The Interpretation of UNCITRAL Law in Australian Courts: A Roadmap for Elevating the UN Sales Convention's Status to That of Arbitration Law

Benjamin Hayward*

Abstract

Despite being part of Australian law for more than 30 years, the *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*') has not secured the internationally minded interpretation that *CISG* art 7(1) requires. Australia's international commercial arbitration ('ICA') laws, however, are routinely approached by Australian courts with an internationalist perspective, as their own interpretative rules require. It is tempting to conclude that Australia's approach to interpreting its ICA laws is transferable to the *CISG* context. In this article I address a previously unexplored nuance affecting that conclusion. Australian courts routinely accept Singaporean, Hong Kong and New Zealand interpretative influence concerning ICA laws. In the *CISG* context, however, significantly less influence from those jurisdictions exists. That being so, I explore how Australia's courts might better apply the *CISG* in an internationalist manner. First, I recommend that Australia's courts emphasise to practitioners the need to consider the *CISG's* application and its internationalist interpretation requirements. Second, I recommend that Australian courts use the amicus curiae procedure to solicit third party submissions addressing the *CISG's* interpretation.

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* Associate Professor, Department of Business Law and Taxation, Monash Business School, Monash University, Caulfield East, Victoria, Australia.
Email: benjamin.hayward@monash.edu. ORCID iD: https://orcid.org/0000-0001-7409-7966.

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Both techniques are applied by foreign courts in the ICA context and would assist Australian courts in discharging their *CISG* art 7(1) obligations.

I Introduction

Australia has a long association with the United Nations Commission on International Trade Law ('UNCITRAL'). It was an original UNCITRAL member and is a current member through to 2028.[1] The UNCITRAL National Coordinating Committee for Australia 'provide[s] the primary platform for Australia's engagement' with UNCITRAL.[2] Australia has also adopted several UNCITRAL instruments aimed at addressing the 'conviction that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade'.[3] These include the *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*'),[4] the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*'),[5] and the *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*').[6]

The *CISG* is a treaty intended to facilitate cross-border goods trade by establishing uniform contract law rules governing international sales of goods.[7] By establishing uniform substantive law rules addressing contract formation and party

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1 United Nations ('UN'), 'Member States History', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/about/faq/mandate_composition/memberhistory>.

2 UNCITRAL National Coordinating Committee for Australia, 'Chair's Welcome', *About Us* (Web Page) <https://www.uncca.org/about-us>.

3 *Establishment of the United Nations Commission on International Trade Law*, GA Res 2205/XXI, UN GAOR, 21st sess, 1497th plen mtg (17 December 1966) 99.

4 *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) ('*CISG*'). See United Nations, 'Chapter X: International Trade and Development – 10 United Nations Convention on Contracts for the International Sale of Goods', *United Nations Treaty Collection* (Web Page, 26 March 2025) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20X/X-10.en.pdf> ('Chapter X'); *Sale of Goods (Vienna Convention) Act 1987* (ACT); *Sale of Goods (Vienna Convention) Act 1987* (Norfolk Island); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act 1987* (NT); *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1987* (Tas); *Goods Act 1958* (Vic) pt IV; *Sale of Goods (Vienna Convention) Act 1986* (WA); *Competition and Consumer Act 2010* (Cth) sch 2 s 68.

5 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*'). See United Nations, 'Chapter XXII: Commercial Arbitration and Mediation – 1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards', *United Nations Treaty Collection* (Web Page, 26 March 2025) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en> ('Chapter XXII'); *International Arbitration Act 1974* (Cth) ss 2D(d), 3–14.

6 *UNCITRAL Model Law on International Commercial Arbitration*, GA Res 61/33, UN Doc A/RES/61/33 (18 December 2006, adopted 4 December 2006) ('*Model Law*'). See United Nations, 'Status: *UNCITRAL Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006', UNCITRAL (Web Page) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> ('*Model Law* Status'); *International Arbitration Act 1974* (Cth) ss 2D(e), 16(1), sch 2.

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

rights and obligations,[8] transaction costs are reduced and trade is thereby promoted.[9] The *New York Convention* and the *Model Law*, on the other hand, are procedural laws addressing different legal aspects of international commercial arbitration ('ICA'). ICA is 'a means by which international business disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral adjudicative procedures that provide the parties an opportunity to be heard'.[10] Essentially, ICA is a form of 'private justice'[11] grounded in party agreement that occurs outside of court but remains governed by law and relies on court support for its effectiveness.[12] This being so, the *New York Convention* is a treaty harmonising standards for enforcing arbitration agreements and ICA awards,[13] allowing courts to enforce both party agreements to arbitrate and the outcomes of ICA. The *Model Law* fulfils a different purpose.[14] It is a 'prototype' law[15] that States can adopt (verbatim or modified) to regulate the conduct of ICAs occurring within their jurisdictions and harmonise their ICA processes with those established in other jurisdictions.[16] Together, the *New York Convention* and *Model Law* constitute a necessary legal backbone for the global ICA system.

Australia's *CISG* and ICA laws, based on these instruments, have historically had a difficult time so far as their internationally minded interpretations go.[17] 2010, the year that Justice Croft of the Supreme Court of Victoria queried whether Australian courts could get their act together on ICA,[18] is a pivotal time in this

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8 Ibid art 4.

9 MJ Bonell, 'Introduction to the Convention' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, 1987) 1, 14–16 [2.3].

10 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021) 67.

11 Claudia Salomon, 'Guardian, Gatekeeper or Guide: The Role of Arbitral Institutions in Protecting the Integrity of the Arbitral Process, Promoting the Rule of Law, and Providing Access to Justice' [2024] (3) *ICC Dispute Resolution Bulletin* 5, 6.

12 ICA is considered a preferred dispute resolution process among legal practitioners and other stakeholders operating in the international trade space: School of International Arbitration, Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World', *Research* (Survey Report, 2021) 5–6 <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf>. For a description of the range of respondents to this survey: see 35–6.

13 Born (n 10) 104–5.

14 Ibid 104.

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

16 Born (n 10) 140–1.

17 Regarding the *CISG*: see, eg, Lisa Spagnolo, 'The Last Outpost: Automatic *CISG* Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers' (2009) 10(1) *Melbourne Journal of International Law* 141, 169. Regarding the *International Arbitration Act 1974* (Cth): see, eg, Justice Clyde Croft, 'The Development of Australia as an Arbitral Seat: A Victorian Supreme Court Perspective' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years: 50th Anniversary Conference, Geneva 2011* (International Council for Commercial Arbitration (ICCA) Congress Series No 16, Kluwer Law International, 2012) 227, 233.

18 See generally Justice Clyde Croft, 'Can Australian Courts Get Their Act Together on International Commercial Arbitration?' (Conference Paper, Financial Review International Dispute Resolution Conference, 15 October 2010) <https://www.supremecourt.vic.gov.au/about-the-court/speeches/can-australian-courts-get-their-act-together-on-international-commercial> ('Can Australian Courts Get Their Act Together?').

regard. Australia's 'most interesting'[19] ICA cases were decided following the enactment of the *International Arbitration Amendment Act 2010* (Cth) and the *Commercial Arbitration Act 2010* (NSW) – the first of Australia's domestic commercial arbitration Acts based on the *Model Law*[20] that are treated as ICA laws for the purposes of this article.[21] The *New York Convention* and *Model Law* are now routinely interpreted in an internationalist manner in Australian courts.[22] On the other hand, Australia's *CISG* laws still do not receive that same treatment.[23] In this article, I investigate this otherwise trite observation from a new perspective. Noting the intuitive appeal of extending Australia's ICA interpretative approach to the *CISG*,[24] I argue that different practical strategies are necessary to give effect to these laws' respective internationalist interpretation requirements.

My focus being on these practical strategies, it is important to note that I am not addressing *why* Australia's *CISG* and ICA laws are interpreted inconsistently. Scholarship analyses this matter elsewhere: identifying as possible explanations (among other things) their respective substantive and procedural natures, and the wording of Australia's *CISG* implementing legislation.[25]

In Part II of this article, I set the scene by identifying the internationalist interpretation rules governing all three instruments under examination. In Part III, I demonstrate that in Australia the *New York Convention* and *Model Law* are routinely interpreted in a manner particularly receptive of Singaporean, Hong Kong and New Zealand interpretative influence. In Part IV, I explain that significantly less influence from those jurisdictions exists regarding the *CISG*. That being so, in Part V I make two recommendations aimed at better equipping Australian courts to discharge their

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19 Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore* (Kluwer Law International, 2016) 88.

20 See *Commercial Arbitration Act 2017* (ACT) pt 1A note; *Commercial Arbitration Act 2010* (NSW) pt 1A note; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 1E; *Commercial Arbitration Act 2013* (Qld) pt 1A note; *Commercial Arbitration Act 2011* (SA) pt 1A note; *Commercial Arbitration Act 2011* (Tas) pt 1A note; *Commercial Arbitration Act 2011* (Vic) pt 1A note; *Commercial Arbitration Act 2012* (WA) s 1D.

21 Australia's domestic commercial arbitration Acts must be interpreted consistently with their international counterpart: *Commercial Arbitration Act 2017* (ACT) s 2A(1); *Commercial Arbitration Act 2010* (NSW) s 2A(1); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 2A(1); *Commercial Arbitration Act 2013* (Qld) s 2A(1); *Commercial Arbitration Act 2011* (SA) s 2A(1); *Commercial Arbitration Act 2011* (Tas) s 2A(1); *Commercial Arbitration Act 2011* (Vic) s 2A(1); *Commercial Arbitration Act 2012* (WA) s 2A(1). See *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* (2024) 98 ALJR 1096, 1107–8 [45] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ), 1111 [61] (Jagot and Beech-Jones JJ) ('*CBI*'); *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880, 885 [3] (Gageler CJ), 898 [91] (Gordon and Gleeson JJ), 926–7 [235] (Steward J), 940 [298] (Jagot and Beech-Jones JJ) ('*Tesseract*').

22 Andrea Anastasi, Benjamin Hayward and Stephanie Peta Brown, 'An Internationalist Approach to Interpreting Private International Law? Arbitration and Sales Law in Australia' (2020) 44(1) *Melbourne University Law Review* 1, 20–35; Luke Nottage, 'Cross-Fertilisation in International Commercial Arbitration, Investor-State Arbitration and Mediation: The Good, the Bad and the Ugly?' (Speech, Supreme Court of New South Wales ADR Address, 2 November 2023) 4 <https://disputescentre.com.au/supreme-court-of-new-south-wales-adr-address-2023/>.

23 Anastasi, Hayward and Brown (n 22) 37–44.

24 See, eg, ibid 50–3; Benjamin Hayward, '*CISG* as the Applicable Law: The Curious Case of Australia' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *Contracts for the International Sale of Goods: A Multidisciplinary Perspective* (Sweet & Maxwell, 2019) 167, 185–7 [10.45]–[10.48] ('*CISG* as the Applicable Law').

25 Anastasi, Hayward and Brown (n 22) 44–54.

CISG art 7(1) interpretative obligations, which are binding under public international law.[26] In Part VI, I conclude that effecting those recommendations stands to assist the *CISG* in fulfilling its trade facilitation purposes.

II Internationalist Interpretation: The *CISG*, *New York Convention* and *Model Law*

An appropriate starting point for my analysis, given the interpretative stratification identified in Part I, is the internationalist interpretation requirement relating to the application of the *CISG*, *New York Convention* and *Model Law*.

