

CISG AND THE PROBLEM WITH COMMON LAW JURISDICTIONS

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I. INTRODUCTION

Generally applauded as the most successful international trade treaty so far, The United Nations Convention on Contracts for the International Sale of Goods (“CISG” or “Convention”)¹ is law in fifty-seven countries to date.² CISG is the culmination of

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1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. TREATY DOC. NO. 98-9 (1983); 19 I.L.M. 668-99 (1980); see also *Final Act of the United Nations Convention on Contracts for the International Sale of Goods*, Annex I, U.N. Doc. A/Conf.97/18 (1980), in Official Records, Conference on Contracts for the International Sale of Goods 178, U.N. Doc. A/Conf.97/19 (entered into force on Jan. 1, 1988) [hereinafter CISG].

2. CISG Database, *Participating Countries: Current Status, Trends*, at <http://www.cisg.law.pace.edu/cisg/cisgintro.html> (as of Apr. 30, 2000).

years of work spanning most of the 20th Century, representing compromises and solutions amenable to all legal systems whose representatives adopted the Convention.³ The scope of the Convention is limited to contract formation and the rights and obligations of the buyer and seller.⁴ The very fact that the drafters limited themselves to a narrow field of application within international trade suggests the difficulties inherent in formulating law that needs to be international in scope, application, and acceptance. It is no small triumph that CISG is law in all of the "contracting states" (i.e. countries that have ratified CISG), including the U.S., Australia, Singapore, and Canada – all of which share an English common law heritage.⁵ Yet, there is very little case law concerning CISG in any of those countries. By contrast, civil law countries, particularly European Union members and newly democratized European countries, have reported a disproportionately large number of CISG cases.⁶

Out of the more than 600 CISG court cases documented in the CISG data base⁷ (excluding International Chamber of Commerce (ICC) arbitrations and the Iran-U.S. Claims Tribunal), only twenty-one are from common law jurisdictions: one from Australia, two from Canada, and eighteen from the U.S.⁸ Why is it that common law contracting states have not accepted CISG with the alacrity one might expect, given their prominent position in world trade? One of the more compelling answers is that courts of law in these particular countries remain acutely attuned to legal history (as the reverence for past legal tradition is peculiar to the common law). These courts appear to be loath to apply law that has not been created from within and, moreover, that may conflict with well-established domestic common law or

3. See *id.* (62 states took part in the UN Diplomatic Conference in Vienna, which adopted CISG).

4. CISG, *supra* note 1, art. 4.

5. CISG Database, *Participating Countries: Current Status, Trends*, at <http://www.cisg.law.pace.edu/cisg/cisgintro.html> (the United Kingdom is, surprisingly, not a Contracting State).

6. See 1 UNILEX, *International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods* (Transnational Publishers, Inc.) (Sept. 2000) [hereinafter UNILEX] § C.

7. See *id.* (Arguably, it would be incorrect to draw conclusions based on the CISG database maintained by Pace University. Nevertheless, since the intent of CISG is to promote uniformity of application, CISG, *supra* note 1, art. 7, we can assume that courts who do decide on CISG would like their judgments to be known and accessible. After all, if international uniformity and harmonization is desired, there needs to be some way of communicating international decisions. To date, the CISG database seems to be the major central reference point, and for this reason, this paper will deal primarily with court cases reported on the CISG database).

8. *Id.*

codes⁹ (such as the United States' Uniform Commercial Code (UCC)). U.S. court cases provide particularly glaring examples of how the U.S. legal system manages to ignore or even circumvent CISG.

Thus, this article turns to CISG cases decided in the U.S. and the reluctant acceptance of CISG in U.S. jurisdictions to show that statute law, such as CISG, does not best serve *lex mercatoria*. Furthermore, the rather arresting fact that the vast majority of CISG cases pertain to European jurisdictions appears to indicate a propensity towards regionalization, rather than the internationalization envisaged by CISG. This article concludes that a genuine *lex mercatoria* is best housed in the realm of non-legally binding harmonizing agreements, such as the International Institute for the Unification of Private Law (UNIDROIT), and not in the comparatively intractable arena of statute law.

II. *LEX MERCATORIA* – THEORIES AND APPLICATIONS

A. *Definitions of Lex Mercatoria*

In its broad sense, the *lex mercatoria* refers to a body of law as well as trade practices and rules that international trading parties use to regulate their dealings.¹⁰ In this article, *lex mercatoria* is used in a general sense and conforms more or less to the definition offered by Berthold Goldman: “a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.”¹¹ For the purposes of this article, the definition is expanded to include some state law that is part of international law (such as CISG). This broad understanding of a *lex mercatoria* may not offer the kind of certainty afforded by a particular domestic law, but arguably serves international trade better, as it is able to take into account a continuously revolving set of rules whose validity is accepted by

9. *But see* Roder Zelt-und Hallenkonstruktionen GmbH v. Rosedown Park, Pty. Ltd. (1995) 57 F.C.R. 216, <http://www.cisgw3.law.pace.edu/cases/950428a2.html>. Although the Australian court here accepted CISG, this is the only reported Australian CISG case and is thus statistically meaningless.

10. Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?*, in PACE DATABASE ON THE CISG AND INTERNATIONAL COMMERCIAL LAW (June 1998), at <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>.

11. Berthold Goldman, *The Applicable Law: General Principles of Law – the Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 116 (Julian D. M. Lew ed., 1987).

the international commercial community, and may be enhanced, if the parties desire, by domestic law. It is precisely because a broad conception of *lex mercatoria* offers the possibility of including aspects of domestic laws that may be acceptable or normal to some trading partners, but not to others, that it is amenable to the international trading environment. International trade requires a greater flexibility and sensitivity to the legal and commercial backgrounds of each party than can be provided by domestic law, which by nature is biased towards its own legal tradition.

