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*Interpretation of the United Nations Convention on  
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according to principles of international law : a reply*

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# Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) according to Principles of International Law – a reply.

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## Introduction

The successful acceptance and application of international uniform law instruments such as the CISG depends on outcomes, which are consistent and predictable in all member states. The most important single factor to achieve uniformity and hence predictability is a uniform interpretation of laws. The CISG has recognized this and introduced article 7 into its regime. Much has been written, which intends to explain the importance and function of article 7.<sup>1</sup>

An argument has been advanced that the Vienna Convention on the Law of Treaties (VCLT) is also applicable in the interpretation of the CISG. Specifically Roth suggests that articles 31 to 33 of the VCLT ought to be taken into consideration when interpreting the CISG.<sup>2</sup> In support of their argument both Roth and Happ<sup>3</sup> contend that the rules of the VCLT represent and coincide with valid customary international law.<sup>4</sup> They argue that:

*“There is no convincing argument against interpreting all the provisions of the CISG according to international law rules. Since the CISG is a treaty governed by international law, it must be interpreted according to rules of international law as set forth in Art 31-33 of the VCTL.”<sup>5</sup>*

In addition the above authors suggest that very few attempts have been made to explain or develop a methodology or methodological reasoning.<sup>6</sup> In summary the contention is that:

*“... supporters of autonomous interpretation actually derive the meaning of terms from the wording in context, keeping object and purpose in mind, and resorting to the preparatory work of the treaty when necessary.”<sup>7</sup>*

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<sup>1</sup> See Pace website <http://cisgw3.law.pace.edu/cisg>

<sup>2</sup> Roth, M and Happ. R., “Interpretation of the CISG According to Principles of International Law” *International Trade and Business Law Annual*, Vol, IV 1999 1, 5.

<sup>3</sup> Happ R., “Anwendbarkeit völkerrechtlicher Auslegungsmethoden auf das UN-Kaufrecht” (1997) *5 Recht der Internationalen Wirtschaft*.

<sup>4</sup> Roth above n 2, 5.

<sup>5</sup> Ibid 11.

<sup>6</sup> ibid 3.

<sup>7</sup> Ibid.

Such an argument is given weight if article 31 of the VCLT is considered. This article states:

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

The proposition presented by the above authors needs to be viewed critically. There is no debate that the VCLT has a relationship with the CISG. The question is how far and to what extent does the VCLT influence the interpretation of the CISG?

### **VCLT article 31 – an analysis**

A brief analysis of article 31 is appropriate to fully understand its influence and value. The first point to note is that the VCLT as a customary rule is primarily used for the interpretation of treaties where the State is a party to the proceedings. This in itself does not indicate that the VCLT is not appropriately used for private international law as well. It merely suggests that its usage is specifically important for the interpretation of public international law. The VCLT is appropriately used where treaties, unlike the CISG, have not incorporated an interpretative article into their regime.

Roth confirms such an argument by stating that:

*“... multilateral treaties [such as] the Convention on the Contracts for the International Carriage of Goods by Road is unanimously interpreted by applying the rules set forth in Arts 31-33 of the VCLT as no other specific rules of interpretation exists.”*<sup>8</sup>

As all treaties must be ratified it is left to municipal courts to apply the rules of interpretation of international documents and views were expressed that:

*“there is a high probability that [words and expressions] have been incorporated with knowledge of the meaning which has been given to them by national courts.”*<sup>9</sup>

However such arguments have been dismissed. It is now universally recognized that in the interest of uniformity national courts must construe conventions “on broad principles of general acceptance.”<sup>10</sup>

Such broad principles could be termed valid customary international law if a uniform understanding as to the custom could be established. Roth suggests that:

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<sup>8</sup> *ibid* 8.

<sup>9</sup> *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd*. [H.C.A.] 1980, 159.

<sup>10</sup> *James Buchanan & Co. Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] A.C. 141, 152.

