Object and Purpose as Interpretation Tool in International Commercial Law Conventions: How to Make the 'Top Down Approach' Work

Maren Heidemann

Contents

Abstract By creating unworkable rules based on misaligned object, content and purpose states fail to achieve their public policy goals by exceeding the limits of their remit and are responsible for the continued necessity for a spontaneous, non-state informal private legal order in cross border trade, the so-called bottom up approach to self-regulation. This in turn appears to prompt a need for state regulation in order

M. Heidemann (✉)
Institute of Advanced Legal Studies, School of Advanced Studies, University of London, London, UK

M. Heidemann, J. Lee (eds.), *The Future of the Commercial Contract in Scholarship and Law Reform*, https://doi.org/10.1007/978-3-319-95969-6_16

to safeguard the very public policy goals. Only a reflection on the relationship between object and purpose can be a basis for successful modern treaty law in the area of international private commercial law. This chapter examines the role of object and purpose as recognized by Art. 31 of the 1969 Vienna Convention on the Law of Treaties, VCLT. The author looks at object and purpose separately and explains the meaning of each of these two terms with regard to selected international conventions regulating private commercial law including tax treaties. In combination with interpretation rules contained in the commercial law conventions themselves, an expanded meaning and use of object and purpose of a treaty can be discerned and used to form a reinforced comprehensive autonomous interpretation method. While the purpose of any convention is discernible by recourse to the texts and materials of a treaty, the object plays a decisive role in successful drafting, application and interpretation of a commercial law treaty. The author argues that it is exclusively the international character of the object that requires the creation of transnational substantive uniform law and other types of international commercial law.

1 Introduction

The decades following World War II have seen worldwide efforts to establish a legal framework facilitating international trade. This framework is generally intended to create a comprehensive infrastructure for merchants.[1] The four general areas can be said to consist of public law import and export rules, private law substantive commercial contract law, transnational commercial adjudication and enforcement and a supportive system of international taxation. Progress has been made in all these areas. The degree to which the resulting legal landscape is truly transnational varies, though, and elements of this global structure appear in different costumes, national, international and transnational, public and private. While the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) have provided a world wide network of trade agreements dealing with trade barriers, international organisations have promoted the adoption of conventions providing substantive commercial contract law for cross border contracts. International adjudication has not manifested in the shape of an international commercial court yet, but rather employing a system of informal incentives to promote convergence across national court systems by offering databases of international commercial case law using the substantive contract law conventions. A great amount of international commercial dispute settlement remains entrusted to the arbitration centers around the world. The desire to regulate and control international trade and commerce is growing, however, revealing a tension between the public and the private sector when it comes to finding the most promising avenues to achieving fairness, justice and ethical observance in the newly globalized world of trade. One strand of debate is therefore

[1] See Van Alstine (1998), p. 689.

whether the so called top down approach (formal state legislation) is better than the so called bottom up approach (evolutionary often uncodified and customary law originating from private sources of traditional self governance) to legislating and rule making in the sphere of commercial dealing. This includes taxation which of course seems doubtlessly reserved to the public law and top down method. At present, it is not obvious which of the two seems to be the most successful in promoting trade for the benefit of both national and international interests. While the 'top down approach' is generating substantial zealousness and output at present, some undeniable short comings of this philosophy seem to perpetuate the need to sustain the opposite number, the 'bottom up approach' to transnational commercial law. This chapter identifies as one of these short comings the lack of clarity in the object and purpose of public international law instruments regulating international commercial relationships.[2] Object and purpose of international treaties are an element of the (autonomous) interpretation method as incorporated in Art 31 (1) of the 1969 Vienna Convention on the Law of Treaties (VCLT).[3] The autonomous interpretation method is instrumental for the successful application of international law and is yet reserved to formal conventions adopted among state signatories. This tool, the interpretation rule applicable to an international treaty, constitutes the interface between public and private commercial contract law and other relevant commercial regulatory law. This chapter explores the role of the component of 'object and purpose' of a convention for the successful application and enforcement of treaty law regulating transnational commercial contract law and in three of the four areas of activity mentioned above—substantive contract law, its enforcement and its taxation.

International commercial contracts have been subject to international legislation all through the past century. The result has often been cast in the form of an international convention containing substantive rules of contract law. Examples are the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) as well as the 1980 United Nations Convention of Contracts for the International Sale of Goods (CISG). These conventions incorporate rules which commit the contracting state parties to adopt the conventions according to their respective national implementation procedures, including reservation clauses and all rules normally to be expected in international treaties. The operative part of the conventions, however, can be said to stand out from the majority of treaties in that it consists of substantive rules of private contract law. This is remarkable in two ways. For one thing, these rules of substantive contract law are intended to operate only between private parties. There may be occasions where states may choose to interact in this way, but this will be rare. The

[2] Along with Jonas and Saunders (2010), p. 569: "Scholars debate why states comply with their international law obligations despite the lack of strong enforcement mechanisms, and one of the critical factors recognized by multiple theories is whether the law is *clear*.'[…] Vague terms such as object and purpose erode the law's capacity to guide state behavior."

[3] See for the drafting history of this provision Buffard and Zemanek (1998), Crnic-Grotic (1997) and Klabbers (2001).

rules are meant to govern contracts for the sale of goods across borders between private parties. For another thing, these contractual rules complement or replace state rules on contractual relations between private individuals. This effect is not as apparent in comparable conventions such as the Warsaw convention[4] on the liability of air carriers and of the Hague-Visby rules[5] on the liability of sea carriers. The rules contained therein do not constitute the actual underlying liability rules, they only specify that liability should arise from a certain situation and attributed to the carrier. They do not seek to establish a separate regime of tort law. The above mentioned sales law conventions do exactly that. They create a directly applicable separate regime of contract law for international sale of goods. This was one of the reasons why contract formation in particular was hard to agree and took two conventions (ULF and CISG) to be introduced at transnational level by the signatory states. Contract laws differ a lot around the globe and they depend not only on isolated rules within each jurisdiction but are an integral part of a whole network of rules that do not easily function in isolation but depend on a background of contextual and enforcement rules. Acknowledging this difficulty in creating a transnational commercial contract law, databases were established hosted by a number of international organisations (the Institute for the Unification of Private Law, UNIDROIT and the United Nations Commission on Trade Law, UNCITRAL) and academic institutions (most prominently the Pace University) which compile court decisions referring to international conventions and other instruments such as model laws providing uniform law.[6] This is an attempt to create a comprehensive legal infrastructure at transnational level which is naturally present at the national level of domestic law. The obstacle faced by this attempt, however, is the fact that using these databases is not only non-mandatory but even hard to justify for each national court using the uniform sales laws. It is this fact that highlights the inherent conflict contained in uniform sales conventions. The states who are the signatory parties to the conventions effectively have no direct interest in the correct use and application of its operative part. The same is true for the below mentioned tax law conventions.[7] The signatory states may be able to monitor and demand the adherence to the implementation rules contained in the sales law treaties but they will not have an interest in the correct application of the substantive rules of contract law contained therein, even less so than in the case of the tax law conventions. It is the aim of this chapter to analyse this conflict of interest, its reasons and effects on uniform law and the practice of international commercial contracts.

[4] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929—Warsaw Convention 1929 as amended by the Montreal Convention 1999. Text available from IATA at https://www.iata.org/policy/Documents/MC99_en.pdf.

[5] The Hague-Visby Rules—The Hague Rules as Amended by the Brussels Protocol 1968.

[6] UNIDROIT maintains a database on all its texts including the UNIDROIT Principles of Commercial contracts on its website, see Sect. 2.2 below.

[7] See Sect. 5 below.

