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### The Application of the United Nations Convention on Contracts for the International Sale of Goods Uniformity Interpretation Principle in U.S.

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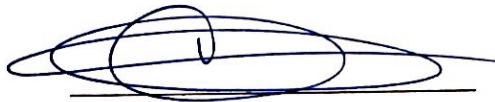
THE APPLICATION OF THE UNITED NATIONS CONVENTION ON  
CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS  
UNIFORMITY INTERPRETATION PRINCIPLE IN U.S.

Yuqing Nie

Submitted to the faculty of Indiana University Maurer School of Law  
in partial fulfillment of the requirements  
for the degree  
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of the requirements for the degree of Master of Laws – Thesis.

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## **ABSTRACT**

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) plays an increasingly important role in international sale of goods. However, the CISG is not always correctly applied, especially one of its basic principles – the uniform interpretation principle stated in its Article 7(1), which is usually ignored or incorrectly applied in its contracting States.

The CISG requires high-level uniformity, which requires the CISG to be applied autonomously if there involves parties from two CISG contracting States and the contract governing the transaction has no clause specifying other law as the governing law. Additionally, the CISG uniform interpretation principle requires uniform interpretation, with the goal of having different tribunals attribute the same meaning of the CISG texts.

In reality, the CISG uniformity goal is usually unachieved. This paper chooses several typical cases in U.S. and other CISG contracting States to analyze the application of the CISG uniform interpretation principle. Through an analysis of these cases it provides an explanation for the failure and some suggestions for improvements.

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## CHAPTER 1. INTRODUCTION OF THE TOPIC

Economic activity is one of the most indispensable consisting parts of modern society. It helps us to enjoy a more and more convenient life, especially in the recent century with the rapid and deep globalization. In the trend of globalization, the rate of international sale of goods increases substantially. Living in the 21st century, it is hard to find a product; especially a machine comes from only one country. It becomes more and more frequent and common for a company to buy raw materials in Country A, manufacture those materials in Country B, compose the components in Country C, and sell those products all over the world. Naturally, thousands of economic activities, i.e. international sales business transactions, happen during the process. With the booming international economic activities and various kinds of disputes, the world needs an infrastructure of modern and uniform commercial law to undergird those activities. Under such background, United Nations Commission on International Trade Law (hereinafter: UNCITRAL) gathered a bunch of sales laws and international law experts to draft a Convention to work as a uniform international sales law in international sales transactions. The Convention is named as the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG). It was drafted in 1980 and entered into force in 1988. Of course, the CISG is not the only body of the current applicable international sales laws, but it has central role in that sphere.<sup>1</sup>

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<sup>1</sup> CURTIS R. REITZ, SALES TRANSACTIONS: DOMESTIC AND INTERNATIONAL LAW 65 (4th ed. 2011).

Generally, the CISG works well in solving disputes in the international contract of the sale of goods. But there still exist some problems in the process of the CISG application. One of the worst but inconspicuous is the incorrect application of the CISG uniformity interpretation principle defined in Article 7(1)<sup>2</sup>, which requires the tribunal to promote uniformity in the interpretation of the CISG. The Article 7(1) contains another interpretation principle also; it is the good faith rule, which requires the tribunal to promote good faith in the interpretation of the CISG and also the observance of good faith in international trade. In practice, courts usually correctly follow the good faith rule. The problem is they sometimes ignore the uniformity rule or apply the uniformity rule incorrectly. Both of the uniformity and good faith interpretation rule are stated in the CISG general provision part and they constitute the framework of the application of the entire CISG provisions. They play such an important role in the CISG application process. Only if the interpretation rules are correctly comprehended and applied in the way as it defined and supposed in the provision, the other parts of the CISG could be understood and applied in the way that they suppose to be.

Unfortunately, in reality, the importance of the CISG interpretation rules is usually ignored. Some courts did not notice that they did not apply the interpretation rules correctly as they were drafted. For example, in the case of the U.S., the CISG is used within its territory; the way of interpreting the CISG provisions is not always conducted as it is stated in CISG Article 7. Max Rheinstein, a German-American scholar studied 40

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<sup>2</sup> “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.” United Nations Convention on Contracts for International Sale of Goods, art. 7(1), Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

cases where American courts had applied the CISG. He found that in 32 of these cases, the CISG was applied wrongly, in four, the result had been highly doubtful, and in another four, the result had been correct, by sheer coincidence.<sup>3</sup> Another recent finding shows U.S. courts have made more negative contributions to international uniformity than positive ones in their interpretation of the CISG.<sup>4</sup> Most U.S. court decisions to date failed to follow the basic approach to the uniformity interpretation rule.<sup>5</sup> Wrongful application of CISG interpretation rule could establish the framework of CISG not in the way as it was designed, which may cause different results or outcomes in the merit of the same case in different forum States.

In the recent decade, the CISG has been widely accepted and applied as the governing law in international sales transactions all over the world. More and more countries signed and ratified the CISG, as for the year of 2018, CISG has 89 signatories. Also, more and more areas and larger and larger amount of money are involved in international sale of goods. Under such circumstance, the CISG is more frequently and extensively used than ever. The right application of the CISG would make the international market operate better and develop well. Nevertheless, as introduced before, there exists a problem of the wrongful application of the CISG uniformity interpretation rule. This problem could be worse without a general accepted solution. It is essential and urgent to solve this problem in order to get the CISG be applied as it was designated.

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<sup>3</sup> Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?* 1/2 Unif. L. Rev. 126 (2003).

<sup>4</sup> JACK M. GRAVES, *THE ABCS OF THE CISG* 21 (2013).

<sup>5</sup> See JACK M. GRAVES, *Id.* at 20-21.

With the increasing number of people involved in international sales transactions, the concern about the wrongful application of the CISG uniformity interpretation principle will also increase. The judge and arbitrator need to know the importance of the CISG interpretation rules, what are the meanings of the interpretation rules, how could they be applied correctly and how to avoid wrongful comprehension or interpretation of the interpretation rules in the future to apply the CISG correctly, which could increase the certainty and fairness in the process of the CISG application. Also, the contracting parties and their lawyers have a strong desire to solve this problem to get a better predictability of the possible outcomes when they draft and sign international commercial agreements, which could help them to reduce risks, increase certainty and save costs. The certainty and fairness could be guaranteed if the CISG could be interpreted in the same way even it is applied in different legal systems or in differ countries.

The CISG is designated to make the buying and selling goods easier across borders. And it provides an opt-out provision for the contracting parties to choose another governing law. The opt-out makes the CISG uniform interpretation principle important to the commercial world. As stated above, the correct application of the CISG uniform interpretation principle could help to improve certainty and fairness. Those two goals, certainty and fairness, are very important for in a contracting party's decision to choose opt-out or not. The correct application of the CISG uniform interpretation principle could increase certainty and fairness. Under such circumstance, it is much easier and more efficient for a contracting party to predict the result of the CISG working as the governing law. If the result is not desirable or favorable, they can choose other governing

law. So the correct application of the CISG uniform interpretation principle is important in both the academic world and the commercial world.

This paper is going to analyze the problem of wrongful application of the CISG uniformity interpretation rule. First it will introduce the CISG as a whole. Then it will analyze the CISG interpretation rules, focusing on the uniformity rule. And it will explore the cases decided by U.S. courts and other contracting States' courts where CISG was involved. After the case analysis, this thesis will discuss the reason for misapplication of CISG Article 7(1) and provide some suggestions to solve that problem. Finally it will come with a conclusion that U.S. Courts should follow the principle of uniform statutory interpretation if the CISG applies.

As to the scope and objective of this paper, the following questions are to be answered in order. (1)How did the CISG come out? (2)What are the interpretation rules defined in the CISG? (3) How should they be apprehended and applied? (4)Why does the gap-filling rule result in wrongful application of uniformity rule in practice? (5)What are the current situation of the CISG application in U.S. and other contracting States? (6)Why was the CISG Article 7 not applied widely correctly as drafted? (7)How could this problem described in (5) be solved?

## **CHAPTER 2. INTRODUCTION OF UNIFORM SALES LAW AND THE CISG**

### **2.1 The History of International Uniform Sales Law**

### 2.1.1 The Development of International Uniform Sales Law before the CISG

Theoretically, the need of international sales law (*lex mercatoria*) appeared since the beginning of sale of goods among countries, which could be traced back several centuries ago. However, at that time, those deals only happened among a few countries; usually, one of the contracting parties came from an extremely powerful country A comparing to the other party's country B. Under such circumstances, although there are two countries involved in, most of those international cases were decided in country A or under the law of country A, which means the law of country A played a role of international sales law, and the law of country B was ignored.

Entering the 20th century, several countries became stronger and stronger. The international community began to be influenced and controlled by more and more countries other than some few powerful ones. Also, increasing types of sale of goods appeared, larger and larger amount money was involved in the international market. The disputes arising in those international economic activities began to be solved in several countries instead of a single one. Naturally, various legal systems stepped in. Under such legal diversity, it is difficult to decide which law will be the governing law in the international level of sales transaction to cater for all States. The choice of law problem became an urgency. Consequently, it hindered the evolution of international uniform sales law. Drafting an international uniform law would be a better and easier accepted solution than settling a State's domestic sales law as the governing law for international sales transactions. Afterwards, some international organizations were established, and it became possible to draft a strong, distinct and uniform modern international sales law for sale of goods.

At the ending of the World War I, the Paris Peace Conference was held beginning on January 18, 1919 with 32 countries joined in. As one of the main results of the Paris Peace Conference, the League of Nations, an intergovernmental organization was built on January 10, 1920. It was the first international organization aiming at maintaining world peace. The Charter of the League of Nations, called the Covenant, states its goals, including maintaining the measure of peace and security achieved in World War One, solving international disputes by negotiation and arbitration, etc. It has three main constitutional organs: the Assembly, the Council and the Permanent Secretariat, and two essential wings: the Permanent Court of international Justice and the International Labor Organization.<sup>6</sup> But the United States never joined the League of Nations. And it was replaced by the United Nations in 1946, after 26 years of the creation. Some of its agencies and organizations were inherited by the United Nations.

Four years after the creation of the League of Nations, another international organization was founded by virtue of a decision taken by the Council of the League of Nations on October 3, 1924. Its name was the International Institute for the Unification of Private Law (hereinafter: UNIDROIT). UNIDROIT was designed to work as an auxiliary organ of the League of Nations. Created in 1926, UNIDROIT was officially inaugurated in Rome on May 30, 1928. After that it was re-established in 1940 on the basis of a multilateral agreement<sup>7</sup>. Under the terms of Article 1<sup>8</sup> of its statute, the purpose of

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<sup>6</sup> LEAGUE OF NATIONS, [https://en.wikipedia.org/wiki/League\\_of\\_Nations#Establishment](https://en.wikipedia.org/wiki/League_of_Nations#Establishment) (last visited May 5, 2018).

<sup>7</sup> UNIDROIT - Overview, <https://www.unidroit.org/ulis-overview> (last visited May 5, 2018).

<sup>8</sup> “The purposes of the International Institute for the Unification of Private Law are to examine ways of harmonising and coordinating the private law of States and of groups of

UNIDROIT is to “examine ways of harmonizing and coordinating the private law of states and groups of states, and to prepare gradually for the adoption by governments of uniform rules of private law”.<sup>9</sup>

UNIDROIT has promulgated two important treaties on international sale of goods. They are the Uniform Law for the International Sale of Goods (hereinafter: ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter: ULFC). Those two treaties were also called the 1964 Hague Conventions since they were discussed on the 1964 Hague Conference as the long-standing project for unifying the rules of law for international sales transactions to new and significant stage. The 1964 Hague Conference was a diplomatic conference held at Hague in April 1964. And it was the first time that the United States participated in this kind of work.<sup>10</sup>

ULIS was desired to establish a uniform law on the international sale of goods<sup>11</sup>. It can be traced back to 1930 when the UNIDROIT established a drafting Committee<sup>12</sup> of European scholars to develop a draft uniform law. After World War II, in 1951 Hague

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States, and to prepare gradually for the adoption by the various States of uniform rules of private law.” UNIDROIT Statute art. 1.

<sup>9</sup> Mario Matteucci, *the History of Unidroit and the Methods of Unification*, 66 Law Libr. J. 286 (1973).

<sup>10</sup> John Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 Law and Contemporary Problems 326, 326 (Spring 1965).

<sup>11</sup> UNIDROIT – ULIS 1964, <https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964> (last visited May 5, 2018).

<sup>12</sup> “This committee was composed of two representatives from the United Kingdom-Sir Cecil Hurst (the Chairman) and Professor H. C. Gutteridge; two from Sweden-Judge Algot Bagge (the only member of this group who was able to come to the 1964 Conference) and Professor Martin Fehr; Professor Henri Capitant of France; and Professor Ernst Rabel of Germany. Until his death, the most influential member of the drafting groups was probably Professor Rabel, whose comparative study of the law of sales is still accepted as a primary authority.” See John Honnold, *supra* not 12, at 327.



Conference with twenty-one States attending, a special Committee<sup>13</sup> was pointed to continue the work.<sup>14</sup> With thirteen years of work, a revised and examined draft was submitted to the 1964 Hague Conference. Then the ULIS was adopted on July 1, 1964 and entered into effect on August 18, 1972 with the ratification of five countries.<sup>15</sup> Up to now, ULIS is effective in nine countries.<sup>16</sup>

Working as the supplement of ULIS, ULFC was desired to establish a uniform law concerning on the formation of contract based upon international sale of goods. It does not have such a long history as the ULIS. ULFC was drafted in the ULIS revision process in 1963. Only after two year of its draft, it was adopted on July 1, 1964 and entered into effect on August 23, 1972 with the ratification of five countries<sup>17</sup>. The largest number of its signatories is 13. Now it is only effective in Gambia and United Kingdom.<sup>18</sup>

### 2.1.2 The Non-Uniformity Problem before the CISG

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<sup>13</sup> The Special Commission had the following members: M. Pilotti (President of The Hague Conference), V. Angeloni (Italy), A. Bagge (Sweden), F. de Castro y Bravo (Spain), L. Fridricq (Belgium), M. Gutzwiller (Switzerland), J. Hamel and A. Tunc (France), Baron F. van der Feltz (Netherlands), T. Ascarelli (representing the Rome Institute), O. Riese (Federal Republic of Germany), B. A. Wortley (Great Britain), and P. Eijssen (Netherlands), Permanent Secretary.

