I. Introduction

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

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5 Ferrari in Schlechtriem and Schwenzer, UN-Kaufrecht, Article 7, para. 9; Harry M. Flechtner, “The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1),” 17 J.L. & Commerce 187, 188 (1998);
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by focusing on the international character of the CISG, the need to promote uniformity in its application, and the observance of good faith in international trade; and second, Article 7(2) serves as a basis for gap filling.

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

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

II. Main Areas of the Homeward Trend

A. General

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

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


For a general overview, see Ferrari, Internationales Handelsrecht, 8 (2009).
As mentioned earlier, the first form of homeward trend consists of simply disregarding the applicability of the CISG.\textsuperscript{12} Certainly, no numbers exist in how many cases courts did not apply the CISG.\textsuperscript{13}

\textbf{B. Not Applying the CISG Where it Should be Applied}

As mentioned earlier, the first form of homeward trend consists of simply disregarding the applicability of the CISG.\textsuperscript{21} Certainly, no numbers exist in how many cases courts did not apply the CISG.\textsuperscript{13}
not apply the CISG despite it being applicable and not excluded by the parties. But it is likely to be in the thousands. In Australia, the CISG formally entered into force as early as April 1, 1989, and yet to this day, there are only eleven Australian cases that apply the CISG beyond the mere decision whether the CISG is applicable or not. This may in part, or even to a great extent, be attributed to the fact that many Australian parties automatically exclude the CISG in their contracts. But this fact alone—even if it is true—cannot explain the whole picture. The CISG has been in force in Australia now for more than twenty years and Australia’s top five trading partners are all CISG member states; there certainly must have been more than these eleven cases litigated before Australian courts where the CISG applied. It seems very likely that in many cases neither the parties, nor their counsel, nor the judges ever realized that they were pleading and deciding the case under the wrong law. A similar picture is found in New Zealand, where the CISG entered into force on October 1, 1995. One of its first true CISG cases


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


26 See Butler, “New Zealand,” 251, 254 et seq., arguing that “in all the cases the CISG provisions are used to back up a court’s interpretation of domestic law.” Butler further notes that the New Zealand courts
appeared in 2011 and is still pending before the Court of Appeal.\textsuperscript{27} However, the Court of Appeal of New Zealand applied the CISG in a very recent case.\textsuperscript{28} Furthermore, there are quite a few CISG cases litigated and decided outside Australia and New Zealand involving Australian and New Zealand parties.\textsuperscript{29} Notably, there are many such CISG awards delivered under auspices of CIETAC, the China International Economic, and Trade Arbitration Commission.\textsuperscript{30}

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

C. Interpreting CISG Provisions in Light of Domestic Law

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

mentioned the CISG in only seven cases; see 251, 254 et seq. for further references. Furthermore, see Hideo Yoshimoto v. Canterbury Golf International Ltd. [2001] 1 NZLR 523, CISG-online 1080.\textsuperscript{27} International Housewares (NZ) Ltd v. SEB S.A. (High Court Auckland, March 31, 2003), CISG-online 835.


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


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

\textsuperscript{33} Cour de Cassation, October 25, 2005, CISG-online 1226; Cour de Cassation, June 26, 2001, CISG-online 598.

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

Many American courts seem to be convinced that it is perfectly normal to interpret the CISG according to UCC case law. In a recent case, a U.S. District Court, unfortunately without further reflection, noted that "case law is relatively sparse" even though this is not true, and consequently relied on the UCC while interpreting the CISG. Also, in 2008, two additional District Court decisions relied on the UCC "to clarify the CISG" claiming that there was "virtually no American case law on the CISG," relying on a statement in the 1995 Delchi Carrier decision and ignoring the already abundant U.S. case law on the CISG. Not only did the District Court fail to research foreign decisions, it ignored the considerable case law from other U.S. courts. Similar attitudes, however, can be found around the globe. For example, Australian courts have interpreted the CISG through comparisons with domestic legislation.

In Europe, the Austrian Supreme Court, in order to justify the result of a notice of nonconformity to become effective under Article 27 CISG has to be properly dispatched, refers only to a commentary on the Austrian Commercial Code.


