... [as the] CISG is based on the principle of full compensation [including both reliance and expectation losses].}]
\end{quote}


\textsuperscript{68} \textit{CISG}, above n 1, art 46, 62 (buyer/seller can require other party’s performance); arts 47, 63 (buyer/seller can set an additional reasonable time period for other party’s performance). Default terms on non-conformity are found in art 35. See, below nn 275, 279, 280, 283, 394 and 401. All can be modified by agreement: \textit{CISG}, above n 1, art 6.

\textsuperscript{69} \textit{CISG}, above n 1, art 37 (before delivery date); art 48 (seller can remedy own breaches at own expense if this does not cause unreasonable delays, expense or inconvenience for the buyer). See also, \textit{Inflatable Triumphal Arch Case} (Handelsgericht Aargau, Switzerland, 5 November 2002) §4(d)(a) <http://cisgw3.law.pace.edu/cases/021105s1.html> (on the relationship between arts 48 and 49, concluding that if an objective fundamental breach can be cured by the seller without unreasonable delay or burden, then the buyer is obliged to accept the cure unless, for example, there is unreasonable uncertainty or the seller is obviously incapable).
cases where the contract is avoided. Avoidance or termination is, in turn, only permitted in two serious circumstances: if the breach is fundamental, in the sense that it foreseeably and substantially deprives the innocent party of what they were entitled to expect under the contract; or alternatively, in cases of non-delivery, where the breaching party fails to deliver within an additional reasonable time period set by the innocent party, or declares that it will not do so within the additional time. Unless timely delivery is an essential requirement of the

70 Damages measured by reference to an actual or theoretical substitute transaction are available pursuant to arts 75 and 76. See discussion of arts 74, 75 and 76, below on 248–252 and accompanying text. Article 75 enables calculation of damages as the difference between contract price and substitute transaction price, but substitution must occur after avoidance was declared, within a reasonable time and in a reasonable manner, as determined by reference to a reasonably prudent business person. Abstract damages under art 76 are the difference between contract price and current market price at the time of avoidance: *Novia Handelsgesellschaft mbH v AS Maseko* (Tallinna Ringkonkohus, Estonia, 19 February 2004) <http://www.cisg-online.ch/cisg/urteile/826.pdf> (stating that crucial to art 76 is proof of a current price). Article 75 usually takes precedence. However, if there is no substitute transaction or the substitute transaction was unreasonable, damages can be calculated pursuant to art 76 abstractly, or art 74 according to concrete actual loss: CISG Advisory Council, *Calculation of Damages under CISG Articles 75 and 76* (CISG-AC Opinion No 8, 15 November 2008), Commentary [4.1.1]–[4.1.5], available from <http://www.cisgac.com/default.php?id=128>. To discourage speculation on price movements by buyers that have ‘taken over’ the goods before avoidance, current price for art 76 is determined at the time the goods were ‘taken over’ pursuant to art 76: Victor Knapp, ‘Article 76 — Damages Based on Current Price’ in Cesare Bianca and Michael Bonell (eds), Commentary on the *International Sales Law: The 1980 Vienna Sales Convention* (1987) 552, 555–6; Hans Stoll and Georg Gruber, ‘Sale of Goods Provisions Common to the Obligations of the Seller and of the Buyer: Damages: Arts 74–77’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), Commentary on the *UN Convention on the International Sale of Goods (CISG)* (2nd ed, 2005) 745, 785; CISG Advisory Council, *Opinion No 8*, above this note, Commentary [4.4.2]. A futures market price (for performance date), current at time of avoidance for anticipatory breach, could be the most accurate measure for art 76: Peter Schlechtriem, *Calculation of Damages in the Event of Anticipatory Breach under the CISG* (2006) §III(2)(c) <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem20.html>; CISG Advisory Council, *Opinion No 8*, above this note, Commentary [4.4.3]. Note art 76 delivers evidentiary advantages in avoiding disclosure of potentially sensitive internal information necessary to prove concrete damages: Schlechtriem, above this note, §I, III. The right to restitution arises pursuant to art 81(2). On the restitutionary provisions, see CISG Advisory Council, *Opinion No 9*, above n 52, Commentary [1.2], [3.6], [3.8], which characterises their effect as a ‘modified resale’ or ‘reverse sale’ designed to reverse gains rather than compensate losses.

71 ‘Fundamental breach’ is defined in art 25 of the CISG. A buyer can avoid pursuant to art 49(1)(a) for a fundamental breach or art 49(1)(b) for failure of the seller to comply with additional time set under art 47(1) in cases of non-delivery. The seller can avoid pursuant to art 64(1)(a) for a fundamental breach or art 64(1)(b) for failure of the buyer to comply with additional time set under art 63(1). See also Leonardo Graffi, ‘Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention’ (2003) 3 *International Business Law Journal* 338; *Shoes Case* (Oberlandesgericht Düsseldorf, Germany, 24 April 1997) <http://cisgw3.law.pace.edu/cases/970424g1.html>; *Cutlery Case* (Handelsgericht Aargau, Switzerland, 26 September 1997) §2F(2)(a) <http://cisgw3.law.pace.edu/cases/970926s.html> (stating that non-compliance with guaranteed exclusive supply was a fundamental breach). The procedure for setting an additional time for performance is often referred to as a ‘Nachfrist’. See also Peter Huber, ‘CISG — The Structure of Remedies’ (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 13, 16, 20–1 (explaining that art 49(1)(b) allows the buyer to ‘upgrade’ a non-fundamental breach to one which justifies avoidance by using the ‘Nachfrist’-procedure in art 47, [a] possibility … limited to … non-delivery); Müller-Chen, above n 66, 580–1; John O Honnold, *Uniform Law for International Sales* (3rd ed, 1999) 205–9; *Model Locomotives Case* (Kantonsgericht
contract, breaches might be precluded from characterisation as fundamental if the seller makes a serious offer to cure a defect which will not cause the buyer unreasonable delay or inconvenience. However, by agreement, parties can specify that certain breaches will be fundamental in nature. The right to remedies for non-conformity, and the more drastic right to avoid the contract require the giving of notices and declarations to the breaching party.
In keeping with the *CISG*’s design for international sales, the emphasis is on performance.75 If goods are merely non-conforming,76 but not so seriously as to constitute a fundamental breach, then, unless modified by agreement, the *CISG* will not allow them to be rejected. Instead, given the distances involved in international trade, the *CISG* sensibly requires delivery of non-conforming goods to be taken and paid for, with any non-conformity leading to either a self-help unilateral price reduction, subsequent claim for damages, or an additional time period to be set for the problem to be rectified.77 If the contract is avoided, there is an obligation to preserve the goods pending restitution, and to sell them where potential rapid deterioration makes preservation impracticable.78

These features will sometimes be advantageous, and on other occasions disadvantageous for particular clients. One might argue that the requirement of notice of non-conformity specifying the nature of the defect within a reasonable time on pain of loss of remedies provides an advantage to the seller, who could escape liability for non-conformities if the transaction happens to be with a buyer who is lax in communication. The seller can also take comfort from the fact that under the *CISG*, the buyer cannot reject the goods and bring the contract to an end for minor non-conformities.79 Of course a fundamental breach can trigger the end of the contract, but lesser non-conformities will simply result in a damages claim, price reduction, or a request to rectify the problem. The seller also benefits from a right to cure defects provided this does not cause unreasonable delay or inconvenience. Such a cure naturally does not remove the buyer’s ability to seek damages.80

However, the buyer enjoys countervailing advantages. If the goods have still not arrived by the delivery date, the buyer can resolve the uncertainty as to when


77 Ibid arts 85–8. See CISG Advisory Council, *Opinion No 9*, above n 52. See also above n 70. At common law, the buyer after a valid rejection becomes a bailee with duties of care: Reynolds, ‘Remedies in Respect of Defects’, above n 76, 638; Ziegel, ‘Commentary on Party Autonomy’, above n 20, 130.

78 See *CISG* Advisory Council, *Opinion No 5*, above n 72, *Commentary* [2.2] (fn 18–22) (dealing specifically with the perfect tender rule, and noting that treatment differs in the case of certain commodity transactions); Butler, above n 48, 28; Ziegel, ‘Commentary on Party Autonomy’, above n 20, 124 (arguing that the buyer’s right of rejection under the *CISG* is less generous than under UK sales law). See also above nn 71–72 and accompanying text.

79 CISG, above n 1, art 48.
the failure becomes serious enough to warrant avoidance of the contract, by simply setting an additional reasonable time for delivery. If the seller fails to comply, or declares that they will not, the buyer can then confidently declare the contract avoided. The buyer is not left punting on whether time was ‘of the essence’. The buyer is also given the advantage of unilateral price reduction for non-conformity. This self-help remedy is available for both mere non-conformity and fundamental breach, although in practical terms, it will be of little comfort if a letter of credit has already been provided.

Overall, the substantive balance achieved is reasonably even, and provisions are geared more closely to the needs of international transactions than domestic laws. Additionally, parties can always modify any of the provisions that do not suit their circumstances by agreement. It clearly offers overriding systemic and strategic advantages for many clients. The question therefore remains, why do Australian lawyers currently appear to routinely advise to opt out, when in many cases this could be contrary to their clients’ interests?

IV. THE CULTURE OF OPTING OUT AND WHY OPT OUTS SHOULD NEVER BE AUTOMATIC

To date, only 12 Australian cases mention the CISG. The CISG was applicable law in only eight of those cases. Although other reasons have been suggested, the lack of CISG cases in Australia almost certainly reflects the

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81 Ibid art 47.
82 Ibid art 49(1)(b).
83 See above n 67.
84 Although art 50 does contemplate price reductions after the goods are paid for, a buyer who has already paid the price will be unable to effect the remedy as a self-help measure without either the cooperation of the seller (refund or credit note) or an independent right of set-off, sourced externally to the CISG itself. The common law position is that generally, the covenant to pay will be independent: Treitel, above n 76, 1580–97.
85 It is therefore a ‘myth’ to state that the CISG generally favours either the buyer or the seller: Sandra Saiegh, ‘The Business Lawyer’s Perspective’ in Harry M Fletcher, Ronald A Brand and Mark S Walter (eds), Drafting Contracts under the CISG (2008) 257 (referring to the ‘myth’ amongst in-house counsel that the CISG favours buyers); Ingeborg Schwenzer, ‘The CISG: A Global Story of Success’ (Lecture delivered at Monash University, Melbourne, Australia, 5 February 2009) (advantages for buyers and sellers effectively cancel one another out such that the CISG favours neither); Mathias Reimann, ‘The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care’ (2007) 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht 115, 125 (dismissing the substantive reasons for opt outs on the basis that the CISG is balanced); Widmer and Haschem, above n 38, 281, 297. Contra Ziegel, ‘Commentary on Party Autonomy’, above n 20, 129 (arguing that the CISG remedies favour sellers).
86 CISG, above n 1, art 6.
87 See Pace Law School, CISG Database Country Case Schedule: Australia (2009) <http://www.cisg.law.pace.edu/cisg/text/casecit.html#australia>, which lists 15 cases for Australia, but I have not counted appeals and preliminary applications as different cases. In four of the 12 Australian cases, the CISG is mentioned but does not apply.
88 See below n 507.
89 Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [2.3], suggest the reason for the small number of Australian cases is a combination of the prevalence of arbitration, mediation and expert determination, choice of law other than Australian law and the fact that [at the time of writing] two of Australia’s largest trading partners, Japan and the UK, have not acceded to the CISG. The first two are not unique to Australia. I would contend that Australian lawyers are equally (if not more) inclined to opt out as their Japanese or UK counterparts, although admittedly, an inclination on both sides is more likely to bring about an agreed opt out.
prevalent practice in Australia of avoiding the CISG at the drafting stage by opting out within choice of law clauses, as indicated by anecdotal evidence.90 Australian lawyers are not alone. Similar opt out cultures exist elsewhere. Although empirical evidence varies, there is sufficient evidence91 to support a conclusion that opting out is prevalent in the US, probably less common but still frequent in Germanic nations, and less common again in China. In the US, one study reported that 71 per cent of lawyers generally opt out, although a more recent study put this at 55 per cent of US lawyers.92 A large study showed that opt outs were ‘normal’ practice for 55 per cent of Austrian, 41 per cent of Swiss, and 42 per cent of German lawyers.93 In China, the rate of lawyers preferring to opt out could be 37 per cent or lower, although this evidence is from a small sample size.94 So from the front end of the legal process, it seems there is a range of 90 See above n 2. The above anecdotal accounts also accord with my own experience in practice in Australia, and with that of colleagues.
92 Fitzgerald’s study in 2006–07 of US practitioners showed that 55 per cent typically opt out. Note that only 47 respondents were in a position to answer this question: above n 75, 64. A study of 48 respondents from the US by Koehler in 2004–05 revealed that around 71 per cent of US lawyers generally or predominantly opt out: Martin F Koehler, Survey regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of Its Application (2006) <http://cisgw3.law.pace.edu/cisg/biblio/koehler.html>. See also Philippopoulos, above n 41. Philippopoulos surveyed 46 US lawyers (presumably in 2007), and found high opt out levels. However, the survey was focussed on litigation attorneys, and frequency of opt out practices and frequency of reasons for opting out are less specific than the Fitzgerald (above this note) and Koehler and Guo surveys (below n 94). While Philippopoulos states the ‘overwhelming majority’ opt out if advising a buyer, the number opting out is not reported. It appears opt out levels (amongst litigation lawyers) were around 61 per cent: Philippopoulos, above n 41, 361–2. However, comments elicited by the more open style survey used by Philippopoulos are quite revealing. See discussion below n 515. There was also a study conducted by Michael Gordon in 1997, confined to Florida: Gordon, above n 41. It found half of those with ‘fairly strong’ or ‘reasonable’ knowledge had opted in or out. The number of surveys distributed is specified (124 lawyers, at 368) but not the number of responses.
93 Smaller surveys found this was true for 73 per cent of German lawyers and 62 per cent of Swiss lawyers: Widmer and Hachen, above n 38, 282, 285–6 (surveying 153 Swiss lawyers in 2008 involved in international sales); Koehler, above n 92 (surveying 33 respondents in 2004–05).
of frequencies of opt outs. Judging by the largest samples, the US is probably at
the higher and China at the lower ends of the scale, with Germanic nations
somewhere in the middle. While, of course, other explanations are also plausible,
it is possible to argue that comparisons of US studies demonstrate a reduction in
opt outs over time, consistent with one anecdotal account of front-end trends in
the US.95 There have been other recent reports of some movement away from
opting out in other nations where opt outs are prevalent.96

At the other end of the legal process, Chinese arbitral tribunals and courts are
working under a burgeoning CISG case load. Many Chinese cases have emerged
in the last few years, and an enormous 342 have been translated into English.97
By contrast, the number of cases in the (highly litigious) US is small, with only
93 cases.98 Yang observes that there are almost as many CISG cases involving
US parties in China as there are in the US.99 Likewise, at least 21 Chinese CISG
cases involve Australian parties — almost double the number of Australian CISG
cases!100 The story in Germany is quite different, with German CISG cases being
quite numerous, at around 444.101 Austria has produced 77 cases, and there are
35 Swiss cases. Of course, case numbers vary due to the costs and speed of
litigation, dispute resolution culture, recoverability of litigation costs and level of

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95 Compare Koehler (2004) 71 per cent, Philippoppoulos (presumably 2007) 61 per cent and
Fitzgerald (2006–07) 55 per cent: see above n 92. Flechtner observed, in 2007, a ‘change’ in
the queries that he received from practitioners regarding the CISG from purely litigious to
front-end (drafting/choice of law) queries: Flechtner, above n 32, 3. Alternatively,
differences could simply be due to survey design, sample composition (for example,
Philippoppoulos targeted litigators), but not sample size (48, 46 and 47 respectively).

96 A recent anecdotal report is that while opting out is still prevalent in Italy, many specialist
drafters are now choosing not to opt out: Marco Torsello, ‘Italy’ in Franco Ferrari (ed), The
similar trend is appearing in Germany, where Magnus reports the impression that an
increasing number of business associations no longer generally recommend opting out, and
that opting out is no longer the norm for standard forms: Ulrich Magnus, ‘Germany’ in

97 The Pace Law School website lists 342 translated Chinese CISG cases: Institute of
International Commercial Law, Pace Law School, CISG Database: Country Case
Schedule (2009) <http://cisgw3.law.pace.edu/cisg/text/casecit.html#a06>. For these and
subsequent case numbers, I have utilised a count of the country case list for each country,
but not counted appeals and preliminary applications as additional cases, therefore case
numbers differ slightly from the summary available at Pace Law School, CISG Database

98 According to the Pace Law School website, there have been 93 US CISG cases: Institute of
International Commercial Law, Pace Law School, CISG Database Country Case Schedule

99 Yang, above n 18, 375 (reporting that there have been 74 Chinese CISG cases involving a
party from the US, compared with 95 US CISG cases at the time).

100 Kritzer, ‘CIETAC Arbitration Awards’, above n 33.

Further, not all cases in these jurisdictions are reported internationally.\footnote{See Reimann, above n 85, 125–6 (discussing the paucity of US cases and cost of US-style litigation); Ziegel, ‘The Future of the International Sales Convention’, above n 50, 343–4 (considering but ultimately dismissing differences between US and German incentives to litigate on opt outs, including US allowance of contingency fees compared to German regulation of litigation fees, party responsibility for own fees in the US (‘American Rule’) compared to possible partial recovery of fees from opponents in Germany (‘Loser-Pays Rule’)). In regard to recovery of attorney fees in \textit{CISG} cases, see CISG Advisory Council, \textit{Opinion No 6}, above n 67, §5; Zapata Hermanos Sucesores SA v Hearthside Baking Co (US Circuit Court of Appeals (7th Cir), US, 19 November 2002) <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html>; Joseph Lookofsky and Harry M Flechtner, ‘Zapata Retold: Attorneys’ Fees Are (Still) Not Governed by the \textit{CISG}’ (2006) 26 Journal of Law and Commerce 1; Stoll and Gruber, ‘Arts 74–77’, above n 70, 757; Lookofsky, \textit{Understanding the \textit{CISG}}, above n 59, 133.}

What is irrefutable is that, all other things being equal, more frequent opt outs necessarily reduce the pool of potential \textit{CISG} cases and contribute to unfamiliarity in the jurisdiction concerned through lack of exposure to \textit{CISG} dispute work. This unfamiliarity then seems to often feed back into choice of law options, resulting in a vicious cycle.\footnote{See above n 99.}

Unfamiliarity is indeed often nominated as a reason for opt outs in surveys.\footnote{See also Lisa Spagnolo, ‘A Glimpse through the Kaleidoscope: Choices of Law and the \textit{CISG} (Kaleidoscope Part I)’ (Paper presented at Moot Alumni Association (‘MAA’), ‘Issues on the \textit{CISG} Horizon: Conference in Honour of Peter Schlechtriem (1933–2007)’, Vienna, Austria, 2 April 2009), to be published in (2009) \textit{Vindobona Journal of International Commercial Law and Arbitration} (forthcoming).}

Conversely, in China, where instances of opt outs appear lower, unfamiliarity is less important in opt out decisions.\footnote{In Fitzgerald’s 2006–07 study, ‘lack of sufficient familiarity’ was the ‘principal’ reason for opting out for 16 per cent of US lawyers. However, Fitzgerald indicates that the number might in fact be higher: Fitzgerald, above n 75, 12 (fn 23), 65. The Koehler study found 53 per cent of US and German lawyers opted out, at least partly because the \textit{CISG} was ‘generally not very well known’: Koehler, above n 92, Questionnaire and Chart: ‘Practical Reasons for Exclusion’. Unfamiliarity was not listed amongst options for respondents to select in the Meyer studies, in which the most frequent reason for opt outs given by German, Austrian and Swiss lawyers was ‘not enough legal certainty’. Meyer concludes from individual comments many lawyers and clients are unfamiliar with the \textit{CISG}: Meyer, \textit{The \textit{CISG} in Attorneys’ Every Day Work}, above n 31, 8, Question 5, Tables 5A–5C.}

In 2004, unfamiliarity was found to be a significant reason for opt outs in the US, Switzerland and Germany.\footnote{Only 30 per cent of Chinese lawyers surveyed gave the view that the \textit{CISG} is ‘generally not very well known’ as a reason for opt outs: see, Koehler and Guo, above n 94, § IV (47.2 per cent or 51 of 108 US, German and Chinese respondents). See also, Koehler, above n 92, reporting that 53.1 per cent or 43 US and German respondents. Chinese respondents with this view therefore amount to 29.6 per cent (using the calculation (51 – 43) ÷ 27 = 29.6 per cent).}

Arguably, levels of unfamiliarity with the \textit{CISG} significantly influence opt out levels.\footnote{See Koehler’s results, and to a lesser extent, those of Fitzgerald in 2006–07, above n 105. See comment on Meyer study regarding unfamiliarity, above n 105. In Widmer and Hachem’s Swiss survey, 42 per cent responded that one reason for opt outs was ‘lack of certainty’ which the authors attribute in part to insufficient familiarity: Widmer and Hachem, above n 38, 285.}

Baseline levels of unfamiliarity are much higher in the US than they are in...
Germany, Switzerland or Austria. It is probable that this also holds true for Australia, where lack of coverage in compulsory law school courses is compounded by a paucity of cases and a split of work between litigation and front-end (drafting) divisions within law firms, which ensures that most Australian lawyers have never once dealt with the CISG, unlike, by way of contrast, the vast majority of Germanic and Chinese lawyers. This makes two things likely: that unfamiliarity with the CISG explains much of the opt out culture in Australia; and that opt out rates in Australia are probably equal to, or higher than, in the US, a conclusion which accords with anecdotal evidence of Australian practice.