2 Interpretation of Uniform Laws

Uniform laws are a number of conventions, model laws and 'principles' that have been drafted, adopted and enacted to provide uniform law for international commercial contracts. Typically, they contain their own interpretation rules. These rules relate to the interpretation of the convention or model law itself and also in parts to the construction of the contractual relationship. It can be observed that the interpretation rules relating to the legal instrument itself differ according to the legal nature of the instrument. They also fall into two categories which can be called a method rule and an actual interpretation rule. The method rule stipulates the method to be chosen in order to 'fill gaps' left by the instrument, matters that are not covered by the instrument itself. Which laws or legal rules should apply in such instances and how to arrive at them is the subject of the method rules. The way to interpret the rules contained within the uniform instrument is the subject of the interpretation rules.

2.1 Method Rules

The method of how to progress from the text of the substantive contract law convention to legal rules outside the convention has been a prime concern for drafters of contract law conventions. The first law of this kind was created with the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS). It contained the method rule as a 'point of departure' within the development and successive enactments of later conventions dealing with private contract law. Art 17 ULIS reads:

> Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.

This rule can be viewed as a semi perfect design for the use of uniform law. The rule stipulates to resort to underlying general principles on the encounter of a gap in ULIS.[8] It would be perfect if it then went on to stipulate horizontal progression to the use of other relevant uniform or international law in order to reflect the international character of the contract it regulates. However, ULIS stopped short of this. This is because later developments of uniform contract law show that this next step went too far in the eyes of the state drafters of this law.

The next uniform law on international commercial contracts to be adopted as an international treaty was the 1980 United Nations Convention on the International Sale of Goods (CISG). Article 7 CISG reads:

> (1) 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 and the observance of good faith in international trade.

[8] This technique is advocated by Van Alstine (1998).

> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Art. 7 (2) CISG introduces the next step in finding the applicable law to an international commercial contract by pointing to the traditional method of applying national rules of private international law. These always point to a domestic law rather than to other tailor made transnational uniform rules for commercial contracts, for instance the UNIDROIT Principles for Commercial Contracts (UPICC). Franco Ferrari has set out that at present the UPICC cannot be used to complement CISG[9] on the encounter of gaps. Gaps (*lacunae*) occur as *lacunae intra legem* and *lacunae praeter legem.* The former are an effect of the limited scope of a legal instrument and the latter are matters where no rule of it can be considered to address a specific question of law that arises out of a dispute governed by the legal instrument. These are the type of gaps covered by Art. 7 (2) CISG and Art. 17 ULIS. It can be observed, that uniform rules for international commercial contracts that have not amounted to international treaties such as the UPICC and others contain the same method rule as ULIS does. Art 1.6. UPICC reads:

> (Interpretation and supplementation of the Principles)
> (1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.
> (2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

This may still not allow resorting to other relevant uniform law instruments outside the one containing the method rule. Therefore, there is currently no available network or range of international uniform laws that can be resorted to horizontally and thereby remaining within an international law setting in the way of a hierarchy formed by the degree of specialisation of each set of rules in relation to the case in hand. Instead, at the end of each application of a method rule by state courts stands domestic national law. This may not be the best solution for an international commercial dispute involving substantive private law. The question is of course what is meant by 'the best solution'. This is discussed below.

2.2 Integrated Interpretation Rules

While ULIS only contained the method rule, subsequent uniform law conventions, model laws and principles of substantive commercial contract law also provide for an interpretation rule. It usually precedes the method rule within the same Article as can be seen from the above quoted instruments. These interpretation rules do not relate to

[9] Ferrari (1998, 2007).

the interpretation of the contracts governed by the legal rules of the convention or model law as the case may be but to the interpretation of the rules that the instruments consist of. This must be seen as a deviation from domestic law where interpretation rules relating to the law itself are usually part of general legal doctrine and judicial practice and not contained in any codification itself. For uniform law it was deemed necessary to expressly state interpretation rules in order to reinforce and preserve the aims and objectives that were to be pursued with their adoption. What are these aims and objectives? The answer to that may seem straightforward. Both Art. 1.6. UPICC and Art. 7 (1) CISG, for instance, specify 'the need to promote uniformity in [the] application' of these two instruments. But can 'the international character' of these rules as well as 'the observance of good faith in international trade' (Art. 7 (1) CISG) be regarded to be an aim of the convention? Based on a purely textual understanding this may not be entirely unequivocal. The UPICC also mention 'their purposes' in the plural, suggesting that there must be more purposes that are not mentioned in the interpretation rule itself. Where and how can these purposes be found relying on an internationally accepted method? In the case of formal public international law such as CISG and other substantive law conventions adopted by UNCITRAL, for instance, the answer will be found by looking at the preamble of the conventions as well as by applying Art. 31-33 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[10] These latter provisions contain interpretation rules applicable to international treaties which CISG and other uniform law conventions doubtlessly are.[11] However, are these rules meant to govern substantive law disputes between private parties and are they suitable for this purpose? This question reveals an unique tension present in substantive law conventions which arises from their legal nature as treaties concluded between state parties and their substantive law content which almost exclusively binds individual private commercial parties except in rare cases where states may act commercially and remain in an 'eye level' position with a commercial party. This raises questions as to the object and purpose to be pursued with these conventions in the sense of Art. 31 (1) of the VCLT which reads:

> General rule of interpretation
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

[10] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

[11] See for further detail Sect. 4.2 below.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

The interpretation rules in uniform law instruments which are integrated into their text contain additional criteria compared to the VCLT when they mention the need to promote uniformity in the application of the substantive law conventions or the observance of good faith in international trade. When viewed together with the VCLT, this can be considered to constitute a novel interpretation standard for use with substantive law conventions and uniform law. This comprehensive standard requires a rule of uniform law to be viewed as a stand alone rule within the context of the actual legal instrument in the sense of an autonomous interpretation and also as part of a transnational system of adjudication. In the absence of a transnational commercial court this is created by the multitude of national court decisions which are collected and publicised by the various public and private databases provided by international legal drafters such as the UN Commission on International Trade Law (UNCITRAL)[12] and the Institute for the Unification of Private Law (UNDROIT)[13] as well as by academic institutions[14] or even collections provided by international arbitration centers.[15] The difficulty with this understanding of uniformity is that while it may be maintained that recourse to any of the national case law is mandatory pursuant to Art. 7 (1) CISG and similar interpretation rules in other formal conventions, each of the domestic decisions have no binding force in the way of judicial precedent outside the jurisdiction of each body of adjudication. This creates a tension between the expectation created within uniform law conventions by way of their integrated interpretation rules and traditional legal doctrine and practice resisting of any influence of foreign courts as a matter of asserting sovereignty.[16]

The tension is well illustrated by a closer analysis of the criterion of object and purpose of a uniform instrument in the context of international treaty law.

3 Object and Purpose in Public International Law

The VCLT determines as one of the first criteria for the interpretation of a rule of an international treaty the ‘object and purpose’ of a convention as a standard for the contextual analysis of the meaning of a treaty provision.[17] This criterion is only

[12] Maintaining their database CLOUT.

[13] Maintaining their database Unilex.

[14] Such as the Pace University database or ‘lex mercatoria’ at the University of Oslo.

[15] Such as the International Chamber of Commerce (ICC) in Paris.

[16] The current ‘Brexit’ debate as it is conducted in the UK is a discouraging confirmation of this reluctance. See also Fredman (2015) and Roberts (2011).

[17] See Art. 31 (1) VCLT as quoted above. The expression “object and purpose” appears in seven further provisions of the VCLT. It has most often been discussed in case law of the ICJ in order to determine questions of the validity of reservations to treaties (as a compatibility test providing an

seemingly starightforward and it not necessarily easy to determine even if primarily established by recourse to the preamble of the treaty as suggested by the VCLT.[18] It is useful to leave conventional practice to one side[19] and analyse the object and the purpose of a treaty separately.

3.1 The Purpose of a Convention

The purpose or objective of a convention can be established by recourse to the express terms of the preamble[20] or any material setting out the intentions of the drafters and contracting parties. If no express recorded declarations are made, it is less obvious how to establish the purpose of a treaty in order to shed light on any of its rules according to Art. 31-33 VCLT. In the case of CISG, the brief preamble reads:

> THE STATES PARTIES TO THIS CONVENTION,
> BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,
> CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,
> BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,
> HAVE AGREED as follows:

This preamble or mission statement refers sweepingly to visionary and long term goals and objectives decidedly of a public policy nature. They are easy to establish and determine.