<sup>14</sup> The Uniform Law for the International Sale of Goods: the Hague Convention of 1964. See John Honnold, *supra* not 12, at 327.

<sup>15</sup> They are Belgium, Israel, Netherlands, Dan Marino and United Kingdom.

<sup>16</sup> They are Belgium, Gambia, Germany, Israel, Italy, Luxembourg, Netherlands, San Marino and United Kingdom.

<sup>17</sup> They are Belgium, Italy, Netherlands, San Marino and United Kingdom.

<sup>18</sup> UNIDORIT - Status, <https://www.unidroit.org/status-ulfc-1964> (last visited May 5, 2018).

Those two UNIDROIT treaties ULIS and ULFC were aimed at unifying the international sales law that requires common interpretation in different systems that have adopted it<sup>19</sup>, which is stated as the uniformity interpretation rule in the CISG Article 7(1). The success of a uniform code could result in “the creation of an international community of people who perceive themselves as bound together and governed by a common legal system”<sup>20</sup>.

Although ULIS and ULFC helped in regulating the private international law in sale of goods, its uniformity goal on international sales law had never been achieved. The non-uniformity happened for several reasons. Objectively, there are only very few countries have adopted ULIS and ULFC. Non-uniformity was expected to happen in those non-contracting countries. Even in those adopted countries, ULIS and ULFC usually were neither binding nor could act as the default rule in international commercial agreements. The State usually prefers its own private international law other than ULIS or ULFC, which may demonstrate that the State domestic law will be applied in the merit of an international case. So the applied substantive law may be different if the forum State has been changed, which means the result or court decision may differ from States. This caused non-uniformity in those contracting countries. Even the ULIS and ULFC had been applied as the governing law in solving international sales transaction disputes. The uniformity had not been achieved before. Because ULIS and ULFC did only harmonize the general principles in international sales law; but they did not unify substantive laws

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<sup>19</sup> JOHN FELEMEGAS ET AL., AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 6 (John Felemegas ed. 2007).

<sup>20</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 6-7.

on settling specific issues. As the reasons stated above the uniformity in international sales transaction did not be achieved in the era of ULIS and ULFC (1972 ~ 1988).

Take ULIS as the analyzing example, ULIS was “eliminated from the law of international sales the application of national law, including the large body of international commercial law and custom contained in national law”<sup>21</sup>. It excluded “the application of rules of private international law unless the contract provides otherwise”<sup>22</sup>. The ULIS did a great job in harmonizing basic principles of the international sales law in a generally accepted way among several legal systems. But it did not solve the problem of national diversity, which leaves the non-uniformity problem unsolved also. For instance, the case *Comptoir d'Achat et de Vente du Boerenbond Belge, S.A. v. Luis de Ridder, Limitada* involves an Argentine seller and a Belgian buyer. This case was decided by the House of Lords in Belgium. Belgium is a member of ULIS. The ULIS was applicable. As stated before, the ULIS harmonized the general principles but it did not unify the substantive provisions. Instead, it left those specific issues to be solved by the domestic law. The ULIS failed to harmonize the national diversity. Here the matter at issue is “may a delivery order tendered instead of a bill of lading”. “The House of Lords held that the delivery order had no commercial value and that the use of it, instead of a bill of lading, transformed the contract into a destination contract.” The result would be different if a very similar case with the exact same issue decided in a U.S. Court. The Uniform Commercial Law would be the governing law, which includes delivery orders

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<sup>21</sup> Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 *Law and Contemporary Problems* 354, 355 (1965).

<sup>22</sup> See Harold J. Berman, *Id.*

among documents of title.<sup>23</sup> Probably the U.S. Court would hold in the opposite way that the House of Lords did. The holding would be the delivery order did have commercial value since the document of title is permitted in delivery stated in UCC §1-201.

## **2.2 Nutshell Overview of the CISG**

### 2.2.1 The General History and Scope of the CISG

With the idea of achieving uniformity in international sales transactions, UNCITRAL consequently worked on the draft of the CISG, which has a broader basis and has replaced the ULIS and ULFC.<sup>24</sup> The CISG came out with the purpose of promoting an applicable and forcible uniform sales law,. It attempts to minimize the uncertainties and misunderstandings in international commercial activities<sup>25</sup>, especially in the dispute resolution. The CISG was designed and developed by UNICTRAL. The idea of the creation of CISG was instituted in the year of 1968 by UNCITRAL. It was purposed to arrive at a unified law of sales that would be generally acceptable to the international community.<sup>26</sup> After ten years of work, the first draft of the CISG was produced in 1978. Two years later, the CISG was signed at Vienna Conference on April 11, 1980. So the CISG is sometimes called the Vienna Convention. The United States played an active role in both the preparation of the CISG and in the conference that

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<sup>23</sup> The “Delivery” should be treated “with respect to an instrument, document of title, or chattel paper, means voluntary transfer of possession”. U.C.C. § 1-201(15)

<sup>24</sup> See UNIDORIT – Overview, *supra* note 9.

<sup>25</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 15.

<sup>26</sup> 1 WILLIAM P. STRENG & JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION §5.04 (2018).

adopted it.<sup>27</sup> Eight years later, the CISG came into effect with the ratification of eleven countries<sup>28</sup> on January 1, 1988. After being in effect, the CISG prescribes a uniform sales law for sales of goods among the contracting States. The CISG replaces the contracting States' domestic laws in its govern area with a single a law that transcends<sup>29</sup> over various legal systems and national borders.<sup>30</sup> The CISG works well as it was designed in 1968. As of 2018, it has 89 signatories, which represents over 75% of all world trade.

The CISG is a great success of UNCITRAL and a big step in the history of international uniform sales law. It established the world law for sale of goods and influenced some countries' domestic laws. It was the “godfather” of the UNIDROIT Principle of International Commercial Contracts and the Principles of European Contract Law.<sup>31</sup> The CISG contains 101 articles, divided into four parts. Part I contains the scope of application and several general provisions. Part II deals with the formation of contract. Part III sets up parties' obligations. Part IV talks about the public law provisions.

Part I of the CISG contains Article 1 ~ 13. Article 1 ~ 6 state the sphere of the CISG application, stating the application issues about the nationality of the contracting parties, the nature of transaction and the nature of the dispute at issue. Article 7 ~13 state the general provisions, including the interpretation principles, the interpretation of the

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<sup>27</sup> See WILLIAM P. STRENG & JESWALD W. SALACUSE, *Id.*

<sup>28</sup> Those eleven countries are: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia.

<sup>29</sup> “In strict terms, no international law is able to ‘transcend’ a national border. The term ‘transcend’ as used here means to cross multiple state boundaries and to have a law apply within a variety of legal jurisdictions.” See PETER J. MAZZACANO, *supra* note 2 at 2.

<sup>30</sup> See PETER J. MAZZACANO, *supra* note 2 at 1-2.

<sup>31</sup> ERIC BERGSTEN ET AL., *CISG METHODOLOGY* (Andre Janssen & Olaf Meyer eds. 2009).

party's intent, the lack of the contract formation requirement that could be governed by the CISG.

Part II of the CISG (Article 14 ~ 24) approaches the formation of an international agreement on sale of goods based on offer and acceptance. Article 14 specifies the essential elements of a contract. Article 15 states the withdrawal of an offer. Article 16 ~ 17 talk about the revocation and termination of an offer. Article 18 ~ 22 states the rule of acceptance. Article 23 ~ 24 answer the question when is the contract concluded.

Part III of the CISG contains Article 25 ~ 88. Article 25 ~ 29 generally talk about the process of the contract formation, but the CISG does not govern of the contract validity. Then it states the seller's obligations, buyer's obligations, the contract risks and some common obligations to the seller and buyer.

Part IV of the CISG contains Article 89 ~ 101. It states the CISG depositary, the ratification of the CISG, the reservation of Article 1(1)(b) the application based on IPL and some other rights and limitations of the contracting States.

### 2.2.2 The Reason of the U.S. Ratification of the CISG

United States signed the CISG on August 31, 1981. The CISG was submitted to the Senate for advice in September 1983. The Senate approved it on October 9, 1986. The CISG finally entered into force in U.S. on January 1, 1988. Why did U.S. sign the treaty? Here are two reasons. The CISG is becoming more and more important with the increasing amount of money involved in international sale of goods and the increasing

number of its signatories. Those contracting States prefer CISG than other uniform sales laws.

More importantly, U.S. could benefit a lot by joining the CISG. First, the CISG could help U.S. parties to reduce difficulties in reaching the agreement with foreign partners in the clause of choice-of-law. Second, CISG is forcibly applicable when both parties are contracting States, which plays a role of binding law. Third, acting as a binding law, CISG will be autonomously applied if both of the commercial contracting parties are CISG signatories and there is no opt-out clause in the agreement, which guarantees an international case will be decided under an international law. Fourth, the CISG respects party's autonomy. It permits the party to choose other applicable substantive law as the governing law of the contract. Fifth, the CISG has no interest group. It applies to all sales of goods. This feature demonstrates that all kinds of sale of goods will be treated equally under its application. The contracting parties do not have to worry about what kinds of sale they are involving. Furthermore, the equal treatment could make the CISG to achieve fairness and certainty more easily. Also, it could reduce the legal costs that may be incurred by the research and translation of foreign laws.

### 2.2.3 The Non-Uniformity Problem after the CISG

The CISG did a great work in the promotion of its uniformity goal in worldwide sale of goods. The uniformity has been approved somehow. Some courts do begin to analyze the uniformity interpretation rule before applying the CISG substantive provisions. However, there still exists a non-uniformity problem after the CISG entered

into force. Some domestic tribunals still ignore the CISG uniformity interpretation rule and interpret the CISG referring to divergent domestic cases.

For instance a U.S. district court case *Korea Trade Insurance Corporation v. Oved Apparel Corporation*<sup>32</sup> was decided with a non-uniformity problem. This case was decided by U.S. District Court, Southern District of New York on March 23, 2015. The contracting parties were a Korean seller and a U.S. buyer. The matter at issue was the payment method for the good sports apparel, which came along with a sub-issue of agency relationship between the Korean seller and its U.S. agent. In the Court discussion part, the Court correctly applied the CISG as the governing law since both U.S. and South Korea were the CISG signatories and there was no clause in the contract to specify a different law, by reference to the CISG Article 1<sup>33</sup> and 6<sup>34</sup>. Then the Court started its analysis and discussion without considering the CISG Article 7(1)<sup>35</sup> the interpretation rules. But the Court did apply the CISG correctly on some degree. Although the Court did not apply the CISG uniform interpretation rule, it mentioned another CISG general principle “the CISG does not adopt the parol-evidence rule of American law”<sup>36</sup> that was

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<sup>32</sup> See *Korea Trade Ins. Corp. v. Oved Apparel Corp.*, Id. 13-CV-07918 DAB, 2015 WL 1345812(S.D.N.Y. Mar. 23, 2015).

<sup>33</sup> See *Korea Trade Ins. Corp. v. Oved Apparel Corp.*, *Id.*

<sup>34</sup> “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” United Nations Convention on Contracts for International Sale of Goods, art. 6, Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

<sup>35</sup> “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.” United Nations Convention on Contracts for International Sale of Goods, art. 7(1), Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

<sup>36</sup> See *Korea Trade Ins. Corp. v. Oved Apparel Corp.*, *supra* note 34 at \*2.



stipulated in the CISG Article 11<sup>37</sup>. Instead of only analyzing the CISG Article 11 texts to figure out what evidence was allowed under the application of the CISG, the Court also cited another U.S. CISG case for solution. “The CISG \*\*\* ‘allows all relevant information into evidence even if it contradicts the written documentation.’<sup>38</sup>” The combination was a good way to apply a statute, and referring to relevant case was necessary under American common law. But no consideration to the CISG uniform interpretation rule and referring to domestic case, even a domestic CISG case may cause non-uniformity problem.

After setting the evidence rule, the Court found the sub-issue of agency relationship between the Korean seller and its agent needs to be settled before analyzing the main issue payment method. The Court stated that “the CISG does not address agency law” in its footnote. The agency relationship was an external gap<sup>39</sup> problem. The external gap – agency relationship could be filled by U.S. domestic law without tracing back to the CISG. The Court correctly applied U.S. domestic law to settle this sub-issue. However, the main issue payment method was mentioned and settled in the CISG, which meant the payment method dispute should be settled by the CISG. The CISG should be traced back after the agency relationship was settled by U.S. domestic law. But the Court did not trace back to the CISG even dealing with the main issue payment method that

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<sup>37</sup> “A contract of sale need not be conclude in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witness.” United Nations Convention on Contracts for International Sale of Goods, art. 11, Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

<sup>38</sup> TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00-5189, 2006 WL 2463537, at \*7 (S.D.N.Y. Aug. 23, 2006) (quoting Claudia v. Olivieri Footwear Ltd., No. 96-8052, 1998 WL 164824, at \*4-5 (S.D.N.Y. Apr. 7, 1998)).

<sup>39</sup> “External gap” is issue that the CISG does not mention it at all. It will be discussed detailedly in Chapter 4 - 4.2 What Does the Gap Mean in the Gap-Filling Rule.

could be solved by CISG provisions. This improper application of domestic law ruined the CISG uniform interpretation rule and caused non-uniformity problem much worse.

## **CHAPTER 3. THE CISG APPLICATION & THE UNIFORMITY INTERPRETATION**

### **PRINCIPLE**

#### **3.1 When and How the CISG Will Be Applied**

The first step of analyzing the CISG is to know when will the CISG apply. The answer can be found in the CISG Article 1(1). It states “ 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”.

It established the scope of the CISG application. The basic requirement is the contract is for sale of goods. Then, the contracting parties’ places of business must be two different countries. If so, both of those two countries need to be the signatory of the CISG. Under this circumstance, any potential conflict of laws will be avoided and the CISG will be the governing law without any conflict of laws analysis if there is no clause expressly excludes the application of the CISG in the international sales contract.<sup>40</sup>

As mentioned in Article 1(1)(b) the private international law is not the

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<sup>40</sup> See CISG Article 6, *supra* note 36.

substantive laws that govern the parties' obligations and rights. It is the rule for solving the conflict of laws issue. It is usually used to determine which State's domestic law governs the dispute. If the private international law leads to the law of the CISG Contracting State will be applied. Then the CISG will be automatically applied as it was ratified by the Contracting State, which makes it has the same role as other domestic laws have. Under this circumstance, the CISG application is the "extend" application of the CISG Contracting State's domestic law.

