Application of the CISG in the United States

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A. Introduction

Living today, in the beginning of the twenty-first century, is equivalent to the concept of living in a "global village."[1] Geopolitical and economic factors have radically decreased the significance of territoriality.[2] Decentralized law making has become acceptable and has even opened the doors for the acceptance of the law merchant, or Lex Mercatoria, as an autonomous legal order in international commerce.

The United Nations Convention for the International Sales of Goods (CISG), the constituent part of the new Lex Mercatoria, is recognized as the most genuine expression of general rules and principles of international commercial law and as the best source to determine prevailing trade usage. Sixty-two states have adopted the CISG.[3] Its members vary from the least economically developed nations to the leaders of the global economy, representing all major legal traditions in the world. Their combined share of cross-border trade represents more than two-thirds of the total volume of international trade.

The statistical facts regarding international trade and the number of CISG participating members are quite impressive, but CISG activity in individual signatory countries is less so. A leading example is the United States, one of the main promoters during the drafting and ratification of the CISG, which caused a large number of states to join the Convention.[4] The United States and other

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1 S. Gopolan, *The Creation of International Law: Sovereignty Felled?*, 5 San Diego Int'l L. J. 267, 272 (2004).

2 K. P. Berger, *The New Law Merchant and the Global Market: A 21st Century View of Transnational Commercial Law*, Int'l Arb. L. Rev. 91, 98 (2000)

3 According to the Pace University Law School Institute of International Commercial Law Database on CISG (http://cisgw3.law.pace.edu/cisg/guide.html) as of November 17 2005, the following States had adhered to the Convention: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Republic of Korea, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Saint Vincent & Grenadines, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, and Zambia.

4 Trade statistics for 1980 demonstrate the influential role of the United States at the time of the

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common law states (Australia, Singapore, and Canada) report a significantly lower number of CISG cases in contrast with those of civil law countries, particularly European Union members and newly democratized European countries.

This article will show that uniform interpretation and application of the CISG is illusory and improbable. It is too difficult to create a uniform mandatory convention for the international sale of goods that would suit the needs of trading parties and member states.

This article will also show that the drafters of the CISG reduced the likelihood that it would be widely applicable with the introduction of such provisions as Article 6, Article 95, and Article 28 that were reached through compromise. Such provisions created an opening for states, courts, and trading parties to depart from other aspects of the CISG.

The following discussion will focus on one of the risks for the uniform interpretation and application of the CISG: courts' unwillingness and inability to apply the CISG when resolving international sales disputes. Article 28, which gives the aggrieved party the right to require specific performance, is an example of how common law courts are able to deviate from the CISG by granting this remedy. Moreover, Part IV will show that United States' courts cannot comply with Article 7(1)[5] and will explore the reasons why.

In Part V, this article will analyze United States practitioners' attitude towards the CISG and law schools' input into improving the awareness of international law, including the CISG. This part will also examine the main reasons for the low percentage of the CISG's application to the international sales of goods.

The conclusion will provide suggestions for increasing the awareness of students, judges, and international sales law practitioners about the CISG.

I. General Overview of CISG

1. Lex Mercatoria – Predecessor of Uniform International Commercial Law

The end of the cold war marked the transition of many countries to the free market economy and the dawn of many new trading alliances. Afterwards, the harmonization and worldwide codification of private international law became a main concern for governments and independent international commercial law agencies.

After many attempts to provide the international business community with a uniform set of international commercial rules, there are now legally binding international private law conventions and non-mandatory rules and principles

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Convention in Vienna. These statistics indicate that many states relied upon the United States as their most significant export market. International Monetary Fund, Direction of Trade Statistics Yearbook 2 (1982) at 379, 380-382

5 Article 7 of the CISG provides,

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

such as those of the International Institute for the Unification of Private Law (UNIDROIT), which are also known as a part of the new Lex Mercatoria. The question remains: which form of international private law is most convenient for international trading partners and which serves their interests best? Should domestic laws of the trading partners be the dominant choices for regulating the international business transactions?

Lex Mercatoria originated in medieval times when merchant courts used uniform commercial customs to resolve merchant disputes. Later commercial customs developed into a separate and autonomous body of law that is now called the new Lex Mercatoria. This modern Lex Mercatoria can be defined as the body of law governing international trade.[6] Lex Mercatoria has five characteristics that distinguish it from other legal rules and make it one of the most popular choices for regulating international commercial transactions, even though it is not legally binding and is not mandatory.

- Lex Mercatoria applies to international transactions.
- Its principal source is mercantile customs.
- Merchants, not judges, have traditionally administered this law.
- The procedure was fast and informal.
- The overriding principle undergirding Lex Mercatoria was equity (fairness).

The main drawback of Lex Mercatoria was that it was vague and undefined.[7]

The new Lex Mercatoria has the same five characteristics. While there is no common practice to include 'Lex Mercatoria', 'general principles of trade law', or 'customs of international trade' in legal agreements, it is certainly typical to refer to the CISG or UNIDROIT Principles in dispute resolution clauses. Both sets of rules of international commercial law are recognized as constituent parts of the new Lex Mercatoria. The UNIDROIT Principles are recognized as the most genuine expression of general rules and principles of international commercial law. The CISG is regarded as the best source for determining prevailing trade usage. The main difference between these legal sources is that the CISG, as a United Nations Convention, is legally binding whereas the UNIDROIT Principles are not mandatory and will only be included in international commercial contracts voluntarily, if at all.

2. History of the CISG

The first attempts to codify Lex Mercatoria started in 1920 when Ernst Rabel suggested the unification of laws governing international sales of goods.[8] These efforts resulted in the first draft of international trade rules in 1935. In 1951, the Hague conference presented a new draft of a possible international sales

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6 G. Baron, *Do the UNIDROIT* Principles of International Commercial Contracts *Form a New Lex Mercatoria?,* Pace Database at www.cisg.law.pace.edu/cisg/biblio/baron.

7 H. J. Berman & C. Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 Harv. Int'l L.J. 221, 225 (1978).

8 Many authors have mentioned the role of Ernst Rabel. *See, e.g.*, M. J. Bonell, *Introduction to the Convention, in* C. M. Bianca & M. J. Bonell (Eds.), Commentary on the International Sales Law: The 1980 Vienna Sales Convention, 3 (1987).

convention.[9] Finally, all prior efforts were incorporated in two conventions: the Uniform Law on the International Sale of Goods (ULIS)[10] and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) in 1964 at the Hague conference.[11] Unfortunately, the latter conventions did not attain significant international acceptance because they mostly represented Western European perceptions of international commercial law. Nevertheless, they served as a platform for the successful unification of international commercial law and provided sufficient grounds for future revisions.

The next initiative to create a uniform set of rules for the international sales of goods was the United Nations Commission on International Trade Law (UNCITRAL), which involved new drafters from sixty-one states representing governments, scholars, lawyers, and businesses. The United States was an active and influential participant (in contrast to previous experience when its recommendations were virtually disregarded).[12]

In 1980, the General Assembly of the United Nations authorized convening a diplomatic conference in Vienna, and the results of the international working group were represented at the Conference. Sixty-two participating countries approved the resulting United nations Convention on the International Sales of Goods (CISG) that came into force on January 1, 1988.[13] The CISG is one of the most successful UNCITRAL projects in the field of international private law unification after the New York Convention on the Recognition and Enforcement of Arbitral Awards (which has more then 125 member states). Today, the CISG is the leading source and codification of international commercial law.