*“Evidence of customary international law requires evidence of constant state practice and the conviction of states in action that they are legally bound to their actions.”<sup>11</sup>*

However for a custom to be termed international, evidence of usage must also be international. A constant practice within one state would elevate that particular event into a customary law in that particular state. It could not be termed an international customary law because it is only applied locally. An international customary law does not only require intra state compliance but also interstate recognition.

Furthermore most commonly article 31 has been interpreted as indicating that “an ordinary meaning has to be given to the terms of a treaty in their context and in the light of its object and purpose.”<sup>12</sup> The problem, which may arise is whether a court in its application of “ordinary meaning” can turn to a cultural meaning, which is by definition external to the particular treaty in question. In other words is the “object and context” of a treaty a tool which allows the inclusion of cultural meanings? Article 31(3) despite the fact that it widens the scope of what is allowable only “takes into account ... subsequent agreements between the parties”<sup>13</sup> which hardly expresses cultural meanings. The VCTL due to its very nature of applying to treaties of different subject matters must in nature be a “generic” product.

In other words, the VCLT is an instrument attempting to serve all conventions and treaties and hence “context” is the restring factor of interpretation. The fact that object and purpose of a treaty must be viewed in context suggests that the VCTL in its interpretation is bound to the four corners of a treaty. Arguably Katz J must have had in mind that the VCTL merely incorporated an international rule into its regime, which already existed in international public law. Otherwise it would be unclear why he gave supremacy to the customary rule when he noted:

*“the Vienna Convention constitutes an authoritative statement of customary international law including the customary public international law of the interpretation of treaties and it was those rules of customary public international law rather than the Vienna Convention itself which obliged Cooper J to look beyond the text ... in order to arrive at its correct construction.”<sup>14</sup>*

Such an observation leads to the conclusion that article 31 of the VCLT is a tool to interpret treaties and conventions where the text is unclear. It appears therefore that customary public law is not to be confused with the rules laid down in the VCLT. Such conclusion as derived at by Katz J<sup>15</sup> is supported by the fact that the VCLT is not a governing law in all countries of the world but merely in those who adopted and ratified

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<sup>11</sup> Roth above n 2, fn 22.

<sup>12</sup> WTO Panel Report WT/DS160/R, 15 June 2000, United States – Section 110(5) of the US Copyright Act

<sup>13</sup> article 31.3 VCTL

<sup>14</sup> *Minister for Immigration & Multicultural Affairs v Savvin* [2000] FCA 478 (12 April 2000), 91.

<sup>15</sup> Ibid.

this particular convention. Hence it follows that if one would talk about a customary public law one would assume that it is applicable everywhere and not constraint by a ratification process which imposes limitations. This does not mean that article 31 is not an authoritative statement of a customary public law. Indeed Katz J noted that:

*“ ... no doubt because the Vienna Convention does constitute an authoritative statement of customary public international law rules for the interpretation of treaties that its relevant provisions ... are referred to ... ”*<sup>16</sup>

However the mere application of authoritative statements does not guarantee a uniform application despite the fact that the aim of the VCLT is to harmonize and unify the application of international treaties. As an example it has been shown that uniformity is not a feature of the Hague Rules.<sup>17</sup> As a consequence McHugh J was compelled to explain that:

*“If uniformity of interpretation could be achieved by abandoning the approach taken by this court in Gamlen I would be in favor of overruling Gamlen. But to overrule that decision would not yield uniformity – the approach of courts in England, Germany and France would remain different.”*<sup>18</sup>

However it must be recognized that McHugh J did not indicate the source of his information and hence it is not clear whether the courts of the various countries did apply the VCLT. The fact remains that uniformity has not been achieved.

In sum article 31 represents an authoritative statement of international interpretative rules and as such is an invaluable tool to interpret treaties. But as a generic product the VCLT needs to be applied to a variety of treaties. It is used to interpret WTO rules, various conventions in private law such as the Hague Rules and International Carriage by Road Convention. Furthermore disputes between States<sup>19</sup> as well as questions of interpretation of a Constitution as to international involvement in armed conflict<sup>20</sup> have been assisted by the VCLT. Due to its general nature the VCLT must, as a rule, remain “general” in its application and is not suited to assist in the interpretation, which requires a distinctively specialized approach.