The CISG Article 1(1)(b) does not apply to the United States. U.S. has signed a reservation provided in Article 95 "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention. " Up to now, there are five States have declared a reservation under Article 95, namely China, Singapore, the Czech Republic, Slovakia and United States. Consequently, in U.S. the CISG applies to a contract only if it meets both of the following conditions: (1) it is a contract on sale of goods, (2) the seller's and the buyer's business places in different countries, (3) both of those countries are the signatory of the CISG.<sup>41</sup> To avoid the dispute on the seller's or the buyer's business place, a careful and experienced contract draft attorney should state clearly the place of business of the seller and the buyer in the contract.

The second step of analyzing the CISG is to know how it should be applied. The way of application depends on the way of interpretation. The CISG Article 7(1) builds up the framework of its interpretation principles. It states:" in the interpretation of

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<sup>41</sup> See WILLIAM P. STRENG & JESWALD W. SALACUSE, *supra* note 28.

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". The CISG is designated to achieve international uniform interpretation and application by stating two interpretation principles. One is uniformity rule; another is good faith rule. Literally, the uniformity rule requires similar explanation of the CISG provisions in different legal systems. The good faith rules requires the CISG provisions are explained under the promotion of good faith. "As an international sales law, uniformity of application lies at the core of the CISG's objectives."<sup>42</sup> On the contrary, the good faith rule is usually autonomously and correctly applied by most of the courts in practice. But the uniformity rule is sometimes ignored or incorrectly applied. This problem could consequent in different result of the same merit of case if it is decided in different jurisdictions. Certainly, it will cause failure of the CISG, since the practical success of the CISG depends on whether its provisions are interpreted and applied similarly by different national courts and arbitral tribunals.<sup>43</sup>

To sum up, taking U.S. as an example, the CISG will be automatically applied by U.S. court when both of the sales contract dispute parties come from two different CISG contracting States or their places of business locate in two different CISG contracting States; and one of the parties has reasonable relationship with U.S., i.e. holding the U.S. citizenship, doing international sales transaction in U.S. territorial, etc. Also, there should be no clause expressly states the exclusion of the CISG application. Then the CISG will be interpreted and applied under the interpretation rule of uniformity

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<sup>42</sup> INGEBOG SCHWENZER, CHRISTIANA FOUNTOLAKIS & MARIEL DIMSEY, INTERNATIONAL SALES LAW xli (2nd ed. 2012).

<sup>43</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 7.

and good faith.

### **3.2 the Uniformity Interpretation Principle**

In the CISG drafter's ideal world, the CISG should be able to cover all the legal issues settled in the CISG provisions. And those provisions should be interpreted and explained in the similar way no matter where the tribunal locates. Although the ideal world could not be realized, it could be infinitely closed to if the uniformity interpretation principle could be emphasized and applied correctly. Why did those CISG drafters consist on uniformity? I think there are two reasons. First, the achievement of uniformity could help both the seller and buyer with great certainty as to their expected rights and obligations along with the possible solutions for potential disputes in their international sales transactions. Also, the success of uniformity will simplify the international sales transactions, which may result in the decrease of disputes. Consequently, it will encourage people to involve in international sales, which will be a big step in the development of international transactions especially in the sales of goods. To achieve the success, the following two problems need to be solved.

#### 3.2.1 What Level of Uniformity Does the CISG Fill in

The first problem is what level of uniformity does the CISG fill in? Uniformity is about the interaction of domestic application of international treaties. There are two

levels of uniformity, low-level uniformity and high-level uniformity.<sup>44</sup> In low-level uniformity, the treaty merely fits within the domestic laws, which means the treaty is not part of the domestic law. And it must be interpreted and applied within the scope and relevant rules of the domestic law. Domestic law has a higher hierarchy than the treaty. In high-level uniformity, the treaty should be applied autonomously, which means the treaty plays the same role as the other domestic laws play; it is part of the domestic laws. The treaty and other domestic laws are in the same level of hierarchy. Once the case falls in the scope of the treaty's application. The treaty will be the governing law autonomously.

As for the CISG, been ratified by the signatories, it is the consisting part of the contracting States' domestic laws. It falls in the high-level uniformity. It will be automatically in the area of international sale of goods unless the contracting parties have expressly excluded the application of the CISG in their contract.

### 3.2.2 What Kind of Uniformity Does the CISG Require

The second problem is what kind of uniformity does the CISG require. In the text of Article 7(1), CISG requires "uniformity in its application". Does this "uniformity" refer to uniform interpretation or uniform application? "Uniform interpretation suggests that different courts attribute the same meaning to the CISG text, whereas uniform application suggests that those who decide CISG disputes should achieve similar results (outcomes)."<sup>45</sup> In most cases, the uniform interpretation could result in similar results in

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<sup>44</sup> CAMILLA BAASCH ANDERSEN, UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG (2006).

<sup>45</sup> JOSEPH LOOKOFKY, UNDERSTANDING THE CISG 32 (5th ed. 2017).

different legal systems. But in the case that the CISG provision, i.e. Article 7(2) the gap-filling rule requires the application of the domestic substantive law. The uniform interpretation may cause different results in different legal systems if the relevant domestic substantive laws differ from each other.

What does the phrase “uniformity in its application” in Article 7(1) mean? It should be comprehended with the context. Despite uniformity, Article 7(1) states “good faith in international trade”. Uniformity should be comprehended in the same level and the same way of good faith. It is not hard to conduct that good faith should be put in the level of interpretation, which means CISG provisions should be interpreted based on good faith. Similarly, uniformity should be understood in the way of interpretation, which means same meaning to the CISG text should be attributed.

Besides, the first part of Article 7(1) contributes its purpose “in the interpretation of this Convention”, which proves that Article 7(1) is a provision of interpretation other than application. The uniformity and good faith should refer to the level of interpretation. Also, connected to the purpose of the CISG, uniformity, certainty and fairness. If the uniformity means uniform interpretation, those three purposes are achievable in most cases. Oppositely, if the uniformity refers to uniform application, it is hard to predict what the uniform/similar result would be, what standard should be used for the similar results. Those two issues would cause uncertainty and unfairness, and the goal of uniformity could not be achieved either.

With those three reasons, it could be proved that “uniformity” refers to uniform interpretation. The CISG should be interpreted in the same way among different jurisdictions.

#### **CHAPTER 4. WHEN SHOULD THE CISG GAP-FILLING RULE JUMP IN**

The CISG does not settle all the potential disputes in international sales contract, i.e. the validity of contract. Article 7(2) works as the gap-filling rule to set those unwritten or excluded issues. Article 7(2) writes:“ 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.” To analyze the gap-filling rule, several questions need to be answered.

##### **4.1 What Is the Relationship between Article 7(1) and Article 7(2)**

The first question is what is the relationship between Article 7(1) and Article 7(2). As analyzed before, the core purpose of the CISG is to create a uniform sales law for international sales transactions. Uniformity success is the most important part the CISG success. How to achieve uniformity success? There are two steps need to be accomplished. First, it must be sure that the domestic tribunals interpret the CISG provisions in a uniform manner, which is the uniformity interpretation rule stipulated in Article 7(1). Second, it must be sure that the same tribunals adopt a uniform approach to the filling of gaps in the CISG. The filling of gaps is stipulated in Article 7(2) known as



the CISG gap-filling rule. Both Article 7(1) and 7(2) aim at uniformity in the CISG interpretation and application. The relationship between Article 7(1) and 7(2) is directly and substantively connected.

The success of Article 7(1) – uniformity interpretation rule is the premise of the uniformity success. If the CISG provisions could settle all the matters at issue, the first step success is the uniformity success. If not, unsettled matters must be filled according to Article 7(2); and the approach of gap filling should be the same no matter where the tribunal locates. Same as the second step, the CISG Article 7(2) works as the supplement of step one – Article 7(1) uniformity interpretation principle. In the manner that Article 7(2) is drafted, the risk of diversity in the CISG’s gap-filling from one jurisdiction to another is minimized, by limiting the application of domestic law.<sup>46</sup> The domestic law can only be applied when the CISG is the governing law but the matter at issue is not settled in its provisions. And the approach of applying the gap-filling rule should be similar, which means the applying approach will not vary from different legal systems. In sum, Article 7(1) works as the basis of Article 7(2); Article 7(2) works as supplement of Article 7(1). They work together to achieve the CISG uniformity success.

Yet, there exists a critique about Article 7(2). It argues that Article 7(2) makes “the rules of private international law” become applicable during its application, which will harm the CISG’s uniformity goal by producing divergent decisions.<sup>47</sup> I do not agree this opinion. Rationally thinking, even the CISG drafters tried to cover most of the

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<sup>46</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 22-23.

<sup>47</sup> This critique argument comes from John Felemegas. See JOHN FELEMEGAS ET AL., *supra* note 21 at 23.

disputes in international sale of goods. It cannot be realized. New problems appear all the time. Despite of the new problem, the CISG cannot cover all the issues have been appeared before with numbered provisions either. It is inevitable that there are some gaps, internal or external, that need to be filled by other relevant laws. Hence the application of the rules of private international law is not a violation of uniformity. But those rules do have to be referred to with a uniform interpretation of Article 7(2).

#### **4.2 What Does the Gap Mean in the Gap-Filling Rule**

The second question is what does the gap mean in the gap-filling rule, which is to say what kind of gaps could be settled by the gap-filling rule. There are two categories of gaps. One is internal gap, also called gap '*praeter legem*'. Another is external gap, also called gap '*intra legem*'. Only the internal gaps could be filled by Article 7(2). Internal gaps are issues that are relevant in the CISG but not expressly settled in the CISG provisions, i.e. the interest rate. CISG Article 78 provides the payment of interest but does not specify the rate of interest. Article 78 writes: "if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74." Here the gaps are the definition and the trade usage of the interest rate. By applying the gap-filling rule, those gaps need to be filled by domestic law. But the CISG needs to be concerned again after the filling. It means the domestic law is only used for the courts or arbitral institution to demonstrate what is the rate of the interest and how large it should be. Once those questions are answered, the domestic law should be put away and the CISG is the only governing law. In practice, the uniformity rule is often ruined in this situation. Some

judges or arbitrators may be heavily influenced once the domestic law jumped in. Much worse, some of those decision makers may subconsciously take the relevant domestic cases as precedents.

The external gaps are not in the scope of Article 7(2). External gaps are issues that CISG is totally silent, i.e. choice of laws issue. Those external gaps are excluded from the scope of the application in the CISG provisions, such as Article 2, 3, 4, and 5. Article 2 states the CISG does not apply to non-consumer purchases. Suppose a Canadian manufacturer sells a washing machine to a U.S. individual who buys the washing machine for self-using, the CISG will not be applied even both Canada and U.S. are the signatories of the CISG. If the buyer is not a U.S. individual, but a U.S. shop that is going to sell the washing machine purchased from the Canadian manufacturer. The CISG will be the governing law if the sale contract does expressly exclude the application of the CISG. Article 3 states that the CISG cannot be applied in the cases of supply and manufacture contracts and labor contracts. It means international commercial contracts between the manufacturer and the supplier, and labor contracts are not governed by the CISG. Article 4 excludes the contract validity. The CISG provisions do not govern the issue of contract validity. Article 5 excludes the seller's liability for death or personal injury caused by the goods to any person.

To fill those external gaps, domestic law jumps in also, but there is no requirement of tracing back or further reference to the CISG, which is not permitted in internal gaps filling and will not cause the violation of uniformity rule. Take the issue concerning on conflict of laws for example, if there is a conflict of law issue, the State's domestic law will govern. If the State's law of conflicts point to the application of other

domestic substantive law, that law will take the governing place of the CISG. Under this circumstance, it is usually happened that the substantive law of the forum will govern the contract at issue, which could cause the governing law differs from the forum. But, this difference is not considered as a break of the uniformity success.

#### **4.3 What Is the Methodology of the CISG Gap-Filling Rule**

The third question is what is the methodology of the CISG gap-filling rule. There are three most widely accepted methodologies in explaining the gap filling in various conventions and laws. They are “true-Code” approach, “meta-Code” approach and the combination of the “true-Code” approach and “meta-Code” approach.<sup>48</sup>

The “true-Code” approach is the method of gap filling totally relied on the Convention itself; no outside law could be the governing law; and any kinds of reference to other law are prohibited. The tribunal, when facing a gap in the Convention, they should look into the Convention itself, including the purposes and policies stated in the Convention Preamble or behind the Convention, which may be found in the Convention legislative history, but no more. “It follows that, for the solution of questions governed by a Convention, the answer can be found within the framework of that Convention. The justification of this approach lies in the belief that a ‘true Code’ is comprehensive”<sup>49</sup>, and “it is sufficiently inclusive and independent to enable it to be administered in accordance

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<sup>48</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 24-25.

<sup>49</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 24.

with its own basic policies”<sup>50</sup>. The “true-Code” approach was introduced and discussed to UNIDROIT in the 1951 Hague Conference that was held from January 1, 1951 to January 10, 1951. And the 1964 Hague Conventions (ULIS and ULFC) follow the “true-Code” approach; the gaps are filled by their general principles.

On the contrary of the “true-Code” approach, the “meta-Code” approach based on the external legal principles to fill those gaps found in the Convention. The tribunal, when facing a gap in the Convention, is supposed to find external relevant statutes and codes to fill the gap. Those external statutes are highly reliable and applicable. This approach comes from the idea that “external legal principles should supplement the provisions of a Convention, unless this is expressly disallowed by that Convention”<sup>51</sup>. The Uniform Commercial Code follows this gap-filling approach. In U.C.C. §1-103(b), it states “Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.” This approach seems quite favorable in common law countries.

