2 The Perversity of Contract Law Regionalization in a Globalizing World

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> [T]he adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.[1]

On 12 November 2011, the leaders of Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States announced the achievement of the broad outlines of an ambitious, 21st-century, Trans-Pacific Partnership (TPP) agreement.[2] The aim of the TPP agreement is to enhance trade and investment among the TPP partner countries, to promote innovation, economic growth and development, and to support the creation and retention of jobs.[3]

Businesses, and especially smaller businesses, will be one of the key players and beneficiaries of the TPP. Businesses favour a world without legal complexity. They would welcome a world with one simple, neutral legal system that fully meets their needs. Businesses wanting to sell or buy goods cross-border often have one major problem: too much choice in regard to choosing a law benefitting their particular needs. In practice, it is difficult for businesses to gather information about different legal systems and their benefits, as this usually requires (expensive) legal advice. This is especially difficult for small businesses. In the absence of full information, businesses will naturally favour their own legal system, which may make it difficult to agree to the choice of law when a business from another state favours in turn its own legal system.

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1 Preamble, United Nations Convention on Contracts for the International Sale of Goods UN Document A/CONF.97/18.

2 *See* <www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>. Unless otherwise indicated, all websites in this chapter were last accessed 21 February 2012.

3 *See* <www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was introduced by UNCITRAL as a set of international rules to eliminate legal complexity in regard to cross-border sale of goods. The CISG has been ratified by 79 countries from all continents.[4] Six of the nine TTP member states are also member states to the CISG, including major trading nations such as the US. The CISG, therefore, should be expected to be the law of choice for cross-border sale of goods within the TPP.

However, the publishing of a proposal for a Common European Sales Law (CESL) in October 2011 by the European Commission[5] might indicate that the development could take a different turn. It is too early to reliably predict under which law cross-border sale of goods will be conducted in the TPP. Nevertheless, it is quite instructive to trace the history and the discussion surrounding CESL to examine whether any lessons can be learnt. It is the author's contention that the creation of regional sale of goods laws would be a dangerous development that cannot be in the interest of businesses, large or small. Possible advantages will be outweighed by added legal complexity by putting yet another choice into the mix of the already numerous existing ones.[6]

This chapter will first set out the academic and professional preoccupation within the European Union with a unified contract law and the reasons for it. It will then examine and compare CESL with the CISG, and following on from this examination, will make some critical observations in regard to the regionalization of contract law. In the last part, this chapter will give an overview of the acceptance of the CISG in the TPP countries and will try to predict whether or not the TPP will go the way of the European Union.

2.1 COMMON EUROPEAN SALES LAW – A BRIEF HISTORICAL OVERVIEW FROM THE FIRST HARMONIZATION ATTEMPTS TO THE COMMON EUROPEAN SALES LAW

The proposed CESL is the most recent of a series of attempts to harmonize European contract law. Attempts to systematically harmonize European private law were made first and

4 *See* <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

5 *European Commission*, 'Proposal for a Regulation on a Common European Sales Law', COM(2011) 635 final (11 October 2011).

6 *See* discussion on a global contract law ten years ago already: O. Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law', 53 *American Journal of Comparative Law* 379 (2005); M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law', 56 *American Journal of Comparative Law* 1 (2008); U. Magnus, 'Die Gestalt eines Europäischen Handelsgesetzbuches', *in* J.J. Basedow & K.J. Hopt & H. Kötz, *Festschrift für Ulrich Drobnig*, Mohr Siebeck, Tübingen 1998, p. 57 esp. p. 71; A.S. Hartkamp, 'Modernisation and harmonisation of contract law: objectives, methods and scope', *Congress to celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private Law* (2002).

foremost by academia with works like Ernst Rabel's *Recht des Warenkaufs*.[7] Actual work on common principles of European contract law began about 30 years ago when, in 1982, the Lando Commission was established to bring together contract law specialists from different member states. Following comparative studies of the contract laws of member states, the Lando Commission published its 'Principles of European Contract Law'.[8] The Principles have not only been an influential resource for some east European states when formulating new civil codes,[9] but have also been discussed as a European *lex mercatoria*,[10] or as a useful tool to fill any gaps in the CISG.[11]

Since the end of the 1990s, there have been several calls from the European Parliament for the harmonization of contract law. For example, in 1999 the European Parliament and the Council called for measures to harmonize certain aspects of member states' civil (non-criminal) laws.[12] The Council of the European Union followed suit and requested that the Commission investigate the need for such a comprehensive act of legislation. The Commission responded in 2001 with a Communication on European Contract Law,[13] which sparked an intensive debate on whether, and to what extent, it would be desirable to harmonize, or even unify, European private law, and which options were available to achieve that end.[14] This resulted in the Commission setting out an Action Plan in 2003 to develop a 'Common Frame of Reference', abandoning the idea of a European Contract Code.[15] The Commission argued that by 'establishing common principles and terminology' it would

7 E. Rabel, *Recht des Warenkaufs – eine rechtsvergleichende Darstellung*, de Gruyter, Berlin 1967 (reprint of the 1958 edition).

8 O. Lando & H. Beale, *Principles of European Contract Law Vol. I & II*, Kluwer Law International, Alphen aan den Rijn 2000; O. Lando *et al.*, *Principles of European Contract Law Vol. III*, Kluwer Law International, Alphen aan den Rijn 2003.

9 S. Vogenauer, Professor of Comparative Law, University of Oxford, evidence to the House of Lords' European Union Committee for its 12th Report, European Contract Law: the Draft Common Frame of Reference, in response to question 24, available at <www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/8112604.htm>.

10 V. Kamath, *An Analysis of Principles of European Contract Law as an Autonomous/Universal Lex Mercatoria*, 2010, available at <http://ssrn.com/abstract=1613142> or <dx.doi.org/10.2139/ssrn.1613142>; *see also* O. Lando, supra note 6, p. 382.

11 U. Magnus, 'Wesentliche Fragen des UN-Kaufrechts', *ZeuP* (1999), p. 642; F. Sabbajh-Farsh, *Die vorvertragliche Haftung im UN-Kaufrecht und in den UNIDROIT- und Lando-Prinzipien unter Einbeziehung des deutschen und englischen Rechts*, Verlag P. Lang, Frankfurt a. M. 2008, p. 50 *et seq.*

12 The European Parliament encouraged work towards a European Code of Private Law, or greater harmonization of civil law, and the Council, meeting in Tampere in 1999, called for a study on the desirability of harmonizing the civil legislation of member states.

13 *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM(2001) 398 final (11 July 2001).

14 For a comprehensive overview, *see* Jansen, *Binnenmarkt, Privatrecht und europäische Identität*, Mohr Siebeck, Tübingen 2004, pp. 2-6 with further references.

