Chapter 1 INTERNATIONAL COMMERCIAL LAW

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Those who cannot learn from history are doomed to repeat it.

George Santayana
The Life of Reason (1905-06)

§1.01 INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the “CISG”) is often referred to as “one of the most successful examples of unification in the area of international law.” Many of the legal concepts of the CISG can be traced to the historical development of rules and norms governing international trade and commerce throughout the centuries. Consequently, the history of private international commerce is a fundamental subject that should not be overlooked by a practitioner. This chapter serves a dual purpose for it not only reflects on the development of commercial law through the centuries up until the adoption of the CISG, but it also serves as a guide to legal research under the CISG. As to the latter, a checklist for legal research sources under the CISG is provided in Appendix A-7. Practitioners should not hesitate to include other historical reasoning in their legal analysis as inclusion not only assists courts in their ruling but also provides additional logic to their conclusion.

This chapter begins by briefly examining ancient societies. See §1.02. Evidence of foreign trade among ancient societies can be traced back as far to Ancient Greece. Upon the fall of the Roman Empire, a dramatic decline in trade occurred among Western European countries although Eastern Europe was overall


unaffected by this event. However, the legal renaissance that subsequently emerged in Western Europe deeply expanded within the commercial context by countries adopting more detailed foreign trade laws and ideas, including the development of lex mercatoria. See §§1.03-1.04. In contrast, the commercial history of Ancient Asian societies was directly influenced by their societal beliefs, and it is not until the late nineteenth century that these countries adopted comprehensive commercial codes comparable to their European counterparts. See §1.06. By the early 1900s, countries began to implement and enter into unilateral and multilateral treaties as a means of trade with other countries. See §1.05. After World War I, the need to unify an international commercial code was recognized by the League of Nations and subsequently at the 1964 Hague Conference. See §1.07. Unsuccessful in world acceptance, the earlier efforts ultimately led to the formation and ratification of the CISG by the United Nations. See §1.08 and Appendix A-1 for the text of United Nations Convention on Contracts for the International Sale of Goods. The CISG’s impact on domestic law in the United States as well as the renewed renaissance of legal thought has led to the promulgation of international “Restatements,” which are also examined in this chapter. See §§1.09-1.10.

§1.02 ANCIENT WESTERN SOCIETIES

Evidence exists that Ancient Greek merchants engaged in extensive trade with countries neighboring the Black Sea and the Mediterranean Sea. Although the majority of the trade within the territory of Athens was almost “exclusively carried out by non-citizens,” this dominance of foreign traders commenced the development of early forms of commercial rules. For example, “emporiai laws” were enacted that prescribed laws; an “emporiai suit” derived from emporiai laws and mostly involved foreigners.

Imperial Rome also engaged in extensive trade and commerce. The Roman Empire was strongly influenced by Greek laws in its adoption of a commercial code. As the dominant world power of its time, Rome expanded its trade to various areas of the world. This world supremacy warranted adoption of laws to further protect the interests of Roman merchants outside Rome. Thus, the Roman Empire regulated and protected these interests by entering into treaties with other countries. These treaties, in addition to Rome’s commercial code, became an additional means to resolve conflicts of commercial interest between Roman merchants and foreigners.

§1.03 CONTINENTAL EUROPE—THE COMMERCIAL RENAISSANCE

By the fifth century, Germanic tribes had broken through the Roman defenses. During this time, the legal organization and trade mechanisms of the Roman Empire faulded due to the lack of knowledge and resources of the invading forces coupled with the disease of the time. This situation lasted until the tenth century in some parts of Western Europe and in other areas of Europe until the twelfth or fourteenth century with the emergence of the new legal renaissance. The birth of a new legal thought was not new but rather a resurgence—hence a “renaissance” of legal thought mixed with the demands of the present society.