The last approach is the combination of “true-Code” approach and “meta-Code” approach. The CISG gap-filling rule follows it. According to this approach, the tribunal is supposed to look into to the Convention itself, especially the general principle part, to figure whether the gap could be filled or not. If the tribunal fails to fill the gap with the

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<sup>50</sup> William D. Hawkland, “Uniform Commercial ‘Code’ Methodology” U. Ill. L. Rev. 291. 292 (1962).

<sup>51</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 25.

reconsideration of the Convention, they should look for external statutes and codes for gap filling. Therefore the third approach is to apply the “true-Code” approach first. If the problem is still unsolved, then apply the “meta-Code” approach.

In practice, this combined approach is used in the CISG applications. When there is a matter at issue is governed by the CISG but not expressly settle in the CISG substantive provisions. Article 7(2) the gap-filling rule offers a two-step solution. Step one, internal analogy (“true-Code” approach), the gap could be filled by the combination of the specific provision and the CISG general principles defined in Article 1 ~ 13. If there is no applicable general principle in the CISG, then the tribunal goes to step two, external reference (“meta-Code” approach). They are allowed to find external statutes and codes that are relevant and applicable to the issue at matter. This approach helps the CISG to be interpreted uniformly by setting the internal analogy as the first step. Also, it makes the CISG more widely covered and accepted by the external reference.

#### **4.4 How Should the Gap-Filling Rule Be Interpreted Based on the Uniformity Rule**

Pursuant to the Article 7(2) the gap-filling rule, any gaps must be filled within the CISG itself. The solution must comply with the aim of Article 7(1) the uniformity interpretation rule; that is, the promotion of uniformity success in the CISG application process.<sup>52</sup> Stated in the Article 7(1), the uniformity interpretation rule serves the role of a general principle in the CISG application, especially in the process of interpretation. “A general principle stands at a higher level of abstraction than a rule or might be said to

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<sup>52</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 25. FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 58 (1992).

underpin more than one such rule”<sup>53</sup>, which demonstrates that the gap-filling rule Article 7(2) should be interpreted under the CISG uniformity interpretation rule.

Settling the basic line of the gap-filling rule interpretation, another question arises. Should Article 7(2) be interpreted restrictively or broadly? Restrictive interpretation requires Article 7(2) to be interpreted without complementary method of legal reasoning. Broad interpretation goes to the opposite way. Here, as concluded above, Article 7(2) should be interpreted on the basis of uniformity interpretation rule to achieve uniformity success. The interpretation of Article 7(2) should fill in the broad scope. Besides the legal reasoning method of considering CISG general interpretation rule, the method of analogy should be used to get a closer step to uniformity when fill the gaps. It contributes to the uniformity success when analogous provision relevant to the gap could be found in the CISG substantive clauses, which provides a reference to the gap filling. Ideally, if the tribunals could all follow the analogy facing similar issues, uniformity will be achieved somehow.

#### **4.5 What Is the Role of Domestic Law in the CISG Gap-Filling Rule Application**

The fifth question concerns on the role of domestic law in the CISG gap-filling rule application. Dealing with the internal gap, the domestic law works as the substantive law to explain and analyze the specific matter at issue that are mentioned but not expressly explained in the CISG provisions. The tribunal is not going to use the domestic law to interpret or explain the CISG, but only to answer the substantive question cannot

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<sup>53</sup> See JOHN FELEMEGAS ET AL., *supra* note 21 at 27.

be answered by the provision of CISG. All the other issues should be still decided by the CISG. The CISG needs to be referred back after answering the unsettled question. If the tribunal does not follow this guideline, it could result in ruining the uniformity rule. Any kinds of using domestic law stand at the opposite of the uniformity rule. The domestic law should function as a dictionary in gap-filling rule application. Unfortunately, many U.S. courts misinterpreted the mandated of CISG Article 7(2). It is unclear how those U.S. courts reason they should use U.S. domestic to interpret the CISG. It is clearly wrong under Article 7, which violate the uniformity rule.<sup>54</sup>

In summary, the CISG drafters' aspiration of perfect uniformity could not be achieved in reality, since there are so many objective differences in each CISG case decision progress, i.e. different legal systems, different development levels of those CISG contracting States, different education and practice levels of judges. Realistically, the uniformity goal should include the following aspects: first, the CISG uniform interpretation rule (Article 7(1)) should be take into consideration, working as the basis of the CISG provisions interpretation; and second, the CISG should be traced back after applying the gap-filling rule (Article 7(2)) if there are still some unsolved dispute issues that are stipulated in the CISG provisions. The ideal uniformity goal will be more closely achieved if those two aspects could be implemented.

## **CHAPTER 5. THE APPLICATIONS OF THE CISG UNIFORMITY INTERPRETATION**

### **PRINCIPLE IN OTHER CONTRACTING STATES**

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<sup>54</sup> See JACK M. GRAVES, *supra* note 6 at 24.



## **5.1 the Applications in Latin America**

Up to now, a lot of Latin America countries become the CISG members. However, there were only a few Latin American countries ratified the CISG in the 20th century. Namely, the CISG entered into force in Argentina on January 1, 1988, in Mexico on January 1, 1989, in Chile on March 1, 1991, in Ecuador on February 1, 1993, and in Cuba on December 1, 1995. In the 21st century, more Latin American countries ratified the CISG. The last one is Brazil. The CISG became a binding law in Brazil since April 1, 2014.

Since the 1970s, the Latin American economies did a large amount of sales transactions with their major trading partners, most of whom are the CISG signatories, i.e. China, France, Germany, Spain and the United States. Moreover, the amount of such international sales transactions increased rapidly in the recent two decades. But there are only a few CISG cases decided or collected from those Latin American countries. Additionally, fewer cases did apply the CISG Article 7; much fewer cases did apply the uniform interpretation rule correctly in Latin America.

Here I will take Argentina, the only original and the oldest CISG signatory in Latin America as the typical country for analysis of the application of the CISG uniformity interpretation rule. I chronologically choose three cases to analyze the development of the CISG uniform interpretation principle application in Argentina.

### 5.1.1 Elastar Sacifia v. Bettcher Industries Inc.

The first Latin American example case involving in CISG is a case named *Elastar Sacifia v. Bettcher Industries Inc.*<sup>55</sup> dating back to the beginning of 1990s. It was decided by the Argentina Court – Juzgado Nacional de Primera Instancia en lo Comercial No. 7 (Buenos Aires) on May 20, 1991. It was a case between a U.S. seller from Ohio State and an Argentine buyer. The matter at issue was about the price of the sale; and the sub-matter was the interest rate.

Since there was no choice-of-law clause in their contract, one of the parties domiciled in Argentina and Argentina was the place of forum. Argentina held close relationships to apply its domestic law. Since the CISG was ratified to work as an Argentine domestic law dealing international business transaction issues. The Argentine Court applied the CISG as the governing law. During the application, the Argentine Court found that the issue of the payment of price was contemplated in the CISG Article 18(3)<sup>56</sup> without expressing settlement. Also the sub-issue – interest rate was contemplated in the CISG Article 78<sup>57</sup> but without expressing settlement either. Those two issues were the internal gaps. Therefore the Court looked the CISG Article 7(2), the gap-filling rule. Then the Court followed “the rules of private international law” stated in Article 7(2) to

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<sup>55</sup> CASE REPRESENTATION - *Elastar Sacifia v. Bettcher Industries*, <http://cisgw3.law.pace.edu/cases/910520a1.html> (last visited May 5, 2018).

<sup>56</sup> “ However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.” United Nations Convention on Contracts for International Sale of Goods, art. 18(3), Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

<sup>57</sup> “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.” United Nations Convention on Contracts for International Sale of Goods, art. 78, Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

decide which State's domestic should be used to fill those gaps. Pursuant to the choice-of-law rules in the private international law, the law of the seller's domicile should be applied. In this theory, the law of seller's domicile has the closest relationship and connection to the sales contract. Here, the law of Ohio should be applied to solve both the price gap and the interest gap.

However, the Argentina Court just applied the law of Ohio to settle the matter of price. The Court struggled to apply the CISG to settle the interest rate. Of course, no solution could be found in the CISG provisions or based on the general principles and purposes of the CISG<sup>58</sup>. Wrongfully, the Court looked into the usages of international commerce instead of the law of Ohio with the reason that "usages of international commerce" were presently accepted as a source of the applicable law for international sales.

It was the first time that the Argentine Court applied the CISG. And it was only three years after the CISG became effective. It was not surprising that the Court did not apply the CISG correctly. Comparing to the uniformity goal stated in section 4, this instant case was wrong. The Court escaped the CISG interpretation rules of uniformity and good faith stipulated in Article 7(1). There was no word in the Court's decision discussed about how the CISG provisions should be interpreted. The Court ignored the basic step of the uniformity success. Consequently, it applied the gap-filling rule without establishing the framework of uniformity. Moreover, the Court applied the gap-filling rule settling two gaps in two different ways. The Court even did not consider uniformity

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<sup>58</sup> Here is the application of the CISG gap-filling method. The methodology is discussed in Chapter 4 - 4.3 What Is the Methodology of the CISG Gap-Filling Rule.

of matter settlements in this single case. The CISG uniformity interpretation rule had not been applied correctly in 1991.

#### 5.1.2 Cervecería y Maltería Paysandú S.A. v. Cervecería Argentina S.A.

Another sample case is a case decided by an Argentine Court also. But eleven years after the first CISG decision. It was a case decided by Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires (Second Instance Court of Appeal) on July 21, 2002, named *Cervecería y Maltería Paysandú S.A. v. Cervecería Argentina S.A.*<sup>59</sup> It concerned a dispute between Uruguay seller and Argentina buyer about the quality of the goods (malt) delivered. The matter at issue was the conformity of the goods. The Argentina district Court applied Argentinean Commercial Code, which had been reversed by the appellant Court. The appellant Court concluded the CISG should be the governing law. Although Uruguay was not a member of the CISG, the CISG Article 1(1)(a) could not be applied. Argentine did not sign a reservation provided in Article 95 to exclude the application of Article 1(1)(b). The CISG would be applicable “when the rules of private international law lead to the application of the law of a Contracting State”. In this case, the goods were delivered to the buyer’s place, which makes it clear that the buyer’s place – Argentina had the most characteristic relationship. Under the rules of private international law, Argentina law should be the governing law. As ratified by Argentina, the CISG plays the same role as other Argentina domestic laws. Here the dispute happened in the sale of goods, and the two parties came from two countries. So the CISG will be

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<sup>59</sup> CISG CASE REPRESENTATION - Cervecería y Maltería Paysandú S.A. v. Cervecería Argentina S.A., <http://cisgw3.law.pace.edu/cases/020721a1.html> (last visited May 5, 2018).

automatically applied as the governing law.

After the settlement of the governing law, the appellant Court looked up the CISG provisions to solve the matter of goods conformity. Unfortunately, it was not settled nor even mentioned in the CISG provisions. So Article 7(2) was applied. Similar to the case *Elastar Sacifia v. Bettcher*, the Court filled the gap without considering uniformity interpretation. Fortunately, the non-uniformity in *Elastar Sacifia v. Bettcher* did not happen in this case. The reason was not because the Court's consideration of uniformity. But was that there was only one unsettled issue in this case.

In summary, the appellant Court did a great job in correcting the issue of governing law with the correct and detailed analysis of the application rule of the CISG. But, similar to the Court in *Elastar Sacifia v. Bettcher*, the appellant Court did jump over the application of the CISG interpretation principles (both uniformity rule and good faith rule) and have no desire for promoting uniformity. Those two typical cases showed that there was almost no development in the process of the uniformity interpretation rule application over ten years in Argentina. The uniformity goal had not been achieved in either of those two cases.

#### 5.1.3 Sr. Carlos Manuel del Corazón de Jesús Bravo Barros v. Salvador Martínez Gares

The last Argentine case is the latest one provided by the Pace University database, naming *Sr. Carlos Manuel del Corazón de Jesús Bravo Barros v. Salvador Martínez*

*Gares*<sup>60</sup>, decided by Argentina National Commercial Court of Appeals (Buenos Aires) on May 31, 2007. This case involves a Chile seller and an Argentine buyer. Similar to the former two cases, there was a matter at issue that could not be settled neither by the CISG substantive provisions nor the general provisions. Instead of only looking into the rules of private international law, this Court considered a *quo* judgment in a CISG case ratified by both Argentina and Chile also. This combination was a great step to achieve uniformity success. Still, the uniformity goal had not been achieved. The Court jumped over the CISG interpretation rules again, it was a good signal that they began to think about uniformity by trying to get a similar result through take the former CISG case as a persuading source.

In the first two decades of the CISG uniformity interpretation rule application in Argentina. The Court paid no attention to the uniformity interpretation rule and showed no desire to achieve the uniformity goal of the CISG. Fortunately, since 2007 the Court began to think about the uniformity issue and take it into consideration. Even the Latin America is still in a negative position of the uniformity interpretation rule. It is accomplishable in the near future.

## **5.2 the Applications in Asia**

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<sup>60</sup> CISG CASE REPRESENTATION - Sr. Carlos Manuel del Corazón de Jesús Bravo Barros v. Salvador Martínez Gares, <http://cisgw3.law.pace.edu/cases/070531a1.html> (last visited May 5, 2018).

Up to now, there are only 7 Asian countries that ratified the CISG. They are China, Uzbekistan, Mongolia, Kyrgyzstan, Republic of Korea, Japan and Viet Nam.<sup>61</sup> Most of them do not have a long history of the CISG application. Here, I will take China as the typical CISG signatory to study the uniformity interpretation principle application in Asia.

Similar to the Argentine status in Latin America, China is the only original and the oldest CISG signatory in Asia. Moreover, the CISG has phenomenal impact in China. “The CISG has greatly influenced the evolution of Chinese domestic contract law.”<sup>62</sup> Since China was under a strictly planned and controlled economy until the Reform and Opening-up policy conducted in 1978. There was no domestic legislation working on the area of contract in China before 1978. In the year of 1980, China attended the Vienna Diplomatic Conference where the CISG was ratified. Getting access to the CISG context, it triggered the enactment Chinese contract law. More importantly, the CISG provisions provided the Chinese legislators a basic content of how a contact law looks like. Besides the phenomenal impact of the CISG to the Chinese law, another reason to set China, as the typical CISG signatory in Asia is the amount of CISG cases decided in its jurisdiction. According to the Pace University CISG database, there are 96 reported court cases decided in China and 337 reported arbitration cases organized by the China International

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<sup>61</sup> The CISG became effective in China on January 1, 1988, effective in Uzbekistan on December 1, 1997, effective in Mongolia on January 1, 1999, effective in Kyrgyzstan on June 1, 2000, effective in Republic of Korea on March 1, 2005, effective in Japan on August 1, 2009, effective in Viet Nam on January 1, 2017.

