

Promoting uniformity: A comparative review of J Honnold and H Flechtner *Uniform Law for International Sales under the 1980 United Nations Convention*¹ and P Schlechtriem and I Schwenzer *Commentary on the UN Convention on the International Sale of Goods*²

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ABSTRACT

This review article considers the extent to which two commentaries on the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), contribute to the international, uniform interpretation of the CISG. In doing so it will outline the manner in which both commentaries have approached their analysis of a range of provisions within the CISG.

One of the key strengths of the text by Schlechtriem and Schwenzer is its comprehensive referencing of relevant case law to illustrate the manner in which the provisions of the CISG have been interpreted. Honnold and Flechtner focuses on discrete issues arising under the provisions of the CISG and so is not comprehensive, and does not provide extensive references to case law. It nevertheless provides engaging discussion around particular aspects of interpretation of the CISG, and as a piece of scholarly writing on the CISG is itself a valuable interpretive tool to be used by courts and tribunals.

Keywords: CISG, uniformity and internationality, Articles 7, 16, 25, 35, 38 and 39.

¹ J Honnold and H Flechtner, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Alphen aan den Rijn, Wolters Kluwer, 4th Edition, 2009).

² P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (New York, Oxford University Press, 3rd Edition, 2010).

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A. INTRODUCTION

Academic commentaries on the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) arguably perform a more important role than most legal academic texts. That role is essentially to assist in an international, uniform interpretation of the CISG. This becomes important because the CISG is an international convention that does not benefit from consistent interpretation within only one domestic legal system. The commentaries which are the subject of this review – Honnold and Flechtner, and Schlechtriem and Schwenzer – are very different from one another in terms of style and the extent to which they seek to comprehensively address legal interpretations of the CISG. They do, nevertheless, both make valuable contributions to the discourse surrounding interpretation of the provisions of the CISG, and to the causes of internationality and uniformity.

Article 7 of the CISG provides that “in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application...” Academic commentaries, through surveying the landscape of court and tribunal decisions made under the CISG as well as other academic commentaries can provide analysis and direction which, it has been argued, serve as an “antidote to the danger of divergent interpretations of the CISG.”³ Whereas case law can amount to binding precedent or at least be highly persuasive within a given legal system, the international context within which the CISG operates makes a uniform, international interpretation through case law less likely. In this regard Felemegas has noted that “the disappointing element that emerges from a survey of the existing CISG case law is that

³ J Felemegas, *The United Nations Convention on Contract for the International Sale of Goods: Article 7 and Uniform Interpretation*, <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html>, accessed 8 June 2010, 70.

very rarely do decisions take into account the solutions adopted on the same point by courts in other countries.”⁴

Both Honnold and Flechtner, and Schlechtriem and Schwenzer, refer to the important role that their commentaries play in promoting the international and uniform interpretation of the CISG. Schlechtriem and Schwenzer write in the introduction to their commentary that:

“Preserving a uniform understanding and, thereby, a uniform interpretation requires, first of all, information. To that extent, a commentary such as this work has considerable importance, because the domestic jurist often has no or only restricted access to the solutions suggested in foreign literature and practice.”⁵

Similarly, in the preface to the third edition of Honnold, Honnold referred to the language of Article 7 and asserted that that “language calls for tribunals to consider interpretations in other States. One goal of this book is to help respond to this mandate.”⁶

The importance placed on case law analysis by the authors of the two commentaries is somewhat different. Schwenzer, writing the preface to the third edition of Schlechtriem and Schwenzer, confirms the intention of that commentary to include case law analysis in its discussions as an important way to achieve uniform interpretation.

⁴ Felemegas, *supra* n 3, 69.

⁵ Schlechtriem and Schwenzer, *supra* n2, 7.

⁶ Honnold and Flechtner, *supra* n 1, xi.

“It is the intention and purpose of commentaries such as this to analyse and depict the distinct developments of the law in order to ensure that the benefits of uniform law and legal security are not disrupted by diverging interpretations in the various Contracting States. Therefore, particular effort has been given to include and discuss literature and, in particular, case law from as many jurisdictions as possible.”⁷

The third edition of Schlechtriem and Schwenger in fact contains more extensive referencing to case law than Schlechtriem’s second edition,⁸ incorporating the significant body of case law that has arisen since the second edition.

