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

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

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6 For an up-dated list of contracting States, see the UNCITRAL website at <http://www.uncitral.org>.
7 In Japan, the CISG will enter into force on 1st August 2009.
remarkable, since the CISG - supposedly - governs two-thirds of world trade, if not more? Or is it the fact that the CISG is increasingly being applied both by state courts and arbitral tribunals?

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

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12 Baretić/Nikić, Croatia, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 93, 93.

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


particularly those who deal with these kinds of cases, but [. . .] there are many who are not.\footnote{16 Fresnedo de Aguirre, Uruguay, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 333, 334.}

The reasons for this lack of awareness are manifold; one obvious one relates to other—generally purely domestic—issues being more pressing and, thus, requiring more attention. This certainly is true as regards Canada, where the “arrival of the CISG [. . .] coincided with a number of significant developments which served to marginalize its eventual role in Canadian law [. . .]. Thus, the CISG did not enjoy an auspicious beginning in Canada.”\footnote{17 McEvoy, Canada, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 33, 37.}

On the other hand, no negative inference should be drawn from the fact that more than 130 countries have not become contracting States, as the reasons do not necessarily arise from opposition to the CISG. Some countries simply favour a more regional—rather than the CISG’s global—approach to the unification of sales law,\footnote{18 For papers regarding the relationship between the CISG and regional unification efforts in the area of sales law, see, e.g., Ferrari, Universal and Regional Sales Law: Can they coexist?, Uniform Law Review 177 ff. (2003); Sarcevic, The CISG and Regional Unification, in: Ferrari (ed.), The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences, 2003, p. 3 ff.} as they believe that this will benefit intra-regional commerce more.\footnote{19 On regional versus global harmonization efforts in the area of private law in general, see Basedow, Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report, Uniform Law Review 2003, 31 ff.} This is true, for instance, as regards the member States of the Organization for the Harmonization of Business Law in Africa,\footnote{20 For an analysis of the sales law elaborated by the Organization for the Harmonization of Business Law in Africa, see Hagge, Das einheitliche Kaufrecht der OHADA (Organisation pour l’Harmonisation en Afrique du Droit des Affaires), 2004.} OHADA, only two member States of which—Gabon and Guinea—ratified the CISG.\footnote{21 For papers comparing the sales law of the Organization for the Harmonization of Business Law in Africa with the CISG; see, e.g., Ferrari, International sales law in the light of the OHBLA Uniform Act relating to general commercial law and the 1980 Vienna Sales Convention, International Business Law Journal 2001, 599 ff.; Schroeter, Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht, Recht in Afrika 2001, 163 ff.}

Other countries, such as the United Kingdom,\footnote{22 For papers on the reasons for the UK’s lack of ratification of the CISG; see, e.g., Forte, The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom, 26 University of Baltimore Law Review 51 ff. (1997); Lee, The UN Convention on Contracts for the International Sale of Goods: OK for the UK?, Journal of Business Law 131 ff. (1993); Moss, Why the United Kingdom Has Not Ratified the CISG, 25 Journal of Law and Commerce 483 ff. (2006); Nicholas, The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?, 1993.} have not yet agreed to the CISG simply due to lack of political momentum. “With no actual opposition, there is no battle to fight, no persuasion to make. The UK[, for instance], is
happy, in principle, to embrace the CISG. It is where the decision requires action that the lethargic stumbling block is found. The decision to implement may well be made, but there is not sufficient interest to take this decision forward, there is no momentum behind it.” 23 In yet other countries, the CISG has not yet been ratified because the legislature has had much more pressing issues to address, a reason not unrelated to the one just mentioned. In Japan, for instance, “[a]fter the burst of so-called bubble economy [ , the] Ministry of Justice became overcharged with urgent [matters], such as fundamental reforms of insolvency law, security law, corporate law, etc., to cope with the critical economic situation.” 24 Thus, it was impossible to devote any energy to the ratification of the CISG. “However, things have changed. Most of the urgent legislative tasks have been fulfilled so that the Ministry of Justice could now put sufficient energy into the accession of CISG” 25; this eventually led to Japan’s accession of the CISG on 1st July 2008. In other countries, the lack of ratification simply cannot be justified. This is true, for instance, of Brazil, as evidenced by a letter from the Brazilian Ministry of Foreign Affairs where it is stated that “there are no substantial reasons that justify Brazil’s non adhesion to the CISG.” 26 Similarly, there appears to be no valid reason for Venezuela not to adhere to the CISG either, since the CISG appears to be perfectly in line with Venezuelan domestic law.27

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

21 Andersen, supra note 9, at 311.
23 Id. at 226.
24 Id. at 9.
25 Id. at 9.
The attention devoted to the CISG both by state courts and arbitral tribunals appears to be a better measure of the CISG’s success. Still, this is


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


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


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

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

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40 Magnus, 25 Jahre UN-Kaufrecht, infra note 203, at 105; Ragno, Convenzione di Vienna e diritto europeo, 2008, p. 233 and 259.
41 For yet another measure of the CISG’s success, see, e.g., Gillette/Scott, supra note 38, at 447, where the authors suggest that the success is to be measured on the basis of whether the rules of the CISG “do for the parties what the parties cannot as easily do for themselves.”
CISG’S IMPACT ON PRACTICING LAWYERS

1. Awareness of the CISG by practicing lawyers

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

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

42 See supra the text accompanying notes 13-15.
43 Zervogianni, supra note 13, at 166.
44 Shalev, supra note 14, at 184.
45 Butler, supra note 15, at 252.
46 Torsello, supra note 35, at 191.
47 For a similar conclusion, see Shalev, supra note 14, at 184, stating - as regards the situation in Israel - that “[n]ot many lawyers are aware of the CISG, and therefore it has no impact on the way they draft their briefs and memoranda or in the way they solve domestic disputes”; also Zervogianni, supra note 13, at 166, where the author states - in relation to the Greek situation - that “[a]s a consequence [of the weak awareness the] CISG cannot be expected to have had considerable (if any) impact neither on the contents of standard contracts forms, nor on the drafting of briefs and memoranda.”
48 Noodt Taquela, supra note 10, at 3.
49 Lookofsky, Denmark, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 119.
50 See C. Witz, France, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 129, 130.
51 Ibid.
52 See M.F. Köhler, Das UN-Kaufrecht (CISG) und sein Anwendungsausschluss, 2007, p. 312; Magnus, Germany, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 143, 144 f.
53 For the text of the questionnaire upon which the survey referred to in the text is based, see The CISG and Its Impact on National Legal Systems, supra note 9, p. 299 ff.
familiar with the CISG."\(^{54}\) Even in Japan, which is not yet a contracting State, practicing lawyers “who specialize in cross-border transactions are surely aware of CISG. It would be simply hard for such lawyers to do their business without having at least basic knowledge about one of the most important and successful international instruments in this field.”\(^{55}\)

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

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

\(^{54}\) Widmer/Hachem, Switzerland, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 281, 287.

\(^{55}\) Hayakawa, supra note 24, at 226-227.

\(^{56}\) See Fresno de Aguirre, supra note 16, at 333; Widmer/Hachem, supra note 54, at 287.

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

\(^{58}\) See Baretić/Nikšić, supra note 12, at 100.

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

\(^{60}\) See, as regards Germany, Magnus, supra note 52, at 145.

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

\(^{62}\) See Noodt Taquela, supra note 10, at 3, referring to Argentina; Lookofsky, supra note 49, at 119, referring to Denmark; Magnus, supra note 52, at 145; referring to Germany; Zervogianni, supra note 13, at 165 note 11, referring to Greece.

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

\(^{63}\) In this respect see, as regards Denmark, Lookofsky, supra note 49, at 119; as regards Italy, see Torsello, supra note 35, at 192.
providers in the last five to seven years (the time period varied with the memory of the organization representative).\textsuperscript{64} This highlights the lack of widespread interest in the CISG in Canada.\textsuperscript{65}

Awareness of the CISG is also promoted through the publication of both commentaries and court decisions in specialized law reviews,\textsuperscript{66} and - and more importantly for raising general awareness of the CISG - general law reviews.\textsuperscript{67}

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

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

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

\textsuperscript{64} McEvoy, supra note 17, at 66.

