

# INTERNATIONAL SALES LAW

A Global Challenge

*Edited by*

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# 8 Divergent Interpretations: Reasons and Solutions

Ingeborg Schwenzer

## I. Introduction

In recent times much has been said and written about homeward trend reasoning by domestic courts when applying the CISG.<sup>1</sup> In general, this homeward trend is strongly criticized,<sup>2</sup> although a few select authors seem to support it by arguing it might prevent some parties from opting out of the CISG.<sup>3</sup> The background of this discussion begins with CISG Article 7. It is this article that lays down the basic methods on interpretation of the CISG. Article 7 contains two rules that are simple in principle: first, Article 7(1) seeks to secure an autonomous interpretation of the provisions of the CISG and its general principles,<sup>4</sup> that is, an interpretation free from preconceptions of domestic laws,<sup>5</sup>

<sup>1</sup> See, e.g., Petra Butler, "The Use of the CISG in Domestic Law," 59 *Belgrade L. Rev.* 7 et seq. (2011); Larry DiMatteo 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 et seq. (2004); Franco Ferrari, "Homeward Trend: What, Why and Why Not," *Internationales Handelsrecht*, 8 et seq. (2009), and in *CISG Methodology* (ed. A. Janssen and O. Meyer) (Munich: Sellier, 2009), 171 et seq.; Franco Ferrari, "The CISG and Its Impact on National Legal Systems: General Report," in *The CISG and Its Impact on National Legal Systems* (ed. F. Ferrari) (Munich: Sellier, 2008), 413 et seq.; 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 et seq. (2007); Mathias Reimann, "The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care," 71 *RabelsZ* 115 et seq. (2007).

<sup>2</sup> DiMatteo et al., 24 *Nw. J. Int'l L. & Bus.* 299, 303 (2004); Ferrari, *Internationales Handelsrecht*, 8, 11 (2009); Ferrari, "The CISG and Its Impact," 458; Flechtner, 19 *Pace Int'l L. Rev.* 29, 31 (2007); Reimann, 71 *RabelsZ* 115, 124 (2007). See also Francesco G. Mazzotta, "Why Do Some of the American Courts Fail to Get It Right?," 3 *Loyola U. Chicago Int'l L. Rev.* 85, 89 (2005); Luke R. Nottage, "Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan," 36 *VUWLR* 815, 838 (2005).

<sup>3</sup> Gilles Cuniberti, "Is the CISG Benefiting Anybody?," 39 *Vanderbilt J. Transnat'l L.* 1511, 1540 et seq. (2006); Halverson Cross, "Parole Evidence under the CISG: The 'Homeward Trend' Reconsidered," 68 *Ohio St. L.J.* 133 et seq. (2007); Clayton P. Gillette and Robert E. Scott, "The Political Economy of International Sales Law," 25 *Int'l Rev. L. & Econ.* 446, 481 (2005); Steven D. Walt, "Novelty and the Risks of Uniform Sales Law," 39 *Virginia J. Int'l L.* 671, 687 et seq. (1999).

<sup>4</sup> Franco Ferrari in *Kommentar zum Einheitlichen UN-Kaufrecht*, 5th ed. (ed. P. Schlechtriem and I. Schwenzer) (Munich: C.H. Beck, 2008), CISG, Article 7, para. 5; Joseph M. Lookofsky, *Understanding the CISG*, 3rd ed. (Alphen aan den Rijn: Kluwer, 2008), 33 et seq.; Ulrich Magnus, "Tracing Methodology in the CISG: Dogmatic Foundations," in Janssen and Meyer, *CISG Methodology*, 33, 39 et seq.; Gudrun Schmid, *Einheitliche Anwendung von internationalem Einheitsrecht* (Baden-Baden: Nomos, 2004), 36.

<sup>5</sup> Ferrari in Schlechtriem and Schwenzer, *UN-Kaufrecht*, Article 7, para. 9; Harry M. Flechtner, "The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)," 17 *J.L. & Commerce* 187, 188 (1998);

by focusing on the international character of the CISG, the need to promote uniformity in its application, and the observance of good faith in international trade;<sup>6</sup> and second, Article 7(2) serves as a basis for gap filling.<sup>7</sup>

The CISG has been in force now for more than twenty-five years and has eighty member states,<sup>8</sup> potentially governing about 80% of world trade. However, it is still – or more and more it seems – extremely hard work to achieve even a basic level of uniformity in the application and interpretation of the CISG.<sup>9</sup> That uniformity is our collective goal has already been decided by the mere fact of its adoption by so many states. Thus, we should not debate the merits of uniformity but rather how it can best be achieved.

This chapter will first identify the main areas where problems with interpreting the CISG from a domestic view have so far arisen. It will then analyze the reasons for homeward trend and finally discuss remedies that could ensure a higher level of uniformity in the future.

## II. Main Areas of the Homeward Trend

### A. General

The homeward trend may take different forms;<sup>10</sup> the first is the nonapplication of the CISG where it should be applied; the second is interpreting the provisions of the CISG according to existing or merely presumed domestic counterparts; and the third, the undermining of the CISG by resorting to concurring domestic remedies.

There are a number of countries that are accused of being especially prone to homeward trend.<sup>11</sup> The largest general group is the common law countries, especially

John O. Honnold and Harry M. Flechtner, *Uniform Law for International Sales*, 4th ed. (Alphen aan den Rijn: Kluwer, 2009), Article, 7 para. 87; Christopher Niemann, *Einheitliche Anwendung UN-Kaufrechts in italienischer und deutscher Rechtsprechung und Lehre: Eine Untersuchung zur Einheitlichen Auslegung unbestimmter Rechtsbegriffe und interner Lückenfüllung im CISG* (Frankfurt a.M.: Peter Lang, 2007), 42; Wolfgang Witz in *International Einheitliches Kaufrecht* (ed. W. Witz, H. C. Salger, and M. Lorenz) (Heidelberg: Verlag für Recht und Wirtschaft, 2000), Article 7, para. 8. See also Ingeborg Schwenzer and Pascal Hachem, in *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed. (ed. P. Schlechtriem and I. Schwenzer) (Oxford: Oxford University Press, 2010), Article 7, para. 1 et seq.

<sup>6</sup> Magnus, “Tracing Methodology,” 33, 42 et seq.; Bruno Zeller, “The Observance of Good Faith in International Trade,” in Janssen and Meyer, *CISG Methodology*, 133, 135 et seq.; Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 7, para. 7; Witz in Witz et al., *International Einheitliches*, Article 7, para. 12.

<sup>7</sup> André Janssen and Sörren Claas Kiene, “The CISG and Its General Principles,” in Janssen and Meyer, *CISG Methodology*, 621, 626 et seq.; Magnus, “Tracing Methodology,” 33, 44 et seq.; Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 7, para. 27 et seq.; Witz in Witz et al., *International Einheitliches*, Article 7, para. 26.

<sup>8</sup> For a detailed list of the member states, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.htm](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.htm) (last accessed October 25, 2013).

<sup>9</sup> Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 7, para. 10 et seq.; Lookofsky, *Understanding the CISG*, 33; Philip Hackney, “Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?,” 61 *Louisiana L. Rev.* 473, 474 (2001).

<sup>10</sup> See Flechtner, 17 *J.L. & Commerce* 187, 199 (1998); Honnold and Flechtner, *Uniform Law for International Sales*, Article 7, paras. 87, 92. See also Ferrari, *Internationales Handelsrecht*, 8, 14 (2009).

<sup>11</sup> For a general overview, see Ferrari, *Internationales Handelsrecht*, 8 (2009).

Australia,<sup>12</sup> New Zealand,<sup>13</sup> and the United States.<sup>14</sup> But French courts do not seem to do much better.<sup>15</sup> And, although there are German authors who emphasize the achievements of the German judiciary in the uniform interpretation of the CISG,<sup>16</sup> a closer examination of German decisions reveals that they, too, are much less international than would be expected.<sup>17</sup> Finally, the high praise of Italian courts<sup>18</sup> must, in the end, also be questioned. Although it is true that there are Italian decisions mentioning up to forty foreign cases,<sup>19</sup> the fact that in most cases this was just a formalistic exercise cannot be overlooked; for example, the conclusion that the CISG applies if both parties have their places of business in contracting states may simply be deducted from Article 1(1)(a) CISG. Relying on an abundant number of foreign decisions to support this result is superfluous.<sup>20</sup>

### B. Not Applying the CISG Where it Should be Applied

As mentioned earlier, the first form of homeward trend consists of simply disregarding the applicability of the CISG.<sup>21</sup> Certainly, no numbers exist in how many cases courts did

<sup>12</sup> Lisa Spagnolo, "The Last Outpost: An Australian Pre-History of the Convention on Contracts for the International Sale of Goods (CISG)," 10 *Mel. J. Int'l L.* 1 et seq. (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* (ed. F. Ferrari) (Brussels: Bruylant, 2005), 293, 294. Furthermore, see Lisa Spagnolo, "A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)," 13 *VJ Int'l Com. & Arb.* 135 (2009).