3. Main Objectives and Limitations of the CISG

The main goal of the CISG was to provide the international business community with uniform rules that would allow trading parties to save costs and to be certain about the legal consequences of international business transactions. Certainty was the CISG's overall objective. Twenty-five years after the CISG came into force it is questionable whether this goal has been achieved. If the CISG has not been fully successful, it appropriate to ask why.

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9 For more details, *see* E. Rabel, *The Hague Conference on the Unification of Sales Law*, 1 Am. J. Comp. L. 58 (1952).

10 *See* Convention Relating to a Uniform Law of International Sales of Goods, 1 July 1964, with Annex, Uniform Law on the International Sale of Goods, 834 UNTS 109, reprinted *in* 13 Am. J. Comp. L. 453 (1964).

11 *See* Convention Relating to a Uniform Law on the Formation of Contracts for the International Sales of Goods, 1 July 1964, with Annex, Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 UNTS 109, reprinted *in* 13 Am. J. Comp. L. 453 (1964).

12 D. J. Rhodes, *The United Nations Convention on Contracts for the International Law of Goods: Encouraging the Use of Uniform International Law*, 5 Transnat'l Law. 387, 394 (1992).

13 There are only six official versions of the Convention: the English, French, Spanish, Russian, Arabic and Chinese. The official versions are reprinted *in* D. B. Magraw & R. R. Kathrein (Eds.) The Convention for the International Sale of Goods: A Handbook of the Basic Materials, 169-246 (1990).

According to general practices of drafting and passing international conventions, agreement on the final text of treaties is reached through consensus or compromise. Consensus usually is achieved through agreeing on the underlying meaning of rules, based on universally accepted practice or norms. In contrast, compromise usually involves a merely technical formulation of the text.[14] Negotiators and commentators claim that the CISG was reached by consensus. The evidence, however, suggests otherwise.

The goal of creating a uniform set of rules for the number of countries representing common, civil, and socialistic law systems naturally raises questions regarding the drafters' ability to reach consensus on the superficially dissimilar national laws and deeply divergent rules. The CISG was likely the product of compromise or reciprocity – countries did not object to certain provisions so that the other provisions they considered vital would make it into the final draft. Hence, common sense and experience supports Honnold's statement that "unanimity" in many cases was reached only with abstentions.[15]

Compromises, or formulations lacking any determinate meaning, appear in several forms in the CISG (e.g. "a principal rule with exceptions, a rule accommodating many types of doctrines, or a rule consisting of conflicting or at least unresolved subparts").[16] Therefore, the drafters of the CISG opened the doors for courts to interpret and apply rules of the CISG differently.[17]

In addition to the possibility of different interpretation of rules that were finalized through compromise, Professor Aleksandar Goldastanj notes that Article 6 gives broad rights to the trading partners to modify the contracts governed by the CISG and treat its provisions as optional. These factors radically undermine the CISG's potential as a universal set of rules for the international trade.

Moreover, the CISG itself embodied the risk of not having a uniform application through Article 95. According to Article 1(1):

> This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.

Subsection (1)(1)(b) allows the CISG to apply when one party is in a non-contracting state and the choice of law leads to the application of that state's domestic law. Therefore Article (1)(1)(b) expands the CISG to apply to even non-contracting states. Unfortunately, this provision is not an absolute one because drafting compromises gave rise to Article 95, which gives contracting states the right to exempt themselves from the application of the Article 1(1)(b), thus decreasing the extent of uniformity. While Article 1(1) was drafted to allow

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[14] Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 Harv. L. Rev. 1984, 1986 (1984).

[15] J. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 Am. J. Comp. L. 210 (1979).

[16] Note, *supra* note 14 at 1989.

[17] *Id.*

contracting states to develop their own international sales law,[18] this intent contradicts the main objective of the CISG: providing uniform international sales rules.

Another example of compromise in the CISG is Article 28, which gives broad discretion in granting specific performance as the main remedy in case of fundamental breach[19] of contract. This matter will be discussed in detail below.

By giving the right to states, courts, and participants of international sales to exclude the CISG as the applicable law of the transaction or as law governing the resolution of an international sales dispute, the CISG undermines its own usefulness as a set of uniform rules in the arena of international commercial law.

II. The CISG as Part of the Legal System of the United States

1. United States Accession to the CISG

The United States' accession to the CISG is controversial and ironic. In 1980, the United States played a highly influential role in the Vienna convention. Because it was the biggest world market, its accession to this Treaty served as a catalyst for the further approval of the CISG by other states.

The practice and statements of the United States are contradictory. When the Senate considered the Convention in 1983, President Reagan sent the Senate a note that pointed to the legal uncertainties in international trade:

> Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer claims based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.[20]

Practitioners also spoke in favor of the CISG. The United States ratified the CIST but still had reservations about its applicability in a case where the non-contracting state's law would otherwise lead to the application of the domestic law of the United States. Article 95 was intended to give contracting states the opportunity to develop their national sales law. The United States' reservations decreased the range of the CISG in the United States and expanded application of the Uniform Commercial Code (UCC) as the most popular law governing international sales contracts between the United States and its foreign trading partners.

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[18] United Nations Conference on Contracts for the International Sale of Goods: Documents of the Conference and Summary Records of the Plenary Meetings of the Main Committee, Official Records, U.N. Doc. A/ CONF. 97/19, U.N. Sales No. E.81.IV.3, 229 (1981).

[19] *See* Article 25 of the CISG

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

[20] R. Reagan, *Message to the Senate Transmitting the United Nations Convention on Contracts for the International Sale of Goods*, 1983 Pub. Papers 1316 (September, 1983).

2. The CISG as a Self-Executing Treaty of the United States

For the purpose of thorough analysis, it is necessary to distinguish between self-executing and non-self-executing treaties to better understand the allocation of powers between the judiciary and the legislature in enforcing compliance with treaties (by private individuals, state and federal executive officials, state legislatures, etc.).[21]

The Supremacy Clause of the United States Constitution states,

> [a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[22]

This provision that gives the judiciary ability to apply treaties without requiring that they first be adopted into the legal system was included to satisfy the objective of compliance with obligations imposed by international treaties and to provide an effective and speedier mechanism for the enforcement of individual rights granted by the treaty. The Supremacy Clause gives a self-executing treaty the same legal stance as federal laws, therefore all of the lower laws must comply with the provisions of the treaty. However, the Supremacy Clause does not eliminate all the obstacles that an individual relying on a treaty faces, but it "gives treaties the character of municipal law enforceable in domestic courts at the behest of the private individuals"[23]

In order for a court to declare a treaty to be a self-executing one, the treaty must encompass certain elements. The Ninth Circuit Court of Appeals defined the factors in *Saipan v. United States Department of Interior*:

> the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.[24]

The CISG is recognized as a self-executing treaty; therefore, after being ratified by the Senate, it became binding. The intention of accepting the CISG as a self-executing treaty was to make it applicable to the international sales of goods without requiring any additional domestic legislation, thereby speeding its implementation and acceptance.[25]

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21 *See* Rhodes, *supra* note 12, at 408. The first distinction between these kind of treaties was made in *Foster v. Neilson* (27 US 253 (1829)). The court stated that a treaty that "operates of itself" does not require legislation before being applicable by the courts. *Id.* at 314.

