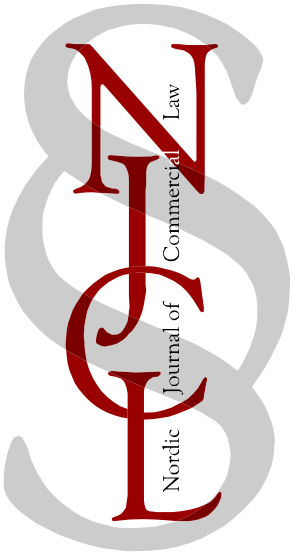

The U.N. Convention on Contracts for the International Sale of Goods, Article 7(1) – The Interpretation of the Convention and the Norwegian Approach

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1. INTRODUCTION[*] [#]

The need for a uniform international sales law has become increasingly more important as the commercial market has become very complex,[1] and most countries are involved in international trade to some extent.

In order to obtain certainty and predictability in international trade, and thereby make sure that international transactions run as smoothly as possible, it is imperative that the different legal systems around the world are being replaced by a uniform body of law to govern the relationship between the commercial actors.[2] By establishing such an uniform body of law one minimises the degree of uncertainty related to which domestic law should be applicable in case of a dispute, and uncertainty in connection with the proper application of the relevant foreign legal system.[3]

This was one of the reasons why the UNCITRAL initiated the establishment of the United Nations Convention on Contracts for the International Sale of Goods.

In addition the drafters intended to establish a 'New International Economic Order'[4] by promoting peaceful co-existence among states[5] through '(...) the development of international trade on the basis of equality and mutual benefit.'[6] This development would be promoted by the establishment of common rules applicable to all contracts of international sale originating

[*] The subject matter of this paper is an analysis of the CISG Article 7(1) and its consequences. I also examine the Norwegian implementation of the Convention, how the Norwegian approach relates to the obligations set forth in Article 7(1), and whether that approach is a loyal compliance with those obligations. I further address the problems caused by the Norwegian transformation and how those problems might be solved.

[#] This essay states the law as at 25 January 2007.

[1] Cook: *The Need for Uniform Interpretation* p. 200.
[2] Honnold: *A Uniform Law for International Sales* pp. 299, 300, 316; Mendes: *The U.N. Sales Convention & U.S.-Canada Transactions* p. 112; Berman and Kaufman: *International Commercial Transactions* p. 264; Zeller: *The Four Corners of the CISG* p. 252; Felemegas: *Uniform Interpretation* p. 123.
[3] Felemegas: *Uniform Interpretation* p. 74.
[4] The CISG, Preamble.
[5] Ryan: *Divergent Interpretations* p. 100.
[6] The CISG, Preamble.

in one of the Contracting States.[7] Overcoming language problems and poor contract drafting was also emphasised by the drafters.[8]

The aim behind the Convention was therefore not to create new provisions for international sales, but to establish a uniform instrument to be applicable independent of national laws:[9]

> "(...) the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."[10]

Most lawyers would probably prefer the transaction to be governed by their domestic law, but it is generally acknowledged that the CISG provides good solutions based on compromises between different legal systems around the world.[11]

There are still several countries that have not yet ratified the Convention, and when it comes to implementation there are two methods available to them; transformation or incorporation.[12] It might be very tempting to those countries to choose to transform the Convention, since this will allow them to stick to what they are used to; they are comfortable with their domestic law, and they would prefer to implement the Convention in a way which would not disturb or be contradictory to their traditional legal system. However, such a solution is not recommendable; the Norwegian approach, which will be thoroughly analysed later in this essay,[13] is an excellent example of why incorporation and not transformation would be the preferred way of implementing the Convention. I believe it is imperative that the prospective ratifying countries look at the possible consequences in relation to the method of transformation, and the Norwegian experiences, when they are going to decide how to implement the Convention. Otherwise, one might be running the risk of having even more countries with a rather 'original' approach to the Convention, which again would impede the achievement of the goals set out in Article 7(1).

In this paper, I will first analyse Article 7(1) in order to find the correct meaning of its three requirements in relation to the interpretation of the Convention; (1) its international character, (2) the need to promote uniformity in its application, and (3) the observance of good faith in international trade.

In light of this analysis I will look at the Norwegian implementation of the Convention, and especially the choice of transformation instead of incorporation, as this raises some important questions in relation to the requirements in Article 7(1). Lastly, I will address some of the material differences between the Convention and the Norwegian transformed version of the Convention, and point out some of the problems this may cause in relation to Article 7(1).

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[7] Gomard and Rechnagel: *International Købelov* p. 20.
[8] Ryan: *Divergent Interpretations* p. 101.
[9] Flechtner: *Challenges to the Uniformity Principle* p. 187.
[10] The CISG, Preamble.
[11] Cook: *CISG: From the Perspective of the Practitioner* p. 350.
[12] See chapter 4.1.
[13] See chapters 4 and 5.

I have chosen to address the specific issues relating to the Norwegian implementation in separate chapters (4 and 5) instead of analysing those problems in chapters 2 and 3. The reason for this is that most of those problematic issues actually relate to more than one of the general points in Article 7 at the same time, and my approach to these problems will therefore cause less repetition. The aspects of Article 7(1) will thus be analysed in the Norwegian context in chapters 4 and 5.

2. HISTORICAL BACKGROUND

There had been an international awareness of the need for a uniform set of rules for the international sale of goods long before the coming into force of the Convention.

Lex mercatoria was for centuries a flexible regulation of international trade.[14] It embodied the customs of the market and fairs, in addition to maritime customs.[15] Under this system it was not lawyers or judges who determined what the law should be, but rather the merchants themselves.[16] Therefore the law was capable of addressing the issues concerned in a very practical and dynamic manner. However, the acceptance into the English common law system deprived it of its flexibility and led to its decline. In the eighteenth century, England became a leading commercial power,[17] and at the same time, in order to meet the merchants' need for a more defined law developed officially and not only by commercial experience,[18] the common law courts were given the authority to overrule decisions from the more specialised mercantile courts.[19] One leading case is *Pillans v van Mierop*,[20] where Lord Mansfield stated that the mercantile law should be decided by the courts rather than matters of custom.

Inconsistent practices and understandings of merchants should no longer be able to interfere once the court had declared a custom.[21]

Given the major role played by England in international commerce, and the fact that the common law courts had the power to overrule decisions by the mercantile courts, lex mercatoria lost its position as a dynamic body of law governing international transactions. Another important factor was the increased need for a more precise body of law to meet the requirements of an industrialised commercial world, as the vague and imprecise rules of lex mercatoria were incapable of addressing those needs.

In 1929 the International Institute for the Unification of Private Law (UNIDROIT) was established, and they took the initiative to produce a uniform law on the international sale of goods.

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[14] Cook: *The Need for Uniform Interpretation* p. 201.
[15] Mendes: *The U.N. Sales Convention & U.S.-Canada Transactions* p. 110.
[16] Mendes: *The U.N. Sales Convention & U.S.-Canada Transactions* p. 111.
[17] Berman and Kaufman: *International Commercial Transactions* p. 226.
[18] Berman and Kaufman: *International Commercial Transactions* p. 226.
[19] Mendes: *The U.N. Sales Convention & U.S.-Canada Transactions* p. 111.
[20] *Pillans v van Mierop* [1765] 3 Burr. 1663 (HL).
[21] Berman and Kaufman: *International Commercial Transactions* p. 227.

The work was temporarily brought to an end during World War II,[22] but resumed in 1951[23] and in 1964 a diplomatic conference was held in Hague where two conventions were adopted; the Uniform Law for the International Sale of Goods (ULIS), and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

However, these two conventions did not achieve the necessary wide acceptance in order to become a uniform instrument for international trade.[24] They were mainly adopted by European civil law nations, but the United States and most third world nations did not contribute to its success as a uniform sales law.[25] In addition, they were very detailed and contained a number of inner contradictions, and thus did not meet the needs of the emerging new economic order.

A new initiative was taken by the UNCITRAL (United Nations Commission on International Trade Law) when they established a working group consisting of fourteen states with the task to come up with a draft, which would gain a wider acceptance. UNCITRAL was founded specifically to address the issues and problems related to the lack of a uniform international trade law.[26] The mandate of UNCITRAL was '(...) the unification and harmonization of international trade law in order to eliminate legal obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis.'[27]

The drafters had obviously learned from the earlier mistakes made in relation to the establishment of an unified sales law, and therefore ensured to have world-wide representation at each stage of the Convention's development.[28] The group sat together from 1970 to 1977 and on the basis of the two Hague Conventions, it prepared two drafts which were adapted into one draft by the UNCITRAL Commission[29] in 1978, and was named the 1978 Draft Convention.[30]

This draft convention, with some modifications, was adopted unanimously by 62 countries at a conference in Vienna 11 April 1980, and was named the United Nations Convention on Contracts for the International Sale of Goods (CISG).

Commentators have stated[31] that since the Convention came into force in 1988 it has become a great success. The States that have ratified the Convention[32] are involved in more than two-thirds of the world trade.[33] All continents are represented, and some of the most influential trading nations, inter alia. Australia, Canada, China, the United States, France and Germany,

[22] Kastely: *Unification and Community* p. 579.
[23] Ferrari: *Uniform Interpretation* p. 190.
[24] Honnold: *Uniform Law* p. 88.
[25] Cook: *The Need for Uniform Interpretation* p. 202.
[26] Mendes: *The U.N. Sales Convention & U.S.-Canada Transactions* p. 115; Farnsworth: *The Vienna Convnetion: History and Scope* p. 18.
[27] Sono: *UNCITRAL and the Vienna Sales Convention* p. 8.
[28] Kastely: *Unification and Community* p. 581.
[29] The Commission consisted of 36 members from around the world.
[30] Hagstrøm: *Kjøpsrett* p. 25.
[31] Lookofsky: *Internationale køb* p. 11; Hagstrøm: *Kjøpsrett* p. 24.
[32] As per 21 January 2007, 70 countries have adopted the Convention. An updated list can be found at www.unilex.info
[33] Henscel: *Varens kontraktsmæssighed* p. 12; Lookofsky: *CISG in Scandinavia* p. 1; Felemegas: *Uniform Interpretation* p. 96.

have ratified the Convention. As stated by Bonell: '(...) the largest part of commercial transactions at world-wide level are in principle subject to the Vienna Convention.'[34]

Two nations which, given their presence on important international markets, would have been natural parties to the Convention are Japan and the United Kingdom.[35] However, they have not at this time chosen to ratify the Convention.

The Convention has not, however, managed to establish itself as the preferred body of law on all areas. Some organisations, e.g. GAFTA,[36] have chosen to stick to their own standard contracts. Those contracts are very detailed in order to meet the specific needs of the members, and the Convention, which is a rather simple instrument, is not suited to deal with those issues. As an example, GAFTA has more than 80 standard forms of contracts, which address issues specifically related to regional differences, the level of risk, the use of the grain or seeds, shipping requirements, quality, conditions etc. Even though the Convention is designed to deal with commodities, it is not a suitable instrument for such specialised trade.

