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Special Issue: Maren Heidemann (ed), *The Future of the Commercial Contract in Scholarship and Law Reform*

- 843 | Editorial Article: The Future of the Commercial Contract in Scholarship and Law Reform – A Work in Progress, *Maren Heidemann*
- 851 | The Autonomous Interpretation Standard of International Uniform Private Law: A Dialogue on Methods of Interpretation from the Perspectives of Comparative Private Law and International Public Law, *Lorenza Mola and Cristina Poncibò*
- 885 | Autonomous Interpretation of Uniform Commercial Law: The East-West European Divide, *Radosveta Vassileva*
- 907 | Object and Purpose in International Uniform Law Conventions
Maren Heidemann
- 929 | Law and the Market: Private Actors and Self-Regulation 'Towards a New Role of Public International Law', *Daniele D'Alvia*
- 949 | CSR in EU Law: How Close to EU Fundamental Rights and Social Justice?
Alexandra Andhov (Horváthová)
- 975 | Electronic Contracts and E-Mediation in EU Law: Time for the EU to Extend E-Mediation for the Benefit of SMEs in B2B Transactions?
Despina Anagnostopoulou
- 997 | Building the Legal Framework of Privatizations in Cyprus: The Missing Link with Sustainable Development, *Thomas Papadopoulos*
- 1021 | Index of Articles
- 1025 | Index of Authors

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Contents

Special Issue: Maren Heidemann (ed), The Future of the Commercial Contract in Scholarship and Law Reform	
Editorial Article: The Future of the Commercial Contract in Scholarship and Law Reform – A Work in Progress <i>Maren Heidemann</i>	843
The Autonomous Interpretation Standard of International Uniform Private Law: A Dialogue on Methods of Interpretation from the Perspectives of Comparative Private Law and International Public Law <i>Lorenza Mola and Cristina Poncibò</i>	851
Autonomous Interpretation of Uniform Commercial Law: The East-West European Divide <i>Radosveta Vassileva</i>	885
Object and Purpose in International Uniform Law Conventions <i>Maren Heidemann</i>	907
Law and the Market: Private Actors and Self-Regulation ‘Towards a New Role of Public International Law’ <i>Daniele D’Alvia</i>	929
CSR in EU Law: How Close to EU Fundamental Rights and Social Justice? <i>Alexandra Andhov (Horváthová)</i>	949
Electronic Contracts and E-Mediation in EU Law: Time for the EU to Extend E-Mediation for the Benefit of SMEs in B2B Transactions? <i>Despina Anagnostopoulou</i>	975
Building the Legal Framework of Privatizations in Cyprus: The Missing Link with Sustainable Development <i>Thomas Papadopoulos</i>	997
Index of Articles	1021
Index of Authors	1025

The Autonomous Interpretation Standard of International Uniform Private Law: A Dialogue on Methods of Interpretation from the Perspectives of Comparative Private Law and International Public Law

LORENZA MOLA AND CRISTINA PONCIBÒ*

*'It would be deplorable if the nations should, after protracted negotiations, reach agreement ... and that their several courts should then disagree as to the meaning of what they appeared to agree upon'*¹

Abstract

Our article is based on a fresh dialogue between two colleagues of public international law and comparative private law. We question whether the standard of interpretation of uniform private conventions is, or should be, identified and shaped under the two scholarships. In particular, we aim to answer three main research questions. The first question is whether the interpretation of uniform private law conventions is governed by the principles of public international law on the interpretation of treaties (as expressed by Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT)). In case of an affirmative answer, the second question follows by discussing whether the application of the rules at Articles 31-33 of the VCLT may be beneficial for the interpretation of the conventions of uniform private law. We argue that these articles may finally offer a 'common interpretative framework' to domestic courts. Third, the article questions whether, in applying uniform private law conventions, domestic courts are under a duty to apply the VCLT interpretative methods and consider foreign case law. Here our point is that such a duty exists, although domestic courts 'tend to ignore it' in adjudicating cases. We will address these questions through dialogue, where we both describe the state of the art in our respective schol-

* Lorenza Mola, Professor of International Law, University of Turin, is the author of sections 3.2, 4.2, 5, 5.1, 5.2, 6.3, 7.1. Cristina Poncibò, Professor of Comparative Private Law, University of Turin, is the author of sections 2.1, 2.2, 2.3, 3.1, 4.1, 6.2, 7.2, 8. Sections 1, 6.1 and 9 are co-authored. We are grateful to the students and the faculty members of the Center for Transnational Legal Studies ('CTLS') who provided us insightful feedbacks on the Colloquium on New Perspectives of Transnational Law which occurred at the CTLS' premises in London on 20 September 2017. A preliminary draft of this article has also been presented at the conference 'The Future of the Commercial Contract in Scholarship and Law Reform – The interface between public international law and substantive contract law' at the Institute of Advanced Legal Studies (London) on 20 October 2017. We are grateful to the scholars who gave us comments. All errors and omissions remain ours.

¹ *Scruttons Ltd. v. Midland Silicones Ltd.*, 1962 A.C. 446, 471 (1961).

arships and try to come to a reciprocal, and if possible even common, understanding on each issue.

1. Introduction

Our article is based on a fresh dialogue between two colleagues of public international law and comparative private law. We question whether the 'autonomous' standard of interpretation of uniform private conventions is, or should be, identified and shaped under the two scholarships.

International uniform law needs to be interpreted in a manner that differs somewhat from our usual understanding of rules based on national law. Thus, uniform law conventions often contain express provisions requiring domestic courts to interpret their rules by considering their international character and the need to promote uniformity in their application. This is notably the case of Article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods ('CISG').² Similar provisions are found, for example, at Article 6(1) of the Unidroit Convention on International Financial Leasing ('CIFL')³ and at Article 4(1) of the Unidroit Convention on International Factoring ('CIFac').⁴ These international conventions have established uniformity among themselves on the goals of their interpretation, not the relevant methodologies. In the absence of a supranational body giving rulings on the interpretation of CISG and other conventions, the solution of methodological problems is a task of domestic courts and arbitrators. The article focuses precisely on uniform private law conventions dealing with international commercial activities and on their interpretation rendered by domestic courts.⁵

Legal scholars usually underline that interpretation according to Article 7(1) CISG begins with an explanation of the wording of the convention (objective interpretation), in its context, and if the meaning remains equivocal, the next step is to consider the object and the purpose of the treaty, by resorting to its preparatory work (subjective

² United Nations Convention on Contracts for the International Sale of Goods ('CISG') (adopted 11 Apr. 1980, entered into force 1 Jan. 1988), 1489 *UN T.S.* 3. The literature about the CISG is very extensive and, thus, it is not possible to quote here all the contributions. Recent edited books about the CISG include: L Di Matteo, A Janssen, U Magnus, R Schulze, *International Sales Law Contract, Principles and Practice* (CH Beck, Hart, Nomos 2016); C Gillette and S Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd ed., Cambridge University Press, 2016).

³ Unidroit, Convention on International Financial Leasing ('CIFL') (Ottawa, 28 May 1988), 2321 *UN T.S.* 195.

⁴ Unidroit, Convention on International Factoring ('CIFac') (Ottawa, 28 May 1988), 2323 *UN T.S.* 373.

⁵ Here we do not question whether uniform private law conventions are an effective tool for achieving a legitimate aim, or whether their application is widespread worldwide. For a critical review of the current role of this type of instruments, see SM Carbone, *Rule of Law and Non-State Actors in the International Community: Are Uniform Law Conventions Still a Useful Tool in International Commercial Law?* 21 *Uniform L. Rev.* 177 (2016). The role of international arbitration in applying uniform private law conventions falls outside the scope of this paper.

interpretation). One may say that this ‘common sense approach’ largely follows the principles of interpretation provided by international public law for international treaties (Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT)).⁶ In this respect, the traditional position in private legal scholarship concerning the role of the VCLT is that such principles may be applied entirely or in part, but, in any case, they have a limited impact to offer guidance to domestic courts.

In this paper we question this argument. Scholars from different fields have not often jointly addressed the role played by VCLT rules of interpretation with respect to uniform private law conventions.⁷ We think that an in-depth analysis of the topic requires an encounter between public law and private law perspectives. Therefore, our paper aims to help develop our understating of the topic by relying on a dialogue from different research fields.

In particular, we aim to answer three main research questions. The first question is whether the interpretation of uniform private law conventions is governed by the principles of public international law on the interpretation of treaties (sections 2-4). As our answer is affirmative, the second question follows by discussing whether the application of Articles 31-33 of the VCLT may be beneficial for the interpretation of the conventions of uniform private law. We argue that these articles may finally offer a common interpretative framework to domestic courts (sections 5 and 6). Third, the article questions whether, in applying uniform private law conventions, domestic courts are under a duty to apply the VCLT interpretative methods and consider foreign case law. Here our point is that such a duty exists, although domestic courts ‘tend to ignore it’ in adjudicating cases (section 7). We will address these questions through a dialogue, where we describe the state of the art in our respective scholarships and try to come to a reciprocal, and if possible even common, understanding on each issue. Lastly, we will put forward a proposal for a reform that establishes specialised, trained

⁶ Vienna Convention on the Law of Treaties (‘VCLT’) (adopted 23 May 1969, entered into force 27 Jan. 1980), 1155 *UN T.S.* 331. The literature on treaty interpretation is very broad. It includes R Gardiner, *Treaty Interpretation* (2nd ed., Oxford University Press 2015); U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2010). S Bariatti, *L’interpretazione delle convenzioni internazionali di diritto uniforme*, 251-323 (Cedam 1986). The issue is also covered by books on treaty law and the VCLT, such as I Sinclair, *The Vienna Convention on the Law of Treaties*, 114 et seq. (2nd ed., Manchester University Press, 1984); E Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, 105 et seq. (Oxford University Press 2011).

⁷ The following legal scholars have explored the topic: U Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in A Janssen and O Meyer (eds), *CISG Methodology*, 33-58 (Sellier 2009). J Basedow, *Uniform Private Law Conventions and the Law of Treaties* 11 *ULR* 731 (2006). M Gebauer, *Uniform Law, General Principles and Autonomous Interpretation* 5 *ULR* 683 (2000). M Roth and R Happ, *Interpretation of Uniform Law Instruments According to Principles of International Law* 2 *ULR* 711 (1997). See also the contributions of S Ferreri, *Il giudice italiano e l’interpretazione del contratto internazionale* (Cedam 2000); A E. von Overbrek, *L’application par le juge interne des conventions de droit international privé*, 132:1 *Recueil des cours* (1971) esp 40 ff; T Treves, *I conflitti di legge in tema di vendita* (Lagoliardica 1971); S Carbone, *L’ambito di applicazione ed i criteri interpretativi della Convenzione di Vienna sulla vendita internazionale*, *Rivista di diritto internazionale privato e processuale* 5 (1980)

judicial sections for international contractual disputes on the domestic level, and draw some more general final remarks (sections 8 and 9).

2. The Labyrinth of Interpretative Methodologies of Uniform Private Law Conventions

2.1. *An Overview*

International uniform law needs to be interpreted in a manner that differs somewhat from our usual understanding of rules based on national law. So uniform law conventions often contain express provisions requiring domestic courts to interpret their rules by considering their international character and the need to promote uniformity in their application (e.g., as already mentioned, Article 7(1) CISG, Article 6(1) CIFL, Article 4(1) CIFac).