The preamble to predecessor ULIS, however, is extremely brief and says nothing about the objectives pursued with the convention. It reads:

> The States signatory to the present Convention, Desiring to establish a uniform law on the international sale of goods, Have resolved to conclude a convention to this effect and have agreed upon the following provisions:…

The preamble is identical to that of the ULF. The absence of express statements of the pursued objectives might reflect the difficulty of arriving at these uniform provisions in the first place. It makes the questions of the aims pursued more poignant. Given that the uniform laws mentioned in this section provide substantive

---

alternative to the unanimity rule, Art. 19 (c) VCLT) and of states' obligations under a treaty prior to its entry into force, Art. 18 VCLT. See Buffard and Zemanek (1998), Jonas and Saunders (2010) and Linderfalk (2003).

[18] Art. 31 (2) VCLT.

[19] Linderfalk (2003), p. 433.

[20] Buffard and Zemanek (1998), p. 318.

rules of contract law only and no agreements on the declared policies in the preamble to CISG begs the question how the uniform laws are suitable to achieve the stated aims or if no aim is stated, what the actual motivation for the signatory states was to adopt them in the first place. The tension arises from the discrepancy between the identity of the obligated parties under the convention and the addressees of the actual rules. Only states can be bound by treaties. The addressees of these contract law conventions, however, are private parties who will become bound by the contracts they conclude, not by the convention itself. On the other hand, these private parties cannot hold a state to account for breach of a rule of the convention by a contractual partner and cannot expect a state to enforce the convention against a contractual party under the uniform laws. While none of these scenarios is unthinkable, they are highly unlikely. The signatory states have stopped short of allowing an international adjudication body to settle contractual disputes arising under the sales law conventions and therefore completing the transnational merchant law regime. Traders have no standing before the International Court of Justice (ICJ) to bring a contractual claim under CISG, ULF or ULIS. It is hard to imagine a scenario where a state could be made responsible for not applying or misapplying a rule of CISG or ULF as they hardly ever do apply these rules. It would be the independent national courts who apply the rules apart from the merchants themselves and private dispute settlement bodies. It is also hard to imagine a state pursuing a private party's contractual claim before the ICJ. What interest and legitimation would states have to do that when they profess to respect private dealing and the freedom of contract? It is clear that states have provided a substantive private law regime for exclusive use by international merchants without any involvement of the signatory states other than the general commitment to implement the conventions nationally. The proceeds of the private commercial contracts concluded under CISG or ULIS do not directly benefit the states but the merchants. Even if the resulting increase in turnover and possibly tax revenue are considered to be the economic benefit, these are hard to quantify and predict at any point in the life of these conventions. This raises the question of the suitability of the instruments to achieve the purposes set out in the preamble of CISG as well as—in the absence of a preamble—the question of the actual motivation behind the adoption of ULF and ULIS. Both questions impact on the usefulness of the purpose of the treaty as a tool for the interpretation of its rules and terms.

By contrast, the 1999 Montreal Convention amending the Warsaw Convention has the following preamble:

> THE STATES PARTIES TO THIS CONVENTION
> RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;
> RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

> RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;
> REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;
> CONVINCED that collective State action for further harmonization and codification of certain rules
> governing international carriage by air through achieving an equitable balance of interests;

This preamble is a lot more focussed and closely related to the actual content of the convention. It recognizes openly that it is made in the interests of consumers, not states. The "equitable balance of interests" mentioned therein is that of the contracting private parties, not that of the signatory states.

3.2 The Object of a Convention

It might be less common to expend much thought on the object of a convention than on its objective or purpose since the answer may appear to be obvious at first glance. In many cases, however, taking a closer look at the object of a treaty may reveal inconsistencies or difficulty to specify the object. While the reference to 'object and purpose' in Art. 31 (1) VCLT may be understood to be a mere turn of a phrase,[21] determining the object of a convention using an extrinsic fact based, non-normative meaning of the term object[22] can be revealing as to the convention's purpose as well as to its content. For instance, the object of CISG is international commercial contracts for the sale of goods. This is not identical with the purposes and declared objectives in the preamble. The object of CISG is neither the 'development of international trade' as a whole, nor the 'friendly relations among States'. In fact, the object that CISG regulates is not state related at all. The object of CISG is contractual relations between private individuals, the international commercial contract for the sale of goods. These contracts may be infused with 'equality and mutual benefit'

[21] Linderfalk (2003), p. 433; Buffard and Zemanek (1998), pp. 315–316; Jonas and Saunders (2010), p. 580, who call it the 'unitary view'.

[22] I.e. synonymous with objective, aim or goal as gleaned from the actual rules of a treaty. Linderfalk (2003), and Buffard and Zemanek (1998) explain in detail how the term object or the French *objet* has been understood in scholarship deriving meaning either from the normative content of the convention or likening the term encyclopedically to that of objective or aim (French *but*). Authors have not stepped out of the actual normative context, created by the convention, however, thereby creating a self referring technique, or circular argument, for the establishment of meaning under Art 31 VCLT and presupposing a similar meaning of both terms, also sometimes suggesting that they are interchangeable. This is criticized by Jonas and Saunders (2010), pp. 573–574, commenting on Art. 31 VCLT: "The text of a treaty must be interpreted in light of the treaty's object and purpose, but the treaty's object and purpose must be discovered through interpretation of the text itself. This circularity problem is discussed in detail [further down in their text]."

in the spirit and through the application of CISG. But this does not automatically lead to the same effect on a state level or within global trade as a whole. It is not impossible that CISG has had and will have this effect or contribute to the declared objectives in the preamble. But this is a question of the causal link between the object and the purpose of a treaty. Looking at other conventions can offer a comparison. A typical public international law convention may be the 1951 United Nations Geneva Convention Relating to the Status of Refugees (the Geneva Convention). The object of this treaty is the status of refugees. This is something that only states can grant. Here, states agree among each other on how to adapt and apply their laws to refugees who are defined in Art. 1 of the Geneva Convention. Subsequent Articles read: "The Contracting States shall accord…", "The Contracting States shall apply…", "granted by a Contracting State to refugees…". Here, the states are clearly bound[23] by and acting under the treaty in question. The convention regulates a horizontal commitment between states which can only be fulfilled by the contracting parties, the signatories.[24] The CISG, by contrast, does not contain a single word that would oblige a state in relation to another signatory party to do something that only a state can do. The same is true (surprisingly) of another example which could be contextualised between CISG at one end and the Geneva Convention at the other—bilateral Double Tax Conventions (DTCs). They deal with a subject that is commercially significant and yet essentially reserved to state acting. Interestingly, the tax law conventions remain entirely vague on this point. Their object is double taxation and double non-taxation. Their purpose is the avoidance of those two objects.[25] This can only be gleaned from the full title of the DTCs in the absence of a preamble. Notably, their object is not the distribution of revenue between the participating states. Instead, the first mentioned object impacts on the tax payer, the second impacts on the state. The interests of those two parties are definitely contrary to each other in this case. It could be assumed therefore that the purpose of DTCs is to balance these interests against each other. Or, it could be assumed that the two objects remain irreconcilable. The first assumption could be verified by comparing the content of the treaties with this purpose. The second could be understood to

[23] So is the refugee according to Art. 2 Geneva Convention.

[24] The criterion of object and purpose was in fact initially developed from case law—see in more detail Buffard and Zemanek (1998), p. 316—in the ICJ's Advisory Opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, Reports 1951, 15–30. See for a more recent case discussion concerning the 1948 Genocide Convention, *Bosnia and Herzegovina v. Serbia and Montenegro (Bosnia v. Serbia),* ICJ Reports 2007, Gibney (2007–2008): Gibney suggests applying the object and purpose (compatibility) test to the question of attribution and state responsibility where the actual acts of genocide are not carried out by the state itself: "If the Court had applied the same kind of "object and purpose" analysis to this issue (which it did not), it is next to impossible to imagine that it would have reached the result that it did. Thus, the question that the ICJ should have asked (but did not) is this: in what way is providing massive amounts of military, economic and political assistance to paramilitary forces with genocidal designs at all consistent with the object and purpose of the Genocide Convention?…", Gibney (2007–2008), p. 146.