The latest edition of Honnold and Flechtner, for which Flechtner has served as editor for the first time, does not share this approach. Flechtner has brought his own ‘flavour’ and approaches to the text throughout, which are distinguished from Honnold’s original work by bold type. Flechtner writes in the preface to the fourth edition that:

“One particular change made in the fourth edition is the elimination of the summaries of cases that Professor Honnold included at the end of substantive discussion in the third edition. Such summaries- which, given the volume of case law under the Convention that is currently accessible, would now be impractical- have been rendered obsolete by wonderful new resources...”⁹

While the summaries of cases included in Honnold’s third edition were not extensive and were not provided in every chapter, many chapters did include a brief list of cases under

⁷ Schlechtriem and Schwenger, *supra* n 2, v.

⁸ P Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (New York, Oxford University Press, 2nd edition, 1998).

⁹ Honnold and Flechtner, *supra* n 1, ix.

relevant sub-headings and a brief outline of the findings of those cases, which assisted the reader in gaining an understanding as to how the relevant article was being applied in practice.¹⁰

The inclusion of the decisions of courts and tribunals and the principles which can be drawn from those decisions was not regarded as impractical by Schwenger as editor of the 3rd edition of Schlechtriem and Schwenger. Admittedly, this does not extend to detailed summaries of most cases however it does include an explanation of interpretations of the CISG asserted in cases. This enables the reader to understand approaches already taken by courts and tribunals in interpreting the CISG. The sparse discussion of case law in Honnold and Flechtner therefore represents a lost opportunity to guide a uniform interpretation through analysis of case law.

This review will outline the manner in which both commentaries have approached their analysis of a range of provisions within the CISG, and will conclude by noting the particular contributions made by each commentary to the causes of internationality and uniformity in CISG interpretation.

B. GETTING WHAT YOU PAID FOR – CONFORMITY OF GOODS UNDER ARTICLE 35 CISG

Article 35 sets the standards by which the conformity of the goods which are the subject of the international sales contract will be assessed.

¹⁰ J.Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (The Hague, Kluwer Law International, 3rd edition, 1999); see for example p.212 in relation to article 25, and p.274 in relation to article 38.

Both commentaries note the importance of distinguishing CISG conformity standards under Article 35 from those derived from domestic law. One example is the English law distinction between condition and warranties which is not reflected in Article 35.¹¹

Other examples are the distinction between express and implied warranties under U.S. law and the French distinction between latent and apparent defects.¹² Schwenger emphasises that domestic law concepts are not relevant to interpreting the concept of ‘conformity’ under the CISG and notes the “risk that each court will interpret Article 35 in accordance with its own domestic legal classifications and that such differences in interpretation will hinder unification of the law.”¹³

Schlechtriem and Schwenger addresses the interaction between article 35 (1) which requires conformity with the “quantity, quality, and description required by the contract”, and Article 35 (2) which requires conformity with the ordinary purpose for which the goods would be used, or a particular purpose made known, or a sample held out by the seller. It is made clear that Article 35 (1) is the primary test, but that what is ‘required by the contract’ can be expressly or impliedly determined;¹⁴ while Article 35 (2) is described as the ‘subsidiary definition’ of conformity which “applies in so far as the contract does not contain any, or contains only insufficient, details of requirements to be satisfied by the goods.”¹⁵

In terms of the interaction between ordinary and particular purpose, Schlechtriem and Schwenger states that it is only in a case where a particular intended purpose is not made

¹¹ Schlechtriem and Schwenger, *supra* n 2, 570.

¹² Honnold and Flechtner, *supra* n 1, 328-9.

¹³ Schlechtriem and Schwenger, *supra* n 2, 570.

¹⁴ Schlechtriem and Schwenger, *supra* n 2, 571.