To provide an example, Article 7(1) of the CISG states that '[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. In particular, the provision stipulates three directives to interpretation. It does so in a standard formula, which has since been applied in many other conventions on the Unification of Private Law.⁸ These international conventions have established uniformity among themselves on the goals of their interpretation. Legal scholars seem to converge on the idea that this common wording, however, only addresses the special features and goals proper to interpretation, not the relevant methodologies.⁹ For the sake of completeness, it should be noted that a supranational court (The International Court of Justice, 'ICJ') would be authorised to give rulings on the interpretation of CISG provisions. Indeed, legal scholars have dedicated scarce attention to this option to focus on the role played by domestic courts.

In the present context, the principle of good faith may be ignored, whereas the first and second principles, i.e. the international character of the Convention and the need to promote uniformity in its application, are particularly significant. Firstly, Article 7(1) requires that the international character of the CISG has to be taken into account when interpreting its provisions.¹⁰ Scholars in the field have construed this provision to mean that the CISG and other conventions are to be interpreted 'autonomously' meaning that a court should 'transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state'.¹¹ In this

⁸ Convention on Agency in the International Sale of Goods (8 Feb. 1983), available at www.unidroit.org/ol-agency/ol-agency-en (accessed 8 May 2018), Art. 6(1). UN Convention on the Assignment of Receivables in International Trade (12 Dec. 2001), Doc. A/RES/56/81, Art. 7(1).

⁹ Note 7 above. Bariatti, *supra* n 6.

¹⁰ M Joachim Bonell, *Bianca-Bonell Commentary on the International Sales Law*, 65 (Fred B Rothman & Co 1987).

¹¹ JE Murray, *The Neglect of CISG: A Workable Solution* 17 *Journal of Law and Commerce* 365 (1998).

respect, one scholar points out that this provision seems to prohibit recourse to methodological theories of interpretation of domestic texts.¹² Other authors do not agree with this argument by claiming that a domestic court may rely on a blend of domestic interpretative methodologies in applying the CISG.¹³

Interestingly, one may find the same concept (i.e. autonomous interpretation) with respect to the interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’).¹⁴ In fact, it is argued that, in principle, the terms used in the New York Convention have an autonomous meaning.¹⁵ Therefore, courts should not interpret the terms of the New York Convention by reference to domestic law. In the words of the commentators: ‘The terms of the Convention should have the same meaning wherever in the world they are applied. This helps to ensure the uniform application of the Convention in all the Contracting States’.¹⁶

Secondly, Article 7(1) also mandates that the promotion of uniformity of the CISG’s application has to be borne in mind during its interpretation. The principle of autonomous interpretation is linked to the second principle, that of uniform application, because the autonomous interpretation of uniform law promotes uniformity of application. The two principles are not always aligned. Obviously, the autonomous interpretation of a convention is no guarantee of its uniform application, since in difficult cases different courts are likely to give different autonomous interpretations of the same rules, even while at pains not to refer to any one national legal system. In addition, uniform application is not always based on autonomous interpretation, and sometimes the latter requires more than merely trying to reach a uniform solution.

In such a context, according to Article 7(2) of the CISG, recourse to domestic law may only be had in order to fill a gap in CISG rules, and only if such a gap cannot be filled autonomously. In other words, the gap should be filled in conformity with the Convention’s general principles, may the unsolved question be settled in conformity with the national law applicable by virtue of the rules of private international law.

In all questions concerning a matter governed by the Convention, the first step is always to seek a solution on the grounds of the Convention, even if there is a gap. Within the ambit of CISG, and in matters governed by the Convention, the domestic law should never be resorted to for the purposes of interpretation in a narrow sense (i.e. excluding the application of a rule by analogy). In addition, even for the purposes

¹² F Ferrari, *Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG Case Law* 22:1 ULR 244-257 (2017).

¹³ L Di Matteo and A Janssen, *Interpretive Uncertainty: Methodological Solutions for Interpreting the CISG* *Nederlands Tijdschrift voor Handelsrecht* (NTHR) 52-69 (2012).

¹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’) (1958), 330 *UN T.S.* 3.

¹⁵ International Council for Commercial Arbitration, *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, with the Assistance of the Permanent Court of Arbitration Peace Palace*, The Hague (2011).

¹⁶ *Ibid.*, at 13 et seq.

of gap-filling, recourse to domestic law constitutes an ultima ratio, occurring only if a general, autonomous principle cannot be derived from the Convention.¹⁷

Doubtlessly while an enormous amount of scientific contributions have been published on the methodologies of interpretation of the CISG¹⁸, we underline that the method(s) towards an autonomous interpretation presents specific and unresolved issues to date when applied to uniform private law. To quote an author: 'The interpretation and application of international uniform law instruments is a much-disputed problem and one as old as uniform law itself'.¹⁹

Our first point here is to note that domestic courts are left in a sort of labyrinth in pursuing the goal of an autonomous interpretation. Here our point is to note that, according to legal scholars in the field, domestic courts have (at least) three different – while confusing or conflicting – options when applying the Convention.

2.2. A 'Blend' or a 'Synthesis' of National Interpretative Methodologies

According to some scholars, the first option consists in choosing from a blend of national interpretative methodologies. In this respect, an author notes: 'Uniform interpretation creates a new methodology in which different interpretation techniques from different legal traditions are being blended'.²⁰

We note that, practically, such an argument requires domestic courts to take some elements from domestic interpretative methodologies, but it remains unclear, to date, which elements are relevant. To provide just an example, relevant methods may include (but are not limited to): grammar (textual interpretation), systemic interpretation (intra-conventional and inter-conventional), historic interpretation, teleological, while the relative weight of different methods is not clear.

Such a list indicates that the problem remains to say what this blend of different national methodologies looks like and how a domestic court should develop it in solving a dispute.²¹ Surely, it is also not clear whether there is some sort of hierarchy within the selected methodologies that should be part of such a 'blend'.

¹⁷ Gebauer, *supra* n 7, at 687.

¹⁸ Before at n 2.

¹⁹ F Enderlein, *Uniform Law and its Application by Judges and Arbitrators* (General Report) in Unidroit (ed.), *International Uniform Law in Practice*. Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (Unidroit, Rome, 1988) at 329.

²⁰ F De Ly, *Uniform Interpretation: What is Being Done? Official Efforts* in F Ferrari (ed.), *The 1980 Uniform Sales Law Old Issues Revisited in the Light of Recent Experiences*, 335-344 (Giuffrè, Sellier 2003).

²¹ There is no need to stress that CLOUT and UNILEX databases are very important tools for lawyers and courts because they offer a wide collection of judgments and arbitral decisions, and report them according to certain search criteria (e.g. Articles of the convention, Country), about the CISG. The main limit of such tools is that they are necessarily limited in providing for an abstract into English of the judgments rendered in domestic languages.

See the Introduction to the Digest of Case Law on the United Nations Sales Convention, U.N. GAOR, 37th Sess., Note by the Secretariat, U.N. Doc. A/CN.9/562 (2004).

The second option requires the court to elaborate a sort of synthesis of the existing methods by examining foreign methodologies, or by deriving such synthesis of methodologies from the case-law or legal scholarship. To clarify the idea, an author was initially proposing to elaborate a synthesis of the methods of interpretation found in continental European and Common Law systems, since neither system by itself provided a satisfactory methodology for interpreting international unified law. While the idea is challenging, it failed because it was not easily feasible in practice.²²

So it seems to us that both the above mentioned options require domestic courts to rely on comparative law in dealing with the differences among legal systems, precisely, in considering domestic interpretative methodologies, comparing them, and elaborating the proposed 'blend' or 'synthesis' of the most relevant methods. Needless to stress here that it is not very reasonable to expect that civil and commercial courts in domestic jurisdictions will act as comparative lawyers, without an adequate specialisation and training in adjudication international commercial transactions (see *infra*, section 8).²³

In addition, both these options require domestic courts to consider foreign courts' case-law by avoiding to immediately shift to domestic case law. An example often quoted by scholars is the judgment rendered by the Tribunale di Vigevano in 2000. When dealing with some of the typical issues raised by the CISG, such as party autonomy notice of non-conformity and burden of proof, the court had only cited a few foreign decisions, referred to an unprecedented number of 40 foreign court decisions and arbitral awards. The Tribunale of Vigevano has shown a certain willingness to take into consideration foreign decisions and some knowledge and research of foreign case law that has not been very common among courts of many countries.²⁴ Legal scholars report other examples, while such judgments referring to foreign precedents remain quite isolated over time.²⁵

²² M Dietrich, *Autonome Auslegung von internationalem Einheitsrecht*, 105 et seq. (1994), quoted by M Roth, R Happ, *Interpretation of Uniform Law Instruments According to Principles of International Law* 4 ULR 702 (1997).

²³ See *Fothergill v. Monarch Airlines* [1981] A.C. 251, 282 (Lord Diplock) and 290 (Lord Scarman) with regard to the Warsaw Aviation Convention.

²⁴ Tribunale di Vigevano (Italy), 2000-07-12: case number 387 (UNILEX). For a comment, F Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy)*, 6 ULR 203 (2001).

²⁵ F Ferrari reports some relevant references in his chapter titled *Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts* in CB Andersen & UG Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday*, 134-167 (Wildy, Simmonds & Hill Publishing 2008).

See also LA Di Matteo, L Dhooge, S Greene and V Maurer, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence* 24 Nw. J. Int'l L. & Bus. 299-440, 309 (2003).

2.3. *The Homeward Trend*

Despite all these important efforts to facilitate access to foreign case-law, in practice, only few judgments have adopted this approach by fully respecting the 'international character' of the CISG.²⁶ Other judgments have been (and still are) rendered by domestic court by relying on domestic concepts and interpretative methodologies.

Here the point is that such comparative research to a 'blend' or a 'synthesis' from the national legal systems would seem to be feasible in conventions involving a limited number of contracting states sharing a common legal, economic and cultural basis, such as, the Member States of the EU. This technique of elaborating a 'synthesis' of national solutions in order to promote autonomous interpretation is not very convincing concerning conventions, such as the CISG, with a number of contracting states from very different legal systems. In addition, we could not ask civil and commercial courts, usually applying domestic laws, to have the skills and competencies (i.e. knowledge of foreign languages), of comparative lawyers.

Third, uniform private law conventions, and particularly the convention we mention as a 'paradigm' (i.e. the CISG), are being applied extensively both by international arbitral tribunals and domestic courts. In the case of the CISG, more than seventy contracting states are part of the convention system. On such a basis, there is no need to underline that each judge and arbitrator is influenced by the legal methodology (and concepts) of their home jurisdiction. Therefore, it is somewhat of a paradox that whilst the number of contracting states is constantly increasing so too is the threat of variation in application.²⁷ So the third interpretative option applies when, in overcoming the confused solutions under options one and two, the domestic court finally turns to domestic concepts and interpretative methods (i.e. the 'homeward trend').²⁸ In fact, the bias towards looking for solutions in domestic case law is obviously present in the mind of civil judges, who are not generally experts of foreign or international law. Actually, domestic civil courts most commonly interpret and apply contracts, statutes, or constitutions, not treaties or conventions.