[25] See Sect. 5.3 below.

stifle the achievement of the pursued aim. In the following, it is attempted to develop conclusions drawn from these tensions which are inherent in treaties due to their object and purpose in respect of the interpretation of the rules of international conventions in the area of commercial law and in respect of recommendations for the further development of public policies.

4 The Effect of Object and Purpose on the Interpretation of Contract Law Conventions

Art. 31 VCLT is the more general and complementary rule to the integrated interpretation rules in the above mentioned contract law conventions. As the VCLT was only adopted in 1969 and entered into force in 1988, older conventions such as ULIS and ULF and also some DTCs may not be governed by this rule therefore. It may nevertheless be regarded as a rule of customary international law which has only been codified or 'restated' in the VCLT. It could also be argued that the convention applies to all treaties from the point of its entering into force regardless of the adoption date of the treaty rule to be interpreted.

4.1 CISG

The object and purpose rule of Art. 31 (1) VCLT is to be applied together with Art. 7 CISG when applying and interpreting a rule of CISG. Art. 7 will have to be treated as the *lex specialis* rule in relation to the VCLT rule and therefore prevail.

4.1.1 Art. 7 (1) CISG

Art. 7 (1) CISG can be understood to reinforce the purposes mentioned in the preamble. It clarifies the aspiration expressed in the preamble to conduct "international trade on the basis of equality and mutual benefit" by emphasizing the requirement to observe good faith. This is an important link to be established between the profession expressed in the preamble by the signatory states and its (desired) execution by the individual merchants who, as mentioned above, are not bound by the convention itself, but rather by their contracts. Art. 31 (1) VCLT can underpin this legal link and counteract the impression that the states have chosen an unlikely tool to achieve their objectives expressed in the preamble which would typically be pursued by means of bilateral or multilateral trade agreements such as GATT. It shows a way of how to achieve public policy ends with private law means. The other component of Art. 31 (1) VCLT, the object of the convention adds another reinforcing tool for users of the convention. The object of CISG is the international commercial contract

for the sale of goods. The seemingly inconspicuous component, the object of an international treaty, adds powerful potential to the wording of Art. 7 (1) CISG. In addition to the international character of the convention itself which is to be considered there, the international character of the object is to be borne in mind. This forms the context mentioned in Art. 31 (1) VCLT. Specifying and considering the object of the convention reinforces the effect of Art. 7 CISG. CISG is a *lex specialis* to domestic contract law in so far as domestic law usually only extends to contracts in general. While national legal systems provide for rules to apply to contracts with an international element they rarely distinguish commercial contracts from private transactions and provide substantive rules of contract law but conflict rules which point to a national (domestic or foreign) legal system to apply to the contract. CISG provides substantive transnational uniform rules which apply directly to the cross border commercial contracts. The signatory states of CISG have thereby acknowledged that the international commercial contract for the sale of goods is a separate contract type. In order to observe this international character and the context of the rules of CISG pursuant to Art. 31 VCLT, it may therefore easily be assumed that Art. 7 (1) CISG provides a mandatory obligation to refer to national court judgments as communicated by the above mentioned official databases in order to promote uniformity in international merchant law. As before, however, neither the individuals adjudicating on the basis of CISG nor the litigating parties are state parties who have committed themselves to CISG and the VCLT but they are independent national judges or arbitrators or private merchants. It is therefore far from obvious that these users can rely on Art. 7 CISG in order to adhere to an international rule of judicial precedent other than spontaneously or relying on persuasive authority and even in spite of or contrary to traditional legal doctrine in order to create uniformity (of application) in the international sale of goods.[26] The fact that in many jurisdictions CISG will only be in force as part of national law[27] unsettles the public international law based interpretation standard even further by removing it from its international origin. Only the object itself, viewed in the context of Art. 7 CISG can be relied on as justification for the mandatory reference to foreign court decisions in the way of international precedent or, less aspirational, international judicial accord (*Entscheidungsharmonie*) and thereby giving effect to the international character of both CISG and the object it regulates according to Art. 7 (1) CISG. There will be other examples of how the international character of both CISG and its object can influence an interpretation of a rule of CISG, for instance when taking into account a shared understanding of a term of a contract concluded under CISG or a specific objectively determined meaning of a contractual term in the light of its international character.

[26] See Roberts (2011) and Baasch-Andersen (2005).

[27] Many jurisdictions require international law to be implemented into national law and do not apply it directly. This is so in both so called monist and dualist systems, see Klabbers (2013), pp. 288–303; Aust (2013), pp. 163–177; Crawford (2012), pp. 48–111.

4.1.2 Art. 7 (2) CISG

The international character of both CISG and its object can be understood to demand a particular use of the method rule. Again, the main difficulty lies in the tension arising from the absence of an international commercial court for the adjudication of cases under CISG and the resulting need for national judges to transcend their national judicial boundaries in order to apply Art. 7 CISG correctly. The problem will almost certainly not arise in arbitration proceedings because the method rule can easily be complemented by further reference to suitable uniform or customary law when the underlying general principles to CISG have not yielded an acceptable answer to the problem in hand. The provisions of the VCLT and CISG can even be understood to require an extension of the method rule to allow horizontal reference to suitable uniform law or general principles outside CISG in order to appropriately consider the international character of the object. They can therefore serve as a legal basis allowing to expand the codified method rule beyond the limits set by current legal doctrine which is to disallow an exclusive horizontal recourse to transnational substantive law applying to cross border commercial contracts.[28]

4.2 The UNIDROIT Ottawa Conventions

In 1988, UNIDROIT called a diplomatic conference in Ottawa, Canada, where two conventions on international leasing and factoring contracts were adopted. These contain for the first time the express reference to 'object and purpose' of the conventions in their interpretation rules. The two conventions contain identical integrated interpretation and method rules which read as follows:

> UNIDROIT Convention on International Factoring (Ottawa, 28 May 1988)
> Article 4
> 1. - In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> 2. - Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

> UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988)
> Article 6
> 1. - In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> 2. - Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

[28] As this is not possible under current state private international law.

The rules make it clear where the object and purpose of the conventions are to be found. The method rules, just as in the other UN conventions mentioned above, may be seen to add an important innovation consisting of only two words—'rules of' private international law. This is understood to allow the applying lawyers or arbitrators a wider choice of conflict rules to arrive at the applicable law. For instance, they may choose to disregard the Rome I Regulation[29] in determining the applicable law even though they would otherwise be bound by it. The expression 'rules of law' is used to denote both formal and informal so called non-state law, while the term 'law' refers to a state's law only. The national conflict of laws do, however, not currently allow the application of non-state transnational law within a national jurisdiction as governing law.[30] National law might be less specialized or simply not sufficiently neutral to be mutually acceptable and therefore not the prime choice to govern an international commercial contract. By choosing the wording in the method rules, the drafters have attempted to optimise the flexibility available within the current scope for a convention to be formally adopted at international level.

The preamble of the factoring convention reads:

> THE STATES PARTIES TO THIS CONVENTION,
> CONSCIOUS of the fact that international factoring has a significant role to play in the development of international trade,
> RECOGNISING therefore the importance of adopting uniform rules to provide a legal framework that will facilitate international factoring, while maintaining a fair balance of interests between the different parties involved in factoring transactions,
> HAVE AGREED as follows:

The preamble of the leasing convention reads:

> THE STATES PARTIES TO THIS CONVENTION,
> RECOGNISING the importance of removing certain legal impediments to the international financial leasing of equipment, while maintaining a fair balance of interests between the different parties to the transaction,
> AWARE of the need to make international financial leasing more available,
> CONSCIOUS of the fact that the rules of law governing the traditional contract of hire need to be adapted to the distinctive triangular relationship created by the financial leasing transaction,
> RECOGNISING therefore the desirability of formulating certain uniform rules relating primarily to the civil and commercial law aspects of international financial leasing,
> HAVE AGREED as follows:

Other than in the CISG both conventions expressly recognise the interests of the contracting parties rather than those of the signatory states or any visionary public policies as the purposes of the conventions.