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

\textsuperscript{66} See, e.g., Internationales Handelsrecht.

\textsuperscript{67} This led one commentator to even state that the CISG “can hardly be overlooked by practitioners”, Magnus, supra note 52, at 145, at least not in Germany.

\textsuperscript{68} See supra the text accompanying note 47.

\textsuperscript{69} See, e.g., Baretić/Nikšić, supra note 12, at 95 note 10; McEvoy, supra note 17, at 67; Torsello, supra note 35, at 198 note 52; Veytia, supra note 11, at 239; Widmer/Hachem, supra note 54, at 288.

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

\textsuperscript{71} McEvoy, supra note 17, at 67.
domestic law and, therefore, plead on the sole basis of that domestic law. In effect, the mere fact that the pleadings are based solely on a given domestic law does not per se lead to the exclusion of the CISG. This is also the view held by most - albeit not all - courts. Pleading on the sole basis of a domestic law lead to an (implicit) exclusion of the CISG only where the parties are aware of the CISG’s applicability, or the intent to exclude the CISG can otherwise be inferred with certainty. If the parties are not aware of the CISG’s applicability and argue on the sole basis of a domestic law merely because they mistakenly believe that this law is applicable, courts will nevertheless have to apply the CISG on the grounds

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


74 See ICC Court of Arbitration, Arbitral award n. 8453, available at http://www.unilex.info/case.cfm?pid=1&do=cases&id=459&step=FullText: “It is also undisputed that the contract is subject to French law (art. 16 of the Contract). Both parties referred in their memorials and pleadings to the legal provisions applicable to sale contracts (art. 1582 et seq. of the French Civil Code). None of the parties referred to the UN Convention of 1980 on the International Sale of Goods (Vienna Convention) which is therefore considered as non applicable.” See also French Supreme Court, 26 June 2001, available at http://www.cisg-france.org/decisions/2606011v.htm.


76 For a reference in case law to the need of the awareness of the CISG’s applicability, see, e.g., Oberlandesgericht Linz, 23 January 2006, available at http://cisgw3.law.pace.edu/cases/060123a3.html.
of the principle iura novit curia,\textsuperscript{77} provided that this principle is part of the procedural law applicable in the forum State.\textsuperscript{78}

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

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

\textsuperscript{77} See Ferrari, Art.6, in: Schlechtriem/Schwenzer (eds.), Kommentar zum Einheitlichen UN-Kaufrecht - CISG, 4\textsuperscript{th} ed., 2004, p. 123, 132 ff.; Graffi, supra note 73, at 242; Reifner, supra note 73, at 57.


\textsuperscript{79} See Mozina, Slovenia, supra this nook, p. 265, 266;

\textsuperscript{80} For a similar statement, see Magnus, supra note 52, at 145.

\textsuperscript{81} For this conclusion, see also Mozina, supra note 79, at 266, stating that “the mere awareness of the CISG is not sufficient for its use.”

\textsuperscript{82} See Torsello, supra note 35, at 196; for an in-depth analysis of the CISG as a drafting tool, see Flechtner/Brand/Walter (eds.), Drafting Contracts under the CISG, 2008.


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

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

\textsuperscript{85} See also Magnus, supra note 52, at 146, referring to Köhler, supra note 52, at 315, and Meyer, supra note 39, at 474 f., and stating that “[t]he reported main reasons for this reluctance towards the CISG are two which are interconnected: first, that the CISG is too little known. Second, doubts concerning legal certainty. It is feared that solutions under the CISG cannot be foreseen due to too many vague terms which the CISG uses.” The author also adds, however, that “the view that the CISG does not guarantee sufficient legal certainty is based on prejudice. For most questions which may arise under the CISG there exists today international case law”, Id. at 147.
reservations\textsuperscript{86} that make the applicable rules even more uncertain.\textsuperscript{87} This is why practicing lawyers tend to avoid the CISG.\textsuperscript{88} It appears that, for these lawyers, “the devil you know is better than the devil you do not know”. This argument, however, is not only unconvincing, but also misleading, as the exclusion of the CISG does not necessarily lead to the application of a domestic law with which the practicing lawyers are more familiar. The exclusion of the CISG may lead to the application of a foreign law even less familiar to the lawyers - and which may be even more disadvantageous to their clients - than the CISG. This is why the exclusion of the CISG may not be advisable\textsuperscript{89} and may even - in extreme cases - lead to malpractice liability, at least in some contracting States to the CISG.\textsuperscript{90}

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

\textsuperscript{86} For a detailed analysis of the reservations that are admitted under the CISG as well as under various other uniform commercial law conventions, see Torsello, Reservations to international uniform commercial law conventions, Uniform Law Review 2000, 85 ff.

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

\textsuperscript{88} See also Reimann, supra note 83, at 125.

\textsuperscript{89} For this conclusion, see also Baretić/Nikšić, supra note 12, at 95.

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

those lawyers can rely on their standard contract forms and the exclusion clause therein only if their clients have more bargaining power than opposing counsel’s clients.92 Where they do not have that power, the CISG will apply (unless the standard contract terms of the opposing party exclude the CISG). Thus, practicing lawyers ultimately cannot avoid becoming more knowledgeable about the CISG. This is true even for the very purpose of excluding the CISG. Practicing lawyers have to become aware of the fact, for instance, that the choice of their domestic law does not by itself constitute an exclusion of the CISG. Thus, it is not sufficient to simply refer to “Croatian law”,93 “German law”,94 “Italian law”95 or “Swiss Law”96 to avoid the application of the CISG,97 as confirmed by many court decisions98 and arbitral awards.


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

93 See Baretić/Nikšić, supra note 12, at 94.


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

It is worth mentioning here that there are countries in which lawyers are very familiar with the CISG but do not generally exclude the it. Sometimes, this occurs because a country’s domestic law is less acceptable to the opposing party than the CISG which is considered a neutral set of rules and, therefore, easier to agree on. This is apparently the case in China, where “it is seldom for practicing lawyers who are aware of the CISG to exclude it [. . .]. One reason for this is that the CISG is deemed fair for the parties of a foreign-related contract. It is easier for a foreigner to accept the CISG than to accept the Contract Law of the P.R.C.”
THE CISG’S IMPACT ON MEMORANDA, BRIEFS, ETC.

The CISG, like many other international uniform commercial law conventions, requires that in interpreting it “regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” Many legal writers argue that to interpret the CISG with regard to its “international character” requires that the CISG be interpreted “autonomously,” not “nationalistically”, i.e. not in light of domestic law, despite the fact that once put in force international conventions become part of domestic law. Consequently, one should generally not have recourse to any domestic

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106 See Ferrari, supra note 34, at 135 f.

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

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

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

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

113 Article 7(1) CISG.

114 See supra the text accompanying notes 32 ff.


116 Baretić/Nikšić, supra note 12, at 96.

117 See Noodt Taquela, supra note 10, at 3.

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

119 See Ročenhalová, supra note 72, at 109.

120 See Lookofsky, supra note 49, at 120.

121 See Magnus, supra note 52, at 148-149, where the author states that “[i]t is not my impression that the CISG’s entry into force has changed in any particular way the style in which practitioners draft their statements of claim or defence or plead in court. [. . .] Quotations of foreign CISG cases or literature unless in German are unusual.” The author then adds that “it should not be overlooked that the German
Spain.\textsuperscript{125} In France, however, briefs and memoranda drafted mainly - albeit not exclusively - in larger law firms seem to resort to foreign case law and legal writing when dealing with the CISG,\textsuperscript{126} while in Uruguay resort to foreign case law and legal writing seems to be the general practice, independently of the size of the law firm, and not only when dealing with the CISG.\textsuperscript{127}

**THE USE OF THE CISG IN PURELY DOMESTIC CASES**

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

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

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

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

\textsuperscript{123} See Shalev, supra note 14, at 184.

\textsuperscript{124} See Mozina, supra note 79, at 266.