3. ARTICLE 7(1)

3.1. Introduction

All legal provisions need to be interpreted in order to find the correct meaning of the law.

Within national systems, the interpreters – the courts or arbitrators – will have the advantage of being able to rely on established principles and methods of interpretation.[37]

When interpreting an international instrument like the CISG, which is based on a compromise between several different legal traditions, the interpreters will face a much more challenging task when it comes to establishing the correct understanding of the law.

Article 7 deals with the interpretation of the Convention. Paragraph (1) aims at securing a uniform application in all the Contracting States, whereas paragraph (2) provides a tool for gap-filling in situations where the Convention does not provide any clear solutions.

Those two paragraphs together help to ensure a dynamic development of the

Convention.[38] There is no doubt that Article 7 is perhaps the single most important provision of the Convention,[39] since it sets out guidelines to the courts on how to achieve the very goal of the Convention; a uniform set of rules applied in the same way in all Contracting States.

[34] Bonell and Liguori: *A Critical Analysis of Current International Case Law (Part I)* p. 148.
[35] Further analysis of the reasons as to why the U.K. has not yet ratified the Convention may be found in Moss: *Why the United Kingdom Has Not Ratified the CISG*; Forte: *Reason or Unreason in the United Kingdom*; and Linarelli: *The Economics of Uniform Laws and Uniform Lawmaking*.
[36] The Grain and Feed Trade Association.
[37] Felemegas: *Uniform Interpretation* p. 65.
[38] Schlechtriem: *Commentary on the UN Convention* p. 94.
[39] Koneru: *The International Interpretation* p. 106.

Article 7(1), which is the main object of the analysis in this paper, sets out three requirements with regard to the interpretation of the Convention; (1) regard is to be had to the international character of the Convention, (2) the need to promote uniformity in its application, and (3) the observance of good faith in international trade.

Some commentators have argued that the first two criteria are so closely connected that they should in reality be treated as one. Bonell advocates this view; 'The two criteria are only apparently independent from each other. On examination the second criterion turns out to be nothing more than a logical consequence of the first.'[40]

However, Schlechtriem treats them as two separate principles,[41] and since I believe this will give the reader a more profound understanding of the interplay between the three conditions, that is the approach I will pursue in the following analysis.

3.2. The international character[42]

The international character of the Convention is expressed in several ways. One is the fact that its jurisdiction is transaction-focused and not party-focused.[43] It is the cross-border transaction that determines whether the Convention applies or not; the nationality of the parties is irrelevant.[44] Another example is the types of sales which are covered by the Convention, and which types are left out. Transactions that are characteristic for the different national systems are excluded from the application of the Convention.[45] Article 2 of the Convention is a good example, which leaves it to the national jurisdictions to regulate consumer sales, auction sales, etc.

First and foremost, the reference to the Convention's international character implies that the Convention has to be interpreted autonomously, i.e., not in the light of domestic law, but in the context of the Convention itself.[46] As a general rule, the traditional methods used in different national systems should be avoided. As formulated by DiMatteo: '(...) the Convention is meant to be interpreted based upon its uniqueness and not its similarities to any one of the legal systems from which it was created.'[47] An interpretation based on the interpreter's domestic legal system would be a violation[48] of the condition that the Convention should be interpreted in light of its international character. As formulated by Zeller: 'Predictability of outcome and clear and simplified norms, the most important goals of any law, can only be achieved through uniformity of application at an international level as opposed to a national one.'[49]

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[40] Bianca and Bonell: *International Sales Law* p. 72.
[41] Schlechtriem: *Commentary on the UN Convention* p. 95.
[42] See chapters 4.4., 4.5, 5.1.1., 5.2.1., and 5.2.2. for detailed analyses of the impact of the Norwegian implementation on the international character-requirement.
[43] DiMatteo: *The Interpretative Turn in International Sales Law* p. 308.
[44] Sono: *UNCITRAL and the Vienna Convention* p. 12.
[45] DiMatteo: *The Interpretative Turn in International Sales Law* p. 309.
[46] Ferriari, Flechtner, Brand: *The Draft UNCITRAL Digest and Beyond* p. 140; Bianca and Bonell: *International Sales Law* p. 74; Gebauer: *Uniform Law* p. 687.
[47] DiMatteo: *The CISG and the Presumption of Enforceability* p. 133.
[48] Felemegas: *Uniform Interpretation* p. 67.
[49] Zeller: *The Four Corners of the CISG* p. 252.

The Convention's international character also implicates that national definitions and interpretations cannot necessarily be applied to the Convention.[50] Reliance on domestic law could seriously undermine the very purpose of the Convention.

There is, however, a limited room for domestic interpretation in relation to gap-filling in Article 7(2), provided that such a gap cannot be filled autonomously.

An autonomous interpretation not only promotes uniformity, but it also prevents forum shopping,[51] which was one of the aims behind the creation of a uniform sales law; making it irrelevant which country's law the choice-of-law rules would point at.

The courts should also refrain from sticking to a narrow grammatical interpretation; they should instead focus on '(...) the underlying purposes and policies of individual provisions as well as of the Convention as a whole.'[52] This is because the underlying principles may to some extent more fully represent the basic objectives of the Convention than the wording of the provisions. Those general principles are what the delegates formulating the Convention agreed upon[53] and focus on the principles will therefore be the most certain way of ensuring a correct international interpretation, and will avoid a domestic approach to the cases before the court.

Since the Convention does not expressly state what those principles are, they must be found in the text itself, the legislative history, and other sources. When the interpreters are searching for those principles that are not expressly found in the text itself, they should have the Convention's overall goal in mind;[54] to promote international trade by removing legal barriers that arise from different social, economic, and legal systems of the world.[55]

Several courts have also referred to the need to take the Convention's international character into consideration, for example the U.S. case *Medical Marketing International Inc v Internazionale Medico Scientifica*, where the court stated that: '(...) under CISG, the finder of fact has a duty to regard the "international character" of the Convention and to promote uniformity in its application. CISG Article 7.'[56]

When interpreting the Convention one must bear in mind that it is a result of a compromise between several independent States. Its provisions form a uniform platform, which embodies the common principles agreed upon by those States. It is therefore imperative that one is utterly careful with liberal interpretations, which might conflict with the agreed common understanding of the Convention. Later in this paper I will address some particular issues of liberal interpretation in relation to the Norwegian implementation.

[50] Schelchtriem: *Commentary on the UN Convention* p. 96.
[51] Ferrari: *Uniform Interpretation* p. 199.
[52] Bianca and Bonell: *International Sales Law* p. 73.
[53] Koneru: *The International Interpretation* p. 115.
[54] Koneru: *The International Interpretation* p. 116.
[55] The Preamble of the Convention.
[56] U.S. District Court for the Eastern District of Lousiana, United States, 17 May 1999 (CLOUT case No. 418).

A Swiss case[57] may be a good illustration as to how a domestic court should approach a problem in order to have regard to the Convention's international character. In this case, an Italian seller delivered boxes of artificial blood vessels to a Swiss buyer. Some of those were resold to a Swiss hospital. When the hospital discovered that the items were not in conformity with the contract, they were returned to the buyer. The Swiss buyer then sent a notice of non-conformity to the Italian seller three and a half months after delivery, and refused to pay the purchase price. The Italian seller took action in order to recover the contract price.

The interesting question in this case was whether a period of three and a half months was in accordance with Article 39(1) of the Convention, which states that a notice of non-conformity has to be given '(...) within a reasonable time after [the buyer] has discovered [the lack of conformity] or ought to have discovered it.' The court recognised that there existed conflicting views among the different Contracting States to the Convention with regard to the interpretation of 'reasonable time.' In Germany, eight days was the limit, whereas according to the courts in the United States and the Netherlands, several months would be acceptable.

In order to have regard to the international character of the Convention, the court came to the conclusion that a good balance between the different approaches would be reached if the time limit was set to one month.

Such an approach is in line with the idea of autonomous interpretation, and helps to preserve the Convention's independence from the different domestic legal systems.

3.3. The need to promote uniformity in its application[58]

As has already been emphasised in the introduction, the very aim of the establishment of the Convention was to obtain a uniform set of rules for the international sale of goods.

The uniformity requirement is closely connected to the principle of autonomous interpretation (see chapter 3.2.), since an autonomous interpretation will quite often promote uniform application.[59] Complete uniformity will, of course, not be possible in practice, and Article 7(1) does not require strict uniformity to be the result; it only puts an obligation on the contracting parties to 'promote' uniformity.[60] Nevertheless, the very wording of the Convention stresses the importance of uniformity; '(...) the *need* to promote uniformity' (emphasis added). Actually, some non-uniformity is desirable in order for the Convention to maintain the necessary flexibility to manoeuvre in the different legal, political and social contexts present in the different Contracting States. A major task would therefore be to distinguish between that desired flexibility, and the unwanted non-conformity[61] stemming for example from ambiguities between the different official language versions of the treaty.

[57] Obergericht Kanton Luzerne, 8 January 1997, n. 11 95 123/357 (UNILEX 1997).
[58] See chapters 4.2., 4.5., 5.1.1., 5.1.2., and 5.2.1. for detailed analysis of the impact of the Norwegian implementation on the uniformity-requirement.
[59] Gebauer: *Uniform Law* p. 686; Felemegas: *Uniform Interpretation* p. 68.
[60] Flechtner: *Challenges to the Uniformity Principle* p. 205.
[61] Flechtner: *Challenges to the Uniformity Principle* p. 209.

Even though strict uniformity is not what the Convention is aiming at, a functional or relative approach would be preferable[62] to the pre-CISG situation, where all States applied different rules to international sales contracts. Hackney argues that even though perfect uniformity is not achievable, this '(...) is not detrimental to the goal of the Convention.'[63]

In order to achieve the desired level of uniformity, it will of course not be sufficient merely to agree on a number of provisions – it is essential that those provisions are also applied in a uniform manner in all the Sontracting States.[64] The House of Lords in *Scruttons Ltd. v Midland Silicones Ltd* formulated this very point quite precisely:[65] 'it would be deplorable if the nations should, after protracted negotiations, reach agreement (...) and that their several courts should then disagree as to the meaning of what they appeared to agree upon.'

One problem is, of course, that there is no international supreme court, like the national ones, that can work as a correction and give directions as to whether the States are interpreting the Convention in a uniform manner or not. Without such an international organ, there will always be a risk of different interpretations in each state.[66] The duty of interpretation is entirely placed upon the national courts themselves. It is therefore imperative that the Contracting States are careful when they interpret the CISG. In theory, there is no reason why a supranational court could not be established; such a tribunal exists inter alia within the EU. However, there are some differences between the EU and the Convention, which suggest that a similar court would face practical problems in the area of the Convention. One obvious challenge, based on the fact that the Convention is not limited to a smaller regional area like the EU, would be to get all the Contracting States, with their different legal and social structures, to agree upon conferring power to a supranational body to decide disputes between them.[67] Instead of establishing an international tribunal, the CISG drafters chose to include in the Convention a specific interpretation rule, leaving it to the national courts in the Contracting States to interpret the Convention.

