FANTASTIC PRECEDENTS AND WHERE TO FIND THEM: AN ARGUMENT FOR LIMITING THE OPERATION OF COMMON LAW BINDING PRECEDENT RULES WHEN INTERPRETING THE *UN SALES CONVENTION* (*CISG*)

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The United Nations Convention on Contracts for the International Sale of Goods' ('CISG') trade facilitation purpose is undermined by divergent State interpretations. Homeward trend CISG interpretations, and the duty to consult international CISG precedents, are well-travelled ground. Common law precedent's effect in perpetuating the homeward trend (and precluding reference to international case law), however, has not yet been satisfactorily examined. My analysis offers a novel interpretation of CISG article 7(1): it negates the binding effect of local CISG precedent that is inconsistent with its terms. This interpretation allows judges in both common law and civil law States to freely consult foreign CISG case law. Using an Australian case study, I show that neither of two potential public law objections (the principle of legality and the separation of powers) affect my argument. Comments are offered concerning my argument's generalisability to other common law States, arbitration, and other private international law instruments.

I INTRODUCTION

Private international law ('PIL'), being 'that part of the law … which deals with cases having a foreign element',[1] fulfils an increasingly important function around the world given the internationalised nature of business.[2] Even apparently purely domestic transactions can turn out to have significant international connections,

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1 Lord Lawrence Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Thomson Reuters, 16th ed, 2022) vol 1, 3 [1-001].

2 Michael Douglas, 'Integrating Private International Law into the Australian Law Curriculum' (2020) 44(1) *Melbourne University Law Review* 98, 102–3, 106, 113, 117–18.

once supply chains and business ownership structures are taken into account.[3] That being so, the potential importance of the *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*')[4] should not be understated, despite its vintage and despite the existence of mixed evidence concerning the extent to which it is used by merchants in practice.[5] This is because, at its core, the *CISG* is concerned with the promotion of international trade.[6] As a truly international sales law, however, the *CISG* cannot achieve this purpose if the courts of its Contracting States interpret the treaty in light of their own non-harmonised substantive laws. This phenomenon is known as the 'homeward trend'. The homeward trend is problematic as the *CISG*'s trade facilitation potential presupposes its consistent interpretation. Such interpretation has in fact been described as the 'only' way for the treaty to achieve its objects.[7]

Homeward trend *CISG* interpretations are not a new problem. Nevertheless, this problem remains – in many parts of the world – unresolved and in need of urgent attention.[8] In this article, I provide new perspectives on the homeward trend problem that are particularly relevant to common law Contracting States. These new perspectives address a previously unappreciated relationship between the *CISG* and public law. That relationship emerges when one considers that in common law Contracting States it is ostensibly possible for locally binding precedent (precedent that would be internally binding on courts within a given State) to prevent the correction of homeward trend interpretative errors. Given the *CISG*'s nature as shared law, and given the 'duty to look at foreign precedents [ie, *CISG* case law coming from courts in other *CISG* Contracting States] remains, based on comity'[9] imposed by the treaty, this surely cannot be the case. Yet no one, to date, has satisfactorily explained why. I do so, for the first time, in this article.

My argument is grounded in a novel, yet in my view essential, interpretation of *CISG* article 7(1): the treaty's interpretative provision. I argue that *CISG* article 7(1) actually negates the otherwise binding force of local precedent that is inconsistent with its terms. This, as I show, is necessary in order to allow courts in common law Contracting States to freely refer to foreign *CISG* case law, as the *CISG* intends. Taking Australia as a case study, I demonstrate that neither of two potential public law objections – the principle of legality, and Australia's constitutionally

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3 Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018) 87 <https://doi.org/10.1093/oso/9780190622305.001.0001>.

4 *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) ('*CISG*').

5 Ingeborg Schwenzer and Edgardo Muñoz, *Global Sales and Contract Law* (Oxford University Press, 2nd ed, 2022) 74–80 [5.05]–[5.23] <https://doi.org/10.1093/law/9780198871255.001.0001>.

6 *CISG* (n 4) Preamble para 3.

7 Renaud Sorieul, Emma Hatcher and Cyril Emery, 'Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58(4) *Villanova Law Review* 491, 499.

8 Camilla Baasch Andersen, 'A New Challenge for Commercial Practitioners: Making the Most of Shared Laws and Their "*Jurisconsultorium*"' (2015) 38(3) *University of New South Wales Law Journal* 911, 923 ('A New Challenge').

9 Camilla B Andersen, 'Article 39 of the *CISG* and its "Noble Month" for Notice-Giving: A (Gracefully) Ageing Doctrine?' (2012) 30(2) *Journal of Law and Commerce* 185, 200 ('A (Gracefully) Ageing Doctrine?') <https://doi.org/10.5195/jlc.2012.5>.

entrenched separation of powers – preclude *CISG* article 7(1) having this effect. My analysis thereby identifies a new avenue to overcome the homeward trend, and to secure the *CISG*'s applied uniformity across both common law and civil law States alike, in aid of the *CISG*'s trade facilitation purposes. Given the *CISG*'s widespread adoption across (at the time of writing) 97 Contracting States,[10] I also identify the implications of my analysis for other common law *CISG* jurisdictions, as well as for arbitration, and for other comparable PIL instruments.

For the purposes of clarity, it should be noted from the outset that my analysis in this article addresses problems related to the *CISG* and *binding* precedent. It assumes that, in a given decision-making context, a judge cannot avoid an existing precedent's application. Of course, in other circumstances, precedents might be persuasive only, distinguished, appealed, or overruled. Appropriate references to these flexible aspects of precedent's operation are also made throughout.

Part II of this article identifies the problem at issue: that non-internationalist *CISG* interpretations can ostensibly be protected, in common law States, by binding precedent. It identifies the implications of this problem, with reference to the *CISG*'s status as a truly international sales law. Part III explains why, in my view and in light of those implications, *CISG* article 7(1) must negate the otherwise binding effect of such precedent. Part IV applies my argument to Australia, as an example of a common law *CISG* Contracting State. There, I identify problematic and apparently binding *CISG* case law, and I show that neither the principle of legality nor Australia's constitutionally entrenched separation of powers preclude my argument operating in that jurisdiction. Part V explains why, in my view, *CISG* article 7(1) operates differently to other 'regular' statutes giving judges interpretative instructions. In Part VI, I confirm that – perhaps contrary to first impressions – my argument does not implicate regionalism concerns. Instead, it supports the *CISG*'s truly internationalist interpretation. Finally, Part VII concludes by offering insights as to how (amongst other things) my analysis might improve the *CISG*'s interpretative track record in Australia and beyond.

II THE PROBLEM STATED: HOMEWARD TREND *CISG* INTERPRETATIONS AND THE DOCTRINE OF PRECEDENT IN COMMON LAW STATES

Though Part I's description of my analysis may appear technical, and although the *CISG* is grounded in simplicity,[11] it remains the case that legal system complexity 'matters'.[12] In fact, the problem that I introduce here has real-world consequences

10 'Status of Treaties: *United Nations Convention on Contracts for the International Sale of Goods*', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10>.

11 CISG Advisory Council, 'Declaration No 1: The *CISG* and Regional Harmonization', *Opinions* (Web Page, 3 August 2012) [4] <https://cisgac.com/opinions/cisgac-declaration-no-1/> ('Declaration No 1').

12 Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 299.

for the conduct of trade. Those consequences derive from something called the homeward trend: an interpretative approach to the *CISG* that is incompatible with its trade facilitation purposes.

The *CISG*'s drafting sought out 'a balance in the representation of the various regions of the world',[13] and its harmonised contract law rules produced as a result of that process seek to reduce merchants' transaction costs (allowing traders to potentially deal with just one body of law)[14] and thereby promote trade.[15] The *CISG*'s effectiveness in promoting trade thus relies upon its uniform interpretation,[16] as inconsistent interpretations of the instrument degrade its harmonising effect.[17] To combat this problem, *CISG* article 7(1) enshrines internationally minded interpretative rules into the treaty's own text: providing 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'. These rules require the *CISG*'s autonomous interpretation. Autonomous interpretation involves reading the treaty on its own terms, 'free from domestic preconceptions'.[18] Article 7(1) of the *CISG* does not give binding status to foreign *CISG* precedents,[19] but it does require State courts to at least have regard to international *CISG* case law, amongst other types of sources.[20]

Homeward trend *CISG* interpretations are inconsistent with *CISG* article 7(1)'s requirements as they treat the *Convention* as reflecting a Contracting State's own non-harmonised law.[21] Such interpretations are said to be 'a blueprint for the *Convention*'s failure',[22] and as such, they receive sustained academic attention.[23] Their practical effect in undermining trade is illustrated by empirical evidence

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13 Ingeborg Schwenzer, 'Introduction' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 1, 2 ('Introduction').

14 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(2) *Journal of Law and Commerce* 187, 187.

15 Rolf Knieper, 'Celebrating Success by Accession to *CISG*' (2005) 25(1) *Journal of Law and Commerce* 477, 478, 481.

16 Franco Ferrari, *Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention* (Martinus Nijhoff Publishing, 2012) 8–9 <https://doi.org/10.1163/9789004201705>.

17 Pascal Hachem, 'Article 7: Interpretation of Convention and Gap-Filling' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 135, 139–40 [10] ('Article 7').

18 Ibid 137 [5].

19 Ibid 141 [13].

20 Ibid 139–40 [10].

21 Franco Ferrari, 'Homeward Trend and *Lex Forism* despite Uniform Sales Law' (2009) 13(1) *Vindobona Journal of International Commercial Law and Arbitration* 15, 22–3.

22 Harry M Flechtner, 'The Future of the Sales Convention: In Defense of Diversity (Some Non-uniformity) in Interpreting the *CISG*' in Andrea Büchler and Markus Müller-Chen (eds), *Private Law: National: Global: Comparative: Festschrift Für Ingeborg Schwenzer zum 60 Geburtstag* (Intersentia, 2011) 493, 513.

23 See, eg, the provocatively titled Joseph Lookofsky and Harry Flechtner, 'Nominating *Manfred Forberich*: The Worst *CISG* Decision in 25 Years?' (2005) 9(1) *Vindobona Journal of International Commercial Law and Arbitration* 199.

identifying that differing *CISG* applications can even motivate traders to opt out of the *Convention*'s regulatory regime.[24]

All of this is well known. In common law States, however, there is a further dimension to this problem that has not yet been satisfactorily addressed in the literature, and that is the focus of my analysis in this article. Homeward trend *CISG* interpretations may ostensibly become locally protected, in common law States, via the rules of binding precedent. Such binding precedent may prevent the correction of homeward trend errors (even if a later court is aware of them and would, in principle, like to correct them), may perpetuate the homeward trend, and may ultimately stop local courts referring to foreign *CISG* precedent at all: a most undesirable outcome.[25] Since the *CISG* does not, on its face, say anything about local precedent rules,[26] a solution to this problem that is consistent with both the treaty's text and its spirit is necessary in order to explain how the *CISG* can effectively impose its duty to refer to foreign *CISG* case law across common law and civil law State courts alike.