¹⁵ Schlechtriem and Schwenger, *supra* n 2, 575.

known that ordinary purpose would become relevant.¹⁶ Schlechtriem and Schwenger then references the slightly more nuanced approach taken in Honnold and Flechtner which accepts that “an obligation to provide goods suitable for a particular purpose under Art 35 (2) (b) is likely to have had precedence in the parties’ intentions over a conflicting obligation to provide goods suitable for ordinary purposes”, but makes it clear that the quality obligations which should take precedence will depend on which are held to represent the “parties’ true agreement.”¹⁷

There is interesting discussion in both texts regarding the meaning of fitness of goods for an ordinary purpose. Schwenger, writing in Schlechtriem and Schwenger, notes that domestic concepts such as average quality in Germany, and merchantable quality in England should not be applied. She refers with approval to the *Condensate Crude Oil Mix case*, a decision of the Netherlands Arbitration Institute from 2002¹⁸ where the applicable standard was held to be reasonable quality based on the justifiable expectations of the buyer.¹⁹ Again, the more nuanced approach taken by Flechtner, writing in Honnold and Flechtner is referenced by Schwenger. Flechtner declines to assert a ‘hard and fast’ rule but brings the question of standards back to the intentions of the parties. He writes:

“Debate has arisen over whether the standard in CISG Article 35 (2) requires goods of ‘average’ quality, or whether something less e.g. ‘marketable’ quality suffices. Deciding between such abstract and necessarily imprecise verbal formulations standards may prove neither helpful nor necessary for deciding real cases. If as argued above, Article 35 (2) (a) is a tool for determining the meaning

¹⁶ Schlechtriem and Schwenger, *supra* n 2, 575.

¹⁷ Honnold and Flechtner, *supra* n1, 341-2.

¹⁸ Netherlands Arbitration Institute, 15 October 2002, <http://www.cisg.law.pace.edu/cases/021015n1.html>, accessed 10 March 2011.

¹⁹ Schlechtriem and Schwenger, *supra* n 2, 577.

of the parties' agreement, the question is one of the parties' expectations concerning the 'fitness' of the goods for normal applications, taking into consideration all relevant circumstances of the case. This standard is also, obviously, vague and will not yield mechanically-easy answers, but it at least maintains the relevant focus and avoids unhelpful distractions."²⁰

Flechtner takes a similar approach in relation to the application of public law standards in the buyer's State to the question of conformity with ordinary purpose. The well known *New Zealand mussels case*, a decision of the German Supreme Court in 1995²¹ is discussed, in particular its finding that a seller would only be bound by those public law standards where the same standards applied in its jurisdiction. Schwenger notes this finding and states the legal position accordingly.²² Flechtner seeks to bring the question back to a more general one of interpreting the parties' agreement and intentions, assessing all relevant circumstances. He comments that:

"The formulations of Article 35 (2) are tools available to decision makers for the delicate and demanding task of determining the parties' agreement concerning the quality of goods the seller was obliged to deliver. Keeping that understanding in mind helps maintain those tools in proper working order."²³

C. TAKING IT BACK- REVOCABILITY OF OFFERS UNDER ARTICLE 16 CISG

Article 16 provides for the circumstances in which an offer can and cannot be revoked.

²⁰ Honnold and Flechtner, *supra* n 1, 332.

²¹ BGH, 8 March 1995, <http://www.cisg.law.pace.edu/cases/950308g3.html>, accessed 10 March 2011.

²² Schlechtriem and Schwenger, *supra* n 2, 579.

²³ Honnold and Flechtner, *supra* n 1, 336.

Schlechtriem and Schwenger notes that the question of irrevocability of offers to contract was a difficult one for the CISG drafters, given the different positions taken under common law and civil law traditions. While Germanic legal systems hold offerors bound by their offers, common law systems do not in the absence of consideration having been paid for irrevocability.²⁴ Article 16 deals with this conflict by way of compromise. An offer is revocable but only where the revocation reaches the offeree before the offeree has dispatched an acceptance. There is no need to show that consideration has been paid to keep the offer open to that point. There is an exception, in that the offer cannot be revoked where the offeror has indicated that the offer is irrevocable by stating a fixed time for acceptance or otherwise; or where it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. Schroeter, writing in Schlechtriem and Schwenger, refers to ongoing contention concerning the effect of stating a fixed time for acceptance which in common law countries means only that the offer lapses after that time, but not that it is irrevocable up until that time. This could arguably colour the perceived intentions of contracting parties from common law jurisdictions. Schroeter cautions that:

“...in order to promote uniform interpretation under Article 7 (1), it would be wise to avoid provoking a conflict with the views held by jurists in other legal systems. The fixing of a period for acceptance should therefore be a rebuttable presumption of an intention to be bound for that period.”²⁵

Honnold and Flechtner agrees with the concept of the fixing of a time for acceptance as giving rise to a rebuttable presumption of intention to be bound for that period. It

²⁴ Schlechtriem and Schwenger, *supra* n 2, 302.

