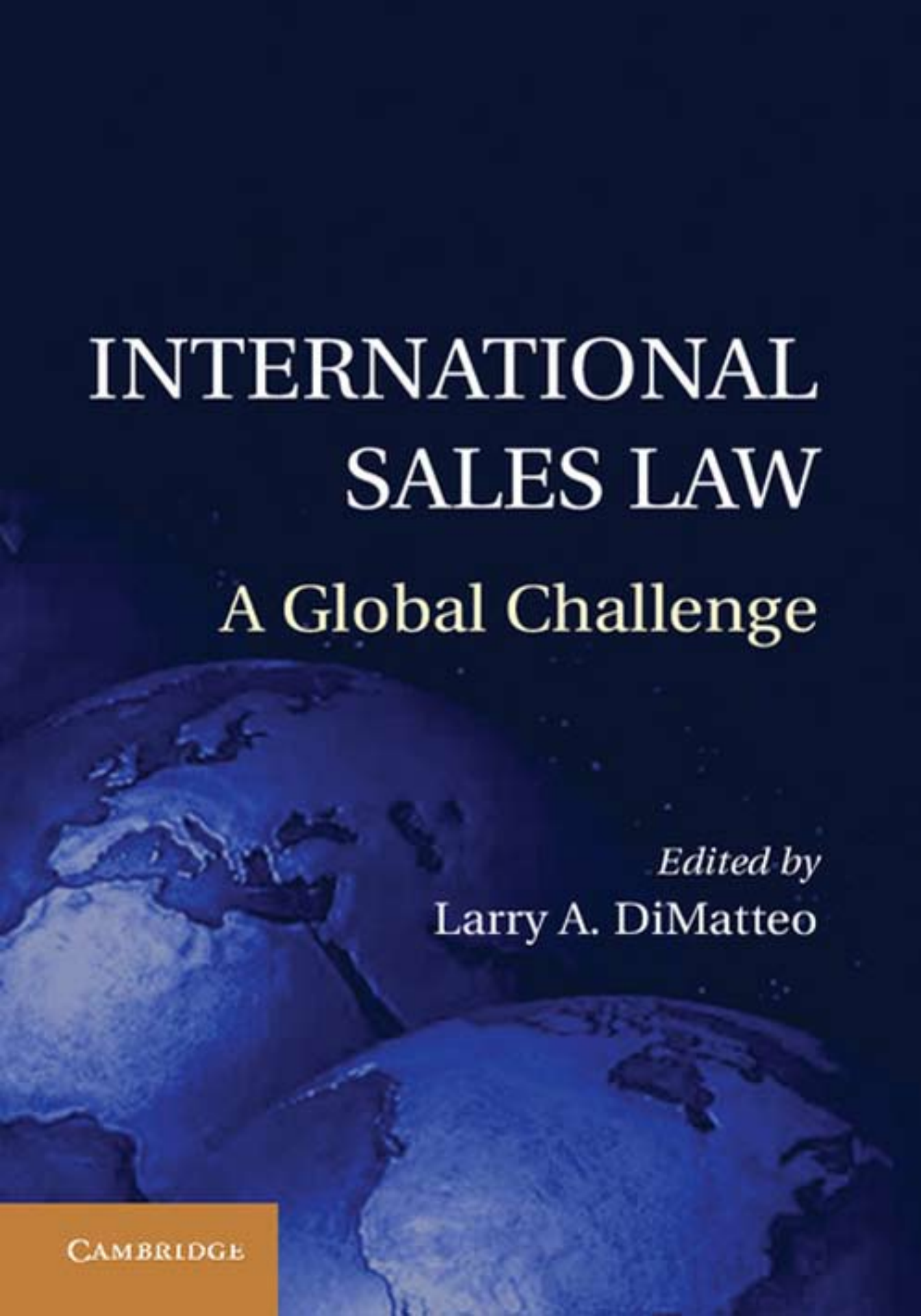
INTERNATIONAL SALES LAW

A Global Challenge

Edited by

Larry A. DiMatteo



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INTERNATIONAL SALES LAW

A Global Challenge

This book brings together the top international sales law scholars from twenty-three countries to review the Convention on Contracts for International Sale of Goods (CISG) and its role in the unification of global sales law at present and into the future. The book covers three general research methodologies: (1) doctrinal or descriptive, (2) theoretical, and (3) practical. In the area of doctrinal–descriptive analysis, the substance of CISG rules is reviewed and alternative interpretations of those rules are analyzed. A comparative analysis is given of how numerous countries have accepted, interpreted, and applied the CISG. Theoretical insights are offered into the problems of uniform laws, the CISG's role in bridging the gap between the common and civil legal traditions, and the debate over the proper role of good faith in CISG jurisprudence. The practitioner perspective argues that the CISG should be viewed as a tool for furthering the interests of business clients.

The book includes a review of the case law relating to the interpretation and application of the provisions of the CISG; analyzes how the CISG has been recognized and implemented by national courts, as well as arbitral tribunals; offers insights into the problems of uniformity of application of an international sales convention; compares the CISG with the English Sale of Goods Act and places the CISG in the context of other texts of UNCITRAL; and analyzes the CISG from the practitioner's perspective, including how to use the CISG proactively.

Larry A. DiMatteo is the Huber Hurst Professor of Contract Law and Legal Studies at the Warrington College of Business Administration and Affiliate Professor at the Levin College of Law at the University of Florida. He is the author or editor of more than seventy scholarly publications including *International Sales Law: A Critical Analysis of the CISG* (2005) and *Commercial Contract Law: Transatlantic Perspectives* (2013). Professor DiMatteo obtained his J.D. from Cornell Law School, LL.M. from Harvard Law School, and Ph.D. in Business and Commercial Law from Monash University.

International Sales Law

A GLOBAL CHALLENGE

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"Founding Father"

John Honnold
(1916–2011)

> "The only way to create a genuine and effective international legal system is to explore and appreciate the world's diverse views on challenging topics."
> *Harry Flechtner*

"The Great Scholar"

Peter Schlechtriem
(1933–2007)

> "Nonetheless, you had the firm impression that he had rather preferred to sit in his office and write one of his books or articles."
> *Ulrich Magnus*

"The Great Disseminator"

Al Kritzer
(1928–2010)

> "Al poured his heart and his soul, and his money, into building systems and networks which enabled us to share knowledge and insight. Now, with Al gone, it is up to us to ensure that we all continue to share."
> *Camilla Andersen*

"Society" of Scholars

In referencing Honnold, Schlechtriem, and Kritzer, Harry Flechtner notes that "I have often thought that the spirit and personalities of these wonderful people formed a distinctive culture around the CISG that partook of their character. I have often noticed what a remarkable group of scholars that have been attracted to the Convention as a major focus of their careers – thinkers who are not just bright and energetic, but truly friendly and other-centered."

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CISG – Commentary (C. H. Beck, Munich, 2011). He is the author of more than one hundred publications.

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Preface

On 11–12 November 2011, a group of internationally recognized scholars – from more than two dozen countries and six continents – convened at the University of Florida. Papers were presented by scholars representing the civil, common, Islamic, mixed, and socialist market legal systems. The countries represented at the conference included Argentina, Australia, Austria, Canada, Colombia, Denmark, Egypt, Finland, France, Germany, Israel, Italy, Mexico, Montenegro, The Netherlands, the People's Republic of China, Saudi Arabia, Serbia, Slovak Republic, South Africa, Sweden, Switzerland, the United Kingdom, and the United States. Between those in attendance at the conference and the full complement of contributors to this book, the total country representation reached thirty with subsequent contributions coming from Lithuania, New Zealand, and Spain.

The title of the conference was "The Global Challenge of International Sales Law." Within this umbrella, the United Nations Convention on Contracts for the International Sale of Goods (CISG) was analyzed from numerous perspectives. The diversity of the subject areas and scholars allowed for a better understanding of the issues still confronting the CISG and its application. The scholars and practitioners that wrote papers for this book provided original research that has resulted in numerous insights not thoroughly explored previously. This book's goal is to provide this scholarship to a broader audience encompassing scholars, practitioners, judges, arbitrators, and students.

The purposes of the conference were three-fold. First, the conference sought to advance CISG scholarship. In this regard, the conference structure was constructed from a preformed table of contents. In this way, the conversion of the papers presented to book form was undertaken within a holistic framework. The papers were grouped into six parts: "Introductory Materials"; a review of the case law relating to the interpretation and application of the "Substantive Provisions of the CISG"; a series of "Country Analyses" analyzing how the CISG has been recognized and implemented by the judicial and arbitral courts of a given nation; "Insights" into the problems of uniformity of application of an international sales convention and whether the CISG can act as a bridge between the common and civil law systems; "CISG in Context," which compares the CISG with a competing system of rules represented by the English Sale of Goods Act, the CISG in the context of other texts of the United Nations Commission on International Trade Law (UNCITRAL), and the substantive area of precontractual liability as it relates to the CISG; and finally, a "Practitioner's Perspective," which covers the decision of legal counsel to exclude, ignore, or use the CISG, as well as how to use the CISG proactively.

In the end, this book uses three general research methodologies: (1) doctrinal or descriptive, (2) theoretical, and (3) practical. In the area of doctrinal–descriptive analysis, the substance of CISG rules is reviewed and alternative interpretations of those rules are analyzed. A comparative analysis is given of how numerous countries have accepted, interpreted, and applied the CISG. Theoretical insights are offered into the problems of uniform laws, the civil–common law divide and the CISG's role in bridging the gap between the two legal traditions, and the debate over the proper role of good faith in CISG jurisprudence. The view of the practitioner perspective argues that the CISG should be viewed as an opportunity to further the interests of business clients.

A few additional notes are required. There is a preconceived connection between Parts III–IV and V–VI. The substantive provisions reviewed in Parts III–IV are then used as a template for the country analyses found in Parts V–VI. Parts V–VI apply the substantive topics covered in Parts III–IV and analyzes them in relationship to particular countries' CISG case law. Second, the countries selected for analysis are a diverse sampling of countries and legal systems. This diversity includes Western Europe, where the deep jurisprudence, literature, and commentaries provide the anchor for understanding the CISG and its civilian nature. These countries include Austria, France, Germany, Italy, The Netherlands, Spain, and Switzerland. Separate chapters analyze the use of the CISG at the regional level: Baltic countries, the Nordic countries, and Southeastern Europe. Continental reports are provided under the titles of the United States and Canada and Central and South America. Asia is represented by a report on the People's Republic of China. Finally, reports are provided for Australia and New Zealand. An important analysis of the application of the CISG within an Islamic legal system is given through a country analysis of Egypt. Finally, another report analyzes the CISG and the Israeli legal system.

The conference and book provided a forum for CISG scholars to gather and discuss the CISG's role in the world at present and into the future. The conference also honored three visionaries without whom the CISG would never have come into existence and would not have achieved a high level of success – John Honnold, Peter Schlectriem, and Albert Kritzer.

I would like to thank the sponsors that provided the funding and support for making such a large undertaking possible. The major financial support was provided by the University of Florida Center for International Business Research and Education and the Warrington College of Business Administration. Additional financial support was provided by the University of Florida's Levin College of Law, University of Florida's Center for European Studies, and the University of Florida's Office of Research. The conference was also sponsored and promoted by the United Nations Commission on International Trade Law and Pace University's Institute for International Commercial Law.

Tributes

In Memory of John Honnold

On January 21, 2011, John Honnold, the William A. Schnader Professor of Commercial Law Emeritus at the University of Pennsylvania Law School, died at the age of ninety-five. All interested in the CISG know his name and have benefited from his scholarship. Some of you, like me, had the privilege and honor of meeting him personally. I had the extraordinary luck of meeting him several times during my days as a junior academic. John's insights into international commercial law, his passion for promoting and understanding the topic, his unique role in shaping the area in the second half of the twentieth century and the resulting authority with which he spoke on the topic, his obvious desire to understand the views of others, his understanding and appreciation of those views, and the sweetness of personality that allowed him to encourage their expression – all these combined to make him one of the biggest influences on my career. I know there are many others who would say the same.

All who met John knew immediately that they were in the presence of a great man. John's professional life encompassed four or five careers that would, separately, be proud accomplishments for the most talented and ambitious. After receiving his B.A. from the University of Illinois, where he met his future wife and lifelong helpmate and colleague Annemarie, John attended Harvard Law School. He graduated with honors and served as editor of the *Harvard Law Review*. He hinted at the international bent of his future by honeymooning with Annemarie in Europe on the eve of the outbreak of the Second World War. When he returned to the States, John began the first (and shortest) of his careers – working on Wall Street (at a modest salary), living in Brooklyn, and beginning a family with Annemarie. Their family eventually came to include three children – Carol, Heidi, and Edward.

John soon began his next career, which took him to public service and Washington, D.C., to work for the Securities Exchange Commission and, during World War II, as Chief of the Court Review Branch in the Chief Counsel's Office of Price Administration. Then, in 1946, John joined the law faculty at the University of Pennsylvania, where he taught and authored casebooks on constitutional and commercial law. It was from this position that John took a key role in one of the most significant law reform projects in U.S. commercial law history – the development and enactment of the Uniform Commercial Code. In 1958, John entered the arena of international commercial law when he taught the subject, under a Fulbright grant, at the University of Paris Law School. As a result

of his talent and passion, he was soon representing the United States at the Hague Diplomatic Conference on International Law.

But John was not finished with public service – and this time the public service was of a particularly courageous kind. In 1965, John served as chief counsel of the Lawyers' Committee for Civil Rights in Mississippi, and he became a Director and a member of the Executive Committee of the Board of the American Friends Service Committee. His dedication to social justice was not just a public cause; it was a personal commitment. John and Annemarie resigned from the swim club where they lived because of its racially discriminatory policies. During the "red scare" days he joined other academics in signing an open letter against the proposed Subversive Activities Control Act of 1948, and as a delegate to the 1968 Democratic Party National Convention he publicly criticized the tactics of the Chicago police in quelling street demonstrations. But the call of international service grew increasingly strong for John. After teaching at the Salzburg Seminar in American Studies, he began to focus professionally on international commercial arbitration.

In 1969, in the most significant development for those interested in uniform international commercial law, John was appointed Director of the International Trade Law Division of the Office of Legal Affairs of the U.N. Secretariat, which made him the Secretary of the then-fledgling UNCITRAL. He oversaw the work of UNCITRAL as secretary from 1969 to 1974, guiding the critical early efforts that led to the creation of the CISG. When he left UNCITRAL to rejoin the University of Pennsylvania Law Faculty in 1974 (succeeded as UNCITRAL's Secretary by Willem Vis) he remained actively involved in drafting the treaty text. In 1980, he led the U.S. delegation (and played a crucial role) at the diplomatic conference in Vienna, where the text of the CISG was finalized and approved for signature and ratification by states.

Thereafter, John worked tirelessly to elucidate the significance and meaning of the CISG. Two milestones of particular note followed quickly. In 1981, John published his seminal commentary on the CISG: *Uniform Law for International Sales under the 1980 U.N. Convention*. This work, now in its fourth edition (which this author is extremely honored to have taken over editing and updating), quickly became one of the most authoritative and cited works on the CISG – a distinction due (no doubt) to John's unique knowledge of and insights into the creation of the CISG, to his understanding of its global commercial and political significance, to his appreciation of the extraordinary challenges it presents to those who must apply it, and to his insightful analysis of the operation of its provisions. In December 1986, the United States ratified the CISG – a ratification that, along with simultaneous ratifications by Italy and the People's Republic of China, brought the number of contracting states to eleven, surpassing the number required to bring the CISG into force; the CISG became effective in the United States and the other original contracting states on January 1, 1988.

Throughout this period, John lectured and published prolifically on the CISG. He continued to build a remarkable record of achievement as a member of the Penn Law faculty by issuing new editions of his influential casebooks on sales and on security interests. He reinforced and added to his distinguished reputation as a classroom teacher, and he built Penn's program for foreign law graduates.