At first glance, one might not perceive any problems as arising here at all. One might suppose that the *CISG*'s nature as shared law *by definition* renders this problem otiose. Closer analysis, however, shows that this is not necessarily the case. The *CISG* applies in any given case as 'part of' a Contracting State's law.[27] In other words, 'State courts within Contracting States … do not apply the *CISG* as foreign law or international law but as unified State law'.[28] This explains why Professor Pilar Perales Viscasillas identifies the need to strike 'a balance' between the *CISG*'s international origins and its situation within any given Contracting State's legal system.[29] Whilst the *CISG* seeks to harmonise substantive contract law to the extent of *CISG* article 4's subject matter scope, it does not otherwise abolish 'the variety which exists in legal cultures'.[30] Harmonising substantive contract law does not, therefore, necessarily abrogate State precedent practices, as desirable as that might be. State law is already recognised as affecting the *CISG*'s

24 Gustavo Moser, *Rethinking Choice of Law in Cross-Border Sales* (Eleven International Publishing, 2018) 72–3.

25 Andersen, 'A New Challenge' (n 8) 927.

26 Indeed, adopting the *CISG* (n 4) does not 'require cessation of sovereignty akin to that given up by EU members through the EU treaties': ibid 925–6.

27 Pascal Hachem, 'Article 1 *CISG*: Sphere of Application' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 26, 39 [31]; Robert Koch, '*CISG*, *CESL*, *PICC* and *PECL*' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 125, 134 <https://doi.org/10.1515/9783866539662.125>.

28 Pascal Hachem, 'Introduction to Articles 1–6 *CISG*: General Questions Regarding the Sphere of Application' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 17, 18 <https://doi.org/10.1093/law/9780198868675.003.0004> ('Introduction to Articles 1–6 *CISG*').

29 Pilar Perales Viscasillas, 'Article 7' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (CH Beck, Hart and Nomos, 2nd ed, 2018) 112, 115 [7].

30 Schwenzer, 'Introduction' (n 13) 12.

practical operation in many ways: some controversial[31] and arguably departing from the ideal,[32] but others being nearly universally accepted, as where limitation periods preclude the bringing of *CISG* claims.[33] So although the *CISG*'s own terms supersede ordinary substance and procedure divides,[34] the fact that the doctrine of precedent might seem to lie beyond *CISG* article 4's subject matter scope confirms that a real issue exists here.

It is, of course, important not to overstate that issue's extent. This article is, as Part I explained, concerned with binding precedent only. Common law precedent's binding effect is limited: for example, only the ratio decidendi of higher court judgments (or sometimes judgments rendered by courts at the same level) can be binding.[35] Even taking such limitations into account, however, the scope for binding precedent perpetuating the homeward trend remains. Prior research by Associate Professor Gary F Bell – the only other scholarship that I have been able to identify adverting to the problem under examination here – suggests '[t]he fact

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31 See, eg, *Rienzi & Sons Inc v N Puglisi & F Industria Paste Alimentarí SpA*, 638 F Appx 87, 89–90 (Raggi, Chin and Droney JJ) (2nd Cir, 2016); Clayton P Gillette and Steven D Walt, 'Judicial Refusal to Apply Treaty Law: Domestic Law Limitations on the *CISG*'s Application' (2017) 22(2) *Uniform Law Review* 452, 452–60; Michael Angarola, 'Raise It or Waive It: Recognition of the Applicability of the *CISG* and the Need to Raise It Early', *UIC Law Review* (Blog Post, 16 December 2023) <https://lawreview.law.uic.edu/news-stories/raise-it-or-waive-it-recognition-of-the-applicability-of-the-cisg-and-the-need-to-raise-it-early/>.

32 Hachem, 'Introduction to Articles 1–6 *CISG*' (n 28) 18; Lisa Spagnolo, '*Iura Novit Curia* and the *CISG*: Resolution of the Faux Procedural Black Hole' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2011) 181, 181; CISG Advisory Council, 'Opinion No 16: Exclusion of the *CISG* under Article 6', *Opinions* (Web Page, 30 May 2014) [5]–[6] <https://cisgac.com/opinions/cisgac-opinion-no-16/>.

33 Despite what may initially appear, with reference to *CISG* (n 4) article 39(2), the *CISG* does not deal at all with limitation periods, and thus limitation lies outside of *CISG* (n 4) article 4's subject matter scope. A limitation period sourced from an otherwise applicable law, or perhaps from the *Convention on the Limitation Period in the International Sale of Goods*, opened for signature 14 June 1974, 1511 UNTS 3 (entered into force 1 August 1988) ('*Limitation Period Convention*'), will apply alongside the *CISG*: see generally Benjamin Hayward, 'New Dog, Old Tricks: Solving a Conflict of Laws Problem in *CISG* Arbitrations' (2009) 26(3) *Journal of International Arbitration* 405. Such limitation periods may constitute substantive law or procedural law, depending upon any given legal system's approach to that classification question: see, eg, *Choice of Law (Limitation Periods) Act 1993* (NSW) s 5. For examples of cases applying the *Limitation Period Convention* (n 33) alongside the *CISG*, albeit concluding that its limitation period had not actually expired: see *Jelen DD v Malinplast GmbH*, High Commercial Court of the Republic of Croatia, Pž-1134/05-3, 30 October 2007; *Industria Conciaria SpA v Šimecki DOO*, High Commercial Court of the Republic of Croatia, Pž-2728/04-3, 26 July 2005; *Nelson Servizi SRL v Empresa RC Comercial*, Sala de lo Económico del Tribunal Supremo Popular [Economic Chamber of the Supreme People's Court of Cuba], No 3, 30 April 2009. These (and all other) CLOUT case abstracts are available at: United Nations, 'Case Law on UNCITRAL Texts (CLOUT)', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/case_law> ('CLOUT'). It is only exceptionally suggested that limitation periods are actually within the *CISG*'s scope: see Adam Williams, 'Limitations on Uniformity in International Sales Law: A Reasoned Argument for the Application of a Standard Limitation Period under the Provisions of the *CISG*' (2006) 10(2) *Vindobona Journal of International Commercial Law and Arbitration* 229, 233, 238–59.

34 Pascal Hachem, 'Article 4 *CISG*: Substantive Scope of Convention' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 87, 89–90 [5].

35 Durgeshree Raman, 'The Doctrine of Precedent (*Stare Decisis*) Revisited' [2022] (1) *New Zealand Law Journal* 28, 28.

that internally some cases may be binding due to *stare decisis* does not prevent the courts from looking at foreign sources as well'.[36] In my view, however, this is strictly true only where international and local *CISG* case law are consistent. If the concept of *having regard* under *CISG* article 7(1) is to have any real meaning, as will be explored in Part III, it requires judges to be able to change their approach by accepting a foreign *CISG* precedent's influence. That simply cannot occur where local binding precedent applies.

A solution is therefore required – one that is consistent with the *CISG*'s text and also its spirit, no less – in order to ensure that common law courts can consult international case law with the same freedom as their civilian counterparts where strict doctrines of precedent do not apply.[37] Bell's prior work on this problem focused mainly on precedent's flexibility as a solution.[38] In this article, I offer a different perspective, directly targeting the *binding* precedent problem and grounded in the *CISG*'s own text. In my view, and as now explained in Part III, *CISG* article 7(1) actually negates the otherwise binding nature of local homeward trend precedent within common law *CISG* Contracting States.

III A NEW PERSPECTIVE ON *CISG* ARTICLE 7(1): NEGATING THE OTHERWISE BINDING NATURE OF LOCAL HOMEWARD TREND PRECEDENT WITHIN COMMON LAW *CISG* CONTRACTING STATES

As Part II explained, *CISG* article 7(1) does not confer binding status upon foreign *CISG* case law. However, its phrase 'regard is to be had' is 'more than a mere recommendation to use the interpretative principles established': it is instead 'a most explicit command directed at courts and arbitral tribunals applying the *Convention*'.[39] Pursuant to this provision, the consultation of international *CISG* case law is considered to be 'indispensable'.[40] Yet to date, no one has sought to explain exactly *how* this provision overcomes the problem of common law binding precedent that I identified in Part II. A new perspective on *CISG* article 7(1) is therefore required in order to reconcile this precedent problem with the widely recognised (and indeed essential) duty to consult international case law.

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36 Gary F Bell, 'Uniformity through Persuasive International Authorities: Does Stare Decisis Really Hinder Uniform Interpretation of the CISG?' in Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds and Hill Publishing, 2008) 35, 42.

37 Larry A DiMatteo, 'The Curious Case of Transborder Sales Law: A Comparative Analysis of *CESL*, *CISG*, and the *UCC*' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 25, 33 <https://doi.org/10.1515/9783866539662.25>; Andersen, 'A (Gracefully) Ageing Doctrine?' (n 9) 190.

38 Bell (n 36) 45–6.

39 Hachem, 'Article 7' (n 17) 138 [7].

40 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, 148 <https://doi.org/10.1007/s40802-020-00166-3>.

If we accept the premise that courts must be allowed to refer to international *CISG* case law when interpreting the *CISG* – an eminently sensible proposition in the context of shared law – it follows (in my view) that *CISG* article 7(1) has an as-yet-unappreciated effect. That provision must negate the otherwise binding force of any common law Contracting State's local precedent that is inconsistent with its terms. This conclusion emerges from a two-stage analysis. First, it must be shown that this really is *CISG* article 7(1)'s abstract effect. And secondly, it must be possible to realise this effect in any particular jurisdiction, given the constraints of that jurisdiction's public law. The first step of this analysis is addressed in this Part, whilst Part IV below addresses Australia's public law as a second step case study.

Regarding the first step, I must acknowledge from the outset that my understanding of *CISG* article 7(1)'s precedent negating effect is not reflected in current mainstream *CISG* texts,[41] two key historical *CISG* reference texts,[42] the treaty's *travaux préparatoires*,[43] or the United Nations Commission on International Trade Law's digest of *CISG* case law.[44] It nevertheless emerges from what I believe it must mean, in a practical sense, for an interpreter to *have regard* to foreign *CISG* case law. Some assistance in understanding this requirement is provided by Professor Franco Ferrari's comments made at a 2012 conference addressing Brazil's adoption of the *CISG*:

> Next step? Oh great, so we all can come up with these autonomous interpretations and so forth, does that create uniformity? No. Consider the possibility of one concept leading you to more than one autonomous interpretation. I give you the easiest example: that is that of place of business. What's a place of business? According to some, every place from which you do business … According to others … a place where you do business and there is some stability … According to other people yet, stability is required, duration (that may amount to stability), and autonomous power to contract. So you see at this point … I have pointed out three autonomous interpretations. But by itself you can see that it doesn't help, because the next judge has a choice. And the chance that the judge applies one of those three is 33 per cent … So you need something other than just autonomous interpretation to get to uniform law and that's where the second part of Article 7(1) comes in: that's the part that says that you also have to take into consideration the need to promote … uniform application. According to everybody today that means courts of one country have to actually look into what happens in other countries. So basically, you have to look into foreign case law and see whether there is actually a solution on a similar problem.[45]

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41 Hachem, 'Article 7' (n 17) 135–58; Perales Viscasillas (n 29) 112–45.

