

## THE CISG AND ITS IMPACT ON NATIONAL CONTRACT LAW - GENERAL REPORT

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### INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods<sup>1</sup> (hereinafter: CISG)<sup>2</sup> is generally<sup>3</sup> considered a success,<sup>4</sup> so much so, that one commentator even hailed it as “arguably the greatest legislative achievement aimed at harmonizing private commercial law”<sup>5</sup>. What, however, is the measure of that success? Is it the number of contracting States which is indeed impressive, the CISG being in force in 70 countries<sup>6</sup> - with more countries to enter the CISG into force shortly?<sup>7</sup> Is it the percentage of world trade to which it applies, which, one must admit, is

<sup>1</sup> For the English text of the United Nations Convention on Contracts for the International Sale of Goods, see 19 International Legal Materials 668 ff. (1980). The text of the other official versions (*i.e.* Arab, Chinese, French, Russian and Spanish) can be found in: Bianca/Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention*, 1987, p. 681-806, and in: Magraw/Kathrein (eds.), *The Convention for the International Sale of Goods. A Handbook of the Basic Materials*, 2nd ed., 1990, p. 169-246.

<sup>2</sup> For a paper examining the various acronyms used for the United Nations Convention on Contracts for the International Sale of Goods in legal writing, see *Flessner/Kadner, CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11. April 1980, Zeitschrift für Europäisches Privatrecht* 1995, 347 ff.

<sup>3</sup> See, however, *Bailey, Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 Cornell International Law Journal 273 ff. (1999); *Stephan, The Futility of Unification and Harmonization in International Commercial Law*, 39 Virginia Journal of International Law 743 ff. (1999); *Walt, Novelty and the Risks of Uniform Sales Law*, 39 Virginia Journal of International Law 671 ff. (1999).

<sup>4</sup> See, most recently, *Davis, Unifying the Final Frontier: Space Industry Financing Reform*, 106 Commercial Law Journal 455, 477 (2001); *Gopalan, The Creation of International Commerical Law: Sovereignty Felled?*, 5 San Diego International Law Journal 267, 289 (2004); *Schlechtriem, Of Words and Issues – Finding Common Law Language for Common Issues*, Review of the Convention on Contracts for the International Sale of Goods (CISG) 79, 80 f. (2003-2004); *K. Sono, The Rise of Anational Contract Law in the Age of Globalization*, 75 Tulane Law Review 1185, 1185 (2001).

<sup>5</sup> *Lookofsky, Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 American Journal of Comparative Law 403, 403 (1991); see also *Barnes, Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 Louisiana Law Review 677, 678 (2005), referring to the CISG as “a monumental achievement”.

<sup>6</sup> For an up-dated list of contracting States, see the UNCITRAL website at <<http://www.uncitral.org>>.

<sup>7</sup> In Japan, the CISG will enter into force on 1<sup>st</sup> August 2009.

remarkable, since the CISG - supposedly - governs two-thirds of world trade,<sup>8</sup> if not more?<sup>9</sup> Or is it the fact that the CISG is increasingly being applied both by state courts and arbitral tribunals?

In this rapporteur's opinion, by itself none of the foregoing measures is sufficient to justify the foregoing conclusion. As regards the fact that the CISG is in force in 70 countries, for instance, it mainly bears witness to the CISG's political acceptability and says little about how it is received in those countries or about the level of awareness of the CISG's existence. In effect, there are contracting States in which there is little awareness of the CISG's existence, at least in the business community. This is true for instance in Argentina, where, despite many attempts to raise awareness about the CISG's existence, the CISG, albeit known by practicing lawyers, "is not so well known in business circles"<sup>10</sup>. Similarly, in Mexico the business community does not seem to be aware of the CISG<sup>11</sup>; in Croatia the lack of awareness is rooted even more deeply, since "the CISG caused little or no interest in the business community and among practising lawyers"<sup>12</sup>, although there is evidence to show that this situation is changing. In Greece, too, "a great number of [...] lawyers, if not the majority, are rather unaware of the Convention"<sup>13</sup>. In Israel, "in spite of the fact that the CISG is in force [there] and has been incorporated into Israeli law, it does not have much visibility and awareness among the [...] legal community"<sup>14</sup>. In New Zealand as well, "[t]he profession is largely not aware of the CISG"<sup>15</sup>; in Uruguay, too, "[s]ome practicing lawyers are aware of the CISG,

<sup>8</sup> See *Kleefeld*, Rethinking "Like a Lawyer": An Incrementalist's Proposal for First-Year Curriculum Reform, 53 *Journal of Legal Education* 254, 262 note 29 (2003); *Kritzer*, The Convention on Contracts for the International Sale of Goods: Scope, Interpretation, and Resources, 9 *International Quarterly* 203, 204 (1997); *van Alstine*, Dynamic Treaty Interpretation, 146 *University of Pennsylvania Law Review* 687, 689 (1998).

<sup>9</sup> See *Andersen*, United Kingdom, in: Ferrari (ed.), *The CISG and Its Impact on National Legal Systems*, 2008, p. 303, 303; *Friebe/Huck*, Das UN-Kaufrecht in sieben Sprachen. Einführung in eine Datenbank zur variablen und dynamischen Textrecherche von Deutsch, Englisch, Französisch, Spanisch, Italienisch, Niederländisch und Chinesisch, *Internationales Handelsrecht* 2008, 14, 14.

<sup>10</sup> *Noodt Taquela*, Argentina, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 3, 3.

<sup>11</sup> See *Veytia*, Mexico, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 231, 231.

<sup>12</sup> *Baretić/Nikšić*, Croatia, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 93, 93.

<sup>13</sup> *Zervogianni*, Greece, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 163, 166.

<sup>14</sup> *Shalev*, Israel, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 183, 184.

<sup>15</sup> *Butler*, New Zealand, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 251, 252.

particularly those who deal with these kinds of cases, but [ . . . ] there are many who are not”<sup>16</sup>.

The reasons for this lack of awareness are manifold; one obvious one relates to other – generally purely domestic – issues being more pressing and, thus, requiring more attention. This certainly is true as regards Canada, where the “arrival of the CISG [ . . . ] coincided with a number of significant developments which served to marginalize its eventual role in Canadian law [ . . . ]. Thus, the CISG did not enjoy an auspicious beginning in Canada.”<sup>17</sup>

On the other hand, no negative inference should be drawn from the fact that more than 130 countries have not become contracting States, as the reasons do not necessarily arise from opposition to the CISG. Some countries simply favour a more regional – rather than the CISG’s global – approach to the unification of sales law,<sup>18</sup> as they believe that this will benefit intra-regional commerce more.<sup>19</sup> This is true, for instance, as regards the member States of the Organization for the Harmonization of Business Law in Africa,<sup>20</sup> OHADA, only two member States of which – Gabon and Guinea – ratified the CISG.<sup>21</sup>

Other countries, such as the United Kingdom,<sup>22</sup> have not yet agreed to the CISG simply due to lack of political momentum. “With no actual opposition, there is no battle to fight, no persuasion to make. The UK[ , for instance], is

<sup>16</sup> *Fresneda de Aguirre*, Uruguay, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 333, 334.

<sup>17</sup> *McEvoy*, Canada, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 33, 37.

<sup>18</sup> For papers regarding the relationship between the CISG and regional unification efforts in the area of sales law, see, e.g., *Ferrari*, Universal and Regional Sales Law: Can they coexist?, *Uniform Law Review* 177 ff. (2003); *Sarcevic*, The CISG and Regional Unification, in: *Ferrari* (ed.), *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences*, 2003, p. 3 ff.

<sup>19</sup> On regional versus global harmonization efforts in the area of private law in general, see *Basedow*, Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report, *Uniform Law Review* 2003, 31 ff.

<sup>20</sup> For an analysis of the sales law elaborated by the Organization for the Harmonization of Business Law in Africa see *Hagge*, Das einheitliche Kaufrecht der OHADA (Organisation pour l’Harmonisation en Afrique du Droit des Affaires), 2004.

<sup>21</sup> For papers comparing the sales law of the Organization for the Harmonization of Business Law in Africa with the CISG; see, e.g., *Ferrari*, International sales law in the light of the OHBLA Uniform Act relating to general commercial law and the 1980 Vienna Sales Convention, *International Business Law Journal* 2001, 599 ff.; *Schroeter*, Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht, *Recht in Afrika* 2001, 163 ff.

<sup>22</sup> For papers on the reasons for the UK’s lack of ratification of the CISG; see, e.g., *Forte*, The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom, *26 University of Baltimore Law Review* 51 ff. (1997); *Lee*, The UN Convention on Contracts for the International Sale of Goods: OK for the UK?, *Journal of Business Law* 131 ff. (1993); *Moss*, Why the United Kingdom Has Not Ratified the CISG, *25 Journal of Law and Commerce* 483 ff. (2006); *Nicholas*, The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?, 1993.

happy, in principle, to embrace the CISG. It is where the decision requires action that the lethargic stumbling block is found. The decision to implement may well be made, but there is not sufficient interest to take this decision forward, there is no momentum behind it.”<sup>23</sup> In yet other countries, the CISG has not yet been ratified because the legislature has had much more pressing issues to address, a reason not unrelated to the one just mentioned. In Japan, for instance, “[a]fter the burst of so-called bubble economy [, the] Ministry of Justice became overcharged with urgent [matters], such as fundamental reforms of insolvency law, security law, corporate law, etc., to cope with the critical economic situation.”<sup>24</sup> Thus, it was impossible to devote any energy to the ratification of the CISG. “However, things have changed. Most of the urgent legislative tasks have been fulfilled so that the Ministry of Justice could now put sufficient energy into the accession of CISG”<sup>25</sup>; this eventually led to Japan’s accession of the CISG on 1<sup>st</sup> July 2008. In other countries, the lack of ratification simply cannot be justified. This is true, for instance, of Brazil, as evidenced by a letter from the Brazilian Ministry of Foreign Affairs where it is stated that “there are no substantial reasons that justify Brazil’s non adhesion to the CISG.”<sup>26</sup> Similarly, there appears to be no valid reason for Venezuela not to adhere to the CISG either, since the CISG appears to be perfectly in line with Venezuelan domestic law.<sup>27</sup>

As for the impressively high percentage of world trade to which the CISG - supposedly - applies, it does not constitute an appropriate measure of the CISG’s success either; rather, it is a way of pointing out how important the CISG is potentially for world trade, given its broad sphere of application. But the CISG’s potential importance is not to be confused with its real success.

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<sup>23</sup> *Andersen*, *supra* note 9, at 311.

<sup>24</sup> *Hayakawa*, Japan, in: *The CISG and Its Impact on National Legal Systems*, *supra* note 9, p. 225, 225-226.

<sup>25</sup> *Id.* at 226.

<sup>26</sup> *de Aguilar Vieira*, Brazil, in: *The CISG and Its Impact on National Legal Systems*, *supra* note 9, p. 7, 8; the truth be told, the author also refers to the fact that in Brazil the lack of ratification “is due to the lack of pressures by the legal community, which cannot draw their attention [to] problems like this, which do not have a strong political appeal”, *Id.* at 9.

<sup>27</sup> See *Madrid Martinez*, Venezuela, in: *The CISG and Its Impact on National Legal Systems*, *supra* note 9, p. 337, 337 f.

The attention devoted to the CISG both by state courts<sup>28</sup> and arbitral tribunals<sup>29</sup> appears to be a better measure of the CISG's success. Still, this is

<sup>28</sup> For recent papers discussing the judicial applications of the CISG, see, apart from the papers cited infra in notes 203 and 204, *Bonell/Liguori*, The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part I), *Uniform Law Review* 1996, 147 ff.; (Part II), *Uniform Law Review* 1996, 359 ff.; *Del Duca/Del Duca*, Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part I), 27 *UCC Code Law Journal* 331 ff. (1995); (Part II), 29 *UCC Code Law Journal* 99 ff. (1996); *Dimatteo et al.*, International Sales Law: A Critical Analysis of CISG Jurisprudence, 2005; *Ferrari*, Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, 15 *Journal of Law and Commerce* 1 ff. (1995); *Ferrari*, La vendita internazionale di beni mobili. Applicabilità ed applicazioni della Convenzione di Vienna, 2nd ed., 2006; *Flechtnner*, The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation, in: *Ferrari* (ed.), *Quo Vadis CISG?* Celebrating the 25<sup>th</sup> anniversary of the United Nations Convention on Contracts for the International Sale of Goods, 2005, p. 91 ff.; *Flechtnner*, More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity", and Reduction of Price under Article 50, 14 *Journal of Law and Commerce* 153 ff. (1995); *Huber/Kröll*, Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren 2001/2002, *Praxis des internationalen Privat- und Verfahrensrechts* 2003, 309 ff.; *Janssen*, The Application of the CISG in Dutch Courts, in: *Quo Vadis CISG?* supra this note, p. 129 ff.; *Karollus*, Judicial Interpretation and Application of the CISG in Germany 1988-1994, Review of the Convention on Contracts for the International Sale of Goods (CISG) 51 ff. (1995); *Liguori*, La Convenzione di Vienna sulla vendita internazionale di beni mobili nella pratica: un'analisi critica delle prime cento decisioni, *Foro italiano* 1996/V, 145 ff.; *Lookofsky*, CISG Case Law in Scandinavia, in: *Quo Vadis CISG?* supra this note, p. 167 ff.; *Lurger*, Überblick über die Judikaturentwicklung zu ausgewählten Fragen des CISG- Teil 1, *Internationales Handelsrecht* 2005, 177 ff.; Teil 2, *Internationales Handelsrecht* 2005, 221 ff.; *Magnus*, CISG in the German Federal Civil Court, in: *Quo Vadis CISG?* supra this note, p. 211 ff.; *Perales Viscasillas*, Spanish Case Law on the CISG, in: *Quo Vadis CISG?* supra this note, p. 235 ff.; *Piltz*, New Developments in UN Sales Law, 7 *Vindobona Journal of International Commerical Law and Arbitration* 213 ff. (2003); *Posch/Petz*, Austrian Cases on the UN Convention on Contracts for the International Sale of Goods, 6 *Vindobona Journal of International Commercial Law and Arbitration* 1 ff. (2002); *Posch/Terlitz*, The CISG before Austrian Courts, in: *Quo Vadis CISG?* supra this note, p. 263 ff.; *Posch/Terlitz*, Entscheidungen des österreichischen Obersten Gerichtshofs zur UN-Kaufrechtskonvention (CISG), *Internationales Handelsrecht* 2001, 47 ff.; *Sannini*, L'applicazione della Convenzione di Vienna sulla vendita internazionale negli Stati Uniti, 2006; *C. Thiele*, Das UN-Kaufrecht vor US-amerikanischen Gerichten, *Internationales Handelsrecht* 2002, 8 ff.; *Vazquez Lepinette*, Compraventa Internacional de Mercaderías. Una vision jurisprudencial, 2000; *Waté/Nuyts*, Le champ d'application de la Convention de Vienne sur le vente international. La théorie à l'épreuve de la pratique, *Journal du droit international* 2003, 365 ff.; *C. Witz*, L'application de la Convention de Vienne sur la vente internationale de marchandises par les juridictions françaises - Premier bilan, in: *Majoros* (ed.), *Emptio - venditio inter nationes*. *Mélanges Neumayer*, 1997, p. 425 ff.; *C. Witz*, Les premières applications jurisprudentielles de la Convention de Vienne sur la vente internationale de marchandises, in: *Ferrari* (ed.), *The Unification of International Commercial Law*. *Tilburg Lectures*, 1998, p. 159 ff.; *C. Witz*, Les premières applications jurisprudentielles du droit uniforme de la vente internationale. *Convention des Nations Unies du 11 avril 1980*, 1995; *C. Witz*, La Convention de Vienne sur la vente internationale de marchandises à l'épreuve de la jurisprudence naissante, *Dalloz Chronique* 143 ff. (1995); *Witz/Wolter*, Die neuere Rechtsprechung französischer Gerichte zum Einheitlichen UN-Kaufrecht, *Recht der internationalen Wirtschaft* 1998, 275 ff.; *Witz/Wolter*, Die ersten Entscheidungen französischer Gerichte zum Einheitlichen Kaufrecht, *Recht der internationalen Wirtschaft* 1995, 810 ff.; *Zeller*, The CISG in Australasia – An Overview, in: *Quo Vadis CISG?* supra this note, p. 293 ff.

<sup>29</sup> For papers on the CISG's application by arbitral tribunals, see, e.g., *Béraudo*, La Convention des Nations Unies sur les contrats de vente internationale de marchandises et l'arbitrage, *Bulletin de la Cour Internationale de l'Arbitrage de la CCI* 61 ff. (1994); *De Ly*, La pratique de l'arbitrage commercial international et la vente internationale, *International Business Law Journal* 465 ff. (2001); *Fisanich*, Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity, *American Review of International Arbitration* 101 ff. (1999); *Mourre*,

not conclusive either; the sole fact that a uniform law convention, such as the CISG, is being applied by courts and arbitral tribunals does not make it a success. Rather, it is also necessary that courts and arbitral tribunals apply it in a uniform manner,<sup>30</sup> i.e., in a way that allows its ultimate goal, the creation of uniformity,<sup>31</sup> to be reached. This means, among others, that courts and arbitral tribunals have to consider the practice of other jurisdictions,<sup>32</sup> i.e., "what others have already done"<sup>33</sup>. Recent surveys<sup>34</sup> as well as, for instance, the Italian country report<sup>35</sup> show that courts increasingly apply the CISG in a way that is in line with the CISG's ultimate

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Application of the Vienna International Sales Convention in Arbitration, *Bulletin de la Cour Internationale de l'Arbitrage de la CCI* 2006, 43 ff.; *Muir Watt*, L'applicabilité de la Convention des Nations Unies sur le contrat de vente international de marchandises devant l'arbitre international, *International Business Law Journal* 401 ff. (1996); *Song*, Award of Interest in Arbitration under Article 78 CISG, *Uniform Law Review* 2007, 719 ff.; *van Houtte*, The Vienna Sales Convention in ICC Arbitral Practice, *Bulletin de la Cour Internationale de l'Arbitrage de la CCI* 2000, 22 ff.

<sup>30</sup> For this measure of the CISG's success, see *Tuggey*, The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge, 21 *Texas International Law Journal* 540, 554 (1985-1986).

<sup>31</sup> It has often been pointed out that the CISG's ultimate goal is uniformity; see, e.g., *Malloy*, The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts, *Fordham International Law Journal* 662, 667 note 17 (1995).

<sup>32</sup> See *Andersen*, Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG, 2007, p. 47; *Bernstein/Lookofsky*, Understanding the CISG in Europe, 2nd ed., 2003, p. 32-33; *Flechtnar*, Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on *Zapata Hermanos Sucesores, S.A. v. Hearthsides Baking Co.*, 22 *Northwestern Journal of International Law and Business* 121, 122-123 (2002); *Graffi*, Securing Harmonized Effects of Arbitration Agreements under the New York Convention, 28 *Houston Journal of International Law* 663, 768 (2006); *Komarov*, Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1), 25 *Journal of Law and Commerce* 75, 80 (2006); *Lookofsky*, Digesting CISG Case Law: How Much Regard Should We Have?, 8 *Vindobona Journal of International Law and Arbitration* 181, 184 (2004); *Lookofsky/Flechtnar*, Nominating Manfred Forberich: The Worst Decision in 25 Years?, 9 *Vindobona Journal of International Commercial Law and Arbitration* 199, 201 (2005); *McQuillen*, The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation, 61 *University of Miami Law Review* 509, 511 (2007); *Müller/Togo*, Die Berücksichtigung der Überzeugungskraft ausländischer Präzedenzfälle bei der Auslegung des CISG. Die neuere Rechtsprechung als Vorreiter und Vorbild, *Internationales Handelsrecht* 2005, 102, 103; *Whittington*, Comment on Professor Schwenerz's Paper, 36 *Victoria University of Wellington Law Review* 809, 812 (2005).

<sup>33</sup> *Maskow*, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in: *La vendita internazionale. La Convenzione di Vienna dell'11 Aprile 1980*, 1981, p. 39, 54.

<sup>34</sup> See, e.g., *Ferrari*, Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts, in: *Andersen/Schroeter* (eds.), *Sharing International Commercial Law across National Boundaries. Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, 2008, p. 134 ff.; *Ferrari*, Do courts interpret the CISG uniformly?, in: *Quo Vadis CISG*, *supra* note 28, p. 3 ff.

<sup>35</sup> See *Torsello*, Italy, in: *The CISG and Its Impact on National Legal Systems*, *supra* note 9, p. 187, 215 ff.

goal. Divergences in the CISG's application still exist,<sup>36</sup> however, and will continue to persist for many years. The reasons range from the lack of a supreme international tribunal with the mandate to unify diverging applications by courts from the many contracting States<sup>37</sup> to the wording of the CISG, which itself constitutes a source of diverging applications, as often pointed out in legal writing.<sup>38</sup>

When referring to the CISG's success, commentators have often also referred to the CISG's impact on national legal systems.<sup>39</sup> Thus, some commentators have aptly referred to the CISG's "Austrahlungswirkung"<sup>40</sup>, defined as the CISG's effectiveness beyond its own scope, as - yet another - measure of the CISG's success.<sup>41</sup> If the CISG in fact influenced the national legal systems, this would certainly qualify as a success. This paper will examine whether the CISG really has done so and, if so, to what extent. It will mainly - albeit not exclusively - rely on the various country reports submitted to the 1<sup>st</sup> Intermediate Congress of the International Academy of Comparative Law, held in Mexico City from 13-15 November 2008, most of which are reprinted in this book.

<sup>36</sup> For overviews of the divergences referred to in the text, see, e.g., *de Lukowicz*, Divergenzen in der Rechtsprechung zum CISG. Auf dem Weg zu einer einheitlichen Auslegung und Anwendung?, 2001; *Ferrari*, Divergences in the application of the CISG's rules on non-conformity of goods, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2004, 473 ff.

<sup>37</sup> See *Bonell*, *L'interpretazione del diritto uniforme alla luce dell'art. 7 della convenzione di Vienna sulla vendita internazionale*, *Rivista di diritto civile* 1986/II, 221, 226; *Gebauer*, *Uniform Law, General Principles and Autonomous Interpretation*, *Uniform Law Review* 2000, 683, 684; *G. Schmid*, Einheitliche Anwendung von internationalem Einheitsrecht, 2004, p. 32 f.

<sup>38</sup> See *Bell*, Review of 'International Sales Law: A Critical analysis of CISG Jurisprudence', *Bar News* 105, 105 (2005/2006); *Gillette/Scott*, The Political Economy of International Sales, 25 *International Review of Law and Economics* 446, 474 ff.; *Note*, Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods, 97 *Harvard Law Review* 1984, 1999 (1984); *Tuggey*, *supra* note 30, at 554.

<sup>39</sup> See, e.g., *Magnus*, 25 Jahre UN-Kaufrecht, *infra* note 203, at 104 f.; *J. Meyer*, UN-Kaufrecht in der deutschen Anwaltspraxis, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2005, 457, 460.

<sup>40</sup> *Magnus*, 25 Jahre UN-Kaufrecht, *infra* note 203, at 105; *Ragno*, Convenzione di Vienna e diritto europeo, 2008, p. 233 and 259.