Most will agree that uniform application of the CISG is dependent on its uniform interpretation by various fora. In turn, uniform interpretation of the CISG depends upon the willingness of the court to consider foreign precedents. To date, domestic courts still tend to interpret the same provisions contained in uniform private law conventions differently, each having their own guiding objective, underlying value system, and interpretative community, thereby contributing to the cacophony of fragmentation in their application.

So courts do not always comply with the mandate (of Article 7 CISG) 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

²⁶ For more references see n 25.

²⁷ A book edited by A Jansen and O Meyer introduces the diverging domestic interpretations about the CISG, including China and a number of countries. The book is quoted *supra* n 7.

²⁸ Ferrari, *supra* n 12.

allows one to state that a ‘homeward trend’ is discernible, at least by some courts. This trend is deplorable because it promotes parochialism and, thus, defeats the very purpose of the CISG, namely the creation of a uniform sales law aimed at the creation of legal certainty and ‘the removal of legal barriers in international trade’.²⁹

It is now clear that the domestic court is facing a very fragmented and confusing set of options. Clearly, the uncertainty arising from these options undermines uniformity, and in case of reliance on domestic methods, the international characters, too.

3. The ‘Autonomous Interpretation’

3.1. *A Private Lawyer*

The question is whether the autonomous interpretation of uniform law can also be expressly defined. One of the pieces of this puzzle is how uniform private law conventions engage with national law where it is necessary to interpret and apply them. To clarify, the main issue is whether the concepts, and, for the purposes of our article, the interpretative methods, under the CISG are really autonomous in relation to domestic ones.

For example, the solution offered in the CISG case-law is ambiguous provided that few judgments have expressly relied on the ‘autonomous’ interpretation, while the majority seem to ignore it. 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’.³⁰ An express reference to the need to interpret the CISG autonomously can – just to provide a few examples – be found in another Swiss case³¹, an Austrian case³² and several recent Italian court decisions, rendered by the Tribunale di Padova in 2005, as well as the Tribunale di Modena.³³ In particular, the court explicitly did so in 2004 by saying that from a substantive point of view, it is necessary that the contract concerns the sale of goods which, however, the convention does not define. Nevertheless, the lack of an express definition should not lead one to resort

²⁹ *Ibid.*

³⁰ Richteramt Laufen des Kantons Bern (Switzerland), 7 May 1993, *Automatic storage system case*, *Revue suisse de droit international et de droit européen* 277-278 (1995).

³¹ Handelsgericht Aargau (Switzerland), 26 September 1997, *Cutlery case*, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 78-80 (1998).

³² Oberster Gerichtshof (Austria), 23 May 2005, *Coffee machines case*, *IHR* 165 ff (2005).

³³ Tribunale di Padova (Italy), 11 January 2005, *Ostroznik Savo v. La Faraona soc. coop. a r.l.*, *3 Rivista di diritto internazionale privato e processuale* 791 ff (2005). Tribunale di Modena (Italy), 9 December 2005, *XX Cucine S.p.A. v. Rosda Nigeria Limited*, excerpt published in *2 Rivista di diritto internazionale privato e processuale* 387-391 (2007).

to a domestic definition, such as that to be found in Article 1470 of the Italian Civil Code. Italian judges were actually stating that ‘in effect, the Convention’s concept of contract for the sale of goods has to be interpreted, as has the majority of concepts (such as that of place of business, habitual residence, goods) autonomously, i.e. without resort to concept characteristic of any particular legal system’.³⁴

3.2. *A Public Lawyer*

In public international law, the concept of autonomous interpretation could point to recourse to the common rules of interpretation set by Articles 31-33 of the VCLT.

After all, uniform private law conventions are international treaties (as defined by Article 2(1)(a) of the VCLT). They are international agreements concluded between states. They are ‘governed by public international law’, differing from those international agreements ‘which, although concluded between States, are regulated by the national law of one of the parties (or by some other national system chosen by the parties)’.³⁵ Moreover, taken overall, Articles 31 and 32 of the VCLT are widely understood as reflecting customary norms.³⁶ This implies that the principles and means of interpretation of these articles express are of general application, irrespective of whether States involved in the interpretation of a treaty have ratified the VCLT. Quite straightforwardly in principle, it follows that they should be considered when searching for a way to interpret uniform private law autonomously. By applying international law conventions to international contracts the domestic judge would have to take account of their international conventional nature. However, civil judges are often unfamiliar with the use of international law, among other reasons because many countries apply international norms domestically, through the intermediary of the internal source inserting them into the domestic legal order (see *infra*, section 6). The following arguments, together with those under section 4.2 below, may better explain and sustain these assertions.

In fact, as was said earlier, international law enjoys a ‘single’ set of rules on interpretation as far as treaties are concerned.³⁷ Being ‘single’ implies that this set of rules is both common to all treaties and ‘autonomous’ from other frameworks for legal interpretation. Although some debate was held at the early stages of the works of the International Law Commission (ILC) on the codification of international treaty law,

³⁴ Tribunale di Padova (Italy), 25 February 2004, *Agricultural products case*, *Giurisprudenza italiana* 1405-1408 (2004).

³⁵ International Law Commission, Draft Articles on the Law of Treaties, with Commentaries, Yearbook of the ILC, II (1966) 187, 189.

³⁶ This was recognized and expressly endorsed by the ICJ itself, as well as by other international courts and tribunals and by national courts. References are provided by Gardiner, *supra* n 6, at 14 et seq. See, in particular, ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, (2004), ICJ Reports 37-38, para. 83. See also Art. 2(2)(b) of the Resolution of the Institut de droit international on ‘L’interprétation des traités’, *Annuaire IDI* 359 (1956).

³⁷ Gardiner, *supra* n 6, at 14 et seq.

it was finally agreed to insert provisions on the interpretation of treaties in the Convention.³⁸

A reason for providing a normative framework for the interpretation of treaties in the VCLT is legal certainty. As one of the chairmen of the ILC Working Group on the matter said ‘the VCLT rules of interpretation are meant to apply to all treaties, for the benefit of the certainty of law’.³⁹ It is commonly understood that they apply to all treaties including those concluded before the entry into force of the VCLT itself (1980); they apply ‘across the board’ irrespective of the subject matter; finally, they apply to all states (and other international subjects), even when the states involved are not part of the VCLT, because – or, insofar as – they are of customary nature.

Another reason for opting for a single set of rules of treaty interpretation is given by the very notion of treaty (an agreement between at least two parties). In other words, the rejection of unilateralism is intrinsic in this field of law.⁴⁰ Along this line of argument, Article 31(3) of the VCLT on the interpretation of a treaty put in its wider context and Article 33 on the interpretation of treaties authenticated in two or more languages imply that there cannot be unilateral approaches to the meaning of treaty terms. Additionally, some treaties contain provisions aimed to avoid unilateral interpretation. For example, in the EU system power on uniform interpretation is conferred upon a central body (i.e. the Court of Justice of the European Union, ‘CJEU’). Other treaties refer to the application of the treaty’s general principles. This is precisely the case with Article 7(2) of the CISG.

It follows that interpreters of treaties need to search for the ‘only and objective meaning’ of the terms of that treaty. Only in the case that a treaty provides so, they may find this meaning within the internal legal order of one contracting state. For example, any treaty provision that states that an issue is to be dealt with in accordance to the law of the contracting parties, requires a construction of the meaning specific to a national legal order. Otherwise, the interpreter of a treaty may extract the only and objective meaning of the terms of the treaty in question from the general principles of that treaty, or from the principles common to the contracting states. However, to do so, interpreters are given a single normative framework of interpretation, as specified at Articles 31-33 of the VCLT. At the same time, as will be seen in the next sections (4-6), this does not exclude different approaches or techniques of interpretation that have been developed within specific sub-sets of international law.⁴¹

³⁸ ILC, *supra* n 35, at 217 et seq. See ME Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission* in Cannizzaro, *supra* n 6, 105, at 106. The author notes that ‘in most domestic legal orders rules on interpretation on national legislation will not be found in the legislation itself, so misgivings may arise whether ‘it is indeed necessary to have a rule on the interpretation of treaties in a treaty on treaties’.

³⁹ R Ago, Report of the 726th meeting, 19 May 1964, Yearbook of the ILC, 23 (1964).

⁴⁰ C Focarelli, *Schemi delle lezioni di diritto internazionale*, 68 (Morlacchi 2003).

⁴¹ See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by M Koskeniemi, A/CN.4/L.682, 2006.

4. Applicability of the VCLT to Uniform Private Law Conventions

Given the meanings of 'autonomous interpretation' from the two perspectives of our dialogue, we must now address the relationship between the autonomous interpretation and the principles of public international law on the interpretation of treaties. The precise question is whether Articles 31-33 of the VCLT govern the interpretation of uniform private law conventions. In a subsequent section, we will approach the same question within the context of the interpretation of uniform private law conventions by domestic judges, i.e. the activity through which domestic courts give meaning to a uniform private law convention in the context of a particular case or fact pattern (see *infra*, section 7).

4.1. *A Private Lawyer*

Legal scholars in uniform private law have elaborated some theses about the relationship between Articles 31-33 of VCLT and uniform private law conventions.

According to an early thesis, the autonomous character of the CISG includes 'autonomy from both domestic law and public international law'.⁴² Rather than resort to the interpretation methods applied in international law, namely Articles 31-33 of the VCLT, most authors maintain that uniform law must be interpreted autonomously, arguing that not only terminology but also the methodology must be derived from the Convention itself. For example, many commentators agree that the CISG contains its own principles of interpretation. Therefore, its interpretation can and should be entirely based on the CISG itself, without recourse to the interpretive principles of international or national law.⁴³

The issue here is that private international instruments, for example the CISG, may live alone in 'splendid isolation' by being (ideally) detached from both domestic law and international law. The concerns expressed by legal scholars about a homeward trend in CIGC application before domestic courts evidently confirm this point.⁴⁴

The second thesis discusses whether international law principles of interpretation are suited, or not, to uniform private law instruments. In fact, the VCLT has been primarily conceived for treaty provisions that impose rights or obligations of States. Uniform private law conventions set out the obligations of the private parties, in a form that is directly applicable in national law. For example, in the German literature on CISG the application of Articles 31-33 of the Vienna Treaty Convention is questioned as a matter of principle. Some authors also argue that these provisions are only significant for the final Part IV of CISG.⁴⁵

⁴² Basedow, *supra* n 7, at 731 et seq.

⁴³ This is the position of JO Honnold, *Uniform Law for International Sales under the United Nations Convention*, 89 (3rd ed., Deventer, 1999).

⁴⁴ Ferrari, *supra* n 12.

⁴⁵ Dietrich, *supra* n 22, at 133.

This view, however, risks confusion at two levels of interpretation which should be kept strictly separate: the interpretation of a Convention is one thing, the interpretation of contracts which come into existence within the scope of application of that Convention is a totally different issue which is explicitly covered, for example, by Articles 8 and 9 CISG. In fact, it should be kept in mind that any multilateral, law-unifying treaty is a contract governed by international law from which legal rights and obligations among contracting states are the result. Under CISG, therefore, signatory states and their courts are committed to applying the rules laid down in Articles 1-88 of the CISG to the international sale of goods.