²⁵ Schlechtriem and Schwenger, *supra* n 2, 307.

contains factual examples to illustrate how this presumption might be applied on certain facts, including where there is a clear promise to hold an offer open for a certain period of time, or where there has been reasonable reliance on the part of the offeree that the offer will remain open.²⁶ There is also an interesting discussion concerning the dangers of attributing through statute or convention, certain meanings to words used by the parties in a private contract.

“Should a statute attempt to state the meaning of specified words or expressions used in private contracts? Statutory drafters may define the words *they* use but should not try to state the meaning of words and expressions used by *others*, especially in contracts made by private persons in a virtually infinite variety of settings.”²⁷

D. SUBSTANTIAL DEPRIVATION- FUNDAMENTAL BREACH UNDER ARTICLE 25 CISG

Article 25 of the CISG defines what constitutes a fundamental breach of contract, giving rise to a right to avoid the contract under article 49. Schroeter, writing in Schlechtriem and Schwenger, notes that at the Vienna conference it was decided that fundamental breach should be dependant purely on the extent of the detriment or damage suffered, by reference to the interests of the promisee as determined by the contract itself.²⁸ In other words, being substantially deprived of what the promisee was entitled to expect under the contract.

²⁶ Honnold and Flechtner, *supra* n 1, 216, 220.

²⁷ Honnold and Flechtner, *supra* n 1, 219.

²⁸ Schlechtriem and Schwenger, *supra* n 2, 401.

Given this particular path chosen by the drafters of the CISG, both Schroeter and Honnold caution against interpreting Article 25 by applying domestic concepts such as the English concept of ‘fundamental breach’, described by both as a ‘false friend.’²⁹

Schlechtriem and Schwenger contains useful examples of events which might be held to give rise to a substantial deprivation under the CISG. One example is where time has been made of the essence in a contract so that a late delivery substantially deprives the buyer of what it was entitled to expect regardless of actual damage suffered.³⁰ Similarly, Honnold provides factual examples illustrating the application of Article 25, including in circumstances where there has been an offer to cure, or when price has been adjusted, so that substantial deprivation cannot be said to have occurred.³¹

In relation to the effect of an offer to cure by the party in breach, Honnold notes that a buyer should not be able to avoid where the cure prevents any substantial deprivation.³²

Schroeter agrees that:

“...there is initially no fundamental breach of contract in cases in which it is possible for the seller to repair the goods, deliver substitutes, or remove a defect in title within a time which is reasonable and takes the buyer’s plans for the goods into account, and in which the seller can be expected to do so.”³³

A contentious issue with which both commentaries deal is the question of the relevant time for assessing the foreseeability of the substantial deprivation, given that a lack of

²⁹ Schlechtriem and Schwenger, *supra* n 2, 405; Honnold and Flechtner, *supra* n 1, 273.

³⁰ Schlechtriem and Schwenger, *supra* n 2, 409.

³¹ Honnold and Flechtner, *supra* n 1, 280-1.

³² Honnold and Flechtner, *supra* n 1, 280.

