THE APPLICATION OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN U.S. COURTS

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I. Brief Introduction: the CISG, its history and purpose

In 1966 the United Nations established the UN Commission on International Trade Law ("UNCITRAL"). This commission was established in order to aid in the development of international trade law, specifically the creation of a uniform international sales law.[1] The goal of creating a uniform internal commercial law had been around well before 1966.[2] But earlier attempts to create international uniform sales law were not able to generate enough signatory states to be considered successful.[3]

The underlying notions behind a uniform international trade law have generally been two-fold. Uniform trade law is thought to promote consistency in contracting which thereby reduces the cost of doing business.[4] This boosts economies and encourages job growth, thus helping developing and developed states around the world.[5] The second belief underlying the development of uniform international commercial law is the notion

[1] See e.g., James E. Bailey, Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods As an Obstacle to A Uniform Law of International Sales, 32 Cornell Int'l L.J. 273, 278 (1999).
[2] See e.g., Paul B. Stephan, The Futility of Unification and Harmonization in International Commercial Law, 39 Va. J. Int'l L. 743 (1999) ("For more than a century, specialists in international and comparative law have gathered in various venues to promote convergence in those national laws that affect international commercial transactions.");
[3] See e.g., James E. Bailey 32 Cornell Int'l L.J. 273, 277-78.
[4] See e.g., Philip Hackney, Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?, 61 La. L. Rev. 473, 474 (2001).
[5] See e.g., Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development, 108 Harv. L. Rev. 1715, 1718 (1995).

that it will encourage peace. Growing economies around the world will be less likely to risk their economic prosperity by entering into war, while also fostering interdependence on foreign markets and relations between states.[6]

UNCITRAL set out to draft a uniform body of law to govern the sale of goods internationally.[7] The members of UNCITRAL were broadly selected in order to allow the commission to adequately consider the differences between legal systems in States throughout the world.[8] In order for the CISG to be applicable all over the world it was essential that the commission wrestle with the differences between jurisdictions not only in language and cultural differences, but the CISG had to also account for differences in legal analysis.[9] While many jurisdictions throughout the world apply similar legal theories, each jurisdiction may have slight variations to their application. The CISG would have to account for these slight variations throughout the world as well as larger differences between jurisdictions. For example, there are strong differences in the weight

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[6] See e.g., Don Mayer, Corporate Citizenship and Trustworthy Capitalism: Cocreating A More Peaceful Planet, 44 Am. Bus. L.J. 237 (2007).

[7] See Christine Moccia, The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms"', 13 Fordham Int'l L.J. 649, 653 (1990) (citing U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 52 FR 6262-02).

[8] See Anthony J. McMahon, Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2), 44 Colum. J. Transnat'l L. 992, 1000 (2006) (The CISG is a result of negotiations among a number of states coming from different legal systems that made their proposals and entered into compromises in order to achieve what they regarded as the minimum required by their particular interests.) (internal quotes omitted).

[9] Id.

that a common law court will give to an academic opinion as opposed to the weight which a civil law court may give to an academic opinion.[10]

Sixty-two States met in 1980 at the Vienna Conference in order to edit a UNCITRAL draft.[11] Those States produced the UN Convention on Contracts for the International Sale of Goods ("CISG"). The CISG was enacted in the US in March of 1987[12], and came into effect in January of 1988.[13] The CISG governs the formation of international sales contracts and sets out the rights and obligations of the parties.[14] To date the CISG has been adopted in 78 states.

The CISG "applies to contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States."[15] Per an optional provision in the CISG[16] the US will only apply the CISG where both parties are from contracting states.[17] Parties are also free to contract around the CISG, specifically, Article 6 contains an 'opt-out" provision which allows parties to completely exclude application of the CISG to their contract. The CISG also allows parties to vary the applicability of certain other provisions of the CISG.[18]

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[10] See Vivian Grosswald Curran, Romantic Common Law, Enlightened Civil Law: Legal Unifornity and the Homogenization of the European Union, 7 Colum. J. Eur. L. 63 (2001).
[11] Christopher Sheaffer, The Failure of the United Nations Convention on Contracts for the International Sale of Goods and A Proposal for A New Uniform Global Code in International Sales Law, 15 Cardozo J. Int'l & Comp. L. 461, 469 (2007).
[12] U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 52 FR 6262-02.
[13] Christine Moccia, 13 Fordham Int'l L.J. 649, 655-56.
[14] See e.g., James E. Bailey, 32 Cornell Int'l L.J. 273, 276.
[15] CISG Art. 1(1)(a).
[16] CISG Art. 95.
[17] See e.g., Marlyse McQuillen, The Development of A Federal Cisg Common Law in U.S. Courts: Patterns of Interpretation and Citation, 61 U. Miami L. Rev. 509, 513 (2007)
[18] CISG art. 6.

In order to build a uniform law of international sales contracts, the drafters of the CISG encourage courts to consider the underlying principles of the CISG when considering gaps in the treaty.[19] This is made clear by the structure of article 7(2), which directs courts to first consider to the general principles of the CISG before turning to domestic law.[20] The CISG did not create a supra-national adjudicative body.[21] The courts deciding cases under the CISG would be the domestic courts of the parties or the courts of the forum which the parties chose in the contract. Thus the burden of deciding to what extent the principles of the CISG are relevant, and even of deciding what exactly those principles are, falls on domestic courts.[22]

Despite the language of CISG Article 7(2) and the opinions of academics, US courts have consistently turned to applied domestic law in cases regarding the CISG, in direct contradiction of the underlying goals on international uniformity.[23] Academics state that according to the text of Article 7 and the purpose of the CISG itself, a court should only consider private international law when the CISG text itself, in consideration of the general principles of the CISG, cannot address the issue. [24]

Scholars generally agree that foreign case law ought to be considered by courts in cases involving the CISG. However, scholars disagree on how much weight courts ought

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[19] CISG Art. 7(2).
[20] U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 52 FR 6262-02; Christine Moccia, 13 Fordham Int'l L.J. 649, 663.
[21] Marlyse McQuillen, 61 U. Miami L. Rev. 509, 510.
[22] See James E. Bailey, 32 Cornell Int'l L.J. 273 at 291 ("Ultimately, though, courts are left on their own in determining both how to best interpret the command in Article 7(1) to interpret the CISG according to its "international character" and how to apply that principle").
[23] See section III(B)(ii) Reliance on the UCC infra pp.26-30.
[24] Philip Hackney, 61 La. L. Rev. 473, 478; See also Schmitz-Werke Gmbh Co. v. Rockland Indus., Inc., 37 F. App'x 687, 691 (4th Cir. 2002).

to give foreign case law when interpreting the CISG.[25] As discussed infra pages five and thrity-six, the CISG merely requires that courts give "regard" for global uniformity.[26] Opinions differ as to what that entails. This disagreement among scholars and courts may lead to greater inconsistency in the application of the CISG.[27]

But the majority of US courts have not considered foreign case law at all when deciding cases on the CISG. So although there is some disagreement as to how much weight courts should accord to foreign opinions, US courts have historically not considered foreign case law at all.[28] In other words, US courts have not even gotten to the point where this issue would be relevant. In recent years however, courts have shown an increased willingness to consider foreign case law in US courts. The question of weight may be becoming increasingly relevant.[29]

II. Early application in the US

Early application of the CISG in US courts may have been difficult. US courts, like all common law courts, rely heavily on case precedent. Case law on the CISG was severely limited by the fact that the CISG, as a new treaty, had simply not been considered by many courts during the early years of its applicability.[30] Courts were left with nothing to guide them except the specific language and general principles of the treaty. As discussed page supra pages 31-36 common law courts are not accustomed to analyzing cases purely on the text and general principles of a statute.

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[25] Marlyse McQuillen, 61 U. Miami L. Rev. 509, 511.
[26] CISG Article 7(1).
[27] James E. Bailey, 32 Cornell Int'l L.J. 273, 294.
[28] See Section II Early Application in the US infra pp. 5-11.
[29] Compare Philip Hackney, 61 La. L. Rev. 473, 479 with James E. Bailey, 32 Cornell Int'l L.J. 273, 291.
[30] See Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir.1995) ("(T)here is virtually no case law under the Convention.").