\textsuperscript{125} See Garcia Cantero, Spain, in: The CISG and Its Impact on National Legal Systems, supra note 9, p. 273, 274.

\textsuperscript{126} See Witz, supra note 50, at 131.

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

\textsuperscript{128} For remarks similar to the following ones, see Torsello, supra note 35, at 200.

\textsuperscript{129} See Bussani, Contratti moderni: factoring, franchising, leasing, 2004, p. 272.

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

In most countries, practicing lawyers do not invoke CISG rules in purely domestic disputes. This is true not only as regards contracting States, such as Argentina, Canada, Croatia, the Czech Republic, Denmark, Greece, Slovenia, Spain and Uruguay, but also - and even less surprisingly - in respect of non-contracting States such as Brazil and Japan.

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133 See Article 3(1) Unidroit Convention on International Financial Leasing.
135 See Italian Supreme Court, 28 November 2003, Giustizia civile 2004, 1506.
136 See Noodt Taquela, supra note 10, at 4, where, after stating that “is not habitual that practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach”, the authors also state that “may be that this happens in some cases.”
137 See McEvoy, supra note 17, at 70.
138 See Baretić/Nikšić, supra note 12, at 97.
139 See Rozehnalová, supra note 72, at 109.
140 See Lookefsky, supra note 49, at 121.
141 See Zervogianni, supra note 13, at 167.
142 See Mozina, supra note 79, at 267.
143 See Garcia Cantero, supra note 125, at 275.
144 See Fresnedo de Aguirre, supra note 16, at 334, where the author, after stating that “I could not find any case where practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach or for any other reason”, also states that “there could be some isolated case in that sense.”
145 See de Aguirre Vieira, supra note 26, at 19.
146 See Hayakawa, supra note 24, at 227.
As regards the reason for this lack of reference to the CISG in purely domestic disputes, it has convincingly been put suggested by the drafter of the Italian country report: “In purely domestic disputes [. . .], reference to the CISG seems less likely to occur [. . .]. Indeed, one could imagine a need to resort to the CISG only if it could provide some interpretative support and play a gap-filling role vis-à-vis the relevant domestic rules.”148 This, however, “is unlikely to be the case when the transaction in question is a sales transaction, [as sales transaction, unlike leasing transactions, are in all countries] exhaustively addressed by provisions to be found in the Civil code[s or in special statutes or by] court decisions.”149 Invoking the CISG in disputes involving domestic transactions, however, is not unheard of.150

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

CISG’S IMPACT ON SCHOLARS

1. Scholarly interest in the CISG

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

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148 Torsello, supra note 35, at 199.
149 Id. at 199-200.
150 Id. at 200 note 60
151 See Han, supra note 57, at 84.
152 Id. at 74.
153 For the importance of this distinction in Germany, see Magnus, supra note 52, at 147, stating that “the reluctance towards/satisfaction with the CISG depends to a great deal on how much practitioners specialise in international sales, how much they have to do with the CISG in their daily work and how
had an enormous impact on scholars. This is true not only in contracting States to the CISG, such as Argentina, Croatia, Germany and Italy, but also in some non-contracting States. This is not really surprising, since judges and practicing lawyers from non-contracting States will not be exposed to the CISG very often, and therefore have less incentive to become knowledgeable about the CISG, although exposure to it cannot be excluded a priori. Scholars, on the other hand, are much more exposed to the CISG, as it has become one of the topics constantly discussed in academic circles. That is the case, at any rate, among scholars dedicated to contract law, commercial law and private international law. Unlike judges and practicing lawyers, scholars tend to focus on more than positive law, which - ontologically - makes them more receptive to rules that are not in force in their home country. Therefore, it is not surprising that scholars from non-contracting States have devoted much attention to the CISG. Rather than focusing on the CISG per se, they tend to compare the CISG to their domestic law, in part "to show how important it is [for their country] to adopt the Convention" and in part to demonstrate that "there is no incompatibility between the text of CISG and [domestic] law".

One may think that it is mainly contract and commercial law specialists rather than private international law scholars who focus on the CISG, because the CISG is "merely" a substantive law convention that does not

\[\text{\footnotesize{154 See Butler, supra note 15, at 252, stating that "[overall, there is no significant CISG scholarship in New Zealand", Shalev, supra note 14, at 184, stating, in respect of the Israeli situation, that "[s]cholars writing about the subject are rare."}}\]

\[\text{\footnotesize{155 See Noodt Taquela, supra note 10, at 4.}}\]

\[\text{\footnotesize{156 Ibid.}}\]

\[\text{\footnotesize{157 See Baretić/Nikšić, supra note 12, at 97.}}\]

\[\text{\footnotesize{158 See Magnus, supra note 52, at 149, stating that "[i]n comparison to other countries there is a particularly high scientific interest in the CISG in Germany."}}\]

\[\text{\footnotesize{159 See Torsello, supra note 35, at 201.}}\]

\[\text{\footnotesize{160 For analysis of the CISG’s applicability and, thus, the exposure of judges and practicing lawyers to it in Brazil, where the CISG has not yet entered into force, see de Aguilar Vieira, supra note 26, p. 10 ff.}}\]

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

\[\text{\footnotesize{162 See also Hayakawa, supra note 24, at 228, stating that for scholars the "CISG is an invaluable source of reflection on domestic contract law and contract law in general."}}\]

\[\text{\footnotesize{163 Id. at 227.}}\]

\[\text{\footnotesize{164 See de Aguilar Vieira, supra note 26, at 22.}}\]

\[\text{\footnotesize{165 Id. at 23.}}\]

\[\text{\footnotesize{166 In this respect see, most recently, Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html, expressly holding that the CISG "is a uniform convention on substantive law and not one on private international law as sometimes erroneously}}\]
set forth any private international law rule.\textsuperscript{167} This, however, is not true, at least not everywhere.

In Mexico, for instance, it is mostly - if at all -\textsuperscript{168} private international law scholars who have analyzed the CISG.\textsuperscript{169} The same can be said for both the Czech Republic\textsuperscript{170} and Venezuela.\textsuperscript{171} In Greece, in contrast, “[f]rom the very beginning the scholars who focused their attention on the CISG the most were those of private law, and especially civil law”,\textsuperscript{172} and “the scholars of private international law who have dealt with the CISG are relatively few.”\textsuperscript{173} “The strong interest of the scholars of civil law [i]n CISG [c]an be attributed to the fact that the entry into force of the CISG in [. . . ] Greece, timely coincided with the issuance of the Directive 99/44/EC on consumer sales and thus triggered a more general discussion on the reform of the Greek Civil Code in respect to the sales contract, which in fact took place in 2002.”\textsuperscript{174} Similarly, in Switzerland, “[a] closer look at the authors of Swiss contributions on the CISG shows that the scholars who pay particular attention to the CISG are primarily contract law scholars. Swiss doctoral theses on the CISG are also generally supervised by contract scholars. As the Convention consists of rules of substantive law, the heightened interest of contracts scholars in the CISG seems only natural.”\textsuperscript{175}
In Spain\textsuperscript{176} as well as in Uruguay,\textsuperscript{177} both private international law and commercial law scholars are paying attention to the CISG. In Brazil, the small group scholars that has focused on the CISG “is composed of experts in contract law and private international law.”\textsuperscript{178} In China, international law scholars focus on the CISG as do contract law and commercial law scholars, but “the studies by international law scholars seem to be more attractive.”\textsuperscript{179}

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

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

\textsuperscript{176} See Garcia Cantero, supra note 125, at 275.
\textsuperscript{177} See Fresnedo de Aguirre, supra note 16, at 334.
\textsuperscript{178} de Aguilar Vieira, supra note 26, at 20, where the author also states that “there is no coordination of activities between these [experts]. Many of them work independently or rarely in partnerships.”
\textsuperscript{179} Han, supra note 57, at 75.
\textsuperscript{180} See Witz, supra note 50, at 131 f.
\textsuperscript{181} Baretić/Nikšić, supra note 12, at 97.
\textsuperscript{182} Lookofsky, supra note 49, at 122-123.
\textsuperscript{183} For a paper on Ernst Rabel’s impact on the international unification of sales law, see, most recently, Röschler, Siebzig Jahre Recht des Warenkaufs von Ernst Rabel, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2006, 793 ff.
\textsuperscript{184} Magnus, supra note 52, at 151.
\textsuperscript{185} Id. at 151-152, stating that “when in 1980 the CISG was concluded also general contract law scholars became interested. The reason for this growing interest was the parallel initiative of the German government to reform the German law of obligations. A Commission for the reform of the German law of obligations was installed which in 1992 came out with the proposal to adapt the German Civil Code to the model of the CISG.42 The majority of civil law scholars refused this proposal. But when the European Consumer Sales Directive had to be implemented into German law in rather short time until 2002 the Government came back to the proposal and introduced it after hot debates and with slight amendments. A side-effect was that the CISG became widely known.” (footnotes omitted)
by the CISG. It also derived from the need to implement the European Consumer Sales Directive which is also heavily influenced by the CISG, as the report on “the CISG’s Impact on EU Legislation” clearly shows. As a result, “[t]oday it can be safely said that every private law scholar [in Germany] has heard of the CISG and has some knowledge of it.”

