

Excerpt from Allison E. Butler, "A PRACTICAL GUIDE TO THE CISG: NEGOTIATIONS THROUGH LITIGATION," Aspen Publishers (2007 Supplement 2). © Author. Reproduced with permission. For full text, see <<http://cisgw3.law.pace.edu/cisg/biblio/butler6.html>>.

APPENDIX A-7

TABLE 5—CHECKLIST OF LEGAL RESEARCH AND ANALYSIS UNDER THE CISG

"This writer, although nurtured in the common law, has come to believe that *international unification calls for us to re-examine our traditional approach.*"*

1. ___ Does the terms of the Contract address the issue in question?

Practical Application: The CISG does not preempt a private contract between parties; instead, it provides a statutory authority from which contract provisions are interpreted, fills gaps in contract language, and governs issues not addressed in the contract. Under the CISG the terms of the parties' agreement control. *Ajax Tool Works, Inc. v. CanEng Mfg. Ltd.*, 2003 U.S. Dist. LEXIS 1306; 2003 WL 223187 (N.D.Ill., Jan 30, 2003), also available at www.cisg.law.pace.edu/cisg/wais/db/cases2/030129ul.html. *Belgium 24 April 2006 Appellate Court Antwerp (GmbH Lothringer Gunther Grosshandels-gesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepeco International)*, available at <http://cisgw3.law.pace.edu/cases/060424b1.html> (noting that the hierarchy of rules, the terms of the contract should be applied first, then the CISG and finally Belgian general rule. Thus, the will of the parties (art. 8) and usages (art. 9) should only be applied if the contract does not contain a clear term, since the contract precludes the CISG in the hierarchy).

2. ___ Does the CISG apply? [Article 5]
 - ___ Is the contract international? Article 1(1)(a) or 1(1)(b)?
 - ___ Was the country a Contracting State at the conclusion of contract?
 - ___ Do the terms of the contract "opt out of the CISG?" [Article 6]
 - ___ Does the contract deal with goods as set forth in Articles 2 and 3?

* John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 2d ed. (Kluwer Law International 1991), p. 156.

Convention as codifying the international law of treaties. *See* Restatement (Third) of the Foreign Relations Law of the United States, Part III, introductory note (1986).

7. _____ Review case law on particular article, including foreign case law.*

Practical Application: In order to maintain the international character of the convention, an autonomous interpretation of the Convention independent of domestic law is warranted. “[F]or this purpose, it is necessary to adopt a different methodology than used to apply domestic law. The only way to assure the uniformity of the convention is to take into account decisions from tribunals of other countries when applying the convention . . . in order to achieve uniformity.” Spain 7 June 2003 Appellate Court Valencia (Cherubino Valsangiaco, S.A. v. American Juice Import, Inc.), available at <http://cisgw3.law.pace.edu/cases/030607s4.html>. “Judges and arbitrators are bound . . . to look beyond local precedents and local modes of thought.” *See*, Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in Blainpain, ed., *International Encyclopaedia of Laws—Contracts* (Kluwer Law International 1993), para. 77, p. 42. By looking at domestic and foreign case law accordance with Article 7(1) of the CISG is satisfied. *See also* Italy 26 November 2002 District Court Rimini (Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.), available at <http://cisgw3.law.pace.edu/cases/021126i3.html> (declaring that, though precedents in international case law cannot be considered legally binding, they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of CISG (Art. 7(1) CISG)). *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 2004 WL 1166628 (N.D. Ill), also available at <http://www.cisgw3/wais/db/cases2/040521u1.html> (observing preamble and Article 7 the court looked to foreign case law and scholarly writing for guidance in interpreting the CISG); Italy 12 July 2000 District Court Vigevano (Rheinland Versicherungen v. Attarex) available at <http://cisgw3.law.pace.edu/cases/000712i3.html> (precedents in international case law cannot be considered legally binding; in the court’s opinion they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and

* Although the language of the CISG may follow this step, for research purposes the author has elected to place this step first since reference to applicable article of CISG and legislative history most often will be discussed within case law or scholarly writing.

application of CISG (Article 7(1)), *Medical Marketing Int'l v. Internazionale Medico Scientifica*, 1999 WL 311945 (E.D. La.), also available at <http://www.cisgw3.law.pace.edu/cases/990517u1.html> (holding finder of fact has a duty to regard the international character of the convention and to promote uniformity in its application); *St. Paul Guardian Ins. Co. v. Neuro Medical Sys. & Support*, 2002 WL 465312 (S.D.N.Y.), also available at <http://cisfw3.law.pace.edu/cases/02032bu1.html> (CISG aims to bring uniformity to international business transactions); *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001), also available at <http://www.cisgw3.law.pace.edu/cases/010727u1.html> (the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action); Italy 12 July 2000 District Court Vigerano (*Rheinland Versicherungen v. Atlarex*); available at <http://cisgw3.law.pace.edu/cases/021015.html> (stating foreign case law is not binding but it is nevertheless to be considered in order to assure and to promote uniform enforcement of the CISG according to Article 7); Netherlands 15 October 2002 Netherlands Arbitration Institute, Case No. 2319) available at <http://cisgw3.law.pace.edu/cases/021015n.html>.