## **The problem – a preliminary view**

There are really two arguments contained in the proposition of the above authors. The first argument is that in effect article 7 is incapable to contribute towards a methodology

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<sup>16</sup> *ibid.*

<sup>17</sup> *Great China Metal Industries Co Limited v Malaysian International Shipping Corporati Berhad* [1998]196 CLR 161, 187.

<sup>18</sup> *Ibid.*

<sup>19</sup> Bundesgericht, Urteil BGE 97 I 359, Bundesrepublik Deutschland gegen Kanton Schaffhausen, [<http://www.eurospider.ch>] last update September 20, 2001

<sup>20</sup> 2BvE 3/92, 2BvE 5/93, 2BvE 7/93, 2BvE 8/93, [<http://www.rewi.hu-berlin.de/HFR/12-1996/Urt920286.html>]

of interpretation. By implication the contention is made that the VCLT will just do that. This paper will not address this issue.<sup>21</sup>

The second argument is that the VCLT is better equipped to solve the interpretational needs of the CISG and therefore can or should replace article 7.

There are several reasons why this is not so. The most compelling reason is that the VCLT, like any other treaty, needs to be ratified. Furthermore article 4 of the VCLT forbids retroactivity. Therefore all states, which have ratified the CISG before they ratified the VCLT or have not ratified the VCLT, cannot apply the Law of Treaties to the CISG. Roth herself mentions this impediment and notes that:

*“Since not all CISG member states are also parties to the VCLT, such as the USA or in Europe, France, Norway and Romania, this convention is not applicable to the CISG.”*<sup>22</sup>

Therefore the very argument that the VCLT is not always applicable is in direct breach of the mandate in article 7 namely the need to “promote uniformity in its application.” Roth though suggests that the VCLT is still applicable as article 31 coincides with valid customary international law.<sup>23</sup> However such a suggestion is tentative and lacks certainty. Why introduce a possible customary international law when the CISG already has in its regime a firm and certain rule as to interpretation?

Secondly there is no authority that one article of one convention can override and replace an article in another convention. A distinction has to be made where a particular convention has no interpretative articles. In such a case the VCLT can supply an answer but only if the States concerned have ratified the VCLT and are therefore within the mandate of article 4 VCLT. In these circumstances contractual obligations emanating from ratification are adhered to.

On the other hand where an interpretative article forms part of the convention contracting parties are only bound to what they have signed and not what could possibly be introduced at a later stage. It contravenes all principles of treaty ratification as well as contract principles.

As a third argument consideration must be given to the overwhelming agreement amongst scholars that the CISG must be interpreted autonomously.<sup>24</sup> As such principles, which are not part of the CISG, cannot be introduced as interpretative tools.

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<sup>21</sup> For a full discussion on a methodology of interpretation of the CISG see: Zeller, B. *“The United Nations Convention on contracts for the International Sale of Goods – A Methodology for its Interpretation and Application.”* PhD Thesis (Law) The University of Melbourne, (2002)

<sup>22</sup> Roth above n 2, 5.

<sup>23</sup> Ibid.

<sup>24</sup> See Diedrich F., “Autonome Auslegung von Internationalem Einheitsrecht, 1994, and Schlechtriem, P., (ed) *“Commentary on the UN Convention on the International Sale of Goods (CISG)”*, 2<sup>nd</sup> ed, (1998), Oxford Press

## **The relationship between the CISG and the VCLT**

The CISG as an improvement to many conventions and treaties incorporates its own interpretative articles hence a mandatory application of article 7 is warranted. However the argument has been advanced that article 7 only “addresses the special features and goals of the convention’s application but does not mention the methods of interpretation.”<sup>25</sup> The fact that Happ argues that the CISG has “special features and goals” would make an application of the VCLT problematic. Happ continues to argue that the CISG does not formulate any methods of interpretation but that the CISG must be interpreted uniformly.<sup>26</sup>

As mentioned above, the problem of applying the VCLT will have an important bearing on uniformity if a country has not ratified the VCLT but has done so for the CISG. Pursuant to the VCLT it cannot be applied if it is not ratified. In such an instant a judge or arbitrator would be compelled to either use domestic interpretative methods or rely on article 7. In either case uniformity worldwide could not be achieved.

