

ANALYSIS OF THE CULTURAL HOMEWARD TREND IN INTERNATIONAL SALES LAW

PROFESSOR BRUNO ZELLER*

Article 7 of the Vienna Convention on Contracts for the International Sale of Goods ('CISG') mandates that the convention must be interpreted uniformly without recourse to domestic principles. This article demonstrates that the homeward trend – the tendency to project domestic laws onto the international provisions of a Convention is breach of art 7(1). However, art 7(2) alerts the reader that some matters are not expressly settled but must be settled by recourse to general principles within the CISG and again no recourse to domestic laws can be sought even if the terms track domestic laws. This article argues that a distinction must be drawn if vague terms such as reasonable time must be interpreted. These terms are not governed by laws but are subject to factual events such as customs or universal understanding.

I INTRODUCTION

The term 'homeward trend' has been coined to describe the introduction of domestic principles in the application of the *Vienna Convention on Contracts for the International Sale of Goods* ('CISG'): 'a behavioural bias in favour of domestic law'.¹ The fact that it is of consequence is exhibited in the discussion of the term in at least 72 articles,² and that in Australia this trend is unfortunately pronounced. However, in principle, the 'uniform interpretation of the CISG functions satisfactorily already'.³ Hence, a revisit of the homeward trend is appropriate to establish what is truly a homeward trend. Ferrari and others have attempted to define the homeward trend. He noted that it compares to the natural tendency of those interpreting the CISG to project the domestic laws in which the interpreter was trained onto the international provisions of the Convention.⁴

* University of Western Australia, Australia and Victoria University, Australia.

1 *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988). Steven Walt, 'Importing Uniform Sales Law into Article 2' (2018) 23(2) *Barry Law Review* 179, 181.

2 See 'CISG Bibliography', *CISG-Online* (Web Page, 2021) <<http://beta.cisg-online.ch/cisg-bibliography>>.

3 Ulrich Magnus, 'Tracing Methodology in the CISG Dogmatic Foundations' in Andre Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 33, 59.

4 Franco Ferrari, 'Homeward Trend: What, Why and Why Not' in Andre Janssen and Olaf Meyer (eds),

To put it differently, Gillette and Scott have argued that the homeward trend ‘induces tribunals both to ignore non-domestic law and assume that ‘international’ interpretations reflect domestic ones’.⁵

It is not difficult to understand that an instrument that is international in character can have variations due to the homeward trend.⁶ This is mainly due to the drafting of the *CISG* as it is not a complete statement. The *CISG* in effect is a compromise among all the participating states during the drafting process. Hence some issues are purposefully left out as noted in art 7(2) – either expressly such as the validity of the contract in art 4, or as an undefined term such as private international law in art 1. It is left to the courts of the forum to determine this issue and cannot be classed as a homeward trend.⁷ Article 7(2), however, also addresses internal gaps which are to be addressed with the aid of general principles and cannot be left to domestic law solutions as it contributes to the homeward trend.

A distinction needs to be drawn when applying vague terms of universal character such as ‘good faith’, ‘fitness for purpose’ and ‘reasonableness’ just to mention a few. These terms are found in the *CISG* as well as in domestic systems. The issue is – as Professor Ferrari pointed out – these expressions are ‘concepts that are independent and different from national concepts’.⁸ They need to be given meaning within the four corners of the *CISG*. The problem, however, is when a term is regarded as being controversial within the *CISG*. An example of this is art 39, and the determination of what a ‘reasonable time’ to give notice actually is. The answer has been given by Professor Andersen who noted: ‘a number of commentators as well as the *CISG* Advisory Council distanced themselves from the notion of any benchmark for determining reasonable time.’⁹ Hence whether it is shorter or longer in days does not constitute a homeward trend in the true sense. It merely reflects a point of opinion or a reflection of trade specific customs, but does not vary the crucial principle of ‘reasonable time’ and substitute it with another principle based on domestic law.

CISG Methodology (Sellier. European Law Publishers, 2009) 171, 182.

5 Clayton P Gillette and Robert E Scott, ‘The Political Economy of International Sales Law’ (2005) 25 *International Review of Law and Economics* 446, 472.

6 Admittedly it must also be recognised that a homeward trend does not automatically arrive at the wrong result, but the issue is the way the result was reached which in certain circumstances could arrive at the correct result.