Are there any other reasons beside unfamiliarity for ‘automatically’ opting out of the CISG? As mentioned above, like every law, the CISG has certain substantive shortcomings. At this stage, its substantive content probably plays a much less predominant role in determining opt out levels than does unfamiliarity. As discussed above, substantively the CISG presents a reasonably balanced law specifically designed for international transactions, combined with inherent flexibility to tailor the law to the parties’ needs. Further, in practice there are both systemic and strategic practical advantages that flow from the CISG. It follows that for many but not all clients, the CISG will be the best choice. However, this can only be appreciated when the issues are understood and considered. A knee-jerk reaction based on unfamiliarity cannot ensure the best interests of the client are met.

Arguably, practitioners that ‘automatically’ opt out of the CISG are vulnerable to claims of professional negligence. Since the CISG is part of Australian law, ethical and competent Australian lawyers advising clients dealing in international trade should be familiar with it before they advise clients to opt in or out.

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109 By baseline levels, I mean any familiarity with the CISG at all. Fitzgerald found 44 per cent of US lawyers were ‘not familiar with the CISG at all’: above n 75, 32. Fitzgerald’s survey can be contrasted to the work of Widmer and Hachem, above n 38, 284, 287 (finding that 93 per cent of Swiss lawyers had ‘basic’ or better knowledge of the CISG, and less than two per cent had not heard of it); Magnus, above n 96, 145 (commenting on the relatively high familiarity of German lawyers).

110 No empirical data is yet available on the situation in Australia.

111 Only 12 CISG cases exist in Australia. In Part VI, each is discussed in turn.

112 In Germany, Austria and Switzerland, 70–78 per cent of lawyers have at least once encountered a CISG dispute: Meyer, above n 31. See also, Han, above n 94, 71–2 (reporting that the CISG is examinable within the National Judicial Examination for qualification as a lawyer).

113 See above n 2.


Practitioners involved in advising their clients on commercial transactions have a professional obligation to know about the CISG and its application. The latest developments in international commercial transactions mandate that all commercial or business lawyers should be familiar with the CISG.
Advice should be based on a professional assessment of advantages and disadvantages of the CISG compared with alternative choices of law, not blind unfamiliarity. Like any other area, if the practitioner is unfamiliar with the CISG, expert help should be obtained or the client referred. Better still, lawyers should familiarise themselves with the CISG, which is, after all, Australian law. Although this involves an initial investment of time and effort, development of CISG expertise naturally gives the firm involved competitive advantages and ensures advice is based on a professional analysis case by case,116 rather than a knee-jerk. It seems that this process of seriously considering not opting out, and investing in ‘start up’ costs to become familiar with the CISG has begun in the US, where market forces have forced lawyers to gain expertise in this area.117 Those Australian firms that take this route earlier rather than waiting until they are compelled to do so could enjoy a head start over other local firms.118

While lawyers and law firms themselves must take responsibility for the quality of their professional advice, Australian lawyers and firms can also push for courses and seminars. The CISG needs to rate more than a mention in foundational law school courses, and should be specifically offered for Continuing Legal Education purposes.119

Likewise, Australian CISG cases reveal the current state of unfamiliarity of Australian lawyers through a dearth of argument on the CISG, even when both sides concede that the CISG governs the contract. Of course, there might be strategic reasons for this, but it is also possible that the omission is due to a reluctance to deal with the unfamiliar, including a disinclination to invest the time and effort to acquire enough knowledge of the CISG to argue its provisions, or to even determine whether there is any advantage in doing so.120 It is hard to imagine this deplorable state of affairs being tolerated in relation to any other area of Australian law. Whatever the reason and consequences (or lack thereof) for the individuals involved,121 the overall picture is that failure to engage with

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Dodge, above n 43, 73 (fn 5) (arguing that the failure ‘to determine the law that governs a contract … [is] probably malpractice’); Contra Baasch Andersen, above n 31, 305; Butler, above n 48, 26 (stating that there is an ethical duty to advise clients of the pros and cons of opting out even if clients insist on doing so).

116 Interestingly, Meyer’s studies showed the proportion of decisions on choice of law made on a ‘case-by-case’ basis was 32 per cent: Meyer, above n 31, Question 4, Tables 4A–4C.

117 Flechtner, above n 32, 2 (commenting on a change in enquiries received from US lawyers from litigation queries to choice of law queries, and concluding that “the change has already begun”). Although explicable on other bases such as sample size, study design etc, it is also interesting to note the shift from US data in 2004 (71 per cent opt out) to 2006–07 (55 per cent): above n 92.

118 Flechtner, above n 32, 2 (noting ‘start up’ costs for expertise are of course, effectively amortised).

119 Nottage, above n 2. See also Gordon, above n 41.

120 Ziegel, ‘The Future of the International Sales Convention’, above n 50, 345 (arguing that economic rationales are more plausible than cultural factors); Meyer, The CISG in Attorneys’ Every Day Work, above n 31, 8 (‘many attorneys think it is not worthwhile to get into the CISG regime in detail’).

121 Counsel in Australia are immune from liability for negligence in regard to conduct of a case in court: Giannarelli v Wraith (1988) 165 CLR 543. Note that this immunity has now been overturned in England in the House of Lords: Arthur J S Hall & Co v Simons [2002] 1 AC 615. Discussing the US litigation, Reimann, above n 85, 122, observes that attorneys ignoring the CISG when applicable in litigation engage in malpractice. See also above n 115.
the CISG is prevalent in Australian litigation, and argument is predominantly modelled on the law that counsel would prefer to apply, rather than the applicable law.\textsuperscript{122} A ‘misuse of judicial resources’ and decline in administration of justice has arisen\textsuperscript{123} as increasingly, counsel’s approach has diverted the judiciary from the task of proper application of the CISG in Australia.\textsuperscript{124}

V REQUIREMENTS FOR PROPER APPLICATION OF THE CISG

Where the CISG is the governing law of the contract, it must be applied internationally and autonomously, in order to preserve its uniformity on a global scale. This requirement is imposed on courts by art 7(1) which demands that ‘[i]n the interpretation of [the CISG], regard is to be had to [its] international character and to the need to promote uniformity in its application’.\textsuperscript{125} In essence, the CISG must be interpreted autonomously; that is, free from domestic preconceptions and in accordance with its own terms. Further, it must be applied with an internationalist perspective, that is, with reference to CISG sources from around the world. Therefore, for issues falling within the scope of the CISG, courts or tribunals should:

\begin{itemize}
  \item avoid domestic legal terminology and concepts;\textsuperscript{126}
  \item refrain from reference to non-CISG cases;
  \item avoid reference to inapplicable non-CISG provisions;\textsuperscript{127}
  \item make reference to CISG cases from its own and other jurisdictions as persuasive authority;\textsuperscript{128}
\end{itemize}

\textsuperscript{122} See the discussion below in Part VI. Similarly, this trend has been noted in some US cases. For example, William Dodge notes that in one US case, plaintiff’s counsel’s lack of familiarity with the CISG caused a fatal delay in raising a defence to the argument of non-compliance with (displaced) Statute of Fraud writing requirements. Counsel’s unfamiliarity cost the plaintiff a CISG argument that was ‘a sure winner’: Dodge, above n 43, 74 (referring to GPL Treatment v Louisiana-Pacific Corp, 894 P 2d 470 (Or Ct App, 1995); aff’d 914 P 2d 682 (Or, 1996)); Harry M Flechtner, ‘Another CISG Case in the US Courts: Pitfalls for the Practitioner and Potential for Regionalized Interpretations’ (1995) 15 Journal of Law and Commerce 127, 130–3. On this trend in common law countries, see Ziegel, ‘The Scope of the Convention’, above n 9, 69; Kritzer, ‘CISG: Scope, Interpretation and Resources’, above n 18; Kilian, above n 41, 227, 242–3 (noting that US courts ‘go out of their way’ to avoid applying the CISG or taking account of foreign CISG cases). However, Kilian agrees that a change in approach was signalled in Medical Marketing International Inc v Internazionale Medico Scientifica SRL (US District Court (ED La), US, 17 May 1999) <http://cisgw3.law.pace.edu/cases/990517ul.html>.

\textsuperscript{123} Fitzgerald, above n 75, 14; Pribetic, above n 26, 7 (fn 31); Reimann, above n 85, 125.

\textsuperscript{124} Making an interesting observation about the difference in common law and civil judicial approaches and the principle of iura novit curia, whereby ‘the court is required to resort to its own knowledge to identify and apply the legal rules relevant to the case at hand, irrespective of the parties’ submissions’: Torsello, above n 96, 191–5 (fn 20), 209; see Reimann, above n 85, (fn 48) and accompanying text; Franco Ferrari, ‘Remarks on the UNICITRAL Digest’s Comments on Article 6 CISG’ (2005) 25 Journal of Law and Commerce 13, 30–1; Pribetic, above n 26, 27 (arguing that the CISG must be applied if applicable despite differences between common and civil law on this point). See discussion below in Part VIII.

\textsuperscript{125} CISG, above n 1, art 7(1).

\textsuperscript{126} CISG drafters carefully avoided such terms: see Honnold, \textit{Uniform Law for International Sales}, above n 71, 15 (describing ‘[t]he effort … to avoid legal idioms that have divergent local meanings and, instead to speak in terms of physical events that occur in international trade’), 89 (describing familiar domestic terms as \textit{des faux amis}.

refer to CISG Advisory Council Opinions,\textsuperscript{129} CISG scholarship, and CISG legislative history;\textsuperscript{130}

- abandon domestic interpretive techniques, and instead utilise the CISG’s own interpretive method and contractual construction rules;\textsuperscript{131}
- apply the CISG as exclusive law, pre-emptive of overlapping domestic law, subject to art 7(2).

Failure to do this is known as viewing the CISG through ‘domestic lenses’ or the ‘homeward trend,’\textsuperscript{132} and amounts to improper application of the CISG. It

\textsuperscript{128} See the following excellent sources for CISG cases from around the world: Pace Law School, CISG Database <http://cisgw3.law.pace.edu>; UNILEX, UNILEX on CISG and UNIDROIT Principles: International Case Law and Bibliography <http://www.unilex.info>; UNCITRAL, CLOUT Abstracts <http://www.uncitral.org/uncitr/en/case_law/abstracts.html>; Global Sales Law, Faculty of Law, University of Basel, CISG-online.ch <http://www.cisg-online.ch>. Another resource is the UNCITRAL CISG Digest of Case Law, which neutrally orders case law within provisions of the CISG, although one needs to refer to scholarly works for a critical view of cases: see UNCITRAL, Digest of Case Law, above n 15.

\textsuperscript{129} Of persuasive but not binding authority are opinions issued by the CISG Advisory Council. This is a private body of internationally recognised experts on the CISG, and CISG-AC Opinions are designed to deal with controversial issues arising from the interpretation of the CISG. In the interests of furthering uniformity, this author suggests CISG-AC Opinions should be considered ‘highly persuasive’. To date there have been nine CISG-AC Opinions, available from <http://www.cisgac.com/default.php?sid=128>. On the role of the CISG Advisory Council, see Lorraine de Germiny and Joshua Karton, ‘Has the CISG Advisory Council Come of Age?’ (2009) 27(2) Berkeley International Law Journal (forthcoming) <http://works.bepress.com/joshua_karton/2>. The article concludes that the academic tendency is to treat CISG-AC Opinions as ‘reliable sources of authority on controversial matters of interpretation’: de Germiny and Karton, above this note, 41. Lookofsky and Flechtner take issue with the authority of the CISG Advisory Council to, in their view, override reliance of drafters on substantive–procedural distinctions in relation to the scope of the CISG for recovery of attorney fees. However, Lookofsky and Flechtner still treat CISG-AC Opinions as at least as important as ‘the theories of a leading academic’: de Germiny and Karton, above this note, 44 (citing Lookofsky and Flechtner, above n 102, 7).

\textsuperscript{130} See, eg, Pace Law School, CISG Database <http://cisgw3.law.pace.edu>. One of the most authoritative texts on the CISG is Peter Schlechtriem and Ingeborg Schwenzer (eds), Commentary on the UN Convention on the International Sale of Goods (CISG) (2nd ed, 2005); see also Honnold, Uniform Law for International Sales, above n 71.

\textsuperscript{131} See CISG, above n 1, arts 7–9. Matters ‘governed by’ [the CISG] which are not expressly settled in it — internal gaps must be filled by internal interpretive methodology. Liberal interpretation by analogy and use of general principles are hallmarks of this method. For internal gaps, recourse to the law applicable through conflict rules is permissible only as a last resort: art 7(2). For matters not governed by the CISG — external gaps — resolution is by the law determined by application of conflict rules. See Schlechtriem, ‘Art 7’, above n 52, 101–9; Honnold, Uniform Law for International Sales, above n 71, 88–114; Franco Ferrari, ‘Uniform Interpretation of the 1980 Uniform Sales Law’ (1994) 24 Georgia Journal of International and Comparative Law 183, 215–19. Whether an issue is external or internal to the CISG should be determined as a preliminary matter: see Spagnoletti, ‘Opening Pandora’s Box’, above n 54, 306–9. On relevance of statements and conduct of parties, usages and past practices in construction of contractual terms, see CISG, above n 1, arts 8 and 9, discussed below n 426 and above n 59 (on the parol evidence rule).

raises a point of appeal, jeopardises the uniformity of the CISG worldwide, and undermines its aims of removing barriers to trade. It could also amount to a breach of treaty obligations undertaken by the Contracting State, and certainly provides grounds for appeal.

It is important to note that CISG cases (often fully translated), CISG scholarship and CISG Advisory Council Opinions are freely and readily available via the internet, which makes the Australian trend even more puzzling.

VI THE AUSTRALIAN TRACK RECORD

Although Swiss, Austrian and US lawyers share the Australian predilection for opt outs in drafting, the policy of ignoring the CISG is not always carried through to litigation. Germanic courts and tribunals have long shown awareness of the CISG. By contrast, US courts have looked at the CISG through ‘domestic lenses’. One court even stated that US Uniform Commercial Code (‘UCC’) case law could be used to interpret the CISG where the language of the CISG


See above n 128.

‘tracked’ that of the UCC, an error still echoed today.\textsuperscript{137} Despite the continued predominance of poor decisions, US courts have shown recurrent signs they are beginning to come to terms with the CISG’s proper application as an autonomous and uniform law, either in relation to specific issues\textsuperscript{138} or interpretative method.\textsuperscript{139} The previously unremarkable track record of Italian


\textsuperscript{138} Chateau des Charmes Wines Ltd v Sabaté USA Inc (US Circuit Court of Appeals (9\textsuperscript{th} Cir), US, 5 May 2003) <http://cisgw3.law.pace.edu/cases/030505u1.html> (correctly rejecting domestic ‘in writing’ requirements and noting arts 8(3), 19 and 29 in formation); MCC-Marble Ceramic Center v Ceramica Nuova D’Agostino (US Circuit Court of Appeals (11\textsuperscript{th} Cir), US, 29 June 1998) <http://cisgw3.law.pace.edu/cases/980629u1.html> (citing scholarship and rejecting the parol evidence rule). Flechtner, above n 137, 91–2, 98 (commenting that good US cases are ‘exceptions rather than the rule’).

\textsuperscript{139} For citation of foreign cases, see Chicago Prime Packers Inc v Northam Food Trading Co (US District Court (ND Ill), US, 21 May 2003) <http://cisgw3.law.pace.edu/cases/030521u1.html> (citing seven foreign cases from Italy, Germany and the Netherlands, and referring to CISG scholarship); Usinor Industeel v Leeco Steel Products Inc (US District Court (ND Ill), US, 27 March 2002) <http://cisgw3.law.pace.edu/cases/020328u1.html> (citing an Australian case); St Paul Guardian Insurance Co v Neuromed Medical Systems and Support GmbH (US District Court (SD NY), US, 26 March 2002) <http://cisgw3.law.pace.edu/cases/020510u1.html> (citing German cases from the commentary; Medical Marketing v Internazionale Medico Scientifica (US District Court (ED La), US, 17 May 1999) <http://cisgw3.law.pace.edu/cases/990517u1.html> (citing a German case); Kilian, above n 41, 241 (approving the use of foreign cases in Medical Marketing; but critical of such application to framework agreement without hesitation); Amco Ukservice v American Meter Co (US District Court (ED Pa), US, 29 March 2004) <http://cisgw3.law.pace.edu/cases/040329u1.html> (German cases cited and followed, holding that the CISG does not apply to joint venture agreements); Zapata Hermanos Suciores SA v Hearthside Baking Co (US Circuit Court of Appeals (7\textsuperscript{th} Cir), US, 19 November 2002) <http://cisgw3.law.pace.edu/cases/021119u1.html> (the reliance on foreign cases went unquestioned); Ziegel, ‘The Scope of the Convention’, above n 9, (fn 32) (citing Zapata as a ‘striking improvement’); Baasch Andersen, ‘GlobalJurisconsultorum’, above n 132, 174–5 (on Zapata). Even a relatively poor US decision managed to cite CISG cases from a non-English speaking jurisdiction: Barbara Berry SA de CV v Ken M Spooner Farms Inc (US District Court (WD Wash), US, 13 April 2006) <http://cisgw3.law.pace.edu/cases/060413u1.html> (citing a Swiss case). Showing recourse to foreign scholarship: Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc (US District Court (SD NY), US, 10 May 2002) <http://cisgw3.law.pace.edu/cases/020510u1.html>.
courts has now been graced by an ‘enlightened minority’ of cases that are excellent examples of multi-jurisdictional case citation. On the other hand, there is little to celebrate in Australia.

Australian courts made a promising start, especially in *Roder Zelt* and *Perry* (discussed below), but things took a turn for the worse, as courts across Australia perpetuated the unfortunate tendency to cite non-applicable domestic legislation, case law or concepts in cases where the CISG was the governing law, often due to the reluctance of counsel to engage with the CISG. Thus, the opt out culture has flowed through to litigation in Australia. After a hopeful beginning, we have for too long resorted to the blinkered notion that ‘ignorance is bliss’.

(a) *Renard Constructions (ME) Pty Ltd v Minister for Public Works*

The first mention of the CISG came in a widely discussed decision in the New South Wales Court of Appeal. The case came before the Court on appeal from an

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143 *Perry Engineering Pty Ltd v Bernold AG* [2001] SASC 15 (Unreported, Burley J, 1 February 2001) (‘*Perry*’).

144 Failure of US judges to apprehend applicability and content of the CISG is probably the product of the bar’s own unfamiliarity with it, and subsequent failure to properly present argument accordingly: Fitzgerald, above n 75, 14.

arbitral award on a question of law, in a dispute that centred on a ‘show cause’ notice and subsequent termination of the contract.