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5 Id., pp. 169-71.
7 The Roman Empire was strongly influenced by the Lex Rhodia de Jactu. This law was developed on the island of Rhodes and became the most influential set of rules governing maritime and international commerce. For detailed discussion of Roman Codes, see Maine, Ancient Law, Dent & Sons, London, 1972, pp. 1-12.
8 Ancient Greece also adopted treaties with other countries; however, its treaties dealt with import regulation rather than with commercial agreements granting reciprocal benefits to each party. Hasebroek, supra note 4, p. 113.
Beginning in Italian cities, this new legal thought quickly spread to Spain, France, and the rest of Europe. This was particularly true for the commercial renaissance that embraced Europe by the eleventh and twelfth centuries. As merchants expanded their trade across boundaries and into foreign markets, *lex mercatoria*, a new, special law for the merchant class reduced local practices into regulatory codes, thereby encouraging the adoption of a universal system of law in specific locations.\(^\text{10}\)

*Lex mercatoria* has five characteristics that distinguished it from local, feudal, royal, and ecclesiastical law:

1. It was transactional in nature;
2. Laws were based on mercantile customs;
3. Cases were adjudicated before merchants and promoted and developed by mercantile corporations;
4. Informal proceedings promoted expediency; and
5. Emphasis was placed on freedom of contract and decision of cases *ex aequo et bono*.\(^\text{11}\)

§1.04 ENGLAND—COMMON LAW

The history of *lex mercatoria* in England was curtailed in part by the development of common law where commercial issues were treated as issues of fact. Although evidence exists as to its earlier incorporation,\(^\text{12}\) Lord Mansfield, Chief Justice of King's Bench (1756-1788), is often given the honor of reintroducing *lex mercatoria* to the common law courts in the case of *Pillans v. Mieron*.\(^\text{13}\) Lord Mansfield acknowledged that the primary purpose of the law is to promote certainty in commercial transactions and "reconciled the conflicting interests of flexibility and certainty by incorporating into the common law the general principles of the law merchant while at the same time leaving a large number of subsidiary matters as questions of fact for the jury."\(^\text{14}\)

**Practical Application:** *Lex mercatoria* should be considered in one's legal analysis and conclusions when applicable. *Lex mercatoria* has been argued in CISG cases.\(^\text{15}\) Notably, scholars often refer to the UNIDROIT Principles of International Commercial Contracts promulgated in 1994 as the modern *lex mercatoria*. For further discussion see §1.10.

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\(^\text{10}\) Some scholars have questioned to whether this law was uniformly applied. See Michael Joachim Bonell, *An International Restatement of Contract Law—The UNIDROIT Principles of International Commercial Contracts* (1994), p. 3. However, this work attempts to introduce a uniform commercial law during the middle of the nineteenth century.


\(^\text{14}\) Rodgers, *supra* note 12, p. 164.

§1.05 EMERGENCE OF THE BILATERAL TREATY

As the years progressed, \textit{lex mercatoria} waned as countries adopted and incorporated many of these concepts into national laws and statutes;\footnote{Baron Gesa, \textit{supra} note 11, p. 12.} however, an increase in bilateral treaties emerged throughout the European continent. The 1860 Treaty of Commerce and Navigation between England and France marked a new era of commercial law as it established a new means of establishing commercial relations between countries. The 1860 treaty established two principles of commercial trade: (1) a free trade policy, and (2) the incorporation of the most favored nation (MFN) clause.

\textbf{Practical Application:} Practitioners should be familiar with various relevant treaties as they relate therein, as a treaty is considered "equal in stature and force as any other domestic federal law."\footnote{Schroeder v. Lufthansa German Airlines, 875 F.2d 613, 616 n. 2 (7th Cir. 1989), quoting \textit{In re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1161, n.19 (5th Cir. 1987).}} A court's application of a relevant treaty may assist in enforcement and application of the CISG.\footnote{For example, treaty interpretation; \textit{see, e.g.,} United States v. Alvarez-Machain, 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed. 2d 441 (1992); Bishop v. Reno, 210 F.3d 1295 (11th Cir. 2000).} A complete list of relevant treaties and authority for citation can be found in Appendix A-5, Table 3—List of Relevant Treaties and Other Relevant Organizations. \textit{See also} further discussion in Chapter 2.