<sup>62</sup> Long, Weidi, *The Reach of the CISG in China: Declarations and Applicability to Hong Kong and Macao*, the 2nd Annual MAA Schlechtriem CISG Conference, 83, 84(November 8, 2011).

THE REACH OF THE CISG IN CHINA: DECLARATIONS AND APPLICABILITY TO HONG KONG AND MACAO: <https://ssrn.com/abstract=1956356>.

Economic and Trade Arbitration Commission (hereinafter: CIETAC) in the last 30 years of the CISG application.

Considering the large amounts of both court cases and arbitration cases, I will analyze the developments of court's decisions and arbitration's decisions separately. I chronologically select three court cases and two arbitration cases to analyze the development of the CISG uniformity interpretation rule application in China.

### 5.2.1 The Court Cases Decided in China

The first court case is *San Ming Trade Co. Ltd. v. Zhanzhou Metallic Minerals Import and Export Company*<sup>63</sup>. Decided by Fujian High People's Court on December 20, 1994, this case involved a Japanese buyer and a Chinese seller. The matters at issue were the quality of the goods (granite stone), storage of good quantities, goods delivery method and refusal of payment. Same as the oldest Argentine case *Elastar Sacifia v. Bettcher Industries Inc.*, the Court did not mention the CISG Article 7, and the Court decision reported did not show that Article 7 was considered and applied in the scope of CISG application. The Court did not show any idea on the achievement of the uniformity. Oppositely, it ruined the CISG uniformity goal by applying several domestic laws to solve those disputes. Those laws included the *Law of the People's Republic of China on Economic Contracts Involving Foreign Interest* (Articles 7, 8, 18) and the *Civil*

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<sup>63</sup> English version: CASE REPRESENTATION - San Ming v. Zhanzhou Metallic Minerals, <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/941200c1.html> (last visited May 5, 2018).

Chinese version: CISG China Wuhan University Institute of International Law - Fujian High Court December 1994, [http://aff.whu.edu.cn/cisgchina/en/news\\_view.asp?newsid=99](http://aff.whu.edu.cn/cisgchina/en/news_view.asp?newsid=99) (last visited May 5, 2018).



*Procedure Law of the People's Republic of China* (Articles 126, 147, 249). Much worse, the Chinese court decision did not have a tradition to write how the judge reasoned the decision. So we could not know how could those two laws worked together with the CISG. Also, we could not know whether those article were used as the relevant domestic laws for gap filling or not. The record shows nothing about it. There is no word showing that the Court did consider about the uniformity interpretation principle when they applied the CISG.

Six years later, another case involving the CISG Article 7 was decided by Jiangsu High People's Court on February 19, 2001. It was a case between a Japanese seller and a Chinese buyer, named as *Tai Hei Business Co. Ltd. v. Jiangsu Shun Tian International Group Nantong Costume Import and Export Company*<sup>64</sup>. The matter at issue was the delivery of the four excavating machines as a consequence of the un-cashed letter of credit. The multiple applications of domestic laws appeared again, without any explanation or reasoning in the Court's decision report. In the report the Court stated they applied Article 4 and 88 of the *General Principle of Civil Law of the People's Republic of China*, Article 37 and 67 of the *Contract Law of the People's Republic of China*, and article 30 of the CISG to analyze the facts and make the decision. One tiny progress was that the Court did mention the good faith interpretation rule stated in the CISG Article 7, which indicates that the Court did get the knowledge that Article 7(1) established the

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<sup>64</sup> English version: CASE REPRESENTATION - Tai Hei v. Shun Tian, <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010219c1.html> (last visited May 5, 2018).

Chinese version: CISG China Wuhan University Institute of International Law - Jiangsu High Court 19 February 2001, [http://aff.whu.edu.cn/cisgchina/en/news\\_view.asp?newsid=89](http://aff.whu.edu.cn/cisgchina/en/news_view.asp?newsid=89) (last visited May 5, 2018).

framework of the CISG interpretation rules. Strangely, it just mentioned the good faith rule but kept silent on the uniformity rule. Objectively speaking, this case was a positive example of applying the CISG Article 7(1). But it did not apply Article 7(1) in its full-scale.

The latest case involving Article 7 did make a giant step in the application of the CISG uniformity interpretation rule. It was a case decided by Shanghai High People's Court on September 21, 2011, involving a Chinese buyer and an Italian seller. The case name was *Comac SpA v. Shanghai Swift Mechanical & Electronic Equipment Co., Ltd.*<sup>65</sup>, with a matter at issue whether the seller breached the contract. This case did a great progress in the CISG application compared to the above two Chinese cases in three ways. First, the court detailedly analyzed and reasoned why the CISG should be the governing law. Second, it stated the uniformity interpretation rule should be the basis of the CISG provisions interpretations. Third, it explained the application of Chinese domestic laws based on the CISG Article 7(2) gap-filling rule. Although, the courts did not show concern on uniformity when it applied the gap-filling rule. It achieved the first step of the reality uniformity goal with the application of the CISG Article 7(1). It is a great development in the application of the uniformity interpretation rule in China. With about three decades of CISG application, the Chinese Court began to consider and apply the uniformity interpretation rule in some cases. Such a progress should go further and deeper to make the uniformity interpretation rule be applied in every case.

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<sup>65</sup> CASE REPRESENTATION - Electronic equipment case, <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/110921c1.html> (last visited May 5, 2018).

### 5.2.2 The Arbitration Cases Decided by CIETAC

Other than the positive development of uniformity interpretation rule in court cases, the situation in arbitration cases is not good. According to the Pace University CISG Database, there are 337 reported CISG arbitration cases. The number is much larger than the court cases (96). But there are only 17 reported CISG arbitration cases are categorized in the issue of Article 7 of the CISG, which is about only 5% of the whole amount of the arbitration cases. Much worse, the number of arbitration case taking Article 7 as a key issue is less than 17. The oldest available arbitration case *Talcum block case*<sup>66</sup> was decided by CIETAC on March 30, 1993. There was an issue about the general principles in Article 7. But the arbitration tribunal did not write an official opinion in the application of Article 7. The latest available case *Heaters case*<sup>67</sup> was decided by CIETAC on December 7, 2005. It involved the CISG interpretation principles. As a progress compared to the *Talcum block case*, the tribunal made official opinion on the application of the CISG that “the provisions and general principles in the CISG shall be applied first”. It stated the general principles should be applied first as the framework of the CISG application. But it did not specify the interpretation principles, especially the uniformity rule. The uniformity goal is still unaccomplished in arbitration.

Based on the limited data, the uniformity interpretation rule did a worse job in arbitration cases than that of court cases. In practice, much more disputes were settled by

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<sup>66</sup> CASE REPRESENTATION - Talcum block case,  
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930330c1.html> (last visited May 5, 2018).

<sup>67</sup> CASE REPRESENTATION - Heaters case,  
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/051207c1.html> (last visited May 5, 2018).

arbitrators in China. Usually, the contracting parties usually prefer CIETAC to court. But the arbitration did apply the uniformity interpretation rule as it designed in Article 7, which made a large amount of CISG case be decided without (correct) application of its interpretation rules. The Chinese situation is not good, especially in arbitration.

### **5.3 the Applications in Europe**

The CISG is so widely accepted in Europe. There are 39 European countries has ratified the CISG among all the 50 European countries (including transcontinental countries Kazakhstan and Russia). The CISG works as the default law in international sale of goods in 78% European countries. The proportion can be as high as 85.7% in European Union (hereinafter: EU). Only four EU countries have not ratified the CISG. They are Ireland, Malta, Portugal and United Kingdom. The CISG ratification proportion is a little bit lower in non-EU countries. It is about 68%. 15 of 22 non-EU countries have joined in the CISG also. Since EU stands at such an important position in the world especially in Europe. I would select one typical EU country and another typical non-EU country as my examples to study the CISG uniformity interpretation rule applications in Europe.

For my analysis, I choose Netherlands and Switzerland as the typical example countries and chronologically choose some cases from those two countries to analyze the development of the uniform interpretation principle applications. Netherlands is one of the founders of EU and the CISG entered into force in Netherlands since January 1, 1992. Although Netherlands is not the CISG original countries as Argentine and China stated before. It joined in the CISG earlier than most other EU countries. It does have a quite

long history of CISG application. Also, it is the ninth largest exporter and the eleventh importer in the world, “the six-largest economy in EU, playing an important role as a European transportation hub”<sup>68</sup>. As of 2016, Netherlands’ key international trading partners are Belgium, China, France, Germany, Italy, Russia, the United Kingdom, and the United States.<sup>69</sup> Most of them are CISG contracting States. Moreover, Netherlands has made 268<sup>70</sup> CISG relating decisions from 1992 to 2018. The application of the uniformity interpretation rule in Netherlands could be an objectively typical sample of EU.

As for the non-EU example Switzerland, similar to Netherlands, it joined the CISG earlier and holds a long history of CISG application with 212<sup>71</sup> CISG relating decisions. It is the 16th largest exporter and 18th largest importer in the world. Most of its international trading partners are CISG signatories also. They are China, France, Germany, India, Italy, the United Kingdom and the United States.<sup>72</sup> Switzerland would be

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<sup>68</sup> GENERAL INTELLIGENCE AGENCY – THE WORLD FACTBOOK – NETHERLANDS, <https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html> (last visited May 5, 2018).

<sup>69</sup> As of 2016, Netherlands’ key international trading partners are Belgium (export 10.7%), China (import 14.1%), France (export 8.8%), Germany (export 24.1%, import 15.3%), Italy (export 4.2%), and Russia (import 4.1%), the United Kingdom (export 9.4%, import 5.3%), and the United States (import 7.9%). The percentage is the amount of the export/import dollar value compare to Netherlands total export/import total value. Netherlands export total dollar value of 2016 is \$495.4 billion. Netherlands import total dollar value of 2016 is \$402.9 billion. *See* GENERAL INTELLIGENCE AGENCY – THE WORLD FACTBOOK – NETHERLANDS, *Id.*

<sup>70</sup> Data comes from CISG Database Country Base Schedule, <http://www.cisg.law.pace.edu/cisg/text/casecit.html> (last visited May 5, 2018).

<sup>71</sup> Data comes from CISG Database Country Base Schedule. *See* CISG Database Country Base Schedule, *Id.*

<sup>72</sup> As of 2016, Netherlands’ key international trading partners are China (export 15.1%, including Hong Kong 6.1%; import 4.7%), France (export 5.8%, import 6.1%), Germany (export 14.4%, import 19.4%), India (export 4.8%), Italy (export 4.9%, import 7.4%), the

a good example to study the CISG uniformity interpretation principle application in non-EU countries.

### 5.3.1 the Application in Netherlands

In the first decade of the CISG Application in Netherlands, the tribunals did consider the gap-filling rule, but they did not show desire to apply the gap-filling rule in the basis of uniformity interpretation of the CISG. In the cases *P.T. Van den Heuvel v. Santini Maglificio Sportivo de Santini P&C S.A.S.*<sup>73</sup>, *Gruppo IMAR S.p.A. v. Protech Horst*<sup>74</sup> and *Nieuwenhoven Veehandel GmbH v. Diepeveen BV*<sup>75</sup> decided in the year of 1993, the tribunal applied the Article 7(2) gap-filling rule to apply domestic laws, but they did not stress it should be applied under the uniformity interpretation basis.

In the second decade after joining in the CISG, Netherlands arbitral tribunals began to consider the uniformity interpretation rule. In the Arbitration Case No. 2319<sup>76</sup> decided on October 15, 2002 by Netherlands Arbitration Institute, there was a dispute of goods conformity between a Netherlands seller and an England buyer. To settle this

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United Kingdom (export 10.7%, import 7.1%) and the United States (export 12.1%, import 9%). The percentage is the amount of the export/import dollar value compare to Switzerland total export/import total value. Switzerland export total dollar value of 2016 is \$318.1 billion. Switzerland import total dollar value of 2016 is \$264.9 billion. *See* GENERAL INTELLIGENCE AGENCY – THE WORLD FACTBOOK – NETHERLANDS, *Id.*

<sup>73</sup> CASE REPRESENTATION - Diepeveen-Dirkson v. Nieuwenhoven Veehandel, <http://cisgw3.law.pace.edu/cases/950822n1.html> (last visited May 5, 2018).

<sup>74</sup> CASE REPRESENTATION - Gruppo IMAR v. Protech Horst, <http://cisgw3.law.pace.edu/cases/930506n1.html> (last visited May 5, 2018).

<sup>75</sup> CASE REPRESENTATION - Nieuwenhoven Veehandel v. Diepeveen, <http://cisgw3.law.pace.edu/cases/931230n1.html> (last visited May 5, 2018).

<sup>76</sup> CASE REPRESENTATION - Condensate crude oil mix case, <http://cisgw3.law.pace.edu/cases/021015n1.html> (last visited May 5, 2018).

dispute, the tribunal needed to interpret the CISG Article 35(2)(a)<sup>77</sup> for the goods conformity standard. Instead of using the English common law conformity standard “*merchantability*”, nor the civil law system conformity standard “*average quality rule*”<sup>78</sup>. This tribunal analyzed the drafting history and the goal of the CISG. And they concluded that the interpretation of CISG Article 35(2)(a) should comply with the Article 7(1) to take the CISG international character uniformity into account. Particularly, the arbitrators officially stated the application of the uniformity interpretation rule in the official reported opinion. “The interpretation of Article 35(2)(a) CISG is to be guided by Article 7(1) CISG which suggests that the international character of the Convention and the need to promote uniformity in its application and the observance of good faith in international trade are to be taken into account in the interpretation process.” This case made such a great contribution in the CISG uniformity interpretation rule application. It achieved the reality uniformity goal by interpreting the CISG provisions referring to the uniform interpretation rule and applying the gap-filling rule under the uniformity rule also. It set a very good example of how to achieve the uniformity goal.

