Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law

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Abstract

This article identifies two trends in the United Nations Convention on Contracts for the International Sale of Goods (CISG) case law, the homeward trend, and the outward trend, both of which are disruptive of the goal behind the CISG. The article analyses the trends and suggests how to tackle them to promote a uniform application of the CISG.

I. Autonomous Interpretation versus Homeward Trend?

It is common knowledge that ‘drafting uniform words is one thing; ensuring their uniformity is another’,1 since ‘uniformity does not follow automatically from a proclamation of uniform rules’.2 Therefore, in order to reduce the risk of diverging interpretations of the same text,3 that text must be interpreted in a uniform manner since, as stated by Viscount Simonds on behalf of what then was still the House of Lords in Scruttons Ltd v Midland Silicones Ltd, ‘it would be deplorable if the nations should, after protracted negotiations, reach agreement . . . and that

3 It has often been stated that it is only possible to reduce the danger of diverging interpretations; it is not possible to eliminate it as such; see eg JM Lookofsky, Consequential Damages in Comparative Context (Djøf 1989) 294.
their several courts should then disagree as to the meaning of what they appeared to agree upon’. 4

The drafters of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG)5 were aware of this problem, which led them to introduce Article 7, pursuant to which, in the interpretation of the CISG, ‘regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade’. 6

It is common knowledge that courts7 and commentators have construed this provision to mean that the CISG is to be interpreted ‘autonomously’, 8 not ‘nationalistically’—that is, not in the light of domestic law, 9 as difficult as it may be for a court to ‘transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state’. 10 Consequently, one should generally not have recourse to any domestic concept in order to solve interpretive problems arising under the CISG. 11

Commentators have argued that the above proposition applies even where the expressions employed by the CISG are textually the same as expressions that have a specific meaning within a particular domestic legal system. 12 In effect, the CISG

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6 CISG (n 5) art 7(1).
12 Note, however, that according to S Salama, ‘Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application’ (2006) 28 University of Miami
refers to concepts that are necessarily independent\textsuperscript{13} and different\textsuperscript{14} from national concepts,\textsuperscript{15} since the expressions employed in uniform law conventions such as the CISG are intended to be neutral.\textsuperscript{16} This appears to be a basic principle of international uniform law,\textsuperscript{17} resulting, in part, from the assumption that international uniform law ‘does not want to identify itself with any legal system, because it wants to conjugate with all.’\textsuperscript{18} Indeed, any choice of one expression rather than another is the result of a compromise\textsuperscript{19} and does not generally correspond to the reception of a concept peculiar to a specific domestic law,\textsuperscript{20} as a result, an interpreter must be aware of so-called \textit{faux-amis}. However, where it is apparent from the legislative history that the drafters wanted a given concept to be

\textit{Inter-American Law Review} 225, 232, ‘a methodological approach that discounts the use of analogies to domestic legal concepts seems impractical if not impossible. In particular, a judge looking to interpret a provision needs some frame of reference to assist in understanding that provision’.


See also A Lanciotti, \textit{Norme uniformi di conflitto e materiali nella disciplina convenzionale della compravendita} (Edizioni Scientifiche Italiane 1992) 287.


interpreted in light of a specific domestic law, one is allowed to have recourse to the ‘domestic’ understanding of that concept.

Unfortunately, however, courts do not always comply with this mandate to interpret the CISG autonomously, nor do they seem to resort to ‘nationalistic’ interpretations only where justified by the legislative history. Rather, a closer look at some decisions allows one to state that a ‘homeward trend’ is discernible, at least by some courts. This trend is deplorable because it promotes parochialism\(^21\) and, thus, defeats the very purpose of the CISG,\(^{22}\) namely the creation of a uniform sales law\(^{23}\) aimed at the creation of legal certainty and ‘the removal of legal barriers in international trade’\(^{24}\). In effect, the homeward trend ‘deprives the collective signatories of the predictability and reliability of law which the CISG was meant to create. In order for the CISG to truly live up to the purpose for which it was created, interpreting courts must stay within the strict boundaries of Article 7’\(^{25}\). It is therefore rather surprising that one commentator suggests not only that the ‘categorical condemnation of the homeward trend is unwarranted’\(^{26}\) but also that ‘[t]he homeward trend may . . . enhance the legitimacy and acceptability of the CISG over the long term’\(^{27}\).