<sup>13</sup> Petra Butler, "New Zealand," in *The CISG and Its Impact on National Legal Systems* (ed. F. Ferrari) (Munich: Sellier, 2008), 251, 252. However, the Court of Appeal of New Zealand in a very recent case referred to German, Austrian, U.S., and French case law, expressly stating that domestic law must be avoided; see *RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller* C A545/2010 [2011] NZ C A 340 (New Zealand Court of Appeal, July 22, 2011), CISG-online 2215. Therefore, this case suggests that New Zealand also acknowledges the need for a uniform interpretation of the CISG.

<sup>14</sup> Honnold and Flechtner, *Uniform Law for International Sales*, Article 7, para. 92; Harry M. Flechtner, "The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation," in Ferrari, *Quo Vadis CISG?*, 91, 92 et seq.; Alain A. Levasseur, "United States of America," in *The CISG and Its Impact on National Legal Systems*, 313, 314 et seq.; Mazzotta, 3 *Loyola U. Chicago Int'l L. Rev.* 85 et seq. (2005); Zeller, 12 *Pace Int'l L. Rev.* 79, 80 et seq. (2000).

<sup>15</sup> Below para. II. 2.

<sup>16</sup> Ulrich Magnus, "CISG in the German Federal Civil Court," in Ferrari, *Quo Vadis CISG?*, 211, 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."

<sup>17</sup> Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium," 24 *J.L. & Commerce* 159, 176 (2005); Flechtner, 19 *Pace Int'l L. Rev.* 29, 47; Niemann, "Einheitliche Anwendung," 249.

<sup>18</sup> Franco Ferrari, "Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy)," 5 *Uniform L. Rev.* 203, 207 (2001), arguing 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."

<sup>19</sup> See, e.g., Tribunale di Vigevano, July 12, 2000, CISG-online 493.

<sup>20</sup> See also, Tribunale Forlì, December 11, 2008, CISG-online 1788.

<sup>21</sup> For a very interesting survey about the CISG and its nonapplication in the United States, see Michael W. Gordon, "Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles

not apply the CISG despite it being applicable and not excluded by the parties. But it is likely to be in the thousands. In Australia, the CISG formally entered into force as early as April 1, 1989,<sup>22</sup> and yet to this day, there are only eleven Australian cases that apply the CISG beyond the mere decision whether the CISG is applicable or not.<sup>23</sup> This may in part, or even to a great extent, be attributed to the fact that many Australian parties automatically exclude the CISG in their contracts.<sup>24</sup> But this fact alone – even if it is true – cannot explain the whole picture. The CISG has been in force in Australia now for more than twenty years and Australia's top five trading partners are all CISG member states; there certainly must have been more than these eleven cases litigated before Australian courts where the CISG applied. It seems very likely that in many cases neither the parties, nor their counsel, nor the judges ever realized that they were pleading and deciding the case under the wrong law.<sup>25</sup> A similar picture is found in New Zealand, where the CISG entered into force on October 1, 1995.<sup>26</sup> One of its first true CISG cases

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, 369 et seq. (1998). See also Albert H. Kritzer, "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources," *Rev. CISG* 147, 163 (1995); Reimann, 71 *RabelsZ* 115, 120 et seq. (2007).

<sup>22</sup> The CISG first appeared in Australian statute books in 1986 (NSW) and 1987 (Vic). It was similarly inserted into the legislation of other states of Australia at about the same time. Under Australia's constitution, trade is a state matter and thus it was necessary for the CISG be introduced at a state level. However, the state legislation contained a provision stating that the law would not become operative until the date CISG entered into force at a federal level.

<sup>23</sup> See *Castel Electronics Pty Ltd. v. Toshiba Singapore Pte Ltd.* [2011] FCAFC 55 (April 20, 2011, Federal Court of Australia), CISG-online 2219; *Castel Electronics Pty Ltd. v. Toshiba Singapore Pte Ltd.* [2010] FCA 1028 (Federal Court of Australia, September 28, 2010), CISG-online 2158; *Delphic Wholesalers (Aust) Pty Ltd. v. Agrilex Co. Limited* [2010] VSC 328 (Supreme Court of Victoria, August 6, 2010) CISG-online 2127; *Vetzeria Etrusca Srl v. Kingston Estate Wines Pty Ltd.* [2008] SASC 75 (Supreme Court of South Australia, March 14, 2008), CISG-online 1891; *Italian Imported Foods Pty Ltd. v. Pucci SRL* [2006] NSWSC 1060 (Supreme Court of New South Wales, October 13, 2006), CISG-online 1494; *Summit Chemicals Pty Ltd. v. Vetrotex Espana SA* [2004] WASCA 109 (May 27, 2004), CISG-online 860; *Playcorp Pty Ltd v. Taiyo Kogyo Ltd.* [2003] VSC 108 (Supreme Court of Victoria, April 24, 2003), CISG-online 808; *Ginza Pte Ltd. v. Vista Corp. Pty Ltd.* [2003] WASC 11 (Supreme Court of Western Australia, January 17, 2003), CISG-online 807; *Downs Investments Pty Ltd. v. Perwaja Steel SDN BHD* [2002] 2 Qd R 462 (Queensland Court of Appeal, October 12, 2001), CISG-online 955; *Perry Engineering Pty Ltd. v. Bernold AG* [2001] SASC 15 (Supreme Court of South Australia, February 1, 2001), CISG-online 806; *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd.* (1995) 57 FCR 216 (Federal Court of Australia, April 28, 1995), CISG-online 218. See also Spagnolo, 10 *Mel. J. Int'l L.* 1, 4 (2009) (discussion of the respective cases).

<sup>24</sup> Spagnolo, 10 *Mel. J. Int'l L.* 1, 4 (2009). For a detailed analysis why parties and lawyers tend to opt out of the CISG, see Lisa Spagnolo, "Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts," 6 *J. Priv. Int'l L.* 417 et seq. (2010); Spagnolo, 13 *VJ Int'l & Com. Arb.* 135 et seq. (2009). See also Lisa Spagnolo, "Rats in the Kaleidoscope: Rationality, Irrationality, and the Economics and Psychology of Opting in and Opting out of the CISG (Kaleidoscope Part II)," 13 *VJ Int'l Arb. & Com.* 157 et seq. (2009), for an economical analysis of the problem.

<sup>25</sup> See, e.g., *Italian Imported Foods Pty Ltd. v. Pucci SRL* [2006] NSWSC 1060 (Supreme Court of New South Wales, October 13, 2006), CISG-online 1494; Spagnolo, 10 *Mel. Int. L.J.* 1, 31 (2009). See also Bruno Zeller, "Downs Investment Pty Ltd. v. Perwaja Steel SDN BHD [2000] QSC 421 (November 17, 2000)," 5 *VJ Int'l Com. & Arb.* 124 (2001); Bruno Zeller, "Downs Investments Pty Ltd. (in liq) v. Perwaja Steel SDN BHD [2002] 2 Qd R 462," 9 *VJ Int'l Com. & Arb.* 43 (2005).

<sup>26</sup> See Butler, "New Zealand," 251, 254 et seq., arguing that "in all the cases the CISG provisions are used to back up a court's interpretation of domestic law." Butler further notes that the New Zealand courts

appeared in 2011 and is still pending before the Court of Appeal.<sup>27</sup> However, the Court of Appeal of New Zealand applied the CISG in a very recent case.<sup>28</sup> Furthermore, there are quite a few CISG cases litigated and decided outside Australia and New Zealand involving Australian and New Zealand parties.<sup>29</sup> Notably, there are many such CISG awards delivered under auspices of CIETAC, the China International Economic, and Trade Arbitration Commission.<sup>30</sup>

Another prominent example of circumventing the application of the CISG can be found in France.<sup>31</sup> In contrast to decisions from many other countries,<sup>32</sup> the Cour de cassation<sup>33</sup> held that pleading a case in court under French law amounted to a subsequent implicit exclusion of the CISG irrespective of whether the parties were aware or not that the CISG applied to their contract.<sup>34</sup>

### C. Interpreting CISG Provisions in Light of Domestic Law

There are innumerable examples of national courts equating CISG concepts and provisions with familiar domestic ones, not realizing and probably not being interested in the

mentioned the CISG in only seven cases; see 251, 254 et seq. for further references. Furthermore, see *Hideo Yoshimoto v. Canterbury Golf International Ltd.* [2001] 1 NZLR 523, CISG-online 1080.

<sup>27</sup> *International Housewares (NZ) Limited v. SEB S.A.* (High Court Auckland, March 31, 2003), CISG-online 833.

<sup>28</sup> *RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller* C A545/2010 [2011] NZ C A 340 (New Zealand Court of Appeal, July 22, 2011), CISG-online 2215. For a discussion of the case see Butler, 49 *Belgrade L. Rev.* 7, 22 (2011).

<sup>29</sup> See, e.g., Guangdong Province Higher Court, January 11, 2005, CISG-online 1610; CIETAC China International Economic and Trade Arbitration Commission, January 19, 2004, CISG-online 1804; CIETAC China International Economic and Trade Arbitration Commission, April 8, 1999, CISG-online 1114; *Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc. d/b/a Fiona Waterstreet Hats* U.S. Dist. LEXIS 10630 (1997) (S.D. NY 1997), CISG-online 297.