Priestley J concluded that ‘reasonableness in performance’ was implied in the contract concerned.146 His Honour then likened this to notions of good faith in Europe and the US, and noted that, although such a concept was not yet fully accepted in Australia ‘the time may be fast approaching’.147 In the 16 years since those words, Australia has indeed moved down the path of an implied duty of good faith in performance, and although the issue has not yet been settled in the High Court,148 the Australian position now seems closer to the US view than that in the UK, at least for commercial contracts.149

However, at the time, this was still groundbreaking territory for Australia. Therefore Priestley JA makes extensive use of scholarship, cases and statutes from a number of jurisdictions, the UNCITRAL Model Law on Arbitration,150 and various provisions such as s 51A of the Trade Practices Act 1974 (Cth),151 and art 7(1) of the CISG.152 Thus the CISG was not directly relevant.153 Nonetheless, it signalled a promising level of judicial cognisance of the CISG in Australia, and was overwhelmingly and widely hailed as such in international circles.154

148 The High Court majority left the matter open in Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 186 ALR 289, 301, 327.
150 UNCITRAL. UNCITRAL Model Law on International Commercial Arbitration (1985); see also International Arbitration Act 1974 (Cth) s 16 (recognising the Model Law as having the force of law in Australia). The laws governing arbitration in Australia are currently under review.
152 Ibid 264.
153 Ibid.
The Last Outpost

(b) **Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd**

By Australian standards, *Roder Zelt* was a relatively enlightened decision by von Doussa J in the Federal Court. It involved a retention of title clause in a contract for large tent marquees and accessories. The parties were a German seller and Australian buyer, to which an administrator was appointed after delivery. The parties agreed that the *CISG* was the governing law of the contract. Despite this, ‘[c]ounsel made only passing reference to the [*CISG*] at trial’, and the pleadings were all couched in ‘the language and concepts of the common law, not in those of the [*CISG*]’.

The Court correctly pointed out that interpretation of the *CISG* was not a matter for expert evidence, since it was part of domestic law and ‘not to be treated as a foreign law which requires proof as a fact’.

As the main issue was property in the goods, von Doussa J rightly referred to art 4(b) which excludes the *CISG* from concern with regard to ‘the effect the contract may have on property in the goods sold’. The parties accepted that the issue was therefore governed by the law applicable upon application of German conflict of law rules, since Germany was identified as the place in which the contract was concluded. Yet, as the analysis of von Doussa J demonstrates, identification of Germany as the place the contract was made was itself only determinable by reference to arts 18 and 24 of the *CISG* on the effect and timing of acceptance of an offer.

German rules of private international law resulted in the applicability of Australian property law on the question of ownership once the goods were in Australia. But was there an agreed retention of title clause? This question was still a matter for the *CISG* and von Doussa J made extensive reference to the provision on contractual interpretation in art 8, to art 11 on formalities, arts 15 and 18 on effectiveness of offers and acceptance, and art 29 on modification.

After finding that a retention of title clause formed part of the contract, von Doussa J turned to the fundamental breach and remedy provisions of the *CISG*. His Honour held fast to *CISG* terminology and concepts, and found that both the appointment of an administrator to the buyer, and denial of the retention of title clause amounted to fundamental breaches because they ‘substantially … deprive[d] [the seller] of what it was entitled to expect under the contract’.

Under the *CISG*, a buyer’s fundamental breach allows an innocent seller to avoid the contract pursuant to art 64, but declaration of avoidance is required by art 26 before it becomes effective. Thus von Doussa J correctly concluded that

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156 Ibid 220.
157 Ibid.
158 Ibid 222.
159 Ibid.
161 Reference was made to arts 25, 26, 53, 61, 63 and 64 of the *CISG*: ibid 233–4.
162 On arts 25 and 26 of the *CISG*, see above nn 71, 74.
contract was still on foot when the administrator was appointed, as ‘no declaration of avoidance had been notified to Rosedown’ at that stage. 165 Attention was then turned to insolvency provisions in Part 5.3A of the 
Corporations Law,166 which the Court concluded did not prevent ‘Roder from notifying a declaration of avoidance’.167

Perhaps the common law-centric state of the pleadings168 prompted a momentary slip in which his Honour enquired what might have ‘constitute[d] the “acceptance of the … repudiation”’.169 This is a common law concept with no place in the CISG. His Honour quickly returned to appropriate CISG terminology by equating this with notification of declaration of avoidance,170 although the two are not related. His Honour eventually concluded that the declaration occurred in the form of the statement of claim.171

Article 72(1) on anticipatory breach enables avoidance of the contract where it is clear that a party will commit a fundamental breach. As Ziegel observes, this might have provided a more appropriate basis for the Court’s decision,172 but was not considered. Ziegel also argues that the Court misconstrued art 63(1), which allows the seller to set an additional time for performance.173 In this way, the seller can convert an uncertain fundamental breach into a definitive right of avoidance.174 It is submitted the Court did not fall into error on this point. The reference to art 63 was by way of clarification, not as a prerequisite to avoidance. Perhaps a little awkwardly, the Court was effectively saying the failure to pay interest was not a fundamental breach per se, nor did a right of avoidance arise by notice pursuant to art 63.175

Ultimately, it held the seller was entitled to enforce the Romalpa clause pursuant to domestic law, and was entitled to damages pursuant to arts 74–6. It also indicated that the buyer was entitled to restitution of payments made under art 81.176 However, examination of those provisions was cut short because there was insufficient evidence before the Court.177 The matter was set down for re-listing, but presumably settled.

Additionally, von Doussa J determined that damages for conversion, and interest would be available. Unfortunately, like the other Australian cases that

166 Corporations Law (Cth) pt 5.3A; amended by Corporations Act 2001 (Cth) pt 5.3A.
169 Ibid 235.
170 Ibid
171 Ibid.
173 Ziegel, ‘Comment on Roder Zelt’, above n 172, 60.
174 See CISG, above n 1, arts 64(1), 63(1). On ‘upgrading’ (in this case, non-payment of price) to fundamental breach, see above n 71.
176 Ibid 239.
177 Ibid.
The comments were made without regard for the interrelation of domestic tort actions with the operation of the CISG. The judgment shows a reasonable level of cognisance of the CISG provisions and their effect. It has been criticised as providing ‘little future guidance’. Yet the Court did successfully navigate the interface between the CISG and the law applicable to property in the goods. In Roder Zelt, the CISG was correctly applied to arrive at the construction and meaning of the retention of title clause, and then, since property in goods is an issue external to the CISG, it fell to the law applicable on that issue to determine the effect of the clause. Similar interactions between the CISG and other laws on external issues have not been as well handled in subsequent Australian cases.

As Roder Zelt did not refer to any CISG cases from other jurisdictions or CISG scholarship, it can hardly be described as internationalist. These would have alerted the Court to the above issues. It must be remembered, however, that the judgment was rendered in 1995, before the advent of websites that now abound with sources of guidance.

Roder Zelt still stands out amongst Australian cases in which the CISG actually applied, because it treated the CISG autonomously. It displayed a willingness to engage in the challenge of interpreting the CISG free of domestic preconceptions, an admirable effort given the pleadings. The case attracted copious international attention, and is still cited in CISG cases in other jurisdictions.

178 Including Perry and Ginza Pte Ltd v Vista Corp Pty Ltd, discussed below nn 192 and 268 respectively, and accompanying text.


180 See, in support, Fairlie, above n 2, 51–2. Contra, Ziegel, ‘Comment on Roder Zelt’, above n 172, 56–9 (arguing that CISG remedies should not apply to security aspects of instalment sales contracts). Fairlie notes that Ziegel’s point is relevant in those jurisdictions where the effects of such clauses fall within personal property securities legislation.

181 See also Schmidt-Kessel, above n 59, 114.

182 See also Schmidt-Kessel, above n 59, 114; Zeller, ‘A Leap Forward’, above n 154, 90, and accompanying text.

183 See above n 130.

184 See above n 130.

There have been other CISG cases dealing with retention of title clauses since Roder Zelt. These would be relevant to any future Australian court’s interpretation of the CISG on this aspect.

(c) South Sydney District Rugby League Football Club Ltd v News Ltd

Like Renard some five years earlier, this case did not really involve the CISG, since the dispute was between a rugby league organisation and a club that had been unsuccessful in seeking admission to the competition. The dispute did turn to some degree on the existence or otherwise of contractual duties of good faith in the performance and enforcement of contracts. While noting that Australia had not at that time committed itself in an unqualified manner to such duties, Finn J observed in passing that the ‘supposed uncertainty with “good faith” terminology has not deterred every state and territory legislature in this country from enacting into domestic law the provisions of art 7(1) of the [CISG]’.

Notably, in both South Sydney and Renard, the heightened level of awareness of the CISG was displayed by members of the Court who had each previously written extrajudicially on comparative law issues and participated in international uniform law efforts. As the CISG was not applicable, the case attracted little comment by CISG writers.

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189 Ibid 696.


191 In the CISG context, see Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [9.6]. In terms of Australian commentary on good faith in contract more generally, it received greater attention: see, eg, Jeannie Paterson, Andrew Robertson and Peter Heffey, Principles of Contract Law (2nd ed, 2005) 309.
(d) Perry Engineering Pty Ltd v Bernold AG

This case involved a contract for the manufacture and supply of steel tunnelling formworks between an Australian engineering firm and a Swiss manufacturer.\(^\text{192}\) Apparently, there were some four earlier appearances in the matter. Zeller notes that it was surprising that the plaintiff’s failure to argue on the basis of the \textit{CISG} was not rejected on these earlier occasions.\(^\text{194}\)

Default judgment had already been entered for the plaintiff. The hearing on assessment of damages came before Burley J. It was only after this was complete that his Honour, in preparing to hand down orders, realised that in fact the \textit{CISG} was the applicable law, but that no \textit{CISG} arguments had been made. The judge promptly invited further submissions on that basis. Incredibly, counsel for the plaintiff declined. Instead, in response to Burley J’s specific invitation, the submission simply contended that it was unnecessary to address the \textit{CISG} specifically, citing \textit{Roder Zelt}\(^\text{195}\) in support, and did not seek to present argument on the basis of the \textit{CISG} in the alternative. This interpretation of \textit{Roder Zelt} was quickly rejected by Burley J.

Damages on the basis of contract were denied. In what might be termed a ‘warning’ to those who would ignore the \textit{CISG} at any cost, including that of ‘unnecessary expenses for clients’,\(^\text{196}\) Burley J stated that the failure to address the \textit{CISG} in pleadings or argument was ‘fatal’ to the plaintiff’s (uncontested) claim.\(^\text{197}\)

The plaintiff’s alternative claims were founded on negligence and ss 51A and 52 of the \textit{Trade Practices Act 1974} (Cth). Although these were ultimately unsuccessful, the preliminary question as to whether these causes of action were pre-empted by the \textit{CISG} should have been considered.\(^\text{198}\)

Burley J’s insistence on the need to address the law of the contract shows that an alert bench can lead counsel in regard to the \textit{CISG}.\(^\text{199}\) It also highlighted the need for counsel to understand the \textit{CISG} in order to serve the client’s best interests. However, the prospect of a \textit{Perry}-like result has not been enough to prevent a pattern of \textit{CISG}-phobia in Australian \textit{CISG} cases since.

\textit{Perry Engineering} gained some attention from Australian authors writing internationally.\(^\text{200}\)

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\textsuperscript{193} Ibid [2].

\textsuperscript{194} Zeller, \textit{CISG Cases}, above n 2, 1.

\textsuperscript{195} The plaintiff contended that ‘it was not necessary to plead the specific provisions of the \textit{Sale of Goods (Vienna Convention) Act} in reliance on the earlier case of \textit{Roder Zelt} (1995) 57 FCR 216: see Perry [2001] SASC 15 (Unreported, Burley J, 1 February 2001) [17].

\textsuperscript{196} Zeller, \textit{CISG Cases}, above n 2, 1.

\textsuperscript{197} Perry [2001] SASC 15 (Unreported, Burley J, 1 February 2001) [16].

\textsuperscript{198} The \textit{CISG} may pre-empt certain tortious and other actions: see above n 179.

\textsuperscript{199} See discussion above n 124.

This case involved scrap metal sold by an Australian seller to a Malaysian buyer. The buyer failed to open the letter of credit as required by the contract. At first instance, Ambrose J held that there had been a failure of the obligation to pay the price, amounting to a fundamental breach in accordance with art 25, thereby enabling the seller to declare the contract avoided pursuant to art 64(1). The fact that the buyer had undergone a change in management structure was no excuse. Ambrose J assessed damages in accordance with arts 74 and 75, and accepted that sub-charter of the ship fulfilled the obligation to mitigate. Resale of the scrap within two months was considered a substitute transaction for the purposes of assessing damages, since it was done within a ‘reasonable time’ as required under art 75. Article 72 on anticipatory breach was also considered.

The quality of the trial decision was undermined by domestic terms such as ‘acceptance of repudiation’, reference to a domestic definition of repudiation, and two passing references to non-CISG cases. CISG formation provisions were not mentioned, despite extensive discussion of the facts of formation and modification. While far from ideal, the trial decision did encouragingly manage a reference to one US CISG case and one CISG text. At the international level, the trial decision was discussed widely, generally as a step in...
the right direction on certain points, and is still cited today, particularly regarding awards for additional costs associated with substitute transactions under art 75.212

Unfortunately, the appeal decision was far more disappointing. To some extent, one might have sympathised with the Court of Appeal’s references to domestic law.213 Part of the appeal case was that failure to plead CISG provisions should have precluded the seller from reliance on the CISG at trial.214 Astoundingly, like Perry, the CISG’s importance ‘only became obvious at a late stage in the trial’.215 and counsel was recalled 44 days after the hearing.216 For the purposes of determining prejudice, comparison of the CISG with the Sale of Goods Act 1896 (Qld) was conceivably relevant.217

However, absence of similarity between the laws would not have constituted prejudice of the relevant kind. The Court of Appeal correctly concluded that no prejudice had been suffered, not because of similarities between provisions, but in light of the manner in which proceedings were conducted.218 According to the Court, arguments at trial and during the leave application made it ‘obvious’ that the seller’s case rested on something other than the Sale of Goods Act.219 Further, the buyer had been afforded an opportunity to address the CISG in further argument220 and written submissions had been received.221

Given this conclusion, it is difficult to maintain the above sympathy. Roder Zelt’s autonomous, if not internationalist, approach was ignored. Instead, without reference to relevant authority, the Court decided there was no material difference ‘between art 25 and the common law’,222 and that the CISG ‘adopts, at least to some extent, the common law concept of repudiation’.223 Such statements are not only incorrect, but are, at best, dangerous examples of viewing the CISG through ‘domestic lenses’.224


212 CISG Advisory Council, Opinion No 8, above n 70, Commentary [3.1] (fn 41) (costs of chartering new vessel for substitute transaction).

213 See, eg, Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.40] (coining the term ‘domestication’).


215 Ibid 474.

216 Mentioned in argument by O’Reilly SC for the appellant: ibid 464.

217 Ibid 472.

218 Ibid 472–5.


221 Ibid 474.

222 Ibid. On fundamental breach, see above n 71 and accompanying text.


224 See also Jacobs, Cutbush-Sabine and Bambagiotti, above n 4, [7.33]–[7.39].
Unperturbed, the Court embarked upon the slippery slope of ‘domestication’, all the while chipping away at the uniformity of a law intended to be applied in the same way around the world. Despite efforts of CISG drafters to avoid such terms, it described the seller’s entitlement to ‘rescind’ and cited two non-CISG (and therefore irrelevant) UK cases in support. The term ‘avoidance’ would have been more appropriate. As discussed above, art 64 allows the seller to avoid the contract when there is either a fundamental breach, or the buyer fails to pay the price or take delivery within an additional period set by the seller under art 63(1). The Court considered the latter basis satisfied but determined a fundamental breach had already arisen in any event, due to the failure to open a letter of credit. While the relevant provisions were considered, CISG cases and commentary on this very issue were ignored.

Again, without reference to relevant authority, the Court concluded the ‘only possible difference between the [Sale of Goods] Act and the CISG for present purposes is with respect to the calculation of damages’. Rather than seek guidance on those differences, it instead simply equated the right to consequential damages in art 74 with the common law test in Hadley v Baxendale. In doing so, the Court disregarded the subtle differences between the Sale of Goods Act and the CISG. The common law examines the ‘contemplation’ of both parties, while the CISG looks only at the breaching party’s perspective.

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225 Jacobs, Cutbush-Sabine and Bam Bagiotti, above n 4, [7.40].
226 See above n 126.
227 Downs [2002] 2 Qd R 462, 480 (Williams JA).
228 Ibid 479.
229 CISG, above n 1, art 64(1)(a). On art 25, see above n 71.
230 CISG, above n 1, art 64(1)(b). See also above n 71 and accompanying text.
231 By an agreed variation, the letter of credit was due on 1 August 1996. On 5 August, the seller’s solicitor wrote to request it by 7 August 1996: Downs [2002] 2 Qd R 462, 201, 476–8.
234 Downs [2002] 2 Qd R 462, 473 (Williams JA) (stating that the ‘difference between the contract price and the resale price was essentially the formula provided in Article 75 of the [CISG]’. This does not misdescribe art 75, but one imagines, had the Court been interpreting any other Australian legislation, that it would have referred to case law on the provision, perhaps scholarship.
235 Ibid 475.
236 [1854] 9 Ex 341; 156 ER 145. Also cited: Robinson v Harman [1848] 1 Ex 850; 154 ER 363.
Timing of foreseeability for both is at contractual conclusion, but the threshold for liability is expressed differently: *Hadley*’s limitation refers to ‘probable’ results, while art 74 directs attention to ‘possible’ consequences.238 *Hadley* has two rules: the first is objective foreseeability by a reasonable person in the same position. The second makes the ‘defendant liable for loss which could have been foreseen by a reasonable person *with the same knowledge* of special circumstances as the defendant had’,239 thus containing ‘mixed’ subjective and objective elements.240 Article 74 more clearly maintains the distinction between subjective and objective elements, by specifying that liability depends on whether the breaching party ‘foresaw or ought to have foreseen’ the loss, ‘in the

Anglo-American law, the ‘contemplation’ of both parties is decisive. In contrast, for the purposes of Article 74, the foreseeability of the loss must be judged from the viewpoint of the party in breach at the time of the conclusion of the contract ... taking into account the circumstances of which he was aware or ought to have been aware (emphasis added) (citations omitted).

Saidov, ‘Methods of Limiting Damages’, above n 211, 334, 339 (notes this difference, but also acknowledges that since an aggrieved party almost always knows their own situation better than the breaching party, divergent results are unlikely).

238 Murphey, above n 237, 439–40 (arguing that this makes the *CISG* more generous for injured parties); Barry Nicholas, ‘The Vienna Convention on International Sales Law’ (1989) 105 *Law Quarterly Review* 201, 230 (stating that the difference might mean the art 74 requirement is “weaker”); V Susanne Cook, ‘The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricty’ (1997) 16 *Journal of Law and Commerce* 257, 260; Dodge, above n 43, 91–2. See also Cooling Systems Case (Oberster Gerichtshof, Austria, 14 January 2002) <http://cisgw3.law.pace.edu/cases/020114a3.html>, stating that foreseeability [refers to] possible consequence of a breach of contract. The foreseeability of a breach ... does not matter ... [foreseeability in art 74 ... refers ... only to losses that at the time of the conclusion of the contract were an assessable consequence of a possible breach of obligation ... According to prevailing opinion, art 74 ... does not require precise and detailed foreseeable of losses ... It is necessary that the obligor could recognize that a breach of contract would produce a loss essentially of the type and extent that actually occurred (citations omitted).

Re Siskiyou Evergreen Inc (Debtor) (US Bankruptcy Court (D Or), US, 29 March 2004) <http://cisgw3.law.pace.edu/cases/040329u2.html> (rejection of third party contracts unforeseeable and therefore lost profits could not have been claimed pursuant to art 74).

239 Treitel, above n 237, 155; Saidov, ‘Methods of Limiting Damages’, above n 211, 341. It has been argued *Hadley* contained anywhere between one to three rules: Murphey, above n 237, 429–34.