[29] Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[30] Within the EU this is currently determined by Articles 3 and 4 Rome I Regulation.

4.3 UNCITRAL and UNIDROIT Principles and Model Laws

Where the texts are not intended to be formally adopted, the phrasing allowing non-state law into the dispute settlement process is more pronounced. This is the case in the UNCITRAL Model Law on international arbitration and the UPICC. The interpretation rules there read as follows:

> UPICC
> ARTICLE 1.6 (Interpretation and supplementation of the Principles)
> (1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.
> (2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.
>
> The UNCITRAL Model Law on international arbitration (as revised 2006)
> Article 2 A.
> International origin and general principles (As adopted by the Commission at its thirty-ninth session, in 2006)
> (1) In 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.
> (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

These two instruments will not be subject to the VCLT. Therefore, it can be assumed that elements of Art. 31 (1) VCLT have been added to the texts in order to clarify the application process. In the absence of the confines of state law, however, it is surprising that the method rules do not go further in pointing to other suitable transnational commercial law but exclusively to those general principles on which the rules are based rather than all those which might best aid the dispute settlement process. Instead, the instruments remain self-contained and self-referring.

4.4 Conclusion

When viewed together, the interpretation standards employed in the contract law conventions adopted by the United Nations and those prepared by UNIDROIT can become a rather elaborate comprehensive standard suitable to deal with transnational commercial contracts by applying uniform law. The method rules, however, appear to fall short of their potential because they do not tie in with each other beyond the actual convention they are part of nor indeed with other sources of private commercial law at transnational level. The method rules do not have any effect beyond the individual conventions to form a comprehensive set of tools in transnational commercial law and thereby creating the "New International Economic Order" mentioned in the preamble to CISG. Such an effect does not seem to be intended either as could be taken from the method rules in the UPICC and UNCITRAL Model Law where the drafters could have exercised more discretion than in the formally adopted contract law conventions. Once again, the tension between the intentions and inherent ways of state acting and the needs of private

merchants could be at the heart of this phenomenon. The new economic order is no new legal order after all. This might indicate the limits of legislating for private dealing and substantive transnational contract law by means of international conventions.

5 The Effect of Object and Purpose on the Interpretation of Tax Law Conventions

Taxation is an important factor for international trade. Outside the EU, which has developed certain shared rules on Value Added Tax (VAT)[31] and transfer pricing,[32] double taxation conventions (DTCs) are the only transnational source of law that applies to cross border transactions. DTCs are almost exclusively bilateral conventions[33] and therefore a large number of them exist. Some of them are based on the Model Tax Convention published by the Organisation for Economic Development and Co-operation (OECD), the OECD Model Convention.[34] The United Nations also offer a Model Tax Convention, the UN Model.[35] The model conventions leave room for a preamble and both recommend that

> States wishing to [insert a preamble] may follow the widespread practice of including in the title a reference to either the avoidance of double taxation or to both the avoidance of double taxation and the prevention of fiscal evasion.[36]

5.1 Interpretation Rules in DTCs

The OECD Model DTC contains an integrated interpretation rule in its Art. 3 (2) which reads:

> As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

---

[31] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, pp. 1–118.

[32] Parent Subsidiary Directive.

[33] Multilateral DTCs exist among Scandinavian countries and have been proposed by some European states to no avail so far, see Townsend (2001), p. 223.

[34] The Model gets updated on a regular basis. This chapter refers to the (penultimate) ninth version of it which is available from the OECD, "Model Tax Convention on Income and on Capital 2014 (Full Version)", at http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-2015-full-version-9789264239081-en.htm. This publication also contains a list of all DTCs in force worldwide.

[35] United Nations Model Double Taxation Convention between Developed and Developing Countries, available at http://www.un.org/esa/ffd/wp-content/uploads/2014/09/DoubleTaxation.pdf.

[36] Identical text of footnote 1 to the preamble left blank of the UN and OECD Model.

The text shows no resemblance to the wording in the above mentioned contract law conventions. No sign of an intended uniformity in application or the observance of an international character of the convention. Instead, the Model gives priority to the contracting states to take recourse to their national laws instead of seeking to establish a shared or international understanding of a term contained in the convention but "not defined therein" and "unless the context otherwise requires". Not surprisingly the practical application of the Model or the DTCs based thereon shows very little attempt to achieve any kind of uniformity or shared understanding of a term across the bilateral scope of the conventions.[37] In the same way as with the contract law conventions, the absence of a joint adjudication and lack of a 'judicial precedent' across national boundaries are the reasons for the absence of a joint standard of interpretation. Whether or not DTCs are subject to the VCLT is not straightforward. Even though many of them have been concluded before the VCLT entered into force and not all states are parties to it, it can be argued that the standard contained in Art. 31-33 VCLT applies to them by way of custom and subsequent acceptance.[38] Rather, it would take some justification to maintain an interpretation of a DTC that directly contradicts the VCLT provisions. A rather comprehensive discussion of the interpretation standard provided by the interpretation rule contained in the DTC between Germany and the UK can be seen in the *Memec* case series.[39] More modern DTC texts steer in a more promising direction. The interpretation rule in the 1991 German-Swedish DTC for instance, reads:

> Artikel 3 - Article 3 *Allgemeine Begriffsbestimmungen* (General definitions) (2) *Dieses Abkommen ist bei seiner Anwendung durch beide Vertragsstaaten übereinstimmend aus sich selbst heraus auszulegen. Ein in diesem Abkommen nicht definierter Ausdruck hat jedoch dann die Bedeutung, die ihm nach dem Recht des anwendenden Staates zukommt, wenn der Zusammenhang dies erfordert und die zuständigen Behörden sich nicht auf eine gemeinsame Auslegung geeinigt haben (Artikel 39 Absatz 3, Artikel 40 Absatz 3*).(An interpretation of this convention is to be derived from the convention itself when applied by both

[37] See Townsend (2001) for US judicial practice. A "shared understanding" seems to be generally acknowledged in US doctrine and judicial practice on the basis on a contractual conception of treaties. However, cases like *United States v. Alvarez-Machain* 504 U.S. 655 (1992) (see on this also Bederman 1994) and *National Westminster Bank, PLC v. United States* 144 Fed.Cl. 120 (1999) (*NatWest*) demonstrate how the contractual model has been taken to an extreme so that "a foreign nation's wishes in the treaty interpretation process are to be utterly ignored when they conflict with the interpretation supported by the United States government" Bederman (1994), p. 1010. In both cases the partner state was deemed to have agreed to the respective US practice by having had knowledge of it at the time of contracting, i.e. the *Ker* doctrine concerning forcible abductions and extradition agreements in *Alvarez* and the Treas. Reg. sections 1.861-8 and 1.882-5 expressly mentioned in the Technical Explanations accompanying the DTC negotiating documents in *NatWest*, see Townsend (2001), p. 242. See Lang et al. (1998) for European judicial practice in the German speaking jurisdictions.

[38] It is accepted in case law of the ICJ and scholarship that the VCLT restated existing custom in international law. See for instance *Arbitral Award of 31 July 1998 (Guinea-Bissau v Senegal),* ICJ Reports 1001, 53; *Genocide (Bosnia v Serbia),* ICJ Reports 2007, 43, 109-10; Buffard and Zemanek (1998), p. 318; Crawford (2012), p. 380.

[39] *Memec plc v Inland Revenue Commissioners (IRC)* Simons Tax Cases Ch D [1996] STC, 1336 (Chancery Division); *Memec plc v Inland Revenue Commissioners (IRC)* CA [1998] STC, 754.