<sup>30</sup> For a detailed list of the cases, see the CISG-online database on <http://www.globalsaleslaw.org/index.cfm?pageID=29> (last accessed October 25, 2013).

<sup>31</sup> Filip De Ly, "Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary" in Ferrari, *Quo Vadis CISG?*, 25, 32; Claude Witz, "France," in Ferrari, *The CISG and Its Impact*, 129, 137. See also Vincent Heuzé, *La vente internationale de marchandises: Droit uniforme* (Paris: L.G.D.J., 2000), para. 95 et seq.

<sup>32</sup> For Italian decisions, see, e.g., Tribunale di Vigevano, July 12, 2000, CISG-online 493; Tribunale di Padova, February 25, 2004, CISG-online 819, holding that the reference in the pleadings to the nonuniform domestic rule of a contracting state alone is not, by itself, sufficient to exclude the applicability of the CISG. Several German courts held that the parties' referring to German substantive law in the choice of law clause also includes the CISG and therefore does not lead to an opting out of the CISG, see Oberlandesgericht Stuttgart, March 31, 2008, CISG-online 1658; Landgericht Bamberg, October 23, 2006, CISG-online 1400; Oberlandesgericht Rostock, October 10, 2001, CISG-online 671. For a U.S. decision, see *American Mint LLC, Goede Beteiligungsgesellschaft, and Michael Goede v. GOSoftware, Inc.* 2006 WL 42090 (M.D. PA 2006), CISG-online 1175. For a Russian decision, see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, November 5, 2004, CISG-online 1360. See also Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 6, para. 19; Ferrari, *Internationales Handelsrecht* 8, 21 (2009).

<sup>33</sup> Cour de Cassation, October 25, 2005, CISG-online 1226; Cour de Cassation, June 26, 2001, CISG-online 598.

<sup>34</sup> For a detailed discussion about this matter, see Claude Witz, "Vente internationale: l'office du juge face au pouvoir des plaideurs d'écartier le droit uniforme et jeu combiné," in *Convention de Bruxelles et de la Convention de Vienne*, Dalloz 3607 et seq. (2001); Günter Hager, "Zur Auslegung des UN-Kaufrechts: Grundsätze und Methoden," in *Festschrift für Ulrich Huber zum siebzigsten Geburtstag* (ed. T. Baums et al.) (Tübingen: Mohr Siebeck, 2006), 319, 326; Ferrari, *Internationales Handelsrecht*, 8, 21 (2009).

fact that they are – at least sometimes – totally different. This chapter highlights some of the most striking examples.

Many American courts seem to be convinced that it is perfectly normal to interpret the CISG according to UCC case law.<sup>35</sup> In a recent case, a U.S. District Court, unfortunately without further reflection, noted that “case law is relatively sparse” even though this is not true, and consequently relied on the UCC while interpreting the CISG.<sup>36</sup> Also, in 2008, two additional District Court decisions<sup>37</sup> relied on the UCC “to clarify the CISG” claiming that there was “virtually no American case law on the CISG,” relying on a statement in the 1995 *Delchi Carrier* decision<sup>38</sup> and ignoring the already abundant U.S. case law on the CISG.<sup>39</sup> Not only did the District Court fail to research foreign decisions, it ignored the considerable case law from other U.S. courts.<sup>40</sup>

Similar attitudes, however, can be found around the globe.<sup>41</sup> For example, Australian courts have interpreted the CISG through comparisons with domestic legislation.<sup>42</sup> In Europe, the Austrian Supreme Court, in order to justify the result that a notice of nonconformity to become effective under Article 27 CISG has to be properly dispatched, refers only to a commentary on the Austrian Commercial Code.<sup>43</sup>

<sup>35</sup> Cases where the CISG was interpreted according to specific provisions of the UCC. See, e.g., *Hilaturas Miel, S.L. v. Republic of Iraq* 573 F. Supp. 2d 781 (S.D. NY 2008), CISG-online 1777; *Macromex Srl. v. Globex International Inc.* 2008 WL 1752530 (S.D. NY 2008), CISG-online 1653; *TeeVee Toons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH* 2006 WL 2463537 (S.D. NY 2006), CISG-online 1272; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 408 F. 3d 894 (7th Cir. 2005), CISG-online 1026; *Genpharm Inc. v. Pliva-Lachema A.S., Pliva d.d.* 361 F. Supp. 2d 49 (E.D. NY 2005), CISG-online 1006; *Raw Materials Inc. v. Manfred Forberich GmbH & Co.*, KG 2004 WL 1535839 (N.D. IL 2004), CISG-online 925; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 320 F. Supp. 2d 702 (N.D. IL 2004), CISG-online 851; *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.* 2003 U.S. Dist. LEXIS 1306 (N.D. IL 2003), CISG-online 772; *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*; *Rockland International FSC, Inc.* 37 Fed. Appx. 687 (4th Cir. 2005), CISG-online 625. For further references, see the CISG-online database at <http://www.cisg-online.ch> (last accessed October 25, 2013). See also Honnold and Flechtner, *Uniform Law for International Sales*, Article 7, para. 92; Levasseur, “United States of America,” 313, 315 et seq.

<sup>36</sup> *Hanwha Corporation v. Cedar Petrochemicals Inc.* 09 Civ. 10559 (AKH) (S.D.N.Y. 2011), CISG-online 2178.

<sup>37</sup> *Hilaturas Miel, S.L. v. Republic of Iraq* 573 F. Supp. 2d 781 (S.D. NY 2008), CISG-online 1777; *Macromex Srl. v. Globex International Inc.* 2008 WL 1752530 (S.D. NY 2008), CISG-online 1653.

<sup>38</sup> *Delchi Carrier, SpA v. Rotorex Corp.* 10 F. 3d 1024 (2nd Cir. 1995), CISG-online 140.

<sup>39</sup> According to the entries in the CISG-online database, in 2011, there were more than 120 cases decided by U.S. courts that are dealing with the CISG. All cases are freely available at <http://www.cisg-online.ch> (last accessed October 25, 2013) and <http://www.cisg.law.pace.edu> (last accessed October 25, 2013).

<sup>40</sup> For a suggestion of how the homeward trend could be overcome in the United States, see James E. Bailey, “Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to Uniform Law of International Sales,” 32 *Cornell Int'l L.J.* 273, 313 et seq. (1999).

<sup>41</sup> Hossam El-Saghir, “The Interpretation of the CISG in the Arab World,” in Janssen and Meyer, *CISG Methodology*, 355, 366. See also Cairo Chamber of Commerce and Industry, October 3, 1995, CISG-online 1289, where the arbitrator applied Egyptian law to interpret CISG. For China, see Shiyuan Han, “China,” in Ferrari, *The CISG and Its Impact*, 71, 78 et seq., stating that “many courts did not distinguish where the CISG was applied and where domestic law was applied, but enumerated articles both of the CISG and domestic laws.” See also Wei Li, “The Interpretation of the CISG in China,” in Janssen and Meyer, *CISG Methodology*, 343, 344 et seq. For Argentina, see Nood Taquela, “Argentina,” in Ferrari, *The CISG and Its Impact*, 3, 5, arguing that “Argentine courts are not conscious enough of the mandate to interpret the CISG in the light of the international character and in general do not take into account the need to promote uniformity.”

<sup>42</sup> Spagnolo, 10 *Mel. J. Int'l L.* 141, 177 (2009).

<sup>43</sup> Oberster Gerichtshof, May 24, 2005, CISG-online 1046.



Although the German courts are widely praised as interpreting the CISG in a truly international manner and not falling back on purely domestic law,<sup>44</sup> many rely solely on German Commentaries on the CISG and German case law.<sup>45</sup> The same holds true for Austrian and Swiss courts.<sup>46</sup> Thus, the quality and internationality of the commentaries used by the courts largely determine the quality of the judicial decisions. The following sections review the areas that are especially prone to be interpreted from a domestic perspective and serve to illustrate the extent of the problem.

### 1. Examination and Notice Requirements: CISG Articles 38 and 39

In domestic sales laws, there is a great variety of views concerning the question of whether a buyer has to inspect the goods and give notice to the seller of a nonconformity thereby discovered.<sup>47</sup> Most domestic sales laws do not recognize any such obligations of the buyer.<sup>48</sup> Even in those countries whose domestic sales laws do contain such provisions, their function and interpretation varies greatly from very rigid requirements to

<sup>44</sup> Ulrich Magnus, "Germany," in Ferrari, *The CISG and Its Impact*, 143, 156; Ulrich Magnus, "CISG in the German Federal Civil Court," in Ferrari, *Quo Vadis CISG?*, 211, 233 et seq.; Martin Karollus, "Judicial Interpretation and Application of the CISG in Germany 1988–1994," *Rev. CISG* 51, 52 (1995).