15 Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – an Action Plan, COM(2003) 68 (12 February 2003), p. 16.

help in 'ensuring greater coherence of existing and future *acquis* in the area of European contract law'.[16] The European Parliament earlier had, however, felt encouraged to propose an extremely ambitious timescale for the enactment of a European Union Contract Law, aiming for within nine years, that is, by the year 2010.[17]

In the meantime, the German academic Christian von Bar established a Study Group on a European Civil Code.[18] It envisaged the preparation of a Draft Code going far beyond the Principles of European Contract Law, covering the entire field of patrimonial law. Nevertheless, it has been argued that the ambitious project overall cannot claim to be a genuinely European text of reference in the same way as the Principles of European Contract Law, since the non-contractual parts of private law, like tort, property, or unjust enrichment, are so different in the respective legal systems that homogenous principles could not be found in the same way as for contract law.[19] The group did, however, make a significant contribution to the discussion on European civil law. While the Draft Common Frame of Reference (DCFR) was developed by a Joint Network on European Private Law, with funding from the European Commission, the European Research Group on the Existing EC Private Law ('Acquis Group',[20] founded in 2002) prepared a systematic revision of the *acquis communautaire*. The DCFR was published in 2009 with, amongst other things, rules and principles of European contract law derived in a modified form from the Principles of European Contract Law. It is a rather academic text, which has been described as 'nothing less than the draft of the central components of a European Civil Code.'[21] The DCFR has provided a valuable resource for drafting CESL. There are many similarities between the DCFR and the European Commission's proposal. CESL, however, is much more limited than the DCFR, covering only contracts for the sale of goods, for the supply of digital content and related services, and where the seller undertakes to perform a service for the buyer in relation to the goods.

16 Communication from the Commission to the European Parliament and the Council, *supra* note 15. It should be noted that the European Commission relegated the idea of a European Civil Code to a secondary position in this second Communication.

17 Resolution of the European Parliament on the approximation of the civil and commercial law of the Member States, OJ C140E/538, 542 (13 June 2002): 'from 2010: establishment and adoption of a body of rules on contract law in the European Union that takes account of the common legal concepts and solutions established under previous initiatives'.

18 On that Group, *see* C. von Bar, Die Study Group on a European Civil Code, *in* P. Gottwald *et al.*, *Festschrift für Dieter Henrich*, Verlag Ernst und Werner Gieseking, Bielefeld 2000, p. 1.

19 N. Jansen & R. Zimmermann, 'Restating the Acquis Communautaire? A Critical Examination of the "Principles of the Existing EC Contract Law"', 71 *Modern Law Review* 505 (2008).

20 The Acquis Group consisted of scholars from various member states of the European Union, with a significant number of German scholars (*see* for more comprehensive insight into the work of the Acquis Group: N. Jansen & R. Zimmermann, *supra* note 19).

21 P.S. Atiyah *et al.*, *Atiyah's Sale of Goods*, Pearson Education, Harlow 2010, p. 6.

In summary, CESL is just the latest initiative in a longstanding attempt to draft a common European contract law (as part of an even larger project – a European Civil Code).[22] The need and/or idea of a unified contract law was being considered as far back as the 1930s, but it really captured the imagination of academics and officials alike from the end of the 20th century. The result was the development of five different sets of rules available for a business to choose from, in addition to its respective national contract law, or that of another member state. For 23 of its 27 member states, yet another set of rules might be applicable (and can also be chosen by businesses, whether or not they are located in one of those 23 states) – the CISG, which is designed to facilitate global international sale of goods.

2.2 THE NEED FOR A EUROPEAN UNION SOLUTION

The just-summarized history of CESL suggests that there was an enormous need felt by officials and academics alike, as well as by small and medium-sized businesses for a unified sale of goods law within the EU. What was that need?

Von Bar's Study Group on a European Civil Code came into being against the backdrop of the European Parliament's resolutions in 1989[23] and 1994,[24] where the Parliament 'summoned' the legal academic community to bring its expertise to bear in the creation of a European Code of Private Law. The legal academic community considered that 'only those trained in the discipline can pursue the essential task of intensive comparative research free from the constraints of representing national interests and accommodating political expediency'.[25] As a reaction to the activities of the European Parliament and the Commission in the area of European contract law, the Acquis Group was set up to provide a comparative analysis concentrating on the existing and available set of rules within the EU.[26]

The Green Paper published by the European Commission in July 2010 'on policy options for progress towards a European Contract Law for consumers and businesses'[27] argued that the single EU market was inhibited by the myriad different national contract laws in

22 *See*, for a more comprehensive history of the European contract law endeavour, M.J. Bonell, *supra* note 6, p. 5 *et seq.*

23 OJ C 158 (28 June 1989).

24 OJ C 205 (25 July 1994).

25 *See* <www.sgecc.net/pages/en/introduction/88.background.htm>.

26 *See* <www.acquis-group.org/>.

27 COM(2010), p. 348. The Green Paper consultation closed on 31 January 2011 and resulted in 320 responses. *See*, in regard to the responses by various governments – most very skeptical in regard to the benefits of a European sales law, UK Law Commission & Scottish Law Commission, 'Optional Common European Sales Law: Advantages and Problems (Advice to the UK Government)', November 2011, Para. 1.24, *et seq.*

the EU and the unavailability of translations of those laws. It was considered that small and medium-sized businesses 'may be reluctant to engage in cross-border transactions', the effect of which was the hindering cross-border competition.[28] The Commission thought that more must be done to ease cross-border transactions by 'making progress in the area of European Contract Law'.[29] 'An instrument of European Contract Law could help the EU to meet its economic goals and recover from the economic crisis.'[30] Bearing in mind that small to medium-sized businesses make up 99% of the businesses in the EU, the Commission's concern is understandable.[31]

The CISG and the UNIDROIT Principles were acknowledged as setting international standards for business-to-business (B2B) sales, and model rules for legislators[32] around the world. However, they were felt to be too limited because they were only dealing with B2B transactions and, in regard to the CISG, only cover sale of goods.[33] Furthermore, and most importantly for the Commission, both instruments are not applied and interpreted uniformly in all the member states.[34]

The Commission acknowledged that its proposal for a European Union sales law targeted small and medium-sized businesses that, in its view, did not have strong bargaining power and could not ensure that their contracts were subject to a particular national law. The Commission was concerned that this raised 'obstacles to pursuing a uniform commercial policy across the Union, thus preventing businesses from grasping opportunities in the internal market'.[35]

A survey by Eurobarometer supports the Commission's contention that small and medium-sized businesses perceive that they would benefit most from a single European sales law. Small and medium-sized businesses ranked contract-law-related obstacles among the top barriers to cross-border trade.[36]

28 COM(2010) 348, p. 2.
29 COM(2010) 348, p. 2.
30 COM(2010) 348, p. 3.
31 Commissioner Reding, 'Towards a European Contract Law', conference speech, Leuven, 3 June 2011, p. 19. *See also* in regard to more pronouncements to that effect: UK Law Commission & Scottish Law Commission, *supra* note 27, Para. 6.29, *et seq.*
32 For example, the Organisation for the Harmonisation of Business Law in Africa has been working on developing a Uniform Act on Contracts largely inspired by the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles and PECL have also inspired the Chinese Contract Act of 1999.
33 COM(2010) 348, p. 3.
34 COM(2010) 348, p. 6.
35 COM(2010) 348, p. 7.
36 Flash Eurobarometer 320, 'European Contract Law in Business-to-Business Transactions of 2011', p. 15.