7 See Franco Ferrari, ‘Do Courts Interpret the CISG Uniformly?’ in Franco Ferrari (ed), *Quo Vadis CISG?* (Sellier European Law Publishers, 2005) 3, 10.

8 Ferrari, ‘Homeward Trend: What, Why and Why Not’ (n 4) 176.

9 Camilla B Andersen, ‘Article 39 of the CISG and its “Noble Month” for Notice-Giving: A (Gracefully) Ageing Doctrine?’ (2012) 30 *Journal of Law and Commerce* 185, 185.

Simply put, the *CISG* is silent on an exact time – despite the coining of the ‘noble month’ – and hence as long as the time is reasonable it will not trigger the definition of homeward trend, as the determination does not violate art 7(1). After all the drafters left ‘certain questions of interpretation to be decided by judges’.¹⁰

To avoid a homeward trend, courts need to take into consideration *CISG* decisions and academic commentary.¹¹ It is obvious that ‘foreign’ *CISG* decisions cannot be binding. After all, the *CISG* is part of the relevant domestic legal system and any decisions outside the system are normally considered to be foreign. Hence the better-reasoned position is that the decisions should have a highly persuasive character but not binding authority.¹² Article 7(1) uses the term ‘regard has to be had’, hence the question is: ‘what is the appropriate level of regard in order to fulfil the mandate of art 7’? Lookofsky and Flechtner have argued that for a *CISG* decision to be accorded a persuasive character, it must ‘itself [comport] with the mandate of *CISG* art 7(1)’.¹³

As seen so far, the purpose of the *CISG* is to create international uniformity, which is the very aim of the inclusion of art 7 into the convention. Equally important is to recognise that there is a difference between applying principles and provisions incorrectly and merely varying practical execution of a principle.

This paper will argue that a true homeward trend is associated with a lack of understanding of the mandate of art 7. This is so because the interpretation and application of the *CISG* can only be accomplished within the four corners of the *CISG*. The key role of art 7(1) of the *CISG* has already been noted by Professor Eorsi in 1984 when he noted:

The elements of regard to the international character of the *Convention* and uniformity in its application were well chosen. The first, as we have seen, was devised to check the homeward trend, and the second is an admonition to follow precedents on the international plane.¹⁴

Professor Ferrari was equally adamant, stating that art 7 must be understood ‘to mean that the *CISG* is to be interpreted “autonomously”, not “nationalistically”, i.e. not in the light of domestic law, as difficult as this may be’.¹⁵ The reason for this

10 Olaf Meyer, ‘Constructive Interpretation – Applying the *CISG* in the 21st Century’ in Andre Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 319, 319.

11 See João Ribeiro-Bidaoui, ‘The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organisations’ (2020) 67(1) *Netherlands International Law Review* 139.

12 Joseph Lookofsky and Harry Flechtner, ‘Nominating Manfred Forberich: The Worst *CISG* Decision in 25 Years’ (2005) 9 *Vindobona Journal of International Commercial Law and Arbitration* 199, 201.

13 Ibid.

14 Gyula Eörsi, ‘General Provisions’, in Nina Galston and Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Bender, 1984) 2, 2–5.

15 Franco Ferrari, ‘Homeward Trend and Lex Forism Despite Uniform Sales Law’ (2009) 13 *Vindobona Journal of International Commerce Law and Arbitration* 15, 17 (‘Homeward Trend and Lex Forism’).

is that the *CISG* is a neutral law not subject to domestic variations. This is, as Ferrari stated, only possible if the *CISG* is interpreted with art 7 in mind – that is, ‘moving towards a *CISG* perspective that transcends domestic ideology’.¹⁶

The lack of understanding is not unique to the *CISG* as an internationally drafted document. It is a sign of courts and the legal profession persisting to remain in the domestic paddock as explained in *Scruttons Ltd. v Midland Silicones Ltd*,¹⁷ where the court noted: ‘it would be deplorable if the nations, after protracted negotiations, reach agreement ... and that their several courts should then disagree as to the meaning of what they appeared to do’.¹⁸

In the *CISG* the problem is that art 7 has not been understood or has been overlooked. The result has been that jurisdictions have used ambiguous methodologies regarding the provision’s application.¹⁹ The argument can be made that

the single most important source of non-uniformity in the *CISG* is the different background assumptions and conceptions that those charged with interpreting and applying the *Convention* bring to the task.²⁰

Simply put, the misunderstanding of the mandate of art 7 contributes significantly to courts and tribunals seeking ‘refuge’ in known principles.

