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INTERNATIONAL SALES LAW—THE ACTUAL PRACTICE

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# International Sales Law—The Actual Practice<sup>1</sup>

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1. A chapter developed from this article will be published in INGBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, *GLOBAL SALES AND CONTRACT LAW* (Oxford University Press) (forthcoming).

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## I. INTRODUCTION

When addressing the topic of global sales law, a preliminary but very important consideration must be the prevalence of international trade. It is international trade which has, and continues to be, the catalyst for developments in global sales law.

As the statistics below demonstrate, the sustained overall development of international trade over the last half century is startling. Equally extraordinary was the dramatic decrease of world merchandise exports in 2009. As against the year 2000 figures, world merchandise exports fell just over 12% in 2009.<sup>2</sup> When compared to the 2008 figure the decline was 23%—the greatest fall in over fifty years.<sup>3</sup> However, preliminary figures indicate a strong rebound, with the value of trade in the first quarter of 2010 said to be more than 25% higher than of the same time in 2009.<sup>4</sup> Furthermore, recent announcements suggest trade would likely grow by 13.5% in 2010.<sup>5</sup>

While not dismissing the 2009 figures as a mere anomaly, it is, however, more useful to have regard to the demonstrated trend up to 2008. World Trade Organization (“WTO”) figures for 2008 indicate that worldwide merchandise export trade amounted to \$15,717 billion USD and worldwide merchandise import trade to \$16,127 billion USD.<sup>6</sup> These figures are approximately 100 times more than forty-five years ago and more than ten times the level at the time of the signing of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) in 1980.<sup>7</sup> The average annual growth from 2000 to 2008 was more than 5% for both exports and imports worldwide.<sup>8</sup> No longer is the highest growth found in North America, Europe, and Japan, but instead it is the transition economies from different points of the globe—particularly China, Brazil, Russia, and some African countries.<sup>9</sup>

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2. See World Trade Organization [WTO], International Trade Statistics 2010, at 4 (2010), available at [http://www.wto.org/english/res\\_e/statis\\_e/its2010\\_e/its2010\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2010_e/its2010_e.pdf).

3. *Id.*

4. Press Release 604, World Trade Organization, First Quarter of 2010 Sees Trade Value Rise By About 25% (June 2, 2010), available at [http://www.wto.org/english/news\\_e/pres10\\_e/pr604\\_e.htm](http://www.wto.org/english/news_e/pres10_e/pr604_e.htm).

5. Press Release 616, World Trade Organization, Trade Likely To Grow By 13.5% In 2010, WTO Says (Sept. 20, 2010), available at [http://www.wto.org/english/news\\_e/pres10\\_e/pr616\\_e.htm](http://www.wto.org/english/news_e/pres10_e/pr616_e.htm).

6. WTO, World Trade Developments, 9 (2009), available at [http://www.wto.org/english/res\\_e/statis\\_e/its2009\\_e/its09\\_world\\_trade\\_dev\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2009_e/its09_world_trade_dev_e.pdf).

7. *Id.*

8. *Id.* at 7.

9. *Id.* at 8.

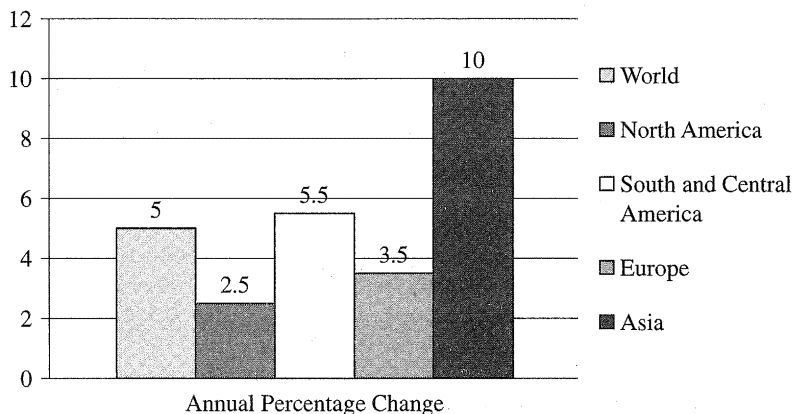


Figure 1—Growth in World Trade

This change is not in the least part due to containerisation that revolutionised cargo shipping. It has been suggested that approximately 90% of non-bulk cargo is moved worldwide in containers on cargo ships.<sup>10</sup> Anecdotally, today it is cheaper to ship a bottle of wine from Australia to Hamburg (approximately 15,403 km / 9,571 miles) than to take it from Hamburg to Munich (approximately 776 km / 482 miles).

Trade has always been an incentive for harmonising or unifying law. Differing legal regimes can be an obstacle to cross-border transactions. The impetus trade provides can be seen not only throughout the history of codification of laws in Europe in the nineteenth century, but also in the United States with the Uniform Sales Act<sup>11</sup> and, subsequently, in the Uniform Commercial Code,<sup>12</sup> as well as more recently in Africa with the Organisation for the Harmonisation of Business Law in Africa (“OHADA”).<sup>13</sup> To this very day, European businesses still consider variation in legal systems and the costs of foreign legal advice to be the main obstacles to cross-border transactions after tax concerns.<sup>14</sup>

Accordingly, in the legal context, there have been significant developments towards global harmonisation and unification of contract

10. Chuck. E. Ebeling, *Evolution of a Box*, 23 INVENTION AND TECHNOLOGY 8-9 (2009).

11. See generally Unif. Sales Act (1906).

12. See generally U.C.C. (2000).

13. Organisation pour l’Harmonisation en Afrique du Droit des Affaires Home Page, [www.ohada.com](http://www.ohada.com).

14. Stefan Vogenauer & Stephen Weatherill, *The European Community’s Competence to Pursue the Harmonisation of Contract Law—An Empirical Contribution to the Debate in THE HARMONISATION OF EUROPEAN CONTRACT LAW* 105, 128 (table 9) (Vogenauer & Weatherill eds., 2006).

law. The CISG, as alluded to above, was signed in 1980.<sup>15</sup> It has become, without question, the most successful international treaty in the field of private law. Today, there are 76 member states<sup>16</sup> and indications are that more will join in 2011.<sup>17</sup> Nine of the top ten leading trade nations are member states today, with the United Kingdom being the sole exception.<sup>18</sup> Theoretically approximately 80% of worldwide trade is governed by the CISG.<sup>19</sup> In this regard, it must be noted that the CISG applies not only where both parties (i.e., seller and buyer) have their respective seats in contracting states, but—for most member states—also where the rules of private international law lead to the application of the law of a contracting state.<sup>20</sup>

The International Institute for the Unification of Private Law (“UNIDROIT”), an independent intergovernmental organisation, issued its Principles for International Commercial Contracts (“PICC”) in 1994,<sup>21</sup> which were subsequently revised and updated in 2004.<sup>22</sup> The PICC are intended to provide general rules of contract law beyond simply those that relate to contracts for the sale of goods. Although substantively the PICC have drawn heavily on the solutions already developed in the CISG, they do go beyond its scope. In particular, they encompass rules on agency, validity, third party rights, set off, assignment and limitation periods—all of which are areas not covered by the CISG.<sup>23</sup> However, because the PICC are not a convention, they are traditionally viewed as being “soft law.” According to their preamble, the PICC will primarily be applied when the parties agree to have their contract governed by the

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15. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-99, 1489 U.N.T.S. 3.