<sup>45</sup> An analysis of the fourteen most recent German cases published on the CISG-online database shows that none of the German courts made reference to either foreign case law or scholarly materials from outside of the Germanic legal system, see, e.g., Oberlandesgericht Düsseldorf, March 23, 2011, CISG-online 2218; Oberlandesgericht Hamm, November 30, 2010, CISG-online 2217; Oberlandesgericht Jena, November 10, 2010, CISG-online 2216; Landgericht Bielefeld, November 9, 2010, CISG-online 2204. Only Oberlandesgericht Stuttgart, March 31, 2008, CISG-online 1658, made reference to a Dutch decision.

<sup>46</sup> For Switzerland, see, e.g., Schweizerisches Bundesgericht, December 20, 2006, CISG-online 1426; Schweizerisches Bundesgericht, June 12, 2006, CISG-online 1516; Schweizerisches Bundesgericht, April 5, 2005, CISG-online 1012. For Austria, see, e.g., Oberster Gerichtshof, December 19, 2007, CISG-online 1628; Oberster Gerichtshof, November 30, 2006, CISG-online 1417; Oberster Gerichtshof, September 12, 2006, CISG-online 1364; Oberster Gerichtshof, January 25, 2006, CISG-online 1223.

<sup>47</sup> CISG-AC, "Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39," (June 7, 2004, Rapporteur: Eric Bergsten), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144> (last accessed October 25, 2013), Comments 2.1. et seq.; Ingeborg Schwenzer and Pascal Hachem, "The CISG: Successes and Pitfalls," 57 *Am. J. Comp. L.* 457, 469 (2009); Ingeborg Schwenzer, "National Preconceptions That Endanger Uniformity," 19 *Pace Int'l L. Rev.* 103, 105 et seq. (2007); Ingeborg Schwenzer, "Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG," in *Proceedings of the 101st Annual Meeting: The Future of International Law* (ed. American Society of International Law) (Washington, DC: ASIL, 2007), 416, 417 et seq.; Ingeborg Schwenzer, "The Noble Month (Articles 38, 39 CISG): The Story behind the Scenery," 7 *EJLR* 353, 354 et seq. (2005); Schwenzer in Schlechtriem and Schwenzer, *Commentary*, Article 39, para. 4.

<sup>48</sup> Among the exceptions are the domestic sales laws of Germany, Austria, and Switzerland, which all know an express duty of the buyer to examine the goods and to give notice of any lack of conformity, see §§377, 378 German Handelsgesetzbuch (HGB), §377 Austrian Unternehmensgesetzbuch (UGB), and Article 201 Swiss Code of Obligations (OR). For further exceptions see, e.g., U.S., §2-607(3)(a) UCC; Italy, Article 1667(2) Italian Codice Civile (CC); The Netherlands, Article 7:23.1 Dutch Burgerlijk Wetboek (BW), and Portugal, Article 471 Código de Commercio (Ccom); see also Schwenzer and Hachem, 57 *Am. J. Comp. L.* 457, 469 (2009); Schwenzer, 19 *Pace Int'l L. Rev.* 103, 106 et seq. (2007); Schwenzer in Schlechtriem and Schwenzer, *Commentary*, Article 39, para. 4; Schwenzer, 7 *EJLR* 353, 354 (2005).

more flexible ones<sup>49</sup> designed to prevent fraud.<sup>50</sup> Thus, it does not come as a great surprise that diverging domestic preconceptions have heavily influenced the interpretation of these CISG provisions.<sup>51</sup>

Many if not most decisions, especially in common law countries, do not mention the fact of when or even if the buyer had given notice of nonconformity of the goods.<sup>52</sup> In most cases, neither the parties, nor the counsels, nor the courts recognized the issue of the requirement of timely notice. If the issue of timely notice is discussed, generous timeframes are usually allowed.<sup>53</sup> Sometimes, notice given several weeks or months after delivery of the goods has been deemed to be appropriate.<sup>54</sup> However, interestingly, CISG Article 39 was recently relied on by a U.S. District Court<sup>55</sup> in a manner for which it was not designed. It was applied by analogy to a case of an alleged late delivery of goods – Article 39 CISG only relates to nonconformity and its Paragraph 2 is interpreted as a statute of limitation. The CISG, however, does not deal with the prescription of actions.<sup>56</sup> There is a separate U.N. Limitation Convention to which the United States is also a party.<sup>57</sup>

<sup>49</sup> See, Germany, §377 HGB (strict examination of the goods and notice of nonconformity requirements); Peter Schlechtriem, *Schuldrecht Besonderer Teil*, 6th ed. (Tübingen: J.C.B. Mohr, 2003), para. 70; Barbara Grunewald, in *Münchener Kommentar zum Handelsgesetzbuch*, 2nd ed. (ed. K. Schmidt) (Munich: C.H. Beck, 2007), §377, para. 3. See also Honnold and Flechtner, *Uniform Law*, Articles 39, 40, and 44, para. 258; Schwenger and Hachem, 57 *Am. J. Comp. L.* 457, 469 (2009); Schwenger in Schlechtriem and Schwenger, *Commentary*, Article 39, para. 4; Schwenger, 7 *EJLR* 353, 354 (2005); Schwenger in Schlechtriem and Schwenger, *UN-Kaufrecht*, Article 39, para. 4.

<sup>50</sup> For the meaning of “reasonable time” under the UCC, see James J. White and Robert S. Summers, *Uniform Commercial Code*, 6th ed. (St. Paul: West, 2010), 419 et seq.

<sup>51</sup> See Harry M. Flechtner, “Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof under the United Nations Sales Convention,” 26 *Boston U. Int’l L.J.* 1, 15 et seq. (2008).

<sup>52</sup> For Australia, see Spagnolo, 10 *Mel. J. Int’l L.* (2009) 141, 197 et seq. referring to *Italian Imported Foods Pty Ltd. v. Pucci SRL* [2006] NSWSC 1060 (Supreme Court of New South Wales, October 13, 2006), CISG-online 1494. For the United States, see, e.g., *BP Oil International v. Empresa Estatal Petroleos de Ecuador* 332 F. 3d 333 (5th Cir. 2003), CISG-online 730. Although some recent U.S. decisions do in fact mention Article 39 CISG and the requirement of timely notice of the nonconformity of the goods, they do not elaborate on the reasonableness, see, e.g., *TeeVee Toons, Inc. (d/b/a TVT Records) and Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH* 2006 WL 2463537 (S.D. NY 2006), CISG-online 1272; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 320 F. Supp. 2d 702 (N.D. IL 2004), CISG-online 851. Furthermore, see Schwenger, 19 *Pace Int’l L. Rev.* 103, 118 (2007); Schwenger in Schlechtriem and Schwenger, *Commentary*, Article 39, para. 4.

<sup>53</sup> *Shuttle Packaging Systems, L. L.C. v. Jacob Tsonakis, INA S. A. and INA Plastics Corporation* 2001 U.S. Dist. LEXIS 21630 (W. D. MI 2001), CISG-online 773 stating that “it will not be practicable to require notification in a matter of a few weeks.”

<sup>54</sup> See, e.g., *TeeVee Toons, Inc. (d/b/a TVT Records) and Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH* 2006 WL 2463537 (S.D. NY 2006), CISG-online 1272 (“two months”). See also Schwenger, “Buyer’s Remedies in the Case of Non-conforming Goods,” 416, 419; Schwenger, 19 *Pace Int’l L. Rev.* 103, 118 (2007); Schwenger, 7 *EJLR* 353, 363 (2005).

<sup>55</sup> *Sky Cast, Inc. v. Global Direct Distribution LLC* 2008 WL 754734 (E.D. KY 2008), CISG-online 1652.

<sup>56</sup> Honnold and Flechtner, *Uniform Law*, Articles 39, 40, and 44, para. 254.2; Ulrich Magnus in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)*, 15th ed. (Berlin: De Gruyter, 2005), Article 4, para. 38 (hereafter referred to as *Staudinger*); Schwenger and Hachem in Schlechtriem and Schwenger, *Commentary*, Article 4, para. 50.

<sup>57</sup> United Nations Convention on the Limitation Period in the International Sale of Goods (New York, June 14, 1974), available at [http://www.uncitral.org/pdf/english/texts/sales/limit/limit\\_conv\\_E\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf) (last accessed October 25, 2013). See also Honnold and Flechtner, *Uniform Law*, Articles 39, 40, 44, para. 261.1; Schwenger in Schlechtriem and Schwenger, *Commentary*, Article 39, para. 28.

At the other end of the spectrum are the decisions from the Germanic legal systems. Since the German, Austrian, and Swiss domestic sales laws are known for very rigid notice obligations,<sup>58</sup> parties and courts thoroughly investigate the question of whether timely notice of any nonconformity was given. When the CISG first came into force, German courts merely relied on the interpretation of the respective domestic provisions, consequently allowing buyers only a few days for inspection of the goods and giving notice.<sup>59</sup> Over time, the German courts,<sup>60</sup> as well as the Swiss Supreme Court,<sup>61</sup> were convinced by comparative scholarly writings<sup>62</sup> that this was not in line with an international interpretation of the CISG.<sup>63</sup> In general, case law from both countries now allows the buyer one month for giving notice.<sup>64</sup> However, the Austrian Supreme Court still favors an overall period of a fortnight to inspect and notify.<sup>65</sup> It was inspired to do so

<sup>58</sup> See Germany, §377 HGB; Switzerland, Article 201 OR. Austria changed the provision regarding the timely notice of nonconformity of the goods (§377 HGB) from “*unverzüglich*” (without delay) to “*binnen angemessener Frist*” (within reasonable time) in order to adjust the domestic law to the CISG, see §377 UGB. See also CISG-AC “Opinion No. 2,” Comment 5.1; Flechtner, 26 *Boston U. Int’l L.J.* 1, 16 (2008).