One of the major threats to international uniformity is that the national judges read the Convention as if it were a domestic legal document.[68]

In order to avoid that, and to obtain uniformity, the Contracting States have to take court decisions from other Contracting States into account when they are going to make a decision in any particular case. As formulated by Honnold: '(...) courts in States that adopt the Sales Convention should have no doubt as to their responsibility to consider interpretations in other countries.'[69]

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[62] DiMatteo: *The Interpretative Turn in International Sales Law* p. 310.
[63] Hackney: *Achieving Uniformity?* p. 476.
[64] Ferrari, Flechtner, Brand: *The Draft UNCITRAL Digest and Beyond* p. 138; Ferrari: *A New Challenge for Interpreters?* p. 245.
[65] *Scruttons Ltd. v Midland* [1962] AC 471 (HL).
[66] Bonell: *International Uniform Law in Practice* p. 867.
[67] Bianca and Bonell: *International Sales Law* p. 89; Gebauer: *Uniform Law* p. 684.
[68] Honnold: *The Sales Convention in Action* p. 208.
[69] Honnold: *The Sales Convention in Action* p. 211.

Especially two problems may arise in such situations; (1) the decisions may not be readily available to the court, and (2) the decisions may be written in a language foreign to the judges who are going to make the decision. UNCITRAL has taken an initiative to remedy those difficulties by establishing an information system named CLOUT[70] (Case Law on UNCITRAL Texts).[71] The idea is that the Contracting States may send in all cases relevant to the Convention. The case will be available to the other States in its original language, in addition to abstracts translated into all the working languages of the Convention. There are also a number of other initiatives taken by universities, which aim at making it easier for the Contracting States to access the case law from other States, for example the Pace Institute of International Commercial Law in New York.[72]

Foreign case law will not be binding in other countries, but such decisions may nevertheless have, if they are well-reasoned, a persuasive authority,[73] which means that the case law will not be binding per se, but will rather provide the judge or arbitrator with a set of good arguments to apply on the case they are about to decide. Making foreign case law binding would make it much easier to achieve a uniform application, but then the major concern would be to avoid the risk of being '(...) locked into a foolish interpretation of the Convention for the sake of uniformity.'[74]

Another obvious problem with a situation of binding case law, is that one would have to establish a system under which it is decided which decisions from which courts should be considered to be on a higher level in a hierarchy than decisions from other courts. This would be almost an insurmountable task and is therefore a quite convincing argument in favour of a system where the foreign case law only have persuasive value.

Ferrari argues that foreign case law should only have persuasive value,[75] which implies that one can look to foreign case law to find good arguments or counterarguments. This would also mean that the interpreter would not have to decide between which courts to look to; a decision from an arbitral tribunal may be just as relevant as a ruling from a state's supreme court. Even case law from non-Contracting States may be taken into consideration if it can provide valuable arguments in the given case.

Even though one considers foreign case law only to have persuasive value, such case law should be granted considerable weight by the Contracting States in order for them to comply with the uniformity condition.[76]

The obligation to take foreign case law into consideration will not be sufficient to ensure uniformity, because this will not eliminate differing interpretations in the different Contracting States.[77] If the observance of foreign case law were a guarantee to ensure uniformity, it would

[70] www.uncitral.org
[71] Schlechtriem: *Commentary on the UN Convention* p. 98.
[72] www.cisg.law.pace.edu
[73] Schlechtriem: *Commentary on the UN Convention* p. 99.
[74] Hackney: *Achieving Uniformity?* p. 479.
[75] Ferrari: *A New Challenge for Interpreters?* p. 260.
[76] Cook: *The Need for Uniform Interpretation* p. 199.
[77] Ferrari: *A New Challenge for Interpreters?* p. 258.

mean that the first case deciding a specific matter by any court would be shaping all subsequent cases dealing with that issue.

DiMatteo has emphasised that the national courts will have two functions when it comes to looking at foreign case law in order to interpret the Convention: 'First, they would look at decisions of foreign courts for guidance. Second, they would actively unify international sales law by distinguishing seemingly inconsistent prior decisions and by harmonizing differences in foreign interpretations.'[78]

The question is then; does this work in practise? Do the states take foreign case law into consideration? An Italian case decided by Tribunale di Vigevano[79] is a very good illustration that they do.

When deciding those issues relevant to the Convention (whether the buyer had lost his right to rely on lack of conformity due to inadequate notice), and even though it stated that foreign case law was not binding, the court referred to some forty foreign cases, inter alia, from Austria, France, Germany, the Netherlands, Switzerland, and the United States.[80]

In a more recent case, the Tribunale di Rimini[81] referred to about thirty foreign cases when it was to decide a case where CISG was applicable.[82]

What can be learned from this is that the national courts do take foreign case law into consideration whenever that is necessary in order to maintain a uniform application of the Convention in the contracting states, and apparently the initiatives from UNICITRAL and other bodies have helped, at least to some extent, to overcome the obvious obstacles related to availability of the case law and the language problem.

Article 7(1) sets out the goals in relation to uniform application, but it does not, however, say anything about which methods should be used in order to reach those goals.[83] The question is then whether not only the terminology should be interpreted autonomously, but also the methodology used for interpreting the Convention should be derived from the Convention itself.

Roth and Happ argue that autonomy cannot be the solution when it comes to methodology, because the Convention does not say anything about this matter.[84] One therefore has to look elsewhere to find the answers to the methodological questions. One solution is to look at the principles of interpretation provided in international law.

Gebauer states that autonomous interpretation would not have any meaning except for the goal of uniform application, if uniform application is the supreme goal of law-unifying

[78] DiMatteo: *CISG and the Presumption of Enforceability* p. 136.
[79] Tribunale di Vigevano, 12 July 2000, *Giurisprudenza italiana* 2001, 280 et seq. (CLOUT case No. 378).
[80] Ferrari: *Applying the CISG in a Truly Uniform Manner* p. 208.
[81] Tribunale di Rimini, 26 November 2002, *Giurisprudenza italiana* 2003, 896 et seq.
[82] Ferrari, Flechtner, Brand: *The Draft UNCITRAL Digest and Beyond* p. 147.
[83] Roth and Happ: *Interpretation of the CISG According to Principles of International Law* p. 1; Ferrari: *Uniform Application and Interest Rates* p. 471.
[84] Roth and Happ: *Interpretation of the CISG According to Principles of International Law* p. 2.

conventions.[85] According to some commentators[86] the answer to this would be to replace the concept of autonomous interpretation by the principles of interpretation as set out in the Vienna Convention on the Law of Treaties.[87] According to Gebauer,[88] however, uniformity of result is not the sole objective of interpreting uniform law – the solution must also be right.

In addition to the two requirements in Article 7(1) dealing with the Convention's international character and the need to promote uniformity, Article 7(2) is in accordance with the concept that the Convention should be supplemented by the common principles of treaty construction.[89] Thus, the principles laid down in the Vienna Convention on the Law of Treaties may be a relevant source when it comes to the determination of the correct applicable method of interpretation.

There exist an enormous amount of academic writings on most issues relating to the Convention, and such writings may undoubtedly be of great value when it comes to the promotion of uniformity. Traditionally, there has been a variation between the legal systems as to the weight they put on scholarly writings in the interpretive process of establishing the content of the law.[90] Civil Law countries have always looked to doctrine, whereas the Common Law countries have been more reluctant to do so. However, there has been movement in the Common Law countries in their view of doctrine as a factor of interpretation, and the *Fothergill case*,[91] a judgment by the English House of Lords, is a good example of that. This dispute was governed by an article in the Warsaw Convention on Carriage by Air, and, when giving its judgment, the House of Lords put a great emphasis on doctrine.

Honnold argues that the legislative history may play an important role when determining the content of the Convention: 'When important and difficult issues of interpretation are at stake, diligent counsel and courts will need to consult the Convention's legislative history. In some cases this can be decisive.'[92]

In civil law countries, the use of travaux préparatoires is quite common in the interpretation of statutes and conventions. Not all countries are part of this tradition, and some commentators have therefore argued that one should be careful when using those sources in the interpretation of the Convention.[93]

However, in the *Fothergill case* the House of Lords made reference to the legislative history in order to interpret a provision of the Warsaw Convention. This, I believe, is a step in the right direction, making it easier for common law judges to have recourse to the legislative history when interpreting international instruments.

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[85] Gebauer: *Uniform Law* p. 691.
[86] Roth and Happ: *Interpretation of the CISG According to Principles of International Law* p. 8.
[87] The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S., Articles 31-33.
[88] Gebauer: *Uniform Law* p. 692.
[89] Cook: *The Need for Uniform Interpretation* p. 211.
[90] Felemegas: *Uniform Interpretation* p. 80.
[91] *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 (HL).
[92] Honnold: *Uniform Laws for International Trade* p. 5.
[93] Ferrari: *Uniform Interpratation* p. 207.

Another problem in relation to the achievement of uniformity relates to the fact that Articles 92 through 97 of the Convention make it possible for States to make reservations with regard to the Convention's applicability when they become contracting parties to the Convention. However, the drafters made an attempt to minimise the negative effects on uniformity, which might result from Articles 92 through 97, by specifically authorising only certain types of reservations.[94] In spite of this, there are still problems relating to reservations.[95] One is the reservation made by the Scandinavian countries in relation to Part II of the Convention, which deals with contract formation. If you, for example, have a situation where one of the parties wishes to withdraw his notice of termination, you cannot look to Part III for guidance, since this part does not address this issue. The question is then where to look for guidance. According to Article 7(2) gap filling is to be based on the general principles upon which the Convention is founded. In relation to this question, it would be natural to look to Part II, but that will of course be impossible because of the reservations made by the Scandinavian countries.

3.4. The observance of good faith in international trade

One of the most debated and controversial issues in connection with the CISG is the role and definition of the principle of good faith.[96] This debate is a very good example of the difficulty of reaching a common understanding when a uniform body of law is to be established.

One question one has to ask is whether the reference to 'good faith' only relates to the interpretation of the Convention, or if Article 7(1) also refers to good faith in relation to the parties' behaviour.

The fact that the term 'good faith' is only present in the provision in the Convention dealing with interpretation should be an argument against taking the parties' behaviour into account. The very wording of Article 7(1) suggests that good faith should only be related to the interpretation of the Convention: 'In the interpretation of this Convention, regard is to be had to (...) the observance of good faith in international trade.'