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

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186 See, e.g., Meyer, supra note 39, at 460.
187 See Troiano, supra note 9, at 345, 348 ff.
190 See Noodt Taquela, supra note 10, at 4.
191 See Rozehnalová, supra note 72, at 109.
192 See Fresnedo de Aguirre, supra note 16, at 335.
193 Magnus, supra note 52, at 152.
In Greece, the situation is somewhat similar as, at least in part, the comparisons between the CISG and domestic law “aim mainly at pointing out the similarities between the two instruments, in order to render [the] CISG more familiar to the reader, whereas differences have been discussed from a de lege ferenda perspective, especially until the recent reform of the Civil Code provisions on sale.”

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

2. The CISG’s impact on domestic treatises

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

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

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

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199 Andersen, supra note 9, at 307.
200 See Magnus, supra note 52, at 143 and 151.
201 Id. at 152. (footnotes omitted)
CISG, one dealing with Articles 1-13,\textsuperscript{205} one with Articles 14-24.\textsuperscript{206} Also, a commentary on the laws connected to the Italian Civil code contains a comment on the CISG.\textsuperscript{207} In Austria, there appears to be only one commentary on the Austrian Civil code where coverage of the CISG has been included.\textsuperscript{208}

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

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

In Croatia\textsuperscript{214} and Denmark,\textsuperscript{215} however, it appears that domestic treatises on both commercial contracts and contract law refer to the CISG. The same can


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

\textsuperscript{210} Id. at 61-62.

\textsuperscript{211} See Shalev, supra note 14, at 184.

\textsuperscript{212} See Garcia Cantero, supra note 125, at 277, stating that the CISG’s influence on treatises on civil law is rather weak.

\textsuperscript{213} See Fresnedo de Aguirre, supra note 16, at 335.

\textsuperscript{214} See Baretić/Nikšić, supra note 12, at 100.

\textsuperscript{215} See Lookofsky, supra note 49, at 123.
be said as regards Switzerland, where the “CISG is also discussed in many standard treatises on Swiss domestic law, although both the precise scope of discussion and the way in which it is broached vary greatly between authors.”\footnote{Widmer/Hachem, supra note 54, at 290-291, where the authors go on to state that “[the CISG] is generally discussed in treatises on domestic contract law, either briefly or at length. In Treatises on the general part of the Swiss law of obligations, i.e., that part which deals, inter alia, with formation and validity of contracts and delay in performance and payment (Articles 1-183 CO), comparisons between the CISG and the Swiss Code of Obligation are often drawn, albeit selectively.” (footnotes omitted)}

In Slovenia, “some references to the CISG can be found in treatises on contract law, above all in situations where national contract law contains identical or similar solutions as the CISG and foreign commentators are being cited, but also in cases where scholars prefer the solutions of the CISG to the ones of national law.”\footnote{Mozina, supra note 79, at 269.}

In France, the major treatises on specific contracts also analyze the CISG (albeit in broad terms).\footnote{See Witz, supra note 50, at 134; similarly, in Argentina, “[r]eferences to CISG can be found in works on Argentine domestic commercial contract law”, Noodt Taquela, supra note 10, at 4.} Furthermore, in France, not unlike in Germany,\footnote{See supra the text accompanying notes 203 and 204.} an overview on CISG case law from around the globe is periodically published - under the directorship of Claude Witz - in one of the most widely circulating generalist law reviews,\footnote{See Witz, supra note 50, at 132.} namely the Recueil Dalloz.\footnote{For these overviews, see Recueil Dalloz 1997, 1998, 1999, 2000, 2002, 2003, 2005, 2007.} Moreover, in France (as well as in other countries, Italy among them), CISG case law is also, although not frequently, commented on both in specialized law reviews\footnote{See, e.g., Revue critique de droit international privé, Journal du droit international, Revue de droit des affaires internationales.} and in more generalist law reviews, such as the Gazette du Palais\footnote{See, e.g., Cytermann-Sinay, L’application d’office de la Convention de Vienne relative à la vente internationale de marchandises et le respect du principe du contradictoire, Gazette du Palais 2003, 234 f.} and Juris Classeur Périodique.\footnote{See, e.g., Missaoui, La validité des clauses aménageant la garantie des vices cachés dans la vente internationale de marchandises, Juris Classeur Périodique 1996, 3927 f.} This certainly helps to raise awareness of the CISG among legal professionals who are specialized neither in international commercial law nor in related areas.

In the United States, the situation is not as encouraging, as only “some contracts casebooks used in U.S.-American law schools now touch on [the CISG].”\footnote{Reimann, supra note 83, at 120.}
3. The impact of scholarly writings on the CISG

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

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

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

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

226 Noodt Taquela, supra note 10, at 5.
227 Hayakawa, supra note 24, at 228.
formation,” because Brazil is a non-contracting State, “the publications on the CISG have had very little or no impact on [practicing lawyers and] courts.”

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

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

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

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228 de Aguilar Vieira, supra note 26, at 23.
229 Ibid.
230 It goes without saying that the impact of scholarly writing differs among the different contracting States; in Germany, for instance, “scholarly writing has generally a wider impact on legal practice [. . .] than it has in many other countries”, Magnus, supra note 52, at 152. In Uruguay, “[s]cholarly writing [. . .] has produced some works on the CISG, which are consulted by practicing lawyers, judges and students. They also consult foreign scholarly writing on the matter”, Fresnedo de Aguirre, supra note 16, at 335.
231 For a similar statement, see, e.g., Han, supra note 57, at 76.
232 Baretić/Nikšić, supra note 12, at 100, where the authors also state that “it can [nevertheless] be assumed that legal literature has done its work in promoting the CISG”, Id. at 101.
233 Lookofsky, supra note 49, at 123.
234 Ibid.
235 See Witz, supra note 50, at 135, stating that “[l]es avocats ne manquent pas de se référer, dans leurs mémoires et plaidoiries, aux écrits de la doctrine. Grâce à la doctrine, les avocats prennent aussi le réflexe de citer à l’appui les décisions jurisprudentielles étrangères.”
236 Zervogianni, supra note 13, at 171.
influential on Italian practicing lawyers; this is the case even though scholarly writing normally is influential in Italy. 237 “The reason for this probably lies in the decreasing attention that practicing lawyers pay to law treaties and scholarly writings, as a result of the (wrong) belief that they can get all the information they need from handier computer databases or practice-oriented commentaries.”238

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

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

238 Ibid.

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

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

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

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

243 This has been completely overlooked by Sant’Elia, available at , as evidenced by the fact that when commenting on an Italian court decisions that cited 40 foreign courts decisions, the author states that...
‘prevailing opinion’ in scholarly writing, to the ‘best opinion’, to the ‘opinion to be shared by the court’. Under no circumstances, however, may the court identify the scholars referred to. This is likely to emphasize the divide between those (few) who already possess the knowledge about the scholarly opinion referred to by the court and those (many) who are not in the position to recognize the citation and to fully understand the reasons and the implications of the court’s reference. As a result, court decisions, which nowadays (thanks to computerized database of case-law) are the most effective vehicle for the spreading of legal information, are prevented from transferring the pieces of information regarding the identity of the scholars who have in-depth analyzed a specific issue and who have inspired the decision adopted by the court.”