The third thesis advances the idea of the specialty of the CISG with respect to other international conventions not dealing with the law of sale, i.e. a purely private matter. Some authors question whether the CISG is subject to a specific interpretative regime. However, there is no clear evidence that the state parties to the CISG did intend to set up a special interpretive regime.⁴⁶

According to a fourth thesis, other commentators support reference to the VCLT to provide guidelines for the interpretation of the CISG because Article 1 of the VCLT provides that it is applicable to treaties between states and that the CISG therefore falls under its scope of application.⁴⁷ Whilst it is true that the content of obligations differs, it has been noted that there is nothing to suggest that Articles 31-33 of the VCLT do not apply to all types of treaties and treaty obligations.⁴⁸

4.2. *A Public Lawyer*

Whether the provisions on interpretation in the CISG constitute *lex specialis* to Articles 31-33 of the VCLT comes exactly into the remit of an international lawyer. In fact, there can be no question that the customary norms on treaty interpretation apply to uniform private law conventions, once it has been determined that there is one single set of rules of interpretation for all treaties (see *supra*, section 3). The VCLT rules are applicable to the CISG and other conventions of uniform private law in light of the formal nature of treaties of these instruments. The only way the VCLT rules of interpretation, as *lex generalis*, may not be applied is through the insertion of *lex specialis* into a given treaty.

Authors with an international legal background support the point that there is no *lex specialis* on the interpretation of uniform private law conventions.⁴⁹ Provisions

⁴⁶ Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, UN Conference on Contracts for the International Sale of Goods (Vienna 10 March – 11 April 1980) (11 April 1980) UN Doc A/CONF.97/19 at 260, where the Swedish delegate remarked that the VCLT might be useful in relation to provisions on the interpretation of the contract; even so, the delegate only suggested that the VCLT provided a useful model on ascertaining intentions of parties.

⁴⁷ T Allen, *General Principles of International Law and the Autonomous Interpretation of the Convention on Contracts for the International Sale of Goods* 8 J. Islamic St. Prac. Int'l L. 94 (2012).

⁴⁸ *Ibid.*

⁴⁹ Bariatti, *supra* n 6, at 251.

on interpretation of the relevant convention such as Article 7 of the CISG do not seem aimed at asserting *lex specialis* but rather at excluding unilateralism which would undermine the very purpose of the uniform private law conventions. In other words, the VCLT may offer the methodologies that are not clearly stated by uniform private law instruments, which are only indicating the goals – international character, uniformity and good faith in international trade. These goals are pursued by resorting to the generally-applying international norms on treaty interpretation as set in the VCLT.

5. Treaty Interpretation under the VCLT

Turning to the rules of interpretation of the VCLT themselves, some overall remarks should be made to help appreciate the content of Articles 31-33 of the VCLT for the purposes of this article.

First of all, the norms under consideration provide the interpreter with a well-defined approach or method of interpretation. The construction of the meaning of the terms of a treaty is enshrined in a structured, multi-faceted set of tools. A ‘general rule’ specifies the primary means of interpretation (Article 31), while other means are clearly identified as ‘supplementary’ (Article 32), and guidance is given on the interpretation of texts authenticated in two or more languages (Article 33).

Also on a general note, the means of interpretation covered by these rules convey a prominent role for objective interpretation. The text is the basis for the interpretation of a treaty; it text is presumed as the authentic expression of the will of the parties and its meaning is to be assessed on objective grounds.⁵⁰ This does not mean that subjectivism – or the will of the parties – is completely excluded. On the one hand, Parties’ unilateral or common understanding of the terms of a treaty is an element to be taken into consideration in the context of the terms of a treaty, with specific qualifications (Article 31(2) and (3) of the VCLT). On the other hand, the original intentions of the parties are considered – although only – among the supplementary means of interpretation (Article 32). Broadly speaking, it is clear, that under the VCLT rules the former, ‘objectivized’ intentions of the parties under the general rule trump the role of parties’ original will.

The following remark must be added. Within the two broad features outlined above, the VCLT rules provide for several means of interpretation without a specified hierarchical relationship among them and without any obvious pre-determined weighting. Thus, different interpretative approaches are available to the interpreter, and the result of the interpretation of a term of a treaty according to the VCLT rules is not necessarily uniform when applied by different interpreters. This is also true when the interpreters are domestic courts. In other words, the fact that domestic courts resort to the VCLT rules to interpret uniform private law conventions does not neces-

⁵⁰ ILC, *supra* n 35, at 220: ‘the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties’.

sarily result in uniform interpretation of the law – but likely the adoption of the same interpretative methods convey a convergent interpretation.⁵¹

5.1. *The General Rule, Supplementary Means, and Texts Authenticated in Two or More Languages*

The general rule of interpretation set at Article 31 of the VCLT requires that a treaty is interpreted in accordance with the ordinary meaning of the terms, put in their context and in light of the object and purpose of the treaty (Article 31(1) VCLT).

Article 31, paragraphs 2 and 3 of the VCLT define the context of the terms that are the object of interpretation. The context is many-fold. An inner context, i.e. which is most intimately related to the terms, includes not only the article or the section in which a term is inserted, but also the preamble and annexes (Article 31(2), first sentence). Additionally the context is next to the text given by documents connected with the text. These are related agreements between all the parties (Article 31(2)a; e.g., protocols and declarations) and ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty’ (Article 31(2)b); e.g., unilateral or plurilateral declarations, reservations). Furthermore, the interpreter should take into account a wider context. It results from subsequent agreements between the parties on the interpretation or application of the treaty itself (Article 31(3)a), or subsequent practice establishing an agreement of the parties on the interpretation of the treaty (Article 31(3)b), or other sources of international law applicable in the relations between the parties (Article 31(3)c).

Article 31, paragraph 4 of the VCLT incorporates the exceptional circumstance in which, notwithstanding the apparent meaning of a term, parties decided to confer a special meaning to it.

Article 32 of the VCLT indicates what must be considered as supplementary means of interpretation. These include the preparatory works of the treaty and the circumstances of its conclusion, as explicitly stated by the provision at stake. They also implicitly refer to ‘rational techniques of interpretation’ (such as *contra proferentem*, *interpretatio in favorem debitoris* etc.) and translation of the treaty text which is not an authenticated version.⁵² Importantly for our dialogue (see *infra*, sections 5.2 and 6), these means are not intended to be alternative or autonomous, but as an aid to the means contemplated under the general rule.⁵³ Thus, recourse to such elements is supplementary in the sense that it can only be made, as stated in Article 32 itself, ‘in order to confirm the meaning resulting from the application of Article 31, or to determine

⁵¹ On variants on the usage of the VCLT by domestic courts and on coherence of the interpretative results, see T Reinold, *Diffusion Theories and the Interpretive Approaches of Domestic Courts* in HP Aust, G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, 267 (Oxford University Press 2016).

⁵² Villiger, *supra* n 38, at 112-113.

⁵³ ILC, *supra* n 35, at 223.

the meaning, when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable’.

Finally, Article 33 of the VCLT deals with the issue of interpretation of treaties authenticated in two or more languages – an aspect that is highly sensible in the realm of uniform private law conventions (see *infra*, section 6). The VCLT provides equal authority to the text in each language, except when otherwise stated in a treaty, and a presumption in favour of the same meanings of the terms of the treaty in each language. Should discrepancies in the meaning of the terms of equally authoritative texts in different languages remain after the application of the general rule and the supplementary means of interpretation, the interpreter must refer to the object and purpose of the treaty to determine and adopt the meaning that best reconciles the texts.

5.2. *Specific Interpretative Approaches and Variable Interpretative Results*

As the International Law Commission stressed in its commentaries on the VCLT, the application of the various elements or means of the general rule of interpretation is not hierarchically ordered, but is a ‘single combined operation’⁵⁴ On the one hand, it is an operation of such a kind that the ordinary meaning of a term (the starting element of the general rule and logically the starting point of treaty interpretation) is not sufficient *per se*, but has to be considered in combination with the other elements of the general rule. On the other hand, this single combined operation also implies that although different means of interpretation are adopted with some priority and a usual order, this is not pre-determined or binding, but interpreters may give different weights to the same elements. Therefore, the outcome of the interpretative activity according to the VCLT rules is not necessarily uniform.

To illustrate this point, one may outline the different approaches or techniques of interpretation that have been developed within specific sub-sets, or self-contained regimes, of international law.⁵⁵ In the field of human rights treaty law, emphasis has been put on the element of the purpose of the treaties (i.e. the protection of individuals’ rights) in favour of a teleological interpretation. At the same time, human rights treaty terms have been given meaning taking into account societal changes over time (‘evolutive’ or ‘evolutionary’ interpretation).

As regards teleological interpretation in general, the objective or the spirit of a treaty may be taken from the treaty’s preamble as sustained by the full text’s substantive provisions. Notice should be given to the limitations to this interpretative approach. It cannot result in the alteration of the clear meaning of terms, and cannot be made in isolation from the terms of the treaty.⁵⁶ Additionally, a purely general

⁵⁴ *Ibid*, at 219.

⁵⁵ See the Report on Fragmentation by M Koskeniemi, *supra* n 41, at 65 et seq. See also, among many others, M Waibel, *Uniformity versus Specialization: A Uniform Regime of Treaty Interpretation?* in C Tams, A Tzanakopoulos, A Zimmermann (eds), *Research Handbook on the Law of Treaties*, 375 (Edward Elgar 2014).

⁵⁶ On teleological interpretation before the CJEU, see MP Maduro, *Interpreting European Law:*

teleological approach falling short of considering the other elements of the general rule of interpretation set under the VCLT would be at odds with this rule.

It is debated whether evolutionary interpretation is a separate method of interpretation with respect to those indicated in the VCLT. In both case law and literature, authoritative arguments may be found, which plead that this approach is not detached from the means of interpretation considered by the VCLT rules – on the contrary it fits in with them by emphasizing the intentions of the parties.⁵⁷ According to this view, evolutionary interpretation may be the exact result of the correct application of the VCLT rules.⁵⁸

Some insights may help catch the potential relevance of evolutionary interpretation for interpreting uniform private law conventions. Already mentioned by the ICJ in the Opinion on the case of Namibia in 1971,⁵⁹ evolutionary interpretation has recently received a working definition by the ICJ in Navigation Rights.⁶⁰ The ICJ was to interpret the phrase ‘for the purposes of commerce’ in a treaty of 1858 between the parties to the dispute; the question was whether ‘commerce’ included tourism, i.e. one of the sectors where trade in services – as it is now understood⁶¹ – occurs. The Court held that the term is to be interpreted to cover all forms of commerce, as the parties i) chose a generic term ii) in a long-lasting treaty and iii) must have been aware of the likely evolution of its meaning. These elements indicate when evolutionary interpretation is appropriate. According to the Court, evolutionary interpretation refers to ‘situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them, – a meaning or content capable of evolving, not one fixed once and for all, to make allowance for, among other things, developments in international law’.⁶²

Judicial Adjudication in a Context of Constitutional Pluralism 1 European Journal of Legal Studies 1-21 (2007).

