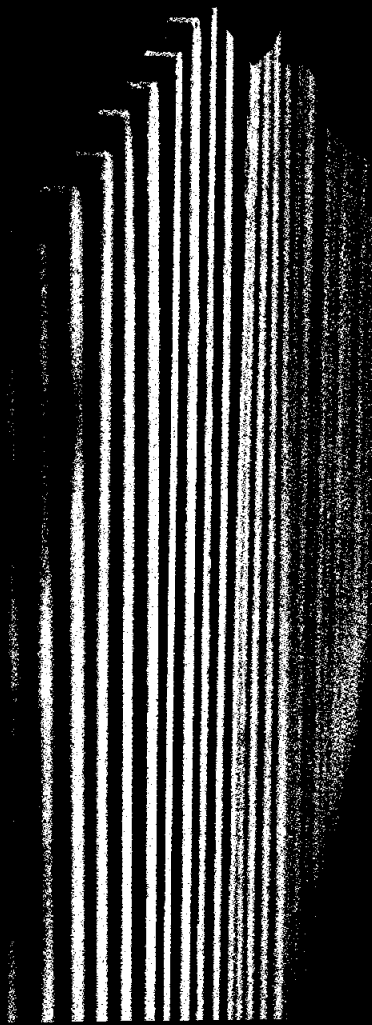


FEATURE

DOMESTIC LAW

CISG



# Getting

Globalisation has changed, probably irreversibly, the legal systems of nations, especially for the sale of goods.

### INTERNATIONAL CONVENTIONS

Globalisation has been an important aspect of the late 20th century. It has shaped the way we do business. It has reduced the importance of national boundaries.

"International communication is now so swift and easy, trade and commerce between nations so routine . . . that the legal systems of nation states are being forced to come to terms with a new reality."<sup>1</sup>

One of the effects of this new reality is the creation of international conventions. The UN Convention on Contracts for the International Sale of Goods 1980 (the Vienna Convention, or CISG) is such a development.<sup>2</sup> It enables traders to overcome national differences in favour of an international sales law. Unfortunately, anecdotal evidence suggests that the legal profession still takes advantage of article 6 of the CISG and excludes the application of the international law in favour of domestic laws.

This is only a short-term solution, as with increased globalisation more attention will be directed towards uniformity and harmonisation of laws. In the US, the body of law dealing with the CISG is increasing at a rapid rate and cannot be ignored.

The most important factor in advancing the CISG is the understanding of the underpinning conceptual basis. This requires the development of a new approach to interpretation, which is not yet applied in domestic dispute resolutions.

### GROWING INTERNATIONAL ACCEPTANCE OF CISG

The CISG has been ratified by 57 countries, and because of that has become the de facto international sales law, especially in the European Community. It must be pointed out that not all major trading partners of Australia have ratified the CISG; England, Japan and Indonesia, for example, are among those that have not done so.

Ratification is the unstated philosophical underpinning of the system with the acceptance of the paramount rights of sovereign nations.<sup>3</sup> The Vienna Convention on the Law of Treaties (Law of Treaties) regulates the mechanism through which states can enter into binding treaties with each other. It has also made the judiciary aware of the interpretation of conventions. Section 3 sets out the rules for the interpretation of treaties. Article 31(1) of the Law of Treaties is of special interest as it states:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

### QUESTIONS OF APPLICATION

#### **CISG and domestic law**

What standing does the CISG have within our domestic law? Von Doussa J explained this clearly when he said: ". . . the Convention, which is now part of the municipal law of Australia, the meaning of that law, and its application to the facts, is to be determined by this Court. It is not a matter for expert evidence. The Convention is not to be treated as a foreign law which requires proof as a fact."<sup>4</sup> Within the *Sale of Goods (Vienna Convention) Act 1987*, s6 in the enabling part states that:

"The provisions of the Convention prevail over any law in force in Victoria to the extent of any inconsistency."<sup>5</sup>

**The Australian legal system must come to terms with the new reality of international rather than domestic solutions to problems due to globalisation. The CISG is an opportunity, if understood and applied correctly, to keep pace with international developments.**

This is supplemented by article 1, which states:

"(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State."