<sup>59</sup> See, e.g., Landgericht Stuttgart, August 31, 1989, CISG-online 11; Oberlandesgericht Düsseldorf, January 8, 1993, CISG-online 76; Oberlandesgericht Düsseldorf, March 12, 1993, CISG-online 82; Oberlandesgericht Saarbrücken, January 13, 1993, CISG-online 83; Oberlandesgericht Düsseldorf, February 10, 1994, CISG-online 116; Oberlandesgericht München, February 8, 1995, CISG-online 142. See also Honnold and Flechtner, *Uniform Law*, Articles 38, 39, and 44, para., 257.1; Niemann, “Einheitliche Anwendung,” 161.

<sup>60</sup> Bundesgerichtshof, November 3, 1999, CISG-online 475, referring to Bundesgerichtshof, March 8, 1995, CISG-online 144.

<sup>61</sup> Schweizerisches Bundesgericht, October 10, 2005, CISG-online 1353.

<sup>62</sup> Honnold and Flechtner, *Uniform Law*, Articles 38, 39, and 44, para. 257.1; Schwenger, 19 *Pace Int’l L. Rev.* 103, 115 et seq. (2007); Schwenger, 7 *EJLR* 353, 361 (2005). See, e.g., Camilla Baasch Andersen, “Reasonable Time in Article 39(1) of the CISG: Is Article 39(1) Truly a Uniform Provision?,” available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html> (last accessed October 25, 2013); DiMatteo et al., 24 *Nw. J. Int’l L. & Bus.* 299, 364 (2004).

<sup>63</sup> German scholarly writings and case law have been met with criticism; see Claude Witz, *Les premières applications du droit uniforme de la vente internationale (Convention des Nations Unies du 11 avril 1980)* 90 et seq. (Paris: L.G.D.J., 1995); Lookofsky, “Understanding the CISG,” 87; Claude Witz, “A Raw Nerve in Disputes Relating to the Vienna Sales Convention: The Reasonable Time for the Buyer to Give Notice of a Lack of Conformity,” 11 *ICC Ct. Bull.* 15, 20 (2000). See also Schwenger in Schlechtriem and Schwenger, *UN-Kaufrecht*, Article 39, para. 17.

<sup>64</sup> In a very recent decision, a German court acknowledged that the relevant scholarly writings advocate a one-month period. However, the court left the issue open because two and a half months passed prior to the notification which was in any case too long, see Oberlandesgericht Hamm, November 30, 2011, CISG-online 2217 (“Die angemessene Rügefrist nach Article 39 CISG beträgt nach der einschlägigen Kommentar-Literatur hingegen 1 Monat.”) For further decisions, see, e.g., Oberlandesgericht Koblenz, October 19, 2006, CISG-online 1407; Landgericht Bamberg, October 23, 2006, CISG-online 1400; Landgericht Hamburg, September 6, 2004, CISG-online 1085. But, see Oberlandesgericht Köln, May 19, 2008, CISG-online 1700, and Landgericht Tübingen, June 18, 2003, CISG-online 784, wrongly assuming a standard period of two weeks. Furthermore, see Oberlandesgericht Düsseldorf, January 23, 2004, CISG-online 918, where the court did not make reference to any standard period at all. For Switzerland, see, e.g., Schweizerisches Bundesgericht, November 13, 2003, CISG-online 840; Obergericht Luzern, May 12, 2003, CISG-online 846; Handelsgericht St. Gallen, February 11, 2003, CISG-online 960; Obergericht Luzern, January 8, 1997, CISG-online 228. See also Flechtner, 26 *Boston U. Int’l L.J.* 1, 17 (2008); Schwenger in Schlechtriem and Schwenger, *UN-Kaufrecht*, Article 39, para. 17.

<sup>65</sup> See Oberster Gerichtshof, January 14, 2002, CISG-online 643; Oberster Gerichtshof, August 27, 1999, CISG-online 485; Oberster Gerichtshof, October 15, 1998, CISG-online 380. See also Magnus in

exclusively by Austrian scholars who negatively commented on the shift by the German Supreme Court toward more internationality.<sup>66</sup> Consequently, Articles 38 and 39 are an area where national preconceptions heavily influence the interpretation of the CISG.

## 2. Other Areas of Divergent Interpretation

Other areas of domestically influenced divergent interpretations of the CISG include the major areas of damages (Article 74 CISG)<sup>67</sup> and exemption (Article 79 CISG),<sup>68</sup> as well as the special problem of the common law parol evidence rule.<sup>69</sup>

### D. Narrowing the Scope of the CISG

Another facet of the homeward trend can be seen in endeavors to narrow the scope of the CISG, be it by applying concurrent domestic law remedies or by relying on rules that are defined as concerning issues of validity or as being procedural in nature.

*Staudinger*, Article 39, para. 49; Burghard Piltz, *Internationales Kaufrecht*, 2nd ed. (Munich: C.H. Beck, 2008), paras. 5–65; Schwenzer, 19 *Pace Int'l L. Rev.* 103, 116 (2007).

<sup>66</sup> Martin Karollus, "UN-KR: Anwendungsbereich, Holzhandelsusancen, Mängelrüge," *JBI* 318, 321 et seq. (1999); Ernst Kramer, "Rechtzeitige Untersuchung und Mängelanzeige bei Sachmängeln nach Article 38 und 39 UN-Kaufrecht: Eine Zwischenbilanz," in *Beiträge zum Unternehmensrecht: Festschrift für Hans-Georg Koppenssteiner zum 65. Geburtstag* (ed. E. Kramer et al.) (Vienna: Orac, 2001), 617, 627 et seq.; Magnus in *Staudinger*, Article 39, para. 49. See also Schwenzer, 19 *Pace Int'l L. Rev.* 103, 116 (2007); Schwenzer, 7 *EJLR* 353, 361 (2005).

<sup>67</sup> CISG-AC, "Opinion No. 6, Calculation of Damages under CISG Article 74" (Spring 2006, Rapporteur: John Gotanda), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148> (last accessed October 25, 2013), Comments 2.5. and 9.5.; Susanne V. Cook, "The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity," 16 *J.L. & Commerce* 257 et seq. (1997); DiMatteo et al., 24 *Nw. J. Int'l L. & Bus.* 299, 420 (2004); Ferrari, *Internationales Handelsrecht*, 8, 14 (2009). See also Schwenzer in Schlechtriem and Schwenzer, *Commentary*, Article 74, para. 1.

<sup>68</sup> CISG-AC, "Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG" (October 12, 2007, Rapporteur: Alejandro Garro), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169> (last accessed June 6, 2013), Comment 26; Flechtner, "Article 79," 1, 29, 31; Honnold and Flechtner, *Uniform Law*, Article 79, para. 427; Joseph M. Lookofsky and Harry M. Flechtner, "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?," 9 *VJ Int'l Com. & Arb.* 199, 202 et seq. (2005). See also Schwenzer in Schlechtriem and Schwenzer, *Commentary*, Article 79, para. 1.

<sup>69</sup> CISG-AC, "Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG," (October 23, 2004, Rapporteur: Richard Hyland), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=145&sid=145> (last accessed October 25, 2013), Comment 1.2.; Rod N. Andreason, "MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law under the Convention on Contracts for the International Sale of Goods," 24 *BYU L. Rev.* 351, 353 et seq. (1999); Flechtner, 17 *J.L. & Commerce* 187, 201 (1998); Harry M. Flechtner, "More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, 'Validity' and Reduction of Price Under Article 50," 50 *J.L. & Commerce* 153, 156 (1995); Lookofsky, *Understanding the CISG*, 42 et seq.; Marlyse McQuillen, "The Development of a Federal CISG Common Law in the U.S. Courts: Patterns of Interpretation and Citation," 61 *U. Miami L. Rev.* 509, 520 (2007); Paolo Torzilli, "The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?," 4 *St. John's L. Rev.* 843, 855 (2000). See also Schmidt-Kessel in Schlechtriem and Schwenzer, *Commentary*, Article 8, para. 33.

