International Sales Law
A Critical Analysis of CISG Jurisprudence

Larry A. DiMatteo
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CAMBRIDGE

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Larry A. DiMatteo
University of Florida

Lucien J. Dhooge
University of the Pacific

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Boston College

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Marisa Anne Pagnattaro
University of Georgia

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This book is the product of extended research by five scholars working in the area of private international law. It provides a comprehensive review and analysis of the jurisprudence surrounding the United Nations Convention on Contracts for the International Sale of Goods (CISG). As of February 15, 2005, sixty-four countries have adopted the CISG as their international sales law. Given its importance as the world's preeminent sales law, the authors believe that a fresh analysis of the evolving case and arbitral law is needed at this time. It has been fifteen years since the adoption of the CISG, and in those years a critical mass of interpretive jurisprudence has developed. The analysis in the book is undertaken at two levels – the practical interpretation of the CISG and the theoretical limits of interpreting of supranational conventions.

Larry A. DiMatteo is a Professor of Legal Studies at the University of Florida. He is a graduate of the Cornell and Harvard Law Schools. He is the author of many law review articles and four books, mostly in the area of contract law and theory. His books include *Contract Theory: The Evolution of Contractual Intent* (1998) and *The Law of International Contracting* (2000).

Lucien J. Dhooge is an Associate Professor of Business Law at the University of the Pacific. He received his Juris Doctor from the University of Denver College of Law and his LL.M. from the Georgetown University Law Center. Before coming to the University of the Pacific, he spent eleven years in practice with the Federal Trade Commission in Washington, D.C., and with private firms in Denver.

Stephanie Greene is an Assistant Professor of Business Law at Boston College. She is a graduate of Boston College Law School, where she served as Executive Editor of the *Boston College Law Review*. She has practiced law in the Real Estate Department at Hale & Dorr in Boston and continues to serve as counsel to the firm of Green & Hoffman, where she specializes in civil litigation.

Virginia G. Maurer is the Hubert Hurst Professor of Business Law and Legal Studies at the University of Florida. She is a graduate of Stanford Law School. She is the Director of The Poe Center for Business Ethics at the Warrington College of Business at the University of Florida. She also was the Editor-in-Chief of the *American Business Law Journal*.

Marisa Anne Pagnattaro is an Assistant Professor of Legal Studies at the Terry College of Business at the University of Georgia. She earned her J.D. from New York Law School and Ph.D. from the University of Georgia. She was a litigation attorney with Kilpatrick and Cody (now known as Kilpatrick Stockton LLP), where her practice was devoted to corporate and securities litigation. Dr. Pagnattaro is the former Editor-in-Chief of the *Georgia Bar Journal*.

To Colleen and Ian Griffith DiMatteo,
and to friends old and wise: Jeffery and Janet Barat, Lucy DiVirgilio,
Pat and Anne Dooley, Nadim and Christine Habib, Jeffrey and Marcie LePine,
Michael Meagher, Robert and Ann Marie Morrow, Joseph and Rita Zinni

LAD

To Julia

LJD

To Tom, Tucker, Natasha, and Melissa Greene

SG

To the guys – Ralph Gerald, Ralph Emmett, and William Edward Maurer

VGM

To Marian and Peter Pagnattaro

MAP

PREFACE

This book is the product of extended research by five scholars working in the area of private international law. It provides a comprehensive review and analysis of the jurisprudence surrounding the United Nations Convention on Contracts for the International Sale of Goods (CISG). As of February 8, 2005, sixty-four countries have adopted the CISG as their international sales law. Given its importance as the world's preeminent sales law, the authors believe that a fresh analysis of the evolving case and arbitral law is needed. It has been fifteen years since the CISG, went into effect on January 1, 1988, and in those years a critical mass of interpretive jurisprudence has developed. The analysis in the book is undertaken at two levels – the practical interpretation of the CISG and the theoretical limits of interpretation of supranational conventions.

Critics have argued that the benefits of uniform international business law are minimal and that national courts will inevitably be the conscious or subconscious victims of *homeward trend* or *domestic gloss* analysis. In responding to this criticism, the authors address the following four questions:

- How has the CISG in fact been interpreted and applied by the various national courts?
- Is there evidence of convergence or divergence among the national courts in interpreting the CISG?
- Is the current level of disharmony associated with divergent national interpretations acceptable from the perspective of the CISG's mandate of uniformity?
- How does divergence in national interpretations impact the effectiveness or functionality of the CISG?

The book concludes that despite the problem of diverging interpretations, there are signs that courts are taking more seriously their role in applying CISG

interpretive methodology. There is evidence of a coalescing of the different interpretations through the formulation of more specific default rules and the recognition of factors to be used in applying CISG articles.