16. United Nations Commission on International Trade Law, Status: 1980 United Nations Convention on Contracts for the International Sale of Goods.

17. There are suggestions that Brazil and Portugal will become member states in 2011.

18. WTO, World Trade Developments, *supra* note 5, at 12.

19. This figure is arrived at by taking the contribution of the export values of CISG member states as a percentage of the world’s fifty leading exporters as reported by the WTO. *See id.* Typically conflicts-of-law rules lead to the application of the law of the seller’s place of business, and thus it is appropriate to specifically consider figures relating to exporters.

20. CISG, *supra* note 15, at art. 1(1).

21. International Institute for the Unification of Private Law, Principles of International Commercial Contracts (1994).

22. In 2005 the Governing Council of UNIDROIT established a working group to develop a third edition of the PICC. That working group meets annually. Further details of the topics the Working Group is addressing can be found at <http://www.unidroit.org/english/workprogramme/study050/main.htm> (last visited June 9, 2010).

23. Ingeborg Schwenzer & Pascal Hachem, *Introduction to Articles 1-6, in SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, (Ingeborg Schwenzer ed., 2010).

PICC.<sup>24</sup> Furthermore they may be applied when the parties have agreed that their contract is governed by general principles of law, *lex mercatoria*, or the like. Thus, unlike the CISG, which is an opt-out system, the PICC are opt-in.

Besides endeavours to harmonise and unify international commercial law, trade usages have always been of significant importance to international trade. As long ago as 1936, the International Chamber of Commerce (“ICC”) codified the then-current uses and distributed the first edition of the INCOTERMS.<sup>25</sup> These terms are shorthand descriptions that can be used by contracting parties to describe their respective duties on a wide variety of issues, such as delivery, necessary licences, transport, insurance, risk of loss, costs, etc. During the last seventy years, the development of the transportation techniques, handling practices, transmission of data, and commercial practices have necessitated numerous revisions and modifications. The most recent edition, “INCOTERMS 2010,” entered into force on January 1, 2011.<sup>26</sup>

## II. EMPIRICAL RESEARCH

### A. Previous Surveys

Despite the importance of global trade, until very recently, little was known about how the law interacts with actual practice, though many anecdotal stories existed. One of these stories, in particular, was that parties disliked the CISG and, therefore, were regularly contracting out of its application.<sup>27</sup> In recent years, there has been an increase in empirical research in this field; these surveys, however, have been limited by the geographic area approached, and the number of survey respondents. As far as geographic areas are concerned, these surveys focused on Germanic legal systems (Germany,<sup>28</sup> Switzerland<sup>29</sup> and

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24. International Institute for the Unification of Private Law, Principles of International Commercial Contracts (1994) (Preamble).

25. Int’l Chamber of Comm., INCOTERMS: International Rules for the Interpretation of Trade Terms, I.C.C. at 4 (2010).

26. See Int’l Chamber of Comm., INCOTERMS: International Rules for the Interpretation of Trade Terms, I.C.C. (2010).

27. See Lisa Spagnolo, *A Glimpse Through the Kaleidoscope: Choices of Law and the CISG*, 13 VINDOBONA INT’L J. COM. L. & ARB. 135, 135 n.1 (2009) (citing further references).

28. Justus Meyer, *UN-Kaufrecht in der deutschen Anwaltpraxis*, 69 RABELSZ 457 (2005); Martin F. Köhler & Yujun Guo, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems—An International Comparison of three Surveys on the Exclusion of the CISG’s Application Conducted in the United States, Germany and China*, 20 PACE INT’L L. REV. 45 (2008).

Austria<sup>30</sup>), the United States,<sup>31</sup> and a rather small survey with under fifty respondents conducted in China.<sup>32</sup> There have been other surveys that did not directly address the CISG, but considered cross-border transactions in Europe<sup>33</sup> and the worldwide use of transnational law.<sup>34</sup>

Against this research background, our research group in Basel decided to conduct a global survey on the use and understandings of law in international sales transactions.

### B. *Global Sales Law Surveys*

The Global Sales Law survey was conducted online in Fall 2009 and was supported by the United Nations Commission on International Trade Law (“UNCITRAL”). The survey was conducted in the six UN languages.<sup>35</sup> Approximately 5,000 individuals received personally addressed letters in United Nations envelopes, and there were four target groups—practicing lawyers, arbitrators, businesses engaging in trade and law schools. Additionally, various e-mail lists were used to draw attention to the survey website. It is estimated that about 9,000 people across the globe would have received an invitation to participate. Approximately four weeks after the letters, follow-up e-mails were sent. The survey was open for a period of six weeks ending in early November 2009.

The survey website run by our research team received more than 1,500 hits and 640 useable responses.<sup>36</sup> Responses were submitted from

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29. Justus Meyer, *UN-Kaufrecht in der schweizerischen Anwaltspraxis*, 104 SJZ 421 (2008); Corinne Widmer & Pascal Hachem, “Switzerland” in *THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS* 281 (Franco Ferrari ed., 2008).

30. Justus Meyer, *UN-Kaufrecht in der österreichischen Anwaltspraxis*, 20 ÖJZ 792 (2008).

31. Wallace Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State’s (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 AM. J. COMP. L. 361 (Supp. 1998); Köhler & Guo, *supra* note 28; George V. Philippopoulos, *Awareness of the CISG Among American Attorneys*, 40 U.C.C. L.J. 357 (2008); Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States* 27 J. L. & COMM. 1 (2008).

32. Köhler & Guo, *supra* note 28.

33. Vogenauer & Weatherill, *supra* note 14, at 105.

34. Klaus P. Berger & Holger Dubberstein, *Anwendung Transnationalen Rechts in der internationalen Vertrags- und Schiedspraxis*, 101 ZvgIRWiss 12 (2002).

35. English, French, Spanish, Chinese, Arabic and Russian.

36. Initial analysis has identified useable responses per category to be: Arbitrators, 98; Lawyers, 347; Businesses, 60; and Law Schools, 135.



eighty-five countries,<sup>37</sup> of which 58% are CISG member states. Many of these countries have not been included in reported surveys before, especially countries from South America, the Middle East, Africa and Asia.<sup>38</sup>

In addition to the online survey, we continue to collect and review general terms and conditions of, thus far, seventy-nine businesses<sup>39</sup> which were published and are freely available in English, French, or German on the Internet.