At first glance, it appears that the interpretation of this article does not pose any problem. In an International Chamber of Commerce arbitration case, the arbitrator ruled that the CISG, which is the law of California, applies to matters governed by the CISG pursuant to article 1(1)(a).<sup>6</sup>

A second case also indicates a correct application of article 1. An arbitrator had to decide the choice of law in a contract that was silent on this issue. The seller was from Russia, the buyers from Argentina and Hungary, and the stipulated forum was Zurich in Switzerland. The arbitrator applied the law of the forum, namely Swiss law.

According to Swiss domestic law, he had to apply the Hague Convention, which led him to apply Russian domestic law. As the CISG is part of Russian domestic law, the arbitrator could apply the CISG as the governing law.<sup>7</sup>

# off the fence

by BRUNO ZELLER

Not all interpretations followed the same line of reasoning, as two Italian decisions illustrate clearly. In the first case, the dispute was between an Italian seller and a Japanese buyer. The contract was subject to Italian law. The majority of arbitrators, with one dissenting, came to the conclusion that the choice of law amounted to an implicit exclusion of the CISG.<sup>9</sup> Such a conclusion, in my opinion, is patently wrong. The court correctly stated that the conflict of law rule leads to the application of Italian law and should have applied article 1(1)(b), as Japan is not a contracting state. If a country accepts the CISG, that is, ratifies the Convention, it becomes part of its own body of law. If a matter falls within the sphere of application of the CISG then the Convention must be applied.

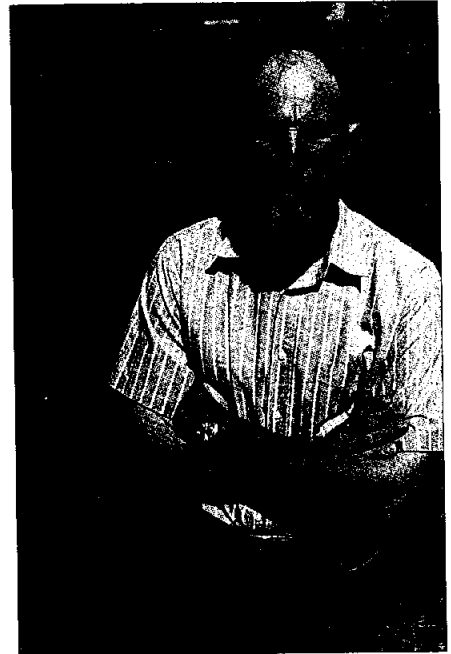
The second case, from the Tribunale Civile di Monza, is similar.<sup>9</sup> The court correctly, in my opinion, found that article 1(1)(a) was not applicable, as Sweden was not a contracting state, and went on to reject the applicability of article 1(1)(b) on the grounds that the article only operates in the absence of a choice of law by the parties. The court read the sub-section far too narrowly.

Clearly, the two Italian cases illustrate that the tribunals did not interpret the CISG correctly.

The adoption of uniform rules has been achieved by introducing the same rules into various domestic systems, replacing domestic rules. In Australia, the CISG would have replaced, in parts, the *Goods Act 1958* (Vic), the *Trade Practices Act 1974* (Cth) and the law on contracts. The CISG promises to take into consideration the variances and differences encountered through different social, economic and legal systems which would, as a result, advance different solutions to problems that are potentially the same. With such a system in place, the legal barriers to international trade would be removed, hence reducing or managing cross-border legal risks faced by Australian firms.

### QUESTIONS OF INTERPRETATION

Given the circumstances mentioned above, the task of correct interpretation is difficult as the judiciary traditionally base their decisions on a conceptual basis known to them, namely, the domestic system. The CISG has, contrary to other conventions such as the Hague/Visby Rules of the Carriage of Goods by Sea, included an article specifically devoted to the interpretation of the CISG. It specifically urges tribunals and courts not to use domestic law unless specifically directed to do so by the Convention itself.



Bruno Zeller

Assuming that CISG article 7 is written clearly and is understood by the judiciary, many people expect that uniform laws will eventually govern international trade.