22 The Constitution of the United States, article VI, cl. 2.

23 *See* C. M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1108-1109 (1992). *See also* United States *v.* Alvarez-Machain, 504 US 655, 667 (1992).

24 Saipan *v.* United States, 502 F.2d 90, 97 (9th Cir. 1974).

25 J. 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, 281-282 (1999).

Even though the CISG "preempts state law and supplants the UCC"[26] in cases of the international sales of goods, judges sometimes think of the CISG as foreign law rather than as a self-executing treaty of the United States. The problem is that the CISG is still largely unknown in the United States.

Another legal obstacle to the full and successful implementation of the CISG in the United States is the "last in time" doctrine, according to which new legislation that conflicts with already existing provisions of a treaty supplants the treaty provisions.

All these factors – key Articles of the CISG, the lack of widespread knowledge of the treaty, the "last in time" doctrine, and the tendency in the United States to favor the UCC instead of the CISG – undercut the status and the widespread, uniform acceptance of the CISG.

III. Broad Discretion in Granting Specific Performance – Risk for the Uniform Application of the CISG

1. Specific Performance

As mentioned above, the main goal of the CISG was to provide the international business community with uniform rules for international trade. Unfortunately, today many scholars and practitioners question whether provisions adopted by consensus actually did not serve the opposite purpose – creating a ground for uninformed interpretation and application of the CISG.

Article 28 of the Convention illustrates the confusion that lies within the CISG. Article 28 bridges the gap between different perceptions of specific performance in the civil and common law traditions. It provides that courts in countries that would not grant specific performance under their domestic law not be forced to give this redress under the CISG either. The question remains whether giving such broad rights to domestic courts conflicts with one of the essential articles of the CISG – Article 7(1). That section provides, "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

Specific performance is derived from such fundamental principles of contract law such as *pacta sunt servanda* (agreements must be kept).[27] The intent of requiring specific performance is to put the aggrieved party into the same position as it would have been according to the contract and to assure that the party will have the right to get what it was entitled to according to the agreement.

The availability of specific performance varies from country to country. The legal approach to granting specific performance can be classified into four kinds of forums: 1) specific performance is generally available, and is subject only to narrow exceptions; 2) specific performance may be available only for certain

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[26] J. R. Hartwig, *Schmitz-Werke GMBH & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J.L. & Com. 77, 81 (2003).

[27] R. Hyland*, Pacta Sunt Servanda: A Mediation, 34* Va. J. Int'l Lae 405, 406 (1995).

types of obligations; 3) specific performance is an exceptional remedy available only in particular circumstances; or 4) specific performance is not available at all.[28] Specific performance is a remedy normally available in civil law countries,[29] but in common law countries it is granted only as a rare exception.

2. Specific Performance in the CISG

The specific performance provisions of the CISG incorporate the civil law concept of this remedy. The buyer's and seller's rights for specific performance are implemented in Articles 46 and 62, respectively. "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."[30] The "seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."[31]

Article 46 gives the buyer right to demand for the delivery of conforming goods in case of fundamental breach,[32] or the repair of nonconforming goods "unless this is unreasonable having regard to all the circumstances."[33] In the real world, specific performance may include "delivery of the goods before or at specified time or at specified place if time or place is an important factor in the buyer's expectation under the contract;" "prompt delivery of proper bills of lading and other documentation;" and "the performance by the seller of his other obligations under the contract and/or Convention."[34]

To have the right to demand specific performance, the buyer must not have chosen an inconsistent remedy.

> [I]nconsistent remedies include: (1) avoidance of the contract under articles 26, 49 or 81; (2) reduction of the contract price under article 50; and (3) a claim for damages based on the market-contract price differential under article 74.[35]

Article 62 gives the right to the seller to demand specific performance, i.e., "to require the buyer to: (1) take delivery of goods; (2) pay the price of the goods; and/or (3) fulfill his other obligations under the contract and/or Convention, such as the obligation under Article 86(1) to preserve the goods which [the buyer] intends to reject after being received."[36] Analogous to the requirements that must

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28 S. Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 Tex. Int'l L.J. 211, 213 (1991).

29 *See, e.g.* for France: Article 1603, 1610 Code Civil; for Germany: §433 para. 1 Bürgerliches Gesetzbuch (Civil Code- BGB).

30 CISG, Article 46(1).

31 CISG, Article 62.

32 CISG, Article 46(2).

33 CISG, Article 46(3).

34 J. Shen, *The Remedy of Requiring Performance Under the CISG and the Relevance of Domestic Rules*, 13 Ariz. J. Int'l & Comp. L. 253, 261 (1996).

35 Walt, *supra* note 28 at 214.

36 Shen, *supra* note 34 at 261.

be fulfilled in order to require specific performance under Article 46, the seller cannot resort to inconsistent remedies before seeking specific performance (e.g. avoidance of the contract under the Article 64.)

3. The Effect of Broad Discretion Given to the Courts by Article 28

The scope of the remedy of specific performance was one of the thorniest issues encountered in preparing the uniform rules. The CISG grants specific performance on a wider scale than does the common law, which operates from the premise that performance will be compelled only when damages do not provide an adequate remedy. In response to different domestic approaches to the remedy of specific performance, the CISG included Article 28:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court *is not bound* to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.[37]

Under Article 28, rules of domestic law on specific performance can prevail over the rules of the CISG, thereby denying the applicability of Articles 46 and 62 when the CISG otherwise governs the international sales contract. Article 28 contains a few ambiguous and vague phrases such as "under its own law" and "similar contracts of sale not governed by this Convention," which give broad discretion to domestic courts in deciding to grant specific performance.

These phrases mean different things depending on whether a civil lawyer or a common lawyer is reading Article 28. In the common law, a decree of specific performance refers to an order that could have only been made by a court of equity.[38] Civil law systems did not inherit this procedure for the enforcement of or the restrictions on requiring specific performance. However, there are significant differences among civil law approaches to enforcing contractual promises.

The majority of scholars and commentators agree that the phrase "under its own law" in Article 28 means the law of the forum where suit is brought, and not the law that would govern the case through choice of law principles.[39] Any other understanding of *lex fori* as law including private law may lead to the nullity of Article 28 or create problems of *renvoi*.[40] For example, a court may be forced to grant specific performance even though it would not normally be granted in its jurisdiction. This interpretation would contradict the main intent of Article 28,

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37 CISG, Article 28 (emphasis added).

38 G. H. Treitel, Remedies for the Breach of Contract 46 (1988).

39 A. H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of Vienna Convention*, 63 Wash. L. Rev. (1988), 637-638; Walt, *supra* note 28 at 218-219; J. O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention 272 (1991).