> contracting states. A term which is not defined in this convention however, has the meaning which it has according to the law of the applying state if the context so requires and if the competent authorities have not reached an agreement on a joint interpretation, Art. 39 (3) and Art. 40 (3).)

The autonomous interpretation standard is incorporated in this interpretation rule, qualified by the condition that the convention be 'applied by both contracting states.' Under this newer DTC, the tax payer can also seek the correct application of the DTC (i.e. the correct taxation) regardless of a double taxation effect of a misinterpretation.[40]

The role of the object and purpose of a DTC within this interpretation rule is discussed below.

5.2 The Purpose of DTCs

Using the aforementioned method, the purpose of a convention should be found in the preamble as a starting point. The 'model preamble' is notably very brief. It is used for instance in the DTC concluded between the UK and Germany which reads:

> The United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany,
> Desiring to conclude a new Convention for the avoidance of double taxation and the prevention of fiscal evasion,
> Have agreed as follows:…

This DTC displays almost the identical text already in its title. The brevity of these points of reference are contrasted by the much more wordy Introduction to the text of the UN Model:

---

[40] Artikel 40 *Verständigung*—[direct conciliation between fiscal authorities initiated by taxpayer]

(1) *Ist eine Person der Auffassung, daß Maßnahmen eines Vertragsstaats oder beider Vertragsstaaten für sie zu einer Besteuerung führen oder führen werden, die diesem Abkommen nicht entspricht, so kann sie unbeschadet der nach dem innerstaatlichen Recht dieser Staaten vorgesehenen Rechtsbehelfe ihren Fall der zuständigen Behörde des Vertragsstaats, in dem sie ansässig ist, oder, sofern ihr Fall von Artikel 38 Absatz 1 erfaßt wird, der zuständigen Behörde des Vertragsstaats unterbreiten, dessen Staatsangehöriger sie ist.* [A person is entitled to refer his or her case to the authorities of his or her state of residence or nationality irrespective of national procedure if they think that measures taken by one or both contracting states will lead to a taxation that does not comply with this convention.]

(2) *Hält die zuständige Behörde die Einwendung für begründet und ist sie selbst nicht in der Lage, eine befriedigende Lösung herbeizuführen, so wird sie sich bemühen, den Fall durch Verständigung mit der zuständigen Behörde des anderen Vertragsstaats so zu regeln, daß eine dem Abkommen nicht entsprechende Besteuerung vermieden wird. Die Verständigungsregelung ist ungeachtet der Fristen des innerstaatlichen Rechts der Vertragsstaaten durchzuführen.* [If the competent authority considers the complaint justified… they can seek an understanding with… the other contracting state, in order to resolve the case in such a way that a taxation that does not comply with this convention is avoided]. [Note the 'negative' formulation.]

> The prevention or elimination of international double taxation—i.e., the imposition of similar taxes in two or more States on the same taxpayer in respect of the same base—whose effects are harmful to the exchange of goods and services and to the movement of capital and persons, constitutes a significant component of such a climate. Broadly, the general objectives of bilateral tax conventions may today be seen to include the full protection of taxpayers against double taxation (whether direct or indirect) and the prevention of the discouragement which taxation may provide for the free flow of international trade and investment and the transfer of technology. They also aim to prevent discrimination between taxpayers in the international field, and to provide a reasonable element of legal and fiscal certainty as a framework within which international operations can be carried on. With this background, tax treaties should contribute to the furtherance of the development aims of the developing countries. In addition, the treaties have as an objective the improvement of cooperation between taxing authorities in carrying out their duties.[41]

The UN Model thereby reveals that its aim is predominantly to regulate the taxation between developed and developing countries. This is in direct response to OECD findings published in 1965 which stated:

> the traditional tax conventions have not commended themselves to developing countries. […] the essential fact remains that tax conventions which capital-exporting countries have found to be of value to improve trade and investment among themselves and which might contribute in like ways to closer economic relations between developing and capital-exporting countries are not making sufficient contributions to that end … Existing treaties between industrialized countries sometimes require the country of residence to give up revenue. More often, however, it is the country of source which gives up revenue. Such a pattern may not be equally appropriate in treaties between developing and industrialized countries because income flows are largely from developing to industrialized countries and the revenue sacrifice would be one-sided. But there are many provisions in existing tax conventions that have a valid place in conventions between capital-exporting and developing countries too.[42]

The OECD Model itself is advertised with the following text:

> International juridical double taxation – generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods – has harmful effects on the international exchange of goods and services and cross-border movements of capital, technology and persons. In recognition of the need to remove this obstacle to the development of economic relations between countries, as well as of the importance of clarifying and standardising the fiscal situation of taxpayers who are engaged in activities in other countries, the OECD Model Tax Convention on Income and on Capital provides a means to settle on a uniform basis the most common problems that arise in the field of international juridical double taxation.[43]

Even this brief overview shows that the purpose of DTCs extends beyond those contained in their titles and preambles. The OECD Intro text explains the rationale behind avoiding double taxation which is explained as serving the tax payer and thereby contributing to a smoother functioning of "economic relations between

[41] UN Model, Introduction A. 2.

[42] 1964 report of the OECD Fiscal Committee paras 164–165 quoted after UN Model, Introduction A. 3.

[43] http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-2015-full-version-9789264239081-en.htm.

countries." In the UN Intro text, however, which interestingly relies on previous OECD work, certain details of the resulting allocation of tax revenue are criticized as disadvantageous to developing countries who typically are source countries and not countries of residence. This observation draws on the actual model which has become a world wide standard and which uses the residency status of the tax payer as the preferred and default defining factor for the determination of the tax base. The alternative, using the source of the arising income as a determinant for the tax base has been discussed vividly at the outset of the international co-operation work in this area of law.[44] The general antagonism between 'capital exporting' industrialised countries and the more dependent developing or emerging markets continues. Initiatives promoted by the OECD and G20[45] clearly prevail at present and define the parameters and standards in international taxation.

DTCs are therefore not intended to provide uniform law for international taxation. They do not provide a common standard of taxation, neither in respect of the tax base nor the rates. States cannot agree on these common standards. DTCs are also no agreements as to the distribution of the arising revenue. For the purposes of this enquiry the point of note is the discrepancy between the aims that are stated expressly in the DTCs and the aims that are actually pursued as well as of course the resulting question whether the actual content and the practice of application serves or achieves any of these aims. The question is whether the purpose and content of the conventions are in alignment and how this impacts on the application of the conventions in terms of the interpretation.

Of the many examples of inconsistencies in the interpretation of DTCs only one or two can be mentioned here. Two issues may serve to illustrate the complex picture that arises from the shortcomings of international alignment of the actual purposes of DTCs—the residency status of taxpayers and the qualification of the proceeds of partnerships.

5.2.1 Residency Status

The residency status remains the most important anchor for the determination of tax base and liability. Nevertheless, no uniform definition of this status is currently in use. States use definitions that range from nationality to 'having a permanent home available to them.' The DTCs are aspiring to provide a platform for "clarifying and standardising the fiscal situation of taxpayers" and to this end incorporate what I would term a 'DTC residency'. In the case of the above mentioned UK/Germany DTC this is Art. II (1) (h) (i)–(iii) which defines a person's residency status in four subsections of subsection (ii). This means that the ordinary residency status in the contracting states exists alongside the DTC status which in the case of the UK/Germany DTC means that the German tax payers go by the 'permanent home'

[44] Vogel (1990).