The *CISG* embeds internationally minded interpretative rules in *CISG* art 7(1): '[i]n the interpretation of this *Convention*, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. This provision requires the *CISG's* autonomous interpretation, 'free from domestic preconceptions'.[27] It also requires judicial and arbitral decision-makers to consider internationally minded interpretative resources including the treaty's *travaux préparatoires*, scholarship, and international case law.[28]

The *New York Convention*, pre-dating the *CISG* art 7(1) 'standard uniform interpretation clause',[29] does not contain interpretative instructions. Equivalent internationalist interpretation rules apply, however, via public international law principles reflected in the *Vienna Convention on the Law of Treaties*.[30] Conceptually, those rules apply to the *New York Convention* via 'reading in'.[31]

Finally, although the 1985 version of the *Model Law* was also silent as to its interpretation, this changed with its 2006 revisions. *CISG* art 7(1) became the template on which a new *Model Law* art 2A(1) was based.[32] Model laws are generally domestic legislation when implemented and are not necessarily required to be interpreted with an internationalist mindset.[33] *Model Law* art 2A(1) displaces that general position, providing that '[i]n the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'. Though the drafting history of *Model*

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26 Renaud Sorieul, Emma Hatcher and Cyril Emery, 'Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58(4) *Villanova Law Review* 491, 500.

27 Pascal Hachem, 'Article 7 CISG: Interpretation of Convention and Gap-Filling' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 135, 137 [5] ('Article 7').

28 João Ribeiro-Bidaoui, 'The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organisations' (2020) 67(1) *Netherlands International Law Review* 139, 148–50.

29 Ibid 141.

30 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

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

32 Binder (n 15) 59–60.

33 Ingeborg Schwenzer, 'Who Needs a Uniform Contract Law, and Why?' (2013) 58(4) *Villanova Law Review* 723, 728.

Law art 2A(1) gives little guidance as to its intended meaning,[34] its relationship with *CISG* art 7(1) confirms that it requires an internationalist interpretation when applying the *Model Law*.

III Internationalist Interpretation Examined: The *New York Convention* and *Model Law* in Australia

As I identified in Part I, Australia's ICA laws have enjoyed more than a decade of jurisprudential progress, with ICA being described in 2011 as 'the new black' in Australian law.[35] While it is well established that Australia's ICA laws are now routinely interpreted in an internationalist spirit, in this Part I examine a different matter: the practical means by which that interpretation is secured.

A *Realising Internationalist Interpretation in Practice: Singaporean, Hong Kong, and New Zealand Case Law*

While the *New York Convention* and *Model Law* are both subject to internationalist interpretation requirements, Australian courts often refer to Singaporean, Hong Kong, and New Zealand case law in particular to satisfy those requirements. At the heart of this proposition lies a 'critical passage'[36] in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* ('*TCL v Castel*'):

> This approach to confining the scope of public policy has widespread international judicial support. Contrary to the submission of the appellant, it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the *New York Convention* and the *Model Law*. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the *IAA* permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand. Such is a reflection of the growing recognition of the harmony of what can be seen as the 'law of international commerce' … It is also an approach required by Art 2A of the *Model Law*, and by the highest authority when dealing with treaties … This approach should not be confined to treaties proper to which there are contracting state parties. Where, as with the *Model Law*, there has been extensive discussion and negotiation of a model law under the auspices of a United Nations body, such as UNCITRAL, and where the *Model Law* has been adopted by the General Assembly of the United Nations with recommendation of 'due consideration' by member states to advance uniformity of approach, the same appropriate respect for, and, where necessary, sensitivity or deference to,

[34] Howard M Holtzmann, Joseph E Neuhaus, Edda Kristjánsdóttir and Thomas W Walsh, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) 24–5.

[35] Richard Garnett and Luke Nottage, 'The 2010 Amendments to the *International Arbitration Act*: A New Dawn for Australia?' (2011) 7(1) *Asian International Arbitration Journal* 29, 31.

[36] Anastasi, Hayward and Brown (n 22) 29.

> reasoned decisions of other countries, should be shown. This is especially so in the field of international commerce.[37]

To be clear, I do not claim that Australia's courts exclusively or principally rely on Singaporean, Hong Kong, and New Zealand ICA case law. That would be inconsistent with the very notion of internationalist interpretation, and the High Court of Australia's views expressed in related proceedings one year earlier:

> Those considerations of international origin and international application make imperative that the *Model Law* be construed without any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles.[38]

Still, *TCL v Castel* establishes what might be called a heightened interpretative value of 'the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand'.[39] The Full Federal Court of Australia apparently envisages reliance on cases from those jurisdictions as going some significant (practical) way towards securing the *New York Convention* and *Model Law's* internationalist interpretation. This view has been influential. The Lexis Advance database discloses 18 Australian cases citing *TCL v Castel* as at 2 December 2024,[40] and the decision features in Australian judges' extra-curial writings.[41]

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

38 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 545 [8] (French CJ and Gageler J). See also *Tesseract* (n 21) 887 [19] (Gageler CJ).

39 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

40 *International Relief and Development Inc v Ladu* [2014] FCA 887, [169] (Kenny J); *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* (2014) 290 FLR 233, 244–5 [41], 265 [128] (Darke J) ('*William Hare NSWSC*'); *Chief Executive Officer of Australian Sports Anti-Doping Authority Australian Football League (ASADA) v 34 Players* [2014] VSC 635, [7] n 7 (Croft J) (citing *TCL v Castel* in context, though without pinpoint); *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [19] (Croft J) ('*Cameron*'); *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 328–9 [13] (Croft J) ('*Robotunits*'); *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* (2015) 324 ALR 372, 390 [59] (Bathurst CJ, Beazley P agreeing at 391 [64], Sackville AJA agreeing at 391 [65]); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 207 [18] n 28, 207–8 [20], 212 [32], 222 [73] n 117 (Croft J) ('*Indian Farmers No 1*'); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770, [13] n 20 (Croft J) ('*Indian Farmers No 2*'); *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [23], [31] n 57 (Croft J) ('*Amasya*'); *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452, 470 [101] (Foster J); *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2017) 52 VR 198, 201 [10] n 3 (Croft J) ('*Lysaght*'); *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] 1 Qd R 245, 255 [20] (Jackson J) ('*Mango Boulevard*'); *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [96] (Gleeson J) ('*Liaoning*'); *Energy City Qatar Holding Co v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116, [52] (Jagot J); *Beijing Jishi Venture Capital Fund (Ltd Partnership) v Liu* [2021] FCA 477, [40] (Middleton J); *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* (2021) 290 FCR 298, 305 [18] (Stewart J, Allsop CJ agreeing at 301 [1], Middleton J agreeing at 302 [12]) ('*Hub Street Appeal*'); *Gemcan Constructions Pty Ltd v Westbourne Grammar School* [2022] VSC 6, [77] n 78 (Riordan J) ('*Gemcan*'); *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584, [32] (Stewart J) ('*Guoao*'); *Secretary, Department of Social Services v Vader* (2024) 302 FCR 352, 368 [55] (Perry J, Charlesworth J agreeing at 374 [81], Jackson J agreeing at 374 [82]–[83]).

41 See, eg, Justice Clyde Croft, 'The Temptation of Domesticity: An Evolving Challenge in Arbitration' in Neil Kaplan and Michael Moser (eds), *Jurisdiction, Admissibility and Choice of Law in*

B *Rationales: Understanding Why Singaporean, Hong Kong, and New Zealand Case Law is Considered Important by Australian Courts*

Why has the Full Federal Court suggested that Australian courts should 'especially'[42] refer to Singaporean, Hong Kong, and New Zealand ICA judgments? There are several potential explanations and, starting with the practical, ample ICA jurisprudence exists in each of these jurisdictions. While it is difficult to say with absolute precision, there are in the order of 1,476 Singaporean ICA cases,[43] 388 Hong Kong cases,[44] and 716 New Zealand cases[45] handed down in those jurisdictions' overlapping *New York Convention* and *Model Law* eras. As each jurisdiction adopted the *New York Convention* before the *Model Law*,[46] still further *New York Convention* cases are likely to exist. With this many ICA cases, relevant and useful decisions are identifiable by Australian courts. In addition, as *TCL v Castel* noted, Singapore, Hong Kong, and New Zealand are common law jurisdictions in Australia's region.[47] From the perspective of Australian courts and practitioners, decisions from those jurisdictions thus have a certain accessibility (especially given their shared use of legal English).[48]

Still, the significance of the accessibility of Singapore, Hong Kong and New Zealand case law should not be overstated. Several international efforts ensure that the world's ICA case law is shared widely across national borders, legal traditions, and languages. For example, as at 2 December 2024, the Case Law on UNCITRAL

International Arbitration: Liber Amicorum Michael Pryles (Kluwer Law International, 2018) 57, 59–60 ('The Temptation of Domesticity').

42 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

43 Determined via searching (as at 2 December 2024) the vLexJustis database, a subscription database cataloguing reported and unreported Singaporean case law: see vLex, 'Sign In' (Web Page) <https://justis.vlex.com/>. This search used the exact term 'Arbitration Act' and a date range on or after 27 January 1995: the date that the *International Arbitration Act 1994* (Singapore) (implementing the *Model Law* (n 6)) came into force. Using the search term 'Arbitration Act' thereby captured all references to the *International Arbitration Act* (Singapore, cap 143A, 2020 rev ed) and its predecessors, as well as all references to the domestically focused *Arbitration Act* (Singapore, cap 10, 2002 rev ed) and its predecessors. That latter Act's case law is of ICA significance as 'much of the [*Arbitration Act*] is based on the *Model Law*': Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa Law, 2nd ed, 2016) 3. See also *Drydocks World-Singapore Pte Ltd v Jurong Port Pte Ltd* [2010] SGHC 185, [14]–[20] (Nathaniel Khng AR).

44 Determined via searching (as at 2 December 2024) the Westlaw US & International database, a subscription database housing a significant collection of Hong Kong case law. This search used the exact term 'Arbitration Ordinance' and a date range after 31 May 2011: as the *Arbitration Ordinance* (Hong Kong) cap 609 (implementing the *Model Law* (n 6)) came into force on 1 June 2011. While this figure is likely over-inclusive, as some cases decided on or after 1 June 2011 would inevitably still have applied the (now repealed) *Arbitration Ordinance* (Hong Kong) cap 341, it remains sufficiently high to confirm my proposition.

45 Determined via searching (as at 2 December 2024) the New Zealand Legal Information Institute ('NZLII') database: see NZLII, 'Search NZLII' (Web Page) <https://www.nzlii.org/forms/search1.html>. This search used the exact term 'Arbitration Act 1996', as the *Arbitration Act 1996* (NZ) is the Act implementing the *Model Law* (n 6) in New Zealand.

46 See UN, 'Chapter XXII' (n 5); UN, '*Model Law* Status' (n 6).

47 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

48 With limited exception in Hong Kong, where Chinese is also an officially recognised language for court proceedings: *Official Languages Ordinance* (Hong Kong) cap 5, s 3(1).