As already noted above, the question is which deviations are severe enough to constitute a homeward trend, and which ones are merely flexible application of a principle based on the facts of the case (such as determining a ‘reasonable time’ to give notice pursuant to art 39). It is obvious that perfection in the interpretation of the *CISG* was never envisaged as it is also not possible in any legal system. In addition, as already noted, the *CISG* is not a complete statement of sales laws as it contains gaps.

To minimise variations, art 7(2) instructs the interpreter on how to fill the gaps in the *CISG*. Only if the *CISG* presents an external gap – as explained in art 7(2) – can recourse to the otherwise applicable law be allowed. Unfortunately, some commentators have been arguing that art 7 only provides minimal theoretical guidance as to its interpretation, resulting in inconsistencies in the application of

16 Ibid 22, quoting H Flechtner and J Lookofsky, ‘Viva Zapata! American Procedure and CSIG Substance in a U.S. Circuit Court of Appeal’ (2003) 7 *Vindobona Journal* 93, 103.

17 [1962] AC 446.

18 Ibid 471.

19 Christopher Sheaffer, ‘The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Code in International Sales Law’ (2007) 15(2) *Cardozo Journal of International and Comparative Law* 461, 462.

20 Harry M. Flechtner, ‘The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)’ (1998) 17 *Journal of Law and Commerce* 187, 200.

the *CISG*.²¹ These views are contrary to the intentions of the drafters. The Secretariat Commentary to art 7 noted that the article was included to avoid the implications of diverse domestic principles that courts might apply (what is now called the homeward trend).²² Sheaffer, in response, argues that the reasons to do so are ‘rooted’ in different approaches. He notes:

While civil law systems commonly apply general principles to fill ‘gaps’, common law jurisdictions typically opt for a more definitive approach, choosing to fill ‘gaps’ with legislative history and legal precedent. Such conflicting ideologies have resulted in discrepancies as to which approach should be used, contributing to further inconsistent judgments as courts refuse to break from domestic tradition.²³

However, importantly the question must be asked whether the term ‘homeward trend’ hides other issues. First – at the basic level – the obvious one is that the court did not understand the mandate of the *CISG* and ostensibly applied the *CISG* while reverting to and using domestic laws. Lookofsky and Flechtner view the homeward trend as ‘[a] reasoning [which] is completely unpersuasive because the court completely ignores, and even aggressively violates, the mandate of Art. 7(1) *CISG*’.²⁴

Arguably – more sophisticated – there are instances where art 7(1) has been applied, giving the impression of a full understanding reverting to domestic ‘escapes’ where the court was not comfortable with the outcome due to controversies in application. Taking a broad brushstroke approach all the above probabilities can be termed ‘homeward trend’. However, as the *CISG* is maturing, a more sophisticated approach is warranted as a purely dogmatic view can be detrimental to the application of the *CISG* (which, after all, fulfils the mandate of a flexible instrument).

This paper will now analyse the two possibilities by reviewing academic opinions and importantly jurisprudence which is the ultimate judge on any application of legislation in pts II–III followed in pt IV by a discussion. This paper in pt V concludes the arguments.

21 Phanesh Koneru, ‘The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles’ (1997) 6 *Minnesota Journal of Global Trade* 105, 129.

22 See University of Bale, Guide to CISG Article 7: Secretariat Commentary (closest counterpart to an Official Commentary) ‘1979 Secretariat Commentary’, *CISG-Online* (Web Page, 2021) <<https://cisg-online.org/Travaux-preparatoires/1979-secretariat-commentary>>.

23 Sheaffer (n 19) 473.

24 Lookofsky and Flechtner (n 12) 202.

II LACK OF UNDERSTANDING OF ARTICLE 7

It is appropriate to understand the term homeward trend in context. Professor Cross has argued that ‘categorical condemnation of the homeward trend is unwarranted’.²⁵ This is only correct insofar as variations in interpreting and applying the *CISG* are not due to the homeward trend – but it is wrong to argue that ‘the homeward trend may enhance the legitimacy and acceptability of the *CISG* over the long term’.²⁶ Such a statement encourages the undisciplined and incorrect application of transnational law which is to be condemned as certainty in the application of transnational laws is of paramount importance.