240 Treitel, above n 237, 155; Saidov, ‘Methods of Limiting Damages’, above n 211, 341. On the issue of objective and subjective elements in art 74, see Cooling Systems Case (Oberster Gerichtshof, Austria, 14 January 2002) <http://cisgw3.law.pace.edu/cases/020114a3.html>: ‘Generally an objective standard is applied for foreseeability. The obligor must reckon with the consequences that a reasonable person in his situation (art 8(2) *CISG*) would have foreseen ... Whether he actually did foresee this is ... insignificant’. On the subjective elements, the Court stated: Yet, subjective risk evaluation cannot be completely ignored: if the obligor knows that a breach ... would produce unusual or unusually high losses, then these consequences are imputable to him. [It is necessary] to determine to what degree a reasonable person ... in ... circumstances known to [the Seller] at the time of the conclusion of the contract could (or should) foresee such problems and expenses; and if need be ... were actually foreseeable for [Seller] ... [Here, the Seller] knew at the conclusion of the contract [the conditions and places of installation and] therefore must have foreseen ... a loss in the amount claimed could arise ... [The fact that the Seller] was informed of threaten[ed] damages claims of [the Buyer]’s customer, would only be of ... importance ... if this information was given prior to or during the conclusion of the contract.
light of the facts and the matters … he … knew or ought to have known’. 241

Then there is the debate over the level of certainty required for substantiation of loss under the CISG, and the availability of ‘loss of a chance’ damages,242 issues recently considered by the CISG Advisory Council.243 Such subtle differences could alter outcomes in marginal cases, thus many CISG scholars warn against the use of the Hadley test in the CISG.244 In any event, irrespective of whether any practical difference in outcome ensues, reference to Hadley preconceptions contravenes the overriding prohibition on domesticated interpretations of the CISG, and erodes the CISG’s uniformity by way of the ‘homeward trend’. For all of these reasons, it would have been best not to refer to Hadley at all.

However, momentum on the precarious slopes in Downs had inexorably gathered. Some scrap metal used by the seller in the substitute transactions was

241 Saidov, ‘Methods of Limiting Damages’, above n 211, 341. See also Nicholas, above n 238, 230 (stating that art 74 embraces both rules).

242 Substantive–procedural classifications of issues regarding burden and standard of proof vary across jurisdictions: Djakhongir Saidov, ‘Standards of Proving Loss and Determinating the Amount of Damages’ (2006) 22 Journal of Contract Law 27, 51–2. It is submitted that, regardless of any difference in domestic classification, the CISG can govern procedural rules indirectly: contra Sunflower Oil Case (Handelsgericht Zürich, Switzerland, 5 February 1997) <http://cisgw3.law.pace.edu/cases/970205s1.html> (domestic law determines whether future loss estimates are sufficiently definite). Stoll and Gruber maintain ‘loss of a chance’ damages are unavailable under the CISG due to a high level of certainty required in proof of loss: Stoll and Gruber, ‘Arts 74–77’, above n 70, 759. Contra Saidov argues that ‘loss of a chance’ damages are governed by the CISG and should be awarded on the basis of a reasonable level of certainty, emphasising flexibility rather than ‘all or nothing’: Saidov, above this note, 51–2; see also Joseph Lookofsky, ‘Consequential Damages in CISG Context’ (2007) 19 Pace International Law Review 63, 84 (agreeing with Saidov, but ultimately favouring limitation of consequential damages by reference to domestic law proportionality tests, by treating the issue as an external gap).

243 In regard to standard of proof, the CISG Advisory Council considers that ‘reasonable certainty’ is required rather than ‘mathematical precision’. Concerning ‘loss of a chance’, unless the contract itself was such that the chance of profit was an asset acquired pursuant to the contract, the CISG Advisory Council comments that ‘loss of a chance’ damages are typically unavailable under art 74, because the profit was dependent on a contingent event, and thus cannot be proven with ‘reasonable certainty’: CISG Advisory Council, Opinion No 6, above n 67, §2, Commentary [3.16]. It is submitted that Saidov’s approach to ‘loss of chance’ is preferable in the interests of promoting uniformity and fairness: see Saidov, ‘Standards of Proving Loss’, above n 242.

not identical to that designated to the original contract. Two further (non-
CISG) US cases were cited in support of the notion that this was acceptable
‘where fungibles are involved … as the sale is commercially reasonable’. The
US decisions related to the UCC, not art 75 of the CISG.

Numerous decisions on art 75 itself were available, had counsel checked
relevant sources. These make clear the need to declare the contract avoided
before entry into the substitute transaction. Substitute transactions must be
entered within a reasonable time, as the Court correctly noted. However, CISG
cases should have guided the Court on what constituted a reasonable time period
under art 75, and on reasonableness of resale terms, which need not be

245 Despite a contrary position at trial (see references to steel ‘held’ for the buyer: Down
Investments Pty Ltd v Perwaja Steel Sdn Bhd [2000] QSC 421 (Unreported, Ambrose J, 17
November 2000) [22], [93]), it seems that on appeal it was accepted that some of the steel
used for the substitute transactions was not the exact same steel that would have been
supplied to the original buyer: Down [2002] 2 Qd R 462, 483–4 (Williams JA).


247 Specifically, UCC §2–706.

248 See above n 128. See above n 70, regarding damages under arts 75 and 76 of the CISG,
which are triggered only upon avoidance. Fisher notes the more limited sphere of arts 75
and 76 of the CISG compared to provisions in the Sale of Goods Act 1923 (NSW) ss 52(3),
Commercial Law Quarterly 19, 32.

249 Arguably, if the other party has made it clear that they will not perform the contract, a
substitute transaction before avoidance is declared might be sufficient for the purposes of art
75, on the basis that good faith in art 7(1) may make the need to declare avoidance
beforehand unnecessary: Iron Molybdenum Case (Oberlandesgericht Hamburg, Germany,
28 February 1997) §(c) <http://cisgw3.law.pace.edu/cases/970228g1.html>; see also Stoll
and Gruber, ‘Arts 74–77’, above n 70, 776 (stating that a party making it clear that it would
not perform could not in good faith complain of failure to declare avoidance by the other
cases/968574i1.html> (purchases by aggrieved buyer before it had avoided contract not
substitute transactions under art 75); Fabric Case (Oberlandesgericht Bamberg, Germany,
13 January 1999) <http://cisgw3.law.pace.edu/cases/990113g1.html> (buyer’s cover
purchase made before avoidance declared, so art 75 calculation inappropriate, and buyer
failed to satisfy art 74); see also the recent statement by the CISG Advisory Council,
Opinion No 8, above n 70, §1.2, Commentary [2.3.3] (contrary the Iron Molybdenum Case
and Stoll and Gruber, ‘Arts 74–77’, above this note; concluding that even if the obligor
‘unambiguously declared that it would not perform’, it would be ‘inconsistent with the
explicit language of Article 75’ to allow damages calculated on the basis of art 75 for a
substitute transaction was entered before declaration of avoidance).

250 Time begins upon declaration of avoidance: see the
Secretariat Commentary on draft art 71 in the Commentary of the Draft Convention on
Contracts for the International Sale of Goods, UN Doc A/CONF.97/5 (14 March 1979) 60
[5] (‘Secretariat Commentary’).
completely identical.\(^\text{252}\) Despite clearly being troubled about whether the resale was truly in substitution, the Court was not in a position to assess any proper alternative basis for damages because it failed to consult *CISG* doctrine or cases.

The Court was aware that abstract damages could have been calculated under art 76 if there had been no reasonable or true substitute transaction.\(^\text{253}\) Yet contrary to the Court’s opinion that ‘there is no justification for limiting the operation of art 75 to contracts involving the sale of specific goods’,\(^\text{254}\) there is a strong view among scholars that art 76 is more appropriate than art 75 when the ‘promisee is continuously “in the market” and therefore a specific substitute transaction cannot be attributed’ for art 75 purposes.\(^\text{255}\) As the price of scrap metal was falling rapidly, a smaller award of damages would have ensued, since

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\(^{251}\) See, eg, *Shoes Case* (Oberlandesgericht Düsseldorf, Germany, 14 January 1994) <http://cisgw3.law.pace.edu/cases/940114g1.html> (seasonal goods (shoes) reasonably resold at lower cost recovery per art 75); *Frozen Bacon Case* (Oberlandesgericht Hamm, Germany, 22 September 1992) <http://cisgw3.law.pace.edu/cases/920922g1.html> (bacon resold at 25 per cent of market price was unreasonable and therefore damages was based on art 76); *Industrial Raw Material Case* (China International Economic and Trade Arbitration Commission (‘CIETAC’), China, 4 June 1999) <http://cisgw3.law.pace.edu/cases/990604c1.html> (resale ex-warehouse was ‘hard’, therefore lower price reasonable). See also, Schlechtriem, *Calculation of Damages*, above n 70, §II(1).

\(^{252}\) Terms of cover contract should correspond ‘more or less’ to the contract breached: Schlechtriem, *Calculation of Damages*, above n 70, §II.2. Although terms need not be identical, an adjustment might need to be made to account for saved or additional costs of the substitute transaction *CISG* Advisory Council, *Opinion No 8*, above n 70, *Commentary* [2.3.4]; see below n 262 (discussion of damages for extra costs through art 74 ‘further damages’).

\(^{253}\) *Downs* [2002] 2 Qd R 462, 482 (Williams JA). Although art 75 ‘ordinarily takes precedence if [its] requirements … are met’, where the substitute transaction is not ‘reasonable’, damages should be calculated in accordance with either art 76 or art 74: *CISG* Advisory Council, *Opinion No 8*, above n 70, *Commentary* [2.4.2], [2.4.3], [4.1.2] (accepting art 76 abstract calculation ‘as if no substitute transaction had taken place’ or art 74 concrete calculation of actual losses, and rejecting an alternative approach involving art 75 calculation with adjustment for ‘the factor(s) that made it unreasonable’); Knapp, above n 70, 553–4 [2.3]; *Frozen Bacon Case* (Oberlandesgericht Hamm, Germany, 22 September 1992) <http://cisgw3.law.pace.edu/cases/920922g1.html> (supporting the use of art 76 and ignoring the unreasonable substitute transaction); *Secretariat Commentary*, above n 250, 60 [6] (if substitute transaction took place after unreasonable time or in unreasonable manner, calculation should proceed under art 74 or 76 as if no substitute occurred). *Contra* Stoll and Gruber, ‘Arts 74–77’, above n 70, 778 (supporting the use of art 75 plus adjustments for unreasonable substitution).

\(^{254}\) *Downs* [2002] 2 Qd R 462, 484.

\(^{255}\) It is noteworthy that the commentary of Knapp and Honnold, below this note, was available at the time *Downs* was decided. *Jewelry Case* (Oberster Gerichtshof, Austria, 28 April 2000) 190 <http://cisgw3.law.pace.edu/cases/000428a3.html> (stating that ‘Where the party regularly concludes similar transactions, the abstract calculation of damages under art 76 is excluded only if it identifies one of them as a specific substitute transaction’). Stoll and Gruber, ‘Arts 74–77’, above n 70, 781 (and authors referred therein); Knapp, above n 70, 554 [2.4] (arguing ‘where it is impossible to determine with certainty whether a substitute transaction has been entered into … if the injured party is consistently in the market for goods of the type in question, it may be difficult or impossible to determine which of the many contracts … was in replacement. In such a case … Article 76 will apply’); Honnold, *Uniform Law for International Sales*, above n 71, 450. A similar conclusion was reached in the commentary of a recent *CISG* Advisory Council Opinion: *CISG* Advisory Council, *Opinion No 8*, above n 70, *Commentary* [2.3.4] (concluding that where an aggrieved party ‘often deals in contracts similar to the avoided one’, identification of ‘a single transaction as a substitute may be difficult’, leaving the party with three options: (1) to identify the ‘substitute transaction [before] engaging in it’ and proceed under art 75; (2) ‘choosing the first transaction after avoidance as the substitute’ and proceed under art 75 (this would produce similar results to art 76); and (3) proceed ‘abstractly under Article 76’).
art 76 fixes the price at the time of avoidance, whereas art 75 uses the substitute price actually obtained, in this case, some two months later.

Alternatively, the Court could have awarded net profits lost on the avoided sale pursuant to art 74. Lost volumes are recoverable under art 74 by sellers, on the basis that the ‘resale’ transaction would have happened anyway, thus the true loss was the net profit lost on the terminated sale, recovery of which places the seller in the position it would have been in had both sales occurred. The claim needs to be proven with reasonable certainty. This might involve showing capacity to supply both transactions, and proof the subsequent transaction was an independent event. In this case, the seller went to special lengths to find alternative buyers, thus the buyer could argue the replacement sales would not have occurred irrespective of avoidance of the first contract, and were therefore not truly independent events. The seller could counter that in a falling market, a buyer should not be allowed in good faith to reap the advantage of its own fundamental breach. The seller could not have recovered both lost volume profits under art 74 nor damages under arts 75 or 76, or it would have received double recovery, which would go beyond the general principle of ‘full compensation’ inherent in the CISG.

256 Current price when the buyer ‘took over’ goods is used if this occurred before avoidance, to prevent speculation: see above n 70.

257 CISG Advisory Council, Opinion No 6, above n 67, §3C, Commentary [3.10]–[3.22]; Bielloni Castello Spa v EGO SA (Corte di Appello di Milano, Italy, 11 December 1988) <http://cisgw3.law.pace.edu/cases/981211i3.html> (seller’s lost sales volume was argued but dismissed on the evidence, and damages were awarded under art 75); Jewelry Case (Oberster Gerichtshof, Austria, 28 April 2000) <http://cisgw3.law.pace.edu/cases/ 000428a3.html> (awarding damages to a seller for lost sales volume under art 76 on the basis that the second sale would have occurred in any event). See also Honnold, Uniform Law for International Sales, above n 71, 454 (arguing lost volume of sales under art 74); Stoll and Gruber, ‘Arts 74–77’, above n 70, 779 (favouring compensation for lost profits due to loss of volume if the promisor is aware or ought to have been aware the promisee continuously deals in the goods concerned); Ziegel, ‘Remedial Provisions in the Vienna Sales Convention’, above n 244, 454 (arguing compensation for lost volume profits of sellers pursuant to art 74 in addition to arts 75, 76 damages); Huber and Mullis, above n 16, 335–6 (available pursuant to art 74 or combination of arts 74 and 75).

258 CISG Advisory Council, Opinion No 6, above n 67, §2, Commentary [2.9].

259 See Saidov, ‘Methods of Limiting Damages’, above n 211, 323–6 (outlining considerations to take into account in lost sales volume cases to prevent overcompensation); CISG Advisory Council, Opinion No 8, above n 70, Commentary [3.4] (describing ‘true lost volume’ situations enabling art 74 claims as ‘where the subsequent transaction would have occurred regardless of avoidance’). Some of these sources were not available to the Court when Downs was decided. The Court in Downs did not consider the following, even though they were available to the Court at the time of the decision: Bielloni Castello, Ziegel, Knapp and Honnold.

260 Article 7(1) requires interpretation of the provisions of the CISG to promote good faith. Further, good faith is a gap-filling general principle of the CISG pursuant to art 7(2).

261 CISG Advisory Council, Opinion No 6, above n 67, Commentary [3.22]. Contra Saidov, ‘Methods of Limiting Damages’, above n 211, 318–26 (arguing in favour of recovery of lost volume profits of sellers pursuant to art 74 in addition to arts 75, 76 damages); Huber and Mullis, above n 16, 335 (similarly splitting damages between arts 74 and 75).

262 CISG Advisory Council, Opinion No 8, above n 70, Commentary [3.2]–[3.4], 6.4) (asserting that lost profits could not be claimed as ‘further damages’ under art 74 if a substitute transaction had enabled the preservation of those profits in third party transactions, since this would place the aggrieved party in a ‘better economic position than if the contract had been performed’. Thus parties, having made a substitute transaction, must generally choose between a lost profit claim under art 74 and art 75 damages. In the case of
Either analysis makes the question of ‘fungibles’ redundant. Unfortunately, the Court referred to only one relevant authority, Delchi v Rotorex, itself the subject of much criticism for its own poor application of the CISG, a matter easily established from commentary on CISG websites. In summary, Downs itself is an excellent example of ‘legal ethnocentricity’. It is interesting that the appeal decision, unlike the trial decision, was met almost unanimously with a diplomatic, or perhaps, stunned silence from international CISG academics.

(f) Ginza Pte Ltd v Vista Corp Pty Ltd

A contract for the supply of contact lens solution required that the goods complied with requirements of the Australian Therapeutic Goods Administration (‘TGA’) and that the goods were sterile. After the TGA found bacterial contamination, it ordered a recall of the goods. The Singaporean seller sued for a ‘true lost volume seller’, where no true substitution occurs, the CISG Advisory Council’s Commentary suggests calculation under either art 74 or art 76. In ordinary non-‘true lost volume’ situations, the CISG-AC Opinion concludes that lost profits exceeding art 76 damages might additionally be claimed under art 74: CISG Advisory Council, Opinion No 6, above n 67, §1. See also Stoll and Gruber, ‘Arts 74–77’, above n 70, Commentary [3.1] (fn 41). Contrast this with numerous and continuing citations of trial decision, above n 211, 212.

263 Delchi Carrier, Spa v Rotorex Corp (US Circuit Court of Appeals (2nd Cir), US, 6 December 1995) <http://cisgw3.law.pace.edu/cases/951206u1.html> (customs, shipping costs). The latter four cases had been decided by the time Downs was heard.

264 Murray, above n 91, 369–70; Cook, above n 238, 258; Dodge, above n 43, 92.

265 See, eg, the sources listed in Pace Law School, <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951206u1.html> (giving the case citation, details, access to abstract and full text, and listing at ‘Citations to Comments on Decision’ a number of commentaries on the case, including hypertext links to many articles). See, eg, Zeller, ‘A Leap Forward’, above n 154, 89 (fn 39) and accompanying text (arguing that the Court in Delchi made a mistake in noting that CISG damages were to be limited by Hadley v Baxendale foreseeability principles); and Saidov, ‘Methods of Limiting Damages’, above n 211, (fn 148) (arguing that there was a ‘misapplication’ of art 74 in Delchi, as the Court applied the Hadley test).

266 Cook, above n 238, 263 (coining the term).


the price. The Australian buyer claimed the price should be reduced to zero for non-conformity. The buyer also counterclaimed damages for non-conformity and for negligence claiming lost profits, costs of recall and loss of goodwill.

The buyer relied on express terms relating to TGA compliance and sterility, but relied in the alternative upon implied terms of ‘merchantable quality and fitness for purpose’ pursuant to the Sale of Goods Act 1895 (WA) or the CISG. Remarkably, unlike most Australian cases, the pleadings in Ginza referred to the CISG. However, grouping such claims is undesirable. It gives the impression that no difference exists, and results in domestic terms like ‘merchantable quality’ being inappropriately used in CISG contexts.

Indeed, the Court remarked that fitness for purpose and merchantable quality ‘find expression in both’ regimes. The Court interpreted the CISG through comparisons with domestic legislation. While equating the CISG with familiar law affords comfort for lawyers from all backgrounds, this tendency must be curbed if the CISG is to remain uniform. As a truly autonomous body of law, only CISG authorities should guide its interpretation. Unfortunately, such resources were not utilised in Ginza. Barker J correctly identified that art 35 relating to non-conformity was crucial. However, contrary to the Court’s view, art 35(2) says nothing of ‘merchantability’. It requires goods be fit for their ordinary purposes, or purposes made known to the seller, unless reliance on the seller’s skill and

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269 Ibid [12]–[13], [16]–[18]. A related action between Ginza and a corporation related to Vista, Kontack Pty Ltd was consolidated with this action. Counterclaimed commission fees were admitted and are not relevant to the current discussion: see ibid [20].

270 Ibid [21], [214]. On damages for loss of goodwill under art 74, see above n 67.


272 Ibid [190].

273 Ibid [191] (comparing s 14 of the Sales of Goods Act 1895 (WA) with the CISG art 35(1)), and [195], [197], [259] (comparing art 50 with s 52 of the Sales of Goods Act 1895 (WA)).

274 Graffi, above n 71, 338 (civil and common law domestic concepts have no place in CISG interpretation).


276 Although the above sources on art 35 were not available to the Court in Ginza (with the exception of the New Zealand Mussels Case), dozens of cases and commentary were available at the time. For a chronological overview and updated list of cases dealing with art 35, see Pace Law School, <http://cisgw3.law.pace.edu/text/anno-art-35.html> (including year-by-year case law and link to UNCITRAL, Digest of Case Law, above n 15). Similarly, for scholarly texts and annotations to art 35, see Pace Law School, Annotated Text of CISG: Article 35 <http://cisgw3.law.pace.edu/cisg/text/e-text-35.html>.