It was during this period that I had my first contact with John. It occurred at a Pittsburgh conference on the CISG in December 1987. The conference was organized by my colleague, dear friend, and the other main influence on my own career, Professor

Ronald Brand – another great man and a recipient, like John, of the prestigious Leonard J. Theberge Award for Private International Law. At that time, I was strictly a domestic commercial law specialist, teaching contracts, sales, and bankruptcy law. I had barely heard of the CISG, but Ron talked me into participating in the conference that he was organizing. I remember reading the CISG for the first time as I prepared my paper for the conference. I found the text mildly interesting, but John's keynote conference address, with its profound opening and closing remarks,[1] opened up a whole new world of thought for me.

John continued his distinguished work even after he became an emeritus professor in 1984; he still taught at Penn, spoke around the world on the CISG, and published important commentaries on international sales law from a perspective that only he could bring. And I continued to have opportunities for personal contact with him in connection with conferences on the CISG. Once, while I was in Philadelphia to moderate an all-star CISG workshop at which John was one of the featured participants, I had the honor of staying in his home and meeting his wife Annemarie. John and I grew to have a friendship – a respectful friendship between a junior academic and a great senior scholar and mentor, but it included a personal dimension. For example, I dabble in performing folk music, and I found out during one of our meetings that John's broad-ranging musical interests encompassed the folk genre. In fact, he revealed that he was a longtime collector and sometime performer of folk songs. I was so bold as to record a couple of my performances and send them to him. From his response I learned how a consummate diplomat can express puzzlement in the most polite, friendly, and encouraging fashion!

It was through our personal contact that I gained insight into the special nature of John's achievements and the light they shed on his work with the CISG. Of course, the formal record of John's extraordinary career bespeaks a great man. Among the many special honors it brought him were a Guggenheim Fellowship, a visiting appointment as the Arthur Goodhart Professor in the Science of Law at Cambridge University, and the Theberge Award. But the nature of John's greatness, I believe, derived almost as much from his personality as from his powerful intellect and astonishing drive.

Anyone who ever met him will testify that John was one of the sweetest, most soft-spoken, and most thoughtful people imaginable. In the end, this sweetness and gentleness of personality gave John his special greatness; it made possible his lifetime of breakthrough achievements, including his crucial role in bringing the CISG into existence, making it understood, and making it successful. He was a genuinely extraordinary man because he combined a marvelous intellect and drive with a profound and powerful passion for understanding the views of others. John was a good listener – one who conveyed the vivid impression that he was truly interested in, even inspired by, your ideas. He conveyed that impression because it was true. From the moment I met John in 1987 it was clear to me that he was a genuine student in the best sense of the word, passionate to acquire knowledge by seeing things through the eyes of others.

I can imagine how John's listening skills and powers of empathy and sympathy were tested as he worked to get the CISG project off to a good start, and as he helped shepherd it through the drafting and approval processes. Of course an achievement such as the

[1] See John Honnold, "The Sales Convention: Background, Status, Application," 8 J.L. & Com. 1 (1988); John Honnold, "The Sales Convention in Action – Uniform International Words: Uniform Application?" 8 J.L. & Com. 207 (1988).

CISG – a complex substantive law covering a critically important area and requiring worldwide acceptance – is possible only through the efforts of many talented people. Its success has required many to hear and truly understand the views of a diverse international community, and to bring that diverse community into agreement. The CISG project has had the extraordinary good fortune to attract a number of remarkable people, in addition to John, who were capable of taking on this challenge; people such as Peter Schlechtriem and Albert H. Kritzer who, like John, have now passed on and are being honored in this book. I have often thought that the spirits and personalities of these wonderful people formed a distinctive culture around the CISG that partook of their character. I have often noticed what a remarkable group of scholars have been attracted to the CISG as a major focus of their careers – thinkers who are not just bright and energetic, but truly friendly and other-centered. And I have often recognized how undeservedly lucky I am to have stumbled into becoming a part of that group.

I smile to think of John as an invisible presence wherever people gather to discuss the CISG. I have often sensed his tolerant and inquisitive spirit pushing me to understand the law from a broader and more humane perspective. I have been far less true than I should have been to his example of always respecting, and always seeking to understand and profit from, the wisdom of others. I recognize that even my chapter for this book is combative and challenging in a way that is not fully in keeping with John's spirit. He was a strong and effective advocate for his own positions, but he never lost sight of the fact that even he did not have a monopoly on wisdom, and that the only way to create a genuine and effective international legal system is to explore and appreciate the world's diverse views on challenging topics. I know I would be better at what I do if I more often remembered and emulated that attitude, which was such a notable aspect of John's work and character. It would be a fitting memorial to John Honnold – and yet another breakthrough achievement to be added to John's long list – if we all agreed to follow more closely his inspiring example of curiosity about and openness to the ideas of others.

Harry M. Flechtner,[2]
Pittsburgh

In Memory of Peter Schlechtriem

I want to say some words in the memory of Peter Schlechtriem. He lived from 1933 to 2007. For many years he was *the* globally leading scholar on the CISG, the UN Convention on Contracts for the International Sale of Goods. Everybody concerned with the CISG knows his name from his numerous and leading publications in the field of international sales law; his book *UN Law on International Sales* is used in CISG courses all over the world; many of us have met him personally.

I met Peter Schlechtriem for the first time forty years ago, in 1971, in Heidelberg. It was in the Institut für ausländisches und Internationales Privat- und Wirtschaftsrecht (Institute for Foreign and International Private and Commercial Law) at the University Place in the center of Heidelberg. He had become the successor of my doctoral supervisor

[2] I wish to thank John Honnold's son, Mr. Edward Honnold, for supplying much of the biographical information included herein.

at that law faculty and for reasons that will become evident a little later I must mention that my doctoral supervisor, Professor Dr. Eduard Wahl, was a pupil and close collaborator of Ernst Rabel, the famous comparatist, founder of modern comparative law, and creator and driving force behind the uniform international sales law movement, which led to the CISG. I visited Peter Schlechtriem in his new office only a few days after his arrival in Heidelberg and met a young, sportive looking man with elastic and energetic movements, a warm voice, and very bright eyes. He was the model of a young, modern professor, open-minded and international in his thinking. Remember, these were the years shortly after the students' revolt against the old, politically conservative patriarchs and he fully represented the new type of professor that I and my fellow students sought.

His way was indeed colorful and closely tied to the German history of the twentieth century. He was born on March 2, 1933, a fatal year for Germany with the rise of the Nazi dictatorship. He was born in the town of Jena, which after the Second World War became part of the socialist German Democratic Republic, or East Germany, and exposed Schlechtriem to a second dictatorial regime. He finished school there but immediately after school he left his hometown and the socialist part of the then-divided Germany. He went to Hamburg – in the "capitalistic" West – where he studied first shipbuilding and then political science and sociology and finally law. In 1956, he moved to Freiburg, where he finished his law studies, wrote his dissertation, and became an assistant of Professor Dr. Ernst von Caemmerer, another pupil and former collaborator of Ernst Rabel. In 1964–65, Schlechtriem studied at Chicago Law School and was awarded a Master of Comparative Law. There he met Professor Max Rheinstein, yet another close collaborator of Rabel. From 1968 to 1990, Schlechtriem served as assistant professor at Chicago Law School. Back in Freiburg, he completed his *habilitation* with a comprehensive comparative law study in 1970 and was offered a chair at both the University of Heidelberg and the University of Erlangen. He accepted the position at Heidelberg. Rabel's thinking and method – practiced by Rabel's students – had very much influenced Schlechtriem's scientific ideas and convictions. In his work he used and perfected Rabel's functional comparative method and the idea that the purpose of a legal norm is the key to its understanding. Moreover, he was passionate about the need for a uniform sales law and, in particular, the CISG, which became a lifelong subject of his scientific work. Scientifically, Schlechtriem became an important part of Rabel's progeny. He remained true to the long and prestigious tradition of German legal science.

The reason for my visit to his new office in Heidelberg in 1971 was to obtain a position as one of his assistants. When I asked him, he said: "I am very sorry but I have already made the contracts with my collaborators." As was his custom, he had things carefully arranged in advance. I was very disappointed but fittingly I found a position at the Max-Planck-Institute in Hamburg, which had previously been founded by Rabel in Berlin before the Nazis expelled him because of his Jewish heritage. With respect to my first meeting with Peter Schlechtriem, one could not think of a better start to a long-standing scientific and friendly relationship. I did not see Schlechtriem again until 1985, after I had become a professor at the University in Hamburg where I worked in the same field as Peter, namely on the CISG. He had meanwhile moved to Freiburg where he succeeded his mentor von Caemmerer and had become more and more involved with the CISG. In 1980, he was a member of the German delegation to the Vienna Conference that adopted the CISG. He subsequently wrote about the conference and contributed to

the first comprehensive commentary on the new uniform sales law. He had heard that I collected court decisions on the Hague Uniform Sales Law (the predecessor of the CISG) and we agreed to work together to publish these decisions. In the beginnings of the electronic communications era this was no easy task; nonetheless, the work was well received.

In the following years, Schlechtriem became one of the leading German scholars in various areas of the law. His publications on the law of obligations strongly influenced German legislation and educated generations of students. His international experience, interest in other legal systems, comparative approach to law study, wise judgment, and organizational talents expanded his influence far beyond Germany. He was asked and gave advice when Estonia reformed its law of obligations, when UNIDROIT prepared the 2004 version of its Principles, and when the Draft Common Frame of Reference of the EU was in the making. For seven years, he served as president of the German Society of Comparative Law. When the CISG entered into force in Germany in 1991, Schlechtriem edited and authored the first great commentary on the subject; a little later the work was translated into English, which he saw as the language of international commerce and law. Today, the commentary is the most authoritative and influential source for the international application of the CISG. Now the editorship is in the hands of Ingeborg Schwenzer, his former pupil and collaborator, and so the tradition begun with Rabel continues.

Schlechtriem was also one of the founders and the first chairman of the CISG Advisory Council, an association of CISG experts who publish opinions on specific CISG problems and issues. The idea behind the Council is to support the uniform interpretation and application of the CISG.

Among the many honors he received were honorary doctorates from the University of Basel and the University of Tartu in Estonia, as well as an appointment as a Fellow of St. Catherine's College in Oxford. In 2003, on his seventieth birthday, he received a Festschrift of almost one thousand pages and he gave a grand reception in appreciation at Freiburg's finest hotel and restaurant. A broad staircase led to the entrance of the reception rooms. Schlechtriem stood at the top of the stairs at the entrance and greeted every guest by name and welcomed each very warmly. Nonetheless, you had the firm impression that he would rather have been sitting in his office writing a book or an article. He was not much interested in parties and small talk and even less in celebrating his own achievements.

The last time I saw him was at a CISG conference in Pittsburgh in November 2005. He gave an impressive speech on the CISG as *lingua franca* of international commercial law. In private talks at the conference he was as friendly and interested as ever. He kept secret that he was already fatally ill. His last publication was a contribution to the *Festschrift* for Albert H. Kritzer. Peter's article dealt with the conflict between merger and form clauses with oral modifications under the CISG. The *Festschrift* was published on the occasion of Kritzer's eightieth birthday on April 21, 2008. Peter had submitted his article far in advance in order to see it completed before his death. He died on April 23, 2007, at the age of seventy-four. His combination of intellect and character was a rarity, and for this he will not be forgotten.

Ulrich Magnus,
Hamburg

In Memory of Albert H. Kritzer

The last time I gave a speech about Albert H. Kritzer he was in the room. I was standing with my good friend and colleague Ulrich Schroeter on the stage of the Vienna Concert Hall, and we were bursting with joy! It was 2008, and we were presenting the *Festschrift* in honor of Al's eightieth birthday, and we had managed to solicit great contributions that took Al completely by surprise. It was an occasion of pure unadulterated exuberance – the unquestioned high point of my career – an "Oscar-style" achievement speech, an accolade (and a song) for Al in front of thousands. I thought writing my speech would be daunting, but it was a breeze, thrown together in the back of a taxi and driven by pure pleasure.

In stark contrast, I thought writing this tribute would be easy – but it has been grueling. Not only was he not in the room when my tribute was given (although the room was named "Alberts"!), but Albert will never be in the room with me again – I have lost my "other father," whom I have not been able to say a proper goodbye to before now. As a result, I am unable to provide an objective insight into Albert H. Kritzer – I offer you my subjective take on the man, the scholar, and my friend. I will explain my relationship to Al first, then list his accomplishments, and then try to surmise some of the wisdom I have been able to glean from my experiences with him.

My Other Father . . .

"Other father?" You may ask, "What does that mean?" You would have to have known Al to truly understand, but I will do my best to explain. I was "adopted" by Al at the age of 26. Moreover, my parents – who are both still alive and well and had taken excellent care of me until I left home some years before – were somewhat surprised at the time, and – frankly – so was I, as I felt I was taking great care of myself. I first met Al at the Vis Moot in the spring of 1997, where he judged my contribution to the Essay Competition. Subsequently, Al decided that he would adopt me, and he announced his intentions in a formal email – and so it was. I was not the first to be subject to this rather eccentric practice of "adopting" grown-ups – I have an older adopted CISG "sister," Pilar Perales Viscasillas, who has been nurtured far more successfully than I. In both of us, Al saw potential that he wanted to unlock, and once he decided to nurture he dedicated himself to the task with fervor. I must admit that at first I found it somewhat awkward (especially the good-natured squabbling with Al about who would lead me down the aisle at my wedding, eventually resolved by my refusal to marry at all, much to my partner's delight!). But Al soon became a welcome and invaluable part of my family's life. He visited us, and my parents, often, and arranged visits to New York; he spoiled my children as extravagantly as any grandfather would; and we spent holidays together and shared many wonderful moments. Professionally, Al guarded me and guided me; often subtly, as required when trying to help a pig-headed, anti-authoritarian like myself, and sometimes without the desired result. But Al never ceased to express his love and support for me, even when we both knew I could have reacted better to a given situation or task. He would send emails – out of the blue – simply saying "I am proud of you and I love you," and he once sent me a crystal Steuben heart to remind me of his support. Initially, this was very overwhelming, but, today, I really miss his caring ways and generosity of spirit. I can unequivocally state that I would not be where I am today if it were not for Al's love and support, which

made my journey not only more enjoyable, but for his advice and interference, made the journey possible.

Biography of Albert H. Kritzer

Al was a native of New York, born in April 1928. He was educated at the College of William and Mary, and went on to gain distinction at Cornell Law School in 1951. Before his final graduation, he took time to travel through Europe and already showed signs of greatness, not only because he was driven by the need to expand his horizons, but because of the way he did it. I will explain how he did it when I address the subject of "thinking big." After graduating Cornell, he was called to the New York Bar, where he remained a member for almost 70 years and was recongized for his accomplishments. After Cornell, he went to work as a Judge Advocate in the U.S. Air Force; he told many exciting stories from that time, especially about his experiences in Japan. Upon returning to New York, he joined the law firm of Donovan, Leisure, Newton and Irvine and married the love of his life, Jacqueline, with whom he was to father four beautiful daughters of great character and intellect.

In 1966, he joined the legal section of General Electric (GE), which sparked his interest in writing an international contract manual (ICM). Al realized that standard form contracting would make GE's negotiating and contacting much more streamlined and simple, so he formalized an approach to GE's contracts and developed a manual that would act as a flexible standard form contract – with built-in contract checklists to facilitate negotiation of customized modifications of the contract when needed. In this area, Al was ahead of his time; for example, the ICC had not yet begun its work on model contract forms. Having seen how his manual worked within GE, he realized its wider potential, generalized the approach, and brought the initial volumes of the ICM into publication. Kluwer now publishes the manual, with contributions from leading contract scholars, in seven volumes – its success is immense, and the royalties funded many of Al's subsequent projects.

After the tragic loss of his youngest daughter in a car accident, Al often said that he took stock of his life and decided to start giving back. His life changed pace, literally, when he moved to Pace University School of Law in 1991 at the age of 63. He spent the next nineteen years there, working for a dollar a year, creating the Institute for International Commercial Law and some of the most impressive and cutting-edge information-sharing mechanisms for dealing with uniform international commercial law, most notably, the preeminent CISG database in the world.

Al is best known for his pioneering establishment and ongoing building of the CISGW3 database, realizing early on that the key to a successful international private law, such as the CISG, would require access to information and the dissemination of knowledge. He not only saw the potential in the Internet for fulfilling this vital role, he realized it, ensuring (and often personally funding) translations of cases and soliciting permission for free access to articles and even books. It was no surprise that in 2002 the Association of Law Librarians awarded the CISGW3 Database its Best Website Award. The database remains an outstanding example of how scholarship and case law can be shared across national and cultural boundaries.