This book provides an analysis of those provisions of the CISG that have been applied in a "critical mass" of court and arbitral decisions. In doing so, the book assesses the state of international sales law. The book is timely given the maturing state of CISG jurisprudence.

INTENDED AUDIENCE

The book presents some theoretical themes but is mostly a descriptive work. It reviews case law and arbitral decisions in order to gain insight into the various interpretations rendered on the general and often ambiguous provisions of the CISG. Cases are described and analyzed to determine interpretive trends such as evolving default rules and factors analyses. The authors believe that the book's ultimate character is as a general reference work aimed at practitioner and scholarly researchers. It is not meant to compete with the more comprehensive volumes currently in existence. It is meant to add to that literature by providing a fresh analysis of CISG jurisprudence. Legal cases, arbitral decisions, and the secondary literature are listed in the Table of Authorities and Cases, which is segmented by areas and CISG articles. Finally, the text of the CISG and a list of signatory countries are provided in the Appendices.

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We would first like to thank the Academy of Legal Studies in Business, which has provided us the professional venue to meet and discuss such topics as private international law. This book began as a panel discussion at the Academy's 2003 annual meeting in Nashville, Tennessee. We are grateful to the International Law Section of the Academy for bestowing the Ralph J. Bunche Award for Best International Paper to a paper that became the basis for this book. We would like to thank the Editorial Board of the *Northwestern Journal of International Law & Business* for providing excellent editorial assistance in transforming the manuscript into a polished work. We acknowledge the *Journal's* copyright of the materials appearing in Volume 24 and thank the *Journal* for granting a copyright release of that article for use in this book. We also acknowledge and thank the *Yale Journal of International Law* and the American Arbitration Association's *Dispute Resolution Journal* for granting us permission to publish excerpts from previous published works. We would like to especially thank John Berger, our editor at Cambridge University Press, for his faith in this effort. Finally, we would like to thank our deans and colleagues at our respective schools for providing the support and intellectual environments vital to such undertakings.

Gainesville, Florida
October 1, 2004

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CHAPTER ONE

INTRODUCTION

> "[E]ven when outward uniformity is achieved, . . . , uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words."[1]

> "[H]ow [does one] determine which interpretation should be preferred when the CISG itself gives rise to different autonomous interpretations [?]"[2]

A hopeful note was expounded 250 years ago by Lord Mansfield when he stated that "mercantile law . . . is the same all over the world. For from the same premises, the sound conclusions of reason and justice must universally be the same."[3] The universality of commerical practice provides the opportunity to structure a uniform law of sales premised upon the commonality of practice. It is on this view of the universality of commercial practice that the success of a uniform international sales law is hinged. Critics of such a view assert that such uniformity efforts are both unwise and doomed to failure. Unwise, because there are substantial and reasonable differences in national practices that are reflected in differences in national laws. Doomed to failure, because legal and cultural differences will necessarily be reflected in the national courts' interpretations of a supranational sales law. Thus, the uniformity of form (a single body of rules) will lose to non-uniform application (jurisprudential chaos). A middle view between Mansfield's idealism and the realist critque will be discussed later in this chapter. The middle view is that absolute uniformity of application should not be the test to measure the success of any international

[1] R. J. C. Munday, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450, 450 (1978).

[2] Franco Ferrari, *Ten Years of the U.N. Convention: CISG Case Law – A New Challenge for Interpreters?*, 17 J. L. & COM. 245, 254 (1998).

[3] *Pelly v. Royal Exchange Assurance Co.*, 97 Eng. Rep. 342, 346 (1757).

sales law. Instead, a standard of common discourse or relative uniformity of application is a more appropriate measurement. In the end, the true test should be whether a uniform law of sales has reduced the legal impediments to international trade. Does the uniform law provide a common legal discourse that is facilitative of international business transactions?

Despite the questions involving uniformity of application, the United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted on April 11, 1980, and entered into force on January 1, 1988, under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).[4] Critics have argued that the benefits of uniform international business law are minimal,[5] and that national courts will inevitably be the conscious or subconscious victims of *homeward trend*.[6] Homeward trend

[4] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* Pace Law School Institute of International Commerce Law, http://www.cisg.law.pace.edu (hereafter CISG). The CISG was incorporated into the law of the United States on January 1, 1988. *See generally* E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17 (1984); John O. Honnold, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989) (hereafter, Honnold, DOCUMENTARY HISTORY). The CISG officially went into force on January 1, 1988. As of February 8, 2005, sixty-four countries had acceded to the CISG. *See* UNICTRAL at http://www.uncitral.org/english/status/status-e.htm. The countries that have ratified the CISG, in alphabetical order, are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Republic of Korea, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Moldova, Romania, Russian Federation, Saint Vincent & the Grenadines, Serbia & Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, and Zambia. Notable exceptions include Brazil, Indonesia, India, Japan, Malaysia, and the United Kingdom. In a 1990 article, Professor Farnsworth stated generally that the internationalization of contract law and the adoption of the CISG was one of the "Top Ten" developments in contract law during the 1980s. Regarding the CISG he states that "the 1980's saw the internationalization of contract law – a legislative event that was the culmination of an effort spanning a half century." E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE WEST. L. REV. 203, 204 (1990).