Table 2.1 The Impact of Contract-Related Obstacles on Businesses' Decisions to Sell/Purchase Across Borders from/to Businesses from Other EU Countries[37]

	Large impact	Some impact	Minimal impact	No impact
Difficulty in finding out about the provisions of a foreign contract law	8%	12%	15%	57%
Problems in resolving cross-border conflicts, including costs of litigation abroad	9%	10%	13%	60%
Obtaining legal advice on foreign contract laws	6%	10%	15%	62%
Difficulty in agreeing on the foreign contract law	5%	10%	15%	63%

The survey confirmed that differences in contract law, and the additional transaction costs and the complexity that they generate in cross-border transactions, dissuade a considerable number of businesses, in particular small and medium-sized businesses, from expanding into markets in other EU member states. These differences have the effect of limiting competition in the internal market. The Commission estimates that the value of the trade foregone each year between member states due to differences in contract law amounts to tens of billions of Euros.[38]

The European Commission's main impetus for CESL, therefore, was the lack of participation of small to medium-sized businesses in the European (sale of goods) market. Academics were, it seems, at least indirectly driven by the idea of legal unification within the EU and clearly felt that the academy could provide the sound and rigorously researched basis for any proposal.

2.3 CESL IN COMPARISON

The question arises in regards to what CESL adds to the already existing national sales laws, but also in regards to what advantages it has in relation to the CISG.

In regard to national sales laws, the advantage is easily made out: CESL provides a neutral, non-national law for the European small to medium-sized business community. A law

37 Flash Eurobarometer 320, *supra* note 36, p. 15.

38 Flash Eurobarometer 320, *supra* note 36; European Commission, *supra* note 5, p. 3.

that the Commission proposed had to be, and would be, 'sufficiently clear to the average user' and provide 'legal certainty'.[39]

However, does CESL offer an advantage in regards to the use of the CISG? Or does it just add another alternative to a myriad of available sale of goods laws? An answer lies in the consideration of the following questions:[40] first, in regard to the scope of application and regulation of CESL, are its rules advantageous to those of the CISG; secondly, is the lack of a superior court really prohibitive in developing a unified interpretation of an international set of rules; and lastly, is it not, in fact, easier even for a small to medium-sized business to be *au fait* with a set of rules that can be used in every cross-border situation, *i.e.* within and outside the EU?

2.3.1 CESL v. CISG

The following will compare broadly the differences and commonalities between CESL and the CISG.[41] In regard to the scope of CESL, the CESL proposal stipulates two key requirements parties have to meet before they can choose CESL. It is proposed that the parties can only choose CESL in a business-to-business contract if one of the parties is a small to medium-sized enterprise (defined as having less than 250 employees and having an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million (Art. 7 Regulation)). Further, at least one of the parties has to have its habitual residence in one of the EU member states (Art. 4 Regulation).[42] The Commission's reasoning for defining the scope of CESL and thereby narrowing its application is that CESL is designed to tackle the existing internal market and competition problems in a targeted and proportionate fashion. The regulation should therefore focus on parties who are currently dissuaded from doing business abroad by the divergence of national contract laws, with the consequence of a significant adverse impact on cross-border trade.[43]

The CISG applies if the parties have their business in different CISG member states (Art. 1(1)(a) CISG) or if the private international law rules lead to the application of the

39 European Commission, *supra* note 5, p. 10, 21.

40 *See* in regard to a detailed comparison between CESL and the CISG: I. Schwenzer, 'CESL and CISG' in this volume.

41 For a more detailed overview and analysis in regard to CESL *see*: H. Eidenmueller *et al.*, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht', available at <ssrn.com/abstract=1991705> (last accessed 1 March 2012). In regard to the CISG *see*: L. Mistelis *in* S. Kröll & L. Mistelis & P. Perales Viscasillas, *U.N. Convention on Contract for the International Sale of Goods (CISG)*, C.H. Beck, Munich 2011, Art. 1; S. Eiselen, 'Electronic Commerce and the U.N. Convention on Contract for the International Sale of Goods', 6 *EDI Law Review* 21 (1999).

42 *See* in regard to CESL and the Rome I Regulation: H. Eidenmueller *et al.*, *supra* note 38, p. 8 *et seq.*

43 *European Commission*, *supra* note 5, Para. 21.

law of a member state (Art. 1(1)(b) CISG). Parties with no connection to a CISG member state can (and are encouraged to) agree on the application of the CISG. Under the principle of party autonomy, non-EU parties will be free to agree on CESL as their governing set of rules; however, it seems the proposal discourages that. CESL will only assert itself in the market of international sale of goods rules if it offers a more comprehensive and an easier set of rules than the CISG. Both set of rules cover the B2B cross-border sale of goods and exclude contracts where the purpose was not the sale of goods, at least in its preponderant part.[44] A slight difference in the scope exists in regard to the supply of digital content, which is expressly covered by CESL whereas it is questionable under what circumstances the supply of digital content is covered by the CISG.[45]

CESL's starting point is the responsible but otherwise free-spirited party. As in the CISG, party autonomy is the foundation of the parties' contractual relationship.[46] Once the parties have contracted, general principles of party behavior apply: the parties have a duty to act in accordance with good faith and fair dealing (Art. 2 CESL) and have an obligation to co-operate with each other (Art. 3 CESL). Even though this is not articulated expressly in the CISG, the spirit of the CISG encompasses the same concepts.[47] Like the CISG, CESL stipulates that it is to be interpreted autonomously.[48]

Interestingly, after stating these general principles, CESL regulates very extensively the negotiation, formation, conclusion, and the obligations and remedies of a cross-border sales contract (there is insufficient space in this chapter for an article-by-article analysis). Therefore, CESL does regulate issues of contract law for which the CISG does not provide an express answer, for example: contract conclusion when using standard terms,[49] limitation period,[50] and the rate of interest to be paid.[51] Further, being a new document, CESL does (unsurprisingly) deal expressly with the issue of concluding a contract by electronic means, on which the CISG is silent.[52] Neither the CESL nor the CISG adheres to the

44 Art. 6(1) CESL Regulation; Art. 3(2) CISG.

45 Art. 5 CESL Regulation; in regard to the CISG *see*: F. Ferrari *in* P. Schlechtriem & I. Schwenzer, *Kommentar zum Einheitlichen U.N. – Kaufrecht – CISG*, C.H. Beck, Munich 2008, Art. 1 Para. 38.

46 Art. 1 CESL; *see* Art. 6 CISG.

47 It is controversial whether Art. 7 CISG encompasses the concept of good faith also in regard to the parties; *see* P. Perales Viscasillas, *in* S. Kröll, & L. Mistelis & P. Perales Viscasillas, *supra* note 41, Art. 7 Paras 24-30.

48 Art. 4 CESL; Art. 7 CISG.

49 Arts. 7, 70, 86, CESL.

50 Arts. 78 *et seq.* CESL.

51 Art. 166 CESL.

52 *See* discussion on the use of electronic communication and CISG: P. Butler, 'Electronic Commerce in the Framework of the CISG', conference paper, Istanbul, 25 May 2012 (forthcoming). The thesis of the paper is that the CISG is well equipped for the new electronic communication age.

common law parol evidence rule, and both 'agree' that pre-contractual negotiations and post-contractual conduct can be used to determine the agreement between the parties.[53]

Also, in regard to the core provision of any sale of goods law – what constitutes non-conformity – CESL and CISG could be seen to sing in unison.[54] However, depending how one reads Arts. 99 and 100 CESL, CESL could be an unfortunate copy of Article 35 CISG. The CISG in Article 35(1) clearly requires the goods to be in conformity, that is, to have the properties agreed upon by the parties in their contract. Article 35(2) stipulates circumstances in which an agreement between the parties can be ascertained should the parties have failed to explicitly or impliedly agree upon them.[55] Article 99 CESL, like Article 35 CISG, also makes party agreement the cornerstone of a conformity analysis. However, Article 100, unlike Article 35(2) CISG, lists other requirements goods 'must' possess to conform with the contract. The list is (un)surprisingly similar to the elements set out in Article 35(2). Should CESL come into force, it would remain to be seen whether 'must' in Article 100 will be interpreted in a strict sense, or whether the spirit and purpose of CESL in regard to B2B demand an interpretation more akin to Article 35(2) CISG.