The concept of *lex mercatoria* stems from the medieval tradition originating in Europe, where special merchant courts came to decide disputes arising in transborder trade.¹² Gesa Baron lists five characteristics of the *lex mercatoria*, which distinguished it from any other kind of law:

Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of the mercantile customs. Thirdly, it was not administered by professional judges but by merchants themselves Fourthly, its procedures were speedy and informal and finally fifthly, as overriding principles, it emphasized freedom of contract and decision of cases *ex aequo et bono*.¹³

The "new" *lex mercatoria* is modelled on much the same principles as the "old" one.¹⁴ However, the romantic notion that the old *lex mercatoria* truly represented disinterested anationalism is, of course, a fallacy. There has never been a law that transcends domestic legal traditions, nor has there ever been a genuinely disinterested judiciary (or, in case of the medieval *lex mercatoria*, disinterested merchant judges). A judge cannot be genuinely independent of his or her own legal paradigm. Nevertheless, the myth - and utopia - of a *lex mercatoria* haunts legal scholars in search for harmonization of international law so that transborder trade may proceed without certainty and to the satisfaction and benefit of all trading parties. The *lex mercatoria*

12. Baron, *supra* note 10.

13. *Id.*

14. *See id.*

is supposed to accomplish this with exclusive reference to a particular legal system.¹⁵

The *lex mercatoria* is therefore not a defined body of law, but consists mostly of general principles and trade practices, supplemented with the occasional piece of substantive law (such as CISG). Common complaints about the *lex mercatoria* are these: it is not a "real" law, there is no agreement about what forms part of it and what is excluded; it is vague and incoherent, and any decisions based on it will be arbitrary.¹⁶ From this view, the *lex mercatoria* is an indefinable and mostly extra-legal set of principles based on ever-changing trade custom. As Keith Highet calls it, an "elusive and often frightening subject."¹⁷ For this reason, it cannot be the law governing a contract, as it evaporates as a law as soon as a dispute arises and the question of applicable law is raised. The open notion of a *lex mercatoria* is strongly repudiated by commentators who are uncomfortable with the idea of a "floating" kind of transnational law that has no basis in an existing legal framework. Thus, Highet regards with horror the idea of a "state-free contract" which he believes is a contract without law¹⁸ and, by implication, an unpredictable, anarchic creature that exists only in the minds and expectations of the parties. Such an informal arrangement between parties, he claims, is not a contract at all.¹⁹ A stateless contract, is nothing but a mirage, as any enforcement or dispute resolution has to take place in a particular jurisdiction, and therefore the law of a particular domestic legal system need apply.²⁰ Despite the fact that Highet rashly equates a stateless contract with a lawless contract, he is quite right in asserting that a contract under *lex mercatoria* is best seen as a contract under *principia mercatoria*²¹ (in the sense that there is no single, definable body of law called the *lex mercatoria*, which has equal legal authority, applicability and interpretation in every jurisdiction).

B. *Lex Mercatoria as Law*

Strangely, international trading partners occasionally stipulate that their contract is to be governed according to the *lex*

15. See *supra* text accompanying note 11.

16. See *id.*

17. Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 613 (1989).

18. *Id.* at 613-14.

19. *Id.* at 614.

20. *Id.* at 615.

21. *Id.* at 628.

mercatoria, although there is not such thing as a readily identifiable *lex mercatoria*. It seems clear that the parties agree to be governed by a nonexistent law, because they believe that there is some sort of consensus in international trade to which reasonable commercial partners in a particular line of business would agree. In such contracts, onus is placed on whoever resolves the dispute (most likely an arbitrator), and the parties implicitly trust the adjudicator to take into consideration generally agreed principles of international trade law.

While probably not common practice, things like "natural justice," "general principles of trade," or the "*lex mercatoria*" occasionally govern the contract.²² While contracting parties may believe that this is the most equitable way of dealing with potential disputes, in reality, applying such non-law is exceedingly difficult, even in arbitration. Some recent arbitral decisions have taken this opportunity to apply UNIDROIT Principles (which have no legal authority) as the law governing the contract, on the grounds that the UNIDROIT Principles "are today the most genuine expression of general rules and principles enjoying wide international consensus and as such should be applicable as the law governing the contracts in question."²³

Nevertheless, most trading parties are not content to entrust an arbitrator to resolve their dispute by referring to something as nebulous as a *lex mercatoria*. Moreover, a court of law would most likely give short shrift to such a governing "law." Most courts would simply perform a conflict of laws analysis to determine which law to apply.

In contracts where there is no applicable law specified, arbitrators may be permitted to act as they see fit and to apply whichever rules of law they may decide are best (the idea of the arbitrator as *amiable compositeur*).²⁴ Of course, this occurs only with the permission of the parties, but relies, perhaps too much, on subjectivity. Although one of the major advantages of arbitration is flexibility, it is possible that this freedom can be taken too far. Being obliged to act as an *amiable compositeur* is doubtlessly stressful to the arbitrator, as the feuding parties may nevertheless suspect him of bias. There is no neutral yardstick against which his performance can be measured. Here is where

22. Michael Joachim Bonell, *The UNIDROIT Principles on Practice - The Experience of the First Two Years*, 2 UNIFORM LAW REV. 34, 39 (1997), available at <http://www.cisg.law.pace.edu/cisg/biblio/pr-exper.html>.

23. *Id.* at 42.

24. Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 50, 70, *supra* note 11.

the UNIDROIT Principles come into play. Indeed, in the absence of a choice of law clause, the UNIDROIT Principles have been used as the law governing the contract in several arbitral decisions. For example, in Award No. 1795 of December 1, 1996 by the National and International Court of Arbitration of Milan, the parties agreed to settle the dispute "in conformity with the UNIDROIT Principles tempered by recourse to equity."²⁵ By being able to invoke the Principles to govern the contract, the arbitrator is in a sense relieved of having to act *ex aequo et bono* or as an *amiable compositeur*.²⁶

Nevertheless, the notion that something like a *lex mercatoria*, which is no law at all, can be the chosen law governing the contract meets with considerable resistance in courts of law. How is it to be administered, interpreted, or enforced? How can a "law" floating in an extra-legal space (i.e. international space, which is a legal orphan) have the same binding force as properly legislated state law, or even common law? Considering *lex mercatoria* as a law is, in the words of Hight, "a logical impossibility and an intellectual solecism."²⁷ This may be true. However, contracting parties nevertheless continue to use clauses referring to rather vague things like "general principles of law" and "*lex mercatoria*." It would be presumptuous to infer that this choice of non-law as the applicable law implies that the parties are unaware of the importance of choice of law. To the contrary, the parties consciously reject domestic law because they do not want, or cannot agree, to be subjected to a particular legal system that one of the parties is unfamiliar with. Instead, they prefer to take any disputes to legally neutral grounds. This kind of choice of non-law, however, is better suited to arbitration than litigation. Courts of law will most likely apply domestic law rather than the UNIDROIT Principles, although the consensus is that the UNIDROIT Principles most closely reflect a *lex mercatoria*.

It is perhaps because the UNIDROIT Principles are seen as a convenient way of defining the *lex mercatoria* that some countries have used them in formulating their new commercial laws. The UNIDROIT Principles have "served as an important source of inspiration in some of the most recent codifications," including the Dutch Civil Code, the new Civil Code of Quebec and the new Civil Code of the Russian Federation.²⁸ Bonell also notes that

25. Bonell, *supra* note 22, at 43.

26. Jarvin, *supra* note 24, at 70.

27. Hight, *supra* note 17, at 614.

28. Bonell, *supra* note 22, at 37.

Lithuania, Estonia, Czech Republic, Scotland, Tunisia, New Zealand, and fifteen states in Africa referenced the UNIDROIT Principles in new draft legislation.²⁹

However, in using the provisions of the UNIDROIT Principles to codify national commercial laws, a two-fold danger exists. First, it undermines the flexibility due to the fact that the UNIDROIT Principles are just that, principles not law. Second, adoption of the UNIDROIT Principles as domestic law would likely detract from their very purpose of serving as a kind of independent *lex mercatoria*. The experience of CISG seems to suggest that an international agreement with legal authority is not easily accepted as law, even in the jurisdictions that have ratified it. The way CISG has fared in courts of law suggests that a *lex mercatoria* with legal authority is not as beneficial for the unification of international trade law as it may first appear.