§1.06 ANCIENT ASIAN SOCIETIES

Evidence of Ancient China's trade patterns can be traced back to the fourth and third centuries B.C.\footnote{Evidence of Ancient China's trade patterns can be traced back to the fourth and third centuries B.C. (C. A. P.)} The "Silk Road" provided a trade route from China to central Asia, the Middle East, and Europe, including Ancient Rome.\footnote{Trans World Airlines, Inc., 169 F.3d 1151, 1153 (8th Cir. 1999) (finding Warsaw Convention preempts state law personal injury claim); Jack v. Trans World Airlines, Inc., 820 F. Supp. 1218, 1220 (N.D. Cal. 1993) (finding removal proper because Warsaw Convention preempts state law causes of action); but see Stawski Distributing Co., Inc. v. Zywiec Breweries PLC, 2003 WL 22290412 (N.D. Ill. 2003) (holding Illinois law enacted pursuant to powers reserved to state under Twenty-First Amendment to the U.S. Constitution was not preempted from conflicting provisions of CISG).} Despite this significant world trade presence, legislation as to commercial law or trade in general was scarce due in part to Confucianism, which placed merchants at the lowest class of the social hierarchy.\footnote{Gernet, \textit{A History of Chinese Civilisation}, translated by Foster (Cambridge University Press, Cambridge, 1982), pp. 73 and 130.} Laws enacted by the government often dealt with regulation, such as taxation and jurisdiction, but there was never any system of commercial or merchant law.\footnote{Sinkin, \textit{The Traditional Trade of Asia}, Oxford University Press, London, 1968, p. 34; \textit{see also} Parker, \textit{China: Her History, Diplomacy, and Commerce from the Earliest Times to the Present Day}, 2d ed., John Murray, London, 1917, pp. 50-51.} China reached its height of trade isolation during the Ming Dynasty (1368-1644), which prohibited Chinese citizens from sailing overseas and from selling a number of goods to foreign merchants.\footnote{Confucianism despised merchants, regarding them as selfish, always placing profit-making first. Shi Zhongliang, \textit{The Dual Economic Function of Confucianism}, available at http://www.crwp.org/book/series/03/iii-14/chapter_1.htm.} It was not until after the Opium Wars (1840-1842) that

\footnote{Taxation of foreign merchants was addressed in the Ming Code. Chang et al., \textit{A History of the Chinese Legal System} (Zhongkuo Fa Zhi Shi), Sichuan Social Science Academy Press, Chengdu, 1987, in Chinese, pp. 62-79.}
China adopted a number of codes that were based on the German and Japanese model of law. In 1903, China adopted the General Rules of Merchants, which contained nine provisions that established general rules applicable to merchants. Despite the adoption of the Code, China's market economy failed to dominate during the period between the collapse of the Qing dynasty (1644-1911) and the birth of the People's Republic of China in 1949.

The death of Chairman Mao Tse-tung in 1976 led to the elimination of the "Gang of Four," a political faction led by the widow of Chairman Mao. The new leaders of China sought to introduce social and economic reform with an "open door" policy toward other nations without forsaking their centrally planned government structure. This led to the "Four Modernizations," which meant the modernization of industry, agriculture, science, and military defense. In order to achieve this goal, it became necessary to reform the past economic regime. Notably, the centrally planned economy that existed prior to 1978 was predominantly controlled by the government. As such, the majority, if not all, of the Chinese legal system was eliminated. Therefore, one of China's main tasks was the enactment of a series of laws: The General Principles of the Civil Law ("GPCL"), the Economic Contract Law ("ECL"), the Foreign Economic Contract Law ("FECL"), and the Technology Contract Law ("TCL"). The last three have subsequently been superseded by the Contract Law of the People's Republic of China (hereinafter referred to as the "Contract Law"), which was enacted on October 1, 1999. However, it should be noted that the ECL, FECL, and the TCL each governed separate contractual situations. Hence, the adoption of the Contract Law ended three separate contract laws in China in different fields. The CISG was ratified and adopted to govern international contracts for the sale of goods between parties in China and other Contracting States of the CISG.

In general, the GPCL functions as a civil code as it regulates the basic principles governing civil and commercial transactions. Of particular interest is Article 142, paragraphs 2 and 3 of the GPCL, which provides respectively:

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.