Like the CISG, CESL is silent in regard to unconscionability, illegality, agency, set-off, majority of creditors/debtors, and assignment.[56] Furthermore, neither instrument contains rules on penalty clauses, absence of intent caused by third parties, and the suspension of the period of limitation due to reasons outside the creditor's sphere of control.[57]

Overall, the CESL adds more detail to those principles that the CISG has relied on courts and tribunals to fill with some detail, a role that they have successfully filled over the last 30 years. The CISG has proved to be a flexible instrument, being able to accommodate the economic and technological changes over time. The CESL does not in any way create a groundbreaking new cross-border sale of goods framework. In fact, in its core principles, the CESL is not different from the CISG. At this stage, the CESL encompasses 186 articles

53 Arts. 58, 59 CESL; Art. 8 CISG.

54 Arts. 99, 100 CESL; Art. 35 CISG.

55 The relationship between Art. 35(1) and Art. 35(2) is not without controversy; *see* S. Kröll *in* S. Kröll, L. Mistelis & P. Perales Viscasillas, *supra* note 41, Art. 35 Para. 3.

56 Those legal doctrines are particularly difficult to unify due to how differently they are treated in the different European legal systems, *e.g.*, set off is first and foremost a procedural objection in English law whereas it is a substantive defence in German law. *See also* H. Eidenmueller *et al.*, *supra* note 41, p. 5. It also has to be noted that the CISG is, strictly speaking, not 'silent' in regard to unconscionability and illegality – Art. 4 (a) CISG states, 'This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with (a) the validity of the contract or of any of its provisions or of any usage . . .'.

57 *Compare* H. Eidenmueller *et al.*, *supra* note 41, p. 5.

(including B2C contracts), whereas a business only needs to come to terms with 101 CISG articles. It is unrealistic to hope that the CESL will attract less litigation or arbitration among businesses due to its more detailed regulation of certain issues.

2.3.2 *The Role of the Superior Court*

The wealth of readily available literature, court decisions, and international arbitral awards, in conjunction with a growing awareness of the need for an autonomous interpretation of the CISG (which is partly achieved by a comparative analysis), has paved the way for an increasingly more homogenous autonomous interpretation of the CISG. The users of the CISG do not feel the lack of a superior court is a disadvantage. In fact, the lack of a superior court opens the opportunity for the CISG to remain a dynamic set of rules that can respond well to the changes and demands of time and be truly international.[58]

The latter might be one of the greatest disadvantages of the CESL. According to the European Court of Justice's ('ECJ') annual report, it has already faced a consistent backlog of 700 to 800 cases each year between 2006 and 2011.[59] In 2010, the average time from a reference by a national court to a judgment by the ECJ was 16.1 months. The statistic can only worsen with the additional adjudication under the CESL. As the UK Law Commission points out, the problem with delays is that they are additional to the such delays caused by national courts. The Law Commission analyzed ten recent cases and found that the litigation had continued for an average of 59 months by the time the ECJ gave judgment, and, of course, the ECJ judgment does not conclude the issue. Following the reference, the case will then return to the national court.[60]

For small and medium-sized businesses, drawn-out litigation poses as much a risk as litigation pertaining the CISG in front of a national court or an international arbitral tribunal. During the years it will take for the ECJ to develop a predictable jurisprudence under the CESL, it can be safely assumed that CISG jurisprudence around the world will have homogenised even more, such that litigation under the CISG will have the same outcome, wherever the decision-making body.

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58 For example, when the CISG was drafted email and Internet were still things of the future. However, discussion and scholarship suggest that the CISG is well able to adapt to the challenges those media bring: *see* S. Eiselen, *supra* note 41; J. Hill, 'The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods', 2 *Northwestern Journal of Technology & Intellectual Property* 1 (2003).

59 *See* <www.theioi.org/downloads/7muqr/ECJ%202010_version_integrale_en.pdf>, at 83, 97 (last accessed 28 Feb 2012).

60 UK Law Commission & Scottish Law Commission, *supra* note 27, Paras 7.20, 7.21 with further examples.

2.3.3 *Small and Medium-Sized Businesses and International Sale of Goods*

The CESL is proposed to be a second sales contract law regime within the national law of each member state. Where the parties have agreed to use CESL, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the CESL, there is no scope for the application of any other national rules (Art. 11 Regulation) unless the issue is not covered by the CESL. Therefore, in addition to the CESL, parties will still have to choose another set of complementary rules. Most importantly, small and medium-sized businesses that do trade outside the EU will again face the challenge of agreeing with another party on a neutral set of rules under which to conduct their international sale of goods, as the CESL might not be seen as 'neutral' by a non-EU party. For a small to medium-sized business to familiarize itself with the CISG is, from a cost-benefit perspective, beneficial, since the CISG encompasses a truly international set of rules governing the international sale of goods that will be neutral for any other party in a cross-border sale.

2.3.4 *Summary*

It is puzzling why the European Commission went through drafting a common European sales law, when 23 of its 27 member states are already CISG member states. The CESL in its current form, in regard to B2B contracts, does not deliver a new innovative framework that offers breathtaking advantages to the CISG. Some might argue, on the contrary, that its length and its drafting of minutia detail instead makes the CESL an unclear, hard to comprehend set of rules for non-lawyers. Resources would have been better spent, in the author's view, by promoting the CISG to businesses and to the four EU member states that are not CISG member states. The CISG gives business one set of cross-border sale of goods rules for cross-border sales within but also for trade with states outside the EU.

2.4 INTERNATIONAL SALES LAW IN TPP COUNTRIES

The core question this chapter raises is the likelihood that the TPP will follow the EU example and enact a TPP cross-border sales law instead of making the CISG the cross-border sales law of choice. Of course, a crystal ball is not available. However, what might be one of the strongest indicators of whether a unique TPP cross-border sales law might have a chance of being born is the acceptance of the CISG in the TPP countries. Six of the nine TPP countries are CISG member states. In the available space, this chapter will provide an overview of the CISG's acceptance in Australia, New Zealand, the United States, and Singapore. As measurement for acceptance this chapter discusses the CISG's acceptance under three headings: scholarship, jurisprudence, and legislation.

2.4.1 *Scholarship*

Scholars have a variance of influence on the acceptance of law. However, a lively academic discussion is beneficial and a necessary prerequisite to the acceptance of a particular law or legal principle. Students being exposed to the CISG during their studies are guarantors to advancing the use of and knowledge about the CISG.

Overall, there is no sizable CISG scholarship in New Zealand. In fact, at this point in time, Victoria University has admitted New Zealand's first doctoral candidate who will conduct CISG research. Using available research databases, especially Austlii, the publication of articles that have some CISG focus seems a bit more diverse in Australia, *i.e.*, not only published student papers but also papers from foreign CISG experts like Henry Gabriel. Otherwise, the picture seems similar to that of New Zealand – the CISG is in the hands of a few (mainly two) scholars.