<sup>41</sup> For yet another measure of the CISG's success, see, e.g., *Gillette/Scott*, *supra* note 38, at 447, where the authors suggest that the success is to be measured on the basis of whether the rules of the CISG "do for the parties what the parties cannot as easily do for themselves."

## CISG'S IMPACT ON PRACTICING LAWYERS

### 1. Awareness of the CISG by practicing lawyers

When examining whether the CISG has an impact on a national legal system, it is vital to analyze its impact on the various players the legal profession is made of (i.e., lawyers and judges), as well on those who create (legislators) and influence (scholars) the law in a given country.

To have an impact on practicing lawyers, the CISG must be known to them. As mentioned earlier,<sup>42</sup> there are countries – such as Greece,<sup>43</sup> Israel<sup>44</sup> and New Zealand,<sup>45</sup> as well as - at least to some extent - Italy,<sup>46</sup> in which practicing lawyers are rather unaware of the CISG; consequently, in those countries the CISG can have little (positive) impact on practicing lawyers.<sup>47</sup> On the other hand, there are countries - even countries in which the CISG has not yet entered into force - in which practicing lawyers are much more aware of its existence. In Argentina, for instance, “practicing lawyers, in general, know about the existence of the CISG.”<sup>48</sup> Similarly, in Denmark “the average practicing lawyer is likely to be very much ‘aware’ of the CISG”<sup>49</sup>. In France, too, conscientious<sup>50</sup> practicing lawyers are generally aware of the CISG;<sup>51</sup> the same is true in Germany, at least for those lawyers who practice in the area of international sales law.<sup>52</sup> A survey conducted by the two drafters of the Swiss country report<sup>53</sup> shows “that an overwhelming majority of practicing lawyers in Switzerland (over 98% of participants) are

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<sup>42</sup> See supra the text accompanying notes 13-15.

<sup>43</sup> *Zervogianni*, supra note 13, at 166.

<sup>44</sup> *Shalev*, supra note 14, at 184.

<sup>45</sup> *Butler*, supra note 15, at 252.

<sup>46</sup> *Torsello*, supra note 35, at 191.

<sup>47</sup> For a similar conclusion, see *Shalev*, supra note 14, at 184, stating - as regards the situation in Israel - that “[n]ot many lawyers are aware of the CISG, and therefore it has no impact on the way they draft their briefs and memoranda or in the way they solve domestic disputes”; also *Zervogianni*, supra note 13, at 166, where the author states - in relation to the Greek situation - that “[a]s a consequence [of the weak awareness the] CISG cannot be expected to have had considerable (if any) impact neither on the contents of standard contracts forms, nor on the drafting of briefs and memoranda.”

<sup>48</sup> *Noodt Taquela*, supra note 10, at 3.

<sup>49</sup> *Lookofsky*, Denmark, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 113, 119.

<sup>50</sup> See *C. Witz*, France, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 129, 130.

<sup>51</sup> *Ibid.*

<sup>52</sup> See *M.F. Köhler*, *Das UN-Kaufrecht (CISG) und sein Anwendungsausschluss*, 2007, p. 312; *Magnus*, Germany, in: *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 143, 144 f.

<sup>53</sup> For the text of the questionnaire upon which the survey referred to in the text is based, see *The CISG and Its Impact on National Legal Systems*, supra note 9, p. 299 ff.

familiar with the CISG”<sup>54</sup>. Even in Japan, which is not yet a contracting State, practicing lawyers “who specialize in cross-border transactions are surely aware of CISG. It would be simply hard for such lawyers to do their business without having at least basic knowledge about one of the most important and successful international instruments in this field.”<sup>55</sup>

It appears that currently the most important sources through which practicing lawyers become familiar with the CISG are law schools,<sup>56</sup> since the CISG has become part of the regular law school curriculum in many countries, including China,<sup>57</sup> Croatia<sup>58</sup> and Denmark,<sup>59</sup> although not necessarily on a compulsory basis,<sup>60</sup> which limits the impact of promoting awareness of the CISG.<sup>61</sup>

There are other sources from which practicing lawyers can draw their knowledge of the CISG. Bar associations in contracting States have offered introductory courses on the CISG.<sup>62</sup> The need to obtain CLE (Continuing Legal Education) credits has also helped to increase awareness of the CISG, at least in some countries.<sup>63</sup> In Canada, however, where CLE for practicing lawyers is compulsory in most jurisdictions, “it appears that only two CLE events [regarding CISG related topics] have been presented by major CLE

<sup>54</sup> *Widmer/Hachem*, Switzerland, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 281, 287.

<sup>55</sup> *Hayakawa*, supra note 24, at 226-227.

<sup>56</sup> See *Fresnedo de Aguirre*, supra note 16, at 333; *Widmer/Hachem*, supra note 54, at 287.

<sup>57</sup> See *Han*, China, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 71, 71-72, where it is stated that “[b]ecause the CISG is now a component part of the legal system of the P.R.C., it is a natural result for it to be a component part of legal education and National Judicial Examination. In other words, students of law schools in China should have learned the CISG, and test questions on the CISG may be encountered in National Judicial Examinations. For those who want to be an eligible lawyer in China, it is now necessary to understand or even gain a mastery of rules of the CISG.”

<sup>58</sup> See *Baretić/Nikšić*, supra note 12, at 100.

<sup>59</sup> In Denmark, this has led one commentator to state that most practicing lawyers, “as part of their legal education, have read a CISG textbook, attended CISG classes, and then, on that basis, have been tested on acquired CISG-knowledge during one or more law school exams”, *Lookofsky*, supra note 49, at 119.

<sup>60</sup> See, as regards Germany, *Magnus*, supra note 52, at 145.

<sup>61</sup> See *McEvoy*, supra note 17, at 65, stating that “[i]t is readily apparent that the major impediment to achieving wide exposure to the CISG by Canadian law students is that courses in which the CISG is a logical component of study, and for which the course description specifically mentions the CISG, are optional rather than compulsory so that only a subset of students take the course.”

<sup>62</sup> See *Noodt Taquela*, supra note 10, at 3, referring to Argentina; *Lookofsky*, supra note 49, at 119, referring to Denmark; *Magnus*, supra note 52, at 145, referring to Germany; *Zervogianni*, supra note 13, at 165 note 11, referring to Greece.

See, however, as regards the Uruguayan situation, *Fresnedo de Aguirre*, supra note 16, at 333, stating that “there have been few actions, if any, in business circles or bar associations to raise awareness of the Convention being in force.”

<sup>63</sup> In this respect see, as regards Denmark, *Lookofsky*, supra note 49, at 119; as regards Italy, see *Torsello*, supra note 35, at 192.

providers in the last five to seven years (the time period varied with the memory of the organization representative).”<sup>64</sup> This highlights the lack of widespread interest in the CISG in Canada.<sup>65</sup>

Awareness of the CISG is also promoted through the publication of both commentaries and court decisions in specialized law reviews,<sup>66</sup> and - and more importantly for raising general awareness of the CISG - general law reviews.<sup>67</sup>

## **AWARENESS OF THE CISG, STANDARD CONTRACT FORMS AND EXCLUSION OF THE CISG**

As mentioned earlier,<sup>68</sup> where there is no awareness of the CISG, the CISG cannot have a positive impact on practicing lawyers; in other words, practicing lawyers that are unaware of the CISG cannot shape their standard contract forms so as to take advantage of the CISG. This does not mean, however, that the lack of familiarity with the CISG has no effect. It probably leads lawyers simply to adopt the exclusion clauses contained in many -<sup>69</sup> albeit not all -<sup>70</sup> standard contracts forms readily available on the internet or by contacting various associations. Interestingly enough, CISG exclusion clauses can be found “in the ‘terms of use’ of websites for a professional association, an organization matching volunteers with social agencies in one city, a dating or matchmaking service, and a listing service for private home sales.”<sup>71</sup> This tells much about the level of understanding of the CISG.

Lack of awareness may also lead to some surprises, such as the CISG’s application in cases where the lawyers rely on the applicability of their

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<sup>64</sup> *McEvoy*, *supra* note 17, at 66.

<sup>65</sup> *Id.* at 66, stating that “[t]he general lack of CLE sessions on the CISG confirms both the lack of interest and importance that CLE planners associate with the CISG as they identify and develop programs aimed to attract the attendance of fee-paying practising lawyers at CLE events. It is a supply/demand reaction in the CISG marketplace.”

<sup>66</sup> See, e.g., *Internationales Handelsrecht*.

<sup>67</sup> This led one commentator to even state that the CISG “can hardly be overlooked by practitioners”, *Magnus*, *supra* note 52, at 145, at least not in Germany.

<sup>68</sup> See *supra* the text accompanying note 47.

<sup>69</sup> See, e.g., *Baretić/Nikšić*, *supra* note 12, at 95 note 10; *McEvoy*, *supra* note 17, at 67; *Torsello*, *supra* note 35, at 198 note 52; *Veytia*, *supra* note 11, at 239; *Widmer/Hachem*, *supra* note 54, at 288.

<sup>70</sup> See *Lookofšky*, *supra* note 49, at 120, referring to the Nordic General Conditions (for the supply of machines and other equipment) that do not exclude the CISG, but simply refer to the law of the vendor as the applicable which includes the CISG in those countries in which it has entered into force.

<sup>71</sup> *McEvoy*, *supra* note 17, at 67.

domestic law<sup>72</sup> and, therefore, plead on the sole basis of that domestic law. In effect, the mere fact that the pleadings are based solely on a given domestic law does not *per se* lead to the exclusion of the CISG.<sup>73</sup> This is also the view held by most - albeit not all<sup>74</sup> - courts.<sup>75</sup> Pleading on the sole basis of a domestic law lead to an (implicit) exclusion of the CISG only where the parties are aware of the CISG's applicability,<sup>76</sup> or the intent to exclude the CISG can otherwise be inferred with certainty. If the parties are not aware of the CISG's applicability and argue on the sole basis of a domestic law merely because they mistakenly believe that this law is applicable, courts will nevertheless have to apply the CISG on the grounds

<sup>72</sup> See also *Rozehnalová*, Czech Republic, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 107, 108.

<sup>73</sup> See *Bazinas*, Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest, in: Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods, 2006, p. 18, 26; *Graffi*, L'applicazione della Convenzione di Vienna in alcune recenti sentenze italiane, European Legal Forum 2000/2001, 240, 241; *Grijalva/Imberg*, The Economic Impact of International Trade on San Diego and the Application of the United Nations Convention on the International Sale of Goods to San Diego/Tijuana Commercial Transactions, 35 San Diego Law Review 769, 776 (1998); *Mazzotta*, The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example, 15 Pace International Law Review 437, 442 (2003); *Piltz*, Neue Entwicklungen im UN-Kaufrecht, Neue Juristische Wochenschrift 2000, 553, 555; *Reifher*, Stillschweigender Ausschluss des UN-Kaufrechts im Prozess?, Internationales Handelsrecht 2002, 52, 57; *Rosati*, Anmerkung zu Trib. Vigevano, 12. Juli 2000, Internationales Handelsrecht 2001, 78, 80; *Schlechtried*, Aufrechnung durch den Käufer wegen Nachbesserungsaufwand - deutsches Vertragsstatut und UN-Kaufrecht, Praxis des internationalen Privat- und Verfahrensrechts 1996, 256, 256; *Spiegel*, Exclusion tacite de la Convention de Vienne par les parties et dénonciation des défauts de conformité, Recueil Dalloz-Sirey Jurisprudence 2002, 395, 395; *Wasmer*, Vertragsfreiheit im UN-Kaufrecht, 2004, p. 31 f.

<sup>74</sup> See ICC Court of Arbitration, Arbitral award n. 8453, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=459&step=FullText>: "It is also undisputed that the contract is subject to French law (art. 16 of the Contract). Both parties referred in their memorials and pleadings to the legal provisions applicable to sale contracts (art. 1582 et seq. of the French Civil Code). None of the parties referred to the UN Convention of 1980 on the International Sale of Goods (Vienna Convention) which is therefore considered as non applicable."

See also French Supreme Court, 26 June 2001, available at <http://www.cisg-france.org/decisions/2606011v.htm>.

<sup>75</sup> See Landgericht Bamberg, 23 October 2006, available at <http://cisgw3.law.pace.edu/cases/061023g1.html>; Tribunale di Padova, 25 February 2004, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html>; Landgericht Saarbrücken, 2 July 2002, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020702g1.html>; Oberlandesgericht Rostock, 10 October 2001, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011010g1.html>; Tribunale di Vigevano, 12 July 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>; Kantonsgericht Nidwalden, 3 December 1997, available at <http://cisgw3.law.pace.edu/cases/971203s1.html>; Oberlandesgericht Hamm, 9 June 1995, available at <http://cisgw3.law.pace.edu/cases/950609g1.html>; Landgericht Landshut, 5 April 1995, available at <http://cisgw3.law.pace.edu/cases/950405g1.html>.

<sup>76</sup> For a reference in case law to the need of the awareness of the CISG's applicability, see, e.g., Oberlandesgericht Linz, 23 January 2006, available at <http://cisgw3.law.pace.edu/cases/060123a3.html>.

of the principle *iura novit curia*,<sup>77</sup> provided that this principle is part of the procedural law applicable in the forum State.<sup>78</sup>

What, however, is the impact of the CISG on practicing lawyers who are aware of it? Do these lawyers model their standard contract forms in a way that allows their clients to benefit from the advantages the CISG may offer them?

Unfortunately, it appears that for the most part they do not.<sup>79</sup> In this rapporteur's opinion, this is due to the fact that the CISG is not the same as knowledge of the CISG and the way it is interpreted and applied.<sup>80</sup> The latter is required to be able to take advantage of the CISG,<sup>81</sup> for instance by using it as a contract drafting tool.<sup>82</sup> Practicing lawyers who are aware of the CISG but who do not have profound knowledge of it or of the way it works more often than not insert into their standard contract forms a clause aimed at excluding the CISG,<sup>83</sup> generally for fear of the unknown.<sup>84</sup> It is often assumed that the substance of the CISG cannot be easily grasped, because it has not yet been applied often, and, therefore, it does not offer sufficient legal certainty,<sup>85</sup> or because it allows contracting States to declare

<sup>77</sup> See *Ferrari, Art.6*, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, 4<sup>th</sup> ed., 2004, p. 123, 132 f.; *Graffi*, supra note 73, at 242; *Reifner*, supra note 73, at 57.

<sup>78</sup> See *Ferrari*, CISG rules on exclusion: Art. 6, in: *Ferrari/Flechtnner/Brand* (eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, 2004, p. 114, 131.

<sup>79</sup> See *Mozina*, Slovenia, supra this nook, p. 265, 266;

<sup>80</sup> For a similar statement, see *Magnus*, supra note 52, at 145.

<sup>81</sup> For this conclusion, see also *Mozina*, supra note 79, at 266, stating that "the mere awareness of the CISG is not sufficient for its use."

<sup>82</sup> See *Torsello*, supra note 35, at 196; for an in-depth analysis of the CISG as a drafting tool, see *Flechtnner/Brand/Walter* (eds.), *Drafting Contracts under the CISG*, 2008.

<sup>83</sup> See *Reimann*, The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 11,5 122 ff. (2007).

<sup>84</sup> For this justification of the tendency to exclude the CISG, see, e.g., *McEvoy*, supra note 17, at 69, where the following reason is given for the exclusion of the CISG in favour of a different law: it is "thought better to spell provisions out or provide for the law to be applicable to the contract specifically and for that law to be one of known and familiar commercial effect."

For similar remarks, see, as regards the situation in the United States, *Philippopoulos*, Awareness of the CISG Among American Attorneys, 40 UCC Law Journal 357 ff. (2008).

<sup>85</sup> See also *Magnus*, supra note 52, at 146, referring to *Köhler*, supra note 52, at 315, and *Meyer*, supra note 39, at 474 f., and stating that "[t]he reported main reasons for this reluctance towards the CISG are two which are interconnected: first, that the CISG is too little known. Second, doubts concerning legal certainty. It is feared that solutions under the CISG cannot be foreseen due to too many vague terms which the CISG uses." The author also adds, however, that "the view that the CISG does not guarantee sufficient legal certainty is based on prejudice. For most questions which may arise under the CISG there exists today international case law", *Id.* at 147.

See also *Reimann*, supra note 83, at 125, stating that an "important reason to opt out are the legal uncertainties, whether perceived or real, inherent in the CISG."

reservations<sup>86</sup> that make the applicable rules even more uncertain.<sup>87</sup> This is why practicing lawyers tend to avoid the CISG.<sup>88</sup> It appears that, for these lawyers, “the devil you know is better than the devil you do not know”. This argument, however, is not only unconvincing, but also misleading, as the exclusion of the CISG does not necessarily lead to the application of a domestic law with which the practicing lawyers are more familiar. The exclusion of the CISG may lead to the application of a foreign law even less familiar to the lawyers - and which may be even more disadvantageous to their clients - than the CISG. This is why the exclusion of the CISG may not be advisable<sup>89</sup> and may even - in extreme cases - lead to malpractice liability, at least in some contracting States to the CISG.<sup>90</sup>

Lawyers who contemplate excluding the CISG in their standard contract forms should be aware that the CISG is an opt-out convention, i.e., it will apply unless there is an agreement as to its exclusion.<sup>91</sup> This means that

<sup>86</sup> For a detailed analysis of the reservations that are admitted under the CISG as well as under various other uniform commercial law conventions, see *Torsello*, Reservations to international uniform commercial law conventions, *Uniform Law Review* 2000, 85 ff.

<sup>87</sup> See *Baretić/Nikšić*, *supra* note 12, at 95, stating that the CISG’s exclusion is due, among others, to the fact that its “application does not offer a sufficient level of legal certainty. As is often suggested in the literature, the CISG has been rarely applied in practice, even in countries extensively involved in international trade. As suggested, this is predominantly due to the CISG’s ambiguity and deficiency in providing for a defined structure of interpretation, which has all too often led to domestic courts interpreting the CISG’s provisions in accordance with their own domestic law, rather than in accordance with the CISG’s international character. On the other hand, the CISG permits contracting states to exclude certain parts of the CISG, thus creating uncertainty in its implementation in the sense that the court applying the CISG must be familiar with both the text of the Convention itself and the extent to which the Convention applies in a particular state. This is probably why the examined general contract forms provide for the application of the general contract law of the state in which the traders who have made them have their places of business. Obviously, the traders who have adopted these general contract forms were of the opinion that the CISG does not offer a sufficient level of legal certainty for their international transactions.”

<sup>88</sup> See also *Reimann*, *supra* note 83, at 125.

<sup>89</sup> For this conclusion, see also *Baretić/Nikšić*, *supra* note 12, at 95.

<sup>90</sup> See *Andersen*, *supra* note 9, at 305, for a brief analysis of whether a lawyer from a non-contracting State can be liable for advising an opt-out of the CISG where the CISG was a better choice for the client and for failure to nominate the CISG where it would not normally apply, and would have been a better choice.

<sup>91</sup> This has often been pointed out in case law; see, e.g., *Oberlandesgericht Linz*, 24 September 2007, available at <http://cisgw3.law.pace.edu/cases/070924a3.html>; *French Supreme Court*, 20 February 2007, available at <http://www.cisg-france.org/decisions/200207v.htm>; *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. Dist. Ct. (Minn.), 31 January 2007, available at <http://cisgw3.law.pace.edu/cases/070131u1.html>; *Swiss Supreme Court*, 20 December 2006, available at <http://cisgw3.law.pace.edu/cases/061220s1.html>; *Rechtbank Arnhem*, 28 June 2006, available at <http://cisgw3.law.pace.edu/cases/060628n1.html>; *Oberlandesgericht Köln*, 24 May 2006, available at <http://cisgw3.law.pace.edu/cases/060524g1.html>; *Oberlandesgericht Köln*, 3 April 2006, available at <http://cisgw3.law.pace.edu/cases/060403g1.html>; *Oberlandesgericht Linz*, 23 January 2006, available at <http://cisgw3.law.pace.edu/cases/060123a3.html>; *Handelsgericht Zürich*, 22 December 2005, available at <http://cisgw3.law.pace.edu/cases/051222s1.html>; *American Mint LLC v. GOSoftware, Inc.*, U.S. Dist. Ct. (M.D. Pa.), 16 August 2005, available at <http://cisgw3.law.pace.edu/cases/050816u1.html>;

those lawyers can rely on their standard contract forms and the exclusion clause therein only if their clients have more bargaining power than opposing counsel's clients.<sup>92</sup> Where they do not have that power, the CISG will apply (unless the standard contract terms of the opposing party exclude the CISG). Thus, practicing lawyers ultimately cannot avoid becoming more knowledgeable about the CISG. This is true even for the very purpose of excluding the CISG. Practicing lawyers have to become aware of the fact, for instance, that the choice of their domestic law does not by itself constitute an exclusion of the CISG. Thus, it is not sufficient to simply refer to "Croatian law",<sup>93</sup> "German law",<sup>94</sup> "Italian law"<sup>95</sup> or "Swiss Law",<sup>96</sup> to avoid the application of the CISG,<sup>97</sup> as confirmed by many court decisions<sup>98</sup> and arbitral awards.<sup>99</sup>

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Oberlandesgericht Linz, 8 August 2005, available at <http://cisgw3.law.pace.edu/cases/050808a3.html>; Landgericht Neubrandenburg, 3 August 2005, available at <http://cisgw3.law.pace.edu/cases/050803g1.html>; Austrian Supreme Court, 21 June 2005, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1047&step=FullText>; Austrian Supreme Court, 24 May 2005, available at <http://cisgw3.law.pace.edu/cases/050524a3.html>; Kantonsgericht Wallis, 21 February 2005, available at <http://cisgw3.law.pace.edu/cases/050221s1.htm>; Austrian Supreme Court, 26 January 2005, available at <http://cisgw3.law.pace.edu/cases/050126a3.html>; Tribunale di Padova, 11 January 2005, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>; Tribunale di Padova, 31 March 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova, 25 February 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

<sup>92</sup> See in this respect also *Lookafsky*, *supra* note 49, at 120, stating that "only a limited number of Danish sellers or buyers could be presumed to possess such a significant degree of bargaining power that they could convince a non-Danish contracting party to agree to the inclusion of a choice-of-law clause which designates the Danish domestic Sales Act (*Købeløben*) as the applicable law [and, thus leads to the exclusion of the CISG]."

<sup>93</sup> See *Baretić/Nikšić*, *supra* note 12, at 94.

<sup>94</sup> See Oberlandesgericht Stuttgart, 31 March 2008, *Internationales Handelsrecht* 2008, 102, 104; Oberlandesgericht Hamburg, 25 January 2008, available at <http://cisgw3.law.pace.edu/cases/080125g1.html>; Oberlandesgericht Rostock, 10 October 2001, available at <http://cisgw3.law.pace.edu/cases/011010g1.html>.

<sup>95</sup> See *Ferrari*, *supra* note 28, at 215 f.; *Torsello*, *supra* note 35, at 198-199; *contra*, see *Ad Hoc Arbitral Tribunal Florence*, 19 April 1994, available at <http://cisgw3.law.pace.edu/cases/940419i3.html>; *Tribunale di Monza*, 14 January 1993, available at <http://cisgw3.law.pace.edu/cases/930114i3.html>.

<sup>96</sup> See *Appellationsgericht Basel-Stadt*, 22 August 2003, available at <http://cisgw3.law.pace.edu/cases/030822s1.html>.