This paper argues that the term has been misused – that it has been too readily used in labelling variations in the application of the *CISG*. The first point to note is that a homeward trend must have at its source the application of the *CISG*; that is, the court must recognise that the *CISG* governs the contract. Therefore, simply ignoring the application of the *CISG* does not constitute a homeward trend as such an incident is simply applying the wrong law (and arguably should give rise to an appeal).²⁷ A homeward trend generally implies that the *CISG* was not viewed as an exhaustive regulation, but simply as a complementary law.

In most reported cases the courts did recognise that the *CISG* applied but when interpreting provisions of the *CISG* court reverted to the application of domestic law instead of the applicable principles of the *Convention*.²⁸ In *Italdecor SAS v Yiu Industries* the court – in brief – only consulted domestic case law,²⁹ despite the fact that the court did note that the *CISG* was applicable. Another earlier case is *Delchi Carrier SpA v Rotorex Corp*,³⁰ where the court erroneously noted ‘In the absence of a specific provision in the *CISG* for calculating lost profits, the District Court was correct to use the standard formula employed by most American courts’,³¹ hence ignoring in effect the application of art 74. In addition, the court also stated that

25 Karen Cross, ‘Parol Evidence Under the CISG: The “Homeward Trend” Reconsidered’ (2007) 68 *Ohio State Law Journal* 133, 138.

26 Ibid.

27 See *Mitias v Solidea Srl* (Tribunale di Forlì [District Court of Forlì, Italy], Cortesi J, 11 December 2008) <<https://cisg-online.org/search-for-cases?caseId=7647>>.

28 Cases where the court entirely ignored the CISG and applied domestic law are not easily found and this paper relies entirely on reported cases on ‘CISG-Online’, *CISG-Online* (Web Page, 2021) <<http://beta.cisg-online.ch/home>>

29 *Italdecor SAS v Yiu's Industries (HK) Ltd* (Corte di Appello di Milano [Court of Appeal Milan, Italy], 20 March 1998) <<https://cisg-online.org/search-for-cases?caseId=6320>>.

30 *Delchi Carrier SpA v Rotorex Corp*, 71 F 3d 1024 (2nd Cir, 1995).

31 Ibid.

[case law] interpreting analogous provisions of Article 2 of the *Uniform Commercial Code* ... may also inform a court where the language of the relevant *CISG* provisions tracks that of the *UCC*.³²

Arguably, such an observation is a classical homeward trend situation as it indicates a lack of understanding of art 7.

In the same manner in Australia, the court followed the homeward trend due to the lack of understanding of art 7.³³ *Ginza Pte Ltd v Vista Corporation Pty Ltd* set a precedent followed by subsequent courts in applying the homeward trend.³⁴ Counsel for the defendant attempted to rely both on the provisions of ‘the *Sale of Goods Act 1895* (WA) (*SOG Act*) or the *CISG*’ to be echoed by the court, noting that fitness for purpose and merchantability – both terms to be found in common law – find expression both in the *SOG Act* and the *CISG*. This is certainly not correct, as merchantability is not a feature of art 35. *Ginza* was followed by *Playcorp Pty Ltd v Taiyo Kogyo Ltd* persisting with the homeward trend.³⁵ The court again noted in a similar manner:

It was not suggested that there was any material difference or inconsistency between the provisions of art 35 and s 19(a) and (b) [of the *SOG Act*] and because of that and the way the case was conducted, it is unnecessary to consider whether there is. Counsel proceeded on the basis that there was no material difference or inconsistency.³⁶

In addition, the court relied exclusively on domestic case law and did not refer to academic comments. Unfortunately, *Playcorp* was used as a precedent again and the same mistakes were repeated. Comments by the claimant are noteworthy; namely, they ‘invoked, further or alternatively, the warranties of fitness for purpose and merchantable quality implied by s19(a) and (b) of the *Goods Act 1958* (Vic) (“*Goods Act*”):³⁷ The court responded by stating again:

32 Ibid 1028.

33 See Lisa Spagnolo, ‘Law wars: Australian Contract Law Reform vs. CISG vs. CESL’ (2013) 58 *Villanova Law Review* 623, 644; Benjamin Hayward, ‘The CISG in Australia: The Jigsaw Puzzle Missing a Piece’ (2010) *Vindobona Journal of International Commercial Law and Arbitration* 193, 222; Benjamin Hayward, ‘CISG as the Applicable Law: The Curious Case of Australia’, in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *Contracts for the International Sale of Goods: A Multidisciplinary Perspective* (Sweet & Maxwell, 2019) 167, 167–187.

34 [2003] WASC 11.

35 [2003] VSC 108.

36 Ibid [235].

37 *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] FCA 1028, [53].

Those provisions have been treated by Australian courts as imposing, effectively, the same obligations as the implied warranties of merchantable quality and fitness for purpose arising under s 19 of the Goods Act.³⁸

Australian courts are not on their own in repeating the misunderstanding of the application of the *CISG*. In the 2008 decision in *Hilaturas Miel, SL v Republic of Iraq*,³⁹ the court noted similarly:

Courts also often look to analogous provisions of the *UCC*, to inform decisions under the *CISG*. See, e.g., *Delchi Carrier*, 71 F.3d at 1028 ('Caselaw interpreting analogous provisions of Article 2 of the *Uniform Commercial Code* ... may also inform a court where the language of the relevant *CISG* provisions tracks that of the *UCC*).

In addition, the relevant academic writing was not consulted. This is indicated by the fact that the court relied on *Raw Materials Inc. v Manfred Forberich GmbH & Co., KG* and *Delchi* both cases having been criticised for their homeward trend. In effect, the mistakes were perpetuated.⁴⁰

The case of *Manfred Forberich* also requires examination. Lookofsky and Flechtner nominated this decision for the worst-case award as 'it seems to represent the very worst example of the 'homeward trend'.⁴¹ Their argument was that the 'reasoning is completely *unpersuasive* because the court completely ignores, and even aggressively violates, the mandate of Art. 7(1) *CISG*.⁴² The issue was that steel rails had to be shipped out of St Petersburg, but adverse weather conditions froze the port and stopped shipping. Forberich claimed an art 79 protection. As with other patently homeward trend decisions, the court noted that domestic law could be used 'where the relevant *CISG* provisions track that [*sic*] of the *UCC*'.⁴³ As Flechtner commented:

Not one word of this discussion would have to be changed if *UCC* Article 2 had actually been the applicable law. A more flagrant and depressing example of a court ignoring its obligations under *CISG* article 7(1) and indulging – nay, wallowing in – the homeward trend is hard to imagine. The court's methodology should mean that its analysis will properly be ignored by other courts – both US and foreign – that are called upon to apply *CISG* article 79. ... The only good that could come of the *Manfred Forberich* decision, in this author's view, is if it became an example of what to avoid when interpreting the *CISG*.⁴⁴

38 Ibid [123]; See also commentary by Spagnolo.

39 573 F Supp 2d 781, 799 (SD NY, 2008).

40 *Raw Materials Inc. v Manfred Forberich GmbH & Co., KG and Delchi* (ED Ill, No. 03 C 1154, 7 July 2004).

41 Lookofsky and Flechtner (n 12) 202.

42 Ibid.

43 Ibid.

44 Harry M. Flechtner, 'The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation' in Franco Ferrari (ed), *Quo Vadis CISG?* (Sellier European Law Publishers, 2005) 92, 107.

The very point is that the courts have interpreted and applied the *CISG* by looking through the preconceived domestic lenses, ignoring art 7(1). The excuse – if any – is that art 35 is particularly susceptible to the pernicious influence of the ‘homeward trend’.⁴⁵ Another principle that has been misunderstood is the foreseeability requirement. Many courts in common law countries noted that foreseeability is identical to the well-known rule of *Hadley v Baxendale*.⁴⁶ In *TeeVee Toons*,⁴⁷ the District Court of New York specifically stated: ‘The foreseeability requirement, the Second Circuit has explained, is identical to the well-known rule of *Hadley v Baxendale*, such that relevant interpretations of that rule can guide the Court’s reasoning regarding proper damages’. Professor Murray commented that the statement is nothing more than ‘a consummate illustration of a court unwittingly seeing provisions of the Connection through the domestic lens’.⁴⁸ The difference between the two principles, in brief, is that the *CISG* only considers what damages were foreseeable not what had to be in the contemplation of the parties as explained in *Hadley v Baxendale*.