## 1. Concurring Domestic Law Remedies

A special form of homeward trend is the application of concurrent domestic law remedies.<sup>70</sup> The CISG and its uniform interpretation can be severely undermined in this way, too.<sup>71</sup> Again, American courts,<sup>72</sup> with the support of at least some U.S. scholars,<sup>73</sup> seem to be especially prone to this form of a homeward trend. The main device to circumvent the CISG seems to be negligent misrepresentation.<sup>74</sup> As negligent misrepresentation is conceived as sounding in tort it is not regarded as being excluded by the CISG – which allegedly only deals with the contractual obligations of the parties.<sup>75</sup> However, the mere fact that there is hardly any case in which a buyer complaining about nonconformity of the goods under a sales contract is not simultaneously relying on negligent misrepresentation shows how the two fields overlap. Allowing concurring domestic remedies undermines the CISG in a core area, namely, seller's liability for nonconformity of the goods. Unification is thus highly endangered. The best answer to this question is the one

<sup>70</sup> See the seminal article about this issue by Peter Schlechtriem, "The Borderland of Tort and Contract: Opening a New Frontier?," 21 *Cornell Int'l L. J.* 467 et seq. (1988). See also Franco Ferrari, "The Interaction between the United Nations Convention for the International Sale of Goods and Domestic Remedies," 71 *RabelsZ* 52, 70 et seq. (2007); Helen E. Hartnell, "Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods," 18 *Yale J. Int'l L.* 1, 72 (1993); Peter Huber, "Some Introductory Remarks on the CISG," *Internationales Handelsrecht* 228, 231 (2006); Joseph M. Lookofsky, "In Dubio pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)," 13 *Duke J. Comp. & Int'l L.* 263, 283 (2003); Joseph M. Lookofsky, "Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules," 39 *Am. J. Comp. L.* 403 et seq. (1991); Schwenger and Hachem, 57 *Am. J. Comp. L.* 457, 470 (2009); Schwenger, "Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG," 416, 419.

<sup>71</sup> Hager, "Zur Auslegung des UN-Kaufrechts," 319, 320; Flechtner, "The CISG in U.S. Courts," 91, 97; Monica Kilian, "CISG and the Problem with Common Law Jurisdictions," 10 *Transnat'l L. & Pol'y* 217, 228 (2001); Lookofsky, 13 *Duke J. Comp. & Int'l L.* 263, 266 (2003); Schwenger and Hachem, 57 *Am. J. Comp. L.* 457, 471 (2009); Schwenger, "Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG," 416, 421; Spagnolo, 10 *Mel. J. Int'l L.* 1, 6 (2009).

<sup>72</sup> *Usinor Industeel v. Leeco Steel Products, Inc.* 209 F. Supp. 2d 880 (N.D. IL 2002), CISG-online 1326; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 320 F. Supp. 2d 702 (N.D. IL 2004), CISG-online 851; *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.* 2003 U.S. Dist. LEXIS 1306 (N.D. IL 2003), CISG-online 772.

<sup>73</sup> Cuniberti, 39 *Vanderbilt J. Transnat'l L.* 1511, 1546 (2006); Gillette and Scott, 25 *Int'l Rev. L. & Econ.* 446, 447 (2005). See also the non-U.S. American scholars Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Munich: Sellier, 2007), 26; Lookofsky, *Understanding the CISG*, 23.

<sup>74</sup> See *Sky Cast, Inc. v. Global Direct Distribution LLC* 2008 WL 754734 (E.D. KY 2008), CISG-online 1652; *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH* 2006 WL 2924779 (S.D. OH 2006), CISG-online 1326; *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.* 201 F. Supp. 2d 236 (S.D. NY 2002), CISG-online 653. See also Honnold and Flechtner, *Uniform Law*, Article 5, para. 73; Lookofsky, *Understanding the CISG*, 25; Schwenger in Schlechtriem and Schwenger, *Commentary*, Article 35, para. 48; Schwenger and Hachem, 57 *Am. J. Comp. L.* 457, 471 (2009); Schwenger, "Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG," 416, 420. For a basic description of the concept of negligent misrepresentation under the U.S.-American law, see Joseph M. Perillo, *Calamari and Perillo on Contracts*, 6th ed. (St. Paul: Thomson West, 2007), 336 et seq.

<sup>75</sup> *Viva Vino Import Corp. v. Franese Vini S.r.l.* 2000 U.S. Dist. LEXIS 12347 (E.D. PA 2000), CISG-online 675; Lookofsky, *Understanding the CISG*, 25. For further details, see Schwenger and Hachem, 57 *Am. J. Comp. L.* 457, 471 (2009); Schwenger, "Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG," 416, 419.

already given by the late John Honnold,<sup>76</sup> that the CISG displaces any domestic rules – whether based in contract or tort – if the facts that invoke such rules are the same facts that invoke the CISG.<sup>77</sup> In 2009, this position was acknowledged by a U.S. District Court.<sup>78</sup> This is a promising move in the right direction.

## 2. Issues of Validity

A further field open to homeward trend is the question of validity.<sup>79</sup> According to CISG Article 4(2)(a), the CISG is not concerned with the validity of the contract and any of its clauses. There are numerous examples of court decisions relying on domestic concepts of validity, not realizing that the very term “validity” has to be interpreted autonomously.<sup>80</sup> This may very well yield bizarre results. Thus, a U.S. District Court<sup>81</sup> has recently discussed a clause disclaiming liability for nonconformity pursuant to CISG Article 35(2) by using UCC Section 2–316(2). The court highlighted the word “merchantability” without having regard to the fact that this is not a concept under the CISG.<sup>82</sup>

## 3. The Substantive–Procedural Divide

Finally, drawing the line between so called “substantive” and “procedural” law issues often leads to familiar domestic law.<sup>83</sup> Procedural questions are not dealt with by the CISG.<sup>84</sup> Thus, it is questionable whether such issues as burden and standard of proof

<sup>76</sup> Honnold and Flechtner, *Uniform Law*, Article 35, para. 240.

<sup>77</sup> Schlechtriem, 21 *Cornell Int'l L.J.* 467, 475 (1988); Ferrari, 71 *RabelsZ* 52, 75 (2007); Schwenzer and Hachem, 57 *Am. J. Comp. L.* 457, 471 (2009); Schwenzer, “Buyer’s Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG,” 416, 421. See also Joseph M. Lookofsky, “CISG Case Commentary on Concurrent Remedies in *Pamesa v. Mendelson*,” available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky19.html> (last accessed October 25, 2013) (discussing an Israeli case).

<sup>78</sup> *Electrocraft Arkansas, Inc. v. Electric Motors, Ltd. et al.*, 2009 U.S. Dist. LEXIS 120183 (E.D. AR 2009), CISG-online 2045.

<sup>79</sup> For a detailed analysis of the problem, see Patrick C. Leyens, “CISG and Mistake: Uniform Law vs. Domestic Law, the Interpretative Challenge of Mistake and the Validity Loophole,” *Rev. CISG* 3, 14 et seq. (2003–4). See also Ferrari, 71 *RabelsZ* 52, 59 et seq. (2007); Ferrari in Schlechtriem and Schwenzer, *Commentary*, Article 4, para. 16; Lookofsky, *Understanding the CISG*, 23; Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 4, para. 24; Schwenzer and Hachem, 57 *Am. J. Comp. L.* 457, 472 (2009).

<sup>80</sup> See, e.g., *Norfolk Southern Railway Company v. Power Source Supply, Inc.* 2008 U.S. Dist. LEXIS 56942 (W.D. PA 2008), CISG-online 1776; *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.* 2007 WL 4039341 (9th Cir. 2007), CISG-online 1603; *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs, Inc.*, 201 F. Supp. 2d 236 (S.D. NY 2002), CISG-online 653. See also Flechtner, 50 *J.L. & Commerce* 153, 165 (1995); Ferrari in Schlechtriem and Schwenzer, *Commentary*, Article 4, para. 16; Schwenzer and Hachem, 57 *Am. J. Comp. L.* 457, 472 (2009). Contra, Lookofsky, *Understanding the CISG*, 22.

<sup>81</sup> *Norfolk Southern Railway Company v. Power Source Supply, Inc.* 2008 U.S. Dist. LEXIS 56942 (W.D. PA 2008), CISG-online 1776.

<sup>82</sup> See Honnold and Flechtner, *Uniform Law*, Article 35, para. 225.

<sup>83</sup> *Id.*, Article 4, para. 70.1; Stefan Kröll, “Selected Problems Concerning the CISG’s Scope of Application,” 25 *J.L. & Commerce* 39, 47 (2005); Schwenzer and Hachem, in Schlechtriem and Schwenzer, *Commentary*, Article 4, para. 24.

<sup>84</sup> Honnold and Flechtner, *Uniform Law*, Article 4, para. 70.1; Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 4, para. 24; Kurt Siehr in *Kommentar zum UN-Kaufrecht*, Article 4, para. 29 (ed. Honsell) (Berlin: Springer, 1997).

(which may often decide the outcome of a case) need to be decided autonomously.<sup>85</sup> Similarly, compensation for legal costs has also been given considerable attention.<sup>86</sup>

Although the view that national conceptions of drawing the line between procedural and substantive law cannot be decisive in applying the CISG has become more and more accepted, there are still those who advocate the necessity of relying on this distinction.<sup>87</sup> The modern trend that regards such a distinction as being outdated and unproductive<sup>88</sup> is too often discarded by some courts. Leaving questions such as burden and standard of proof to domestic law is nothing more than a clear expression of homeward trend.

### III. Reasons for the Homeward Trend

Why are courts prone to fall back on their own domestic law? What are the reasons that impede the uniform interpretation of the CISG called for in its Article 7(1)?

