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Part I *History of and Researching the CISG*

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1 Global Challenge of International Sales Law

Larry A. DiMatteo

I. Introduction

The genesis for this book was an interest in looking at the world's most successful substantive international commercial law convention – the United Nations Convention on Contracts for the International Sale of Goods (CISG) – from various national and methodological perspectives. Success here is measured by the overwhelming reception of the CISG by countries throughout the world. By late 2013, Brazil (4 March 2013) and Bahrain (25 September 2013) became the seventy-ninth and eighth countries to adopt the CISG.¹ Thus, the CISG, along with the New York Convention,² can be seen as the two most successful international private law conventions in history. The former deals with the substantive area of sales of goods; the latter is a procedural law requiring signatory countries to enforce the arbitral awards of other countries to the Convention. At the current rate of adoption, there is little doubt that the CISG will in the near future reach one hundred adoptions.

The ordinary measure of importance of a convention is by the number of countries adopting, acceding, or ratifying the convention. Many international conventions or model laws are impressive in name, but are of little significance in practice. Numerous worthy, and not so worthy, conventions have failed to reach the minimum number of signatories to become effective, and others have entered into law, but have not obtained the critical mass of participating countries to have much of an effect in the real world. The CISG has clearly reached both thresholds of importance – entering into force and a critical mass of adoptions. But, unlike the New York Convention, private parties have the ability to opt out of the CISG, thus presenting a third threshold of effectiveness – the CISG importance in practice. This issue was the thematic genesis for this book.

The CISG has reached the level of acceptance in which it can be declared the face of international sales law. However, the “global challenge” is whether practicing lawyers will educate themselves in the substantive provisions of the CISG and recognize the

¹ Brazil acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG) on March 4, 2013, becoming the 79th State Party to the Convention. The Convention will enter into force in Brazil on April 1, 2014. See Journal of the United Nations, No. 2013/43 (March 5, 2013), available at <http://www.un.org/Docs/journal/En/20130305e.pdf>.

² United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 U.N.T.S. 38. As of this writing, there are approximately 140 signatory countries to the New York Convention. See William Park, *Arbitration of International Business Disputes*, 2nd ed. (Oxford: Oxford University Press, 2012), 461–8.

benefits of a uniform international sales law, whether parties and trade associations will begin to embrace it as a preferred choice of law, and whether courts and arbitral tribunals will recognize it as applicable law and as evidence of international customary law.

This book examines these issues from the perspectives of the scholar and the practitioner. It reviews the strengths and shortcomings of the CISG, as well as the crucial issue of the uniformity of its application. A uniform text often masks chaotic, nonuniform interpretations and applications of the text. In fact, disunity in application is a contradiction to the harmonizing goal of uniform law. Divergent applications create a jurisprudence that acts as an obstacle instead of serving the intended purpose of diminishing variant national laws as an obstacle to international trade. A chaotic CISG jurisprudence creates the type of uncertainty represented by the private international law regime that it seeks to replace. Currently, we are at a crucial time in the life of the CISG: Will it reach the level of uniformity of application that will allow it to be recognized as a truly uniform international law?

The two fundamental questions noted earlier are what this book addresses. First, will the CISG eventually be accepted at the grassroots level of legal and business practice, so that its degree of importance at the transactional level becomes closer to the degree of importance it has reached at the level of national adoptions? Second, will a significant or minimal level of uniformity of application allow the CISG to become all it can be – a truly uniform international sales law that solves the problem of uncertainty caused by private international law?

Fortunately, the accessible cases and arbitral case law are of enough density to make the second question primarily a descriptive undertaking. Thus, the book, through its analysis of the substantive provisions of the CISG and its broad menu of country analyses, offers a solid foundation to assess whether it is being uniformly interpreted and applied. A tentative assessment here on the second question is that, after a period of numerous divergent interpretations and a slew of homeward-biased decisions, the trend has been toward a convergence in the CISG jurisprudence toward greater uniformity of application. In those areas where such convergence has not resulted in a uniform interpretation, there has been a greater recognition in the case law around majority and minority views or a number of minority views.

