

SUBMISSION ON DISCUSSION PAPER "AN AUSTRALIAN CONSUMER LAW"

INTERACTION BETWEEN AUSTRALIAN CONSUMER LAW AND CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ('CISG')

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The TPA currently contains s. 66A, which states that the CISG prevails to the extent of any inconsistency with Division 2 of Part V (Conditions and Warranties implied into consumer sales). By definition, such sales would rarely be caught within the CISG's sphere since Art. 2(a) excludes from its default application any sale of goods for "personal, family or household use" unless the seller did not know and ought not to have known they were for such use.

However, some situations could arise due to the expansive definition of "consumer" (especially by some Australian courts recently) under s. 4B of the present TPA, of either (a) goods valued less than \$40,000 or (b) goods more valuable than that but ordinarily for personal or household use. For example, if the subject matter were within situation (a), but also (b) where:

- (i) Australian courts may have developed a test concluding that the goods were usually for personal use (eg *Bunnings v Laminex* [2006] FCA 682) but courts and commentators applying CISG may consider such goods *not* to be for such use eg. goods were for both personal and commercial use, therefore caught by the CISG; or
- (ii) Australian courts consider the goods were for personal use and the test under CISG would usually lead to the same conclusion, but the seller *did* (reasonably) know that the buyer was not purchasing the goods for such personal use in that particular case.

Relevant considerations for determining "personal" use under CISG, which may no longer overlap with those applied by Australian courts interpreting TPA s. 4B and thus giving rise to problem (b)(i) above, would be the nature of the goods, the quantity, the manner of purchase, and whether the goods were exclusively intended for personal purposes. And leading especially to problem (b)(ii), depending on which party relies on application of the CISG, the burden falls on the buyer as to intended purpose, but on the seller as to knowledge: OGH, Austria, 11 February 1997, 10 Ob 1506/94, CLOUT Case No. 190, translation at <http://cisgw3.law.pace.edu/cases/970211a3.html>; Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application & Scholarly Writing*, 15 J.L. & COM. 1, 70-77 (1995); Bruno Zeller, *Is the Sale of Goods (Vienna Convention) Act the Perfect Tool to Manage Cross Border Legal Risks faced by Australian Firms?*, 6(3) MURDOCH U. ELECTRONIC J. OF L. [51]-[56] (1999), http://www.murdoch.edu.au/elaw/issues/v6n3/zeller63_notes.html#n89.

It is important that the conditions and warranties in Division 2 of Part V do not apply to CISG contracts of sale, since the CISG, where applicable, aims to imply its own default set of obligations and remedies. These are intended to be applied uniformly except to the extent

modified by agreement between commercial parties. It does not operate on the basis of classification of terms into categories of conditions, warranties or, for that matter, intermediate terms, but instead, distinguishes between fundamental and non-fundamental breaches, with some mechanisms for “upgrading” certain breaches. The implication of TPA warranties in addition would unbalance this structure and the global uniformity achieved by the CISG. It would also arguably impinge on Australia’s treaty obligations as a signatory to the Convention.

If the definition of “consumer” within the new legislation is broadened so as to include businesses, the previously largely redundant s. 66A will be required to avoid the above problem. However, the wording used within s. 66A could cause confusion within the courts. This has already been the case with the equivalent Victorian provision, in *Playcorp Pty Ltd v. Taiyo Kogyo Ltd* [2003] VSC 108, because the court literally perceived the legislation as continuing to allow application of the domestic *Goods Act* if it could not detect an “inconsistency.” The *Goods Act* was in fact displaced by the CISG in that case, but the wording of the legislation led the court into an error of law: Lisa Spagnolo, *The Last Outpost*, MELBOURNE J. INTERNAT’L L. at n.322 (*forthcoming* 2009). In regard to Division 2 Part V, it would therefore be preferable to clearly state that *application of Division 2 is excluded where the CISG applies*.