This view is not tenable. The suggestion that the homeward trend enhances the CISG’s legitimacy overlooks the fact that the CISG’s legitimacy is derived from the wide acceptance it enjoys,\(^{28}\) which in turn is due to the goal it pursues—namely the creation of a uniform sales law able to break down the obstacles to international import/export constituted by the plethora of existing legal regimes\(^{29}\). This goal can only be achieved by applying the CISG in one and the same manner in the various contracting States.\(^{30}\)

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24 CISG (n 5) preamble.
27 Ibid.
The suggestion that the homeward trend enhances the CISG’s applicability by preventing parties from the countries in the courts of which the homeward trend is discernible from opting out is similarly misguided.\(^{31}\) It does not take due account, for example, of the fact that those parties’ reliance on the homeward trend is justified only where the dispute is to be decided by the courts of the countries in which they are located.\(^{32}\) This, however, would (generally) require the opposing parties to agree with the former parties’ choice of forum, which they may be unwilling to do. Instead, they may want their own courts’ domestic interpretation of the CISG, where one exists, to apply (thus, leading to a battle of homeward trends) or simply be reluctant to give the opposing party the competitive advantage of reliance on its ‘domestic’ interpretation. The resolution of this potential conflict may ultimately require excluding the CISG altogether (which certainly does nothing to enhance the CISG’s applicability).\(^{33}\) What is certain is that this conflict creates unpredictability and, therefore, cannot be advocated.\(^{34}\)

The theory of enhanced CISG applicability as a result of the homeward trend has additional weak points. It does not take into account, for example, that the homeward trend limits rather than promotes the CISG’s applicability because it prevents the CISG from functioning as a neutral law to which parties can resort when they wish to avoid the application of the domestic law of the opposing party.\(^{35}\)

Furthermore, a homeward trend in any given country may not be readily identifiable to contracting parties \textit{ex ante}, which may increase transaction costs in international contracts. If a party is unaware that his or her national courts’ interpretation is the result of a homeward trend, the party may be induced to believe that his or her courts’ interpretation is one generally accepted. The reliance upon this erroneous assumption may induce the parties to make wrong choices (regarding, for instance, the forum) and generate costs. Again, this

\(^{31}\) See Cross (n 26) 138, stating that ‘the propensity of U.S. courts to interpret the Convention in light of domestic legal traditions may ameliorate the tendency of US parties to opt out of the CISG’.

\(^{32}\) For a recent analysis of the relationship between the CISG and choice of forum, see F Ferrari, ‘Choice of Forum and CISG; Remarks on the Latter’s Impact on the Former’, in: R. Brand et al. (eds), Drafting Contracts under the CISG (OUP 2007) 103–48.

\(^{33}\) See also Gillette and Scott (n 29) 454, stating that ‘[i]f the problem solving objective of a uniform [International Sales Law] is not met, therefore, the product will be linguistically uniform upon enactment, but the parties subsequently will either abandon the law entirely or opt-out of dis-favored provisions thus undermining even the initial benefits of the standard terms’.

\(^{34}\) See Rockwell (n 21) 74, stating that courts should have ways ‘to enable them to avoid the temptations, and . . . unpredictability, of the homeward trend’.


conflicts with one of the primary goals of the CISG, namely that of reducing costs by creating a uniform regime.\textsuperscript{36}

From this, only one conclusion can be drawn:

Indulging in the homeward trend, obviously, violates the mandate of Art. 7(1) (which requires that the CISG be interpreted with ‘regard’ for its international character and for ‘the need to promote uniformity in its application’) and constitutes a serious—quite possibly the most serious—threat to the main purpose of the CISG: progress toward a uniform regime of international sales law.\textsuperscript{37}

In other words, only if one moves ‘towards a CISG perspective that transcends domestic ideology’\textsuperscript{38} can the CISG’s main purpose be reached.\textsuperscript{39} This requires fighting the homeward trend, not advocating for it.

\textbf{II. Defining homeward trend}

How, however, can this—arguably the most significant—threat to the CISG’s main purpose be defined?\textsuperscript{40} According to those CISG commentators who have not only referred to the homeward trend,\textsuperscript{41} but who have also attempted to define it, the homeward trend is akin to the ‘natural’\textsuperscript{42} ‘tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention’.\textsuperscript{43} It is, in other words, ‘the tendency to think that the words we


\textsuperscript{37} See, however, G Cuniberti, ‘Is the CISG Benefiting Anybody?’ (2006) 39 Vanderbilt Journal of Transnational Law 1511, arguing that the CISG does not really reduce costs.