Texts ('CLOUT') database[49] hosts 325 *New York Convention* case abstracts from 52 different jurisdictions, and 562 *Model Law* abstracts from 43 different jurisdictions, all presented in the six official United Nations languages, including English. Binder's article-by-article commentary on the *Model Law*[50] summarises CLOUT cases relevant (as at 2019) to each *Model Law* provision. The *ICCA Yearbook Commercial Arbitration*, hosted on the Kluwer Arbitration database and in its 49th volume in 2024, summarises (in English) and translates (into English) *New York Convention* case law. These and additional cases are also available on Professor Albert Jan van den Berg's newyorkconvention.org website,[51] covering 97 jurisdictions as at 2 December 2024.[52] *New York Convention* and *Model Law* case law from around the world is thus readily accessible to those with the will to look. Given the ready availability of worldwide ICA case law, a more robust explanation than simple convenience is required to explain the Full Court's reference to Singaporean, Hong Kong, and New Zealand case law in *TCL v Castel*. This is particularly so given that Australia's preparedness to accept interpretative influence from those jurisdictions has correlated with an improved quality of Australia's ICA case law.[53]

A partial explanation lies in the reality that Australian courts will be most assisted by ICA case law from jurisdictions also adopting the *Model Law* and *New York Convention*,[54] thereby having textual 'similarity' in their ICA legislations.[55] While the *New York Convention* boasts 172 Contracting States,[56] making its reach 'almost universal',[57] many leading arbitral centres (including England and Wales, France, and Switzerland) have not adopted the *Model Law*,[58] while Singapore, Hong Kong, and New Zealand have.[59] Save as to local variations in the *Model Law's* implementation,[60] Singaporean, Hong Kong, and New Zealand case law will be instructive in both *New York Convention* and *Model Law* contexts. Of course, there

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49 United Nations, 'Case Law on UNCITRAL Texts (CLOUT)', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/case_law> ('CLOUT').

50 Binder (n 15).

51 'The *New York Convention*', *New York Convention* (Web Page) <https://www.newyorkconvention.org/>.

52 'Court Decisions: Per Country', *New York Convention* (Web Page) <https://www.newyorkconvention.org/court-decisions/court-decisions-per-country>.

53 Lewis (n 19) 107–29; Sydney Law School, 'Comparative History of International Arbitration: Australia, Japan and Beyond (21 September 2023)', *YouTube* (Seminar Recording, 23 November 2023) 00:58:54–00:59:24 (Professor Luke Nottage) <https://www.youtube.com/watch?v=0X6XVOR0Y6U>.

54 Croft, 'The Temptation of Domesticity' (n 41) 60.

55 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303, 314 [37] (Warren CJ). See also 342 [130] (Hansen JA and Kyrou AJA).

56 UN, 'Chapter XXII' (n 5).

57 Alex Baykitch and Lorraine Hui, 'Celebrating 50 Years of the *New York Convention*' (2008) 31(1) *University of New South Wales Law Journal* 364, 364.

58 UN, '*Model Law* Status' (n 6). See *Arbitration Act 1996* (UK); *Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage* [Decree No 2011-48 of 13 January 2011 on the new French Law on International Arbitration] (France) JO, 14 January 2011; *Bundesgesetz vom 18 Dezember 1987 über das Internationale Privatrecht* [Federal Act on Private International Law] (Switzerland) AS 1988 1776, 1 January 1989, ch 12.

59 UN, '*Model Law* Status' (n 6). See *International Arbitration Act* (Singapore, cap 143A, 2020 rev ed) s 3(1), sch 1; *Arbitration Ordinance* (Hong Kong) cap 609, s 4, sch 1; *Arbitration Act 1996* (NZ) s 6(1)(a), sch 1.

60 See, eg, *CBI* (n 21) 1117 [89] (Jagot and Beech-Jones JJ); *Mango Boulevard* (n 40) 260 [45] (Jackson J).

are many other *Model Law* States across the Asia-Pacific and beyond,[61] and much international English language ICA case law (as noted above). Still, the common ICA framework shared by Australia, Singapore, Hong Kong, and New Zealand provides a legal foundation for *TCL v Castel's* interpretative directive.

In addition to that legal foundation, Singapore and Hong Kong are leading global (and no longer just regional)[62] arbitration centres.[63] Those jurisdictions' cases interpreting the *New York Convention* and *Model Law* can thus fairly be described as having global significance. When Australian courts refer to them, in turn, those courts can be seen as adopting a de facto internationalist approach to those instruments' interpretation.

C *Results: Evidencing Australia's Receptiveness to Singaporean, Hong Kong, and New Zealand ICA Case Law*

What evidence is there, then, of Australian courts actually treating Singaporean, Hong Kong, and New Zealand ICA case law as 'especially' important?[64] In this Part I identify several examples. According to the Lexis Advance database as at 2 December 2024, 242 cases have addressed the *International Arbitration Act 1974* (Cth) since the *International Arbitration Amendment Act 2010* (Cth) came into force on 6 July 2010,[65] and there are 339 instances of courts addressing Australia's domestic commercial arbitration Acts[66] (treated as ICA cases for present purposes given the *Model Law* foundations of those Acts). Given these case numbers, my examples are necessarily select. In this context, then, I evidence Australia's receptiveness to Singaporean, Hong Kong, and New Zealand ICA case law by reference to *qualitatively impactful* examples.

1 *TCL v Castel: A Starting Point*

Unsurprisingly, *TCL v Castel* is an excellent starting point. Of its international case citations, 18 are from Singapore, Hong Kong, and New Zealand, while 28 come from the rest of the world.[67] On a strictly numerical basis, citations to Singaporean, Hong Kong, and New Zealand cases are overrepresented. Although this evidence is not

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61 Justice Clyde Croft, 'The Judicial Approach to Arbitration: An Asia Pacific Perspective' (Conference Paper, Arbitrators' and Mediators' Institute of New Zealand Conference, August 2014) 1 <https://www.supremecourt.vic.gov.au/about-the-court/speeches/the-judicial-approach-to-arbitration-an-asia-pacific-perspective> ('The Judicial Approach'); UN, '*Model Law* Status' (n 6).

62 Cf Loukas A Mistelis, 'Arbitral Seats: Choices and Competition' in Stefan Kröll, Loukas A Mistelis, María Pilar Perales Viscasillas and Vikki M Rogers (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 363, 377.

63 School of International Arbitration, Queen Mary University of London (n 12) 6–7.

64 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

65 *International Arbitration Amendment Act 2010* (Cth) s 2(1).

66 There are 6 cases referencing the *Commercial Arbitration Act 2017* (ACT), 114 referencing the *Commercial Arbitration Act 2010* (NSW), 8 referencing the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), 23 referencing the *Commercial Arbitration Act 2013* (Qld), 24 referencing the *Commercial Arbitration Act 2011* (SA), 11 referencing the *Commercial Arbitration Act 2011* (Tas), 60 referencing the *Commercial Arbitration Act 2011* (Vic), and 93 referencing the *Commercial Arbitration Act 2012* (WA). The word 'instances' rather than 'cases' is used in this note's accompanying text as these jurisdictional numbers are not mutually exclusive; some cases refer to more than one (sometimes even all) of the domestic commercial arbitration Acts.

67 *TCL v Castel* (n 37) 363–6.

itself qualitative, it provides context for *TCL v Castel's* substantive resolution, where the Full Federal Court rejected the legitimacy of dressing up merits challenges to awards as being based on natural justice concerns.[68] In analysing natural justice, *TCL v Castel* referred to Singaporean, Hong Kong, and New Zealand cases.[69] That this analysis is qualitatively impactful is confirmed by its subsequent scholarly[70] and judicial[71] attention. It is interesting also to observe that *TCL v Castel* itself described the issue as being a matter 'of some importance'.[72]

2 *TCL v Castel: A Springboard*

Cases citing *TCL v Castel* also tend to cite case law from Singapore, Hong Kong, and New Zealand. For example, in *Guoao Holding Group Co Ltd v Xue (No 2)*, the Federal Court noted that *TCL v Castel* had 'adopted comments of Bokhary PJ and Sir Anthony Mason in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*' from Hong Kong.[73] Equivalent analyses are seen elsewhere.[74] By way of further example, the Victorian Supreme Court in *Full Joy Foods Pty Ltd v Australian Dairy Park Pty Ltd* identified that '[i]n *TCL*, the Full Court accepted as "helpful … but not determinative" the following list of general principles distilled by Fisher J in *Trustees of Rotoaira Forest Trust v Attorney-General*' regarding public policy and natural justice.[75] Other cases are to similar effect,[76] and there are more examples.[77]

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68 Ibid 376 [54] (Allsop CJ, Middleton and Foster JJ).

69 Ibid 380–1 [64], 384–5 [76], 385–6 [79] (Allsop CJ, Middleton and Foster JJ).

70 See, eg, Chester Brown and Malcolm Holmes, *The International Arbitration Act 1974: A Commentary* (LexisNexis, 3rd ed, 2018) 91, 105–6; Shaheer Tarin and Ozlem Susler, 'Judicial Approaches to Enforcing Foreign Arbitral Awards in Australia and Singapore' (2020) 21(2) *Flinders Law Journal* 201, 218–19; Jonathan Hill, 'Claims That an Arbitral Tribunal Failed to Deal With an Issue: The Setting Aside of Awards under the *Arbitration Act 1996* and the *UNCITRAL Model Law on International Commercial Arbitration*' (2018) 34(3) *Arbitration International* 385, 412–13; Stephen R Tully, 'Challenging Awards Before the National Courts for a Denial of Natural Justice: Lessons from Australia' (2016) 32(4) *Arbitration International* 659, 665–6, 675.

71 *Indian Farmers No 1* (n 40) 207 [18] (Croft J); *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, 789 [8], 790 [17] (Whelan, Beach and Ferguson JJA); *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735, [45], [56], [79] (Hammerschlag J); *ALYK (HK) Ltd v Caprock Commodities Trading Pty Ltd* [2015] NSWSC 1006, [16] (Black J); *Cameron* (n 40) [22], [35], [59] (Croft J); *Amasya* (n 40) [18] (Croft J); *Lysaght* (n 40) 209 [29] (Croft J); *Mango Boulevard* (n 40) 255 [20] (Jackson J).

72 *TCL v Castel* (n 37) 367 [11] (Allsop CJ, Middleton and Foster JJ).

73 *Guoao* (n 40) [33] (Stewart J). See *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111.

74 *Gemcan* (n 40) [78] (Riordan J); *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [103] (McMurdo JA, Fraser JA agreeing at [1]) ('*Mango Appeal*'); *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732, 740 [19] n 31 (Warren CJ, Santamaria and Beach JJA); *Indian Farmers No 1* (n 40) 212–13 [33]–[35] (Croft J); *Liaoning* (n 40) [102] (Gleeson J).

75 *Full Joy Foods Pty Ltd v Australian Dairy Park Pty Ltd* [2020] VSC 672, [75] (Niall JA). See *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452.

76 *Amasya* (n 40) [45]–[47], [49] (Croft J); *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, 342 [226] (Beach J); *Mango Appeal* (n 74) [17] n 14 (Morrison JA); *Mango Boulevard* (n 40) 275 [102]–[103] (Jackson J); *The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* (2021) 395 ALR 720, 750–1 [138]–[139] (Rees J) ('*Nuance*').

77 *Lieschke v Lieschke* [2022] NSWSC 1705, [7], [10], [16], [151] (Rees J) ('*Lieschke*'); *Nuance* (n 76) 749 [132], 752 [143], 753 [147] (Rees J); *Sharma v Military Ceramics Corp* [2020] FCA 216, [48]–[49] (Stewart J); *Tayar v Feldman* [2020] VSC 66, [150] nn 46–7 (Lyons J) ('*Tayar*'); *Mango Boulevard* (n 40) 258 [31]–[34], 260 [47] n 21, 269 [86] (Jackson J); *Lysaght* (n 40) 211–12 [34]

Regarding qualitative impact, here we see courts drawing on *TCL v Castel's* own reasoning in conjunction with its interpretative directive.