<sup>97</sup> *Contra*, see *F. Bydlinski*, *Diskussionsbeitrag*, in: *Doral* (ed.), *Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht*, 1985, p. 48, 48; *Karollus*, *Der Anwendungsbereich des UNCITRAL-Kaufrechts im Überblick*, *Juristische Schulung* 1993, 378, 381.

<sup>98</sup> For recent decisions, see Swiss Supreme Court, 17 July 2007, available at <http://cisgw3.law.pace.edu/cases/070717s1.html>; *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. Dist. Ct. (Minn.), 31 January 2007, available at <http://cisgw3.law.pace.edu/cases/070131u1.html>; *Rechtbank van Koophandel Hasselt*, 28 June 2006, available at <http://www.law.kuleuven.ac.be/iph/eng/cases/2006-06-28%20Hasselt.html>; *Rechtbank Arnhem*, 28 June 2006, available at <http://cisgw3.law.pace.edu/cases/060628n1.html>; *Hof van Beroep Antwerpen*, 24 April 2006, available at <http://cisgw3.law.pace.edu/cases/060424b1.html>; *Rechtbank van Koophandel Hasselt*, 15 February 2006, available at <http://cisgw3.law.pace.edu/cases/060215b1.html>; *Oberlandesgericht Linz*, 23 January 2006, available at <http://cisgw3.law.pace.edu/cases/060123a3.html>; *Rechtbank van*

What has been said thus far does not mean that lawyers who are very knowledgeable about the CISG do not or should not exclude the CISG.<sup>100</sup> By excluding the CISG, knowledgeable lawyers may take advantage of a law that is more favourable to their clients' interests.<sup>101</sup> This is perfectly fine, as long as the lawyers know what they are doing.

It is worth mentioning here that there are countries in which lawyers are very familiar with the CISG but do not generally exclude it.<sup>102</sup> Sometimes, this occurs because a country's domestic law is less acceptable to the opposing party than the CISG which is considered a neutral set of rules<sup>103</sup> and, therefore, easier to agree on.<sup>104</sup> This is apparently the case in China, where "it is seldom for practicing lawyers who are aware of the CISG to exclude it [...]. One reason for this is that the CISG is deemed fair for the parties of a foreign-related contract. It is easier for a foreigner to accept the CISG than to accept the Contract Law of the P.R.C."<sup>105</sup>

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Koophandel Hasselt, 14 September 2005, available at <http://www.law.kuleuven.ac.be/ipl/eng/cases/2005-09-14%20Hasselt.html>; Hof Leeuwarden, 31 August 2005, available at <http://cisgw3.law.pace.edu/cases/050831n1.html>; Oberlandesgericht Linz, 8 August 2005, available at <http://cisgw3.law.pace.edu/cases/050808a3.html>; Oberlandesgericht Linz, 23 March 2005, available at <http://cisgw3.law.pace.edu/cases/050323a3.html>; Hof van Beroep Gent, 20 October 2004, available at <http://cisgw3.law.pace.edu/cases/041020b1.html>; Oberlandesgericht Düsseldorf, 21 April 2004, available at <http://cisgw3.law.pace.edu/cases/040421g3.html>; Oberlandesgericht Düsseldorf, 23 January 2004, available at <http://cisgw3.law.pace.edu/cases/040123g1.html>; Austrian Supreme Court, 17 December 2003, available at <http://cisgw3.law.pace.edu/cases/031217a3.html>.

<sup>99</sup> See ICC Court of Arbitration, Arbitral award n. 11333, available at <http://cisgw3.law.pace.edu/cases/0213331.html>; ICC Court of Arbitration, Arbitral award n. 9187, available at <http://cisgw3.law.pace.edu/cases/999187i1.html>; Arbitral Tribunal of the Hamburg Chamber of Commerce, 21 March 1996, available at <http://cisgw3.law.pace.edu/cases/960321g1.html>.

<sup>100</sup> See also *Magnus*, supra note 52, at 147.

<sup>101</sup> For this reasoning, see also *Fresnedo de Aguirre*, supra note 16, at 334: "practicing lawyers who are aware of the CISG tend to exclude it from their clients contracts, particularly those who are giving legal advice to the seller. Perhaps that is due to the fact that when sellers or their legal advisers draft their contracts, they try to incline the balance in their favour"; for very similar statements, see *Noodt Taquela*, supra note 10, at 3; *McEvoy*, supra note 17, at 69; *Zervogianni*, supra note 13, at 166-167.

<sup>102</sup> This is true, for instance, in Denmark; see *Lookofsky*, supra note 49, at 120, stating that "[t]here does, however, seem to be considerable (direct and indirect) evidence suggesting that Danish practicing lawyers who are aware of the CISG – and there, as just indicated, many of these – do not tend to exclude it (opt out), as is sometimes otherwise suggested in legal writing (concerning lawyers outside Denmark)."

<sup>103</sup> See, e.g., *Fountoulakis*, The Parties' Choice of 'Neutral Law' in International Sales Contracts, European Journal of Law Reform 2005, 303, 314, stating that "[t]he CISG is neutral law by nature. Neither party has a particular advantage when applying it; the parties are quasi on the same 'level playing field'."

For similar statements, see *De Ly*, Opting out: some Observations on the Occasion of the CISG's 25th anniversary, in: *Quo Vadis CISG?*, supra note 28, p. 25, 36 f.; *Magnus*, supra note 52, at 147; *McNamara*, U.N. Sale of Goods Convention: Finally Coming of Age?, 32 Feb. *Colorado Lawyer* 11, 20 (2003); *Nakata*, Filanto S.p.A. v. Chilewich Intl Corp.: Sounds of Silence Bellow Forth under the CISGs International Battle of the Forms, 7 The Transnational Lawyer 141, 144 (1994).

<sup>104</sup> See also *Widmer/Hachem*, supra note 54, at 287.

<sup>105</sup> *Han*, supra note 57, at 72.

## THE CISG'S IMPACT ON MEMORANDA, BRIEFS, ETC.

The CISG, like many other international uniform commercial law conventions,<sup>106</sup> requires that in interpreting it “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.”<sup>107</sup> Many legal writers argue that to interpret the CISG with regard to its “international character” requires that the CISG be interpreted “autonomously”<sup>108</sup>, not “nationalistically”, i.e. not in light of domestic law,<sup>109</sup> despite the fact that once put in force international conventions become part of domestic law.<sup>110</sup> Consequently, one should generally<sup>111</sup> not have recourse to any domestic

<sup>106</sup> See *Ferrari*, *supra* note 34, at 135 f.

<sup>107</sup> Article 7(1) CISG; for nearly identical provisions, see Article 4(1) of the International Factoring Convention, reprinted in UNIDROIT Convention on International Factoring, reprinted in 27 International Legal Materials 943, 945 (1988); Article 6(1) of the International Financial Leasing Convention, reprinted in 27 International Legal Materials 931, 933 (1988).

<sup>108</sup> See, among others, *Audit*, *La vente internationale de marchandises*, 1991, p. 47; *Barnes*, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 *Lousiana Law Review* 677, 754 (2005); *Bisazza*, *Auslegung des Wiener UN-Kaufrechts unter Berücksichtigung ausländischer Rechtsprechung: ein amerikanisches Beispiel*, *European Legal Forum* 2004, 380, 381; *Bonell*, *Commento all'art. 7 della Convenzione di Vienna, Nuove Leggi civili commentate* 1989, 20, 21; *U.P. Gruber*, *Methoden des internationalen Einheitsrechts*, 2004, p. 80; *McMahon*, *Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2)*, 44 *Columbia Journal of Transnational Law* 992, 1000 (2006); *Melin*, *Gesetzesauslegung in den USA und in Deutschland*, 2005, p. 355; *Lookofsky*, *In Dubio Pro Convention? Some Thoughts About Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, 13 *Duke Journal of Comparative and International Law* 263, 275 (2003); *Salama*, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application*, 28 *University of Miami Inter-American Law Review* 225, 231 (2006); *Schlechtriem*, *Requirements of Application and Sphere of Applicability of the CISG*, *Victoria University of Wellington Law Review* 781, 789 (2005); *Schmid*, *supra* note 37, at 42; *Torsello*, *Common Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law*, 2004, p. 18.

<sup>109</sup> See *Honnold*, *The Sales Convention in Action - Uniform International Words: Uniform Applications?*, 8 *Journal of Law and Commerce* 207, 208 (1988), where the author states that “one threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law”; see also *Babiak*, *Defining “Fundamental Breach” under the United Nations Convention on Contracts for the International Sale of Goods*, 6 *Temple International and Comparative Law Journal* 113, 117 (1992); *Komarov*, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 *Journal of Law and Commerce* 75, 76 (2006); *Kritzer*, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, 1989, p. 109; *Schlechtriem*, *Internationales UN-Kaufrecht*, 4th ed., 2007, p. 45.

<sup>110</sup> Compare *Carbone*, *L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna, in: La vendita internazionale*, *supra* note 33, p. 61, 84; *Witz/Salger/Lorenz*, *International Einheitliches Kaufrecht*, 2000, p. 81.

<sup>111</sup> For exceptions see, in legal writing, *Ferrari*, *CISG Case Law: A New Challenge for Interpreters?*, *International Business Law Journal*, 1998, 495, 497 ff.; in case law, see *Tribunale di Padova*, 11 January

concept in order to resolve interpretive problems arising from the CISG.<sup>112</sup> On the other hand, “the need to promote uniformity in [the CISG’s] application”<sup>113</sup>, requires, as mentioned earlier,<sup>114</sup> that one consider the practice of other jurisdictions.<sup>115</sup>

Has the aforementioned obligation affected practicing lawyers? In other words, has the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application had any impact on the drafting of briefs and memoranda? Has it led lawyers to refer more often than in domestic cases to commentators and court decisions?

As the country reports clearly show, these questions have to be answered negatively. “[T]here is no empirical evidence [to show] that practising lawyers have changed the way of drafting briefs and memoranda or that they have changed the way they substantiate their arguments”<sup>116</sup>, for instance, by citing foreign sources, at least not in Argentina,<sup>117</sup> Croatia,<sup>118</sup> the Czech Republic,<sup>119</sup> Denmark,<sup>120</sup> Germany,<sup>121</sup> Greece,<sup>122</sup> Israel,<sup>123</sup> Slovenia<sup>124</sup> and

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2005, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>; Tribunale di Padova, 25 February 2004, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html>.

<sup>112</sup> See also Honnold, JO (1999) *Uniform Law for International Sales under the United Nations Convention* (3rd ed.) Kluwer Law International 89, stating that “the reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to its international character.” For a similar affirmation in case law, see Cassazione civile (Italy) 24 June 1968, Rivista di diritto internazionale privato e processuale, 1969, p. 914.

<sup>113</sup> Article 7(1) CISG.

<sup>114</sup> See supra the text accompanying notes 32 ff.

<sup>115</sup> See, apart from the commentators cited supra in notes 32 and 33, Cook, The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity, 16 Journal of Law and Commerce 257, 259 (1997); Darkey, A U.S. Court’s Interpretation of Damage Provisions Under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity, 15 Journal of Law and Commerce 139, 142 (1995); Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 Yale International Law Journal 1, 7 (1993); Patterson, United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination, 22 Stanford Journal of International Law 263, 283 (1986); Reinhart, UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über den internationalen Warenkauf, 1991, p. 30; Zeller, The UN Convention on Contracts for the International Sale of Goods: A Leap Forward Towards a Unified International Sales Laws, 12 Pace International Law Review 79, 104 (2000).

<sup>116</sup> Baretić/Nikšić, supra note 12, at 96.

<sup>117</sup> See Noodt Taquela, supra note 10, at 3.

<sup>118</sup> See Baretić/Nikšić, supra note 12, at 96.

<sup>119</sup> See Rozehnalová, supra note 72, at 109.

<sup>120</sup> See Lookofsky, supra note 49, at 120.

<sup>121</sup> See Magnus, supra note 52, at 148-149, where the author states that “[i]t is not my impression that the CISG’s entry into force has changed in any particular way the style in which practitioners draft their statements of claim or defence or plead in court. [...] Quotations of foreign CISG cases or literature unless in German are unusual.” The author then adds that “it should not be overlooked that the German

Spain.<sup>125</sup> In France, however, briefs and memoranda drafted mainly - albeit not exclusively - in larger law firms seem to resort to foreign case law and legal writing when dealing with the CISG,<sup>126</sup> while in Uruguay resort to foreign case law and legal writing seems to be the general practice, independently of the size of the law firm, and not only when dealing with the CISG.<sup>127</sup>

## THE USE OF THE CISG IN PURELY DOMESTIC CASES

As the previous chapter has clearly shown, the CISG has had virtually no impact on the style of the briefs and memoranda drafted by practicing lawyers. The next question to be looked into is whether it has had some impact on the substance of those briefs and memoranda, in particular, whether practicing lawyers use CISG solutions in purely domestic disputes to which the CISG does not apply - to corroborate the results they want to reach.

The use of solutions from international uniform commercial law conventions in purely domestic disputes is not unheard of. In Italy, for instance,<sup>128</sup> where leasing contracts are still innominate contracts,<sup>129</sup> in that no statute exists specifically governing this type of contracts,<sup>130</sup> reference has been made by practicing lawyers to the Unidroit Convention on International Financial

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commentaries on the CISG are strictly devoted to an internationally uniform interpretation of the CISG based on the international jurisprudence and literature. Thus, by citing these commentaries practitioners rely indirectly but nonetheless effectively on a uniform interpretation of the CISG," *Id.* at 149.

<sup>122</sup> See *Zervogianni*, *supra* note 13, at 166, where the author states, however, that "[i]nternational literature and case-law is taken indirectly into account, since the vast majority of legal scholars writing on CISG include foreign references in their writings."

<sup>123</sup> See *Shalev*, *supra* note 14, at 184.

<sup>124</sup> See *Mozina*, *supra* note 79, at 266.

<sup>125</sup> See *Garcia Cantero*, Spain, in: *The CISG and Its Impact on National Legal Systems*, *supra* note 9, p. 273, 274.

<sup>126</sup> See *Witz*, *supra* note 50, at 131.

<sup>127</sup> See *Fresnedo de Aguirre*, *supra* note 16, at 334, stating that "[i]t has always been a widespread use in Uruguay that practicing lawyers [...] cite to foreign legal writing and case law in most cases, particularly French, Spanish, German and Italian sources, depending on the matter. That is not exclusively when dealing with CISG or other international uniform Conventions related disputes. I do not think that the target is to complying with the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application, but to reinforce and support their arguments and interpretation of the legal texts in general."

<sup>128</sup> For remarks similar to the following ones, see *Torsello*, *supra* note 35, at 200.

<sup>129</sup> See *Bussani*, *Contratti moderni: factoring, franchising, leasing*, 2004, p. 272.

<sup>130</sup> See, e.g., *Martinek*, *Das Leasingrecht in Italien*, in: *Martinek/Stoffels/Wimmer-Leonhardt* (eds.), *Handbuch des Leasingrechts*, 2nd ed., 2008, p. 1043, 1048.

Leasing<sup>131</sup> in purely domestic disputes, even though the Convention is exclusively applicable to international leasing contracts,<sup>132</sup> i.e., to leasing contracts in which the parties have their places of business in different countries.<sup>133</sup> The lawyers argued that the Convention, in force in Italy since 1<sup>st</sup> May 1995, was to be applied by analogy. The Court of 1<sup>st</sup> Instance of Naples adopted this approach,<sup>134</sup> but in 2003, it was rejected by the Italian Supreme Court.<sup>135</sup> Nevertheless, on a later occasion, while still rejecting the aforementioned approach, the Italian Supreme Court held that the rules set forth in the Convention “although not directly applicable, may constitute a useful reference tool in the adjudication of the case.”<sup>136</sup>

In most countries, practicing lawyers do not invoke CISG rules in purely domestic disputes. This is true not only as regards contracting States, such as Argentina,<sup>137</sup> Canada,<sup>138</sup> Croatia,<sup>139</sup> the Czech Republic,<sup>140</sup> Denmark,<sup>141</sup> Greece,<sup>142</sup> Slovenia,<sup>143</sup> Spain<sup>144</sup> and Uruguay<sup>145</sup> but also - and even less surprisingly - in respect of non-contracting States such as Brazil<sup>146</sup> and Japan.<sup>147</sup>

<sup>131</sup> See Unidroit Convention on International Financial Leasing, 27 International Legal Materials 931 (1988).

<sup>132</sup> See *Dageförde*, Leasingvertrag, in: Reithmann/Martiny (ed.), Internationales Vertragsrecht, 6th ed., 2004, p. 888, 892; *de Capoa/Massironi*, La disciplina materiale uniforme del leasing, in: I nuovi contratti nella prassi civile e commerciale, vol. 11, Figure della contrattazione internazionale, 2004, p. 467, 476; *Frignani*, Convenzione Unidroit sul leasing finanziario internazionale (1988), in: Ferrari (ed.), Le convenzioni di diritto del commercio internazionale. Codice essenziale con regolamenti comunitari e note introduttive, 2nd ed., 2002, p. 151, 158; *Girsberger*, Leasing, in: Kronke/Melis/Schnyder (eds.), Handbuch Internationales Wirtschaftsrecht, 2005, p. 757, 762.

<sup>133</sup> See Article 3(1) Unidroit Convention on International Financial Leasing.

<sup>134</sup> See, e.g., Tribunale di Napoli, 29 March 2001, Diritto e giustizia 2001, 401.

<sup>135</sup> See Italian Supreme Court, 28 November 2003, Giustizia civile 2004, 1506.

<sup>136</sup> Italian Supreme Court, 16 November 2007, Giustizia civile - Massimario 2007, 11.

<sup>137</sup> See *Noodt Taquela*, *supra* note 10, at 4, where, after stating that “is not habitual that practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach”, the authors also state that “may be that this happens in some cases.”

<sup>138</sup> See *McEvoy*, *supra* note 17, at 70.

<sup>139</sup> See *Baretić/Nikšić*, *supra* note 12, at 97.

<sup>140</sup> See *Rozehnalová*, *supra* note 72, at 109.

<sup>141</sup> See *Looofosky*, *supra* note 49, at 121.

<sup>142</sup> See *Zervogianni*, *supra* note 13, at 167.

<sup>143</sup> See *Mozina*, *supra* note 79, at 267.

<sup>144</sup> See *Garcia Cantero*, *supra* note 125, at 275.

<sup>145</sup> See *Fresnedo de Aguirre*, *supra* note 16, at 334, where the author, after stating that “I could not find any case where practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach or for any other reason”, also states that “there could be some isolated case in that sense.”

<sup>146</sup> See *de Aguilar Vieira*, *supra* note 26, at 19.

<sup>147</sup> See *Hayakawa*, *supra* note 24, at 227.

As regards the reason for this lack of reference to the CISG in purely domestic disputes, it has convincingly been put suggested by the drafter of the Italian country report: “In purely domestic disputes [ . . . ], reference to the CISG seems less likely to occur [ . . . ]. Indeed, one could imagine a need to resort to the CISG only if it could provide some interpretative support and play a gap-filling role vis-à-vis the relevant domestic rules.”<sup>148</sup> This, however, “is unlikely to be the case when the transaction in question is a sales transaction, [as sales transaction, unlike leasing transactions, are in all countries] exhaustively addressed by provisions to be found in the Civil code[s or in special statutes or by] court decisions.”<sup>149</sup> Invoking the CISG in disputes involving domestic transactions, however, is not unheard of.<sup>150</sup>

The general lack of reference to the CISG in purely domestic disputes makes sense only respect of those domestic sales laws that are well established and not influenced by the CISG. To the extent domestic sales law is influenced by the CISG and is not as well established, there is no reason for the lack of reference to the CISG. This is why it is neither surprising nor in contradiction with what has been said earlier that, for instance, in China – where the new (19999 domestic Contract Law is heavily influenced by the CISG –<sup>151</sup> “practicing lawyers [sometimes] use CISG solutions in purely domestic disputes to corroborate the results they want to reach. One reason lies in that many rules of the CISG [ . . . ] have been followed by Contract Law (P.R.C.). In interpreting these rules, it is not only helpful, but also necessary, to make a reference to the interpretations of the CISG.”<sup>152</sup>

## CISG’S IMPACT ON SCHOLARS

### 1. Scholarly interest in the CISG

Whereas the CISG has had only a minor impact on the world’s practicing lawyers (at least on those who are not specialized in the field of import/exports contracts),<sup>153</sup> in many – although not all –<sup>154</sup> countries it has

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<sup>148</sup> *Torsello*, *supra* note 35, at 199.

<sup>149</sup> *Id.* at 199-200.

<sup>150</sup> *Id.* at 200 note 60

<sup>151</sup> See *Han*, *supra* note 57, at 84.

<sup>152</sup> *Id.* at 74.

<sup>153</sup> For the importance of this distinction in Germany, see *Magnus*, *supra* note 52, at 147, stating that “the reluctance towards/satisfaction with the CISG depends to a great deal on how much practitioners specialise in international sales, how much they have to do with the CISG in their daily work and how

had an enormous impact on scholars.<sup>155</sup> This is true not only in contracting States to the CISG, such as Argentina,<sup>156</sup> Croatia,<sup>157</sup> Germany<sup>158</sup> and Italy,<sup>159</sup> but also in some non-contracting States. This is not really surprising, since judges and practicing lawyers from non-contracting States will not be exposed to the CISG very often, and therefore have less incentive to become knowledgeable about the CISG, although exposure to it cannot be excluded a priori.<sup>160</sup> Scholars, on the other hand, are much more exposed to the CISG, as it has become one of the topics constantly discussed in academic circles.<sup>161</sup> That is the case, at any rate, among scholars dedicated to contract law, commercial law and private international law.<sup>162</sup> Unlike judges and practicing lawyers, scholars tend to focus on more than positive law, which - ontologically - makes them more receptive to rules that are not in force in their home country. Therefore, it is not surprising that scholars from non-contracting States have devoted much attention to the CISG.<sup>163</sup> Rather than focusing on the CISG per se, they tend to compare the CISG to their domestic law, in part “to show how important it is [for their country] to adopt the Convention”,<sup>164</sup> and in part to demonstrate that “there is no incompatibility between the text of CISG and [domestic] law”.<sup>165</sup>

One may think that it is mainly contract and commercial law specialists rather than private international law scholars who focus on the CISG, because the CISG is “merely” a substantive law convention<sup>166</sup> that does not

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much they therefore precisely know of the CISG. The more specialised they are the more advantages of the CISG they see and vice versa.”

<sup>154</sup> See *Butler*, *supra* note 15, at 252, stating that “[o]verall, there is no significant CISG scholarship in New Zealand”; *Shalev*, *supra* note 14, at 184, stating, in respect of the Israeli situation, that “[s]cholars writing about the subject are rare.”

<sup>155</sup> See *Noodl i Taquela*, *supra* note 10, at 4.

<sup>156</sup> *Ibid.*

<sup>157</sup> See *Baretić/Nikšić*, *supra* note 12, at 97.

<sup>158</sup> See *Magnus*, *supra* note 52, at 149, stating that “[i]n comparison to other countries there is a particularly high scientific interest in the CISG in Germany.”

<sup>159</sup> See *Torsello*, *supra* note 35, at 201.

<sup>160</sup> For analysis of the CISG’s applicability and, thus, the exposure of judges and practicing lawyers to it in Brazil, where the CISG has not yet entered into force, see *de Aguilar Vieira*, *supra* note 26, p. 10 ff.