The extent to which the CISG is taught in New Zealand law schools and in Australian law schools, too, is dependent on the individual lecturer. If the CISG is taught, it will generally be covered briefly in private international law or international commercial law.[61] It might be that the pinnacle of academic discussion at this point takes place among undergraduate students preparing for the Willem C Vis Moot. This might be the reason why Victoria University has, in the last 10 years, developed the most substantial academic analysis of the CISG,[62] being the only New Zealand university that regularly participates in the competition. The University of Auckland, like Victoria University, covers the CISG mainly in their LL.M. courses such as International Sales and Finance Law or International Commercial Law, both of which contain a fairly comprehensive section on the CISG. However, given that LL.M. courses are limited to up to fourteen students, often non-New Zealanders, only a few students are exposed to the CISG during their studies. Despite its LL.M. level course, there are virtually no postgraduate papers available on the subject at the University of Auckland.[63] A Google search and the search of individual law school websites in Australia has not yielded any positive result in finding a dedicated CISG/international commercial master's course or undergraduate course. Personal discussion with two law

61 Most courses will briefly mention the CISG, but even in Contract Law or Commercial Law subjects it will receive no more than a brief mention.

62 A search in the New Zealand universities' library catalogue to date refers to sixteen Victoria University student research papers and one University of Auckland student research paper; *see also* (especially in regard to topics covered) P. Butler, 'New Zealand', *in* F. Ferrari (Ed.), *The CISG and its Impact on National Legal Systems*, Sellier, Munich 2008, p. 253.

63 Although one LL.M. paper received first place in the 2009 Clive M. Schmitthoff International Essay Competition and a resulting publication in *The Vindobona Journal of International Commercial Law and Arbitration*: K. Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods', 14 *Vindobona Journal of International Commercial Law and Arbitration* 83 (2010).

schools in regard to teaching such a course did not produce any results. Even though not all information might be easily accessible, research suggests that, in comparison to other courses like international trade or even international dispute resolution/arbitration, the CISG is not often taught in Australia.

The United States was one of the first countries to ratify the CISG.[64] Unsurprisingly, given the size of the United States, there is an interesting body of scholarship published. The CISG has not only provoked scholarship directly on the CISG, including scholarship authored by such academics as Henry Deeb Gabriel, Harry Flechtner, Larry DiMatteo and E. Allan Farnsworth,[65] but also played a significant role in more general scholarship in the areas of international contract, sales and finance law.[66] A number of American universities also offer limited opportunities for students to cover the CISG – Pace University offers a subject through the Pace London Law Program;[67] the University of Pittsburgh offers two courses that deal with the CISG;[68] U.C. Davis offers one course specific to their International Commercial Law LL.M.;[69] NYU Law sporadically offered one subject since 2004;[70] Columbia Law School offers three subjects, two of which are not of limited entry;[71]

64 The CISG entered into force in the US on 1 January 1988.

65 *See* in H.D. Gabriel, 'The Buyer's Performance Under the CISG: Articles 53-60 Trends in the Decisions', 25 *Journal of Law & Commerce* 273 (2005-2006); H. Flechtner, 'Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach test: the homeward trend and exemption for delivering non-conforming goods', 19 *Pace International Law Review* 29 (2007); H. Flechtner, 'Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and the Notice Thereof Under the United Nations Sales Convention (CISG)', 26 *Boston University International Law Journal* 1 (2008); L. DiMatteo, *International Sales Law: An Analysis of CISG Jurisprudence* (2005); L. DiMatteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings' 22 *Yale Journal of International Law* 111 (1997); E.A. Farnsworth, 'The American Provenance of the UNIDROIT Principles', 72 *Tulane Law Review* 1985 (1997-1998); J. M. Lookofsky, 'Consequential Damages in CISG Context' 19 *Pace International Law Review* 63 (2007).

66 C. Leonhard, 'Beyond the Four Corners of a Written Contract: A Global Challenge to US Contract Law', 21 *Pace International Law Review* 1 (2009); L. Nottage, 'Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, US, Japanese and International Sales Law and Practice', 14 *Indiana Journal of Global Legal Studies* 385 (2007); C. Sukurs, 'Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods', 34 *Vanderbilt Journal of Transnational Law* 1481 (2001); R. Sarkar, 'The Developing World in the New Millennium: International Finance, Development, and Beyond', 34 *Vanderbilt Journal of Transnational Law* 469 (2001).

67 International Commercial Transactions – *see* <www.pace.edu/school-of-law/curriculum>.

68 International Sales Seminar – <www.law.pitt.edu/course/5858>; and Commercial Transactions in Goods – *see* <www.law.pitt.edu/academics/courses/2124/17637>.

69 Global Trading System – *see* <extension.ucdavis.edu/unit/international_law/global.asp>.

70 Commercial Sales Law: Domestic and International – *see* <https://its.law.nyu.edu/courses/description.cfm?id=9079>.

71 International Sales and Arbitration – *see* <www.law.columbia.edu/courses/L8136-international-sales-and-arbitration>; Sales Transactions: International and Domestic – *see* <www.law.columbia.edu/courses/L6282-sales-transactions-international-and-domestic>; International Commercial Contracts – *see* <www.law.columbia.edu/courses/L6263-international-commercial-contracts>.

University of Florida's Levin College of Law offers a course on the CISG combined with the Vis Moot competition;[72] and courses are also offered at two further US universities.[73]

The National University of Singapore does offer an undergraduate course on the CISG[74] and, for the last 10 years, has participated in the Willem C Vis Moot. Further, the university offers a master's programme in international business law. Equally, the Singapore Management University offers an undergraduate elective in comparative sales with a focus on the CISG.[75] A small body of Singaporean scholarship on the CISG also exists, though the majority of it seems to have been undertaken by students at NUS.[76]

2.4.2 Courts

As of 23 February 2011 on the Pace website,[77] three CISG decisions were allocated to Peru, two to Chile, 153 to the US, one to Singapore, 22 to Australia, and 11 to New Zealand. Given the different population sizes, the size of the jurisprudence is not a very encouraging picture. If the legal profession is not familiar with the CISG and, consequently, the courts do not do justice to the CISG, then there is a failure to create a solid body of case law that visibly illustrates the CISG's advantages.

2.4.2.1 New Zealand

There are ten cases where the New Zealand courts referred to the CISG solely to back up or to contrast the main line of argument in the case.[78] The use has, however, often been incorrect. In particular, there are numerous international sale goods cases in which it had not occurred to the party residing in Australia, the party residing in New Zealand, their lawyers or the court that the CISG applied. To illustrate, it took 15 years for the first case on the CISG to reach the New Zealand Court of Appeal.[79]

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72 International Commercial Arbitration Moot-Law – *see* <www.law.ufl.edu/programs/jd/description.shtml>.

73 University of Washington, International Business Transactions – *see* <www.law.washington.edu/CourseCatalog/Course.aspx?YR=2012&ID=A578>; University of Michigan, Cross-Border Contracts – *see* <web.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=043590>.

74 In 2011, for example, Professor Franco Ferrari taught a course at NUS on international and comparative law of sales – *see* <law.nus.edu.sg/student_matters/course_listing/courses_desc.asp?MC=LL4027&Sem=1&MGC=2> (last accessed 10 May 2012).