### III. RESULTS IN DETAIL

#### A. *Sales Cases in General*

The increase in international trade is clearly reflected by a comparable increase in sales-law litigation and arbitration. Practitioners in law firms were asked to report on the total number of sales-law cases between 2004 and 2008. The results indicate a steady increase of approximately 5% per year, which almost exactly equals the development of world trade during this period.<sup>40</sup> On average, arbitrators indicated that 16% of their caseload involved goods transactions over the last ten years. If this percentage is applied to the total number of arbitrations reported by arbitral institutions during that period (so not including ad hoc arbitrations), it can be hypothesised that nearly 5,000 arbitrations concerned the sale of goods over that period.<sup>41</sup>

#### B. *CISG Cases*

With regard to the total number of sale of goods cases, the increase in the number dealing with the CISG is all the more impressive. Whereas throughout the 1990s CISG cases were scarce, at least in the majority of CISG member states, today it can confidently be said that

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37. Including lawyers from sixty-six different countries. The IP addresses of respondents were examined to determine this figure. There is a certain margin of error in this number as some respondents may have been using a proxy server which would have hidden their true location. The likelihood of this affecting the figures was considered minimal.

38. A non-exhaustive example of some of the countries which do not appear to have been canvassed in others include: Albania, Algeria, Argentina, Benin, Bolivia, Brazil, Burkina Faso, Cameroon, India, Indonesia, and Saudi Arabia.

39. All companies searched are on the Forbes 500 list.

40. WTO, World Trade Developments, *supra* note 5, at 7.

41. This figure is based on the reported statistics published by the Hong Kong International Arbitration Centre ("HKIAC"). See Hong Kong International Arbitration Center, available at [http://www.hkiac.org/show\\_content.php?article\\_id=9](http://www.hkiac.org/show_content.php?article_id=9) (last visited Apr. 26, 2011).

more than 2,000 cases are listed in the leading case databases on the CISG.<sup>42</sup> We estimate that this is four times more than ten years ago. The significant majority of these cases have been decided by state courts. This fact is notable because it has been suggested<sup>43</sup>—and is confirmed by our survey—that more than 60% of international commercial disputes are not litigated before courts but rather go to international commercial arbitration. Arbitral awards are typically not published as confidentiality is one of the main features of arbitration. Thus, the real number of CISG cases must be a multiple of those published in the databases.

More than 100 decisions on CISG cases have been delivered by US courts alone,<sup>44</sup> however, despite this, in 2008 two decisions of the Southern District of New York claimed that there was “virtually no American case law on the CISG.”<sup>45</sup> Presently, there are approximately 419 CIETAC arbitral awards that have been translated and reported on the Pace website.<sup>46</sup> CIETAC is the China International Economic and Trade Arbitration Commission. As CIETAC only publishes a selection of its arbitral awards and, even then, only three years after they have been rendered, it can be expected that virtually thousands of arbitral awards concerning the CISG must exist in China.

The importance of the CISG in international litigation and arbitration is clearly mirrored in the results of our survey. Arbitrators in particular reported a significant increase in the numbers of CISG cases they were asked to determine. Over the last ten years, respondent arbitrators indicated they had heard 1,306 cases in total involving the sale of goods. In 2008 alone, 217 of these were CISG cases. Thus,

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42. The precise number of cases is difficult to calculate and is in any event increased regularly. The Pace Website reports 2,500 cases and the CISG-online website report 2,094—although some cases are reported on both sites, there are many that are only reported on one database. Consequently the real figure may be closer to 3,000. For further detail about these websites see *infra* note 84.

43. See Stefan Vogenauer, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law, A Business Survey Final Results*, INSTITUTE OF EUROPEAN AND COMPARATIVE LAW, Oct. 1, 2008, (question 48), available at <http://denning.law.ox.ac.uk/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf> (Reporting that 63% of respondents preferred arbitration and 37% preferred litigation before a court when conducting a cross border transactions.).

44. As of February 22, 2011, there were 123 reported US cases on the CISG-online website, and 146 on the Pace website. For further detail about these websites see *infra* note 84.

45. See *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F.Supp.2d 781 (S.D.N.Y. 2008), Aug. 20, 2008, CISG-online 1777, available at <http://cisgw3.law.pace.edu/cases/080820u1.html> (last visited Apr. 26, 2011); *Macromex Srl. v. Globex International Inc.*, 2008 WL 1752530 (S.D.N.Y. 2008), Apr. 16, 2008, CISG-online 1653, available at <http://cisgw3.law.pace.edu/cases/080416u1.html> (last visited Apr. 26, 2011).

46. Search of Pace database using jurisdiction field “China” conducted on Feb. 22, 2011.

extrapolations suggest that a very high percentage of all sale-of-goods cases involve the CISG.

### C. *Familiarity with the CISG*

Time and again it has been suggested that, unfortunately, lawyers are still not very familiar with the CISG. In the surveys before ours, results regarding familiarity has varied greatly—an almost 100% familiarity reported from Germany and Switzerland,<sup>47</sup> good familiarity reported from China and Denmark,<sup>48</sup> to a much lower familiarity in mainly Common Law countries.<sup>49</sup>

Our survey asked both law-firm practitioners and businesses to state their relative familiarity with the CISG. As a percentage of the total respondents in each sub-survey, 78% of lawyers and 45% of businesses reported being familiar or somewhat familiar with the CISG. However, to draw a meaningful comparison with other surveys, it is necessary to examine the responses coming from CISG member states alone, where the respective figures are 84% for lawyers and 63% for businesses. Although these figures are encouraging and are above those reported in previous surveys,<sup>50</sup> the lack of familiarity of businesses is alarming. This is particularly the case as only 13% of businesses reported using external lawyers.

Lawyers were also asked whether they discussed the CISG with their clients. When examining the replies from those situated in CISG member states only, it can be seen that 45% always or sometimes raise the issue. Interestingly, 5% indicated they never discussed the CISG. However, it is not possible to draw any significant conclusions from these statistics. A high percentage of respondents failed to provide any response (40% of those from CISG member states) and even fewer answered a subsequent question inquiring about the circumstances under which the lawyers would discuss the CISG with their client.

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47. See Spagnolo, *supra* note 27, at 138 n. 14; Widmer & Hachem, *supra* note 29, at 284, 287.