42 Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (Oceana Publications, 1992) 53–61; Michael Joachim Bonell, 'Article 7' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè, 1987) 65.

43 See generally *United Nations Conference on Contracts for the International Sale of Goods: Vienna, 10 March – 11 April 1980*, UN GAOR, UN Doc A/CONF.97/19 (1991) ('*Conference Records*').

44 United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations, rev ed, 2016) 42–53 ('*UNCITRAL Digest*').

45 FGV, 'The *United Nations Convention on Contracts for the International Sale of Goods* (Parte 3)', *YouTube* (Conference Recording, 21 December 2012) 00:09:31–00:11:10 <www.youtube.com/watch?v=Tt8ZY2zFhbM>.

In Professor Ferrari's view, therefore, judges need to be able to choose amongst *CISG* interpretations taken by courts elsewhere in the world. They cannot do so, however, if they are constrained by binding precedent within the context of their own legal system. The maintenance of such a constraint goes against the very grain of the *CISG*'s nature as shared law. The concept of *having regard* thus, in my view, necessarily implies a capacity to be persuaded,[46] which in turn must result in the displacement of local homeward trend precedent's binding effect. Such displacement, as alluded to in Part II, places common law judges in an equivalent position to their civilian counterparts vis-a-vis local and international *CISG* case law: further underscoring the implications of my analysis for the *CISG*'s truly internationalist interpretation.

An (admittedly imperfect) analogy can be drawn here between my understanding of *CISG* article 7(1)'s effect and the status within the United Kingdom ('UK') of case law handed down by the Court of Justice of the European Union following the end of the Brexit transition period on 31 December 2020. Pursuant to the *European Union (Withdrawal) Act 2018* (UK) ('*EU (Withdrawal) Act*') section 6(1)(a), when interpreting assimilated European Union law, UK courts are 'not bound by any principles laid down, or any decisions made, on or after exit day by the European Court'. This resembles the prospective overriding of precedent's binding effect that I understand is the result of applying *CISG* article 7(1) in common law Contracting States. The analogy is imperfect as the Court of Justice of the European Union no longer forms part of the UK's court hierarchy following its exit day, unlike the courts whose judgements are at issue with respect to *CISG* article 7(1). Still, the *EU (Withdrawal) Act* section 6(1)(a) – like (in my view) *CISG* article 7(1) – evidences an intention to prospectively clarify that certain precedents are not binding. Like *CISG* article 7(1), the effectiveness of that instruction falls to be determined within a public law context. Whilst only the UK's public law is relevant concerning the effectiveness of the *EU (Withdrawal) Act* section 6(1)(a),[47] in the case of *CISG* article 7(1), different public law considerations may apply in different Contracting States. Those applicable in Australia are now considered in Part IV's case study below.

Before addressing this Australian example, however, it is necessary to clarify that it is *not* my view that *CISG* article 7(1) invalidates homeward trend decisions as between the actual parties to legal disputes generating precedent. Instead, I argue that such judgments can be ignored (despite their ostensibly binding status) for the purpose of resolving *future* disputes.[48] This previously unappreciated aspect of *CISG* article 7(1)'s operation thereby allows common law courts to apply the *CISG* in a comparable way to their civilian counterparts.

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46 Hachem, 'Article 7' (n 17) 139–40 [10], 140–1 [13]; Perales Viscasillas (n 29) 130–1 [45]; Bonell (n 42) 91 [3.1.3]; Ribeiro-Bidaoui (n 40) 148–9.

47 For the avoidance of doubt, it is not suggested that any impediments to giving the *European Union (Withdrawal) Act 2018* (UK) section 6(1)(a) effect actually exist under UK public law.

48 Cf Justice Kristen Walker, 'When Can a Court's Decision Be Ignored?' (2023) 46(2) *Melbourne University Law Review* 572, 574.

IV PUBLIC LAW CONSIDERATIONS: AN AUSTRALIAN CASE STUDY

Since (as Part II noted) 'a balance' must be struck between the *CISG*'s international origins and its situation within any given Contracting State's law,[49] when assessing *CISG* article 7(1)'s operation in practice, it is necessary to determine whether any given common law Contracting State's public law permits or precludes the operation of my argument. Potential Australian public law objections are addressed, as a case study, in this Part. Again, for the avoidance of doubt, it is *not* my argument that there should be a particular common law approach to interpreting the *CISG*. Instead, this Part's analysis reflects the reality that the *CISG* is 'part of' a broader body of Australian law,[50] and that State laws beyond *CISG* article 4's subject matter scope have the potential to impact the *CISG*'s practical application. This has already been recognised with respect to Australian rules of civil procedure.[51] This Part takes one further conceptual step by asking whether two potential public law objections – the principle of legality, and Australia's constitutionally entrenched separation of powers – preclude my understanding of *CISG* article 7(1) (which for this Part's purposes is taken to be correct) operating in Australia. I ultimately conclude that they do not.

A Australia's *CISG* Case Law and the Homeward Trend

Before addressing those potential public law objections, however, it is important to note that Australia is an interesting case study *precisely because* it is a common law *CISG* Contracting State with appellate-level homeward trend case law. The binding precedent problem that I identified in Part II thus has the potential to directly manifest in Australia, making Australia a perfect testing ground for my argument. Whilst – noting the limitations of precedent referred to in Part II – it is possible for appeals and subsequent cases to provide opportunities for Australian courts to correct 'erroneous' decisions 'that do not promote uniformity',[52] this is not reflected in Australia's actual *CISG* experience. In particular, it is noteworthy that no case applying the *CISG* has yet been considered by the High Court of Australia.[53] Amidst that state of play, two appellate-level Australian cases evidencing homeward trend *CISG* reasoning are readily identified. On top of this, as will be seen below, even persuasive precedent has perpetuated the homeward trend in Australia, though that situation is not the primary focus of my analysis.

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49 Perales Viscasillas (n 29) 115 [7].

50 *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216, 222 (von Doussa J).

51 *Perry Engineering Pty Ltd (rec and mgr apptd) (admins apptd) v Bernold AG* [2001] SASC 15, [18] (Burley J); *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD* [2002] 2 Qd R 462, 472–5 [2]–[16] (Williams JA, Davies JA agreeing at 472 [1], Byrne J agreeing at 485 [52]) ('*Downs Investments*').

52 Bell (n 36) 39.

53 Special leave to appeal one of Australia's appellate homeward trend decisions was denied: *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] HCASL 208, [5] (Gummow and Kiefel JJ).

First, a series of Australian cases equate *CISG* article 35's conformity obligations with the implied terms concerning fitness for purpose and merchantable quality found in Australia's non-harmonised *Sale of Goods Acts*.[54] This interpretation is problematic for several reasons. Those Acts contain no equivalent to *CISG* article 35(3)'s defence, applicable where 'the buyer knew or could not have been unaware of such lack of conformity' arising under *CISG* article 35(2). Their implied terms are subject to party agreement,[55] though agreement is conceptually very different to the actual or constructive knowledge of one party alone that is relevant for *CISG* article 35(3)'s purposes. Moreover, the *CISG* does not adopt those Acts' distinctions between description and sample,[56] and quality and description.[57] Thus, it is clearly not correct to treat *CISG* article 35 as reflecting the *Sale of Goods Acts*' implied terms. Yet this is exactly what binding precedent might require Australian courts to do, given the Full Court of the Federal Court of Australia's decision in *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* ('*Castel*').[58] Article 35 of the *CISG* was at issue in that appeal,[59] making this homeward trend interpretation both ratio and potentially binding precedent.

Secondly, appellate Queensland case law in *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDH BHD* ('*Downs Investments*')[60] equates *CISG* article 74's damages rules with those in *Robinson v Harman*[61] and *Hadley v Baxendale*.[62] This interpretation is also problematic as the common law's damages rules and *CISG* article 74 diverge in several meaningful respects.[63] This erroneous interpretation of *CISG* article 74 is also at risk of Australian perpetuation via binding precedent: damages were 'contentious' in *Downs Investments*,[64] making this homeward trend interpretation again both ratio and potentially binding.

In the context of Australia's federal legal system, *Castel* is strictly binding only upon the Federal Court, whilst *Downs Investments* is binding only in Queensland at the Supreme Court level and below. Still, these decisions stand to have cross-jurisdictional influence too, as Australian courts must follow other internal jurisdictions' reasoned appellate decisions addressing national uniform legislation unless they are considered

54 Andrea Anastasi, Benjamin Hayward and Stephanie Peta Brown, 'An Internationalist Approach to Interpreting Private International Law? Arbitration and Sales Law in Australia' (2020) 44(1) *Melbourne University Law Review* 1, 39–43.

55 See, eg, *Sale of Goods Act 1923* (NSW) s 57.

56 Michael Bridge (ed), *Benjamin's Sale of Goods* (Sweet and Maxwell, 12th ed, 2024) 614 [11-081].

57 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 467, 470–1 (Lord Hodson), 471–3, 475 (Lord Guest), 484–6 (Viscount Dilhorne), 489, 495 (Lord Wilberforce), 503–4, 511–12 (Lord Diplock).

58 (2011) 192 FCR 445, 460 [89] (Keane CJ, Lander and Besanko JJ).

59 Ibid.

60 *Downs Investments* (n 51) 484 [48] (Williams JA, Davies JA agreeing at 472 [1], Byrne J agreeing at 485 [52]).

61 (1848) 1 Ex Rep 850; 154 ER 363.

62 (1854) 9 Ex Ch 341; 156 ER 145.

63 V Susanne Cook, 'The *UN Convention on Contracts for the International Sale of Goods*: A Mandate to Abandon Legal Ethnocentricity' (1997) 16(2) *Journal of Law and Commerce* 257, 259–60.

64 *Downs Investments* (n 51) 484 [48] (Williams JA, Davies JA agreeing at 472 [1], Byrne J agreeing at 485 [52]).

plainly wrong.[65] *CISG* specialists would immediately identify both decisions as plainly wrong given *CISG* article 7(1)'s autonomous interpretation rule. Analogous international commercial arbitration ('ICA') experience, however, shows that the hurdle is high and that not all courts will feel comfortable clearing it. The infamous Queensland Court of Appeal decision of *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*[66] was reconsidered twice, in New South Wales and then again in Queensland, within the space of nine days. In New South Wales, *Cargill International SA v Peabody Australia Mining Ltd*[67] considered the decision plainly wrong and refused to follow it. Back in Queensland, however, *Wagners Nouvelle Caledonie SARL v Vale Inco Nouvelle Caledonie SAS*[68] refused to overrule the decision, instead confining it to its facts.

Outside of the appellate context, as *CISG* cases are occasionally brought before Australian courts lower than the Supreme Court level, trial level Supreme Court case law might also be ostensibly binding. Another of the cases equating *CISG* article 35 with the *Sale of Goods Acts*' implied terms was handed down by the Supreme Court of Victoria.[69] Had a recent decision of the Victorian County Court correctly understood the *CISG* as applicable – via *CISG* article 1(1)(b) – where a contract between Australian and Indian parties was governed by Victorian law,[70] that Supreme Court case might have been considered binding. In addition, as noted above, even persuasive precedents have perpetuated the homeward trend in Australian *CISG* case law.[71] Adding to all of this analysis the ethical obligations placed upon barristers to alert courts to the existence of binding authority tending against a client's case,[72] it can be expected that the decisions addressed in this Part will continue to persist in Australian law, notwithstanding the theoretical possibility that at some indeterminate point in the future they may be overruled.