75 <www.law.smu.edu.sg/blaw/electives_description.asp#comparative> (last accessed 10 May 2012).

76 L.Y. Nghee, 'A case for harmonisation of ASEAN contract laws', 17 *The Singapore Law Review* 373 (1996); L.Y. Nghee, 'UNIDROIT Principles – A Model for the Harmonisation of ASEAN Contract Law', 18 *The Singapore Law Review* 355 (1997); W.P. Yee, 'Rethinking a Principle Underlying Contract Law', 22 *The Singapore Law Review* 131 (2002).

77 <www.cisg.law.pace.edu/cisg/text/casecit.html>.

78 *See* overview of case law in P. Butler, *supra* note 63, p. 251.

79 *R J & A M Smallmon v. Transport Sales Limited*, CA 545/2010, New Zealand Court of Appeal, 22 July 2011.

The case concerned involved an Australian plaintiff that had purchased trucks from a New Zealand-based defendant company (T.S.L., owned by Mr Miller). However, when the trucks arrived in Australia, the Queensland authorities refused to register them, as they were lacking the required compliance plates (broadly similar to a warrant of fitness in New Zealand). The Smallmons contended that, because the trucks were not registerable at the point of sale, and could never be fully registered, they could not be driven and were therefore not fit for the ordinary purpose.

In the High Court, although both of the parties initially attempted to rely on domestic law, it was confirmed that this was not the correct law to apply. The Court correctly identified that the plaintiff was precluded from suing under domestic sale of goods law, as the CISG applied. The Court also dismissed the parties' argument that, in determining the claim under the CISG, the Court should take into account domestic case law. Instead, after requesting further submissions to be filed, the Court followed the principles established by the CISG decisions of overseas courts, which provide that a seller will only be responsible for compliance with the regulatory provisions or standards of the importing country if certain circumstances are met in the fact situation.

The central issue heard by the Court of Appeal was the application of Article 35 CISG to the sale of the four trucks. The judges were first required, in the absence of an express term regarding registerability of trucks in Queensland, to determine whether it was an implied term of the contract that the trucks met the requirements for registration, when the seller was located in New Zealand. The second question to determine was which party was responsible for the registration of the four trucks in Queensland. The Court recognised that, in order to answer these questions, they were required to apply Article 35(2) of the CISG. The Court focused on international jurisprudence, including both cases and academic writing to determine what a breach of Article 35(2) required. It found, for the Smallmons to establish a breach of Article 35(2)(a), it was necessary for T.S.L. and Mr Miller to have known about the registration requirements because of special circumstances – such as T.S.L. having previously exported trucks into Australia. The Court also discussed Article 35(2)(b) and found that there had been no need for the High Court to consider Article 35(2)(b), as the sale did not involve the buyers making any 'particular purpose' known to the seller, and that there was no issue about determining whether it was reasonable for the buyers to rely on the seller's skill or judgement. Further, it was concluded that the question of 'special circumstances' did not arise under Article 35(2)(a). It is pleasing to see that the Court engaged in an autonomous interpretation relying on comparative material, rather than applying a domestic law vision to the issue. The judges in the High Court and Court of Appeal have to be commended that they embraced the spirit of the CISG in *Smallmon*, despite the lack of discussion on the CISG within New Zealand's legal community.

Having shown the lack of scholarship and discourse within the profession in regard to the CISG, a parallel development should be examined at this point: the impact of the CISG on New Zealand contract law, and in particular on the rules surrounding the regard one has to have to pre-contractual negotiations and post-contractual conduct when interpreting a contract. As the survey of cases indicates, the New Zealand courts, in particular Justice Thomas, have used Article 8 of the CISG as an aid to advance pre-and post-contractual conduct as part of the contract interpretation canon. Further, the CISG has been continuously used by Professor David McLauchlan to support his thesis in regard to contract interpretation.[80] The openness to include internationally negotiated principles has influenced a shift in New Zealand's contract interpretation law which now has come close to requiring/allowing an Article 8 analysis when interpreting contracts.[81]

2.4.2.2 Australia

A similar picture can be painted for Australia. Even though Australia has five times the population of New Zealand and was one of the earlier signatories of the CISG worldwide (ratified in 1989), Australia's track record is not in any way better. The lack of understanding of the CISG has resulted in some interesting, even weird and wonderful, observations by the courts: for example, the quite surprising assumption by an Australian court (echoed by the N.Z. Court of Appeal) that Japan was a CISG member state – 10 years ahead of time.[82] As Bruno Zeller points out, Australia has taken a piecemeal approach (so far) in regard to the application and interpretation of the CISG.[83] According to Zeller and Spagnolo, this has led to a worrying trend of decision-making by the Australian courts equating the CISG with domestic sales law.[84]

Cortem SpA v. Contromatic Pty, a 2010 Federal Court of Australia case, provides a good example. In that case, the question arose in a cross claim as to whether the 'failure of the products in question to measure up to TestSafe standards inevitably resulted in a contravention of Article 35 in some respect'.[85] The Court held that it could be concluded that the failure of the products concerned to conform to current rules and regulations meant

80 For example, D. McLauchlan, 'The Plain Meaning Rule of Contract Interpretation', 2 *New Zealand Business Law Quarterly* 80 (1995); D. McLauchlan, 'Subsequent Conduct as an Aid to Interpretation', 2 *New Zealand Business Law Quarterly* 237 (1996).

81 *See* D. McLauchlan, 'Common Intention and Contract Interpretation', *Lloyd's Maritime and Commercial Law Quarterly* 30 (2011).

82 *Playcorp Pty Ltd v. Taiyo Kogo Ltd*, [2003] VSC 108.

83 B. Zeller, 'Commodity Sales and the CISG', *in* U. Schroeter & C.B. Andersen (Eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmonds & Hill, London 2008.

84 L. Spagnolo, 'Green Eggs and Ham: the CISG, Path Dependence, and the Behavioural Economics of Lawyers Choices of Law in International Sales Contracts', 6 *Journal of Private International Law* 417 (2010).

85 *Cortem SpA v. Contromatic Pty* [2010] FCA 852, Para. 92.

that the products were not of the quality or description required by the contract within the meaning of Article 35(1) CISG, but the Court pointed out that this conclusion went no further than the conclusion the Court had reached under the contract itself. The Court dismissed Article 35(2)(a) of the CISG due to a lack of evidence that the products were not fit for the purpose for which goods of the relevant description would ordinarily be used. The Court stated that, in their view, establishing that the goods did not pass the tests administered by TestSafe was not the same thing as saying that they were not fit for the purposes referred to in Article 35(2)(a). The Court held[86]

> It seems that the products in question were supplied to [the Respondent] in much the same way as [the Claimant] would have supplied any other wholesaler, the problem being that, in Australia, the products encountered a regime of testing to which they might not previously have been subjected.

Article 35(2)(b) CISG was also raised, but failed also on factual grounds. The Court concluded that none of the other provisions of Article 35 appeared to have any relevance.