This bifurcation between majority and minority views is a second-order means to greater uniformity of application. Instead of total chaos, legal practitioners will be able to better assess how the CISG is interpreted in the different national court systems. In many ways, these interpretive groupings of case law replicate what happens at the national or domestic law level. The American Uniform Commercial Code (UCC) is applied by fifty-three independent court systems.³ It was inevitable, despite the presence of a common legal tradition, that the different court systems would interpret identical UCC provisions differently. However, the number of such divergent interpretations is low, and where they occur, the different interpretations are well known. A savvy transactional lawyer may simply choose the state law that has the preferred interpretation. This would seem to be a rarity, however, as the differences are primarily in degree, rather than in kind. The mainstream scholarly and lawyerly view of the UCC is that it is a “uniform” commercial law.

³ The UCC has been adopted, except for Article 2 (Sale of Goods) in Louisiana, in the fifty American states, Puerto Rico, U.S. Virgin Islands, and the District of Columbia.

Another element that has reduced the number of divergent interpretations of the UCC, over time, is the use of case law from other states as persuasive precedent. The need to use foreign case law is much discussed in CISG scholarship. Whether the use of foreign case law is a required element of CISG interpretive methodology is beside the point. Article 7's mandate – that the interpretation of the CISG should take into account its international character and the need to promote uniformity in its application – is unobtainable without reviewing well-reasoned cases from other jurisdictions. Just as in UCC jurisprudence, nothing requires the courts applying the CISG to look to other legal systems for cases that can be used as persuasive precedent, but uniformity of application is greatly enhanced by doing so. In the civilian legal tradition, the lack of the notion of binding precedent provides another example of the potential for a less-than-uniform “uniform law.” Judges in the civilian tradition are trained to go directly to their countries' codes to find the applicable solution to a case in dispute. Thus, the seeds of divergent interpretations within the same national legal systems are constantly present. Yet few scholars and judges would argue against the view that there exists a relatively uniform national law in civil law countries. In Germany and some other civilian countries, the scholarly legal commentary serves as the glue that binds together a relatively uniform private law.

The history of CISG jurisprudence is not so different than what is found in the early development of the American UCC⁴ and the national private law systems in countries of the civil law tradition. The first step in the process of applying a new uniform law involves cases of first impression that are often seminal in nature. At the same time, with no preexisting jurisprudence,⁵ this is the period when there is the greatest opportunity for divergent interpretations. The second step is the accumulation of a critical mass of jurisprudence that can then be analyzed to determine the majority and minority views of given interpretations of the uniform law. It is also a time to ascertain trends and anomalies in the case law. The hopeful third step is a more universal recognition of variant interpretations and the coalescing of courts and arbitral tribunals around the best-reasoned interpretation given the underlying principles of the law. This process of coalescing requires that some of the initial positions taken in a national court system would need to be modified to bring its law into conformity with the “best-reasoned interpretation.” An example of this phenomenon is found in the German case law relating to the reasonable time to give notice of nonconformity of goods under CISG Article 39. The early German case law favored a homeward trend interpretation of the notice requirement. The courts interpreted the reasonable time period of Article 39 very restrictively. In one case, a period of eight days from delivery of the goods was construed as being a belated notice. The more recent German case law on the subject has taken a much more liberal view of the time allowed to give notice.

It is the third step of the process of formulating a more uniform jurisprudence that the CISG has hopefully reached. It is a stage in which it can be said that a relative or acceptable level of uniformity of application is near. Through scholarship, as represented

⁴ See Larry A. DiMatteo, “The Curious Case of Transborder Sales Law: A Comparative Analysis of the CESL, CISG, and UCC,” in *CISG and Regional Private Law Unification* (ed. Ulrich Magnus), (Sellier European Publishers, 2012).

⁵ Although in the case of the CISG, the Hague Sales Conventions are considered predecessors to the CISG. Some national courts applied those Conventions by analogy to their initial interpretations of the CISG.

by this book, as well as better education on the CISG in law schools and at the bar, it is likely that uniformity of application will continue to improve. It may take another generation of lawyers before the threshold of acceptability of the CISG and a uniformity of application will be universally recognized. The trend toward better-reasoned CISG case decisions provides the hope that CISG jurisprudence is on the right track. However, it must be recognized that absolute uniformity is unreachable for any transborder law being applied by independent court systems. Further, the CISG, just as in the UCC or BGB, is infused with the principles of reasonableness, trade usage, and good faith that are forever changing to reflect changes in society. The dynamism found in the business world and international trade will continue to present cases of first instance likely to lead to variant interpretations as CISG rules are applied to novel fact patterns. Over time, the novelty will be embraced by CISG jurisprudence and the poorly reasoned decisions will be worked out of the CISG canon and relative uniformity of application will be reached again and again.