However, if the interpretation of the CISG is not understood, recourse to domestic law is inevitable. The question therefore is whether the CISG has been

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drafted clearly. Magnus Karollus surely thought so when he stated that the CISG "is well on the way to becoming the Magna Carta of international trade".<sup>10</sup>

#### Deciphering the meanings of words

Experience with domestic legislation has shown that words are never precise. To give a piece of legislation life and meaning, interpretation is essential. Domestic and international legislation share common problems, but international legislation has additional unique concerns. In order to interpret legislation successfully two problems must be analysed:

- the policy of interpretation, which needs to be understood; and
- a method of interpretation, which needs to be devised to implement the policy.

The first step is to recognise the goals or policy of interpretation. The CISG has recognised this requirement and introduced article 7(1), which sets the goal or policy of interpretation. In its broadest sense, the policy requires a uniform application of the CISG in good faith.

Before we determine the method of interpretation, some of the differences between domestic and international legislation, and in particular the CISG, need to be examined. First, we need to be aware that interpretation is not only a problem of the *application or choice of words*, but also of the *application of concepts or principles* that are contained in the legislation. Any interpretative tool needs to make provisions for interpreting words within a conceptual framework.

Domestic legislation needs to consider the choice and clarity of words. International legislation also needs to consider the effects of translation on the meaning of words.

This, then, leads to a new method of interpretation where meaning must be given to an unclear word. Translations of the same word and article in different languages should be consulted to find a possible answer to the original question. Article 3(1) can be used to illustrate this point. The particular issue is that the buyer can supply a "substantial" part of material. What is the meaning of "substantial"? If we look at the official German and French translations of the CISG, we find that the words "*Wesentlich*" and "*un part essentielle*" are used. In my opinion, "*Wesentlich*" does not match exactly the French or the English translation, but corresponds better with the French "*un part essentielle*" rather than the English "substantial". Hence, when we look at "substantial", as found in article 3(1), the word "essential" must be kept in mind and this may help to overcome any ambiguities

that may otherwise arise. Such an approach also fits into the policy of uniform interpretation as mentioned above, as it views words not in a national but in an international context. It also overcomes a problem Honnold describes as literary "deconstruction".<sup>11</sup>

Such considerations make the choice of words harder and require a special solution. The drafters of the CISG solved this particular problem and consciously "rooted out words with domestic legal connotations in favour of non-legal earthy words to refer to physical acts".<sup>12</sup> Keeping the above in mind, legislative interpretation requires a different approach to that which the legal profession is used to.

Indeed, to appreciate the full meaning of words and to resolve many ambiguities, they must be read within the context of the CISG.<sup>13</sup> For example, we could pose the question, what is the definition of "goods"? Article 2 does not describe what goods are. It states and lists those items that are *not* classed as goods. At first glance, the solution to the definition of goods is simple. It is everything not excluded in article 2. This is not very satisfactory, but a further reading of the CISG supplies us with a more narrowly defined description. Article 35 mentions goods as required by the contract and "which are contained or packaged" in the manner required by the contract.<sup>14</sup> Article 46(3) requires that, if goods do not conform with the contract, the seller can remedy the lack of conformity by "repair".<sup>15</sup> Articles 85 to 88 regulate the preservation of goods and article 87 specifically mentions "warehousing" of goods. What conclusions do we draw from this? If there are ambiguities, that is, whether a particular item can be classified as goods, a court can ask the additional question of whether the item in question is a movable tangible property that can be packaged, repaired if necessary and warehoused if required.

Whenever we examine conceptual issues we must remember that the CISG, like any other international convention, contains provisions that are a result of negotiations "amongst wildly different interests over long time periods [and] with narrow windows of political opportunity".<sup>16</sup>

#### Interpretation: inclusion and exclusion

We should also remember that the CISG was never intended to be an exhaustive source of law on the international sale of goods. As an important example, the legislation itself states that it "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract".<sup>17</sup>



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Hence, the question of validity is specifically excluded. It follows that the CISG cannot govern without domestic law. The problem with interpretation is that it is not only restricted to what is in the legislation, but also what is excluded from it. The question, which needs careful examination, is whether we make the exclusions through interpretation as narrow as possible or as wide as possible. In other words, how much is domestic law applicable?

