40 Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)

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I. Introduction

Attempts to describe the importance of the United Nations Convention on Contracts for the International Sale of Goods (CISG) – currently, the law of eighty countries – have characterized it as the law applicable to 75% of the world's exports and imports,[1] with fifteen among the twenty leading exporters in world trade having adopted the CISG.[2] These facts do not mean that three-fourths of all world trade is governed by the CISG, as the CISG's applicability to a given sales contract depends on the requirements of Article 1(1)(a) or (b) being fulfilled. A more important factor affecting the CISG's role in commercial practice is its lack of acceptance by business parties, legal advisers, and courts. According to Article 6 CISG, the parties may exclude the application of the CISG (opting out). It has been claimed that parties "regularly" or "routinely," at the suggestion of counsel,[3] do just that[4] – a claim typically made without any empirical support being cited.

This chapter collects and organizes the increasing empirical evidence on how the CISG is excluded, ignored, or actively used in practice, thereby measuring rumors against reality. The second part reviews the existing empirical, as well as anecdotal, evidence on the CISG's role in practice. It analyzes the evidence relating to its use by the courts, attorneys, and the parties to international sales contracts. The third part outlines the possible risks that legal practitioners face when they ignore the CISG, potentially exposing them to claims of professional malpractice.

[1] World Trade Organization, "Leading Exporters and Importers in World Merchandise Trade (2009)," in *International Trade Statistics 2010* (World Trade Organization: Geneva 2010).

[2] The non-CISG contracting states among the 20 leading exporters of the world are the United Kingdom, the United Arab Emirates, Chinese Taipeh (Taiwan), and Saudi Arabia, although the legal status of Hong Kong (the world's 11th largest exporter) under the CISG is a matter of dispute. Cf. Ulrich G. Schroeter, "The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods," 16 *Pace Int'l L. Rev.* 307 (2004). For the purpose of the calculations presented in this chapter, Hong Kong has been treated as a non-contracting state.

[3] See Ulrich G. Schroeter, "Schaffung und Akzeptanz einheitlichen Privatrechts in Europa: Lehren aus der Anwendung des UN-Kaufrechts für ein Europäisches Vertragsrecht," 14 *Jahresheft der Internationalen Juristenvereinigung Osnabrück* 35, 47 (2007).

[4] Cf. inter alia Reinhard Fischer, *Vor- und Nachteile des Ausschlusses des UN-Kaufrechts aus Sicht des deutschen Exporteurs* (Hamburg: Verlag Dr. Kovač, 2008), 2–3; Christopher Sheaffer, "The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law," 15 *Cardozo J. Int'l & Comp. L.* 461, 469–70 (2007).

II. Empirical Evidence on the Use of the CISG

A. *The CISG in Practice: Existing Surveys*

Empirical evidence on the CISG's role as law in practice essentially comes in two forms – (1) the number of court decisions and arbitral awards applying the CISG, and (2) surveys among lawyers. A number of CISG-related surveys have been conducted over the years. They followed a similar design in that questionnaires were sent to members of the targeted group. The first such survey was conducted by Michael Gordon of the University of Florida in 1997 and targeted faculty teaching at law schools in Florida, 124 practitioners specializing in transactional international law, as well as judges at state courts in Florida.[5] In 2004, Justus Meyer surveyed German attorneys specializing in international sales matters, with a sample size of 479.[6] In 2007, he duplicated the survey using Austrian attorneys with a sample size of 319,[7] and among 396 Swiss attorneys.[8] At the same time, a combined survey using identical questionnaires in three countries was conducted by Martin Koehler and Guo Yujun, with Koehler targeting practicing attorneys in Germany and the United States (in 2004–5) and Guo targeting attorneys in the People's Republic of China.[9] Unfortunately, small sample sizes – 50 responses from U.S. lawyers, 33 from German lawyers, and 27 from Chinese lawyers – limit the statistical power of the Koehler–Guo surveys.[10] In 2006–7, Peter Fitzgerald collected a total of 236 responses, primarily from California, Florida, Hawaii, Montana, and New York.[11] Two additional surveys were conducted in 2007: George Philippopoulos collected a data set from 46 commercial litigation attorneys whose practices dealt with international transactions,[12] and in Switzerland Corinne Widmer and Pascal Hachem targeted registered lawyers practicing in the field of commercial law and conflict of laws, receiving 170 usable replies.[13] Finally, in late 2009, Ingeborg Schwenzer and

[5] Michael 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.* (Suppl.) 361 (1998).

[6] Justus Meyer, "UN-Kaufrecht in der deutschen Anwaltspraxis," 69 *Rabel J. Comp. & International Private L.* 457, 468 (2005).

[7] Justus Meyer, "UN-Kaufrecht in der österreichischen Anwaltspraxis," *Österreichische Juristenzeitung* 792, 794 (2008).

[8] Justus Meyer, "UN-Kaufrecht in der schweizerischen Anwaltspraxis," *Schweizerische Juristenzeitung* 421, 423 (2008).

[9] Martin F. Koehler and Guo Yujun, "The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems," 20 *Pace Int'l L. Rev.* 45, 47 (2008).

[10] The small number of replies can hardly be regarded as "an early indication of poor acceptance of the CISG," as Koehler and Guo, "Acceptance of the Unified Sales Law," 46–7, boldly claim – it is no more than an indication of the poor acceptance of the request to participate in their survey (and may have even be caused by the fact that many of the practitioners addressed had no time for a participation, as they were busy applying the CISG in real cases).

[11] Peter L. Fitzgerald, "The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on Contracts for 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. & Com.* 1, 4–6 (2008).

[12] George V. Philippopoulos, "Awareness of the CISG among American Attorneys," 40 *Uniform Commercial Code L. J.* 357 (2008).

[13] Corinne Widmer and Pascal Hachem, "Switzerland," in *The CISG and Its Impact on National Legal Systems* (ed. F. Ferrari) (Munich: Sellier European Law Publishers, 2008), 281, 282.

Table 40.1. *CISG Cases: 1989–2010*

Year	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Cases	18	18	28	66	69	120	146	181	184	153	140
Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Cases	123	111	190	169	171	156	187	142	135	97	58

her "Global Sales Law" research team at the University of Basel conducted the most comprehensive survey to date. The data set consisted of 640 responses from 66 countries.[14] While most of the surveys mentioned focused on practicing attorneys, the Global Sales Law survey encompassed four target groups, namely practicing lawyers (347 responses), arbitrators (98 responses), businesses engaged in trade (60 responses), and law schools (135 responses).

In summary, all existing CISG surveys combined yielded usable responses from a total of 2,227 practicing attorneys, with a focus on five CISG contracting states: Switzerland, Germany, the United States, Austria, and China.[15] However, as noted earlier, a number of these surveys lacked statistical power.

B. *Courts' Approach to the CISG*

1. Empirical Evidence

The number of cases applying the CISG by the courts and arbitral tribunals has steadily increased since 1988. The Albert H. Kritzer CISG Database run by the Institute of International Commercial Law at Pace Law School[16] lists a total of 2,697 court decisions and arbitral awards that, in one way or another, addressed the CISG.[17] Table 40.1 shows the development of CISG case law over the years.

The use of the numbers displayed in Table 40.1 above as empirical evidence on the CISG's practical relevance[18] meets with some caveats. First, and maybe most importantly, the CISG database does not cover all CISG decisions that have been made, but only the CISG decisions that have been published. The real number of CISG decisions in practice could be considerably higher.[19] Second, experience shows that court decisions in many jurisdictions are only published with a significant delay, sometimes years after they

[14] Ingeborg Schwenzer and Christopher Kee, "Global Sales Law – Theory and Practice," in *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (ed. I. Schwenzer and Lisa Spagnolo) (The Hague: Eleven International Publishing, 2011), 155, 156. The same survey's results are reported in Ingeborg Schwenzer and Christopher Kee, "International Sales Law: The Actual Practice," 29 *Penn St. Int'l L. Rev.* 425 (2011).

[15] Switzerland: 566; Germany: 512; United States: 456; Austria: 319; China: 27. (It is unclear how many lawyers participated in more than one of the surveys.)