40 CISG and *renvoi* Doctrine are discussed by F. Ferrari, *CISG Case Law: A New Challenge for Interpreters?,* 17 J.L. & Com. (1999) 251-252; *see also* J. P. Bate, Notes on the Doctrine of Renvoi in Private International Law 1-8 (1904). An example of *renvoi* is when country A's conflict of law rules refer to the laws of country B, which refer back to the laws of country A.

which was to prevent courts in common law jurisdictions from having to grant specific performance in cases in which it would be inappropriate to do so under common law principles.[41]

The phrase "similar contracts of sale not governed by this Convention" in Article 28 appears to be ambiguous. Steven Walt agrees that the wording refers to contracts that are outside the scope of CISG, i.e., primarily domestic contracts for the sales of goods.[42] Therefore, courts would abide by domestic law in a domestic sales case.[43]

The broad discretion given to the courts in granting specific performance in cases where it would not otherwise be granted under domestic law constitutes one of the main risks for the uniform application of the CISG when cases are decided in a common law jurisdiction. The United States is an example of a country which allows specific performance as an exceptional remedy. UCC §2-716 states, "Specific performance may be decreed where the goods are unique or in other proper circumstances." The parties to a domestic contract, as opposed to parties that are subject to the CISG, are not able to request specific performance as their preferred remedy because the court possesses the right to determine whether the goods of the contract are unique, or in the alternative, whether "other proper circumstances exist."

There is no clear criteria that courts apply when deciding to grant specific performance but one commentator suggests the four most common factors are: 1) replaceability of the goods; 2) uniqueness; 3) hard-to-measure damages; and 4) undue hardship.[44]

The essential issue governing domestic courts' right to grant specific performance is the meaning of the irreplaceability of goods, in particular, the weight given to goods in short supply. The commentary to the UCC states, "[i]nability to cover is a strong evidence of 'other proper circumstances' for awarding specific performance."[45] A distinction should be made between difficulty of replacement and absolute irreplaceability. The goods may not need to be unique in order to give a court the right to grant specific performance. For example, if the buyer has

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41 Magellan Int'l Corp. *v.* Salzgitter Handel GmbH., 76 F. Supp. 2d 919 (N.D. Ill. 1999), (CLOUT case No. 417).

42 Walt, *supra* note 28 at 219. The other category that is outside the scope of CISG under Article 2 is the purchase of goods bought for personal, family or household use, unless the seller, at any time or before or at the time of conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; by auction; on execution or otherwise by authority of law; of stocks, shares, investment securities, negotiable instruments or money; of ships, vessels, hovercraft or aircraft; of electricity.

43 Walt, *supra* note 28, at 219.

44 J. M. Catalano, *More Fiction than Fact: The Perceived Differences in the Application of Specific Performance under the United Nations Convention on Contracts for the International Sale of Goods*, 71 Tul. L. Rev. 1807, 1825-1829 (1997). Commentators agree that "the real ground for specific performance is irreplaceability, and that uniqueness is not the only cause of irreplacability." *Id.* at 1826. *See also* Walt, *supra* note 28, at 227-228.

45 UCC § 2-716 cmt. 2.

no other sources to obtain the goods because of monopoly or shortage, the court may award specific performance even for the ordinary goods.[46]

Given the discretion given to courts in awarding specific performance, and given the extent to which tradition and UCC limit specific performance in the United States, courts are left to determine whether a foreign party in contracts with a United States party will be granted specific performance to effectuate the reasonable expectations of the foreign party and to promote the uniformity in the application of the CISG in consistency with the mandate of Article 7(1).[47]

In sum, by ceding the matter of specific performance to the domestic law of contracting states, Article 28 virtually assures that the CISG will not have uniform application because the remedy depends upon national – not international – law.

IV. Obstacles to the Correct Interpretation and Application of the CISG

1. Civil Law Interpretation Principles Implemented in the CISG

As discussed in Part II of this Article, the CISG is a self-executing treaty in the United States and shares the same legal status as federal laws. Therefore, the domestic courts of the United States are obligated to comply with the provisions included in the CISG, including Article 7. One of CISG's main objectives was to find the ideal balance between civil and common law systems. Article 7 threatens that balance because it relies on interpretation tools of the civil law system that may not be acceptable to common law courts.

Article 7 is "arguably the single most important provision in ensuring the future success of the Convention."[48] That article responds to the fact that the CISG performs a unique and difficult function by establishing uniform international law.[49] Article 7 provides:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[50]

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46 Courts have granted specific performance in cases involving cotton (*see* R. N. Kelly Cotton Merchant, Inc. *v.* York, 494 F.2d 41, 41-42 (5th Cir. 1974)), carrots (*see* Campbell Soup Co. *v.* Wentz, 172 F. 2d 80, 82-83 (3rd Cir. 1948)), and aviation fuel (*see* Eastern Air Lines, Inc. *v.* Gulf Oil Corp., 415 F. Supp. 429, 442-443 (S.D. Fla. 1975)).

47 *See* Article 7(1), *supra* note 5.

48 S. L. Harjani, *The Convention on Contracts for the International Sales of Goods in United States Courts*, 23 Hous J. Int'l L. 49, 56 (2000) (quoting Ph. Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minn. J. Global Trade 105, 106 (1997)).

49 J. Honnold, *supra* note 39 at 135.

50 CISG, Article 7.

In general, Article 7 emphasizes that the CISG should be interpreted with a sensitive regard for its special character and purpose. It also helps the law to adapt and grow in the light of new circumstances. Moreover, Article 7 includes three different rules: it can be a rule for interpretation of the CISG, a rule for gap filling, and a rule regarding the relationship between the CISG and national law.

Provisions of Article 7 embody the compromise among the contracting states "who would have preferred a provision imposing directly on the parties the duty of explicit reference to the principle of good faith, and those who on the contrary were opposed to any explicit reference to the principle of good faith in the Convention."[51] Article 7 is an additional example of a provision that was included through the compromise of the participating states. It is most likely Article 7 will not be followed by the participating states, in particular, the representatives of common law systems because it is not an accurate reflection of a provision that could be implemented in those systems.[52]

The main reason is that the CISG incorporated civil law concepts into its interpretation rules through Article 7, although one of the main objectives of the CISG was to find the golden mean between the principles and interests of the two major legal systems. United States courts do not comply with the obligations of the uniform interpretation and application of the CISG because of the nature of Article 7 and the fact that the CISG's interpretation methods are incompatible with the legal tradition of the United States as a common law state.

The House of Lords, also a representative of the common law system, described the foundations concerning interpretation of international conventions in *Fothergill v. Monarch Airlines*, which interpreted the Warsaw Convention with respect to the liability of carriers.[53] That decision declared that courts, in order to apply a uniform interpretation of the CISG, are obliged to look for other sources such as *travaux preparatoir*, foreign case law, and scholarly writings to reach conclusions that would comply with the uniform practice of the rest of the participating countries.[54] The United States Supreme Court has also stated, "[T]he opinions of our sister signatories [to an international convention are] to be entitled to considerable weight."[55]

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[51] Bonell, *supra* note 8 at 83-84. For similar affirmations, *see* J. O. Honnold, Uniform Law For the International Sales Under the United Nations Convention 99 (1999) stating that

> Article 7(1) was adopted as a compromise between two divergent views: (a) Some delegates supported the general rule that, at least in the formation of the contract, the parties must observe principles of "fair dealing" and must act in "good faith"; (b) Others resisted this step on the ground that "fair dealing" and "good faith" had no fixed meaning and would lead to uncertainty.

[52] *See supra* text accompanying notes 14-17.

[53] Fothergill *v.* Monarch Airlines, [1981] A.C. 251 (H.L. 1980) (Appeal taken from U.K.).

[54] *See* L. Diplock's opinion in *Fothergill* for an extensive analysis of which works should be considered authoritative and which should be persuasive only.

[55] Air France *v.* Saks, 470 US 392, 404 (1985).