II. Blueprint for a Conference and a Book

From the very beginning stages of planning for the conference and this book the focus was on a targeted, communal research effort. Simply stated, the menu of topics or table of contents was set before scholars were invited to contribute. The task then was to find the best scholars to fit the preselected topics. At the same time, it was a goal of the organizer to make sure that a great amount of diversity was represented in the pool of authors. The diversity goal was reached at a spectacular level. The author pool includes scholars from numerous common and civil law legal systems, mixed common–civil law systems, Islamic legal systems, and a socialist market system. The authors came from six continents and some twenty-two countries. This diversity of scholars ensures that the different perspectives of the CISG have been represented in this book.

Also, from the beginning, the book was planned to serve multiple audiences – scholar, student, jurist, and practitioner. This multifaceted purpose is reflected in the different parts of the book. Part I provides context in reviewing the history and evolution of the CISG. The use of the CISG in national courts is examined, as well as divergences between theory and practice and the unevenness of CISG case law in the interpretation of the numerous CISG provisions. It also provides material of interest to all audiences – sources of CISG law, research methodologies, and problems of translation. Part II examines the area of the interpretation of the CISG and the related issue of the problem of divergent interpretations. The meta-principle of good faith is analyzed as a critical component of CISG interpretive methodology. Part II also examines the use of the CISG in arbitration and as soft law.

Part III examines three key substantive, and heavily litigated, areas of the CISG: contract formation, including the battle of the forms scenario; the inspection and notice requirements relating to the nonconformity of goods; and the determination of fundamental breach. A note of thanks is owed to Morton Fogt for covering the numerous CISG provisions dealing with the formation of contracts. Part IV extends the substantive analysis to the area of remedies, damages, and excuse. A special note of appreciation is owed to Ulrich Magnus for his sweeping analysis of damages, price reduction, avoidance, mitigation, and preservation of goods. A discussion of the usefulness of the excuse provided in Article 79 (impediment) is provided, and the issues of legal costs as reimbursable damages are studied as well.

Parts V and VI analyze the CISG at the nation-state level. The authors were asked to review the substantive issues discussed in Parts III and IV from the perspective of their national legal systems. These country analyses serve two purposes – to present knowledge of CISG law as interpreted within each national court system and to find divergent interpretations within and across national legal systems. The country analyses also provide a longitudinal perspective as to how the CISG has evolved within certain national court systems. Part V focuses on the CISG in Europe with country reports on Austria, France, Germany, Italy, Spain, Switzerland, and The Netherlands. Due to the scarcity of case law (Southeastern Europe, Baltic States, Belarus, and the Ukraine) or a communal approach to the CISG (Nordic countries), a number of the reports are regional in nature. Part VI explores the CISG's application elsewhere in the world, including Australia, Egypt, Israel, New Zealand, and People's Republic of China. Again, due to the scarcity of cases, two of the reports were regionalized – North America, as well as Central and South America.

Parts VII and VIII crosses the theoretical–practical divide with the former providing some theoretical insights and the latter reviewing issues relating to the use of the CISG in practice. These parts show that the areas of theoretical insight and legal practice are not mutually exclusive. Part VII examines the potential use of the CISG to bridge the gap between the common and civil laws. Alternatively stated, the CISG was constructed to bridge differences between the two major legal systems. Part VII also looks at the problem of interpreting and applying uniform laws, as well as the issues of precontractual liability and the enforceability of precontractual agreements. These three chapters should be required reading for all international transactional lawyers. Part VIII is entitled “Practitioner's Perspective” and covers a number of disparate, but important, issues relating to the CISG and the practice of law. The issues examined include the potential for professional liability (malpractice) for ignoring or avoiding the CISG, a review of complimentary texts (convention) that can be used in conjunction with the CISG, a comparison of the CISG with the English Sale of Goods Act, the use of soft law alongside of the CISG, and the active implementation of the CISG in legal practice.

III. Conclusion

The goal of this book was to bring a diverse group of top-flight CISG scholars together to analyze the CISG's current place in international business transactions. They used various research methodologies, including doctrinal, comparative, empirical, theoretical, and practice-oriented. The organization of the book allows for breadth in coverage and in-depth analysis of key issues. Ultimately, the quality of this undertaking rests on the quality of the research of the contributing authors. The assembled pool of top-flight CISG scholars have provided outstanding, original scholarship, which combined makes a significant contribution to the CISG literature.