C. CISG as *Lex Mercatoria*?

Like UNIDROIT, CISG has gained the status of a *lex mercatoria*, at least in arbitral proceedings. For example, the tribunal in ICC 7331/1994 held that in the absence of an applicable law clause, the contract was to be governed by "the general principles of international commercial practice and accepted trade usages, and as such by CISG, which reflects those principles and usages."³⁰ Indeed, arbitral tribunals apply CISG to international sale of goods contracts, regardless of whether either party to the dispute is a contracting state or has chosen CISG. Furthermore, tribunals may apply CISG whether or not arbitration takes place in a contracting state. In ICC Case No. 5713/1989, CISG was taken to govern the contract because the arbitrators saw it as the most appropriate law governing international transactions and had no qualms applying it to two parties from non-contracting states.³¹

However, unlike the UNIDROIT Principles, CISG was conceived as statute law from the start. The purpose of the document was to provide a legal framework that contracting states could adopt as their law governing the international sale of goods. CISG is built on the notion of freedom of contract, which means that parties can agree to contract out of CISG and any of

29. *Id.*

30. UNILEX, *supra* note 6, § D.1994-33 (citing ICC Case No. 7331/1994 (Yugo. v. Italy), 6-2 Int'l Comm. Arb. 73 (1994)).

31. *Id.* § D.1989-1 (citing ICC Case No. 5713/1989, XV Yearbook Comm. Arb. 70 (1989)).

its provisions: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."³² In a sense, this "self-effacing character"³³ of CISG compromises its position as statute law. Conceivably, Article 6 could make CISG powerless – if the applicable law governing transnational contracts can simply be derogated, what is the point of the Convention? Essentially, the success of CISG depends largely on the goodwill of the parties to the contract to remain within the confines of an international legally valid framework.

CISG also allows contracting states to make a declaration under Article 95, whereby they may decide not to be bound by to Article 1(b).³⁴ In effect, this is simply another way in which contracting states can avoid CISG if one of the trading parties does not carry on business in a contracting state. One cannot help but suspect that the ability to contract out of CISG altogether does little to favor the harmonization of international trade law. Indeed, contracting out of CISG may well be the U.S. lawyer's initial reaction when faced with a contract that may fall under CISG.

Furthermore, the almost total freedom of contract does very little to protect disadvantaged parties, which may be forced to accede to the law of choice of their stronger and legally more sophisticated trading partner. It is impossible to combine the principle of freedom of contract with the notion that CISG ought to be used to facilitate trade among unequal parties, as the preamble states "considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States"³⁵

Perhaps it is because freedom of contract is central to CISG that it has enjoyed such popularity (though not among courts of law). It is the ultimate international goodwill gesture – states can adopt it as statute law, while contracting parties can choose to contract out of CISG and therefore out of domestic statute law. However, the ability to mold the Convention as the parties see fit is part and parcel of an international convention that needs to appeal to all types of legal systems. It allows parties to walk a

32. CISG, *supra* note 1, art. 6.

33. Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION 139, 174 (Thomas E. Carbonneay ed., 1990), available at <http://www.cisg.law.pace.edu/cisg/biblio/audit.html>.

34. CISG, *supra* note 1, art. 95.

35. CISG, *supra* note 1, preamble.

fine line between internationalism and parochialism. As Hartnell notes, “[t]he drafting history undeniably suggests that the drafters intended article 4(a) to serve as a loophole which could stretch to fit the needs of each domestic legal system.”³⁶ On the one hand, the ability to reach compromises that reflect a party’s familiar domestic law may be considered counterproductive to the international focus of the Convention. On the other hand, there is no point in adopting a convention that makes trading parties uncomfortable. The future of CISG as an effective and welcome international legal device rests in the hands of those who are using it: the business and legal communities.

III. INTERNATIONAL VERSUS DOMESTIC LAW - THE PURPOSE OF ARTICLE 7(1)

A vital provision of CISG – and arguably the heart of the Convention – is Article 7 (1): “in the interpretation of this Convention, 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.”³⁷ Although Helen Elizabeth Hartnell believes that “article 7(1) requires at the very least that tribunals in one contracting state consider the opinions of tribunals in other contracting states,”³⁸ this is more wishful thinking than feasible reality where U.S. courts of law are concerned. Admittedly, the rather timid wording does little else but *encourage* adherence to the provision. The Article also leaves open the means by which uniformity of application is to be achieved. Nevertheless, given the fact that the Convention needs to take into account the sensibilities of a range of legal systems to avoid disharmony and discontent, it is a reasonably worded provision that offends no one. At the same time, however, adherence to it is patchy. As Michael Joachim Bonell and Fabio Liguori comment, “[v]ery rarely do decisions take into account the solutions adopted on the same point by courts in other countries.”³⁹

36. Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1, 21 (1993), available at <http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html>.

37. CISG, *supra* note 1, art. 7(1) (emphasis added). Judging from scholarly commentary on 7(1) it appears that the issue of good faith has generated much heated debate – more than on the issue on uniform application. However, for the purpose of this paper, references to Article 7(1) will ignore the good faith debate.

38. Hartnell, *supra* note 36, at 7.

39. Michael Joachim Bonell & Fabio Liguori, *The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997*, 2 REVUE DE DROITE UNIFORME 385, available at <http://www.cisg.law.pace.edu/cisg/biblio/libo1.html>.

A. CISG in U.S. Courts

As both John E. Murray and John P. McMahon note, domestic (U.S.) legal practitioners (both lawyers and judges) are suspicious about and even afraid of CISG.⁴⁰ American lawyers frequently advise their clients to simply opt out of CISG, because of what Article 6 of CISG allows, “[T]he common wisdom among traders and their advisors has been that the C.I.S.G. is so new and so different from the U.C.C. and the ramifications of its provisions are so uncertain that it is sound practice to exercise the option to exclude it.”⁴¹ This has been used as a convenient escape route to the more familiar territory of domestic law. It is therefore not surprising that some U.S. courts seem to go out of their way to find that CISG does not apply.⁴² Consequently, as of 1998, there were only three “significant”⁴³ U.S. court cases decided on CISG: *Delchi Carrier, S.p.A. v. Rotorex Corp.*,⁴⁴ *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*,⁴⁵ and *Filanto, S.p.A. v. Chilewich International Corp.*⁴⁶ In view of the fact that the U.S. conducts much of its trade with contracting states, and that, moreover, it was among the first states to adopt CISG as law (January 1988), this low figure is astonishing. Considering further that part of the purpose of CISG is to “give recognition to the rules born of commercial practice and to encourage municipal courts to apply them,”⁴⁷ the paucity of CISG cases in the U.S. is even more disturbing.