Some questions arise immediately. Are United States courts complying with their international obligations by looking at cases in foreign jurisdictions? In addition, are foreign courts deciding relevant cases in accordance with the jurisprudence of the United States Supreme Court?

2. Different Interpretation Methods in Civil and Common Law Systems

The CISG calls for interpretation of its provisions according to the civil law tradition. That is, it provides that civil law will fill the gaps when the written law does not provide an exact answer.[56] As is true of many other civil law codes, the Austrian code incorporates one of the main principles of legal interpretation:

> Where a case cannot be decided either according to the literal text or the plain meaning of the statute, regard shall be had to the statutory provisions concerning similar cases. … If the case still remains doubtful, it shall be decided … on the ground of principles of natural law.[57]

Similar provisions can be found in many countries that operate based on the civil law system.[58] The general principles of 'natural law' are widely applied by the judiciary of the civil law countries and are accepted as a natural and mandatory means for the interpretation of law.[59] In contrast, in common law countries, statutory law is interpreted strictly without resort to 'natural law'. Common law judges are not trained to apply the general principles of law in order to interpret the statutory law. This may be the reason why the judiciary of the United States is hesitant to apply the CISG.

The two systems differ not only regarding their attitudes about main law principles and applicable law but also regarding the importance given to the reasons why and in what circumstances the certain provision was adopted, i.e., to the *travaux preparatoir* of the CISG[60] – the material revealing the history of the provision and giving the deeper understanding of the rule's purpose and the way it should be applied. Common law judiciary interprets statutes narrowly and strictly. United States courts are more accustomed to and are more willing to apply common law interpretative principles instead of principles derived from civil law such as referral to *travaux preparatoir*.[61]

3. Role of Precedent in Common Law

In order to determine whether the United States is able to comply with its obligations under the CISG, it is necessary to look at the main factors that may serve as obstacles for the successful application of the CISG.

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56 F. Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga. J. Int'l & Comp. L. 183, 217-220 (1994).

57 *Id.* at 220, n. 201 (quoting Austrian Civil Code, 1811, article 7).

58 *See id*. nn. 203 & 204 (citing Article 1(2) of the Egypt Civil Code (1948) and Article 6(2) of the Spanish Civil Code).

59 *See id.* at 221.

60 H. Lutz, *The CISG and Common Law Courts: Is There Really a Problem?*, 35 Vict. U. Wellington L.Rev. 711, 715 (2004).

61 *Id.*.

Civil law countries apply the statutory laws in addition to the provisions implemented in their code. The main purpose of code provisions is to cover all the situations that occur in the real world and to result in the same outcome in the identical situations covered by it. The judiciary strictly interprets and applies the code and other statutory laws when deciding cases.

In contrast, the common law system heavily emphasizes case law in addition to statutory law. When interpreting statutes, common law courts are guided first by the wording of the statute. If the statute is unclear, common law courts will look to past cases that interpreted that statute or similar statutes. Whatever decision a court – particularly an appellate court – reaches will serve as precedent for later courts. However, common law courts are extremely reluctant to fill in gaps in the laws. They believe that they are to interpret the laws as written, not improve the laws even if doing so makes sense to the judges personally.

Hence, a common law system can be characterized as: "stand by the precedents and do not disturb the calm."[62] The main purpose of giving such a heavy weight to precedent is to provide predictability[63] in dispute resolution and fulfill the legitimate expectations of the parties that every like case will be treated alike. The tendency to stick to the old precedents is one of the common features of the United States judiciary and reflects not only its mentality, but also its attitude to the radical changes with regard to the new precedent and new law, in particular, international law.

The legal education system in the United States also focuses on maintaining the domestic precedent's status quo and influences the mentality of future judges, forms their conservative attitudes to the legal sources in deciding the cases. Every first year law student is taught to analyze and apply the rule, to treat the every like case alike and not to look for any reinvention of the law.[64] David Frisch suggests that the way American judges are taught tends to create a habit that "can force courts to act as guardians of a past that may be no longer relevant."[65] Usually judges are influenced by ambition to follow the rules and apply precedential law. In many cases, they may not be willing to approach a dispute with innovative application not only of domestic but also of international law.

Unfortunately, the mentality and the education model is probably not going to change very rapidly, therefore United States active participation in developing international commercial law will be delayed. This conservatism of common law judges slows down the acceptance of new streams in international commercial law, i.e., fast codification that requires correct interpretation and application in order to succeed as the main legal tool for the international trade.

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62 J. P. Stevens, *The Life Span of a Judge- Made Rule*, 58 N.Y.U.L. Rev. 1, 1 n. 2 (1983) quoting Justice Stanley Reed.

63 L. F. Powell, *Stare Decisis and Judicial Restraint*, N.Y. St. B.J., 15, 18 (1990) (noting that predictability of outcome "is especially important in cases involving property rights and commercial transactions").

64 D. Frisch, *Commercial Common Law, The United Nations Convention on the International Sale of Goods, and The Inertia of Habit,* 74 Tul. L.Rev. 495, 521. *See generally*, L. Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1 (1989).

65 Frisch, *supra* note 64 at 502.

The reasons for the adherence to precedent and a conservative approach to the law exist not only regarding domestic law but with regard to international law also. From the following discussion, it appears that one of the possible reasons for the non-application of the CISG may be the mentality of judges as opposed to the international nature of the treaty. Nevertheless, it should be taken into account that the CISG is a self-executing treaty that should be applied in the same way as the domestic federal law Therefore, the impact of a conservative mentality can not be exaggerated and should be accepted only as one of the possible reasons for the hesitation to apply the CISG.

4. United States Courts' Attitude to CISG Case Law

a) Legal weight of foreign decisions

One of the main principles implied by the Article 7(1) is the autonomous interpretation of the Convention without any recourse to domestic law.[66] Even though precedent is one of the main sources for United States courts when deciding domestic cases, CISG precedent does not have the same stature when it comes to an international sales contract governed by CISG. One possible explanation is that there is little precedent to find because few legal decisions have interpreted the CISG.

Another possible reason for the non-application of CISG is not the lack of decisions providing guidelines of CISG interpretation but general attitude to foreign decisions interpreting and applying the Convention, and possibly US judiciary's ambition to create its own precedents that would be adjusted to the legal climate of the United States. This fact may be viewed not only as a negative but also as a positive process in the development of Convention's uniform interpretation and application.

As was mentioned before, one of the CISG drafters' objectives was to unify international commercial law and provide the trading community with a sufficient legal instrument. One of the main reasons for the application of CISG is the ability to predict the outcome of the legal dispute involving international sales of goods. At the time the CISG system was created, it did not include a mechanism that would ensure its uniform interpretation.

The contracting parties decided not to create a court that would be in charge of revising the decisions and would be responsible for the uniform interpretation and application of the Convention. The main reason for not creating a court that would have the same function as the European Union Court of Justice[67] was the lack of a similar hierarchy on an international level that would allow for the creation of a

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[66] J. O. Honnold, *The Sales Convention in Action – Uniform International Words: Uniform Application?*, 8 J.L. & Com. 207, 208 (1988). The author notes, "One threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law."

[67] F. Ferrari, *Interpretation of the Convention and Gap-Filling: Article 7*, *in* F. Ferrari, H. Flechtner & R. A. Brand (Eds.), The Draft UNCITRAL Digest and Beyond – Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, 150 (2004).