Al was also a key player in the creation of the Willem C. Vis Moot Competition, which he saw as an opportunity to spread knowledge of the CISG and to educate the coming

generations of legal professionals. He attended the Vis whenever possible (but famously never acted as an arbitrator because he did not wish to judge students) and he strongly influenced the creation of the Vis Moot Alumni Association (MAA). He did this in his typical way of encouraging and prompting others to make good things happen without taking much deserved credit for his actions. Again, in 2000, Al helped spearhead the creation of the CISG Advisory Council. He saw the need to create a council of experts to guide the application of the CISG. He refused a leadership role, handing the reigns to his good friend Peter Schlechtriem, but he continued to sit on the council and occasionally funded its activities.

Al often stated that scholars had designed the CISG, but that it now belonged to those who had to apply it, the judges and the council. But what he failed to see was how instrumental one academic – himself – was in advancing the cause of uniform law – enabling practitioners to access information on the CISG and advancing educational efforts, such as the creation of the Vis Competition and CISG Advisory Council. In many ways, he adopted the CISG and guided it and guarded it, in much the same way he adopted me and Pilar – but I doubt he saw the extent of his personal and professional impact and importance.

Three Lessons Subtly Taught by Al

Al's accomplishments are truly impressive. But the worth of the man is in more than just a list of accomplishments – it is in the judgment of him found in the memories of those left behind, which is a sum of choices made, means applied to ends, and moments we choose to recall. In Danish legends, Viking burials are said to have included the recalling of an Icelandic saga: "Fae doe, fraende doe, en ting ved jeg som aldrig doe: dommen over doed mands minde," which, loosely translated, means "Enemies die, allies die, one thing I know doth never die: our judgment of our memories of dead men."

I have chosen to outline three of the main characteristics of Al Kritzer, and to pepper them with anecdotes from his life, to help explain why he should be remembered so fondly, what made him special, and what we could all learn from the life he lived. There are undoubtedly more than those three to be had, but for now I offer these three: "sharing," "thinking big," and "loving."

Sharing!

Sharing was Al's favorite thing to do, and his exceptional form of generosity motivated others to want to share and work for the betterment of others. It for this reason that Ulrich Schroeter and I named the *Festschrift* in Al's honor: *Sharing International Commercial Law*. But the ease with which that entire 2008 *Festschrift* project was produced and delivered speaks volumes about the kind of dedication and enthusiasm Al sparked. Incredibly busy scholars dropped what they were doing to contribute – because this was an accolade that was worth contributing to. Sharing something with Al, or on his behalf, was an honor and a joy for many of us.

Al was indeed a great sharer – he shared his wisdom, joy, and experiences, as well as being generous with time, money, insight, and gifts. What kind of a man would spend his private funds financing ideas like the CISG database, financing case translations, and establishing the CISG Advisory Council? What kind of person would work about

eighty hours a week for one dollar a year? The answer is that only a special, caring, and thoughtful person would undertake such Herculean efforts. When I hear the expression "putting your money where your mouth is" I invariably think of Al, who never sought credit for his many acts of generosity, but financed efforts because he believed in their efficacy and worth for the greater good.

Moreover, sparked by a wealth of generosity and enthusiasm, he had a knack for teasing commitments from others and establishing a stable network of people to share information, insight, and commitments to a cause. Al would fly across the globe to investigate opportunities and dig for needed sources. Al could motivate people to find their own inner generosity and enthusiasm in contributing to his undertakings. Al poured his heart and his soul, and his money, into building systems and networks that allowed for the international sharing of knowledge and ideas. Now, with Al gone, it is for us to follow his example to ensure that what he started continues to grow and nurture future generations of scholars, jurists, students, and lawyers.

Think Big!

Those of us who knew him would often get a kind of vertigo from the rate and intensity of the ideas that streamed out of Al. Peter Schlechtriem used to talk of the boxes in his own garage, accumulated over almost 20 years, all labeled "Al's Ideas," many of which had been realized and many of which would never be taken up again. But Al's mind was sharp as a honed blade and always on the prowl for a good idea, and he was never afraid to air his thoughts.

Thinking big for Al wasn't an impetuous state; he took as much time as needed to intellectually vet his big ideas, to fine-tune them, and to finally determine their feasibility. I invite you to imagine a young Albert, still a law student about to graduate, traveling through Europe on a shoestring budget. He was driven by a need to expand his horizons, to meet people from other countries, and to gain insight into how others think and how their countries function. He wrote letters to leaders of states, asking them to meet with him so he could learn more about their politics, their views, and their culture. He often spoke of an intriguing meeting with President Josip Tito of the former Yugoslavia. Where most would be too timid to ask, Al would charge ahead. Sometimes like the proverbial bull in the china shop, he often did not get what he wanted, but sometimes he did!

I have at home a letter from the Danish Ministry of Royal Affairs, politely declining his request for Her Royal Majesty Queen Margaret to present me with my Vis Essay Competition Prize. The fact that he thought of asking the Queen makes me smile to this day. Al was never shy about asking for things from important people, especially when it was on the behalf of someone else. Thinking big means not holding back; it means pursuing an idea until it is achieved or the pursuit is exhausted.

Loving!

The final characteristic I have chosen to describe is love, and I do apologize for the built-in sentimentality of doing so, but Al was a man defined by love. I am not referring to a schmaltzy kind of love, but I refer to the kind of love that fuels our personalities and our energy for life and work. First of all, Al had a profound love for what he did, a love for ideas, a love for seeing and realizing potential, a love for curiosity, and a love for the

complexities of law and society. These loves sparked an intense dedication in him and those inspired by him. His work was its own reward. He also had a great love for life – a love for the arts, for good food, and for travel. He had a love for humanity and a love of silly hats and a love for plain old fun! These loves sparked a pure joy in him, which made you want to be in his company and share experiences and moments with him.

The sharing and loving aspects of his character made him a very energetic and joyful individual. His love of his work fueled him to continue on past the point that would exhaust the rest of us, and his love of fun balanced it out so it never wore him down. His energy levels were extraordinary. Al was unique in that the abundance of energy he possessed allowed him to live life to the fullest even past the age of eighty. Al also inspired love in others, love for the work at hand, in sharing his enthusiasm, and love of life. He was the kind of man who made you want to be a better person. Al frowned on negativity and constantly steered me away from negative responses and toward more positive trains of thought.

A Final Goodbye: Learning to Lose

Most of us have experienced the tragic loss of a loved one – and those who have not will one day. Al was eighty-two when he died, and he had lived a full, rich life, and wanting him back is simply too selfish a thought. But it is a very natural reaction to losing such an important person in one's life. The finality of death can often make us frustrated and bitter at the things that are so nonnegotiable; the missed opportunities and regrets of not doing more when the person was alive. I keep trying to be the person that Al saw in me. I will leave this memorial tribute the way Al would have liked – with a positive spin.

I am much more grateful for my fourteen years as Al's adopted daughter than I am sad at having lost him.

Goodbye, Albert. I miss you very much.

Camilla Andersen,
Western Australia

Part I *History of and Researching the CISG*

1 Global Challenge of International Sales Law

Larry A. DiMatteo

I. Introduction

The genesis for this book was an interest in looking at the world's most successful substantive international commercial law convention – the United Nations Convention on Contracts for the International Sale of Goods (CISG) – from various national and methodological perspectives. Success here is measured by the overwhelming reception of the CISG by countries throughout the world. By late 2013, Brazil (4 March 2013) and Bahrain (25 September 2013) became the seventy-ninth and eighth countries to adopt the CISG.[1] Thus, the CISG, along with the New York Convention,[2] can be seen as the two most successful international private law conventions in history. The former deals with the substantive area of sales of goods; the latter is a procedural law requiring signatory countries to enforce the arbitral awards of other countries to the Convention. At the current rate of adoption, there is little doubt that the CISG will in the near future reach one hundred adoptions.

The ordinary measure of importance of a convention is by the number of countries adopting, acceding, or ratifying the convention. Many international conventions or model laws are impressive in name, but are of little significance in practice. Numerous worthy, and not so worthy, conventions have failed to reach the minimum number of signatories to become effective, and others have entered into law, but have not obtained the critical mass of participating countries to have much of an effect in the real world. The CISG has clearly reached both thresholds of importance – entering into force and a critical mass of adoptions. But, unlike the New York Convention, private parties have the ability to opt out of the CISG, thus presenting a third threshold of effectiveness – the CISG importance in practice. This issue was the thematic genesis for this book.

The CISG has reached the level of acceptance in which it can be declared the face of international sales law. However, the "global challenge" is whether practicing lawyers will educate themselves in the substantive provisions of the CISG and recognize the

[1] Brazil acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG) on March 4, 2013, becoming the 79th State Party to the Convention. The Convention will enter into force in Brazil on April 1, 2014. See Journal of the United Nations, No. 2013/43 (March 5, 2013), available at http://www.un.org/Docs/journal/En/20130305e.pdf.

[2] United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 U.N.T.S. 38. As of this writing, there are approximately 140 signatory countries to the New York Convention. See William Park, *Arbitration of International Business Disputes*, 2nd ed. (Oxford: Oxford University Press, 2012), 461–8.

benefits of a uniform international sales law, whether parties and trade associations will begin to embrace it as a preferred choice of law, and whether courts and arbitral tribunals will recognize it as applicable law and as evidence of international customary law.

This book examines these issues from the perspectives of the scholar and the practitioner. It reviews the strengths and shortcomings of the CISG, as well as the crucial issue of the uniformity of its application. A uniform text often masks chaotic, nonuniform interpretations and applications of the text. In fact, disunity in application is a contradiction to the harmonizing goal of uniform law. Divergent applications create a jurisprudence that acts as an obstacle instead of serving the intended purpose of diminishing variant national laws as an obstacle to internatonal trade. A chaotic CISG jurisprudence creates the type of uncertainty represented by the private international law regime that it seeks to replace. Currently, we are at a crucial time in the life of the CISG: Will it reach the level of uniformity of application that will allow it to be recongized as a truly uniform international law?

The two fundamental questions noted earlier are what this book addresses. First, will the CISG eventually be accepted at the grassroots level of legal and business practice, so that its degree of importance at the transactional level becomes closer to the degree of importance it has reached at the level of national adoptions? Second, will a significant or minimal level of uniformity of application allow the CISG to become all it can be – a truly uniform international sales law that solves the problem of uncertainty caused by private international law?

Fortunately, the accessible cases and arbitral case law are of enough density to make the second question primarily a descriptive undertaking. Thus, the book, through its analysis of the substantive provisions of the CISG and its broad menu of country analyses, offers a solid foundation to assess whether it is being uniformly interpreted and applied. A tentative assessment here on the second question is that, after a period of numerous divergent interpretations and a slew of homeward-biased decisions, the trend has been toward a convergence in the CISG jurisprudence toward greater uniformity of application. In those areas where such convergence has not resulted in a uniform interpretation, there has been a greater recognition in the case law around majority and minority views or a number of minority views.

This bifurcation between majority and minority views is a second-order means to greater uniformity of application. Instead of total chaos, legal practitioners will be able to better assess how the CISG is interpreted in the different national court systems. In many ways, these interpretive groupings of case law replicate what happens at the national or domestic law level. The American Uniform Commercial Code (UCC) is applied by fifty-three independent court systems.[3] It was inevitable, despite the presence of a common legal tradition, that the different court systems would interpret identical UCC provisions differently. However, the number of such divergent interpretations is low, and where they occur, the different interpretations are well known. A savvy transactional lawyer may simply choose the state law that has the preferred interpretation. This would seem to be a rarity, however, as the differences are primarily in degree, rather than in kind. The mainstream scholarly and lawyerly view of the UCC is that it is a "uniform" commercial law.

[3] The UCC has been adopted, except for Article 2 (Sale of Goods) in Louisiana, in the fifty American states, Puerto Rico, U.S. Virgin Islands, and the District of Columbia.

Another element that has reduced the number of divergent interpretations of the UCC, over time, is the use of case law from other states as persuasive precedent. The need to use foreign case law is much discussed in CISG scholarship. Whether the use of foreign case law is a required element of CISG interpretive methodology is beside the point. Article 7's mandate – that the interpretation of the CISG should take into account its international character and the need to promote uniformity in its application – is unobtainable without reviewing well-reasoned cases from other jurisdictions. Just as in UCC jurisprudence, nothing requires the courts applying the CISG to look to other legal systems for cases that can be used as persuasive precedent, but uniformity of application is greatly enhanced by doing so. In the civilian legal tradition, the lack of the notion of binding precedent provides another example of the potential for a less-than-uniform "uniform law." Judges in the civilian tradition are trained to go directly to their countries' codes to find the applicable solution to a case in dispute. Thus, the seeds of divergent interpretations within the same national legal systems are constantly present. Yet few scholars and judges would argue against the view that there exists a relatively uniform national law in civil law countries. In Germany and some other civilian countries, the scholarly legal commentary serves as the glue that binds together a relatively uniform private law.

The history of CISG jurisprudence is not so different than what is found in the early development of the American UCC[4] and the national private law systems in countries of the civil law tradition. The first step in the process of applying a new uniform law involves cases of first impression that are often seminal in nature. At the same time, with no preexisting jurisprudence,[5] this is the period when there is the greatest opportunity for divergent interpretations. The second step is the accumulation of a critical mass of jurisprudence that can then be analyzed to determine the majority and minority views of given interpretations of the uniform law. It is also a time to ascertain trends and anomalies in the case law. The hopeful third step is a more universal recognition of variant interpretations and the coalescing of courts and arbitral tribunals around the best-reasoned interpretation given the underlying principles of the law. This process of coalescing requires that some of the initial positions taken in a national court system would need to be modified to bring its law into conformity with the "best-reasoned interpretation." An example of this phenomenon is found in the German case law relating to the reasonable time to give notice of nonconformity of goods under CISG Article 39. The early German case law favored a homeward trend interpretation of the notice requirement. The courts interpreted the reasonable time period of Article 39 very restrictively. In one case, a period of eight days from delivery of the goods was construed as being a belated notice. The more recent German case law on the subject has taken a much more liberal view of the time allowed to give notice.

It is the third step of the process of formulating a more uniform jurisprudence that the CISG has hopefully reached. It is a stage in which it can be said that a relative or acceptable level of uniformity of application is near. Through scholarship, as represented

[4] See Larry A. DiMatteo, "The Curious Case of Transborder Sales Law: A Comparative Analysis of the CESL, CISG, and UCC," in *CISG and Regional Private Law Unification* (ed. Ulrich Magnus), (Sellier European Publishers, 2012).

[5] Although in the case of the CISG, the Hague Sales Conventions are considered predecessors to the CISG. Some national courts applied those Conventions by analogy to their initial interpretations of the CISG.

by this book, as well as better education on the CISG in law schools and at the bar, it is likely that uniformity of application will continue to improve. It may take another generation of lawyers before the threshold of acceptability of the CISG and a uniformity of application will be universally recognized. The trend toward better-reasoned CISG case decisions provides the hope that CISG jurisprudence is on the right track. However, it must be recognized that absolute uniformity is unreachable for any transborder law being applied by independent court systems. Further, the CISG, just as in the UCC or BGB, is infused with the principles of reasonableness, trade usage, and good faith that are forever changing to reflect changes in society. The dynamism found in the business world and international trade will continue to present cases of first instance likely to lead to variant interpretations as CISG rules are applied to novel fact patterns. Over time, the novelty will be embraced by CISG jurisprudence and the poorly reasoned decisions will be worked out of the CISG canon and relative uniformity of application will be reached again and again.

II. Blueprint for a Conference and a Book

From the very beginning stages of planning for the conference and this book the focus was on a targeted, communal research effort. Simply stated, the menu of topics or table of contents was set before scholars were invited to contribute. The task then was to find the best scholars to fit the preselected topics. At the same time, it was a goal of the organizer to make sure that a great amount of diversity was represented in the pool of authors. The diversity goal was reached at a spectacular level. The author pool includes scholars from numerous common and civil law legal systems, mixed common–civil law systems, Islamic legal systems, and a socialist market system. The authors came from six continents and some twenty-two countries. This diversity of scholars ensures that the different perspectives of the CISG have been represented in this book.