<sup>161</sup> For a statement along the same lines, see *Torsello*, *supra* note 35, at 201-202, stating that “[i]n one way or another, both for CISG enthusiasts and for those who never came to consider it in positive terms, the CISG represented a milestone in legal scholarship in all countries where the Convention was adopted (including Italy), as well as in many where the Convention is still not in force.” (footnote omitted)

<sup>162</sup> See also *Hayakawa*, *supra* note 24, at 228, stating that for scholars the “CISG is an invaluable source of reflection on domestic contract law and contract law in general.”

<sup>163</sup> *Id.* at 227.

<sup>164</sup> See *de Aguilar Vieira*, *supra* note 26, at 22.

<sup>165</sup> *Id.* at 23.

<sup>166</sup> In this respect see, most recently, *Tribunale di Padova*, 25 February 2004, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html>, expressly holding that the CISG “is a uniform convention on substantive law and not one on private international law as sometimes erroneously

set forth any private international law rule.<sup>167</sup> This, however, is not true, at least not everywhere.

In Mexico, for instance, it is mostly - if at all -<sup>168</sup> private international law scholars who have analyzed the CISG.<sup>169</sup> The same can be said for both the Czech Republic<sup>170</sup> and Venezuela.<sup>171</sup> In Greece, in contrast, “[f]rom the very beginning the scholars who focused their attention on the CISG the most were those of private law, and especially civil law”,<sup>172</sup> and “the scholars of private international law who have dealt with the CISG are relatively few.”<sup>173</sup> “The strong interest of the scholars of civil law [i]n CISG [can] be attributed to the fact that the entry into force of the CISG in [ . . . ] Greece, timely coincided with the issuance of the Directive 99/44/EC on consumer sales and thus triggered a more general discussion on the reform of the Greek Civil Code in respect to the sales contract, which in fact took place in 2002.”<sup>174</sup> Similarly, in Switzerland, “[a] closer look at the authors of Swiss contributions on the CISG shows that the scholars who pay particular attention to the CISG are primarily contract law scholars. Swiss doctoral theses on the CISG are also generally supervised by contract scholars. As the Convention consists of rules of substantive law, the heightened interest of contracts scholars in the CISG seems only natural.”<sup>175</sup>

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stated”; see also Tribunale di Rimini, 26 November 2002, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/021126i3.html>, holding that the CISG is a “uniform substantive law convention”; Austrian Supreme Court, 29 June 1999, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/990629a3.html> (stating the same).

<sup>167</sup> For this statement see *Enderlein/Maskow*, International Sales Law. United Nations Convention on Contracts for the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods, 1992, p. 370; *Ferrari*, What sources of law for contracts for the international sale of goods?, *Internationales Handelsrecht* 2006, 1, 4.

<sup>168</sup> See *Veytia*, *supra* note 11, at 240-241, stating the reason why not too much attention is devoted to the CISG in Mexico: “In Mexico, as in many other countries in Latin America, professional research is considered a hobby for practitioners. [The] Mexican government has devoted efforts and resources thorough the National System for Research to encourage scholars to publish. However one of the requisites is not having a private practice, therefore, full time legal scholars rather devote their energy to other areas with wider audiences, such as constitutional law, family law, or environmental law.”

<sup>169</sup> *Ibid.* at 241.

<sup>170</sup> See *Rozehnalová*, *supra* note 72, at 109, where the author also expressly states that “scholars in the field of contract law deals with analysis of the CISG only sporadically.”

<sup>171</sup> *Madrid Martinez*, *supra* note 27, at 339.

<sup>172</sup> *Zervogianni*, *supra* note 13, at 170.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Widmer/Hachem*, *supra* note 54, at 291, where the authors also state that “several contracts scholars in Switzerland also conduct research on conflict of laws, so that a distinction between the two cannot always easily be drawn. In any case, contracts scholars working on the CISG are unlikely to have a “pure” substantive law focus.”

In Spain<sup>176</sup> as well as in Uruguay,<sup>177</sup> both private international law and commercial law scholars are paying attention to the CISG. In Brazil, the small group scholars that has focused on the CISG “is composed of experts in contract law and private international law.”<sup>178</sup> In China, international law scholars focus on the CISG as do contract law and commercial law scholars, but “the studies by international law scholars seem to be more attractive.”<sup>179</sup>

In France, it has originally been mostly private international and international commercial law scholars who have devoted their attention to the CISG; in recent years, however, this has changed and general contract law scholars, too, now focus on the CISG.<sup>180</sup> In yet other countries, it appears that the range of scholars focusing on the CISG is much larger. In Croatia, for instance, “[l]egal scholars who wrote about the CISG do not belong to any specific legal branch of private law – the CISG is a topic which has attracted the interest of scholars who otherwise research private international law, commercial law or civil law.”<sup>181</sup> In Denmark, “it does not [even] seem possible to identify a specific group of Danish [...] scholars that more than any other one has focused its attention on the CISG.”<sup>182</sup>

In Germany, where the tradition of dealing with international sales goes back to Ernst Rabel,<sup>183</sup> prior to the CISG it had been “mainly specialists of comparative law, some also of private international law”<sup>184</sup> who had shown interest in international sales law. As pointed out in the German country report,<sup>185</sup> however, after 1980, scholars of general contract law also became interested. This was due in part to the efforts to reform the German law of obligations and the new law of obligations of 2002 was heavily influenced

<sup>176</sup> See *Garcia Cantero*, *supra* note 125, at 275.

<sup>177</sup> See *Fresneda de Aguirre*, *supra* note 16, at 334.

<sup>178</sup> *de Aguilar Vieira*, *supra* note 26, at 20, where the author also states that “there is no coordination of activities between these [experts]. Many of them work independently or rarely in partnerships.”

<sup>179</sup> *Han*, *supra* note 57, at 75.

<sup>180</sup> See *Witz*, *supra* note 50, at 131 f.

<sup>181</sup> *Baretić/Nikšić*, *supra* note 12, at 97.

<sup>182</sup> *Lookofsky*, *supra* note 49, at 122-123.

<sup>183</sup> For a paper on Ernst Rabels’ impact on the international unification of sales law, see, most recently, *Rösler, Siebzig Jahre Recht des Warenaufs von Ernst Rabel, Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2006, 793 ff.

<sup>184</sup> *Magnus*, *supra* note 52, at 151.

<sup>185</sup> *Id.* at 151-152, stating that “when in 1980 the CISG was concluded also general contract law scholars became interested. The reason for this growing interest was the parallel initiative of the German government to reform the German law of obligations. A Commission for the reform of the German law of obligations was installed which in 1992 came out with the proposal to adapt the German Civil Code to the model of the CISG.<sup>42</sup> The majority of civil law scholars refused this proposal. But when the European Consumer Sales Directive had to be implemented into German law in rather short time until 2002 the Government came back to the proposal and introduced it after hot debates and with slight amendments. A side-effect was that the CISG became widely known.” (footnotes omitted)

by the CISG.<sup>186</sup> It also derived from the need to implement the European Consumer Sales Directive which is also heavily influenced by the CISG,<sup>187</sup> as the report on “the CISG’s Impact on EU Legislation”<sup>188</sup> clearly shows. As a result, “[t]oday it can be safely said that every private law scholar [in Germany] has heard of the CISG and has some knowledge of it.”<sup>189</sup>

Not only are there differences in the various countries as regards the scholars who devote their attention to the CISG, but the scholarship itself also differs. In some countries, such as Argentina,<sup>190</sup> the Czech Republic,<sup>191</sup> Germany and Uruguay,<sup>192</sup> “[t]hose scholars who devote their attention to the CISG mainly focus on the Convention in that they discuss its provisions and solutions, or comment on it, in the light of the international court practice and scholarly writing.”<sup>193</sup> In Germany, however, scholars also refer to differences between the CISG and their domestic law; “[m]ainly this is done to clarify differences and to inform about them, also to discuss their justification. Partly, it is done to enable a clearer choice whether or not the CISG should be excluded.”<sup>194</sup>

<sup>186</sup> See, e.g., *Meyer*, supra note 39, at 460.

<sup>187</sup> See *Troiano*, The exclusion of the sellers’ liability for recognizable lacks of conformity under the CISG and the new European Sales Law: The changing fortunes of a notion of variable content, in: The 1980 Uniform Sales Law, supra note 18, p., 148-149, stating that “it is well known that the drafters of this directive have extensively, if not systematically, used the CISG as their model.” For similar statements, see also *G. De Cristofaro*, Difetto di conformità al contratto e diritto del consumatore, 2000, p. 8 ff.; *Grundmann*, Europäisches Schuldvertragsrecht, 1999, p. 289; *Magnus*, Der Stand der internationalen Überlegungen. Die Verbrauchsgüterkauf-Richtlinie und das UN-Kaufrecht, in: *Grundmann/Medicus/Rolland* (eds.), Europäisches Kaufgewährleistungsrecht. Reform und Internationalisierung des deutschen Schuldrechts, 2000, p. 79, 79; *Schermaier*, Rechtsangleichung und Rechtswissenschaft im kaufrechtlichen Sachmängelrecht, in: *Schermaier* (Hrsg.), Verbraucherkauf in Europa: Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG, 2003, p. 3, 12 f. (in particular note 52); *Sandstedt*, Schwedisches Kaufrecht und die Umsetzung der Verbrauchsgüterkaufrichtlinie (Teil 1), Internationales Handelsrecht 2007, 90, 93.

<sup>188</sup> See *Troiano*, The CISG’s Impact on EU Legislation, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 345, 348 ff.

<sup>189</sup> *Magnus*, supra note 52, at 152.

<sup>190</sup> See *Noodt Taquela*, supra note 10, at 4.

<sup>191</sup> See *Rozehnalová*, supra note 72, at 109.

<sup>192</sup> See *Fresnedo de Aguirre*, supra note 16, at 335.

<sup>193</sup> *Magnus*, supra note 52, at 152.

<sup>194</sup> *Ibid.*; for papers comparing the CISG with domestic (German) law for the specific purpose of suggesting whether to opt-out of the CISG or not, see, e.g., *R. Fischer*, Vor- und Nachteile des Ausschlusses des UN-Kaufrechts aus Sicht des deutschen Exporteurs: Rechtsvergleichende Betrachtung der Verkäuferrisiken nach BGB und CISG unter Berücksichtigung jeweiliger Haftungsausschluss- und Haftungsbegrenzungsmöglichkeiten, 2008; *Regula/Kamowski*, Nochmals: UN-Kaufrecht oder BGB? Erwürungen zur Rechtswahl aufgrund einer vergleichenden Betrachtung, Internationales Handelsrecht 2004, 45 ff.; *Schillo*, UN-Kaufrecht oder BGB? – Die Qual der Wahl beim internationalen Warenkaufvertrag – Vergleichende Hinweise zur Rechtswahl beim Abschluss von Verträgen, Internationales Handelsrecht 2003, 257 ff.

In Greece, the situation is somewhat similar as, at least in part, the comparisons between the CISG and domestic law “aim mainly at pointing out the similarities between the two instruments, in order to render [the] CISG more familiar to the reader, whereas differences have been discussed from a *de lege ferenda* perspective, especially until the recent reform of the Civil Code provisions on sale.”<sup>195</sup>

In other countries the focus of publications on the CISG is completely different: In France, for instance, the main purpose behind the comparisons between the CISG and domestic law is purely pedagogical; scholars do not advocate changes of domestic sales law in light of the CISG nor do they advocate the use of CISG case law to interpret the domestic sales law.<sup>196</sup> The contrary seems to be true in Slovenia: one of the purposes informing comparisons between the CISG and Slovenian domestic law appears to be identifying issues in relation to which “national law is different from the CISG”, because in cases where these [domestic] solutions are unsound, the Convention could be used as a possible source of inspiration for a legislative reform.”<sup>197</sup>

## 2. The CISG’s impact on domestic treatises

As suggested in the previous chapter, the CISG has had an impact on scholarship in many countries, although the extent of this impact differs from country to country. It is important for the promotion of the CISG and of its ultimate goal, the creation of uniformity,<sup>198</sup> that interest in the CISG is not limited to scholars who specialize in international business law or private international law, as these areas are often considered niches not easily accessible to a wide audience. It is necessary, in other words, that the CISG be analyzed and dealt with also in more generally accessible publications, i.e., in publications that target a larger, non specialized audience, since, “as long as [the CISG] is viewed as a niche subject, it is unlikely to obtain [the]

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<sup>195</sup> *Zervogianni*, *supra* note 13, at 170.

<sup>196</sup> See *Witz*, *supra* note 50, at 134, stating that “[c]es écrits ont un objectif principalement didactique. On ne saurait donc s’attendre à ce qu’ils contiennent des plaidoyers en faveur d’une réforme du droit interne de la vente ou une interprétation jurisprudentielle du droit interne influencée par la Convention de Vienne.”

<sup>197</sup> *Mozina*, *supra* note 79, at 269.

<sup>198</sup> See *supra* the text accompanying note 31.

popular support”<sup>199</sup> it needs to be truly successful in reaching its ultimate goal.

In some countries, this is happening already. There are countries in which analyses of the CISG can be found in “mainstream” legal publications, that is, publications targeting legal professionals at large and not specifically lawyers who are specialized in international commercial law or private international law. The best example is Germany, which is not surprising in light of the history of uniform sales law there.<sup>200</sup> In Germany, “today almost every treatise on the domestic German law of obligations at least mentions the CISG. So do also the commentaries on the BGB which in Germany are particularly important for the application of the law. Not only do most of them contain a full commentary on the CISG. Often the comments also on the single provisions of the BGB on contractual obligations refer to the respective article of the CISG.”<sup>201</sup> One of the most influential commentaries on the German Commercial code also contains a commentary on the CISG.<sup>202</sup> Moreover, various overviews on CISG developments are published periodically in Germany,<sup>203</sup> one of which appears in one of the most widely read law reviews, namely *Neue Juristische Wochenschrift*.<sup>204</sup>

In other countries, treatment of the CISG is also included in commentaries that are widely used in everyday practice, but to a much lesser extent. In Italy, for instance, “commentaries [. . .] for the most part only focus on domestic law”; still, there are two exceptions. The most famous commentary on the Italian Civil code (*Commentario del Codice Civile Scialoja-Branca*), composed of more than 80 volumes, contains two volumes dedicated to the

<sup>199</sup> *Andersen*, *supra* note 9, at 307.

<sup>200</sup> See *Magnus*, *supra* note 52, at 143 and 151.

<sup>201</sup> *Id.* at 152, (footnotes omitted)

For commentaries on the German Civil code that also contain a commentary on the CISG, see Bamberger/Roth (eds.), *Kommentar zum Bürgerlichen Gesetzbuch*, vol. 3, 2nd ed., 2007; Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 4th ed. 2004; Soergel Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 13th ed., 2000; Julius von Staudinger Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, *Wiener UN-Kaufrecht* (CISG), 2005.

<sup>202</sup> See Münchener Kommentar zum Handelsgesetzbuch, vol. 6, 2nd ed., 2007.

<sup>203</sup> See, apart from the overview referred to in the next footnote, the one prepared by Professor Magnus, published in *Zeitschrift für Europäisches Privatrecht*, a most prestigious law review that, however, does not necessarily cater to mainstream lawyers, *Magnus*, 25 Jahre UN-Kaufrecht, *Zeitschrift für Europäisches Privatrecht* 2006, 86 ff.; *Magnus*, Das UN-Kaufrecht - aktuelle Entwicklungen und Rechtsprechungspraxis, *Zeitschrift für Europäisches Privatrecht* 2002, 523 ff.; *Magnus*, Wesentliche Fragen des UN-Kaufrechts, *Zeitschrift für Europäisches Privatrecht* 1999, 642 ff.; *Magnus*, Das UN-Kaufrecht: Fragen und Probleme seiner praktischen Bewährung, *Zeitschrift für Europäisches Privatrecht* 1997, 823 ff.; *Magnus*, Stand und Entwicklungen des UN-Kaufrechts, *Zeitschrift für Europäisches Privatrecht* 1995, 202 ff.; *Magnus*, Aktuelle Fragen des UN-Kaufrechts, *Zeitschrift für Europäisches Privatrecht* 1994, 79 ff.

<sup>204</sup> See *Piltz*, Neue Entwicklungen im UN-Kaufrecht, *Neue Juristische Wochenschrift* 2007, 2159 ff.; *Piltz*, Neue Entwicklungen im UN-Kaufrecht, *Neue Juristische Wochenschrift* 2005, 2126 ff.

CISG, one dealing with Articles 1-13,<sup>205</sup> one with Articles 14-24.<sup>206</sup> Also, a commentary on the laws connected to the Italian Civil code contains a comment on the CISG.<sup>207</sup> In Austria, there appears to be only one commentary on the Austrian Civil code where coverage of the CISG has been included.<sup>208</sup>

It appears that in other countries commentaries on the Civil code containing a part specifically dedicated to a comment on the CISG do not exist. This does not mean that one cannot assess the impact of the CISG on domestic legal scholarship; rather, it means that one must turn to other kinds of publications, such as treatises and textbooks on domestic law, to determine whether the CISG has had such an impact.

As regards Canada, the picture seems very clear: “Canadian treatises on contracts, regardless of whether from a common law or civil law perspective, do not include significant coverage on the CISG. Instead, Canadian treatises focus primarily, and often exclusively, on domestic contract rules.”<sup>209</sup> As regards Canadian academic texts on sales law, the situation is comparable.<sup>210</sup> In Israel<sup>211</sup> as well as in Spain<sup>212</sup> the picture does not seem to be too different. In Venezuela, treatises on domestic law do not at all refer to or analyze the CISG.<sup>213</sup>

In Croatia<sup>214</sup> and Denmark,<sup>215</sup> however, it appears that domestic treatises on both commercial contracts and contract law refer to the CISG. The same can

<sup>205</sup> See *Ferrari*, Vendita internazionale di beni mobili. Vol. 1. Art. 1-13. Ambito di applicazione. Disposizioni generali, 1994.

<sup>206</sup> See *Ferrari*, Vendita internazionale di beni mobile. Vol. 2. Art. 14.24. formazione del contratto, 2006.

<sup>207</sup> See Alpa/Zatti (eds.), Commentario breve al codice civile. Leggi complementari, vol. 1, Diritto internazionale privato – persone e famiglia – beni e proprietà – obbligazioni e contratti – responsabilità civile – lavoro e professioni, 3rd ed., 1999, p. 1443 ff.

<sup>208</sup> See Schwimann (ed.), ABGB-Praxiskommentar, vol. 4, 3rd ed., 2006, p. 1343 ff.

<sup>209</sup> See *McEvoy*, supra note 17, at 61, where the author cites several examples: “For example, J.D. McCamus, “*The Law of Contracts*” and S.M. Waddams, “*The Law of Contracts*”, both published in 2005, do not address the CISG - though it is to be expected that future editions will at least mention the CISG because of its inclusion in a more recent text, J. Swan, “*Canadian Contract Law*” published in 2006 [ . . . ]. In Québec civil law, it should similarly be expected that CISG will find its way into basic texts on the law of obligations though a leading text, “*Beaudouin et Jobin, Les Obligations* (6e éd)” refers four times to the CISG but only, for example, when discussing C.C.Q. article 1456, one of the five articles identified in the “*Commentaires du ministre de la Justice*” as at least partially inspired by the CISG.” (footnotes omitted)

<sup>210</sup> *Id.* at 61-62.

<sup>211</sup> See *Shalev*, supra note 14, at 184.

<sup>212</sup> See *Garcia Cantero*, supra note 125, at 277, stating that the CISG’s influence on treatises on civil law is rather weak.

<sup>213</sup> See *Fresnedo de Aguirre*, supra note 16, at 335.

<sup>214</sup> See *Baretić/Nikšić*, supra note 12, at 100.

<sup>215</sup> See *Lookofsky*, supra note 49, at 123.

be said as regards Switzerland, where the “CISG is also discussed in many standard treatises on Swiss domestic law, although both the precise scope of discussion and the way in which it is broached vary greatly between authors.”<sup>216</sup>

In Slovenia, “some references to the CISG can be found in treatises on contract law, above all in situations where national contract law contains identical or similar solutions as the CISG and foreign commentators are being cited, but also in cases where scholars prefer the solutions of the CISG to the ones of national law.”<sup>217</sup>

In France, the major treatises on specific contracts also analyze the CISG (albeit in broad terms).<sup>218</sup> Furthermore, in France, not unlike in Germany,<sup>219</sup> an overview on CISG case law from around the globe is periodically published - under the directorship of Claude Witz - in one of the most widely circulating generalist law reviews,<sup>220</sup> namely the *Recueil Dalloz*.<sup>221</sup> Moreover, in France (as well as in other countries, Italy among them), CISG case law is also, although not frequently, commented on both in specialized law reviews<sup>222</sup> and in more generalist law reviews, such as the *Gazette du Palais*<sup>223</sup> and *Juris Classeur Périodique*.<sup>224</sup> This certainly helps to raise awareness of the CISG among legal professionals who are specialized neither in international commercial law nor in related areas.

In the United States, the situation is not as encouraging, as only “some contracts casebooks used in U.S.-American law schools now touch on [the CISG].”<sup>225</sup>

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<sup>216</sup> *Widmer/Hachem*, *supra* note 54, at 290-291, where the authors go on to state that “[the CISG] is generally discussed in treatises on domestic contract law, either briefly or at length. In Treatises on the general part of the Swiss law of obligations, *i.e.*, that part which deals, *inter alia*, with formation and validity of contracts and delay in performance and payment (Articles 1-183 CO), comparisons between the CISG and the Swiss Code of Obligation are often drawn, albeit selectively.” (footnotes omitted)

<sup>217</sup> *Mozina*, *supra* note 79, at 269.

<sup>218</sup> See *Witz*, *supra* note 50, at 134; similarly, in Argentina, “[r]eferences to CISG can be found in works on Argentine domestic commercial contract law”, *Noodt Taquela*, *supra* note 10, at 4.

<sup>219</sup> See *supra* the text accompanying notes 203 and 204.

<sup>220</sup> See *Witz*, *supra* note 50, at 132.

<sup>221</sup> For these overviews, see *Recueil Dalloz* 1997, 1998, 1999, 2000, 2002, 2003, 2005, 2007.

<sup>222</sup> See, *e.g.*, *Revue critique de droit international privé*, *Journal du droit international*, *Revue de droit des affaires internationales*.

<sup>223</sup> See, *e.g.*, *Cytermann-Sinay*, *L’application d’office de la Convention de Vienne relative à la vente internationale de marchandises et le respect du principe du contradictoire*, *Gazette du Palais* 2003, 234 f.

<sup>224</sup> See, *e.g.*, *Missaoui*, *La validité des clauses aménageant la garantie des vices cachés dans la vente internationale de marchandises*, *Juris Classeur Périodique* 1996, 3927 f.

<sup>225</sup> *Reimann*, *supra* note 83, at 120.

### 3. The impact of scholarly writings on the CISG

As shown in the previous chapter, the CISG undoubtedly has had an impact on scholarly writings. But have these writings had any impact on legal doctrine, on practicing lawyers and/or judges? The question must be answered affirmatively.