After that, many Netherlands tribunals took the uniformity interpretation rule into consideration. In case *Feinbckerei Otten GmbH & Co. Kg and HDI-Gerling Industrie Versicherung AG v. Rhumveld Winter & Konijn B.V.*<sup>79</sup> decided on April 22, 2014, the

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<sup>77</sup> “are fit for the purposes for which goods of the same description would ordinarily be used;” United Nations Convention on Contracts for International Sale of Goods, art. 35(2)(a), Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

<sup>78</sup> The “*average quality rule*” could be found in the Austrian, French, German and Swiss civil code.

<sup>79</sup> English version: CASE REPRESENTATION - 22 April 2014 Gerechtshof Den Haag, <http://cisgw3.law.pace.edu/cases/140422n1.html> (last visited May 5, 2018).

court was to “determine the formation and interpretation of contracts”<sup>80</sup> to settle the dispute. The relevant CISG provisions Article 8, 9, 14, and 18 needed to be interpreted. The Court stated the CISG Article 7 interpretation rule and the promotion of uniformity in their applications of those substantive provisions. In following analysis, the Court did consider the CISG Advisory Council’s opinions on similar issues and looked for a German decision as persuasive authorities. In case *Trading Company P. van Adrighem B.V. v. Integrated Logistics Co.*<sup>81</sup> decided on August 26, 2014, *Wavin overseas B.V. v. Picenum Plast SPA*<sup>82</sup> decided on December 3, 2014, *Corporate Web Solutions Ltd. v. Vendorlink B.V.*<sup>83</sup> decided on March 25, 2015, those courts considered the principles of interpretation and the uniformity in application of the CISG. The uniformity interpretation rule has been mentioned in 21st century. Although, it is not as highly used as it supposes to be, Netherlands stile makes a great progress and a very good example of the uniformity interpretation rule application.

### 5.3.2 the Application in Switzerland

The situation in Switzerland is not as positive as in Netherlands. During the history of the CISG application in Switzerland, there were only some cases applied the

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Dutch version: Uitspraken - 22 April 2014 Gerechtshof Den Haag,  
<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2014:1341> (last visited May 5, 2018).

<sup>80</sup> See Gerechtshof Den Haag, Id.

<sup>81</sup> CASE REPRESENTATION - 26 August 2014 Gerechtshof Den Haag,  
<http://cisgw3.law.pace.edu/cases/140826n1.html> (last visited May 5, 2018).

<sup>82</sup> CASE REPRESENTATION - Rechtbank Overijsse,  
<http://cisgw3.law.pace.edu/cases/141203n1.html> (last visited May 5, 2018).

<sup>83</sup> CASE REPRESENTATION - Rechtbank Midden,  
<http://cisgw3.law.pace.edu/cases/150325n1.html> (last visited May 5, 2018).



CISG Article 7(2) gap-filling rule. And none of them talked about the uniformity interpretation rule or the gap-filling rule should be applied with the basis of uniformity, i.e. *Marmipedretti Graniti S.r.l. v. Nichini S.A. Pierres naturelles et artificielles*<sup>84</sup> decided on December 20, 1994, *S. S.p.A. v. J. AG*<sup>85</sup> decided on June 30, 1998, a case numbered as HOR.2005.83<sup>86</sup> decided by Handelsgericht (Commercial Court) Aargau on June 19, 2007. Unlike the ignoring of uniformity rule, some courts consider the good faith rule, stating the CISG provisions should be interpreted base on good faith, i.e. *T. SA v. R. Établissement*<sup>87</sup> decided on November 30, 1998, a case numbered as HOR.2006.79<sup>88</sup> decided by Handelsgericht (Commercial Court) Aargau on November 26, 2008. Fortunately, there was a recent case<sup>89</sup> decided by Bundesgericht (Federal Supreme Court) on April 2, 2015 did mentioned the CISG Article 7(1) principles of interpretation and the CISG international character.

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<sup>84</sup> CASE REPRESENTATION - Stone blocks case,  
<http://cisgw3.law.pace.edu/cases/941220s1.html> (last visited May 5, 2018).

<sup>85</sup> CASE REPRESENTATION - Granite stones case,  
<http://cisgw3.law.pace.edu/cases/980630s1.html> (last visited May 5, 2018).

<sup>86</sup> English version: CASE REPRESENTATION - Railway rails case,  
<http://cisgw3.law.pace.edu/cases/070619s1.html> (last visited May 5, 2018).

German version: HOR.2006.83/ ds / tp,  
<http://globalsaleslaw.com/content/api/cisg/urteile/1741.pdf>.

<sup>87</sup> CASE REPRESENTATION - Lambskin coat case,  
<http://cisgw3.law.pace.edu/cases/981130s1.html> (last visited May 5, 2018).

<sup>88</sup> English version: CASE REPRESENTATION - Fruit and vegetables case,  
<http://cisgw3.law.pace.edu/cases/081126s1.html> (last visited May 5, 2018).

German version: HOR.2006.79/ Ac / tv,  
<http://globalsaleslaw.com/content/api/cisg/urteile/1739.pdf>.

<sup>89</sup> German version: Bundesgericht,  
[http://relevancy.bger.ch/php/aza/http/index.php?lang=de&type=show\\_document&highlight\\_docid=aza://02-04-2015-4A\\_614-2014&print=yes](http://relevancy.bger.ch/php/aza/http/index.php?lang=de&type=show_document&highlight_docid=aza://02-04-2015-4A_614-2014&print=yes) (last visited May 5, 2018).

Compared to other countries discussed before (Argentina, China and Netherlands), the CISG uniformity interpretation principle application in Switzerland is almost zero. Of even great appeal, Switzerland is one of the top six countries for decisions relating to the CISG provisions.<sup>90</sup> Up to now, it has made at least 212 decisions where the CISG is the governing law. But there is almost no case detailedly analyzed and applied the uniformity interpretation rule in Article 7(1). Neither did those Switzerland tribunals show any desire to achieve or consider the uniformity international character and goal of the CISG. There is still a huge gap between Switzerland and the correct application of the CISG uniformity interpretation rule.

Why there is such an obvious difference between the two European countries, Netherlands and Switzerland in the application of the CISG uniformity interpretation rule? First, Netherlands has a longer history of applying uniform international sales law. Netherlands is the signatory of both ULIS<sup>91</sup> and ULFC<sup>92</sup>. Switzerland did not join in ULIS or ULFC. Second, Netherlands is a member of EU. Switzerland is not a EU member. Additionally, six of nine ULIS<sup>93</sup> members and four of five ULFC<sup>94</sup> members are

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<sup>90</sup> Those top six countries for decisions relating to the CISG are Germany (534 cases from 01/01/1991 to 04/12/2018), China (432 cases from 01/01/1988 to 04/12/2018), Russian (305 cases from 09/01/1991 to 04/12/2018), Netherlands (268 cases from 01/01/1992 to 04/12/2018), Switzerland (212 cases from 03/01/1991 to 04/12/2018), and the United States (183 cases from 01/01/1988 to 04/12/2018).

Data comes from CISG Database Country Base Schedule. *See* CISG Database Country Base Schedule, *supra* note 71.

<sup>91</sup> ULIS: the Uniform Law for the International Sale of Goods, introduced in Chapter 2 – 2.1.1 The Development of International Uniform Sales Law before the CISG.

<sup>92</sup> ULFC: the Formation of Contracts for the International Sale of Goods, introduced in Chapter 2– 2.1.1 The Development of International Uniform Sales Law before the CISG.

<sup>93</sup> ULIS members are Belgium (EU), Gambia, Germany (EU), Israel, Italy (EU), Luxembourg (EU), Netherlands (EU), San Marino and United Kingdom (EU).

EU members. Under this circumstance, the non-uniformity among EU members was greatly and effectively diminished by the implementation of those early international uniform sales laws, ULIS and ULFC. Consequently, “global uniform sales law has a longer tradition in EU”<sup>95</sup> than outside world. Being a member of EU, it makes Netherlands benefit in getting the knowledge of the uniformity goal and its importance earlier and better than Switzerland, which could help Netherlands to correctly apply the CISG uniformity interpretation rule easier Switzerland.

In summary, the biggest problem for the incorrect application of the CISG uniformity interpretation rule is the tribunals usually ignored it. For those tribunals that considered the uniformity rule, most of them made progress in its application no matter how big the progress was.

## **CHAPTER 6. THE APPLICATIONS OF THE CISG UNIFORMITY INTERPRETATION**

### **PRINCIPLE IN U.S.**

This section is going to analyze the process of the CISG application and both the incorrect and correct application of the CISG uniform interpretation principle in U.S. First, this section is going to answer the question how could the CISG be applied as the governing law in U.S. Court’s decision with a sample case that detailedly analyzes the process of the CISG application as the governing law. Then two types of incorrect

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<sup>94</sup> ULFC members are Belgium (EU), Italy (EU), Netherlands (EU), San Marino and United Kingdom (EU).

<sup>95</sup> Ulrich G. Schroeter, *Global Uniform Sales Law – With a European Twist? CISG Interaction with EU Law*, 13 *Vindobona Journal of International Commercial Law & Arbitration* 179 (1/2009).

application of the uniform interpretation principle will be analyzed with sample cases. One incorrect application demonstrates a court's overlooking of the CISG uniform interpretation rule; another incorrect one is the domestic law influence and partial application of the CISG uniform interpretation rule. Last, this section will set good examples that have achieved the reality uniformity goal as the correct application of the CISG uniform interpretation rule. In this section, the cases are not picked up by chronological order as in section 5 but by different types of the CISG uniform interpretation principle application.

### **6.1 the Process of the CISG Application**

How could the CISG be applied as the governing law in U.S. Court's decision? The case *Asante Techs. v. PMC-Sierra, Inc.*<sup>96</sup> provides a very good and detailed example of the application process. It was a case involving a dispute arising in the sale of electronic components between two Delaware corporations that had different places of business. The plaintiff was the buyer having its "primary place of business in Santa Clara County, California", United States<sup>97</sup>. The defendant was the seller, having an engineer office in Portland Oregon, United States and having its headquarters, inside sales and marketing office, public relations department, principal warehouse and most design and engineering functions in Burnaby, British Columbia, Canada.<sup>98</sup> Additionally, this case was removed from a state Court the Superior Court for the State of California, Santa Clara County to this federal Court U.S. District Court for the Northern District of

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<sup>96</sup> *Asante Techs. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001)

<sup>97</sup> *See Asante Techs. v. PMC-Sierra, Inc.*, *Id.* at 1144.

<sup>98</sup> *See Asante Techs. v. PMC-Sierra, Inc.*, *Id.* at 1145.

California, San Jose Division. The plaintiff filed a motion to remand and for attorney's fees. The defendant asserted the CISG should be the governing law.

#### 6.1.1 Does the Federal Court Have Jurisdiction Over This Case

The first mission here was to determine whether this federal Court had jurisdiction over this case. The Court cited 28 U.S.C. §1441(a) & (c)<sup>99</sup> for legal basis. It concluded "a defendant may remove to federal court any civil action brought in a state court that originally could have been filed in federal court. When a case originally filed in state court contains separate and independent federal and state law claims, the entire case may be removed to federal court"<sup>100</sup>. So the question turned to be did the cause of action, here the sales transaction arise under federal law? And this question was guided by the "well-pleaded complaint" rule, meaning "a cause of action arises under federal law only

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"(a) Generally. Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(c) Joinder of Federal law claims and State law claims.

(1) If a civil action includes--

- (A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title [28 USCS § 1331]), and
- (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1)." 99 28 U.S.C. §1441.

<sup>100</sup> See *Asante Techs. v. PMC-Sierra, Inc.*, *supra* note 98 at 1146.

when the plaintiff's well-pleaded complaint raises issues of federal law"<sup>101</sup>. The question had been specified as does the plaintiff's well-pleaded complaint refer to federal law? Judging by the appearance, the plaintiff preferred a state law than federal one. However, the state law might be preempted when a federal was implicated. To answer this question, the governing law issue should be decided first.

### 6.1.2 Is the CISG the Governing Law

As noted in Section 3, U.S. has signed the reservation of Article 95, which made the CISG general application principle Article 1(1)(b) inapplicable in U.S. territorial. The CISG Article 1(1)(a) was applicable, stating "this Convention applies to contracts of sale of goods between parties whose places of business are in different States: when the States are Contracting States", there were three requirements must be affirmed before the CISG application. First, the dispute issue must be the contract of sale of goods. Here it was a contract of sale of electronic components. Second, the parties' places of business must in different States. Here, there was no dispute about the buyer's (plaintiff's) place of business. It was in California, United States. But the seller's (defendant's) place of business needed to be determined. The court had to decide which place has a closer relationship with the seller, United States or Canada? Third, those different States must be the CISG contracting states. Here, U.S. and Canada were both CISG signatories.

The question went to where was the seller's (defendant's) place of business since it had relations with both U.S. and Canada. The Court concluded the seller's (defendant's) place of business was Canada. The defendant had a much closer relationship with Canada

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<sup>101</sup> See *Asante Techs. v. PMC-Sierra, Inc.*, *Id.* at 1150.

than it with U.S. So the CISG was implicated based on its Article 1(1)(a). Then the buyer (plaintiff) came with an “opt-out” argument, stating about the choice of law clauses. Although the CISG does provide an “opt-out” provision<sup>102</sup>, here was inadequate evidence showed the parties had derogated from the CISG. Even with this conclusion in mind, the Court did a great job in analyzing all the potential results of the choice of law clauses. Even if both of the parties chose the domestic law of its place of business, the CISG would be applicable in this case also. Both Canada and U.S. were CISG signatories, which means the CISG would be autonomously applied in those two countries in contracts for international sale of goods issues. So the CISG was implicated whenever there was a choice of law clause or not.

Since the CISG was surely applicable in this case, the next step was to set whether the CISG preempts state law? Having been ratified on December 11, 1986 and entered into force on January 1, 1988, the CISG worked as federal law, United States Codes. “The question of whether a certain action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone.”<sup>103</sup> To analyze the congressional intent, the Court looked the CISG introductory text, “the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.”<sup>104</sup> Knowing the CISG’s goal of developing uniform international contract law, the

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<sup>102</sup> See CISG Article 6, *supra* note 36.