Also, from the beginning, the book was planned to serve multiple audiences – scholar, student, jurist, and practitioner. This multifaceted purpose is reflected in the different parts of the book. Part I provides context in reviewing the history and evolution of the CISG. The use of the CISG in national courts is examined, as well as divergences between theory and practice and the unevenness of CISG case law in the interpretation of the numerous CISG provisions. It also provides material of interest to all audiences – sources of CISG law, research methodologies, and problems of translation. Part II examines the area of the interpretation of the CISG and the related issue of the problem of divergent interpretations. The meta-principle of good faith is analyzed as a critical component of CISG interpretive methodology. Part II also examines the use of the CISG in arbitration and as soft law.

Part III examines three key substantive, and heavily litigated, areas of the CISG: contract formation, including the battle of the forms scenario; the inspection and notice requirements relating to the nonconformity of goods; and the determination of fundamental breach. A note of thanks is owed to Morton Fogt for covering the numerous CISG provisions dealing with the formation of contracts. Part IV extends the substantive analysis to the area of remedies, damages, and excuse. A special note of appreciation is owed to Ulrich Magnus for his sweeping analysis of damages, price reduction, avoidance, mitigation, and preservation of goods. A discussion of the usefulness of the excuse provided in Article 79 (impediment) is provided, and the issues of legal costs as reimbursable damages are studied as well.

Parts V and VI analyze the CISG at the nation-state level. The authors were asked to review the substantive issues discussed in Parts III and IV from the perspective of their national legal systems. These country analyses serve two purposes – to present knowledge of CISG law as interpreted within each national court system and to find divergent interpretations within and across national legal systems. The country analyses also provide a longitudinal perspective as to how the CISG has evolved within certain national court systems. Part V focuses on the CISG in Europe with country reports on Austria, France, Germany, Italy, Spain, Switzerland, and The Netherlands. Due to the scarcity of case law (Southeastern Europe, Baltic States, Belarus, and the Ukraine) or a communal approach to the CISG (Nordic countries), a number of the reports are regional in nature. Part VI explores the CISG's application elsewhere in the world, including Australia, Egypt, Israel, New Zealand, and People's Republic of China. Again, due to the scarcity of cases, two of the reports were regionalized – North America, as well as Central and South America.

Parts VII and VIII crosses the theoretical–practical divide with the former providing some theoretical insights and the latter reviewing issues relating to the use of the CISG in practice. These parts show that the areas of theoretical insight and legal practice are not mutually exclusive. Part VII examines the potential use of the CISG to bridge the gap between the common and civil laws. Alternatively stated, the CISG was constructed to bridge differences between the two major legal systems. Part VII also looks at the problem of interpreting and applying uniform laws, as well as the issues of precontractual liability and the enforceability of precontractual agreements. These three chapters should be required reading for all international transactional lawyers. Part VIII is entitled "Practitioner's Perspective" and covers a number of disparate, but important, issues relating to the CISG and the practice of law. The issues examined include the potential for professional liability (malpractice) for ignoring or avoiding the CISG, a review of complimentary texts (convention) that can be used in conjunction with the CISG, a comparison of the CISG with the English Sale of Goods Act, the use of soft law alongside of the CISG, and the active implementation of the CISG in legal practice.

III. Conclusion

The goal of this book was to bring a diverse group of top-flight CISG scholars together to analyze the CISG's current place in international business transactions. They used various research methodologies, including doctrinal, comparative, empirical, theoretical, and practice-oriented. The organization of the book allows for breadth in coverage and in-depth analysis of key issues. Ultimately, the quality of this undertaking rests on the quality of the research of the contributing authors. The assembled pool of top-flight CISG scholars have provided outstanding, original scholarship, which combined makes a significant contribution to the CISG literature.

2 History of the CISG and Its Present Status

Vikki Rogers and Kaon Lai

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a remarkable historical achievement and success for the unification of international private law. It is the progeny of centuries of custom and trade practice, as well as comparative legal scholarship. The CISG reflects the modern willingness[1] of countries to incorporate into their national laws a uniform sales law for international transactions.[2] The list of contracting states currently includes eighty countries and is growing. The Pace CISG database disseminates approximately 3,000 cases and arbitral awards on the CISG and in excess of 10,000 articles have been written on the CISG. Several countries have used the CISG as the basis for modernizing their domestic contract and sales laws.

This chapter will describe the historical building blocks that led to the creation of the CISG and provide an introduction to its structure. It will then discuss the current status of the CISG, specifically identifying (1) the number of contracting states and the representation of contracting states within regions; (2) the impact of the CISG on the interpretation and modernization of domestic sales law codes and the development of other private international commercial law agreements; and (3) the current global efforts toward promoting awareness and use of the CISG.

II. Movement toward Uniform International Sales Law

The root of international sale of goods law harmonization is traceable to the twelfth century's *lex mercatoria*, an "autonomous, practical body of commercial law created

[1] See Camilla B. Andersen, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination* (The Netherlands: Kluwer Law International, 2007), 5 ("Modern unification of laws is a political *voluntary* process whereby different jurisdictions elect to share a set of rules – not where it is imposed upon them, as opposed to historical uniformity (like Roman law, common law, or other colonial laws)" (citations omitted)).

[2] See id., 4–5 ("Uniform law is a new form of lawmaking, with a different *origin* and a different *focus*, and it usually arises in a transnational context – or at least in a trans-jurisdictional context (the United States, for instance, being multi-jurisdictional as far as state law is concerned, applies uniform laws within the national boundaries") (citations omitted).

not by legal scholars but by merchant court[s].”[3] Used throughout Europe during the medieval period, it allowed merchants to settle disputes based on customary business usage.[4] Over time, the law for merchants slowly evolved and found its way into national laws.[5] The expansion of international trade created a need to unify substantive law of sales in order for merchants to operate within increasingly complex legal systems.[6] In the latter half of the nineteenth century, an internationalist movement developed in Europe, which sought to create a *uniform ius commune* based on domestic laws.[7] The internationalist movement led to the formation of L'Institut de droit international (Institute of International Law) in Belgium and the International Law Association in Brussels in 1873.[8]

The determination to remove barriers to international trade led to a push for greater predictability regarding applicable law for international sales.[9] Ernst Rabel, an Austrian scholar and academic, became an influential force in the unification and harmonization of the law of sales. In 1917, he founded the Institute of Comparative Law at the University of Munich.[10] In 1926, the Kaiser Wilhelm Foundation for the Advancement of Science established two larger comparative law institutes, one in the area of foreign and international public law and the other in foreign and international private law.[11] Ernst Rabel became the director of the Kaiser Wilhelm – now Max Planck[12] – Institute for Foreign and International Private Law in Berlin.[13] Along with these institutes, the *Journal of Foreign and International Private Law* (*Rabel's Journal*) was established.[14] One of the studies undertaken by the Institute was the comparative study of the law of the sale of goods. In 1926, the League of Nations in Rome founded an intergovernmental organization, the Institut international pour l'unification du droit privé (International Institute for the

[3] Franco Ferrari, “International Business, Law Merchant, and Law School Curricula,” 6 *Yale J. of L. & the Humanities* 95, 96 (1994).

[4] Gabrielle S. Brussel, “The 1980 United Nations Convention on Contracts for the International Sale of Goods: A Legislative Study of the North-South Debates,” 6 *New York Int'l L. Rev*. 53, 56 (1993); Klaus P. Berger, “The CENTRAL: List of Principles, Rules and Standards of the Lex Mercatoria, Transnational Law in Commercial Legal Practice,” 1 *Central Practice and Study Guides* 127–31 (1999) (describing the different sets of rules and principles of the *lex mercatoria* that were used by the community of merchants).

[5] Harold J. Berman and Colin Kaufman, “The Law of International Commercial Transactions (Lex Mercatoria),” 19 *Harvard Int'l L. J*. 221, 227 (1978).

[6] Brussel, “1980 United Nations Convention,” 57.

[7] Allison E. Butler, *A Practical Guide to the CISG: Negotiations through Litigation* (Aspen Publishers, 2006), 7.

[8] Sieg Eiselen, “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa,” 116 *So. African L. J*. 323, 332 (1999).

[9] Kurt H. Nadelmann, “The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio,” 74 *Yale L. J*. 449, 449–50 (1965).

[10] Max Rheinstein, “In Memory of Ernst Rabel,” 5 *American J. of Comparative L*. 185, 190 (1956).

[11] Id.

[12] “In the course of World War II, the Institute which Rabel had founded was evacuated from Berlin to Tübingen, and its library suffered severe losses. After the War, the Institute was reorganized under the energetic directorship of Professor Hans Dölle. Under the name Max Planck Institute of Foreign and Private International Law, it [was] ready to move from its constrained emergency quarters in Tübingen to a spacious new building in Hamburg, the city which has traditionally been Germany's window toward the world.” Id., 194.

[13] Curriculum vitae of Prof. Dr. Ernst Rabel, available at http://www.globalsaleslaw.org/index.cfm?pageID=649.

[14] Rheinstein, “In Memory,” 191.

Unification of Private Law) (UNIDROIT).[15] This institute was an important initiative toward sales unification.[16] UNIDROIT's stated purpose is:

> [T]o examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law. To this end the Institute shall: (a) prepare drafts of laws and conventions with the object of establishing uniform internal law; (b) prepare drafts of agreements with a view to facilitating international relations in the field of private law; (c) undertake studies in comparative private law; (d) take an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary; (e) organise conferences and publish works which the Institute considers worthy of wide circulation.[17]

In 1928, Rabel, as a member of UNIDROIT's board of directors, suggested that its first project focus on the unification of the law relating to international sale of goods.[18] Rabel submitted a provisional report concerning the unification of sales as well as the "Blue Report"[19] in 1929.[20] In 1930, UNIDROIT set up a committee, with Rabel as one of its members, to work on the uniform law of sales project.[21] Other members came from four major legal systems: the Anglo-American, Latin, Germanic, and Scandinavian systems.[22] The committee met eleven times between 1930 and 1934[23] and in 1935 produced a preliminary draft,[24] which was "considerably influenced by the comparative studies on the law of sales which Rabel and his colleagues at the Berlin Institute for International and Foreign Private Law had undertaken."[25] Subsequently, member states of the League of Nations debated and commented on the draft, and in 1939, a second draft was completed.[26] World War II halted negotiations on the draft,[27] but Rabel published his

[15] "Following the demise of the League [of Nations], [UNIDROIT] was re-established as an independent intergovernmental organization on the basis of a multilateral agreement, the UNIDROIT Statute, on 15 March 1940." *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (ed. S. Vogenauer and J. Kleinheisterkamp) (New York: Oxford University Press, 2009), 6.

[16] Butler, *A Practical Guide*, 7.

[17] Article 1 of the Statute of UNIDROIT, as amended on March 26, 1993, available at www.unidroit.org/mm/statute-e.pdf.

[18] Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed. (Oxford, 2005), 1.

[19] *Rapport sur le droit comparé de vente par le "Institut für ausländisches und internationales Privatrecht" de Berlin* (Rome: Pallotta, 1929).

[20] Schlechtriem and Schwenzer, *Commentary*, 2.

[21] Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier European Law Publishers, 2007), 2.

[22] Gary K. Nakata, "*Filanto S.P.A. v. Chilewich Int'l Corp.*: Sounds of Silence Bellow Forth Under the CISG's International Battle of the Forms," 7 *Transnational Lawyer* 141, 145 (1994).

[23] Huber and Mullis, *The CISG*, 2.

[24] John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed. (ed. Harry M. Flechtner) (The Netherlands: Kluwer Law International, 2009), 5.

[25] Huber and Mullis, *The CISG*, 2.

[26] Peter Winship, "The Scope of the Vienna Convention on International Sales Contracts," in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (ed. N. M. Galston and H. Smit) (1984), 4.

[27] E. Allan Farnsworth, "Formation of International Sales Contracts: Three Attempts at Unification," 110 *U. of Pennsylvania L. Rev.* 305, 306 (1962).

epochal treatise *Das Recht des Warenkaufs* on the law of sale of goods in 1936 (Volume 1) and 1957 (Volume 2).[28]

The project on the law of sale of goods resumed in the 1950s. In 1951, UNIDROIT held a conference of twenty-one states at The Hague.[29] Revised drafts were sent to governments for comments in 1956 and 1963 while work also commenced on a uniform law for the formation of sales contracts.[30] A diplomatic conference of twenty-eight states met at The Hague in April of 1964 to work on both drafts.[31] Shortly thereafter, the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contract for the International Sale of Goods (ULF) were finalized.[32] ULIS and ULF came into force in 1972 with ratification by five States[33] but ultimately, only nine States[34] ratified the Conventions.

The ULIS and ULF were criticized for the abstractness of several key legal concepts and the failure to address the needs of the developing countries, Eastern Europe, and the United States.[35] Another effort at sales law unification began in 1966 when the General Assembly of the United Nations established the United Nations Commission on International Trade Law (UNCITRAL), a permanent committee initially consisting of twenty-nine States.[36] In 1968, with the general mandate to promote "progressive harmonization and unification of the law of international trade,"[37] the commission created a Working Group consisting of fourteen states[38] to "prepare [draft legislation] that would facilitate acceptance by countries of different legal, social, and economic systems."[39] Taking into consideration earlier failures at unification, UNCITRAL carefully weighed its approach to its unification project. John Honnold has stated that:

> [W]hen UNCITRAL met to organize its works on the unification of the law for international trade, it was agreed at the outset that priority should be given to sales of goods,

[28] Huber and Mullis, *The CISG*, 2.
[29] Honnold, *Uniform Law for International Sales*, 4th ed., 5.
[30] Id.
[31] Id., 6.
[32] John O. Honnold, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations, and Decisions that Led to the 1980 United Nations CISG with Introductions and Explanations* (The Netherlands: Kluwer Law and Taxation Publishers, 1989), 1.
[33] Winship, "Scope of the Vienna CISG," 12 n. 25.
[34] ULIS and ULF entered into force in Belgium on August 18, 1972; Gambia on September 5, 1974; Germany on April 16, 1974; Israel on August 18, 1972 (ULIS) and November 20, 1980 (ULF); Italy on August 23, 1972; Luxembourg on August 6, 1979; the Netherlands on August 18, 1972; San Marino on August 18, 1972; Great Britain (with reservation requiring parties to opt-in) on August 18, 1972.
[35] Winship, "Scope of the Vienna Convention," 11–12.
[36] UNCITRAL's membership expanded to thirty-six states in 1973; Africa was represented by nine states, Asia by seven states, Eastern Europe by five states, Latin America by six states, Western Europe and others (including Australia, Canada, the United States, and New Zealand) by nine states. Schlechtriem and Schwenzer, "Commentary," 2–3. For the U.N.'s determination of the need for a uniform sales law, see UNCITRAL Web site at http://www.uncitral.org/uncitral/en/about/origin.html (recognizing that the disparity in domestic laws governing international trade created obstacles to the flow of trade).
[37] UNCITRAL Web site.
[38] Although the Working Group represented less than half of the full commission's membership, the states nevertheless reflected UNCITRAL's worldwide representation. These states included: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.
[39] John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (The Hague: Kluwer Law International, 1999), 8.