To show to what extent CISG related scholarly writings have impacted domestic legal doctrine, it may suffice to mention two experiences. In Argentina, the “characterization of a contract as international was changed by scholars when the CISG entered into force in Argentina. Before that, private international law scholars used to consider a contract as international, when its place of execution and its place of conclusion were located in different States. This characterization was changed when the Vienna Convention entered into force in Argentina: scholars began to affirm that a contract was international when the place of business of one party is located in a different State [from that] where the place of business of the other party is located.”<sup>226</sup>

In Japan, the impact seems to be even more profound, which is surprising, considering that Japan has only very recently acceded to the Convention. Express references to or analyses of the CISG may not appear in treatises or textbooks on domestic law, but it appears that some of the CISG’s principles and rules have - through scholarship – found their way into those treatises and textbooks, as noted by the drafter of the Japanese country report, according to whom the “CISG has introduced some rules which traditional Japanese contract law did not really know. For example, we were not familiar with the concept of ‘fundamental breach of contract’, ‘obligation to mitigate loss’, ‘anticipatory breach’, ‘suspension of performance’. These new concepts were so stimulating that some of our law professors of civil law wrote various treatises introducing these ideas and tried to incorporate them, in one way or another, into our contract law.”<sup>227</sup>

As for the impact of CISG related scholarly writings on practicing lawyers, that depends, *inter alia*, on whether or not the practicing lawyers are operating in contracting States. Thus, although “scholars’ publications have an enormous impact on the daily life of Brazilian lawyers and on their

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<sup>226</sup> *Noodt Taquela*, *supra* note 10, at 5.

<sup>227</sup> *Hayakawa*, *supra* note 24, at 228.

formation”<sup>228</sup>, because Brazil is a non-contracting State, “the publications on the CISG have had very little or no impact on [practicing lawyers and] courts.”<sup>229</sup>

In contracting States, CISG related scholarly writings seem to have much more impact on practicing lawyers,<sup>230</sup> although it is not always easy to assess the extent of that impact.<sup>231</sup> For example, in some countries, including Croatia, “[l]egal practitioners [...] are not in the habit of quoting legal literature.”<sup>232</sup> Similarly, in China, “impacts of scholarly writings by Chinese scholars on legal practice [...] should be admitted, albeit it is difficult to quantitatively show them. [Still, when] there is an ambiguous meaning on an article of the CISG in legal practice, it goes without saying for a lawyer or a judge to look up relevant scholarly writings.” In Denmark, “[w]hile it would be difficult to assess the overall impact which scholarly writing devoted to the CISG had in Denmark”<sup>233</sup>, it is clear that such writing has had an impact “on Danish legal practice, in that Danish practitioners regularly cite scholarly works (primarily Danish language works) to support their arguments in court.”<sup>234</sup> In France, practicing lawyers refer in their briefs and memoranda to CISG related scholarly works; indeed, it is due to these works that practicing lawyers started to refer to foreign court decisions in support of their arguments.<sup>235</sup>

In Greece, scholarly writings are influential in legal practice and “[d]ue to the fact that CISG is new to lawyers and judges, the influence of scholarly writings can be reasonably expected to be [even] decisive, at least until there is sufficient (Greek) case-law on these issues.”<sup>236</sup>

The contrary appears to be true in Italy. Despite the availability of much scholarly writing on the CISG, such scholarship does not appear to be very

<sup>228</sup> *de Aguilar Vieira*, *supra* note 26, at 23.

<sup>229</sup> *Ibid.*

<sup>230</sup> It goes without saying that the impact of scholarly writing differs among the different contracting States; in Germany, for instance, “scholarly writing has generally a wider impact on legal practice [...] than it has in many other countries”, *Magnus*, *supra* note 52, at 152. In Uruguay, “[s]cholarly writing [...] has produced some works on the CISG, which are consulted by practicing lawyers, judges and students. They also consult foreign scholarly writing on the matter”, *Fresnedo de Aguirre*, *supra* note 16, at 335.

<sup>231</sup> For a similar statement, see, e.g., *Han*, *supra* note 57, at 76.

<sup>232</sup> *Baretić/Nikšić*, *supra* note 12, at 100, where the authors also state that “it can [nevertheless] be assumed that legal literature has done its work in promoting the CISG”, *Id.* at 101.

<sup>233</sup> *Lookofsky*, *supra* note 49, at 123.

<sup>234</sup> *Ibid.*

<sup>235</sup> See *Witz*, *supra* note 50, at 135, stating that “[l]es avocats ne manquent pas de se référer, dans leurs mémoires et plaidoiries, aux écrits de la doctrine. Grâce à la doctrine, les avocats prennent aussi le réflexe de citer à l’appui les décisions jurisprudentielles étrangères.”

<sup>236</sup> *Zervogianni*, *supra* note 13, at 171.

influential on Italian practicing lawyers; this is the case even though scholarly writing normally is influential in Italy.<sup>237</sup> “The reason for this probably lies in the decreasing attention that practicing lawyers pay to law treaties and scholarly writings, as a result of the (wrong) belief that they can get all the information they need from handier computer databases or practice-oriented commentaries.”<sup>238</sup>

In contracting States,<sup>239</sup> scholarship on the CISG has had an impact on courts.<sup>240</sup> This is not surprising, at least not in respect of those countries in which courts generally resort to scholarly writing. That would include Switzerland,<sup>241</sup> where CISG-related scholarly publications are very numerous and can easily be accessed by courts hearing CISG disputes.<sup>242</sup> In some countries, such as Austria, Germany and Switzerland, it is sufficient to read a few court decisions to realize how important scholarly writing is. Reading Italian court decisions, however, give the impression that in Italy scholarly writing has no influence at all, since no scholars are ever cited. This, however, is not due to legal writer’s lack of influence, or to the ignorance of judges, but rather to the fact that courts are by statute prohibited from citing scholars.<sup>243</sup> “Indeed, a court decision may refer to the

<sup>237</sup> *Torsello*, supra note 35, at 207, stating that the “considerable attention devoted by legal scholars [to the CISG] has not, in turn, resulted in the spreading of a comparable interest in (and a comparable acquaintance with) the CISG by practicing lawyers and courts. As a matter of fact, although in theory - as Italy is a civil law jurisdiction - scholarly writing is expected to be influential in practice, in the area at hand, this appears to be the case only to a very limited extent.”

<sup>238</sup> *Ibid.*

<sup>239</sup> Unsurprisingly, in the courts of non-contracting States, CISG related scholarly writing has very little impact; see, e.g., *de Aguilar Vieira*, supra note 26, at 23, stating that “the publications on the CISG have had very little or no impact on Brazilian [...] courts until the present.”

<sup>240</sup> See, e.g., the Greek country report, where it is stated that “[d]ue to the fact that CISG is new to lawyers and judges, the influence of scholarly writings can be reasonably expected to be decisive”, *Zervogianni*, supra note 13, at 171.

<sup>241</sup> See, e.g., *Widmer/Hachem*, supra note 54, at 293, stating, “[w]ith regard to scholarly impact on court decisions, [that] it is important to remember that in Switzerland (as indeed in most civil law jurisdictions), courts in their decisions refer not only to case law, but also cite extensively to scholarly writings. These citations are not limited to contributions which support the court’s reasoning; rather, they also comprise texts that argue the opposite position. Scholarly contributions thus play an important part in helping to adjust the CISG to new developments in international trade and in supporting courts to strive for a correct application of the Convention.”

<sup>242</sup> For this reasoning, see *Magnus*, supra note 52, at 153, stating that “German scholarly writing on the CISG and on its predecessor, the Hague Uniform Sales Law, influenced first the courts. Since the Hague Law and the Vienna Law was ‘new’ law that differed at least in its structure and style from German domestic law the courts in particular when seized for the first time with the new law welcomed any help for the interpretation of the uniform sales law offered by scholarly writing. And the Federal Supreme Court when finally deciding on CISG-problems tends generally to follow the view on the interpretation of a specific CISG-provision which already prevails in scholarly writing.”

<sup>243</sup> This has been completely overlooked by *Sant’Elia*, available at , as evidenced by the fact that when commenting on an Italian court decisions that cited 40 foreign courts decisions, the author states that “”.

‘prevailing opinion’ in scholarly writing, to the ‘best opinion’, to the ‘opinion to be shared by the court’. Under no circumstances, however, may the court identify the scholars referred to. This is likely to emphasize the divide between those (few) who already possess the knowledge about the scholarly opinion referred to by the court and those (many) who are not in the position to recognize the citation and to fully understand the reasons and the implications of the court’s reference. As a result, court decisions, which nowadays (thanks to computerized database of case-law) are the most effective vehicle for the spreading of legal information, are prevented from transferring the pieces of information regarding the identity of the scholars who have in-depth analyzed a specific issue and who have inspired the decision adopted by the court.”<sup>244</sup>

#### 4. The CISG and Interconventional Interpretation

As mentioned earlier,<sup>245</sup> there are various measures of the CISG’s success. It is here suggested, that one such measure is the CISG’s use by scholars in interpreting other international uniform law instruments. If this were to occur, it could be compared to an implicit acknowledgement of the CISG’s role as an “indispensable point of reference”,<sup>246</sup> and, thus, of its success. In the last few years, this “interconventional interpretation”<sup>247</sup> has been advocated by various commentators.<sup>248</sup> This systematic approach to the interpretation of international uniform law instruments has the advantage of making the unification of law process easier: it limits the number of autonomous concepts that must be dealt with simply by obviating the need to create different autonomous concepts for each international uniform law instrument.<sup>249</sup> This prepares the ground for a more coherent unification of the law<sup>250</sup> that could replace the piecemeal unification one confronts today.

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<sup>244</sup> *Torsello*, supra note 35, at 208.

<sup>245</sup> See supra the text accompanying notes 6 ff. and 41.

<sup>246</sup> *Torsello*, supra note 35, at 209.

<sup>247</sup> *Magnus*, supra note 52, at 154.

<sup>248</sup> See, e.g., *Ferrari*, *I rapporti tra le convenzioni diritto materiale uniforme in materia contrattuale e la necessità di un’interpretazione interconvenzionale*, *Rivista di diritto internazionale privato e processuale* 2000, 669 ff.; *Ferrari*, *Uniform Law Review* 2000, 69 ff.; *Magnus*, *Konventionsübergreifende Interpretation internationaler Staatsverträge privatrechtlichen Inhalts*, in: Basedow et al. (eds.), *Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht*, 2001, p. 571 ff.; *Torsello*, supra note 108, at 271 ff.

<sup>249</sup> It may be appropriate to point out that the suggestion made in the text should operate independently from the question of whether the international uniform law instruments are drafted by one

In this rapporteur's opinion, the CISG should be used as a starting point for interconventional interpretation. This is justified, *inter alia*, by the CISG's role as paradigm for international unification efforts<sup>251</sup> - a role that has been - implicitly - acknowledged by various international legislators when they used the CISG as a model for their unification efforts. The drafters of the Unidroit Convention on International Factoring<sup>252</sup> for example, have used the CISG when they were elaborating<sup>253</sup> and discussing<sup>254</sup> that Convention.<sup>255</sup> Indeed, the relationship between the CISG and the Unidroit Convention on International Factoring is so close that one commentator dubbed the latter Convention an "annex" of the CISG.<sup>256</sup>

Scholars, furthermore, have suggested resorting to interpretations of the CISG in respect of not only the aforementioned Unidroit Convention on International Factoring,<sup>257</sup> but also the Unidroit Convention on International Financial Leasing<sup>258</sup> and the new Uncitral Convention on the Assignment of Receivables in International Trade,<sup>259</sup> as these conventions have also been influenced by the CISG.<sup>260</sup> This is not surprising since these international commercial law conventions have the same goals as the CISG and their rules of interpretation also are identical to those of the CISG. It may be more

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and the same agency or body; *contra Diedrich*, Autonome Auslegung von internationalem Einheitsrecht, 1994, p. 69.

<sup>250</sup> See *Ferrari*, How to create one uniform law, 5 Vindobona Journal of International commercial Arbitration 3 ff. (2000).

<sup>251</sup> See also *Herrmann*, The Future of Trade Law Unification, Internationales Handelsrecht 2001, 6, 8.

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<sup>253</sup> See Explanatory Report on the Draft Convention on International Factoring prepared by the UNIDROIT Secretariat, in: 1 Diplomatic Conference for the Adoption of the Draft UNIDROIT Conventions on International Factoring and International Financial Leasing. Acts and Proceedings, 1991, p. 88-89.

<sup>254</sup> See *Basedow*, Internationales Factoring zwischen Kollisionsrecht und UNIDROIT-Konvention, Zeitschrift für Europäisches Privatrecht 1997, 613, 629.

<sup>255</sup> See also *Ferrari*, Il factoring internazionale, 1999, p. 15.

<sup>256</sup> *Basedow*, *supa* note 254, at 629; for a reference to the Unidroit Convention on International Factoring being an "offspring" of the CISG, see, e.g., *Bussani*, Contratti moderni. Factoring. Franchising. Leasing, 2nd ed., 2004, p. 148 note 352; *De Nova*, Il progetto UNIDROIT sul factoring internazionale, Diritto del commercio internazionale 1987, 716, 716.

<sup>257</sup> For authors advocating resort to CISG concepts in interpreting the Unidroit Convention on International Factoring, see, apart from the authors cited *supra* in notes 255 and 256, see *Ferrari*, Art. 4 FactÜ, in: Münchener Kommentar zum Handelsgesetzbuch, vol. 5, Recht des Zahlungsverkehrs, Effektengeschäft, Depotgeschäft, Ottawa Übereinkommen über internationales Factoring, 2001, p. 1605, 1611 f.; *Mankowski*, Art. 4 FactÜ, in: *Ferrari* et al. (eds.), Internationales Vertragsrecht, 2007, p. 1055, 1056 f.

<sup>258</sup> See *Frignani*, Convenzione Unidroit sul leasing finanziario internazionale (1988), in: Le convenzioni di diritto del commercio internazionale, *supra* note 132, p. 151, 156.

<sup>259</sup> See Uncitral Convention on the Assignment of Receivables in International Trade, 41 International Legal Materials 776 (2002).

<sup>260</sup> See *Rudolf*, Einheitsrecht für internationale Forderungsabtretungen, 2006, p. 40 f.

surprising that scholars have also proposed to interpret uniform law instruments of a different kind in light of the CISG, specifically the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels 1 Regulation).<sup>261</sup> Although this approach has been criticized,<sup>262</sup> on the grounds that the Brussels 1 Regulation constitutes a set of rules on international civil procedure and therefore should not be interpreted in light of a set of uniform substantive law rules, more and more authors favour this kind of approach.<sup>263</sup> The justification for this is rather convincing: although the Brussels 1 Regulation focuses on international civil procedure, there are instances where the heads of jurisdiction it sets forth refer to substantive law concepts, such as “sale of goods”, which it does not itself define.<sup>264</sup> What better set of - autonomous – rules is there than the CISG<sup>265</sup> to be used as a reference for interpreting - in an autonomous way, as required by the Brussels 1 Regulation -<sup>266</sup> this substantive concept? There is none, which is why recourse to the CISG has often been advocated.<sup>267</sup>

Thus, it is clear that scholars - mainly, although not exclusively,<sup>268</sup> from Germany and Italy -<sup>269</sup> have suggested resorting to the CISG to interpret

<sup>261</sup> See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 12, of 16 January 2001, p. 1 ff.; Commission Regulation (EC) No 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 334, of 10 November 2004, p. 3 ff.; Commission Regulation (EC) No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 381, of 28 December 2004, p. 10 ff.

<sup>262</sup> For a criticism, see, e.g., Tribunale di Rovereto, 28 August 2004, available at <http://www.cisg-online.ch/cisg/urteile/902.pdf>.

<sup>263</sup> See, e.g., *Ragno*, Forum destinatae solutionis e Regolamento (CE) N. 44 del 2001: Alcuni spunti innovativi dalla giurisprudenza di merito, *Giurisprudenza di merito* 2006, 1413, 1427 ff.; *Schlosser*, EU-Zivilprozessrecht: EuGVVO, EuEheVO, AVAG, HZÜ, EuZVO, HBÜ, EuBVO; Kommentar, 2nd ed., 2003, p. 73.

<sup>264</sup> See *Ferrari*, L’interpretazione autonoma del Regolamento CE 44/2001 e, in particolare, del concetto di „luogo di adempimento dell’obbligazione“ di cui all’art. 5, n. 1, lett. b, *Giurisprudenza italiana* 2006, 1016, 1022; *Magnus*, Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO, *Internationales Handelsrecht* 2002, 45, 47.

<sup>265</sup> It has often been stated that the CISG constitutes a set of autonomous rules; see, e.g.,

<sup>266</sup> See *Ferrari*, *supra* note 264, at 1022; *Piltz*, Gerichtsstand des Erfüllungsortes in UN-Kaufverträgen, *Internationales Handelsrecht* 2006, 53, 55; in case law, see Oberlandesgericht Karlsruhe, 12 June 2008, available at <http://cisgw3.law.pace.edu/cases/080612g1.html>.

<sup>267</sup> See, e.g., *Ferrari*, Remarks on the autonomous interpretation of the Brussels 1 Regulation, in particular of the concept of “place of delivery” under Article 5(1)(b), and the Vienna Sales Convention (on the occasion of a recent Italian court decision), *International Business Law Journal*, 2007, 83, 91 ff.; *Torsello*, *supra* note 35, at 209.

<sup>268</sup> See, in respect of the situation in Japan, *Hayakawa*, *supra* note 24, at 229, stating that “[s]cholars who are interested in CISG are usually interested in other uniform law instruments as well. Thus such scholars tend to make use of reflections on CISG in discussing other uniform law instruments.”

other uniform law instruments, thus making the CISG a success beyond its scope.

## CISG'S IMPACT ON COURTS

### 1. The CISG's impact on the style of court decisions

As mentioned in the introductory chapter,<sup>270</sup> courts increasingly apply the CISG. In this respect it may suffice to recall that whereas in 1995 merely one hundred and fifty decisions of the CISG could be counted<sup>271</sup> and 444<sup>272</sup> and 555<sup>273</sup> in 1997 and 1999 respectively, today more than 2100 decisions on the CISG are known.<sup>274</sup> In this rapporteur's opinion, the number of decisions by itself cannot, however, constitute a measure of the CISG's success, as no inference can be drawn from that number as regards, for instance, the quality of the decisions - in terms, for example, of their compliance with the mandate set forth in Article 7(1) CISG, pursuant to which in interpreting the CISG "regard is to be had to its international character and to the need to promote uniformity in its application".<sup>275</sup>

<sup>269</sup> It should be mentioned that there are various countries in which it appears that the CISG has not been used to interpret other uniform law instruments; this is true, for instance, in Argentina (see *Noodt Taquela*, *supra* note 10, at 5); the same can be said as regards the Czech Republic (see *Rozehnalová*, *supra* note 72, at 110) as well as France (see *Witz*, *supra* note 50, at 135 f.) and Slovenia (see *Mozina*, *supra* note 79, at 270). In Denmark, "[t]here seem to have been few instances, if any, where Danish scholars have used interpretations of the CISG to interpret other uniform law instruments", *Lookofsky*, *supra* note 49, at 123.

<sup>270</sup> See *supra* the text accompanying notes 28 f.

<sup>271</sup> For a complete list of the first hundred and fifty applications see *Will*, International Sales Law under CISG. The UN Convention on Contracts for the International Sale of Goods. The First 150 or so Decisions, 2nd ed., 1995.

<sup>272</sup> See *Will*, International Sales Law under CISG. The UN Convention on Contracts for the International Sale of Goods. The First 444 or so Decisions, 6th ed., 1997.

<sup>273</sup> See *Will*, International Sales Law under CISG. The UN Convention on Contracts for the International Sale of Goods. The First 555 or so Decisions, 8th ed., 1999.

<sup>274</sup> The most complete list of judicial applications of the CISG can be found on the internet at <http://cislaw3.law.pace.edu/cisg/text/casecit.html>.

<sup>275</sup> For recent papers on Article 7 CISG, see, e.g., *Andersen*, Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG, 2007; *Bisazza*, Auslegung des Wiener UN-Kaufrechts unter Berücksichtigung ausländischer Rechtsprechung: ein amerikanisches Beispiel, European Legal Forum 2004, 380 ff.; *De Ly*, Uniform Interpretation: What is Being Done? Official Efforts, in: The 1980 Uniform Sales Law, *supra* note 18, p. 335 ff.; *Diedrich*, Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts under the CISG, 8 Pace International Law Review 303 ff. (1996); *Felemegeas*, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Review of the Convention on Contracts for the International Sale of Goods (CISG) 115 ff. (2000-2001); *Ferrari*, The CISG's Uniform Interpretation by Courts - an Update, 9 Vindobona Journal of International Commercial Law and Arbitration 233 ff. (2005); *Graffi*, L'interpretazione

This part of the General Report will examine, however, not only the compliance of those decisions with the aforementioned mandate, but also whether changes in the style of decisions rendered by the court of contracting States<sup>276</sup> have occurred that have been triggered by the need to comply with that mandate. Have civil law judges started, as had been suggested by one commentator as a way to comply with the aforementioned mandate,<sup>277</sup> to “approximate their common law counterparts in increasing their reliance on [case law]”?<sup>278</sup> And what about common law judges, have they begun to take into account legal writing as well as legislative history - something they are normally not inclined to do? It does not appear so.

As can be easily derived from various country reports - such as the Argentinean,<sup>279</sup> Chinese,<sup>280</sup> Croatian,<sup>281</sup> Danish,<sup>282</sup> French,<sup>283</sup> German,<sup>284</sup> Greek,<sup>285</sup> Slovenian<sup>286</sup> and Swiss ones,<sup>287</sup> “[t]he CISG’s coming into force has not had any impact on the style of court decisions.”<sup>288</sup> It was, for instance, impossible to “find more references to case law [in CISG related

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autonomia della Convenzione di Vienna: rilevanza del precedente straniero e disciplina della lacune, *Giurisprudenza di merito* 873 ff. (2004); *Happ/Roth*, Interpretation of uniform law instruments according to Principles of International Law, *Uniform Law Review* 702 ff. (1997); *Koneru*, The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principle, 6 *Minnesota Journal of Global Trade* 105 ff. (1997); *McQuillen*, The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation, 61 *University of Miami Law Review* 509 ff. (2007); *Niemann*, Einheitliche Anwendung des UN-Kaufrechts in italienischer und deutscher Rechtssprechung und Lehre, 2006; *Rizzi*, Interpretazione e integrazioni della legge uniforme sulla vendita internazionale di cose mobile, *Rivista di diritto privato* 1997, 237 ff.; *Salama*, supra note 108, at 225 ff.; *Schwenzer*, The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents, *Victoria University of Wellington Law Review* 785 ff. (2005); *van Alstine*, supra note 8, at 687 ff.; *Veneziano*, Uniform Interpretation: What is Being Done? Unofficial Efforts and Their Impact, in: The 1980 Uniform Sales Law, supra note 18, p. 325 ff.; *Witz*, L’interprétation de la CVIM: divergences dans l’interprétation de la Convention de Vienne, in: The 1980 Uniform Sales Law, supra note 18, p. 279 ff.

<sup>276</sup> The issue addressed here is not relevant in non-contracting States.

<sup>277</sup> *Grosswald Curran*, The Interpretive Challenge to Uniformity, 15 *Journal of Law and Commerce* 175, 177 (1996).

<sup>278</sup> *Ibid.*

<sup>279</sup> See *Noodt Taquela*, supra note 10, at 5.