[16] *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostina, S.p.A.*, June 29, 1998, 144 F.3d 1384, 1389 footnote 14 (11th Cir. 1998) refers to the database as "a promising source" for "persuasive authority from courts of other States Party to the CISG."

[17] The case count was as of October 10, 2011.

[18] Harm Peter Westermann, "Das UN-Kaufrecht im Aufschwung?," *in Privatrecht und Methode: Festschrift für Ernst A. Kramer* (ed. H. Honsell et al.) (Basel: Helbing & Lichtenhahn, 2004), 717, 719.

[19] Peter Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG," 36 *Victoria U. Wellington L. Rev.* 781 (2005); Schwenzer and Kee, "International Sales Law," 157.

were handed down ("publication lag").[20] Third, although the Kritzer Database reports a number of arbitral awards, the vast majority of arbitral awards remain unpublished.[21] Fourth, the numbers listed in the table are overstated because they count the same dispute as a separate case at each stage of the appellate process. And fifth, they also include cases in which the CISG's applicability was denied.

Surveys – potentially another source for empirical evidence on the courts' approach to the CISG – have only rarely addressed the judiciary. The two surveys that tackled this task[22] received so small a number of replies that they can hardly been seen as an indication of the judiciary's attitude in general.[23]

2. Anecdotal Evidence

Because there is currently only limited empirical evidence on CISG-related matters, the present chapter will try to supplement it with "anecdotal" evidence on the CISG's role in practice. Under this heading, it will present evidence of actions by the courts (and, in the respective following sections, by the parties and counsel), which, in the author's subjective opinion, is indicative of general trends in the CISG's application.

a. *Pretending that there is "virtually no" CISG case law: The* Filanto *dictum and its progeny*

In 1992, the United States District Court for the Southern District of New York rendered its decision in *Filanto, S.p.A. v. Chilewich Intern. Corp.*[24] It was the first U.S. decision to address the CISG in a substantive way, and accordingly attracted significant attention among academic scholars.[25] Its influence on the developing U.S. case law on the CISG, however, was not primarily due to its application of the CISG, but rather by its introductory dictum: "Although there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention, ...[26] This factual statement – certainly accurate at the time it was made, as there had merely been one earlier CISG decision by a U.S. court[27] – was soon quoted by other U.S. courts, first in *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*[28] and then in *Delchi Carrier SpA v. Rotorex Corp.*, where the court (unintentionally?) expanded the assessment's international scope by claiming that "there is virtually no case law under the Convention."[29] In doing so, the court in *Delchi Carrier* overlooked that there already was an ever-increasing number of CISG judgments from other CISG contracting states. Thus firmly rooted in U.S. case law, the *Filanto* dictum became a steady staple in American CISG jurisprudence[30] – somewhat surprisingly, as it explicitly dealt with the situation at one specific point in time (in early 1992). Even sixteen years and some 2,000 published CISG cases later, two U.S. decisions issued in 2008 still proclaimed that there is "virtually no case law under the Convention," citing the *Filanto* dictum in support.[31] This is especially troubling because the full statement found in *Filanto* stated that: "Although there is as yet virtually no U.S. case law interpreting the Sale of Goods CISG . . . , it may safely be predicted that this will change: absent a choice-of-law provision, and with certain exclusions not here relevant, the CISG governs *all* contracts between parties with places of business in different nations, so long as both nations are signatories to the CISG."[32] Since then, the court's prediction has become reality with a steadily growing body of CISG case law, both from the U.S. and from other countries.

b. *Raising the hurdles for the CISG's exclusion by party agreement under Article 6*

Courts, including those in the United States, have taken a strict view of how to properly opt out of the CISG as allowed under CISG Article 6. Interpretation of choice-of-law clauses, as with any contract term, is governed by Article 8 CISG,[33] focusing primarily on the parties' intent where the respective other party knew or could not have been unaware of the other party's intent.[34] The second order rule, when the other party's intent is not known, is the meaning affixed by a "reasonable person" under the same circumstances.[35]

In applying these standards, the search for the parties' "true" intent is the ultimate goal, and not an interpretation in accordance with the intent of some "standard" party. The courts in most CISG contracting states, however, have developed a general approach that – largely detached from the contracting parties concerned – attaches one and the same interpretation to typical contract clauses, and thereby uniformly determines whether a given clause results in an exclusion of the CISG's application (rarely) or not (usually). From a methodological perspective, this neglect of party intent in favor of standardized meanings is an inappropriate application of Article 8's interpretive methodology.

The most common type of choice-of-law clauses in international sales contracts are those that call for the application of the law of a CISG contracting state ("This contract

[20] The effect of the publication lag is clearly visible in the case numbers for 2009 and 2010 listed in Table 40.1.

[21] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International, 1999), 65; Schwenzer and Kee, "International Sales Law," 157 (hypothesizing that approximately 5,000 arbitrations concerning sales of goods must have been conducted between 2004 and 2008).

[22] Namely, the surveys conducted by Gordon, "Some Thoughts," and by Fitzgerald, "International Contracting Practices Survey Project."

[23] This point is also noted by Fitzgerald, "International Contracting Practices Survey Project."

[24] *Filanto, S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

[25] Cf. Ronald A. Brand and Harry M. Flechtner, "Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention," 12 *J. L. & Commerce* 239 (1993); Peter Winship, "The U.N. Sales Convention and the Emerging Caselaw," in *Emptio-Venditio Inter Nationes* (ed. F. Majoros) (Basel: Recht und Gesellschaft, 1997), 227.

[26] *Filanto, S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), appeal dismissed, 984 F.2d 58 (2nd Cir. 1993).

[27] *Interag Ltd v. Stafford Phase*, May 22, 1990, 1990 WL 71478 (S.D.N.Y.); see also, *Orbisphere v. U.S.*, October 24, 1989, 726 F.Supp. 1344 (Ct. Int'l Trade 1989) (court had made an obiter reference to the CISG without interpreting or applying any of its provisions).

[28] *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, June 15, 1993, 993 F.2d 1178, 1183 (5th Cir. 1993).

[29] *Delchi Carrier SpA v. Rotorex Corp.*, December 6, 1995, 71 F.3d 1024, 1028 (2nd Cir. 1995).

[30] See the references to the respective statements from either Filanto or Delchi Carrier in, e.g., *Claudia v. Olivieri Footware Ltd.*, April 7, 1998, 1998 WL 164824 (S.D.N.Y.); *MCC-Marble Ceramic Center, Inc., v. Ceramica Nuova d'Agostino, S.p.A.*, June 29, 1998, 144 F.3d 1384, 1389 (11th Cir. 1998); *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, August 23, 2006, 2006 WL 2463537 (S.D.N.Y.).

[31] *Hilaturas Miel, S.L. v. Republic of Iraq*, August 20, 2008, 573 F.Supp.2d 781, 799 (S.D.N.Y. 2008); *Macromex Srl. v. Globex International, Inc.*, April 16, 2008, 2008 WL 1752530 (S.D.N.Y.).

[32] *Filanto, S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

[33] Martin Schmidt-Kessel 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 8, paras. 1, 61.

[34] CISG, Article 8(1).