The Claimant did, however, make the general submission that the Respondent had never (until after the commencement of the present proceeding) made a complaint about the faults or defects.[87] The Court relied on Article 39, too, to dismiss part of the Respondent's cross claim: a result, the Court pointed out, which it had reached as well 'under the printed conditions of sale'. Thus, the Court was to a certain degree receptive to the CISG. However, the Court stressed that the submissions based on the CISG were afterthoughts and rather subsidiary.[88]

Overall, Australian courts have the tendency to cite non-applicable domestic legislation, case law or concepts in cases where the CISG is the governing law. An overview also shows that the CISG is not used by counsel or courts as a back up to develop domestic contract law, differing from common practice in New Zealand.

Having shown the lack of scholarship and discourse within the profession in regard to the CISG, a parallel development should be examined at this point: the impact of the CISG on New Zealand and Australian contract law, and in particular on the rules surrounding the regard one has to have to pre-contractual negotiations and post-contractual conduct when interpreting a contract. As pointed out earlier, the survey of cases indicates, the New Zealand courts, in particular Justice Thomas, have used Article 8 of the CISG as an aid to advance pre- and post-contractual conduct as part of the contract interpretation canon. Further, the

86 *Cortem, supra* note 85, Para. 94.
87 *Cortem, supra* note 85, Para. 97.
88 *Cortem, supra* note 85, Para. 102.

CISG has been continuously used by Prof. David McLauchlan to back up his thesis in regard to contract interpretation.[89] As mentioned earlier, this led to a shift in New Zealand's contract interpretation law which is now close to an Article 8 CISG analysis.[90] A similar trend could not be detected in Australia. In fact, the way that Australian courts seem to equate domestic law and the CISG precludes the opportunity to get guidance from the CISG on contract law issues. This is unfortunate, since it presents a great chance also for the CISG if the CISG is utilised as a tool to develop domestic contract law, since mutual fertilization would ensure that courts and counsel would feel far more confident in using the CISG.[91] In that regard, Australia seems to be further away than New Zealand from doing so.

2.4.2.3 United States

As Levasseur points out, 'the [US] federal courts did not truly begin to make use of the CISG until ten years after the USA [. . .] ratified the CISG'.[92] Given the size of the United States, 153 CISG cases do not amount to a substantial body of jurisprudence. Overall, the CISG has suffered more or less an identical fate as in Australia. In addition to a lack of knowledge about the CISG, the acceptance and/or use of the CISG in the United States is hindered by a perceived competitor – the Uniform Commercial Code ('UCC'). Even though foreign case law and academic opinion is sporadically cited in briefs and case law,[93] US courts more often use the UCC to interpret the CISG. *Raw Materials Inc v. Manfred Forberich GmbH & Co KG*[94] serves as a representative example. The Court stated:[95]

> While no American court has specifically interpreted or applied Article 79 of the CISG, caselaw interpreting the Uniform Commercial Code's ("UCC") provision on excuse provides guidance for interpreting the CISG's excuse provision since it contains similar requirements as those set forth in Article 79 .... Accordingly, in applying Article 79 of the CISG, the Court will use as a guide caselaw interpreting a similar provision of §2-615 of the UCC.

89 For example, D. McLauchlan, 'The Plain Meaning Rule of Contract Interpretation', 2 *New Zealand Business Law Quarterly* 80 (1995); D. McLauchlan, 'Subsequent Conduct as an Aid to Interpretation', 2 *New Zealand Business Law Quarterly* 237 (1996).

90 *See* D. McLauchlan, *supra* note 82, p. 30.

91 *See* P. Butler, 'The Use of the CISG in Domestic Law', 15 *Vindobona Journal of International Commercial Law and Arbitration* 15 (2011).

92 A. Levasseur, 'United States of America', *in* F. Ferrari (Ed.), *supra* note 62, p. 313.

93 *See*, for example, *Barbara Berry, SA de CV v. Ken M Spooner Farms, Inc.* 2006 WL2701361 (9th Cir.) (16 August 2006), Appelant's brief note 8; *Delizia v. Columbia Distributing Company* 2004 WL2975203 (WD Wash, 9 September 2004); in general A. Levasseur, *supra* note 92, p. 314.

94 WL1535839 (ND Ill., 7 July 2004).

95 *Raw Materials Inc v. Manfred Forberich GmbH & Co KG*, 2004 WL1535839 (ND Ill. 7 July 2004); *see also Genpharm Inc v. Pliva-Lachema AS*, 361 F Supp 2d 49 (EDNY, 19 March 2005), where the Court acknowledged that another court in a similar situation had applied the CISG, but the Court nevertheless felt, that it was appropriate to analyse the case taking guidance from UCC. The Court, however, recognized that UCC case law was not *per se* applicable. More recently in *Dingxi Longhai Dairy, Ltd v. Becwood Technology Group*

In other cases, the courts reverted back to state law, sometimes even acknowledging that the CISG would demand another outcome.[96] Like New Zealand's *Smallmon* case, there are also extremely well-reasoned and thoughtful judgments mostly based on skilful and elaborated briefs. The US Court of Appeals (11th Cir.) held, for example, that 'the district court properly determined that, under the CISG, the meaning the parties ascribe to a contractual term in their course of dealings establishes the meaning of that term in the face of a conflicting customary usage of that term.'[97]

2.4.2.4 Singapore

Chwee Kin Keong and Others v. Digilandmall.com Pte Ltd[98] is the only case reported on the Pace database for Singapore. It is a fascinating case since it concerns the sale of goods (laser printers) over the Internet and the core question is when offer and acceptance reach the respective other party. The Court refers to the CISG as 'another statute that ought to be taken into consideration in determining the appropriate default rule in e-commerce transactions'.[99] Unfortunately, the Court does not elaborate on whether the CISG is applicable due to buyer and seller having their businesses in different countries (Art. 1(1)(a) CISG)[100] or whether the Court used the CISG principles in regard to offer and acceptance as a comparator to the postal-acceptance rule and the rules espoused by the Singaporean Electronic Transactions Act 1999. The latter seems to be most likely. It is unfortunate that the Court did not discuss the CISG's applicability under Article 1(1)(a) CISG, since it would have provided for a development of the CISG in regard to e-commerce.

L.L.C. (18th Cir., 14 February 2011), available at <law.pace.edu/cisg/> (last accessed 9 May 2012): 'It is undisputed that the contract was governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), the "international analogue" to Article 2 of the Uniform Commercial Code (UCC). *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894 (7th Cir. 2005). In applying the Convention, we look to the language of its provisions and the "general principles on which it is based." Art. 7(2) CISG. 'Caselaw interpreting analogous provisions of Article 2 . . . may also inform a court where the language of the relevant CISG provisions tracks that of the UCC', *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir., 1995). With regard to pleading requirements, the 'Convention's structure confirms what common sense (and the common law) dictate as the universal elements of [a breach-of-contract] action: formation, performance, breach and damages.' *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 76 F. Supp. 2d 919, 924 (N.D. Ill., 1999).

96 For example, *ECEM European Chemical Marketing BV v. The Purolite Company* (3rd Cir., 9 November 2011) 2011 US App. LEXIS 22827 and <law.pace.edu/cisg/> (last accessed 9 May 2012), where the Court had to determine whether the buyer was entitled to pre-judgment interest, the Court stated: 'On the other hand, if, as [Seller] argues, the CISG (an international treaty) governs the dispute, then we may treat the dispute as a federal question. 28 U.S.C. § 1331. And, assuming that this case presents a federal question, under our well-established precedent, the District Court had broad discretion in determining whether to award pre-judgment interest.'