<sup>280</sup> See *Han*, supra note 57, at, 76, stating that “The CISG’s coming into force had no impact on the style of court decisions in China. Since January 1, 1993, the style of court decisions has been prescribed by the Sup. People’s Ct. with a set of patterns of litigation documents [ . . . ]. One problem [ . . . ] is that there is only one fixes style for thousands of cases.”

<sup>281</sup> See *Baretić/Nikšić*, supra note 12, at 102.

<sup>282</sup> See *Lookofsky*, supra note 49, at 124.

<sup>283</sup> See *Witz*, supra note 50, at 136.

<sup>284</sup> See *Magnus*, supra note 52, at 155.

<sup>285</sup> See *Zervogianni*, supra note 13, at 175.

<sup>286</sup> See *Mozina*, supra note 79, at 270.

<sup>287</sup> See *Widmer/Hachem*, supra note 54, at 293.

<sup>288</sup> *Noodt Taquela*, supra note 10, at 5.

disputes than in non-CISG related ones].”<sup>289</sup> The reasons for this are manifold. In China, for instance, this is due to a decision of the Supreme People’s Court imposing the style of court decisions<sup>290</sup> from which one cannot deviate. In Denmark, the reason for this is to be found in “the traditional style of Danish judicial decisions”<sup>291</sup>, characterized by a “general reluctance of Danish courts to cite (even) Danish ‘precedents’.”<sup>292</sup> Similarly, in France courts tend generally not to refer to case law, not even French one; scholarly writing is generally not referred to either, not even when courts copy word for word what commentators have said.<sup>293</sup>

In Switzerland, the reason is a completely different one: “courts in Switzerland traditionally cite both to case law as well as to scholarly writings in their decisions. This was true before the coming into force of the CISG and remains so to this day. A Swiss court will usually refer to other court decisions if a similar question has already been dealt with by other courts and then, in a second step, state that this reasoning is in line with the prevailing opinion in legal doctrine or, as the case may be, that it deviates from the majority view. If the issue raised in a given case has not yet been decided in case law, the court will analyse scholarly writings and refer to them in its decision. However, it will do this regardless of whether the governing law is the CISG, Swiss domestic law or, indeed, a foreign law applicable by virtue of the Swiss conflict of law rules.”<sup>294</sup> This appears to also be the reason why in Uruguay “the CISG’s coming into force has had no impact on the style of court decisions[:] There have always been numerous citations to case law and to scholarly writing in the courts of Uruguay, regarding not only the CISG, but in general.”<sup>295</sup>

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<sup>289</sup> *Ibid.*

<sup>290</sup> See *Han*, supra note 57, at, 76-77, stating that “The CISG’s coming into force had no impact on the style of court decisions in China. Since January 1, 1993, the style of court decisions has been prescribed by the Sup. People’s Ct. with a set of patterns of litigation documents [ . . . ]. One problem [ . . . ] is that there is only one fixes style for thousands of cases.”

<sup>291</sup> *Lookofsky*, supra note 49, at 124.

<sup>292</sup> *Id.* at 125.

<sup>293</sup> See *Witz*, supra note 50, at 136, stating that “la Cour de cassation ne cite jamais d’opinion doctrinale. En dépit de l’influence traditionnelle de la doctrine française sur l’interprétation des normes légales, les juges du fond s’abstiennent généralement de citer les auteurs. Tel est même le cas lorsque les juges reprennent presque mot à mot des affirmations doctrinaires. Ainsi, le style judiciaire français s’oppose radicalement au style judiciaire allemand ou suisse. Pas davantage, les juges ne se réfèrent à la jurisprudence existante pour appuyer leurs solutions ou pour mieux marquer un revirement de jurisprudence. Les juges de première ou de deuxième instance ne citent généralement pas la jurisprudence de la Cour de cassation, même s’ils entendent le plus souvent la suivre fidèlement. La Haute cour ne se réfère jamais à ses arrêts antérieurs.”

<sup>294</sup> *Widmer/Hachem*, supra note 54, at 293.

<sup>295</sup> *Fresneda de Aguirre*, supra note 16, at 335.

In Italy, the answer to the foregoing questions is a little more complex. This is due to the fact that if one were to “look at the general picture”, one would have to state “that the CISG has had no impact whatsoever on the style of court decisions.”<sup>296</sup> Still, there are a few decisions, rendered by an “enlightened minority”<sup>297</sup> of courts, namely the Tribunale di Vigevano,<sup>298</sup> the Tribunale di Rimini<sup>299</sup> and the Tribunale di Padova,<sup>300</sup> “which in the application of the CISG adopted a completely new style compared to the usual one adopted for purely domestic cases.”<sup>301</sup> For one, these courts cited a lot of decisions, which by itself is a surprise, as this is not what Italian courts normally do; what is even more surprising, however, is that the decisions cited include not just foreign court decisions, but also awards rendered by arbitral tribunals which is basically unheard of. The aforementioned courts are also “innovative with respect to [their] style, in that [they] did not limit [their] sources of knowledge of relevant precedents to law reports and law reviews, but also resorted extensively to databases available on the Internet in order to find the foreign decisions relevant to the case[s].”<sup>302</sup>

## 2. Autonomous interpretation v. homeward trend

As mentioned earlier,<sup>303</sup> the fact that the CISG is increasingly being applied in both courts and arbitral tribunals is not by itself a measure of the CISG’s success. Rather, the extent to which it is applied in compliance with the mandate - aimed at creating a uniform law “in action”<sup>304</sup> rather than keeping

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<sup>296</sup> *Torsello*, supra note 35, at 215.

<sup>297</sup> *Ibid.*

<sup>298</sup> See Tribunale di Vigevano, 12 July 2000, available at <http://www.cisg-online.ch/cisg/urteile/493.htm>.

<sup>299</sup> See Tribunale di Rimini, 26 November 2002, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

<sup>300</sup> See Tribunale di Padova, 10 January 2006, available at <http://cisgw3.law.pace.edu/cases/060110i3.html>; Tribunale di Padova, 11 January 2005, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>; Tribunale di Padova, 31 March 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova, 25 February 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

<sup>301</sup> *Torsello*, supra note 35, at 215. (footnotes omitted)

<sup>302</sup> *Id.* at 216.

For similar remarks, see also *Ferrari*, Applying the CISG in a truly uniform manner: Tribunale di Vigevano (Italy), 12 July 2000, *Uniform Law Review* 2001, 203, 206.

<sup>303</sup> See supra the text following notes 30 f.

<sup>304</sup> See also *Widmer/Hachem*, supra note 54, at 282.

uniformity in the books – is. Thus, whether the CISG is a success depends - among others - on the answer to the question of whether courts are taking into account the aforementioned mandate to interpret the CISG autonomously and in light of the need to promote uniformity in its application or whether they rather succumb to the homeward trend, i.e., the “natural”,<sup>305</sup> “tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention.”<sup>306</sup> It is, in other words, the “the tendency to think that the words we see [in the text of the CISG] are merely trying, in their awkward way, to state the domestic rule we know so well.”<sup>307</sup>

Although this homeward trend characterizes the case law of the courts of various countries, such as Argentina<sup>308</sup> and Israel,<sup>309</sup> it is most prominent in the United States,<sup>310</sup> where - unfortunately - courts seem not only to rely on it as regards specific issues,<sup>311</sup> but, as can easily be derived from the United States country report,<sup>312</sup> also as a matter of principle, as evidenced by the following statement, to be found in many decisions, pursuant to which “caselaw interpreting analogous provisions of Article 2 of the Uniform

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<sup>305</sup> *Salama*, supra note 108, at 231.

<sup>306</sup> *Flechtnar/Lookofsky*, Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?, 9 *Vindobona Journal of International Commercial Law and Arbitration* 199, 203 (2005).

For similar definitions, see *Keily*, Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG), 3 *Vindobona Journal of International Commercial Law and Arbitration* 15, 19 (1999); *Nottage*, Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan, 36 *Victoria University of Wellington Law Review* 815, 838 (2005); *Walt*, The CISG's Expansion Bias: A Comment on Franco Ferrari, 25 *International Review of Law and Economics* 342, 348 (2005); *Whittington*, supra note 32, at 811.

<sup>307</sup> *Honnold*, The Sales Convention in Action - Uniform International Words: Uniform Application?, 8 *Journal of Law and Commerce* 207, 208 (1988).

<sup>308</sup> See *Noodt Taquela*, supra note 10, at 5.

<sup>309</sup> See *Shalev*, supra note 14, at 185.

<sup>310</sup> See also *Salama*, supra note 108, at 225, stating that “[i]n practice it has been found that U.S. courts rely on the “homeward trend” more often than other judges in interpreting the CISG.”

<sup>311</sup> See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.; Rockland International FSC, Inc.*, U.S. Circuit Court of Appeals (4th Circuit), 21 June 2002, available at <http://cisgw3.law.pace.edu/cases/020621u1.html>, which “disregarded CISG interpretive methodology and resorted to a homeward trend analysis”, *Dimatteo et al.*, The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence, 24 *Northwestern Journal of International Law and Business* 299, 398 (2004); see also *Delchi Carrier SpA, v. Rotorex Corporation*, U.S. Circuit Court of Appeals (2d. Cir.), 6 December 1995, available at <http://cisgw3.law.pace.edu/cases/951206u1.html>, where “the U.S. court rejected the application of international case law and instead looked to the UCC and its domestic interpretations for guidance”, *Sheaffer*, The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law, 15 *Cardozo Journal of International and Comparative Law* 461, 477 (2007).

<sup>312</sup> See *Levasseur*, United States, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 313, 315 ff.

Commercial Code ("UCC") may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."<sup>313</sup> In this rapporteur's opinion,<sup>314</sup> this statement as well as other comparable ones,<sup>315</sup> that go to show, as suggested already more than half a century ago, that "the homeward trend may be prompted not only by greater strangeness but also by greater similarity between forum and foreign [or uniform] law",<sup>316</sup> are not tenable. The mere fact that the wording of a particular CISG provision corresponds to that of a specific domestic rule (whether created by statute or case law) is *per se* insufficient to allow one to resort to interpretations of that domestic rule. Only where it is apparent from the legislative history that the drafters wanted a given concept to be interpreted in the light of a specific domestic law, one is allowed to have recourse to the "domestic" understanding of that concept.<sup>317</sup> All other approaches contrast with the mandate set forth in Article 7(1) CISG which requires an "autonomous" interpretation of - most -<sup>318</sup> concepts of the CISG.

The truth be told, the need for an autonomous interpretation has also been acknowledged by some United States courts; in *St. Paul Guardian Insurance*

<sup>313</sup> See *Macromex SRL v. Globex Intern., Inc.*, U.S. District Court, Southern District of New York, 16.4.2008, 2008 WL 1752530 (S.D.N.Y.); *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. District Court, Minnesota, 31 January 2007, available at <http://cisgw3.law.pace.edu/cases/070131u1.html>; *Genpharm Inc. v. Pliva-Lachema A.S.*, U.S. District Court for the Eastern District Court of New York, 19 March 2005, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050319u1.html>; (stating also, however, that "UCC case law is not *per se* applicable to cases governed by the CISG") *Raw Materials Inc. v. Manfred Forberich GmbH & Co. KG, U.S. District Court*, Northern District of Illinois, Eastern Division, 6 July 2004, available at <http://cisgw3.law.pace.edu/cases/040706u1.html>.

<sup>314</sup> For this author's view on the matter, see *Ferrari, The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 Loyola of Los Angeles Law Review 1021 ff. (1996).

<sup>315</sup> See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.; Rockland International FSC, Inc.*, U.S. Circuit Court of Appeals (4th Circuit), 21 June 2002, available at <http://cisgw3.law.pace.edu/cases/020621u1.html>, surprisingly stating that "case law interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions in the CISG can also be helpful in interpreting the Convention", after having stated that the "CISG directs that its interpretation be informed by its 'international character and [...] the need to promote uniformity in its application and the observance of good faith in international trade'." For similar statements, see, more recently, *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, U.S. District Court, Northern District of Illinois, Eastern Division, 21 May 2004, available at <http://cisgw3.law.pace.edu/cases/040521u1.html>; for an earlier statement to the same effect, see *Delchi Carrier SpA, v. Rotorex Corporation*, U.S. Circuit Court of Appeals (2d. Cir.), 6 December 1995, available at <http://cisgw3.law.pace.edu/cases/951206u1.html>.

<sup>316</sup> *Ehrenzweig*, Interstate and International Conflicts Law: A Plea for Segregation, 41 Minnesota Law Review (717, 723 (1956-1957).

<sup>317</sup> For this conclusion, see *Achilles*, Kommentar zum UN-Kaufrechtsübereinkommen (CISG), 2000, p. 29; *Ferrari*, Art. 7, in: Kommentar zum Einheitlichen UN-Kaufrecht – CISG, *supra* note 77, p. 138, 142; *Magnus*, Wiener UN-Kaufrecht – CISG, 2005, p. 171.

<sup>318</sup> It has been suggested that not all concepts of the CISG are to be interpreted autonomously; see *Ferrari*, *supra* note 111, at 497 ff.

Co. et al. v. Neuromed Medical Systems & Support GmbH, et al.,<sup>319</sup> United States District Court for the Southern District of New York held that “the CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language”. Similar language can be found in other United States court decisions, such as MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.,<sup>320</sup> where it is expressly stated that “courts applying the CISG cannot [ . . . ] substitut[e] familiar principles of domestic law when the Convention requires a different result.” This line of reasoning constitutes the basis for other United States court decisions, too, such as Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.,<sup>321</sup> stating that “UCC case law is not *per se* applicable to cases governed by the CISG”,<sup>322</sup> and Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.<sup>323</sup>, where it is expressly stated that “although the CISG is similar to the UCC with respect to certain provisions, it differs from the UCC with respect to others, including the UCC's writing requirement for a transaction for the sale of goods and parol evidence rule. Where controlling provisions are inconsistent, it would be inappropriate to apply UCC case law in construing contracts under the CISG.” In another US decision, the court simply referred to the aforementioned need to take the CISG's international character into account.<sup>324</sup>

European courts as well have complied with the obligation not to interpret the CISG in the light of domestic law, but rather by having regard to its international character. In a Swiss case from 1993,<sup>325</sup> a court of first instance even expressly stated that the CISG “is supposed to be interpreted

<sup>319</sup> *St. Paul Guardian Insurance Co. et al. v. Neuromed Medical Systems & Support GmbH et al.*, U.S. District Court for the Southern District of New York, 26 March 2002, 2002 WL 465312 (S.D.N.Y.).

<sup>320</sup> *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998, 1998 WL 343335 (11th Cir. (Fla.)).

<sup>321</sup> *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, U.S. District Court for the Southern District of New York, 10 May 2002, 201 F.Supp. 2d 236.

<sup>322</sup> *Id.* at 281; for the statement referred to in the text, see most recently *Genpharm Inc. v. Pliva-Lachema A.S.*, U.S. District Court for the Eastern District Court of New York, 19 March 2005, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050319u1.html>; *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, U.S. District Court, Northern District of Illinois, Eastern Division, 21 May 2004, 2004 U.S. Dist. LEXIS 9347; *Orbisphere Corp. v. United States*, U.S. Court of International Trade, 24 October 1989, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989).

<sup>323</sup> *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*, U.S. District Court, Southern District of New York, 6 April 1998, 1998 U.S. Dist. Lexis 4586.

<sup>324</sup> See e.g. *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l.*, U.S. District Court, Eastern District of Louisiana, 17 May 1999, 1999 WL 311945 (E.D. La.), stating that “under CISG, the finder of fact has a duty to regard the “international character” of the Convention and to promote uniformity in its application. CISG Article 7”.

<sup>325</sup> Gerichtspräsident Laufen, 7 May 1993, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930507s1.html>.

autonomously and not out of the perspective of the respective national law of the forum. Thus, [...] it is generally not decisive whether the Convention is formally applied as particularly this or that national law, as it is to be interpreted autonomously and with regard to its international character.” An express reference to the need to interpret the CISG “autonomously” can also be found in a more recent Swiss case<sup>326</sup> as well as in a Spanish case<sup>327</sup> and an Austrian one<sup>328</sup> and various very recent Italian court decisions, rendered by the aforementioned “enlightened minority” of Italian courts.<sup>329</sup>

In Germany, while there are some courts that simply referred to the need to interpret the CISG by having regard to its international character and to the need to promote its uniform application,<sup>330</sup> there are other ones which went further. In 1996, the German Supreme Court, for instance, expressly stated that “the CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)”.<sup>331</sup> And it is this reasoning that has led the Court of Appeal of Karlsruhe to state that “German legal concepts such as “Fehler” and “zugesicherte Eigenschaften” are therefore not transferable to the CISG”.<sup>332</sup> More recently, in 2005, the German Supreme Court stated that “insofar as the Court of Appeals refers to [various German] judgments [...] in analyzing the question whether, at the time the risk passed, the delivered meat conformed with the contract within the meaning of Arts. 35, 36 CISG, it ignored the fact that these decisions were

<sup>326</sup> Handelsgericht Aargau, 26 September 1997, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=404&step=FullText>.

<sup>327</sup> See Audiencia Provincial de Valencia, 7 June 2003, available at <http://cisgw3.law.pace.edu/cases/030607s4.html>, stating that “[s]cholars maintain that the international character of the Convention obliges an autonomous interpretation of the Convention independent of domestic law, for this purpose, it is necessary to adopt a different methodology than used to apply domestic law. The only way to assure the uniformity of the Convention is to take into account decisions from tribunals of other countries when applying the Convention and to consult expert opinions of scholars in the subject, in order to achieve uniformity.” For a favourable comment on this decision when discussing the uniform interpretation of the CISG, see *Perales Viscasillas*, Spanish Case Law on the CISG’ in: *Quo Vadis CISG?*, supra note 28, p. 235, 240-241.

<sup>328</sup> See Austrian Supreme Court, 23 May 2005, available at <http://cisgw3.law.pace.edu/cases/050523a3.html>, stating that “[t]he CISG creates substantive law [...] and is to be interpreted autonomously in accordance with CISG Art. 7. Therefore, discussions on the Austrian legal situation [...] have to be omitted”.

<sup>329</sup> See, apart from the court decisions cited in notes 298-300, Tribunale di Modena, 9 December 2005, available at <http://www.cisg-online.ch/cisg/urteile/1398.pdf>.

<sup>330</sup> See, e.g., Oberlandesgericht Frankfurt a.M., 20 April 1994, available at <http://www.cisg-online.ch/cisg/urteile/125.htm>.

<sup>331</sup> German Supreme Court, 3 April 1996, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960403g1.html>.

<sup>332</sup> Oberlandesgericht Karlsruhe, 25 June 1997, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970625g1.html>.

issued before the CISG went into effect in Germany and refer to § 459 BGB [...]. The principles developed there cannot simply be applied to the case at hand, although the factual position - suspicion of foodstuffs in transborder trade being hazardous to health - is similar; that is so because, in interpreting the provisions of CISG, we must consider its international character and the necessity to promote its uniform application and the protection of goodwill in international trade (Art. 7(1) CISG)<sup>333</sup>.

### 3. Recourse to Foreign Case Law

As pointed out twice already,<sup>334</sup> for the CISG to be applied in conformity with “the need to promote uniformity in its application”, courts of one jurisdiction must take into account what the courts of another jurisdiction have already done. The issue is, however, whether courts do so. From the country reports one can infer that generally they do not do so in Argentina,<sup>335</sup> nor do they do so in Croatia,<sup>336</sup> the Czech Republic,<sup>337</sup> Denmark,<sup>338</sup> France,<sup>339</sup> Germany,<sup>340</sup> as well as other countries.<sup>341</sup>

Still, there are instances in which courts of one jurisdiction, including some of the aforementioned jurisdictions, have relied on decisions rendered by courts of another jurisdiction. The most famous decision<sup>342</sup> in this respect is that of the Tribunale di Vigevano rendered in 2000. When dealing with some of the typical issues raised by the CISG, such as party autonomy, notice of non-conformity and burden of proof, the court referred to an unprecedented

<sup>333</sup> German Supreme Court, 2 March 2005, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050302g1.html>.

<sup>334</sup> See supra the text accompanying notes 32 ff. and 115.

<sup>335</sup> See *Noodt Taquela*, supra note 10, at 5.

<sup>336</sup> See *Baretić/Nikšić*, supra note 12, at 102.

<sup>337</sup> See *Rozehnalová*, supra note 72, at 110.

<sup>338</sup> See *Lookofsky*, supra note 49, at 125.

<sup>339</sup> See *Witz*, supra note 50, at 137.

<sup>340</sup> See *Magnus*, supra note 52, at 156, where the author also refers to an exception to the rule.

<sup>341</sup> See, as regards Slovenia, *Mozina*, supra note 79, at 270, stating that in Slovenian courts, “cases neither a homeward trend nor interpretation according to Art. 7 CISG can be established.”

<sup>342</sup> For papers on this decision, see *Ferrari*, Problematiche tipiche della Convenzione di Vienna sui contratti di vendita internazionale di beni mobili risolte in una propspettiva uniforme, *Giurisprudenza italiana* 2001, 281 ff.; *Ferrari*, Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt with, 20 *Journal of Law and Commerce* 225 ff. (2001); *Ferrari*, Internationales Kaufrecht einheitlich ausgelegt, *Internationales Handelsrecht* 2001, 56 ff.; *Mazzotta*, supra note 73, at 437 ff.; *Rosati*, Anmerkung zu Trib. Vigevano, *Internationales Handelsrecht* 2001, 78 ff.; *Veneziano*, Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri, *Diritto del commercio internazionale* 2001, 509 ff.

number of 40 foreign court decisions<sup>343</sup> and arbitral awards,<sup>344</sup> thus “show[ing] a certain willingness to take into consideration foreign decisions and [...] a depth of knowledge and research of foreign case law which has not been very common among courts of many countries”<sup>345</sup>.

The Tribunale di Vigevano has not remained the only Italian court to have extensively referred to foreign decisions. In 2002, the Tribunale di Rimini,<sup>346</sup> in a very well received decision<sup>347</sup>, has done so, too. Indeed, like the Tribunale di Vigevano, the Tribunale di Rimini also took into account the need to promote uniformity in the CISG’s application and cited 35 foreign decisions and arbitral awards.<sup>348</sup> Similarly, in three more recent decisions, rendered on 25 February 2004,<sup>349</sup> on 31 March 2004<sup>350</sup> and on 11 January 2005<sup>351</sup>, the Tribunale di Padova cited 40, 24 and 14 foreign decisions respectively. In an even more recent decision, the Tribunale di Padova referred to a more limited number of foreign decisions, as the main issue the court had to deal with did only marginally relate to the CISG.<sup>352</sup> More recently, the Tribunale di Rovereto referred to two German decisions when dealing with an issue regarding jurisdiction over contracts governed by the CISG.<sup>353</sup>

<sup>343</sup> In its decision, the court referred to court decisions from Austria, France, Germany, the Netherlands, Switzerland and the United States.

<sup>344</sup> In its decision, the court referred to two ICC arbitral awards.

<sup>345</sup> *Mazzotta*, supra note 73, at 438.

<sup>346</sup> See Tribunale di Rimini, 26 November 2002, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html>.