> negotiable instruments for international payments, and arbitration. In considering what to do about international sales, the first question was: Should UNCITRAL promote a wider adoption of the 1964 Hague Sales Conventions as it did with respect to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Or should it prepare a new Convention? This led to a more specific question: Would it be possible to obtain a wide spread adoption of the 1964 Conventions? On this question further information was needed. So the Commission authorized the Secretary General to ask Governments whether they intended to adhere to these Conventions, and to give their reasons.[40]

In deciding whether The Hague Conventions would be adopted, the text of the conventions, along with a commentary by Professor André Tunc, an influential member of the ULIS drafting committee,[41] were sent to all governments with an invitation to comment on the conventions as well as their positions on ratification.[42] During this consultation period, it was determined that major trading nations would not ratify The Hague Conventions, even if they were revised, because states were concerned that these conventions "reflected the legal traditions and economic realities of continental Western Europe."[43] Although it was decided that it was necessary to draft a new convention.[44] The Hague Conventions nevertheless marked a significant achievement in the development of a uniform international sales law, and would provide the framework for the drafting of the CISG.[45]

III. Development of the CISG

There were three phases in the development of the CISG.[46] Between 1970 and 1977, under the leadership of Chairman Jorge Barrera Graf, the Working Group held nine sessions.[47] The first session was held on January 5, 1970 with all Working Group members represented, except for Tunisia, along with various observer states, as well as intergovernmental and international nongovernmental organizations.[48] In 1976, the Working Group completed and unanimously passed a draft Convention on the International Sale of Goods (Sales Draft), which set forth the rights and obligations of sellers and buyers under sales contracts.[49] The following year, the Working Group Draft on Formation of the Sales Contract (Formation Draft) was also completed.[50] Starting the second phase of

[40] John O. Honnold, *On the Road to Unification of the Law of Sales* (The Netherlands: Kluwer Law and Taxation Publishers, 1983), 6.
[41] E. Allan Farnsworth, "Developing International Trade Law," 9 *California Western Int'l L. J.* 461, 462 (1971).
[42] Honnold, *Uniform Law for International Sales*, 3rd ed., 8.
[43] Claire M. Germain, "The United Nations CISG on Contracts for the International Sale of Goods: Guide to Research and Literature," 24 *Int'l J. of Legal Information* 48, 50 (1996).
[44] Franco Ferrari, "Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing," 15 *J. of L. & Commerce* 1, 7–8 (1995).
[45] Trevor Perea, *"Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*: A Perspective on the Lackluster Implementation of the CISG by American Courts," 20 *Pace Int'l L. Rev.* 191, 196 (2008).
[46] Honnold, *Documentary History*, 2–3.
[47] Id., 3.
[48] Id., 15.
[49] Id., 3.
[50] Id.

the CISG's development, UNCITRAL convened in Vienna from May to June 1977 to review, finalize, and unanimously approve the Sales Draft.[51] In New York, from May to June of 1978, the full commission reviewed the Formation Draft and formed a drafting group of ten states to integrate the Sales Draft and Formation Draft.[52] In June 1978, the commission completed the integration work and unanimously approved the 1978 UNCITRAL Draft Convention on Contracts for the International Sale of Goods (New York Draft).[53]

A UN-authorized diplomatic conference[54] for the purpose of voting on the New York Draft[55] was convened in Vienna from March 10 to April 11, 1980, with sixty-two states and eight international organizations in attendance.[56] In this third phase of the CISG's development, two committees were formed to work on different sections of the New York Draft: the First Committee focused on the substantive provisions (Parts I-III, Articles 1–88), while the Second Committee worked on the final provisions governing CISG entry into force and related matters (Part IV, Articles 89–101).[57] The Second Committee also prepared a protocol to the 1974 Convention on the Limitation Period in the International Sale of Goods, modifying its provisions on sphere of applicability, to make the 1974 Limitation Convention conform to the New York Draft.[58] The texts prepared by the First and Second Committees were then voted on, article by article, in plenary session.[59] Honnold observed:

> Nearly all the provisions in the UNCITRAL Draft Convention of 1978 were approved in substance . . . The degree of approval resulted from the fact that representatives from each region of the world had participated in preparing the draft. In addition, most delegates realized that the eighty-eight articles of the uniform sales law (Parts I-III) were closely related to each other [and] major changes in individual articles could affect the integrity of the structure. As the Conference progressed with its article-to-article discussion it became evident that the time for review of the draft as a whole would be limited, as compared with the repeated reviews that occurred during the decade of work [proceeding the Conference].[60]

Although each article required approval by a two-thirds majority, of the eighty-eight substantive articles found in Parts I-III, seventy-four were approved unanimously and eight received only one or two negative votes.[61] Except in two instances, the remaining articles received approval with large majorities, and the outstanding two articles were also approved with no dissent after ad hoc working groups resolved the disagreements.[62]

[51] Id., 318.
[52] Id., 364.
[53] Schlechtriem and Schwenzer, *Commentary*, 2.
[54] See generally Honnold, *Documentary History*.
[55] Heidi Stanton, "How to Be or Not to Be: The United Nations Convention on Contracts for the International Sale of Goods, Article 6," 4 *Cardozo J. Int'l & Comp. L.* 423, 426 (1996).
[56] Honnold, *Uniform Law for International Sales*, 4th ed., 10.
[57] Honnold, *Documentary History*, 3–4.
[58] Honnold, *Uniform Law for International Sales*, 4th ed., 12.
[59] Id.
[60] Id., 10–11.
[61] Id., 12.
[62] Id.

After the plenary vote, the entire CISG was submitted to a roll call vote and approved unanimously.[63]

The CISG was adopted on April 11, 1980.[64] Eleven states, representing "every geographical region and every major legal, social, and economic system"[65] signed the CISG immediately.[66] By September 30, 1981, a total of eighteen states signed the CISG.[67] By December 11, 1986, eleven states deposited instruments of adherence with the Secretary General, satisfying the requirements of Article 99, which provides that the CISG will come into force "on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under Article 92."[68] The CISG entered into force on January 1, 1988.[69]

While the CISG contains elements found in the ULIS and ULF, there are major differences between these conventions. The CISG is a self-executing treaty "where legal rules arising from the treaty are open for immediate application by national judges and all living persons in contracting states are entitled to assert their rights or demand the fulfillment of another person's duty by referring directly to the legal rules of the treaty."[70] On the other hand, The Hague Conventions were "drawn up as an annex to an international treaty and had to be brought into force."[71] ULIS has a vertical structure and addressed remedies related directly to each obligation, while the CISG adopts a horizontal structure – first providing rules for sellers' obligations followed by buyers' remedies, and then setting out buyers' obligations followed by sellers' remedies.[72] The CISG, unlike the ULIS and ULF, regulates the formation of the sales contract between two foreign parties and provides the substantive law governing international sales in one document.[73] Another difference is that the CISG reconciles "different legal traditions" and involved more countries in the drafting process, as shown in Table 2.1.[74] Finally, compared to The Hague Conventions, the CISG contains more open-ended legal concepts in order to allow it to gain wider acceptance of the participating countries.[75]

[63] Franco Ferrari, *The Sphere of Application of Vienna Sales Convention* (The Netherlands: Kluwer Law International, 1995), 4.
[64] Honnold, *Uniform Law for International Sales*, 4th ed., 3.
[65] Germain, "United Nations Convention on Contracts," 51.
[66] The eleven states were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, the United States, Yugoslavia, and Zambia. Honnold, *Uniform Law for International Sales*, 4th ed., 3.
[67] The eighteen signatory states are: Austria, Chile, China, Denmark, Finland, France, Germany, Ghana, Hungary, Italy, Lesotho, The Netherlands, Norway, Poland, Singapore, Sweden, the United States, and Venezuela. Three additional states also signed the CISG but they no longer exist: the former German Democratic Republic, the former Czechoslovakia, and the former Yugoslavia.
[68] CISG, Article 99, "United Nations Convention on Contracts for the International Sale of Goods (1980)," 52 *Federal Register* 6262, 6264–80 (March 2, 1987).
[69] Honnold, *Uniform Law for International Sales*, 4th ed., 3.
[70] Ferrari, *The Sphere of Application*, 4–5.
[71] Schlechtriem and Schwenzer, *Commentary*, 3.
[72] Id., 4.
[73] Kathryn S. Cohen, "Achieving a Uniform Law Governing International Sales: Conforming the Damage Provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code," 26 *U. of Pennsylvania J. of Int'l Economic L.* 601, 606 (2005).
[74] Id., 605–6.
[75] Schlechtriem and Schwenzer, *Commentary*, 4.

Table 2.1. *Country Membership According to Economic Development Stage and Political System*[76]

	Country Economic Region		
Events	**Developed**	**Developing**	**Socialist Bloc**
Hague Conference	78.6%	10.7%	10.7%
UNCITRAL	25.0%	61.0%	14.0%
Working Group	33–41%	41–50%	14–21%
CISG Participation	35.5%	46.8%	17.7%

IV. Structure of the CISG

The CISG has been translated into six official languages (Arabic, Chinese, English, French, Russian, and Spanish) and dozens of unofficial languages.[77] The text of the treaty is divided into four parts. The first three parts provide the general rules and principles governing sales transactions: Part I, Articles 1–13 (sphere of application, rules of interpretation, and form requirements), Part II, Articles 14–24 (contract formation), Part III, Articles 25–88 (obligations of seller and buyer, remedies for breach, passing of risk, anticipatory breach and instalment contracts, damages, interest and exemptions), and Part IV (states' ratification, acceptance, approval, or accession to the CISG and applicability – Articles 91 and 100; CISG's relationship with other international agreements – Article 90 and 99; State declarations and Reservations – Articles 92, 94–98; applicability to territorial units – Article 93; denunciation – Article 101).

V. Contracting States

Since its entry into force, eighty countries have adopted the CISG,[78] reflecting a global consensus on legal principles related to the international sale of goods. Statistically, this means an average of 2.6 ratifications or accessions per year; this pace of adoption makes the CISG the second most adopted treaty in the field of international trade law, after the New York Convention.[79] However, two major trading nations have not adopted the CISG: India and the United Kingdom. Interestingly, India and the United Kingdom are consistently within the top ten users of the Pace CISG Database. Maps 2.1, 2.2, 2.3, 2.4, and 2.5 show the CISG contracting states by region.[80]

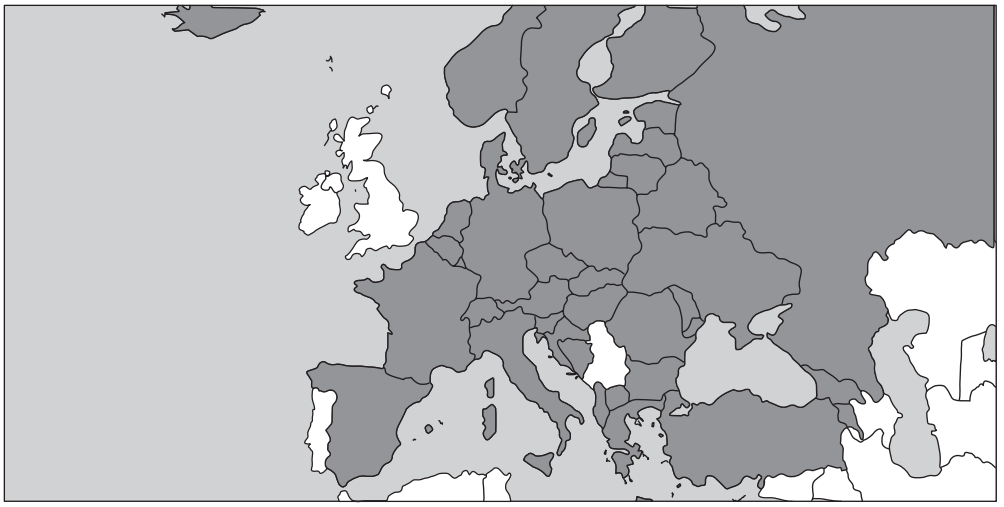
[76] Brussel, "1980 United Nations Convention," 61.

[77] Unofficial language versions include Czech, Danish, Dutch, Finnish, German, Italian, Japanese, Norwegian, Persian, Polish, Portuguese, Serbian, and Swedish.

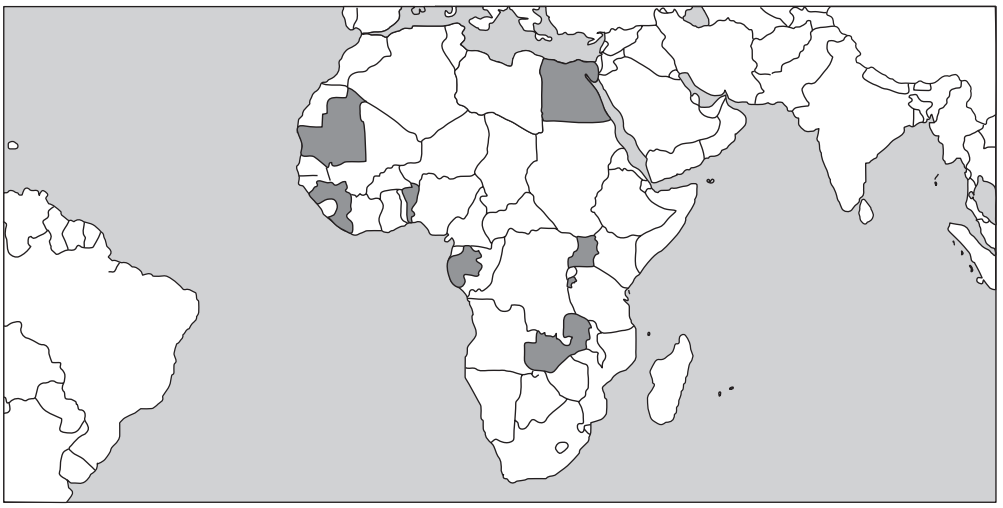
[78] For a "Table of Contracting States" see http://www.cisg.law.pace.edu/cisg/countries/cntries.html.

[79] Luca G. Castellani, "Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)," 13 *Vindobona J. of Int'l Commercial L. & Arbitration* 244 (2009) (citations omitted). Based on the number of ratifications and/or accessions to the CISG since 2009, the yearly average is slightly lower at 2.48 per year.

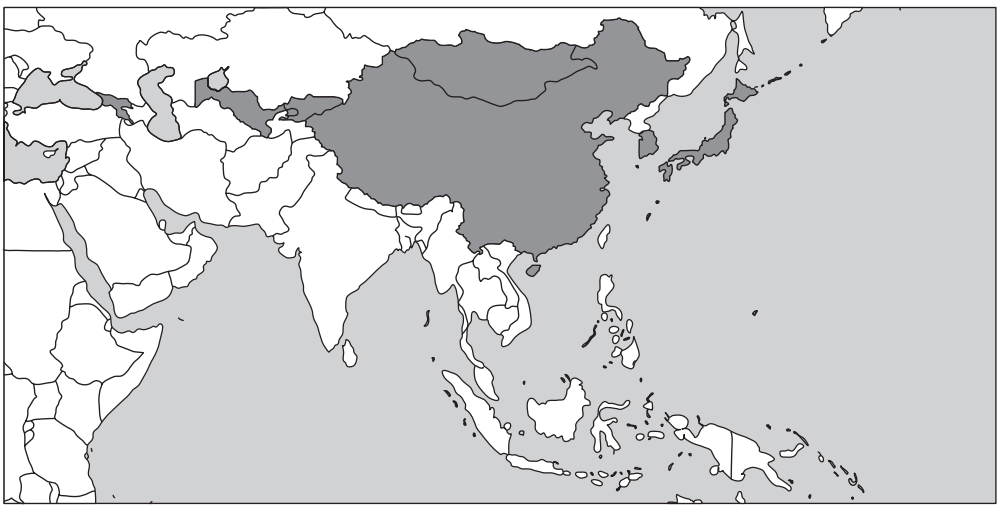
[80] Transcontinental countries have been listed within both regions of which they are a part solely for purposes of calculating regional representation.



Map 2.1. Europe (39 contracting states out of 48 European UN member states or 81.25%).



Map 2.2. Africa (10 contracting states out of 54 African UN member states or 18.52%).



Map 2.3. Asia (9 contracting states out of 32 Asian UN member states or 28.125%).

Map 2.4. South America (8 contracting states out of 12 South American UN member states or 66.67%).

The majority of European countries have adopted the CISG and the European Commission has recently issued a proposal for a Common European Sales Law.[81] The formation rules of the CESL were influenced by the CISG.[82]

Despite the presence and involvement of African countries in the development of the CISG, it has been adopted by less than one-fifth of African countries. However, the Organization for the Harmonisation of Business Law in Africa (OHADA) published a Draft Uniform Act on Contract Law that is modeled on the UNIDROIT Principles of International Commercial Contracts. Considering the limited number of contracting states, including non-OHADA members, further work must be done in the region to promote the adoption of the CISG.