³³ Schlechtriem and Schwenger, *supra* n 2, 424-5.

foreseeability of the detriment by the party in breach will render the breach non-fundamental under the Article. Schroeter adopts a view previously expressed by Schlechtriem that a breach will only be fundamental where the substantial detriment was foreseeable by the party in breach *at the time of conclusion of the contract*. Schroeter writes that:

“A promisee is only entitled to rely on something as a ‘substantial’ expectation ‘under the contract’ if his contracting partner knew (or a reasonable person of the same kind in the same circumstances would have known) that, by entering into the contract, such a particular expectation would be created...The majority among the authors agree... that the time at which the contract was concluded is decisive.”³⁴

Flechtner disagrees, adopting the approach previously stated by Honnold, and makes out a very compelling case for being a dissenter. He utilises an example originally put by Honnold, whereby a seller of rice only discovers from the buyer after contract, but before bagging and shipping the rice, that a particular type of bag is crucial for the buyer’s customers. At the time of entering into the contract it could not have been foreseeable to the seller that the failure to use a particular type of bag would cause substantial detriment, however this was foreseeable at a time when the seller was still in a position to do something to avoid the detriment. In a circumstance where the seller nevertheless proceeded to use the ‘wrong’ type of bag, Flechtner comments that:

“When it committed the violation the seller knew that its breach would cause substantial harm to the buyer. It makes no sense to say that the contractual

³⁴ Schlechtriem and Schwenger, *supra* n 2, 412, 414.

relationship has not been damaged in a way that justifies avoidance just because the seller was not aware how important that would be to the buyer when the seller originally promised to ship the rice...”³⁵

Flechtner is critical of the approach taken by Schlechtriem as misconstruing the purpose of the foreseeability rule. While the question of a contractual obligation is determined at the time of contracting, he argues that the question of foreseeability of a substantial detriment should extend to circumstances where that detriment was foreseeable at a time where the party in breach could have taken steps to avoid the detriment.

E. CHECKING IT OUT - INSPECTION AND NOTIFICATION UNDER ARTICLES 38 AND 39 CISG

Article 38 CISG requires the buyer to examine the goods, or cause them to be examined, within as short a period as practicable in the circumstances. This provision is closely linked to Article 39 which requires the buyer to give notice of non-conformity within a reasonable time after he has discovered it or *ought to have discovered it*, which in many cases will arguably be at the time at which the Article 38 examination ought to have taken place. The consequence of failure to give notice under Article 39 is that the buyer loses the right to rely on the lack of conformity.

The relationship between Articles 38 and 39 is explained in both commentaries, Schwenger noting that:

“The buyer’s obligation to examine the goods forms the basis of his obligation to notify the seller of defects under Article 39. The time by which the buyer must

³⁵ Honnold and Flechtner, *supra* n 1, 278.

examine the goods under Article 38 corresponds to the time, in Article 39, by which he ought to have discovered any lack of conformity and from which a ‘reasonable time’ in which to give notice of the lack of conformity begins to run.”³⁶

Similarly, Honnold notes that “Article 38 is important in fixing the time when the buyer ought to have discovered the defect,” which is followed by Flechtner’s comment that “there is no independent remedy or sanction for a buyer’s non-compliance with Article 38 beyond the possibility that a failure to timely discover a lack of conformity may cause the buyer to miss the deadlines imposed by Article 39...”³⁷

The chapter on Article 38 in Schlechtriem and Schwenger goes into significant detail to describe different obligations that might arise with respect to examination, depending upon the types of goods and circumstances involved. This includes discussion around perishable and consumable goods, very large quantities of goods, goods rendered unfit for use by examination, goods to be processed, machinery and so forth. Relevant case law is cited with respect to every example.³⁸

In contrast, Honnold and Flechtner focuses on a 2005 decision of the Frankfurt District Court known as the *Used shoes case*,³⁹ which Flechtner asserts was wrongly decided in finding that the buyer had failed to conduct a timely examination. He provides a general caution against requiring a buyer to go to extraordinary lengths with respect to

³⁶ Schlechtriem and Schwenger, *supra* n 2, 608-9.

³⁷ Honnold and Flechtner, *supra* n 1, 353.

³⁸ Schlechtriem and Schwenger, *supra* n 2, 613-4.