The CISG was enacted in order to enhance consistency in how contracts would be interpreted throughout the world. But it was left to domestic courts to take on this challenge, not the officials who enacted it.[31] And with no supra-national court empowered with the ability to resolve conflicting case law, domestic courts were left to their own perspectives and biases to decide on interpretation.[32]

Not surprisingly courts are most comfortable analyzing and applying their own domestic law. This has been the case in the US, where courts regularly apply the Uniform Commercial Code to CISG cases. This type of "homeward trend"[33] has proven difficult to overcome for the CISG.[34]

Clearly the early years of the CISG could not provide courts with adequate case law to help guide their decisions. But this problem exists with any new law. US courts have used this as an excuse to diminish the CISG and they have instead relied more heavily on the Uniform Commercial Code in interpreting the CISG. In fact even in very recent case law, US courts have relied on this reasoning when considering the CISG. US courts continue to insist that there is 'sparse' case law on the CISG today, despite the fact that the CISG has been in effect for almost 25 years.[35]

A common theme in early CISG application was for courts to acknowledge the underlying principles of the CISG and then disregard them. US Courts often noted that

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[31] James E. Bailey, 32 Cornell Int'l L.J. 273, 291 ("Ultimately, though, courts are left on their own in determining both how to best interpret the command in Article 7(1)").
[32] See Timothy N. Tuggey, The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will A Homeward Trend Emerge?, 21 Tex. Int'l L.J. 540, 542 (1986) (anticipating a "homeward trend" where judges would rely on their own domestic rules of interpretations).
[33] See generally Timothy N. Tuggey, 21 Tex. Int'l L.J. 540.
[34] See section III(B)(ii) Reliance on the UCC infra pp. 26-30.
[35] See e.g., Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd., 06 CIV. 3972 LTS JCF, 2011 WL 4494602 (S.D.N.Y. Sept. 28, 2011).

the CISG is to be interpreted in light of the "general principles on which it is based".[36] It is without question that one of the driving 'general principles on which the CISG is based' is international uniformity.[37] But these courts would then go on to thwart that goal by citing only US domestic courts. Early courts (as well as many courts today) would simply interpret the CISG under the guidance of the UCC.[38]

In the typical case between 1988 and 2003, the court would state that there was "virtually" no case law.[39] From there the court would likely state that since the UCC is so similar, that UCC case law could "guide" the court's interpretation.[40] Interestingly, the courts would almost always explain that UCC case law however would not be "per se applicable".[41] This caveat not only gives the court the authority to use UCC case law, but it also gives the court the power to disregard the UCC if he deemed appropriate.[42] Most courts would then go on to apply the UCC to the case at bar.[43]

Courts did this despite the fact that the UCC only applies in the US. Obviously when applying the UCC only US case law could apply. But the application of a body of law which could only lead to the use of US case law is itself evidence that the UCC ought

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[36] CISG Article 7(2).
[37] See generally CISG Article 7.
[38] See section III(B)(ii) Reliance on the UCC infra pp. 26-30.
[39] This statement became almost boilerplate after the 1995 case of Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir.1995).
[40] See e.g., Delchi., 71 F.3d at 1028 (2d Cir.1995).
[41] Citing Orbisphere Corp. v. United States, 726 F.Supp. 1344, 1355 (Ct.Int'l Trade 1989).
[42] Some commentators have argued that the application of the UCC may actually promote uniformity but the ability of courts to use the UCC and disregard it can only further distort the consistency of application of the CISG. See Philip Hackney, 61 La. L. Rev. 473, 479
[43] But see Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992)

not be applied to the CISG. Where a court is applying a body of law that only exists domestically, it is far less likely for another CISG jurisdiction to come to the same conclusion.[44] The application of domestic doctrines should only be done in rare circumstances[45] and when it is done, it invariably hinders international uniformity, the very goal of the CISG.[46] The application of the UCC in CISG cases may be the clearest and most prevalent example of the homeward trend regarding the CISG.

The problem for the courts, at least during the first decade of the CISG is that they simply did not have the know-how or resources to fulfill the goals of the CISG adequately. Even if courts wanted to interpret foreign case law, it would be difficult to access current foreign case law before the advent of the internet, search databases, and the important developments of UNILEX and CLOUT.[47] Although it would certainly be possible to gather foreign case law and interpret it, it wouldn't be an easy or affordable process for an average court.

Courts often lack the ability to translate cases and the experience necessary to analyze foreign case law which may rely on different legal assumptions than a US court would. Differences between civil and common law analysis would also prove difficult for US courts attempting to interpret civil case law.[48] It has also been noted that many parties and their attorneys may not have been aware of the CISG, much less of its applicability to

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[44] See Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001); see also Christopher Sheaffer, 15 Cardozo J. Int'l & Comp. L. 461.
[45] See Philip Hackney, 61 La. L. Rev. 473, 478.
[46] See e.g., James E. Bailey, 32 Cornell Int'l L.J. 273, 289-90; But see Steven Walt, Novelty and the Risks of Uniform Sales Law, 39 Va. J. Int'l L. 671, 700 (1999) ("Interpreting the terms of uniform law in the same way as under national law enhances predictability.").
[47] See discussion infra pp. 9-11.
[48] See discussion infra pp. 31-36.

their case.[49] While many of these issues may still exist today, tools have developed which have allowed for the minimization of these concerns.

With the advent of the Internet, online legal research databases, and a growing number of CISG case law databases the inability for courts to find foreign case law is diminishing. Although there is no supra-national judicial body which governs the interpretation of the CISG, useful tools have emerged to help domestic courts wrestle with foreign case law and diverging interpretations.

CISG Advisory Council:

The CISG Advisory Council is comprised of leading academics. The council analyzes particular issues within the CISG and provides guidance in the form of published opinions. Courts may look to the Advisory Council where a particular issue is not resolved explicitly in the text of the CISG. But the Council may or may not have already published an opinion on that issue. Since the Council is made up of leading scholars throughout the world, the presumption is that the general principles of international contract law will have been thoroughly considered in any opinion issued by the Council.[50]

Pace Law Database:

Pace University School of Law maintains a CISG database. As part of a collaborative effort between Pace and the Institute of International Commercial Law, this

[49] Marcia J. Staff, United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned from Five Years of Cases, 6 S.C.J. Int'l L. & Bus. 1, 4 (2009); See also James E. Bailey, 32 Cornell Int'l L.J. 273, 276, 280-281 (arguing that due to the way the CISG came into effect, as a self-executing treaty, that most parties to contracts were not aware of the existence of the CISG.).

[50] See http://www.cisgac.com/(follow "About US" hyperlink).

database offers thousands of cases on the CISG, as well as abstracts, citations, commentaries, and various books on the CISG.[51]

UNILEX:

Another resource for courts today is the UNILEX database. UNILEX collects and analyzes cases under the CISG, including arbitration cases. They provide detailed abstracts, the full text of decisions, and a list of contracting states. Courts are able to search for cases by date, issue, or country.[52]

CLOUT:

UNCITRAL introduced the Case Law on UNCITRAL Texts System ("CLOUT"). CLOUT collects and disseminates international court decisions on the CISG as well as arbitral awards. Particularly useful for US courts is that CLOUT translates these cases into English. CLOUT also offers case abstracts, webcasts on CISG issues, and digests, which attempts to "present selected information on the interpretation of the Convention in a clear, concise and objective manner."[53]

The creation of these tools have significantly improved courts' access to foreign case law and interpretation. Today these databases are being cited at an increasing rate.[54] But with a growing number of CISG databases, it is becoming increasingly important that

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[51] See http://www.cisg.law.pace.edu/; see also Francesco G. Mazzotta, Why Do Some American Courts Fail to Get It Right?, 3 Loy. U. Chi. Int'l L. Rev. 85, 93 (2005).
[52] See http://www.unilex.info/ (follow "About UNILEX" hyperlink); See also Francesco G. Mazzotta, 3 Loy. U. Chi. Int'l L. Rev. 85, 92-93 (citing - Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 712 (N.D. Ill. 2004) ("(T)his court relies upon the detailed abstracts of those decisions provided by UNILEX, an "intelligent database" of international case law on the CISG.").
[53] See http://www.uncitral.org/uncitral/en/case_law.html; http://www.uncitral.org/uncitral/en/case_law/digests.html.
[54] See section III(A) Recent Use of Foreign Case Law pp. 15-21.

these databases remain in-tune with each other. If the abstracts on databases are not consistent from database to database uniformity will undoubtedly suffer.

III. **Recent Application in the US**

Recent years (2003-2012) have seen an increased willingness by US courts to consider foreign case law on issues regarding the CISG. While many- if not most of- US courts are still taking the same approach as earlier US courts[55], today's courts are turning to foreign courts more frequently than ever before. There may be a variety of factors for the recent use of foreign case law by US courts.