[45] Such as the OECD's "BEPS" Action Plan and the resulting multilateral conventions, see OECD (2013), see on this Heidemann (2017).

status whereas British tax payers are subject to a much more complex status based on time spent, domicile and intention to stay.[46] The OECD Convention on Mutual Administrative Assistance in Tax Matters as amended in 2010, however, has prompted the adoption of a number of national tax laws for the purpose of the exchange of tax relevant information requiring the co-operation of the tax payer which do not make this pre-existing distinction of double layered residency status or expressly refer to the DTC defined tax status. The above declared purpose of providing foreseeability for the tax payer is thereby diluted and reversed. This begs the question of course, if the interests of the tax payer are to be served at all in these conventions or those of the contracting states only. As with the above mentioned contract law conventions the fact that states agree to an international treaty in an area that is directly affecting and involving private parties but without giving them a role in the negotiation or application practice within the text of the operative part makes it unlikely for a purpose to have legal effect outside the state operated sphere. As with the contract conventions, objectives are being described which are decidedly part of public policies and state reserved areas of operation such as the 'development of economic relations' and 'settle on a uniform basis the most common problems that arise in the field of international juridical double taxation' (OECD Model) or 'tax treaties should contribute to the furtherance of the development aims of the developing countries'. In addition, the treaties have as an objective 'the improvement of cooperation between taxing authorities in carrying out their duties' (UN Model). The interests of the tax payer are described as a means to serve these aims, not as an end in itself or a guarantee given to trading and migrating individuals.[47] This is very similar to the expectations expressed in the contract law conventions. It almost insinuates that the merchants and international tax payers are at the service of the sates in order to further their interests. The question arises to what extent the nexus between the states and their citizens can get lost in this way before the damage to private trading creates exactly those harmful effects described in the above-quoted OECD Model introduction which it set out to remove in the first place.

5.2.2 Partnerships

The OECD acknowledged the difficulty of taxing partnerships across borders by way of their partnership report.[48] A specific detail of the taxation of partnerships was the subject of the *Memec* case series where an English company sought to claim tax relief in respect of trade tax paid by their German subsidiary before the British courts. They lost their case due to the silent partnership structure they had chosen

[46] The UK Guidance Notes are available at https://www.gov.uk/government/publications/rdr3-statutory-residence-test-srt.

[47] Such a guarantee would be what Tammelo described as justice in his 1969 article commenting on the drafting process of the VCLT, Tammelo (1969), see section 6 below, note 58.

[48] OECD (1999).

for their German investment which was treated as giving rise to dividends rather than business profits according to the UK/German DTC. The British judges in both instances demonstrated a meticulous method of interpretation based on *Fothergill*[49] by which they arrived at this conclusion and which included reference to respective German court decisions.[50] They also inadvertently confirmed the unfortunate fact that there is no meaningful practice of cross border judicial exchange or precedent as explained above in order to form a uniform or shared understanding of a term of the DTCs.[51] The crucial point that was missed by the judges (and in fact academia) is that Germany along with most civil law countries distinguishes 'typical' from 'atypical' silent partnerships and classes the latter category as generating business profits. The DTC would have required the respective term of silent partnership to be interpreted in the light of this discrepancy. The British judges acknowledged in the light of *Fothergill* the general necessity of giving a specifically international meaning to a term whereas there is no such acknowledgement in any German decision about the 'atypical' silent partnership. Instead, the interpretation rule of Art II of the UK/German DTC is effectively applied like a conflict rule pointing to German law. The result when seen under the aspect of the purpose of the DTC reinforces the conclusion that interpreting DTCs according to an international standard has no place outside the immediate interest of avoiding double taxation and double non-taxation. No decisions have been made in respect of a meaningful distribution of arising revenue between the contracting states by way of the DTCs and therefore no uniform standards are being supported in their application. It is clear that the maintenance of conflicting, contradictory and arbitrary taxation results and legal reasoning rather adds to than diminishes obstacles in trade on the part of the merchants. On the part of the states this practice seems to avoid conflict only thanks to the isolation they maintain in respect of the full understanding of each other's tax regimes thereby abstaining from any serious attempt to create a uniform standard of international taxation. This would have to include decisions as to the distribution of the available revenue and therefore involve mutual concessions in the way suggested by the Introduction to the UN Model Convention quoted above.

5.3 The Object of DTCs

The object of DTCs may not be as straight forward to determine as their preambles suggest. Is the object double taxation and double non-taxation or is the object the international tax payer? Or is the object multiple residency? Just as the purpose of DTCs, the object is indeterminate or debatable. The impression is that in this area of

[49] *Fothergill v Monarch Airlines* [1981] AC 251; [1980] 2 All ER 696; [1980] 3 WLR 209; [1980] 2 Lloyd's Rep 295.

[50] For details see Heidemann and Knebel (2010).

[51] Lang et al. (1998) found a very small number of reference to foreign court decisions by German courts in their analysis of cases arising under DTCs.

law or regulation, there is a fundamental lack of alignment of the object, purpose and content of the treaty, partly caused by a lack of explicitness. A lack of agreement or a reluctance to uncover disagreement is obfuscated and smoothed over by a lack of enforcement of the convention itself.[52] Considering carefully what the object of the intended regulation is and whether it is compatible with one or more other objects to be pursued in one and the same convention must be a starting point for the definition of purpose and content of a treaty if it is to be successfully applied and complied with. Attainability and viability of each component may have to be re-evaluated and placed in a realistic relationship with each other.

6 Conclusions

The above analysis shows that the starting point for a successful interpretation of public international law conventions is the determination of the object. The object delimits the purposes and objectives that appear to be attainable with the convention. Both form an important and often underestimated component of treaty interpretation as embodied in the VCLT. In the area of conventions which seek to provide substantive commercial contract law and other commercial law related infrastructure for private cross border trade the relationship between the signatory states and the object and purpose of the conventions they conclude is very complex. Not only should states ask themselves whether they are the right actors[53] to employ the respective tool for the purposes they seek to achieve but also whether the desired policies are achievable at all with the chosen instrument. The impact of a well defined or misaligned object and purpose on the interpretation and enforcement of the treaty forms an important factor for success or failure of a treaty. A lack of underlying consent or unrealistic expectations can be reasons for poorly chosen objects and purposes.[54]

In the case of contract law conventions the fact that the object, international commercial contracts—a form of acting usually not practiced by states—is employed to achieve a public policy aim (friendly economic relations between countries) which

[52] States seek to apply their national law instead, using the interpretation rule in the Model and the respective DTCs based on that as explained above, and see Townsend (2001).

[53] Tammelo, writing at the time the VCLT was being drafted by the International Law Commission, ILC, observed: "…it has become obvious that the organization of the world into States as they exist today has become increasingly obsolescent. Contemporary States are not internally organized in such a way that their governments would be sufficiently capable of responsible and efficient action in the interest of their own citizens and for the sake of mankind.", Tammelo (1969), p. 85.

[54] Another argument why the criterion 'object and purpose' may indeed be ill chosen, an opinion held by contemporary scholars and indeed drafters at the time, see Tammelo (1969), p. 81 who would have preferred 'justice' as a criterion to temper the 'plain terms rule' (see also note below), Buffard and Zemanek (1998), pp. 319–321 and Klabbers (2001), p. 306, who reports on the making of the 'object and purpose' criterion in Art. 18 VCLT in the context with the obligations of states during the time between signing, ratification and entry into force of a convention.

in turn is not normally pursued by private merchants and by way of commercial contracts creates a misalignment of object and purpose. This leads to a lackluster enforcement infrastructure where states eventually sabotage their own 'product' including the interpretation rule by disallowing a transnational commercial court and non-state governing law. The intended policy aims may not be achievable with the tool of a substantive international commercial contract law regime. This begs the question of why these aims had to be published in preambles and other material in order to justify the adoption of CISG and other conventions. The chosen tool in turn does not get the support by its creators that it would need to strive fully[55] because it may be the product of the spur of the moment where private acting was appreciated perhaps not at all as a vehicle for achieving public policies but rather as a consequence of such policies and of prior efforts to create a globalised world of trade and friendly relations, an expression of success rather than a precondition, therefore the actual aim itself. The preambles of the Ottawa conventions are an expression of this attitude. They focus on the actual object of the conventions which are two special types of cross border commercial contract. They can still not explain the role and interest of the states in agreeing to those substantive rules of contract law because the distinctive feature has to be the international character of the object which is the only reason why uniform rules are needed. This is not clear in the preambles of these conventions. Instead, they suggest that leasing and factoring contracts need optimising without giving a point of reference.[56] This gives justified reason to question the mandate of the drafting institutions. The mandate cannot be to create a transnational system of law to be imposed on international merchants and to replace national laws as an expression of trade policies or even to provide a 'better law' for the sake of it. The mandate must be to respond to the needs of international trade to rely on a specialised legal infrastructure which inevitably has to transcend national judicial boundaries in order to support the cross border activities that have already transcended these boundaries with the consent of the jurisdictions involved. While the desired legal regime would certainly be self-contained as proclaimed by UNCITRAL[57] its only justification is the international character of its object and its role as a *lex specialis* for transnational as opposed to purely domestic transactions.[58] An exception to this would be where national law lacks a suitable legal framework in the area of trade law. This does not explain the adoption of a general standard through the UN, though.