4. The CISG and Interconventional Interpretation

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

244 Torsello, supra note 35, at 208.
245 See supra the text accompanying notes 6 ff. and 41.
246 Torsello, supra note 35, at 209.
247 Magnus, supra note 52, at 154.
249 It may be appropriate to point out that the suggestion made in the text should operate independently from the question of whether the international uniform law instruments are drafted by one
In this rapporteur’s opinion, the CISG should be used as a starting point for interconventional interpretation. This is justified, inter alia, by the CISG’s role as paradigm for international unification efforts - a role that has been implicitly acknowledged by various international legislators when they used the CISG as a model for their unification efforts. The drafters of the Unidroit Convention on International Factoring, for examples, have used the CISG when they were elaborating and discussing that Convention. Indeed, the relationship between the CISG and the Unidroit Convention on International Factoring is so close that one commentator dubbed the latter Convention an “annex” of the CISG.

Scholars, furthermore, have suggested resorting to interpretations of the CISG in respect of not only the aforementioned Unidroit Convention on International Factoring, but also the Unidroit Convention on International Financial Leasing and the new Uncitral Convention on the Assignment of Receivables in International Trade, as these conventions have also been influenced by the CISG. This is not surprising since these international commercial law conventions have the same goals as the CISG and their rules of interpretation also are identical to those of the CISG. It may be more
surprising that scholars have also proposed to interpret uniform law instruments of a different kind in light of the CISG, specifically the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels 1 Regulation). Although this approach has been criticized, on the grounds that the Brussels 1 Regulation constitutes a set of rules on international civil procedure and therefore should not be interpreted in light of a set of uniform substantive law rules, more and more authors favour this kind of approach. The justification for this is rather convincing: although the Brussels 1 Regulation focuses on international civil procedure, there are instances where the heads of jurisdiction it sets forth refer to substantive law concepts, such as “sale of goods”, which it does not itself define. What better set of - autonomous – rules is there than the CISG to be used as a reference for interpreting - in an autonomous way, as required by the Brussels 1 Regulation - this substantive concept? There is none, which is why recourse to the CISG has often been advocated. Thus, it is clear that scholars - mainly, although not exclusively, from Germany and Italy - have suggested resorting to the CISG to interpret

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

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


268 See, in respect of the situation in Japan, Hayakawa, supra note 24, at 220, stating that “[s]cholars who are interested in CISG are usually interested in other uniform law instruments as well. Thus such scholars tend to make use of reflections on CISG in discussing other uniform law instruments.”
other uniform law instruments, thus making the CISG a success beyond its scope.

CISG’S IMPACT ON COURTS

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

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

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


274 The most complete list of judicial applications of the CISG can be found on the internet at http://cisgw3.law.pace.edu/cisg/text/casecit.html.

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

As can be easily derived from various country reports - such as the Argentinean Chinese, Croatian, Danish, French, German, Greek, Slovenian and Swiss ones, “[t]he CISG’s coming into force has not had any impact on the style of court decisions.” It was, for instance, impossible to “find more references to case law [in CISG related...
disputes than in non-CISG related ones]." The reasons for this are manifold. In China, for instance, this is due to a decision of the Supreme People’s Court imposing the style of court decisions from which one cannot deviate. In Denmark, the reason for this is to be found in “the traditional style of Danish judicial decisions”, characterized by a “general reluctance of Danish courts to cite (even) Danish ‘precedents’.” Similarly, in France courts tend generally not to refer to case law, not even French one; scholarly writing is generally not referred to either, not even when courts copy word for word what commentators have said.

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

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289 Ibid.
290 See Han, supra note 57, at 76-77, stating that “The CISG’s coming into force had no impact on the style of court decisions in China. Since January 1, 1993, the style of court decisions has been prescribed by the Sup. People’s Ct. with a set of patterns of litigation documents [. . .]. One problem [. . .] is that there is only one fixes style for thousands of cases.”
291 Leokofsky, supra note 49, at 124.
292 Id. at 125.
293 See Witz, supra note 50, at 136, stating that “la Cour de cassation ne cite jamais d’opinion doctrinale. En dépit de l’influence traditionnelle de la doctrine française sur l’interprétation des normes légales, les juges du fond s’abstiennent généralement de citer les auteurs. Tel est même le cas lorsque les juges reprennent presque mot à mot des affirmations doctrinales. Ainsi, le style judiciaire français s’oppose radicalement au style judiciaire allemand ou suisse. Pas davantage, les juges ne se réfèrent à la jurisprudence existante pour appuyer leurs solutions ou pour mieux marquer un revirement de jurisprudence. Les juges de première ou de deuxième instance ne citent généralement pas la jurisprudence de la Cour de cassation, même s’ils entendent le plus souvent la suivre fidèlement. La Haute cour ne se réfère jamais à ses arrêts antérieurs.”
294 Widmer/Hachem, supra note 54, at 293.
295 Fresnedo de Aguirre, supra note 16, at 335.
In Italy, the answer to the foregoing questions is a little more complex. This is due to the fact that if one were to “look at the general picture”, one would have to state “that the CISG has had no impact whatsoever on the style of court decisions.”\footnote{296 Torsello, supra note 35, at 215.} Still, there are a few decisions, rendered by an “enlightened minority\footnote{Ibid.} of courts, namely the Tribunale di Vigevano,\footnote{See Tribunale di Vigevano, 12 July 2000, available at http://www.cisg-online.ch/cisg/urteile/493.htm.} the Tribunale di Rimini\footnote{See Tribunale di Rimini, 26 November 2002, available at http://cisgw3.law.pace.edu/cases/040225i3.html.} and the Tribunale di Padova,\footnote{See Tribunale di Padova, 10 January 2006, available at http://cisgw3.law.pace.edu/cases/060110i3.html; Tribunale di Padova, 11 January 2005, available at http://www.unilex.info/case.cfm?id=1&do=case&id=1005&step=FullText; Tribunale di Padova, 31 March 2004, available at http://cisgw3.law.pace.edu/cases/040331i3.html; Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cases/040225i3.html.} “which in the application of the CISG adopted a completely new style compared to the usual one adopted for purely domestic cases.”\footnote{Torsello, supra note 35, at 215. (footnotes omitted)} For one, these courts cited a lot of decisions, which by itself is a surprise, as this is not what Italian courts normally do; what is even more surprising, however, is that the decisions cited are almost exclusively foreign decisions. Not only, the decisions cited include not just foreign court decisions, but also awards rendered by arbitral tribunals which is basically unheard of. The aforementioned courts are also “innovative with respect to [their] style, in that [they] did not limit [their] sources of knowledge of relevant precedents to law reports and law reviews, but also resorted extensively to databases available on the Internet in order to find the foreign decisions relevant to the case[s].”\footnote{Id. at 216.}

2. Autonomous interpretation v. homeward trend

As mentioned earlier,\footnote{See supra the text following notes 30 f.} the fact that the CISG is increasingly being applied in both courts and arbitral tribunals is not by itself a measure of the CISG’s success. Rather, the extent to which it is applied in compliance with the mandate - aimed at creating a uniform law “in action”\footnote{See also Widmer/Hachem, supra note 54, at 282.} rather than keeping
uniformity in the books – is. Thus, whether the CISG is a success - among others - on the answer to the question of whether courts are taking into account the aforementioned mandate to interpret the CISG autonomously and in light of the need to promote uniformity in its application or whether they rather succumb to the homeward trend, i.e., the “natural”305 “tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention.”306 It is, in other words, the “the tendency to think that the words we see [in the text of the CISG] are merely trying, in their awkward way, to state the domestic rule we know so well.”307

Although this homeward trend characterizes the case law of the courts of various countries, such as Argentina308 and Israel,309 it is most prominent in the United States,310 where - unfortunately - courts seem not only to rely on it as regards specific issues,311 but, as can easily be derived from the United States country report,312 also as a matter of principle, as evidenced by the following statement, to be found in many decisions, pursuant to which “caselaw interpreting analogous provisions of Article 2 of the Uniform

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305 Salama, supra note 108, at 231.