<sup>347</sup> For favourable comments on the decision of the Tribunale di Rimini, see Ferrari, International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini, 8 *Vindobona Journal of International Commercial Law and Arbitration* 1 ff. (2004); Graffi, Sunti in tema di vendita internazionale e forum shopping, *Diritto del commercio internazionale* 2003, 807 ff.; Mecarelli, A propos du caractère inévitable du Forum Shopping dans la vente internationale, *Revue de droit des affaires internationales* 2003, 935 ff.

<sup>348</sup> In its decision, the Tribunale di Rimini referred to court decisions rendered in Austria, Belgium, France, Germany, Switzerland, the Netherlands and the United States, as well as one Hungarian arbitral award.

<sup>349</sup> Tribunale di Padova, 25 February 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

<sup>350</sup> Tribunale di Padova, 31 March 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>; for a comment, see Ferrari, La disciplina sostanziale della vendita internazionale ed il saggio d’interessi’ *Giurisprudenza di merito* 2004, 1069 ff.

<sup>351</sup> Tribunale di Padova, 11 January 2005, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>.

<sup>352</sup> See Tribunale di Padova, 10 January 2006, available at <http://cisgw3.law.pace.edu/cases/060110i3.html>.

<sup>353</sup> See Tribunale di Rovereto, 24 August 2006, available at <http://www.cisg-online.ch/cisg/urteile/1374.pdf>.

Italian courts, however, are not the only ones to take into account decisions rendered abroad. In its decision *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*,<sup>354</sup> the U.S. District Court, Northern District of Illinois, Eastern Division, cited 7 foreign decisions<sup>355</sup>, all of which taken from the UNILEX,<sup>356</sup> a “reasoned collection of case law and an international bibliography on the CISG”<sup>357</sup>, thus “cit[ing] more foreign cases than any other previous American ruling on the UN Sales Convention”.<sup>358</sup> In effect, previously only few US courts had cited any foreign decisions at all.<sup>359</sup> More often than not, United States courts had not even bothered to look for foreign case law - which, given the aforementioned homeward trend of United States courts, is not surprising -, but had simply (and incorrectly)<sup>360</sup>

<sup>354</sup> *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, U.S. District Court, Northern District of Illinois, Eastern Division, 21 May 2004, 2004 U.S. Dist. LEXIS 9347.

<sup>355</sup> In its decision, the U.S. District Court referred to decisions rendered by Dutch, German and Italian courts.

<sup>356</sup> For a comment on UNILEX as a tool to promote the CISG's uniform application, see *Liguori, “UNILEX”: A Means to Promote Uniformity in the Application of CISG*, *Zeitschrift für Europäisches Privatrecht* 1996, 600 ff.

<sup>357</sup> *Bonell/Liguori*, *supra* note 28, (Part I), at 147 note 1.

<sup>358</sup> *Teiling*, Case Analysis of *Chicago Prime Packers v. Northam Food Trading*, *Uniform Law Review* 2004, 431, 435.

<sup>359</sup> See *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, U.S. District Court, Western District Washington at Tacoma, 13 April 2006, 2006 WL 1009299 (W.D.Wash.) (citing one Swiss court decision); *Amco Ukservice & Prompriladameco v. American Meter Company*, U.S. District Court, Eastern District of Pennsylvania, 29 March 2004, 2004 WL 692233 (E.D.Pa.) (citing two German decisions, both of which were taken from the Pace University website referred in n 78); *Usinor Industeel v. Leeco Steel Products*, U.S. District Court for the Northern District of Illinois, Eastern Division, 28 March 2002, 209 F.Supp. 2d 880 (citing one Australian case); *St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al.*, U.S. District Court for the Southern District of New York, 26 March 2002, WL 465312 (S.D.N.Y.) (referring to 3 German cases); *Medical Marketing v. Internazionale Medico Scientifica*, U.S. District Court, Eastern District of Louisiana, 17 May 1999, 1999 WL 311945 (E.D. La.) (citing one decision rendered by the German Supreme Court).

It should be noted that from the text of two US court decisions one can gather that the courts had looked at foreign decisions before rendering their decisions; see *Shuttle Packaging Systems v. Tsonakis et al.*, U.S. District Court, Western District of Michigan, Southern Division, 17 December 2001, 2001 WL 34046276 (W.D.Mich.) at \*8, stating that “The international cases cited by Defendants are not apposite to this discussion because they concern the inspection of simple goods and not complicated machinery like that involved in this case”; *Zapata Hermanos v. Hearthsidge Baking*, U.S. District Court, Northern District of Illinois, Eastern Division, 28 August 2001, 2001 WL 1000927 (N.D. Ill.) at \*4, stating that “That distorted reading of the language is clearly refuted by the decisions cited at [seller] Mem. 4 from other countries' courts and arbitral tribunals.”

In one case, a federal Court of Appeals referred to its unsuccessful efforts to locate foreign court decisions on the issue it had to deal with; see *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998, available at <http://cisgw3.law.pace.edu/cases/980629u1.html>.

<sup>360</sup> For critical comments see also *Hartwig, Schmitz-Werke & Co. v. Rockland Industries Inc.* and the *United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and developing International Legal Norms*, 22 *Journal of Law and Commerce* 77, 98 (2003).

stated that there was virtually no case law on the CISG<sup>361</sup>, at times when foreign decisions were readily available. Whether, however, the Chicago Prime case will have the same effect in the United States that the decision by the Tribunale di Vigevano has had in Italy is doubtful, considering that the same U.S. District Court that had rendered the Chicago Prime decision in a more recent decision not only avoided any reference to foreign decisions, but even rejected the autonomous interpretation in favour of a “nationalistic” interpretation when it stated in respect of the Article 79 CISG issue of “excuse” that “case law interpreting the Uniform Commercial Code’s (“U.C.C.”) provision on excuse provides guidance for interpreting the CISG’s excuse provision since it contains similar requirements as those set forth in Article 79.”<sup>362</sup>

Courts of other countries as well have started to refer to foreign case law, albeit not as massively as the Italian courts. This is true for instance for Belgian courts; in a decision of 2002, the Rechtbank van Koophandel Hasselt<sup>363</sup> referred to one German and one Swiss decision; on two earlier

<sup>361</sup> See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, U.S. Court of Appeals (7th Circuit), 23 May 2005, 2005 WL 1243344 (7th Cir. (Ill.)) (stating that “there is little case law under the CISG”); *Ajax Tool Works, Inc., Plaintiff, v. Can-Eng Manufacturing Ltd., Defendant*, U.S. District Court, Northern District of Illinois, Eastern Division, 29 January 2003, 2003 Westlaw 22187 (N.D.Ill., Jan 30, 2003) (stating that “case law interpreting and applying the CISG is scant”); *Usinor Industeel, v. Leeco Steel Products, Inc.*, U.S. District Court for the Northern District of Illinois, Eastern Division, 28 March 2002, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002) (stating the same); *MCC Marble Ceramic Center, Inc. v. Ceramica Nuova d’Agostino, S.p.A.*, U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998, 144 F.3d 1384, 1389 (11th Cir.1998) (stating that “[d]espite the CISG’s broad scope, surprisingly few cases have applied the Convention”); *Supermicro Computer v. Digitechnic*, U.S. District Court, Northern District of California, San Francisco Division, 30 January 2001, 2001 U.S. Dist. LEXIS 7620 (stating the same); *Calzaturificio Claudia v. Olivieri Footwear*, U.S. District Court, Southern District of New York, 6 April 1998, 1998 Westlaw 164824 (stating that “there is little to no case law on the CISG in general”); *Helen Kaminski v. Marketing Australian Products*, U.S. District Court, Southern District of New York, 21 July 1997, Westlaw 414137 (1997) (stating the same); *Filanto v. Chilewich*, U.S. District Court, Southern District of New York, 14 April 1992, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (stating that “there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention”); *Delchi Carrier SpA v. Rotorex Corp.*, U.S. Circuit Court of Appeals (2d. Cir.), 6 December 1995, 71 F.3d 1024, 1027-28 (2d Cir. 1995) (observing that “there is virtually no case law under the Convention”); for a similar (incorrect) statement in legal writing, see *Brannely, The United States Grant of Permanent Normal Trade Status to China: A Recipe for Tragedy or Transformation?*, 25 Suffolk Transnational Law Review 565, 572-573 (2002); *Pistor, The Standardization of Law and Its Effect of Developing Economies*’ (50) American Journal of Comparative Law 97, 111 (2002).

<sup>362</sup> *Raw Materials Inc. v. Manfred Forberich GmbH & Co. KG*, U.S. District Court, Northern District of Illinois, Eastern Division, 6 July 2004, 2004 WL 1535839 (N.D.Ill.).

<sup>363</sup> Rechtbank van Koophandel Hasselt, 6 March 2002, available at <http://www.law.kuleuven.ac.be/ipl/eng/cases/2002-03-06s.html>.

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occasions, that same court had cited two different Austrian decisions (both rendered by the Austrian Supreme Court).<sup>364</sup>

On several occasions, German courts as well referred to (a limited number of) foreign cases; this is true not only in respect of lower courts,<sup>365</sup> but also as far as the German Supreme Court is concerned.<sup>366</sup> Similarly, Swiss courts,<sup>367</sup> including the Swiss Supreme Court,<sup>368</sup>, have on various occasions cited foreign cases, as has the Austrian Supreme Court.<sup>369</sup>

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<sup>364</sup> See Rechtbank van Koophandel Hasselt, 28 April 1999, available at <http://www.law.kuleuven.ac.be/iph/eng/cases/1999-04-28.html>; Rechtbank van Koophandel Hasselt, 2 December 1998, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=809&step=FullText>.

<sup>365</sup> See Oberlandesgericht Hamburg, 25 January 2008, available at <http://cisgw3.law.pace.edu/cases/080125g1.html>, citing two Austrian Supreme court decisions as well as a Swiss Supreme Court decision; Oberlandesgericht Karlsruhe, 8 February 2006, available at <http://www.cisg-online.ch/cisg/urteile/1328.pdf>, citing a Swiss Supreme court decision as well as a decision rendered by a U.S. district court; Landgericht Neubrandenburg, 3 August 2005, available at <http://cisgw3.law.pace.edu/cases/050803g1.html>, citing one Russian arbitral award; Oberlandesgericht Karlsruhe, 20 July 2004, available at <http://www.cisg-online.ch/cisg/urteile/858.pdf>, citing a decision rendered by the Austrian Supreme Court; Landgericht Trier, 8 January 2004, available at <http://cisgw3.law.pace.edu/cases/040108g1.html>, citing a US court decision; Oberlandesgericht Köln, 14 October 2002, available at <http://www.cisg-online.ch/cisg/urteile/709.htm>, citing a Swiss Supreme Court decision as well as a decision by the Austrian Supreme Court.

<sup>366</sup> See German Supreme Court, 2 March 2005, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/050302g1.html>, citing two decisions from the Austrian Supreme Court; German Supreme Court, 30 June 2004, available at <http://www.cisg-online.ch/cisg/overview.cfm?test=847>, citing a Dutch and a Canadian decision, as well as an ICC arbitral award and an award of the Arbitral Tribunal of the Stockholm Chamber of Commerce; German Supreme Court, 31 October 2001, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/011031g1.html>, citing one decision of the Austrian Supreme Court.

<sup>367</sup> See also Kantonsgericht Appenzell Ausserrhoden, 9 March 2006, available at <http://www.cisg-online.ch/cisg/urteile/1375.pdf>, citing one German and one Austrian decision; Handelsgericht Aargau, 5 November 2002, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/021105s1.html>, citing one German court decision; see also Obergericht Kanton Luzern, 8 January 1997, available at <http://cisgw3.law.pace.edu/cases/970108s1.html>, where the court, in dealing with the timeliness of the notice of non-conformity, referred to German, Dutch and US practice, without, however, quoting specific cases.

<sup>368</sup> See Swiss Supreme Court, 13 November 2003, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/031113s1.html>, citing two decisions rendered by the German Supreme Court, one rendered by a German court of appeals as well as one rendered by a Belgian court of appeals; Swiss Supreme Court, 28 October 1998, available at <http://www.cisg-online.ch/cisg/urteile/413.htm>, citing a decision rendered by the German Supreme Court.

<sup>369</sup> See Austrian Supreme Court, 25 January 2006, available at <http://cisgw3.law.pace.edu/cases/060125a3.html>, citing one German Supreme court decision; Austrian Supreme Court, 13 April 2000, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/0000413a3.html>, citing one decision rendered by the German Supreme Court; see also Austrian Supreme Court, 15 October 1998, available at <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/981015a3.html>, citing one decision rendered by the German Supreme Court; Austrian Supreme Court, 6 February 1996, available at: <http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/960206a3.html>, citing one German decision.

In one instance, an Australian court, too, referred to foreign case law,<sup>370</sup> the same is true for a Canadian court,<sup>371</sup> a Danish court<sup>372</sup> as well as a French court.<sup>373</sup>

The foregoing clearly shows that courts have overcome “the two critical obstacles that often limit capability of courts of taking foreign cases into account, namely the difficulty to retrieve foreign decisions and the difficulty to have access to foreign cases in a language understandable to the interpreter”,<sup>374</sup> thus opening the door to further applications of the CISG in compliance with the mandate set forth in Article 7(1) CISG. This certainly is a success.

#### 4. The CISG’s application beyond its sphere

This last chapter of this part of the General Report is dedicated to the issue of whether the CISG has an impact in courts that goes beyond its sphere of application, i.e., whether courts referred to the CISG, on the one hand, to solve issues relating to situations not governed by the CISG and, on the other hand, to interpret other uniform law instruments.

As regards the first question, the overall answer is obvious: courts have generally not relied on the CISG to solve issues relating to situations beyond the CISG’s scope. Some country reports, such as the Argentinean one<sup>375</sup> as well as the Croatian,<sup>376</sup> the Czech,<sup>377</sup> the Danish,<sup>378</sup> the Slovenian<sup>379</sup> and the Uruguayan one<sup>380</sup> make this very clear.

<sup>370</sup> See *Downs Investments v. Perwaja Steel*, Supreme Court of Queensland, 17 November 2000, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001117a2.html>, citing a US court decision.

<sup>371</sup> See *Diversitel v. Glacier*, Supreme Court of Justice, Ontario, 6 October 2003, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/031006c4.html>, citing a German court decision.

<sup>372</sup> See Maritime and Commercial Court of Copenhagen, 31 January 2002, available at [http://www.cisg.dk/DANISH\\_COMMERCIAL\\_COURT31012002.HTM](http://www.cisg.dk/DANISH_COMMERCIAL_COURT31012002.HTM), citing two Dutch decisions and a German one.

<sup>373</sup> See Cour d’Appel de Grenoble, 23 October 1996, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/961023f1.html>, referred to also by *Witz*, supra note 50, at 137.

<sup>374</sup> *Torsello*, supra note 35, at 216.

<sup>375</sup> See *Noodt Taquela*, supra note 10, at 6, stating that “there are not reported cases in Argentina on the use of the CISG in relation to contracts not covered by its sphere of application.”

<sup>376</sup> See *Baretić/Nikšić*, supra note 12, at 102, stating that “there is no empirical evidence that the Croatian courts used the CISG in relation to contracts not covered by its sphere of application.”

<sup>377</sup> See *Rozehnalová*, supra note 72, at 110.

<sup>378</sup> See *Lookofsky*, supra note 49, at 127, stating that “[t]here do not appear to have been any reported instances where Danish courts have used the CISG in relation to contracts not covered by its sphere of application.”

Still, exceptionally the CISG has been relied on to solve issues that did not fall within its sphere of application. In France, for instance, where the Civil code does not contain any rules on formation of contract, the Supreme Court turned to Article 14 CISG for inspiration when having to draw a line between an offer and a mere invitation to make an offer (*invitatio ad offerendum*).<sup>381</sup> In England as well, the CISG served as a “source of inspiration”<sup>382</sup> in purely domestic cases.<sup>383</sup>

In Israel, the CISG was relied on in one (international) case in which it was - for temporal reasons - not applicable.<sup>384</sup>

In Italy, a court of first instance<sup>385</sup> “had to deal with a dispute regarding a claim for restitution stemming from a purely domestic transaction. However, after reaching a preliminary solution on the sole basis of the analysis of Article 2033 of the Italian Civil code (a solution which in fact did not entirely correspond to the literal interpretation of the provision), the court tried to corroborate its solution by referring to the text of Article 81(2) CISG.”<sup>386</sup>

In Spain, the Supreme Court resorted to the CISG twice to corroborate solutions reached on the basis of Spanish domestic law in respect of contracts not governed the CISG, namely a lease contract and a contract for the sale of an immoveable.<sup>387</sup> Interestingly enough, the German Supreme Court as well relied on the CISG when having to deal with a contract for the sale of an immoveable.<sup>388</sup>

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<sup>379</sup> See *Mozina*, *supra* note 79, at 270.

<sup>380</sup> See *Fresneda de Aguirre*, *supra* note 16, at 335.

<sup>381</sup> See *Witz*, *supra* note 50, at 138, also pointing out why this resort to the CISG may have occurred: “Cette source d’inspiration s’éclaire d’autant mieux que la Chambre commerciale s’est prononcée à la lumière de l’avis du Conseiller Jean-Pierre Plantard, qui faisait partie de la délégation française à la Conférence diplomatique de Vienne d’avril 1980.”

<sup>382</sup> *Andersen*, *supra* note 9, at 308.

<sup>383</sup> See *The Square Mile Partnership Limited v. Fitzmaurice McCall Limited*, Court of Appeal (Civil Division), 18 December 2006, available at <http://cisgw3.law.pace.edu/cases/061218uk.html>; *ProForce Recruit Ltd v Rugby Group Ltd.*, Court of Appeal (Civil Division), 17 February 2006, available at <http://cisgw3.law.pace.edu/cases/060217uk.html>.

<sup>384</sup> See *Shalev*, *supra* note 14, at 185.

<sup>385</sup> See *Tribunale di Bergamo*, 19 April 2006, *Corriere del merito* 2006, 835.

<sup>386</sup> *Torsello*, *supra* note 35, at 220. (footnote omitted)

<sup>387</sup> See *Garcia Cantero*, *supra* note 125, at 278.

<sup>388</sup> See German Supreme Court, 24 March 2006, *Neue Juristische Wochenschrift* 2006, 1960 ff.: see also German Supreme Court, 18 October 2000, *Neue Juristische Wochenschrift* 2001, 221 ff., referring to Article 19 CISG when having to decide whether a reply to an offer relating to a lease contract that modifies the offer amounts to an acceptance.

In New Zealand, recourse to the CISG in cases in which it was not applicable seems to be more common practice. “In fact in all the cases [in which the CISG has been referred to] the CISG provisions are used to back up a court’s interpretation of domestic law”<sup>389</sup>, on the grounds basically of the reasoning that “there was something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice.”<sup>390</sup>

As for the second question posed, that of whether courts have relied on the interconventional interpretation - by resorting to the CISG to interpret other uniform law instruments -, the answer is comparable to the one just given: in most countries,<sup>391</sup> courts do not resort to that approach; nevertheless, in a (very) limited number of cases, courts have done so.

This statement perfectly reflects the Italian situation. While courts have not generally used the aforementioned approach,<sup>392</sup> in (very) limited cases (very few) courts have done so, namely when having to interpret certain concepts contained in the Brussels 1 Regulation, in particular, the concepts of “sale of goods” and “place of delivery” referred to in Article 5(1)(b) of the Regulation. The first Italian court to use this approach was the Tribunale di Padova,<sup>393</sup> which held in 2006, as also pointed out by the drafter of the Italian country report,<sup>394</sup> that “the concept of ‘sale of goods’ is not defined by the Regulation. It would not be appropriate to resort to domestic law definitions, as this would impair a uniform application of the Regulation across the Member States. An ‘autonomous’ interpretation must be pursued. To this end, it is useful to resort to the CISG [ . . . ]. The CISG, ratified in Italy by Law n. 765 of 11 December 1985 and entered into force on 1 January 1988, although it is not a Convention about procedure, but ‘merely’ a substantive convention [ . . . ]. Recourse to the CISG is proper because the concept that needs to be determined (sale of goods) is of a substantive nature

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<sup>389</sup> *Butler*, *supra* note 15, at 254.

<sup>390</sup> *Ibid.*, citing to *Attorney-General v. Dreux Holdings Ltd.*, (1996) 7 TCLR 617.

<sup>391</sup> As regards Argentina, see *Noodt Taquela*, *supra* note 10, at 6; as regards Croatia, see *Baretić/Nikšić*, *supra* note 12, at 102; as regards the Czech Republic, see *Rozehnalová*, *supra* note 72, at 111; as regards Denmark, see *Lookofsky*, *supra* note 49, at 127; as regards France, see *Witz*, *supra* note 50, at 138; as regards Israel, see *Shalev*, *supra* note 14, at 186; as regards Slovenia, see *Mozina*, *supra* note 79, at 270; *Garcia Cantero*, *supra* note 125, at 278; as regards Uruguay, see *Fresnedo de Aguirre*, *supra* note 16, at 336.

<sup>392</sup> See *Torsello*, *supra* note 35, at 221.

<sup>393</sup> See *Tribunale di Padova*, 10 January 2006, available at <http://cisgw3.law.pace.edu/cases/060110i3.html>.

<sup>394</sup> See *Torsello*, *supra* note 35, at 222.

and, in consideration of the prominent role the CISG plays at the international level and in consideration of its ‘expansive’ nature. While it is true that the CISG constitutes an autonomous set of rules, it does not mean that its concepts are not applicable outside the CISG itself. It is not a coincidence that the European legislature used the CISG as a reference for drafting Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, relating to certain aspects of the sale of consumer goods and associated guarantees.” More recently, the Italian Supreme Court also interpreted the Brussels 1 Regulation in light of the CISG.<sup>395</sup>

Resort to the CISG to interpret the Brussels 1 Regulation also occurred in Germany, where as recent as in June 2008 the Oberlandesgericht Karlsruhe, too, used the CISG to interpret the concept of “sale of goods” referred to in Article 5(1)(b) of said Regulation.<sup>396</sup>

## THE CISG’S IMPACT ON LEGISLATORS

### 1. From very little - direct - impact.

Commentators have often stated that the CISG has had an impact on domestic legislation.<sup>397</sup> This last part of the General Report is dedicated to examining whether this claim is correct. If it were, the implications for the CISG being able to be qualified as a success are obvious. Of course, for this claim to be correct, it is not necessary for the CISG to have influenced the domestic legislation of every or most countries.

Venezuela, for instance, has not at all succumbed to the “expansive reach” of the CISG mentioned earlier; not only has the CISG not entered into force there, it has had no impact on the domestic legislation whatsoever.<sup>398</sup> The same is true as regards Brazil,<sup>399</sup> which is a little more surprising, at least as

<sup>395</sup> See Italian Supreme Court, 27 September 2006, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1153&step=FullText>; for an opinion to the contrary rendered, however, before the decision by the Italian Supreme Court just referred to, see Tribunale di Rovereto, 24 August 2006, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1147&step=FullText>.

<sup>396</sup> See Oberlandesgericht Karlsruhe, 12 June 2008, available at <http://ciscgw3.law.pace.edu/cases/080612g1.html>; see also Oberlandesgericht Oldenburg, 20 December 2007, Internationales Handelsrecht 2008, 112, 118; contra Oberlandesgericht Dresden, 11 June 2007, Internationales Handelsrecht 2008, 162, 165.

<sup>397</sup> See, apart from the authors cited supra in notes 39, *Magnus*, supra note 203, at 104 f.; *Ragno*, supra note 40, at 234.