[55] CISG is still most often opted out of in international commercial contracts.

[56] The Annex—Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on International Bills of Exchange and International Promissory Notes says in its section A4.: "The United Nations Convention on International Bills of Exchange and International Promissory Notes is the result of a movement to establish a modern, self-contained international legal regime that would apply world-wide."

[57] See previous note.

[58] Such a regime ought to be employed to deliver "justice" in international relations as Tammelo put it: "The phrase 'international.., justice' in Art. 1 (1) [of the UN Charter] can be understood to mean justice between men in their international concerns, that is, men in their international roles and affected by international events." Tammelo (1969), p. 85.

In the case of tax law conventions the public policies to be achieved by way of seemingly enabling and protective tools such as the avoidance of double taxation are employed without any role to play for the international tax payer. This is because there is no genuine consent among states to share revenue. DTCs should really be agreements between two or more states to split the proceeds of international trade. It should not be up to the tax payer to guarantee the correct allocation of funds because this is a genuinely governmental role and prerogative. The DTCs are an expression of compromise rather than active co-operation. This is why enforcement is directed against the tax payer rather than against the partner state as it helps to avoid the question of fair distribution of tax revenue as suggested by the drafters of the UN Model. The limited scope and incomplete interpretation rules effectively help to self defeat the tools which were not very ardently desired in the first place but necessary concessions for fear of overburdening and stifling international trade intolerably. This explains why the objective of avoiding tax evasion (double non-taxation) serving the state is pursued in the same convention as the enabling function serving the tax payer but directly disempowering the conceding state by giving up revenue. The interplay of object and purpose reveals both the true intentions behind a convention as well as a clear path ahead. Clearly stated objects and reasonably related and achievable purposes tailored to fit the object are essential for the success of a legal tool such as a trade enhancing treaty. Some objects such as sharing revenue never get openly discussed and successfully agreed. Some purposes, despite being formally agreed, may not be fully endorsed by all contracting states but a product of compromise and strategy. If the resulting treaty can only be realised by a private party who is not directly bound by it no surprise should arise from the resulting sense of futility.

7 Outlook

The so-called top down approach in international and transnational legislation for cross border trade is clearly the preferred method among the governments of the world. This is true of the UN whose New Economic Order declared in 1974 presupposes state acting in order to achieve the public policy ends described therein and assigns the required activity to states only. It is also true for the EU where despite increased stake holder participation legislative initiatives in the area of private and commercial law take the form of administrative acts culminating in the recently withdrawn Common European Sales Law (CESL) proposal.[59] Due to the fragmented nature of the "top down approach" to international commercial law regulation on the part of state legislation, as well as the lack of attention and good will shown to the objects in relation to the purposes of this legislation, the prevailing method of providing a transnational commercial legal infrastructure will have to remain the "bottom up

[59] Proposal for a Regulation on a Common European Sales Law for the European Union COM(11)635.

method". This means that merchants will continue to rely on informal self regulation and private dispute settlement. Some parameters of state acting may have to be reviewed so that public policies can be realised with the means of private law such as equality, fairness, welfare and the principle of consent on which treaty law and its interpretation are based. One starting point for this review can be the recognition of the international character of the objects of legislation in this area. These objects require specialised autonomous transnational uniform law whether these consist of cross border transactions or migrating merchants or private parties. If this is observed, top down regulation may be successful and actually achieve the desired public policy ends as the ones proclaimed by the UN on 1 May 1974.[60] An object-based technique as proposed in this chapter would then possibly achieve justice as expressed by Tammelo in 1969:

> The phrase 'international.., justice' in Art. 1 (1) [of the UN Charter] can be understood to mean justice between men in their international concerns, that is, men in their international roles and affected by international events. This interpretation would harmonise with the requirement of international peace and security expressed in the same provision, for it appears that international conflicts can best be managed when the greatest possible regard is paid to what is due to individual human beings under the relevant criteria of justice.[61]

References

Aust A (2013) Modern treaty law and practice, 3rd edn. Cambridge University Press, Cambridge, New York

Baasch-Andersen C (2005) The uniform international sales law and the global jurisconsultorium. J Law Commerce 24:159–179

Bederman DJ (1994) Revivalist canons and treaty interpretation. UCLA Law Rev 41(4):953–1034

Buffard I, Zemanek K (1998) Object and purpose of a treaty: an enigma. Austrian Rev Int Eur Law 3

Crawford J (2012) Brownlie's principles of public international law, 8th edn. Oxford University Press, Oxford

Crnic-Grotic V (1997) Object and purpose of treaties in the Vienna Convention on the Law of Treaties. Asian Yearb Int Law 7:141–174

Ferrari F (1998) Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen. Juristenzeitung 1:9–17

Ferrari F (2007) The interaction between the United Nations Conventions on contracts for the international sale of goods and domestic remedies. Rabels Zeitschrift für ausländisches and internationales Privatrecht 71:53–71

Fredman S (2015) Foreign fads or fashions? The role of comparativism in human rights law. ICLQ 64(3):631–660

Gibney M (2007–2008) State responsibility and the object and purpose of the genocide convention. Int Stud J 4(2–3):141–150

Heidemann M (2017) Is internationalisation going too far? – Constitutional challenges of international data exchange programmes. EBLR 28(6):847–878

[60] Doc. 3201 (S-VI). Declaration on the Establishment of a New International Economic Order, available at http://www.un-documents.net/s6r3201.htm.

[61] Tammelo (1969), p. 85.

Heidemann M, Knebel A (2010) Double taxation treaties: the autonomous interpretation method in German and English Law; as demonstrated by the case of the silent partnership. Intertax 38(3):136–152

Jonas DS, Saunders TN (2010) The object and purpose of a treaty: three interpretive methods. Vanderbilt J Transnatl Law 43(3):565–610

Klabbers J (2001) How to defeat a treaty's object and purpose pending entry into force: toward manifest intent. Vanderbilt J Transnatl Law 34(2):283–332

Klabbers J (2013) International law. Cambridge University Press, Cambridge

Lang M, Mössner JM et al (1998) Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und Österreichs. Linde Verlag, Wien

Linderfalk U (2003) On the meaning of the object and purpose criterion, in the context of the Vienna Convention on the Law of Treaties, Article 19. Nordic J Int Law 72(4):429–448

OECD (1999) The application of the OECD model tax convention to partnerships. OECD Publications, Paris

OECD (2013) Action plan on base erosion and profit shifting. OECD Publishing, Paris

Roberts A (2011) Comparative international law? The role of national courts in creating and enforcing international law. ICLQ 60(1):57–92

Tammelo I (1969) Treaty interpretation and considerations of justice. Revue Belge de Droit International/Belg Rev Int Law 5(1):80–86

Townsend JA (2001) Tax treaty interpretation. Tax Lawyer 55(1):219–308

Van Alstine MP (1998) Dynamic treaty interpretation. Univ Pa Law Rev 146(3):687–794

Vogel K (1990) World wide vs source taxation of income - a review and reevaluation of arguments. In: McLure et al (eds) Influence of tax differential on international competitiveness. Proceedings of the VIIIth Munich Symposium on International Taxation. Kluwer, Deventer, Boston, pp 117 et seq