B *CISG* Article 7(1) and Australia's Public Law Constraints

Can these Australian decisions' otherwise binding natures (and thereby their homeward trend reasoning) be overcome by *CISG* article 7(1)? This is the question to which I now turn, with reference to Australian public law. Directing our attention to public law might initially seem incongruous, given the *CISG*'s PIL nature and its focus on private law (contractual) relationships. Nevertheless, respect for

65 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*').

66 [2001] 1 Qd R 461.

67 (2010) 78 NSWLR 533.

68 [2010] QCA 219 ('*Wagners*').

69 *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108, [235], [245] (Hansen J).

70 Cf *C P Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd* [2023] VCC 2134, [182]–[183] (Judge Macnamara).

71 Bruno Zeller, 'The *CISG* and the Common Law: The Australian Experience' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 57, 59 <https://doi.org/10.1515/9783866539662.57>; Bruno Zeller and Camilla Andersen, 'The Transnational Dimension of Statutory Interpretation: Tragically Overlooked in a Global Commercial Environment' [2019] (1) *Nordic Journal of Commercial Law* 5, 16.

72 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) s 29.

precedent – the issue actually under examination here – is 'an aspect of the rule of law'.[73] It is thus part of the judicial (and ultimately is a governmental) function.

Whilst my analysis here does not implicate any of the *Commonwealth Constitution*'s express or implied guarantees[74] – those guarantees simply not being relevant for present purposes – two potential public law objections to my analyses' Australian application remain. These objections, now taken in turn, address whether or not *CISG* article 7(1) can prospectively override precedent (a question answered with reference to the principle of legality) and my argument's consistency with Australia's constitutionally entrenched separation of powers.

1 CISG Article 7(1) and the Principle of Legality

Parliament's status as Australia's 'superior lawmaker'[75] is an essential *point de départ* regarding this first potential objection. Statute prevails over common law,[76] and Parliament can displace existing statutory interpretations via subsequent legislation,[77] as occurred (in the tax law context) after *Commissioner of Taxation v La Rosa* held that losses flowing from illegal business activity were capable of being valid tax deductions.[78] These lawmaking propositions are rightly considered uncontroversial,[79] though *CISG* article 7(1) raises a different consideration: Parliament's capacity to *prospectively* override precedent in Australia.

Since statutory interpretation is considered to be a judicial 'duty',[80] and since binding precedent's application is partly grounded in fairness considerations,[81] my argument might be understood as affecting private litigants' dispute resolution rights. Specifically, it might be argued that *CISG* article 7(1) overrides a common law right held by private litigants to binding precedent's application. Hence, the principle of legality's potential relevance: it is a statutory interpretation principle presuming that legislation does not interfere with fundamental common law rights, unless an intention to do so has been made sufficiently clear. The relevant contours of this principle are explored in more detail below.

It is not definitively clear that the principle of legality would actually apply here. It is still prudent to consider this potential objection, however, given the principle being likened to 'underwear which has always been worn but has recently

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73 Douglas White, 'Originality or Obedience? The Doctrine of Precedent in the 21st Century' (2019) 28(4) *New Zealand Universities Law Review* 653, 653.

74 See generally Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 135–50 ('*The Rule of Law*').

75 Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511, 531 ('An Institutional Justification').

76 Leeming (n 12) 121–4.

77 Ibid 12, 91, 235.

78 (2003) 129 FCR 494, 500–1 [23], 501–2 [26]–[29] (Hely J, Merkel J agreeing at 498 [12]). See *Income Tax Assessment Act 1997* (Cth) s 26-54(1); Explanatory Memorandum, Tax Laws Amendment (Loss Recoupment Rules and Other Measures) Bill 2005 (Cth) 145–6 [6.1]–[6.7].

79 Leeming (n 12) 214–15.

80 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

81 *Telstra Corp Ltd v Treloar* (2000) 102 FCR 595, 602 [23] (Branson and Finkelstein JJ).

become fashionable to wear on the outside instead of underneath clothing'.[82] *Coco v The Queen* ('*Coco*'), the principle's 'foundational modern authority',[83] explains its operation in a 'seminal statement of principle'[84] as follows:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[85]

Three specific questions arise for assessment here. First: is binding precedent's application a relevant right? Secondly, assuming that it is: is *CISG* article 7(1)'s text sufficient to displace that right? And thirdly: should the principle of legality really apply in this context anyway?

It is implicit in my formulation of the first of these questions that the principle of legality only arises as a potential consideration where binding *CISG* precedent is at issue. This reflects my argument's focus, as explained in Part I, on problems concerning the *CISG* and binding precedent's application. Where precedent's application is, by way of contrast, flexible, it is not necessary for *CISG* article 7(1) to override precedent's binding effect, and no principle of legality considerations arise. For example, where (pursuant to the rule in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*) courts in one Australian jurisdiction may depart from appellate reasoning in another where it is considered plainly wrong,[86] precedent is not strictly binding, and the principle of legality does not arise for consideration. My analysis here thus covers different ground to Associate Professor Bell's, where (as noted in Part II), precedent's flexibility was the focus.

Even so, it is possible that my analysis might still encourage otherwise-hesitant courts to find that a decision is plainly wrong (and thereby to decline to follow it) in the first place. And to reiterate the focus of my analysis, strictly binding precedent is a different category of case altogether. Even Associate Professor Bell accepted that '[t]here could be a binding precedent by a domestic court in a given common law country which is clearly inconsistent with the uniform interpretation of the *CISG* outside that country, and that precedent could be repeatedly followed … because of … *stare decisis*'.[87] The three questions that I identify above concerning

82 Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2016) 258.

83 Francis Cardell-Oliver, 'Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality' (2017) 41(1) *Melbourne University Law Review* 30, 36.

84 Dan Meagher, 'Fundamental Rights and Necessary Implication' (2023) 51(1) *Federal Law Review* 102, 103 <https://doi.org/10.1177/0067205X221146332> ('Fundamental Rights').

85 (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) ('*Coco*').

86 *Farah* (n 65) 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

87 Bell (n 36) 39.

the principle of legality do arise squarely for consideration where that is the case, and are now addressed in turn.

As to the first question, numerous common law rights are currently understood as potentially protected by the principle of legality.[88] Binding precedent's application is not amongst them. However, the list of protected rights is 'neither crystal clear, nor set in stone'.[89] Thus absent judicial clarification, and duly noting the difficulty in defining what rights are considered fundamental,[90] it is prudent to assume that the principle of legality may apply here. If nothing else, this ensures that I confront the highest possible hurdle for my analysis. If this assumption is wrong, *CISG* article 7(1)'s Australian operation simply stands, subject only to my separation of powers analysis set out below.

Moreover, this assumption is reasonable. The principle of legality has been described as 'a rough beast',[91] emphasising the imprecise nature of its boundaries. The 'longevity and durability' of a right is said to be relevant to its fundamental status,[92] it being notable that precedent's application is central to common law litigation.[93] And the principle of legality has the capacity to apply beyond the abrogation of rights per se,[94] to 'important institutional features' of the legal system[95] and consequent 'departures from the general system of law'.[96] Thus even if there is no strict fundamental right to binding precedent's application in Australia, it may still be that negating precedent's otherwise binding status qualifies as a relevant institutional or general legal system change.

On the second question, and turning now to *CISG* article 7(1)'s text, is that text sufficiently clear to displace the right to binding precedent's application? According to *CISG* article 7(1), '[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'. The fact that my understanding of *CISG* article 7(1)'s effect has not been expressly recognised in existing literature admittedly tends against this point. Still, in my view, *CISG* article 7(1) is actually sufficiently clear. This conclusion rests upon what it must mean for an Australian court to have regard to the *CISG*'s international character and the need to promote uniformity in the *CISG*'s application, in particular. These express

88 *Momcilovic v The Queen* (2011) 245 CLR 1, 177–8 [444] (Heydon J) ('*Momcilovic*').

89 Crawford, 'An Institutional Justification' (n 75) 520. See, eg, Dominique Allen, Janina Boughey and Dan Meagher, 'A Case for Recognising Non-discrimination as a Fundamental Right at Common Law' (2023) 46(3) *University of New South Wales Law Journal* 902, 910–14 <https://doi.org/10.53637/WVRH1333>.

90 Crawford, 'An Institutional Justification' (n 75) 537.

91 Robert French, 'Foreword' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) v, v.

92 Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 458.

93 Chief Justice Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4(2) *Australian Bar Review* 93, 93.

94 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 132 [87] (Hayne and Bell JJ). See also *Lee v NSW Crime Commission* (2013) 251 CLR 196, 217–18 [29] (French CJ).

95 Cardell-Oliver (n 83) 33–4.

96 Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329, 331.

requirements imply a need, as identified in Parts I–III, to consult international case law. In my view, this comity-based 'duty' to consider international case law[97] is meaningless if local binding precedent can apply: it therefore necessarily, in my view, presumes its abrogation. I see no other way to faithfully interpret *CISG* article 7(1) that would 'avoid or minimise … encroachment'[98] upon binding precedent's operation, assuming (as explained above) that binding (rather than only persuasive) precedent is at issue. This is so even taking into account the fact that the duty to consult international case law is in some senses an emergent phenomenon vis-a-vis *CISG* article 7(1)'s express wording. Compliance with that duty is a way in which courts ensure that they comply with the requirements to have regard to the *CISG*'s international character and its uniform interpretation. Duly noting the principle of legality's presumptive strength,[99] binding precedent's capacity to render *CISG* article 7(1)'s intended effect nugatory (with respect to having regard to the *CISG*'s international character and its uniform application) is in my view a complete answer. My analysis here thereby overcomes Associate Professor Bell's caution that finding 'a change in the methodology of the common law' in *CISG* article 7(1) might require 'clearer language',[100] noting too that Bell supported (at least in the abstract) the idea that 'adherence to domestic *stare decisis* should be abandoned in interpreting the *CISG*'.[101]

One might wonder, at this stage, what the effect on my argument would be if there was a uniform majority international judicial opinion about a particular *CISG* interpretation issue that was still objectively considered wrong. This hypothetical does not detract from my analysis, and key here again is *CISG* article 7(1)'s requirement that courts have regard to (but not be bound by) international *CISG* case law. In my view, one cannot have regard without having the *potential* to change one's approach, regardless of whether that change in approach actually occurs. It is the *potential* to be influenced by foreign *CISG* case law that is foreclosed by local binding precedent's application. The hypothetical posed here therefore does not affect my conclusion as to the effect of *CISG* article 7(1)'s text, where local (homeward trend) binding precedent is inconsistent with *CISG* article 7(1)'s requirements.