[35] Id., Article 8(2).

is governed by Danish law"). These types of clauses have generally been interpreted as *not* indicating intent to exclude the CISG's application, as the CISG is part of the law of each contracting state.[36] Although, theoretically, evidence is admissible to prove a different intent – a possibility that can hardly be neglected in cases in which neither the parties nor their legal advisers were even aware of the CISG – such proof almost never succeeds in practice.[37] Additionally, a choice-of-law clause excluding the application of the 1964 Hague Sales Laws, the predecessor to the CISG, does not exclude the CISG.[38] Some courts (primarily from the U.S.) have gone even further by making an "explicit" exclusion of the CISG a requirement for opting out[39] – an approach that has been criticized for not being in harmony with the purpose and legislative history of Article 6 CISG, which both do not generally rule out implicit exclusions of the convention.[40]

Due to lack of knowledge, attorneys for the seller and buyer both have in some cases pleaded their clients' cases based on domestic law despite the CISG being the applicable law. Such action could theoretically qualify as an implicit exclusion of the CISG under Article 6. The behavior of counsel as legal representatives of their clients could be viewed as "subsequent conduct" under CISG Article 8(3) indicating the parties' intent to exclude the CISG at the time of formation or as an implicit party exclusion of the CISG at the trial stage of the dispute.[41] The majority of courts, however, regard any implicit CISG exclusion through counsels' mutual reliance on domestic law with great skepticism, demanding a clear indication that the parties knew of the CISG's existence before finding an implicit exclusion.[42] They accordingly require more than action by counsel which, when viewed in isolation, would be deemed to sufficiently indicate that domestic law is the law under which both seller and buyer want their dispute to be decided. CISG's exclusion under Article 6 is therefore subject to stricter requirements

[36] See Ingeborg Schwenzer and Pascal Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 6. See also ICC Arbitral Award, Case No 12365, CISG-online 2143; Hof van Beroep Gent, October 20, 2004, CISG-online 983 (original clause in German stated, das für Inländer in der Bundesrepublik Deutschland maßgebende Recht); *Asante Technologies v. PMC-Sierra*, July 27, 2001, 164 F. Supp. 2d 1142, 1150 (N.D.C al. 2001) (choice a national law of another CISG country results in the application of the CISG).

[37] Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas, "Introduction to the CISG," in *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary* (ed. S. Kröll, L. Mistelis, and P. Perales Viscasillas) (Munich: C.H. Beck, Hart, Nomos, 2011), para. 42; Lisa Spagnolo, "Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole," in *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (ed. I. Schwenzer and L. Spagnolo) (The Hague: Eleven International Publishing, 2011), 181, 209.

[38] Oberlandesgericht München, October 19, 2006, *Internationales Handelsrecht* 30 (2007).

[39] See Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, para. 3.

[40] Id., para. 3.

[41] Cf. id., para. 21.

[42] Oberlandesgericht Linz, January 23, 2006, CISG-online 1377; Tribunale di Padova, February 25, 2004, *Internationales Handelsrecht* 31 (2005); Oberlandesgericht Zweibrücken, February 2, 2004, CISG-online 877; Oberlandesgericht Rostock, October 10, 2001, CISG-online 671; Tribunale di Vigevano, July 12, 2000, CISG-online 493; Oberlandesgericht Dresden, December 27, 1999, CISG-online 511; Kantonsgericht Nidwalden, December 3, 1997, CISG-online 331; Landgericht Bamberg, October 23, 2006, CISG-online 1400; International Court of the Russian Chamber of Commerce and Industry, Arbitral Award of June 6, 2000, CISG-online 1249. Concurring, Peter Schlechtriem, *Internationales UN-Kaufrecht*, 4th ed. (Tübingen: Mohr Siebeck, 2007), para. 21. But see Corte Suprema, September 22, 2008, CISG-online 1787; Cour de Cassation, October 25, 2005, CISG-online 1098.

than an implicit choice of law governed by private international law rules, where reliance by both attorneys on the same domestic law is often considered a valid choice of the law.[43] The majority view on implicit exclusion of the CISG views counsels' unawareness of the CISG as insufficient party intent to exclude its application.[44]

In summary, the present CISG case law from various countries serves as anecdotal evidence for an increasing pro-convention bias by courts, which have raised the hurdles for the convention's exclusion by party agreement so high that many attempted exclusions fail in practice.

c. *Judges' refusals to apply the CISG*

Only very rarely have situations been reported that demonstrate an intentional rejection of the CISG by a judge. Anecdotal evidence of this kind is not found in written court decisions, but rather in other reports. In Florida, one state court judge who participated in Michael Gordon's 1997 survey reported to have rejected the CISG as applicable law in one case because he was "strongly opposed to world government," making clear his determination not to apply "foreign" law in "his" state court.[45] In Germany, Burghard Piltz reported two similar incidences. In 1992, a German judge stated that "UN law does not apply in Germany."[46] And even in a 2010 proceeding, another judge opened the hearing by informing counsel that although one of the parties had relied on the CISG in their brief, "this court" was not familiar with the provisions of the CISG. He strongly suggested that the parties reach a settlement of the case.[47] A refusal to apply the CISG to sales contracts that fall into its sphere of application constitutes judicial impropriety or misconduct.[48] But, as Michael Gordon has correctly remarked: Failure to apply the applicable law at the trial stage is one reason we have appellate courts.[49]

3. Evidence Explained

a. *Case numbers*

Unfortunately, simply counting cases does not provide an adequate picture of the CISG's practical use. First, the CISG database is not sufficiently granulated to determine

[43] See inter alia Oberlandesgericht Hamm, June 9, 1995, *Recht der Internationalen Wirtschaft* 689 (1996), where the court held that litigation exclusively based on the provisions of the German Civil Code constituted a positive choice of German law under the German conflict of laws rules, and accordingly the CISG – as part of German law so chosen – was to be applied.

[44] Some commentators, however, view the case law on this subject differently; see Spagnolo, "Iura Novit Curi," 189: "current outcomes are unpredictable and diverse."

[45] Gordon, "Some Thoughts," 361, 369, and 371. The judge added that he had no final comments that could be printed; id., 369, n. 30.

[46] Reported by Burghard Piltz, *Internationales Kaufrecht* (Munich: C.H. Beck, 1993), 10.

[47] Burghard Piltz, "Neue Entwicklungen im UN-Kaufrecht," *Neue Juristische Wochenschrift* 2261, 2262 n. 9 (2011).

[48] Ronald A. Brand, "Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law," 34 *Vanderbilt J. Transnat'l L.* 1135, 1162 (2001); Burghard Piltz, *Internationales Kaufrecht*, 2nd ed. (Munich: C.H. Beck, 2008), paras. 1–36. Cf. also *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) stressing that "International Law ... is part of our law, and *must* be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination" (emphasis added).

[49] See Gordon, "Some Thoughts," 371.

Table 40.2. *CISG Cases Decided by the German Supreme Court*

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Cases		1			2	4	4	2	2	
Year	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Cases	2	2	1	3	1	1	2	1		2

statistical significance. The inclusion of cases in which the CISG is mentioned, but not applied, skewers the total count.

Second, as already outlined, the total number of published CISG decisions represents only a portion of such decisions due to the existence of unreported cases, especially of arbitral proceedings. Counting cases does not capture contracts covered by the CISG that did not result in legal disputes. Therefore, if there is a decrease in the number of cases it may conceivably be due to the fact that interpretative issues under the CISG have become established. In addition, in a given jurisdiction, the publication of lower court decisions depends on the novelty of the issues in the case. Thus, the publication rate is likely to decrease once the CISG loses its novelty in a court system. Germany has the highest number of reported cases (477 as of October 10, 2011), but recently lower court decisions have been published less frequently. This development should not be mistaken as a sign of the decreasing importance of the CISG in German court practice, as can be see in the consistent pattern of CISG cases decided by the German Federal Supreme Court (Bundesgerichtshof) (Table 40.2).[50]

Furthermore, the number of cases published across and between legal systems is uneven. Thus, a lower reporting rate in a jurisdiction cannot be equated to low practical use of the CISG.[51] Differences among the court systems and the case publication systems may in particular affect the number of available CISG decisions by lower courts, as a comparison between CISG case statistics for Austria and Germany shows. Although Austria boasts 79 CISG decisions by its Supreme Court (Oberster Gerichtshof) out of a total of 128 CISG decisions, the German *Bundesgerichtshof* has decided only 30 cases out of the total of 477 German CISG decisions.[52] In the end, the number of court decisions on the CISG therefore says little about the CISG's role in practice. Better and more comprehensive data on the CISG's practical use are needed.

b. *Assumed lack of CISG case law as excuse for recourse to UCC*

The reason behind some U.S. courts' ongoing reliance on the *Filanto* dictum (discussed earlier) becomes clear when viewed in the context in which the courts since *Delchi Carrier* have employed the dictum: That court, and many courts afterwards, used the "virtually no case law under the Convention" statement as an argumentative "door opener," and then added: "Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code (UCC) may also inform a court where the language of the

[50] The CISG entered into force for the Federal Republic of Germany on January 1, 1991.

[51] Cf. the calculation presented (albeit in a slightly different context) by Lisa Spagnolo, "A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)," 13 *Vindobona J. Int'l Comm. L. & Arb.* 135, 145 (2009).