The advent of online legal research databases, the CISG Advisory Council, CLOUT, UNILEX, and other CISG databases have made foreign case law and analysis more accessible for US courts.[56] A younger generation of judges may also be beginning to emerge, and these younger judges may have studied the CISG or other similar uniform international treaties. It may simply be a situation where judges are more comfortable applying foreign case law. The notion of applying foreign interpretation may have been unwelcome in the earlier years of the CISG[57], but that idea is beginning to seem less foreign as the CISG has remained and US case law as grown.[58]

The frequency with which US courts now cite foreign case law is still dwarfed by their use of US case law. The outline of how a US court treated CISG cases in the first

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[55] Outlined supra pp. 8-9.
[56] Discussed supra pp. 9-11.
[57] See Sandeep Gopalan, The Creation of International Commercial Law: Sovereignty Felled?, 5 San Diego Int'l L.J. 267, 268 (2004) (arguing that adoption of uniform international law marginalizes sovereignty); Paul B. Stephan, 39 Va. J. Int'l L. 743, 744; Steven Walt, 39 Va. J. Int'l L. 671, 700 ("Interpreting the terms of uniform law in the same way as under national law enhances predictability.").
[58] See Vlad F. Perju, The Puzzling Parameters of the Foreign Law Debate, 2007 Utah L. Rev. 167, 174 (2007) (stating that "For both sociological[36] and normative[37] reasons, reference to foreign materials began to increase considerably in judicial opinions.").

decade of the CISG[59] is still most common today.[60] US courts rely heavily on US case law when interpreting the CISG. The cases most often relied on by US courts are cases that applied the UCC. Courts are still insisting that there is very little case law on the CISG.[61] Its also important to note that when courts say that there is no case law on point, they're generally referring only to the absence of US case law.[62] Courts also continue to insist that the UCC can provide guidance where the CISG is unclear.[63]

The decision whether or not a US court will consider foreign case law is twofold: (1) whether a party in the case pleads using foreign precedent and (2) the disposition of the sitting judge.

The initial question is whether the parties themselves will present and argue using foreign case law. The US system is an adversarial system, meaning that it is the obligation of the attorneys to present their case. Attorneys are therefore responsible for bringing forth case law to support their positions, so the initial question of whether foreign case law will be used in a case depends on the attorneys. In order for attorneys to offer foreign case law, they must first be aware that the CISG governs their contract and

[59] See supra pp. 8-9.
[60] See e.g., Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011).
[61] See Hanwha 760 F. Supp. 2d at 430; see also Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd., 06 CIV. 3972 LTS JCF, 2011 WL 4494602 (S.D.N.Y. Sept. 28, 2011).
[62] Marlyse McQuillen, 61 U. Miami L. Rev. 509, 511-12 (stating that between 1988 and 2006, only 10 cases regarding the CISG even referenced any international law at all.).
[63] See e.g., Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group L.L.C., 635 F.3d 1106, 1107-08 (8th Cir. 2011).

subsequent dispute, and evidence suggests that the parties may not be aware that he CISG governs their agreement.[64]

It must also be noted that foreign case law is not binding on US courts. As a practical matter it seems unlikely that an attorney would rely on non-binding, foreign case law unless he or she was unable to find US case law which supported their position. For this reason, the nonbonding nature of foreign case law puts it at a severe disadvantage in our adversarial system where it's the responsibility of the parties to offer case law.

Although foreign case law is at a disadvantage in our adversarial system, there are scenarios in which an attorney might offer foreign case law in a US court regarding the CISG. (1) An attorney might do so in order to bolster the credibility of existing US case law, especially where there may be a split of authority. In this scenario however, the US case law may still receive the bulk of the court's attention and the decision may even ignore the additional foreign case law.

(2) Foreign case law may also be offered in a circuit that has not yet decided the issue. But an attorney is more likely to cite other US circuit decisions because judges would likely feel more comfortable analyzing cases from these circuits, because of their familiarity with other US circuits. It has been argued that the foreign case law ought to be judged on its reasoning rather than where it comes from.[65] If that were the case, foreign case law may be considered equally with case law from other circuits. Of course, competing US circuit courts may still share a homeward trend toward each other's logic.

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[64] See Marcia J. Staff, 6 S.C.J. Int'l L. & Bus. 1, 4 (explaining that many parties are surprised to find out that their contracts are governed by the CISG); See also James E. Bailey, 32 Cornell Int'l L.J. 273, 276, 280-281.

[65] Francesco G. Mazzotta, 3 Loy. U. Chi. Int'l L. Rev. 85, 89-92.

(3) In another scenario there might not be any US case law on point. This technique gives foreign case law the best chance at being persuasive. But the extent to which the foreign case law is persuasive, rests almost entirely with the inclination of the judge deciding the case, or the appellate judge.

A court must address the issues that the parties have plead, but the amount of attention which the court pays to a particular case is mostly at the discretion of the judge. This may be especially true when the case law presented is not binding, as would be the case with all foreign case law regarding the CISG. The persuasiveness of any foreign case law is entirely up to the judge's own perception and biases. Thus, even where parties do present foreign case law, the amount of consideration that the case law receives lies with the judge. As parties prepare for cases they are likely to consider a judge's history in deciding whether or not to plead foreign case law.

To summarize, in order to have foreign case law considered in a particular case several conditions would likely need to be met. (1) The agreement of the parties in dispute would have to implicate the CISG. (2) The parties must know that the CISG governs their agreement.[66] (3)The issue must be something that US courts have not addressed, or at least no court in that circuit has addressed. (4)There must not be any UCC provision which are similar, because of US judges' tenancy to apply the UCC to CISG cases.[67] (5) At least one party's attorney would have to feel comfortable citing foreign case law. (6) Finally, the case must have a judge assigned who is comfortable with the idea of considering foreign case law.

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[66] See Marcia J. Staff, 6 S.C.J. Int'l L. & Bus. 1, 4 (explaining that many parties are surprised to find out that their contracts are governed by the CISG); See also James E. Bailey, 32 Cornell Int'l L.J. 273, 276, 280-281.

[67] See section III(B)(ii) Reliance on the UCC infra pp.26-30.

Only if all of those conditions are met is there a high likelihood that foreign case law would be considered. In the absence of any of those conditions, foreign case law may still be considered. But it becomes less likely that a court would consider foreign case law in the absence of one or more of those conditions. This not only negates CISG's international character it negates the uniformity of the CISG, even within our domestic regime.

A. RECENT USE OF FOREIGN CASE LAW

Since 2002, foreign case law and/or Advisory Council opinions have been considered in at least fourteen separate cases.[68] Both the second [69] and third[70] circuits have considered foreign case law to some extent. Of these cases, nine have been decided since 2006.[71] This is a drastic increase from the first eighteen years of the CISG. In the past six years almost as many CISG cases have considered foreign case law as in the first eighteen years of the CISG. From 1988, the year the CISG came into effect in the US, until 2006 only ten cases considered foreign law either directly or indirectly.[72] The following is a synopsis of recent US cases that considered foreign case law. The cases considered range from 2002-2012.

[68] See e.g., Amco Ukrservice v. Am. Meter Co., 312 F. Supp. 2d 681, 686-87 (E.D. Pa. 2004) (referencing two German cases via UNCITRAL).
[69] St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, 00 CIV. 9344 (SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002) aff'd, St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GMBH, 53 F. App'x 173 (2d Cir. 2002).
[70] Valero Mktg. & Supply Co. v. Greeni Oy, 242 F. App'x 840, 844 (3d Cir. 2007)
[71] See e.g., Innotex Precision Ltd. v. Horei Image Products, Inc., 679 F. Supp. 2d 1356, 1359 (N.D. Ga. 2009).
[72] Marlyse McQuillen, 61 U. Miami L. Rev. 509, 511.