[5] *See generally* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999).

[6] For a discussion of the problem of homeward trend *see* Honnold, DOCUMENTARY HISTORY, *supra* Note 4. *See also* Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J. L. & COM. 187 (1998). "Perhaps the single most important source of non-uniformity in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task." *Id.* at 200. One commentator argues that homeward trend can be minimized if the CISG is re-titled, enacted as a piece of federal legislation, and state law [UCC] expressly refers to it. *See* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods*

reflects the fear that national courts will ignore the mandate of autonomous-international interpretations of the CISG in favor of interpretations permeated with domestic gloss. It is most difficult for a court to "transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state."[7]

An example of homeward trend jurisprudence is the Italian case of *Italdecor SAS v. Yiu Industries*.[8] The court ignored the interpretive methodology of the CISG[9] that is explored in Chapter 2. For current purposes, a brief introduction is needed. CISG interpretive methodology includes the use of analogical reasoning by using CISG articles not directly related to the issue in a case and the use of the general principles of the CISG in fabricating default rules. Furthermore, for the sake of uniformity, national courts should review holdings of foreign courts and arbitration panels for insight in rendering well-reasoned decisions. In the *Italdecor SAS* case, the court failed to review pertinent foreign cases and arbitral decisions. Its failure to review existing cases resulted in rendering a decision without the guidance provided in the cases dealing with the determination of fundamental breach.[10] If any semblance of applied uniformity is to be achieved, it is imperative that courts look to relevant foreign decisions for guidance.

One can argue that substantive uniformity can be obtained only through the use of foreign case law, especially of upper-level or supreme courts, as binding precedent. Others have rejected such a common law view of precedent in favor of the use of foreign cases as persuasive precedent. The latter opinion is the correct one given that the CISG fails to provide an express

as an Obstacle to a Uniform Law on International Sales, 32 CORNELL INT'L L.J. 273 (1999). The drafters of the CISG were aware and concerned by the problems of homeward trend: "[I]t is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum" GUIDE TO CISG, Article 7, *available at* http://cisgw3.law.pace.edu/cisg/text/e-text-07.html.

7 John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L & COM. 365, 367 (1998). *See also* V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J. L. & COM. 257 (1997). *See, e.g.*, Danielle A. Thompson, Commentary, *Buyer Beware: German Interpretation of the CISG has Led to Results Unfavorable to Buyers*, 19 J. L. & COM. 245 (2000). "Perhaps the decision of the Oberlandesgericht [German appellate court] can be explained as a demonstration of the formalism and strictness that pervades German culture." *Id.* at 263.

8 *Italdecor SAS v. Yiu Industries*, CA Milano, Mar. 20, 1998, (It.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html#ct.

9 *Infra* Chapter 2.

10 Angela Maria Romito & Charles Sant'Elia, Case Comment, *CISG: Italian Court and Homeward Trend*, 14 PACE INT'L L. REV. 179, 195 (2002) (hereafter, Romito & Sant'Elia, *Homeward Trend*).

mandate to view foreign cases as binding precedent. Furthermore, the lack of an international appellate body renders such a view impracticable and unwise. One co-author has asserted the persuasive precedent approach in which courts and arbitral panels have a duty to review all relevant cases on the contested legal issues. They also have a duty to explain their decisions using CISG interpretive methodology. In this regard, Professor Ferrari misunderstood Professor DiMatteo's analysis of this subject.[11] Ferrari correctly criticizes the binding precedent view as follows:

> First, from a substantive point of view, stating that uniform case law should be treated as binding precedent does not take into account that a uniform body of cases does not per se guarantee the correctness of a substantive result. . . . Second, from a methodological point of view, the suggestion to create a *supranational stare decisis* . . . must be criticized, since it does not take into account the rigid hierarchical structure of the various countries' court systems. . . .

The co-author is in complete agreement with this statement. Also, the co-author's use of the phrase *supranational stare decisis* may have been inappropriate. The use of the phrase was not meant to indicate that all foreign decisions, at whatever level of the judicial system and whatever the quality of the analysis, should be accepted as binding precedent. This is indicated by the fact that the full phrase used was "*informal* supranational stare decisis."[12] The term *informal* highlights the point that Professor Ferrari makes that because there is no supranational appellate process to speak of, binding precedent is nonsensical. The point being made by Professor DiMatteo is that courts should (not must) follow well-reasoned foreign case law opinions; they are free to disregard foreign cases that demonstrate poor reasoning and those that fail to comply with CISG interpretive methodology.