[52] All case numbers as reported by the Albert H. Kritzer CISG Database on October 10, 2011.

relevant CISG provisions tracks that of the UCC. However, UCC case law 'is not per se applicable.'"[53] The assumed lack of CISG case law accordingly serves as an excuse for an interpretative recourse to UCC case law, an approach that has rightly been criticized by many authors for being incompatible with CISG Article 7(1).[54] No matter whether there is case law under the convention on a given subject or not, and whether the language of a relevant CISG provision "tracks" that of a domestic provision (and how this alleged "tracking" is to be determined), case law on domestic law may *never* inform a court when interpreting the CISG, neither "per se" nor otherwise.

The ongoing reliance on the *Filanto* dictum can therefore also be viewed as an indication of some U.S. courts' continuing lack of familiarity with the CISG. This explanation is in line with assessments by some legal authors, who as recently as 2008 suggested that a North Carolina superior court judge, "or even a federal district court judge for that matter," would have little or no experience with the CISG.[55] Other recent U.S. court decisions, however, increasingly indicate a more open-minded approach, as notably demonstrated by the decision in *David S. Taub v. Marchesi Di Barolo*. In these proceedings – which concerned the U.S. court's jurisdiction, and not a sales law matter as such – counsel for the Italian defendant Marchesi went on

> at some length to convince the Court that the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), and not New York law, will govern the parties' dispute. The apparent implication of this discussion is that the "foreign law" factor counsels in favor of deferring to the Italian court because this Court will have some difficulty in interpreting and applying the CISG. However, even if the Court assumes for the purposes of this motion that the CISG governs the instant dispute and further assumes that the CISG can be properly characterized as foreign law, Marchesi's argument is still unpersuasive. Federal courts, including this Court, have had little difficulty in interpreting and applying the CISG. [Case law citations omitted.] As such, the Court does not share Marchesi's apparent concern about the potential difficulties in applying the CISG.[56]

Cases such as Marchesi are therefore fortunate signs that courts in the U.S. are getting more and more accustomed to the convention. There is reason to hope that they may soon admit that there already *is* a significant amount of case law on the CISG (both domestic and foreign), making a recourse to UCC cases not only inappropriate – as it always has been – but simply unnecessary.

[53] *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2nd Cir. 1995), citing *Orbisphere Corp. v. U.S.*, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989). The now (in)famous reference to UCC case law has often been repeated by U.S. courts, most recently in *Dingxi Longhai Dairy, Ltd. v. Becwood Technology Group L.L.C.*, 635 F.3d 1106 (8th Cir. 2011).

[54] See Susanne Cook, "The U.N. Convention on Contracts for the International Sale of Goods: a Mandate to Abandon Legal Ethnocentricity," 16 *J. L. & Com.* 257 (1997); Joanne M. Darkey, "U.S. Court's Interpretation of Damage Provisions Under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity?," 15 J. *L. & Com.* 139 (1995).

[55] Alicia Jurney Whitlock and Boris S. Abbey, "Who's Afraid of the CISG? Why North Carolina Practitioners Should Learn a Thing or Two about the 1980 United Nations Convention on Contracts for the International Sale of Goods," 30 *Campbell L. Rev.* 275, 290 (2008).

[56] *David S. Taub et al. v. Marchesi Di Barolo S.p.A.*, December 10, 2009, 2009 U.S. Dist LEXIS 115565.

c. *CISG as preferable to foreign domestic sales law*

The increasing pro-CISG bias demonstrated by most courts when interpreting party agreements potentially aimed at excluding the CISG's application under Article 6 CISG can be explained by different factors. First, there are policy reasons. The court in *Travelers Property Casualty Company of America v. Saint-Gobain* reasoned that "an affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG,"[57] and another U.S. court in *St. Paul Guardian Insurance v. Neuromed* held that the contractual choice of the law of a CISG contracting state did not amount to an exclusion of the CISG. The court reasoned that "[t]o hold otherwise would undermine the objectives of the CISG."[58]

A second reason may be the courts' realization that the alternative to the CISG's application may not be the application of the *lex fori*, but the application of foreign domestic sales law. Peter Schlechtriem has explained this point as follows:

> When the great scholar John Honnold defended the CISG before the sub-committee of the United States Senate which was in charge of preparing the decision of the Senate on the CISG's ratification, he remarked something along the following lines: in evaluating the CISG, you should not compare it with the Uniform Commercial Code (UCC) and should not ask, whether it is better than or inferior to the UCC. Certainly, the UCC is better for American parties and their counsel and lawyers. But you should ask, whether the CISG is better and easier to apply than, for example, the sales law of Mongolia or China. For we cannot expect that the UCC will always apply to international sales and that foreign parties will always submit to American law.[59]

A practical illustration of the issue of applying foreign sales law was provided in *Italdecor v. Yiu's Industries (H.K.)*, which involved a claim by an Italian buyer against a seller from Hong Kong.[60] Although the Court of Appeal in Milan, applying Italian conflict of laws rules, came to the conclusion that the sales law of Hong Kong properly governed the buyer's claim, it chose to apply the CISG (as part of Italian law) because it "had not been able to ascertain" the content of Hong Kong law.[61] The courts' incentive to avoid the application of foreign law may therefore explain the rather strict standards often used in interpreting whether a choice-of-law clause works as an opting out of the CISG.

The explanation presented here explains why courts interpret choice-of-law clauses in favor of a *foreign* sales law in a particularly strict manner, although a similar incentive for the court would not exist where choice-of-law clause favors the sales law *of the forum*. The available CISG case law, however, shows no distinction between these two categories, which may mean that the strict interpretative standards for CISG "opt out" clauses, once

[57] *Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Ltd.*, January 31, 2007, 2007 WL 313591.

[58] *St. Paul Guardian Insurance Company and Travelers Insurance Company v. Neuromed Medical Systems & Support GmbH*, March 26, 2002, 2002 U.S. Dist. Lexis 5096 (S.D.N.Y.).

[59] Peter Schlechtriem, "Requirements of Application," 793.

[60] At the time the contract concerned had been entered into and performed (in 1990–1), Hong Kong was still a British crown colony, so that Article 1(1)(a) CISG did not apply. As to the dispute about Hong Kong's status under the CISG since July 1, 1997 (the date of the "hand-over" resulting in Hong Kong being part of the People's Republic of China), see Schroeter, "The Status of Hong Kong and Macao."

[61] *Italdecor s.a.s v. Yiu's Industries (H.K.) Limited*, Corte di Appello di Milano, March 20, 1998, *Diritto del commercio internazionale* 455 (1999).

developed, are now indiscriminately applied to all party agreements aimed at excluding the CISG.

In a 2010 decision by the German Federal Supreme Court,[62] counsel for both parties had agreed on "the application of German law to the current dispute" and had subsequently submitted their legal arguments based on the German Civil Code (BGB) and the German Commercial Code (HGB). Both the court of first instance and subsequently the Court of Appeals had decided the dispute applying these two sources of German law. The Supreme Court reversed and remanded the case, admonishing the Court of Appeals for having treated the agreement on "German law" as an exclusion of the CISG, and directing it to investigate whether the parties had really intended to choose the BGB and HGB. This is remarkable, as both counsels had explicitly agreed on the applicable law. In cases such as this, the court may be actively trying to protect the parties involved from their own counsels' tendency to exclude the CISG, which may or may not be in the clients' best interest.[63]

C. *Sellers, Buyers, and the CISG*

Although counsels' actions when representing their clients are legally those of the clients, this legal categorization is not helpful for the purposes of the present chapter, which investigates how and on what basis decisions affecting the CISG's application are reached. This part is based on the common sense assumption that the attorney, especially in drafting standard terms, is the decision maker and the client is not.[64]

1. Empirical Evidence

Empirical evidence on the knowledge and use of the CISG by merchants is limited. The Global Sales Law survey conducted in 2009 was the only one that surveyed companies. Based on responses from 60 companies,[65] the survey found that 45 percent of the businesses where somewhat familiar with the CISG. However, 63 percent of the businesses located in CISG contracting states were somewhat familiar with the CISG.[66] Other surveys asked practicing lawyers whether they had in the past excluded the CISG during contract drafting upon their clients' request, and 41.3 percent of the German lawyers,[67] 34.1 percent of the Austrian lawyers,[68] and 32.6 percent of the Swiss lawyers[69] answered in the affirmative. Another survey adopted the reverse approach by asking practicing lawyers whether they had excluded the CISG at the contract drafting stage because their clients' *business partner* insisted on the application of his or her national

[62] Bundesgerichtshof, May 11, 2010, *Internationales Handelsrecht* 216 (2010). See commentary Ulrich G. Schroeter, *Entscheidungen zum Wirtschaftsrecht* (2011), 149.