CISG’s mission is to negotiate between international and domestic laws and ideally should accommodate both so as not to discourage potential states from joining or existing contracting states from modifying their position.⁴⁸ However, it appears that

40. See John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365 (1998), available at <http://www.cisg.law.pace.edu/cisg/biblio/murray1.html>. See also John P. McMahon, *When the U.N. Sales Convention Applies and Some of the Reasons Why it Matters to You and Your Clients*, PACE DATABASE ON THE CISG AND INT’L COM. L. (1996), at <http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html>.

41. McMahon, *supra* note 40.

42. See, e.g., *Helen Kaminski Pty. Ltd. v. Mktg. Austl. Products, Inc.*, No. 96B46519, 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. July 21, 1997), available at <http://cisgw3.law.pace.edu/cases/970721u.1.html>.

43. Murray, *supra* note 40, at 368 n.17.

44. 71 F.3d 1024 (2d Cir. 1995), available at <http://cisgw3.law.pace.edu/cases/951206u1.html>.

45. 993 F.2d 1178 (5th Cir. 1993), available at <http://cisgw3.law.pace.edu/cases/930615u1.html>.

46. 789 F.Supp. 1229 (S.D.N.Y. 1992), available at <http://cisgw3.law.pace.edu/cases/920414u1.html>.

47. Audit, *supra* note 33, at 139.

48. Hartnell, *supra* note 36, at 3.

this balanced approach is not working particularly well in the U.S.⁴⁹ The main problem Murray perceives is that judges are not equipped to interpret the Convention in an international light.⁵⁰ Article 7(1) of CISG demands that in interpreting the Convention "regard is to be had to its international character."⁵¹ How is a judge, schooled in his or her domestic legal tradition, supposed to do this? The problem here is that judges tend to interpret the Convention with reference to their domestic laws, "If a judge in Hungary, the United States or any other contracting state is to see the Convention through an international lens instead of a lifetime domestic lens, we now know that the typical judge may require assistance from an international legal ophthalmologist."⁵² This is not meant to denigrate the ability of judges – merely to point out that a significant paradigm shift is required for which judges may see no pressing need. In this context, David Frisch remarks that a judge's "inertia of habit" – formed by his legal education and experience – leads to "intellectual stubbornness" that makes it difficult to accept a new kind of legal thinking.⁵³ Indeed, Frisch believes that most judges will not change their habits until forced to do so (i.e., until there is a new law).⁵⁴

Although it is debatable whether CISG encourages recourse to domestic law in interpreting CISG provisions, U.S. courts have no qualms applying UCC to help fill the gaps in interpretation, without first consulting relevant international case law (as Article 7 would suggest).⁵⁵ Case law interpreting analogous provisions of Article 2 of the UCC may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC case law "is not per se applicable."⁵⁶ It is debatable whether the spirit of Article 7 of CISG would consider recourse to the UCC as an appropriate way of having regard to a provision's international character.

Adding to the difficulty in interpreting CISG is the fact that common law jurisdictions have specific methods for interpreting statutes, which generally require narrow interpretation.⁵⁷ Narrow interpretation, however, does not sit well with the

49. See Murray, *supra* note 40.

50. *Id.* at 367.

51. CISG, *supra* note 1, art. 7(1).

52. Murray, *supra* note 40, at 367.

53. David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 522-23 (1999).

54. *Id.* at 524.

55. See CISG, *supra* note 1, art. 7.

56. *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989).

57. Audit, *supra* note 33, at 140.

international character of the Convention. Indeed, a narrow approach to interpreting CISG would be, as Bernard Audit comments, "inapposite."⁵⁸ Inappropriate or not, a study conducted by Michael P. Van Alstine suggests that U.S. courts do, more often than not, use narrow interpretative strategies for treaties, including CISG.⁵⁹ U.S. judges are not attuned to what Van Alstine believes is the implied "interpretative paradigm" of CISG, which encourages broad interpretation and welcomes and expects change, despite the fact that it is a piece of legislation and therefore notoriously difficult to change⁶⁰ (especially if one considers that any changes to the Convention must be made multilaterally). Van Alstine's view that the spirit of CISG is best served by broad rather than narrow interpretative strategies is shared by others, including Audit, who argues that "the purpose of the Vienna Convention is not only to create new, state-sanctioned law, but also to give recognition to the rules born of commercial practice and to encourage municipal courts to apply them."⁶¹ In other words, legal scholars argue that CISG is more than mere legislation as interpreted in common law jurisdictions.

Harry M. Flechtner points out a rather surprising phenomenon: there are very few instances where CISG is applied to contracts between the U.S. and Canada – even though they are in the same economic bloc (NAFTA), are both contracting states, and the U.S. is Canada's largest trading partner.⁶² Judging from the case example he gives (*GPL Treatment, Ltd. v. Louisiana-Pacific Corp*)⁶³ it appears that CISG is often used as an afterthought, in "as passing a fashion as possible,"⁶⁴ when all else fails and the party raising CISG would be advantaged by CISG provisions. In the *GPL Treatment* case, the Canadian plaintiff asserted that a contract existed without writing (as it would have under CISG), but not under Section 2-201 (1) of the U.C.C. (the Statute of Frauds provision, which applies to contracts for sale of goods for \$500 and up).⁶⁵ Although CISG was not used to decide the issue, the plaintiff belatedly recognized the possible

58. *Id.* at 153.

59. See generally Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998).

60. See *id.*

61. Audit, *supra* note 33, at 139.

62. Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potentials for Regionalized Interpretations*, 15 J.L. & COM. 127, 130-33 (1995).

63. 894 P.2d 470 (Or. Ct. App. 1995).

64. Flechtner, *supra* note 62, at 127.

65. See *GPL Treatment*, 894 P.2d at 471.

advantages were CISG to govern the contract.⁶⁶ Given that there must be many disputes arising between Canadian and U.S. parties, the absence of the application of CISG may seem surprising. In theory, contracting states that are also large trading partners ought to pay attention to CISG, but in practice they do not; this undoubtedly stems from the two parties' familiarity with each other's legal system, customary trade usage, etc.