48. See Spagnolo, *supra* note 27, at 138.

49. See *id.*; for surveys on the U.S., see Various Articles, *supra* note 31.

50. See Fitzgerald, *supra* note 31, at 41.

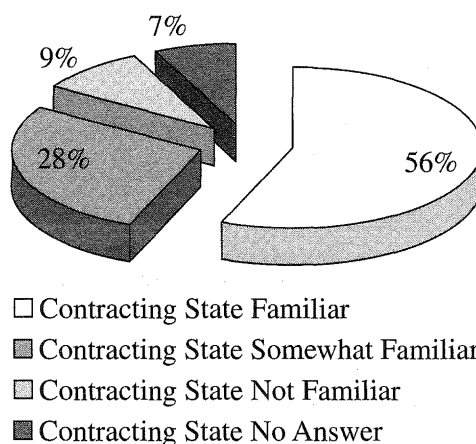


Figure 2—Lawyers Familiarity in Contracting States as %

#### D. Exclusion of the CISG

The question of the extent to which parties are opting out of or excluding the operation of the CISG has become a perennial one. Hearsay suggests the number of opt-outs is considerable; the empirical evidence from other surveys is less emphatic, suggesting that between 37% to 71% of lawyers promote opting out.<sup>51</sup> The 71% comes from a survey of US lawyers, although the sample was very small.<sup>52</sup>

Our survey figures are considerably less dramatic. Of the lawyers from CISG member states who answered this question, only 13% reported always excluding the CISG, and a further 32% reported they sometimes did so. A considerable 55% answered that they never or rarely excluded the CISG. The respective figures for US lawyers who provided a response were: 12% always excluding, 42% sometimes excluding, and 46% never or rarely excluding. The responses from non-contracting states are similar to the US. Amongst that group, 19% always excluded the CISG and 36% did so sometimes, while 45% rarely or never excluded it.

51. See Spagnolo, *supra* note 27, at 136.

52. Martin Köhler, *Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG)*, in LEGAL PRACTICE AND THE EXCLUSION OF ITS APPLICATION, CISG, October 2006, available at <http://www.cisg.law.pace.edu/cisg/biblio/koehler.html>.

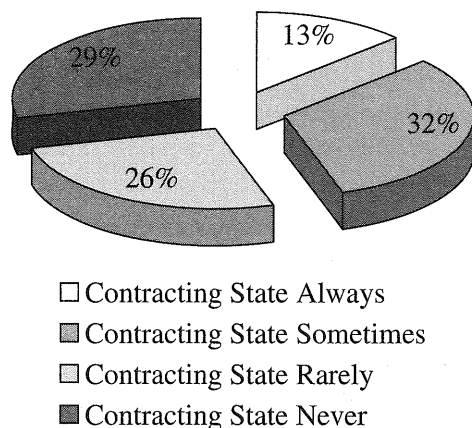


Figure 3—Lawyers Contract Out in Contracting States as %

Unlike in other surveys, unfamiliarity with the CISG is seldom mentioned as a reason to exclude it by the lawyers who responded to the question, although many respondents who exclude the CISG indicate a certain preference for their own domestic law. Some respondents from South America expressed their concern about a lack of case law—the two jurisdictions in question were Brazil, a non-member state, and Chile, a CISG signatory. It is evident though that many of the respondents do carefully consider the most appropriate law to be applied to their client's situation and decide accordingly. This underscores the good degree of familiarity with the CISG already noted above.

Despite these survey results, it is not possible to completely dismiss the opt-out hearsay. The results from our examination of terms and conditions available online do point to a considerable preference for opting out. Amongst the companies examined from contracting states, 58% specifically excluded the CISG. Added to the difficulty in understanding this issue is that, amongst those companies from contracting states that had not excluded the CISG, 96% used choice-of-law clauses that simply referred to the laws of a contracting state (i.e., without express mention of the CISG). While such clauses may not, in law, exclude the application of the CISG, experience has shown that some parties do believe they are excluding the CISG when simply not mentioning it in their choice-of-law clause. A possible explanation of this discrepancy may be that the participants in our survey were rather pro-CISG, whereas those who were sceptical did not participate in our survey at all.

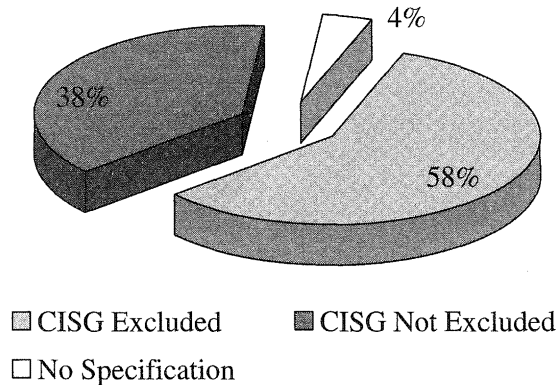


Figure 4—Companies from Contracting States Excluding the CISG as %

#### E. Choice of Law Clauses

Businesses were asked whether they included a choice-of-law clause in their standard terms and conditions. It is significant that 47% indeed did so; this coincides with the findings of other surveys that the possibility to choose the applicable law is highly valued.<sup>53</sup> Such a choice cannot on its own be interpreted as a decision to opt-out of the CISG, if for no other reason than that a choice-of-law clause is quite sensible to deal with those areas not covered by the CISG.

Businesses and arbitrators were also asked to identify which law parties were choosing in their contracts; lawyers were asked to identify the law that they recommend. As can be expected, businesses and lawyers displayed a preference for their own national law.<sup>54</sup> Arbitrators reported a variety of generic laws such as the law of the seller; however, references to English and Swiss law consistently recurred.<sup>55</sup> Especially among South American participants, a reference to the law of the place of performance of the contract was popular. This is not surprising, as the conflict-of-law rules in this region usually designate the law of the place of performance of the contract as the proper law of the sales contract.<sup>56</sup> A further interesting response from a small number of arbitrators was the suggestion that applicable law was that at the seat of arbitration, reminiscent of an old approach according to which the choice of the seat

53. See Vogenauer & Weatherill, *supra* note 14, at 120 (addressing the “Importance of Ability to Choose the Governing Law”).

54. *Id.* at 121. See also Queen Mary University of London, School of International Arbitration, 2010 *International Arbitration Survey: Choices in International Arbitration* 13, chart 9 (2010), available at [http://www.arbitrationonline.org/docs/2010\\_InternationalArbitrationSurveyReport.pdf](http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf).

55. Cf. Vogenauer, *supra* note 43, (questions 17.1 & 17.2).

56. EDGARDO MUÑOZ, *MODERN LAW OF CONTRACTS AND SALES IN LATIN AMERICA, SPAIN AND PORTUGAL* 36 (2011).

of arbitration constitutes an implicit choice of law of that place at the same time.<sup>57</sup>

In this context it is also interesting that arbitrators indicated between 20%<sup>58</sup> and 36%<sup>59</sup> of cases involving the sale of goods applied non-national laws such as PICC and *lex mercatoria*.

#### F. *Specific Contract Clauses*

Our survey also addressed specific clauses contained in standard terms and conditions. Businesses were asked to report whether they included certain clauses in their contracts. The results of these questions reveal that, as can be expected, limitation-of-liability clauses are very frequent, with 55% of respondents indicating their use. Marginally more than one-third of the respondents reported using both liquated-damages or penalty clauses, and INCOTERMS.<sup>60</sup> It is remarkable that at least 12% in their standard terms and conditions referred to the UN Global Compact or similar ethical guidelines.<sup>61</sup> All these results are supported by our study of general terms and conditions published on company websites.