#### A. Lack of Knowledge

The first and probably the most important reason for the deplorable application of the CISG by national courts seems to be sheer lack of knowledge.<sup>89</sup> Although the CISG itself should by now be commonly known to exist, the degree of familiarity with the CISG is still very low. This seems to be reinforced by prejudices being nourished especially

<sup>85</sup> This is a highly debated issue; see CISG-AC, "Opinion No. 6," Comment 2. For scholars in favor of the CISG governing the burden of proof in a standard sense, see, e.g., Wilhelm-Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (Berlin: Hermann Luchterhand, 2000), Article 4, para. 15; Bernard Audit, *La vente internationale de marchandises, Convention des Nations-Unies du 11 avril 1980* (Paris: L.G.D.J., 1990), 100; Heuzé, *La vente internationale de marchandises*, 260; Kröll, 25 *J.L. & Commerce* 39, 47 (2005); Magnus in *Staudinger*, Article 4, para. 63; Karl H. Neumayer and Catherine Ming in *Convention de Vienne sur les contrats de vente internationale de marchandises* (ed. F. Dessemontet) (Lausanne: CEDIDAC, 1993), Commentaire, Article 4, para. 13; Ferrari in Schlechtriem and Schwenger, *Commentary*, Article 4, para. 8; Schwenger and Hachem in Schlechtriem and Schwenger, *Commentary*, Article 4, paras. 25 et seq.; Anna Veneziano, "Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri," *Dir. com. int.* 509, 515 (2001). See also Oberlandesgericht Köln, January 14, 2008, CISG-online 1730; Schweizerisches Bundesgericht, November 13, 2003, CISG-online 840. But see Honnold and Flechtner, *Uniform Law*, Article 4, para. 70.1.

<sup>86</sup> Harry M. Flechtner, "Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*," 22 *Nw. J. Int'l L. & Bus.* 121, 127 (2002); Troy Keily, "How Does the Cookie Crumble? Legal Costs under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods," 1 *Nordic J. of Commercial L.* 1, 2 (2003); Joseph M. Lookofsky and Harry M. Flechtner, "Zapata Retold: Attorneys' Fees Are (Still) Not Governed by the CISG," 26 *J.L. & Commerce* 1, 2 et seq. (2006); Joseph M. Lookofsky and Harry M. Flechtner, "Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal," 7 *VJ Int'l Com. & Arb.* 93, 94 (2003); Ingeborg Schwenger, "Rechtsverfolgungskosten als Schaden?," in *Mélanges en l'honneur de Pierre Tercier* (ed. P. Gauch et al.) (Zurich: Schulthess, 2008), 417, 422 et seq.

<sup>87</sup> Chiara Giovannucci Orlandi, "Procedural Law Issues and Law Conventions," 5 *Uniform L. Rev.* 23, 25 (2000).

<sup>88</sup> See CISG-AC, "Opinion No. 6," Comment 5.2.

<sup>89</sup> Andersen, 24 *J.L. & Commerce* 159, 177 (2005). For a detailed analysis of the reasons for the lack of familiarity with the CISG, see Spagnolo, 13 *VJ Int'l Com. & Arb.* 135, 137 (2009); Spagnolo, 13 *VJ Int'l Com. & Arb.* 157 (2009).

by U.S. scholars. There are numerous articles in American law journals that blame the CISG for being unpredictable, imprecise, and not suited for the needs of (American) international trade; in short, being clearly inferior to the Uniform Commercial Code.<sup>90</sup>

However, it is not only a lack of knowledge of the CISG that is a problem; it is even worse, a lack of knowledge that there can ever be another dogmatic solution to a legal problem than the one that a person has learned and practiced for a long time. Can many common law lawyers imagine a legal system without the doctrine of consideration? How difficult is it for a German lawyer to acknowledge that special abstract rules for legal acts, apart from those for contracts, may be unnecessary and simply stem from historical whimsicalities? Will a French lawyer easily find a substitute concept for that of *cause*? Thus, simply speaking, for many lawyers, counsels, and judges, there is no alternative legal world other than the one they already know. Having this in mind it is perfectly understandable why – if the CISG is applied at all – this is mostly done through domestic lenses. Many of those applying the CISG just do not possess alternative perspectives.

### B. Language Barriers

A truly international application and interpretation is frustrated by language barriers. This applies despite the fact that nowadays many CISG court decisions and arbitral awards are translated into English and are freely accessible via websites around the globe.<sup>91</sup> More and more scholarly articles are published in English and also made available on websites.<sup>92</sup> The reasons why these materials still are not widely utilized differ for the English-speaking legal community on the one side and the rest of the world on the other.

Although, at least for international transactional lawyers, English has become the *lingua franca*, this does not hold true 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 very low. Only very recently are some law classes taught in English. With more classes taught in law schools in English this picture may hopefully change in a couple of years. Furthermore, in many countries, judges are working under severe time constraints. When dealing with their daily domestic cases they consult only one – if at all – of certain handbooks and commentaries. They exclusively rely on one domestic database that is provided by the justice administration. Expecting these judges to consider foreign decisions and to access foreign databases for the few, if any, CISG cases they are

<sup>90</sup> Kathryn S. Cohen, “Achieving a Uniform Law Governing International Sales: Conforming the Damages Provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code,” 26 *U. Pa. J. Int’l Econ. L.* 601, 610 (2005); Cuniberti, 39 *Vanderbilt J. Transnat’l L.* 1511, 1549 (2006); Gillette and Scott, 25 *Int’l Rev. L. & Econ.* 446, 479 (2005), suggesting a “competition for laws,” where the CISG “ultimately will lose out in competition with alternative legal regimes.” See also Paul B. Stephan, “The Futility of Unification and Harmonization in International Commercial Law,” 39 *Va. J. Int’l L.* 743, 779 (1999).

<sup>91</sup> See the database of the Pace Law School, available at <http://www.cisg.law.pace.edu> (last accessed October 25, 2013). Furthermore, see <http://www.cisg-online.ch> and <http://www.unilex.info> (both last accessed October 25, 2013).

<sup>92</sup> See the extensive online collection of scholarly writings (currently more than 1,400 texts) at the Pace database, available at <http://www.cisg.law.pace.edu/cisg/biblio/bib2.html> (last accessed October 25, 2013).



confronted with is asking too much of them. They just do not have the necessary time to do so, let alone to learn doing it on the job.

For English-speaking lawyers, the picture is different. They may not rely on the excuse of not being able to access relevant materials in their own language. Many common law lawyers are very happy with the common law and just do not want to have it substituted by any set of rules with which they are not familiar. This seems to be especially the case for parties, lawyers, and judges in Australia and New Zealand. Furthermore, many common law lawyers are not accustomed to consulting case law outside their own jurisdiction. And – one may add – even if they did so they might not understand, for example, a translated decision of the Supreme Court of France because they are not familiar with the peculiarities of French judicial decisions.

### C. *Relevant Cases Are Arbitrated*

The number of international sales law cases being litigated in domestic courts should not be overestimated. Having 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>93</sup> A random look at fifty recent 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>94</sup> trees,<sup>95</sup> cherries,<sup>96</sup> potatoes,<sup>97</sup> rice,<sup>98</sup> watermelons,<sup>99</sup> and poppy seeds,<sup>100</sup> as well as other food-stuffs such as beer,<sup>101</sup> crabs,<sup>102</sup> and shrimps.<sup>103</sup> A second group comprises textile products, including yarn,<sup>104</sup> leather,<sup>105</sup> shoes,<sup>106</sup> and the like, as well as small- and medium-sized machinery such as heating equipment,<sup>107</sup> motor vehicle parts,<sup>108</sup> or locomotives.<sup>109</sup>

<sup>93</sup> For a detailed analysis about the commonness of application of the CISG in international commercial arbitration, see Loukas Mistelis, “CISG and Arbitration,” in Janssen and Meyer, *CISG Methodology*, 375, 388.

<sup>94</sup> Handelsgericht des Kantons Aargau, November 26, 2008, CISG-online 1739.

<sup>95</sup> Landgericht Bamberg, October 23, 2006, CISG-online 1400.

<sup>96</sup> *Hannafor* (trading as *Torrans Valley Orchards*) v. *Australian Farmlink Pty Ltd.*, [2008] FCA 1591 (October 24, 2008), CISG-online 1743.

<sup>97</sup> Cour de Cassation, September 16, 2008, CISG-online 1821; Rechtbank Maastricht, July 9, 2008, CISG-online 1748; Oberlandesgericht Köln, August 14, 2006, CISG-online 1405.

<sup>98</sup> *The Rice Corporation v. Grain Board of Iraq*, 2008 U.S. Dist. LEXIS 40204 (E.D. CA 2008), CISG-online 1770.

<sup>99</sup> Rechtbank Breda, January 16, 2009, CISG-online 1789.

<sup>100</sup> Oberster Gerichtshof, May 8, 2008, CISG-online 1784.

<sup>101</sup> Oberlandesgericht Brandenburg, November 18, 2008, CISG-online 1734.