If further support for my conclusion is needed, however, it can be found in understanding *CISG* article 7(1)'s context. When asking whether Parliament has '[used] clear words so the courts know not to apply the presumption',[102] it needs to be kept in mind that the *CISG*'s text was not the product of Australian parliamentary processes,[103] but was instead settled via an international diplomatic conference.[104] Should there be any concerns as to the generality of *CISG* article 7(1)'s text, noting that it expressly refers to the *CISG*'s international character and its uniformity but

97 Andersen, 'A New Challenge' (n 8) 925.
98 *Momcilovic* (n 88) 46 [43] (French CJ).
99 Sanson (n 82) 247.
100 Bell (n 36) 46.
101 Ibid 36.
102 Sanson (n 82) 226.
103 Cf *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281 (Lord Diplock) ('*Fothergill*').
104 See generally *Conference Records* (n 43).

not to negating precedent's binding effect, this context mitigates the seriousness of those concerns.

Further support still is gleaned from the principle of legality's rationales, which are said to help shape the principle's 'content and scope',[105] noting that any statutory interpretation canon 'demands a justification which is principled and coherent, and which aligns with the way in which it is applied by the courts'.[106] Initially, it was believed 'in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.[107] Referring again to the *CISG*'s international origins, no such improbability arises where Parliament adopts a treaty, drafted at the international level, that is understood around the world to constitute shared law requiring an internationalist interpretation. More recently, *Coco* explains that 'curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process'.[108] In this regard, Australia's parliaments made a conscious decision to enact the *CISG* in conjunction with executive accession, after business and legal stakeholder consultations that were 'widely' in favour of the treaty's adoption.[109] Looking to this rationale, no parliamentary process concerns arise.

More recent analyses of the principle of legality's rationales 'propose an alternative account',[110] which is similarly instructive for present purposes. According to Professor Lisa Burton Crawford, 'courts may read statutes in light of the common law, not because there is evidence that this is what Parliament actually intended, nor to enhance the democratic process, but because of the institutional setting in which statutes operate and statutory interpretation occurs'.[111] Noting that 'Parliament *can* overrule the common law, [but that] not every statute need do so',[112] common law rights (in Professor Crawford's view) are 'a weight on the scale' in the modern approach to statutory interpretation.[113] From this perspective, it is reasonable to understand *CISG* article 7(1) as displacing the right to binding (homeward trend) precedent's application. Whilst local binding precedent's application is central to ordinary common law litigation, the contextual value of such application rapidly diminishes where shared law, intended to apply in the same way across 97 Contracting States, is at issue. Shared law would hardly be shared law otherwise.

105 Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 373–4.
106 Crawford, 'An Institutional Justification' (n 75) 548.
107 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
108 *Coco* (n 85) 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
109 Ian Govey and Christopher Staker, '*Vienna Sales Convention* Takes Effect in Australia Next Year' (1988) 23(5) *Australian Law News* 19, 19.
110 Crawford, 'An Institutional Justification' (n 75) 513.
111 Ibid 526.
112 Ibid 531 (emphasis in original).
113 Ibid 534.

Alternatively again, Murphy has recently sought to build upon the 'democracy-enhancing account' of the principle of legality referred to above, suggesting that 'when the courts are faced with reasonably open constructional choices, they may push, but not force, the law in directions that are conducive to institutional well-functioning'.[114] My understanding of *CISG* article 7(1) is capable of operating in Australia on this view, too. As identified above, in my view, *CISG* article 7(1) does not actually leave room for constructional choices. In any event, institutional well-functioning (in the uniform law context) is best supported by Australian courts prioritising the *CISG*'s internationally harmonised application. Protecting parochial views as to the treaty's meaning via binding precedent rules is antithetical to the very reason for the *CISG*'s existence as shared law.

Duly noting that there is no present agreement as to the precise rationale correctly underpinning the principle of legality in Australia,[115] in each of these four cases, the various competing rationales *all* support *CISG* article 7(1)'s capacity to override the otherwise binding nature of homeward trend precedent.

Finally, with respect to *CISG* article 7(1)'s text, *Coco* observed that 'an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless'.[116] Even if implication is required – which I do not consider to be the case – the implied displacement of precedent's binding effect would be justified given the potential for *CISG* article 7(1)'s international character and uniform interpretation instructions to be otherwise rendered ineffective. Whilst recent research suggests that this exacting standard of necessary implication may be in the process of being tempered in Australia by the modern approach to statutory interpretation, it still 'might be constitutionally justified to apply a stricter form of legality to those rights, freedoms and principles which are essential to the proper exercise of judicial power and to maintain the rule of law'.[117] Since binding precedent's application might fairly be described in these terms, it remains important that this necessary implication standard is capable of being met (as I argue to be the case).

As to the third question posed above, despite my assumption as to the existence of a relevant fundamental right, it might still be the case that the principle of legality does not apply in the context of private law litigation due to the absence of an asymmetric relationship akin to that existing as between government and subject.[118] If this is so, my argument remains unaffected. The result would merely be the removal of one potential public law obstacle from the path of *CISG* article 7(1) having the effect that I understand it has in Australia.

By way of interim conclusion, it can therefore be observed that the principle of legality does not prevent *CISG* article 7(1) from negating the binding nature

114 Julian R Murphy, 'Institutionally-Informed Statutory Interpretation: A Response to Crawford' (2023) 46(3) *Melbourne University Law Review* 780, 811–12.

115 Most recently: see Lisa Burton Crawford, 'The Institutional Justification for the Principle of Legality, Revisited' (2023) 46(3) *Melbourne University Law Review* 859.

116 *Coco* (n 85) 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).

117 Meagher, 'Fundamental Rights' (n 84) 123.

118 See generally Brendan Lim, 'Executive Power and the Principle of Legality' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76.

of local precedent affected by the homeward trend. However, noting that the principle of legality is considered to be 'an aspect of the rule of law',[119] my enquiry cannot stop here. It is necessary to also consider the impact of other rule of law considerations upon my analysis. For this reason, Australia's constitutionally entrenched separation of powers[120] is now addressed as a second potential public law objection to my argument's Australian application.

2 CISG Article 7(1) and the Separation of Powers

Within the Australian legal system, general understandings of the rule of law do not supplant actual, specific, constitutional requirements.[121] For this reason, it is appropriate to focus my analysis of this second potential public law objection on the separation of powers doctrine in particular. Two related questions initially arise. First, have Australian parliaments impermissibly exercised judicial power in enacting *CISG* article 7(1); and second, in applying that provision, would judges be impermissibly exercising non-judicial power?[122] Both scenarios would infringe the strict separation of powers – derived from the structure of the *Commonwealth Constitution*[123] – existing at the Commonwealth level of the Australian federation.[124]

That Commonwealth level qualification is important, as it is necessary to identify with specificity what parliaments, and what judges, are relevant for present purposes. Australia's *CISG* implementing Acts, with the exception only of the *Competition and Consumer Act 2010* (Cth) schedule 2 section 68 ('*Australian Consumer Law*'), are state and territory legislation.[125] Still, they may be applied by federal judges via the exercise of accrued jurisdiction, or by the High Court of Australia as the nation's final court of appeal. The Commonwealth's strict separation of judicial power would apply in these contexts and would also apply where the *Australian Consumer Law* section 68 is directly at issue before federal courts, although that provision has not yet actually been considered by any existing Australian *CISG* case.

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119 *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

120 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers*'); Crawford, *The Rule of Law* (n 74) 67–9, 73–6.

121 *Palmer v Western Australia* (2021) 274 CLR 286, 294 [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

122 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 97–8 (Dixon J); Will Bateman et al, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis, 11th ed, 2021) 873–4 [8.2.2].

123 David Tan et al, 'How Does the High Court Interpret the *Constitution*? A Qualitative Analysis Between 2019–21' (2024) 47(1) *University of New South Wales Law Journal* 177, 184 <https://doi.org/10.53637/TOSV8965>.

124 *Boilermakers* (n 120) 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See generally James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 224–33; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) 586 [14.1].

125 See, eg, *Sale of Goods (Vienna Convention) Act 1986* (NSW).

So far as Australia's states and territories are concerned, there is no strict constitutionally entrenched separation of powers,[126] although 'separation of powers-*type* restrictions … apply in the States, too'[127] via the also-structurally-derived[128] principles laid out in *Kable v Director of Public Prosecutions*:[129]

> The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.[130]

For this reason, a third question emerges too, concerning this institutional integrity point.

First impressions might suggest that no separation of powers concerns could possibly arise here given *CISG* article 7(1)'s character as a statutory interpretation rule. Statutory interpretation itself 'is a quintessential judicial function',[131] and Australia's parliaments 'can enact legislation that directs how legislation should be interpreted'.[132] Still, there is nuance here, that does require further exploration.

First, there are constraints bounding Parliament's capacity to adjust Australia's regular statutory interpretation rules. It has been said, for example, that Parliament cannot 'fundamentally [alter] the nature of the interpretative task'.[133] One might wonder: is this what *CISG* article 7(1) does, in Australia, if it has the capacity to deprive Australian precedent of its otherwise binding status? On the one hand, applying local statutory precedent is a regular part of Australia's statutory interpretation process,[134] whilst on the other hand, foreign (or at least, non-UK) court decisions are only infrequently cited by Australian courts in the ordinary course of events.[135] Still, citing precedent is said to be 'one way for judges to give their decisions legitimacy',[136] and citing foreign *CISG* case law in the treaty's harmonised law context might equally achieve that end. Whilst *CISG* article 7(1) (in my view) adjusts the sources that Australian judges are to refer to when interpreting that instrument, it does not

126 Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2nd ed, 2021) 170.

127 Ibid 170–1 (emphasis added). See also Stellios (n 124) 293.

128 Tan et al (n 123) 184.

129 (1996) 189 CLR 51.

130 *A-G (NT) v Emmerson* (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (citations omitted). See also Stellios (n 124) 291–322; Bateman et al (n 122) 953–88 [8.5.12]–[8.5.46]; Williams, Brennan and Lynch (n 124) 595–7 [14.23]–[14.26].

131 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook, 6th ed, 2024) 208 [6.10].

132 Crawford et al (n 126) 178.

133 Ibid.

134 Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42(2) *Sydney Law Review* 209, 211.

135 Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31(3) *Melbourne University Law Review* 733, 753 <https://doi.org/10.2139/ssrn.995060>.

136 Ibid 734.

affect the requirement for judges 'to give written reasons', that requirement being a 'defining feature of judicial power in Australia'.[137]

Secondly, statutory interpretation is considered to be a judicial 'duty': a duty 'to give the words of a statutory provision the meaning that the legislature is taken to have intended'.[138] Notwithstanding *CISG* article 7(1)'s effect, this *nature* of the statutory interpretation function remains intact. Judges interpret the *CISG* in accordance with Parliament's instructions, Parliament having enacted *CISG* article 7(1). That role, in turn, is 'an assurance of the legitimacy of the judicial interpretative function'.[139]

Further support for the view that this architecture is not constitutionally objectionable can be taken from Justice Clyde Croft and David Fairlie's extra-curial assessment of interpretative rules introduced into the *International Arbitration Act 1974* (Cth) ('*IAA*') in 2010. Pursuant to sections 39(1)–(2)(a) of the *IAA*, when a court is undertaking statutory interpretation functions (amongst other functions) under that Act, it must 'have regard to' the objects in section 2D of the *IAA* and additional statutory facts that are set out in section 39(2)(b). As Justice Croft and Fairlie noted, 'hav[ing] regard to' the *IAA*'s objects is not the same as 'imposing [an] obligation on the courts to decide according to the objects', this approach being 'consistent with providing guidance to, *but not prescribing the actions of*, the judiciary'.[140] In other words, were the legislature to direct courts to decide according to statutory objects, this might be seen as directing courts to reach particular conclusions, which is constitutionally problematic. But where courts are instead instructed to take statutory objects into account, their ability to reach their own conclusions is preserved, consistently with Australian separation of powers constraints.