It is also important to bear in mind that there are not many countries which through their domestic legislation have imposed a duty of good faith on the parties' behaviour, especially countries which belong to the common law tradition. Among the civil law jurisdictions there are, however, countries which have imposed such a duty of behaviour. Two examples of the latter are Germany[97] and France. Being aware of this difference between the countries, one should be careful with interpreting the Convention in a way which would impose a duty of good faith on the parties' behaviour.

It is very difficult to define the concept of good faith, and the expression itself is very vague. It may thus open up for different interpretations. This might actually conflict with the obligation

[94] The Convention, Article 98.
[95] Flechtner: *Challenges to the Uniformity Principle* p. 193.
[96] Felemegas: *Uniform Interpretation* p. 33.
[97] BGB 242

to ensure uniformity in the application of the Convention.[98] This in itself is an argument against an interpretation, which imposes a general obligation on the parties to act in good faith.

Also the legislative history indicates that the reference to good faith only has to do with the interpretation of the Convention: The reference to 'good faith' in Article 7(1) is the result of a compromise between those who would like to impose a duty on the parties to act with good faith, and those who did not want any reference to good faith in the Convention at all.[99]

When the Convention was being drafted there was a big discussion on whether one should include a reference to good faith in the Convention or not.

Some delegates would not include such a reference, and they inter alia argued that it represented a moral exhortation, which should not be elevated to the status of a legal obligation.[100] It was also argued against such an inclusion because they thought it was unnecessary since the principle was implicit in all national laws anyway. Another argument put forward was that the Convention does not specify any sanctions for failing to comply with the good faith principle, with the consequence that this would be left open to national law,[101] which would jeopardise the achievement of uniformity of sanctions.

Other delegates, however, favoured the inclusion and argued that there would be little harm in having such a provision because the principle was 'universally recognized.'[102]

They also claimed that it would not be necessary to spell out the consequences of a violation of the good faith obligation, since this could be developed in a flexible manner on a case-by-case basis.

As a result of this intense debate, the delegates finally agreed on the compromise[103] of including the reference to good faith in the provision dealing with the interpretation of the Convention; Article 7(1).

A number of prominent commentators, Ferrari,[104] Honnold,[105] Hagstrøm,[106] and Lookofsky,[107] are opposed to the idea that good faith is a general principle of the Convention – that good faith should be related to the parties' behaviour. They argue that good faith only refers to the interpretation of the Convention.

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[98] Ferrari, Flechtner and Brand: *The Draft UNCITRAL Digest and Beyond* p. 152; Ferrari: *Uniform Interpretation* p. 210.
[99] Bianca and Bonell: *International Sales Law* p. 83.
[100] Honnold: *Documentary History* p. 369.
[101] Felemegas: *Uniform Interpretation* p. 64.
[102] Koneru: *The International Interpretation* p. 139.
[103] Felemegas: *Uniform Interpretation* p. 64.
[104] Ferrari, Flechtner, Brand: *The Draft UNCITRAL Digest and Beyond* p. 155.
[105] Honnold: *Uniform Law* p. 100.
[106] Hagstrøm: *Kjøpsrett* p. 26.
[107] Lookofsky: *Internationale køb* p. 22.

Powers[108] claims that Schlechtriem is a representative for the other view: that Article 7(1) also imposes a duty on the parties. He uses a statement from the 1998-edition of Schlechtriem's 'Commentary' to back his argument: '[good faith mentioned in the CISG] should amount to a general principle, such as section 242 of the German BGB.'[109]

It is questionable if this is the correct interpretation of what Schlechtriem really means. In the new edition of the Commentary from 2005 the relevant section has been rephrased, and what Schelchtriem now says is that:

> "As its history shows, the origin of that term lies in the reference to good commercial practice and it was initially intended to govern not the interpretation of the Convention's rules by courts, but the parties' conduct. But such opinions, which are influenced not least of all by the German understanding of the principle of *Treu und Glauben* and its bearing on legal texts as well as individual contracts, cannot being regarded as having prevailed. The maxim of 'observance of good faith in international trade', therefore, concerns the interpretation of the Convention only and cannot be applied directly to individual contracts (...)"[110]

From this extract it is hard to see that Schlechtriem disagrees with the view that 'good faith' in Article 7(1) relates only to the interpretation of the Convention.

Even though the wording of Article 7(1) and the legislative history clearly suggest that good faith only relates to the interpretation of the Convention, some commentators have argued that the provision should not be read so narrowly. Bonell seems to favour such a wider application of the good faith principle, so that it also includes the behaviour of the parties; even as a simple aid to the interpretation of the CISG's specific provisions, the principle of good faith may have some impact on the behaviour of the parties.

Koneru seems to argue along the line that even though the drafters of the Convention may have intended the inclusion of good faith only to relate to the interpretation of the Convention, they may have indirectly imposed a duty on the parties to act in good faith. He states that: '(...) good faith cannot exist in a vacuum and does not remain in practise as a rule unless the actors are required to participate.'[111]

The result may be that the principle of good faith actually has two roles within the Convention; one which relates to the judiciary – those who are going to interpret the Convention –, and one which relates to the parties and their duty to act with good faith: 'While the Convention does not explicitly impose an obligation of good faith on the parties, many of the Convention's general principles operate collectively to create such an obligation.'[112]

Certain courts have also taken the view that the principle of good faith should be given a wider application. One example is the French case, *S.a.r.l. BRI Production 'Bonaventure' v Socit Pan*

[108] Powers: *Defining the Undefinable* p. 345.
[109] Schlechtriem: *Commentary (1998)* p. 61.
[110] Schlechtriem: *Commentary on the UN Convention* p. 95.
[111] Koneru: *The International Interpretation* p. 140.
[112] Koneru: *The International Interpretation* p. 152.

African Export,[113] where the court ordered the payment of damages based on the fact that the liable party's conduct was '(...) contrary to the principle of good faith in international trade laid down in Article 7 CISG.'

Such diverging views do not promote the uniform application of the Convention, and no matter which view one would consider to be the most correct with regard to the position of the doctrine of good faith under the Convention, it would be easy to agree with Powers when he states that: 'The only thing that seems clear through all these competing arguments is that the uniformity sought by the CISG is definitely lacking with respect to the existence and extent of a good faith obligation.'[114] He argues further that, even though imposing a general duty of good faith on the contracting parties might be considered as an amendment to the Convention expressly rejected by the drafters, good faith is nevertheless an international principle,[115] and should thus be made part of any international agreement on contracts.[116]

However, this is a highly controversial approach. When the drafters expressly rejected the imposition of such a duty on the parties, one cannot subsequently alter this position by analogies from other sources, such as the UNIDROIT Principles.

Even if one chooses to restrict the application of the principle of good faith in Article 7(1) to the interpretation of the Convention, this does not necessarily mean that there is no room for a more general principle of good faith in relation to other provisions in the Convention. One example may be the doctrine of 'gap-filling' in Article 7(2).[117] However, as Felemegas[118] puts it:

> "What is less, if at all, legitimate is the subsequent catapulting of the concept of good faith as a 'general principle' of the CISG under Article 7(2), into the interpretative mechanism of the CISG under Article 7(1), through the reference to 'good faith in international trade'."

Since Article 7(1) expressly refers to 'good faith *in international trade*' (emphasis added), it is quite clear that the principle of good faith should not be analysed in light of standards ordinarily adopted within the various national legal systems.[119] However, as also argued by Bonell, national standards, both in relation to good faith and the specification of the principles upon which the Convention is based, should be taken into consideration to the extent that they are commonly accepted at a comparative level.[120] Honnold argues along the same lines:

> "The Convention's goal 'to promote uniformity' should bar the use of purely local definitions and concepts in construing the international text. But this objection does

[113] Cour d'appel Grenoble, Chambre commerciale, 22.02.1995, 93/3275, Journal du Droit International 632-639. Available at http://131.152.131.200/cisg/urteile/151.htm. (CLOUT case No. 154).
[114] Powers: *Defining the Undefinable* p. 348-349.
[115] See for example the UNIDROIT Principles, Article 1.7.
[116] Powers: *Defining the Undefinable* p. 353.
[117] Bianca and Bonell: *International Sales Law* p. 85.
[118] Felemegas: *Uniform Interpretation* p. 45.
[119] Bianca and Bonell: *International Sales Law* p. 86.
[120] Bianca and Bonell: *International Sales Law* p. 86; Felemegas: *Uniform Interpretation* p. 70.

> not apply to 'good faith' principles that reflect a consensus – a 'common core' of meaning – in domestic law."[121]

To take domestic definitions of good faith of one single country into consideration, without analysing how the principle is applied in other countries, would, however, contradict the idea of uniform application of the Convention.[122]

I believe that the correct approach would be to limit the principle of good faith to the interpretation of the Convention. The very aim of the Convention – to create a uniform sales law – would be easier to achieve this way. Considering the legislative history, this would also be the most loyal approach to this problem.

4. THE NORWEGIAN APPROACH

4.1. Introduction

The Norwegian legal tradition is based on the dualistic principle when it comes to the implementation of international conventions, which means that a special act of ratification needs to be presented by the Parliament before the convention comes into force. This is opposed to the monistic system under which international obligations will be automatically internally binding.

There are basically three different ways of implementing a convention under the dualistic system; (1) transformation, i.e. the convention is re-written into an independent domestic act of parliament, (2) incorporation, i.e. the convention is directly given the status of an act, and (3) 'passive transformation', i.e. a statement saying that the national law is compatible with the international obligations.[123]

Traditionally, the Nordic countries have tried to create a uniform legal platform in different areas, inter alia when it comes to the sale of goods. The Nordic countries have a pretty similar social structure and political traditions, and since much trading takes place between companies in the different Nordic countries it is therefore quite convenient to have a common legal basis. With this in mind, they established a commission in 1980, the year of the adoption of the CISG, in order to sort out the possibilities of passing new Sale of Goods Acts in all the Nordic countries based on the new developments that the CISG would initiate.

Since the CISG is concerned with international sales, there was not really a need to change the Norwegian Sale of Goods Act of 1907.[124] However, since the CISG was not considered to contradict the domestic Sale of Goods Act in any major way, it was decided to conduct a revision of the Act in order to obtain an even higher degree of uniformity.

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[121] Honnold: *Uniform Law* p. 100.
[122] Zeller: *Good Faith – The Scarlet Pimpernel of the CISG* p. 227; Powers: *Defining the Undefinable* p. 334.
[123] NOU 1972: 16 p. 7.
[124] Hagstrøm: *Kjøpsrett* p. 35.