2 History of the CISG and Its Present Status

Vikki Rogers and Kaon Lai

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a remarkable historical achievement and success for the unification of international private law. It is the progeny of centuries of custom and trade practice, as well as comparative legal scholarship. The CISG reflects the modern willingness¹ of countries to incorporate into their national laws a uniform sales law for international transactions.² The list of contracting states currently includes eighty countries and is growing. The Pace CISG database disseminates approximately 3,000 cases and arbitral awards on the CISG and in excess of 10,000 articles have been written on the CISG. Several countries have used the CISG as the basis for modernizing their domestic contract and sales laws.

This chapter will describe the historical building blocks that led to the creation of the CISG and provide an introduction to its structure. It will then discuss the current status of the CISG, specifically identifying (1) the number of contracting states and the representation of contracting states within regions; (2) the impact of the CISG on the interpretation and modernization of domestic sales law codes and the development of other private international commercial law agreements; and (3) the current global efforts toward promoting awareness and use of the CISG.

II. Movement toward Uniform International Sales Law

The root of international sale of goods law harmonization is traceable to the twelfth century's *lex mercatoria*, an “autonomous, practical body of commercial law created

¹ See Camilla B. Andersen, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination* (The Netherlands: Kluwer Law International, 2007), 5 (“Modern unification of laws is a political *voluntary* process whereby different jurisdictions elect to share a set of rules – not where it is imposed upon them, as opposed to historical uniformity (like Roman law, common law, or other colonial laws)” (citations omitted)).

² See *id.*, 4–5 (“Uniform law is a new form of lawmaking, with a different *origin* and a different *focus*, and it usually arises in a transnational context – or at least in a trans-jurisdictional context (the United States, for instance, being multi-jurisdictional as far as state law is concerned, applies uniform laws within the national boundaries)” (citations omitted)).

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not by legal scholars but by merchant court[s].”³ Used throughout Europe during the medieval period, it allowed merchants to settle disputes based on customary business usage.⁴ Over time, the law for merchants slowly evolved and found its way into national laws.⁵ The expansion of international trade created a need to unify substantive law of sales in order for merchants to operate within increasingly complex legal systems.⁶ In the latter half of the nineteenth century, an internationalist movement developed in Europe, which sought to create a *uniform ius commune* based on domestic laws.⁷ The internationalist movement led to the formation of L’Institut de droit international (Institute of International Law) in Belgium and the International Law Association in Brussels in 1873.⁸

The determination to remove barriers to international trade led to a push for greater predictability regarding applicable law for international sales.⁹ Ernst Rabel, an Austrian scholar and academic, became an influential force in the unification and harmonization of the law of sales. In 1917, he founded the Institute of Comparative Law at the University of Munich.¹⁰ In 1926, the Kaiser Wilhelm Foundation for the Advancement of Science established two larger comparative law institutes, one in the area of foreign and international public law and the other in foreign and international private law.¹¹ Ernst Rabel became the director of the Kaiser Wilhelm – now Max Planck¹² – Institute for Foreign and International Private Law in Berlin.¹³ Along with these institutes, the *Journal of Foreign and International Private Law* (*Rabel’s Journal*) was established.¹⁴ One of the studies undertaken by the Institute was the comparative study of the law of the sale of goods. In 1926, the League of Nations in Rome founded an intergovernmental organization, the Institut international pour l’unification du droit privé (International Institute for the

³ Franco Ferrari, “International Business, Law Merchant, and Law School Curricula,” 6 *Yale J. of L. & the Humanities* 95, 96 (1994).

⁴ Gabrielle S. Brussel, “The 1980 United Nations Convention on Contracts for the International Sale of Goods: A Legislative Study of the North-South Debates,” 6 *New York Int’l L. Rev.* 53, 56 (1993); Klaus P. Berger, “The CENTRAL: List of Principles, Rules and Standards of the Lex Mercatoria, Transnational Law in Commercial Legal Practice,” 1 *Central Practice and Study Guides* 127–31 (1999) (describing the different sets of rules and principles of the *lex mercatoria* that were used by the community of merchants).

⁵ Harold J. Berman and Colin Kaufman, “The Law of International Commercial Transactions (Lex Mercatoria),” 19 *Harvard Int’l L. J.* 221, 227 (1978).

⁶ Brussel, “1980 United Nations Convention,” 57.