It is notable that *CISG* article 7(1) adopts the very same instruction of having regard to those features in these *IAA* provisions, making it likewise arguable that Parliament has not prescribed the outcomes of *CISG* proceedings. As argued below, concerning the institutional integrity point, *CISG* article 7(1) requires Australian courts to reason in a novel way, but does not require Australian courts to reach specific conclusions or to decide in a way that secures specific results.

One might query, with reference to the ICA constitutional decision in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* ('*TCL*'),[141] whether this distinction is sound. There, the High Court of Australia addressed the constitutionality of Australia's adoption of the ICA award enforcement provisions contained in the *UNCITRAL Model Law on International Commercial*

137 Ibid.

138 *Project Blue Sky* (n 80) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

139 Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20(1) *Public Law Review* 26, 28.

140 Clyde Croft and David Fairlie, 'International Commercial Arbitration: The New Framework for International Commercial Arbitration in Australia' (Conference Paper, International Commercial Arbitration: Efficient, Effective, Economical? Conference, 4 December 2009) 15 (emphasis added).

141 (2013) 251 CLR 533 ('*TCL*').

Arbitration ('*Model Law*').[142] At issue there was the absence of an award enforcement court's capacity to review the correctness of an arbitrator's application of the law.[143] Superficially, in these circumstances, it might be thought that the *Model Law*'s ICA award enforcement regime (held to be constitutionally valid) directs courts to accept arbitrators' legal analyses, and thereby directs courts to uncritically adopt those legal conclusions. If that were true, it would indeed undermine the persuasiveness of my argument set out immediately above. However, upon closer examination, it emerges that this was not the case. As the High Court explained, judges enforcing arbitral awards *do not* merely adopt arbitrators' legal analyses.[144] Instead, conceptually, arbitral awards operate via accord and satisfaction.[145] They replace, by virtue of the parties' voluntary agreement,[146] the parties' pre-existing rights and obligations.[147] Courts *then* apply the law – unfettered by any direction to reach specific conclusions – when determining whether the parties' arbitration agreement is valid, whether there is a valid award to enforce, and whether the requirements for an award's enforcement are satisfied.[148]

Turning more specifically to the idea of courts having regard as embodied in *CISG* article 7(1), and noting that the concept of judicial power cannot itself be strictly defined in Australia,[149] judicial application of *CISG* article 7(1) in line with my argument presented in Part III would remain consistent with several indicia of judicial power. Relevantly:

- *CISG* decisions (even if affected by the homeward trend) would remain legally enforceable as between the relevant parties to those disputes,[150] with such enforceability being '[t]he strongest indicator of judicial power';[151]
- Courts would continue to make determinations about existing rights,[152] 'as opposed to their creation';[153] and

142 *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc A/40/17 (11 December 1985) annex I ('*UNCITRAL Model Law on International Commercial Arbitration*'), as amended by *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session*, UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex I ('*Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration*').

143 *TCL* (n 141) 544 [4] (French CJ and Gageler J), 562 [56]–[57] (Hayne, Crennan, Kiefel and Bell JJ).

144 Ibid 555–6 [34] (French CJ and Gageler J).

145 Ibid 567 [77]–[78], 575 [108] (Hayne, Crennan, Kiefel and Bell JJ).

146 Ibid 550 [17], 555 [31] (French CJ and Gageler J), 566 [75], 574–5 [106]–[107], [109] (Hayne, Crennan, Kiefel and Bell JJ).

147 Ibid 567 [79]–[80] (Hayne, Crennan, Kiefel and Bell JJ).

148 Ibid 555 [32]–[33] (French CJ and Gageler J).

149 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 108 [66] (Gageler J); *Palmer v Ayres* (2017) 259 CLR 478, 496 [43] (Gageler J). Cf *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) ('*Huddart*').

150 See *Huddart* (n 149) 357 (Griffith CJ).

151 Joseph and Castan (n 131) 209 [6.16].

152 *Huddart* (n 149) 357 (Griffith CJ); ibid 211 [6.20].

153 Crawford et al (n 126) 171.

- Courts would not 'translat[e] policy into statutory form or the executive function of administration'.[154]

For all of these reasons, applying my understanding of *CISG* article 7(1)'s operation in Australia would not infringe upon the strict separation of Commonwealth level judicial power. No issues arise as to Parliament exercising judicial power, nor judges exercising non-judicial power of the Commonwealth.

Turning then to this Part's final institutional integrity point, it has been said that the 'principles of statutory interpretation must reflect the constitutional distribution of powers between the legislative, executive and judicial branches'.[155] Article 7(1) of the *CISG*'s effect does not disturb that reflection, and once again, ICA experience in *TCL* is instructive. In *TCL*, it was explained that legislation must be compatible 'with the essential character of a court as an institution' that is (and that is also seen to be) independent and impartial.[156] Even if legislation prospectively overriding precedent might be seen as interfering with regular court processes in an abstract sense, there is no infringement of their independence or impartiality. Though 'there has been a marked difficulty in defining' the concepts of judicial independence and impartiality,[157] *CISG* article 7(1) raises no concerns as to courts being improperly aligned with the Executive or Parliament, nor being unfairly predisposed to one party or the other's case. This is important as *TCL* explained that '[t]he doctrine of the separation of powers is directed to ensuring an independent and impartial judicial branch of government to enforce lawful limits on the exercise of public power'.[158] Similarly, to the extent that it may be relevant to assessing the impairment of institutional integrity,[159] no infringement of procedural fairness is evident either. As noted with respect to my analysis of the strict separation of Commonwealth level judicial power, Parliament might have directed courts to interpret the *CISG* in a particular way – even in an unusual way, by local standards – but it has not directed courts to reach particular conclusions. Article 7(1) of the *CISG* mandates a method, not results, and thereby leaves institutional integrity intact. Referring to *TCL* one last time, it is not the case that *CISG* article 7(1) co-opts State courts 'to perform a task which did not engage the courts' independent judicial power to quell controversies'.[160] That power is actually very much engaged.

As a final aside, one might query whether institutional integrity issues could arise where Australian courts consult foreign *CISG* case law via sources that they would consider non-authoritative in a primary source of law sense. In the ordinary course, Australian courts will insist upon the use of authorised (or at least most authoritative) law reports. Where foreign *CISG* case law is consulted, however, the case law publication landscape looks very different. International *CISG* case

154 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 25 [76] (McHugh and Gummow JJ).

155 Lisa Burton Crawford, 'The Rule of Law' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 77, 90 <https://doi.org/10.5040/9781509918430.ch-005>.

156 *TCL* (n 141) 553 [27] (French CJ and Gageler J) (citations omitted).

157 Joe McIntyre, *The Judicial Function* (Springer, 2019) 163 <https://doi.org/10.1007/978-981-32-9115-7>.

158 *TCL* (n 141) 574 [104] (Hayne, Crennan, Kiefel and Bell JJ).

159 Stellios (n 124) 302–9; Bateman et al (n 122) 988–94 [8.5.47]–[8.5.50].

160 *TCL* (n 141) 574 [105] (Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

law is made widely accessible to worldwide audiences via secondary source reproductions: open access databases[161] and publications[162] that are not considered official reports in those cases' jurisdictions of origin. For *CISG* article 7(1)'s purposes, the duty to refer to foreign *CISG* cases is qualified by a reasonableness standard,[163] rendering reference to these sources proper for the treaty's own purposes. But what about for the purposes of Australian constitutional law? Whilst it is inevitable that these sources will vary in their quality and that they will also contain imperfections from time to time, such deficiencies do not undermine the independence or impartiality of the Australian courts referring to them, nor do they affect the procedural fairness that such courts afford to the parties. Once again, no institutional integrity concerns arise.

It can therefore be concluded that, on the basis of this Part's analysis, neither the principle of legality nor the separation of powers preclude my understanding of *CISG* article 7(1) operating in Australia. In my view, *CISG* article 7(1) prevents Australian homeward trend *CISG* decisions being considered locally binding precedent. In doing so, it empowers Australian courts to properly fulfil their duty to consider international *CISG* case law, that can otherwise already be effectively carried out by civil law courts which are unconstrained by *stare decisis*.

V JUSTIFYING *CISG* ARTICLE 7(1)'S UNIQUE EFFECT VIS-A-VIS OTHER NON-HARMONISED STATUTORY LAWS

At this point, some readers might feel that an elephant remains in the room. Why, it might be asked, do *CISG* article 7(1)'s interpretative instructions negate the binding force of local precedent when comparable 'ordinary' (non-harmonised) statutory laws giving judges interpretative instructions do not?

As this very question suggests, it is the *CISG*'s harmonised nature that is key. A careful distinction needs to be drawn, therefore, between shared laws (like the *CISG*) and statutory provisions that may or may not be based upon an international template but that have no '*animus unificandi*' (intended uniform interpretation).[164] Securing the *CISG*'s uniform interpretation across different types of legal systems – the motivation underpinning my analysis – is not a relevant consideration in the context of non-harmonised law. The *Australian Consumer Law*'s consumer

161 See, eg, Pace University Elisabeth Haub School of Law, 'Search Cases in the *CISG* Database', *Albert H Kritzer CISG Database* (Web Page) <https://iicl.law.pace.edu/cisg/search/cases>; Faculty of Law at University of Basel, 'Search for Cases', *CISG-online* (Web Page, 2024) <https://cisg-online.org/search-for-cases>; 'CLOUT' (n 33). Free registration is required to access the *Albert H Kritzer CISG Database*'s case law search functionality.

162 See, eg, United Nations Commission on International Trade Law, *UNCITRAL Digest* (n 44); Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2022–) vol 1–3.

163 Ribeiro-Bidaoui (n 40) 148–9.

164 FGV (n 45) 00:03:10–00:04:51.

guarantees, for example, are based upon New Zealand law,[165] but those provisions do not constitute harmonised law. There is no intention either side of the Tasman for their uniform interpretation. The consumer guarantees remain, therefore, non-harmonised Australian law.

That being so, attention can usefully be directed at the consumer guarantee of acceptable quality in order to further explore the difference under examination here. This guarantee applies via the *Australian Consumer Law* section 54(1), with the *Australian Consumer Law* section 54(2) identifying its five requirements: goods must be fit for the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe, and durable (so far 'as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable'). Most importantly, for present purposes, the *Australian Consumer Law* section 54(3) then identifies factors that courts must take into account when applying the reasonable consumer test: being the nature of the goods, their price, statements made about the goods on their packaging or on their labels, and representations made about the goods by their supplier or by their manufacturer. As an interpretative provision, the *Australian Consumer Law* section 54(3) bears some functional resemblance to *CISG* article 7(1).