The current Contract Law provides no such provision. As such, there is currently scholarly debate in China as to whether the GPCL acts as a federal supremacy clause, thereby overriding the Contract Law.

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25 Id., p. 244.
26 Id.
28 The ECL was the first contract law in China. It was enacted four years prior to the GPCL, and in effect set in motion the free-market trend in China. The ECL was subsequently amended in 1993 to provide broader scope.
29 The FECL, enacted in 1985, applied to contracts between Chinese enterprises (or other economic organizations), foreign enterprises and individuals, except for international transportation contracts. Chinese individuals were expressly excluded.
30 The TCL, which consisted of seven chapters and fifty-five provisions, was enacted by the National People's Congress in 1987 and later implemented in 1989. The law gave Chinese legal persons and individuals the capacity to enter into technology contracts; however, the TCL did not apply to agreements involving a foreign party.
31 The Contract Law, as the uniform contract law, was adopted by the second meeting of the Ninth National People's Congress on March 15, 1999, and superseded the LECFI, the ECL and the TCL, thereby ending the situation in which there were three contract laws in China in different fields.
enabling application of the CISG. However, application may be subject to the viewpoint of the arbitrator based on the discretionary language of the GPLC.

India and Japan have a rich history of trade and commerce similar to China. However, both countries either through colonization or social change adopted and incorporated European code provisions earlier than China. India engaged in trade of spices, fine cottons, and precious stones with Egypt, Greece, and Rome as well as Persia. In contrast to China, India’s law and customs were based on Hindu and Muslim law and customs that were said to have society’s best interest at heart. In the eighteenth century, England introduced English common law into India and such law has remained since that time. The influence of China on Ancient Japan reveals that many Chinese and Korean merchants and artisans emigrated to Japan as early as 206 B.C.-214 A.D. In the seventeenth century a legal code was developed based on the Chinese Tang law. The influence of China ceases in the nineteenth century when Japan entered into numerous trade agreements with Western Powers, which increased not only their military power but also their economic trading power. As a result, Japan in 1890 adopted the Japanese Commercial Code, which was drafted by a German adviser to the Japanese government. The code is a combination of French and German law, thereby introducing continental law to Japan.

**Practical Application:** The emergence of China as a world trade power has increased clients’ interest in doing business in China, which became a Contracting State to the CISG on January 1, 1988. Since the adoption of the Chinese Contract Law, there has been a growing trend by the China International Economic and Trade Arbitration Commission (CIETAC) to focus on the terms of the contract. Hence, counsel is encouraged to take serious consideration when

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32Some researchers, such as He Xiaoyong and Liu Yongxiang, hold that Article 142 acts as a supremacy clause; however, others, such as Chen Hanfeng, Zhou Weiguo, Jiang Hao, and Wu Dong, hold otherwise. Wu Dong noted that those in disfavor of supremacy find that the provisions of Article 142 itself are not strong enough to conclude that conventions may override domestic civil laws. Communication with Wu Dong, December 29, 2005.

33It is encouraged that parties seek use of China’s arbitration system, such as the CIETAC and other arbitration institutions. Most observers agree that Chinese courts are not up to international standards. For instance, most judges have minimal or no legal training and observers have stated those poorly trained court officials are susceptible to corruption and regional protectionism. See The China Team, *Dispute Avoidance and Dispute Resolution in China*, available at http://www.ita.doc.gov/exportamerica/TechnicalAdvice/ta_Chi naDispute.pdf#search=China%20CIETAC%20rulings. See Bruno Zeller, *The CISG and China: Dialog Deutschland-Schweiz VII*, Faculté de droit, Université de Genève (1999) 7-22, also available at http://www.cisg.law.pace.edu/cisg/biblio/zeller.html.


39Id.