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

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


41 Hosam El-Saghir, "The Interpretation of the CISG in the Arab World," in Janssen and Meyer, CISG Methodology, 355, 366. See also Cairo Chamber of Commerce and Industry, October 3, 1995, CISG-online 1289, where the arbitrator applied Egyptian law to interpret CISG. For China, see Shiyuan Han, "China," in Ferrari, The CISG and Its Impact, 71, 78 et seq., stating that "many courts did not distinguish where the CISG was applied and where domestic law was applied, but enumerated articles both of the CISG and domestic laws." See also Wei Li, "The Interpretation of the CISG in China," in Janssen and Meyer, CISG Methodology, 343, 344 et seq. For Argentina, see Nood Taquela, "Argentina," in Ferrari, The CISG and Its Impact, 3, 5, arguing that "Argentine courts are not conscious enough of the mandate to interpret the CISG in the light of the international character and in general do not take into account the need to promote uniformity." 37 Seeppolo, 10 Mel. Int'l L. 141, 177 (2009).

42 Oberster Gerichtshof, May 24, 2005, CISG-online 1046.
Although the German courts are widely praised as interpreting the CISG in a truly international manner and not falling back on purely domestic law, many rely solely on German Commentaries on the CISG and German case law. The same holds true for Austrian and Swiss courts. Thus, the quality and internationality of the commentaries used by the courts largely determine the quality of the judicial decisions. The following sections review the areas that are especially prone to be interpreted from a domestic perspective and serve to illustrate the extent of the problem.

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

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

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

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


48 Among the exceptions are the domestic sales laws of Germany, Austria, and Switzerland, which all know an express duty of the buyer to examine the goods and to give notice of any lack of conformity, see §§377, 378 German Handelsgesetzbuch (HGB), §§377 Austrian Unternehmensgesetzgebuck (UGB), and Article 201 Swiss Code of Obligations (OR). For further exceptions see, e.g., U.S., §2-607(3)(a) UCC; Italy, Article 1667(2) Italian Codice Civile (CC); The Netherlands, Article 7:23.1 Dutch Burgerlijk Wetboek (BW), and Portugal, Article 471 Código de Comercio (Ccom); see also Schweizer and Hachem, 57 Am. J. Comp. L. 457, 469 (2009); Schweizer, 19 Pace Int’l L. Rev. 103, 106 et seq. (2007); Schweizer in Schlechtriem and Schweizer, Commentary, Article 39, para. 4; Schweizer, 7 EJLR 333, 354 (2005).
more flexible ones designed to prevent fraud. Thus, it does not come as a great surprise that diverging domestic preconceptions have heavily influenced the interpretation of these CISG provisions.

Many if not most decisions, especially in common law countries, do not mention the fact of when or even if the buyer had given notice of nonconformity of the goods. In most cases, neither the parties, nor the counsels, nor the courts recognized the issue of the requirement of timely notice. If the issue of timely notice is discussed, generous timeframes are usually allowed. Sometimes, notice given of the requirement of timely notice.

If delivery of the goods has been deemed to be appropriate. However, interestingly, limitation. The most cases, neither the parties, nor the counsels, nor the courts recognized the issue designed. See, Germany, §377 HGB (strict examination of the goods and notice of nonconformity requirements); Peter Schlechtriem, Schuldrecht Besonderer Teil, 6th ed. (Tübingen: J.C.B. Mohr, 2003), para. 70; Barbara Grunewald, in Münchner Kommentar zum Handelsgesetzbuch, 2nd ed. (ed. K. Schmidt) (Munich: C.H. Beck, 2007), §377, para. 3. See also Honnold and Flechtner, Uniform Law, Articles 39, 40, and 44, para. 258; Schwenzer and Hachem, 57 Am. J. Comp. L. 457, 469 (2009); Schwenzer in Schlechtriem and Schwenzer, Commentary, Article 39, para. 4; Schwenzer, 7 EJLR 353, 354 (2005); Schwenzer in Schlechtriem and Schwenzer, UN-Kaufrecht, Article 39, para. 4.

For the meaning of "reasonable time" under the UCC, see James J. White and Robert S. Summers, Uniform Commercial Code, 6th ed. (St. Paul: West, 2010), 419 et seq.