[63] See in more detail below.

[64] The latter is often not true when standard terms addressing the performance of contractual obligations are concerned, but choice-of-law clauses as well as arbitration and forum selection clauses are in practice often of little interest to the client himself.

[65] Schwenzer and Kee, "Global Sales Law," 156. The survey results published do not specify in which countries the responding businesses were based.

[66] Id., 159.

[67] Meyer, "UN-Kaufrecht in der deutschen Anwaltspraxis," 476.

[68] Meyer, "UN-Kaufrecht in der österreichischen Anwaltspraxis," 796.

[69] Meyer, "UN-Kaufrecht in der schweizerischen Anwaltspraxis," 426.

law – 39.4 percent of the German, 37 percent of the Chinese, and 27.1 percent of U.S. practitioners answered in the affirmative.[70]

Another source of evidence of the merchant community's approach toward the CISG is found in the standard contract terms published by general business associations, such as the German Chambers of Industry and Commerce (DIHK). The standard terms of business associations are written from a broader perspective than those used by individual companies.[71] This justifies the assumption that choices made in their standard contracts and comparable documents are generally reflective of the business community's interest and unaffected by interests of a particular drafting attorney.[72] Neither the ICC Model International Sales Contract for Manufactured Goods[73] nor the DIHK Model Sales Contract[74] excludes the application of the CISG. Moreover, these standard forms were developed with the CISG's rules in mind. However, model contracts designed for use in particular trade sectors often include a clause excluding the CISG's application in favor of a domestic legal system (usually English law).

Anecdotal evidence on contracting parties' opinions about the CISG primarily exists in form of individually drafted contracts addressing the application (or non-application) of the CISG. Cases adjudicated by European courts surprisingly often involve international sales contracts that explicitly call for the application of the CISG.[75] It is also common that explicit agreements between businesses from the People's Republic of China and the European Union expressly choose the CISG as applicable law.

2. Evidence Explained

The evidence does not support the conclusion that the CISG is shunned or even rejected by merchants. Instead, businesspersons seem more open to the CISG's use than their legal advisers. The degree of familiarity of the CISG among merchants (63%) may be around the rate of familiarity with their own domestic sales law.

In the rare situations in which merchants themselves are personally deciding upon the law applicable to their contracts – when drafting individual contracts, or when developing model contracts through their representatives in business associations – there does not seem to be a strict preference in favor of "home law." The CISG is seen as an acceptable compromise law since it is viewed as a "neutral set of rules."[76]

[70] Koehler and Guo, "Acceptance of the Unified Sales Law," 50. Yet other U.S. attorneys reported no difficulties in convincing the opposing party to opt out of the CISG during negotiations; cf. Philippopoulos, "Awareness of the CISG," Article 4.

[71] Cf. Article 1(2) Constitution of the International Chamber of Commerce (June 2011).

[72] Cf. Berger, *Creeping Codification*, 108–10.

[73] The ICC Model International Sales Contract – Manufactured goods intended for resale, ICC Publications No 556 (1997). Cf. Kröll et al., "Introduction to the CISG," para. 56, who refer to the ICC Model Sales Contract as "the most prominent example" for contract forms developed on the basis of the CISG.

[74] Deutscher Industrie- und Handelskammertag, Schuldrechtsreform – Auswirkungen für den Außenhandel 24 (2003); cf. Rolf Herber, Editorial, *Internationales Handelsrecht* 1 (2002).

[75] See Oberlandesgericht Koblenz, April 22, 2010, *Internationales Handelsrecht* 255 (2010); Oberlandesgericht Saarbrücken, May 30, 2011, *Neue Juristische Online-Zeitung* 1363 (2011).

[76] The advantage of the CISG being a "neutral law" was reported by 33.8% among the German lawyers, 21.6% among the Austrian lawyers, and 21.1% among the Swiss lawyers; see Meyer, "UN-Kaufrecht in der deutschen Anwaltspraxis," 480; Meyer, "UN-Kaufrecht in der österreichischen Anwaltspraxis," 798; and Meyer, "UN-Kaufrecht in der schweizerischen Anwaltspraxis," 427.

D. *Counsels' Approach to the CISG*

In commercial practice, the law applicable to the contract will, in the vast majority of cases, be a matter handled by legal counsel, either during contract negotiations, during the drafting of standard terms, or during legal proceedings in front of courts or arbitral tribunals. The approach of counsel toward the CISG is accordingly the most important influence on the use of the CISG in international sales transactions. It is therefore no surprise that most of the empirical surveys dealing with the CISG have primarily targeted practicing lawyers.

1. Empirical Evidence

When asked about their awareness of the CISG,[77] the rate of awareness was at 92.3 percent for Swiss practitioners,[78] but it was only 30 percent for practicing lawyers in the United States.[79] In the Global Sales Law survey conducted in 2009, on the contrary, 78 percent of the lawyers reported being familiar or somewhat familiar with the CISG[80] – a promising tendency, although all numbers mentioned have to be read with the knowledge that the practitioners who responded were specialized in international trade law or neighboring fields, which means that the average CISG awareness among all lawyers is likely to be much lower.[81]

A point addressed by almost every CISG survey[82] is the degree to which counsel are preponderantly excluding the CISG's applicability in contracts or standard terms drafted for their clients. The "opting-out quota" reported varied among jurisdictions, as well as between different surveys covering the same jurisdiction. In alphabetical order, the empirical results are: Austria: 55.2 percent;[83] China: 44.4 percent;[84] Germany: 42.17 percent;[85] Switzerland: 40.8 percent[86] and 62.1 percent;[87] and the United States: 70.8 percent,[88] 55 percent (in 2006–7),[89] and 54 percent (in 2009).[90] The Global Sales Law survey (from 2009) again provides the most recent statistics, which are also the most CISG friendly: 13 percent of lawyers always and 32 percent sometimes exclude the CISG, but the majority (55%) rarely or never does.[91]

[77] Spagnolo, "A Glimpse through the Kaleidoscope," 137–8, helpfully lists numerous anecdotal descriptions of the CISG familiarity among attorneys from a range of jurisdictions.

[78] Widmer and Hachem, "Switzerland," 284. The number mentioned includes the 55.29% who reported a "basic" knowledge and the 37.05% who claimed "good" knowledge of the CISG.

[79] Fitzgerald, "International Contracting Practices Survey Project," 7; Gordon, "Some Thoughts," 368.

[80] Schwenzer and Kee, "Global Sales Law," 159.

[81] William S. Dodge, "Teaching the CISG in Contracts," 50 *J. Legal Educ.* 72, 75 (March 2000); see also Koehler and Guo, "Acceptance of the Unified Sales Law," 57.

[82] An exception was the 1997 Florida survey by Gordon, "Some Thoughts."

[83] Meyer, "UN-Kaufrecht in der österreichischen Anwaltspraxis," 795.

[84] Koehler & Guo, "Acceptance of the Unified Sales Law," 48.

[85] Meyer, "UN-Kaufrecht in der deutschen Anwaltspraxis," 471.

[86] Meyer, "UN-Kaufrecht in der schweizerischen Anwaltspraxis," 425.

[87] Widmer and Hachem, "Switzerland," 285.

[88] Koehler and Guo, "Acceptance of the Unified Sales Law," 48.

[89] Fitzgerald, "International Contracting Practices Survey Project,"14.

[90] Schwenzer and Kee, "Global Sales Law," 160.

[91] Id.