Chicago Prime:

Chicago Prime Packers, Inc. v. Northam Food Trading Co.[73] involved an American meat wholesaler suing a Canadian meat wholesaler for breach of contract under the CISG. In Chicago Prime the court began its discussion of the CISG in a similar fashion as most US courts. The court explained that there was little case law on the CISG and that the UCC may be used for interpretive guidance where its provisions were analogous.[74] The court also explained that the CISG's purpose of promoting a uniform international application of contract law in the sales of goods ought to be considered in its interpretation.[75]

The court considered both US case law as well as foreign case law. In particular the court considered case law from Germany, the Netherlands, and Italy.[76] The court noted in a footnote that the foreign cases which it cited had not been translated into English and thus the court was relying on UNILEX's abstracts.[77] The court seamlessly transitioned from US domestic case law to foreign case law, at one point stating merely that "Decisions under the CISG indicate that the buyer bears the burden of proving that the goods were inspected within a reasonable time," citing a case from the Netherlands.[78] This is precisely the type of application the CISG hopes to achieve. When the court in Chicago Prime referred to "Decisions under the CISG" they were referring to both domestic and international decisions without distinction. This case stands as an example

[73] Chicago Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005).
[74] Id. at 708-709.
[75] Id.
[76] Id. at 712-713.
[77] Id. at 712.
[78] Id.

of the seamless interplay between foreign and domestic case law that can be achieved in US courts.

Chicago Prime was affirmed by the seventh circuit court of appeals. In its decision however, the seventh circuit ignored the foreign case law referenced in the district court's opinion.[79] The seventh circuit instead focused on the parallels between the CISG and the UCC. Although the case was affirmed in the seventh circuit, that decision was hardly an endorsement of the use of the foreign case law. This court of appeals' opinion is an example of how different judges may treat foreign case law.

It is also relevant to note that the US case law and foreign case considered in Chicago Prime was not in disagreement. A more interesting question would be posed if the foreign case law diverged from US case law. The question would be whether or not a US court would blindly accept domestic case law (assuming it wasn't already binding). Or whether the court would analyze the competing theories in the cases presented regardless of what country the analysis comes from.

Am.'s Collectibles:

Am.'s Collectibles Network, Inc. v. Timlly (HK)[80] represented a unique situation regarding the CISG in US courts. At the time Am.'s Collectibles was decided, two US courts had come to opposing conclusions regarding whether or not Hong Kong was a

[79] Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894 (7th Cir. 2005).
[80] Am.'s Collectibles Network, Inc. v. Timlly (HK), 746 F. Supp. 2d 914 (E.D. Tenn. 2010).

signatory under the CISG.[81] While Hong Kong itself was clearly not a signatory, as a region of China, it may be subject to certain Chinese treaties.

The two competing cases, Innotex Precision Ltd. v. Horei Image Products, Inc.[82] and CNA Int'l Inc. v. Guangdon Kelon Electronical Holdings,[83] both considered foreign case law. In fact both cases considered the same French Supreme Court case[84]. Innotex Precision agreed with the holding in the French case, while CNA Int'l held that Hong Kong was bound by the CISG. In analyzing the two cases, Am.'s Collectibles found Innotex Precision "far more persuasive. Based upon the 1997 Declaration, foreign case law, the Hong Kong Department of Justice's interpretation, and relevant scholarship."[85] The court in Am.'s Collectibles specifically listed foreign case law as a motivating factor for finding Innotex Precision persuasive.

Interestingly, only CNA Int'l actually analyzed the French Supreme Court case at all. Innotex Precision simply referenced its holding and moved onto Chinese case law. The following are brief synopsizes of the reasoning in Innotex Precision and CNA Int'l. In CNA Int'l the court held that Hong Kong was a signatory in the CISG through their relationship with China. That decision turned on whether or not China filed an article 93(1) declaratory letter to the UN. The letter would have to express China's intention to have the CISG apply to its territories in Hong Kong. Both the court in France and the

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[81] Compare Innotex Precision Ltd. v. Horei Image Products, Inc., 679 F. Supp. 2d 1356 (N.D. Ga. 2009) with CNA Int'l Inc. v. Guangdon Kelon Electronical Holdings, 05 C 5734, 2008 WL 8901360 (N.D. Ill. Sept. 3, 2008).
[82] Innotex Precision 679 F. Supp. 2d 1356.
[83] CNA Int'l, 05 C 5734, 2008 WL 8901360.
[84] The French case was translated into English by UNCITRAL and is available at: <http:// cisgw3.law.pace.edu/cases/080402f1.html>.
[85] Am.'s Collectibles 746 F. Supp. 2d at 920.

court in CNA Int'l acknowledge that a letter was sent to the UN, but the courts disagreed on the effect of that letter.

The letter in question listed various treaties which China intended to extend to its territory in Hong Kong. The letter did not mention the CISG. The French court had found that the absence of the CISG from this letter indicated that the CISG was not being imposed on Hong Kong. The court in CNA Int'l, on the other hand, found that this letter was not a declaratory letter as required by CISG Article 93(1). Since the letter was not an Article 93(1) declaration according to the CNA Int'l court, the absence of any reference of the CISG was irrelevant. The court in CNA Int'l also found it persuasive that the letter reserved the right to name treaties that would apply to Hong Kong in the future.[86]

Innotex Precision found that the CISG did not apply to Hong Kong and it accepted the holding of the French court at face value without considering its analysis.[87] But Innotex Precision did go on to discuss Chinese cases as well. These cases however, were not translated by UNCITRAL and in fact were not read by the court in Innotex Precision. The Innotex Precision court referenced the Chinese cases by name, but their citations were to law review articles which had cited the cases.[88]

Although the court in Innotex Precision cited more foreign case law, and Innotex Precision agreed with foreign case law, the court in Innotex Precision did not do a substantive analysis of the foreign case law. The holding in Innotex Precision however, does promote uniformity in the application of the CISG throughout different jurisdictions.

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[86] CNA Int'l, 05 C 5734, 2008 WL 8901360.
[87] Innotex Precision, 679 F. Supp. 2d at 1359.
[88] Innotex Precision 679 F. Supp. 2d at 1359 (citing Xiao Yongping and Long Weidi, Selected Topics on the Application of the CISG in China, 20 Pace Int'l L.Rev. 61, 79 (2008)).

Furthermore, the holding in Innotex Precision was persuasive enough to convince another Federal court to rule the same way on the question of whether or not Hong Kong was considered bound by the CISG.

The expanding use of foreign case law in US courts may be for a variety of reasons. The advent of online legal research databases, the CISG Advisory Council, CLOUT, UNILEX, and other CISG databases have made foreign case law and analysis more accessible for US courts.[89] A younger generation of judges may also be beginning to emerge. These younger judges may have studied the CISG in law school. It may simply be a situation where judges are more comfortable applying foreign case law. The notion of applying foreign interpretation may have been unwelcome in the earlier years of the CISG[90], but that idea is beginning to seem less foreign as the CISG has remained and US case law has grown.[91] The evidence is clear however that the growth of online CISG case databases have allowed courts greater access to CISG decisions in foreign jurisdictions. In fact, all of the recent cases that consider foreign case law, reference one or more of the CISG databases and/or the Advisory Council.[92]

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[89] Discussed supra pp. 9-11.

[90] See Sandeep Gopalan, 5 San Diego Int'l L.J. 267, 268 (arguing that adoption of uniform international law marginalizes sovereignty); Paul B. Stephan, 39 Va. J. Int'l L. 743, 744; Steven Walt, 39 Va. J. Int'l L. 671, 700 ("Interpreting the terms of uniform law in the same way as under national law enhances predictability.").

[91] See generally Vlad F. Perju, 2007 Utah L. Rev. 167) (stating that "For both sociological[36] and normative[37] reasons, reference to foreign materials began to increase considerably in judicial opinions.").

[92] See Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co., Ltd., 10 C 1174, 2012 WL 962698 (N.D. Ill. Mar. 21, 2012); Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd., 06 CIV. 3972 LTS JCF, 2011 WL 4494602 (S.D.N.Y. Sept. 28, 2011) (citing a CISG Advisory opinions); Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 399-400 (3d Cir. 2010) (citing the UNCITRAL Digest and academic articles which examine foreign cases such as in Russia, Belgium, and Hungary); Valero Mktg. & Supply Co. v. Greeni Oy, 242 F. App'x 840, 844 (3d Cir. 2007); TeeVee Toons,

B. RECENT CASE LAW ONLY CITTING US LAW

Despite the expansion of foreign case law being considered in US courts in the last ten years, US courts overall remain reluctant to consider foreign case law.[93] These courts, when applying the CISG, follow the outline laid out supra pages eight through nine. US courts generally state that there is little to no case law regarding the CISG.[94] This statement almost always considers only US case law.[95] The courts then state that the UCC is similar enough to the CISG that UCC case law could "guide" the court's interpretation of the CISG.[96] Courts almost always go on to explain that UCC case law is not "per se applicable".[97] Finally, courts may even go on to acknowledge that gaps in CISG provisions are to be interpreted with its general principles in mind.[98] But almost all these cases very often go on to consider only US case law.[99]

This formula was developed in early CISG case law[100] and has virtually become a boilerplate starting point for CISG cases in the US.[101] Even cases which go on to cite

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Inc. v. Gerhard Schubert GmbH, 00 CIV. 5189 (RCC), 2006 WL 2463537 (S.D.N.Y. Aug. 23, 2006) (considering the CISG Advisory Council).