4.2. The Norwegian implementation

Norway, as the only country in the world, chose to transform ('re-write') the Convention into a single body of law, which governs both domestic and international sales, and thereby creating an 'unofficial'[125] version of the Convention:[126] The Sale of Goods Act.[127] Lookofsky has commented on the Norwegian approach to the implementation of the Convention that '*Norway* went a step further: it *transformed* the authentic CISG text into Norwegian, and integrated the Norwegian rules for domestic and international sales law into a *single* – and in several respects highly controversial – statutory instrument.'[128]

The consequence of the choice of transformation is that the Convention has been translated, restructured, and interpreted in a Norwegian Act of Parliament.[129]

All other countries,[130] because of their incorporation of the Convention, have two bodies of sales law; one which is applicable to domestic sales, and one which is applicable to international sales.[131] The Norwegian approach, however, has resulted in a situation where the interpreters and contracting parties have to handle one body of rules containing both the transformed provisions of the CISG and provisions exclusively applicable to domestic transactions.

In the process of deciding which way to implement the Convention, one of the major concerns was the small and medium size export and import companies, and their difficulty in handling such a complicated set of rules as the Convention. The drafters claimed that since very few companies have a department specifically established to deal with issues related to international trade it would be much easier for those companies to handle a domestic sale of goods act, which includes the rules for international sale of goods.[132] It was also argued that transformation traditionally was the most widely used way of implementing international conventions regulating areas of common interest which ordinary citizens would be dealing with.[133] Incorporation was, according to the drafters, reserved for technical and complicated sets of rules, which are not, to any particular degree, aimed at the ordinary citizens.

Some commentators have warned against looking at the Convention as a part of domestic law even after it has been implemented:

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[125] Lookofsky: *CISG in Scandinavia* p. 5.
[126] Lookofsky: *Alive and Well in Scandinavia: CISG Part II* p. 289.
[127] The Sale of Goods Act of 13 May 1988 (Act No. 27). Available in English at www.lovdata.no/info/ueng.html
[128] Lookofsky: *CISG in Scandinavia* p. 2.
[129] Hagstrøm: *Kjøpsrett* p. 37.
[130] It is worth noting that Israel has also taken a somewhat unique approach to the Convention. The Convention was incorporated into Israeli law by the Sales Law (International Sale of Goods) 5760-1999, which came into effect on 5 February 2000. However, for international sales contracts concluded prior to that date, the previous laws, i.e. ULIS and ULF, would continue to apply. The result would be that for a period of time there will be three conventions relating to international sales (CISG, ULIS and ULF) working side by side, and the courts which are going to decide on cases involving Israeli companies would have to pay particular attention to which set of rules is applicable in any given case, as problems may have to be addressed differently depending on which convention is applicable. See also www.bin.ac.il/law/cisg
[131] Lookofsky: *CISG in Scandinavia* p. 5.
[132] Ot.prp. No. 80 (1986-1987) p. 18.
[133] Bergem and Rognlien: *Kjøpsloven* p. 402.

> "Even though the CISG is incorporated into municipal law, international sales law should not be regarded as a part of various national legal systems because this would inhibit its development as an autonomous branch of law and distort its interpretation and application."[134]

Bearing this in mind, it is quite obvious that the Norwegian approach of transforming the Convention, instead of using the method of incorporation, will pose a threat to the goal of uniform application. Keeping the domestic Sale of Goods Act separate from the Convention would make it much easier for the interpreters to avoid confusion and the use of national interpretative methods on the international transactions covered by the Convention. Unless the parties to a contract expressly agree otherwise,[135] the Norwegian SGA will be applicable whenever the choice-of-law rules state that Norwegian law should be the applicable law. Krüger is very critical to the Norwegian solution:

> "(...) [T]he method for adaptation of the CISG 1980 into Norwegian law was a major mistake. One simply tried to do something which cannot be done properly. *Firstly*, the reading of the Act is a very complicated task (...) *Secondly*, the method has resulted in blatant *discrepancies* in the wording of statutory sales of goods law (...)"[136]

4.3. Is the transformation in itself a violation of the basic principles of the Convention?

Since Norway is the only Contracting State that has implemented the Convention by transformation, it is only natural to raise the question of whether this is an available solution at all. Is this a loyal approach in the light of the basic goals of the Convention, and Article 26 of the Vienna Convention on the Law of Treaties,[137] which states that 'Every treaty in force is binding upon the parties to it and must be performed by them in *good faith*'? (emphasis added).

An examination of the legislative history of the implementation of the Convention shows that the drafters touched this issue in their discussions.[138] Traditionally the conventions that Norway has ratified have not prescribed any preferred method of implementation; it has usually been up to the legislator to choose which method to use. The drafters recognised, however, that in certain circumstances there is a need for a convention to be implemented provision by provision, without any technical adjustments. ULIS and ULF are considered to be examples of that.

However, the Norwegian legislators did not consider the CISG to pose any restrictions with regard to the method of implementation.[139] Lookofsky supports this view,[140] and so do Bergem

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[134] Felemegas: *Uniform Interpretation* p. 66. The word 'incorporation' in this extract must mean the more specific method of transformation, since incorporation would not very likely make the interpreters mix the methods together to the same extent as a transformation would.
[135] Bergem and Rognlien: *Kjøpsloven* p. 403.
[136] Krüger: *Norsk kjøpsrett*, ch. 26.1.
[137] The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S.
[138] NOU 1972: 16 p. 9.
[139] Ot.prp. No. 80 (1986-1987), appendix 5, p. 322.
[140] Lookofsky: *Internationale køb* p. 18.

and Rognlien.[141] Like the legislators, both Lookofsky and Bergem/Rognlien seem to base their conclusions solely on the fact that the Convention, unlike ULIS,[142] does not contain any provisions with regard to the method of implementation. They therefore consider the legislator to be free to use whichever method he may find most appropriate. But even though Norway chose to transform the Convention, this does not mean that they are free to interpret the Convention in light of their domestic law;[143] they cannot deviate from the obligation in Article 7(1) to interpret the Convention in light of its international character in order to promote uniform application just because they have chosen another method of implementation than the other Contracting States.

I believe, however, that by reaching this conclusion the legislator puts too much emphasis on ULIS as a historic predecessor of the CISG. As already mentioned elsewhere in this paper, ULIS was based on a much narrower mandate and did not achieve such a broad acceptance as the CISG has. Also, because the idea behind the Convention was to create a common frame of reference, it would have to be a much simpler instrument and not so detailed as ULIS.

The CISG was initiated as a result of ULIS' failure to become a unified sales law for the entire commercial world – a failure resulting to some extent from not taking the interests of the developing countries and the common law tradition sufficiently into account. ULIS had no provision like the CISG Article 7(1),[144] and the inclusion of a specific reference to the promotion of uniformity, combined with the diverse background of the delegates in the drafting committee, suggest that the approach in relation to the CISG was much more ambitious. An antithetical interpretation would therefore overestimate ULIS' role.

I would argue that even though the Convention does not contain any specific provisions as to how the Convention is to be implemented by the Contracting States, there might be other factors to take into consideration when one is going to make a choice. In my opinion, Article 7(1) imposes certain restrictions in this respect; if one chooses to transform the Convention it has to be done in a way, which ensures the compliance with this provision. Otherwise, there is a risk that the whole project of establishing an international uniform sales law would fail. In fact, the very idea behind the Convention – the creation of a common ground of reference – would give directions to the national authorities on how the Convention is to be implemented, regardless of the non-existence of a provision like the ULIS Article I, paras, (2) and (3).

The argument that since the CISG, unlike ULIS, does not contain a specific provision relating to the method of implementation, and consequently that it is entirely up to the states how to implement the CISG, cannot, therefore, carry any weight.

The overall aim of the establishment of the Convention was to create a common ground of reference, with the result that it would not make any difference, in the case of a dispute, which country's set of rules was prescribed – all the parties would be familiar with the Convention.[145] However, this aim would not be satisfied when the prescribed set of rules is Norwegian law; the

[141] Bergem and Rognlien: *Kjøpsloven* p. 447.
[142] ULIS Article I, paras 2 and 3.
[143] Lookofsky: *Internationale køb* p. 21.
[144] Honnold: *Uniform Law* p. 88, note 1.
[145] Hagstrøm: *Kjøpsrettskonvensjon* p. 563.

contracting parties would have to deal with the Norwegian Sale of Goods Act.[146] Since this is a transformed version of the Convention, it would be quite confusing for a person not familiar with the Act. One example is Article 79 regarding the exemption from the duty to pay damages. In the Norwegian transformed text this provision has been divided into three different rules; §§ 27, 40, 57(1) and (2).[147] Such a restructuring of the common ground of reference would of course present problems for foreign contracting parties, judges and arbitrators.

One problem is that:

> "(...) the 'transformed' portion of the SGA text is itself *clearly at odds with the authentic CISG text* on a number of significant points, thus raising the possibility that Norwegian courts will have to face complex 'supremacy' issues.[148] (...) I.e. whether to uphold Norway's obligations under the CISG treaty in the face of contrary (transformed) national legislation. The resolution of these issues in the concrete context concerned may depend on whether the Norwegian legislator (a) made a *mistake* in transformation or (b) *intended to depart* from the authentic CISG text."[149]

Prospective ratifying countries should therefore be extremely careful when they are going to decide on a method of implementation, as transformation might actually in itself be a violation of the basic principles set forth in Article 7(1).

4.4. Practical consequences of the Norwegian implementation

As will be more thoroughly analysed in chapter 5, the Norwegian implementation has caused a number of discrepancies in relation to the authentic text of the CISG. As a result, the choice-of-law rules will still be relevant. This is a clear evidence of the fact that the Norwegian implementation is not in conformity with the Convention's goal of uniformity. As stated by Winship: 'If all states adopted uniform rules, of course, there would be no need for choice-of-law rules, except perhaps where states adopt divergent readings of the uniform rules.'[150]

A few practical examples can help to illustrate what kind of difficulties the courts, arbitrators, and parties to the contract may face as a result of the Norwegian approach.

If the seller is in Norway and the buyer in France, Article 1(1)(a) applies since both Norway and France are Contracting States to the Convention. What would be the situation if the dispute is going to be heard in France, but the parties have not agreed on which country's law should be applicable?

In this situation, the correct approach would be to stick to the solution prescribed by the rules of private international law. Those rules customarily dictate that in a case where the parties have not decided which country's law should be applicable to the contract, the sale should be

[146] See chapter 4.4.
[147] Hagstrøm: *Kjøpsrett* p. 37.
[148] Lookofsky: *CISG in Scandinavia* p. 6.
[149] Lookofsky: *CISG in Scandinavia* p. 6, note 41.
[150] Winship: *Private International Law and the U.N. Sales Convention* p. 487.

governed by the law at the seller's place of business.[151] In this example, that would be Norwegian law, i.e. the Norwegian SGA. The French court or arbitration tribunal would therefore have to get familiar with the Norwegian implemented version of the CISG, its legislative history, etc. It goes without saying that this would lead to major practical problems in relation to translations, understanding the structure of the SGA, and the way it is interpreted.