3 *TCL v Castel: Reflected in Party Submissions*

Further evidence of *TCL v Castel's* interpretative directive having qualitative impact can be seen in courts recounting party submissions drawing heavily on Singaporean and Hong Kong ICA case law.[78] Such submissions demonstrate practitioner awareness of the value placed by Australian courts on those jurisdictions' cases.

4 *Minimum Curial Intervention*

Perhaps one of the most qualitatively impactful examples of Singaporean and Hong Kong ICA case law's interpretative influence in Australia relates to the principle of minimum (or minimal) curial intervention. Post-2010 Australian ICA cases have endorsed this principle, typically citing both *TCL v Castel* and relevant Singaporean and Hong Kong cases.[79] That this approach is particularly impactful emerges from three considerations. First, the High Court of Australia has identified this principle twice, very recently, with reference to Singaporean cases.[80] Second, the *International Arbitration Amendment Act 2010* (Cth) was passed amid some Australian courts intervening in the ICA process more than the *New York Convention* and *Model Law* envisage,[81] and those cases were considered damaging to Australia's ICA reputation.[82] Third, Australia's contemporary adherence to this principle features in its ICA branding, communicated (for example) through judges' extra-curial writings.[83]

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n 24, 212 [35] (Croft J); *Liaoning* (n 40) [117]–[118] (Gleeson J); *Amasya* (n 40) [28]–[30], [82] n 158, [92] n 171 (Croft J); *Indian Farmers No 1* (n 40) 210 [28] n 41 (Croft J); *Cameron* (n 40) [17] n 17, [53] n 140 (Croft J); *Indian Farmers No 2* (n 40) [6] n 10, [13]–[17] (Croft J); *William Hare NSWSC* (n 40) 264–5 [124] (Darke J).

78 See, eg, *Cameron* (n 40) [23] nn 31–45, 48–9, 51–5, 60, 62–5, [45] n 126, [51] n 137 (Croft J); *Lysaght* (n 40) 218–19 [52]–[54] (Croft J); *Amasya* (n 40) [44], [90] (Croft J).

79 *Lieschke* (n 77) [14]–[15] (Rees J); *Gemcan* (n 40) [74] (Riordan J); *Tayar* (n 77) [59] n 17, [135] (Lyons J); *Spaseski v Mladenovski* [2019] WASC 65, [55]–[57], [60] (Kenneth Martin J) ('*Spaseski*'); *Mango Appeal* (n 74) [85] n 82 (Morrison JA); *Mango Boulevard* (n 40) 255–7 [20] (Jackson J); *Amasya* (n 40) [23], [74] (Croft J); *Indian Farmers No 1* (n 40) 208 [21]–[22] (Croft J); *Robotunits* (n 40) 329 [14] (Croft J); *Cameron* (n 40) [20]–[21], [34] n 95 (Croft J).

80 *CBI* (n 21) 1107 [41] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ); *Tesseract* (n 21) 924 [219], 925 [226] (Edelman J).

81 See, eg, *Re Resort Condominiums International Inc* [1995] 1 Qd R 406, 427 (Lee J): 'a general discretion exists whether to enforce a foreign award' even if no ground for refusal is established; *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317, 320 [10] (McDougall J): the public policy defence is 'wide'.

82 Robert McClelland, 'International Commercial Arbitration in Australia: More Effective and Certain' (Speech, International Commercial Arbitration: Efficient, Effective, Economical? Conference, 4 December 2009): 'I am sure no one here needs reminding of the impact that the *Eisenwerk* decision has had on Australia's reputation internationally'. See *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461.

83 See, eg, Croft, 'The Temptation of Domesticity' (n 41) 60–1; Chief Justice James Allsop and Justice Clyde Croft, 'The Role of the Courts in Australia's Arbitration Regime' (Seminar Paper, Commercial CPD Seminar Series, 11 November 2015) 4–5 <https://www.supremecourt.vic.gov.au/about-the-court/speeches/the-role-of-the-courts-in-australias-arbitration-regime>; Croft, 'The Judicial Approach' (n 61) 1, 3; Justice James Allsop, 'International Arbitration and the Courts: The Australian

5 *The Discretion to Enforce*

Another example of Singaporean and Hong Kong case law having a particular qualitative impact on Australian ICA law is seen in Australia's recognition of an enforcement (or annulment) court's discretion to enforce an award (or decline annulment) notwithstanding the existence of a challenge ground. Australian courts now recognise this discretion, with reference to Singaporean and Hong Kong case law.[84] This interpretative influence ensures that Australian courts respect the text of the *New York Convention* art V and *Model Law* art 34(2), all using the permissive 'may' regarding award challenges,[85] notwithstanding the potentially narrow scope for exercising this discretion.[86]

6 *The Model Law in the High Court of Australia*

Finally, returning to the two High Court cases referenced in Part III(C)(4), both cite Singaporean and Hong Kong cases throughout, the most recent quite liberally.[87] Here, the influence of Singaporean and Hong Kong ICA case law is felt not only in these two decisions, but also in the signalling effect that their citation practices have for future disputes.

What emerges from this analysis is both a stated and evidenced preference of Australian courts for Singaporean, Hong Kong, and New Zealand ICA case law. What, then, of the *CISG*? Can Australia's courts take a similar practical approach to effect its internationalist interpretation? This is the question to which I turn in Part IV.

IV Internationalist Interpretation Examined: The *CISG* in Australia

It is well known that Australia's courts have not taken a consistently internationalist approach to the *CISG's* interpretation, despite the *CISG* art 7(1) requirement to do so.[88] In this Part, I show that Australia's courts cannot correct this state of affairs via ICA's practical strategy of referring 'especially'[89] to Singaporean, Hong Kong, and

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Approach' (Conference Paper, CIArb Asia Pacific Conference, 2011) 6–7 <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/Pre-2015-Speeches/Assorted---A-to-K/allsop_index.pdf>; Croft, 'Can Australian Courts Get Their Act Together?' (n 18) 18; Chief Justice Marilyn Warren, 'The Victorian Supreme Court's Perspective on Arbitration' (Speech, International Commercial Arbitration: Efficient, Effective, Economical? Conference, 4 December 2009) 4.

84 *Hub Street Appeal* (n 40), 320 [92], 321 [95]–[97] (Stewart J, Allsop CJ agreeing at 301 [1], Middleton J agreeing at 302 [12]); *Spaseski* (n 79) [64], [112] (Kenneth Martin J); *Indian Farmers No 1* (n 40) 234 [113]–[114] (Croft J); *Cameron* (n 40) [23] (Croft J); *TCL v Castel* (n 37) 375 [48] (Allsop CJ, Middleton and Foster JJ).

85 Born (n 10) 3435, 3741–2.

86 Ibid 3436, 3745–6.

87 *CBI* (n 21) 1101 [15] n 6, 1102 [18], 1104 [25] n 24, 1105 [28]–[29] nn 34–7, 1105 [30] nn 39–40, 1106 [35] n 45, 1106 [37] n 47, 1107 [41] n 49, 1108 [45] nn 57–60, 1108 [47] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ), 1112 [66] n 101–2, [69], 1114–15 [75]–[77], 1116–17 [84]–[87], 1117 [89] (Jagot and Beech-Jones JJ); *Tesseract* (n 21) 889 [32]–[33], 891 [46] (Gageler CJ), 901 [103] (Gordon and Gleeson JJ), 923 [214] n 219, 923 [216] n 221, 925 [226] n 228 (Edelman J), 947 [342] n 346 (Jagot and Beech-Jones JJ).

88 Anastasi, Hayward and Brown (n 22) 37–44.

89 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

New Zealand cases. The reason is that only limited helpful *CISG* case law exists in those jurisdictions.

For the purposes of clarity, I do not claim that this lack of Singaporean, Hong Kong, and New Zealand *CISG* case law has *caused* Australia's *CISG* status quo. Instead, identifying this relative lack of helpful case law is essential context for charting the course ahead, a matter I address in Part V.

A *Singapore's CISG Case Law*

Singapore acceded to the *CISG* on 16 February 1995,[90] giving it force of law via the *Sale of Goods (United Nations Convention) Act 1995* (Singapore, 2020 rev ed). Although the *CISG* has been part of Singaporean law for approximately 30 years, no Singaporean cases apply the instrument.

In order to identify all Singaporean *CISG* cases — by which I mean Singaporean cases relating to the *CISG* in any way — I conducted searches across the vLexJustis database, the eLitigation Supreme Court Judgments database,[91] the Albert H Kritzer *CISG* Database,[92] *CISG*-online,[93] UNCITRAL's CLOUT database,[94] and UNILEX.[95] The vLexJustis and eLitigation Supreme Court Judgments databases were my primary search vehicles.[96] Though they are not commonly used by *CISG* scholars, they (collectively) contain all reported and unreported Singaporean judgments, and are thus complete repositories of all types of Singaporean cases. That being so, supplementary reference was made to the other databases listed above to ensure that my search was as thorough as possible. While 20 cases were identified,[97] none apply the *CISG*.

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90 UN, 'Chapter X' (n 4) 2.

91 eLitigation, 'Supreme Court Judgments' (Web Page, 1 August 2024) <https://www.elitigation.sg/gd/>.

92 Pace University Elisabeth Haub School of Law, 'Search Cases in the *CISG* Database', *Pace Law Albert H Kritzer CISG Database* (Web Page) <https://iicl.law.pace.edu/cisg/search/cases>. Though there is a perception that the Albert H Kritzer *CISG* Database is no longer regularly updated, this is not so, particularly for the jurisdictions I examined for this article. Free registration is required to access the Database's case law search functionality.

93 Faculty of Law University of Basel, 'Search for Cases', *CISG-online* (Web Page, 2024) <https://cisg-online.org/search-for-cases>.

94 UN, 'CLOUT' (n 49).

95 'Selected Cases by Country', *UNILEX* (Web Page) <unilex.info/cisg/cases/country/all>.

96 The following (exact phrase) search terms were used across each: 'CISG', 'Vienna Sales', 'Convention on Contracts', 'Convention on International Sale', 'Convention on the International Sale', and 'Sale of Goods (United Nations Convention) Act'. The search term 'Vienna Convention' was omitted, so as to eliminate false positive results referencing the *VCLT* (n 30).

97 As at 2 December 2024, and excluding irrelevant cases where the party name 'CIFG' was misspelled on one occasion as 'CISG' (*CIFG Special Assets Capital I Ltd v Ong Puay Koon* [2018] 1 SLR 170, 175 [15] (Sundaresh Menon CJ)) and where the carriage of goods (rather than the sale of goods) was involved (*Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2020] 1 Lloyd's Rep 130).