#### G. *Dispute Resolution Clauses*

Our survey results clearly indicate that disputes in international trade are, today, primarily a matter for arbitral tribunals. Sixty percent of business respondents reported including a dispute-resolution clause in their general terms and conditions. While this, on its own, does not speak to the predominance of arbitration, it supports the other statistics, which do. Arbitration was strongly preferred by lawyers, 60% of whom recommended it to their clients. To this figure can be added, to probably a significant degree, the 12% who recommend a multi-tiered dispute-resolution clause. Only 21% recommended litigation in state courts and 7% mediation alone. These results are supported by other surveys that also report a 60 to 65% preference for international arbitration over state-

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57. For example, this was the position in the UK before it was rejected in *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA*, [1971] A.C. 572, 596 (H.L.).

58. Including non-responses. See also Fitzgerald, *supra* note 31, at 43 (reporting that 50% of all respondents were not familiar with the PICC).

59. Valid percentage response.

60. 38% and 37%, respectively.

61. For a discussion of the consequences see Ingeborg Schwenzer & Benjamin Leisinger, *Ethical Values and International Sales Contracts*, in *HUMAN SECURITY AND BUSINESS* 124-148 (Benjamin Leisinger & Marc Probst eds., 2007).

court litigation.<sup>62</sup> Confidentiality and speed are still noted as the primary reasons.<sup>63</sup>

The preference for international arbitration is clearly reflected in the development of the reported caseload across many arbitral institutions. The caseload of some institutions, especially those in the Asian region, has doubled or even tripled in the last ten years.<sup>64</sup>

#### IV. ANALYSIS

##### A. *Domestic Orientation*

Although our survey suggests that familiarity with the CISG has reached generally good levels, other evidence suggests that problems in practice still remain, most notably what might be termed the domestic orientation of lawyers. This is evidenced by the, albeit decreasing, but in our opinion still surprisingly high number, of those who are opting out of the CISG. As has been observed elsewhere, there are many degrees of familiarity,<sup>65</sup> and it would appear unwise to equate familiarity with a genuine understanding of how the CISG operates and can operate in international trade.

Many of those who have considered this issue have suggested it is a problem with the standard of legal education. The results from our survey of law schools support this contention. Approximately two-thirds of responding law schools were from CISG member states. But even among these the exposure of students to the CISG appears to be very limited. Of the law schools from member states, 6% indicated that they did not teach the CISG at all. The majority, 40%, reported that the CISG is dealt with in optional courses, and in only 34% is it an obligatory course. However, in almost 90%<sup>66</sup> of courses the CISG was taught as part of another course. Two observations can be made. First, that it is part of an obligatory (or optional) course, does not mean that it is necessarily mentioned much more than occasionally or in passing.<sup>67</sup>

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62. See Vogenauer, *supra* note 43, question 48 (reporting that 63% of respondents preferred arbitration and 37% preferred litigation before a court when conducting cross-border transactions).

63. See *id.* (questions 49.1 & 49.2).

64. HKIAC website, *supra* note 41. See also SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION—AN ASIA-PACIFIC PERSPECTIVE 33-53 (Cambridge University Press, 2011).

65. See Spagnolo, *supra* note 27, at n.8. (citing Ulrich Magnus, *Germany*, in THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 143 (Franco Ferrari ed., 2008)).

66. In law schools from CISG member states this figure was 66%.

67. See Fitzgerald, *supra* note 31 (questions 28, 30, 33 & 35); Spagnolo, *supra* note 27, at 142 n.28.



Second, where the course is optional, it seems likely that only a small group of the student population will ever come into contact with this subject. Interestingly the percentage results from law schools situated in non-member states did not differ greatly. Other surveys have also yielded similar results.<sup>68</sup> A positive example for international education can be found in China, where the CISG is not only part of the compulsory curriculum but also examinable within the National Judicial Examination for qualification.<sup>69</sup>

A very important method of providing students with genuine international exposure are international student competitions, such as the Willem C. Vis International Commercial Arbitration Moot (“Vis Moot”). Although in 2009-10, 251 law schools participated in the moot in Vienna, and seventy-five law schools in Hong Kong, which are impressive figures, when compared to the total number of law schools around the world this represents quite a small number of students. This is the case particularly when it is estimated that there are usually only about five students on each team.

All in all, while CISG and international commercial-law issues are not totally unknown to most law students, the majority are still educated in and for a domestic environment. This is entirely understandable given that the majority of law students will never enter the international commercial legal community.

#### *B. Consequences of Choosing Domestic Rather than Uniform Law*

The above observations about legal education suggest that when choosing domestic law over uniform law, the decision is not always an informed one. This may have severe and significance consequences.

Certainly there are situations where recourse to domestic law is indeed favourable to a party. If, for example, a party has enough economic power to force upon its co-contractant not only its own domestic law but also a choice of its own domestic courts, it would, at least at first sight, seem reasonable to do so. Thus, for example, the standard terms and conditions of a big pharmaceutical company in Switzerland include not only a choice of Swiss law but also a designation of the Swiss state courts at its seat.

However, a practice such as this is not without danger. First, the forum-selection clause might not be recognised by courts in the country

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68. For a good discussion see Spagnolo, *supra* note 27, at 141.

69. Shiyuan Han, *China, in THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS* 71, 71-72 (Franco Ferrari ed., 2008).

of the co-contractant,<sup>70</sup> thus not preventing the other party from suing in its home jurisdiction. Furthermore, although it is now common ground in most Western industrialised countries that parties are free to choose the law applicable to their contract, it is certainly not a standard that holds true in all parts of the world. The fear of giving Western trade corporations too many advantages still leads developing and transitioning countries to deny validity to choice-of-law clauses. Brazil is a prominent example, as there, the validity of choice-of-law clauses is a matter of considerable controversy.<sup>71</sup> An American party, proud and confident of having contracted on the basis of the UCC, may find itself in a precarious position when having to litigate before Brazilian courts. This is a particularly pertinent example given that Brazil is expected to become a CISG member state in the near future.

However, even if a choice-of-law clause is recognised, parties insisting on their own domestic laws may still encounter difficulties when litigating before the courts in a foreign country. As a first step, the law has to be proven in court. Consequently, it may not only be necessary to translate statutes, but also other documents and texts such as court decisions and scholarly writings. Expert opinions might also be required.<sup>72</sup> In some jurisdictions, these experts may be appointed by the court,<sup>73</sup> in others they will be party-appointed.<sup>74</sup> In the latter case, multiple experts may be presented. Needless to say, the procedures can be very expensive. Such costs are not always recovered, particularly in jurisdictions where each party bears its own costs regardless of the outcome of the proceedings, as is especially the case under the so called “American Rule.”<sup>75</sup> Even if a party is willing to take on these costs, the question of how these laws are to be interpreted and applied is at best unpredictable, and frequently, in reality, amounts to a lottery.

Often, parties wish to apply a “neutral law” to the resolution of their disputes. However, it seems likely that there is a misguided assumption that political neutrality guides the suitability of the chosen law for

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70. For a comparison with US conflict-of-laws rules, see D. Stringer, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts*, 44 COLUM. J. TRANSNAT'L L. 959, 960 (2005-06).