"supranational stare decisis" doctrine.[68] Currently, courts and legal practitioners are facing naturally expected problems in reaching a uniform interpretation of the Convention because the various stages of judiciary from different legal systems and traditions of interpretation are dealing with cases involving the CISG.

Franco Ferrari notes that "a uniform body of case law does not per se guarantee the correctness of a substantive result."[69] The United States domestic courts' hesitation to apply foreign case law helps to "distil" the large number of decisions made by courts with varying experience in deciding international sales cases and with different positions in the hierarchy of the courts.

Nevertheless, United States courts are obliged to comply with the provisions of the international treaty and should follow the CISG contracting states courts' general practice. Professor M. J. Bonell suggests that "[i]f there is already the body of international case law" it should have the authority of precedent. [70] Naturally, there is the issue of what legal "weight"-- mandatory or persuasive-- should be given to the precedents created by foreign courts.

Harry M. Flechtner suggests that it would be more effective for the uniformity in interpreting the Convention to distinguish two kinds of precedents: mandatory precedents and persuasive precedents.[71] A court should consider various cumulative factors to classify prior decisions into the these categories and to decide what legal 'weight' to give to a prior decision when resolving its current case.[72]

The first factor to consider is the authority of the tribunal rendering the decision within its own legal system. That is, "the higher the authority of the tribunal, the more deference the case is due."[73] However, the position of the tribunal is not the only self determining factor in order to classify the decision as persuasive or mandatory precedent. In many cases, a lower tribunal may adopt a decision involving application of the CISG that is already enforced; therefore, the possibility of appeal to a higher tribunal is already exhausted. Nevertheless, a court deciding a case involving the application of the CISG should always take into account the existing CISG case law as the source of supporting or contra arguments.

A second factor would be "the extent to which decisions of other tribunals are or are not in accord with the decision at issue."[74] If a majority of the tribunals interprets a particular issue of the CISG in the same way then other tribunals should accept that interpretation as the common practice in international commercial law. If a majority cannot be determined then a tribunal should take its own position

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68 *Id.* .

69 *Id.* at 151.

70 Bonell & Bianca, *supra* note 8 at 91.

71 H. M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on* Zapata Hermanos *v.* Hearthside Baking, 22 N.W. J. Int'l L & Bus. 121, 141, (2002).

72 *Id.* at 143.

73 *Id.*

74 *Id.* at 144.

with regard to the particular provision of the CISG and pass its own decision.[75] If this occurs, a tribunal should still take into account the reasoning of the prior decisions when making the decision that it considers the most appropriate to reach the outcome that would be in accord with the requirements of the CISG.[76]

The third factor introduced by Professor Flechtner is the amount of the international trade in the tribunal's jurisdiction.[77] This factor would give more weight to decisions from tribunals that are located in the most active international trade areas. This factor should not give more weight to decisions from active areas with the assumption that they are somehow better reasoned than decisions from smaller or developing areas, but because a contrary position would have a larger effect on uniform application of the CISG.[78] The author concedes that the application of this criterion may hinder the interests of small and developing countries whose trade does not constitute the big part of the world's trade.[79]

The author considers the last criterion to be the most important. It is "the extent to which the foreign decision itself comports with the mandates of CISG Article 7(1) to have regard to the international character of the CISG, the need to promote its uniform application and the need to promote the observance of good faith in international trade."[80] Decisions that meet this criterion to a great extent are more "likely to reflect an international perspective on the Convention."[81]

Nevertheless, despite different opinions[82] on the legal 'weight' that should be given to the decisions of other foreign tribunals, courts should consider foreign case law and try to comply with the emerging practice of foreign tribunals.[83] Fortunately, some US courts recognize the importance of promoting the uniformity in CISG interpretation and use foreign case decisions to ensure the consistent development of the CISG system.[84]

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75 *Id.*

76 *Id.*

77 *Id.* at 144.

78 *Id.* at 145.

79 *Id.* at 144.

80 *Id.* at 145.

81 *Id.* at 145-146.

82 J. Lookofsky, *CISG Foreign Case Law: How much Regard Should We Have?, in* F. Ferrari, H. Flechtner & R. A. Brand (Eds.), The Draft UNCITRAL Digest and Beyond – Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, 216-234 (2004).

83 In a recent case, the Tribunale di Rimini decided a dispute concerning a contract governed by the CISG by resorting to about 30 foreign court decisions. The Tribunale di Vigevano in a case decided in 2000 dealing with various issues of the CISG referred to about 40 foreign case decisions. F. Ferrari, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale Di Rimini, 26 November 2002*, 23 J.L. & Com. 169, 170-172 (2004). *See also* Rechtbank Koophandel Hasselt, Belgium, 2 December 1998, available at http://www.law.kuleuven.ac.be/ipr/eng/cases/1996-10-08.html

84 *See* Calzaturificio Claudia s.n.c. *v.* Olivieri Footwear, 1998 US Dist. LEXIS 4586, *14 (D.N.Y. 1998) ("Although the CISG is similar to the UCC with respect to certain provisions, … it would be inappropriate to apply UCC caselaw in construing contracts under the CISG."); Medical Mktg. Int'l, Inc. *v.* Internazionale Medico Scientifica, S.R.L, 1999 US Dist. LEXIS 7380, *4-5 (D. La. 1999) ("Under CISG, the finder of the fact has a duty to regard the 'international character' of the convention and to promote uniformity in its application. CISG Article 7."); Delchi Carrier SpA. *v.*

b) Is the argument of the lack of sufficient CISG database sound?

Common law countries contend that there is no database that would provide United States courts with a sufficient number of foreign cases to serve as guidelines for the interpretation of the Convention. Henning Lutz justifies this hesitation by referring to a computerized search in the United States legal databases in order to demonstrate that CISG is "unproven commodity" in Colorado.[85]

There is no sound basis for that argument because the reason for the hesitation to use provided databases and to apply foreign case decisions is the matter of the common law judiciary's desire to create its own CISG precedents.[86]

There are enough sources capable of providing sufficient data regarding the interpretation of the CISG. The main and probably most popular source is the website developed by the Pace University Institute of International Commercial Law which provides free access to foreign case decisions, scholarly writings, an updated bibliography, history of the CISG legislature and other useful sources for a thorough understanding of the CISG.[87] In addition, similar websites exist in Belgium,[88] Germany,[89] France,[90] and in other states.

Lutz argues that the databases created and maintained by the universities are dependent on the voluntary contributions of domestic and foreign courts,[91] but this still cannot justify the fact that domestic courts of the United States are hesitant to apply the CISG. Even if we accept the argument that databases hosted by private bodies, such as Pace Law School, are not capable of providing a comprehensive list of all the CISG decisions, we still should look at the disparity between the numbers of decisions submitted by the United States and the rest of CISG participating countries.

The Pace database provides access to the case decisions passed by the courts of many countries participating in CISG. The databases show that out of about 1700 published decisions the majority of the cases belongs to the civil law countries among which the leaders in applying the CISG are Austria, Belgium, France, and Germany.[92] These are the countries contributing to the uniform interpretation and application of the Convention the most. In addition, China is

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Rotorex Corp., 71 F.3d 1024, 1028 (2nd Cir. 1995) ("Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ('UCC'), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw 'is not per se applicable.'").