Application of other divisions of the TPA to CISG contracts, such as Part V, Division 1 (misleading & deceptive conduct) & Part IVA (unconscionability) should also be considered. These actions were not caught by s. 66A previously. As validity issues are excluded from the CISG’s scope under Art. 4(a), the current Part IVA presents no problems, and can apply in tandem. The same is true of proposed unfair contract terms, which, like unconscionability matters, can be characterized as issues going to validity for CISG purposes. Liability for products causing personal injury which is excluded from the CISG’s sphere by Art. 5, so there is no overlap there. However, Part V, Division 1 is more problematic, as some of the issues covered in a contracting situation overlap. For example, if there has been a misleading statement regarding the product, that statement will, moreso than under Australian contract law, be likely to form part of the contract and therefore remedies for breach will fall within the CISG regime. However, it is conceivable that there may be some situations in which the CISG will not apply but the conduct might be caught by s. 52. The overlap between TPA misleading & deceptive claims and CISG actions has not been grappled with by Australian courts: see *Perry Engineering Pty Ltd v. Bernold AG* [2001] SASC 15 (ss. 51A & 52 claims unsuccessful); *Summit Chemicals Pty Ltd v. Vetrotex Espana SA* [2004] WASCA 109, at [23]-[24] & [35](non-specific reliance on TPA); discussed in Spagnolo, *Last Outpost* (above), at §6; see generally, Joseph Lookofsky, *In Dubio Pro Conventione?*, 13 DUKE J. COMP. & INTERNAT’L L. 263; Peter Schlechtriem, *The Borderland of Tort and Contract – Opening a New Frontier?*, 21 CORNELL INT’L L.J. 467; SONJA KRUISINGA, (NON-) CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT? 187-213 (2004).

The extent of pre-emption of (analogous) domestic misrepresentation torts by the CISG is still controversial. While there are cases in other jurisdictions and views to the contrary (*Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, US Dist. Ct. (New York), 10 May 2002; *Miami Valley Paper LLC v. Lebbing Engineering & Consulting GmbH*, US Dist. Ct (ohio), 10 October 2006; Lookofsky, *In Dubio* (above), at 286 & Lookofsky, *Understanding the CISG*, 76 (3rd (worldwide) edn, 2008)), most commentators disagree. The better view is that the CISG pre-empts negligent misrepresentation actions but not proprietary torts. The statement is given legal effect as part of the contract, and thus falls within the scope of the

CISG's functional ambit concerning contractual interests. Domestic laws will therefore be pre-empted unless they protect clearly separate interests to those involved in what is now the contractual bargain. Thus in particular, domestic actions arising from statements about the goods or their qualities will be displaced by the application of the CISG because it "covers the field": JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 3rd ed., at 261-2; Schlechtriem, *Borderland* (above), at 473; Schlechtriem, *Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany*, JURIDISK TIDSKRIFT 1 (1991/2)(stating that were it otherwise, the uniformity achieved by the CISG would be in "grave danger"); M. Joachim Bonell & Fabio Liguori, *The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law – 1997 (Part 1)*, UNIFORM L. REV. 385, n.36 (1997).

The situation could be made clearer. A provision dealing with the application of Part V Division 1 where the CISG applies could be inserted to provide clarity on the issue, but in less definite terms than for Division 2. However, the problems of the "inconsistency" type provision should be avoided. Perhaps this could best be addressed by a section that asserts that *if the CISG provides a remedy on the basis of predominantly the same facts, Division 1 Part V is excluded, and further, that such exclusion will be effective even if the remedy or action pursuant to the CISG is unsuccessful for reasons including but not limited to failure to give any notice required by the CISG, or expiry of the limitations period applicable to the CISG remedy or action.*

The latter would prevent the CISG structure being usurped by the domestic legislation every time a party failed to comply with the requirements under the CISG that notice must be promptly given of non-conformity in order to preserve the claim for damages (or unilateral right to price reduction), and the maximum limitation of 2 years for notice of non-conformity: Arts 39. However, if the CISG would not provide a remedy in any case, because the statements or conduct in question for some reason did not give rise to obligations under the CISG, then Division 1 Part V would continue to apply as an alternative to/in tandem with CISG actions ie. concurrently. This achieves a suitable balance between the objectives of ensuring the integrity of the CISG regime including its pre-emptive effect where it overlaps with domestic law, and the need to ensure Division 1 applies when the circumstances giving rise to the TPA action would not fall within the CISG's sphere in any event. It would also provide clearer guidance to courts.

The above suggestions should be considered particularly if the definition of "consumer" is to be extended to include businesses, but should also be considered as providing greater certainty in what is currently an uncertain area: the overlap of Division 1, Part V & CISG.