A major problem for the French tribunal would be to have recourse to the Norwegian travaux préparatoires. Not only would they have to be translated, but the tribunal would also have to operate a totally foreign system of doctrine and sources of law in order to obtain a correct interpretation of the provisions in the Norwegian SGA.

If the buyer and seller switch places – the buyer is in Norway and the seller is in France – the solution would be different. If one falls back on the rules of private international law, it would be French law, i.e., the authentic text of the Convention that would govern the contract. Both a French and a Norwegian court would have to apply the original Convention.

We can also have a situation where the seller is in Norway, the buyer in New York, but the dispute is going to be heard in Paris. If the parties have decided that the sale is to be governed by American law the French tribunal would have to apply the authentic Convention. If, on the other hand, the parties have decided that Norwegian law should be applicable the Norwegian SGA would be the relevant law, and the tribunal would then face all the problems described in the first example.

Finally, if the seller is in Germany, the buyer in Denmark, and the dispute is heard in Norway, what law should then be applicable? Since no Norwegian company is a party to the dispute, the SGA would have no relevance. In this situation it would not make any difference which party's law the choice-of-law rules would point to; both Germany and Denmark have incorporated the Convention and use the authentic text in all international transactions, and the Norwegian tribunal would therefore have to apply the original text.

As can be seen from these four examples, the private international law rules still play an important role whenever a Norwegian seller is involved, even though one of the aims of the establishment of the Convention was to eliminate the importance of those rules.[152]

These examples also illustrate the likely practical implications that might occur if prospective ratifying countries do not pay sufficient attention to the consequences of their chosen method of implementation. One can only imagine what would be the result if several other countries followed the Norwegian path of paying more attention to domestic needs than the promotion of uniform application and adherence to the international character of the Convention; the whole project of creating a common ground of reference would collapse.

[151] Convention sur la loi applicable aux ventes a caractère international d'objets mobiliers corporels, June 15, 1955, Article 3. (This convention is ratified by France).
[152] Honnold: *Uniform Law* p. 34-35.

4.5. Assessment of the chosen method of implementation

With regard to the method of implementation, the Ministry of Justice[153] acknowledged that international transactions play a vital part for Norwegian industry and commerce, and thus the rules governing international sales will be of great importance to Norwegian commercial parties.

Even though the major part of international sales is carried out by big companies, smaller companies, with relatively insignificant legal expertise, play an important role as well. The Ministry held that it would be a great advantage for those companies to deal with a Norwegian text since only a minority of the companies have established a corporate legal department dealing exclusively with international trade. They would benefit from having one single body of rules relating to both international and domestic sales. The Ministry also claimed that transformation traditionally has been the preferred method of implementation of conventions containing rules that have a broad common interest, which ordinary citizens might be expected to deal with, while incorporation has mainly been reserved for technically, complicated rules that do not address ordinary citizens.

It seems like the wish to maintain a high degree of accessibility to the users of the Convention was a determinate factor in the choice between the methods of implementation. The legislator's aim was to create one body of law which should contain all the rules relating to sales. The transformed SGA should cover all the situations that Norwegian traders would encounter; Norwegian, Nordic, and international. Compared to the old SGA such an approach would lead both to a regionalization and an internationalization of the law of sales.

It is hard to see how the argument that small and medium size companies would have difficulties dealing with the original version of the Convention could carry any weight. Even though the Convention is transformed into a Norwegian Act of Parliament, Norwegian traders would nevertheless have to deal with the original text of the Convention, for example whenever the choice-of-law rules state that another country's law should be applicable to the given contract of sale. Also, in order to comply with the SGA §88(1), the original text of the Convention would have to be taken into consideration as a relevant factor in the process of interpretation. This provision states that:

> "In international sales, the interpretation of the rules of this Act shall take into account the need to promote uniform application of rules based on the UN Convention on Contracts for the International Sale of Goods 1980, their international character and the observance of honesty and good faith in international trade."[154]

The argument that small and medium size companies would have problems dealing with an English convention in their relations with foreign traders is not very convincing. First of all, it is highly unlikely that Norwegian companies, even if they do not have a separate department dealing with international trade, would have any greater problems dealing with an English text than the other parties coming from non-English speaking countries that have chosen to incorporate the Convention, like Germany, Italy, Sweden, etc. Secondly, companies trading internationally would have to deal with a lot of documents in foreign languages anyway,

[153] Ot.prp. No. 80 p. 18.
[154] The SGA, §88(1).

especially English since this has become the most commonly used language in international business.

Another argument made by the Ministry of Justice was that the accessibility of the Convention required a transformation into a Norwegian text. The thought might have been that the Norwegian SGA would be more readily available to the Norwegian parties than the Convention itself, and that a transformation into one single body of law would indirectly make the Convention more accessible.

It might be so that the SGA is more readily available than the Convention, but I do not believe that a transformation of the Convention into the domestic SGA would make it more accessible to the parties. As analysed elsewhere in this paper, the method of transformation has resulted in a complete restructuring of the Convention, leaving it almost unrecognisable compared to the original text. In my opinion, the present situation is not contributing to the accessibility of the Convention. Quite the contrary, the transformation has only promoted confusion and actually made it more difficult to access the true meaning of the Convention. The development of modern systems of electronic communication has also deprived this argument of promoting accessibility of most of its validity.

The last argument put forward by the legislators was that transformation was the most common way of implementing Conventions like the CISG. It is true that transformation has been used earlier as a method of implementation of very detailed and complicated conventions, but in most cases those conventions have had the *national* level as their main area of application,[155] and the provisions have then been translated one by one without restructuring the whole convention. This is, however, not the case with the CISG where *international* uniformity is the overall goal.

Even though those arguments analysed in the foregoing are relevant to some extent, it is quite clear that they may be contradictory to the principles laid down in Article 7(1). The primary consideration must be to implement the Convention according to the overarching goal of uniformity in Article 7(1), which would make the arguments favouring transformation as the method of implementation put forward by the Ministry of Justice secondary considerations.

The question is then whether the legislators have, to the required extent, taken the principles in Article 7(1) into consideration when they chose the method of transformation instead of incorporation.

In my opinion, they focused too much on the secondary considerations, and thus placed too little emphasis on achieving international uniformity.

In chapter 3.3, I emphasised the importance of having regard to foreign case law in order to promote uniformity in the application of the Convention. The Norwegian approach makes it much harder to do so. When the interpreters in the different countries do not base their decisions on the same documents,[156] this will undoubtedly make it difficult for Norwegian

[155] Inter alia, conventions relating to the transportation sector, cheques, and bills of exchange.
[156] Norwegian interpreters would use the transformed version of the Convention, whereas interpreters from other countries, which have incorporated the Convention, would use the authentic version.

interpreters to make use of foreign case law in situations where the transformed version of the Convention is not consistent with the authentic text, and vice versa; decisions from Norwegian courts would not easily be taken into account by foreign interpreters when either the material provisions or structure of the SGA is different from the Convention.

One example is SGA §18 and Article 35(1) of the Convention regarding information on properties or use, which is analysed more thoroughly in chapter 5.1.1. In this area, it would be impossible to obtain a uniform application, since the rules are materially different.

The problems connected to taking foreign case law into consideration, would be seriously increased if more countries choose to implement the Convention the same way as Norway has done.

Since the Convention is an international instrument, based on a compromise between many States from different jurisdictions and with different legal traditions, it may be both vague and imprecise. Therein, however, lies both its strength and weakness; The strength is that it preserves the need for flexibility in international trade, but within limitations such as Article 7(1). The weakness is that it does not possess the precision that is necessary in a well-functioning domestic sales law. This should suggest that one keeps the domestic SGA and international sales law separated.

In other words; when the Convention is vague, or even silent, on certain points this is for a reason. The drafters wanted to preserve a dynamic approach on those areas. It is therefore contradictory to the very essence of the Convention when the Norwegian solution gives a precise regulation in such areas. See for example the issue of interest rates discussed in chapter 5.2.2.

The transformation of the Convention resulted in a lot of structural changes;[157] provisions were moved, split into several other provisions, and some provisions from the Convention cannot even find its counterpart in the SGA. Two examples of the splitting up in several other provisions are Article 67, which in the SGA is split into three different provisions: §§7, 13 and 14, and Article 79 which is split into §§27, 28, 40 and 57. It goes without saying that such structural changes will make it very difficult for someone who does not have intimate knowledge of the SGA to apply it on an international sales contract.

When the Convention was transformed, the legislator, by an Act of Parliament, carried out interpretations, which, in my opinion, are inconsistent with the obligations set out in Article 7(1). The dynamic element of the Convention is lost when interpretations are hammered out by a domestic act. Article 7(2), however, opens up the possibility of gap-filling when this is in conformity with 'the general principles on which it is based'. Interpretations, or gap-fillings, based on national law will thus be a violation of the obligation to promote a uniform body of law. A close examination of the changes that resulted from the transformation shows that they are to a large extent based on the Scandinavian legal tradition, and in practice the national Norwegian tradition. Whether this results from a lack of understanding of the underlying

[157] Hagstrøm: *Kjøpsrett* p. 39.

principles of the Convention, or a deliberate violation of Article 7, does not really matter. In any case, the Norwegian legislator has pushed the limits of his freedom of gap-filling too far.

As already mentioned elsewhere in this paper, one of the main goals behind the establishment of the Convention was to make it virtually irrelevant which country's law the choice-of-law rules would point at in case of a dispute. In most cases, the choice-of-law rules dictates that it is the law in the seller's country that shall be applicable.[158] When an international buyer is dealing with a Norwegian export company, the buyer can demand to make the Norwegian SGA applicable to the sale of goods contract. Even though the SGA might seem like something foreign and strange to the buyer, it is not unlikely that he would prefer the SGA to the original Convention. A close examination of the SGA shows that the liberal interpretations and violations of the Conventions to a great extent are beneficial to the buyer.[159] It is therefore not given that the buyer would insist on using the Convention instead of the SGA. Given the fact that quite a few export companies are based in Norway, one would imagine that the solution chosen by the Norwegian legislator would be quite problematic for a huge part of the Norwegian industry.

A situation like this, where the buyer may be better off choosing one country's law instead of another's, promotes forum-shopping which was exactly one of the reasons why one wanted to establish an international uniform sales law. Language problems will, of course, also be an issue in those situations where the buyer chooses to apply the SGA to the contract.

Some commentators on the Convention have expressed great criticism on the Norwegian way of implementing the Convention. Krüger has claimed that '(...) the method for adaptation of the CISG 1980 into Norwegian law was a major mistake.'[160] Hagstrøm advocates that the legislator should aim at reversing what has been done in relation to the Norwegian implementation.[161]

Prospective ratifying countries should take these comments very seriously, as they would most likely be faced with the same problems if they choose to implement the Convention by transformation.