Another important issue in the homeward trend is the inability of some courts to recognise the influence of art 6 to exclude the *CISG*. The issue hinges on the fact that not only an express but also implied exclusion is possible, which has been confirmed by many courts applying the *CISG* correctly.⁴⁹ The point to make is that an implied exclusion must be based on regulations contained within the *CISG* (such as under art 8), against which an implied exclusion must be measured that is the parties did contemplate to exclude the *CISG*.⁵⁰ A mere term such as ‘the contract is governed by Italian law’ is not an express or implied exclusion of the *CISG*. As the law of Italy is not only subject to domestic sales laws but also the *CISG*, recourse to art 1 will show that an international sale between parties is subject to the *CISG* if both states are contracting states or the conflict of laws rule points to the application of the law of a contracting state.⁵¹

In sum, this part has demonstrated that the inability of courts to understand the mandate of art 7(1) is a recurring issue in the practice of a homeward trend.

45 Harry M. Flechtner, ‘Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice thereof under the United Nations Sales Convention (“CISG”)’ (2008) *Boston University International Law Journal* 1, 7.

46 (1854) 9 Ex 341; 156 ER 145.

47 *TeeVee Toons, Inc v Gerhard Schubert GmbH* (SD NY, No. 00 Civ. 5189(RCC), 23 August 2006).

48 John E Murray, ‘The Neglect of the CISG: A Workable Solution’ (1998) 17(2) *Journal of Law and Commerce* 365, 371–372.

49 See Ferrari, ‘Homeward Trend and Lex Forism’ (n 15) footnote 137, where he notes in excess of 20 examples.

50 For a full discussion see ‘CISG Advisory Council Opinion 16’, *CISG Advisory Council* (Web Page, 2021) <<http://cisgac.com/cisgac-opinion-no16/>>.

51 *Perry Engineering Pty Ltd v Bernold AG* [2001] SASC 15.

Interestingly, this appears more frequently in common law jurisdictions and very rarely in civil law countries.

It is therefore important to demonstrate how art 7 should be applied. A very good example can be found in *RJ & AM Smallmon v Transport Sales Limited and Grant Alan Miller*. The New Zealand court observed:

Art 7 is generally accepted as establishing what has been called a principle of autonomous interpretation. That means the *Convention* must be applied and interpreted exclusively on its own terms, having regard to the principles of the *Convention* and *Convention*-related decisions in overseas jurisdictions. Recourse to domestic case law is to be avoided.⁵²

The conclusion is that the ‘classical homeward trend’ is where the *CISG* was only applied in name but not in fact, expressed by the use of domestic literature and case law. In sum, the above cases illustrate the true homeward trend where counsel and the courts did not know or understand the mandate of art 7 even though the *CISG* did apply which was acknowledged by the courts.

III THE IMPRESSION OF FULL UNDERSTANDING

The homeward trend can also be detected where a court or tribunal has applied the *CISG* correctly but finds that the outcome is not in conformity with the result which could be achieved under domestic laws; hence the homeward trend is used to achieve the desired result. *Scafom International BV v Lorraine Tubes SAS* clearly illustrates this issue.⁵³ In this case, there was a 70% price increase between the formation of the contract and the delivery of the steel. As there was no price adjustment clause in the contract, the buyer refused to pay a higher price.

The judgments – both in the first instance and in the Belgian Supreme Court – expressed a high degree of competence in the application of the *CISG* as all the relevant articles were consulted. The issue, however, was the application of art 79 and whether hardship cases fall under the sphere of the *CISG*.

The court of *Tongeren* in the first instance was aware of the controversy over the inclusion of hardship in art 79.⁵⁴ The court noted that ‘[a]ccording to J. Herbots,⁵⁵ this

52 *RJ & AM Smallmon v Transport Sales Limited and Grant Alan Miller* [2012] 2 NZLR 109.