³⁹ Landgericht Frankfurt, Germany, 11 April 2005, <http://cisgw3.law.pace.edu/cases/050411g1.html>, accessed 10 March 2011.

examination when the seller has suffered no loss from the timing or nature of the examination undertaken, stating that:

“The Convention’s rule was crafted to ensure that the buyer is not unreasonably burdened by its obligation to examine. Examination is a means to a secondary goal of the Convention – to ensure the seller receives timely notice of lack of conformities...the meaning and purposes of the Convention are distorted when Article 38 is applied in a fashion that undermines one of the Convention’s primary goals – to ensure that seller delivers goods of the quality required by the contract – in circumstances where the seller has suffered little or no prejudice from the timing of the buyer’s examination.”⁴⁰

The chapters relating to Article 39 in both commentaries discuss the required specificity of the notice of non-conformity, as well as the meaning of a ‘reasonable time’ within which to provide the notice.

In relation to specificity of the notice, Schlechtriem and Schwenger discusses a number of cases, giving examples as to what would be regarded as sufficiently specific and what would not.⁴¹ Honnold and Flechtner on the other hand takes a more general approach, noting the function and purpose of Article 39 as being “to give the seller an opportunity to obtain and preserve evidence of the condition of the goods and to cure the deficiency...”⁴² Honnold and Flechtner then refers to Schlechtriem and Schwenger for cases discussing the level of detail required in Article 39 notices.⁴³

⁴⁰ Honnold and Flechtner, *supra* n 1, 362.

⁴¹ Schlechtriem and Schwenger, *supra* n 2, 625-6.

⁴² Honnold and Flechtner, *supra* n 1, 368.

⁴³ Honnold and Flechtner, *supra* n 1, 368.

The question of a 'reasonable time' for giving notice after a defect is discovered or ought to have been discovered is a cause of some controversy because of different approaches taken in different jurisdictions. Commentators such as Anderson have referred to the problem of a lack of consistent, international CISG case law on this point where, for example, "a clear diversity between German courts and Austrian courts has evolved", with German courts favouring a standard 14 day period and Austrian courts favouring a standard one month period.⁴⁴

In an effort to overcome this problem, Schwenger suggests adopting a presumptive period of one month, arguing that:

"If excessive differences in interpretation are to be prevented, it would appear that a convergence of views is crucial. Consequently, a period of approximately one month should at least be adopted as a rough average."⁴⁵

By way of footnote, Schwenger acknowledges that Honnold and Flechtner opposes any presumption as to what is a reasonable time, which indeed it does. Flechtner writes that:

"In the view of the editor of the current edition, however, the very idea of a presumptive 'reasonable time' period in Article 39 departs from the intention of the drafters. They could easily have included a presumptive period in Article 39...The drafters, however, eschewed reference to any specific period and chose

⁴⁴ C Anderson, "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *Journal of Law and Commerce*, 159, 161.

⁴⁵ Schlechtriem and Schwenger, *supra* n 2, 632.

a radically flexible standard- a 'reasonable time'- designed to vary with the facts of each situation."⁴⁶

F. CONCLUSION

Schlechtriem and Schwenger takes a comprehensive approach to analysing the provisions of the CISG while Honnold and Flechtner is more relaxed in its approach. The latter text focuses on points of particular interest and reads more like a discussion with a colleague on discrete issues than a comprehensive statement of the law. This perhaps makes Honnold and Flechtner the more engaging text and one which would be highly beneficial for university teaching purposes, whereas Schlechtriem and Schwenger is perhaps the more practical and comprehensive text to which practitioners and academics might turn. Both texts fulfil an important role in promoting understanding and debate around the CISG and its international nature however Schlechtriem and Schwenger better performs the role of promoting uniformity in interpretation through a careful and thorough analysis of case law and other commentaries. Both texts cross reference one another extensively⁴⁷ thus highlighting the complementary and important roles that both texts play.

In considering the meaning to be attributed to provisions of the CISG, Honnold and Flechtner tends to speak in general terms, applying broad considerations derived from the intentions of the CISG drafters and the contracting parties. By contrast, Schlechtriem and Schwenger seeks to arrive at a clearly defined legal position where possible. This can be seen in the discussion relating to the standard of quality applicable to fitness of goods for an ordinary purpose. Schwenger seems to support a test of reasonable quality based

⁴⁶ Honnold and Flechtner, *supra* n 1, 372.