Roth argues that customary international law principles as embodied in article 31 VCLT are applicable to the CISG because they are universally valid.<sup>27</sup> Such a statement is based on certain assumptions, which are difficult to maintain. First it assumes that internationally the rules are not only known but are also practiced. Secondly as customary rules are not binding - they are not based on legislation - it is difficult to argue that customary rules are universally valid. The fact that courts are compelled to invoke article 7 indicates that at least all courts and tribunals use the same tool.

It is a completely different argument to suggest that the interpretation set forth in the VCLT is applicable to the CISG. That may well be the case but the main question still remains will the VCLT achieve what article 7 purportedly fails to do and secondly does the CISG actually allow the “importation” of another interpretive tool to regulate the CISG.

It cannot be disputed that the VCLT has a connection with the CISG. Simply put the CISG is a convention hence the Law of Treaties is relevant as it regulates the mechanism through which States can enter into binding treaties with each other. The obligations of the Contracting States to each other are contained in Part IV of the CISG. Interpretation and construction of that part must be undertaken within the confines of the VCLT. The other Parts deal with the obligations of parties to a sales contract and hence are governed by article 7. However there is an interesting question; what governs the interpretation of article 7? Honnold puts the following argument:

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<sup>25</sup> Roth above n 2, 1,

<sup>26</sup> Happ above n 3, 376.

<sup>27</sup> Rothabove n 2, 7.

*“Article 7 of the Sales Convention embodies mutual obligations of the Contracting States as to how their tribunals will construe the Convention. Hence the Vienna Convention would be pertinent to a question concerning the construction of article 7, but the Vienna Convention would not govern the interpretation of the articles dealing with the obligations of the parties to the sales contract, for these articles are to be construed according to the principles of article 7.”<sup>28</sup>*

Honnold identifies two distinctly different tasks. First the interpretation of article 7 and secondly the application of article 7 to interpret the CISG specifically the articles dealing with the obligations of the parties to the sales contract.

Such an interpretation is indeed very logical. As the CISG has no tools or methodology in place to interpret the interpretative article it cannot interpret itself. Such a task should be left to the VCLT or more accurately to the “rules of customary public international rules.” However once article 7 is clear and unambiguous, it is the appropriate tool to exercise its function allocated by the CISG, namely to interpret the articles of the CISG. If Honnold is right in his assessment then Roth and Happ by definition must be wrong as they assume that the VCLT can be used to interpret “all the provisions of the CISG.”<sup>29</sup>

It could be argued that a relationship between the CISG and the VCLT can be discovered because it is a fact that the interpretative rules of the VCLT are widely known and regularly observed by courts. As an example the WTO Appellate Court stated:

*“...the Panel relies also on the customary rules of interpretation of ... international law as a basis for the interpretative principles it offers ...”<sup>30</sup>*

The VCLT is a customary rule and therefore could be connected to the CISG through article 9, which states:

*“The Parties are considered ... to have impliedly made applicable to their contract or its formation a usage ... which in international trade is widely known to and regularly observed.”*

However it is difficult to argue that a “usage” as envisaged by the drafters of the CISG includes a customary rule of interpretation. Rather it refers to customs by merchant. Furthermore article 9 is subject to article 7 and hence must be interpreted autonomously as suggested by Honnold. Roth and Happ have extended the terminology of “usage” to the VCLT and hence linked it to the CISG despite Roth making the correct observation that the interpretation of the CISG and interpretation of contracts is different. The CISG

<sup>28</sup> J. Honnold, “*Uniform Sales for International Sales*” (1991) 159.

<sup>29</sup> Roth above n 2, 11.

<sup>30</sup> WTO Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*. WT/DS50/AB/R, 19 December 1997, 17.



is interpreted pursuant to article 7 whereas contracts are interpreted according to articles 8 and 9.<sup>31</sup> As seen above such an extension is flawed and unsustainable.