\textsuperscript{38} Flechtner and Lookofsky (n 37) 103.

\textsuperscript{39} See also Murray (n 10) 367, stating that courts have to ‘transcend [their] domestic perspective and become a different court that is no longer influenced by the law of [their] own nation state’.


\textsuperscript{41} Salama (n 12) 231.

\textsuperscript{42} Flechtner and Lookofsky (n 37) 203.

see [in the text of the CISG] are merely trying, in their awkward way, to state the
domestic rule we know so well’.44

This ‘natural tendency [by courts] to read the international rules in light of the
legal ideas that have been imbedded at the core of their intellectual formation’45 is,
however, to be distinguished from recourse to domestic law for interpretive pur-
poses in cases where that recourse to domestic law is imposed by the CISG itself.
Although it may seem contradictory to first advocate, as has been done in Part I,
the autonomous interpretation of the CISG and then refer to the need to resort to
domestic law, it is not. The mandate to interpret the CISG autonomously is not
absolute,46 and, therefore, not all expressions used by the drafters of the CISG
must be interpreted autonomously.47 Indeed, there are some expressions that an
interpreter must interpret ‘domestically’, despite the negative effect this may have
on the uniformity the drafters of the CISG wanted to achieve. This is true, for
instance, with respect to the expression ‘private international law’ employed by
the CISG.48 Although various courts had already implicitly adopted this view,49
an Italian court, the Tribunale di Padova, did so more explicitly.50 When exam-
ining the CISG’s substantive applicability requirements, the court first rejected
the homeward trend when it stated that:

from a substantive point of view, it is necessary that the contract be one for the sale of
goods which, however, the Convention does not define. Nevertheless, the lack of an
express definition should not lead one to resort to a domestic definition, such as that
to be found in Article 1470 of the [Italian] Civil Code. In effect, the Convention’s
concept of ‘contract for the sale of goods’ has to be interpreted, as have the majority of

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44 Honnold (n 9) 208.
45 JO Honnold, Documentary History of the Uniform Law for International Sales: The Studies,
Deliberations and Decisions that Led to the 1980 United Nations Convention with Introductions
and Explanations (Springer 1989) 1.
Journal of International Commercial Law and Arbitration 233, 241; HM Flechtner, ‘The Several
Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and
Other Challenges to the Uniformity Principle in Article 7(1)’ (1998) 17 Journal of Law and
Commerce 187, 205.
47 For the following remarks, see F Ferrari, ‘La jurisprudence sur la CVIM: un nouveau défi pour les
48 For this conclusion, see also F Ferrari, ‘Do Courts Interpret the CISG Uniformly?’ in Ferrari (n 35)
3, 10.
49 See the court decisions commented on by F Ferrari, ‘Der Begriff des ‘internationalen Privatsrechts’
nach Art. 1 Abs. 1 lit. b) des UN-Kaufrechts’ [1998] ZeuP 162; Oberlandesgericht Düsseldorf, 8
January 1993 <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930108g1.html>; Bezirksgericht
Wien, 20 February 1992 <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/920220a3.html> (ac-
cessed 13 February 2017); Landgericht Aachen, 3 April 1990 <http://www.cisg-online.ch/cisg/
50 Tribunale di Padova, 25 February 2004 <http://cisgw3.law.pace.edu/cases/040225i3.html> (ac-
cessed 13 February 2017).
concepts (such as that of ‘place of business’, ‘habitual residence’, ‘goods’) autonomously, i.e. without resort to concepts characteristic of any particular legal system.

The court then went on to state that not all CISG expressions had to be interpreted autonomously; by way of example, it referred to the ‘concept of “private international law”, which corresponds to the concept of private international law of the forum’. In so stating, the court made it clear that there is a distinction between the homeward trend as defined above—which is to be avoided—and recourse to domestic law, which may be required by the CISG itself.

The homeward trend, as defined above, must be distinguished not only from the legitimate, albeit exceptional, recourse for interpretive purposes to domestic law in cases where it is imposed by the CISG itself but also from another trend, namely that of promoting interpretive solutions that ‘by one means or another, result in the application of the forum’s own internal law’. This trend of ‘favor legis fori’ is a variation of the homeward trend and differs from the variation referred to earlier in that it does not manifest itself in domestic interpretations of supposedly autonomous concepts but, rather, in the tendency to reach results that lead to the application of domestic law tout court. This ‘lex forism’ is independent from the variation of the homeward trend mentioned initially; although they may, at times, go hand in hand.