278 Ibid [190].
judgement in such matters was unreasonable or there was no reliance.279 An autonomous view of art 35(2)(a) fitness for ordinary purposes requires the goods be of reasonable quality.280

His Honour determined that the goods did not comply with express terms,281 and therefore did not conform to art 35(1), which requires compliance with the contractual ‘quality, quantity and description’. The Court’s findings that the ‘the whole of the goods supplied were contaminated’ rested on an inference from evidence of ‘widespread and serious’ contamination,282 supported by reference to a (non-CISG) English case. Rather than refer to non-CISG cases, CISG cases dealing with non-conformity with express requirements for goods could have been consulted.283 The Court should also have addressed CISG cases concerning contamination and the general rule that sellers need not comply with regulations in the buyer’s country.284 The express term concerning TGA requirements would fit within exceptions to this rule, ultimately leading to the conclusion that art 35(1) and (2) were breached. As to evidentiary matters, CISG cases on burden of proof would have provided guidance.285

After its determination that the CISG applied,286 the Court should have refrained from further reference to non-CISG sources. The process of

279 CISG, above n 1, arts 35(2)(a), 35(2)(b), EP SA v FP Oy (Helsinki Court of Appeal, Finland, 30 June 1998) <http://cisgw3.law.pace.edu/cases/980630f5.html> (reliance on seller skill in ensuring vitamin levels within agreed range); New Zealand Mussels Case (Bundesgerichtshof, Germany, 8 March 1995) <http://cisgw3.law.pace.edu/cases/950308g3.html> (regulation on cadmium levels in shelffish not mentioned to seller); Medical Marketing v Internazionale Medico Scientifica (US District Court (ED La), US, 17 May 1999) <http://cisgw3.law.pace.edu/cases/990517u1.html> (circumstances such that seller should have been aware of safety standards); Machinery Case (Tribunal di Busto Arsizio, Italy, 13 December 2001) <http://cisgw3.law.pace.edu/cases/011213i3.html> (non-conformity with purpose made known to seller).


282 Ibid [131]. Similarly, in regard to sterility, see Ginza [2003] WASC 11 (Unreported, Barker J, 11 January 2003) [152] (concluding the ‘extent and level’ of the contamination meant the ‘only proper inference to be drawn’ was that ‘as a whole, the product supplied … was, on the balance of probabilities, not sterile’).


285 See UNCITRAL, Digest of Case Law, above n 15; [15] and cases cited therein.

comparison with domestic law and cases blinded it to significant differences, and entire provisions with which it should have dealt were simply bypassed.

For example, the CISG requires inspection and notification of non-conformity within a reasonable time, failing which, the buyer’s right to damages for non-conformity or price reduction can be lost. Yet in Ginza, arts 38 and 39 were ignored. Consequently, it is unclear from the judgment exactly when the seller was notified.

Despite omission of these crucial prerequisites, the Court found the buyer was entitled to rely on arts 50 and 74. Article 50 enables the buyer to reduce the price for non-conformity, whether or not the price is still unpaid. The reduction permitted is the difference between the value of goods delivered and the value conforming goods would have had at that time. It reflects the principle inherent in the CISG that, where possible, contracts should be kept on foot, given the delays and expenses in reversing international contracts for goods.

The seller argued that not all the goods were contaminated, so any price reduction pursuant to art 50 should be partial only, given the restriction on price reduction in art 51(1) where some goods conform and others do not. The Court rejected the argument, but without reference to any CISG authority.

Had the Court been directed to art 51(2) and CISG cases, it might have paused to consider two very important issues. First, conforming goods need to be ‘separable’ from non-conforming goods for art 51 to have any relevance. The recall and/or extensive level of contamination might have justified a conclusion that it was not possible to truly separate goods in this case, since not every bottle of saline could be tested. Rejection of art 51 on this basis would have ‘fitted’ Ginza with existing CISG cases.

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287 A maximum time of two years for notice is imposed by art 39(2) of the CISG. However, normally a much shorter period is imposed by the requirement that notice be given within a ‘reasonable’ time: see discussion below nn 479–480 and accompanying text (cases on period for notice of non-conformity); Model Locomotives Case (Kantonsgericht Schaffhausen, Switzerland, 27 January 2004) §3c [http://cisgw3.law.pace.edu/cases/040127a1.html] (reasonable time in art 39 depends on the type of goods); Person of Greece v Ed Fruit and Vegetables BV (Rechtbank Breda, Netherlands, 16 January 2009) [3.12] <http://cisgw3.law.pace.edu/cases/090116n1.html> (watermelons subject to decay, inadequate notification if not within days). See also for general discussion of time limits, CISG Advisory Council, Opinion No 2, above n 74; Schwenzer, ‘National Preconceptions’, above n 74, 121–24, Baasch Anderson, ‘Reasonable Time in Article 39(1)’, above n 74. Although some of these materials post-date Ginza, many cases and commentaries existed at the time of the decision.

288 Zeller, CISG Cases, above n 2, 2. On arts 38 and 39, see above n 74, below n 381 and accompanying text.

289 See, in support, Bruno Zeller, ‘Editorial Remarks’ in Pace Law School, CISG Case Presentation: Ginza Pte Ltd v Vista Corporation Pty Ltd (2005) [http://cisgw3.law.pace.edu/cases/030117a2.html] (pointing out that art 39(2) is used for non-conformity in other cases).


291 See also discussion, above n 67, on art 50 of the CISG.

292 The general principle of ‘favor contractus’, see above n 66. On art 50, see above n 67.


294 Ibid [200]. On art 50, see above n 67.


296 See UNCITRAL, Digest of Case Law, above n 15 and cases cited therein.
Second, and far more grave, was the failure to consider fundamental breach, described in art 25. Given contamination was ‘widespread and serious’, it could have foreseeably and substantially deprived the buyer of what it was entitled to expect. If a partial non-conformity is so serious as to amount to a fundamental breach, then not only does art 51(2) remove the restriction on price reduction in art 51(1), but the contract can be avoided by declaration pursuant to art 26. The possibility of fundamental breach was never discussed by the Court.

Interest was awarded without reference to art 78, the source of the obligation to pay interest. Although this does not provide interest rates, it should not have been overlooked. The rate and timing of interest arguably comprise an ‘external gap’ in the CISG, and therefore require application of conflict rules to determine another law to fill the gap. Ultimately, perhaps the Supreme Court Act rates were appropriate, but the solution must be reached by proper means rather than serendipity.

A related entity, Kontack Pty Ltd, argued that it too had contracted with the seller. Incredibly, in its analysis of the facts relating to this possibility, the Court did not refer to CISG formation provisions. It rejected the argument but held the seller liable to Kontack for negligence. The seller was also liable to the buyer for negligence, but conceded damages were identical to art 74 damages. As mentioned earlier, whether the CISG pre-empted the claim in tort should have been considered as a preliminary question.

Sadly, Ginza is not the worst of the Australian CISG cases. At least the pleadings referred to the CISG and the Court was alerted to some of the relevant provisions like art 50. However, it fell far short of an autonomous interpretation, let alone an internationalist one. It needed to address all relevant provisions, utilise CISG resources, refrain from reverting to domestic influences, and deal with pre-emption.

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297 See further above nn 71 and 72.
298 Additionally, the Court would have to question whether, pursuant to art 82(1), the right to avoid (if found to exist) had been lost because the goods could not be restored in substantially the same condition, although the answer would probably lie in art 82(2)(c), since the goods were sold in the normal course of business before the non-conformity was known. On art 25, see above n 71.
300 See above n 51 for full discussion.
301 See above n 131 and accompanying text. On the importance of first considering whether an issue falls within an internal or external gap and the effect of failing to do so, see Spagnolo, ‘Opening Pandora’s Box’, above n 54, 306–9. Although the majority of authors consider it an external gap, there is a minority view to the contrary: see above n 51.
302 Supreme Court Act 1935 (WA) s 32.
304 Ibid [38]–[59], [209]–[211].
305 Ibid [212]–[213].
306 The CISG may pre-empt certain tortious and other actions: see above n 179.
Ginza received some attention, but was criticised as disappointing for its ‘basic lack of understanding’ of the CISG.

(g) Playcorp Pty Ltd v Taiyo Kogyo Ltd

The sale in this case was between an Australian buyer and Japanese seller of radio controlled toys. The Court held their distribution agreement had been rescinded by the buyer following the seller’s repudiation when it wrongfully refused to continue supplying the buyer pursuant to that agreement. This determination appropriately drew on domestic law. The distribution agreement in this case contained a choice of Australian law. Choice of Australian law (or indeed a specific state or territory law) in sales contracts leads to application of the CISG, because it is part of Australian law. The application of non-CISG domestic law to the distribution agreement in this instance was correct because distribution agreements are generally outside the CISG’s scope.

By contrast, individual sales made pursuant to distribution agreements can fall within the CISG’s scope, so if the sales had involved a choice of Australian law the CISG would have applied to them. However, the individual sales in this case did not themselves involve any express choice of law. Thus the CISG could apply to the sales if both parties were from Contracting States (art 1(1)(a)), or because the law of a Contracting State applied pursuant to the conflict rules of the forum, in this case, Australian conflict rules (art 1(1)(b)). The seller’s arguments centred on art 1(1)(a).

Under art 1(1)(a), the CISG applies if each party is from a Contracting State. The seller therefore argued that the CISG was not applicable to the sales.

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310 See above n 4. Note the difference between a choice of law of a Contracting State and a specific choice of the CISG: see discussion above nn 10–17 and accompanying text.


312 See above Part II.

313 Parties are to have ‘places of business’ in Contracting States, but this fact must be apparent before the contract is concluded: CISG, above n 1, art 1(2). See also above n 9.
on the basis that Japan was not, at the time, a signatory to the CISG. Three
Strategically, the argument seemed to suit the seller’s position that there were no
terms relating to quality in the sales contracts at all. It argued that there were no
express terms as to the quality of the product, and further, implied terms did not
arise because the CISG was inapplicable, nor did they arise under the Goods Act
1958 (Vic) because of past practices between the parties, since no defect claims
had been made in the previous nine years.

Unfortunately, the seller’s strategy ignored art 1(1)(b), discussed above, which
makes the CISG applicable where the forum’s conflict rules indicate the
law of a Contracting State, such as Australian law, governs the contract. The
seller’s counsel submitted that the proper law was the law of the place of
performance, but was less than definitive as to which law fitted that
description. The buyer’s counsel submitted that Victorian law applied, since
sales ‘took place under the aegis of the distribution agreement’, which contained
an express choice of Australian law, and the sales had their ‘closest and most real
connection’ with Victoria. As required by art 1(1)(b), Hansen J correctly
applied conflict rules to determine Victorian law applied.

Regrettably, the effect of this conclusion was not fully appreciated. As
discussed above, if Australian law applies as the proper law of an international
sale, then (unless excluded), the CISG is applicable as part of Australian law. Yet
the Court concluded it meant that ‘either the Goods Act or the Convention
applied’ and although the CISG enjoyed ‘paramountcy’ over the Goods Act, that
this was only ‘in the event of any inconsistency between the two’. In other
words, the Court considered that the local enabling Act required the CISG to be
considered ‘before the Goods Act’, however, if there were no ‘material
differences or inconsistencies’ between the two, it would be acceptable to apply
the local Goods Act provisions, since ‘[n]othing turn[ed] on the fact that I have
reversed that order’. Effectively, the Court was stating that the CISG would only
be applied if the paramountcy provision was enlivened by an
inconsistency.

With respect, this is not the way the CISG works. The enabling Act gives the
CISG the force of law. The CISG’s own terms require that it be applied in its
entirety when it is the governing law of the contract, not just to the extent of

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become a Contracting State: see above n 21.
315 Ibid.
316 See above n 10 and accompanying text.
318 Ibid [212].
319 Ibid [242], [243].
320 Ibid [244].
321 Ibid [245].
323 Ibid [235].
324 Ibid.
325 A similar statement was made in Ginza [2003] WASC 11 (Unreported, Barker J, 17 January 2003) [188].
inconsistency. In other words, when the CISG applies, the Goods Act is displaced by it. The CISG applies exclusively, to the extent of its scope. Were it not so, it would be incapable of achieving its purpose of unifying sales laws around the world for international sales. One cannot rely upon seemingly familiar provisions to conclude it is ‘consistent’ with local sales provisions, and therefore no harm flows from their application. The interpretive method demanded by art 7 for the autonomous interpretation of the CISG’s provisions will always render the CISG inconsistent with domestic law regardless of any surface similarities. In any event, neither ss 5 or 6 confines the CISG’s operation to only those situations in which it differs from domestic law. The reference to the CISG prevailing in the event of ‘inconsistency’ in s 6 of the enabling Act is a mere clarification. It should not usurp the force of law granted by s 5, but instead be interpreted as underlining the pre-emptive effect of the CISG on local laws which overlap with its scope. The latter construction enables ss 5 and 6 to be read not only consistently with one another, but also in harmony with the CISG’s legislative history, purpose and jurisprudence.

The misunderstanding meant that yet another court had succumbed to viewing the CISG through ‘domestic lenses’. The Court openly applied domestic law rather than the actual law of the contract, the CISG. Hansen J compared s 19 of the Goods Act 1958 (Vic) with art 35, and concluded that because it ‘was not suggested that there was any material difference or inconsistency between [them] and because of … the way the case was conducted, it is unnecessary to consider whether there is’. It would have been preferable for the Court to have taken the tough stance evident in Perry. Instead, the Court allowed itself to be led astray. Counsel’s approach led the Court to apply the wrong law. Consequently, vital issues were omitted, and domestic law and common law language crept into the judgment.

The Court did not concentrate on art 35. Clearly, it was persuaded that this was unnecessary. The pleadings referred to ‘implied conditions’, despite the fact the CISG does not distinguish between conditions, warranties, or intermediate terms. Instead, the CISG elevates certain breaches as fundamental breaches which enable avoidance of the contract by the aggrieved party. The pleadings attributed implied terms of fitness for purpose and merchantability to s 19 of the Goods Act 1958 (Vic) and art 35, although merchantability is not a word used by the CISG. The Court ultimately disregarded merchantability, but not because

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327 See CISG, above n 1, art 1(1), and the hierarchy inherent in art 7(2).
328 See discussion on requirements for proper application of CISG as governing law, above n 123 and accompanying text. This conclusion is further supported by arts 8 and 9.
330 Zeller, CISG Cases, above n 2, 3. An Italian court recently commented on this aspect of the CISG: Mitias v Solidea Srl (Tribunale di Forli, Italy, 11 December 2008) [3.4] <http://cisgw3.law.pace.edu/cases/081211i3.html> (observing that the CISG does not distinguish between fundamental or non-fundamental terms, therefore even breach of an ancillary term could be a fundamental breach if it met the very strict criteria in art 25).
332 On art 25, see above nn 71, 72 and accompanying text.
333 Playcorp [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [199], [235]. See also text at [203], [211], [230].
it was applying the *CISG*.\textsuperscript{334} Hansen J referred to the buyer’s reliance on the seller’s skill and experience,\textsuperscript{335} also pertinent to art 35(2)(b), but did not refer to *CISG* cases on this aspect.\textsuperscript{336}

Again, like *Ginza*, the need for both buyer examination and notice of non-conformity within a reasonable time were overlooked.\textsuperscript{337} In the haste to distance the case from the *CISG*, valuable argument on these points never surfaced. There was an ambiguous reference to ‘timely notice’ in the seller’s pleadings, but apparently the matter was not pressed as a pre-condition to damages.\textsuperscript{338}

The issue was certainly alive on the facts. Notification of the defects seems to have been given in August 1994,\textsuperscript{339} or perhaps February 1995.\textsuperscript{340} For some of the goods, non-conformities dated back to January 1994.\textsuperscript{341} It was therefore possible to argue that the buyer had lost its right to damages, because it took between seven and 13 months to notify the seller, and that this was ‘unreasonable’ within the meaning of art 39(1). Of course, what is reasonable will depend on a number of factors which can be gleaned from *CISG* cases and scholarship. The nature of the goods is of obvious importance to this question. Depending on the goods, *CISG* cases indicate that anything from 25 days to four months has been held to be unreasonably long in the context of art 39(1).\textsuperscript{342} There is also an important *CISG* Advisory Council Opinion on interpretation of arts 38 and 39.\textsuperscript{343}

Counter-argument on the point was also available to the buyer. The seller had ‘strung Playcorp along’\textsuperscript{344} in an attempt to create a pretext to end the distribution agreement. In interpretation of what constitutes a ‘reasonable’ period under art 39(1), the Court might, in light of this behaviour, have accepted a longer period than usual. Article 7(1) directs interpretation of the *CISG* to promote good faith in international trade.\textsuperscript{345} The Court’s negative view on the potential under domestic law for good faith duties in the distribution agreement\textsuperscript{346} would have no bearing on the sales contracts, which were governed by the *CISG*.

\textsuperscript{334} Ibid [209]–[214], [229]–[230], stating that despite the absence of an express provision on quality, that the goods should be fit for purpose was ‘obvious’ or ‘plain’. However, the Court should have adopted the *CISG* interpretive methodology, rather than resort to domestic interpretive techniques: see above Part V, above n 137 and below n 431 and accompanying text.

\textsuperscript{335} *Playcorp* [2003] VSC 109, [229], [249] (Hansen J).

\textsuperscript{336} On art 35, see above nn 275, 279, 280, 283, and below n 394.

\textsuperscript{337} See Zeller, ‘Editorial Remarks: *Playcorp*’, above n 317 (stating that: ‘It is also interesting to note that the defence never explored articles 38 and 39’). On art 39, see further above n 74.

\textsuperscript{338} *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [200].

\textsuperscript{339} Ibid [250].

\textsuperscript{340} Ibid [249]–[254].

\textsuperscript{341} Ibid [257].


\textsuperscript{343} See discussion below n 494. See further above n 74.

\textsuperscript{344} *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [265].

\textsuperscript{345} Further, a general principle of good faith underlying the *CISG* is also applicable via art 7(2), where the *CISG* governs but does not expressly deal with an issue.

\textsuperscript{346} *Playcorp* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) [267].
Additionally, past practices on returns and repairs held relevance to interpretation of a ‘reasonable’ notice period. Finally, it could be strongly argued that in fact no notice was required, since the seller ‘knew or could not have been unaware’ of the defect pursuant to art 40. As the Court pointed out, the seller was aware of high levels of returns elsewhere.

The buyer’s claim to damages was calculated on wholesale prices for the goods. Hansen J rejected this approach as inappropriate. Yet this could only be evaluated in light of the applicable law. Like Ginza, a failure to focus on the CISG meant fundamental breach was never canvassed, thus questions as to whether the buyer was substantially deprived of what it was entitled to expect, and whether there was a declaration of avoidance went unanswered. These were important, since, if the contract was validly avoided, a different measure of damages might have been appropriate.

Comment on Playcorp has been mostly confined to local observers interested in good faith as a domestic contractual duty or interpretive aid. In the CISG context, it was described as yet another Australian case in which the CISG was ‘in essence ignored’.

(h) Summit Chemicals Pty Ltd v Vetrotex Espana SA

An Australian company (the buyer) was being sued by its customer for faults in pools allegedly caused by defective fibreglass that it had bought from a Spanish supplier. It therefore joined the Spanish seller, its Australian agent and related parties as third parties to the proceeding. The buyer then applied for leave to amend the third party statement of claim to include, inter alia, a pleading that the alleged defects amounted to breaches of terms implied by the CISG. If the CISG claim became statute-barred after the third party notice was issued on 2 July 1999, a grant of leave to amend would have precluded a limitations defence.

At the initial leave hearing, McKechnie J decided that the matter turned on the ambit of the third party notice. This set out the principal claim made against

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347 See CISG, above n 1, arts 8(3), 9(1). See also ibid [265] (referring to the seller ‘shun[ning] its prior manner of dealing’).
349 Ibid [378].
350 Ibid.
351 See also Zeller, CISG Cases, above n 2, 3.
352 CISG, above n 1, art 25. On art 25, see above n 71 and accompanying text.
353 CISG, above n 1, art 26. See above nn 71, 72, 74 and accompanying text.
354 See, eg, CISG, above n 1, art 76.
the buyer, and sought indemnity from the seller on the basis that the fibreglass caused ‘swimming pools … to blister and need replacement,’ because it was ‘contaminated and thereby not fit for purpose, or of merchantable quality’ due to its moisture content. It stated the claim against the seller ‘will be based upon your breach of the terms of sale … and in particular concerning the merchantable quality and fitness for the purpose of the [fibreglass]’ as well as negligence and Trade Practices Act 1974 (Cth) provisions. It also alleged the buyer had queried the moisture content and been reassured by the seller’s Australian agent.