⁴⁷ Although Honnold and Flechtner of necessity cross-references an earlier edition of Schlechtriem as the current edition was published after the latest edition of Honnold and Flechtner.

on the justifiable expectations of the buyer,⁴⁸ while Flechtner regards the standard as best left to the circumstances of a particular case and the parties' expectations.⁴⁹ While these concepts may be similar in application, the difference in approach is one of defining a standard on the one hand, and leaving the standard open and "vague"⁵⁰ on the other. Similarly, in relation to the time period within which notice of non-conformity should be required to be given under Article 39, Schwenger suggests a 'rough average' of one month,⁵¹ while Flechtner resists the idea of any presumptive reasonable period, arguing that what is a reasonable time will vary with the "facts of each situation."⁵²

This difference in approach might be explained by Schwenger's civil law background and Flechtner's common law background, however it is noted that even in common law systems there is still a 'tendency to think that a single rule is implicit in the case law'⁵³ rather than an acceptance of vague, evolving standards. The more nuanced approach adopted in Honnold and Flechtner in fact echoes a civil law resistance to being bound formalistically to particular contractual language, instead being concerned to take into account the intentions of the parties through extrinsic evidence.⁵⁴

Honnold and Flechtner also engages from time to time in normative discussion, for example in questioning whether the fixing of a time period for acceptance of an offer should give rise to a presumption of irrevocability of the offer for that time period.

⁴⁸ Schlechtriem and Schwenger, *supra* n 577.

⁴⁹ Honnold and Flechtner, *supra* n 1, 332.

⁵⁰ Honnold and Flechtner, *supra* n 1, 332.

⁵¹ Schlechtriem and Schwenger, *supra* n 2, 632.

⁵² Honnold and Flechtner, *supra* n 1, 372.

⁵³ R Sacco "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 *American Journal of Comparative Law*, 1, 23.

⁵⁴ In this regard see discussion in P Karrer "The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It" (1 February 2008) *Dispute Resolution Journal*, http://findarticles.com/p/articles/mi_qa3923/is_200802/ai_n25138087/?tag=content;coll, accessed 9 May 2011.

Honnold questions the appropriateness of statutory drafters dictating the meaning to be attributed to specific words used in private contracts.⁵⁵

Honnold and Flechtner provides a dissenting voice where it is perceived by its authors that the prevailing view will lead to injustice. This is evident in the discussion surrounding the time for assessing foreseeability of a substantial detriment under Article 25. Flechtner argues strongly that foreseeability should not be limited to the time of the contract, but should extend up to the point at which the party in breach was still in a position to take steps to avoid the substantial detriment.⁵⁶ This is in contrast to the ‘majority view’ espoused by Schroeter that the time at which the contract is concluded “is decisive.”⁵⁷

While the approaches taken in the two commentaries are very different, they each make valuable contributions to an international and uniform interpretation of the CISG. There is agreement amongst commentators that the goals of international and uniform interpretation of the CISG require consideration of foreign case law by courts and tribunals.⁵⁸ One of the key strengths of the text by Schlechtriem and Schwenger is its comprehensive referencing of relevant case law to illustrate the manner in which the provisions of the CISG have been interpreted. Honnold and Flechtner focuses on discrete issues arising under the provisions of the CISG and so is not comprehensive, and does not provide extensive references to case law. It nevertheless provides engaging discussion around particular aspects of interpretation of the CISG, and as a piece of scholarly writing on the CISG is itself a valuable interpretive tool to be used by courts

⁵⁵ Honnold and Flechtner, *supra* n 1, 219.

⁵⁶ Honnold and Flechtner, *supra* n 1, 278.

⁵⁷ Schlechtriem and Schwenger, *supra* n 2, 414.

⁵⁸ See for example M Bonell, *Article 7*, <http://www.cisg.law.pace.edu/cisg/biblio/bonell-bb7.html>, accessed 8 June 2010; and P Huber, *Some Introductory Remarks on the CISG*, <http://www.cisg.law.pace.edu/cisg/biblio/huber.html> accessed 8 June 2010.

and tribunals. Both commentaries should form an essential part of the libraries of practitioners, academics, arbitrators and judges confronted with contracts governed by the CISG.

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(2005) 24 *Journal of Law and Commerce*, 159.

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