However, as *GPL Treatment* demonstrates, when one party wants to apply CISG (thereby taking the other by surprise), the outcome normally expected could be quite different – otherwise the party bringing up CISG would have no incentive to do so.⁶⁷ Thus, the choice between CISG and UCC can determine the outcome of the dispute. The most obvious contractual issues affected would be formation of contract, parol evidence, missing terms (such as an open price), and the obligations of seller and buyer.⁶⁸ Given that these are very important issues, it is not surprising that legal practitioners and judges are quite hesitant to apply unfamiliar rules. It emerges, then, that established trading patterns are unlikely to be disturbed by unfamiliar provisions of CISG, even though CISG is the domestic law governing international contracts for the sale of goods.

IV. COMMON LAW AND CISG RULES

A. *CISG and UCC*

For U.S. courts, a major hurdle in accepting CISG has been the fact that CISG has rules foreign to both the common law and, in particular, to the U.C.C. In John E. Murray's words, "[w]e are struck by a new world where there is no consideration, no statute of frauds, and no parol evidence rule, among other differences."⁶⁹ The parol evidence rule, in particular, seems very dear to the heart of U.S. legal practitioners (probably because it enshrines the meeting of minds concept of contract law, making contracts much easier, at least in theory).⁷⁰

66. *See id.* at 477 n.4 (Leeson, J., dissenting).

67. *See id.*

68. These are areas where CISG provisions differ notably from those in the UCC.

69. John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11-2 (1988).

70. Although barring parol evidence to change the terms of a contract can be unfair, this rule is mitigated by the doctrine of estoppel, which can apply in certain circumstances.

B. Parol Evidence Rule

The international consensus is that CISG eliminates the parol evidence rule.⁷¹ Among other things, CISG's displacement of the parol evidence rule has a significant impact on the summary judgment rule, that is, where summary judgment can be made, provided there is material fact in dispute. Thus, the removal of the parol evidence rule puts this issue into a new light (and opens the door for prolonged litigation, which is a less felicitous result of CISG). The difference between common law rules and CISG rules on parol evidence is demonstrated in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostina*,⁷² where one of the issues concerned Article 8 of CISG:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by, and other conduct of, a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have

This means that U.S. law is not as inflexible on contractual terms as the parol evidence rule suggests.

71. See John P. McMahon, *Applying the CISG: Guides for Business Managers and Counsel*, in PACE DATABASE ON THE CISG AND INT'L COM. L. (Feb. 2001), at <http://www.cisg.law.pace.edu/cisg/guides.html>. ("It makes it possible to contradict and supersede the clear words of a signed written contract by testimony and other evidence showing that the written contract is not consistent with the real agreement between the seller and buyer.")

72. 144 F.3d 1384, 1387-92 (11th Cir. 1998), available at <http://cisgw3.law.pace.edu/cases/980629u1.html>.

established between themselves, usages, and any subsequent conduct of the parties.⁷³

In *MCC-Marble*, the buyer signed the standard contract, but not before he and the seller agreed that the standard terms did not apply in this case.⁷⁴ The buyer used the standard form contract to order several more batches of tiles.⁷⁵ In one particular delivery, the seller did not deliver the tiles the buyer ordered, and the buyer brought an action against the seller for breach of contract for non-delivery.⁷⁶ The seller subsequently brought a counterclaim for non-payment.⁷⁷ The buyer stated he did not pay because the tiles were non-conforming, whereupon the seller pointed to the contract, which said that the buyer had to bring all non-conforming items to the seller's attention within ten days.⁷⁸ The buyer told the court that it and the seller had agreed orally that the standard contract did not apply in their transaction.⁷⁹ The buyer managed to produce affidavits by some of the seller's company officers that the standard terms were indeed not agreed to.⁸⁰ This situation, where both parties agree that they did not intend to be bound by the written contract, is unusual. In this case, the appellate court overruled the decision by a district court that did not allow evidence admitted to alter the terms of the contract (as per the parol evidence rule).⁸¹ The district court took the traditional view that the parol evidence rule could not alter the terms of a written contract, thereby contradicting *Beijing Metals*.⁸² *Beijing Metals* held that the parol evidence rule applied to CISG, thereby treating CISG as a mere extension of the UCC.⁸³ In *Beijing Metals*, the court stated that it did not need to decide whether CISG or Texan law applied, because the parol evidence rule "applies regardless."⁸⁴ The court's interpretation of CISG's definition of parol evidence was clearly a matter of trying to fit the unfamiliar into a familiar legal pattern⁸⁵ – an interpretation

73. CISG, *supra* note 1, art. 8.

74. *MCC-Marble*, 144 F.3d at 1385-86.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1386.

80. *Id.*

81. *Id.* at 1393.

82. *See id.* at 1389.

83. 993 F.2d 1178, 1182-83 (5th Cir. 1993).

84. *Id.* at 1183 n.9.

85. Ronald A. Brand and Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM.

that does nothing for the international scope of the Convention. As the decisions in both *MCC-Marble* and *Beijing Metals* suggest, CISG has the potential to dramatically alter U.S. law.

The *MCC-Marble* decision is also remarkable because of the court's reference to scholarly studies on this issue (a civil law rather than a common law practice). The scholarly authorities referenced by the court suggest that CISG eliminates the parol evidence rule.⁸⁶ *MCC-Marble* is now precedent for U.S. case law on CISG. The notion that CISG replaces the domestic parol evidence rule is reiterated in *Filanto* and in *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*.⁸⁷ In terms of the harmonizing effort of CISG, it is encouraging that the Supreme Court made the effort required by CISG to initiate uniform interpretation and application, and, further, that it took into account scholarly, rather than court authority, in formulating its decision.

C. The Importance of CISG Precedents

Why does it appear that common law contracting states are reluctant to apply CISG? Common law goes out of its way to exclude CISG, or at least, as in *Helen Kaminski Pty. Ltd. v. Marketing Australian Products*,⁸⁸ to dismiss discussing its applicability in any detail. Apart from the inertia of habit identified by Frisch,⁸⁹ the unwillingness of common law judges to apply CISG is due to the lack of precedence among common law jurisdictions applying CISG, simply because common law judges want to get their precedents in first. There is plenty of case law in non-common law jurisdictions, but it does not seem to carry much authority in common law courts. It is perhaps significant that the United Kingdom, the cradle of common law, is not a contracting state.⁹⁰ Can we therefore conclude that the

239, 251 (1993), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/brand920414u1.html>.

86. See *MCC-Marble*, 144 F.3d 1384, 1390-91 (citing numerous prominent legal scholars, including John Honnold, Harry M. Flechtner, John E. Murray, Peter Winship). See also Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT'L & COMP. L. REV. 279, 281 (1997). ("Subjective intent is given primary consideration ... [Article 8] ... allows open-ended reliance on parol evidence.")

87. 789 F.Supp. 1229, 1237 (S.D.N.Y. 1992); 23 F. Supp. 2d 915, 920-21 (N.D. Ill. 1998).