71. *Id.*

72. For recent judicial criticism of this practice in the United States see *Bodum USA, Inc., v. La Cafetiere, Inc.*, 2010 U.S. App. LEXIS 18374 (7th Cir. Sept. 2, 2010).

73. For example, see Germany and Switzerland.

74. For example, see the United States.

75. For a comparative overview of how the recovery of attorneys' fees is dealt with see J. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 4 (1999); Ingeborg Schwenzer, *Rechtsverfolgungskosten als Schaden?* in *MÉLANGES EN L'HONNEUR DE PIERRE TERCIER* 417, 418 (Peter Gauch, Franz Werro and Pascal Pichonnaz eds., 2008).

international transactions.<sup>76</sup> A prominent example seems to be Swiss law. When parties choose such a third “neutral” law they are often even worse off. First, they have to investigate this foreign law. Second, the trouble and costs in proving it are even more burdensome. Last, but not least, in core areas it may be unpredictable and not suitable to international contracts; this is especially true of Swiss domestic sales law. Two examples demonstrate this problem. First, in relation to non-conformity of goods, the Swiss Supreme Court distinguishes between *peius* and *aliud*;<sup>77</sup> the latter giving the buyer the right to demand performance during ten years after the conclusion of the contract notwithstanding whether it gave notice of non-performance or not. Where the line between *peius* and *aliud* will be drawn in a particular case is almost impossible to forecast.<sup>78</sup> The second example is compensation of consequential losses. Whether there is a claim for damages without fault depends on the number of links in the chain of causation.<sup>79</sup> Extremely short periods for giving notice of defects,<sup>80</sup> as well as a limitation period of one year in case of a *peius*,<sup>81</sup> further militate against domestic Swiss law for the international context.<sup>82</sup>

These difficulties and shortcomings of domestic laws are prevented by applying the CISG. The CISG is not only available in six authoritative languages but also has been translated into numerous other

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76. See Christiana Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts*, 7 EUROPEAN J. L. REFORM 303, 306 (2006).

77. See Bundesgericht [BGer] (Federal Supreme Court), Dec. 5, 2005, 121 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 453 (Switz.).

78. See Fountoulakis, *supra* note 76, at 308.

79. See Bundesgericht [BGer] [Federal Supreme Court] Nov. 28, 2006, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 257 para. 2.5.4 (Switz.).

80. See Schweizerisches Obligationenrecht [OR] [Code of Obligations] Mar. 30, 1911, as amended, art. 201 (Switz.) (demonstrating that article 201 of the Code of Obligations speaks of “immediately;” this requirement is interpreted very narrowly). Cf. Bundesgericht [BGer] [Federal Supreme Court] June 27, 1950, 76 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 221, 225 (Switz.) (stating that four days are still sufficient because these included Sunday), see Hannes Zehnder, *Die Mängelrüge im Kauf, Werkvertrags und Mietrecht*, 96 SCHWEIZERISCHE JURISTENZEITUNG, 545, 548 (2000) (demonstrating that even the minority view only advocates an average period of seven days); Bundesgericht [BGer] [Federal Supreme Court] May 28, 2002, (Switz.) CISG-online 676 para. 2.1.2, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/676.htm> (stating that the notice requirement within Swiss law is harsher than that of Germany and Austria which have similar rules in § 377 of their respective commercial codes; this is all the more true with regard to the CISG).

81. Cf. Schweizerisches Obligationenrecht [OR] [Code of Obligations] Mar. 30, 1911, as amended, art. 201 (Switz.).

82. See Fountoulakis, *supra* note 76, at 311. But see Sebastian Brachert, & Andreas Dietzel, *Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht*, in ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT 441 (2005) (recommending the choice of domestic Swiss law as this provided appropriate solutions for business-to-business contracts especially in transnational contracts).

languages.<sup>83</sup> Many court decisions, arbitral awards and scholarly writings are either written or translated into today's *lingua franca* of international trade, namely English. These are readily accessible not only via books or journals but also via websites.<sup>84</sup>

To sum up, better accessibility of the CISG saves time and costs, and makes the outcome of cases more predictable. These are the main advantages of the CISG when compared to the application of domestic law.

### C. *Dispute Resolution in International Sales Cases*

If uniform law is applied, then it should be reasonable to expect uniform application and interpretation. In other words, it should be predictable. This is one of the core reasons for harmonising and unifying law in the first place. Unfortunately this is not always the case.

Much has been said, particularly in recent times, about the homeward trend by domestic courts when applying the CISG.<sup>85</sup> This

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83. See Global Sales Law Project, <http://www.globalsaleslaw.org/index.cfm?pageID=643> (last visited Feb. 21, 2011) (providing different language versions). See also Pace Law School, CISG Database, <http://www.cisg.law.pace.edu/cisg/text/text.html> (last visited Feb. 21, 2011).

84. See United Nations Commission on International Trade Law, Caselaw on UNCITRAL Texts (CLOUT), [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html) (last visited Mar. 18, 2011). Most prominently UNCITRAL has initiated the Case Law on UNCITRAL Texts (CLOUT) database, which contains court decisions and arbitral awards to increase international awareness of UNCITRAL texts and to facilitate their uniform interpretation and application. See *id.* Further databases have since been established; the CISG Database, run at Pace University, New York, United States, contains numerous materials, scholarly writings, court decisions and arbitral awards. See e.g., Pace Law School, International Library on International Commercial Law and the CISG, <http://www.cisg.law.pace.edu/> (last visited Mar. 18, 2011). CISG Online, run by Prof. Ingeborg Schwenzer at the University of Basel, Switzerland, contains selected articles and numerous court decisions and arbitral awards. See Overview—Global Sales Law Project, <http://www.cisg-online.ch/> (last visited Mar. 18, 2011). Run by Prof. Michael Joachim Bonell, UNILEX on CISG & UNIDROIT Principles contains materials, court decisions and arbitral awards on the CISG as well as the UNIDROIT Principles of International Commercial Contracts 2004. See UNILEX on CISG & UNIDROIT Principles, <http://www.unilex.info/> (last visited Mar. 18, 2011).

85. See Larry Di Matteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299 (2004); Franco Ferrari, *Homeward Trend: What, Why and Why Not*, in CISG METHODOLOGY 171, 171-206 (A. Janssen & O. Meyer eds., 2009); Franco Ferrari, *The CISG and its Impact on National Legal Systems—General Report*, in THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS, 413 (Franco Ferrari ed., 2008); Harry M. Flechtner, *Article 79 of the United Nations Convention on the International Sale of Goods (CISG) as a Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods* 19 PACE INT'L L. REV. 29, 29-51 (2007); Mathias Reimann, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 115, 115-129 (2007).

trend takes different forms.<sup>86</sup> First, it is as simple as not applying the CISG where it should be applied. Second, a domestic court may interpret the CISG according to existing or merely presumed domestic counterparts. Finally, the last form is to resort to concurring domestic remedies.