⁵⁷ E.g., *Mapiripán Massacre v. Colombia*, IACtHR (Judgment) 15 September 2005, para. 106: ‘The Court has pointed out, as the European Court of Human Rights has too, that human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolutive interpretation is consistent with the general rules of interpretation set forth in Art. 29 of the American Convention, as well those set forth in the Vienna Convention on Treaty Law. In this regard, when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being.’ On the place of evolutionary interpretation within the American human rights treaty system, see most recently, CE Arévalo Narváez, PA Patorroyo Ramírez, *Treaties over Time and Human Rights: A Case Law Analysis of the Inter-American Court of Human Rights* 10 Anuario Colombiano de Derecho Internacional: ACIDI 295 (2017).

⁵⁸ E Bjorge, *The Evolutionary Interpretation of Treaties*, 2 (Oxford University Press 2014). As argued by this author, ‘evolutionary interpretation concerns the intention of the parties, which is the most important thread running through the law of treaties’, thus being ‘the result of a proper application of the usual means of interpretation, as means by which to establish the intention of the parties’.

⁵⁹ ICJ Reports (1971), 1.

⁶⁰ Dispute regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*) Judgment, ICJ Reports (2009) 213.

⁶¹ See Art. 1 of the General Agreement on Trade in Services, 1869 UN T.S. 183.

⁶² *Ibid.*

Another increasingly widespread approach to treaty interpretation is systemic interpretation. Article 31(3)c of the VCLT's element of 'relevant rules of international law applicable in the relations between the parties' is normally considered the trigger of systemic interpretation. Each of the terms of this phrase helps to identify which of the wider, external context where the treaty is in force, might come into play when interpreting a treaty. However, here it is not possible to give a full account of the debate on this approach to treaty interpretation. The following section will briefly recall the main aspects of Article 31(3)c of the VCLT trying not to fall short of the controversy surrounding them.

'Relevant' is understood to refer to the subject matter of a treaty, implying that the interpreter of a treaty may have recourse to other treaties on the same subject-matter. The reference to 'rules of international law' points to public international law, and its sources according to Article 38 of the Statute of the ICJ. Cutting short a long and articulated debate in the literature, this provision is normally used to bring into play other treaties applying to the parties, although the same reference to such other treaties may also be established on other grounds than Article 31(3)c of the VCLT.⁶³ As the plain text of the provision shows, there is no requirement for the relevant rules to be in place at the time of the conclusion of the treaty under interpretation. Another issue is whether another treaty is relevant for the purposes of the application of Article 31(3)c of the VCLT only if it is binding upon all the parties to the treaty under interpretation, or at least upon the parties involved in the application (and interpretation) of that treaty in a given circumstance. Although the issue is far from clear and settled, the latter option seems to find support in the literature and in the case law, as well as in a Report of the ILC.⁶⁴ Finally, if the term 'rules' refers to all sources mentioned under Article 38 of the Statute of the ICJ, then judicial decisions are included, while soft-law documents are not, unless they are an expression of general principles of international law or stimulate their formation. In particular, in the field under consideration one interesting question is whether the Unidroit Principles are contributing – either as expression of general principles of municipal private law or through adherence to them at the domestic level – to the formation of general principles of law recognized by civilized nations.⁶⁵ Should this be the case, one might argue that the Unidroit Principles may be taken into account in an interpretative operation carried out according to the VCLT.⁶⁶ From the above, finally, it follows that under the VCLT, not only the systemic approach but also the teleological one allow recourse to inter-

⁶³ See the works of the Group of the ILC on Fragmentation, *supra* n 41.

⁶⁴ Gardiner, *supra* n 6, ft 96 at 317.

⁶⁵ On the concept of 'general principles of law recognized by civilized nations' see, e.g., J Crawford, *Brownlie's Principles of Public International Law*, 34-35 (OUP 2012). Specifically on the point at hand, see P Bernardini, *Private Law and General Principles of Public International Law* 21 ULR 184-189 (2016).

⁶⁶ The ECtHR, for example, has shown a relaxed attitude towards the nature of the instruments which may be taken into account as 'rules' under Art. 31(3)c of the VCLT, as it has often considered non-binding documents adopted by the Council of Europe's bodies as well as treaties not binding upon the party into investigation. See Gardiner, *supra* n 6, at 317.

temporal law in undertaking interpretation, or – put in other terms – to take account of the effects of the evolution of the law on the interpretation of the meaning of a term.⁶⁷

6. A Common Interpretative Framework

6.1. *Benefits From Applying the VCLT Rules to the Interpretation of Uniform Private Law Conventions*

As shown in the previous paragraph, international law offers common rules for interpreting treaties. As noted, these rules are set out in Articles 31-33 of the VCLT and reflect customary international law binding on all states. Therefore, our dialogue develops discussing the question whether the application of Articles 31-33 of the VCLT may be beneficial for the interpretation of the conventions of uniform private law.

Firstly, on a general note, we argue that the said VCLT rules may offer domestic courts a ‘common framework of interpretation’ of uniform private law. In particular, Articles 31-33 of the VLCT may just serve the purpose of contributing to a common foundation for judicial dialogue in interpreting uniform private law conventions.

Secondly, it does not suffice just to be aware of the interpretative methods that can be applied when interpreting uniform private law conventions. We note that it is also vital for the interpreters to be aware that the VCLT rules offer a structured set of interpretative methods,⁶⁸ in particular by specifying what are to be considered ‘supplementary’ means with respect to the general rule of interpretation. At the same time, the rules of interpretation themselves are open-textured. So, what could be deemed as a deficit of these rules may turn into a particular strength: they leave room for assimilation by national courts, which is often required by domestic audiences, while, at the same time, they provide for important clarifications, which facilitate the convergence in interpreting uniform private law instruments.

Consequently, our thesis is as follows. The VCLT principles are ‘universally’ valid and, therefore, also uniform. In contrast to autonomous methods there are no differences of opinions as to interpretation methodology; this is set out clearly in Articles 31-33 of the VCLT. As a consequence of the above, interpreting treaties by means of international law likely promotes more harmonious, if not uniform, application of law. Moreover, it is in keeping with the international character of uniform law instruments, which must be taken into consideration when interpreting their provisions.

⁶⁷ For a comparison, and linkages, between the general principle of intertemporal law and the provision of art. 31, para. 3, c) VCLT, see *ibid.*, 317 et seq. In international law, the general principle that a juridical fact must be appreciated in the light of the law contemporary to it found its expression in the dictum of Judge Huber in the *Island of Palmas* case (IIUNRIAA at 845). See R Higgins, *Some Observations on the Inter-Temporal Rule in International Law* in R Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, 867 (Oxford University Press 2009).

⁶⁸ Di Matteo and Jansen, *supra* n 13, have proposed a ‘bouquet of interpretative flowers’.

In particular, the VCLT offers two main principles representing the proposed 'common interpretative framework' for uniform private law conventions. The first is that treaties must be interpreted in good faith, in accordance with the ordinary meaning of the terms or text of the treaty, in their context, and in light of the treaty's object and purpose. The VCLT's second main principle is that the preparatory work of the treaty and the circumstances of its conclusion are only secondary means of interpretation to confirm meaning established under the first principle or in case the meaning of the treaty remains unclear or leads to an absurd result.

6.2. *Text, Party Intent, Context and Purpose for a Private Lawyer*

Three broad types of dominant hermeneutics can be discussed and assessed against the proposed common interpretative framework: text, party intent, and context and purpose-led interpretation.

a. *Text*

The first approach is to say that the best and most objective expression of intent can be found in the treaty text itself.

In this respect, there is no doubt that the starting point and object of every interpretation of uniform private law conventions, such as the CISG, is – as in domestic law – the wording of the articles (i.e. 'textualism' or 'objective interpretation'). A textual approach will give meaning to words, for example, by looking them up in a dictionary and trying to give these words, as they are used in a particular context, their 'ordinary meaning'. In fact, ordinary meaning is not necessarily identical to the dictionary or plain meaning approach found in common law. An ordinary meaning can be defined as the meaning that is normally used and understood in that field of law.⁶⁹

However, sometimes the ordinary meaning may not be clear enough, especially in light of a changing world. Two authors have provided two examples to clarify the issue of 'the ordinary meaning' with respect to the interpretation of the CISG.⁷⁰ The first example concerns the question whether Article 13 CISG ('writing') also includes electronic communication. Di Matteo and Jansen question whether the ordinary use of the word 'writing' also covers, for example, e-mails, or whether this is a gap under Article 7(2) CISG. Another example is based on a case decided by a German court in 1994: in fact, the Court of Appeal of Cologne held that a market analysis is not covered by the ordinary meaning of the word 'goods' and falls outside the scope of the CISG.⁷¹

In this respect, the 'single combined operation' required by the general rule of treaty interpretation of Article 31 of the VCLT gives meaning to such terms accord-

⁶⁹ Magnus, *supra* n 7.

⁷⁰ Di Matteo and Janssen, *supra* n 13.

⁷¹ Appellate Court Köln, 26 August 1994, *Diritto del Commercio Internazionale* 80 458-459 (1995).

ing to the ordinary meaning, but at the same time by resorting to the context, and to the object and purpose of the treaty (see *supra*, section 5.2).

Additionally, as the said authors note, the literal interpretation of the CISG's wording is complicated due to the fact that there are six different official language versions of the CISG (English, French, Russian, Arabic, Spanish and Chinese). They each have the same weight in the interpretation of the CISG. In practice, it is not plausible to think a national judge could or would consider all the language versions when interpreting the CISG. Implicit recognition of English as the 'official' language of interpretation has evolved by domestic courts, because English was the main working language of the drafting committee of the Convention.⁷² It has been underlined that the '[Convention] was drafted in Arabic, English, French, Spanish, Russian and Chinese. It was also translated into German, among other languages. In the case of ambiguity in the wording, reference is to be made to the original versions, whereby the English version, and, secondarily, the French version are given a higher significance as English and French were the official languages of the Conference and the negotiations were predominantly conducted in English'.⁷³ As English was the main working language of the drafting committee, it can arguably be assumed that, in case of discrepancies between the different language versions, the English text expresses the intention of the Conference better than any other official language versions. Thus, to promote CISG's uniformity in case of discrepancies, English language interpretation seems to be favored.⁷⁴

However, this solution differs from the interpretative hermeneutics of public international law (discussed *supra* at section 5.1).

Legal scholars often note that an objective interpretation, especially when based on the text of the Convention, has to be preferred to uniform private law instruments.⁷⁵ Subjectivity – referring, for example, to shared expectations or values of the drafters (rather than the meaning of words) – has been said to (further) open the door for judges towards discretion, and particularly, the homeward trend.

On such a basis one may maintain that the priority assigned by the VCLT rules to objective interpretation (Article 31 of the VCLT) perfectly fits within the interpreta-

⁷² Another problem is the common use of non-official language translations, such as German or Dutch. So in Germany, for example, the non-binding language version (German) is regarded as a 'de facto official language'. This is regrettable as divergences can arise between the non-binding and the official versions of the CISG.

⁷³ Supreme Court of Switzerland, 13 November 2003, 1 Swiss Review of International and European Law (SRIEL) 116 et seq (2005).

⁷⁴ I Schwenzer and P Hachem, Art. 7 CISG para. 21 in I Schwenzer (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed., Oxford University Press 2010).