88. No. 96B46519, 1997 U.S. Dist. LEXIS 10630, at *7 (S.D.N.Y. July 21, 1997).

89. Frisch, *supra* note 53, at 495.

90. See *supra* note 5 and accompanying text.

international flavor of CISG may span state borders, but finds considerable reluctance among legal systems, and among common law systems in particular?

Given the dearth of U.S. CISG case law, as well as the fact that foreign case law is rarely, if ever, considered, it is little wonder, then, that John E. Murray fears that CISG may ultimately fail.⁹¹ This may happen not because the Convention itself is flawed, but because cross-referencing to other CISG precedents is too difficult and thus the Convention is simply ignored by courts as well as legal practitioners.⁹² Overcoming this difficulty would essentially require a re-education (or perhaps a specialization) among the judiciary.⁹³ However, judging from the number of cases (both arbitration and litigation) that apply CISG it would be premature to predict the demise of CISG, as Murray's gloomy forecast implies:⁹⁴

CISG is a monumental contribution because it evidences a willingness of Nation States throughout the world to seek uniformity in a critical commercial context. The success of CISG could spawn other and more sophisticated efforts at uniformity with critically important effects well beyond international trade. At this time, the paucity of case law and the discouraging reaction of courts that have applied CISG augur a dim future for this noble effort.⁹⁵

Though Murray's analysis overestimates the importance of the U.S. for the future of CISG,⁹⁶ the reluctance of common law courts to apply CISG and look to other courts for precedence in accordance with Article 7 of the Convention is worrisome for the harmonization efforts of private international law. Perhaps this may lead to excluding common law jurisdictions, given the disinclination of some economically important common law countries, such as the United Kingdom and India, to even become contracting states (let alone apply CISG to their contracts). However, Michael Bonell's suggestion that a kind of CISG

91. Murray, *supra* note 40, at 371.

92. *See id.* at 369.

93. *See id.*

94. *See id.* at 373.

95. *Id.*

96. *See generally* Murray, *supra* note 40.

editorial board be set up under the umbrella of UNCITRAL⁹⁷ may contribute greatly to the harmonization goals of CISG and the need for reliance on more certain and uniform law by international traders should it be implemented.

D. Attitude of U.S. Courts Towards International CISG Case Law

Some of the most misleading remarks from U.S. courts concern the availability of CISG case law. In *Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*,⁹⁸ the court said that “[t]he caselaw interpreting and applying the CISG is sparse,”⁹⁹ based on similar comments made in *Kaminski*¹⁰⁰ and *Filanto*.¹⁰¹

The courts’ reluctance to look beyond the U.S. border for CISG case law does little to accelerate the unification of international trade law. Worse, courts do not seize the opportunity to expand at length about CISG (and thereby set the scene for future interpretations). This was the situation in *Kaminski*.¹⁰² In that case, the Australian seller entered into a distribution agreement with the U.S. buyer in which the goods to be sold were identified.¹⁰³ The buyer then ordered more items, not identified in a separate agreement, from the seller.¹⁰⁴ The buyer failed to open a letter of credit for the new order, and the seller requested the buyer to pay within a specified time (as is set out in Article 63 of CISG).¹⁰⁵ The buyer did not pay, and the Australian party started an action in Australia to declare the contract terminated.¹⁰⁶ However, the buyer became insolvent, and the U.S. Bankruptcy Court gave the buyer additional time to cure and also ordered a

97. Michael Joachim Bonell, *A Proposal for the Establishment of a ‘Permanent Editorial Board’ for the Vienna Sales Convention*, in INTERNATIONAL UNIFORM LAW IN PRACTICE, ACTS AND PROCEEDINGS OF THE 3RD CONGRESS ON PRIVATE LAW HELD BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT, ROME 241, 242 (Sep. 1987).

98. 1998 U.S. Dist. LEXIS 4586 (S.D.N.Y. Apr. 6, 1998), available at <http://cisgw3.law.pace.edu/cases/980406ul.html>.

99. *Id.* at *13.

100. *Helen Kaminski Pty. Ltd. v. Mktg. Austl. Products, Inc.*, No. 96B46519, 1997 U.S. Dist. LEXIS 10630, at *8 (S.D.N.Y. July 21, 1997) (where the court made the somewhat breathtaking observation that there was “little to no case law on the CISG in general”).

101. *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (here the court at least limited its comments to the lack of U.S. case law, not CISG case law per se).

102. 1997 U.S. Dist. LEXIS 10630.

103. *Id.* at *1.

104. *Id.* at *2.

105. See CISG, *supra* note 1, art. 28. See also *Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *2.

106. *Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *2.

stay on the Australian proceedings, applying the rules of the U.S. Bankruptcy Code.¹⁰⁷ The Australian party appealed (against the stay), claiming that the contract was governed by CISG, which therefore superseded the Bankruptcy Code.¹⁰⁸ The court found that CISG did not govern this contract, as it was a distribution agreement, and not a sale of goods contract.¹⁰⁹ The court also concluded that in any case CISG would not apply, because the goods were not sufficiently identified as required in Article 14 of CISG.¹¹⁰

Given the fact that Articles 14 and 15 are problematic and in need of interpretation, it is regrettable that the court did not enter into an analysis of CISG. With reference to Article 14, the court declared that "the CISG requires an enforceable contract to have definite terms regarding quantity and price."¹¹¹ Article 14 (1) reads:

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.¹¹²

However, this provision directly contradicts Article 55, which states that a contract can be "validly concluded" without a price being fixed, either expressly or by implication:

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.¹¹³

107. *Id.* at *3.

108. *Id.*

109. *Id.* at *8.

110. *Id.*

111. *Id.* at *7.

112. CISG, *supra* note 1, art. 14(1).

113. *Id.* at art. 55.

Articles 14 and 55 are at odds, and interpreting them together creates confusion, as they seem to be affirming two opposing principles. In *Kaminski*, the court used CISG to find that CISG did not apply by referring to Article 14(1), rather than Article 55.¹¹⁴ Inevitably, there are two different schools of interpretation regarding Articles 14 and 55, with one asserting that Articles 14 and 55 should not be read together, and the other asserting that there is no problem having them together. The first opinion, represented by E. Allan Farnsworth, is that Article 55 applies only if a contracting state has not made an Article 92 declaration that it will not be bound by Part II of the Convention (which concerns formation).¹¹⁵ John Honnold, however, is of the view that Article 55 applies whenever there is a valid contract (whose formation may not be governed by CISG).¹¹⁶ Under either article, the U.S. court's inference in *Kaminski* that CISG requires a clear and fixed price for an enforceable contract to exist is clearly erroneous.