[93] The growth in foreign case law being considered in US courts goes beyond CISG cases and into recent Constitutional law cases. See e.g., Roper v. Simmons, 543 U.S. 551, 575 (2005); see generally Vlad F. Perju, 2007 Utah L. Rev. 167.

[94] See e.g., Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting Gmbh, 1:05-CV-00702, 2009 WL 818618 (S.D. Ohio Mar. 26, 2009).

[95] But see Chicago Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005) (discussed supra pp. 16-17).

[96] See e.g., CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GmbH, 764 F. Supp. 2d 745, 752 (D. Md. 2011).

[97] Citing Orbisphere Corp. v. United States, 726 F.Supp. 1344, 1355 (Ct.Int'l Trade 1989).

[98] See e.g., Establishment v. Se. Ranch, LLC, 10-80851-CV, 2011 WL 7191744 (S.D. Fla. Nov. 8, 2011).

[99] Id.

[100] See section II. Early Application supra pp. 5-11.

foreign case law, will most likely start their analysis with these assertions.[102] Today many if not most US courts still refuse to consider foreign case law in their CISG analysis.

In recent years, US courts have held that where a provision of the CISG is unclear, the court has broad discretion to decide the issue under the federal question doctrine.[103] In San Lucio, S.r.l. v. Imp. & Storage Services, LLC[104], the court noted that there were "no 'general principals' of the CISG that might shed light on the (issue)" and that therefore, private international law was to be used.[105] The court then went on to state that under the federal question doctrine they had broad discretion to decide the issue.[106]

In Hanwha Corp. v. Cedar Petrochemicals, Inc.[107], the court stated that CISG case law was "relatively sparse", and that the court was to interpret the CISG "in accordance with its general principles, with a view towards the need to promote uniformity in its application and the observance of good faith in international trade."[108] But the court went on only to consider US case law.

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[101] Compare Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011) with Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group L.L.C., 635 F.3d 1106, 1107-08 (8th Cir. 2011).
[102] See Chicago Prime, 320 F. Supp. 2d 702 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005) (discussed supra pp. 16-17); but see Amco Ukrservice v. Am. Meter Co., 312 F. Supp. 2d 681, 686-87 (E.D. Pa. 2004).
[103] See Norfolk S. Ry. Co. v. Power Source Supply, Inc., CIV.A. 06-58 J, 2008 WL 2884102 (W.D. Pa. July 25, 2008); San Lucio, S.r.l. v. Imp. & Storage Services, LLC, CIV A 07-3031(WJM), 2009 WL 1010981 (D.N.J. Apr. 15, 2009).
[104] San Lucio, CIV A 07-3031(WJM), 2009 WL 1010981.
[105] Id.
[106] Id.
[107] Hanwha Corp., 760 F. Supp. 2d at 430.
[108] Hanwha Corp, 760 F. Supp. 2d at 430.

At least six cases since 2008 have been decided without regard to foreign case law.[109] Since 2002, foreign case law has been considered in at least fourteen separate cases[110], including second[111] and third[112] circuit cases. Nine of these cases have been decided since 2006.[113] This is a strong increase from the first eighteen years of the US case law under the CISG. The number of US courts that considered foreign case law in the past six years has almost equaled the total number of cases to consider foreign case law in the first eighteen years of the CISG. From 1988, the year the CISG came into effect, through 2006 only ten cases considered foreign law either directly or indirectly.[114] The gap between the number of cases using foreign case law, and the number of cases who do not consider foreign case law is shrinking.

As already discussed, US courts often frustrate the purpose of the CISG by actually applying the UCC (US law) in CISG cases. Courts do this by making two assertions. (1) There is little to no case law on the CISG[115] and (2) the UCC may inform a court where the language tracks that of the CISG.[116] Virtually every US court that decides

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[109] San Lucio, CIV A 07-3031(WJM), 2009 WL 1010981; Norfolk S. Ry. Co, CIV.A. 06-58 J, 2008 WL 2884102; Miami Valley Paper, 1:05-CV-00702, 2009 WL; Belcher-Robinson, L.L.C. v. Linamar Corp., 699 F. Supp. 2d 1329, 1336-37 (M.D. Ala. 2010); Hanwha Corp, 760 F. Supp. 2d at 430; Dingxi Longhai, 635 F.3d at 1107-08.
[110] See e.g., Amco Ukrservice, 312 F. Supp. 2d at 686-87.
[111] St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, 00 CIV. 9344 (SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002) aff'd, St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GMBH, 53 F. App'x 173 (2d Cir. 2002).
[112] Valero Mktg. & Supply Co. v. Greeni Oy, 242 F. App'x 840, 844 (3d Cir. 2007).
[113] See e.g., Innotex Precision, 679 F. Supp. 2d at 1359.
[114] Marlyse McQuillen, 61 U. Miami L. Rev. 509, 511.
[115] See e.g., Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., 01 C 5938, 2003 WL 223187 (N.D. Ill. Jan. 30, 2003).
[116] See e.g., Genpharm Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 54-55 (E.D.N.Y. 2005).

a CISG case will make these assertions in its analysis. Even cases that actually consider foreign law will almost always begin by reciting those two statements.[117]

The CISG was enacted in order to promote uniformity.[118] Although the use of these two assertions has become uniform in US case law, the application of it thwarts the goals of the CISG.[119] The UCC is only applicable in the US; as such UCC guidance will likely further obscure private international law regarding the sale of goods. [120] In doing so, US courts are essentially interpreting CISG contracts under US law as opposed to interpreting them "in accordance with the general principles on which it (the CISG) is based".[121] Nevertheless, the use of these two statements by US courts may be the most uniform aspect of CISG case law in this country.

i. No Case Law

In applying the CISG, most US courts will assert that there is "virtually" no case law on the CISG.[122] Terms like "sparse"[123] or "scant"[124] are also used to describe the amount of case law on the CISG. These assertions are flawed for two reasons. First of all, the CISG has been in force in the US for almost 25 years. Substantial case law has built

[117] See e.g., Chicago Prime, 320 F. Supp. 2d at 712 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005); but see Amco Ukrservice, 312 F. Supp. 2d at 686-87.
[118] CISG Art. 7.
[119] See e.g., Francesco G. Mazzotta, 3 Loy. U. Chi. Int'l L. Rev. 85, 101-02; but see Philip Hackney, 61 La. L. Rev. 473, 479.
[120] But see Philip Hackney, 61 La. L. Rev. 473, 479.
[121] See e.g., James E. Bailey, 32 Cornell Int'l L.J. 273, 289-90 (arguing that this approach is directly contrary to the intentions of the CISG and that national courts are to examine the language of the CISG thoroughly for parallels which might aid their analysis before turning to analogies of their own domestic law).
[122] This statement became almost boilerplate after the 1995 case of Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir.1995).
[123] See e.g., Hanwha Corp., 760 F. Supp. 2d at 430.
[124] See e.g., Chicago Prime, 320 F. Supp. 2d at 708-09 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005).

around the CISG. In fact, most courts still cite a 1995 case[125] to support the idea that there is little case law on the CISG.[126] Yet, as late as 2011 the claim was still being used.[127] Secondly, the courts that assert the absence of CISG case law are only referring to the absence of US case law on the CISG. These courts by and large do not consider whether foreign courts have addressed the issues they are presented with.[128]

After insisting that there is scant case law on the CISG, US courts explain that since the UCC is so similar, UCC case law may guide the court's interpretation.[129] Courts are then quick to note that although UCC case law may guide the court, it is not "per se applicable".[130]

ii. Reliance on the UCC

The damaging effect of applying UCC case law to CISG cases is perhaps best summarized in Asante Technologies, Inc. v. PMC-Sierra, Inc.[131]:

> "The availability of independent state contract law causes of action would frustrate the goals of uniformity and certainty embraced by the CISG. Allowing such avenues for potential liability would subject contracting parties to different states' laws and the very same ambiguities regarding international contracts that the CISG was designed to avoid. As a consequence, parties to international

[125] Delchi Carrier, 71 F.3d at 1028.
[126] See e.g., TeeVee Toons, Inc. v. Gerhard Schubert GmbH, 00 CIV. 5189 (RCC), 2006 WL 2463537 (S.D.N.Y. Aug. 23, 2006).
[127] See Hanwha Corp., 760 F. Supp. 2d at 430.
[128] But see Chicago Prime, 320 F. Supp. 2d 702 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005).
[129] See e.g., Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, 03 C 1154, 2004 WL 1535839 (N.D. Ill. July 7, 2004).
[130] See e.g., Genpharm Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 54-55 (E.D.N.Y. 2005).
[131] Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001).

contracts would be unable to predict the applicable law, and the fundamental purpose of the CISG would be undermined."[132]

The Asante court was referring to why state causes of action should not supercede the CISG. The logic however applies equally when considering the effects of using the UCC to interpret the CISG. Applying case law that interprets only US state law, in cases where the CISG is applicable, frustrates the purpose of the CISG.[133] Although it is possible for foreign courts to reach the same conclusions of US courts that rely on the UCC, the logic and reasoning of the decisions may vary greatly and thus future outcomes would remain uncertain.