Some of these questions are answered by the CISG itself in the interpretative article 7. However, the article also introduces new problems of a conceptual as well as interpretative nature, and from the beginning we should acknowledge that other factors and competing values (for example, the maturity of a domestic economic and political system such as that in China) may intrude.

We should not forget that the CISG, unlike other conventions, did not vest interpretational authority in an international tribunal. Nor has any editorial board been created to amend the CISG as the need arises.<sup>18</sup> Such tasks have been left to domestic courts, but any decisions that interpret the CISG wrongly cannot be amended on an international level. Of course, all decisions by courts and tribunals are scrutinised by

international legal scholars, who are quick to point out mistakes. However, in the final analysis it is left to domestic courts to interpret the CISG, either in the light of their own domestic experience or with the help of scholarly writings and a body of international case law.

## CONCLUSION

Overseas developments have gathered enough momentum to establish irreversibly the CISG as the de facto international sales law. If the first significant case in Australia is any indication,<sup>19</sup> the judiciary is well aware of the conceptual issues involved in applying the CISG. The CISG is not the perfect tool for managing cross-border legal risks, but by ignoring or wrongly developing it, legal uncertainties will be increased.<sup>20</sup> The Australian legal system can no longer operate within national boundaries and must respond to the challenges of globalisation. ■

### Notes

Bruno Zeller is a lecturer in law in the School of Law, Victoria University of Technology.

1. M Gleeson, "The state of the Judicature" (1999) 73(12) *LJ* 67 at 73.
2. See also B Zeller, "The Vienna Convention, 11 years on" (1999) 73(3) *LJ* 72.
3. J Waincymer, "Bringing transparency to the transparency

debate within the legal regime of the World Trade Organisation", paper given at CITER 4, Conference on International Trade Education and Research, Melbourne, 18 September 1999, page 2.

4. *Roder Zelt und Hallenkonstruktionen GMBH v Rosedown Park Pty Ltd* (1995) ACSR 153.

5. Section 6, *Sale of Goods (Vienna Convention) Act 1987* (Vic).

6. ICC Arbitration Case No 7399 of 1993 (see <http://cisgw3.law.pace.edu/cases/937399i1.html>).

7. Zurich Chamber of Commerce, arbitration award ZHK 273/95 of 31 May 1996.

8. Ad hoc Arbitral Tribunal (see [www.cisg.law.pace.edu/cisg/wais/db/cases2/940419i3/html](http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940419i3/html)).

9. *Nuovo Fincinati SpA v Fondmetal National AB*, Tribunale Civile di Monza, 14 January 1993 (it140193 Abstract Unilex Database).

10. M Karollus, "Judicial interpretation of the CISG in Germany 1988-1994" (1995) *Cornell Review of the Convention on Contracts for the International Sale of Goods*, 68.

11. J Honnold, "Uniform laws for international trade: early care and feeding for uniform growth" (1995) 1 *International Trade and Business Journal* at footnote 6.

12. See note 11 above, p.2.

13. See note 12 above.

14. Article 35, CISG.

15. Article 46(3), CISG.

16. See note 3 above.

17. Article 4, CISG.

18. P Koneru, "The international interpretation of the UN Convention on the Contracts for the International Sale of Goods: an approach based on general principles" (1997) 6 *Minnesota Journal of Global Trade* 105.

19. See note 4 above.

20. B Zeller, "Is the *Sale of Goods (Vienna Convention) Act* the perfect tool to manage cross-border legal risks faced by Australian firms?" (see [www.murdoch.edu.au/elaw/indices/issue/v6n3.html](http://www.murdoch.edu.au/elaw/indices/issue/v6n3.html)).



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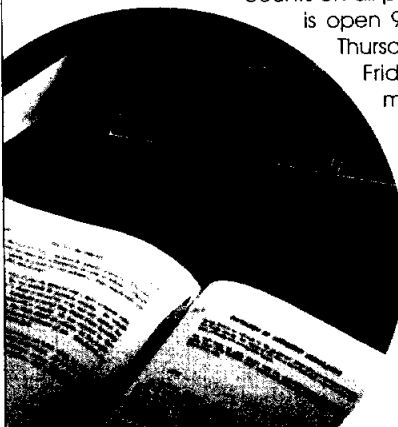
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