I believe that the present situation is very unfortunate. The transformation of the Convention into the Norwegian SGA is clearly a violation of Article 7(1), as it to some extent actually contradicts the very goals of the Convention; uniformity of application, avoiding forum-shopping, making the choice-of-law rules virtually redundant on this particular area, and as a result of all this making trading between Contracting States more efficient.[162]

The problems resulting from the Norwegian implementation could very easily be dealt with, by reversing the whole process and separate the Convention from the SGA and thereby have one body of law dealing with domestic sales, and one dealing with international sales.

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[158] Convention sur la loi applicable aux ventes a caractère international d'objets mobiliers corporels, June 15, 1955, Article 3.
[159] Hagstrøm: *Kjøpsrettskonvensjon* p. 569; Hagstrøm: *Implementation in Norway* p. 247.
[160] Krüger: *Norsk kjøpsrett*, ch. 26.1.
[161] Hagstrøm: *Kjøpsrettskonvensjon* p. 569.
[162] Specific examples will be discussed in chapter 5.

5. DIFFERENCES BETWEEN THE CISG AND THE NORWEGIAN SALE OF GOODS ACT, AND THE CONSEQUENCES IN RELATION TO ARTICLE 7(1)

In addition to all the structural differences between the SGA and the Convention, the transformation has also led to a number of material differences. In this chapter, I will identify some of those differences and analyse the consequences of the discrepancies in relation to Article 7(1). These examples should be a clear warning to prospective ratifying countries of what practical problems might arise if they choose to transform the Convention.

This analysis is not, however, meant to be exhaustive.

5.1. Provisions that do not exist in the CISG, but which are purported to follow from an interpretation of the Convention

5.1.1. SGA §18 and Article 35(1) of the Convention – Information on properties and use

The issue of conformity of the goods is a good example of an area where the Norwegian legislator has constructed a provision with no equivalent in the Convention – a discrepancy, which would be beneficial to the buyer.

According to the SGA §18(1), the rules of non-conformity apply when '(...) the goods are not in accordance with information which the seller, in his marketing or otherwise, has furnished about the goods, their properties or use and which may presumably have influenced the sale.' The seller is strictly liable for such divergence, i.e. it is not dependent on his negligence. It is sufficient that the information does not de facto coincide with the actual condition of the goods. The only limitation is that the buyer have to have relied on the information when he entered into the agreement: '(...) which may presumably have influenced the sale (...)'

In SGA §18(2) the seller's liability is extended to other persons who have provided information to the buyer on behalf of the seller: '(...) when the goods are not in accordance with information which any person other than the seller has furnished on the packaging of the goods, in advertising or other marketing on behalf of the seller or prior sales stages (...)' and the only exception is if the seller '(...) neither knew nor ought to have known that the information had been given (...)'

This rule is undoubtedly in accordance with the Norwegian and Scandinavian legal tradition,[163] but it is highly questionable whether it is in conformity with the Convention.[164] The Norwegian legislator has purportedly claimed that this rule follows from an interpretation of the

[163] Rt. (The Norwegian Supreme Court Reporter) 1924 p. 91; Rt. 1930 p. 1462; Rt. 1934 p. 740; Rt. 1959 p. 581; 1992 p. 166.
[164] Lookofsky: *CISG in Scandinavia* p. 82; Hagstrøm: *Kjøpsrettskonvensjon* p. 565.

Convention.[165] It seems like national traditions and considerations have prevailed at the expense of the needs connected with the international character of the Convention.

The only support one can find in the Convention is Article 35(1), which says that 'The seller must deliver goods which are of the quantity, quality and description required by the contract.' As one can clearly see, this provision does not, as a point of departure, say anything about the seller's liability with regard to incorrect information. Not even the rules in Article 35(2) on more specific matters – which has its equivalent in §17(2) litra a and b of the SGA – mention anything about such liability.

The inclusion of this provision, which is materially quite different from the Convention, would jeopardise the achievement of a uniform application of the Convention. This is because it will be much harder for a seller to avoid liability under the SGA than under the Convention, which again will lead to different standards with regard to what kind of non-conformity the buyer must accept. These discrepancies will make it virtually impossible to take foreign case law on this area into account, because the rules are strict and unambiguous.

5.1.2. The SGA §84 – Claims against prior sales stages

This provision says that '(...) the buyer may as a consequence of non-conformity of the goods bring claims against a prior sales stage if a corresponding claim on account of the non-conformity can be brought against the seller.' This rule makes it possible for the buyer to make a claim against, for example, the seller's supplier. Such a rule may have wide-ranging practical implications on the relationship between the seller, the buyer, and third parties. An opportunity to make a claim in contract against third parties contradicts the idea that a contract only regulates the relationship between the contracting parties,[166] and this may be the reason why many European countries have not adopted such a rule, and probably why one cannot find a similar provision in the Convention.

Even though the Convention is silent on this matter it does not, however, necessarily mean that the topic is not governed by the Convention. If so, it would then have to be solved by reference to Article 7(2) through gap-filling, and claims against prior sales stages would then have to be considered to be in accordance with the general principles upon which the Convention is based. However, to my knowledge there is no one who argues that claims against prior sales stages are within the scope of the Convention.

Some might say that the Norwegian inclusion of this rule is thus a matter, which only concerns the domestic law and not international transactions under the Convention. This would have been an accurate view if the Norwegian legislator had specifically exempted the application of

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[165] Hagstrøm: *Kjøpsrett* p. 69. Lando: *Udenrigshandelsret* p. 334 argues that a provision like the SGA §18(1) may be deduced from Article 35 of the Convention, but that it is questionable whether the rule in the SGA §18(2) is in conformity with the Convention. See also Henschel: *Varens kontraktsmæssighed* p. 99.

[166] *Dunlop Pneumatic Tyre Company Ltd. v Selfridge and Company Ltd.* [1915] AC 847 (HL), 853: 'My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.' The same principle can be found in French law (Code Civil Article 1165), and in German law: see von Bar: *Law of Torts* p. 492 et seq.

§84 in cases of international sales. This has not, however, been done. The provisions in the SGA are applicable to both national and international sales unless they are explicitly exempted. §5(1) states that: "International sales are subject to this Act with the special rules contained therein, especially Chapter XV below."

The Norwegian legislator has clearly, in its eagerness to promote the established domestic solution to this issue, with which it felt familiar, gone far beyond what might be argued to be a solution compatible with Article 7(1). The Norwegian inclusion of a rule regarding this matter is therefore contradicting the very aims of the Convention; the establishment of a common body of law. The achievement of uniformity would become an illusion, and we would be back to the starting point where all the countries had different rules.

5.2. Provisions based on an arguable interpretation of the CISG

5.2.1. SGA §36 and Article 48 of the Convention – The seller's right to rectify

The Norwegian legislator has also created provisions which do not have a counterpart in the Convention, but which the legislator claims follow from an interpretation of the Convention. This is a highly questionable approach.[167] The result is that the interpretative development is being locked by a domestic interpretation, making it impossible to take international developments into consideration.

One example is the seller's right to rectify.

The particular point I want to examine here is the fact that it is not certain that the Convention opens up an opportunity for the seller to rectify when there has been a material breach of contract.

The uncertainty is brought about by the reservation made in Article 48; 'Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligation (...)'

Logically one would assume that as long as the conditions for rectifying the failure are fulfilled, the opportunity to terminate the agreement would have to be suspended.[168] This is the solution according to the Norwegian SGA §37; 'If rectification or delivery of substitute goods is not accepted or is not performed within a reasonable time after the buyer complained of the lack of conformity, the buyer may (...) cancel the contract under §§38 or 39 (...)' However, this is not how Article 48 is constructed. One has to take the rules regarding termination into account in order to get the complete picture of the seller's right to rectify. The seller is only allowed to rectify if this takes place within the closing date for termination as set out in Article 49(1). This follows from the reservation in Article 48; 'Subject to article 49.' The intention has not been to deprive the buyer of his right to terminate the agreement on the basis of a material breach if the seller offers to rectify. However, since the assessment of whether the buyer should be allowed to

[167] Hagstrøm: *Kjøpsrettskonvensjon* p. 564.
[168] Hagstrøm: *Kjøpsrettskonvensjon* p. 577.

terminate is based on all relevant factors, the fact that the seller has offered to rectify would have to be taken into consideration.

Prominent commentators argue that the seller cannot meet the buyer's notice of termination with a counterclaim on rectification when his breach of contract constitutes a fundamental breach.[169]

The Norwegian equivalents can be found in SGA §§36 and 37. According to those provisions the seller may insist on rectifying as long as this will not inflict major disadvantages upon the buyer, and provided that this condition is fulfilled; in cases where there is a fundamental breach, the buyer's right to terminate the contract will be eliminated.

The Norwegian rule might be said to be technically preferable to the Convention. However, even though this rule may not directly contradict the Convention, the inclusion of this rule – based on an interpretation of the Convention – cannot be deemed to be a loyal implementation of the Convention. It may seem like the Norwegian legislator has been too focused on creating a rule that is easy to apply, and thereby interpreted the Convention too liberally.

A practical example would help to illustrate the differences between the SGA and the Convention: A Norwegian exporting company sells something to an Italian buyer. It turns out that the goods suffer from a defect, which constitutes a fundamental breach. The buyer claims to terminate the contract, but the seller makes a counterclaim to rectify instead since this would be much less expensive to him.

Pursuant to the Convention, it might be argued that the buyer will be allowed to terminate, whereas the SGA gives the seller the opportunity to insist on rectification, if this is done within reasonable time.

Case law from other countries contradicts the Norwegian interpretation regarding this issue. One example is a decision from the ICC Court of Arbitration in Paris,[170] which ruled that since the breach by the seller constituted a fundamental breach the buyer was entitled to avoid the contract according to Article 49(1) of the Convention. As a result, the seller was not entitled to remedy by supplying substitute goods under Article 48(1).

Another example is a German case[171] where the court stated in an obiter dictum[172] that in a case of fundamental breach, the buyer's right to avoidance prevails over the seller's right to cure.

In situations like the one described above it would be an advantage to the seller if the SGA would be applicable, since this would give him the opportunity to insist on rectification. This is

[169] Schlechtriem: *Commentary on the UN Convention* p. 567; Honnold: *Documentary History* p. 376; Hagstrøm: *Kjøpsrettskonvensjon* p. 577.
[170] Arbitral Award, the ICC Court of Arbitration, Paris, No. 7531/1994 (UNILEX 1994).
[171] Oberlandesgericht Koblenz (Germany), 31 January 1997, n. 2 U 31/96 (UNILEX 1997).
[172] Based on the facts of the case the court held that the lack of conformity of goods did not constitute a fundamental breach.

therefore one of the few examples where the seller is given an advantage over the buyer when the SGA applies.

Again we can see, that the Norwegian approach reduces the level of predictability in contractual relations that the Convention was aiming at establishing. When the Norwegian SGA and the Convention produce different results in such a practical important area, it will undoubtedly jeopardise the opportunity to achieve a uniform application of the Convention.