## Context and General Principles

There is also a further important difference between the CISG and the VCTL, which both Roth and Happ have not specifically enlarged on or only mentioned in passing, which is contained in article 7(2).

This article states:

*"(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*

The point is that the CISG recognizes that not all matters are settled and that gaps must be "settled in conformity with general principles." The VCTL on the other hand stipulates, that a meaning to terms must be given "in their context".

It is argued that article 31 which uses the words "context" and "object and purpose" does not envisage what article 7(2) stipulates namely "general principles". In a methodological sense context and general principles are not the same. A general principle is a much wider term and gives rise to a broader methodology than merely relying on a "context". It can be argued that the VCTL has a far narrower mandate than article 7. Article 7(2) requires that interpretation and hence filling of gaps must be settled in conformity with general principles. Therefore after considering the context of the CISG and having failed to come to a conclusion, general principles must be used to come to a conclusion. Article 31 on the other hand is a generic article. It can be used in any treaty or convention but only within the context and again only in "the light of its object and purpose" suggesting that the VCTL is narrower in its application than the CISG.

Arguably it is possible to interpret the CISG according to the rules as set out in article 31 to 33 of the VCTL in exactly the same fashion as pursuant to article 7(1) of the CISG. The difference however is that under the VCTL this is the end of the matter in relation to interpretation, whereas article 7(2) instructs the courts and tribunals to apply general principles<sup>32</sup>.

The difference between article 7 of the CISG and articles 31 to 33 of the VCTL is that article 7 is in its socialization process turned to solve contractual problems. As such cultural meanings are not only included in the words contained in the CISG but also in the general principles. A distinction has been drawn between legal provisions and general principles.

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<sup>31</sup> Roth above n 2, 7.

<sup>32</sup> It is not the purpose of this paper to discuss general principles but rather to evaluate the possible application of articles 31 -33 to interpret the CISG

Drobnig illustrates the distinction by pointing to the fact that it is bound up with the Roman division between *leges and jus*. Such a distinction was also used within article 7(2) of the CISG.<sup>33</sup> Drobnig observed that:

*“it is almost of the essence of general principles of law that they are not laid down by any legislative action. They are nowhere readily formulated – rather they have to be elaborated.”*<sup>34</sup>

How then can general principles be elaborated? Such a question can only be answered if the purpose for such elaboration is known. If it is for the purpose of a doctrinal analysis of general principle then the solution is a comparison of national and international systems of contract law that is comparative law. These principles therefore need only be understood in a broad sense. If the purpose is to discover general principles within the CISG such an analysis must be rejected due to the mandate of article 7(1). However this does not change the understanding of principles. They still must be understood in a broad rather than technical sense as they contain “rules” as well as “principles”.<sup>35</sup>

A further argument against the use of the VCLT in the interpretative process is that the CISG, rather uniquely introduced a rhetorical community in which the readers

*“first assent to the language and values of the text itself, and then use the language and values to inform their relations with one another.”*<sup>36</sup>

The CISG therefore, compared with other conventions and treaties, has unique values. It has a common language reflecting values, which are understood irrespective of the cultural or legal background of those who apply the convention because the CISG defines the values of its own community. From that point of view alone a generic interpretative tool cannot be superior or replace an interpretative instrument specifically designed to serve a rhetorical community through the use of principles.

Furthermore it should be considered that in *Texaco v Libyan Arab Republic*<sup>37</sup> the arbitrator noted that general principles are one of the sources of international law.<sup>38</sup> Interestingly the arbitrator argued that there is a difference between “general principles” and “principles of international law”. He pointed out that:

*“principles of international law” are of a wider scope than “general principles” because “the latter contribute with other elements [such as] international custom*

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<sup>33</sup> U. Drobnig, “General Principles of European Contract Law” in P. Sarcevic and P. Volken, (eds), *International Sale of Goods, Dubrovnik Lectures* (1985) 306.

<sup>34</sup> *Ibid* 310.