III. The outward trend: a new trend in CISG case law?

Unfortunately, there are examples of both reiterations of the homeward trend in CISG case law. More recently, however, this commentator was able to discern another trend in CISG case law that also infringes upon the goal behind the

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51 Ibid.
57 For an overview of the case law, see F Ferrari, ‘Tendance insulariste et lex forisme malgré un droit uniforme de la vente’ [2013] Revue critique de droit international privé 323.
creation of uniform law instruments—a trend that, elsewhere, this author labelled the ‘outward trend’.\footnote{See F Ferrari, ‘Heimwärts- und Auswärtsstreben in der Rechtsprechung zum UN-Kaufrecht’ in U Blaurock and F Maultzsch (eds), Einheitliches Kaufrecht und Vereinheitlichung der Rechtsanwendung, (in print).} This trend can be defined as the tendency of those interpreting a uniform law instrument to project foreign law onto the provisions of an international instrument where these provisions refer to legal concepts unknown in the system in which the interpreter is trained.

It may well be worth giving some examples. In 2008, the Spanish Supreme Court, when applying the CISG to a contract dispute between a party with place of business in Spain and one with a place of business in Germany, analysed Article 25 of the CISG, on fundamental breach, and stated that this provision implied a system of contractual liability based on a criterion of objective imputation, attenuated, however, by exceptions and by a parameter of reasonableness.\footnote{See Tribunal Supremo, 17 January 2008 <http://cisgw3.law.pace.edu/cases/080117s4.html> (accessed 13 February 2017).} In doing so, the Spanish Supreme Court expressly stated that the CISG was based on the principles inspiring the Common Law and that Article 25, in particular, did not have a counterpart in Civil Law countries and was derived from Anglo-Saxon law. But this statement is to be criticized not only for being incorrect to the extent that there are Civil Law systems that acknowledge the importance of the distinction between fundamental and non-fundamental breaches but also for not interpreting the concept at hand in an autonomous manner, as mandated by Article 7(1) of the CISG, as the Court should have done. The Court assumed that just because the concept is unknown to the Spanish legal system—a Civil Law system—it necessarily has to be derived from the Common Law system. This reasoning, which has since been adopted by lower courts,\footnote{Audiencia Provincial de Pontevedra, 6 October 2014 <http://cisgw3.law.pace.edu/cases/141006s4.html> (accessed 13 February 2017); Audiencia Provincial de Madrid, 14 July 2009 <http://cisgw3.law.pace.edu/cases/090714s4.html> (accessed 13 February 2017).} cannot be shared and violates as much as any the reiteration of the homeward trend the ultimate goal behind any unification effort.

More recently, in Germany too, a court (the Court of Appeals of Koblenz) succumbed to the outward trend.\footnote{Oberlandesgericht Koblenz, 24 February 2011 <http://www.globalsaleslaw.org/content/api/cisg/urteile/2301.pdf> (accessed 13 February 2017).} When having to determine what measures are reasonable in the circumstances to mitigate the loss as per Article 77 of the CISG, the Court stated that:

> the standard for the appropriate conduct pursuant to Article 77, first sentence, CISG is . . . the conduct of a ‘reasonable person’ . . . The plaintiff was required to take all such measures to mitigate the loss, which were reasonable in the sense of Article 77 CISG in the circumstances. The standard of a reasonable person, which originates in the English and Anglo-American Common Law, is referred to in numerous provisions of the UN Sales Convention (f.i. in Art. 8(2) and Art. 25 CISG) and counts among the Convention’s general principles . . . Reference must be made to the conduct of a prudent person who is in the same situation as the concerned party. . . . In case the
contracting party exercises a profession or a commercial activity, reference must be made to the skills of a member of the profession to which it belongs (Art. 8(2) and Art. 25 CISG: ‘reasonable person of the same kind’ . . .). Since the legal concept of the ‘reasonable man’ is not used in this form in continental European law, the Court considers it essential to resort to principles established in the English and Anglo-American law.