5.2.2. SGA §71 and Article 78 of the Convention – Interest rate

The right to claim interest was one of the most debated issues in the drafting committee; partly because the Muslim countries do not allow interest on payments, and partly because many of the Eastern-European countries did not have a regular market on which the principle of interest is based.[173]

Pursuant to Article 78 of the Convention the seller is entitled to interest if the buyer does not pay the contract price. However, the Convention does not say anything regarding the interest rate or from which time it is to be calculated.

When analysing the case-law it becomes clear that there are two approaches to this issue;

Some decisions have looked upon the lack or regulation of the rate as a matter which is governed by the Convention but not expressly settled in it (*lacuna praeter legem*), and should therefore be solved with reference to Article 7(2) as a matter of gap-filling. Other decisions, however, argue that the interest rate is a matter which is not governed by the Convention at all (*lacuna intra legem*) and should therefore be solved on the basis of other principles.

An Austrian arbitration case[174] based its decision on the *lacuna praeter legem* principle. It was held that the interest rate had to be established in conformity with the general principles upon which the Convention is based. The arbitrator, Professor Bonell, found that full compensation was one of the basic principles of the Convention, and since the application of a state's domestic law could lead to a result where no interest is awarded,[175] this would violate this principle. Therefore the rule regarding the interest rate would have to be found within the Convention itself. Given the fact that the damaged party would most likely borrow money from a local bank, it was held that the interest rate in the country of the damaged party would be the correct rate.

Another case from the same arbitral tribunal, given the same day, argues along the same lines,[176] and also states that full compensation is one of the general principles upon which the Convention is based:

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[173] Hagstrøm: *Kjøpsrettskonvensjon* p. 574; Ramberg and Herre: *Internationella köplagen* p. 553.
[174] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien, June 15, 1994, SCH-4318 (CLOUT case No. 94).
[175] Not all States acknowledge the principle of interests.
[176] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien, June 15, 1994, SCH-4366 (CLOUT case No. 93).

> "This second view is preferred,[177] not least because the immediate recourse to a particular domestic law may lead to results which are incompatible with the principle embodied in Art. 78 of the CISG, at least in the cases where the law in question expressly prohibits the payment of interest. One of the general legal principles underlying the CISG is the requirements of 'full compensation' of the loss caused (...) It follows that, in the event of failure to pay a monetary debt, the creditor, who as a business person must be expected to resort to bank credit as a result of the delay in payment, should therefore be entitled to interest at the rate commonly practiced in its country with respect to the currency of payment, i.e. the currency of the creditor's country or any other foreign currency agreed upon by the parties."

Both of the Austrian cases actually referred to the solution in Article 7.4.9 (2) of the UNIDROIT Principles,[178] which is based on the full compensation approach.

This view is backed by academic writings; Sutton argues that '(...) the interest market of the injured party's principal place of business would normally be the most accurate reference point for determining the cost to the injured party (...)', and continues with reference to the *lacuna intra legem* approach, that '(...) such an approach ignores the stated goal of interpreting the Convention in order "to promote uniformity".'[179]

One example of the *lacuna intra legem* approach is a German case[180] where a French seller sold clothes to a German buyer. The choice-of-law rules pointed to German law as Germany had the closest connection to the sale, and the German private international law then made French law applicable. The question regarding the interest rate was therefore decided in accordance with French law.

An American case, *Delchi*, deals with the issue of interest rate in the same way:

> "Delchi is entitled to prejudgment interest pursuant to UNCCISG Article 78. Because Article 78 does not specify the rate of interest to be applied, the court in its discretion awards Delchi prejudgment interest at the United States Treasury Bill rate as set forth in 28 U.S.C. §1961(a)."[181]

The court gives no answer as to how Article 78 leads to the application of American law when it comes to the interest rate. Neither is it clear whether the court examined how this is solved in other countries.

[177] *Lacuna praeter legem*.
[178] UNIDROIT Principles of International Commercial Contracts, 2004 edition. Available at www.unilex.info
[179] Sutton: *Measuring Damages* p. 750.
[180] Oberlandesgericht (OLG) Frankfurt am Main 5 U 261/90, June 13, 1991 (Germany) (CLOUT case No. 1).
[181] *Delchi Carrier SpA v Rotorex Corp.*, WL 495787 (N.D.N.Y. 1994) (CLOUT case No. 85).

There have also been other cases based on *lacuna intra legem*.[182]

There are good arguments in favour of the *lacuna intra legem* approach.[183] As I have argued elsewhere in this paper, the fact that the Convention is silent on certain topics is because the drafters agreed not to include a solution in the Convention. One should pay respect to the compromise they reached at the Vienna conference, and ensure that the parties applying the Convention are not being surprised by unforeseen developments. As a consequence the problem of the interest rate should be solved on the basis of private international law. However, this approach would not conform with the obligation under Article 7(1) to ensure uniformity in application. However, according to Behr 'This deficiency in the Convention must be accepted. This is preferable to rewriting the Convention without benefit of a new conference and a renewed Convention.'[184]

There are, however, strong arguments favouring the lacuna praeter legem approach as well. One may argue, like Koneru,[185] that since it is only the mechanism of establishing the interest rate that is excluded from the Convention, and not the very issue of interest payment itself, the question regarding the rate should be resolved by having regard to the general principles upon which the Convention is based. The *lacuna intra legem* approach results from '(...) a misunderstanding of the overall scheme of the Convention, as well as the express provisions of Article 7(2) and the general principles on which the Convention is based.'[186] According to Koneru, the principle of full compensation will not be reached if one only looks to national laws in order to determine the applicable interest rate – one should focus on the interest rate, which fully compensates the aggrieved party. This argumentation is thus in line with the Austrian arbitration ruling handed down by Professor Bonell, that it is the interest rate in the plaintiff's country that should be applied.[187]

An interpretation in accordance with the *lacuna praeter legem* approach would undoubtedly lead to certainty for the parties involved; if the relevant interest rate is based on the prevailing rate in the non-breaching party's country, which would be the result if one takes the principle of full compensation into account, it would be much easier for the parties to predict the outcome of a breach of contract.

The Norwegian approach to this problem is quite clear: 'If the price or other outstanding amount is not paid in time, the debtor shall pay interest under the Overdue Payments Interest Act of 17 December 1976 No. 100.'[188] This is in line with those scholars and court decisions,

[182] For example: Landgericht Hamburg 5 O 543/88, September 26, 1990 (Germany) (CLOUT case No. 5); Pretore della giurdizione di Locarno-Campagna, December 15, 1991 (Switzerland) (CLOUT case No. 55); Hauptstadtgericht Budapest 12 G. 41.471/1991/21, March 24, 1992 (Hungary) (CLOUT case No. 52).
[183] Behr: *The Sales Convention in Europe* p. 296.
[184] Behr: *The Sales Convention in Europe* p. 297.
[185] Koneru; *The International Interpretation* p. 123.
[186] Koneru: *The International Interpretation* p. 125.
[187] This is, of course, unless the plaintiff is able to demonstrate that his business usually deposits its funds in countries with a higher interest rate. Then this higher rate would have to be applied in order to compensate the plaintiff for his actual loss. See Koneru p. 129, note 102.

[188] The SGA §71.

for example the Delchi case, that favour the *lacuna intra legem* approach. However, this solution would clearly undermine the principle of full compensation, since it does not distinguish between the situations where the breaching party is Norwegian or from some other country.

Another aspect in relation to the Norwegian solution, which is contradictory to the principle of full compensation, is the level of the interest rate itself. Pursuant to the OPIA §3(1), the rate is calculated with reference to the interest rate, which at any given time is fixed by the Norwegian Central Bank, *added 7%*. It is obvious that this interest rate is not connected to the actual economic loss suffered by the claimant, but rather has a penal element to it. It is thus contradictory to one of the basic principle upon which the Convention is based.

The Norwegian solution is not in line with the international character of the Convention.

The issue of interest rate is not clearly settled in the Convention, and, as has been emphasised in this chapter, there exist divergent interpretations as to which approach should prevail. Interpretations that promote certainty and predictability to international trade should be encouraged and followed.[189]

Since no consensus has been reached on this matter, one should be reluctant to establish a clear interpretation like the Norwegian legislator has done through the SGA. There are good arguments in favour of both the *lacuna intra legem* and the *lacuna praeter legem* approach, and courts have used both on different occasions. When the Norwegian solution clearly states that the *lacuna intra legem* principle should be applied, this does not pay sufficient respect to the compromise reached by the drafters and it will be a hindrance to a dynamic development of the Convention.

As a result of this, the Norwegian approach is clearly not in conformity with the obligation to take the international character of the Convention into consideration. It seems like the wish to apply the domestic well-known rule on international transactions as well as domestic trade has prevailed at the expense of the intention of the drafters.

Prospective ratifying countries, if they choose to transform the Convention, might also be tempted to apply their domestic rules in relation to interest rates. This would, however, contradict the principles in Article 7(1).

5.3. Other issues

5.3.1. SGA §87 and Article 1(1) of the Convention – Application of the rules

A provision in the SGA, which is not directly contradictory to the Convention, but which clearly illustrates the Norwegian legislator's liberal approach to the Convention, is §87, which deals with the application of the SGA. According to this provision, the rules regarding international sales should be applicable to '(...) contracts of sale concluded between parties who have their places of business in different States (...)' In other words; the SGA would also be

[189] Koneru: *The International Interpretation* p. 127.

applicable to contracts between parties from States that have not ratified the Convention.[190] The SGA is therefore applicable to a wider range of contracts than the Convention, which states in Article 1(1) that:

> "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."

Because of the formulation in §87, the SGA does not require application of the 'Contracting states'-rule in Article 1(1)(a) or the 'private international law'-method set forth in Article 1(1)(b).[191]

6. CONCLUSION

Today 70 States have adopted the Convention, which makes it applicable to a great number of transactions throughout the world. The creation of the Convention was mainly motivated out of the idea that a uniform international sales law would enhance predictability and make trading between different States more efficient.

The biggest challenge with such an international instrument is to achieve uniform application of the rules. As can be seen from the earlier discussions in this paper, there are several obstacles to this goal.

Ideally the State's implementation of the Convention should not be an impediment to the achievement of the basic goals of the Convention. However, the Norwegian approach – to transform the Convention – has created a number of difficulties. One might even say that the method of implementation chosen by Norway is an outright violation of the obligations under the Convention.

The Norwegian solution should be a warning to the countries that have not yet ratified the Convention. In order to pay sufficient attention to the obligations under Article 7(1) of the Convention they should be very careful if they choose the method of transformation instead of incorporation. Otherwise, one might end up with a situation of great confusion and uncertainty, which could ultimately jeopardise the achievement of a common sales law applicable worldwide.

[190] Lookofsky: *CISG in Scandinavia* p. 15.
[191] Lookofsky: *CISG in Scandinavia* p. 15.

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