308 See Noodt Taquela, supra note 10, at 5.
309 See Shalev, supra note 14, at 185.
310 See also Salama, supra note 108, at 225, stating that “[i]n practice it has been found that U.S. courts rely on the “homeward trend” more often than other judges in interpreting the CISG.”


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

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


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


318 It has been suggested that not all concepts of the CISG are to be interpreted autonomously; see Ferrari, supra note 111, at 497 ff.
Co. et al. v. Neuromed Medical Systems & Support GmbH, et al., United States District Court for the Southern District of New York held that “the CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language”. Similar language can be found in other United States court decisions, such as MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino, S.p.A., where it is expressly stated that “courts applying the CISG cannot [. . .] substitut[e] familiar principles of domestic law when the Convention requires a different result.” This line of reasoning constitutes the basis for other United States court decisions, too, such as Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc., stating that “UCC case law is not per se applicable to cases governed by the CISG” and Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd. where it is expressly stated that “although the CISG is similar to the UCC with respect to certain provisions, it differs from the UCC with respect to others, including the UCC’s writing requirement for a transaction for the sale of goods and parol evidence rule. Where controlling provisions are inconsistent, it would be inappropriate to apply UCC case law in construing contracts under the CISG.” In another US decision, the court simply referred to the aforementioned need to take the CISG’s international character into account.

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

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324 See e.g. Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l., U.S. District Court, Eastern District of Louisiana, 17 May 1999, 1999 WL 311945 (E.D. La.), stating that “under CISG, the finder of fact has a duty to regard the “international character” of the Convention and to promote uniformity in its application. CISG Article 7”.
autonomously and not out of the perspective of the respective national law of the forum. Thus, [...] it is generally not decisive whether the Convention is formally applied as particularly this or that national law, as it is to be interpreted autonomously and with regard to its international character.” An express reference to the need to interpret the CISG “autonomously” can also be found in a more recent Swiss case as well as in a Spanish case and an Austrian one as well as in various very recent Italian court decisions, rendered by the aforementioned “enlightened minority” of Italian courts.

In Germany, while there are some courts that simply referred to the need to interpret the CISG by having regard to its international character and to the need to promote its uniform application, there are other ones which went further. In 1996, the German Supreme Court, for instance, expressly stated that “the CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)” And it is this reasoning that has led the Court of Appeal of Karlsruhe to state that “German legal concepts such as “Fehler” and “zugesicherte Eigenschaften” are therefore not transferable to the CISG”. More recently, in 2005, the German Supreme Court stated that “insofar as the Court of Appeals refers to [various German] judgments [...] in analyzing the question whether, at the time the risk passed, the delivered meat conformed with the contract within the meaning of Arts. 35, 36 CISG, it ignored the fact that these decisions were rendered autonomously and not out of the perspective of the respective national law of the forum. Thus, [...] it is generally not decisive whether the Convention is formally applied as particularly this or that national law, as it is to be interpreted autonomously and with regard to its international character.” An express reference to the need to interpret the CISG “autonomously” can also be found in a more recent Swiss case as well as in a Spanish case and an Austrian one as well as in various very recent Italian court decisions, rendered by the aforementioned “enlightened minority” of Italian courts.

327 See Audiencia Provincial de Valencia, 7 June 2003, available at http://cisgw3.law.pace.edu/cases/030607s4.html, stating that “[s]cholars maintain that the international character of the Convention obliges an autonomous interpretation of the Convention independent of domestic law, for this purpose, it is necessary to adopt a different methodology than used to apply domestic law. The only way to assure the uniformity of the Convention is to take into account decisions from tribunals of other countries when applying the Convention and to consult expert opinions of scholars in the subject, in order to achieve uniformity.” For a favourable comment on this decision when discussing the uniform interpretation of the CISG, see Perales Viscasillas, Spanish Case Law on the CISG in: Quo Vadis CISG?, supra note 28, p. 235, 240-241.
328 See Austrian Supreme Court, 23 May 2005, available at http://cisgw3.law.pace.edu/cases/050523a3.html, stating that “[t]he CISG creates substantive law [...] and is to be interpreted autonomously in accordance with CISG Art. 7. Therefore, discussions on the Austrian legal situation [...] have to be omitted”.
issued before the CISG went into effect in Germany and refer to § 459 BGB [. . .]. The principles developed there cannot simply be applied to the case at hand, although the factual position - suspicion of foodstuffs in transborder trade being hazardous to health - is similar; that is so because, in interpreting the provisions of CISG, we must consider its international character and the necessity to promote its uniform application and the protection of goodwill in international trade (Art. 7(1) CISG)).

3. Recourse to Foreign Case Law

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

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

334 See supra the text accompanying notes 32 ff. and 115.
335 See Noodt Taquela, supra note 10, at 5.
336 See Baretić/Nikšić, supra note 12, at 102.
337 See Rozehnalová, supra note 72, at 110.
338 See Lookofsky, supra note 49, at 125.
339 See Witz, supra note 50, at 137.
340 See Magnus, supra note 52, at 156, where the author also refers to an exception to the rule.
341 See, as regards Slovenia, Mozina, supra note 79, at 270, stating that in Slovenian courts, “cases neither a homeward trend nor interpretation according to Art. 7 CISG can be established.”
number of 40 foreign court decisions,\textsuperscript{343} and arbitral awards,\textsuperscript{344} thus “show[ing] a certain willingness to take into consideration foreign decisions and [. . .] a depth of knowledge and research of foreign case law which has not been very common among courts of many countries”\textsuperscript{345}.

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

\textsuperscript{343} In its decision, the court referred to court decisions form Austria, France, Germany, the Netherlands, Switzerland and the United States.

\textsuperscript{344} In its decision, the court referred to arbitral awards.

\textsuperscript{345} Mazzotta, supra note 73, at 438.


\textsuperscript{348} In its decision, the Tribunale di Rimini referred to court decisions rendered in Austria, Belgium, France, Germany, Switzerland, the Netherlands and the United States, as well as one Hungarian arbitral award.


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

355 In its decision, the U.S. District Court referred to decisions rendered by Dutch, German and Italian courts.
356 For a comment on UNILEX as a tool to promote the CISG’s uniform application, see Liguori, “UNILEX”: A Means to Promote Uniformity in the Application of CISG, Zeitschrift für Europäisches Privatrecht 1996, 600 ff.
357 Bonell/Liguori, supra note 28, (Part I), at 147 note 1.

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

In one case, a federal Court of Appeals referred to its unsuccessful efforts to locate foreign court decisions on the issue it had to deal with; see MCC-Marble Ceramic Center v. Ceramica Nuova D’Agostino, U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998, available at http://cisgw3.law.pace.edu/cases/980629u1.html.
stated that there was virtually no case law on the CISG, at times when foreign decisions were readily available. Whether, however, the Chicago Prime case will have the same effect in the United States that the decision by the Tribunale di Vigevano has had in Italy is doubtful, considering that the same U.S. District Court that had rendered the Chicago Prime decision in a more recent decision not only avoided any reference to foreign decisions, but even rejected the autonomous interpretation in favour of a “nationalistic” interpretation when it stated in respect of the Article 79 CISG issue of “excuse” that “case law interpreting the Uniform Commercial Code’s (“U.C.C.”) provision on excuse provides guidance for interpreting the CISG’s excuse provision since it contains similar requirements as those set forth in Article 79.”