<sup>35</sup> M. Gebauer, “Uniform Law, General Principles and Autonomous Interpretation” (2000) 4 *Uniform Law Review* 683, 696.

<sup>36</sup> A.H. Kastely, “Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention” (1988) 8 *Northwestern Journal of International Law and Business* 574, 574.

<sup>37</sup> E. Lauterpacht (ed), *International Law Reports* Vol 53, (1976).

<sup>38</sup> *Ibid* 452.

*and practice ... to constitute [a] criterion for the internationalization of a contract.*"<sup>39</sup>

The conclusion suggests that the CISG in article 7(2) refers to "principles of international law" whereas arguably the VCLT was written with general principles of interpretation in mind. Such an argument is based on the fact that the functions of the two instruments are different. The purpose of the VCLT is to interpret treaties whereas the CISG interprets international contracts.

An internationalization of contracts also requires that words used within the instrument be of an international character. The approach to the choice of words must view words not in a national but international context. It also overcomes the problem Honnold describes as literary "deconstruction."<sup>40</sup>

Such considerations made the choice of words harder and required a special solution. The drafters of the CISG solved this particular problem and consciously "rooted out words with domestic legal connotations in favour of non-legal earthy words to refer to physical acts."<sup>41</sup> In sum the CISG must and has used words that refer to typical events of international transactions and "in which the community can conceive relationships and resolve conflicts."<sup>42</sup>

Considering the aspects of language and general principles it is difficult to argue that a generic product such as the VCLT can be used to interpret the CISG little alone to argue that it is a superior instrument than article 7. Article 7 has been written in harmony with the CISG as a whole and its design reflects the aspiration of the CISG to be uniformly applicable to international contracts. Roth argues that through the application of the VCTL differing methods of interpretations are avoided because:

*"interpreting treaties by means of customary international law promotes harmonious uniform application of law."*<sup>43</sup>

Such an argument has shown to be wrong due to the special need of the CISG and more importantly McHugh J has pointed out that the Hague Rules are not interpreted uniformly all the time<sup>44</sup>. Furthermore an investigation of the CISG has shown that uniformity on the whole has been achieved despite the fact that foreign decisions are never treated as being binding but are considered to be of persuasive nature.<sup>45</sup>

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<sup>39</sup> Ibid 452 – 453.

<sup>40</sup> J. Honnold, "Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth", (1995) *1 International Trade and Business Law Journal* 1, fn 6.

<sup>41</sup> Ibid 2.

<sup>42</sup> Kastely above n 36, 579.

<sup>43</sup> Roth above n 2, 9.

<sup>44</sup> *Great China Metal Industries Co Limited v Malaysian International Shipping Corporati Berhad* [1998]196 CLR 161

<sup>45</sup> Zeller above n 21.

## Conclusion

This paper argued that the VCLT has only a limited relationship with the CISG. Such a relationship exists as Part IV of the CISG regulates the obligations of contracting States with each other. An interpretation of this part must be undertaken by the VCLT, as its specific purpose is to interpret treaties. Furthermore article 7 must be interpreted by the VCLT, as the CISG has no interpretive tools specifically designed to do just that. However the involvement of the VCLT does not go further. The CISG through article 7 has at its disposition a mechanism whereby ambiguities can be interpreted in a way the drafters of the convention - and for that matter those who ratified it – expressed their intention.

However the important and possibly distinguishing feature between the CISG and the VCLT is article 7(2) specifically the rule that questions, which are not expressly settled, “are to be settled in conformity with the general principles on which it is based.”

The most compelling argument is that the CISG and specifically article 7 and not article 31 of the VCLT has established itself as the benchmark for the interpretation of international instruments. UNIDROIT has produced two important restatements first the Principles of International Commercial Contract Law (PICC) and secondly the Convention on International Factoring. UNCITRAL currently has produced a draft Convention on Assignment in Receivables Financing. Furthermore the Commission on European Contract Law has released the Principles on European Contract law (PECL). All of the above instruments have included either in total or at least partially article 7 of the CISG.