With the relatively recent adoption of the CISG by Japan, along with previous adoptions by the People's Republic of China and South Korea, a major regional trading block within Asia is under the auspices of the CISG. However, as the map demonstrates, southeastern and western states within Asia have not adopted the CISG. This is partly due to the lack of influence Asian culture and Islamic law had in the development of

[81] European Commission's Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 2011/0284 (COD) (October 11, 2011). See also European Parliament's Report on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses, A7–0164/2011 (April 18, 2011).

[82] See generally *Common European Sales Law (CESL): Commentary* (ed. Reiner Schulze) (Baden-Baden, Germany: Nomos; Munich: C.H. Beck; and Hart Publishing, 2012). For a critical review of the CESL in relationship to the CISG, see Larry A. DiMatteo, "The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC," in *CISG vs. Regional Sales Law Unification* (ed. Ulrich Magnus) (Sellier, 2012), 25. The development of a European Contract Law follows the extensive work that has already been completed by the Principles of European Contract Law, published in three parts from 1995 to 2003. In its relevant parts, the principles largely adhere to the same conclusions established within the CISG. See *Principles of European Contract Law Parts I and II* (ed. O. Lando and H. Beale) (The Hague: Kluwer Law International, 2000).

Map 2.5. World Map (80 contracting states out of 193 UN member states = 41%).

the CISG.[83] Partly given this consideration, an academic initiative is underway to the harmonize contract rules via the drafting of the Principles of Asian Contract Law.

It is further worth noting that the China International Economic and Trade Arbitration Commission (CIETAC) has been one of the most transparent arbitration associations in the world regarding the dissemination of its CISG arbitral awards. The Pace CISG Database includes over three hundred CIETAC awards (translated into English). Since most international sales contracts contain arbitration clauses, the reporting of CISG arbitration awards is essential to the creation of a "global jurisconsultorium" (see discussion *infra)* as well as uniform application of the CISG.

It is noteworthy that Brazil has just acceded to the Convention, becoming the seventy-ninth contracting state. Well before the accession by Brazil, academics and practitioners have been laying the foundation to educate Brazilian lawyers about the CISG via the creation of a Brazilian CISG Database, an essay competition to encourage scholarly writing on the CISG and a translation program to translate CISG decisions into Portuguese.[84]

In its totality, the world map (Map 2.5) shows that the CISG is a remarkable achievement in having been adopted across many distinct and varying legal cultures. But it is also clear that there are gaps in representation that need to be closed.

VI. Impact of the CISG on National Law Reform

> The CISG's modern rules have gone far to help international trade to escape from what Ernst Rabel called the "awesome relics of the dead past that populate in amazing multitude the older codifications of sales law."[85]

[83] Gary F. Bell, "New Challenges for the Uniformisation of Laws: How the CISG is Challenged by 'Asian Values' and Islamic Law," in *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (ed. I. Schwenzer and L. Spagnolo) (The Hague: Eleven International Publishing, 2011), 11.

[84] See http://www.cisg-brasil.net.

[85] Honnold, *On the Road to Unification*, 12.

Whether or not foreseen at the time of creation, history will determine if the CISG's greatest contribution was providing a set of uniform rules for international sales contracts or if its greatest impact was establishing a model for international, regional, and domestic law reforms. Professor Hiroo Sono refers to this latter process "as uniformity or harmonization through 'assimilation.'"[86] Professor Sono states that:

> Assimilation is most conspicuous in legislation influenced by the CISG, e.g., China, Germany, the Scandinavian countries (other than Denmark), former socialist states such as Russia and Estonia. This process of "legislative assimilation" is occurring also in Japan, which acceded to the CISG in 2008.
>
> On the other hand, there is a more discreet and indirect way in which assimilation is achieved. That is by interpretation of existing domestic laws in light of the CISG, and thereby transforming understanding of existing laws. This process of "interpretative assimilation" can also be observed in Japan even prior to its accession to the CISG.[87]

Professor Peter Schlechtriem on the legislative assimilation of the CISG in the former socialist states:

> [The influence of the CISG] is most obvious in the former socialist states, which, in the process of transforming and restructuring their societies and economic systems to accommodate democratic and market-oriented Western-style systems, also reformed and re-codified their legal systems. The CISG model was one of those considered, compared, and weighed, especially in countries that had implemented it already – or were to implement it – as their international sales law, and the Estonian Law of Obligations Act is a noteworthy example. Since 10 of these former socialist states have become members of the European Union and had to implement the European *acquis* – i.e., the legal rules of the EU enacted as regulations, directives, etc. – they also had to implement the Directive on the Sale of Consumer Goods, thereby initiating another "channel of influence" of the CISG.[88]

The legislative assimilation is not restricted to the development of modern domestic sales laws. As noted previously, the CISG has had an impact on regional agreements on the sale of goods.[89] Moreover, its specific provisions have had an impact on the content of related international agreements:

> Article 7 of the CISG offers several safeguards to prevent a "re-nationalization" of international uniform law by, firstly, stating directives for its interpretation and, secondly, providing for gap-filling. These, too, have become almost standard clauses for international instruments – e.g., in Art. 7 of the Limitation Convention . . . , Art. 6 (1) of the 1983 (Geneva) draft Convention on Agency in the International Sale of Goods, Art. 4 (1) of the UNIDROIT Convention on International Factoring of 1988 (Ottawa), Art. 6 (1) of the UNIDROIT Convention on International Financial Leasing of 1988 (Ottawa), Art. 7 (1) of the 2001 UN Convention on the Assignment of Receivables in International

[86] Hiroo Sono, "The Diversity of Favor Contractus: The Impact of the CISG on Japan's Civil Code and Its Reform," in Schwenzer and Spagnolo, *Towards Uniformity*.

[87] Id.

[88] Peter Schlechtriem, "Basic Structures and General Concepts of the CISG as Models for a Harmonization of the Law of Obligations," *Juridica Int'l* 27–36 (2005).

[89] See Michael J. Bonell, "The CISG, European Contract Law and the Development of a World Contract Law," 56 *American J. of Comparative L.* 1 (2008).

> Trade, and Art. 5 of the Convention on International Interests in Mobile Equipment (Cape Town Convention) of 2001.[90]

Regarding interpretative assimilation, Petra Butler has analyzed the impact of the CISG on the interpretation of domestic contract law in common law jurisdictions, noting, by way of example:

> In New Zealand a comparatively greater shift has occurred in regard to the use of pre- and post-contractual conduct as an aid to contractual interpretation . . . Sitting in New Zealand's highest Court, McGrath J recently noted in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* that "[o]ver the past 40 years the common law has increasingly come to recognize that the meaning of a contractual text is clarified by the circumstances in which it was written and what they indicate about its purpose" (it is not quite clear though whether his Honour is only referring to New Zealand or also to English law). An impact of the CISG can be felt in regard to the question of the extent to which pre- and post-contractual conduct can be taken into account when interpreting a contract.[91]

> [The Canadian case of] *Brown & Root Services Corp v. Aerotech Herman Nelson Inc.* concerned a contract for the sale of portable heaters between a Manitoba vendor and a Texas buyer. Even though the CISG would have applied to the contract the Court failed to recognise its applicability and resolved all of the issues with exclusive reference to Manitoba statutory law, common law and domestic cases. However, the defendant relied on Articles 38 and 40 to enhance its position in that the claimant took too long to assert a fundamental breach or repudiation of the contract. The Court accepted the principle stipulated by Articles 38 and 40 but rejected the argument on the facts.[92]

These examples illustrate the broad impact the CISG has had on domestic and international sales law development. As domestic and regional contract laws continue to modernize, it is clear the CISG will remain an influential template.

VII. Global Efforts to Promote the Adoption and Use of the CISG

The widespread adoption of the CISG, along with its influence on the development of international, regional, and domestic law, is a reflection of the international efforts aimed at promoting the CISG. For example, in 2004, UNCITRAL created a Technical Assistance and Coordination Unit within the secretariat to promote UNCITRAL texts. One of the efforts of this unit was to sponsor several conferences around the world celebrating the twenty-fifth anniversary of the CISG.[93] Since then, the majority of conferences promoting awareness of the CISG bear UNCITRAL sponsorship. UNCITRAL has also developed the CLOUT[94] database that provides abstracts of cases as well as arbitral awards and is translated into the official UN languages: "The purpose of the system is to promote international awareness of the legal texts formulated by the Commission

[90] Schlechtriem, "Basic Structures," 27–36.
[91] Petra Butler, "The Use of the CISG in Domestic Law," 3 *Annals of the Faculty of Law in Belgrade- Belgrade L. Rev. Year LIX* 7, 18–19 (2011).
[92] Id., 25.
[93] Castellani, "Promoting the Adoption," 244.
[94] Case Law on UNCITRAL Texts (CLOUT), information available at http://www.uncitral.org/uncitral/en/case_law.html.

and to facilitate uniform interpretation and application of those texts."[95] Moreover, UNCITRAL publishes a CISG Digest of Case Law reporting on CISG decisions from around the world.[96]

Academic institutions from around the world report domestic CISG developments online, including case law and scholarly commentaries. This "autonomous network" of CISG databases not only provides accessibility and awareness, but also has been a critical tool in mitigating "homeward trend" bias. Franco Ferrari defines the concept as follows:

> According to those CISG commentators who have not only referred to the homeward trend, but who have also attempted to define it, the homeward trend is akin to the natural 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. It is, in other words, 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.[97]

The opposite of "homeward trend" is reasoning based on a "global jurisconsultorium."[98] The autonomous network of CISG databases provides a platform for global jurisconsultorium reasoning:

> The foundation of the Autonomous Network of CISG Websites is collegiality. The Internet is a very inexpensive and effective way for us to cooperate in this manner.
>
> This is a uniform law network. The world's uniform international sales law belongs to each country and to all countries. To help one another, we share experience and lessons learned. Each national or regional website provider designs its site to best serve traders and counsel of its home market; together we serve the world market. The network is synergetic – the whole is greater than the sum of its parts.[99]

As a member of the network, the Pace CISG Database is one of the most comprehensive databases on international sales law materials, accumulating domestic law materials into one global reporting database. The database currently contains more than 2,900 cases and arbitral awards, 9,469 bibliography entries in thirty-one languages, and 1,440 full-text CISG articles. To promote the concept of the global jurisconsultorium, the Pace Institute of International Commercial Law created the Queen Mary Case Translation Programme: "The Queen Mary Case Translation Programme is a public service open to the academic and practising legal communities and provides high quality professional translations into English of foreign case law (including arbitral awards) relating to the

[95] Id.

[96] UNCITRAL CISG Digest of Case Law, information available at http://www.cnudmi.org/uncitral/en/case_law/digests/cisg.html.

[97] Franco Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law," 13 *Vindobona J. of Int'l Commercial L. & Arbitration* 15, 22 (2009).

[98] The term was originally proposed in Vikki Rogers and Albert Kritzer, "A Uniform Sales Law Terminology," in *Festschrift für Peter Schlechtriem zum 70 Gerburtstag* (ed. I. Schwenzer and G. Hager) (Tübingen: J.B.C. Mohr/Paul Siebeck, 2003), available at http://CISGw3.law.pace.edu/CISG/Biblio/rogers2.html. See Andersen, *Uniform Application*, 13 (global jurisconsultorium as "cross-border consultation in deciding issues of uniform law").

[99] The Autonomous Network of CISG Websites, Pace CISG Database, available at http://www.cisg.law.pace.edu/network.html.

CISG and UNIDROIT Principles."[100] To date, almost 2,000 cases have been translated into English via the Translation Programme. Professor Kritzer stated that:

> To comply with the mandate recited in article 7(1) CISG, courts *must* have due regard to the "international character" of the CISG "and to the need to promote uniformity in its application," and scholars *must* be equipped to assist judges struggling to comprehend the ramifications and applications of this uniform international sales law.[101]

Twenty years ago, the Pace Institute of International Commercial Law established the Willem C. Vis International Arbitration Moot (Moot).

> [In order to a]chieve the universal acceptance and common use of the Sales Convention as the law applicable to contracts for the international sale of goods, it is suggested that UNCITRAL establish the International Trade Law Moot Arbitration Programme and annually conduct a global competition open to teams representing locally accredited educational institutions with a nexus to international trade. Such teams would be comprised of matriculating students from any graduate level business school or school of international affairs and any law school.
>
> An UNCITRAL moot arbitration competition based on a problem stemming from transactions for the international sale of goods and open to teams from schools of business, international affairs and law would stimulate and captivate the interest of persons on the campus. The preparation of the briefs for submission to the Moot arbitration Board would enlist an expansive spectrum of competent persons to ponder and comment on Sales Convention issues present in real world transactions as framed by the problem. The Moot Arbitration Programme would also engage the interest of jurists, practicing lawyers, arbitrators, academicians and others invited to serve as moot arbitrators.[102]

Indeed, the Moot has engaged the interest of the international commercial law and arbitration community. The Moot now attracts teams from over 300 schools (more than one thousand students) from about sixty countries, along with hundreds of practitioners and academics who review written memoranda and serve as arbitrators during the oral arguments. Student participants enter the competition knowledgeable in their own domestic contract law, and leave with a firm understanding of international sales law and international arbitration.

VIII. Conclusion

The long history of the CISG produced a credible legal instrument influencing both international trade law and the modernization of domestic and regional sales laws. The further collection and dissemination of CISG materials will expand its influence in the future.

[100] The Queen Mary Translation Programme, available at http://www.cisg.law.pace.edu/cisg/text/queenmary.html.

[101] Id.

[102] Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, Remarks of Michael Sher, 94–103, 101, New York, May 18–22, 1992, available at A/CH.9/Ser.D/1; UN Sales No. E.94.V.14.

3 The CISG: Divergences between Success–Scarcity and Theory–Practice

*Olaf Meyer**

I. The CISG: A Success Story

The two Hague Conventions on the sale of goods that preceded the CISG fell far short of the expectations placed upon them. So the expectations for the CISG were hopeful, but not very realistic.[1] However, more than thirty years later, the creators of the CISG would have reason to be satisfied with its development. This success can be viewed from several different perspectives. It has been adopted by eighty nations, and the number is growing. The widespread adoption of the CISG has been called "a success story beyond imagination."[2] It has also stimulated a prodigious amount of research on international sales and contract law. The CISG provides a wealth of highly interesting questions of interpretation, which have challenged international and comparativist scholars for a long time and are now being debated by authors from all over the world. The deep and broad literature on the CISG provides a rich knowledge base for future harmonization efforts.[3]

The best measure of the success of the CISG is the number of court decisions and arbitral awards that have used it. Its practical significance is represented in more than 2,800 published judicial and arbitral decisions, which are listed on the Pace Law School Database.[4] The CISG now enjoys a solid footing in practice.[5] New decisions appear so regularly that the central question has become how to ensure its uniform application.[6]

* The author wishes to express his sincere thanks to Jason Dinse for his very helpful comments and suggestions on an earlier draft.

1 Twenty-nine states adopted the Convention on the Limitation Period in the International Sale of Goods (1974), but produced only twelve decisions; Geneva Convention on Agency in the International Sale of Goods (1983) never came into force; United Nations Convention on the Assignment of Receivables (2001) was ratified by only one country.

2 Stefan Kröll, Loukas Mistelis, and Maria del Pilar Perales Viscasillas, eds., "Introduction to the CISG," para. 22 in *UN Convention on Contracts for the International Sale of Goods* (Munich: Beck, 2011) (hereafter referred to as *UN Convention*).

3 See http://www.cisg.law.pace.edu/cisg/biblio/biblio.html.

4 See http://www.cisg.law.pace.edu/cisg/text/casecit.html.

5 See "Introduction to the CISG," in *UN Convention*, paras. 39–45.

6 Cf. *CISG Methodology* (ed. André Janssen and Olaf Meyer) (Munich: Sellier European Law Publishers, 2009); Camilla Baasch Andersen, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (Alphen aan den Rijn: Kluwer Law International, 2007); Sonja Kruisinga, *(Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?* (Antwerp: Intersentia, 2004).

However, the dispersion of cases among the provisions has been uneven. At one end of the spectrum, there are some highly disputed provisions, such as Articles 39 and 78, which have generated a great many of cases. Other provisions have rarely been interpreted and applied. Does this uneven distribution of cases necessitate a different evaluation of the success of the CISG? Not all areas of the sales or contract law, whether domestic or international, generate an equal number of cases, as some legal questions are more susceptible to being contested than others. Nonetheless, it is perhaps interesting and worthwhile to take a closer look at the least utilized of the CISG provisions to determine whether the underutilization is due to poor drafting, or whether other explanations can be found.