85 Lutz, *supra* note 60, at 728.

86 M. Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. Transnat'l L. & Pol'y 217, 233 (2001).

87 *See* Pace University Institute of International Commercial Law at http://www.cisg.law.pace.edu/.

88 *See* the website created by the Institute for International Trade Law of the Katholieke Universiteit Leuven: http://www.law.kuleuven.ac.be /int/tradelaw/WK/WKhome.html

89 *See* the website created by the Institute of Foreign and Internatioanl Law of Freiburg University: http://www.jura.uni-freiburg.de/institute/ipr1/cisg/.

90 *See* the website created at Saarbrücken University: http://witz.jura.uni-sb.de/CISG/.

91 Lutz, *supra* note 60, at 728.

92 Pace University School of Law, Center Of International Commercial Law, Database on CISG, http://www.cisg.law.pace.edu/cisg/text/casecit.html.

rapidly reporting a large number of the case decisions and arbitral awards granted by China International Economic and Trade Arbitration Commission (CIETAC) since 1993.[93] Countries representing the common law tradition do not belong to the category of the countries making the largest input into the development of CISG case law. Currently, there are only about 70 decisions from the common law contracting states and, unfortunately, the decisions' submission tempo is not going to increase.[94] The number of reported decisions is not compatible with the population represented by the common law countries or with their portion of the world's trade market.

In addition to the university databases, UNCITRAL is continuing to work actively on the creation of a database that would incorporate all the decisions with regard to the applicability of CISG. This database would provide an opportunity to reduce diverse interpretations and applications of CISG. UNCITRAL provides access to the CISG materials on its website CLOUT which is available from the United Nations website.[95] Franco Ferrari and Professor Bonell[96] support the idea of the unified system for the CISG decisions and notes that UNCITRAL should be capable to handle this task because of the well-developed system to gather CISG decisions. The "national correspondents" have to send the full text of the decisions rendered in their contracting state to the UNCITRAL Secretariat and the Secretariat will disseminate the decisions to any interested person.[97]

Moreover, the CLOUT database was designed to be complemented with the preparation of a digest of the cases available in all six United Nations languages.[98] The purpose of the digest is to provide the assistance and guidelines for the interpretation of CISG provisions and to avoid contradictions in its application. In order to assist domestic courts, scholars and practitioners UNCITRAL will be responsible for the revision of the decisions and for the formation of the uniform guide for the uniform CISG interpretation. Due to the limited resources, it was decided to list "the assistance of a group of experts who would prepare parts

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93 *Id*. at http://www.cisg.law.pace.edu/cisg/text/casecit.html#china.

94 *Id.* at http://www.cisg.law.pace.edu/cisg/text/casecit.html#australia.

95 *See* CLOUT's (Case Law On UNCITRAL Texts) The International Trade law Branch of the United Nations Commission on International Trade Law (UNCITRAL): http://www.uncitral.org/en-index.htm.

96 M. J. Bonell, *A Proposal for the Establishment of a "Permanent Editorial Board" for the Vienna Sales Convention*, *in* International Uniform Law Practice, Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law, UNIDROIT, Rome, September 1987, 241. His proposal materialized in the creation of the CLOUT database, which embodies some of the work principals proposed by Bonell. Franco Ferrari, CISG Case Law: New Challenge For Interpreters? 17 J.L. & Com. 256 (1998).

97 The decision to institute the CLOUT database was adopted in the Twenty-First Session 98 of UNCITRAL. *See* Report of the United Nations Commission on International Trade Law on the Work of its Twenty-First Session 98 (1988). *See also* the explanation of the system in the document A/CN.9/SER.C/GUIDE/1 available at http://www.uncitral.org/uncitral/en/case_law.html.

98 The proposal to consider the ways how to ensure the uniform interpretation and application of the Convention was contained in Uniform Interpretation of UNCITRAL texts: sample digest of case law on the United Nations Convention on Contracts for the International Sales of Goods (Vienna 1980), A/CN.9/498, which is available at http://www.uncitral.org/pdf/english/yearbooks/yb-2001-e/yb_2001_e.pdf.

of the text, consult among themselves, and produce a draft that could then be circulated widely and in particular to national correspondents."[99] The creation of the Digest is still in process and up to date we have only the Draft UNCITRAL Digest that must be finalized by the UNCITRAL Secretariat on the basis of the received comments. The latter data basis will be an indispensable source for the interpretation of CISG in the future, therefore, the arguments to refuse to apply foreign case decisions due to lack of the sources will loose their sound.

In summary, the previous reluctance to apply CISG partly is the result of a vicious circle. Common Law courts that want to rely on precedents and that find few in turn create few precedents for future courts. Increasing there are foreign precedents that are easily accessible to help common law courts interpret the CISG – even if that precedent is regarded as instructive rather than binding on other courts.

Taking into account all the facts that were stated above, we can come to the conclusion that one of the reasons of the hesitation to apply CISG is the problem of the vicious circle: domestic US courts are not willing to interpret and apply CISG because of the lack of precedents created by their own courts but at the same moment they are also hesitant to create their new precedents. Even if we accept US justifications for the non application, this fact should not serve as an obstacle for the judiciary to break its habits, go ahead and decide the case a priori by applying CISG even if there is no precedent that may provide guidance. In all other cases where decisions were already passed by the foreign courts, the US courts should accept them at least as the persuasive precedent which is not mandatory but serves as the guidelines for the proper interpretation of the Convention.

V. Law Schools' and Practitioners' Contribution to CISG

The United States – especially considering its enormous role in the world's economy – has been surprisingly passive in using and applying the CISG. While United States courts are partly to blame in this case, United States attorneys and law schools are also responsible.

While writing this article, I conducted an informal survey by questioning United States practitioners, professors and students to see whether they were aware of CISG. Unfortunately, almost every single time I asked a United States lawyer, "Are you familiar with the CISG and what do you think about it?" in eight or nine cases out of ten the attorney would respond that he or she did not know what it was. After I explained the CISG's purpose, I usually heard that this kind of treaty was not necessary for international sales transaction involving United States companies because the United States will always use the UCC as governing law.

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[99] J. Sekolec, *Digest of Case Law on the UN Sales Convention: The Combined Wisdom of Judges and Arbitrators Promoting Uniform Interpretation of the Convention*, *in* F. Ferrari, H. Flechtner & R. A. Brand (Eds.), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Convention (2004).

In one or two cases out of ten, the respondents were aware of the CISG, but were nevertheless not keen to apply it in international sales contracts. The main reasons were the existence of the UCC, lack of knowledge of how to apply the CISG, and lack of confidence that in the case of a dispute they would know how to protect their clients' interests.

The most interesting part of this experience had to do with the result of a survey that was conducted in the Philip C. Jessup International Moot Court Competition organized by the International Law Student Association.[100] Every spring this competition brings together hundreds of students, practitioners, professors, and judges from all over the world. Due to the tempo of the event, I did not have the opportunity to conduct a survey on an extremely broad scale but received results that did not surprise me at all.