As early as 1989 courts have been referencing the UCC for interpretive guidance[134] and that trend has continued as late as March of 2012.[135] The use of the UCC may have been necessary in 1989, the year after the CISG came into effect. But now, nearly 25 years later, there is a growing body of case law- both domestic and foreign- from which a US court may seek guidance. Yet the use of the UCC has continued into 2012 and even cases that do consider foreign law reference the applicability of the UCC to CISG cases.[136]

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[132] Id. (holding that the CISG preempts state law).
[133] See James E. Bailey, 32 Cornell Int'l L.J. 273, 281 (stating that "(T)he legislative history of the CISG demonstrates a clear intent that courts "treat the CISG as an autonomous body of law rather than as a place on which to graft their domestic rules and traditions.").
[134] See Orbisphere Corp. v. United States, 726 F.Supp. 1344, 1355 (Ct.Int'l Trade 1989).
[135] See Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co., Ltd., 10 C 1174, 2012 WL 962698 (N.D. Ill. Mar. 21, 2012).
[136] Chicago Prime, 320 F. Supp. 2d 709 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005).

Courts have claimed that the CISG is the "the international analogue to Article 2 of the UCC".[137] As such, US courts generally believe that where provisions of the UCC are similar to those of an applicable provision of the CISG, case law and the UCC itself could be considered.[138] But courts almost always explain that UCC case law is not "per se applicable".[139]

Courts state that there is 'virtually no case law on the CISG'. Courts then go on to say that the UCC may be relevant. But it's important to note that courts do not expressly state any causation between the two things. So while these assertions often follow each other, courts have not expressly acknowledged that the absence of case law causes the court to consider the UCC.[140]

Courts often acknowledge that the CISG is to be interpreted in accordance with its underlying principles.[141] In Delchi Carrier SpA v. Rotorex Corp.[142], the court stated that their interpretation was to be informed by the CISG's "international character and ... the need to promote uniformity in its application and the observance of good faith in international trade."[143] The court in Delchi Carrier then immediately explains that the UCC may provide relevant guidance.[144] The use of the UCC undermines the very purpose

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[137] See Chicago Prime, 320 F. Supp. 2d 709 (N.D. Ill. 2004) aff'd, 408 F.3d 894 (7th Cir. 2005); Dingxi Longhai, 635 F.3d at 1107.
[138] Generally academics disagree with this assessment. See e.g., Francesco G. Mazzotta, 3 Loy. U. Chi. Int'l L. Rev. 85; Christopher Sheaffer, 15 Cardozo J. Int'l & Comp. L. 461; but see Philip Hackney, 61 La. L. Rev. 473.
[139] See e.g., Genpharm Inc., 361 F. Supp. 2d at 54-55.
[140] See e.g., Hanwha Corp. 760 F. Supp. 2d 426.
[141] See e.g., St. Paul Guardian, 00 CIV. 9344 (SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002) aff'd, 53 F. App'x 173 (2d Cir. 2002).
[142] Delchi Carrier, 71 F.3d at 1027-28.
[143] Id.
[144] Id. at 28.

of the CISG which the court had just acknowledged.[145] Yet this case remains among the most cited cases in CISG case law in the US.[146]

In Macromex SRL v. Globex Int'l, Inc., a court affirmed an arbitration award that relied almost solely on the UCC for analysis of a case which was governed by the CISG.[147] The arbitrator considered the CISG's commentary and case law (only US case law) as well as the UCC and UCC case law. The arbitrator "found that the materials within the CISG were of limited use".[148] The arbitrator held that "the U.C.C. was dispositive of the issue."[149] The arbitrators literally found that UCC case law was more persuasive in regards to the CISG then was the case law of the CISG. The court went on to affirm the holdings of the arbitration.

It's certainly not uncommon for courts in the US to consider UCC case law when determining rights under the CISG. But the explicitness of the opinion in Macromex SRL, which expressly declines to follow CISG case law, is unique. The opinion states that the arbitrators considered the CISG's language itself as well as CISG case law. The arbitrator's found the CISG case law "of limited use".[150] The arbitrators then considered UCC case law and found it to be "dispositive".[151] Even more interesting however is that the party who challenged the arbitration, Globex International, did not challenge the use

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[145] See James E. Bailey, 32 Cornell Int'l L.J. 273, 289-90 (arguing that "(T)he approach described in Delchi … is precisely contrary to the application intended by the drafters of the CISG: national courts are not to analogize the CISG to their own national laws until they have exhaustively examined the language of the Convention.").
[146] See e.g., Dingxi Longhai, 635 F.3d 1106, 1107-08.
[147] Macromex SRL v. Globex Int'l, Inc., 08 CIV. 114 (SAS), 2008 WL 1752530. (S.D.N.Y. Apr. 16, 2008) aff'd sub nom. Macromex Srl v. Globex Int'l Inc., 330 F. App'x 241 (2d Cir. 2009).
[148] Id.
[149] Id.
[150] Id.
[151] Id.

of the UCC. Instead Globex asserted that the arbitrators did not apply the UCC correctly.[152] Globex argued that the commentary of the UCC should have guided the arbitrators to a different conclusion, but they assented to the use of the UCC.[153] Marcomex evinces a complete disregard for the CISG not only among US courts, but among arbitration panels as well as the parties themselves.

In Viva Vino Imp. Corp. v. Farnese Vini S.R.L.[154], the opposite approach was taken. That court noted that the UCC considered distributorship agreements to be contracts for the sale of goods. But, citing Helen Kaminski Pty., Ltd. v. Mktg. Australian Products, Inc.[155], the court in Viva Vino found that distributorship agreements were not contracts for the sale of goods under the CISG.[156]

The examples above demonstrate that the application of the UCC in cases governed by the CISG thwarts uniformity.[157] Not only is it less likely that a foreign court would reach the same determination, but there is inconsistency among US courts themselves. The increase in the use of foreign law in US courts[158] may lead a US court to follow a persuasive ruling of a foreign court. Whereas another US court may be relying solely on UCC case law. These two courts would likely come to divergent conclusions, or in reaching the same conclusions, they would very likely have had divergent analysis.

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[152] Id.
[153] Id.
[154] Viva Vino Imp. Corp. v. Farnese Vini S.r.l, CIV.A. 99-6384, 2000 WL 1224903 (E.D. Pa. Aug. 29, 2000).
[155] Helen Kaminski Pty., Ltd. v. Mktg. Australian Products, Inc., M-47 (DLC), 1997 WL 414137 (S.D.N.Y. July 23, 1997).
[156] Viva Vino, CIV.A. 99-6384, 2000 WL 1224903.
[157] See contra Philip Hackney, 61 La. L. Rev. 473, 479 ("(A) court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries. These interpretations, however, would not be binding, but only persuasive.").
[158] See section III(A) Recent Use of Foreign Case Law supra pp. 15-21.

IV. Effectiveness of the CISG

In considering the effectiveness of the CISG, it's important to understand the different legal systems which the CISG must fit into. Generally speaking the world is divided into common law and civil law jurisdictions.[159]

In common law jurisdictions, courts are bound by the legal doctrine of stare decisis. Common law jurisdictions have a tiered system of courts in which lower courts are bound by the holdings of superior courts.[160] Common law courts write opinions not only to provide the parties of the case with the reasoning behind the decision, but also to explain that reasoning to future courts which may be bound by the decision.[161] Common law legislation is also written with specific detail.[162]

In civil law jurisdictions cases are not binding on subsequent courts. Civil law jurisdictions rely on broad language in codes as opposed to the very detailed statutes, which common law jurisdictions have.[163] Since the CISG was drafted to apply in countries all over the world, it had to be crafted in a way that would allow it to apply in both types of jurisdictions.[164] There are strong differences in how civil and common law

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[159] Legal systems are more complex than simply common law and civil law. There are many jurisdictions which are a mix of common and civil law as well as the existence of Sharia which is varied throughout Muslim countries but is based on the teachings of the Quran. See generally Paul Schiff Berman, Global Legal Pluralism, 80 S. Cal. L. Rev. 1155 (2007).