II. Measuring Success by the Numbers

The 2,872 cases listed in the Pace CISG Database is an inflated number because the only criterion for inclusion is that a case makes any reference to the CISG.[7] No further special criteria, such as that a case needs to apply a substantive provision or rule of the CISG, is required. Nonetheless, because not all cases, especially arbitral decision, are reported, the database acts as a representative sample of all CISG cases. Amongst the most cited CISG provisions is Article 53, the basic rule of the buyer's obligation to pay the contract price (551 citations in the database). Its counterpart, Article 30, the basic obligations of the seller to deliver goods or documents, was cited only 171 times, perhaps an indicator that sellers bring more cases than buyers. One reason for this imbalance is the high thresholds, under Articles 38 and 39, which buyers must overcome to preserve their rights arising from the seller's defective performance. As a result, Article 39 CISG is likewise and not surprisingly among the most widely contested provisions of the CISG (563 citations).

The most cited provisions are in the area of remedies and damages, including Article 78, relating to recovering interest (797 decisions), and Article 74, the CISG's basic damages provision (855 citations). The damage remedy clearly dominates in practice over the other rights available to the parties for a breach of contract.

The informative value of the empirical accounting just presented is dubious without being more thoroughly scrutinized. For example, citation counts may be affected by the quality of the drafting of respective provisions. A well-written, well-formulated rule will not generate as many disputes over its application irrespective of the area of the law. It has been stated that the fact that the CISG contains numerous vague terms likely accounts for a portion of CISG contract disputes.[8]

Moreover, the databases do not differentiate whether a provision was a basis for a decision or was simply mentioned as *obiter dictum*. For instance, a party might wrongly rely

[7] See http://www.cisg.law.pace.edu/cisg/text/casecit.html (as of October 5, 2011). The UNILEX database (www.unilex.info) lists 891 entries regarding the CISG. The Clout database, maintained by UNCITRAL (http://www.uncitral.org/uncitral/en/case_law.html?lf=899&lng=en), lists a total of 648 decisions. Cases citing only Article 1 are not counted in determining the most cited CISG provisions since "almost every CISG case is in a certain sense an Article 1 case." In his commentary, Loukas Mistelis tallied known Article 1 cases and found 731 of such cases. Loukas Mistelis, in *UN Convention*, Article 1, para. 24.

[8] Cf. Filip de Ly, "Opting Out: Some Observations," in *Quo Vadis CISG?* (Franco Ferrari ed., Bruylant: Brussels 2005), 37f.; Ulrich Magnus, "Germany," in *The CISG and Its Impact in National Legal Systems* (ed. Franco Ferrari) (Munich: Sellier, 2008), 146f.

upon a certain provision, which ultimately does not factor into the court's decision. Furthermore, the fact that many provisions regulate several different issues is not adequately taken into consideration through the undifferentiated references in the databases. This applies, for example, to the two paragraphs in CISG Article 7, as well as to the various limitations to the scope of the CISG found in Articles 2 and 4. Some articles, such as Article 31 CISG (149 cases) and Article 58 CISG (130 cases), are quoted not because of their substantive significance, but rather to deal with jurisdictional issues particular to the forum court.[9]

III. "Quiet" Areas of the CISG

This part explores the uneven nature of CISG case law. It also analyzes some seemingly important CISG provisions that have had limited impact in the case law. Finally, it offers reasons for the uneven nature of CISG case law. It examines the jurisdictional scope of the CISG, exclusion and partial derogation under Article 6, and the divergence in the depth of scholarly literature with the relative depth of the case law relating to given provisions of the CISG.

A. *Theoretical Issues and Practical Significance*

This section explores the twin areas of CISG jurisdiction under CISG Article 1, as well as the exclusion of product liability under Article 5.

1. Indirect Application of the CISG by Noncontracting States: Article 1(1)(b)

CISG Article 1 acts as the gateway to CISG jurisdiction. Article 1 provides two avenues for CISG jurisdiction – either both parties to the contract have their places of business in different contracting states (Article 1(1)(a)) or the rules of private international law lead to the application of the law of a contracting state (Article 1(1)(b)). Article 1(1)(a) jurisdiction is the easiest to determine because the court does not need to apply conflict of law rules. Article 1(1)(b) was controversial from the beginning both because it expanded the reach of the CISG and because it allowed countries to opt out of its application, adding unneeded complexity to the determination of jurisdiction.[10] However, with the growth in the number of contracting states, Article 1(1)(a) jurisdiction has expanded and correspondingly, Article 1(1)(b) has diminished in importance.[11] Nonetheless, Article 1(1)(b) serves as an internal choice of law rule for the law of the contracting state, when the conflict of law rules of the forum court of a noncontracting state direct the court to the contracting state.[12]

[9] Cf. Ronald A. Brand, "CISG Article 31: When Substantive Law Rules Affect Jurisdictional Results," 25 *J. of L. & Commerce* 181ff. (2005/6); Ulrich Magnus, "Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO," *Internationales Handelsrecht* (2002), 45ff.

[10] Cf. Ulrich Magnus in Wiener UN-Kaufrecht (*Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (Munich: Sellier, 2005), Article 1, para. 94 (hereafter referred to as *Staudinger*).

[11] Loukas Mistelis in *UN Convention*, Article 1, para. 47; Paul Volken, "Das Wiener Übereinkommen über den internationalen Warenkauf: Anwendungsvoraussetzungen und Anwendungsbereich," in *Einheitliches Kaufrecht und Nationales Obligationenrecht* (ed. Peter Schlechtriem) (Baden-Baden: Nomos, 1987), 96.

[12] Loukas Mistelis in *UN Convention*, Article 1, para. 54; *Staudinger*, Article 1, para. 95; cf. Peter Huber and Alastair Mullis, *The CISG* (Munich: Sellier, 2007), 55f.

Given the existence of Article 1(1)(b), one would expect more CISG cases from noncontracting states. For example, the United Kingdom, a major trading nation, has not yet produced a single substantive decision regarding the CISG. English courts are bound to the European conflict of laws rules, which regularly subject the sales contract to the law of the country where the seller has its place of business.[13] Accordingly, in principle, every English import contract with a party from a CISG contracting state, barring an express opting out, would come under the jurisdiction of the CISG. This is even more remarkable as higher English courts have called on the CISG as persuasive authority when dealing with the development of domestic contract law.[14] One explanation is offered by Qi Zhou in Chapter 41 of this book. He argues that the English Sale of Goods Act is not only a popular choice of law for English traders, but is a popular choice internationally. Hence, if the parties have chosen English law (as is common practice, especially in the commodities trade[15]), the question of applicability of the CISG does not arise. Another reason is that the English judicial system is notoriously expensive[16] and, thus, commercial disputes are often settled out of court.

2. Domestic Product Liability Law under CISG Article 5

Article 5, which excludes from the CISG's scope any liability of the seller for death or personal injury caused by the goods, is among the least cited provisions of the CISG. There have been only two judicial decisions that casually mention Article 5.[17] There are numerous decisions regarding the general relationship between the CISG and national tort law; however, the core subject matter of Article 5 remains unexplored. This practical insignificance is even more surprising given the controversial issue of whether Article 5 excludes a buyer's claim for indemnification against the seller when the buyer is held to be liable to his or her customers for personal harm caused by the goods.[18] The question of whether national product liability standards or the narrow liability regime of the CISG will be applied is of crucial importance.

[13] Articles 4(1) and 19(1)(2) Rome I Regulation.

[14] *Proforce Recruit Ltd v. Rugby Group Ltd.*, UK Court of Appeal, 2006 EWCA Civ 69, Feb. 17, 2006, available at http://cisgw3.law.pace.edu/cases/060217uk.html; cf. Michael Joachim Bonell, "The UNIDROIT Principles and CISG: Sources of Inspiration for English Courts?," *Uniform L. Rev.* 305ff. (2006). For an example of a passing reference from Brazil, cf. Rio Grande do Sul Appellate Court, Apelação Cível no. 70025609579, May 20, 2009, available at http://cisgw3.law.pace.edu/cases/090520b5.html.

[15] Cf. regarding the rivalry between the CISG with English law Michael Bridge, "The Bifocal World of International Sales," in *Making Commercial Law: Essays in Honour of Roy Goode* (ed. Ross Cranston) (Oxford: Clarendon, 1997), 277ff.; Alastair Mullis, "Twenty-Five Years On: The United Kingdom, Damages and the Vienna Sales Convention," 71 *RabelsZ* (2007), 35ff.

[16] Gavin Lightman, "The Civil Justice System and Legal Profession: The Challenges Ahead," 22 *Civil Justice Q.* 235, 239 (2003). ("It is sufficient to say that increasingly informed advisors wisely recommend prospective litigants . . . in order to make savings in terms of cost, where it is practical, to sue on the Continent.")

[17] Commercial Court Zurich, HG 920670, April 26, 1995, available at http://cisgw3.law.pace.edu/cases/950426s1.html; *TeeVee Tunes, Inc. et al. v. Gerhard Schubert GmbH*, Federal District Court [New York], 00 Civ. 5189 (RCC), August 23, 2006, available at http://cisgw3.law.pace.edu/cases/060823u1.html.

[18] Cf. *UN Convention*, Article 5, para. 11ff; Ingeborg Schwenzer and Pascal Hachem in *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed. (ed. Peter Schlechtriem and Ingeborg Schwenzer) (Oxford University Press, 2010), Article 5, para. 8ff.

Article 5 only indicates when the CISG is not applicable, and, therefore, it is not strictly necessary to cite the provision when a court directly applies domestic product liability law. A German court held that the CISG applied to a claim for indemnification resulting from a demand for damages from a third party, without recognizing Article 5.[19] However, the main reason for the lacking case law in this area is probably due to the peculiarities of product liability law in general. In legal systems in which product liability has developed into its own specific area, product liability insurance is common and most such claims are settled out of court. This reason is supported by the fact that there are also relatively few judicial decisions relating to the European Product Liability Directive.[20]

B. *Derogation by the Parties*

Another explanation for the absence of case law regarding certain provisions of the CISG is that the provisions are excluded in the contract. Article 6 CISG allows the parties to exclude part or all the CISG. So far, the primary attention of researchers has focused on the complete exclusion of the CISG. Their decision to opt out of the CISG is likely due to the parties', and their lawyers', unfamiliarity with its rules.[21] Opting out entirely removes the uncertainty of learning a new law. Professor Ulrich Schroeter, in Chapter 40 of this book, provides an in-depth analysis of opting out of the CISG under Article 6.

The partial derogation of CISG provisions, under Article 6, is the more interesting issue for this chapter. The drafters of the CISG were aware that international commerce is a complex and fast-moving matter and that the parties should be given the flexibility to deal with new developments. The rules of the CISG were thus designed as default rules that apply only to the extent that the parties do not provide for a different rule.[22] Not surprisingly, then, the subject of drafting contracts under the CISG has received increased attention in recent years.[23]

Modification or specification of a CISG rule accommodates the needs of the parties. At several points, the CISG offers the opportunity to provide for increased legal certainty through contractual clarification. For instance, in order to prevent the uncertainty of a judicial determination of the "reasonableness" criterion in Article 39(1), parties can establish a certain period of time for giving notice of nonconforming goods. In recent years, in some countries, courts have recognized a rule of thumb of approximately one month for inspection of goods and giving notice of nonconformity.[24] However, this requirement depends in each case upon the judge's evaluation of a multitude of factors. The result is regularly an all-or-nothing decision. The parties can take precaution by

[19] Appellate Court Düsseldorf, 17 U 73/93, July 2, 1993, available at http://cisgw3.law.pace.edu/cases/930702g1.html.

[20] Cf. Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products (COM/2000/0893 final). ("The number of product liability cases seems to be relatively low. 90% of these claims are settled out of court.")

[21] See Chapter 40 of this book.

[22] "Introduction," in *UN Convention*, para. 18, recognizes the principle of party autonomy as a central theme of the CISG.

[23] Cf., e.g., *Drafting Contracts under the CISG* (ed. Harry M. Flechtner, Ronald A. Brand, and Mark S. Walter) (Oxford University Press, 2008).

[24] Huber and Mullis, *The CISG*, 161; *UN Convention*, Article 39, para. 86; Ingeborg Schwenzer, "The 'Noble Month': The Story behind the Scenery," 7 *European J. of L. Reform* 353ff. (2006).

including a clause detailing the requirements for inspection and notice.[25] In many cases, the standard terms and conditions already contain a precise time period for giving notice.[26] Concrete terms could also be used to clarify the concept of "fundamental breach" (CISG Article 25) by providing a measure or criterion for breach or exemption for liability (Article 79(1)) through a detailed *force majeure* clause.[27] Contract clauses modifying Article 74, such as liability limitations or contractual penalties, are standard in international contracts.[28]

Unlike modifying a CISG rule or providing standards for its application, the parties may agree to exclude a CISG rule. Such adaptation through contractual agreement is not problematic for CISG Part III. However, in order to be effective, an agreement to change the rules on contract formation (Part II) should be agreed to in a preliminary agreement, a framework agreement, or an offer composed with modified conditions.[29] In this way, parties could, for example, exclude the modified acceptance rule in Article 19 or the delayed acceptance rule in Article 21. In practice, the customization of CISG rules is rare. The reasons for the lack of revising or excluding specific CISG rules are two-fold. First, the benefit of default rules is lower transaction costs that are incurred by negotiating and drafting highly custom contracts. Second, the party profiting from such a variation or cancellation must regularly give a concession in return for the exclusion of the rule.[30] The parties' willingness to apply the rules of the CISG as they stand may also be understood as proof that the Convention contains a fair and equitable set of rules that is acceptable to both buyers and sellers alike.

The situation is different in trades where preformulated standard conditions or established trade usages exist, which play an important role in CISG interpretive methodology. The drafters were naturally aware that some provisions of the CISG would be eclipsed by other sets of rules, usages, and customs. Here, two common instruments for the unification of international trade law collide, that is, an international convention on the one side and privately established law on the other side.[31] The latter offers the advantage of greater flexibility, as the private texts can be revised by the trade or publishing organization in regular intervals to accommodate new developments. For example, the 2010 revision

[25] Cf., e.g., Ticino Appellate Court Lugano, 12.19.00036, June 8, 1999, available at http://cisgw3.law.pace.edu/cases/990608s1.html: 8 days.

[26] *UN Convention*, Article 39, para. 16.

[27] International Chamber of Commerce (ICC) (model clauses on hardship and force majeure); cf. Christoph Bruner, *Force Majeure and Hardship under General Contract Principles: Exemptions for On-Performance in International Arbitration* (Austin: Wolters Kluwer, 2009); Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts," 39 *Victoria U. of Wellington L. Rev.* 709ff. (2009).

[28] Alexander Komarov, "Limitation of Domestic and International Contract Damages," in *Contract Damages* (ed. Djakhongir Saidov and Ralph Cunnington) (Oxford: Hart Publishing, 2008), 257ff.

[29] Cf. Maria del Pilar Perales Viscasillas, "CISG Articles 14 through 24," in Flechtner et al., *Drafting Contracts*, 295ff.; Michael Joachim Bonell in *Commentary on the International Sales Law* (ed. Cesare Massimo Bianca and Michael Joachim Bonell) (Milan: Giuffrè, 1987), Article 6, cmt. 2.4.

[30] For example, the seller would agree to the exclusion of Article 39 notice only in exchange for concessions on other aspects of the contract or if the change is due inequality of bargaining power; cf. *UN Convention*, Article 39, para. 15.