Regarding the question of case law, the court in *Kaminski* noted that "there is little to no case law on the CISG in general, and none determining whether a distributor agreement falls within the ambit of the CISG."¹¹⁷ This may be true for U.S. case law on CISG, but it is not true internationally. Although it would be an overstatement to declare that case law is abundant and precedent-compelling, two decisions in particular on the issue of distribution agreements have become precedent.¹¹⁸ According to Bonell and Liguori, "recent judgments confirm the tendency not to apply CISG to the distribution agreement as such, where agency aspects prevail, but to consider each individual sales contract concluded under a distribution agreement to fall within the scope of the Convention."¹¹⁹ This represents the currently accepted position of CISG with respect to distribution agreements.

114. Admittedly, Article 55 talks about price only, not identification of the goods. See *Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *6-8.

115. See E. Allan Farnsworth, *Formation of Contract*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 3-1, 3-5 to 3-18 (Nina M. Galston & Hans Smit, eds., 1984).

116. JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 325-27 (1982).

117. *Kaminski*, 1997 U.S. Dist. LEXIS 10630, at *8.

118. See UNILEX, *supra* note 6, § D.1996-9 (citing OLG Düsseldorf, *Recht der Internationalen Wirtschaft* [RIW], (1996), 958); UNILEX, *supra* note 6, § D.1993-23 (citing OLG Koblenz, *Recht der Wirtschaft* [RIW], (1993), 934).

119. Bonell & Liguori, *supra* note 39, at 387.

It is noteworthy that the above-mentioned precedents were decided in a civil law jurisdiction (Germany). Given the navel gazing tendency of U.S. judges, it is quite possible that the U.S. court in *Kaminski* would have ignored the German cases, even if it had bothered to look for them. The acceptance of CISG in U.S. courts (and possibly other common law jurisdictions) arguably would have accelerated had the court in *Kaminski* paid more attention to CISG and its burgeoning international case law when delivering the reasons for its decision. Judging from international case law and scholarly writing, the outcome would most likely have been the same had they considered CISG. Apart from dismissing it without in-depth analysis, the court was apparently pleased to get rid of CISG. Victoria M. Genys reached such a conclusion in her note on the case before, "In fact, the court exhibits an extreme ethnocentricity by preferring to cite no interpretive sources in its decision rather than cite to secondary sources or international cases on point."¹²⁰ The question remains whether the court's cursory reading of CISG is simply another attempt to ignore the Convention and to retreat to the familiar territory of local law.

V. INTERNATIONAL PRECEDENTS – SHOULD "BAD" DECISIONS BE ADOPTED?

"Very rarely do decisions take into account the solutions adopted on the same point by courts in other countries. Until now it would appear that there are only two decisions rendered by national judges in which express reference is made to foreign precedents."¹²¹ Two of the judgments Bonell and Liguori refer to are Italian and French.¹²² The apparent unwillingness of courts to coordinate with one another is somewhat disheartening, in view of the harmonizing intention of CISG and its goal to promote uniformity in its application, which can only be done by courts referring to each others' decisions.

However, some international precedents on specific CISG issues also leave something to be desired, not necessarily because of the decision itself (which inevitably clashes with a domestic law), but with the way the decision is explained. As Paul Amato points out, potentially important precedents need to show

120. Victoria M. Genys, *Blazing a Trail in the "New Frontier" of CISG: Helen Kaminski Pty Ltd v. Marketing Australian Products, Inc.*, 17 J.L. & COM. 415, 426 (1998).

121. Bonell & Liguori, *supra* note 39, at 386.

122. Trib., sez. un., 31 Jan. 1996 (Italy), in UNILEX, *supra* note 6, § D.1996-3; and CA Grenoble, Oct. 23, 1996 (Fr.), in UNILEX, *supra* note 6, § D.1996-10.

adequately the court's reasoning and provide an analysis of the issues decided on.¹²³ This would make a decision more palatable for that jurisdiction where a different decision would most likely result.

For example, in *Pratt & Whitney v. Malev Hungarian Airlines*, the Hungarian Supreme Court considered whether a proposal with an open price was a binding contract and found that it was not.¹²⁴ Here, the Court considered CISG Article 14 and, cursorily, Article 55 to say that the Court could not determine a market price.¹²⁵ Arguably, there was no need to consider Article 55 as the court found that there was no valid agreement because the price was not sufficiently indicated, as required by Article 14.¹²⁶ As mentioned above, the open price provision of CISG is confusing, and its interpretation by courts will no doubt be influenced by the local legal culture. Amato thus contends that a U.S. court would probably have reached a different decision and found that there was a valid agreement, despite the absence of a fixed price.¹²⁷ This is what would happen under UCC rules, "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract, and there is a reasonably certain basis for giving an appropriate remedy."¹²⁸ And further: "[t]he parties if they so intend can conclude a contract for sale of goods even though the price is not settled."¹²⁹

Because Germany has similar provisions, Paul Amato concludes that a German court would also have found a valid sales agreement.¹³⁰ By contrast, he assumes that a French court would not.¹³¹ Thus, "[s]ometimes CISG's provisions will align with a nation's legal traditions, and sometimes they will not."¹³² If, as Amato suggests, an American court decided the case, a completely different precedent would have been set.¹³³ It remains

123. Paul Amato, *U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts*, 13 J.L. & COM. 1, 29 (1993), available at <http://www.cisg.law.pace.edu/cisg/biblio/amato.html>.

124. See generally Legfelsbb Biróság, Gf.I.31, 349/1992/9 (Dr. László Szlávnits trans. 1992, reprinted in 13 J.L. & COM. 31-47 (1993)) [hereinafter *Malev*].

125. See *id.*

126. See *id.*

127. See Amato, *supra* note 123, at 18-19.

128. U.C.C. § 2-204 (3)(1998).

129. U.C.C. § 2-305 (1)(1998).

130. See Amato, *supra* note 123, at 19-20.

131. See *id.* at 20-21.

132. *Id.*

133. See *id.* at 18-19.

to be seen what authority the *Malev* decision will have in other CISG cases involving open price issues, and, in particular, whether it would be followed in jurisdictions whose local legal culture would suggest a different outcome. Amato suggests that U.S. courts, for one, would be "tempted to ignore it as authority in a similar case."¹³⁴

Amato's analysis uncovers a major problem with CISG cases: the inability and unwillingness of various jurisdictions with different legal cultures to comply with CISG provision of uniformity of interpretation.¹³⁵ In a simplistic sense, precedence is established by a first come first serve principle, but no one wants a foreign court to establish authority on issues that the domestic court would instinctively decide differently. Establishing an authoritative precedence that may well fly in the face of some domestic law thus needs to be done with sufficient analysis to establish authority – this, Amato argues, was not accomplished in the *Malev* case.¹³⁶ By providing only a cursory analysis of the reasons for its decision, the court was doing itself (and CISG) a disservice.¹³⁷ Article 7 of CISG again seems like a wish list.¹³⁸

VI. CURRENT TRENDS IN U.S. CASE LAW ON CISG

It appears now that the principles of CISG are gaining more momentum in the U.S., with the court in *MCC-Marble* recognizing that:

[o]ne of the primary factors motivating the negotiation and adoption of CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply . . . Courts applying CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result.¹³⁹

134. *Id.* at 27.