97 *Treibacher Industrie AG v. Allegheny Technologies Inc.*, 464 F 3d 1235 (11th Cir., 12 September 2006).

98 [2004] 2 SLR 594; [2004] SGHC 71.

99 *Chwee Kin Keong and Others v. Digilandmall.com Pte Ltd* [2004] 2 SLR 594, Para. 100.

100 Note that Singapore made an Art. 95 reservation: Art. 1(1)(b) CISG is not applicable in Singapore.

2.4.2.5 Summary

The conclusion Susanne Cook reached in 1998 in regard to the overall treatment of the CISG by United States courts is still valid today, not only for the United States, but also for New Zealand, Australia, and Singapore:[101]

> Among scholars, the CISG has been hailed as the new Lex Mercatoria, an honor it deserves in light of its inclusive drafting procedure an acceptance among scholars, but it is still in the process of earning recognition among courts, practitioners and merchants. . . Until the CISG seasons into a statute that enjoys wide familiarity among practitioners and a recognized tradition of fair interpretation in the courts, practitioners and merchants will be inclined to negotiate for application of the home advantage.

2.4.3 Legislation

The influence on law reform in the four surveyed TPP countries has so far been non-existent, in contrast to, for example, in Germany, the Balticum, and China, where the domestic contract law has been aligned with the CISG through law reform.

The CISG has not influenced any law reform in New Zealand. There has also not been any attempt to align the domestic sales law of New Zealand with the Act or the CISG itself. New Zealand also has no immediate plans in ratifying the supplementary United Nations Convention on the Use of Electronic Communications in International Contracts (2005), despite Australia having embraced the 2005 Convention. Energy, at this point in time, seems to focus on bilateral or multilateral trade agreements like the TPP. It may be that with a rise in trade due to those agreements, especially among small and medium-sized businesses who cannot afford large law firm representation and will therefore not become the victims of standard exclusion clauses, the CISG will gain some prominence.

Like in New Zealand, the CISG has not influenced a discussion on law reform in the United States. Levasseur concluded, after researching the federal Congressional Record, that the CISG has not been on the minds of state legislators, the members of the American Law Institute, or the National Conference of Commissioners on Uniform State Laws.[102] The United States has not signed the UN Convention on the Use of Electronic

101 S. Cook, 'CISG: From the Perspective of the Practitioner', 17 *Journal of Law & Commerce* 343 (1998), pp. 350-352.

102 A. Levasseur, *supra* note 92, pp. 320-321.

Communications in International Contracts (2005) though they have signed, unlike New Zealand and Australia, the Convention on the Limitation Period in the International Sale of Goods 1974,[103] the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 ('Rotterdam Rules'),[104] and the UN Convention on the Liability of Operators of Transport Terminals in International Trade 1991.[105] Forty-eight states have adopted the UNCITRAL Model Law on Electronic Commerce 1996.[106]

As mentioned earlier, Australia has embraced the 2005 Electronic Communications Convention.[107] Eight of its states and territories adopted the UNCITRAL Model Law on Electronic Commerce 1996. However, like in New Zealand, the focus in Australia has been on bilateral and multi-lateral trade agreements, rather than on the ratification of cross-border sales-related texts.[108]

Singapore ratified the 2005 Convention and the 1996 Model Law. As Gary Bell points out, the ratification and implementation of the CISG (and any other UNCITRAL text) by Singapore was no surprise, as Singapore attaches significant importance to the work done by UNCITRAL and its interest in facilitating international trade.[109]

103 1974 United Nations Convention on the Limitation Period in the International Sale of Goods, 1511 UNTS 3 (14 June 1974).

104 2009 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122.

105 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, UN Doc. No A/CONF.152/13 Annex.

106 1996 UNCITRAL Model Law on Electronic Commerce, A/RES/51/162.

107 The driving forces behind the ratification of the ECC were the State Attorney-Generals- the same was true for the CISG: Attorney-General's Department, *Australia's accession to the UN Convention on the Use of Electronic Communications in International Contracts 2005: Proposed amendments to Australia's electronic transactions laws – consultation paper* (November 2008); M. Dixon & T. Beal, 'United Nations Convention on the Use of Electronic Communications in International Contracts 2005', 30 *Commercial Notes* (21 April 2009); Attorney-General's Department, *The United Nations Convention on Contracts for the International Sale of Goods – should Australia accede?* Workshop Paper, 9th International Trade Law Seminar, Canberra (1982).

108 For example, the Australia-United States Free Trade Agreement 2005; the Australia-Chile Free Trade Agreement 2009; Anti-Counterfeiting Trade Agreement 2011. *See also* the Australian government's on-going negotiations for Free Trade Agreements with Malaysia (since 2005), China (since 2005), Japan (since 2007) the Republic of Korea (since 2009), as well as their negotiations for an Australia-India Comprehensive Economic Co-operation Agreement (since 2011) and an Australia-Indonesia Comprehensive Economic Partnership Agreement (since 2010). *See* <www.dfat.gov.au/trade/index.html>.

109 G.F. Bell, 'Why Singapore Should Withdraw Its [Article 95] Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)', *Singapore Yearbook of International Law and Contributors* 53 (2005), p. 53.

2.4.4 *Conclusion*

Overall, the CISG has been more in the minds of academics than the courts, practitioners, or merchants. This is especially so in the United States, where there is sizeable scholarship on the CISG not only focussing on issues of the CISG, but also in regard to the impact of the CISG on international contract law in general. It is interesting to note the overall tendency of the courts to revert back to their domestic law, even if they have acknowledged the applicability of the CISG. Furthermore, together with the lack of discussion of international contract initiatives mandated by UNCITRAL, there is a suggestion that in the area of sales law, globalization has not been embraced. The lack of knowledge about, and acceptance of, the CISG in four of the major economies in the TPP will aid any potential attempt to introduce a TPP cross-border sales law.

2.5 TPP AND THE FUTURE

Interestingly, like the driving force behind CESL, one of the key features of the TPP will be addressing the concerns of the small and medium-sized businesses. The EU experience makes one suspect that, in the future, resources could be spent on the development of a regional cross-border sale of goods law. That should be prevented at all costs. The nine TPP member states represent the two main legal traditions – civil and common law. Six of them are CISG member states. The CISG has been drafted for cross-border international sale of goods between states of different legal traditions.[110] It can look back on a thirty-year history of case law that is readily available via two well-established databases that also provide access to insightful academic commentary on the CISG.[111] The available case law shows that no sharp differences in the interpretation of the CISG by the various national courts exist.[112] A regional cross-border sale of goods law would muddy the waters, especially for small and medium-sized businesses, which would be faced with different cross-border sales laws depending whether the business partner is within or outside the TPP. To promote efficiency and avoid legal complexity, the CISG should be promoted as the cross-border sale of goods law within the TPP.

110 *See also* G. F. Bell, *supra* note 109, who made the same point in regard to the value of the CISG as cross border sales law for ASEAN.

111 *See* <www.cisg.law.pace.edu/cisg/text/cisg-toc.html> (last accessed 4 March 2012); <globalsaleslaw.org/index.cfm?pageID=28> (last accessed 4 March 2012).

112 F. Ferrari, 'Do Courts Interpret the CISG Uniformly?', *in* F. Ferrari, *Quo Vadis CISG*, Bruylant, Bruxelles 2005, p. 3 *et seq.*, esp. p. 6.