I made a written questionnaire available to attendees at the competition. From the forty forms that I received back, United States lawyers had filled out twenty-six and foreign practitioners or professors had filled out twenty. Three out of five United States judges at the competition were familiar with the CISG, but none of them had had a chance to apply it in deciding a case. Eight out of fourteen law discipline professors knew about the CISG but only couple of them briefly covered it in their courses. Only two out of six United States practitioners were aware of CISG's existence and only one was applying it to the international sales' contract. The latter practitioner is an unusual United States lawyer because of many additional activities in the public and private international law field, and attendance at various international law conferences and events exploring needs of the international law practice. That lawyer learned of the CISG through voluntary activities, not through law school. His learning was catalyzed by the realized need to meet the requirements of the fast growing international trade, by the need to compete in the legal service market and meet client's needs because UCC is not the best solution to all the international sales' transactions.

In contrast, the twenty forms filled in by foreign lawyers (Germany – 5, Spain – 3, United Kingdom – 4, South America – 6, Italy – 2) differ dramatically. Four German, two Spanish, two British, three South American, and one Italian lawyer were familiar with the CISG.

In addition to my written questionnaire, I questioned many students from the United States and abroad about whether they knew of the CISG. Most United States students had never heard of the CISG. In contrast, foreign students told me with great enthusiasm that they had covered the CISG at their law school. Even if they were not aware of it, they were interested to know what it was. I, myself, am an international student and learned about the CISG at the Law University of Lithuania during the mandatory private international law course.

Another factor is difficult to record in a survey, especially when the survey is conducted verbally. Often, I registered the respondents' emotions and reactions to the CISG after I described it. Many of the United States respondents were skeptical about the application of the CISG and growth of its popularity among the United States lawyers.

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[100] www.ilsa.org.

Maybe the number of domestic and foreign lawyers does not differ dramatically; but the fact that only one US practitioner out of six actually was applying the CISG raises concerns about the legal education of United States lawyers and the quality of legal education offered by United States law schools.

Law school in the United States is a highly competitive business. Every law school is interested in offering a curriculum that would fulfill the requirements of the future recruiters and that would make students more competitive in the legal market. The focus of the law schools remains on the domestic law while simply ignoring the needs of the reality and growing global market.

There is a perception that relatively few lawyers presently engage in cross-border transactions, and those who do are usually associated with the elite law firms whose financial resources easily allow them to develop their own in-house programs to handle international contracts and other matters. The creators of the law school curriculum seem to forget that many smaller law firms are involved in various cases with international law elements such as family law, estate planning, criminal law and others.[101] In this case, students' ability to analyze and to apply international law would make them even more competitive in the legal market.

United States law schools are not very interested in bringing new courses of international and comparative law into the curriculum because of limited human financial resources. On the other hand, what precludes them from hiring United States professors with foreign teaching experience or inviting foreign professors who would be able to adjust their international experience to the needs of domestic law schools? Richard Redding analyzed the demographic characteristics and law school accomplishments of the 443 new law teachers hired between 1996 and 2000.[102] He came to the conclusion:

> While law faculties have become more and more diverse in race and gender, there has not been a similar increase in the diversity of new law teachers' educational backgrounds. If anything, trend is towards less diversity.[103]

As an international LL.M. student, I had taken mandatory courses on public and private international law at the Law University of Lithuania. In addition, in the United States, I took a broad spectrum of courses on international law and a couple of my professors were from states. Therefore, my legal familiarity with international law puts me on a different footing from these of my United States classmates. In my experience, foreign students are the primary takers of international law courses. Few American students venture in and very few appear truly interested in the subject. My class experience is typical. "At most law schools across the United States, fewer than twenty percent of graduates ever take a course in international law."[104]

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101 A. A. Tarr, *Legal Education in a Global Context*, 36 U. Tol. L. Rev. 199, 200-201 (2004).

102 R. E. Redding, "*Where Did You Go to Law School?" Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. Legal Educ. 594, 599 (2003).

103 *Id.* at 606.

104 J. A. Barrett, *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 Am. U.J. Int'l L& Pol'y 975, 994 (1997).

For a lawyer to be able to compete in the legal market today, he must have knowledge and skills that distinguish him from his competitors. The student has to be able to identify the needs of the market, and, probably, the law school should assist in this matter. For example, United States law firms are hiring a growing number of international lawyers, indicating a demand for international law knowledge.[105] Some international lawyers act as substitutes for United States lawyers, and others are hired for their foreign expertise.[106] The first group is a direct competitor of United States domestic lawyers. In sum, the knowledge of international law and ability to adjust to the needs of the global market is an advantage that may help United States lawyers to compete in the market.

Referring to the previous discussion, we can conclude that United States law schools are committing educational malpractice by ignoring the rapidly changing reality and demand for lawyers with international law knowledge. One of the main defects of the curriculum is the failure to include more cross border materials into the professional responsibility courses, which could then work as the catalyst of students' interest in international law.

Defects in the United States legal education include the lack of cross-border materials in professional responsibility courses and the failure to offer enough courses in international and comparative law. Law schools should revise their curriculum and make their students aware of the need to understand international law.

C. Suggestions and Conclusion

The general principle of contract law, *pacta sunt servanda*, applies not only to the contracts between private parties, but also to treaties among the nations. The CISG is an important modern example.

Even though the CISG is a great achievement of international commercial law, twenty-five years after it was drafted, it yet to fulfill its purpose of becoming the main legal tool for the international sales of goods. Surprisingly, the non-binding UNIDROIT principles are more popular among the trading partners than is the CISG, a binding treaty for sixty-two states, including the United States.

This paper explored many factors that jointly explain why and how the broad compromise that was applied to reach agreement on certain provisions of the CISG, particularly Articles 6, 28, and 95, actually gave the contracting parties and courts a right to deviate from the Convention.

The main reason for this phenomenon appears to be the difficulty of creating a binding treaty that would suit the interests of all contracting states and would be uniformly interpreted and applied by different legal systems of the world.

This paper has also explored the degree to which the United States legal community at all levels – the students, the law schools, the practitioners, and the courts – are unfamiliar with the CISG and have little interest in applying it.

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[105] *See* C. Silver, *The Case of the Foreign Lawyer: Internationalizing the US Legal Profession*, 25 Fordham Int'l L.J. 1039 (2002).

[106] *Id.* at 1042.

The reason for this occurrence is in the legal system itself, especially preparation of lawyers and contribution of the law schools to this process. Another possible reason is the view that United States laws are superior and that there is no need to comply with the obligations of the CISG. In this is true, maybe it would have been better to follow the lead of the United Kingdom, which is still not the party to CISG. The reason for its reservation:

> If the Convention were ratified by the UK and … came to be widely applied to international sales, with or without a connection with this country, the role of English law in the settlement of international trading matters would obviously be diminished. A consequential effect might well be a reduction in the number of international arbitrations coming to this country.[107]

The former dean of Indiana University School of Law, Anthony Tarr, listed several sensible recommendations to rectify this broad and serious problem:

> (a) Law schools could try to promote more effectively their international and comparative law courses; …
> (b) Law schools could make some international and comparative law courses compulsory.
> (c) Finally, law schools could ensure that law courses dealing with national and [state] law systematically include an international component. [108]

We clearly have a long way to go in making the CISG an integral component of international law from the perspective of American lawyers. Adopting the recommendations above would be a good start.

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[107] A. Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom*, 26 U. Balt. L. Rev. 51, 58 (1997)

[108] Tarr, *supra* note 105, at 203 (citing A. Grenon & L. Perret, *Globalization and Canadian Legal Education*, 43 S. Tex. L. Rev. 543, 553 (2002)).