<sup>103</sup> *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987).

<sup>104</sup> 15 U.S.C. App. at 53.

Court concluded that the CISG preempted the state law, which conducted that CISG was the governing law in this case.

The question left in 6.1.1 was answered. The CISG was the governing law. Then the cause of action arose under federal law (CISG). Hence the defendant could remove this case from a state court to a federal court, which indicated the Court had jurisdiction over this case. Although, this case did not consider the CISG uniformity interpretation principle, it is still a good example for analyzing whether the CISG could be the governing law or not. Moreover, the Court did take the CISG's uniformity goal into consideration. It analyzed that "any availability of independent state contract law causes of action would frustrate the goals of uniformity and certainty embraced by the CISG"<sup>105</sup>. If the governing law in international sale of goods is ambiguous, it may result in unpredicted consequences, which would increase the obstacles in international sales transaction. This would go to the opposite of the CISG's uniformity goal.

## **6.2 Incorrect Application of the CISG Uniformity Interpretation Principle**

Being applied as the governing law in contracts for international sale of goods, it is not automatically guaranteed that the CISG will be interpreted as it is designed. The incorrect application of its uniformity interpretation rule stated in Article 7(1) is one of the important but inconspicuous problems. This problem existed since the beginning of the CISG application in U.S., and it appears sometimes even now, 30 years after the CISG adoption. There are three ways of incorrect application of the CISG uniformity

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<sup>105</sup> See *Asante Techs. v. PMC-Sierra, Inc.*, *supra* note 98 at 1150.



interpretation principle. First, the overlook of the uniformity rule, some Courts did not notice or pay attention to the CISG uniformity goal and its uniform interpretation rule at all. They completely ignored it. Second, application of domestic law influence, some Courts noticed and desired to apply the uniformity interpretation rule, but its application was sometimes incorrect because the Courts still referred to or were influenced by domestic law, cases and legal principles. Third, partial application of the uniformity rule, some Courts interpret some provisions based on uniformity rule, but ignore the uniformity rule in the interpretation of other provisions.

#### 6.2.1 Overlook of the CISG Uniform Interpretation Rule

In a recent case *U.S. Nonwovens Corp. v. Pack Line Corp.*<sup>106</sup> decided on March 12, 2015, the Court correctly set the CISG as the governing law following with wrongful application of the CISG in its analysis. The case involved the plaintiff, a U.S. buyer U.S. Nonwovens Corporation and two defendants, a U.S. seller Pack Line Corporation and a Canadian seller Nuspark Engineers Incorporated with separate agreements on purchasing of a custom automatic filling and sealing machine in the seller's products. This case was complicated. Because the plaintiff, U.S. Nonwovens Corporation brought the suit under the CISG with two issues at matter. One issue was breach of contract, which was expressly stipulated in the CISG substantive provisions. But another issue breach of warranty was only asserted under the New York State law – U.C.C. Article 2 and it was not expressed in the CISG.

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<sup>106</sup> *U.S. Nonwovens Corp. v. Pack Line Corp.*, 2015 NY Slip Op 25078, 48 Misc. 3d 211, 4 N.Y.S.3d 868 (Sup. Ct.).

The analysis of the CISG as the governing law was correct. “The CISG is a self-executing treaty that preempts contrary provisions of Article 2 of the UCC and other state contract law to the extent that those causes of action fall within the scope of the CISG.”<sup>107</sup> So the CISG preempted New York State law both in the issue breach of contract, and the issue breach of warranty that was not asserted under the CISG. To settle those two matters, the Court made several mistakes. First, it did not mention the CISG’s international uniformity goal stated in the CISG preamble, nor the uniformity interpretation principle stipulated in Article 7(1). Second, the issue breached of contract had been expressly settled in the CISG substantive Articles §§25, 27, 29, 32, 46, 47, 49, etc. The breach of contract issue should be settled only under the CISG without any reference or consideration of the New York State law. But the Court cited the New York State law, New York cases and the CISG provisions together to settle the issue. This domestic and international law corporation ruined the goal of the CISG’s uniformity goal and break the uniform interpretation rule set in the CISG Article 7(1). Third, the issue break of warrant had not been mentioned in the CISG. It should be governed under New York State law without the tracing back to the CISG after its settlement according to the CISG Article 7(2). The result here was not wrong. The Court applied its domestic law for solution. However, the reasoning of the domestic law application was wrong. The Court here did not cite to the CISG Article 7(2) to use domestic law to solve the issue where the CISG was silent. The Court applied its domestic law to solve the breach of warranty issue automatically after the domestic law’s application on the issue breach of contract, which was completely wrong.

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<sup>107</sup> See U.S. Nonwovens Corp. v. Pack Line Corp., *Id.* at 871.

In case *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*<sup>108</sup> decided on February 14, 2011, it involved a Chinese seller, Dingxi Longhai Dairy Limited as the plaintiff – appellant and a U.S. buyer Becwood Technology Group as the defendant - appellee with a sales contract of Inulin. The issue at matter was the breach of contract. The CISG worked as the governing law since there was a sale of goods contract between a Chinese party and a U.S. party, and both China and U.S. had ratified the CISG. In the CISG application, the Court overlooked both the international uniformity goal in the CISG preamble and the uniformity interpretation rule stipulated in the CISG Article 7(1). Instead, the Court applied the CISG Article 7(2) that was designated for the matters those were not expressly settled in the CISG provisions as the CISG application guideline. Also, it concluded that the domestic caselaw could be used to interpret the CISG provisions tracking to that of U.C.C. Article 2. Then the Court combined “relevant” domestic law and caselaw with the CISG provisions together to settle the breach of contract issue. As analyzed in the previous case *U.S. Nonwovens Corp. v. Pack Line Corp.*, the failure to apply the uniformity interpretation principle and “combination” method of CISG application ruined its international uniformity goal.

### 6.2.2 Domestic Law Influence And Partial Application of the CISG Uniformity

#### Interpretation Principle

After the Court has considered and applied the uniformity interpretation rule, there are still two big obstacles on the road of its correct application. The bigger one is the partial application of the uniformity interpretation principle. Under this circumstance,

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<sup>108</sup> *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106 (8th Cir. 2011).

the Court takes the uniformity interpretation as the basis of the CISG interpretation and application dealing with issues that have been expressly settled in the substantive provisions. However, when the CISG Article 7(2) gap-filling rule jumps in, the Court usually applies domestic law for gap filling without considering the basic uniform interpretation rule. Also, some Court forgets to trace back to the CISG provisions after the internal gap<sup>109</sup> has been filled. Interestingly, the partial application problem seldom appears. Because a lot of Courts apply the CISG Article 7(2) gap-filling rule without considering the uniformity interpretation rule, which puts them to the category of overlooking the uniformity interpretation rule instead of partial application. The smaller obstacle domestic law influence appears much more frequently. Because the judges are easily influenced by the domestic laws and cases since they were educated in domestic law schools. Moreover they may seldom deal with international cases governed by international law.

The following example case is an integrated case that has both the problem of domestic law influence and partial application of the CISG uniformity interpretation rule. In *Delchi Carrier Spa v. Rotorex Corp.*<sup>110</sup>, decided on December 6, 1995, the Court showed intention and desire in the CISG uniformity interpretation rule, but the CISG interpretation and application were influence by the forum domestic law. Also it was actually partially applied before the gap-filling rule jumped in. This case involved an Italian buyer Delchi Carrier Spa and a New York seller Rotorex Corporation. The CISG

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<sup>109</sup> Introduced in Chapter 4 – 4.2 What Does the Gap Mean in the Gap-Filling Rule. Internal gaps are issues that are relevant in the CISG but not expressly settled in the CISG provisions.

<sup>110</sup> *Delchi Carrier Spa v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

worked as the governing law for the instant matters, the breach of contract and failure to deliver conforming goods, compressors. The Court had addressed that there was no caselaw under the CISG. They would look to the CISG's languages and to its basic "general principles".<sup>111</sup> The method the Court used was correct. But they looked Article 7(2) that was drafted for matters "are not expressly settled"<sup>112</sup> in the CISG provisions. Nonetheless, the Court did cite the CISG Article 7(1) "international character and ... the need to promote uniformity in its application and the observance of good faith in international trade" for interpretation also. Although citing to Article 7(2) made the CISG interpretation principles application imperfect, it set an example of the application of CISG interpretation principles.

Besides the positive effect it set, this case also set negative one. Although in the Court decision part it stated "U.C.C.<sup>113</sup> caselaw 'is not per se applicable'<sup>114,115</sup>, it implicated the relevant CISG provisions that could be tracing back to U.C.C. Article 2 provisions could be interpreted based on the caselaw that interpreting U.C.C. Article 2 analogous provisions. Under such interpretation methodology, the CISG could be influenced by the application and caselaw of the domestic law, here was U.C.C. Article 2.

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<sup>111</sup> See *Delchi Carrier Spa v. Rotorex Corp.*, *Id.* at 1028.

<sup>112</sup> "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." United Nations Convention on Contracts for International Sale of Goods, art. 7(2), Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

<sup>113</sup> U.C.C., the Uniform Commercial Code of the United States.

<sup>114</sup> *Orbisphere Corp. v. United States*, 13 C.I.T. 866, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989).

<sup>115</sup> See *Delchi Carrier Spa v. Rotorex Corp.*, *supra* note 111 at 1028.

As introduced in Chapter 2<sup>116</sup> the CISG was drafted influenced by U.C.C. Article 2. And the U.C.C. Article worked well as a uniform sales law in U.S., which set a successful example for those CISG drafters. Even though, the U.C.C. Article 2 could not influence the CISG interpretation and application, the CISG was designed in the international level, various legal systems would be involved in, which is different from that of the U.C.C. Article 2. Looking U.C.C. Article 2 caselaw to get the meaning and comprehension of CISG provision ruined its goal of uniformity severing as an international uniform sales law.

Later in the Court's opinion, it looked both the CISG provisions and U.S. domestic cases for setting the seller's liability, fundamental breach of contract, principle of foreseeability<sup>117</sup>. Those issues had been expressly settled in the CISG substantive provisions. The Court should not combine domestic cases and common law principle with the CISG together in its reasoning part. The CISG should be the only relevant and governing law upon those issues. For the issues of total variable cost and lost profit calculation, they were not explicitly stated in the CISG, the Court looks domestic cases<sup>118</sup> for standards without applying the CISG Article 7(2) gap-filling rule, which was the extension of the CISG uniformity interpretation rule. Those gaps should be filled with reference to domestic law and with the basis of uniformity in international level. The Court was right to refer to domestic laws, but they did not a basis of international

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<sup>116</sup> Chapter 2 INTRODUCE OF UNIFORM SALES LAW AND THE CISG

<sup>117</sup> established in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

<sup>118</sup> *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 495 (2d Cir. 1995). *Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 92-93 (2d Cir. 1984).

uniformity in the domestic application. Despite that, the Court did a proper work in tracing back to the CISG provisions after solving those two inexplicit issues.

### **6.3 the Correct Application of the CISG Uniformity Interpretation Rule**

Even there were a lot of cases had ignored or applied the CISG uniformity interpretation rule incorrectly, there were some cases had noticed and promoted it correctly to achieve the CISG international uniformity goal. An early case *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*<sup>119</sup> decided on June 11, 2003 correctly applied the CISG uniformity interpretation principle. This case involved a U.S. seller BP Oil International, Ltd. and an Ecuador buyer Empresa Estatal Petroleos de Ecuador with a contract for purchasing and transporting of gasoline. Here were two matters at issue. One was the choice of law issue. The decision of this issue could not change the governing law for the other matter. Both U.S. and Ecuador were the contracting States of the CISG. No matter whose domestic law applied, the CISG would preempt the other domestic laws serving as the governing law. Because the other matter at issue was the breach of the contract. The contract was about an international sale of goods, which filled in the scope of the CISG application.

Setting the CISG as the governing law, the Court then looked the sub-issue of the choice of law. That was could the CISG be opted-out. Before analysis the CISG “opt-out” provision Article 9(2), the Court affirmed the two guiding interpretation principles in Article 7(2) “promotes uniformity and the observance of good faith in international

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<sup>119</sup> *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 333 (5th Cir. 2003).

trade”<sup>120</sup>. Concluding in no “opt-out” of the CISG, the Court was consistent in the uniformity and good faith interpretation rules in the later analysis of seller’s obligations and liabilities without any reference to domestic law or case. This case set a good example of the correct application of the CISG interpretation principles both the uniformity rule and the good faith rule. The uniformity goal set in section 4 has been achieved in this case.

Another example for the correct application of the CISG uniformity interpretation rule is the case *Forestal Guarani S.A. v. Daros Int’l, Inc.*<sup>121</sup>, decided on July 21, 2010. It involved a U.S. buyer Daros International Inc. and an Argentine seller Forestal Guarani S.A. with a sale contract of wooden finger-joints. This appeal Court corrected the choice of law issue wrongfully decided by the district Court and analyzed the appeal issue, the interpretation of the CISG. For choice of law issue, the CISG Article 11<sup>122</sup> allowed a contract could be proved even without writing materials. Also the CISG Article 12<sup>123</sup> allowed it contracting State to make a declaration opting out of its Article 11. U.S. had not made such declaration; Argentina had. “The District Court concluded that Argentina's

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<sup>120</sup> See *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, *Id.* at 337.

<sup>121</sup> *Forestal Guarani S.A. v. Daros Int’l, Inc.*, 613 F.3d 395 (3d Cir. 2010).

<sup>122</sup> “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” United Nations Convention on Contracts for International Sale of Goods, art. 11, Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.

<sup>123</sup> “Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.” United Nations Convention on Contracts for International Sale of Goods, art. 12, Apr. 11, 1980, 15 U.S.C. App. (1988), 1489 U.N.T.S. 3.



declaration imposed a writing requirement and that the absence of a written contract in this case precluded the plaintiff's (seller, Forestal Guarani S.A.) claim."<sup>124</sup> The Appeal Court demanded the district for further proceedings to decide which country's law applies based on the forum's choice-of-law rules.