Anecdotally, the not infrequent claim by some attorneys to "regularly exclude" the CISG, however, is not necessarily a reflection of the CISG's real importance in practice.[92] This is due to the fact that practitioners with a preference for CISG exclusion are often practitioners with little or no knowledge of CISG's rules – an unfortunate (and risky) combination, which frequently results in the attempted exclusion not being recognized under CISG Article 6.

a. *Excluding the CISG at the contract drafting stage*

A decision by counsel to exclude the CISG's application in his or her client's contracts or standard terms may not be enough to meet the standard imposed by some courts for Article 6 exclusion. The exclusion clause (which usually forms part of a choice-of-law clause) must not only comply with Article 6, but also needs to be included in the contract in accordance with the requirements of Articles 14–24 CISG.[93] Thus, counsel attempting to exclude the CISG needs to be aware of the extensive CISG case law on both exclusion clauses and the incorporation of an exclusion clause as standard contract term.[94]

The careful drafting of contractual CISG exclusion clauses is therefore of paramount importance. A case in point focused on the use of a comma in a choice-of-law clause. The Austrian Supreme Court interpreted the following clause: "All our disputes are exclusively subject to Austrian law, excluding private international law, and the CISG."[95] Whether the CISG had been excluded by this clause was not clear, as the clause could be read in two different ways: (1) as an exclusion of merely private international law (because the phrase "and the CISG" had been separated by a comma), or (2) as an exclusion of private international law and the CISG (which required disregarding the comma). The Austrian Supreme Court adopted the latter reading, but acknowledged that "from a strict grammatical and lexical point of view the 'excluding private international law' within the standard terms can be seen as a mere insertion and thus even an explicit agreement on the application of the CISG due to the allegedly mistakenly entered comma."[96]

b. *Excluding the CISG during court proceedings*

A phenomenon not infrequently encountered during the first years of the CISG was attempts by counsel to exclude the CISG during court proceedings, usually after first finding out about its existence. Although opposing counsel may sometimes even be willing to agree to the CISG's exclusion, many courts, as noted previously, do not look favorably on counsel attempting to avoid the CISG. Any CISG exclusion at the trial stage furthermore triggers a significant professional liability risk, to be discussed in more detail in the following.

[92] Walter A. Stoffel, "20 Jahre Wiener Kaufrecht: Entsteht ein CISG-geprägtes Muster des transnationalen rechtlichen Diskurses?," *Zeitschrift für Europarecht* 2, 3 (2002).

[93] Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, para. 24.

[94] See Schroeter in Schlechtriem and Schwenzer, *Commentary*, Article 14, paras. 32–76.

[95] Oberster Gerichtshof, April 2, 2009, *Internationales Handelsrecht* 246 (2009). The original clause in German: "Für alle unsere Streitigkeiten gilt ausschließlich österreichisches Recht, ausgenommen IPR, und UN-Kaufrecht."

[96] Oberster Gerichtshof, April 2, 2009, *Internationales Handelsrecht* 246, 247 (2009).

2. Evidence Explained

a. *Reasons for contractual exclusion of the CISG*

The early surveys showed that the CISG "is generally not widely known." In contrast, unfamiliarity was a point only rarely cited in the larger Global Sales Law survey in 2009.[97] The uncertainty in the CISG's application (due to vague legal wording and a lack of uniform interpretation) was given as a reason by 58.1 percent of the practitioners from Austria,[98] as well as 48.1 percent of the Swiss[99] and 43.2 percent of the German practitioners.[100] In a subsequent survey, the lack of sufficient CISG case law was raised as an issue by fewer attorneys – 33.3 percent in the U.S., 29.6 percent in China, and just 6.1 percent in Germany.[101]

Among those attorneys who did *not* advocate a contractual exclusion of the CISG, it was frequently argued that the CISG is easier to apply than a combination of conflict of laws rules and foreign sales laws. This advantage of the CISG was mentioned by 25.3 percent of Austrian attorneys,[102] 35 percent of the German attorneys as a whole, and 69.2 percent of international transactional attorneys in Germany.[103]

b. *Counsels' preferred ignorance of the CISG*

There is an understandable incentive for counsel avoid the CISG, as studying the CISG – a sales law with 101 articles and an ever-increasing body of international case law – requires a substantial investment of time and money.[104] Therefore, it seems that the driving force is not the parties' skepticism towards or rejection of the CISG, but rather some counsels' unwillingness to invest the time and effort necessary to learn the CISG.

III. Professional Liability

The indications that some attorneys exclude the CISG in their own interest, namely, in order to escape the need to deal with its unfamiliar rules, raises the question of professional liability. The relationship between client and counsel is a matter governed by domestic law, and the legal standard are accordingly not internationally uniform.[105] The following discussion of counsels' professional liability in CISG cases focuses on German law[106] and U.S. law.[107]

[97] Schwenzer and Kee, "Global Sales Law," 160.

[98] Meyer, "UN-Kaufrecht in der österreichischen Anwaltspraxis," 796.

[99] Meyer, "UN-Kaufrecht in der schweizerischen Anwaltspraxis," 426.

[100] Meyer, "UN-Kaufrecht in der deutschen Anwaltspraxis," 474.

[101] Koehler and Guo, "Acceptance of the Unified Sales Law," 50.

[102] Meyer, "UN-Kaufrecht in der österreichischen Anwaltspraxis," 797.

[103] Meyer, "UN-Kaufrecht in der deutschen Anwaltspraxis," 479.

[104] Cf. Clayton P. Gillette and Robert E. Scott, "The Political Economy of International Sales Law," 25 *Int'l Rev. L. & Econ.* 446, 478 (2005).

[105] For an overview of attorney liability in fourteen jurisdictions, see *Professional Liability of Lawyers* (ed. Dennis Campbell and Christian Campbell) (London: Lloyd's of London Press, 1995).

[106] See Thomas Lindemann, "Germany," in id., 113–126.

[107] See Michael R. Goldman and Scott A. Semenek, "United States," id., 263–305; J. Benjamin Lambert, "Professional Liability and International Lawyering: An Overview," 77 *Defense Counsel J.* 69, 73 (2010).

A. *Ignoring the CISG*

As a starting point, it is necessary to clarify whether it is legal or unethical for counsel to simply ignore the CISG. Not surprisingly, there is widespread agreement among authors from both the U.S.[108] and Germany[109] that attorneys who accept cases involving an international sales contract potentially governed by the CISG are under a legal obligation to know the CISG.

In the United States, the duty of competence is found in Rule 1.1 of the American Bar Association's Model Rules of Professional Conduct.[110] Rule 1.1 states that an attorney has the duty to possess "the legal knowledge, skill, thoroughness and preparation reasonably necessary" for competent representation. In Germany, the obligation to know the law is regarded as an implied term of the contract between lawyer and client, requiring the lawyer to know *all* domestic laws that could potentially be relevant to the client's case.[111] There are no exceptions for laws that are rarely applied in practice or beyond the experience of the attorney concerned.[112] Attorneys who accept engagements with cross-border implications are under an implied contractual obligation to know the CISG as thoroughly as other German laws and regulations.[113]

B. *The CISG as Domestic (Not Foreign) Law*

Counsel's obligation to know *foreign* law, on the contrary, is subject to less stringent conditions in some jurisdictions.[114] In the United States, however, case law has stressed

[108] Ronald A. Brand, "Professional Responsibility in a Transnational Transactions Practice," 17 *J. L. & Com.* 301, 336–7 (1998); Brand, "Uni-State Lawyers and Multinational Practice," 1163; Dodge, "Teaching the CISG in Contracts," 73, n. 5; Fitzgerald, "The International Contracting Practices Survey Project," 32; Tom McNamara, "U.N. Sale of Goods Convention: Finally Coming of Age?," 32 *Colorado Lawyer* 11, 21 (February 2003); Joseph F. Morrissey and Jack M. Graves, *International Sales Law and Arbitration: Problems, Cases and Commentary* (Alphen aan den Rijn: Kluwer Law International, 2008), 48.