[160] See generally 12A Fla. Jur 2d Courts and Judges § 189.

[161] See e.g., Hon. Gerald Lebovits, Lucero Ramirez Hidalgo, Esq., Advice to Law Clerks: How to Draft Your First Judicial Opinion, 36 Westchester B.J. 29 (2009).

[162] William Tetley, Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified), 60 La. L. Rev. 677, 684 (2000).

[163] Id. at 703.

[164] See Anthony J. McMahon, Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2), 44 Colum. J. Transnat'l L. 992, 1000 (2006) ("The CISG is a result of negotiations among a number of states

jurisdictions approach cases[165], these differences may continue to thwart the uniformity of the CISG.

The role of academic opinion in these two systems is also quite different. In common law jurisdictions, academic opinion can be persuasive but it is not often referred to or relied on.[166] Common law courts are more comfortable interpreting case law from within their own jurisdiction.[167] In contrast, many civil law jurisdictions consider academic opinion quite important in their analysis.[168] Civil law jurisdictions do not rely on case law. This is one of the biggest challenges to uniformity between civil and common law jurisdictions. Common law jurisdictions do not often site academic opinion. So where a common law judge is deciding a CISG case, they will look to case law which has already considered the issue. In that same case however, a civil law judge will likely look to an academic explanation of the CISG on that particular issue.[169]

There are compelling aspects of both systems which encourage uniformity of law. Civil law jurisdictions rely on the code itself as the source of the law. In doing so, courts point to a single, stable source every time a case is considered. To a civil law proponent, case law may look like moving the goal post and thus changing the outcome of the game.

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coming from different legal systems that made their proposals and entered into compromises in order to achieve what they regarded as the minimum required by their particular interests.") (internal quotes omitted).

[165] See Vivian Grosswald Curran, 7 Colum. J. Eur. L. 63.

[166] Id. at 67-69.

[167] Christopher Sheaffer, 15 Cardozo J. Int'l & Comp. L. 461, 477 (defining homeward trend as"many courts refuse to acknowledge the decisions of their international counterparts, opting instead for a "homeward trend" approach, applying familiar domestic law.").

[168] Id.

[169] Id.

On the other hand, when cases bare no relation to each other there may be very little predictability in results. There is inherent ambiguity in language and thus any particular statute will be subject to various interpretations and parties may have no ability to predict how a case will turn out. The reliance on academic opinion in civil law jurisdictions[170] may also lead to unpredictability because academics often disagree with one another.

In a common law system courts will consider the analysis of other courts which have considered similar issues. Since the CISG is meant to apply globally, and since the purpose of the CISG is to promote uniformity globally, it makes sense that courts in common law jurisdictions should be considering a global body of law. That has been the biggest challenge in the US to date. US courts have been reluctant to consider foreign case law, but that has been slowly changing.[171]

Imagine that a civil law court has decided an issue that now presents itself to a common law court. Under the CISG and common law, the court ought to consider the civil court's decision. At this stage, several problems may present themselves. The initial question in an adversarial jurisdiction- such as the US- is whether or not a party to the action offers foreign case law in the case. Without this important first step, it is very unlikely that a court in an adversarial system would consider foreign case law. The onus is on the parties to provide the governing law that supports their position.

Assuming foreign case law is plead, the following obstacles still remain. The decision may be in a different language. But this challenge has been minimized with the use of translated texts and the tools outlined supra pages nine through eleven. Another

[170] Id.
[171] See discussion supra pp. 11-30.

challenge is the opinion itself. A civil court may issue a decision which is only a sentence or two[172]. The reasoning behind the opinion, even if translated, may be of limited use because it may not be written out in detail in the way that a common law judge would be used to reading.[173] Yet another obstacle for the common law judge would be the sources which the civil law court relied on. Assuming the opinion indicated its sources, the civil court may have relied on academic opinion, which a common law judge may or may not find persuasive.[174] Considering the homeward trend, a common law judge is likely to find case law from his or her own jurisdiction most persuasive.[175]

Consider also the example of a civil law court that considers an issue after a common law court has already addressed it. In that case the civil court may or may not need to consider case law. Even if the civil court does consider case law, its search of case law may be limited and thus it may not come across the common law case. The civil law court may also find academic opinion which it finds to be more persuasive than the opinion of a common law court.

The uniformity sought by the CISG may still be able to function in both common and civil law jurisdictions. The CISG favors civil law jurisdictions in some ways but it also favors common law jurisdictions in some ways.

For instance, the CISG requires courts to consider the text of the law itself first. Both civil and common law jurisdictions start their analysis here anyway. But the CISG then asks that any gaps in the language of the CISG be filled with consideration to its

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[172] Id. at 67.
[173] Id.
[174] Id.
[175] Steven Walt, 39 Va. J. Int'l L. 671, 700 (defining homeward trend as the tendency of "(I)nterpreting the terms of uniform law through national law").

overriding principles for international uniformity.[176] This provision favors the analysis which civil law courts are most accustomed to.[177] Civil law courts often consider the broad principles of the law itself when deciding cases.[178] Although common law courts also consider broad principles, common law courts look to case law to define these principles.[179] This particular point may be one of the main reasons that US courts misapply the CISG.

On the other hand, aspects of the CISG favor common law courts. The CISG does require that some level of regard be given to international uniformity. This seems to require courts to consider case law.[180] Common law jurisdictions come very close to uniformity when applying their own domestic law. This is because, generally speaking, once an issue is settled in a case, that issue has been settled for all subsequent cases. Cases cannot diverge from each other without being struck down from higher courts. Even the application of the CISG in the US is relatively uniform. The problem with CISG case law in the US isn't that it's not uniform, its that the reasoning US courts follow cannot be followed around the globe. This is because US courts rely on domestic law to settled CISG cases, and that domestic law simply is not applicable around the world. But

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[176] CISG Article 7.
[177] See James E. Bailey, 32 Cornell Int'l L.J. 273, 288 ("Article 7(1) poses a challenge for U.S. courts which approach the Convention from the case law-based tradition of the common law rather than the code-based tradition of the civil law.").
[178] Philip Hackney, 61 La. L. Rev. 473, 478 ("The Convention, however, clearly adopts in Article 7(2) more of a Civil-Law approach by directing the interpreter of the Convention to decide the case in conformity with general principles from the Convention.").
[179] James E. Bailey, 32 Cornell Int'l L.J. 273, 296 ("(C)ommon law systems which traditionally look to case law rather than legislation as the source of general principles")
[180] Id. at 293 ("(E)ssentially, the criterion of uniformity incorporates the concept of precedent into the CISG.").

the uniformity within the US is an indication that uniformity can be achieved to a certain degree.

The CISG directs signatory countries to have regard for global uniformity.[181] It appears that consideration ought to be given to case law around the globe in order to have regard for that uniformity.[182] But it has been pointed out that the case law which is to be considered, is not binding because the term "regard" denotes only that a court considers foreign case law, it does not require a court to be bound by it.[183]

While both civil and common law courts can achieve some level of uniformity, this is in part due to the fact that both systems generally have a hierarchy of courts. There is a top of the hierarchy which can settle any disputes among lower courts as to interpretation. Inherent ambiguity in language will inevitably lead to different interpretations, particularly when those interpreting the law are from diverse cultural and legal traditions.

The absence of a supranational body empowered to settle divergent interpretations of the CISG is one of the most prevalent criticisms of the CISG.[184] The reasons behind the absence of such a court may be practical. Many countries might have objected to a supra-national body which could essentially dictate law to signatories.[185] For this reason,

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[181] CISG Article 7(1).
[182] James E. Bailey, 32 Cornell Int'l L.J. 273, 293 ("(E)ssentially, the criterion of uniformity incorporates the concept of precedent into the CISG.").
[183] Philip Hackney, 61 La. L. Rev. 473, 479 ("(A) court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries. These interpretations, however, would not be binding, but only persuasive.").
[184] See e.g., Steven Walt, 39 Va. J. Int'l L. 671 at 672-673.
[185] Anthony J. McMahon, 44 Colum. J. Transnat'l L. 992, 1000-01 (referring to the flexibility throughout the CISG, "Such flexibility facilitates adoption because countries perceive it "as a tool which enables them to preserve their sovereignty and to protect their own domestic legal systems.").

it's likely that the CISG would not be ratified in many countries and its goals would be frustrated.[186] But as a result, there is no supra-national court to settle divergent interpretations of the CISG.