Whether as voluntarily applied precedent or as persuasive (semi-binding) precedent, courts should review CISG jurisprudence before rendering a decision. In the case of diverging interpretations, the interpreter should select,

[11] Ferrari, *CISG Case Law*, *supra* Note 2, at 259 (emphasis added). Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 133 (1997) (hereafter DiMatteo, *Presumption of Enforceability*). In reviewing *Italdecor SAS v. Yiu Industries*, Romito and Sant'Elia conclude that "because of the inconsistencies in the reasoning . . . its opinion will probably have little persuasive value for other CISG cases." Romito & Sant'Elia, *Homeward Trend*, *supra* Note 10, at 203.

[12] DiMatteo, *Presumption of Enforceability*.

modify, or reconcile such decisions through the proper use of the CISG's interpretive methodology:

> [C]ourts [should serve] two primary functions [in their roles as *informal* appellate courts]. First, they would look to decisions of foreign courts for guidance. Second, they should actively unify international sales law by distinguishing seemingly inconsistent prior decisions and by harmonizing differences in foreign interpretations.[13]

Simply put, courts' decisions should separate well-reasoned cases from the poorly reasoned ones, explain why they are so, and give persuasive effect to the cases using the proper interpretive methodology.

One commentator concluded that the Court's decision in *Italdecor SAS* was "cryptic, and parochial, and it is written in a way that is hard to understand even for an Italian."[14] The court not only failed to review foreign case law on the CISG, but also failed to use relevant articles of the CISG. In one example, the court applied Article 49(1) without analyzing the related Article 25.[15] Article 49(1) allows for the avoidance of a contract in the event of a fundamental breach. The court held that an untimely delivery was fundamental without applying Article 25 which provides the CISG's parameters for determining whether a breach is fundamental. Without the use of the Article 25 template of "substantiality" and "foreseeability," and without the guidance of foreign cases applying the Article 25 template, there is no deterrent to a homeward trend perspective of fundamentality.

Given the above, the "middle view" is the proper measurement to judge the success of the CISG. The likelihood of substantive uniformity of application is unrealistic, but the utter failure of the CISG as a device to remove legal impediments to international trade is equally implausible. This middle view is found in the ongoing development of CISG jurisprudence. It is the jurisprudence of the CISG that this book seeks to uncover in gauging the impact of the CISG on international sales law.

This is not a book that will focus on the normative aspects of uniformity. The focus of this book is not whether the CISG mandates or should mandate absolute uniformity of application. The literature on this subject is quite extensive.[16] Instead, this book recognizes that many CISG provisions are the

[13] DiMatteo, *supra* Note 11, at 136.

[14] Romito & Sant'Elia, *Homeward Trend*, *supra* Note 10, at 203.

[15] *Id.* at 192.

[16] *See generally* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687 (1998); Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 Pace Int'l L. Rev. 303

product of compromise and asks whether these compromises have proven to be effective or have resulted in a chaotic jurisprudence. How have the articles of the CISG actually been interpreted and applied by the various national courts? At the interpretive level, is there evidence of convergence or divergence among the national courts?

To this end, the remainder of this Introduction will examine the special characteristics of the CISG as an "international code," including the importance of the CISG as an international convention and legal code meant for uniform application. The importance of defining a standard for measuring uniformity of application will be discussed along a continuum between absolute and relative standards of uniformity. The discussion then focuses on the importance of autonomous interpretation, as intended by the drafters of the CISG, to the goal of a relative uniformity of application. The Introduction concludes with a discussion of the more expansive use of the CISG as "soft law." This use of the CISG as evidence of customary international law offers an avenue for courts and arbitral tribunals to bridge differences between domestic law regimes.

The review of CISG jurisprudence in Chapters 2 through 10 will highlight the problems of non-uniform applications. This will be done by highlighting poorly reasoned opinions as well as those that are a product of more exemplary reasoning. The poorly reasoned opinions are generally characterized by decisions that merely apply the legal concepts of the Court's domestic legal system. The exemplary opinions are characterized by the application of CISG interpretive methodology, as discussed in Chapter 2, in pursuit of autonomous interpretations. Finally, numerous arbitral cases will be examined to assess the application of the CISG by arbitral panels.

Chapters 3 through 10 provide a more practical view of the CISG at work. These chapters are intended to provide a descriptive review of the jurisprudence that has developed around major provisions of the CISG as well as the raw material necessary to judge the CISG's functionality in lowering the legal obstacles to the international sale of goods. This review is meant to illustrate the types of issues and interpretation problems encountered by national courts and arbitration tribunals in the fifteen years since the CISG's adoption. It also

(1996); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183 (1994); Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application*, 20 AUSTL. BUS. L. REV. 442 (1992); Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574 (1988); Michael F. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L. J. 540 (1986).