F Ferrari, Art. 7 CISG para. 35 in K Schlechtriem and I Schwenzer (eds), *Kommentar zum Einheitlichen UN-Kaufrecht* (5th ed., CH Beck 2008). For a different opinion ('no prima facie preference for the English version'), see P Perales Viscasillas, Art. 7 CISG para. 34 in S Kröll, L Mistelis, and P Perales Viscasillas (eds) *UN Convention on Contracts for the International Sale of Goods (CISG)*, 111-141 (CH Beck, Hart, Nomos 2011).

⁷⁵ On the importance of the literal interpretation for the CISG, see especially S Eiselen, *Literal Interpretation: The Meaning of the Words* in Janssen and Meyer (eds), *supra* n 7, at 68-90.

tive hermeneutics that are proper for uniform private law conventions, such as the CISG. In particular, we note that this rule of VCLT guides the interpreter on the priorities within methodologies, by clearly establishing a relationship among them.

b. Party Intent

As just shown, while textualism is arguably the preferred approach to interpretation with a view to uniformity of results, this approach is clearly not sufficient for interpretation in any case. The experience with the application of CISG seems to confirm that domestic courts often face the necessity for a more active interpretive process. In these cases, the interpreter may be urged to dig deeper to uncover the actual, subjective intentions of the parties, for example, by looking at the preparatory works of a treaty.

Despite existing differences regarding the value of the legislative history between common law and civil law countries, the majority of legal scholars agree that an historic interpretation based on the legal history of the CISG (which is well documented and easily accessible) is a viable interpretative methodology.⁷⁶ In this respect, the attention for the *travaux préparatoires* assumes a particular importance because of the availability of documents relating to the legislative history of the Convention. This approach may contribute at restraining the homeward trend in application of the CISG.⁷⁷

In addition, there are examples of the use of preparatory works in CISG interpretation: the words 'period' and 'reasonable time' in Articles 38(1) and 39(1) of the CISG.⁷⁸ While several legal systems recognize such an obligation, others do not. It follows from the drafting history of both articles that these provisions were intended as a compromise between these two views.⁷⁹

The point is whether the VCLT rules on interpretation fit with this extensive recourse to parties' original will, including *travaux préparatoires*, and its underpinning rationale pertaining to Uniform Private Law Convention. It is worth reminding that the original intentions of the parties are considered (only) among the supplementary means of interpretation (Article 32 of the VCLT). Thus, under the 'common interpretative framework' the interpreter of uniform private law conventions should be aware that recourse to *travaux préparatoires* should be made not to the forefront

⁷⁶ There is a general agreement that the legislative history can and should be used for the interpretation of the CISG. See, for instance, I Schwenzer and P Hachem, *Art. 7 CISG para. 22* in Schwenzer (ed.), *supra* n 74.

F Ferrari, *Art. 64. 7 CISG para. 36* in Schlechtriem and Schwenzer (eds), *supra* n 74. And UP Gruber, *Legislative Intention and the CISG* in Janssen and Meyer (eds), *supra* n 7, at 91 et seq.

⁷⁷ See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March -11 April 1980, Official Records, Documents of the Conference and Summary of the Plenary Meetings and of the Meetings of the Main Committees 17 (1981).

⁷⁸ See, for more detail, M Kröll, *Art. 38 CISG para. 10 et seq.*, *Art. 39 CISG para. 4 et seq.* in Kröll, Mistelis and Perales Viscasillas, *supra* n 74, at 111-141. In addition, one may read J Reitz, *A History of Cutoff Rules as a Form of Caveat Emptor: Part I – the 1980 U.N. Convention on the International Sale of Goods* 36 *American Journal of Comparative Law* 437 ff (1988).

⁷⁹ For further examples of the historic interpretation, see Magnus, *supra* n 7, at 33-56 (*Art. 28 CISG*).

of the interpretative activity, but secondarily, in aid to the application of the means of the general rule of interpretation. At the same time, preparatory works are neither alternative nor autonomous means, but they fit within the broader legal framework of interpretation of treaty law.⁸⁰

c. Context and Purpose

The third type of hermeneutics in the field of uniform private law conventions is to focus not so much on the raw text of the treaty or the subjective intentions of the drafters themselves, but on the underlying objectives these drafters were attempting to achieve, and/or the wider context in which the treaty is applied.

For example, Article 7(1) and 7(2) of the CISG evidently contemplates an active role for courts in seeking out and giving content to the substantive principles that will guide the future development of the law. Consequently, it is easy to note that the general principles of the convention are nowhere expressly identified in the extant international conventions, and that many of those principles whose existence may be more evident (e.g. good faith, reasonableness, and the like) have neither a pre-determined, nor an immutable content in any event. In such cases, the teleological interpretation should be used with care because, if applied incorrectly, it could lead to homeward trend biased interpretation. In this respect, VCLT rules may be useful because, in providing a structured set of different means, they embed the use of the teleological interpretation.

There is another question here of whether uniform law instruments should be interpreted autonomously or as part of a system. It is often said that the CISG should be interpreted as an autonomous instrument from international law and domestic law. We challenge this view that poses the convention in a sort of unrealistic limbo and propose to enlarge the picture with a systemic interpretation, including primarily other uniform private law instruments.

The systemic approach of treaty interpretation helps to conceive uniform private law instruments as part of 'a fast-growing international body of uniform law'.⁸¹ Uniform law conventions often share many common terms and underlying general principles. Therefore, a settled meaning under one convention could be used to support the interpretation of another convention.⁸²

In this respect, the reference to the VCLT rules is useful, because they confirm the possibility for the domestic courts to rely on systemic interpretation. In addition, the 'common interpretative framework' of the VCLT is part of customary international

⁸⁰ See the website of the research project *Treaties as travaux préparatoires* at the Max-Planck-Institut für europäische Rechtsgeschichte (Professor S Vogenauer).

⁸¹ For example, F Ferrari, *I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e la necessità di un'interpretazione interconvenzionale* 1 *Rivista di diritto internazionale privato e processuale* 669 et seq. (2000).

⁸² This suggests, in essence, that the meaning of the basic terms of uniform law such as 'contract', 'breach of contract' or 'damages' should be the same in all uniform law conventions. Such an approach implies that uniform law may gain a 'genuine' uniform interpretation that is not limited to a single convention.

law. These rules formalize approaches and methodologies that are commonly applied by the various actors in international law. Here the point is that, instead of having regard to domestic legal concepts for interpretation, domestic courts should rather look to other sources of interpretative aids (not only treaties). In this regard, reference may be made to other relevant conventions, as well as other international instruments, such as the Unidroit Principles of International Commercial Contracts⁸³ (see *supra* section 4.2).

6.3. *Foreign Case Law for a Public Lawyer*

A specific note – although in a nutshell – should be added to the aforementioned considerations, which concerns the place and role of foreign case law in the ‘common interpretative framework’.

On the basis of the VCLT rules on treaty interpretation, domestic judgements may come into relevance too. Within the work of the International Law Commission on ‘Subsequent agreements and subsequent practice in relation to interpretation of treaties’⁸⁴, the Special Rapporteur Georg Nolte discussed the ‘[l]egal significance, for the purpose of interpretation and as forms of practice under a treaty, of ... decisions of domestic courts’.⁸⁵ Domestic case law assumes here a twofold relevance: ‘(a) such decisions themselves may be a form of subsequent practice in the application of the treaty; and (b) domestic courts should properly assess subsequent agreements and subsequent practice when they are called to interpret and apply a treaty’.⁸⁶

Domestic case law can be seen as conduct which may contribute to ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ (Article 31(3)b of the VCLT).⁸⁷ It should be noted here that under this provision subsequent practice must be taken into account as ‘a further authentic element of interpretation together with the context’: it ‘constitutes objective evidence of the understanding of the parties as to the meaning of the treaty’ insofar as it is a practice of the parties as a whole and action which has been taken under the Treaty.⁸⁸ In the context of Article 31(3)b of the VCLT, thus, foreign courts’ decisions must be considered in the interpretation of a treaty term only to the extent that they express an agreement of the parties (and the burden on the interpreter is heavy, as he or she must ascertain that this requirement is met).

⁸³ M Heidemann, *Methodology of Uniform Contract Law. The Unidroit Principles in International Legal Doctrine and Practice*, 53 et seq. (Berlin, Springer 2007).

⁸⁴ See <http://legal.un.org/ilc/guide/1_11.shtml#mandate> (accessed 5 Jan. 2018).

⁸⁵ Fourth report of the Special Rapporteur, Mr. Georg Nolte (68th session of the ILC (2016)), A/CN.4/694. The proposed draft conclusion No. 13 (*ibid.*, para. 112) has not been provisionally adopted by the Drafting Committee yet (http://legal.un.org/ilc/guide/1_11.shtml#mandate, accessed 5 Dec. 2017).

⁸⁶ *Ibid.*, para. 96.

⁸⁷ The issue is complicated. See Gardiner, *supra* n 6, at 258: ‘Decisions of a state’s courts are commonly taken as capable of constituting practice, though it is really necessary to see where ultimate authority to interpret treaties lies within the state to be sure that a court’s judgement does truly represent the interpretative position of the state.’

⁸⁸ ILC, *supra* n 35, at 221.

As noted by Nolte, subsequent practice may also constitute a supplementary means of interpretation according to Article 32 of the VCLT. In this latter case, the interpreter may have recourse to particular (foreign) domestic judgements, to confirm a meaning reached through the means of interpretation involved under Article 31 of the VCLT or to determine a meaning when such a meaning is ambiguous or obscure, or absurd or unreasonable. However, Nolte points out that selectivity among (foreign) domestic judgements that disregards significant countervailing practice is to be criticized.⁸⁹ At the same time, this form of judicial dialogue, it is argued, ‘may add to the development of a subsequent practice together with other domestic courts’.⁹⁰

It follows from the above that reference to foreign courts’ decisions is not an alternative method to the rules of interpretation within the general legal framework of treaty interpretation as drawn in the VCLT. Within the ‘single combined operation’ envisaged by the VCLT rules, domestic judges having to construe the meaning of a treaty term may investigate into other states’ judicial decisions. In doing so, they should carefully assess when foreign courts’ decisions are an element of subsequent practice which establishes an agreement between the parties, under the general rules of interpretation (Article 31(3)b VCLT), or when recourse may be made to them as supplementary means of interpretation, according to Article 32 of the VCLT.

7. The Duty of Domestic Courts to Apply VCLT Interpretative Methods

7.1. A Public Lawyer

The question is now whether domestic judicial bodies are under an international obligation to take the VCLT rules on interpretation into account when interpreting uniform private law instruments.⁹¹

At first sight, the answer would be affirmative, if one only considers that courts are definitively bound to apply their state’s international commitments – and courts’ behaviour including how they apply international norms are attributed to the state for purposes of international responsibility.⁹²

⁸⁹ Fourth report of the Special Rapporteur, Mr. Georg Nolte, *supra* n 85, para. 108.

⁹⁰ *Ibid.*

⁹¹ Generally, on the issues of application of international law in domestic legal systems and of interpretation of international law by domestic courts, see D Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011). See also E Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts* 4 EJIL 159 (1993). HP Aust, A Rodles, P Staubach, *Unity or Uniformity? Domestic Courts and Treaty Interpretation* 27 Leiden J. of International L. 75 (2014); Aust and Nolte (eds), *supra* n 51.