Although all of the above criticisms of the CISG are warranted to some degree, recent years have undoubtedly seen a tremendous growth for the CISG. The existence of CISG databases have also grown over the past decade. These tools have led to a dramatic increase of the availability of CISG case law and guidance throughout the world.[187] The translations and abstracts provided by these cites have allowed courts all over the world to have access to guidance on the CISG, thus reducing the cost on courts and parties to CISG cases.

With the growth of these databases has come a growth of CISG awareness among contracting parties and by courts. US courts have seen a dramatic increase in the use of foreign case law regarding the CISG. That increase is due in large part to the use of the CISG database, as evinced by US courts referencing the databases in their opinions. In the last ten years, at least fourteen US courts have considered foreign case law and or CISG Advisory opinions regarding the CISG.[188] While US cases are still largely ignoring foreign case law, those numbers are shrinking and foreign case law is playing an increasing role in US court's CISG analysis.

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[186] James E. Bailey, 32 Cornell Int'l L.J. 273, at 278 (discussing the need for flexibility in order to have a sufficient amount of signatories to make the CISG internationally uniform "(B)ecause these treaties are generally considered too far-reaching in their scope, most countries, including the United States, have refused to adopt them.").
[187] See discussion supra pp. 9-11.
[188] See section III(A) Recent Use of Foreign Case Law pp. 15-21.

Scholarly research also shows that civil law jurisdictions are now paying an increasing level of consideration to case precedent.[189] It may be that the two separate legal systems are slowly beginning to merge ideologies. There are also hybrid jurisdictions today, which use a mix of common and civil law jurisprudence.[190]

Since the CISG was passed in 1980, the world has seen a radical transformation. In 1980 the world was a bipolar place with the US and other capitalist countries opposing the Soviet Union and other communist states. The cold war was in full effect when the CISG was written. Today the world has become interconnected in a way like never before. The fall of communism in the Soviet Union, has lead to a rise in private international trade. According to the World Trade Organization total world exports in 1980 were $2,034,000,000,000 ($2.034 Trillion).[191] The World Trade Organization states that world exports in 2011 were $18,255,000,000,000 ($18.255 Trillion).[192] That's nearly an 800% increase.[193]

The role of the CISG has grown along with the increase in international trade. The purpose of the CISG is as important now as it ever has been. The purposes of the CISG are twofold. On the surface the purpose of the CISG is to encourage trade, but there are deeper, more subtle purposes.

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[189] Dana T. Blackmore, Eradicating the Long Standing Existence of A No-Precedent Rule in International Trade Law - Looking Toward Stare Decisis in WTO Dispute Settlement, 29 N.C. J. Int'l L. & Com. Reg. 487, 498 (2004) ("(T)he idea of precedents and stare decisis is favored by both common law and civil law systems of jurisprudence. Furthermore, recent studies reveal that judicial decisions are beginning to play as important a role in civil law systems as in they do in common law systems.").
[190] Quebec serves as an example. William Tetley, 60 La. L. Rev. 677, 702-03.
[191] http://stat.wto.org/StatisticalProgram/WSDBViewData.aspx?Language=E.
[192] Id.
[193] 18.255 trillion (-) 2.034 trillion= 16.221 trillion; 16.221 trillion (/) 2.034 trillion (=) 7.9749; 7.9749 (x) 100 (=) 797.49% increase.

The most noted and most obvious purpose of the CISG is promote uniformity in international commercial contracts for the sale of goods.[194] The purpose of promoting uniformity is to reduce the cost of contracting.[195] By decreasing instability, uniform law deceases the costs of the transactions. If the law in county A is the same as the law in country B, then a party located in country A is taking on less risk by contracting with a party in country B. The parties may require fewer lawyers and the outcome of disputes would be the same in either country. This would increase trust among the parties because both parties would have a common base of knowledge to work from. Both parties would feel confident in the law and thus uncertainty would be minimized, along with the costs of contracting. This concept is at the heart of the CISG; this is one of the fundamental motivations for any uniform law.

Building on that point however is the goal of promoting growth. By reducing the cost of contracting, the CISG not only reduces the burden on parties already engaged in international commerce, but it can also encourage growth in international commerce. Certainly the growth of the global economy is based in large part to the exponential growth in technology and the availability of cheaper labor abroad, but the confidence that can come with a uniform application of law throughout the world would surely give greater confidence to an international sales market.

The motivations for encouraging global economics are also twofold. The lowered cost of contracting would produce economic growth, and this growth would benefit developing countries. As international commercial law has developed, so too have legal

[194] CISG Article 7(1).
[195] Steven Walt, 39 Va. J. Int'l L. 671 (summarizing the motivations behind uniform law "One reason is that uniform rules promote efficiency. Diverse national laws create legal costs of determining and complying with the laws of multiple jurisdictions.").

protections for developing countries.[196] Globalization has ignited the economies in countries like China and India in the past decade as it did with Japan in the 1980s. The CISG was undoubtedly written to encourage global growth in both developed and developing countries.

The deeper routed idea is that by encouraging economic growth, uniform commercial law also encourages peace.[197] There is a political science theory that democracies are less likely to go to war against each other.[198] An offshoot of that theory is that wealthy countries are less likely to go to war because they have more to lose. Whether these theories are accurate or not, there is logic to the notion that countries which depend on each other economically will be less inclined to go to war with each other. This was one of the theories behind the European Union.[199] Thus, if uniform international commercial law can encourage global economic growth, thereby increasing global dependency among countries, then the likelihood of war between these countries would be diminished. Therefore, it appears that the reduction of war is one of the factors that lead to the development of uniform international law, and it likely played a role in the development of the CISG.

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[196] See Kele Onyejekwe, International Law of Trade Preferences: Emanations from the European Union and the United States, 26 St. Mary's L.J. 425, 427-28 (1995) ("The law of development calls upon developed countries to assist the efforts of developing countries to improve their standards of living through trade and other forms of cooperation.").

[197] See Kele Onyejekwe, 26 St. Mary's L.J. 425, 432 ("Because economic and social deprivation encourage international wars and international human rights violations, the United Nations, like the League of Nations before it, has attempted to ensure international economic and social progress.").

[198] Michael Doyle, Kant, Liberal Legacies, and Foreign Affairs, Philosophy and Public Affairs (1983) 205, 207–208.

[199] Troy A. Eid, The European Union: A Brief Introduction, Colo. Law., MAY 2002, at 9, 10 (explaining the motivations for unification of Europe after WWII, ("(S)uch economic and political interdependence would lead to a more prosperous and peaceful Europe.").

IV. Conclusion:

With the goal of reducing contracting costs and minimizing war, the CISG is just one piece of a political puzzle which is trying to influence the world. Whether the CISG accomplishes the goal of uniformity is debated. To what extent any law can really be uniform is unknown. But the CISG has moved the dial. After almost twenty-five years, the CISG seems to have hit its stride. More US cases are considering foreign case law regarding the CISG and those numbers will likely increase. The reluctance to consider foreign case law is dissipating and access to foreign cases has become almost limitless. The advent of online CISG databases has allowed courts and parties to CISG actions access to vast amounts of information on the CISG at no cost.

There remain ambiguities in the text of the CISG and different jurisdictions have come to different conclusions on the same area of concern. US courts still rely heavily on the Uniform Commercial Code in determining CISG cases.

Since the CISG came into effect in the US in 1988, the world has continued to become a smaller place. These changes are due in large part to developments in technology and political changes. The CISG may have been ahead of its time when it was enacted but the global society may be quickly catching up and perhaps even surpassing it. Although it remains unsettled, the CISG has served as an important building block of the past quarter-century.

As the global economy continues to expand, the CISG may eventually become outdated and in need of replacing. If common and civil law countries continue to merge ideologies or if they begin to drift further apart, drafters of a future edition of the CISG now have twenty-five years of cases and academic opinions to consider. There have been

plenty of articles written which highlight the flaws of the CISG and potential remedies. The growth in the global economy may not be directly attributable to the CISG, but its role today has become even more important that it was when it was enacted back in 1980.