8. Review scholarly writing.

Practical Application: Scholars are obligated to help the bar and the bench by analyzing the legislative history (*travaux préparatoires*) of the CISG and its literature (*doctrine*) and case law (*jurisprudence*) as thoroughly as possible in order to present the full picture of interpretations and opinions to attorneys and jurists. See Peter Schlechtriem, *Uniform Sales Law—The Experience with Uniform Sales Laws in the Federal Republic of Germany*, 3 *Jurisdisk Tidskrift* (1991-92) 16. Scholars maintain that the international character of the convention obliges an autonomous interpretation of the convention independent of domestic law. . . . The only way to assure the uniformity of the convention is . . . to consult expert opinions of scholars on the subject, in order to achieve uniformity. Spain 7 June 2003 Appellate Court Valencia (*Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc.*), available at <http://cisgw3.law.pace.edu/cases/030607s4.html>. See also *St. Paul Guardian Ins. Co. v. Neuro Medical Sys. & Support*, 2002 WL 465312 (S.D.N.Y.), also available at <http://cisfw3.law.pace.edu/cases/02032bu1.html> (referencing U.S. and German scholarly writings); *Claudia v. Olivieri Footwear Ltd.*, 1998 WL 164824 (S.D.N.Y.) (apply scholarly writing for interpretation of Article 11); *Chicago Prime Packers, Inc. v. Northam Food*

Trading Co., 2004 WL 1166628 (N.D. Ill), also available at <http://www.cisgw3/wais/db/cases2/040521u1.html> (relying on scholarly writing for guidance in interpreting Article 74).

9. _____ Review legislative history.

Practical Application: If case law and scholarly writing does not address issue, look to legislative history. Only when the language of a treaty—read in the context of its structure and purpose—is ambiguous may we resort to extraneous information like the history of the treaty, the content of negotiations concerning the treaty, and the practical construction adopted by the contracting parties. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534, 111 S. Ct. 1489, 1493, 113 L. Ed .2d 569 (1991). As the language of a treaty—again, read in context—is regularly contrasted with information extraneous to the treaty (like the *travaux préparatoires*); see, e.g., *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 111 S. Ct. 1489, 1493; *Chan, v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134, 109 S. Ct. 1676, 1683-84; one can infer that the context of a treaty consists of insights drawn from the treaty document itself.

Article 31(2) of the Vienna Convention confirms this inference, for it defines the context of a treaty as the text “including its preamble and annexes,” as well as contemporaneous instruments and agreements made by the parties to the treaty “in connection with the conclusion of treaty.” Obviously, inferences drawn from a treaty’s structural organization (e.g., the titles of its articles and parts) are also part of the contextual analysis of a treaty. When a court speaks of interpreting the language of a treaty in the context of its structure and purpose, it means construing the literal language of the treaty in light of its structural organization and its purpose—as reflected in the preamble and other parts of the treaty. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 111 S. Ct. 1489, 1493; *Chan, v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135, 109 S. Ct. 1676, 1684, which would include reference to the Secretariat Commentary of the 1978 UNICTRAL Draft Text as well as the 1964 Hague Conference. Pilar Perales Viscasillas (Editorial Remarks) Spain 7 June 2003 Appellate Court Valencia (*Cherubino Valsangiaco, S.A. v. American Juice Import, Inc.*), available at <http://cisgw3.law.pace.edu/cases/030607s4.html>.

10. _____ Domestic law.

Practical Application: Matters not addressed in the CISG, such as procedural matters, should be examined under applicable domestic law. *Austria* 22 October 2001 Supreme Court [10b49/oli], available at

<http://cisgw3.law.pace.edu/cases/01122a4.html> (holding Articles 7 and 8 of CISG cannot be used to resolve agency issues); Germany 13 April 2000 Lower Court Duisburg; available at <http://cisgw3.law.pace.edu/cases/000413gl.html> (applying Italian law pursuant to Article 7(2)); Switzerland 11 July 2000 Federal Supreme Court (Gutta-Werke AG v. Dörken AG), available at <http://cisgw3.law.pace.edu/cases/000711sl.html> (procedural matters are not governed by the CISG); Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., 313 F.3d 385 (7th Cir. 2002) (attorney fee issue was procedural issue outside realm of CISG). Domestic analogs to CISG may not be relevant for argument but may assist in research.

Case Law Illustrations: For examples of proper application of CISG see the following:

Spain 7 June 2003 Appellate Court Valencia (Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc.), available at <http://cisgw3.law.pace.edu/cases/030607s4.html>.

Italy 26 November 2002 District Court Rimini (Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.), available at <http://cisgw3.law.pace.edu/cases/021126i3.html>.

Chicago Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 2004 WL 11666628 (N.D. Ill), also available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040521u1.html> (observing preamble and Article 7 the court looked to foreign case law and scholarly writing for guidance in interpreting the CISG).

Italy 12 July 2000 District Court Vigevano (Rheinland Versicherungen v. Atlarex), available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.