⁹² See e.g., B Conforti, *The Role of the Judge in International Law* 1:2 European Journal of Legal Studies (2007). Codification of the latter assumption can be found in Art. 4 of the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Yearbook of the ILC, II (2001), 31 ff, and 40. Also, the argument on the independence of judicial bodies has been rejected under international law, as shown by art. 27 VCLT according to which ‘[a] party may not invoke the provisions

However, at a deeper level of reflection (while it would not be possible to give full account of the rich doctrinal debate on this point), the answer may not be so straightforward – although one may ultimately maintain that it is still affirmative.

A preliminary issue should be mentioned on the type of the obligation to apply international principles on interpretation. As recently outlined by one author, the VCLT provisions on interpretation pertain to that category of international obligations that, if neglected, are not breached with the consequence that international responsibility arises. Indirectly, disregard of these principles in interpreting and applying international law may lead the State to breach another norm of international law, notably the interpreted treaty. In other terms, international rules on treaty interpretation provide obligations of result.⁹³ This line of reasoning was endorsed by the Belgian Court de Cassation with respect to the interpretation of the Convention on the Contract for the International Carriage of Goods by Road, where it stated that cassation would follow from a violation of the rules on treaty interpretation only if it resulted in a violation of the Convention at stake.⁹⁴

The question whether national judges should use the VCLT to interpret international uniform private law conventions is closely linked to the issue of implementation of treaties in domestic jurisdictions and present several facets.⁹⁵

One may argue plainly that judges should adopt the VCLT rules of interpretation in a contractual dispute where the CISG or another international treaty providing uniform private law is directly mentioned in the contract. This is irrespective of whether a forum has ratified the VCLT or not, given that the VCLT rules on interpretation have widely-recognized nature of customary law.

The difficult issues arise when there is no direct reference to the CISG or other international treaties dealing with the subject matter of uniform private law in the contract, but such an international treaty is the law applicable to the contract.

A difference of approach may stem from the monist or dualist attitude of national legal orders towards international law. In those states that make international treaties automatically part of their legal order upon ratification of a treaty, the judge is directly exposed to the international text. In those states which transform their international commitments into domestic norms, the international origin of the regulation may be less apparent. This especially occurs when the incorporation of a treaty into the national legal order is not made upon simple referral to the text of the treaty in a source

of its internal law as justification for its failure to perform a treaty'. Recently, these same arguments have been outlined to critically comment the well-known judgement of the Italian Constitutional Court, n 238 of 22 October 2014, by A Tanzi, *Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale*, *La Comunità internazionale* 13 (1/2015) at 21 et seq.

⁹³ A Nollkaemper, *Grounds for the Application of International Rules of Interpretation in National Courts* in Aust and Nolte (eds), *supra* n 51, at 34, 37 et seq.

⁹⁴ *Ibid.*, 38. *Cigna Insurance Company of Europe SA-NV v. Transport Nijs BVBA*, Cassation appeal, No. C.97.0176.N.ILDC 38 (BE 2000), 30 March 2000, Court de Cassation.

⁹⁵ Regarding soft-law instruments, the VCLT rules do not squarely apply to their interpretation. Soft law instruments may be contemplated in the hermeneutic activity according to the VCLT general framework provided that they meet one of the elements of art. 31(3) or art. 32 VCLT (see *supra* sections 5 and 6).

of the domestic legal order but through the re-wording of the content of the treaty into an internal act.⁹⁶ In such cases, the ‘international quality of a domesticated norm’ may be masked, as indeed the judge applies national law.⁹⁷ It has not always been clear whether the judge should import the VCLT rules to interpret the content of national law instead of applying the principles of interpretation of the domestic legal order in question.⁹⁸ As observed by one author, there are at least two other obstacles to the application of the international legal framework of treaty interpretation in this case, apart from the mask of the international quality of the internal norm. First, a presumption should be allowed that secondary rules – such as rules on interpretation – can migrate between legal orders. Second, domestic law governs the domestic institutions applying the internal norm.⁹⁹ The latter objection may be overcome by considering the notion of state for the purposes of international law as the whole set of entities that participate to the exercise of the public authority, thus including judges.

Not all treaties or provisions of a treaty are of direct applicability; some require further action by the states parties.¹⁰⁰ In this case too, the judge applies purely internal, not international law. A problem arises whether the judge should refer to the VCLT rules when interpreting such national law because the *occasio legis* was a treaty.

With reference to the Italian legal system in particular, but with considerations of broader application, one author outlines several reasons why the above mentioned obstacles should be overcome, and domestic courts should apply the international principles of treaty interpretation even when faced with domesticated norms. According to this author, from the perspective of international law, the way a State implements its international obligations internally (both primary norms and secondary norms like the norms on interpretation) is without relevance provided that the State abides by them.¹⁰¹ The fact that internal rules were adopted in order to introduce an international obligation into the domestic legal system may well justify the interpretation of such internal rules through the international principles of interpretation. The principle of presumption of conformity of all internal rules with the international commitments of a State also justifies the recourse to these hermeneutic norms.¹⁰²

7.2. *A Private Lawyer*

Interestingly, the issue presented and discussed by my colleague in the previous section at 6.1 has become central in the light of recent case-law about the CISG applica-

⁹⁶ Any difference in wording between the text of the treaty and the text of the national act implementing it may be seen as an understanding of the terms of the treaty by the legislature.

⁹⁷ Nollkaemper, *supra* n 93, at 42.

⁹⁸ For a review of the attitude of judges in the UK and in the US, see R Gardiner, *supra* n 6, at 145 et seq.

⁹⁹ Nollkaemper, *supra* n 93, at 43-44.

¹⁰⁰ This also implies that the implementation of an international treaty may vary from State to State within the limits of what is compatible with the treaty text (for example, a treaty provision offering States an alternative on how to deal with a certain issue).

¹⁰¹ Bariatti, *supra* n 6, at 234 et seq.

¹⁰² *Ibid.*, at 245.

tion and exclusion by a domestic court and its consequences, and the subsequent doctrinal debate. The CISG provides governing law for disputes involving contracts for the sale of goods between parties whose places of business are in different signatory States (Contracting States). By its own terms, however, the CISG permits parties to contracts that would otherwise be governed by it to derogate from any or all of its provisions.¹⁰³ The most controversial are cases in which the parties litigate a dispute arisen under a contract that satisfies the criteria of Article 1(1)(a), but – during that litigation – proceed to invoke a law other than the CISG. We refer to a judgment of 2016 to clarify the question.¹⁰⁴ In this case, the parties made no mention of the CISG in their pleadings, the plaintiff's attorney asserted during a pre-trial conference that they were comfortable with the application of New York law, and the plaintiff consistently framed arguments in terms of substantive New York law to the exclusion of the CISG. Three years after the litigation commenced, the plaintiff asserted for the first time that the CISG had governed the dispute. The US Court of Appeals concluded that the conduct of the plaintiff and its attorneys constituted consent to the application of substantive New York law sufficient to exclude the CISG from the case. Other courts, primarily in the USA, have followed the same reasoning in similar cases.¹⁰⁵

Most commentators and several courts find this result objectionable. They maintain that when the CISG applies, it displaces domestic law, including local procedural doctrines that allow a court to refuse to apply the CISG. In their view, a court in a contracting state that, due to the inattention or ignorance of parties or their attorneys or judges, allows domestic law to displace the CISG violates both the terms of the CISG itself and the obligations that state has incurred under doctrines that determine the applicability of treaties.¹⁰⁶

These arguments have been adopted and promulgated in an opinion of the CISG Advisory Council, a group of scholars of international sales law, who have combined to offer opinions concerning the interpretation of the CISG.¹⁰⁷ Therefore, the issue is controversial within the international community of CISG scholars.¹⁰⁸

¹⁰³ The clearest case of derogation involves an express statement within the contract that it is to be governed by law other than the CISG. Rules concerning derogation in what were initially ambiguous cases, such as where a governing law clause refers to the law of a contracting state without mentioning the CISG, have become standardized as courts have interpreted Art. 6 to require evidence of an intent to opt out, even if they do not limit derogation to express statements.

¹⁰⁴ *Rienzi & Sons, Inc v. N Puglisi & F Industria Paste Alimentari SpA*, 638 Fed Appx 87 (2d Cir 2016) (*Rienzi & Sons* 2016).

¹⁰⁵ *Eldesouky v. Aziz*, 2015 US Dist LEXIS 45990 at *7 (SDNY 8 April 2015).

¹⁰⁶ UG Schroeter, *To Exclude, To Ignore or To Use? Empirical Evidence on the Courts, Parties' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability* in L Di Matteo (ed.), *The Global Challenge of International Sales Law*, 649-655 (Cambridge University Press 2014).

¹⁰⁷ See CISG Advisory Council, Opinion No. 16: Exclusion of the CISG under Art. 6 <<http://www.cisg.law.pace.edu/cisg/CISG-AC-op16.html>> accessed 1 January 2018.

¹⁰⁸ CP Gillette, SD Walt, *Judicial Refusal to Apply Treaty Law: Domestic Law Limitations on the CISG's Application* 22 ULR 452-491 (2017). L Spagnolo, *Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole* in I Schwenzler & L Spagnolo (eds), *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference*, 181-221 (Eleven International Publishing, The Hague 2011).

As noted by my colleague, it seems that an obligation arises in domestic courts as a matter of international law, because of course the CISG is an international treaty. Such an obligation of domestic courts is expressly mentioned, just to provide an example, in the commentaries on the interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (often, the ‘New York’ Convention).¹⁰⁹ In the ICCA’s Guide to the New York Convention, the authors note that the convention is an international treaty. As such, it is part of public international law. Consequently, domestic courts are called upon to apply it and must interpret it in accordance with the rules of interpretation of international law, which are codified in Articles 31 and 32 of the VCLT.¹¹⁰ In other words, Articles 31 and 32 of the VCLT have to be followed in sequence: e.g., if the clarity of the meaning is not achieved by reference to the general rule embodied in Article 31, one looks to the supplementary rules embodied in Article 32 (see section 5 above). National rules of interpretation do not apply at all.

In addition, it is also interesting to read the leading case *Fothergill v. Monarch Airlines Ltd* concerning the consultation of travaux préparatoires according to Article 32 of the VCLT by English Courts. Lord Diplock stated: ‘By ratifying that Convention, [the] Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.’¹¹¹

What is also important, is that the treaty obligation used to apply the CISG seems applicable to both the monist and dualist legal systems.¹¹² Clearly, the description of the obligation to apply the CISG as a matter of international law is relatively unproblematic in monist states, where a theory of unity of legal systems and primacy of international law ensures that international treaty obligations directly bind national courts. However, the issue seems more problematic with reference to dualist states, where the accepted theoretical construct suggests two distinct legal orders of international law and municipal law, and in which, consequently, international law is not necessarily recognized as directly binding upon national courts, until transformed in a manner determined internally. Consequently we underline that the CISG has been integrated into the internal legal systems of contracting states, in the case of dualist states, either by being ‘incorporated’ or ‘transformed’ at the domestic level. In summary, the CISG forms part of domestic law, and its provisions incontrovertibly also bind national courts in dualist systems. The argument develops and concludes, by noting that as the CISG is a treaty and the rules of treaty interpretation are of custom-

¹⁰⁹ *Supra* n 14.