Of the 20 cases, 13 reference the *CISG* in ICA contexts.[98] As courts do not review the merits of disputes in ICA-related litigation,[99] Singapore's courts had no capacity to apply the *CISG* in these cases, even where it was the arbitrated contract's governing law. Singapore's status as a global arbitration centre might explain its lack of case law applying the *CISG*, with several pieces of evidence supporting that conclusion:

- approximately two-thirds of Singapore's *CISG* cases exist in this ICA context;
- the two most recent cases involved Singapore-seated arbitrations;[100] and
- the *CISG* has an empirically confirmed relationship with ICA.[101]

Although Singapore has made a *CISG* art 95 declaration,[102] it is probably not true that this 'seriously' curtails the *CISG's* Singaporean application, as suggested elsewhere.[103] With the *CISG* now having 97 Contracting States,[104] *CISG* art 1(1)(a) (causing the *CISG* to apply where both parties are from Contracting States) is 'the standard avenue for the *CISG's* applicability'.[105] Indeed, two out of Singapore's top

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98 Award enforcement and set aside cases: *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057, 1060–3 [8], [13]–[21], [23]–[26], [29], 1064 [32], 1066–9 [37]–[39] (Judith Prakash J); *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, 121 [17], 159–62 [160]–[165] (Belinda Ang Saw Ean J); *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199, [15], [17]–[18] (Chua Lee Ming J); *Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd* [2019] 4 SLR 537, 569–70 [92]–[93] (Belinda Ang Saw Ean J); *BVU v BVX* [2019] SGHC 69, [4(e)], [23]–[24], [28], [89]–[91], [94], [101] (Ang Cheng Hock JC); *BXH v BXI* [2020] 1 SLR 1043, 1057–8 [51] (Steven Chong JA for the Court); *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2021] 5 SLR 228, 270 [134]–[135] (Quentin Loh JAD, Vivian Ramsey and Douglas Jones IJJ); *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2023] 1 SLR 55, 86 [119] (Robert French IJ for the Court); *Siddiqsons Tin Plate Ltd v New Metallurgy Hi-Tech Group Co Ltd* [2024] SGHC 272, [10], [46]–[53] (Hri Kumar Nair J) ('*Siddiqsons*'). Otherwise regarding arbitration: *Mitsui Engineering & Shipbuilding Co Pty Ltd v PSA Corp Ltd* [2003] 1 SLR 446, 453–4 [35] (Woo Bih Li JC); *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2021] 3 SLR 1422, 1431 [26] (Chua Lee Ming J); *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239, 244–5 [7] (S Mohan J); *DGE v DGF* [2024] SGHC 107, [4]–[5], [16]–[17], [25], [27], [42], [54], [61], [80], [89], [94], [128]–[138], [141], [151], [173]–[189] (Kristy Tan JC) ('*DGE*').

99 *AKN v ALC* [2015] 3 SLR 488, 503–4 [37] (Sundaresh Menon CJ for the Court); *AJU v AJT* [2011] 4 SLR 739, 772 [65]–[66] (Chan Sek Keong CJ for the Court); Born (n 10) 3437–8, 3760.

100 *DGE* (n 98) [1] (Kristy Tan JC); *Siddiqsons* (n 98) [72] (Hri Kumar Nair J).

101 Ingeborg Schwenzer and Edgardo Muñoz, *Global Sales and Contract Law* (Oxford University Press, 2nd ed, 2022) 76–7 [5.10]–[5.11].

102 Pursuant to this declaration, Singapore will not apply *CISG* (n 4) art 1(1)(b), which causes the treaty to apply 'when the rules of private international law lead to the application of the law of a Contracting State': see UN, 'Chapter X' (n 4) 4; *Sale of Goods (United Nations Convention) Act 1995* (Singapore, 2020 rev ed) s 3(2).

103 Gary F Bell, 'Why Singapore Should Withdraw its Article 95 Reservation to the *United Nations Convention on Contracts for the International Sale of Goods* (*CISG*)' (2005) 9 *Singapore Year Book of International Law* 55, 56.

104 UN, 'Chapter X' (n 4) 1.

105 Pascal Hachem, 'Article 1 CISG: Sphere of Application' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 26, 29 [6].

three trading partners (Mainland China and the United States of America ('US'), but not Malaysia)[106] are *CISG* jurisdictions.[107]

Singapore's seven remaining *CISG* cases also do not apply the treaty. One concerns a distributorship agreement,[108] two quote *CISG* exclusions where the parties' dispute actually involved jurisdictional questions,[109] and the remaining four apply non-harmonised Singaporean contract law and reference the *CISG* for comparative purposes.[110]

At most, Australia's courts might gain limited interpretative assistance from Singapore's cases comparing the *CISG* with non-harmonised Singaporean contract law. Otherwise, no Singaporean *CISG* interpretative assistance exists.

B *Hong Kong's CISG Case Law*

Compared with Singapore, Hong Kong's *CISG* history is recent. The People's Republic of China ('PRC') was an original *CISG* Contracting State.[111] However, the United Kingdom's abstention from *CISG* membership and Hong Kong's handover to the PRC on 1 July 1997 left it 'at best unclear'[112] whether the *CISG* applied in that Special Administrative Region ('SAR'). In addition, there is 'diverse case law on this question'.[113] From the PRC's perspective, the *CISG* extends to the Hong Kong SAR only from 1 December 2022, via the *Sale of Goods (United Nations Convention) Ordinance* (Hong Kong) cap 641.[114] Since I examine in this Part the *CISG's* application in Hong Kong, it is this PRC perspective that is relevant. Still, it is possible for Hong Kong *CISG* case law to pre-date 1 December 2022 if the *CISG* was applied as part of a foreign governing law, or if it were applied to contracts between Mainland China and Hong Kong entities via choice of law clauses having

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106 Department of Statistics Singapore, 'Singapore's International Trade', *SingStat* (Web Page, 8 April 2025) <https://www.singstat.gov.sg/modules/infographics/singapore-international-trade>.

107 UN, 'Chapter X' (n 4) 1–2.

108 *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21, [67] (Zhuang WenXiong AR). Distributorship agreements are not sale of goods contracts for the purposes of *CISG* (n 4) art 1(1).

109 *Allianz Capital Partners GmbH v Andress Goh* [2022] SGHC 266, [62] (See Kee Oon J); *Allianz Capital Partners GmbH v Andress Goh* [2023] 1 SLR 1618, 1625 [14] (Kannan Ramesh JAD for the Court).

110 *Charles Lim Teng Siang v Hong Choon Hau* [2021] 2 SLR 153, 165 [39] (Steven Chong JCA for the Court); *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, 211–12 [37] (Sundaresh Menon CJ for the Court); *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, 1060–1 [62] (VK Rajah JA for the Court); *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594, 621 [100] (VK Rajah JC).

111 Ulrich Schroeter, 'Article 99 CISG: Entry into Force' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 1647, 1650 [9].

112 Ulrich G Schroeter, 'The Status of Hong Kong and Macao under the *United Nations Convention on Contracts for the International Sale of Goods*' (2004) 16(2) *Pace International Law Review* 307, 309.

113 UNCITRAL: United Nations Commission on International Trade Law, 'Topic 3: The *CISG* as a Backbone of Transnational Commercial Law', *YouTube* (Seminar Recording, 30 October 2020) 00:13:45–00:14:12 (Professor Ingeborg Schwenzer) <https://www.youtube.com/watch?v=GidMVLIO6Ig> ('Topic 3').

114 Unlike Mainland China (and Singapore), Hong Kong does not disapply *CISG* (n 4) art 1(1)(b): UN, 'Chapter X' (n 4) 3.

that effect (as in Mainland Chinese court practice).[115] For this reason, I did not confine my case law search to 1 December 2022 and beyond.

In order to identify all of Hong Kong's *CISG* cases, my primary search was conducted across the Westlaw US & International database.[116] Supplementary reference was again made to the Albert H Kritzer *CISG* Database, *CISG*-online, UNCITRAL's CLOUT database, and UNILEX. No cases dated on or after 1 December 2022 were returned. Six prior cases were identified,[117] all referencing *CISG* exclusions.[118]

While Hong Kong (like Singapore) is a global arbitration centre, the *CISG's* recent extension to that SAR is the most likely reason for its current lack of *CISG* case law; though Hong Kong's arbitration hub credentials may limit its generation of *CISG* case law into the future. In any event, since no existing Hong Kong cases interpret the *CISG*, no interpretative assistance is provided to Australia's courts.

C *New Zealand's CISG Case Law*

The position differs in New Zealand, which adopted the *CISG* at a similar time to Singapore (22 September 1994),[119] gave the treaty initial effect via the *Sale of Goods (United Nations Convention) Act 1994* (NZ),[120] and currently enacts it via the *Contract and Commercial Law Act 2017* (NZ) ss 202–6.[121]

In order to identify all New Zealand *CISG* cases, I employed a different search strategy as compared to that for Singapore and Hong Kong's cases. This is because existing scholarship identifies some *CISG* cases heard by New Zealand

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115 See, eg, Geng Wang, Shu Zhang and Peng Guo, 'Chapter 1: *Novelact (Resources) Limited v Xiamen Special Economic Zone International Trade Trust Company*' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1* (Springer, 2022) 1, 5. The *CISG* (n 4) would not be applicable on its own terms here because the parties would not be 'in different States': see *CISG* (n 4) art 1(1).

116 The same exact phrase search terms were used as for Singapore (see n 96), though substituting 'Sale of Goods (United Nations Convention) Ordinance' for 'Sale of Goods (United Nations Convention) Act'.

117 Putting aside two Philippines decisions returned by the Westlaw US & International database in error: *Benjamin Bautista v Shirley G Unangst* [2008] PHSC 664 (actually referring to the Criminal Investigation Service Group, rather than the *CISG* (n 4) treaty); *MCC Industrial Sales Corp v Ssangyong Corp* [2007] PHSC 1235, n 82 (Nachura J).

118 *Beyond the Network Ltd v Vectone Ltd* [2005] HKEC 2075, [6] (Reyes J); *PCCW Global Ltd v Interactive Communications Services Ltd* [2007] 1 HKLRD 309, 312 [8] (Tang V-P); *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* [2011] 4 HKLRD 262, 266 [5] (Saunders J); *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* [2011] HKEC 1401, [4] (Tang V-P); *Defond Electrical Industries Ltd v Partminer Worldwide Inc* [2011] HKEC 335, [3] (Chan DJ); *CEP Ltd v* 无锡市佳诚太阳能科技有限公司 [2014] HKEC 581, [3] n 1 (Recorder Jat Sew Tong SC).

119 UN, 'Chapter X' (n 4) 2.

120 Pursuant to the *Sale of Goods (United Nations Convention) Act Commencement Order 1995* (NZ) ord 2, the *Sale of Goods (United Nations Convention) Act 1994* (NZ) came into force on 1 October 1995.

121 The *Contract and Commercial Law Act 2017* (NZ) s 345(1)(j) repealed the *Sale of Goods (United Nations Convention) Act 1994* (NZ).

courts.[122] As a starting point, I independently sourced and read these pre-identified judgments. Acknowledging that some *CISG* cases may have been missed in this scholarship – a possibility that eventuated – I then conducted my own search across all dates via the New Zealand Legal Information Institute case law database.[123] Lexis Advance was used to determine whether cases thereby identified had been reported in the *New Zealand Law Reports*. Supplementary reference was again made to the Albert H Kritzer *CISG* Database, *CISG*-online, UNCITRAL's CLOUT database, and UNILEX. A total of 29 New Zealand *CISG* cases were returned.

Butler's scholarship suggests that New Zealand's pre-2010 *CISG* cases mostly refer to the treaty for comparative purposes, when applying non-harmonised New Zealand contract law.[124] My searches (identifying 17 relevant cases) confirm this, and also identify early references to the *CISG* for other contextual purposes.[125] New Zealand's case law comparing the *CISG* to its non-harmonised contract law may offer Australian courts limited interpretative insights. In New Zealand, more cases of this nature exist than in Singapore.