A number of countries are accused of being particularly prone to a homeward trend.<sup>87</sup> Common Law countries, especially Australia,<sup>88</sup> New Zealand<sup>89</sup> as well as the United States<sup>90</sup> are first among them. However, French courts do not fare much better, and despite the fact that German authors emphasize the achievements of the German judiciary in uniform interpretation of the CISG,<sup>91</sup> a closer examination of German decisions reveals that they too are much less international than would be expected.<sup>92</sup> Finally, the high praise of Italian courts<sup>93</sup> must, ultimately, also be questioned. While some Italian decisions mention up to forty

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86. See Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on the Uniformity Principle in Article 7(1) of the U.N. Sales Convention*, 17 J. L. & COM. 187, 199 (1998); HARRY M. FLECHTNER & JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION art. 7* ¶¶ 87 & 92 (2009). See also Ferrari, *supra* note 85, at 181.

87. See generally Ferrari, *supra* note 85, at 171.

88. See Lisa Spagnolo, *The Last Outpost: An Australian Pre-History of the Convention on Contracts for the International Sale of Goods (CISG)*, 10 MELB. J. INT'L L. 141 (2009); Bruno Zeller, *The UN-Convention on Contracts for the International Sale of Goods (CISG)—A Leap Forward Towards Unified International Sales Laws*, 12 PACE INT'L L. REV. 79, 80, (2000); Bruno Zeller, *The CISG in Australia—An Overview*, in *QUO VADIS CISG?—CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS* 293, 294 (Franco Ferrari ed., 2005).

89. See Petra Butler, *New Zealand*, in *THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS* 251, 252 (Franco Ferrari ed., 2008).

90. See FLECHTNER & HONNOLD, *supra* note 86, art. 7, ¶ 92; Harry M. Flechtner, *The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation*, in *THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS* 91, 92 (2008); Alain A. Levasseur, *United States of America*, in *THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS* 313, 314 (Franco Ferrari ed., 2008); Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?* 3 LOY. U. CHI. INT'L L. REV. 85, 85-115 (2005).

91. See Magnus, *supra* note 65, at 233 (arguing that the “decisions [of the German Federal Civil Court] give good guidance and meet the necessary balance between certainty of law and justice in the case at hand. . . . A good number of cases are now internationally accepted leading cases concerning the interpretation and application of the CISG.”).

92. See Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J. L. & COM. 159, 176 (2005); Flechtner, *supra* note 85, at 47.

93. See Franco Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy)*, 5 UNIFORM LAW REVIEW 203, 207 (2001) (stating that “the importance of the Tribunale di Vigevano decision is self-evident. . . . [T]he court referred to some 40 foreign court decisions and arbitral awards. In other words, the court has . . . taken into account the need to have regard to foreign case law in order to promote uniformity.”).

foreign cases,<sup>94</sup> it should not be overlooked that in most cases this was just a formalistic exercise. For example, the conclusion that the CISG applies if both parties have their places of business in Contracting States may simply be determined from CISG Art. 1(1)(a); relying on an abundant number of foreign decisions to support this result seems at best to be superfluous.<sup>95</sup> Amongst this forest of concern there are nevertheless some positive exceptions. In China, for example, courts are reported to have applied the CISG in an international manner.<sup>96</sup> Similarly, in the United States, it can be hoped that a recent case signals a change of approach. A judge of the District Court of the Eastern District of Arkansas, Western Division, first considered the writings of various international commentators and then observed “a tort that is in essence a contract claim and does not involve interests existing independently of contractual obligations (such as goods that cause bodily injury) will fall within the scope of the CISG regardless of the label given to the claim.”<sup>97</sup>

A statistic that is truly startling and alarming is the suggestion that 82% of the American federal district court judges surveyed were “not at all” familiar with the CISG as recently 2007.<sup>98</sup> As it appears only seventeen federal district judges responded to the survey, the percentage figure is hopefully not truly indicative, but it does point to a very real problem. So in some parts of the world the first step to take is to improve the awareness of national judges, which again comes back to legal education. This alone, however, will not secure a uniform application and interpretation of the CISG.

Language barriers may also frustrate a truly international application and interpretation. This is the case even though many CISG court decisions and arbitral awards are translated into English and are freely accessible via websites, as noted above.<sup>99</sup>

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94. See, e.g., *Rheinland Versicherungen v. Atlarex*, Tribunale di Vigevano, July 12, 2000, CISG-online 493, available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

95. See *Mitias v. Solidea S.r.l.*, Tribunale Forli, Dec. 11, 2008, CISG-online 1788, available at <http://cisgw3.law.pace.edu/cases/081211i3.html>.

96. See Han, *supra* note 69, at 79 (acknowledging, however, that not every court decision is a good one).

97. *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd et al.*, No. 4:09cv00318SWW (E.D. Ark. Dec. 23, 2009), 70 UCC Rep. Ser. 2d 716, Dec. 23, 2009, CISG-online 2045, available at <http://cisgw3.law.pace.edu/cases/091223u1.html> (last visited Apr. 26, 2011).

98. See Fitzgerald, *supra* note 31, at 42.

99. See Pace Law School, International Library on International Commercial Law and the CISG, <http://www.cisg.law.pace.edu/> (last visited Oct. 1, 2010); Overview—Global Sales Law Project, <http://www.cisg-online.ch/> (last visited Oct. 1, 2010); UNILEX on CISG & UNIDROIT Principles, <http://www.unilex.info/> (last visited Mar. 18, 2011).

While at least for those lawyers who act internationally, English is the *lingua franca*. This is not the case for many, if not most, domestic judges in French, Germanic and Ibero-American legal systems. Even if English as a language may be widely spoken in these societies—at least in academic circles—the command of “legal” English is still developing. It is really only in very recent times, and with differing levels of enthusiasm, that at least some law classes are taught in English. As the number of classes increases, this picture may hopefully change in a couple of years. Also encouraging is the growing number of English courses specifically teaching Legal English. Naturally, native English speaking judges do not have this excuse. These judges must become accustomed to consulting case law outside their own jurisdictions and beyond Common Law jurisdictions generally.

Language skills aside, it must be recognized that, in many countries, judges work under severe time constraints. When dealing with their daily domestic cases they may only have time to consult one handbook or commentary—if at all. It seems more than likely that they will be relying exclusively on a domestic database provided by the justice administration of that country. Expecting these judges to consider foreign decisions, to access foreign databases once in a year or even less if they are confronted with a CISG case is asking a lot—perhaps too much. They just do not have the necessary time to do so let alone to learn how to do so on the job.

Finally, the number of international-sales-law cases being litigated in domestic courts should not be overestimated. A closer look at the facts of the cases being decided by domestic courts reveals the relative insignificance of these cases, at least from a global trade perspective.<sup>100</sup> A random look at fifty cases from all over the world reveals the following picture. The parties involved in these cases are typically small- to medium-sized businesses. In a majority of cases, the goods sold are agricultural products—fruits,<sup>101</sup> trees,<sup>102</sup> cherries,<sup>103</sup> potatoes,<sup>104</sup>

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100. See LOUKAS MISTELIS, CISG AND ARBITRATION IN CISG METHODOLOGY 388 (André Janssen & Olaf Meyer eds., 2009) (providing a detailed analysis about the commonness of application of the CISG in international commercial arbitration).