53 *Scafom International BV v Lorraine Tubes SAS* (Court de Cassation [Supreme Court, Belgium], C.07.0289.N, 19 June 2009) <<https://cisg-online.org/search-for-cases?caseId=7880>>.

54 *Scafom International BV & Orion Metal BVBA v Exma CPI SA* (Rechtbank van Koophandel Tongeren [Commercial Court Tongeren, Belgium], 25 January 2005) <<https://cisg-online.org/search-for-cases?caseId=7030>>.

55 Jacques Herbots, *De Transnationale Verkoopovereenkomst: Het Weens Koopverdrag Van 1980* (Acco, 1991) 59.

is the definition [as noted in art 79] the Supreme Court gives to “force majeure”.⁵⁶ However, the court noted that ‘Often the performance of a contract is rendered much more difficult due to certain circumstances, even though one cannot speak of force majeure which renders the performance impossible’.⁵⁷ The question, therefore, is whether the contract can be modified under the principle of hardship. The court noted that ‘this issue is not expressly settled in Article 79 *CISG*, or in any other Article of the *CISG*’.⁵⁸ Despite the fact that the court agreed that art 79 only covers issues of force majeure, the court allowed a price adjustment – that is, the contract was still to be executed but under conditions of hardship and ‘equity according to the domestic article 1135 BW a source of supplementary law for contracts’.⁵⁹

The Supreme Court saw the issue differently. It noted that there was a gap in the *CISG* relating to art 79 to be filled by ‘general principles which govern the law of international trade’,⁶⁰ namely the *UNIDROIT Principles of International Commercial Contracts* (*UPICC*). The court required the parties to renegotiate the contract in good faith, relying on art 6.2.3 of the *UPICC*, dealing with hardship, but ignoring art 7.1.7, dealing with force majeure. There is no doubt that the court was not ignorant of the *CISG* and applied *UPICC* to come to the desired conclusion.

The question here is whether the Belgian Supreme Court followed the homeward trend. The court was not driven by ignorance and the homeward trend; if anything, it was the fact that the court saw a gap in the *CISG* where there is none. The point is that the academic view on art 79 is divided because the question of hardship versus force majeure is still debated. Currently, the opinion of courts is that art 79 only covers force majeure – hence, if a court decided that the issue of hardship fell within the rules of the *CISG*, arguably this would not be termed a homeward trend because the decision is made within the rules of the *CISG* indeed following the suggestion of the Advisory Council.⁶¹ If a court, however, notes that the issue is not settled and hence looks at the otherwise governing law for assistance – in effect assistance to make up its mind – can this be termed a homeward trend?

This paper argues that it is not a homeward trend as the court is fully aware of the mandate of art 7. It can be argued that the assistance of domestic law by the court in

56 *Scafom International BV & Orion Metal BVBA v Exma CPI SA (Rechtbank van Koophandel Tongeren [Commercial Court Tongeren, Belgium], 25 January 2005)* <<https://cisg-online.org/search-for-cases?caseId=7030>>.

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 ‘*CISG Advisory Council Opinion 16*’, *CISG Advisory Council* (Web Page, 2021) <<http://cisgac.com/cisgac-opinion-no16/>>.

61 ‘*CISG Advisory Council Opinion No. 7*’, *CISG Advisory Council* (Web Page, 2021) <<https://www.cisgac.com/cisgac-opinion-no7/>> (‘*Opinion No 7*’).

the first instance was merely a guide to come to a decision which is still based on the *CISG*. Reliance on domestic law to arrive at a solution – as opinions are divided on this issue – is not a homeward trend as it is in tune with the underlying system of the *CISG*.

IV DISCUSSION

Arguably a ‘conceptual goal of functional uniformity in a body of international commercial law’ is the ultimate aim but the issue of the homeward trend does not appear to be a simple test of a lack of functional conformity in the application of the *CISG*.⁶² As with any law, certain applications of specific issues are not clear, resulting in variations between decisions within and between states. This is especially so as internationally; linguistic nuances will also play a role in *CISG* interpretation. As an example, Krusinga pointed out that the Dutch version of the *CISG* (which is not an official version) in art 35(3), where the phrase relying on ‘could not have been unaware’ in translation required the buyer to erroneously perform a pro-contractual inspection.⁶³ Does this lead to a homeward trend? Two views could be taken. First, this is not a homeward trend as the *CISG* has been properly applied following the relevant language of the text at the disposal of the courts. The second view and arguably the better one is that it is a homeward trend as the court ought to have been aware that in the end, only the texts in the official languages are to be applied. The Witness Clause to the *CISG* specifies what the authentic language versions of the *Convention* are. Only if art 7 is totally ignored or wrongly applied is the term homeward trend appropriately used. In addition, it appears that only certain articles in the *CISG* are constantly referred to as being subject to the homeward trend – arts 79 and 35 being the most frequent topics of discussion here.