135. *See id.* at 21-28.

136. *Id.* at 27 ("At the least, *Malev* suffers from a dearth of analysis.")

137. *See id.* at 28.

138. *See* CISG, *supra* note 1, art. 7.

139. *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998).

MCC-Marble not only admits evidence of facts that are not part of the signed contract, but also considers the parties' subjective intent, where each party is aware of the other's intent (Article 8(1) CISG).¹⁴⁰ The affidavits submitted by the buyer suggested that the seller was aware of the terms agreed on orally.¹⁴¹ The decision in *Beijing Metals* to apply the parol evidence rule has generally been rejected in subsequent U.S. decisions, to the point where it is no longer "persuasive."¹⁴²

A recent case seems to herald a new awareness in U.S. courts regarding the authority of non-CISG case law. *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L.*, decided in May 1999, is significant because it is the first time that a U.S. court examined foreign CISG case law and considered it authoritative.¹⁴³ At the same time, however, this case clouds the issue of distribution agreements and CISG. Here, the court did not hesitate to apply CISG in what was essentially a framework agreement, as the dispute did not concern specific items.¹⁴⁴

VII. CONCLUSION

Apart from the danger of being ignored even in contracting states where it is law, CISG is further compromised by the trend towards regional interpretation (in its broadest sense), as documented by Flechtner.¹⁴⁵ In view of the international aim of CISG, this is unfortunate, given that a large number of countries representing a variety of legal systems have adopted the Convention. On the other hand, it is still too early to judge where CISG is headed. The authority of precedents will be crucial in determining the direction of CISG. Given the fact that CISG decisions are likely to differ dramatically from one jurisdiction to the next because they stem from different legal cultures, courts are hesitant to consider foreign decisions authoritative.¹⁴⁶

140. *Id.* at 1385 (applying Article 8 of CISG).

141. *Id.*

142. *See, e.g., MCC-Marble*, 144 F.3d at 1389; *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp. 2d 915, 920 (N.D. Ill. 1998).

143. No. 99-0380, 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999).

144. Peter Schlechtriem, *Conformity of the Goods and Standards Established by Public Law Treatment of Foreign Court Decision as Precedent*, in PACE DATABASE ON THE CISG AND INTERNATIONAL COMMERCIAL LAW (Commentary of *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L.*, Andre Corterier, trans., 1999), at <http://www.cisg.law.pace.edu/cisg/wasi/db/cases2/990517u1.html>.

145. Flechtner, *supra* note 62, at 127.

146. One only needs to consider the discontent arising from the *Malev* case.

Does CISG provide for a more regulated arena for international trade? Will common law jurisdictions look to authorities in alien legal systems? These questions will require much more CISG case law before a definite trend can be predicted. However, the most recent U.S. cases give room for cautious optimism. International harmonization even within the relatively small confines of CISG is a difficult process that can be derailed by more persuasive forces than entrenched legal traditions. However, as harmonious international trade is doubtlessly an asset to harmonious relations between states, it is hoped that all contracting states will make an effort towards accelerating the harmonization of international trade law. CISG is an ideal platform to demonstrate the willingness to work towards unification of international trade law. As Van Alstine suggests, the Convention has its own magnetic pull, which he believes will eventually "dissipate the centrifugal force of domestic social and legal traditions."¹⁴⁷ Furthermore, with the growing number of contracting states, their increasing importance in world trade (e.g., Europe), and the corresponding threat this imposes on the U.S. as a preferred global trading partner, the parochial attitude of U.S. courts (and perhaps other common law courts) may be forced to change. The U.S. and other contracting states may have to reconsider the applicability of CISG.

The excuse that a court cannot be expected to take cognizance of foreign decisions because of linguistic barriers, time constraints, and access constraints should not be accepted. This is particularly the case in the (still) early years of CISG when it is crucial to develop a body of authoritative case law if CISG is truly to become the kind of international convention it aims to be. As Flechtner comments with an apt metaphor, "We are passing beyond the childhood of CISG jurisprudence and beginning to enter its adolescence – a period troubling and unsettling, but also exciting and crucial to the ultimate success of the venture."¹⁴⁸ A major problem with CISG is that it is, in a sense, international law applied locally. This inevitably puts a local tint on CISG interpretation. The fact that there is no international court that administers CISG is identified by Ronald A. Brand and Harry M. Flechtner as one of the most "serious obstacles to achieving the uniform international sales regime at which CISG aims."¹⁴⁹ The parochialism of domestic courts coupled with their suspicion of

147. Van Alstine, *supra* note 59, at 790.

148. Flechtner, *supra* note 62, at 137-38.

149. Brand and Flechtner, *supra* note 85, at 239.

foreign judgments that may be differently decided at home is undoubtedly a major impediment to uniform application of CISG. Some of the cases touched on in this paper demonstrate that courts are bending over backwards to avoid having to take into account foreign precedents in a not so subtle bid to ensure that authority regarding CISG is not established. Naturally, each jurisdiction would like to have its CISG judgments become authority, and, equally naturally, each "opposing" jurisdiction would like to prevent that.

Although case law on CISG is growing, it does so slowly and unevenly. In a sense, there is a vicious circle between CISG and courts of law: courts are nervous about the lack of case law, which in turn prohibits the development of case law. This is a little odd, considering how many transactions would be governed by CISG. However, things are completely different when it comes to arbitration, where CISG is not a strange and unfamiliar intruder, but rather fulfills a welcome harmonizing function. In the realm of arbitration, the harmonizing goal of CISG has found a better home than in courts of law. In fact, given that the number of states signatory to the New York Arbitral Convention is larger than the number of CISG contracting states,¹⁵⁰ there is increasing popularity to opt for arbitration rather than litigation in commercial disputes. Moreover, CISG is accepted in arbitration, and, as Brand and Flechtner point out, even in courts of law there is an increased willingness to find for, rather than against, arbitration when arbitration is a divisible portion.¹⁵¹ This was the case in *Filanto*, where the court found that the issue of whether the dispute should go to arbitration was a matter for the courts to decide; only then would the court consider other issues.¹⁵² In this case, the court decided that the dispute should be resolved by arbitration, thereby neatly getting out of ruling on CISG.¹⁵³ Thus, it appears that CISG has broader acceptance than one might imply judging from case law alone.

150. There are 122 signatories to the New York Arbitral Convention (as of Dec. 14, 1999), while CISG currently lists 57 parties, but only 19 signatories.

151. Brand and Flechtner, *supra* note 85, at 260.

152. *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F.Supp. 1229, 1239-42 (S.D.N.Y. 1992).

153. *Id.*