The first New Zealand case applying the *CISG* was the 2010 High Court decision in *Smallmon v Transport Sales Ltd*.[126] The *CISG* was also applied in the appeal from that decision.[127] Referring to New Zealand's *CISG* implementing legislation, the High Court recognised that the *CISG* displaced the *Sale of Goods Act*

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122 Petra Butler, 'New Zealand' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 539, 540–4 ('New Zealand 2014'); Petra Butler, 'New Zealand' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (Sellier European Law Publishers, 2008) 251, 254–8 ('New Zealand 2008'); Petra Butler, 'The Use of the *CISG* in Domestic Law' (2011) 15(1) *Vindobona Journal of International Commercial Law and Arbitration* 15, 17, 19–20, 24–6.

123 The same exact phase search terms were used as for Singapore (see n 96), retaining 'Sale of Goods (United Nations Convention) Act', and adding the exact phrase search term 'Contract and Commercial Law Act'. Noting that the *Contract and Commercial Law Act 2017* (NZ) addresses contract and commercial law in general (inclusive of the *CISG* (n 4)), my search using that term on 2 December 2024 returned 1236 cases, none of which were *CISG* (n 4) cases not already identified by other means.

124 Butler, 'New Zealand 2014' (n 122) 546.

125 *Crump v Wala* [1994] 2 NZLR 331, 338 (Hammond J); *Attorney-General v Dreux Holdings Ltd* (1997) 7 TCLR 617, 627–8 (Blanchard J), 642 (Thomas J) ('*Dreux Holdings*'); *BP Oil NZ Ltd v Rhumvale Resources Ltd* (1997) 8 TCLR 116, 123–4 (Keith J); *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33, 37 (Henry J); *Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand Customs Service* [2001] NZCA 86, [19] (Keith J); *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523, 547–8 [88]–[90] (Thomas J) ('*Yoshimoto*'); *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506, 515 [39] (Thomas J); *KA (Newmarket) Ltd v Hart* (High Court of New Zealand, Heath J, 10 May 2002) [68]; *Thompson v Cameron* (High Court of New Zealand, Chambers J, 27 March 2002) [20]; *International Housewares (NZ) Ltd v SEB SA* (High Court of New Zealand, Master Lang, 31 March 2003) [44]–[45], [59]; *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277, 295 [55] (Tipping J) (not referencing the *CISG* (n 4) by name, but citing *Dreux Holdings* (n 125) and referring to 'general international trade practice'); *MH Publications Ltd v Komori (UK) Ltd* [2008] NZHC 2570, [36], [200] (DI Gendall AsJ); *Dysart Timbers Ltd v Nielsen* [2009] 3 NZLR 160, 174 [55] n 32 (McGrath J); *Fairfax v Ireton* [2009] 3 NZLR 289, 331 [180] (Baragwanath J); *Alcatel-Lucent NZ Ltd v Juniper Networks Australia Pty Ltd* [2009] NZHC 2258, [47] (Clifford J); *Nils Sperre AS v Vela Fishing Ltd* [2009] NZHC 1651, [2], [7], [9] (Duffy J); *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, 449, 452 (McIntosh) (during argument) ('*Vector Gas*').

126 *Smallmon v Transport Sales Ltd* [2010] NZHC 1367 ('*Smallmon Trial*'). See also Butler, 'New Zealand 2014' (n 122) 544.

127 *Smallmon v Transport Sales Ltd* [2012] 2 NZLR 109 ('*Smallmon Appeal*').

1908 (NZ).[128] With reference to *CISG* art 7, the High Court rejected both parties' attempts to rely on 'domestic sale of goods law'.[129] The High Court recognised art 7(1)'s autonomous interpretation rule;[130] and evidenced that rule's application by referencing international case law and scholarship regarding *CISG* art 35(2).[131] On appeal, the *CISG's* autonomous and internationalist interpretation requirements were again identified[132] and given effect via reference to international scholarship[133] and case law.[134] Furthermore, both courts identified the Pace Law School's *CISG* database (now the Pace Law Albert H Kritzer *CISG* Database) as a source of international *CISG* case law.[135]

There are several reasons why these decisions are instructive from an Australian perspective. First, Australian courts have generally failed to interpret the *CISG* in accordance with the internationalist requirements of *CISG* art 7(1).[136] Second, Australian courts have sometimes failed to appreciate that the *CISG's* application displaces non-harmonised sales law to the subject-matter extent of *CISG* art 4.[137] And third, *CISG* art 35(2) has often been at issue in Australian *CISG* litigation.[138] Referencing both *Smallmon* judgments would assist Australian courts in all three respects.

Post-*Smallmon*, 10 additional New Zealand judgments reference the *CISG*. Some reference *CISG* exclusions,[139] some continue to compare the *CISG* with non-harmonised New Zealand contract law,[140] and one identifies that the *CISG* was not argued and not considered regarding a property law question.[141] One applies the

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128 *Smallmon Trial* (n 126) [62] (French J). The *Sale of Goods Act 1908* (NZ) was repealed by the *Contract and Commercial Law Act 2017* (NZ) s 345(1)(i).

129 *Smallmon Trial* (n 126) [85]–[86] (French J).

130 Ibid [88] (French J).

131 Ibid [82]–[84] (French J).

132 *Smallmon Appeal* (n 127) 119–20 [34], 121 [39], [41] (Stevens J for the Court).

133 Ibid 121 [38] n 26, [40], 122–3 [45] n 38, 125 [58] (Stevens J for the Court).

134 Ibid 121–23 [42]–[48] (Stevens J for the Court).

135 *Smallmon Trial* (n 126) [82] n 1 (French J); ibid 117–18 [26] nn 17–19, 121–3 [42]–[48] nn 29–39 (Stevens J for the Court).

136 See, eg, *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] FCA 1028, [123] (Ryan J); *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* (2011) 192 FCR 445, 460 [89] (Keane CJ, Lander and Besanko JJ); *Fryer Holdings (in liq) v Liaoning MEC Group Co Ltd* [2012] NSWSC 18, [16], [19] (McDougall J) ('*Fryer Holdings*').

137 *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108, [235], [245] (Hansen J) ('*Playcorp*'); *A-G (Botswana) v Aussie Diamond Products Pty Ltd (No 3)* [2010] WASC 141, [210] (Murphy J) ('*Aussie Diamond*').

138 Bruno Zeller, 'The *CISG* and the Common Law: The Australian Experience' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 57, 76. See, eg, *Fryer Holdings* (n 136) [16] (McDougall J).

139 *Commerce Commission v Viagogo AG* (2024) 16 TCLR 774, 812 [206] (Peters J); *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] 2 NZLR 475, 477 [2], 478–9 [8] (O'Gorman J); *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, app 1 [35] (JC Holden J); *Transdiesel Ltd v MTU America Ltd* [2016] NZHC 280, [19] (Osborne AsJ).

140 *Edwards v Laybuy Holdings Ltd* [2023] NZEmpC 188, [46] n 16 (JC Holden J); *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] 3 NZLR 486, 506 [44] (Baragwanath J).

141 *Hayat Group Ltd (in liq) v New Zealand Customs* [2011] NZHC 922, [18] (Heath J). But see *CISG* (n 4) art 4(b).

CISG,[142] one applies it indirectly in conjunction with jurisdictional rules,[143] and another jurisdictional judgment mentions the *CISG* as a pleaded cause of action.[144]

The *CISG's* New Zealand operation has been likened to a 'sleeping beauty slumber'.[145] However, although New Zealand has fewer *CISG* cases (29) than Australia (61),[146] its *CISG* case law still stands to benefit Australian courts. One might wonder why this is so. Although New Zealand similarly does not benefit from Singaporean and Hong Kong *CISG* interpretative influence, it must be remembered (as explained at Part IV's outset) that no causative argument is made in this respect. The wording of New Zealand's *CISG* legislation, confirming that the treaty operates as a 'code',[147] is a plausible explanation. That wording clearly identifies that New Zealand's non-harmonised law is displaced where the *CISG* applies,[148] and is a recommended model for Australian legislative reform.[149] Australia's *CISG* Acts, on the other hand, reference the concept of inconsistency,[150] which has led some courts to decline the *CISG's* application on the basis that the *CISG* is (supposedly) consistent with ordinary Australian law.[151] Yet another possible explanation may be the New Zealand courts' greater general receptiveness to international case law and scholarship:[152] should this be the case, it would evidence a mode of reasoning well

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142 *National Plant and Equipment Pty Ltd v P Mundy Heavy Equipment Ltd* [2020] NZHC 1201, [29], [33]–[42] (RM Bell AsJ).

143 *Nelson Honey & Marketing (NZ) Ltd v William Jacks & Co (Singapore) Pvt Ltd* [2015] NZHC 1215, [51]–[64] (Matthews AsJ).

144 *Hill Forest Services Ltd v Cirrus Design Corp* [2020] NZHC 2551, [16] (Downs J).

145 Butler, 'New Zealand 2008' (n 122) 258.

146 The most recent published census puts Australia's *CISG* case load at 57 decisions: Benjamin Hayward, '"Text, Context, and Purpose": Australian Lawmakers' Adoption of the *CISG*, and the Use of Legislative Histories as Aids in Statutory Interpretation' (2024) 47(2) *Melbourne University Law Review* 303, 385 ('Text, Context, and Purpose'). As at 2 December 2024, three further *CISG*-related decisions have been identified: *Aqua Star Pty Ltd v CP Aquaculture (India) Pvt Ltd* [2024] VSCA 67 (Kennedy and Walker JJA); *Re Aqua Star Pty Ltd* [2024] VSC 377 (Gardiner AsJ); *Walsh v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goldburn* (2024) 386 FLR 264, 287 [160] (Curtin AJ). The first two of these do not address the *CISG* (n 4) but are related to *CP Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd* [2023] VCC 2134 (Macnamara J) ('*CP Aquaculture*'). I have also identified one judgment missed in that published census: *Limit (No 3) Ltd v ACE Insurance Ltd* [2009] NSWSC 514, [147] (Rein J).

147 *Smallmon Trial* (n 126) [62] (French J).

148 *Contract and Commercial Law Act 2017* (NZ) s 205; *Sale of Goods (United Nations Convention) Act 1994* (NZ) s 5, as repealed by *Contract and Commercial Law Act 2017* (NZ) s 345(1)(j).

149 Anastasi, Hayward and Brown (n 22) 51–2.

150 *Sale of Goods (Vienna Convention) Act 1987* (ACT) s 6; *Sale of Goods (Vienna Convention) Act 1987* (Norfolk Island) s 6; *Sale of Goods (Vienna Convention) Act 1986* (NSW) s 6; *Sale of Goods (Vienna Convention) Act 1987* (NT) s 6; *Sale of Goods (Vienna Convention) Act 1986* (Qld) s 6; *Sale of Goods (Vienna Convention) Act 1986* (SA) s 5; *Sale of Goods (Vienna Convention) Act 1987* (Tas) s 6; *Goods Act 1958* (Vic) s 87; *Sale of Goods (Vienna Convention) Act 1986* (WA) s 6; *Competition and Consumer Act 2010* (Cth) sch 2 s 68.

151 *Playcorp* (n 137) [235], [245] (Hansen J); *Aussie Diamond* (n 137) [210] (Murphy J). See also Hayward, 'Text, Context, and Purpose' (n 146) 324–7.