Article 79 has been the subject of an academic debate whether it includes only force majeure or also hardship. If judicial deference to international case law and scholarly opinion is the yardstick to measure conformity, variations are inevitable as opinions are divided. As already noted, the Advisory Council in its opinion suggests that cases of hardship will also trigger the application of art 79,⁶⁴ whereas jurisprudence and several academics have rejected this notion.⁶⁵ This fact alone speaks against labelling variations as a homeward trend. In essence, art 7 has been properly applied.

62 Peter Mazzacano, ‘The Treatment of CISG Article 79 in German Courts: Halting the Homeward Trend’ (2012) 2 *Nordic Journal of Commercial Law* 1, 1 (‘Mazzacano’).

63 Sonja Krusinga, *(Non-)Conformity in the 1980 UN Convention on the International Sale of Goods: A Uniform Concept?* (Intersentia, 2004) 53.

64 Opinion No 7 (n 61).

65 See, David Kuster and Camilla Baasch Andersen, ‘Hardly Room for Hardship – A Functional Review of Article 79 of the CISG’ (2016) 35(1) *Journal of Law and Commerce* 1, 2; Bruno Zeller, ‘Covid-19 and Article 79 – a revisit’ (forthcoming).

In this regard, Mazzacano noted that the application of art 79 in Germany bucks the homeward trend and this is an important step as it ‘stands alone as an autonomous international doctrine under the *CISG*’.⁶⁶ Arguably, this is too narrow a view to take and is not supported in this paper. There will always be some variations in the application of isolated articles within and between countries. As long as art 7(1) has been properly applied, variations should not be labelled a ‘homeward trend’.

V CONCLUSION

The problem is that the *CISG* incorporated vague standards which ‘facilitated recourse to domestic standards for interpretive purposes much more than a text that is more specific and contains itself a number of definitions’.⁶⁷ Arguably, therefore, the ‘gravitational pull of the homeward trend’ has resulted in the assumption of courts that international interpretations track or even reflect domestic ones.⁶⁸ With the ‘coming of age’ of the *CISG*, this trend has been declining. Therefore, this paper has argued that the term ‘homeward trend’ should only be used to describe a situation where a court or tribunal – instead of applying art 7(1) – reverted to domestic law. This is so as a ‘proper’ *CISG* decision must be based on a sound understanding of the mandate of the *CISG* as mandated in art 7, and that international jurisprudence and academic opinions have also been consulted.

The fact that in cases of controversial issues domestic law has been chosen is not a homeward trend as long as it does not replace the clear solution found within the *CISG*. As an example, as noted above, art 79 is controversial insofar as opinions diverge on the issue of whether only force majeure or also hardship is covered by the term ‘impediment’. Hence if a choice has been made which is in line with domestic understanding, it is not a homeward trend as it does not display a lack of knowledge of the *CISG*.

However the preferred alternative – requiring a sound grasp of transnational laws – is where the courts, instead of reverting to domestic laws, resort to the application of *UPICC* to fill the gap and hence achieve in essence a solution based on transnational law. Arguably this trend can be observed as so far 61 decided *CISG* cases have resorted to *UPICC*.⁶⁹

66 Mazzacano (n 62) 2.

67 Ferrari, ‘Homeward Trend: What, Why and Why Not’ (n 4) 205.

68 Harry M. Flechtner, ‘Recovering Attorneys’ Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in *CISG* Jurisprudence, With Comments on *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co.* (2002) 22(2) *Northwestern Journal of International Law & Business* 121, 146.

69 ‘*CISG-Online*’, *CISG-Online* (Web Page, 2021) <<http://beta.cisg-online.ch/home>>.