[109] Martin Henssler, "Haftungsrisiken anwaltlicher Tätigkeit," *Juristenzeitung* 178, 185 (1994); André Janssen, "Ausschluss des UN-Kaufrechts als Haftungsfalle," *Außenwirtschaftliche Praxis* 347 (2003); Christoph Louven, "Die Haftung des deutschen Rechtsanwalts im internationalen Mandat," *Versicherungsrecht* 1050, 1051 (1997); Gottfried Raiser, "Die Haftung des deutschen Rechtsanwalts bei grenzüberschreitender Tätigkeit," *Neue Juristische Wochenschrift* 2049, 2051 (1991); Franz-Josef Rinsche, *Die Haftung des Rechtsanwalts und des Notars*, 6th ed. (Cologne: Heymann,1998), 42; Ulrich G. Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen* (Munich: Sellier European Law Publishers, 2005), 521; Dimitri Slobodenjuk, "Vertragliche Anwaltspflichten – überspanntes Haftungsrisiko?," *Neue Juristische Wochenschrift* 113, 115 (2006); Horst Zugehör, *Handbuch der Anwaltshaftung* (Herne: ZAP-Verlag, 1999), para. 570; similarly, with respect to the 1964 Hague Sales Laws, Franz Tepper, "Anwaltshaftung und EuGVÜ," *Praxis des Internationalen Privat- und Verfahrensrechts* 98, 99 (1991).

[110] Brand, "Professional Responsibility," 337; Fitzgerald, "The International Contracting Practices Survey Project," 32; Morrissey and Graves, *International Sales Law and Arbitration*, 48.

[111] Bundesgerichtshof, April 20, 1959, *Versicherungsrecht* 638 (1959).

[112] Bundesgerichtshof, September 22, 2005, *Neue Juristische Wochenschrift* 501, 502 (2006), stressing counsel's obligation to know one Verordnung über die Herstellung und den Vertrieb von Medaillen und Marken of December 13, 1974, in a case involving the sale of metal chips.

[113] Joachim Gruber, "Anwaltshaftung bei grenzüberschreitenden Sachverhalten," *Monatsschrift für Deutsches Recht* 1399, 1400 (1998); Henssler, "Haftungsrisiken anwaltlicher Tätigkeit," 185; Louven, "Die Haftung," 1052; Peter Mankowski, "Anwaltsvertrag," in *Internationales Vertragsrecht*, 6th ed. (ed. C. Reithmann and D. Martiny) (Cologne: Verlag Dr. Otto Schmidt, 2004), para. 2166; Raiser, "Die Haftung," 2051.

[114] The early U.S. decision in *Fenaille & Despeaux v. Coudert*, 44 N.J.L. 286 (1882), is often said to be an example; cf. Mark Weston Janis, "The Lawyer's Responsibility for Foreign Law and Foreign Lawyers," 16 *Int'l Lawyer* 693, 694 (1982): "*Fenaille* might be said to represent the 'ignorance is bliss' theory of responsibility for foreign law."

that counsel "are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State."[115] German courts have adopted a similar approach, expecting an attorney who accepts a case involving the application of foreign law to obtain the necessary knowledge about that law.[116]

It is even more clear that the attorney's knowledge base must include the CISG because it is not foreign law, but part of domestic law. Despite its character as an international treaty, it becomes part of the domestic legal order of every CISG contracting state once it has entered into force.

In 1989, the Oberlandesgericht Koblenz (a German court of appeals) decided a professional liability case involving the 1964 Hague Sales Laws, the predecessors to the CISG. In this case, a German seller who was party to an international sales contract with a Dutch buyer sued his attorney for professional malpractice, because the attorney had unsuccessfully filed a claim for the outstanding contract price relying on the German Civil Code. Before the attorney had discovered that uniform law applied to the contract, the buyer was declared insolvent.[117] The court held that knowledge of the 1964 Hague Sales Laws (ULF and ULIS) and the 1968 Brussels Convention on Jurisdiction[118] could "without any doubt" be expected from the German attorney.[119] Ignorance of the CISG is accordingly not an option for counsel, as it constitutes a violation of her or his legal obligation to know the law.

C. *Exclusion of the CISG as Professional Malpractice*

Sheer unawareness of the CISG qualifies as professional malpractice,[120] but is not the only form of malpractice in CISG cases, such as in the decision to exclude the CISG. Any recommendation to exclude the CISG's application in a contract must be made in the client's best interest.[121] In this respect, some of the arguments routinely advanced by members of the legal profession – that the CISG's interpretation is uncertain, the body

[115] *In re Roel*, July 3, 1957, 3 N.Y.2d 224, 232 (1957) relying on *Degen v. Steinbrink*, July 14, 1922, 195 N.Y.S. 8110 (App. Div. 1922); *Rekeweg v. Federal Mutual Insurance Co.*, February 24, 1961, 27 F.R.D. 431 (N.D. Ind. 1961); Robert W. Hillman, "Providing Effective Legal Representation in International Business Transactions," 19 *Int'l Lawyer* 3, 12 (1985); Janis, "The Lawyer's Responsibility," 696.

[116] See Bundesgerichtshof, February 22, 1972, *Neue Juristische Wochenschrift* 1044 (1972): knowledge of Portuguese law; Oberlandesgericht Hamm, March 14, 1995, *Deutsche Zeitschrift für Wirtschaftsrecht* 460 (1997) (knowledge of Italian law); Friedrich Graf von Westphalen, "Einige international-rechtliche Aspekte bei grenzüberschreitender Tätigkeit von Anwälten," in *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer* (ed. R.A. Schütze) (Munich: C.H. Beck, 2002), 1485, 1488–90.

[117] Counsel could have successfully based the German court's jurisdiction for the contract price claim on Article 5 No. 1 Brussels Convention in conjunction with Article 59(1) ULIS, but was apparently unaware of both legal provisions.

[118] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968.

[119] Oberlandesgericht Koblenz, June 9, 1989, *Neue Juristische Wochenschrift* 2699 (1989).

[120] Brand, "Professional Responsibility," 336–7; Dodge, "Teaching the CISG in Contracts," 73, n. 5; Fitzgerald, "International Contracting Practices Survey Project," 32; Spagnolo, "A Glimpse through the Kaleidoscope," 139.

[121] Fitzgerald, "International Contracting Practices Survey Project,"32; Spagnolo, "A Glimpse through the Kaleidoscope," 139. On the attorney's duty of loyalty under U.S. law, see Lambert, "Professional Liability," 81. See also Klaus Esser, "Anwalt, Mandant oder Formularbuch – wer gestaltet den Vertrag?," in *Gedächtnisschrift für Michael Gruson* (ed. S. Hutter and T. Baums) (Berlin: De Gruyter Recht, 2009), 125, 126–7.

of CISG case law is small, the courts' experience insufficient – by now ring increasingly hollow. There is a body of more than 2,900 easily accessible cases, along with a deep secondary literature including excellent, comprehensive commentaries; practice-focused materials; and a well-developed body of law journal articles.

Accordingly, more substantive reasons are required in order to support the CISG's contractual exclusion. Put simply, the attorney must obtain a competent level of skill and knowledge of the CISG and each of its substantive provisions before opting out. This knowledge allows the drafting attorney to see if there are CISG rules that favor the best interests of the client. Alternatively, the attorney should consider analyzing whether the CISG provides a preferential choice of law if customized – instead of excluding the CISG as a whole, tailoring some of its rules (under Article 6) on behalf of his or her client. It is therefore submitted that a presumption speaks in favor of the CISG providing the preferable set of rules for cross-border transactions, unless specific circumstances of a case indicate the opposite. Attorneys who advise their clients to contractually exclude the CISG's application in its entirety should accordingly bear the burden of explaining and proving the reasons for doing so. In situations in which a contractual exclusion of the CISG is in the client's best interest, counsel needs to draft a contract clause that properly excludes CISG. In situations in which an attempted CISG exclusion fails, counsel furthermore faces the unfortunate situation of having thereby provided evidence of his or her insufficient knowledge of the CISG's rules, which may be viewed as an indication that he or she cannot possibly have advised the client properly about the advantages and disadvantages of the CISG.