152 I am unable to statistically confirm this observation, though it appears from my review of cases applying New Zealand's non-harmonised contract law and referring to the *CISG* (n 4) for comparative purposes: see, eg, *Yoshimoto* (n 125) 538–9 [59]–[62], 539–40 [64]–[65], 540–41 [67]–[68], 542–3 [71]–[74], 545 [80], 547 [88], 548 [90] (Thomas J); *Vector Gas* (n 125) 453 [5], 455–6 [9], [11], [13]–[14] (Blanchard J), 457 [19] nn 15 – 16, 458 [22] n 20–2, 459 [23] n 24, 460 [29] nn 29–30, 461 [33] n 35, 462 [34]–[37] (Tipping J), 468–71 [57]–[69], 472–4 [72]–[78] (McGrath J), 478 [103], 481–5 [120]–[130], 485 [132], [134], 487 [142] (Wilson J).

suited to discharging the requirements of *CISG* art 7(1).[153] Whatever the reason, New Zealand *CISG* interpretative influence does exist from which Australian courts might benefit.

V Two Recommendations: Supporting the *CISG's* Internationalist Interpretation in Australia

In Parts III–IV I identified an interpretative stratification. While the *New York Convention*, *Model Law*, and *CISG* are all subject to internationalist interpretation rules, the practice of Australian courts in 'especially'[154] referring to Singaporean, Hong Kong, and New Zealand ICA case law cannot translate to the *CISG*. Only New Zealand's *CISG* case law provides meaningful interpretative guidance; Singapore's assistance is limited; and Hong Kong interpretative assistance does not exist.

CISG art 7(1) imposes a public international law obligation on Australia's courts to interpret the *CISG* in an autonomous and internationalist manner.[155] This obligation has seldom been discharged.[156] Noting that Australia's courts cannot replicate their ICA interpretative strategy in the *CISG* context, in this Part I make two recommendations for judges hearing *CISG*-related cases that are intended to help Australia's courts better comply with *CISG* art 7(1). Both are based on strategies used by foreign courts in ICA matters and are capable of application in the Australian *CISG* context.

A *Setting Expectations: Judicial Guidance*

My first recommendation is that Australian judges consider giving parties' legal representatives guidance around the *CISG's* application, and their expectations around internationalist *CISG* argument. On the former, judges could: insist on parties carefully considering whether the *CISG* applies; explain to parties the principles used to determine that application; and identify the interpretative implications of the *CISG's* application. This would, for example, avoid the problem recently seen in *CP Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd*.[157] There, in the context of an Australian–Indian contract, the parties agreed that Victorian law applied; yet the *CISG* (part of Victorian law) was not engaged. On the plaintiff's view, this was because India was not a *CISG* jurisdiction, and on the defendant's view, neither party had alleged or proved the *CISG's* application.[158] Had the parties been encouraged to consider the matter more carefully, it may have emerged that the *CISG* still applied via art 1(1)(b) and did not require proof as foreign law.[159]

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153 Hachem, 'Article 7' (n 27) 139–41 [10], [12]–[13].
154 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).
155 Sorieul, Hatcher and Emery (n 26) 500.
156 Anastasi, Hayward and Brown (n 22) 37–44.
157 *CP Aquaculture* (n 146).
158 Ibid [182]–[183] (Macnamara J).
159 *Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216, 222 (von Doussa J) ('*Roder*').

On the latter point as to internationalist *CISG* argument, judges might usefully alert practitioners to the 'several efforts [that] have been made to make interpretative matters easier for courts'.[160] These include:

- online case law databases referenced in Part IV (the Albert H Kritzer *CISG* Database, *CISG*-online, UNCITRAL's CLOUT database, and UNILEX);
- the world's two pre-eminent article-by-article *CISG* commentaries,[161] both cross-referencing cases to the Albert H Kritzer *CISG* Database and *CISG*-online;
- UNCITRAL's *CISG* case law digest;[162]
- the *CISG* Advisory Council's opinions,[163] cited by foreign courts as authoritative interpretative tools;[164] and
- commercial texts collating international *CISG* judgments and arbitral awards.

Consulting these materials would disclose, for example, the existence of voluminous Chinese *CISG* case law rendered through the China International and Economic Trade Arbitration Commission[165] and China's State courts;[166] several Japanese *CISG* cases,[167] noting that '[p]arties do not seem to commonly exclude the

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160 Hachem, 'Article 7' (n 27) 140 [11].

161 Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022); Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods: A Commentary* (CH Beck, Hart & Nomos, 2nd ed, 2018). As at 2 December 2024, at least one edition of at least one of these texts is held in the Federal Court of Australia Library's branches in the Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria, and Western Australia. See 'Federal Court Library Catalogue', *Federal Court of Australia* (Web Page) <https://www.fedcourt.gov.au/digital-law-library/library/library-catalogue>.

162 United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations, 3rd ed, 2016). It has been suggested that the equivalent *Model Law* (n 6) digest should be legislatively identified as a useful *Model Law* (n 6) interpretative resource via amendments to the *International Arbitration Act 1974* (Cth) s 17(1): Luke Nottage, 'International Commercial Arbitration in Australia: What's New and What's Next?' (2013) 30(5) *Journal of International Arbitration* 465, 492. For that equivalent *Model Law* (n 6) digest, see United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012).

163 'Opinions', *CISG Advisory Council* (Web Page, 2024) <https://cisgac.com/opinions/>.

164 'Case Law New', *CISG Advisory Council* (Web Page, 2024) <https://cisgac.com/case-law/>.

165 As at 2 December 2024, 403 *CISG* (n 4) awards rendered by China International and Economic Trade Arbitration Commission tribunals are recorded on the Albert H Kritzer *CISG* Database, with 293 recorded on *CISG*-online.

166 Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1* (Springer, 2022) (48 cases); Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 2* (Springer, 2023) (40 cases); Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 3* (Springer, 2024) (44 cases); Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 4* (Springer, 2025) (38 cases).

167 As at 2 December 2024, seven Japanese *CISG* (n 4) decisions are recorded on each of the Albert H Kritzer *CISG* Database and *CISG*-online.

application of *CISG* in Japan';[168] and numerous Canadian[169] and US cases.[170] Despite some criticism of its early *CISG* decisions,[171] US case law (even in 2004) was described as 'now by far the most developed and thoroughly examined amongst the common law member states'.[172]

An Australian judge might model such guidance on the approach taken by Kaplan J in Hong Kong, concerning ICA law. In *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd*, Kaplan J's judgment included the following note addressing the *Model Law*:

> [It may be helpful for practitioners to be aware of two books on the *Model Law*. The fullest guide to the *Model Law* is 'A Guide to the UNCITRAL *Model Law on International Commercial Arbitration*' written by Howard Holtzmann and Joseph Neuhaus published by Kluwer in 1989. This is a substantial treatise which takes each article of the *Model Law*, comments on it and sets out the various *travaux preparatoires* [sic]. For a shorter and more succinct commentary there is Aron Broches' 'Commentary on the *UNCITRAL Model Law*' also published by Kluwer in 1990.][173]

Shortly after, Kaplan J addressed the *New York Convention* in a similar fashion. In *Shenzhen Nan Da Industrial and Trade United Co Ltd v FM International Ltd*, his Honour stated:

> Before parting with this case, I would like to make the following observations which are not intended as criticism of counsel or their solicitors. There are almost 90 countries who have acceded to the *New York Convention*. Courts in *Convention* countries are being asked to consider the *Convention* on a regular basis and there are many decisions on the *Convention*. It is clearly desirable, so far as is practicable, for the interpretation of the *Convention* to be uniform. Cases under the *Convention* are increasing dramatically in Hong Kong. … There is only one text book devoted solely to the *New York Convention* and that is by Professor Albert Jan van den Berg published in 1981 by Kluwer. That must be the starting point for the consideration of any problem arising under the *Convention*. But this excellent book is now a little out of date and thus it is essential to keep abreast of new developments by reference to *The Yearbook on Commercial Arbitration* published by the International Council for Commercial Arbitration (ICCA). This too is published by Kluwer and is now edited by Professor Albert Jan van den Berg. This work is in the Supreme Court Library and is at the Hong Kong International Arbitration Centre and contains references to all known decisions on the *Convention*. I was not

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168 Asian Business Law Institute, 'Exclusive Jurisdiction and *CISG* for Contracts under Japanese Law' (Report, March 2024) 2 <https://www.linkedin.com/posts/asian-business-law-institute_internationality-of-contracts-japan-2-activity-7174230697841229825-OSnx>. As at 2 December 2024, I have confirmed with the Asian Business Law Institute that this report has only been published on LinkedIn.

169 As at 2 December 2024, 49 Canadian *CISG* (n 4) cases are recorded on the Albert H Kritzer *CISG* Database, with 39 recorded on *CISG*-online.

170 As at 2 December 2024, 482 United States *CISG* (n 4) cases are recorded on the Albert H Kritzer *CISG* Database, with 412 recorded on *CISG*-online.

171 See, eg, V Susanne Cook, 'The *UN Convention on Contracts for the International Sale of Goods*: A Mandate to Abandon Legal Ethnocentricity' (1997) 16(2) *Journal of Law and Commerce* 257, 259–60, regarding *Delchi Carrier SpA v Rotorex Corporation*, 71 F 3d 1024 (2nd Cir, 1995).

172 Henning Lutz, 'The *CISG* and Common Law Courts: Is There Really a Problem?' (2004) 35(3) *Victoria University of Wellington Law Review* 711, 712.

173 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40, 49.

> referred to either of these works and I would suggest that anyone researching or arguing a *New York Convention* point must start with these two works.[174]

Of course, it is conventional wisdom for Australian courts to say 'no more than is necessary to decide' the disputes before them.[175] One might wonder, then, whether giving this kind of guidance is an appropriate part of the Australian judicial function, even if a suitable case arises. Noting that Australia's *CISG* case load grows incrementally but consistently,[176] it is inevitable that a suitable case will eventually arise, particularly if this recommendation's first element is given effect. When that happens, it would indeed be appropriate for an Australian court to act as recommended. Australia's first ever case applying the *CISG* included critique around the parties' *CISG* argument that approaches this type of guidance.[177] Australian courts otherwise routinely identify deficiencies in the arguments put before them, in all kinds of cases.[178] That being the case, it is only an incremental step to implement my recommendation. The propriety of doing so is further confirmed by understanding the guidance recommended here as simple obiter dicta: an unquestionably accepted feature of Australian law.[179]

B *Seeking Input: Amicus Curiae*

My second recommendation for judges hearing *CISG*-related cases in Australia is to consider using the amicus curiae procedure to solicit international (or internationally minded) third party submissions directed at the *CISG's* interpretation.[180] Such submissions might be sought from a foreign law firm, the UNCITRAL National Coordinating Committee for Australia, or perhaps even an international or Australian academic expert, to identify just a few possibilities.

This recommendation's inspiration comes from the Canadian ICA decision of *Hypertec Real Estate Inc v Equinix Canada Ltd*[181] ('*Hypertec*'). There, a foreign

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174 *Shenzhen Nan Da Industrial and Trade United Co Ltd v FM International Ltd* [1992] 1 HKC 328, 336–7.

175 *Primavera v Bakos* [2018] NSWSC 142, [1] (Black J); *Chapman v Quinlan* (Supreme Court of South Australia, Cox J, 17 June 1980) 1.

176 Hayward, 'Text, Context, and Purpose' (n 146) 377–85.

177 *Roder* (n 159) 220, 233 (von Doussa J).