For the appeal issue, the interpretation of the CISG, the Court stated that "the interpretation of a treaty, like the interpretation of a statute, begins with its text"<sup>125</sup> and the CISG Article 7 should be kept in mind as the interpretation direction for the tribunal. The CISG should be interpreted as "its international character and . . . the need to promote uniformity in its application and the observance of good faith in international trade."<sup>126</sup> Settled the basic interpretation rules, the appeal Court interpreted those issued CISG provisions Article 11, 12, 96 based on the texts. Also the Court tried to find a U.S. similar case that involved a declaration country of Article 96 and a non-declaration country. But no case was found. Unlike the counter examples of the correct application of the CISG uniformity interpretation rule, the Court not only looked for U.S. cases for reference but also similar cases in foreign jurisdictions, Although no similar case was found, it was a big step in applying the uniformity interpretation rule and promoting the CISG international uniformity goal. Besides, the Court looked commentators for similar scenario, i.e. UNCITRAL<sup>127</sup> Digest of Case Law on the CISG 46, 48 (2008), and *Choice of Law for International Sales Issues Not*

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<sup>124</sup> See *Forestal Guarani S.A. v. Daros Int'l, Inc.*, *supra* note 122 at 396.

<sup>125</sup> *Medellin v. Texas*, 552 U.S. 491, 506, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

<sup>126</sup> See *Forestal Guarani S.A. v. Daros Int'l, Inc.*, *supra* note 122 at 398.

<sup>127</sup> UNCITRAL: United Nations Commission on International Trade Law

*Resolved by the CISG*<sup>128</sup>, which made the case step further as an extremely good example for the CISG interpretation by concerning on the CISG texts, looking for similar international cases in several jurisdictions and referring relevant academic comments as the CISG drafters designated.

This case *Forestal Guarani S.A. v. Daros Int'l, Inc.* was cited eight times for the CISG application. But only one case *Martini E Ricci Iamino S.P.A. - Consortile Societa Agricola v. Trinity Fruit Sales Co.*<sup>129</sup> cited to its comprehension and application of the CISG uniform and good faith interpretation rules.

#### **6.4 Summary**

In summary, same as the situation in other contracting States, the incorrect application of the CISG uniformity interpretation rule is so serious to be solved immediately. According to the Pace University CISG Database, there are 183 CISG cases decided in U.S. since its adoption. It is the sixth largest number of CISG involving cases<sup>130</sup>. But there were only ten cases that have applied the CISG uniformity interpretation principle, only 5% of the total number of the U.S. CISG cases. Although the Pace University CISG Database is not updated as frequently as the Westlaw or the LexisNexis, it is the most acceptable CISG database. The data provided is reliable, which

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<sup>128</sup> Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & Com. 155 (2001).

<sup>129</sup> *Martini E Ricci Iamino S.P.A. - Consortile Societa Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp. 3d 954 (E.D. Cal. 2014).

<sup>130</sup> Data comes from CISG Database Country Base Schedule. *See* CISG Database Country Base Schedule, *supra* note 71.

has proved the problem stated in section 1 the CISG uniformity interpretation principle is highly wrongful applied in U.S.

## **CHAPTER 7. SUGGESTIONS**

The incorrect application of the CISG uniformity interpretation has been a problem since the adoption of the CISG. However, the current situation is still not positive. This chapter is going to analyze the reasons of the problem and constitute some suggestions for its solution.

### **7.1 the Reasons of the Incorrect Application of the CISG Uniformity Interpretation**

#### **Principle**

##### **1. Problem With Translations**

The first significant reason for the incorrect application of the CISG uniformity interpretation principle is an objective one, problem with translations. The United Nations provides six official translations<sup>131</sup> of the CISG. But even those official translations cannot state some issues logically in other languages. There exist some inevitable nuances among those languages. Also, the different legislative logics in different legal systems make it harder to translate the CISG into another language in accordance with the original English version both literally and logically. For instance, my native language is Chinese, but I found some provisions are more logical and easier to

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<sup>131</sup> They are Arabic, Chinese, English, French, Russian, and Spanish.

understand in English other than in Chinese since there are big differences between English and Chinese writing, especially in drafting laws. Objectively, the translation problem nuance makes it difficult to interpret the CISG provisions in a uniform way.

## 2. Limitations of the CISG Itself

As stated in Article 7(2) “questions concerning matters governed by this Convention are not expressly settled in it”, the CISG drafter did notice that they could not cover all the issue in international sales transactions. Some issues are mentioned without settlement. The other issues are silent in the CISG. Those internal and external gaps would demand for the domestic law application, which could cause non-uniformity problems in the place of forum, choice of law, interpretation and application of domestic law, and tracing back to the CISG. The CISG limitations objectively increase the possibility of incorrect application of the uniformity interpretation rule and decrease the possibility of its correct application.

## 3. Difference Between Common Law Countries and Civil Law Countries

There are so many differences between common law countries and civil law countries. One of the biggest and most significant is the role of caselaw. Common law countries depend more on caselaw than civil law countries. And common law countries usually combine statutes and cases together when analyzing or reasoning a case, which might result in the inadequate influence of domestic common law in the decisions of the courts applying the CISG. Unlike common law countries, the caselaw is not usually applicable in civil law countries. Under this circumstance, the CISG will be less likely influenced by domestic cases in civil law countries than its application in common law

countries. However, the domestic influence cannot be ignored in civil law countries also. Different tribunals may comprehend the CISG texts differently based on their experience, usually experience from domestic cases, which could cause domestic influence also. Moreover, the two different ways of domestic influences in common law countries and civil law countries could enlarge the non-uniformity problem and the incorrect application of the uniformity rule.

#### 4. Judges' Education and Practical Experience

Judges are human beings and individuals. They are educated by domestic law schools, and practiced in their country. Consequently, most of them are more familiar with domestic laws than international law, even those international laws ratified as domestic ones, like the CISG. Although, some judges notice the uniformity interpretation rule and try to interpret the CISG in the way it was designated to. It cannot be ignored that those judges are potentially influenced by their domestic laws, sometimes heavily influenced. That could cause the incorrect application of the uniformity interpretation rule by domestic law influence.

#### 5. Non-Recognition of Foreign Judgments

The last reason is the non-recognition of foreign judgments. Cases, especially similar cases could help the judge to get to know how did they are decided in different jurisdictions. Take foreign judgments into consideration, especially as precedents could help the CISG to achieve its international uniformity goal. Also, it is the requirement of the correct application of the uniformity interpretation principle. But now, lots of countries do not recognize foreign judgments. It is harder for the judge to apply the

foreign judgments in its case reasoning. So no consideration of similar foreign cases judgment is another reason for the incorrect application of the uniformity rule.

## **7.2 Suggestions for Better Application of the Uniformity Interpretation Rule**

How could the uniformity interpretation rule be applied in a better and correct way? The answer is trying to solve the above reasons of incorrect application. Some reasons are not expected to be solved in recent decades, namely the official translation problem, the CISG limitations, the difference between common law system and civil law system, and the non-recognition of foreign judgment. But the judge could be influenced and changed. They could solve the problem if they get the correct and adequate knowledge as they expected to. Here are some suggestions could help the judges (tribunals) to understand the uniformity interpretation rule and its application deeply and comprehensively. Thus, the following suggestions could help for better application of the uniformity interpretation rule.

1. Stress the importance of the uniformity interpretation rule.

It is so important for the tribunals to know the importance of the CISG uniformity interpretation rule. It specifies the purpose demand detailed treatment of the CISG. Moreover its success or failure will determine the CISG's eventual fate as uniform law.

2. Set standard cases and tribunals in each CISG contracting State.

The uniformity goal will be more easily achieved if we could set standard cases and tribunals for CISG case decision-making reference. But it is hard to set standard

cases and tribunals among all the CISG contracting States, and it may also cause dissatisfactions among those contracting countries. To make it more easily achievable, some scholars set an idea of setting “regional” standard countries<sup>132</sup>. The “regional” standard countries idea is to set a standard country in each region, i.e. setting country A as the standard country in Latin America, setting country B in Asia, setting country C in Europe. This approach could achieve “regional” uniformity – the correct application of the uniformity interpretation rule in in different regions in short terms. But it is not good enough and may cause worse problems in long term. In long term, getting to the next step of “regional” uniformity – worldwide uniformity, a lot of consequent problems will come out. Namely, which region’s standards or the standard country will be the standard for all the CISG contracting States? A much bigger and intractable problem will arise up after the short-term success in the uniformity rule application. So neither of the worldwide or the “regional” standard method is achievable now. The better choice is to set standard cases and tribunals in each CISG contracting State separately. The standard tribunal may stress the importance of the uniformity interpretation rule to solve the overlook problem. This method could help the judge to consider and apply the uniform interpretation principle.

### 3. Set cooperation among international tribunal and establish international projects

Although setting worldwide standards is difficult, setting cooperation among international tribunals is compassable. Those tribunals focusing on dealing with

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<sup>132</sup> Ulrich G. Schroeter, *Idea comes from article Global Uniform Sales Law – With a European Twist? CISG interaction with EU law*, 2009 *Vindobona Journal of International Commercial Law and Arbitration* 179 (2009).

international sales transactions could discuss about the cases they have decided to set proper standards of how to make the uniformity rule application better. This cooperation could facilitate communication for the tribunals to know how the others decide the CISG involving cases and make them to rethink the decision they have made before and to improve the uniformity rule application. Besides setting cooperation, establishing international projects, i.e. the CISG Advisory Council is another way for the uniformity rule application improvement.

#### 4. Establish and Extend CISG Databases

During my research, I found the CISG databases of Pace University and Wuhan University Institute of International Law help me a lot in understanding the CISG provisions and finding relevant CISG cases. Some U.S. cases cited resources from the Pace University CISG database also. Those CISG databases did a great job both in the better application of the uniformity interpretation rule and the other CISG provisions application. They will function better if we could establish a broader CISG database or extend the existing ones. Also, the CISG databases will provide a platform for people looking for CISG cases to get to know the CISG has been interpreted in its other contracting States.

A good and efficient CISG database should contain the following features. First, collect as many CISG cases as possible. Second, categorize those collected cases with different standards, i.e. category by countries, category by key issues, category by the CISG involving provisions, etc. Third, provide the English translations of the CISG cases as soon as possible. In my research, I found a lot of CISG cases were only available in the



original languages, which was a big obstacle for me to analyze those cases. If the CISG database could provide in a variety of key languages, it will make the cases more available and helpful for those non-native speakers. Fourth, update the CISG database regularly. Considering it involves so many legal systems and so many languages, an ideal update period is three months. If the CISG database could be updated every three months, the researchers and tribunals will have a chance to get to the newest relevant cases when dealing with CISG issues.

Establishing a good and efficient CISG database will help a lot in promoting the CISG uniformity goal in reality. It would objectively provide the CISG participants a platform to know what is the correct interpretation and application of the CISG and how the other tribunals would deal the similar scenario, which could push the world to apply and interpret the CISG in a similar way. The uniformity goal could be greatly assisted by the CISG database.

##### 5. Get common understanding by commentators and academics

Another method is to get common understanding by commentators and academics. Nowadays, it is widely acceptable in international academy that to apply the CISG uniform interpretation principle and achieve its uniformity goal, the tribunal should not rely one or be influence by domestic laws to prevent interpret the CISG via domestic law. Despite the uniformity rule, the CISG should be interpreted in an autonomous manner. And the foreign State's judgment should be considered in deciding similar cases.<sup>133</sup>

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<sup>133</sup> FRANCO FERRARI & MARCO TORSSELLO, INTERNATIONAL SALES LAW – CISG, 5-8 (2014).

## 6. Create a competent international court guaranteeing the uniformity of interpretation

It is difficult, but it could be the most efficient way if we could create a competent international court that guarantees the uniformity of interpretation.

## **CHAPTER 8. CONCLUSION**

The CISG was designated to create a uniform sales law applying to international sales transactions and to achieve the goal international uniformity. Generally, the CISG has worked well in serving as an international uniform sales law to achieve its uniformity goal. It has removed many obstacles in international sales transactions and encouraged parties to join in international sale of goods by providing and guaranteeing certainty and fairness. Correctly involved in over 75% of the world trade, it constitutes to become more and more important. Its interpretation and application standard and requirement should be achieved as it was drafted. The CISG stipulated two interpretation principles, uniformity rule and good faith rule. Along with those rules, there is a significant but non-obvious problem, which has not been solved since the beginning of the CISG adoption. That is the incorrect application of the CISG uniformity principle.

This problem has not emerged by accident. It is a worldwide problem. As analyzed before, it is a serious problem in each of the sample countries studied here: Argentina, China, Netherlands, Switzerland and the United States. The worst and most widely spread problem in the United States is the failure to fully recognize the uniformity interpretation rule. As the third biggest exporting country and the biggest importing

country<sup>134</sup>, thousands of contracts involving international sale of goods are signed every year many of which result in disputes. There are a lot of CISG cases. But the CISG uniformity interpretation rule served as its general and basic principle that directly determines the CISG's eventual fate as uniform law was not applied so frequently. It should be applied along with the application of the CISG.

The incorrect application of the CISG uniformity rule should be solved to promote greater certainty and fairness. An applicable and achievable solution to the incorrect application of the CISG uniformity interpretation rule could contribute to “(1) reduce forum shopping, (2) reduce the need to resort to rules of private international law, and (3) establish a law of sales appropriate for international transactions”<sup>135</sup>. To achieve the goal of correct application of the CISG uniform interpretation principle, a lot of things need to be done, namely, stressing the importance of the uniformity interpretation rule, setting standard cases and tribunals in each contracting State, setting cooperation among international tribunals, establishing and extending CISG databases. With the improvement of the CISG uniformity interpretation rule application, the CISG's international uniformity goal will be more fully achieved.

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<sup>134</sup> U.S. exporting total dollar value of 2017 is \$1.576 trillion. U.S. importing total dollar value of 2017 is \$2.352 trillion.

Data collected from: GENERAL INTELLIGENCE AGENCY – THE WORLD FACTBOOK – UNITED STATES, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited May 5, 2018).

<sup>135</sup> A. E. BUTLER, A PRACTICAL GUIDE TO THE CISG: NEGOTIATIONS THROUGH LITIGATION § 1.08, at 1-15 (2007 Supp.).

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