[31] Cf. John O. Honnold, "Uniform Law and Uniform Trade Terms: Two Approaches to a Common Goal," in *Transnational Law of International Commercial Transactions* (ed. Norbert Horn and Clive Schmitthoff) (Deventer: Kluwer, 1982), 161ff.; Ingeborg Schwenzer and Pascal Hachem, "The CISG: Successes and Pitfalls," 57 *American J. of Comparative L.* 476f. (2009). Regarding the unification of law through private law-making, see Klaus-Peter Berger, *The Creeping Codification of the New Lex Mercatoria*, 2nd ed. (Austin: Wolters Kluwer, 2010), 40ff.

of INCOTERMS included several adaptations related to modern container shipping.[32] In contrast, a convention routinely leads to petrification of the law, as modifications are only possible through the agreement of all contracting states. The inclusion of an INCOTERMS trade term into a contract has priority over the default rules of the CISG. Furthermore, the mere inclusion of a combination of letters (FOB, CIF, DES) without express reference to the INCOTERMS could likely have the same result – a court or arbitral tribunal could use INCOTERMS as evidence of trade usage, under CISG Article 9(2).[33]

The rules provided under Article 31 (seller's obligation to deliver the goods) and Articles 66–69 (passing of risk) are substantively related to the rules provided by INCOTERMS.[34] The Pace Database lists 149 decisions referencing Article 31, although a good portion of those are merely *obiter dicta*. Article 31 CISG is to be understood as an assisting provision, applied in the event that the parties failed to fix a place of delivery. Despite the predominant use of INCOTERMS, Article 31 retains some real material significance, for example to determine the place of performance of a party's restitution obligation under Article 81(2) after successful avoidance.[35]

Courts are also rarely faced with problems of interpreting Articles 66–99. It is true that all of these provisions are referenced in judicial decisions, but here contractual stipulations by the parties play a much greater role.[36] This is also an area in which the regulation of loss is primarily controlled by transit insurance.

C. *Divergence between Scholarship and Practice*

Some CISG provisions, though not heavily referenced in the case law, have attracted substantial academic research. These are examples of the divergence of research and practice in certain areas. What scholars find interesting does not always equate with practical significance. Of course, provisions enjoying immensely common application, such as those governing the obligation to give notice of nonconformity under Article 38 or the obligation to pay interest under Article 78, have also been thoroughly dealt with in the literature, but other provisions have awakened a disproportionately excessive amount of interest in the research community.

1. The Price Paradox

The first example that comes to mind here is the well-known paradox created by CISG Articles 14 and 55 regarding the relationship between concluding a contract and

[32] Cf. Burghard Piltz, "Incoterms 2010," 11 *Internationales Handelsrecht* 1ff. (2011).

[33] Cf. Burghard Piltz, *Internationales Kaufrecht*, 2nd ed. (Munich: Beck, 2008), paras. 4–10; Corinne Widmer in Schlechtriem and Schwenzer, *Commentary*, Article 30, para 3.

[34] Cf. regarding the differences between the CISG and the Incoterms, Jan Ramberg, "To What Extent Do Incoterms 2000 Vary Articles 67(2), 68 and 69?," 25 *J. of L. & Commerce* 219ff. (2005/6); id., "CISG and INCOTERMS 2000," in *Sharing International Commercial Law across National Boundaries* (ed. Camilla Andersen and Ulrich Schroeter) (London: Wildy, Simmons & Hill, 2008), 394ff.; Burghard Piltz, "Incoterms und UN-Kaufrecht," in *Transport- und Vertriebsrecht* 2000 (ed. Karl-Heinz Thume) (Bielefeld: Luchterhand, 1999), 20ff.

[35] Austrian Supreme Court, 1 Ob 74/99k, June 29, 2000, available at http://cisgw3.law.pace.edu/cases/990629a3.html.

[36] Cf., e.g., *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012) (hereafter referred to as *UNCITRAL Digest*), Article 68 CISG.

determining the price. Article 14(1)(2) CISG requires that a proposal must expressly or implicitly fix or make provision for determining quantity and price. Article 55 contains a rule for determining the contract price according to objective criteria, if the parties fail to agree on a price term. Article 55 implies in the absence of a legally effective offer, a contract price is then, nevertheless, to be determined according to objective criteria. This question has been dealt with thoroughly in the literature, and there is a wide spectrum of opinions as to how to resolve this contradiction.[37] Interestingly, this legal flaw was fully debated at the consultations prior to the adoption of the CISG. However, no diplomatic compromise could be reached and, in the end, the contradiction failed to be rectified.[38]

Despite this obvious conflict within the CISG, this issue has caused few problems in practice.[39] There have been more cases referencing Article 14 than Article 55, which can be attributed to the former article's wider scope of regulation. However, the necessity of stipulating a price to form a contract has rarely been disputed in the case law. The few cases on this point overwhelmingly involve situations in which contractual consent was in dispute. This is not a question to be analyzed under Article 55 CISG but, rather, to be decided solely according to Articles 14 and the other provisions of CISG Part II.

Article 55 CISG maintains a small sphere of application in the area of open price contracts, as the parties have agreed to a sales contract. It is understood that a good will be exchanged for payment of money.[40] Article 55 CISG already presupposes an agreement to exchange performances and, thus, does not aid in the determination of whether a contract had been formed. It is equally not applicable when the parties have agreed to negotiate the price term at a later time, as here the contract is not yet complete.[41] A price can be determined by the circumstances, such as being stated in the seller's catalogue; it can also be determined by way of practice recognized under Article 9(1). Thus, it seems that nearly every problem can be solved though a sensible interpretation of the parties' representations made during the negotiations.[42] If the parties assume inconsistent price terms and this conflict cannot be resolved by an objective interpretation of their statements under Article 8(1), then there is a failure of agreement and the contract is not yet concluded according to Articles 18 and 19. An objective determination of the price term under Article 55 only arises in the few remaining cases, in which the judge is convinced that the parties surely wanted an exchange of performance without in some way making a price term a part of the contract.

[37] Cf. Loukas Mistelis, "Article 55 CISG: The Unknown Factor," 25 *J. of L. & Commerce* 285ff. (2005–6); Ulrich Magnus, "Unbestimmter Preis und UN-Kaufrecht," *Praxis des Internationalen Privat- und Verfahrensrechts* (1996), 145ff.

[38] See Mohs in Schlechtriem and Schwenzer, *Commentary*, Article 55, para. 2.

[39] See Peter Schlechtriem, "Uniform Sales Law: The Experience with the Uniform Sales Laws in the Federal Republic of Germany," *Juridisk Tidskrift* 19 (1991/2).

[40] Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 1, para. 8; Huber and Mullis, *CISG*, 43.

[41] Arbitration proceeding, 309/1993, March 3, 1995, available at http://cisgw3.law.pace.edu/cases/950303r1.html (the arbitral tribunal did not decide that Article 14 should preempt Article 55 but, rather, that a contract does not yet materialize, as long as both of the parties assume that the price term is still negotiable).

[42] Cf., e.g., Austrian Supreme Court, 2 Ob 547/93, November 10, 1994, available at http://cisgw3.law.pace.edu/cases/941110a3.html (held that, based on the facts of the case, a default price "between 35 DM and 65 DM" was sufficiently definite according to Article 14).

That this problem has nevertheless attracted so much attention in the legal literature despite its practical insignificance is attributable to the question's popularity in comparative law. The various legal systems have differing views on whether a *pretium certum*, a definite price, is indispensible to a legally effective contract.[43] Since this difference in conception amounts to a fundamental question of contract law, no consensus could be reached in the drafting of the CISG. However, the fundamental diversity existing in contract theory has had little effect on international sales transactions. The drafters of the CISG left it to practitioners to find an adequate solution, and the judicial decisions generally exhibit a good understanding of whether or not the parties had reached an agreement.

2. Battle of the Forms

The battle of forms scenario is a highly debated and critiqued area in national contract laws. Given the ubiquitous use of standard forms in sales transactions and the difficulty in reaching consensus on how to treat contracts based on the exchange of forms with conflicting terms, the topic has been the subject of a tremendous amount of scholarly studies. True, colliding terms about something like the scope of liability can easily attain great significance in a lawsuit.[44] Still, this appears to be more a problem of contract drafting and less of a practical problem of law. Despite the apparent significance, most battle of the forms situations rarely involve questions of validity, but rather questions of contract interpretation to be determined under Article 8.[45]

The two dominant theories for resolving the battle of the forms scenario rest upon a standardized interpretation of the behavior of the parties. According to the "mirror image" rule codified in Article 19(1) and (2), an acceptance that contains additional terms or terms materially different from those of the offer constitutes a rejection of the offer and acts as a counteroffer. The offspring of the mirror image rule is the "last shot" rule, under which the original offeror is held to have implicitly accepted the terms of the counteroffer by performance, so, for example, a seller is deemed to have accepted a buyer's counteroffer by shipping the goods without objection. Thus, the last shot principle concedes the terms to the party who sends the last counteroffer.[46]

A counterpoise to the "last-shot" rule is the "knock-out" rule, which assumes a different interpretation of the parties' behavior. Under this theory, it is assumed that if the parties undertook performance on the contract they must have attached little importance to inconsistent standard terms. The knock-out rule corresponds with the general experience that such "boilerplate" terms are routinely ignored until a dispute

[43] Article 1591 of the French Code Civile, the price of a sale must be determined and stated by the parties. Additionally, at least at the time the CISG was promulgated, such a requirement was still found in many socialist legal systems; cf. Gyula Eörsi in Bianca and Bonell, *Commentary*, Article 55, cmt. 121; Ewoud Hondius, "CISG and a European Civil Code," 71 *RabelsZ* 101f. (2007). See also Jan Kleinheisterkamp in *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (ed. Stefan Vogenauer and Jan Kleinheisterkamp) (Oxford University Press, 2009), Article 5.1.7, para. 4.

[44] Cf. Documentation in the *UNCITRAL Digest*, Article 19, cmt. 6.

[45] Ulrich Schroeter in Schlechtriem and Schwenzer, *Commentary*, Article 19, para. 34.

[46] Franco Ferrari, in *UN Convention*, Article 19, para. 15; Maria del Pilar Perales Viscasillas, "'Battle of the Forms' under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2–207 UCC and the UNIDROIT Principles," 10 *Pace Int'l L. Rev*. 97ff. (1998).

arises.[47] A party who begins performance despite the existing divergence is not expressing an unconditional acceptance of the other party's standard terms, but it is instead more likely that both parties understand the contract to have been concluded on the basis of the consistent terms (and possibly any other nonconflicting, reasonable terms in one of the exchanged forms). Under the knock-out rule, the conflicting terms do not become part of the contract and, if necessary, any remaining gap will be filled by the default rules of the CISG. However, the knock-out rule is at odds with the broad definition of materiality found in Article 19(3), which prevents the recognition of a contract formation based upon the exchanged forms. It is rationalized that the parties implicitly derogated, under Article 6, based on the assumption that the parties rejected the application of the "mirror-image" rule of Article 19(1) by performing despite the conflicting terms.[48]

Applying Article 19 rigidly is ill suited to effectively resolve a conflict concerning questions of interpretation. Instead, courts retain discretion to carve out decisions that are fair to the interests present in the specific case.[49] For example, it is yet unclear whether the knock-out rule can be retained when a contracting party includes a "defence clause" against the validity of the other party's boilerplate terms in his or her own set of standard terms or even as an individual term in the contract.[50]

D. *Compromise and Dispute*

Provisions that were imprecisely formulated as the result of compromises during the drafting process represent another potential source of legal disputes. The CISG contains numerous "compromise provisions." This is due to the drafters' goal of creating an instrument that would be acceptable to varying legal traditions and political systems. The experience of the Hague Conventions, rejected by many states as Eurocentric, was still fresh in the minds of the drafters. Some of the compromises were of a technical nature, such as those intended to help bridge the divide between the civil and common law legal systems,[51] while other compromises were politically motivated and intended to mitigate the opposing interests among the Western, socialist, and developing countries.[52]

[47] Larry A. DiMatteo et al., *International Sales Law: A Critical Analysis* (Cambridge University Press 2005), 66.

[48] Ulrich Schroeter in Schlechtriem and Schwenzer, *Commentary*, Article 19, para. 41; Huber and Mullis, *CISG*, 94; John O. Honnold, *Uniform Law for International Sales Law under the 1980 United Nations Convention*, 4th ed. (Austin: Wolters Kluwer, 2009), cmt. 170.4.

[49] Cf. German Supreme Court, VIII ZR 304/00, January 9, 2002, available at http://cisgw3.law.pace.edu/cases/020109g1.html; here, the Supreme Court expressly left open which of the positions it would adopt, as according to its interpretation in concreto, both would lead to the same result. For criticism, see Maria del Pilar Perales Viscasillas, "Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002," 6 *Vindobona J. of Int'l Commercial L. & Arbitration* (2002), 217ff.

[50] Cf. Article 2.1.22 UNIDROIT Principles of International Commercial Contracts. The provision generally follows the knock-out doctrine, unless one party clearly indicates in advance or later and without undue delay informs the other party that it does not intend to be bound by such a contract. The Principles do not give a more precise explanation of what is required for a "clear indication," although the official commentary suggests that a mere "boilerplate" term in the standard terms will, as a rule, be insufficient. An almost identical rule is also found in Article 2:209(2)(a) Principles of European Contract Law and Article II-4:209(2)(a) DCFR.

[51] See Chapter 38 of this book.

[52] Cf. Sara G. Zwart, "The New International Law of Sales: A Marriage between Socialist, Third World, Common, and Civil Law Principles," 13 *No. Carolina J. of Int'l L. & Commercial Regulation* 109ff. (1988).

1. Revocability of an Offer

The revocability of offers (CISG Article 16) is an area where various national legal systems have taken opposing positions. An offer remains freely revocable under common law as long as the offeree has not provided consideration, as one-sided obligations are not generally enforceable. In contrast, continental European legal systems are more protective of the offeree's reliance in the continued existence of the offer and regularly hold the offeror bound for a certain period of time.[53] Article 16 attempts to accommodate this divergence with a rule-exception provision. According to paragraph 1, an offer is generally freely revocable, but paragraph 2 sets out two exceptions to the general rule of revocability. The provision is far from unambiguous, and there is indeed much debate in the literature about how the exceptions should be applied. The interpretation of paragraph 2 has been susceptible to the influence of varying national perceptions.[54] However, the revocability of an offer has not generated much dispute in practice, with the Pace Database containing only fourteen decisions and none of them dealing with this specific problem of interpretation.

2. Specific Performance

The different view of the right to specific performance between the civil law (ordinary remedy) and the common law (extraordinary remedy) resulted in the drafting of CISG Article 28, which defers recognition of this remedy to domestic law. Article 28 is not intended to protect the contracting parties, but rather to protect the courts' discretionary powers over the granting of remedies.[55] Therefore, Article 28 is not subject to the principle of party autonomy and the parties cannot opt out of its application.[56] Of the nine reported decisions referring to Article 28, only one originated in a common-law court, and there the plaintiff was granted specific performance as special circumstances existed, in which case the domestic law would have also granted such relief.[57]

Despite its relative insignificance in CISG case law, the right to specific performance plays an important role in the CISG's remedial scheme. For example, even in a country that regularly grants specific performance, Article 77's duty to mitigate may in some situations require a party claiming breach to choose a remedy that is less onerous on the breaching party.[58] The nonbreaching party may be required to obtain substituted performance to mitigate damages, thus rendering the right to specific performance moot. More importantly, in practice, damages is the preferred remedy, as a cover purchase with

[53] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford: Clarendon, 1998), 356ff.

[54] Henry Mather, "Firm Offers under the UCC and the CISG," 105 *Dickinson (Penn State) L. Rev.* 44ff. (2000); Ulrich Schroeter in Schlechtriem and Schwenzer, *Commentary*, Article 16, para. 10.

[55] Bruno Zeller, *CISG and the Unification of International Trade Law* (Oxford: Routledge-Cavendish, 2007), 59f.; Marco Torsello, "Remedies for Breach of Contract," in Ferrari, *Quo Vadis CISG?*, 68.

[56] Huber and Mullis, *CISG*, 190; Ingeborg Schwenzer and Markus Müller-Chen in Schlechtriem and Schwenzer, *Commentary*, Article 28, para. 24.

[57] *Magellan International v. Salzgitter Handel*, Federal District Court [Illinois], 99 C 5153, December 7, 1999, available at http://cisgw3.law.pace.edu/cases/991207u1.html (interests of the buyer were not sufficiently served by a cover purchase).

[58] Ingeborg Schwenzer and Markus Müller-Chen in Schlechtriem and Schwenzer, *Commentary*, Article 46, para. 14; Zeller, *CISG and Unification*, 63.