Not unlike the Spanish Supreme Court, the German court disregarded the mandate to interpret the CISG autonomously, turned to domestic law, and equated the absence of a comparable concept in its own domestic law with the absence of a similar concept in all other continental European legal systems. In doing so, the German Court not only made a substantive error, as there are continental European legal systems that recognize the concept of the ‘reasonable person’, but also it gave in to one of the dangers associated with the existence of the system of legal systems—that is, with the ‘group[ing of] jurisdictions around the world into a handful of legal families based on underlying common characteristics of their laws’. More specifically, it gave in to the risk of being pushed to believe that the lack of a given legal concept in a given legal system (such as the Spanish and German ones), belonging to a given legal family (such as the civil law one), must mean that the legal concept originates from a different legal family, namely the one legal family that is juxtaposed to the one the interpreter belongs to (in the cases referred to earlier, the common law one as the legal family the English and US system referred to by the Court belong to). And it is this erroneous belief that seems to have led the German Court to suggest that the concept of ‘reasonable person’ had to stem from the common law. But the German Court went even further and resorted to English court decisions to determine whether the conduct was appropriate in the circumstances, thus leaving no doubt as to it succumbing to the outward trend (and disregarding the mandate to interpret the CISG autonomously).

**IV. The homeward and outward trends overcome**

Even though there are courts that succumb to the homeward trend and the outward trend, the situation is not really that grim. There are many courts in the countries focused on in this short article that comply with the obligation to have regard for the CISG’s international character and avoid resorting to domestic concepts to interpret the CISG, including US courts, which are generally considered to interpret the CISG in the most homeward trending way. In *St. Paul Guardian Insurance Co. et al. v Neuromed Medical Systems and Support GmbH, et al.*, for instance, it is stated that ‘the CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language’, a

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63 See also Salama (n 12) 225, stating that ‘[i]n practice it has been found that U.S. courts rely on the ‘homeward trend’ more often than other judges in interpreting the CISG’. 
statement that is clearly incompatible with the homeward trend.\textsuperscript{64} In MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D’Agostino, S.p.A., the need to refrain from reading domestic concepts into the CISG is addressed more directly, as it states that ‘courts applying the CISG cannot ... substitut[e] familiar principles of domestic law when the Convention requires a different result’.\textsuperscript{65} This line of reasoning constitutes the basis for other US court decisions too, such as Geneva Pharmaceuticals Tech. Corp. v Barr Labs. Inc.,\textsuperscript{66} stating that ‘UCC case law is not per se applicable to cases governed by the CISG’,\textsuperscript{67} and Calzaturificio Claudia S.n.c. v Olivieri Footwear Ltd., where it is expressly stated that:

although the CISG is similar to the UCC with respect to certain provisions, it differs from the UCC with respect to others, including the UCC’s writing requirement for a transaction for the sale of goods and parole evidence rule. Where controlling provisions are inconsistent, it would be inappropriate to apply UCC case law in construing contracts under the CISG.\textsuperscript{68}

European courts, as well, have complied with the obligation not to interpret the CISG in light of domestic law but, rather, by having regard for its international character. In a Swiss case from 1993, a court of first instance even expressly stated that the CISG:

is supposed to be interpreted autonomously and not out of the perspective of the respective national law of the forum. Thus ... it is generally not decisive whether the Convention is formally applied as particularly this or that national law, as it is to be interpreted autonomously and with regard to its international character.\textsuperscript{69}


\textsuperscript{69} Gerichtspräsident Laufen, 7 May 1993 <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930507s1.html>.
An express reference to the need to interpret the CISG ‘autonomously’ can also be found in a more recent Swiss case, an Austrian case, and various recent Italian court decisions rendered by the Tribunale di Forli, the Tribunale di Padova in 2005 and 2004, and by the Tribunale di Modena.

In Germany, while there are some courts that have simply referred to the need to interpret the CISG by having regard for its international character and to the need to promote its uniform application, other courts have gone further. In 1996, the German Supreme Court, for instance, expressly stated that ‘the CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)’. And it is this reasoning that has led the Court of Appeal of Karlsruhe to state that ‘German legal concepts such as “Fehler” and “zugesicherte Eigenschaften” are therefore not transferable to the CISG’. More recently, in 2005, the German Supreme Court stated that:

insofar as the Court of Appeals refers to [various German] judgments . . . in analyzing the question whether, at the time the risk passed, the delivered meat conformed to the contract within the meaning of Arts. 35, 36 CISG, it ignored the fact that these decisions were issued before the CISG went into effect in Germany and refer to § 459 BGB. . . . The principles developed there cannot simply be applied to the case at hand, although the factual position—suspicion of foodstuffs in transborder trade being hazardous to health—is similar; that is so because, in interpreting the provisions of CISG, we must consider its international character and the necessity to promote its