101. Handelsgericht des Kantons Aargau, [Commercial Court, Aargau], Nov. 26, 2008, CISG-online 1739 (Switz.) available at <http://cisgw3.law.pace.edu/cases/081126s1.html>.

102. See Landgericht Bamberg [District Court, Bamberg], Oct. 23, 2006, CISG-online 1400 (Switz.) available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1400.pdf> (in German).

103. See Hannaford (trading as Torrens Valley Orchards) v. Australian Farmlink Pty Ltd [2008] FCA 1591, Oct. 24, 2008, CISG-online 1743 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2008/1591.html>.

104. See Société Industrielle et Agricole du Pays de Caux (SIAC) v. Agrico Cooperatieve Handelsvereniging Voor Akkerbouwgewassen BA, Cour de Cassation

rice,<sup>105</sup> watermelons,<sup>106</sup> and poppy seeds<sup>107</sup>—or other foodstuffs such as beer,<sup>108</sup> crabs<sup>109</sup> and shrimp.<sup>110</sup> A second group comprises textiles, including yarn,<sup>111</sup> leather,<sup>112</sup> shoes<sup>113</sup> and the like, as well as small- and medium-sized machinery such as heaters.<sup>114</sup> Most notable are the respective amounts in controversy. The vast majority of these cases involve amounts well under \$100,000 USD<sup>115</sup>; in only one out of the 50 cases did the claim amount to more than \$1 million USD.<sup>116</sup>

The reason why more or less marginal cases are treated by domestic courts is self-evident—larger cases are referred to arbitration. This fact is not only shown by the number of parties that indicated a preference for arbitration in the first place as explained above, but also is evidenced in the replies of arbitrators to our surveys. Responding arbitrators reported

(Chambre Commerciale) [Supreme Court (Commercial Chamber)], Sept. 16, 2008, CISG-online 1821 (Fr.), available at <http://www.cisg-france.org/decisions/160908v.htm>; Agristo N.V. v. Maccas Agri B.V., Arrondissementsrechtbank Maastricht [RB Maastricht] [District Court Maastricht], Maastricht, July 9, 2008, CISG-online 1748 (Neth.), available at <http://cisgw3.law.pace.edu/cases/080709n1.html>; Oberlandesgericht Köln [OLG Köln] [Provincial Appellate Court, Cologne], Aug. 14, 2006, CISG-online 1405 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/060814g1.html>.

105. See *The Rice Corporation v. Grain Board of Iraq* 582, F.Supp.2d 1309 (E. D. C. A. 2008), available at <http://cisgw3.law.pace.edu/cases/080519u1.html>.

106. See *Rechtbank Breda [Rb Breda]* [District Court Breda], Jan. 16, 2009, CISG-online 1789 (Neth.), available at <http://cisgw3.law.pace.edu/cases/090116n1.html>.

107. See *Oberster Gerichtshof* [Supreme Court], May 8, 2008, CISG-online 1784 (Austria), available at <http://cisgw3.law.pace.edu/cases/080508a3.html>.

108. See *Oberlandesgericht Brandenburg* [OLG Brandenburg] [Appellate Court Brandenburg], Nov. 18, 2008, CISG-online 1734 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

109. See *Rechtbank Rotterdam* [District Court Rotterdam], Nov. 5, 2008, CISG-online 1817 (Neth.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1817.pdf>.

110. See *Oberlandesgericht Rostock* [OLG Rostock] [Provincial Court of Appeal Rostock], Sept. 25, 2002, CISG-online 671 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/011010g1.html>.

111. See *Oberlandesgericht Düsseldorf* [OLG Düsseldorf] [Appellate Court Düsseldorf], Apr. 21, 2004, CISG-online 913 (F.R.G.) available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/913.pdf>.

112. See *Jorge Plaza Oviedo v. Sociedad Agrícola Sacor Limitada* [Corte Suprema Chile] [Supreme Court Chile], Sept. 22, 2008, CISG-online 1787, available at <http://cisgw3.law.pace.edu/cases/080922ch.html>.

113. See *Mitias v. Solidea S.r.l.*, Tribunale di Forlì [District Court Forlì], Dec. 11, 2008, CISG-online 1788, available at <http://cisgw3.law.pace.edu/cases/081211i3.html>.

114. See *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.*, [2002] CISG-online 1327 (Can.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1013&step=FullText>.

115. *Polytechnique Fédérale de Lausanne v. Y.S.A Bundesgericht* [BGer] [Federal Supreme Court], Dec. 16 2008, CISG-online 1800, available at <http://cisgw3.law.pace.edu/cases/081216s1.html#cx> (Switz.) (showcasing one of the rare cases where the amount in dispute exceeded \$100,000).

116. *Bundesgericht* [BGer] [Federal Supreme Court], May 18, 2009, CISG-online 1900 (Switz.), available at <http://cisgw3.law.pace.edu/cases/090518s1.html>.



that among the sale-of-goods cases arbitrated in 2008 only 18% were below \$500,000 USD. The bulk, 49%, ranged between \$1 and \$10 million USD. A significant number, 22%, were valued at over \$10 million USD.

We can only speculate, but from good grounds, that the CISG is applied in a more international, consistent and predictable manner in arbitration. There are many reasons for this assumption. Arbitrators are often chosen because of their familiarity and expertise in a particular field, in this case the international sale of goods. Whereas in some countries it would not be possible to have a court-appointed expert on the CISG, experts both tribunal- and party-appointed are frequently utilised in international arbitration. By its very nature, international arbitration promotes internationality. In an arbitral tribunal with three arbitrators, often the arbitrators are from different jurisdictions, each of whom will have had different levels exposure to the CISG during their legal training and professional experience. Furthermore, international arbitrators tend to live a life of comparative law, that is, they regularly interact with foreign laws and foreign lawyers. An irresistible consequence of which must be that they lose their domestic-oriented lenses.

## V. CONCLUSION

Laws tend not to be the engine room of an economy; rather they follow some steps behind. International trade, or perhaps more accurately, global trade, is no different. The globalisation of trade transforms law. Industrialisation at the beginning of the nineteenth century precipitated the codification and rationalisation of law worldwide at the level of nation states. Global trade in the twenty-first century is moving us towards the a-nationalisation and delocalisation of law.

Whether a truly global sales law that satisfies all the needs of global trade will ultimately emerge, and indeed whether it would be entirely desirable, is something we can debate. However, we can already recognise and acknowledge the important contribution the CISG has made and continues to make to international trade. One must also acknowledge the role of instruments like PICC and INCOTERMS, and last but not least, international arbitration. All of these enhance predictability, which in turn saves costs and increases trade. More trade will mean more of the positive effects upon law referred to above, and consequently a positive spiral emerges.