The third party notice did not refer to the Sale of Goods Act 1895 (WA) or CISG. McKechnie J held that it was wide enough to encompass the CISG claim in addition to the claims under the Sale of Goods Act 1895 (WA) already pleaded in the original statement of claim. His Honour encouragingly acknowledged that the two laws were different, but did not elaborate beyond saying the CISG imposed ‘like’ obligations on the seller.

The Court of Appeal observed that, strictly speaking, since this was a claim for indemnity, the third party’s liability would not arise until judgment was awarded in the primary action. In other words, time did not start to run until the principal matter was complete.

Nonetheless, the Court of Appeal’s primary focus was on local procedural rules. It asked whether the proposed amendments could be characterised as radically altering the facts pleaded rather than the legal conclusions or causes of action to be drawn from those facts. After noting that parties were not compelled to plead legal conclusions, but could argue any causes of action open on the facts pleaded, the Court of Appeal concluded that the CISG claims could have been drawn from the facts indorsed in the original third party notice, and granted leave to amend. The decision rendered nugatory the question as to whether the CISG action became time-barred after the third party notice, because the Court essentially held that this was not a new cause of action at all.

However, Zeller argues that leave to amend the statement of claim ‘created a new claim contrary to the view expressed by the court’, and the period of

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359 Ibid [23].
360 Ibid.
361 Ibid.
362 Ibid.
363 Ibid [24].
364 Ibid.
366 See ibid [42] (EM Heenan J, noting the Court’s discretion to allow amendments arising out of substantially the same facts advanced in the originating process or statement of claim), [58] (EM Heenan J, relying on Wheeler J’s judgment in Morgan v Banning (1999) 20 WAR 474, 485–6, endorsing, pursuant to Rules of the Supreme Court 1971 (WA) O 21 r 5(5), amendments which amount to a ‘change in the legal categorisation’ as opposed those involving a ‘change of facts’).
369 Zeller, CISG Cases, above n 2, 3.
limitation should have been two years pursuant to art 39, not six years under domestic law.\textsuperscript{[370]}

The reasoning in \textit{Summit} should be understood in context. Certainly, the case betrays a level of misunderstanding about the operation of the \textit{CISG}. Buyer’s counsel sought to plead, inter alia, both the \textit{CISG} and \textit{Sale of Goods Act} as alternatives. Clearly, the \textit{CISG}’s application excludes that of the \textit{Sale of Goods Act}, and had the seller’s counsel made such an application, the \textit{Sale of Goods Act} claims should have been struck out. However, the Court was never asked to consider the issue. Thus, unlike in \textit{Playcorp}, its task was not to determine which law applied, but simply whether the \textit{CISG} claim could be added to original pleadings.

These were interlocutory proceedings, concerned only with procedural rules on pleading amendments. The rule in \textit{Weldon v Neal}, that prohibited amendments to add actions that had become statute-barred after proceedings commenced, has now been abrogated.\textsuperscript{[371]} Pleadings can now be amended at any time with leave, provided any prejudice can be met by adjournments or cost orders. While case management powers and specialised list Practice Directions can intrude, leave is usually granted to ensure the real controversy between the parties is addressed, in some circumstances, even after the close of evidence.\textsuperscript{[372]}

Before trial, leave is normally refused only if the amendment involves substantial incurable prejudice, \textit{mala fides}, or is so ‘obviously futile’ that it would be vulnerable to being struck out.\textsuperscript{[373]} The new cause of action is deemed included in the original pleading, and loss of the time-bar defence is not a relevant prejudice.\textsuperscript{[374]} An arguable claim is not futile even if it does ‘not have much chance of success’.\textsuperscript{[375]}

The focus in \textit{Summit} on whether the \textit{CISG} claim was supported by pleaded facts followed a line of authority that restricts the abrogation of \textit{Weldon v Neal},\textsuperscript{[376]} perhaps due to the particular wording of rules in certain jurisdictions.\textsuperscript{[377]} A more relaxed view might be found elsewhere, however some

\begin{itemize}
\item \textsuperscript{370} Ibid 3–4. See also \textit{Protocol Amending the Convention on the Limitation Period in the International Sale of Goods}, opened for signature 11 April 1980, ?? UNTS 85 (entered into force 1 August 1988) (‘Protocol’), which was adopted at the same time as the \textit{CISG}. The \textit{Protocol} would have introduced a limitation period of four years, however, the Convention and its \textit{Protocol} have attracted only 28 and 20 Contracting States respectively, excluding Australia: see UNCITRAL, \textit{Status: 1980}, above n 3.
\item \textsuperscript{371} See \textit{Weldon v Neal} (1887) 19 QBD 394; \textit{Federal Court Rules 1979} (Cth) O 13, r 2(3); \textit{Court Procedures Rules 2006} (ACT) r 503(1); \textit{Uniform Civil Procedure Rules 1999} (Qld) r 376(4); \textit{Supreme Court Civil Rules 2006} (SA) r 54(7)(a); \textit{Supreme Court Rules 2000} (Tas) r 427(2A); \textit{Rules of the Supreme Court 1971} (WA) O 21, r 5(2); \textit{Supreme Court Rules 1987} (NT) r 36.01(6); \textit{Supreme Court (General Civil Procedure) Rules 2005} (Vic) r 36.01(6); \textit{Civil Procedure Act 2005} (NSW) ss 64, 65(2).
\item \textsuperscript{372} \textit{Williams}, above n 367, [36.01.120], [36.01.150].
\item \textsuperscript{373} Ibid [36.01.110], [36.01.155], [36.01.180].
\item \textsuperscript{374} Ibid [36.01.230].
\item \textsuperscript{375} Ibid [36.01.180].
\item \textsuperscript{376} See \textit{Morgan v Banning} (1999) 20 WAR 474.
\item \textsuperscript{377} Some rules refer to actions arising from the same or substantially similar facts as those originally pleaded: see, eg, \textit{Federal Court Rules 1979} (Cth) O 13, r 2(7)(a); \textit{Civil Procedure Act 2005} (NSW) s 65(2)(c); \textit{Court Procedures Rules 2006} (ACT) r 503(4)(b); \textit{Rules of the Supreme Court 1971} (WA) O 21, r 5(5); \textit{Supreme Court Civil Rules 2006} (SA) r 54(7)(a); \textit{Uniform Civil Procedure Rules 1999} (Qld) r 376(4)(b).
rules require statutory provisions, or legal conclusions to be pleaded. In those cases, CISG provisions and CISG-styled conclusions may need to be pleaded in any event.

Clearly, an art 35(2) argument could be derived from the facts originally pleaded on contamination, blistering and moisture. In accordance with local rules and cases properly applicable to the procedural issue of pleadings, the ability to derive CISG claims from facts pleaded supported a conclusion that the CISG claim was not ‘new.’ This finding meant limitation periods fell into two categories, with commencement of third party proceedings as the dividing line. Those expiring afterwards were irrelevant altogether, and those expiring before were best left to a full hearing, since an interlocutory court will be slow to determine a limitation period has expired.

Had the claim been ‘new’, or had a court of a different jurisdiction been seized of the matter, issues of futility might have been at stake, and therefore late notice might have been relevant. Deliveries occurred between October 1996 and May 1997. It is unclear whether the seller was notified before third party proceedings commenced in July 1999, so the right to rely on non-conformity might have been lost for late notice or due to the two year maximum in art 39(2). But was the claim ‘obviously futile’? The CISG Advisory Council has stated that time pursuant to art 38 for inspection commences when ‘signs of latent non-conformity become evident’, that is, when the buyer ought to have been aware. The pools were manufactured in 1997–98. Principal proceedings commenced in April 1999. While it is unclear from the judgment, if the buyer did not become aware of the issue until late 1998–99, the period in art 39(1) might not have commenced until then. Thus it would be possible to argue notice to the seller was not late, even if comprised of the third party process in July 1999.

Seen in its procedural and interlocutory context, the decision was not so flawed as it might seem. Unlike Perry, the decision in Summit anticipated a full hearing. Argument on expiry of limitations was still open before third party proceeding commenced. Periods of limitation per se fall outside the CISG’s ambit, thus mention of domestic limitations legislation was appropriate, although it should have been arrived at by means of a determination to that

378 Uniform Civil Procedure Rules 1999 (Qld) r 149(1)(c); Supreme Court Rules 1987 (NT) r 13.02(1)(b); Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 13.02(1)(b); Supreme Court Civil Rules 2006 (SA) rr 99(1)(b), 100(1)(d); High Court Civil Rules 2004 (Cth) r 27.04(c); Court Procedures Rules 2006 (ACT) r 406(1)(e).

379 Supreme Court Civil Rules 2006 (SA) r 99(1)(a); Federal Court Rules 1979 (Cth) O 12, r 10; Court Procedures Rules 2006 (ACT) r 407(1). See also Supreme Court Rules 2000 (Tas) r 227(3).


381 CISG Advisory Council, Opinion No 2, above n 74, art 38, §3.

382 Aqua Technics (WA) Pty Ltd v Summit Chemicals Pty Ltd [2003] WASC 182 (Unreported, McKechnie J, 19 September 2003) [3].


effect, followed by application of conflicts rules, at least for the CISG claims.385
One might say that the controversy regarding late notice should have been aired in argument on futility, but, in any event, the futility question was made redundant by the Court’s interpretation of its own procedural rules and its view of timing of liability for indemnity.386 Perhaps most remarkable is that there was no application to have alternative domestic sales law claims struck out at the interlocutory stage. The decision barely rated a mention internationally.387

(i) Italian Imported Foods Pty Ltd v Pucci Srl388

The case involved an Italian seller of preserved vegetables and an Australian importer. The seller sought to recover the price. The buyer argued the goods had been defective.389 A magistrate held the relevant time for assessing quality was upon delivery to the buyer’s shipping agent in Italy,390 and that the buyer had not discharged its onus of proof regarding ‘merchantable quality’.391

Incredibly, neither side nor the Magistrate were aware that the CISG applied, and the trial case was argued and decided on the basis of the wrong law.392 On appeal in the Supreme Court, buyer’s counsel applied to amend pleadings to base the claim on the CISG.393 Despite realising the error, argument was still inadequate. In support of its contention that the Magistrate erred regarding the point in time for measurement of quality, rather than refer to arts 35–44 and relevant CISG case law which could have properly guided the decision,394 the Court was directed to non-CISG, and therefore irrelevant, English case law.395 However, leave was refused, thus the CISG could not be relied upon on appeal. Unlike Summit, where more latitude to amend pleadings was shown, in Italian Imported, the arguments sought to be raised on appeal had not previously

385 Again, whether or not a specific issue falls within an internal or external gap in the CISG was an important preliminary step skipped by the Court: see above n 301 and accompanying text (similar comments regarding interest rates in Ginza).
389 Italian Imported [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [3].
391 Ibid (referring to the reasons of Sweeney LCM).
392 See ibid [7], [11].
393 Ibid [14].
been heard at trial.\footnote{Italian Imported [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [17].} The discretion to grant leave is not exercised as easily in such circumstances.\footnote{Williams, above n 367, [36.01.210].} The Court gave two reasons for the refusal. The first was that the seller ‘might have conducted its case differently at trial’.\footnote{Italian Imported [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [19].} As a rule, appellate courts refuse leave where an issue was not litigated at trial.\footnote{Williams, above n 367, [36.01.145], [36.01.210].} The second reason given was that the amendment would be futile in any event.\footnote{Italian Imported [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [19].} Thus Italian Imported differs from Summit because futility formed part of the basis for the procedural decision.

With respect, on this second point, the Court fell into error. The futility of the amendment to include a CISG claim could not be gauged without examination of its viability in light of arts 35–44. This was not undertaken. Instead, the Court discussed lack of proof that the goods were not ‘merchantable’ at any time,\footnote{Ibid [21]. On art 35 of the CISG, see above nn 275, 279, 280, 283, 394.} and the buyer’s denial of responsibility for testing and consequent lack of evidence.\footnote{Italian Imported [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [11], [21]–[25].} The buyer’s case might still have been weak, but its prospects could not be resolved by evaluation under domestic sales law, itself pre-empted by the CISG’s application.

Even if leave had been granted, Zeller argues the buyer had probably ‘lost any chance’ by its refusal to inspect the goods,\footnote{‘Editorial Remarks’ in Pace Law School, CISG Case Presentation: Italian Imported Foods Pty Ltd v Pucci Srl (2006) <http://cisgw3.law.pace.edu/cases/061013a2.html#ce>.} since art 38 requires buyers to ‘examine the goods … within as short a period as is practicable in the circumstances’. Further, notice of non-conformity was not given until five months after delivery,\footnote{On art 39 of the CISG, see above n 74. On interrelation between arts 38 and 39, see below n 496 and accompanying text} so the right to damages was probably lost pursuant to art 39(1).\footnote{CISG, above n 1, 44. On art 44, see Rheinland Versicherungen v Srl Atlarex and Allianz Subalpina Spa (Tribunale di Vigevano, Italy, 12 July 2000) <http://cisgw3.law.pace.edu/cases/000712i3.html>; Person of Greece v Ed Fruit and Vegetables BV (Rechtbank Breda, Netherlands, 16 January 2009) [3.12] <http://cisgw3.law.pace.edu/cases/090116n1.html> (no excuse for delay in notification of non-conformity).} This conclusion is underscored by the unlikelihood on the facts that the buyer could have argued that there was a reasonable excuse for delay in giving notice.\footnote{Italian Imported [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [16].} There also seemed to have been little prospect of an argument under art 40 that the seller was already aware of the non-conformity.

The best that can be said about the case is that on appeal, the Court acknowledged that local sales law and the CISG ‘are not the same’.\footnote{Italian Imported [2006] NSWSC 1060 (Unreported, Malpass AsJ, 13 October 2006) [11], [21]–[25].} Yet this mild encouragement pales against the Court’s worst miscalculation. After refusing to allow CISG arguments to be raised on appeal, it treated the Sale of Goods Act as an alternative, fallback law. There is no second bite of the cherry. If a CISG claim fails for lack of proof of non-conformity or late notice, or for procedural reasons, the applicability of domestic sales law is not revived. The
matter must stand or fall on the *CISG* when it is applicable law, since it displaces domestic sales law. To uphold a lower court’s decision based on inapplicable law perpetuates an error of law that is borne of a misunderstanding of the *CISG*’s pre-emptive effect. Perhaps because the quality of *CISG* interpretation had stepped up considerably elsewhere, or possibly because this was now the standard anticipated from Australian shores, the case barely raised an eyebrow internationally.409

(j) *Vetreria Etrusca Srl v Kingston Estate Wines Pty Ltd*[^410^]

*Vetreria* does not awaken new hope. This case involved the supply of wine bottles from an Italian manufacturer to an Australian company. The bottles allegedly broke repeatedly during bottling processes. The seller claimed the price and damages for breach in an Italian court. The buyer sought damages for contractual breach on the basis the bottles were not fit for purpose and did not match the sample in an Australian court.

The seller sought interlocutory orders to stay the Australian proceedings on the basis of a clause purporting to grant an Italian court exclusive jurisdiction. At trial, the parties did not dispute that the *CISG* was the governing law. The Supreme Court upheld the refusal to stay on appeal. Despite the undisputed fact that the *CISG* governed the contract, seller’s counsel argued that ‘Australian’ law should be used to construe the choice of forum clause. This led the Supreme Court, like the Court below, to ignore the *CISG*. The law of contract — the *CISG* — was not applied on appeal. Worse still, it was not mentioned in the judgment at all.

At trial in the South Australian District Court[^413^] the choice of forum was considered ambiguous. It covered disputes arising from ‘interpretation, execution or application’ of the contract, but Muecke J determined that this did not include performance. The judge further declined exercise of the discretion to stay proceedings due to the location of witnesses, experts and physical evidence.

The *CISG* applies to contractual formation and therefore the predominant view is that the *CISG* governs incorporation of choice of forum (jurisdiction)

[^408^]: For matters within its sphere of applicability, subject to the interpretive hierarchy of art 7(2), see, eg, *Asante Technologies Inc v PMC-Sierra Inc* (US District Court (ND Cal), US, 27 July 2001) <http://cisgw3.law.pace.edu/cases/010727u1.html> (similarly commenting that the ‘availability of [domestic] contract law … action[s] would frustrate the goals of … the *CISG*’).

[^409^]: The only international comment has been from Zeller, ‘Editorial Remarks: *Italian Imported*’, above n 403.


[^412^]: *Vetreria* [*2008*] SASC 75 (Unreported, Duggan J, 14 March 2008) [9].

[^413^]: *Kingston Estate Wines Pty Ltd v Vetreria Etrusca Srl* [*2007*] SADC 102 (Unreported, Judge Muecke, 12 October 2007).
It is true that special local prerequisites to validity of forum clauses are not within the CISG’s scope. Likewise, international treaties on jurisdiction will prevail over the CISG. Nevertheless, the CISG often resolves questions raised by such treaties, such as place of performance, or prima facie incorporation. The better view is that the CISG not only determines formation and incorporation, but also the meaning and content of forum clauses, subject to local validity laws or superimposed treaty requirements. This view is indicated by the approach taken in most CISG cases and is consistent with mention of dispute resolution clauses in certain CISG provisions.

Admittedly, issues surrounding the CISG’s scope regarding choice of forum clauses are not simple. However, to ignore the CISG cases and commentary on the issue amounts to placing one’s head in the sand. As the CISG governed the contract, the question should have been confronted.

The Court could have taken its lead from Roder Zelt. The disputed clause there involved an issue falling outside the CISG, that is, property in the goods. As the CISG governed the contract, formation and interpretation of content and meaning of the contract were determined by the CISG. Once the existence and meaning of the clause are established, its effect can be determined in accord with

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415 CISG, above n 1, art 4(a); Schmidt-Kessel, above n 59; Ferrari, ‘Choice of Forum and CISG’, above n 17, 130.

416 CISG, above n 1, art 90.

417 Generators Case (Oberlandesgericht Düsseldorf, Germany, 30 January 2004) <http://cisgw3.law.pace.edu/cases/040130g1.html> (the CISG still determined incorporation and interpretation of clause); Synthetic Window Parts Case (Landgericht Trier, Germany, 8 January 2004) <http://cisgw3.law.pace.edu/cisg/wais/db/cases/20040108g1.html> (still referring to CISG to extent not overridden); Tannery Machines Case (Oberlandesgericht Köln, Germany, 8 January 1997) <http://cisgw3.law.pace.edu/cases/970109g1.html> (determining the jurisdiction in accordance with the international treaty, but the place of performance for that purpose was determined pursuant to art 31 of the CISG). See also Torsello, above n 96, 219–20) (referring to role of the CISG in the context of the Council Regulation (EC) No 44 /2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, [2001] OJ L 12/1, concerning jurisdiction and predecessor Brussels Convention 1968).

418 See above nn 414, 417. Article 19(3) of the CISG refers to clauses for ‘settlement of disputes’ in relation to formation, and art 81(1) similarly in the context of avoidance.

419 This is an issue excluded from the CISG’s scope by art 4(b).

420 See also Ziegel, ‘Comment on Roder Zelt’, above n 172, 55, 60.
the law applicable to the external issue on the basis of conflicts rules. In _Roder Zelt_, this was Australian property law. In _Vetreria_, the existence of the choice of forum clause and its construction should have been determined pursuant to the _CISG_ as the first step. The clause should then have been subject to the secondary step of Australian procedural principles concerning stay of proceedings.

The Court itself identified that its first task was to ‘determine the agreement of the parties as to jurisdiction’. Since the _CISG_ applied, its proper application required exclusive use of its own interpretive provisions and methodology for this task. In particular, the Court needed to heed arts 7, 8 and 9. An examination of _CISG_ cases on choice of forum clauses would therefore be necessary, in order to interpret the _CISG_’s terms internationally and uniformly. The contract needed to be construed in light of all relevant circumstances, including pre-contractual negotiations and post-contractual conduct in accordance with art 8(3), a stance quite contrary to ordinary Australian principles of contractual construction. Article 8(1) and (2) directs the Court in construing statements and conduct of parties, and art 9 controls the impact on construction of international usages and practices between the parties. The parol evidence rule

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422 _Italian Imported [2006] NSWSC 1060_ (Unreported, Malpass AsJ, 13 October 2006) [16].