71 See Audiencia Provincial de Valencia, 7 June 2003 <http://cisgw3.law.pace.edu/cases/030607s4.html> (accessed 13 February 2017), holding that [s]cholars maintain that the international character of the Convention obliges an autonomous interpretation of the Convention independent of domestic law, for this purpose, it is necessary to adopt a different methodology than used to apply domestic law. The only way to assure the uniformity of the Convention is to take into account decisions from tribunals of other countries when applying the Convention and to consult expert opinions of scholars in the subject, in order to achieve uniformity. For a favourable comment on this decision when discussing the uniform interpretation of the CISG, see MP Perales Viscasillas, ‘Spanish Case Law on the CISG’ in Ferrari (n 35) 235, 240–1.
72 See Oberster Gerichtshof, 23 May 2005 <http://cisgw3.law.pace.edu/cases/050523a3.html> (accessed 13 February 2017), holding that ‘[t]he CISG creates substantive law . . . and is to be interpreted autonomously in accordance with CISG Art. 7. Therefore, discussions on the Austrian legal situation . . . have to be omitted’.
uniform application and the protection of goodwill in international trade (Art. 7(1) CISG).78

V. Conclusion

As the foregoing part shows, there are courts that do not fall into the trap of either the homeward or the outward trend.79 However, as long as the foregoing trends come ‘naturally’ to interpreters,80 the uniformity aimed at by the drafters of the CISG is as much at risk as its success, at least if one uses the level of uniformity reached as a measure of that success.81 But how does one avoid the ‘gravitational pull’82 of the homeward and the outward trends? Some of the reasons that may ultimately favour these trends under the CISG are intrinsic to the CISG and, therefore, cannot be corrected, as it is unlikely that the CISG will ever be revised to amend the current situation. This is true, for instance, in regard to the ‘vague standards [that] pervade the CISG’.83 The very fact that the CISG uses (a lot of) vague standards84 facilitates recourse to non-uniform standards for interpretive purposes,85 whether these are domestic or foreign standards, much more than a text that is more specific and contains itself a number of definitions.86 In effect,

79 See Gillette and Scott (n 29) 472 (in respect of the homeward trend).
81 See eg Tuggey (n 22) 544, stating that ‘one true test of the CISG’s success as a uniform law will be the extent to which it may implicitly permit national variations in its application’.
For a different measure of the CISG’s success, see Gillette and Scott (n 29) 447, where the authors suggest that the success is to be measured on the basis of whether the rules of the CISG ‘do for the parties what the parties cannot as easily do for themselves’ and, thus, lead to the parties not wanting to opt-out of the CISG (ibid at 454).
82 Flechtner (n 40) 146.
83 Gillette and Scott (n 29) 474.
84 For some examples, see eg Gillette and Scott (n 29) 474ff.
the more a uniform law instrument spells out its own terms, the harder it will be for an interpreter to read domestic legal concepts into it, irrespective of whether these are domestic law concepts (homeward trend) or foreign law ones (outward trend). Also, because the CISG is the result of many compromises, there are ‘ambiguities inherent in the CISG provisions themselves’, which also open the door to resort to domestic or foreign law preconceptions.

What, then, can be done to avoid the aforementioned trends, given that an amendment of the CISG does not appear to be an option? In this author’s opinion, the key to the solution lies in a change of the interpreter’s background assumptions and conceptions. If interpreters are from the outset—that is, during their intellectual formation—made aware of the fact that they operate in a legal system that is composed of various layers of sales law rules, of which the CISG is one, and that it is ontologically autonomous not only from their own domestic law but also from any other domestic law, when—naturally—resorting to their background assumptions and conceptions, interpreters will also resort to the CISG as autonomous from their own or any other domestic law. For this result to be able to be reached, law school curricula as well as textbooks will have to be changed to incorporate the study of the CISG. This, of course, will not be easy, and, therefore, it will still take some time before the disruptive effects of both the homeward trend and the outward trend visible today will be fully overcome.


87 See the text accompanying note 19.
88 Tuggey (n 22) 554.
89 For an analysis of the effects of the failure to incorporate the CISG into law school curricula, see W Dogde, ‘Teaching the CISG in Contracts’ (2000) 50 Journal of Legal Education 72.

Rev. dr. unif., 2017, 244–257