The situation is even more dangerous for counsel when he or she first becomes aware of the applicability of the CISG during litigation or arbitration proceedings. At this stage, it is almost impossible to imagine an exclusion scenario that does not involve professional malpractice from at least one of the parties' attorneys. This situation is clear when counsel for one or both parties exclusively presents arguments based on domestic sales law because he or she is unaware of the convention's applicability. As already discussed above, the prevailing opinion among international courts does not regard such behavior as an exclusion of the CISG, but it obviously constitutes a breach of counsel's obligation to know the Sales Convention and therefore renders him or her liable for the client's loss of time and for legal expenses incurred. In case both counsel know about the CISG's applicability and still decide to agree on its exclusion, such a decision will almost necessarily violate the interest of one of the parties because the change in the applicable law with usually affect the outcome of the case, thereby improving one party's position and worsening that of the other party. As the facts of the case are at this stage already clear, counsel for the latter party cannot agree to the convention's exclusion without violating his or her client's interest, thereby committing malpractice. If, on the contrary, an exclusion of the CISG should be without any effect for the outcome of the case, such exclusion is in neither party's interest, as they both can expect their counsel to represent the respective positions based on the convention's rules, which both counsel are under an obligation to know.

D. *Failure to Plead Foreign Persuasive Precedents as Professional Malpractice*

A final question concerns counsel's obligation to know the available case law on the CISG and to use it to his or her client's advantage. This is most obvious in the area of common

law, where case law is the primary source of law. As counsel's duty of competence covers the CISG as much as it covers purely domestic areas of law, counsel's knowledge also of CISG case law is required.[122]

Article 7(1) CISG requires that "regard is to be had" to the CISG's international character when interpreting it. This requirement is commonly read as calling for the evaluation not only of domestic case law on the CISG, but also of CISG cases from other jurisdictions.[123] Foreign CISG case law, although not binding precedent, can be used as persuasive precedent, especially in cases of well-reasoned foreign decisions.[124] It seems both necessary and appropriate to require knowledge of foreign CISG case law,[125] but only as far as the foreign case law is reasonably accessible to counsel and has been translated into the attorney's language.

Whether counsel is obliged to actively plead foreign persuasive precedents that are favorable to his or her client's case, or whether he or she may rely on the court to discover and evaluate foreign case law on the CISG, essentially depends on the relationship between court and counsel under the applicable procedural law of the forum. The question becomes relevant in practice whenever a foreign CISG precedent would have served the client's interest better than either a domestic precedent or the interpretation reached by the court without knowledge of the foreign cases. The German approach makes it the attorneys' professional liability to inform the court of the relevant law.[126] According to this standard, counsel's failure to be aware of domestic and foreign CISG case law relating to issues of the case that benefits the client qualifies as professional malpractice.

IV. Conclusion

In summarizing the empirical and anecdotal evidence on the CISG's importance in practice, some general trends can be identified. The claim that the CISG is "generally being excluded" in practice, although still often heard and read, is not supported by empirical evidence. The courts in many CISG contracting states are increasingly adopting a positive position toward the CISG (pro-CISG bias). Its practical effect is that agreements between the parties to exclude the CISG under Article 6 CISG are subjected to strict standards, therefore frequently failing to effectively exclude the CISG's application. The approach of buyers and sellers toward the CISG is more difficult to determine,

[122] Brand, "Uni-State Lawyers and Multinational Practice," 1163; Harry M. Flechtner, "Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations," 15 *J. L. & Com.* 127, 132 (1995).

[123] Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium," 24 *J. L. & Com.* 159, 116 (2005); Schwenzer and Hachem in Schlechtriem and Schwenzer, *Commentary*, Article 7, para. 15.

[124] Tribunale di Vigevano, July 12, 2000, *Giurisprudenza italiana* 280 (2000); Gary F. Bell, "Uniformity through Persuasive International Authorities: Does Stare Decisis Really Hinder the Uniform Interpretation of the CISG?," in *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday* (ed. C.B. Andersen and U.G. Schroeter) (London: Wildy, Simmonds & Hill, 2008), 35, 47; Pilar Perales Viscasillas in Kröll et al., *UN Convention*, Article 7, Commentary at para. 41.

[125] Brand, "Uni-State Lawyers and Multinational Practice," 1163.

[126] Bundesgerichtshof, June 25, 1974, *Neue Juristische Wochenschrift* 1865, 1866 (1974); see also Klaus Fahrendorf, "Vertragliche Anwaltspflichten – überspanntes Haftungsrisiko?," *Neue Juristische Wochenschrift* 1911, 1914–15 (2006); Slobodenjuk, "Vertragliche Anwaltspflichten," 117.

as empirical and anecdotal evidence is hard to find. The evidence that exists indicates openness toward the CISG as applicable law. The most anti-CISG bias comes from practicing attorneys unwilling to expend the investment of time and money necessary to familiarize themselves with its rules. An attorney's ignorance of the CISG exposes him or her to the risks of professional liability, given the deep and easily accessible body of case law and scholarship on the CISG.

41 The CISG and English Sales Law: An Unfair Competition

Qi Zhou

I. Introduction

It has been more than thirty years since the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG). It is also widely claimed in academic literature that the CISG is one of the most successful harmonization projects in the field of international commercial law.[1] As of 2012, the CISG has been adopted by eighty countries.[2] It is increasingly being applied both by national courts and by arbitration tribunals.[3]

Despite its widespread adoption, there are a number of shortcomings to its claim of success. First, some major trading countries, such as the United Kingdom and India, have not ratified the CISG. Ironically, the United Kingdom played an influential role in drafting the CISG, but subsequently has refused to ratify it as UK law. British politicians and lawyers are worried that ratification of the CISG would undermine the dominant position of English commercial law in international trade.[4] The mainstream scholarly

[1] Joseph M. Lookofsky, "Loose Ends and Contorts in International Sales: Problems in the Harmonisation of Private Law Rules," 39 *Am. J. Comp. L.* 403 (1991); Kazuaki Sono, "The Rise of Anational Contract Law in the Age of Globalisation," 75 *Tulane L. Rev.* 1185 (2001); Stacey A. Davis, "Unifying the Final Frontier: Space Industry Financing Reform," 106 *Com. L. J.* 455, 477 (2001); Michael Joachim Bonell, "Do We Need a Global Commercial Code?," 106 *Dick. L. Rev.* 87, 88 (2001); Petar Sarcevic, "The CISG and Regional Unification," in *The 1980 Uniform Sale Law. Old Issues Revisited in the Light of Recent Experiences* (ed. Franco Ferrari) (Sellier European Law Publisher, 2001), 3, 15; Sandeep Gopalan, "The Creation of International Commercial Law: Sovereignty Felled?," 5 *San Diego Int'l L. J.* 267, 289 (2004).

[2] Jon C. Kleefeld, "Rethinking 'Like a lawyer': An Instrumentalist's Proposal for First-Year Curriculum Reform," 53 *J. Leg. Ed.* 254, 262 (2003).

[3] See Larry A. DiMatteo et al., *International Sale Law: A Critical Analysis of CISG Jurisprudence* (Cambridge: Cambridge University Press, 2001); Bruno Zeller, *CISG and the Unification of International Trade Law* (Sydney: Cavendish, 2009); Peter Huber and Alastair Mullis, *CISG: A New Textbook for Students and Practitioners* (Berlin: Sellier European Law Publishers, 2007); *Commentary on the UN Convention on the International Sale of Goods* (CISG), 3rd ed. (ed. Peter Schlechtriem and Ingeborg Schwenzer) (Oxford: Oxford University Press, 2010).

[4] Sally Moss, "Why the United Kingdom Has Not Ratified the CISG," 2 *J. of L. & Commercex* 483, (2005–6); Angele Fort, "The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom," 26 *Baltimore. L. Rev.* 51 (1997); Nathalie Hofmann, "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonisation of Contract Law in Europe," 22 *Pace Int'l L. Rev.* 141 (2010); Barry Nicholas, "The Vienna Convention on Contracts for the International Sale of Goods," 105 *L. Quarterly Rev.* 201 (1989); Robert G. Lee, "The UN Convention on Contracts for the International Sale of Goods: OK for the UK?," *J. Bus. L.* 131 (1993).

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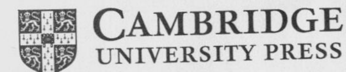

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> *Camilla Andersen*

"Society" of Scholars

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