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

Shuttle Packaging Systems, L. I.C. v. Jacob Theonas, INA S. A. and INA Plastics Corporation 2001 U.S. Dist. LEXIS 21630 (W. D. MI 2001); CISG-online 773 stating that "it will not be practicable to require notification in a matter of a few weeks."

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


Honnold and Flechtner, Uniform Law, Articles 39, 40, and 44, para. 254.2; Ulrich Magnus in J. von Staadingen's Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG), 15th ed. (Berlin: De Gruyter, 2005), Article 4, para. 38 (hereafter referred to as Staadinger); Schwenzer and Hachem in Schlechtriem and Schwenzer, Commentary, Article 4, para. 50.

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

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


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

61 Schweizerisches Bundesgericht, October 10, 2005, CISG-online 1353.


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

65 See Oberster Gerichtshof, January 14, 2002, CISG-online 645; Oberster Gerichtshof, August 27, 1999, CISG-online 485; Oberster Gerichtshof, October 15, 1998, CISG-online 380. See also Magnus in
exclusively by Austrian scholars who negatively commented on the shift by the German Supreme Court toward more internationality. Consequently, Articles 38 and 39 are an area where national preconceptions heavily influence the interpretation of the CISG.

2. Other Areas of Divergent Interpretation

Other areas of domestically influenced divergent interpretations of the CISG include the major areas of damages (Article 74 CISG) and exemption (Article 79 CISG) as well as the special problem of the common law parol evidence rule.

D. Narrowing the Scope of the CISG

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


1. Concurring Domestic Law Remedies

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

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

\section*{2. Issues of Validity}

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

\section*{3. The Substantive–Procedural Divide}

Finally, drawing the line between so called "substantive" and "procedural" law issues often leads to familiar domestic law.\textsuperscript{83} Procedural questions are not dealt with by the CISG.\textsuperscript{84} Thus, it is questionable whether such issues as burden and standard of proof

\textsuperscript{76} Honnold and Flechtner, Uniform Law, Article 35, para. 240.


\textsuperscript{78} Electrocraft Arkansas, Inc. v. Electric Motors, Ltd. et al., 2009 U.S. Dist. LEXIS 120183 (E.D. AR 2009), CISG-online 2045.


\textsuperscript{82} See Honnold and Flechtner, Uniform Law, Article 35, para. 225.

\textsuperscript{83} Id., Article 4, para. 70.1; Stefan Kröll, "Selected Problems Concerning the CISG's Scope of Application," 25 J.L. & Commerce 39, 47 (2005); Schwenzer and Hachem, in Schlechtriem and Schwenzer, Commentary, Article 4, para. 24.

\textsuperscript{84} Honnold and Flechtner, Uniform Law, Article 4, para. 70.1; Schwenzer and Hachem in Schlechtriem and Schwenzer, Commentary, Article 4, para. 24; Kurt Siehr in Kommentar zum UN-Kaufrecht, Article 4, para. 29 (ed. Honsell) (Berlin: Springer, 1997).
(which may often decide the outcome of a case) need to be decided autonomously.\textsuperscript{85} Similarly, compensation for legal costs has also been given considerable attention.\textsuperscript{86}

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

### III. Reasons for the Homeward Trend

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

#### A. Lack of Knowledge

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


\textsuperscript{88} See CISG-AC, “Opinion No. 6,” Comment 5.2.

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

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

B. Language Barriers

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

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


92 See the extensive online collection of scholarly writings (currently more than 1,400 texts) at the Pace database, available at http://www.cisg.law.pace.edu/cisg/biblio/bib2.html (last accessed October 25, 2013).
confronted with is asking too much of them. They just do not have the necessary time to do so, let alone to learn doing it on the job.