Other like interpretative provisions abound in the non-harmonised statutory laws of other common law *CISG* Contracting States. New Zealand's consumer laws contain provisions equivalent to the *Australian Consumer Law* section 54(3).[166] Canadian consumer labelling laws statutorily define the notion of false or misleading representations.[167] Hong Kong's arbitration laws provide a suite of definitions concerning various aspects of third party funding.[168] Singapore's arbitration laws define intellectual property rights (exhaustively),[169] and related disputes (inclusively),[170] for the purposes of intellectual property right arbitrations. These provisions inform the judicial interpretative task in various ways: they identify considerations that must be taken into account, they exhaustively define statutory terms and they inclusively define statutory terms. But in no case have such provisions been understood as prospectively displacing the binding effect of local precedent that is inconsistent with their terms. Such precedent would stand until appealed or reconsidered by a later court appropriately positioned in the same hierarchy, in the usual way.

Why, then, is *CISG* article 7(1)'s effect different? Given that its text evidences an *animus unificandi*, given its international source, and given the public international

165 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 178–9 [7.9].

166 *Consumer Guarantees Act 1993* (NZ) ss 7(1)(f)–(j).

167 *Consumer Packaging and Labelling Act*, RSC 1985, c C-38, s 7(2).

168 *Arbitration Ordinance* (Hong Kong) cap 609, ss 98G–98J. For the avoidance of doubt, it is noted that Hong Kong is not a *CISG* (n 4) Contracting State, but is rather a Special Administrative Region of the People's Republic of China (which is a Contracting State), to which the *CISG* has been applied as of 1 December 2022 via the *Sale of Goods (United Nations Convention) Ordinance* (Hong Kong) cap 641.

169 *Arbitration Act* (Singapore, cap 10, 2020 rev ed) s 52A(1).

170 Ibid s 52A(3).

law obligations placed upon *CISG* Contracting States to faithfully implement the treaty (including *CISG* article 7(1)),[171] binding precedent's displacement is necessary: international jurisprudence must inform the interpretation of shared law. No such necessity arises, however, where ordinary statutory laws are at issue.

VI REGIONALISM BY ANY OTHER NAME? RECONCILING A COMMON LAW FOCUSED ANALYSIS OF THE *CISG* WITH THE *CISG*'S INTERNATIONAL NATURE

Notwithstanding Part V's analysis, it may be that some readers perceive one further elephant as still remaining in the room. The *CISG* is an *international* sales law. How, one might ask, can my common law focused analysis of that treaty be reconciled with its truly international nature? One might legitimately point out, in turn, that the very point of shared law is to have that law applied in the same way everywhere. Indeed, this is the very ambition reflected in *CISG* article 7(1).

My answer to this point is simple: this is also the ambition of my argument. The attentive reader might note, in this regard, that I have already attempted to herd this elephant at several stages of my analysis so far. Nevertheless, given the fundamental nature of this concern, my position bears both repeating and expansion here.

The concerns identified above relate to the concept of regionalism. History has shown that regionalism – in the form of the development of regional legislative initiatives[172] and the emergence of regionalised interpretations of the *CISG*'s 'indefinite legal concepts'[173] – threatens the *CISG*'s trade facilitation ambitions.[174] Should my argument's common law focus merely represent regionalism by another name, it would rightly be rejected.

Two well-known examples of regionalist *CISG* interpretations that also illustrate regionalism's dangers concern the *CISG*'s inspection and notice rules. Under the *CISG*, goods must be inspected in 'as short a period as is practicable in the circumstances',[175] and notice of any non-conformity must then follow within 'a reasonable time'.[176] Courts around the world have grappled with the interpretation of these time periods, often succumbing to the homeward trend.[177] Two particular

171 Sorieul, Hatcher and Emery (n 7) 500.

172 CISG Advisory Council, 'Declaration No 1' (n 11) [2], [4]–[5]. See also Ulrich Schroeter, 'Article 94: Reservation by States with Harmonized Laws Regarding the Convention's Inter Se Applicability' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 1591, 1594 [10]–[11], 1597 [17].

173 See generally Schwenzer, 'Introduction' (n 13) 3–4.

174 Petra Butler, 'The Perversity of Contract Law Regionalization in a Globalizing World' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Globalization Versus Regionalization: 4th Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2013) 13, 14, 35.

175 *CISG* (n 4) art 38(1).

176 Ibid art 39(1).

177 Ingeborg Schwenzer, 'Article 38 *CISG*: Buyer's Examination of the Goods' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 850, 854 [6].

regionalist interpretations, however, are evident in their Germanic consideration: as Professor Ingeborg Schwenzer has observed, 'the case law of most countries … is much more favourable to the buyer than is the case in Germany, Austria, and Switzerland, in particular'.[178] Initially, those States tended to impose very short periods akin to the time limits contained in their non-harmonised laws.[179] Later, they favoured more structured interpretations, with Germany and Switzerland adopting the so-called noble month and Austria adopting 14 days as flexible starting points.[180] It must be noted that these two descriptions of these States' interpretative approaches are broad generalisations, with individual decisions remaining highly variable.[181] Still, these two distinct regionalist interpretations were at least sufficiently consistent to be identified in the scholarship and are even sufficiently notorious so as to feature in the closing lines of Professor Harry Flechtner's tongue-in-cheek *CISG Song*.[182]

This state of affairs has resulted in 'regional approaches which belie the uniform nature of the *CISG* as it was intended'.[183] Such regionalism endangers the *CISG*'s trade facilitation objectives by encouraging forum shopping,[184] by increasing (rather than decreasing) barriers to trade,[185] and by possibly even encouraging parties to opt out of the *CISG*.[186] As where different Contracting States' reservations and declarations create different textual 'versions'[187] of the *CISG*, understood as having

178 Ibid 861 [16]. See also Ingeborg Schwenzer, 'Article 39 *CISG*: Buyer's Notice of Non-conformity' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 868, 877–80 [17].

179 Camilla Baasch Andersen, 'Reasonable Time in Article 39(1) of the CISG: Is Article 39(1) Truly a Uniform Provision?' in Pace International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998* (Kluwer Law International, 1999) 63, 113–20 ('Reasonable Time'); Andersen, 'A (Gracefully) Ageing Doctrine?' (n 9) 196.

180 Andersen, 'Reasonable Time' (n 179) 120–6; Andersen, 'A (Gracefully) Ageing Doctrine?' (n 9) 187–9. The noble month concept derives from the scholarship of Professor Schwenzer and was first summarised in the English language scholarship by Professor Camilla Baasch Andersen: Andersen, 'Reasonable Time' (n 179) 97–8.

181 Andersen, 'Reasonable Time' (n 179) 126–32.

182 In its original iteration, the *CISG Song* identified via '[a]rtistic exaggeration' that 'German courts give me just 5 minutes to inspect and notify': Center for International Legal Education, 'The *CISG Song*', *University of Pittsburgh* (Web Page, November 2005) <https://www.cile.pitt.edu/about-cile/cisg-song>. More recent performances refer to the regionalism existing as between Germany and Austria on point: Willem C Vis Moot, '30th Vis Moot | Prof Harry Flechtner and Band Performing at the Opening Ceremony', *YouTube* (Performance Recording, 3 April 2023) 00:02:12–00:02:28 <https://www.youtube.com/watch?v=1YMXTZAma6M>.

183 Andersen, 'A (Gracefully) Ageing Doctrine?' (n 9) 185. See also at 196–202.

184 Andersen, 'A New Challenge' (n 8) 922. See also Edgardo Muñoz and Luiz Gustavo Meira Moser, 'Brazil's Adhesion to the *CISG*: Consequences for Trade in China and Latin-America' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Globalization Versus Regionalization: 4th Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2013) 79, 96.

185 Andersen, 'A New Challenge' (n 8) 922–3.

186 Moser (n 24) 72–3.

187 Camilla Baasch Andersen, 'Reservations of the *CISG*: Regional Trends and Developments' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Globalization Versus Regionalization: 4th Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2013) 1, 1.

a 'detrimental effect upon the *Convention*'s practical application',[188] regionalist interpretations undermine the treaty's shared nature by creating different versions of the *CISG* in its applied sense.[189]

Despite my analyses' 'common law background',[190] they are not regionalist. In fact, the opposite is true. The doctrine of binding precedent places common law *CISG* Contracting States in different starting positions – regarding *CISG* interpretation – as compared to their civilian counterparts. That is why my common law focus is justified: by explaining why ordinary binding precedent rules *do not apply* with respect to the *CISG* in common law States, I explain how common law courts can fulfil their duty to refer to international *CISG* case law in the same way that civil law courts can. My argument thereby preserves the *CISG*'s status as 'the legal face of globalization'.[191] Rather than differentiating the *CISG*'s common law application, my argument is actually harmonising in its effect, securing the 'close and unprejudiced cooperation between jurists from the common law system, on the one hand, and continental and related systems, on the other' envisaged by Professor Ingeborg Schwenzer.[192] It is also consistent with Professor Camilla Baasch Andersen's description of precedent as a 'scary word' in the context of 'legal principles spanning the common law–civil law divide'.[193] On the common law side, my analysis takes that scary word out of play, whereas on the civil law side it was never truly in play to begin with.

VII CONCLUSION: IMPLICATIONS FOR THE *CISG*'S APPLICATION AROUND THE WORLD AND FOR THE INTERPRETATION OF OTHER PIL INSTRUMENTS

Article 7(1) of the *CISG* is said to be 'the most important provision within the *CISG* since the *Convention*'s success depends upon the direction taken by courts and arbitral tribunals with respect to interpretation'.[194] Whilst 'some of the noisiest debates surrounding Article 7 are not productive and do not contribute to the objectives of the provision',[195] this is not so with respect to my analysis in this article. My novel perspective on *CISG* article 7(1) explains how the duty to have regard to international *CISG* case law can be given proper effect in common law Contracting States. In doing so, it confirms that common law States can apply

188 CISG Advisory Council, 'Declaration No 2: Use of Reservations Under the *CISG*', *Opinions* (Web Page, 21 October 2013) [2] <https://cisgac.com/opinions/cisgac-declaration-no-2/>.

189 See generally Camilla Baasch Andersen, 'Defining Uniformity in Law' (2007) 12(1) *Uniform Law Review* 5, 7, 41–50 <https://doi.org/10.1093/ulr/12.1.5>.

190 Ulrich Magnus, 'Introduction' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 1, 1 <https://doi.org/10.1515/9783866539662.1>.

191 Ibid 3.

192 Schwenzer, 'Introduction' (n 13) 6.

193 Andersen, 'A New Challenge' (n 8) 934.

194 Perales Viscasillas (n 29) 113 [2].

195 Hachem, 'Article 7' (n 17) 137 [5].

the *CISG* – as shared law – in a truly internationalist way, just as civil law States (uninhibited by a strict doctrine of precedent) are already able to do. My case study also arms Australian courts with a new tool to combat their 'wanting'[196] *CISG* interpretative track record.