424 The Australian position was confirmed recently in _Agricultural and Rural Finance Pty Ltd v Gardiner_ [2008] HCA 57 (Unreported, Gummow, Kirby, Hayne, Heydon and Kiefel JJ, 11 December 2008) [35] (Gummow, Hayne and Kiefel JJ), citing _Whitworth Street Estates v Miller_ [1970] AC 583, 603 (Lord Reid); _contra_ [115] (Kirby J), holding that such matters can sometimes be taken into account and _Gardiner v Agricultural and Rural Finance Pty Ltd_ [2007] NSWCA 235 (Unreported, Spigelman CJ, Basten JA and Handley AJA, 6 September 2007) [111], [126] (Spigelman CJ). See also _The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd_ (Court of Appeal, UK, 18 December 2006), available from <http://www.unilex.info>; _Bridge, ‘A Commentary on Articles 1–13 and 78’_, above n 59, 254 (commenting that UK law bars ‘post-contractual behaviour as a guide to interpreting the contract’).

425 Statements or conduct are to be given their subjective meaning if the addressee knew or could not have been unaware of the intent of that subjective intent: _CISG_, above n 1, art 8(1). However, only rarely can knowledge of intent be proven, and ‘gross negligence’ is necessary before the ‘objective filter’ within art 8(1) of ‘could not have been unaware’ is satisfied. Thus, normally, the objective test of intent, being the understanding of ‘a reasonable person in the [addressee’s] shoes’ will prevail per art 8(2). In both cases, the matters directed by art 8(3) should be taken into account: Huber and Mullis, above n 16, 12–13; Schmidt-Kessel, above n 59, 118 (preferring ‘easy to discern’ rather than ‘gross negligence’); Ferrari, ‘Interpretation of Statements’, above n 185, 179–80 (noting that art 8(2) attributes knowledge of trade to the reasonable person). See also _Bridge, ‘A Commentary on Articles 1–13 and 78’_, above n 59, 254 (stating art 8(1) is an ‘empty statement’ while art 8(2) is the ‘controlling rule’). For an example of art 8(1) in practice, see _Glass Bottles Case_ (Bundesgerichtshof, Germany, 27 November 2007) [14], [15] <http://cisgw3.law.pace.edu/cases/071127g1.html>. See also discussion above n 347 and accompanying text. Ferrari, ‘Interpretation of Statements’, above n 185, 177, remarks upon an observation by Burghard Piltz, that, provided subjective intent is manifested, then art 8(1) will bind the addressee to that intent if it is unclearly expressed yet understood, and further, will still bind if clearly expressed but not understood by the addressee.
is not applicable. Article 7 precludes resort to domestic methods of interpretation and construction, to the extent of the CISG’s scope. Unfortunately, the Court was diverted from the task of construing the clause in accordance with the (undisputed) law of the contract by the unanimous preference of counsel for an inapplicable law.

What might have happened had the Court applied the CISG? Arguably, the result might have been the same. The Court might have still maintained that the clause would be viewed as deliberately limited in scope, and that ‘execution’ is a term that a ‘reasonable person’ under art 8(2) would take to mean the signing of the contract rather than its performance. The idea that an ambiguous standard clause should be construed against its author (contra proferentem) might have been relevant.

However, the CISG’s application might have encouraged a more generous construction of the words ‘interpretation, execution or application’. In interpreting the CISG to promote good faith, the Court might have concluded that a reasonable person would give more holistic weight to the preceding words ‘any disputes, none excluded’ as indicative that this was an absolute choice of forum rather than one limited on technical grounds relating to common law definitions of the single word ‘execution’. A reasonable business person rather than a lawyer might have understood a dispute over performance to involve ‘application’ and/or ‘interpretation’ of the contract. Notably, under the CISG, the parol evidence rule does not apply and the court is directed to construe contractual intent in light of both prior and subsequent conduct of the parties. The court would need to construe the clause in light of any international usages that should have been known to both parties or past practices developed between them.

It should be of no comfort that the recent Canadian decision of Linamar upheld a similar error. The decision immediately attracted criticism. The Canadian Court determined the point of formation of the contract without any reference to the CISG, applying common law principles rather than the CISG’s own rules regarding the ‘battle of the forms’. It consequently determined that

426 CISG, above n 1, arts 8(3), 11. See above n 59.
427 See above n 131.
428 See above n 425 for further discussion.
430 The view of a reasonable party is relevant in the interpretation of the words and conduct of the party under art 8(2).
431 See above nn 59, 425.
432 CISG, above n 1, art 9. See also ibid.
433 Linamar Holdings Inc v IGM USA Inc [2008] ONCA 256.
434 The decision of the Court of Appeal and that of the Supreme Court was criticised for failure to refer to the CISG in the formation and construction of a dispute resolution clause, and reference to domestic law and cases rather than CISG cases: James M Klotz, Peter Mazzacano and Antonin I Priebetic, ‘Case Comment: All Quiet on the CISG Front — Guiliani v Invar Manufacturing, the Battle of the Forms, and the Elusive Concept of Terminus Fixus’ (2008) 46 Canadian Business Law Journal 430.
论坛条款尚未被纳入，但基于错误的法律。该决定在上诉时被维持，以类似方式忽视了CISG。436

在加拿大决定中，试图维持论坛条款的当事人是意大利的，而且，在各种论坛条款中，有一个与CISG相似，它被赋予了不可预知的类似性。它没有被融入，法院并没有涉及它的构造。奇怪的是，没有提到任何其他论点，即性能的实现方式，并没有被纳入‘解释和执行’，尽管这在事实上与下文相关，而且该条款在Vetreria437中可能显得更为不言自明。如果这样的措辞在与意大利对手方的贸易中很常见，一个有趣的论点可以被提出，即关于这些条款的客观理解，可以导致对那些经常从意大利进口或出口的当事人的不同看法。438

如果在Vetreria中法院采用了更自由的解释，它仍然可以拒绝维持澳大利亚的程序。439

根据澳大利亚的程序，行使这种选择权。在存在论坛条款的情况下，应尊重当事人之间的协议，除非有充分的理由不这样做。439在这种情况中，所有相关的证据和专家证人都位于澳大利亚。

行使这种选择权来维持或拒绝程序是一项涉及国内程序法的事务。440在合同受CISG管辖的情况下，这种偏好是根据CISG对协议的解释。这种偏好必须在根据适用法律的初步解释的背景下才能得到充分的运用。虽然这可能不会最终改变结果，Vetreria仍然是另一个例子，即从仲裁委员会方面改变这一论点。

唯一的好消息是，Vetreria实际上提到了CISG。这表明了对CISG的早期意识。440在澳大利亚标准看来，这很罕见。

(k) Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd440

最近提到的CISG是另一个Finn J的判决。440

一个澳大利亚的果农TVO通过Farmlink将樱桃销售给香港和新加坡的买家。后者买家没有参与。
to the proceedings. Due to defects, Farmlink claimed to be entitled to pass on price reductions made by the overseas buyers to TVO.

Finn J determined that the relationship between TVO and Farmlink was one of sale, not of agency.\(^{441}\) This meant that the **CISG** did not apply to the dispute before the Court. Had the opposite conclusion been reached, then the contracts of sale would have been between TVO and the overseas buyers. The **CISG** would have applied to the Singapore contracts, as Singapore is a **CISG** Contracting State under art 1(1)(a). However, the Hong Kong contracts might not have been governed by the **CISG**. Certainly, the **CISG** would not be applicable through art 1(1)(a); as Finn J observed, China has not yet taken the necessary steps to make Hong Kong a Contracting State. Notably, in reaching this conclusion, Finn J referred to relevant **CISG** sources, including scholarship and a French case.\(^{442}\) Given the hypothetical nature of the question, the Court understandably did not explore the (unlikely) possibility the **CISG** might apply through art 1(1)(b).

Although the **CISG** was not directly applicable, Finn J made a number of references to its provisions, and in particular, the need for buyers to notify lack of conformity in a timely fashion pursuant to art 39, the right to unilaterally effect a price reduction pursuant to art 50, and art 9 on the influence of usages on contractual terms.\(^{443}\) Not only this, but his Honour also cited relevant **CISG** authority in doing so.\(^{444}\)

The **CISG** is treated in **Hannaford** as an autonomous body of law, and interpretation of it was conducted by reference to international **CISG** decisions and scholarship. Finn J makes it clear that, although the **CISG** did not apply in the dispute before the Court, if it had, different questions would have arisen, and a very different result might have ensued. Certainly the decision demonstrated proper interpretation of the **CISG**, guided by **CISG** sources alone. Although the case properly required application of local sales law rather than the **CISG**, the **CISG**, **UNIDROIT Principles** and comparative law were still used to illuminate global trends in relation to issues pertinent under local sales law.

Finally, Australia has produced a case in which the **CISG** is treated autonomously and in an internationalist spirit, albeit it a case in which the **CISG** was inapplicable. Nonetheless, **Hannaford** stands as a lonely but bright beacon for future Australian courts applying the **CISG**.

(l) **Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA (No 4)**\(^{445}\)

In the most recent decision by the Federal Court, the contract involved the supply of production line equipment for olive oil production. Logan J determined

\(^{441}\) Ibid \([7], [181]\).


\(^{443}\) **Hannaford** [2008] FCA 1591 (Unreported, Finn J, 24 October 2008) \([5], [43], [56], [190], [197], [233], [242], [276]\). See also above n 67.

\(^{444}\) Ibid \([5], [43], [56], [233],\) citing Peter Schlechtriem and Ingeborg Schwenzer, above n 130, **UNIDROIT, UNIDROIT Principles**, above n 190, and a German **CISG** case in relation to art 39 on perishables: **Flowers Case** (Oberlandesgericht Saarbrücken, Germany, 3 June 1998) \(<http://cisgw3.law.pace.edu/cases/980603g1.html>\).

that the CISG was excluded by the words ‘Australian law applicable under exclusion of UNCITRAL law’.446 The case is almost chameleon-like in its approach to the CISG.

The Court reasoned that, although the CISG was ‘part of the relevant Australian law’, reference to exclusion of UNCITRAL law was sufficient to evince an intention to exclude the CISG.447 The buyer contended that the exclusion related only to property issues, since the exclusion followed a sentence amounting to a retention of title clause.448 Logan J correctly pointed out, with reference to Roder Zelt, that such a construction was unlikely to have been intended, given that the CISG does not deal with property issues anyway, pursuant to art 4(b).449 Unfortunately, no reference to other CISG cases was made.450

The Court analysed the formation and interpretation of the choice of law clause by reference to domestic law concepts alone. By doing so, it acted as though the CISG did not have a priori application. In this sense, the Court fell into the same error as did the Court in Vetreria. Had application of the CISG to the questions of formation and construction resulted in a conclusion that the CISG was excluded, then resort to domestic law on formation and interpretation would have been entirely appropriate. But if the same process had led to the conclusion that the CISG was not properly excluded, recourse to domestic law would have been prohibited. The Court could only ever be in a position to know the right course of action by proper application of the CISG, at least up to the point at which exclusion was determined.

In fact, Logan J’s application of domestic interpretive rules was rather liberal. Prior communications were examined, as well as the written ‘contract’,451 and his Honour thus determined that the parties placed a high level of importance upon the written terms.452 The CISG also deems such communications relevant, but would additionally deem subsequent communications of relevance in relation to interpretation of the parties’ contractual intent.453 Logan J took into account of the nature of the contract, the fact that the seller was known to trade internationally, and the position and context of the clause within the document. These would also be relevant under a CISG approach.454 The biggest difference in construction would be the imperative to take an internationalist approach. The Court in Olivaylle should have looked at decisions on CISG exclusion clauses from around the world, and scholarly material on the issue. The need to look at such material is obvious when one considers that, in determining the question of exclusion, one is effectively interpreting art 6 of the CISG. Therefore, language

446 Ibid [28].
447 Ibid.
448 Ibid [29] (summarising the buyer’s contention).
449 Ibid [30].
450 See above text accompanying n 187.
452 Ibid [20]. See also ibid [21] (Email from Dr Paterson, Flottweg, to Mr De Moya, Olivaylle, 7 October 2004, stating that ‘none of these discussions can take precedence over written communications’).
453 CISG, above n 1, art 8(3).
454 Ibid arts 8(2), 8(3).
that is dispositive under domestic law ‘acquires a different meaning under the Convention’.\footnote{E Allan Farnsworth, ‘Review of Standard Forms of Terms under the Vienna Convention’ (1988) 21 Cornell International Law Journal 439, 442.}

Obviously, the Court appreciated that a choice of Australian law would not have excluded the \textit{CISG}.\footnote{This has been upheld in many cases. See, eg, \textit{Tinned Cucumbers Case} (Oberlandesgericht Düsseldorf, Germany, 8 January 1993) <http://cisgw3.law.pace.edu/cases/930108g1.html>.} Express exclusion is clearly permissible pursuant to art 6. Legislative history indicates, and most cases have held, that implicit exclusion is also possible,\footnote{For a summary of supporting cases and the minority holding to the contrary, see UNCTRAL, \textit{Digest of Case Law}, above n 15, art 6. The Drafters did not want courts jumping to the conclusion of implied exclusion too quickly, see \textit{Official Records}, above n 37, 17 (stating that the words ‘such exclusion may be express or implied’ were eliminated from art 5 because they ‘might encourage courts to conclude, on insufficient grounds, that the [CISG was] excluded’).} but it requires ‘clear’ indications of ‘real’ rather than ‘theoretical’\footnote{Honnold, \textit{Uniform Law for International Sales}, above n 71, 80 (requiring ‘real’ and not ‘theoretical’ intent). See also Fritz Enderlein and Dietrich Maskow, \textit{International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary} (1992) 48 (stating that there must be ‘clear indications’); Franco Ferrari, ‘Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing’ (1996) 15 Journal of Law and Commerce 1, 88 (fn 614).} intent. For example, a choice of ‘American law as laid down in the UCC’ would suffice.\footnote{Ferrari, ‘Specific Topics of the CISG’, above n 458, 89 (fn 626); see also Enderlein and Maskow, above n 458, 49.} Although clumsy, the words in question in \textit{Olivaylle} under a \textit{CISG} construction would probably amount to implicit, if not express exclusion. Yet, without further analysis, one cannot be certain that the sloppily chosen words even formed part of the contract, at least in \textit{CISG} terms.

The exclusion clause was contained within the seller’s quotation of 8 February 2005. Logan J conducted a purely common law analysis of formation.\footnote{\textit{Olivaylle} [2009] FCA 522 (Unreported, Logan J, 20 May 2009) [22]–[23].} His Honour concluded that after the buyer’s handwritten alterations to the seller’s document of 1 October 2004, there were further discussions, and then the seller’s quotation of 8 February 2005, which ‘took up such of [the buyer’s] alterations as [the seller] was prepared to adopt’.\footnote{Ibid [22].} The Court then considered various common law characterisations of formation. However, for the purposes of determining exclusion pursuant to art 6, formation should be analysed, at least initially, according to the \textit{CISG}. There would need to be a ‘sufficiently definite’ offer.\footnote{\textit{CISG}, above n 1, art 14(1).} As for the final document containing only some of the buyer’s alterations,\footnote{\textit{Olivaylle} [2009] FCA 522 (Unreported, Logan J, 20 May 2009) [22]. In dealing with the long period of negotiations, Logan J concludes that after the buyer’s handwritten alterations to the seller’s document of 1 October 2004, there were further discussions, and then the seller’s quotation of 8 February 2005, which ‘took up such of [the buyer’s] alterations as [the seller] was prepared to adopt’.} the \textit{CISG} would have had no difficulty classifying this as an acceptance if the terms omitted by the seller were immaterial, provided that
the buyer did not object to the modification.\textsuperscript{464} Alternatively, if they were material omissions, it would amount to a counteroffer\textsuperscript{465} accepted by the buyer’s subsequent conduct, a conclusion similar to Logan J’s less preferred construction.\textsuperscript{466} Further, if, as suggested by Logan J, an earlier contract existed, possibly in October 2004,\textsuperscript{467} then subsequent modification by agreement would have been permissible under art 29. On a \textit{CISG} analysis, the clause would have been incorporated and the \textit{CISG} excluded. Ultimately, the Court applied the correct law, although navigation to that conclusion might have been through much safer waters.

However, perhaps the Court’s sensitivity to the \textit{CISG} had been heightened, because later in the judgment, Logan J returned to the \textit{CISG} as an aid to interpretation of certain contractual provisions. The welcome chameleon-like change in approach was driven by contractual provisions containing the ‘civil law’ concepts of ‘reasonable period of grace’ and ‘reduction in price’.\textsuperscript{468} Logan J sensibly returned to the \textit{CISG} as a guide to construction, and drew upon arts 46, 47, 48 and 50.\textsuperscript{469} Admirably, the Court looked at the concept of \textit{Nachfrist} and some English scholarship on the \textit{CISG}.\textsuperscript{470} Had the Court looked beyond English scholars to other scholars and cases decided on the relevant \textit{CISG} provisions, it would have found much greater guidance still. The usefulness of the \textit{CISG} also prompts the question: why did the parties exclude the \textit{CISG} in the first place?

Besides \textit{Hannaford}, \textit{Olivaylle} flickers intermittently. Through the darkness, it now appears that the Federal Court is willing and prepared to take the next step, should a case to which the \textit{CISG} directly applies come before it.

\section*{VII \hspace{0.2em} Turning the Corner: An Example of World’s Best Practice}

If Australia were a racehorse, our track record would make us an ‘outsider’. Despite a promising maiden run, on each of our subsequent starts we have not done well, at least in cases where the \textit{CISG} was applicable. Yet, for reasons discussed below,\textsuperscript{471} Australia might yet prove ‘good value for money’. Australia

\begin{footnotesize}
\begin{enumerate}
\item[464] \textit{CISG}, above n 1, art 19(2). Notably, art 19(3) lists changes to ‘price, payment, quality and quantity … delivery … liability and [dispute settlement]’ as material alterations. The document dated 8 February 2005 purported to be an ‘offer’ rather than an ‘acceptance’. This would not necessarily be fatal, but would need to be dealt with by the Court, as indeed Logan J did in regard to common law construction.
\item[465] Ibid art 19(1).
\item[466] \textit{Olivaylle} [2009] FCA 522 (Unreported, Logan J, 20 May 2009) [23]. The first, and least preferred characterisation of formation was that the 8 February 2005 document was an offer, the buyer’s acceptance of which was to be ‘inferred from its acquiescence’ and subsequent conduct. However, Logan J preferred the second characterisation, which was that the handwritten alterations and subsequent discussions amounted to the buyer’s counteroffer, and the 8 February 2005 document amounted to an acceptance of the counteroffer as it had ‘come to be formulated’, presumably after the intervening discussions.
\item[467] Ibid [23]. Logan J concluded that ‘[t]he effect of what occurred is that, whatever acceptance [had previously occurred] … the parties agreed wholly to replace that agreement by an agreement set out in the terms of the quotation of 8 February 2005’.
\item[468] Ibid [203].
\item[469] Ibid [203]–[209].
\item[471] See discussion below n 509 and accompanying text.
\end{enumerate}
\end{footnotesize}
is capable of producing better quality outcomes by reaching out to international jurisprudence on the CISG, and perhaps contributing to it. Naturally, this requires judges and practitioners to shed their ‘domestic lenses’. We need, indeed are obliged, to take an international view.472

Fortunately, since the CISG is an international body of law, plenty of help is at hand. As Hannaford shows, Australia can learn from the experiences of courts from other jurisdictions. We should look carefully to jurisdictions that have overcome their initial difficulties with the CISG. In a case that ‘turned the corner’, Rizzieri J in the Tribunale di Vigevano on 12 July 2000473 altered the international perception of Italian CISG decisions drastically. The case was lauded as ‘remarkable’474 in numerous articles and now stands as a shining example of how the CISG should be applied.475

The case involved an Italian seller and a German buyer of rubber for the soles of shoes. The Italian judge showed a willingness to ‘apply the provisions of the CISG faithfully to the letter and spirit of the uniform law’.476 Not only did his Honour show great restraint through a conspicuous absence of ‘references to civilian commentaries and treatises’,477 but the judgment employed CISG cases decided in the US, Austria, Netherlands, France, Germany, Italy and Switzerland, as well as arbitral decisions.478

Like Ginza, Playcorp, Summit and Italian Imported, the case involved non-conformity, and the CISG was the governing law. However, the manner in which the Court interpreted the CISG differs markedly from those cases. The Court examined art 35(2),479 and the need for quite specific notice of the nature of the non-conformity within a reasonable time.480 It later noted that this enabled the seller to determine how to proceed, an important matter since the CISG provides sellers with the means to rectify non-conformities in certain

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472 See above n 133 and accompanying text.
474 Charles Sant ‘Elia, ‘Editorial Remarks’ in *CISG Case Presentation: Rheinland Versicherungen v Atlarex* (2000) <http://cisgw3.law.pace.edu/cases/000712i3.html>. The decision ‘immediately became a widely acclaimed model’ and has been translated ‘into many other languages, including English, French and German, and … commented on by many scholars in several different jurisdictions’: Torsello, above n 96, 216 (fn 122).
476 Sant ‘Elia, above n 474.
477 Ibid.
479 Ibid 214. On art 35 of the CISG, see above nn 275, 279, 280, 283, 394 and 401.
480 Ibid 215. On this point, see above n 74.
circumstances. The Court drew on Swiss and German CISG cases to conclude that it insufficient to simply state goods were ‘causing problems’ or ‘defective’.