178 See, eg, *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* (Supreme Court of Western Australia, Smith J, 12 June 1987) 101 (claim against constructive trustee); *R v Nikodjevic* [2004] VSCA 222, [21] (Ormiston JA, Callaway JA agreeing at [53], Vincent JA agreeing at [54]–[55]) (criminal sentencing); *Conway v Jerram* (2010) 78 NSWLR 689, 703 [68] (Barr AJ) (coronial inquest); *R v Manolas* [2019] NTSC 60, [10], [13] (Riley AJ) (criminal stay); *BET20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1539, [15] (Abraham J) (visa cancellation).

179 Evidenced by, for example, obiter dicta's reference in Australian textbooks designed for use in first year introductory Bachelor of Laws units of study: see, eg, Robin Creyke, David Harmer, Patrick O'Mara, Belinda Smith and Tristan S Taylor, *Laying Down the Law* (LexisNexis, 11th ed, 2021) 194 [7.16].

180 For the purposes of clarity, this recommendation addresses the appointment of amicus curiae and not intervention, the latter being a different procedure whereby interveners become party to the proceedings: George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 368–9.

181 *Hypertec Real Estate Inc v Equinix Canada Ltd* [2023] QCCS 3061. This was an ICA decision in the sense that Canadian inter-provincial arbitrations 'are [legally] assimilated to international arbitrations': at [25] (Babak Barin JCS).

law firm was appointed (pro bono) as an amicus curiae, on the court's own motion and over one party's objection, to provide ten pages of written submissions addressing ICA law.[182] This appointment was described as 'beneficial not only for the parties, but also the development and growth of the law of arbitration in this province'.[183] Describing an amicus curiae as not just a friend of the court but a friend of the court 'in need',[184] Babak Barin JCS made the following comments:

> Turning back to the issue of expounding law impartially, it is useful not to underestimate the importance, in certain occasions, of obtaining neutral and comprehensive assistance, particularly where the legal issues are delicate, complex and of general application and where more significantly, the superior court does *not* have the much-needed basic resources — for example, comprehensive national and international research capabilities — to carry out its duties.[185]

Appointing an amicus curiae in Australian *CISG* proceedings could bring several benefits. Notwithstanding the ready availability of English language *CISG* case law, an amicus may help overcome language barriers still affecting the accessibility of some interpretative materials.[186] The internationalist expertise of an amicus may help narrow a dispute's scope.[187] And, most importantly, an amicus may provide a much-needed internationalist perspective on the *CISG's* interpretation where party submissions are not so cast.[188] The appointment of an amicus in accordance with my recommendation would therefore not be improperly focused on the law's abstract development,[189] but would instead be consistent with its 'major purpose' of ensuring 'that a precedent is sound'.[190]

Given *Hypertec's* Canadian origins, it is again necessary to show that my recommendation can be implemented in Australia. From the outset, it must be admitted that amicus appointments are 'a relatively rare event in Australian courts'.[191] The High Court of Australia in particular has been 'less than enthusiastic about allowing amicus interventions'.[192] However, even it recently allowed amicus submissions by the Australian Centre for International Commercial Arbitration in a case relating to Australia's domestic commercial arbitration laws,[193] and not for the

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182 Ibid [18]–[19], [33].
183 Ibid [19].
184 Ibid [5].
185 Ibid [27] (emphasis in original).
186 For example, not all of the foreign language cases recorded on the Albert H Kritzer *CISG* Database and on *CISG*-online are accompanied by English translations, and CLOUT abstracts (themselves only summaries) may be accompanied by original foreign language judgments but not English translations of those judgments.
187 Cf Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20(1) *Adelaide Law Review* 159, 167.
188 See, eg, *Roder* (n 159) 220, 233 (von Doussa J); *Playcorp* (n 137) [235], [245] (Hansen J); *Aussie Diamond* (n 137) [210] (Murphy J).
189 Transcript of Proceedings, *Garcia v National Australia Bank Ltd* [1998] HCATrans 50 (McHugh J), cited in Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22(3) *Bond Law Review* 126, 128.
190 Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14(3) *Melbourne University Law Review* 522, 533.
191 Kenny (n 187) 160.
192 Ernst Willheim, 'An Amicus Experience in the High Court: *Wurridjal v Commonwealth*' (2009) 20(2) *Public Law Review* 104, 105.
193 *Tesseract* (n 21) 885 [7] (Gageler CJ).

first time.[194] Other Australian private law cases involving amicus appointments are readily identified.[195] Thus while amicus curiae may sometimes be appointed where submissions are offered 'in the public interest',[196] as in *Commonwealth v Tasmania* (involving the Tasmanian Wilderness Society Inc),[197] the public interest is not a limiting factor. Instead, 'there is no prescription of the circumstances in which it may or may not be proper for a court to hear an amicus'.[198]

Australian courts have provided some guidance as to when amicus appointments will be appropriate. According to the Federal Court, an amicus can be appointed where it would be 'assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked'.[199] The High Court has similarly explained that '[t]he footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted'.[200] Noting that Australian courts have historically deferred to party submissions concerning the *CISG*,[201] this test would be satisfied where such submissions fail to reflect the internationalist interpretation requirements of *CISG* art 7(1).

One final aspect of *Hypertec* that might (at first glance) appear problematic in Australia is that court's appointment of an amicus curiae on its own motion. It has been suggested, for example, that in Australia an amicus 'must apply to the court for leave to be … heard'.[202] Nevertheless, this is not a strict requirement. It has been reported, admittedly without case citation, that some Australian courts have themselves 'instigated the involvement as amicus of counsel who are not otherwise involved in the case'.[203] It is therefore open to an Australian court to itself seek out amicus submissions to assist in discharging its *CISG* art 7(1) obligations.

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194 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 243, 254–6 (Jackson QC) (during argument).

195 See, eg, *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 482 [60] (Gummow, Hayne and Heydon JJ) (copyright); *Stevens v Kabushiki Sony Computer Entertainment* (2005) 224 CLR 193, 205 [26] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (copyright); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465, 471 [19]–[21] (Wilcox J) (copyright); *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* [1988] WAR 132, 183 (Smith J) (trusts). See also Kenny (n 187) 162–5 (referencing a medical negligence claim not proceeding to judgment).

196 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 535 (Davies, Wilcox and Gummow JJ) ('*United States Tobacco*').

197 *Commonwealth v Tasmania* (1983) 158 CLR 1, 50–1 (Gibbs CJ) (during argument).

198 *United States Tobacco* (n 196) 535 (Davies, Wilcox and Gummow JJ).

199 *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox J).

200 *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan CJ). See also *Wurridjal v Commonwealth* [2008] HCATrans 348 (French CJ); *Kruger v Commonwealth* [1996] HCATrans 68, quoted in Kenny (n 187) 162.

201 See, eg, *Playcorp* (n 137) [235] (Hansen J); *Aussie Diamond* (n 137) [210] (Murphy J).

202 Kenny (n 187) 159.

203 Mary Wyburn, 'Choosing Your Friends Wisely: The Amicus Curiae in Key Copyright Cases and its Potential to Affect Copyright Policy' (2006) 24(1–2) *Copyright Reporter* 124, 126. See also Re (n 190) 524.

C *Securing Action: Motivating Adoption of My Recommendations*

While my two recommendations are legally robust, their adoption might require an Australian judge sufficiently motivated to act on them. It may be observed, in this regard, that Kaplan J was a well-known ICA expert prior to his Honour's judicial appointment; and that Babak Barin JCS (deciding *Hypertec*) had a pre-appointment professional background in arbitration.

This being so, the implementation of my recommendations would be supported by judicial education initiatives targeting the *CISG*. Organisations such as the Australian Judicial Officers Association[204] and the National Judicial College of Australia[205] offer potential educative fora. If Australian judges are better equipped at understanding the requirements of *CISG* art 7(1), they should be in a better position to identify when *CISG* proceedings are floating adrift, and (in turn) understand how my recommendations can restore their mooring. Education initiatives targeting the profession would similarly assist in the longer run, given that (with limited exceptions) senior practitioners form the population from which judges are appointed.

VI Conclusion

Improving Australia's *CISG* interpretative track record stands to benefit international trade. As I noted in Part I, UNCITRAL's work is premised on the 'conviction that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade'.[206] Despite being one nation among the *CISG's* 97 Contracting States,[207] 'Australia (and thus the world) stands to benefit from a more proactive engagement with the *CISG*'.[208] It is important to note, in addition, that practitioners risk professional liability[209] and disciplinary proceedings[210] if they fail to competently engage with the *CISG*.

My Part V recommendations are directed at helping Australian judges to discharge their art 7(1) obligation to interpret the *CISG* in an internationalist spirit. Since internationalist argument is more likely to occur where it is judicially insisted on,[211] those recommendations also mitigate the practitioner risks identified above. The need for these recommendations reflects the interpretative stratification identified across Parts III–IV. That stratification's identification must now guide initiatives to improve the *CISG's* future Australian interpretation.

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204 'Welcome to the Australian Judicial Officers Association', *Australian Judicial Officers Association* (Web Page, 2024) <https://www.ajoa.asn.au/>.

205 For an overview of the College's programs: see 'Program Planning Committees', *National Judicial College of Australia* (Web Page, 2023) <https://www.njca.com.au/about-us/committees/>.

206 *Establishment of the United Nations Commission on International Trade Law* (n 3) 99. See also *CISG* (n 4) Preamble para 3.

207 UN, 'Chapter X' (n 4) 1.

208 Hayward, '*CISG* as the Applicable Law' (n 24) 187 [10.49].

209 Spagnolo (n 17) 163–4; UNCITRAL, 'Topic 3' (n 113) 00:32:59–00:33:53 (Professor Ingeborg Schwenzer).

210 *Australian Solicitors' Conduct Rules 2021 (as published November 2023)* r 4.1.3; *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 4(c).

211 Anastasi, Hayward and Brown (n 22) 52.

Despite Australia's 'wanting' state of existing *CISG* case law,[212] the interpretative challenge faced by future Australian courts should not be overstated. Even German courts — having excellent reputations concerning the *CISG*[213] — tend to refer mainly to German (and German language) *CISG* interpretative sources.[214] If Australian courts applying the *CISG* can begin by referring even to Australian sources of *CISG* interpretative guidance (such as Australian *CISG* scholarship), this would be a welcome first step. From there, adopting my recommendations in this article will help Australian courts elevate the quality of their *CISG* interpretations to ICA law's existing excellent status. This is ultimately in the service of the *CISG's* trade facilitation objectives and its merchant end-users.

[212] Hayward, '*CISG* as the Applicable Law' (n 24) 180 [10.34].

[213] FGV, 'The *United Nations Convention on Contracts for the International Sale of Goods* (Parte 3)', *YouTube* (Conference Recording, 21 December 2012) 00:11:52–00:12:13 (Professor Franco Ferrari) <https://www.youtube.com/watch?v=Tt8ZY2zFhbM>.

[214] UNCITRAL, 'Topic 3' (n 113) 00:34:40–00:00:35:30 (Professor Ingeborg Schwenzer). For two prominent examples: *New Zealand Mussels Case*, Bundesgerichtshof [German Supreme Court], VIII ZR 159/94, 8 March 1995 [tr Birgit Kurtz, *CISG*-online No 144 <https://cisg-online.org/search-for-cases?caseId=6122>]; *Machinery Case*, Bundesgerichtshof [German Supreme Court], VIII ZR 60/01, 31 October 2001 [tr Birgit Kurtz, *CISG*-online No 617 <https://cisg-online.org/search-for-cases?caseId=6575>].