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

C. Relevant Cases Are Arbitrated

The number of international sales law cases being litigated in domestic courts should not be overestimated. Having a closer look at the facts of the cases being decided by domestic courts reveals the relative insignificance of these cases, at least from a global trade perspective.93 A random look at fifty recent cases from all over the world reveals the following picture. The parties involved in these cases are typically small- to medium-sized businesses. In a majority of cases the goods sold are agricultural products—fruits,94 trees,95 cherries,96 potatoes,97 rice,98 watermelons,99 and poppy seeds,100 as well as other food-stuffs such as beer,101 crabs,102 and shrimps.103 A second group comprises textile products, including yarn,104 leather,105 shoes,106 and the like, as well as small- and medium-sized machinery such as heating equipment,107 motor vehicle parts,108 or locomotives.109

93 For a detailed analysis about the commonness of application of the CISG in international commercial arbitration, see Loukas Mistelis, “CISG and Arbitration,” in Janssen and Meyer, CISG Methodology, 375, 388.
95 Landgericht Bamberg, October 23, 2006, CISG-online 1400.
96 Hannaford (trading as Torrens Valley Orchards) v. Australian Farmlink Pty Ltd., [2008] FCA 1591 (October 24, 2008), CISG-online 1743.
97 Cour de Cassation, September 16, 2008, CISG-online 1821; Rechtbank Maastricht, July 9, 2008, CISG-online 1748; Oberlandesgericht Köln, August 14, 2006, CISG-online 1405.
101 Oberlandesgericht Brandenburg, November 18, 2008, CISG-online 1734.
102 Rechtbank Rotterdam, November 5, 2008, CISG-online 1817.
103 Oberlandesgericht Rostock, September 25, 2002, CISG-online 671.
104 Oberlandesgericht Düsseldorf, April 21, 2004, CISG-online 913.
105 Corta Suprema Chile, September 22, 2008, CISG-online 1787.
107 Brown & Root Services Corp. v. Aerotech Herman Nelson Inc. 2002 MBQB 229 [Court of Queen’s Bench of Manitoba], CISG-online 1327.
Divergent Interpretations: Reasons and Solutions

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

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

IV. Homeward Trend: How Can it be Changed?

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

A. Comparative Research

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

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

¹¹⁰ One of the rare cases where the amount in dispute exceeded 100,000 USD is Schweizerisches Bundesgericht, December 16, 2008, CISG-online 1800.
¹¹¹ Appellationsgericht Basel-Stadt, September 26, 2008, CISG-online 1732.
¹¹² The challenge of producing a comprehensive work on sales law encompassing all legal systems and taking into account present-day problems has been resumed by the Global Sales Law Project and was published in 2012, Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, Global Sales and Contract Law (Oxford: Oxford University Press, 2012), see also http://www.globalsaleslaw.org (last accessed October 25, 2013).
¹¹³ This bibliography contains most of the references to scholarly writing related to the CISG and is available at http://www.cisg.law.pace.edu/cisg/biblio/biblio.html (last accessed October 25, 2013).
¹¹⁴ Ernst Rabel, Das Recht des Warenkaufs: eine Rechtsvergleichende Darstellung (Berlin: De Gruyter, 1956/73).
¹¹⁵ Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, Global Sales and Contract Law.
requires carving out common ground in the field of international trade law.\textsuperscript{116} This has recently become particularly visible with regard to the general understanding of the law of damages where the principles underlying this area of the law have moved to the center of academic debate around the world and new solutions to new challenges have been developed.\textsuperscript{117} Furthermore, in order to solve the respective issues under the CISG, detailed research is needed on the substantive-procedure divide in the different legal systems involved; questions of validity of unfair contract terms should be decided under the CISG once a clear overview of the different approaches by domestic legal systems in controlling contract terms has been established. The argument that it was not the intention of the drafters of the CISG to cover certain issues is a threat to uniform application and dooms the CISG to insignificance.

B. Language

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

C. CISG as Genuine Contract Law

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

\textsuperscript{116} Schwenzer and Hachem, in Schlechtriem and Schwenzer, \textit{Commentary}, Article 7, para. 24.


\textsuperscript{118} See Schlechtriem and Schwenzer, \textit{Commentary}; Schlechtriem and Schwenzer, \textit{Comentario sobre la convencion de las naciones unidas sobre los contratos de compraventa internacional de mercaderias} (ed. I. Schwenzer and E. Munoz) (Cizur Menor: Thomson Reuters, 2011). Translations into Mandarin, Turkish, Russian, Portuguese and French are currently prepared.

D. CISG in Education and Legal Practice

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

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

V. Conclusion

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