⁷ Allison E. Butler, *A Practical Guide to the CISG: Negotiations through Litigation* (Aspen Publishers, 2006), 7.

⁸ Sieg Eiselen, “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa,” 116 *So. African L. J.* 323, 332 (1999).

⁹ Kurt H. Nadelmann, “The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia,” 74 *Yale L. J.* 449, 449–50 (1965).

¹⁰ Max Rheinstein, “In Memory of Ernst Rabel,” 5 *American J. of Comparative L.* 185, 190 (1956).

¹¹ Id.

¹² “In the course of World War II, the Institute which Rabel had founded was evacuated from Berlin to Tübingen, and its library suffered severe losses. After the War, the Institute was reorganized under the energetic directorship of Professor Hans Döle. Under the name Max Planck Institute of Foreign and Private International Law, it [was] ready to move from its constrained emergency quarters in Tübingen to a spacious new building in Hamburg, the city which has traditionally been Germany’s window toward the world.” Id., 194.

¹³ Curriculum vitae of Prof. Dr. Ernst Rabel, available at <http://www.globalsaleslaw.org/index.cfm?pageID=649>.

¹⁴ Rheinstein, “In Memory,” 191.

Unification of Private Law) (UNIDROIT).¹⁵ This institute was an important initiative toward sales unification.¹⁶ UNIDROIT's stated purpose is:

[T]o examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law. To this end the Institute shall: (a) prepare drafts of laws and conventions with the object of establishing uniform internal law; (b) prepare drafts of agreements with a view to facilitating international relations in the field of private law; (c) undertake studies in comparative private law; (d) take an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary; (e) organise conferences and publish works which the Institute considers worthy of wide circulation.¹⁷

In 1928, Rabel, as a member of UNIDROIT's board of directors, suggested that its first project focus on the unification of the law relating to international sale of goods.¹⁸ Rabel submitted a provisional report concerning the unification of sales as well as the "Blue Report"¹⁹ in 1929.²⁰ In 1930, UNIDROIT set up a committee, with Rabel as one of its members, to work on the uniform law of sales project.²¹ Other members came from four major legal systems: the Anglo-American, Latin, Germanic, and Scandinavian systems.²² The committee met eleven times between 1930 and 1934²³ and in 1935 produced a preliminary draft,²⁴ which was "considerably influenced by the comparative studies on the law of sales which Rabel and his colleagues at the Berlin Institute for International and Foreign Private Law had undertaken."²⁵ Subsequently, member states of the League of Nations debated and commented on the draft, and in 1939, a second draft was completed.²⁶ World War II halted negotiations on the draft,²⁷ but Rabel published his

¹⁵ "Following the demise of the League [of Nations], [UNIDROIT] was re-established as an independent intergovernmental organization on the basis of a multilateral agreement, the UNIDROIT Statute, on 15 March 1940." *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (ed. S. Vogenauer and J. Kleinheisterkamp) (New York: Oxford University Press, 2009), 6.

¹⁶ Butler, *A Practical Guide*, 7.

¹⁷ Article 1 of the Statute of UNIDROIT, as amended on March 26, 1993, available at www.unidroit.org/mm/statute-e.pdf.

¹⁸ Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed. (Oxford, 2005), 1.

¹⁹ *Rapport sur le droit comparé de vente par le "Institut für ausländisches und internationales Privatrecht" de Berlin* (Rome: Pallotta, 1929).

²⁰ Schlechtriem and Schwenzer, *Commentary*, 2.

²¹ Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier European Law Publishers, 2007), 2.

²² Gary K. Nakata, "*Filanto S.P.A. v. Chilewich Int'l Corp.*: Sounds of Silence Bellow Forth Under the CISG's International Battle of the Forms," 7 *Transnational Lawyer* 141, 145 (1994).

²³ Huber and Mullis, *The CISG*, 2.

²⁴ John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed. (ed. Harry M. Flechtner) (The Netherlands: Kluwer Law International, 2009), 5.

²⁵ Huber and Mullis, *The CISG*, 2.

²⁶ Peter Winship, "The Scope of the Vienna Convention on International Sales Contracts," in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (ed. N. M. Galston and H. Smit) (1984), 4.

²⁷ E. Allan Farnsworth, "Formation of International Sales Contracts: Three Attempts at Unification," 110 *U. of Pennsylvania L. Rev.* 305, 306 (1962).