The Court then considered the definition of ‘reasonable time’ pursuant to art 39(1), and determined that art 39 should be read consistently with art 38(1), so that the ‘reasonable time’ for notice begins to run from the time when goods ought to have been inspected. In this conclusion it relied on an Italian CISG case. The Court observed that, in some cases, it might not be ‘practicable’ to discover defects until further processing or incorporation into other goods. Arguably, this was true also of the fibreglass in Summit, but unfortunately, the attention of the bench was apparently not drawn to the Tribunale di Vigevano decision of four years earlier.

As to the length of time that would be reasonable for notice of non-conformity, the Court considered German and Italian CISG cases to conclude this was to be determined on a case-by-case basis. Drawing on CISG cases from the Netherlands and Germany, the Court noted the importance of the nature of the goods, with perishability generally resulting in a shorter timeframe for notice of non-conformity. It reviewed a series of CISG cases in which four, three and two months — and in one case, 25 days — were not considered reasonable, and determined that four months was not reasonable for

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483 Ibid 215.


non-perishable goods. This was especially so because upon discovery of the defects after processing, the buyer attempted to sell them rather than notify the seller. The Court appeared to attribute the delay to this conduct, observing that the seller was only notified after retailers forced the buyer to accept returns of the shoes. This demonstrates the relevance of behaviour in calculation of a ‘reasonable time’ for notice, as suggested above in relation to Playcorp.

The Court held that the buyer had lost the right to rely on non-conformity on two grounds: notice of non-conformity was insufficiently specific; and further, notice was late. The buyer also failed to show that the seller already knew or could not have been unaware of the defect pursuant to art 40, or that there was a justifiable excuse for the delay pursuant to art 44. These might have relieved the buyer from the need to provide notice, or at least timely notice.

The careful reasoning and internationalist spirit of this decision was subsequently confirmed by the CISG Advisory Council which dealt with arts 38 and 39 in much the same way. The CISG Advisory Council stated that there are two relevant periods of time: the period for examination of the goods per art 38, and the period for giving notice under art 39. The latter commences upon expiry of the former, at the end of the time when the buyer ‘ought to have discovered’ the defect, or upon actual discovery. Like the Tribunale di Vigevano, the CISG Advisory Council noted that perishability was highly relevant. The CISG Advisory Council echoed the Court’s comments on practicability of examination, noting that sometimes, particularly with complex goods, ‘it may not be commercially practicable to examine the goods … until they can be used in the way intended’; that often, sub-purchasers conduct the examination, and that time begins to run for latent defects only when signs of


490 Ibid 217–18.

491 See Playcorp [2003] VSC 108 (Unreported, Hansen J, 24 April 2003); see also n 335 and accompanying text (in relation to seller’s behaviour having ‘strung along’ the buyer).


494 CISG Advisory Council, Opinion No 2, above n 74. CISG-AC Opinions are persuasive but not binding.

495 Ibid.

non-conformity ‘become evident’. Finally, it also emphasised the need for specificity. The CISG Advisory Council stated that notice should describe at least the ‘symptoms’ where the buyer is unable to be more specific.

One cannot help but think that Australian courts might have benefited from such persuasive authority. In fairness, the CISG Advisory Council Opinion No 2 was not available until after Summit was decided, but all CISG decisions post-Roder Zelt could have made reference to the Tribunale di Vigevano decision, as a relevant source of guidance on arts 35–44.

Perhaps even more relevant than its legal conclusions, the Tribunale di Vigevano decision is demonstrative of the correct interpretive approach to the CISG in any jurisdiction. Thus it was praised as a significant contribution to global jurisprudence on the CISG: a ‘classic’ case. The key was its reference to a wide range of CISG cases from various jurisdictions including arbitral decisions, and its careful avoidance of domestic legislation, cases and principles in interpreting the CISG. In addition to clear reasoning, these qualities have made the case highly persuasive for courts or tribunals around the world.

As noted above, many Italian courts are still prone to viewing the CISG through ‘domestic lenses’. Yet, the brilliance of cases like those in the Tribunale di Vigevano is that they show that some Italian courts have turned the corner — it has to be said — with style. This was again recently demonstrated in the Tribunale di Forli. While ‘enlightened’ cases are far from prevalent, Italian courts are recognisably at the forefront of CISG interpretation. Improvement in the US courts has been more modest, but there is evidence that recent efforts by US litigators have vastly improved. No jurisdiction can claim a perfect record, but the situation in Australia is worse than most.

497 CISG Advisory Council, Opinion No 2, above n 74, art 38 §3.
498 Ibid. See also Inflatable Triumphal Arch Case (Handelsgericht Aargau, Switzerland, 5 November 2002) <http://cisgw3.law.pace.edu/cases/021105s1.html>; Acrylic Blankets Case (Oberlandesgericht Koblenz, Germany, 31 January 1997) <http://cisgw3.law.pace.edu/cases/970131g1.html>; Machinery Case (Tribunale di Busto Arsizio, Italy, 13 December 2001) <http://cisgw3.law.pace.edu/cases/011213i3.html>. On specificity of notice, see above n 74).
500 See above n 140.
501 Mitias v Solidea Srl (Tribunale di Forli, Italy, 11 December 2008) <http://cisgw3.law.pace.edu/cases/081211i3.html>. Baasch Andersen explains that the recent excellence of Italian decisions seems to be largely due to the fact that many of the judges involved were former students of noted CISG scholar, Franco Ferrari: Baasch Andersen, ‘Global Jurisconsultorium’, above n 132, (fn 50).
502 See above n 499.
503 Excellent depth of analysis and impressive citation of scholarship and foreign caselaw appears in briefs of counsel presented in Treibacher Industrie AG v TDY Industries Inc (US District Court (ND Ala), US, 27 April 2005) <http://cisgw3.law.pace.edu/cases/050427u1.html> (the Appellant’s Opening Brief cites the works of 10 authors worldwide, four foreign CISG cases and legislative history; the Appellee’s Brief cites five scholarly works, four foreign CISG cases and the Secretariat Commentary); see also La Delizia Friuliana vs La Delizia, SCARL v Columbia Distributing Co Inc (US District Court, US (WD Wash), 9 September 2004) <http://cisgw3.law.pace.edu/cases/040909u1.html> (in which the Plaintiff’s Brief cited two CISG-AC Opinions within clearly CISG oriented-argument on
VIII CONCLUSION: THE WAY AHEAD — MORE CONTINENTAL DRIFT OR RETURN TO THE COMMUNITY OF CISG JURISPRUDENCE?

Since CISG decisions are reported on the global stage, poor national form becomes a matter of international public record. The quality of Australian decisions has not gone unnoticed, and is rightfully the subject of concern at the international level. In the application of the ‘Magna Carta’ of international trade, our efforts have been conspicuously less than world-class.

A pattern has emerged. Australian lawyers not only avoid the CISG in drafting, but when, against the odds, the CISG does govern a contract, counsel prefer to avoid it. However, ignorance is far from bliss. Counsel’s approach almost invariably misleads the bench in one of two ways: the court is either lulled into application of the wrong law, or fails to grasp the CISG’s preemptive quality and the need to interpret the CISG autonomously and internationally. As the rest of the world removes or at least peers over their ‘domestic lenses’ Australia risks becoming an increasingly isolated island of CISG ignorance.

We can make excuses. It is true that some perceived inadequacies of Australian CISG cases spring from their largely interlocutory nature, as was true of Summit. But it is submitted that once procedural issues are stripped away, application of the CISG by most Australian courts still leaves much to be desired. Not since Roder Zelt and Perry have we seen a serious attempt at real engagement with the CISG in any case where the CISG was applicable.

Courts have been misled into treating the CISG as a variant of local sales statutes. In all cases post-Perry where the CISG should have been applied, domestic cases and concepts have been used to interpret it, or domestic law has been openly applied, despite acknowledgement that the CISG was applicable. This endangers Australia’s compliance with treaty obligations, and seriously undermines the international spirit of the CISG.

Written comments on the poor quality of Australian decisions are few. The parlous state of our decisions has seen very few of them drawn into CISG jurisprudence as sources cited by other courts, a sure sign of the regard in which they are held. The situation is one commonly discussed informally at conferences, especially when Australians are in attendance.

What has led us to this point? As discussed above, the CISG has substantive pros and cons, but also many overriding and invaluable practical benefits, and

notice of non-conformity and latent defects, pointing out the opponent’s failure to cite any CISG cases and the opponent’s attempt, in reliance on domestic cases, ‘to avoid the result mandated by the CISG’. The case was ultimately settled). See Alain A Levasseur, ‘United States of America’ in Franco Ferrari (ed), The CISG and Its Impact on National Legal Systems (2008) 313, 317–18 (fn 10), 320 (praising the briefs in Treibacher and Delizia, and also observing that lawyers in Barbara Berry presented a very thoroughly researched brief that cited five foreign cases from four nations and three scholars). See also Barbara Berry SA de CV v Ken M Spooner Farms, Inc (US District Court (WD Wash), US, 13 April 2006) <http://cisgw3.law.pace.edu/cases/060413u1.html>-.

504 International reports for each Australian CISG case are noted, above nn 145, 155, 188, 192, 201, 268, 309, 357, 388.


plenty of flexibility. At this stage in Australia, it seems much of the disconnect can be attributed to a lack of familiarity with or even awareness of the CISG by Australian practitioners. Symptomatic of this is the failure to plead the CISG in 63 per cent of Australian cases in which it was governing law. Even taking into account variations in pleadings rules, this shows that all too often, the exclusively applicable law is a mere afterthought. It is at least heartening to see that recently in Vetreria, the CISG was referred to in original pleadings.

Australia has the capacity to turn the current continental drift around, in the same way as Italy and, to a lesser extent, the US. A demand for Continuing Legal Education on the CISG would be a rallying point for this process amongst practitioners. Of course, better incorporation of CISG into the undergraduate study of contract law also has a part to play, but it should be remembered Australian law schools have produced some of the finest student advocates in the Willem C Vis International Commercial Arbitration Moot over the last 16 years. Their familiarity and expertise in the CISG will perhaps endure and filter through to more considered advice in the contract drafting stage, and proper argument on the CISG in litigation. We have produced a small number of CISG academics. Encouragingly, great sensitivity toward and proper interpretation of the CISG has been demonstrated just recently by Finn J in Hannaford, despite the inapplicability of the CISG in that case.

Commercial pressures could force Australia to improve its track record. Although other pockets of CISG-phobia still exist in the world, the CISG now frequently serves as a model for the revamp of many domestic laws. Lawyers in the US are starting to respond to commercial pressure. Our close trading ties with China and the Asia-Pacific region will eventually force Australian

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507 The CISG was inapplicable in Renard (1992) 26 NSWLR 234; South Sydney [2000] FCA 1541 (Unreported, Finn J, 3 November 2000); and Hannaford [2008] FCA 1591 (Unreported, Finn J, 24 October 2008), and of the remaining eight cases, the CISG was only pleaded in Ginza [2003] WASC 11 (Unreported, Barker J, 17 January 2003); Playcorp [2003] VSC 108 (Unreported, Hansen J, 24 April 2003); and Vetreria [2008] SASC 75 (Unreported, Duggan J, 14 March 2008).

508 See above n 501, on how legal education largely influenced the improvement of Italian decisions.

509 Australian teams have performed remarkably well. The Vis moot, which now attracts 203 teams from 52 countries, has been won by The University of Queensland (1997 and 2000), Deakin University (1999) and Monash University (2001), with Australian teams often placing second (Deakin University, 1996; The University of Queensland, 1998 and 2002) and third (Deakin University, 1994; The University of New South Wales, 1999; The University of Notre Dame, 2005). Australian individual student advocates have finished: first (The University of Queensland, 2002; Deakin University, 2003; The University of New South Wales, 2005); second (Deakin University, 1996; Monash University, 2006) and third (Deakin University, 1996; The University of Queensland, 1998–2000; Monash University, 2008 and 2009). Team results from the Hong Kong-based Vis East Moot include first (Griffith 2008) and second (Deakin 2006).


511 Klotz, Mazzacano and Pribetic, above n 434, 1 (commenting on the slow pace of development of a body of CISG cases in Canada).


513 Flechtner, ‘Changing the Opt-Out Tradition’, above n 32.
lawyers into closer contact with the CISG. Where the Chinese counterparty has superior bargaining strength, the option of opting out is less likely to be available.514 Not only do surveys confirm the lower frequency of opting out of the CISG by Chinese practitioners, but individual comments reveal an undercurrent of pressure to use the CISG when Chinese counterparties are involved.515 Further, as statistics demonstrate,516 Australian counterparties can expect to be more frequently involved with arbitrations in China, in forums highly familiar with the CISG and predisposed to its application.517

In any case, we should be motivated to improve our track record on purely professional grounds. We do our clients a disservice by contracting out of the CISG automatically. As part of Australian law, the CISG is a legal tool like any other. Its content should be assessed, and utilised where it provides the best outcome for the client.518 There is no other area of Australian law which would be excluded without an understanding of its content.

Likewise, court resources and client costs are wasted when all involved are oblivious to either the CISG’s application, the need to interpret it autonomously and internationally, or its pre-emption of domestic law. Australia has a disproportionate number of cases where CISG applicability is not raised until the late stages of hearings, or worse still, after trial decisions. If counsel are cognisant of its applicability, any residual reluctance to properly engage with the CISG will not serve clients or the administration of justice well, since viable and sometimes vital arguments are likely to be overlooked. Australian courts have decided cases on the basis of inapplicable law, or descended into impermissible ‘domestication’ of the CISG by interpreting it by reference to familiar but irrelevant concepts and authorities. Further, important provisions have been simply overlooked or misunderstood. The potential for appeals and wasted judicial resources is obvious.

Our prolonged ignorance and underperformance can no longer be excused, either commercially or professionally. We now have easy access to CISG materials with the advent of excellent free internet sites that comprehensively index and hyperlink translated texts of CISG cases from around the world, as well as significant commentary.519

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514 See above n 95.
515 See, eg, a response to the Fitzgerald survey, where one US practitioner commented that ‘[p]articularly in Chinese transactions, the CISG will apply to the international contract’ Fitzgerald, above n 75, 106. In the Philippopoulos survey, a response to the question, ‘Have you found lawyers or firms in a specific country that are particularly insistent on CISG as the governing law?’ by a US practitioner stated that ‘he prefers the CISG when contracting with Chinese firms because CISG is more easily understandable than the Chinese law alternative’: Philippopoulos, above n 41, 364. See also Yang, above n 18, 376 (noting that ‘[w]hile the US trend has been for contracting parties frequently to opt out of the CISG ... the trend in China goes the other way’). See Han, above n 94, (Chinese lawyers ‘seldom’ opt out).
516 Kritzer, ‘CIETAC Arbitration Awards’, above n 33 (identifying 21 Chinese CISG arbitration decisions involving Australian counterparties). The underreporting of Chinese cases means that the actual figure is likely to substantially higher.
517 Yang, above n 18, 384–5 (as applicable law, or gap-filler).
518 See, in support, Shiu, above n 244 (an Australian practitioner recommending the advantages of the CISG should be considered on a case-by-case basis for international software contracts).
519 See above n 128.
Australian lawyers can use these resources to turn the corner by improving their awareness of the CISG, which will enable them to plead appropriately. In formulating arguments where the CISG applies, counsel must consult CISG resources in CISG interpretation, and refrain from citing domestic cases for that purpose. In the CISG, counsel will find a rich new vein of argument. Front-end lawyers will find a sound choice of law with systemic and strategic advantages for many clients, including fundamentally predictable outcomes irrespective of dispute settlement forum, or jurisdiction, other than those jurisdictions in which courts have not yet come to terms with the CISG. Consequently, until Australian courts have turned the corner, any Australian party making a choice of law utilising the CISG would be well advised to include an arbitration clause.

However, Australian courts can take steps to become CISG friendly. A harder line can be taken in regard to the reluctance of counsel to properly address the governing law of the contract. Appropriate concern from the bench regarding citation of non-CISG cases and legislation, coupled with suggestions that pleadings be amended to address the CISG where necessary, should be enough to sway counsel to properly formulate argument on the basis of the applicable law. Where reluctance persists, a tough Perry-like stance is to be preferred.

Courts should not allow themselves to be persuaded to apply inapplicable law, nor to incorrectly refer to non-CISG sources in interpreting the CISG. Despite the preferences of counsel to the contrary, courts need to fully appreciate the pre-emptive effect of the CISG, that is, domestic law which overlaps with issues within the CISG’s scope will be excluded if the CISG is applicable, irrespective of the failure of the claim pursuant to CISG provisions, and will remain inapplicable despite denial of leave to plead the CISG. Internal gap-filling methods and CISG cases and scholarship are vital to proper interpretation of the CISG. It is essential that each of these aspects of CISG interpretation and application be seen for what it is; a requirement of Australian law. To ignore any of them would be an error of law.

Moreover, proper application of the CISG offers a rare opportunity for our courts to draw upon and help build an international jurisprudence in which consideration of views from courts, tribunals and scholars around the world is not only legitimate, but required, and in which the value of a decision or opinion owes more to its clarity of reasoning than its hierarchical status. This global

520 Ibid.
521 Arbitral tribunals have generally better understood and applied the CISG: see above n 41.
522 See the discussion above n 124. It is important to note that in three ‘enlightened’ decisions of Italy faced similar hurdles, and the Court had to resort to the principle of iura novit curia: Torsello, above n 96, 187, 191–5 (fn 20, 22), 209; Franco Ferrari, ‘CISG Rules on Exclusion and Derogation: Article 6’ in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention (2004) 114, 131. I would argue that the imperative to apply the CISG uniformly and internationally prevails over domestic procedural rules, at least to the extent such rules allow the application of non-applicable law: see, above n 242. Common law courts may need to therefore adopt an attitude approaching iura novit curia to fulfil the obligation under the CISG. See also Pribetic, above n 26.
523 This is subject to art 7(2) of the CISG. See above n 131.
524 See above n 132.
‘jurisconsultorium’\footnote{525} is already a reality, but currently almost bereft of judicial input from Australia.\footnote{526}

Given the escalating competitiveness of international trade, and rapidly growing importance of the \textit{CISG} in the Asia-Pacific region,\footnote{527} Australia cannot afford to continue to ignore the \textit{CISG}. Australian lawyers need to obtain the skills to utilise this valuable legal tool and to improve their own competitiveness in the international legal market. Our courts need to shed the comfort of familiar terms and precedents in order to abide by Australian treaty obligations, as well as observe the spirit of uniformity and international jurisprudence that has been fostered by the \textit{CISG}. We should also pause to consider the perception of those doing business with Australia if we fail to turn the corner: their perception of Australian law firms, and of the suitability of Australia courts for the resolution of international sales disputes, and by extension, Australia as a hub for international commercial dispute resolution.

Our track record should pose as a glaring red flag. Australia has become an international example of a country that still fails to apply the \textit{CISG} properly. \textit{Hannaford} illuminates the way ahead. From it we must take our cue and replicate the lead of the \textit{Tribunale di Vigevano}, if we are to avoid the fate of being characterised as an outpost of \textit{CISG} ignorance.

\footnote{525}{Bausch Andersen, ‘Global Jurisconsultorium’, above n 132. For evidence of activity within the jurisconsultorium, one need only check the cases and commentaries added every month on the Pace Law School website: Pace Law School, \textit{Recently Added Cases, Case Translations and Commentaries} <http://cisgw3.law.pace.edu/cisg/new-cases.html>.}

\footnote{526}{As \textit{Hannaford} did not involve a direct application of the \textit{CISG}, we are left with \textit{Roder Zelt} and the first instance in \textit{Downs} as the only Australian \textit{CISG} cases still attracting any international attention.}

\footnote{527}{See above n 23 and accompanying text.}