<sup>102</sup> Rechtbank Rotterdam, November 5, 2008, CISG-online 1817.

<sup>103</sup> Oberlandesgericht Rostock, September 25, 2002, CISG-online 671.

<sup>104</sup> Oberlandesgericht Düsseldorf, April 21, 2004, CISG-online 913.

<sup>105</sup> Corta Suprema Chile, September 22, 2008, CISG-online 1787.

<sup>106</sup> Tribunale di Forlì, December 11, 2008, CISG-online 1788.

<sup>107</sup> *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.* 2002 MBQB 229 [Court of Queen’s Bench of Manitoba], CISG-online 1327.

<sup>108</sup> *Valeo Sistemas Electricos S.A. de C.V. v. CIF Licensing, LLC d/b/a GE Licensing v. Stmicroelectronic* 2008 U.S. Dist. LEXIS 53058 (D. DE 2008), CISG-online 1775.

<sup>109</sup> *Norfolk Southern Railway Company v. Power Source Supply, Inc.* 2008 U.S. Dist. LEXIS 56942 (W.D. PA 2008), CISG-online 1776.

Most notable are the respective amounts in controversy. The vast majority of these cases involved amounts well under one hundred thousand dollars;<sup>110</sup> in only one of the cases the claim amounted to more than one million dollars.<sup>111</sup>

The reason why only more or less marginal cases are treated by domestic courts, thus keeping the overall number and possible experiences with CISG cases relatively low, is self-evident; sophisticated parties with contract values well above one million USD regularly submit their disputes to arbitration and not to domestic courts. Additionally, only sophisticated parties have the money necessary to employ sophisticated lawyers knowledgeable in international trade. This is a vicious circle from which escape hardly seems possible.

#### IV. Homeward Trend: How Can it be Changed?

The reasons given for homeward trend decisions inherently show ways to overcome such reasoning.

##### A. Comparative Research

First, there must be a quest for truly comparative research in the field of the law of sales in general.<sup>112</sup> This has to be emphasized despite the fact that the literature on the CISG is abundant. The international sales law bibliography counts more than 8,000 references.<sup>113</sup> However, a closer look reveals that many – too many – publications circle around questions of the scope of applicability, gap filling, uniform interpretation, and methodology, in general often culminating in the lamentation that uniformity has not been achieved or is again jeopardized.

Thorough comparative research of genuine sales law issues is lacking to a great extent. More research is needed that applies the functional approach and embraces more than just one or two legal systems and comparing them to the CISG. Since the times of Rabel's seminal work on *Das Recht des Warenkaufs*,<sup>114</sup> the two-volume book on sale of goods that established the basis for all sales law unification more than fifty years ago, for a long time there has been no such endeavor of that magnitude until the *Global Sales and Contract Law*.<sup>115</sup> The requirement established by Article 7(1) CISG that solutions are to be found that are acceptable in different legal systems with different legal traditions

<sup>110</sup> One of the rare cases where the amount in dispute exceeded 100,000 USD is Schweizerisches Bundesgericht, December 16, 2008, CISG-online 1800.

<sup>111</sup> Appellationsgericht Basel-Stadt, September 26, 2008, CISG-online 1732.

<sup>112</sup> The challenge of producing a comprehensive work on sales law encompassing all legal systems and taking into account present-day problems has been resumed by the Global Sales Law Project and was published in 2012, Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (Oxford: Oxford University Press, 2012), see also <http://www.globalsaleslaw.org> (last accessed October 25, 2013).

<sup>113</sup> This bibliography contains most of the references to scholarly writing related to the CISG and is available at <http://www.cisg.law.pace.edu/cisg/biblio/biblio.html> (last accessed October 25, 2013).

<sup>114</sup> Ernst Rabel, *Das Recht des Warenkaufs: eine Rechtsvergleichende Darstellung* (Berlin: De Gruyter, 1956/73).

<sup>115</sup> Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law*.

requires carving out common ground in the field of international trade law.<sup>116</sup> This has recently become particularly visible with regard to the general understanding of the law of damages where the principles underlying this area of the law have moved to the center of academic debate around the world and new solutions to new challenges have been developed.<sup>117</sup> Furthermore, in order to solve the respective issues under the CISG, detailed research is needed on the substantive–procedure divide in the different legal systems involved; questions of validity of unfair contract terms should be decided under the CISG once a clear overview of the different approaches by domestic legal systems in controlling contract terms has been established. The argument that it was not the intention of the drafters of the CISG to cover certain issues is a threat to uniform application and dooms the CISG to insignificance.

### B. *Language*

The next step must be to address the problem of language barriers. Although this basic comparative research has to be carried out in English in order to be accessible to the entire CISG community, there must be more translations into other languages. The best way to do this seems to be via comprehensive commentaries that discuss relevant CISG provisions from a comparative perspective, thus enabling the domestic practitioner to understand how to reconcile his or her domestic perspective with the uniform solution.<sup>118</sup> Only a few commentaries currently available on the market are living up to these high standards. For example, most of the various German commentaries more or less content themselves with references to other German sources. The same applies to the existing French and U.S. commentaries.

### C. *CISG as Genuine Contract Law*

The CISG has yet to arrive at the core of contract law. Although it has been pointed out that some textbooks on contract law in the United States refer to the CISG in one way or the other,<sup>119</sup> it is obvious that there are not many leading contract scholars in their respective countries who are dedicated to the CISG. In many countries, the CISG is left to lecturers or scholars engaged in other specialized (and often optional) subjects such as International Business Transactions or Conflicts of Laws. Frequently these academics are excellent scholars but the relative importance of the subjects they teach does not provide them with the profiles they deserve. On the other side, when teaching contracts, many eminent scholars focus on the hardcore dogmatic domestic issues such as contract formation, consideration, and mistake, and do not even touch on the domestic law of remedies.

<sup>116</sup> Schwenger and Hachem, in Schlechtriem and Schwenger, *Commentary*, Article 7, para. 24.

<sup>117</sup> For further references, see Ingeborg Schwenger and Pascal Hachem, “The Scope of the CISG Provisions on Damages,” in *Contract Damages: Domestic and International Perspectives* (ed. D. Saidov and R. Cunningham) (Oxford: Hart, 2008), 91.

<sup>118</sup> See Schlechtriem and Schwenger, *Commentary*; Schlechtriem and Schwenger, *Comentario sobre la convencion de las naciones unidas sobre los contratos de compraventa internacional de mercaderias* (ed. I. Schwenger and E. Munoz) (Cizur Menor: Thomson Reuters, 2011). Translations into Mandarin, Turkish, Russian, Portuguese and French are currently prepared.

<sup>119</sup> Reimann, 71 *RebelsZ* 115, 120 (2007).

#### D. CISG in Education and Legal Practice

This leads us directly to the role of the CISG in legal education. Whether a substantive number of students study the CISG exclusively depends on whether it is part of a final exam – if such a final exam exists at all.<sup>120</sup> Setting the CISG as a subject for a bar exam has proven to be very effective. At this stage of their careers, young lawyers are better able to acknowledge the considerable advantages of the CISG over their domestic sales law, and are close enough to real world practice such that they will not forget those advantages in their law practice. Bar associations must be persuaded to support the dissemination of knowledge of the CISG in this way. Still, it will certainly take quite a while before genuine familiarity with the CISG is achieved in young lawyers in a significant number of countries.

Thus, it is important to make the CISG a subject of continuing education of lawyers. Much dread among practitioners could be removed by teaching them contract drafting and litigating under the CISG. Furthermore, they should be told that not considering the CISG in advising a client either in contracting or in litigating might lead to a case of professional liability. If nothing else, at least the threat of liability might spur some further interest in the CISG.

#### V. Conclusion

Homeward trend decisions are a phenomenon that has to be taken seriously in jeopardizing uniformity in international sales law. Although some countries are more prone to homeward trend bias than others, it can be found among all member states of the CISG. The reasons for the homeward trend include lack of knowledge, language barriers, and the fact that disputes involving large damage claims often are resolved in private arbitration. Overcoming homeward trend necessitates genuine comparative research with corresponding translations in different languages and, most of all, the CISG needs to be taken seriously by contract scholars and taught in law schools and in continuing legal education. While overcoming the homeward trend in applying and interpreting the CISG is an important and necessary step towards unification of international sales law, harmonization of contract law stays incomplete if it is not enhanced further. This is why Switzerland called upon UNCITRAL in 2012 to embark upon the question of whether future work in the area of globally harmonizing general contract law is desirable and feasible.<sup>121</sup>

<sup>120</sup> Corinne Widmer and Pascal Hachem, "Switzerland," in *The CISG and Its Impact on National Legal Systems* (ed. F. Ferrari) (Munich: Sellier, 2008), 281, 288.

<sup>121</sup> United Nations Commission on International Trade Law, "Possible future work in the area of international contract law: Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law," 45th session, New York, June 25 – July 6, 2012, A/CN.9/758 (May 8, 2012), available at [www.uncitral.org/uncitral/commission/sessions/45th.html](http://www.uncitral.org/uncitral/commission/sessions/45th.html) (last accessed October 25, 2013)).