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

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On several occasions, German courts as well referred to (a limited number of) foreign cases; this is true not only in respect of lower courts,\footnote{365 See Oberlandesgericht Hamburg, 25 January 2008, available at http://cisgw3.law.pace.edu/cases/080125g1.html, citing two Austrian Supreme court decisions as well as a Swiss Supreme Court decision; Oberlandesgericht Karlsruhe, 8 February 2006, available at http://www.cisg-online.ch/cisg/urteile/1328.pdf, citing a Swiss Supreme court decision as well as a decision rendered by a U.S. district court; Landgericht Neubrandenburg, 3 August 2005, available at http://cisgw3.law.pace.edu/cases/050803g1.html, citing one Russian arbitral award; Oberlandesgericht Karlsruhe, 20 July 2004, available at http://www.cisg-online.ch/cisg/urteile/858.pdf, citing a decision rendered by the Austrian Supreme Court; Landgericht Trier, 8 January 2004, available at http://cisgw3.law.pace.edu/cases/040108g1.html, citing a US court decision; Oberlandesgericht Köln, 14 October 2002, available at http://www.cisg-online.ch/cisg/urteile/709.htm, citing a Swiss Supreme Court decision as well as a decision by the Austrian Supreme Court.} but also as far as the German Supreme Court is concerned.\footnote{366 See German Supreme Court, 2 March 2005, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050302g1.html, citing two decisions from the Austrian Supreme Court; German Supreme Court, 30 June 2004, available at http://www.cisg-online.ch/cisg/overview.cfm?test=847, citing a Dutch and a Canadian decision, as well as an ICC arbitral award and an award of the Arbitral Tribunal of the Stockholm Chamber of Commerce; German Supreme Court, 31 October 2001, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011031g1.html, citing one decision of the Austrian Supreme Court.} Similarly, Swiss courts,\footnote{367 See also Kantonsgericht Appenzell Ausserrhoden, 9 March 2006, available at http://www.cisg-online.ch/cisg/urteile/1375.pdf, citing one German and one Austrian decision; Handelsgericht Aargau, 5 November 2002, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021105s1.html, citing one German court decision; see also Obergericht Kanton Luzern, 8 January 1997, available at http://cisgw3.law.pace.edu/cases/970108s1.html, where the court, in dealing with the timeliness of the notice of non-conformity, referred to German, Dutch and US practice, without, however, quoting specific cases.} including the Swiss Supreme Court,\footnote{368 See Swiss Supreme Court, 13 November 2003, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/031113s1.html, citing two decisions rendered by the German Supreme Court, one rendered by a German court of appeals as well as one rendered by a Belgian court of appeals; Swiss Supreme Court, 28 October 1998, available at http://www.cisg-online.ch/cisg/urteile/413.htm, citing a decision rendered by the German Supreme Court.} have on various occasions cited foreign cases, as has the Austrian Supreme Court.\footnote{369 See Austrian Supreme Court, 25 January 2006, available at http://cisgw3.law.pace.edu/cases/060125a3.html, citing one German Supreme court decision; Austrian Supreme Court, 13 April 2000, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000413a3.html, citing one decision rendered by the German Supreme Court; see also Austrian Supreme Court, 15 October 1998, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981015a3.html, citing one decision rendered by the German Supreme Court; Austrian Supreme Court, 6 February 1996, available at: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960206a3.html, citing one German decision.
In one instance, an Australian court, too, referred to foreign case law,\textsuperscript{370} the same is true for a Canadian court,\textsuperscript{371} a Danish court\textsuperscript{372} as well as a French court.\textsuperscript{373}

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

4. The CISG’s application beyond its sphere

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

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


\textsuperscript{374} See Noordi Taquela, supra note 10, at 6, stating that “there are not reported cases in Argentina on the use of the CISG in relation to contracts not covered by its sphere of application.”

\textsuperscript{375} See Baretči-Nikšić, supra note 12, at 102, stating that “there is no empirical evidence that the Croatian courts used the CISG in relation to contracts not covered by its sphere of application.”

\textsuperscript{376} See Ratcehmalová, supra note 72, at 110.

\textsuperscript{377} See Lokašky, supra note 49, at 127, stating that “[t]here do not appear to have been any reported instances where Danish courts have used the CISG in relation to contracts not covered by its sphere of application.”
Still, exceptionally the CISG has been relied on to solve issues that did not fall within its sphere of application. In France, for instance, where the Civil code does not contain any rules on formation of contract, the Supreme Court turned to Article 14 CISG for inspiration when having to draw a line between an offer and a mere invitation to make an offer (invitatio ad offerendum). In England as well, the CISG served as a “source of inspiration” in purely domestic cases.

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

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

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

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379 See Mozina, supra note 79, at 270.
380 See Fresnedo de Aguirre, supra note 16, at 335.
381 See Witz, supra note 50, at 138, also pointing out why this resort to the CISG may have occurred: “Cette source d’inspiration s’éclaire d’autant mieux que la Chambre commerciale s’est prononcée à la lumière de l’avis du Conseiller Jean-Pierre Plantard, qui faisait partie de la délégation française à la Conférence diplomatique de Vienne d’avril 1980.”
382 Andersen, supra note 9, at 308.
384 See Shalev, supra note 14, at 185.
386 Torsello, supra note 35, at 220. (footnote omitted)
387 See Garcia Cantero, supra note 125, at 278.
388 See German Supreme Court, 24 March 2006, Neue Juristische Wochenschrift 2006, 1960 ff.; see also German Supreme Court, 18 October 2000, Neue Juristische Wochenschrift 2001, 221 ff., referring to Article 19 CISG when having to decide whether a reply to an offer relating to a lease contract that modifies the offer amounts to an acceptance.
In New Zealand, recourse to the CISG in cases in which it was not applicable seems to be more common practice. “In fact in all the cases [in which the CISG has been referred to] the CISG provisions are used to back up a court’s interpretation of domestic law,” on the grounds basically of the reasoning that “there was something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice.”

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

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

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389 Butler, supra note 15, at 254.
391 As regards Argentina, see Noodt Taquela, supra note 10, at 6; as regards Croatia, see Baretić/Nikšić, supra note 12, at 102; as regards the Czech Republic, see Rozehnalová, supra note 72, at 111; as regards Denmark, see Løskofsky, supra note 49, at 127; as regards France, see Witz, supra note 50, at 138; as regards Israel, see Shalev, supra note 14, at 186; as regards Slovenia, see Mozina, supra note 79, at 270; García Cantero, supra note 125, at 278; as regards Uruguay, see Fresneda de Aguirre, supra note 16, at 336.
392 See Torsello, supra note 35, at 221.
394 See Torsello, supra note 35, at 222.
and, in consideration of the prominent role the CISG plays at the international level and in consideration of its ‘expansive’ nature. While it is true that the CISG constitutes an autonomous set of rules, it does not mean that its concepts are not applicable outside the CISG itself. It is not a coincidence that the European legislature used the CISG as a reference for drafting Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, relating to certain aspects of the sale of consumer goods and associated guarantees.” More recently, the Italian Supreme Court also interpreted the Brussels I Regulation in light of the CISG.395

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

THE CISG’S IMPACT ON LEGISLATORS

1. From very little - direct - impact.

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

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


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

398 Madrid Martinez, supra note 27, at 343.

399 See de Aguilar Vieira, supra note 26, at 25.
far as the lack of the CISG’s impact on domestic legislation is concerned, considering that there has been a major reform in areas covered by the CISG, a new Civil Code having been promulgated only recently, in 2002. Still, “[e]ven though the commission in charge of its elaboration was composed of university professors [who were aware of the CISG], there has been no influence of the CISG on the new Civil Code.”

But is it just non-contracting States that have not succumbed to the CISG’s “expansive reach”? A look at the country reports shows that there are contracting States the domestic legislation of which has not been directly influenced by the CISG either. In Argentina, for instance, the “Convention has not had any influence on civil or commercial codes reforms” which is not really surprising, as the legislator had to focus its attention elsewhere, namely “to urgent political matters, in particular those that raised with the economic emergence.”

Similarly, in Canada, “[. . .] jurisdiction specifically amended its domestic sales legislation to conform to provisions contained in the CISG.” The reasons for this differ, however. As regards the common law jurisdictions, this is mainly due to the circumstance that “initial consideration of the CISG coincided with the adoption by the [Uniform Law Conference of Canada] of a reform of domestic sale of goods legislation based, at least in part, on article 2 of the Uniform Commercial Code. After this effort, there was thus little interest in revisiting reform of domestic sales legislation in light of the CISG itself.” As regards the civil law jurisdiction of Quebec, jurists there “were similarly engaged in a law reform project”, the inspiration of which, however, “rest[ed] more with consistency with common law principles and the U.S. Commercial Code than with the CISG directly.”