<sup>398</sup> *Madrid Martinez*, supra note 27, at 343.

<sup>399</sup> See *de Aguilar Vieira*, supra note 26, at 25.

far as the lack of the CISG's impact on domestic legislation is concerned, considering that there has been a major reform in areas covered by the CISG, a new Civil Code having been promulgated only recently, in 2002. Still, “[e]ven though the commission in charge of its elaboration was composed of university professors [who were aware of the CISG], there has been no influence of the CISG on the new Civil Code.”<sup>400</sup>

But is it just non-contracting States that have not succumbed to the CISG's “expansive reach”?

A look at the country reports shows that there are contracting States the domestic legislation of which has not been directly influenced by the CISG either. In Argentina, for instance, the “Convention has not had any influence on civil or commercial codes reforms”,<sup>401</sup> which is not really surprising, as the legislator had to focus its attention elsewhere, namely “to urgent political matters, in particular those that raised with the economic emergence.”<sup>402</sup>

Similarly, in Canada, “no [. . .] jurisdiction specifically amended its domestic sales legislation to conform to provisions contained in the CISG.”<sup>403</sup> The reasons for this differ, however. As regards the common law jurisdictions, this is mainly due to the circumstance that “initial consideration of the CISG coincided with the adoption by the [Uniform Law Conference of Canada] of a reform of domestic sale of goods legislation based, at least in part, on article 2 of the Uniform Commercial Code. After this effort, there was thus little interest in revisiting reform of domestic sales legislation in light of the CISG itself.”<sup>404</sup> As regards the civil law jurisdiction of Quebec, jurists there “were similarly engaged in a law reform project”, the inspiration of which, however, “rest[ed] more with consistency with common law principles and the U.S. Commercial Code than with the CISG directly.”<sup>405</sup>

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<sup>400</sup> *Ibid.*, where the author goes on to state that “despite the fact that the elaboration of the Civil Code has lasted over 25 years, Brazilian legislators have not taken into consideration the CISG project or the Vienna Convention of 1980.”

<sup>401</sup> *Noodt Taquela*, supra note 10, at 6.

<sup>402</sup> *Ibid.*

<sup>403</sup> *McEvoy*, supra note 17, 67, where the author also states, however, that the statement just cited “is subject to the qualification that, as discussed above, the “*Commentaires du ministre de la Justice*” identify five articles of the *Code civil du Québec* as at least co-inspired by the CISG.”

<sup>404</sup> *Id.* at 37.

<sup>405</sup> *Id.* at 41-42, where the author goes on to state that there are, however, 5 provisions of the *Code civil du Québec* that are co-inspired by the CISG; see *Id.* at 42 f. and 67.

In Denmark, too, although “[t]he CISG has most certainly influenced the discussion on law reform”<sup>406</sup>, it has not had any direct effect on domestic legislation, unlike in other Scandinavian countries, where “new domestic legislation [ . . . ] paid considerable attention to the Vienna Convention text.”<sup>407</sup> Still, “the CISG has ‘indirectly’ affected domestic contract and sales law in Denmark, in that Denmark has implemented the EU Directives on Unfair Contract Terms and Consumer Guarantees, both of which contain provisions which were clearly inspired by the CISG.”<sup>408</sup>

In France as well, the CISG seems to merely have an indirect impact on domestic legislation, namely through the implementation of the EU Directive on Consumer Sales, as the efforts in view of a reform of the French law of obligations which are underway do not seem to take the CISG into account too much.<sup>409</sup>

In Italy, too, domestic legislation has not directly been influenced by the CISG, but this should not surprise, the reason being that “since the Convention’s adoption and its entry into force [ . . . ] there have not been major changes of the provisions of the Italian Civil code dealing with commercial contracts.”<sup>410</sup> Still, like in Denmark and France, in Italy the CISG has had an indirect impact, namely through the transposition of EU Directives into the Italian legal system that are inspired by the CISG.<sup>411</sup>

In Mexico, however, the CISG has simply had no impact on local legislation at all.<sup>412</sup> The same can be said as regards New Zealand,<sup>413</sup> Switzerland<sup>414</sup> as

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<sup>406</sup> *Lookofsky*, *supra* note 49, at 127.

<sup>407</sup> *Ibid.*

<sup>408</sup> *Id.* at 128.

<sup>409</sup> See *Witz*, *supra* note 50, at 140, stating that “[I]’impact de la Convention de Vienne sur l’Avant-projet de réforme de la Commission présidée par le Professeur Pierre Catala est faible, ce que l’on peut regretter.”

For a paper examining in detail what the CISG could offer to French contract law, see *Lamazerolles, Les apports de la Convention de Vienne au droit interne de la vente*, 2003.

<sup>410</sup> *Torsello*, *supra* note 35, at 222.

<sup>411</sup> See *Id.* at 222-223, stating that “the only relevant changes which have occurred [in Italy] were the result of the transposition into the Italian legal system of the rules introduced at Community level by means of the EC Directives addressing contractual issues [ . . . ]. As a result, it seems safe to affirm that the CISG’s impact on the Italian legislator has been only indirect, if at all. Beyond doubts, the CISG had an impact on the EC legislator with respect to the drafting of the instruments mentioned above, and this in turn resulted, yet only indirectly, in the implementation in the Italian legal system of rules inspired by the CISG.”

<sup>412</sup> See *Veytia*, *supra* note 11, at 245.

<sup>413</sup> See *Butler*, *supra* note 15, at 258.

<sup>414</sup> See *Widmer/Hachem*, *supra* note 54, at 296, where the authors also state that “if scholars were to refer to the Convention more often as a role model in their contributions on Swiss domestic law, this might provide an incentive for courts and legislators to harmonise such law with the CISG.”

well as Uruguay<sup>415</sup> and the United States,<sup>416</sup> with the exception of some rules to be found in the Louisiana Civil Code.<sup>417</sup>

## 2. .... to a very strong impact

The domestic legislation of the countries referred to in the previous chapter has only been indirectly affected by the CISG, if at all, for the exception of the domestic legislations of the Scandinavian countries other than Denmark. In effect, as already mentioned,<sup>418</sup> their domestic legislation - on sales law – has been substantially influenced by the CISG.<sup>419</sup>

There are other countries as well the domestic legislation of which has been directly<sup>420</sup> influenced by the CISG, at times even to a much greater extent. Estonia, for instance,<sup>421</sup> is one of them.<sup>422</sup> In effect, in Estonia, but this

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<sup>415</sup> See *Fresnedo de Aguirre*, *supra* note 16, at 336.

<sup>416</sup> See *Levasseur*, *supra* note 312, at 320-321, stating that “[a]n answer to the question regarding the extent to which the CISG has or may have influenced any discussion on law reform in the USA can be found in the federal Congressional Record and be expressed in a few words: the CISG has not influenced a discussion on law reform as far as the UCC is concerned [...].”

See also *Flechtnner*, Substantial Revisions to U.S. Domestic Sales Law (Article 2 of the Uniform Commercial Code), *Internationales Handelsrecht* 2004, 225, stating that “unlike those responsible for domestic sales legislation in some other States that have ratified the CISG, the drafters of the revisions to UCC Article [2] did not use the CISG as a model. They opted, instead, to work from the text of current UCC Article 2 (which long pre-dates the CISG), from other U.S. domestic legislation (such as the Uniform Electronic Transactions Act), and from their own original drafting.”

Asserting that the CISG cannot function as a model for the revision of Article 2 UCC; see *Gabriel*, The Inapplicability of the United Nations convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial code, 72 *Tulane Law Review* 1995 ff. (1998).

<sup>417</sup> See *Levasseur*, *supra* note 312, at 321 ff.; for a detailed analysis of the relationship between the CISG and the Louisiana Civil code, see *Levasseur*, The Louisiana Experience, in: The 1980 Uniform Sales Law, *supra* note 18, p. 73 ff.

<sup>418</sup> See *supra* the text accompanying note 407.

<sup>419</sup> See *Ramberg*, Unification of Sales Law: A Look at the Scandinavian States, *Uniform Law Review* 2000, 201, 202; *Schlechtriem*, 10 Jahre CISG – Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts, *Internationales Handelsrecht* 2001, 12, 12.

<sup>420</sup> It goes without saying that in those countries as well, the CISG has had an “indirect” impact, via the transposition of the EU Directive on Consumer Sales which, as repeatedly stated, is heavily influenced by the CISG; for a paper on the transposition of the aforementioned directive in one of the Scandinavian countries – Finland –, see *Schulze Steinen*, Umsetzung der EU-Richtlinie über den Verbraucherkauf in Finnland, *Internationales Handelsrecht* 2003, 212 ff.

<sup>421</sup> See also the situation in Japan, where “a fundamental reform of the Civil Code [is in the making and in respect of which the] CISG’s impact is not limited to sale-specific topics but it goes far beyond to contract law in general and even to the whole civil code”, *Hayakawa*, *supra* note 24, at 229.

<sup>422</sup> For a paper on the CISG’s influence on Estonian law, see *Sein/Kull*, Die Bedeutung des UN-Kaufrechts im estnischen Recht, *Internationales Handelsrecht* 2005, 138 ff.

seems to also hold true - at least in part -<sup>423</sup> in various other post-socialist Eastern and Central European countries,<sup>424</sup> the “CISG has had a strong impact on the most extensive part of the Civil Code - the Law of Obligations.”<sup>425</sup> Unlike in Norway, Finland and Sweden,<sup>426</sup> where the CISG’s impact is limited to sales law (as it is in Greece),<sup>427</sup> in Estonia the “CISG forms the basis not only for the sales contracts chapter but has also been an important source for drafting the general provisions, e.g. formation of contracts, breach of contract and exemption from liability, remedies.”<sup>428</sup>

In Russia, too, the CISG has had a strong impact,<sup>429</sup> so much so that there as well many - albeit not all -<sup>430</sup> new rules on general contract law have been modelled after the CISG.<sup>431</sup>

The CISG’s impact on issues other than purely sales related ones is not limited to post-socialist Central and Eastern European countries; in China,

<sup>423</sup> In Poland, it does not appear that the CISG has had the same impact on all general contract law issues; see *Zoll*, The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, With Some References to Other Central and Eastern European Countries, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2007, 81 ff., where the author points out, for instance, that while the Polish rules on formation have been heavily influenced by the CISG (at 83 ff.), the rules on remedies have not (at 89 ff.). The author also states the reason for this: “Changes in the rules concerning contract formation are probably easier to accommodate in a traditional legal system. Reforming a country’s system of remedies in the case of breach of contract requires much more fundamental changes in the traditional way of thinking”, *Id.* at 98.

<sup>424</sup> For this statements, see *Schlechtriem*, *supra* note 419, at 12.

<sup>425</sup> *Varul*, CISG: a Source of Inspiration for the Estonian Law of Obligations, *Uniform Law Review* 2003, 209, 209.

<sup>426</sup> For a reference to the CISG’s influence on Swedish sales law, see *Sandstedt*, *supra* note 187, at 92.

<sup>427</sup> See *Zervogianni*, *supra* note 13, at 176-177, where the author states that “[e]ven though it was not the CISG itself which triggered the Greek reform of the law of sales, an approximation between the domestic law and the CISG may be detected. A part of this approximation is consequential, in the sense that the Directive 99/44/EC, after which Greek law was modeled, was deeply influenced by the CISG. Hence the core element of all abovementioned texts is that the seller assumes the obligation to deliver to the buyer goods which are in conformity with the contract. The approximation of Greek law and CISG goes further than that, thus manifesting that the Greek legislative committee took the CISG provisions into account when drafting the new law.”

<sup>428</sup> *Varul*, *supra* note 425, at 209.

<sup>429</sup> See *Zoll*, *supra* note 423, at 87.

<sup>430</sup> The CISG has had only very little influence, however, on the Russian rules on formation of contracts; see *Zoll*, *supra* note 423, at 87 f.

<sup>431</sup> See *Talapina*, Russia, in: The CISG and Its Impact on National Legal Systems, *supra* note 9, p. 259, 263, stating that “[l]’acceptation de la Convention a influencé le contenu de la législation civile de la Russie [...]. Par exemple, sous l’influence de la Convention de Vienne le Code civil de la Russie insère les catégories de la violation essentielle du contrat de la livraison (l’art. 523), les droits différenciées de l’acheteur aux conséquences inégales de la transmission de la marchandise de la qualité inadéquate (l’art. 475), la règle sur l’obligation du vendeur livrer la marchandise libre de tout droit ou prétention d’un tiers (l’art. 460), l’établissement d’un délai pour examiner et trouver les manquements de la marchandise (l’art. 477), la précision des obligations de l’acheteur pour l’acceptation des marchandises (l’art. 484), les règles sur les dommages-intérêts abstraits (l’art. 524).”

too, the CISG has had an impact on rules other than those on sales contracts. In effect, “as Professor Huixing Liang, who is a main drafter of [the 1999 Contract Law], has put it, the drafters of the law ‘have consulted and absorbed rules of the CISG on offer and acceptance, avoidance (termination) with a Nachfrist, liabilities for breach of contract, interpretation of a contract and sales contract’. So it may be said that the CISG’s impacts on CL (P.R.C.) are not only limited to sale-specific topics, it has had an impact on non sale-specific issues as well.”<sup>432</sup>

In Germany, as has often been pointed out,<sup>433</sup> the CISG has “had [ . . . ] a strong real impact on the final outcome of the “Schuldrechtsreform”, a reform that is regarded as the most important revision of the BGB since 1900 when the Civil Code entered into force. This reform and likewise the CISG’s influence were not limited to sale-specific matters but changed the general law of obligations. The changes therefore apply to all kinds of contracts.”<sup>434</sup>

At this stage, it is worth pointing out, however, that the CISG and the domestic legislation modelled after it do not necessarily coincide, i.e., differences may - and regularly do - exist, as the legislators have - generally -<sup>435</sup> not taken over the CISG *tel quel*.<sup>436</sup> This is true also for those domestic legislations which have enthusiastically embraced the teachings of the CISG, such as China. The Chinese Contract Law differs from the CISG for instance in respect of its definition of fundamental breach, even though the CISG was used as a model.<sup>437</sup> But there are also other differences which relate, among

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<sup>432</sup> *Han*, *supra* note 57, at 84.

<sup>433</sup> See *Schlechtriem*, Einleitung, in: *Kommentar zum Einheitlichen UN-Kaufrecht*, *supra* note 77, p. 27, 35.

<sup>434</sup> *Magnus*, *supra* note 52, at 159-160, where the author also states that ““most basic concepts of the CISG and a number of its formulations have been implanted into the BGB. And partly this has been done in the form that CISG provisions had been given by the Consumer Sales Directive. Thus, the CISG has crept into German domestic law largely in an indirect way”, *Id.* at 160.

<sup>435</sup> But see the situation in Norway, where *Hagstrom*, CISG - Implementation in Norway, an approach not advisable, *Internationales Handelsrecht* 2006, 246 ff.

<sup>436</sup> For a similar assertion see, as regards the situation in the Czech Republic, *Rozehnalová*, *supra* note 72, at 111, where the author first states that “the legal regulation of purchase contract in the Commercial Code is highly similar to the regulation in the CISG and is based on the CISG”, and then goes on to point out that “specific differences exist. The Convention was not taken over *tel quel* but its text was the ground for the Commercial Code provisions.”

See also, in respect of the reform efforts underway in Japan on which the CISG is having a major impact, *Hayakawa*, *supra* note 24, at 230, stating that “it is probable that the new Code Civil will not take over the rules of CISG *tel quel*.”

<sup>437</sup> See *Han*, *supra* note 57, at 88, stating that the “Chinese legal rule on criteria of a fundamental breach is not so strict like that of the CISG.”

others, to the issue of conformity of the goods sold,<sup>438</sup> the exemption from liability,<sup>439</sup> the avoidance of the contract,<sup>440</sup> etc.

In Germany, too, a comparison between the CISG and its German “offspring”,<sup>441</sup> shows that there are some - not necessarily minor - differences.<sup>442</sup> It may suffice to recall one such “major theoretical difference between the CISG and present German contract law”, namely that which “concerns the question whether a party in breach should be strictly liable in damages - with a very limited possibility of exemption - or whether fault should be required. The former is the concept of the CISG (Art. 79) whereas the BGB still requires that the party in breach is at fault in order to become liable in damages (§ 280 (1) sent. 2 and § 651f (1) BGB).”<sup>443</sup>

In this rapporteur’s opinion, what has just been said does not diminish the CISG’s importance as a model or source of reference for those legislations. Rather, it goes to show that there are other - more country specific - considerations as well which the domestic legislator has to take into account when drafting statutes or codes for purely domestic purposes.<sup>444</sup>

## CONCLUSION

From the foregoing, it clearly results that the impact the CISG has on the members of the legal community - namely lawyers, judges and legal scholars – varies from country to country. It also varies, however, in relation to the various members of the legal community, legal scholars appearing

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<sup>438</sup> *Id.* at 88 f.

<sup>439</sup> *Id.* at 89.

<sup>440</sup> *Id.* at 89 f.

<sup>441</sup> *Magnus*, supra note 52, at 160.

<sup>442</sup> See also *Herber*, The German experience, in: The 1980 Uniform Sales Law, supra note 18, p. 59, 67, stating that “there are many details where the CISG and the new German [...] law differ from each other.”

<sup>443</sup> *Ibid.*, where it is also stated, however, that under German law “in case of breach fault is presumed. The party in breach must prove that it was not at fault. The hurdle for this proof is rather high. Therefore, the difference to Art. 79 CISG which excuses a party only for impediments of performance beyond its control is in practice much less important than could be expected from the theoretical viewpoint.”

For a reference to the issue of exemption as one of the important topics in relation to which the CISG and German law differ, see also *Herber*, supra note 442, at 67.

<sup>444</sup> For a similar statement, rendered in respect of the reform efforts underway in Japan, *Hayakawa*, supra note 24, at 230, stating that “legislation is a long and complicated process of negotiations and discussions so that many other considerations should also be taken into account before we reach our final destination.”

more often than not to be both more aware of and receptive towards the CISG than practicing lawyers and judges.

As regards legislators, “the inclination to incorporate CISG into their national systems of law[, too,] differs considerably”<sup>445</sup> from country to country. Still, at least throughout Europe, within the EU, the CISG’s impact on legislators seems to more homogenous, but this is not as much due to the fact that the CISG entered into force in 24 out of the 27 EU Member States,<sup>446</sup> thus, “giving shape to a set of common rules and principles in the field of cross-border sales transactions [throughout the EU]”<sup>447</sup>, but rather because “this process prepared the ground for the intervention by [ . . . ] EU institutions aimed at harmonizing the national laws on sale within the EU in the light of the CISG’s model and to extend some of the principles underlying the CISG to a broader scope of application than simply sales law. As a result, the legal systems of the EU Member States (including those States which are not contracting parties to the CISG) have been to a smaller or a greater extent [shaped] after the likeness of the [CISG].”<sup>448</sup>

The “most prominent example”<sup>449</sup> for this kind of - indirect - influence by the CISG is its influence on the European Consumer Sales Directive which, as mentioned already,<sup>450</sup> is clearly and to a very large extent based on the CISG.<sup>451</sup> “For the first time in such a considerable extent a non-European act, namely an international convention, officially plays the role as a model for an EU enactment. This choice is even more significant if one bears in mind that the Consumer Sales Directive is the most important European provision in the field of the law of contract, which affects the very heart, one may say, of the ‘classical’ law of contract and obligation. Hence, the Consumer Sales Directive is the living example of an indirect impact of the CISG on the legislation of EU Member States. This means that, whether they liked it or not, even those States which have refused so far to ratify the CISG have indirectly (i.e. through the filter of the EU Consumer Sales

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<sup>445</sup> *Ramberg*, *supra* note 419, at 201.

<sup>446</sup> Only the Ireland, Malta, Portugal and the United Kingdom have not yet entered the CISG into force; *sse also* *Andersen*, *supra* note 9, at 303.

<sup>447</sup> *Trojano*, *supra* note 188, at 347.

<sup>448</sup> *Ibid.*

<sup>449</sup> *Magnus*, The CISG’s Impact on European Legislation, in: The 1980 Uniform Sales Law, *supra* note 18, p. 129, 132.

<sup>450</sup> See *supra* the text accompanying note 187 ff.

<sup>451</sup> See, apart from the authors cited *supra* in note 187, *Micklitz*, Ein einheitliches Kaufrecht für Verbraucher in der EG?, *Europäische Zeitschrift für Wirtschaftsrecht* 1997, 229, 230, *Schlosser*, How to Apply Uniform Legal Rules, *European Legal Forum* 2008, 14, 20; *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 2005, p. 38; *Trojano*, *supra* note 188, at 348.

Directive) been ‘contaminated’ by the ‘CISG virus’”<sup>452</sup>, which led those scholars who feared “the risk of a colonization of their centenary, or even millenary, legal traditions”<sup>453</sup>, to even label the European Consumer Sales Directive “a ‘Trojan horse’, created to permit uniform sales law to penetrate the domestic private law of sale through the back door.”<sup>454</sup>

The European Consumer Sales Directive did, however not only “adopt[. . .] parts of the CISG’s general structure and some of its definitions and provisions”<sup>455</sup>, but, as clearly pointed out in the report on “the CISG’s Impact on the EU Legislation”, “[i]n some cases the Consumer Sales Directive goes even beyond the CISG by extending or generalizing principles laid down in the CISG or building original solutions which are not provided in the CISG.”<sup>456</sup>

Considering that the CISG constitutes a set of rules basically<sup>457</sup> aimed at governing international b2b transactions that has very strongly influenced domestic b2c transactions,<sup>458</sup> and, thus “shows [. . .] that the main policy considerations on which the CISG is based correspond to basic commandments of justice which apply both to business and consumer transactions”<sup>459</sup>, what is the CISG if not a success, at least throughout Europe,<sup>460</sup> where the CISG is not only applied more often<sup>461</sup> than elsewhere<sup>462</sup> but also in way that better conforms to the mandate to promote uniformity in its application.

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<sup>452</sup> *Troiano*, supra note 188, at 349-350, where the author cites an author

<sup>453</sup> *Id.* at 350.

<sup>454</sup> *Raynard*, De l’influence communautaire et internationale sur le droit de la vente: quand une proposition de directive s’inspire d’une convention internationale pour compliquer, encore, le recours de l’acheteur, *Revue trimestrielle de droit civil* 1997, 1020, 1024.

<sup>455</sup> *Magnus*, supra note 449, at 132.

<sup>456</sup> *Troiano*, supra note 188, at 351.

<sup>457</sup> See, however, German Supreme Court, 31 October 2001, available at <http://cisgw3.law.pace.edu/cases/011031g1.html>, correctly pointing out that in exceptional cases the CISG may be applicable even to (international) consumer sales; in accord, legal writing, see *Ferrari*, Art. 2, in: *Kommentar zum Einheitlichen UN-Kaufrecht – CISG*, supra note 77, p. 79, 81.

<sup>458</sup> See *Magnus*, supra note 52, at 162, stating that “[i]t is astonishing enough that the Directive could borrow from an instrument for merchants.”

<sup>459</sup> *Ibid.*

<sup>460</sup> For a word of caution in using “the CISG as a model for legal harmonization within Europe, see *Reimann*, supra note 83, at 128 f.

<sup>461</sup> See <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

<sup>462</sup> See *Reimann*, supra note 83, at 128.