Noting that Australia is just one of many common law *CISG* Contracting States, a question naturally arising at this article's conclusion is: can my Australian case study be generalised to other common law *CISG* jurisdictions? The answer here is a typically-lawyerly 'it depends'. Whilst Part III confirmed that *CISG* article 7(1) negates the binding force of local homeward trend precedent, as an abstract proposition, whether or not that effect can take hold in particular common law States will depend upon their unique public law frameworks. The principle of legality, for example, does not operate absolutely identically in all common law States: as Professor Crawford notes, '[*v*]*ersions* of this principle' apply across the common law world.[197] The ability to challenge legislation's constitutionality also varies by legal system. Other considerations still might apply in jurisdictions, like the United States, where the *CISG* is not given effect via legislation.[198] From a practical point of view, it is also important to keep in mind that resort to my analysis is not actually necessary in common law Contracting States where homeward trend *CISG* interpretations are not at play in the first place.[199]

So far, my analysis has assumed that the *CISG* is being considered in litigation. Another question naturally arising at this point is: to what extent might my analysis apply in ICA? Suppose, for example, that Queensland law is the governing law in an ICA. In applying the *CISG* as part of Queensland law, given an arbitrator's 'often-overlooked, but essential' duty to apply the law,[200] a tribunal might be inclined to apply *Downs Investments* as part of Queensland law too.

ICA's flexibility already provides arbitrators with some latitude to avoid doing so. The absence of merits review and appeals in ICA[201] means that errors of law (if this scenario could even be described in that way) generally stand uncorrected. My analysis arms arbitrators with additional legitimacy, however, if taking this course of action. This, in turn, may incidentally reinforce the *CISG*'s empirically[202] and anecdotally[203] recognised relationship with ICA.

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196 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 and Maxwell, 2019) 167, 180 [10.34].

197 Crawford, 'An Institutional Justification' (n 75) 512 (emphasis added).

198 Bell (n 36) 40.

199 In the New Zealand context see, eg, *Smallmon v Transport Sales Ltd* [2012] 2 NZLR 109, 121 [41] (Stevens J for the Court); *Smallmon v Transport Sales Ltd* [2010] NZHC 1367, [88] (French J).

200 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd ed, 2021) vol 2, 2140.

201 Under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) article V(1) ('*New York Convention*'), awards may be challenged 'only if' (and, at article V(2), 'also if') certain grounds are made out. Those grounds do not include mistakes of fact or law: see, eg, *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, 439 [133] (Foster J).

202 Schwenzer and Muñoz (n 5) 76–7 [5.10]–[5.11].

203 'International Arbitration and the *CISG*', *Arbitral Insights Podcast* (Reed Smith, 21 June 2023) 00:18:06–00:18:58 <https://reedsmithinternationalarbitration.podbean.com/e/international-arbitration-and-the-cisg/>.

What about the implications of my analysis for common law States looking to accede to the *CISG* in the future? Here, my analysis stands to help such States better understand how the *CISG* is intended to apply as a truly shared law. Whilst the *CISG*'s internationalist interpretation is key to securing its trade facilitation objectives, in some cases, this knowledge might help States make better informed decisions about joining the community of *CISG* Contracting States.[204] With particular reference to the UK, duly noting that the prospects of UK accession to the *CISG* remain low,[205] the anti-internationalist sentiment underpinning Brexit[206] might tend against *CISG* article 7(1)'s contemporary acceptability there: even if UK courts have previously appreciated the interpretative sensitivities surrounding shared law.[207]

Finally, looking beyond the *CISG*: is my argument generalisable to other PIL instruments? This question is of great practical importance as *CISG* article 7(1) has become a template adapted by and adopted in numerous subsequent instruments.[208] The answer here is once again 'it depends'. This time, it depends upon an instrument's nature and text.

Regarding nature, as Part V explained, the public international law obligations attaching to the *CISG* as a treaty partially underpin *CISG* article 7(1)'s effect. For this reason, my analysis cannot apply to international instruments containing textual equivalents to *CISG* article 7(1) if they are not treaties binding at public international law. Thus *Model Law* article 2A(1) (being 'prototype' legislation rather than a treaty)[209] cannot qualify. For the avoidance of any doubt, this is not to say that such provisions lack utility. Article 2A(1) of the *Model Law* has been highly influential, for example, in securing the *Model Law*'s internationalist interpretation in Australia.[210] My argument's inapplicability here simply means that precedent inconsistent with *Model Law* article 2A(1)'s requirements remains capable of being locally binding (until appealed or overruled in the ordinary way) in common law States.

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204 It has been suggested, for example, in a different context, that '[t]he US might well have refused to ratify the *CISG* had it thought that the *CISG* would allow the prevailing party to recover its attorney's fees': Gillette and Walt (n 31) 483.

205 UNCITRAL: United Nations Commission on International Trade Law, 'Topic 3: The *CISG* as a Backbone of Transnational Commercial Law', *YouTube* (Seminar Recording, 30 October 2020) 00:11:01–00:11:25 <www.youtube.com/watch?v=GidMVLIO6Ig>. See also Johanna Hoekstra, 'Political Barriers in the Ratification of International Commercial Law Conventions' (2021) 26(1) *Uniform Law Review* 43, 53–4.

206 BBC News, 'Brexit: Why Is There a Row over the European Court of Justice?', *BBC* (online, 28 February 2023) <www.bbc.com/news/uk-northern-ireland-58889543>; The Law Society, 'What is the European Court of Justice and Why Does it Matter?', *Brexit* (Web Page, 23 December 2023) <www.lawsociety.org.uk/topics/brexit/what-is-the-european-court-of-justice-and-why-does-it-matter>.

207 *Fothergill* (n 103) 281 (Lord Diplock); *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce).

208 Hachem, 'Article 7' (n 17) 137–8 [6].

209 Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (Wolters Kluwer, 4th ed, 2019) 18.

210 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 383–4 [75] (Allsop CJ, Middleton and Foster JJ).

On the other hand, treaties with textual equivalents to *CISG* article 7(1) – the *Convention on Choice of Court Agreements*[211] and the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*[212] being examples – may qualify for my argument's application. This would depend upon those treaties' equivalent provisions being interpreted as having the same effect as *CISG* article 7(1), in their own context.[213] Noting the conceptual similarities between treaties and contracts,[214] it has been observed in relation to contractual interpretation that equivalent clauses can have different meanings in the context of different contracts.[215] This may also be the case with respect to provisions equivalent to *CISG* article 7(1), appearing in different treaties and thus in different contexts.

My argument is not generalisable at all, however, to treaties having no *CISG* article 7(1) textual equivalent, even if they are otherwise subject to like interpretative rules. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*'),[216] for example, is subject to internationally minded interpretative rules akin to *CISG* article 7(1)'s rules,[217] though they are sourced from public international law and require 'reading in'.[218] Since *CISG* article 7(1)'s text is also key to my analysis, that analysis cannot apply to the *New York Convention* or other treaties that are similar to it in this respect.

Referring back (in conclusion) to my Australian case study, it has been said in that jurisdiction that '[t]he doctrine of precedent depends for its effectiveness on judges … conscientiously and carefully articulating the content of the practice'.[219] My argument's capacity to help Australian judges apply the *CISG* in a more internationalist sense ultimately now rests upon judicial endorsement of my understanding of *CISG* article 7(1)'s effect. Such judicial endorsement might originate in Australia, or elsewhere across the *CISG*'s global *jurisconsultorium*.[220] Noting the view put forward in 2010 that Australia's *CISG* experience resembled

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211 *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, HCCH No 37 (entered into force 1 October 2015) ('*Convention on Choice of Court Agreements*'). Article 23 of the *Convention on Choice of Court Agreements* is textually equivalent to article 7(1) of the *CISG* (n 4) in respects that are relevant to this article's analysis.

212 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, opened for signature 2 July 2019, HCCH No 41 (entered into force 1 September 2023) ('*Judgments Convention*'). Article 20 of the *Judgments Convention* is textually equivalent to article 7(1) of the *CISG* (n 4) in respects that are relevant to this article's analysis.

213 See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

214 *BG Group PLC v Republic of Argentina*, 572 US 25, 37 (Breyer J) (2014).

215 Regarding arbitration clauses: *Wagners* (n 68) [41], [43] (Muir JA). Regarding contractual arbitration rules: Björn Gehle, 'The Arbitration Rules of the Australian Centre for International Commercial Arbitration' (2009) 13(2) *Vindobona Journal of International Commercial Law and Arbitration* 251, 255–6.

216 *New York Convention* (n 201).

217 Anastasi, Hayward and Brown (n 54) 8–10.

218 Drossos Stamboulakis, *Comparative Recognition and Enforcement: Foreign Judgments and Awards* (Cambridge University Press, 2023) 214–15.

219 Matthew Harding, 'The High Court and the Doctrine of Precedent', *Opinions on High* (Blog Post, 18 July 2013) <https://blogs.unimelb.edu.au/opinionsonhigh/2013/07/18/harding-precedent/>.

220 See generally Andersen, 'A New Challenge' (n 8).

'a jigsaw puzzle missing a critical piece … being an authoritative, appellate level judicial decision clearly confirming the parameters within which the *CISG* operates in domestic Australian law',[221] incorporating my analysis into that puzzle piece will further legitimise the *CISG*'s internationalist interpretation in Australia when it finally falls into place.

In this article, I have identified a significant but so far overlooked effect of *CISG* article 7(1). In order for courts in common law *CISG* Contracting States to fully embrace *CISG* article 7(1)'s duty to have regard to international *CISG* case law, ordinary binding precedent rules must – necessarily – be relaxed. Without such relaxation, binding precedent can perpetuate the homeward trend and effectively preclude foreign *CISG* precedent's influence in common law States. This would place common law courts in a different position vis-a-vis the *CISG* as compared to their civilian counterparts: an interpretative stratification that is untenable given the *CISG*'s status as shared law. I have also shown, with respect to Australia as a jurisdictional case study, that two potential public law objections – the principle of legality and Australia's constitutionally entrenched separation of powers – are no obstacle to my argument having effect in that jurisdiction.

Ultimately, my analysis is offered in service of securing the *CISG*'s truly internationalist interpretation – as shared law – across both common law and civil law States. This is important because, as explained by Professor Schwenzer:

> The application and scientific treatment of the *CISG* make it imperative not only to be familiar with uniform international concepts and structures, but also to understand them as autonomous concepts and to counter the danger of their being interpreted in light of the familiar solutions of domestic law.[222]

As Part II explained, the *CISG*'s existence does not mean that 'the variety which exists in legal cultures will become the sole province of legal historians'.[223] My analysis, in this article, contributes to understanding the 'balance'[224] that must be struck between the *CISG*'s international origins and its situation within its Contracting States' laws. Equipping common law courts with better (and necessary) tools to deal with the *CISG* as shared law will ultimately better secure achievement of the treaty's trade facilitation objectives around the entire world. This is an outcome very much in line with the *CISG*'s own stated intent.[225]

221 Benjamin Hayward, 'The *CISG* in Australia: The Jigsaw Puzzle Missing a Piece' (2010) 14(2) *Vindobona Journal of International Commercial Law and Arbitration* 193, 194.

222 Schwenzer, 'Introduction' (n 13) 11 (citations omitted).

223 Ibid 12.

224 Perales Viscasillas (n 29) 115 [7].

225 *CISG* (n 4) Preamble para 3.