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

401 *Noodt Taquela, supra note 10, at 6.*


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

404 *Id. at 37.*

405 *Id. at 41-42, where the author goes on to state that there are, however, 5 provisions of the Code civil du Québec that are co-inspired by the CISG; see *Id. at 42 f. and 67.*
In Denmark, too, although “[t]he CISG has most certainly influenced the discussion on law reform”\(^{406}\), it has not had any direct effect on domestic legislation, unlike in other Scandinavian countries, where “new domestic legislation [. . .] paid considerable attention to the Vienna Convention text.”\(^{407}\) Still, “the CISG has ‘indirectly’ affected domestic contract and sales law in Denmark, in that Denmark has implemented the EU Directives on Unfair Contract Terms and Consumer Guarantees, both of which contain provisions which were clearly inspired by the CISG.”\(^{408}\)

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

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

In Mexico, however, the CISG has simply had no impact on local legislation at all.\(^{412}\) The same can be said as regards New Zealand,\(^{413}\) Switzerland\(^{414}\) as

\(^{406}\) Lookofsky, supra note 49, at 127.

\(^{407}\) Ibid.

\(^{408}\) Id. at 128.

\(^{409}\) See Witz, supra note 50, at 140, stating that “[l]’impact de la Convention de Vienne sur l’Avant-projet de réforme de la Commission présidée par le Professeur Pierre Catala est faible, ce que l’on peut regretter.”

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

\(^{410}\) Torsello, supra note 35, at 222.

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

\(^{412}\) See Veytia, supra note 11, at 245.

\(^{413}\) See Butler, supra note 15, at 258.

\(^{414}\) See Wider/Hachem, supra note 54, at 296, where the authors also state that “if scholars were to refer to the Convention more often as a role model in their contributions on Swiss domestic law, this might provide an incentive for courts and legislators to harmonise such law with the CISG.”
well as Uruguay\textsuperscript{415} and the United States\textsuperscript{416} with the exception of some rules to be found in the Louisiana Civil Code.\textsuperscript{417}

2. … to a very strong impact

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

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

\textsuperscript{415} See Fresnedo de Aguirre, supra note 16, at 336.
\textsuperscript{416} See Levasseur, supra note 312, at 320-321, stating that “[a]n answer to the question regarding the extent to which the CISG has or may have influenced any discussion on law reform in the USA can be found in the federal Congressional Record and be expressed in a few words: the CISG has not influenced a discussion on law reform as far as the UCC is concerned [. . .].”

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


\textsuperscript{417} See supra the text accompanying note 407.

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

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

\textsuperscript{422} For a paper on the CISG’s influence on Estonian law, see Sein/Kall, Die Bedeutung des UN-Kaufrechts im estnischen Recht, Internationales Handelsrecht 2005, 138 ff.
seems to also hold true - at least in part - in various other post-socialist Eastern and Central European countries, the “CISG has had a strong impact on the most extensive part of the Civil Code - the Law of Obligations.” Unlike in Norway, Finland and Sweden, where the CISG’s impact is limited to sales law (as it is in Greece), in Estonia the “CISG forms the basis not only for the sales contracts chapter but has also been an important source for drafting the general provisions, e.g. formation of contracts, breach of contract and exemption from liability, remedies.”

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

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

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

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

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432 Han, supra note 57, at 84.
433 See Schlechtriem, Einleitung, in: Kommentar zum Einheitlichen UN-Kaufrecht, supra note 77, p. 27, 35.
434 Magnus, supra note 52, at 159-160, where the author also states that “most basic concepts of the CISG and a number of its formulations have been implanted into the BGB. And partly this has been done in the form that CISG provisions had been given by the Consumer Sales Directive. Thus, the CISG has crept into German domestic law largely in an indirect way”, Id. at 160.
435 But see the situation in Norway, where Hagstrom, CISG - Implementation in Norway, an approach not advisable, Internationales Handelsrecht 2006, 246 ff.
436 For a similar assertion see, as regards the situation in the Czech Republic, Rozehnalová, supra note 72, at 111, where the author first states that “the legal regulation of purchase contract in the Commercial Code is highly similar to the regulation in the CISG and is based on the CISG”, and then goes on to point out that “specific differences exist. The Convention was not taken over tel quel but its text was the ground for the Commercial Code provisions.”
437 See also, in respect of the reform efforts underway in Japan on which the CISG is having a major impact, Hayakawa, supra note 24, at 230, stating that “it is probable that the new Code Civil will not take over the rules of CISG tel quel.”
438 See Han, supra note 57, at 88, stating that the “Chinese legal rule on criteria of a fundamental breach is not so strict like that of the CISG.”
others, to the issue of conformity of the goods sold, the exemption from liability, the avoidance of the contract, etc.

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

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

CONCLUSION

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

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438 Id. at 88 f.
439 Id. at 89.
440 Id. at 89 f.
441 Magnus, supra note 52, at 160.
442 See also Herber, The German experience, in: The 1980 Uniform Sales Law, supra note 18, p. 59, 67, stating that “there are many details where the CISG and the new German [...]] law differ from each other.”
443 Ibid., where it is also stated, however, that under German law “in case of breach fault is presumed. The party in breach must prove that it was not at fault. The hurdle for this proof is rather high. Therefore, the difference to Art. 79 CISG which excuses a party only for impediments of performance beyond its control is in practice much less important than could be expected from the theoretical viewpoint.”
444 For a reference to the issue of exemption as one of the important topics in relation to which the CISG and German law differ, see also Herber, supra note 442, at 67.
445 For a similar statement, rendered in respect of the reform efforts underway in Japan, Hayakawa, supra note 24, at 230, stating that “legislation is a long and complicated process of negotiations and discussions so that many other considerations should also be taken into account before we reach our final destination.”
more often than not to be both more aware of and receptive towards the CISG than practicing lawyers and judges.

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

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

\textsuperscript{445} Ramberg, supra note 419, at 201.
\textsuperscript{446} Only the Ireland, Malta, Portugal and the United Kingdom have not yet entered the CISG into force; see also Andersen, supra note 9, at 303.
\textsuperscript{447} Troiano, supra note 188, at 347.
\textsuperscript{448} Ibid.
\textsuperscript{450} See supra the text accompanying note 187 ff.
Directive) been ‘contaminated’ by the ‘CISG virus’\textsuperscript{452}, which led those scholars who feared “the risk of a colonization of their centenary, or even millenary, legal traditions”\textsuperscript{453}, to even label the European Consumer Sales Directive “a ‘Trojan horse’, created to permit uniform sales law to penetrate the domestic private law of sale through the back door.”\textsuperscript{454}

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

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

\textsuperscript{452} Troiano, supra note 188, at 349-350, where the author cites an author
\textsuperscript{453} Id. at 350.
\textsuperscript{454} Raynard, De l’influence communautaire et internationale sur le droit de la vente: quand une proposition de directive s’inspire d’une convention internationale pour compliquer, encore, le recours de l’acheteur, Revue trimestrielle de droit civil 1997, 1020, 1024.
\textsuperscript{455} Magnus, supra note 449, at 132.
\textsuperscript{456} Troiano, supra note 188, at 351.
\textsuperscript{457} See, however, German Supreme Court, 31 October 2001, available at http://cisgw3.law.pace.edu/cases/011031g1.html, correctly pointing out that in exceptional cases the CISG may be applicable even to (international) consumer sales; in accord, legal writing, see Ferrari, Art. 2, in: Kommentar zum Einheitlichen UN-Kaufrecht – CISG, supra note 77, p. 79, 81.
\textsuperscript{458} See Magnus, supra note 52, at 162, stating that “[i]t is astonishing enough that the Directive could borrow from an instrument for merchants.”
\textsuperscript{459} Ibid.
\textsuperscript{460} For a word of caution in using “the CISG as a model for legal harmonization within Europe, see Reimann, supra note 83, at 128 f.
\textsuperscript{462} See Reimann, supra note 83, at 128.