¹¹⁰ International Council for Commercial Arbitration, *supra* n 15, at 12.

¹¹¹ *Fothergill v. Monarch Airlines Ltd* [1981] AC251 (U.K.). The House of Lords was concerned with the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, as amended (1955), implemented in the Carriage by Air Act (1961) (U.K.).

¹¹² Spagnolo, *supra* n 108, at 194-195.

ary nature, domestic judges applying the CISG must interpret it according to the VCLT general framework of interpretation.

8. Proposals for Reform

Here the point is that the previous reasoning also applies to the interpretation of uniform private law conventions. Thus, domestic courts, when indulging in the home-ward trend in applying the CISG, are violating the mandate of Article 7(1): the article requires domestic courts to interpret the CISG with regard for its international character and ‘the need to promote uniformity in its application’. Legal scholars often note that this trend constitutes a serious – quite possibly the most serious – threat to the main purpose of the CISG: progress towards a uniform regime of international sales law. In addition, in the previous paragraph, we argue that domestic courts from contracting states are infringing the duty to apply the VCLT.

One may question whether domestic courts are aware of the existence of a distinct hermeneutical framework provided for by the VCLT when they decide cases pertaining to questions of uniform private law. In other words: do they acknowledge that the VCLT provides for specific rules of interpretation?

Unfortunately, they show a very limited awareness in this respect by just looking at the case law. Indeed, Articles 31-33 of the VCLT are rarely mentioned in the case law about the application of CISG. Few judgments by the Higher Courts of England¹¹³, the Federal Courts of the United States of America¹¹⁴, and Germany¹¹⁵ expressly mention them. Scarce attention and references also emerge in the case law of the CJEU.¹¹⁶ In addition, the provisions of the VCLT, when mentioned, are like a ‘clause de style’: ‘whether routinely and briefly referred to or solemnly reproduced verbatim, they are not always systematically applied’.¹¹⁷

In consideration of the above, the issue here is how to promote the ‘international turn’ before domestic courts in the interpretation of uniform private law conventions. Recently, an author suggested that it is necessary to change the interpreter’s background assumptions and conceptions by reconsidering their intellectual formation.

¹¹³ *Fothergill v. Monarch Airlines* [1981] A.C. 251, 282 (Lord Diplock) and 290 (Lord Scarman) with regard to the Warsaw Aviation Convention.

¹¹⁴ See, e.g., as to the *Warsaw Air Transport Convention*, *Day v. Transworld Airlines*, 528 F. 2d 31, 33 (2nd Cir. 1975); as to the Hague Child Abduction Convention, *Croll v. Croll*, 229 F. 3d 133, 136 (2nd Cir. 2000). As to the Brussels Bills of Lading Convention (Hague Rules), *Senator Linie GmbH & Co KG v. Sunway Line*, 291F 3d 145, 153 in n 7 (2nd Cir. 2002).

¹¹⁵ BGH 10.10.1991, BGHZ 115, 299, 302 as to the CMR in the area of international transport by road; BGH 16.8.2000, BGHZ 97 = NJW 2000, 3349, 3350 sub II 2 before a) as to the Hague Child Abduction Convention.

¹¹⁶ ECJ 10.1.2006, case C-344/04 (*The Queen v. Department for Transport*), [2006] E.C.R. I-403, para. 40.

¹¹⁷ MH Arsanjani and WM Reisman, *Interpreting Treaties for the Benefit of Third Parties: the “Salvors Doctrine” and the Use of Legislative History in Investment Treaties* 104 AJIL 597-604 (2010), cited in Gardiner, *supra* n 6, ft 141 at 490.

He notes: 'For this result to be reached, law school curricula as well as textbooks will have to be changed to incorporate the study of the CISG.'¹¹⁸

Our proposal specifically focuses on the specialization of domestic courts dealing with international commercial transactions, and/or absolute need for a change of mentality¹¹⁹ through dedicated training of the judges called to this 'international turn' in adjudicating international commercial cases.

There is no need here to stress that domestic civil procedural rules are usually not very compatible with the needs of international trade. For example, proceedings before the domestic courts can only be conducted in the official court language.¹²⁰ Translations often become a major bottle-neck in proceedings, not least given the tight deadline for submission with limited to no possibilities to request more time. This does not only relate to, or impact on, the briefs that need to be translated before a foreign client is actually able to provide input both regarding their own submissions and those of the opposing party, but also to translations of evidence to be submitted to the court.¹²¹

Second, international commercial disputes, such as disputes concerning CISG applicability, are often complex. Many such disputes arise in specialized sectors, with complex business customs and technical issues (e.g., oil and gas disputes, insurance and reinsurance disputes, commodities transactions; and corporate disputes). Very few, if any national courts can consistently provide the specialized expertise appropriate for such disputes, also through experts. Even disputes with simple factual matrixes become complex when a foreign – or international – law must be applied.

Third, the process of establishing a specialized court is evidently an exercise of regulatory competition among participating states interested in entering the realm of international commercial litigation (and arbitration). It is probably true that the role of 'preferred' international forum for dispute resolution has been, for quite a long time, in the hands of common law jurisdictions, notably the UK with London as the European hub for commercial arbitration and litigation. As the impact of Brexit intensifies, we note that a number of jurisdictions have sought to increase their standing as dispute resolution venues for financial market and commercial disputes.¹²² It goes beyond the aims of this paper to examine the various and rich experiences in establishing specialized courts for international commercial transactions. Here we briefly mention as an example the case of The Netherlands Commercial Court ('NCC'),

¹¹⁸ Ferrari, *supra* n 12, at 256-257.

¹¹⁹ BS Markesinis, *Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law* 80 *Tulane Law Review* 1325 et seq. (2006).

¹²⁰ C Jeloschek, *The Netherlands Commercial Court. The Future of Litigation in International Commercial Disputes*, *Charta*, 101-105 (2016).

¹²¹ The Dutch Supreme Court has recently held that evidence in a foreign language may not be disregarded as such and that evidence in English, French or German may, in principle, be submitted without a translation (ECLI:NL:HR:2016:65).

¹²² M Huertas, *Paris' Proposal for a Specialist Court Post-Brexit: A Tale Of Two Cities* 32(11) *J.I.B.L.R.* 502-506 (2017). C Consolo, S Marcello, *L'influenza di 'Brexit', a breve e a medio termine, sulla 'litigation' in materia civile e commerciale nel 'legal hub' londinese, ultimo baluardo dell'Impero* 2 *Int'l Lis* 57-61 (2016).

established in 2017.¹²³ The Dutch court aims to solve commercial and – more importantly, international (i.e. cross-border) – disputes. This project consist in establishing a special branch at the courts of Amsterdam both at the District Court as well as the Appeal Court level. The NCC consists of chambers of three judges who will adjudicate matters of commercial law in English, in an expedient matter supported by, inter alia, a digital process and on the basis of Dutch procedural law. According to Dutch commentators this experiment is in line with the practice in other countries where commercial law disputes have long since been decided by specialized courts, such as the Commercial Court in England, the Tribunaux de commerce in France and the Handelsgerichte in some German-speaking countries.¹²⁴

Thus, we argue that an option would be to establish specialized courts for international commercial disputes that are adequately trained and well aware of the ‘international character’ of uniform private law conventions. This awareness also includes knowing and respecting the duty to apply a common interpretative framework, based on the VCLT, and considering foreign case law as subsequent practice in treaty interpretation.

In this context, it could be very much in the self-interest of domestic courts to apply the VCLT rules of interpretation. Adopting an international law orientated methodology signals the aspiration of the domestic court to apply uniform private law conventions faithfully.

9. Concluding Remarks

From the perspective of uniform private law, it appears as if there is an expectation of the highest possible degree of coherence in the practice of domestic courts. With respect to many conventions, such as the CISG, it is indeed the main purpose to ensure uniformity of rules and behaviour among the parties. To reach this goal, adopting a single authoritative text does not suffice – uniform application of the agreed rules is required.

Having considered the above, our paper argues, first, that the principles and techniques of interpretation set forth in the VCLT are applicable to uniform law conven-

¹²³ *Ibid.*

¹²⁴ Some scholars have promoted, in 2017, the *Justizinitiative Frankfurt* (‘Justice Initiative Frankfurt’) in an effort to strengthen the Frankfurt District Court (Landgericht) and the Court of Appeals (Oberlandesgericht) in order to attract more financial disputes to Frankfurt. The initiative looks at introducing organisational and procedural improvements to make the Frankfurt courts more competitive internationally (with respect to London).

E. D’Alessandro examines a German pilot study concerning the use of English in adjudicating controversies about international commercial contracts in the paper titled *Progetto pilota: l’inglese quale lingua del processo nelle controversie nascenti da contratti commerciali internazionali* 2 Int’l Lis 63 et seq. (2010).

Recently, an author has proposed to establish a European Commercial Court, see G Ruehl, *Towards a European Commercial Court?* (11 August 2018) at <<http://conflictflaws.net/2018/towards-a-european-commercial-court>>. Accessed 11 August 2018.

tions. As our analysis has shown, there are no convincing arguments against the interpretation of uniform law instruments according to principles of international law. Since uniform law conventions are treaties governed by international law, they are interpretable according to rules of international law as set forth in Articles 31-33 of the VCLT.

Consequently, we argue that VCLT can be applied to interpret the CISG, offer guidance to domestic courts with the aim of promoting uniformity, besides asking the domestic court to develop a 'blend' or a 'synthesis' of different national methodologies. Thus, we conclude that these rules may offer a common interpretative framework for domestic courts in applying uniform private law. Such a framework may significantly contribute in solving the uncertainty concerning the interpretative methodologies of uniform private law conventions. Precisely, the proposed 'common interpretative framework' provides for three broad types of dominant hermeneutics: the domestic court would rely primarily on: (a) the text of the treaty, (b) the intent of the parties to the treaty, or (c) the underlying objective that the treaty seeks to attain and its wider context. They are terms of reference according to the law of treaties.

In other words, the said VCLT articles provide private lawyers with 'new' lenses to look differently at traditional, unresolved tensions when applying uniform private law. In addition, interpretation of uniform law instruments according to principles of international law yields results that are more rational, better suited to pursuing the objective of legal uniformity than other methods of autonomous interpretation.

Just to provide an example, the emphasis on objective interpretation in the VCLT and the precise role given to *travaux préparatoires* and states' practice set quite a clear test of interpretation that allow interpreters to manage different views and approaches stemming from common law and civil law. In addition, the VCLT may offer guidance in order to interpret uniform private law conventions, while integrating systemic and dynamic perspectives which are necessary in an evolving society of business parties. In this perspective, the VCLT approach also shows that private law conventions have not been kept 'in limbo' but are part of a system (systematic interpretation).

Our joint analysis confirms that domestic courts in contracting states, and their judicial bodies, are under an obligation to consider uniform private law conventions alongside the VCLT rules of interpretation. Consequently, domestic courts should have a common and clear methodology with the view to respecting the international character of the convention and promoting uniformity, or at least a more coherent application of uniform private law conventions.

To conclude, we believe that the 'international turn' in interpreting uniform private law conventions should be promoted by considering establishing specialized courts, and training judges to think as being part of an international community. The VCLT rules would be a valuable device in this regard, not much more, but nothing less. It is for domestic courts to make use of them.