§1.07 COMMERCIAL LAW—LEAGUE OF NATIONS AND THE 1964 HAGUE CONVENTIONS

In the latter half of the nineteenth century, an internationalist movement swept over Europe. The movement sought to create a *uniform ius commune* within Europe based on national codes. The movement led to the formation of the Institute of International Law42 and the International Law Association.43 Despite the efforts of these organizations, the most important initiative toward sales unification came with the creation in 1926 by the League of Nations of UNIDROIT44 and the recognition of the organization to embrace the reasoning of a group of European scholars led by Ernest Rabel,45 who sought resolution of conflicts in domestic commercial law through the adoption of an international convention whose rules would apply unless the parties excluded them in their contracts. In 1935, the first draft of a uniform law of sales based on the basic principles of private law through a comparison of national laws rather than commercial practice was tabled by Rabel. In 1939, a second draft was accepted by the council of UNIDROIT; however, the outset of World War II prevented further developments.

At the Hague Conference of 1964, two conventions were adopted regarding international sales. These included the following:

1. the convention entitled the Uniform Law on the International Sale of Goods ("ULIS");
2. the convention entitled the Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF").

The two conventions referred to collectively as the 1964 Hague Conventions were adopted by a small number of nations, including the United Kingdom.46 Legal decisions were scarce, the majority being rendered by the courts of Germany. Many countries resisted adoption of the conventions owing to two factors: (1) the lack of participation by non-European countries in the process of creating the ULIS and the ULF, and (2) the number of serious deficiencies in the material stipulations of the conventions.47 Nonetheless, the basic structure of both the ULIS and the ULF provided a solid base that influenced the drafting and contents of the CISG. Notably, the influence of the ULIS and the ULF are considered valuable sources in interpreting the CISG.

**Practical Application:** Case law applying and interpreting conventions, which were precursors to the CISG, should not be overlooked for assisting in

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CIETAC Arbitration proceeding (Silicon metal case), available at http://cисgw3.law.pace.edu/cases/000211c1.html (using good faith under Article 7 to provide explanation for delay in buyer’s issuance of letter of credit).

47Gustave Rolin-Jacquemyns, a Belgian jurist and editor of the *Revue de droit international et de législation comparée*, provided the initiative for the founding of the Institute of International Law (L’Institut de droit international).

45ALI was founded in Brussels in 1873 and currently serves as an international nongovernmental organization to UN specialized divisions.

44UNIDROIT is currently located at 28 Via Panisperna, 00184 Roma (Italia)—Tel. +39 06 696211—Fax +39 06 699 41394. Further information may be obtained at its website, www.unidroit.org.

46German comparative (1874-1955).

45Countries that adopted the ULIS and the ULF are the following: Belgium, France, Gambia, Germany, Greece, Holy See, Hungary, Israel, Italy, Luxembourg, Netherlands, San Marino, and United Kingdom, information available at http://www.unidroit.org/english/implement/i-64ulis.pdf and http://www.unidroit.org/english/implement/i-64ulf.pdf. The United Kingdom is not a Contracting State to the CISG but is currently seeking ratification. See note 60, infra.

47Some scholars also speculate that the Western Europe’s civil law traditions’ dominance was a contributing factor to its failure. Wesiack, *Is the CISG too much influenced by civil law principles of contract law rather than common law principles of contract law? Should the CISG contain a rule on the passing of property?*, available at http://cисgw3. law.pace.edu/cисg/biblio/wesiack.html.
§1.08 1980 UN CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS

In 1966, the United Nations established UNICTRAL. One of the main objectives of UNICTRAL was the unification of the law of international sales. Working groups were established which, unlike the Hague Conventions, were comprised of members representing all political, legal, and economic groupings. The development of the CISG can be broken down into three stages:

1. From 1970-1977, working groups produced two draft conventions. The 1976 Draft Convention on Sales, referred to as the “Sales Draft,” established the rights and obligations of the seller and buyer under the sales contract. A year later, the 1977 Draft Convention on Formation, “the Formation Draft” was completed by the working group.

2. A review by the full Commission followed from 1977 to 1978. The Commission combined the “Sales Draft” and the “Formation Draft” into one document, referred to as the 1978 Draft Convention on Contracts for International Sale of Goods. Thereafter, the Commission with its unanimous approval recommended to the UN General Assembly the convening of a diplomatic conference to review the draft and finalize the convention.

3. The Vienna Conference of 1980 was held and the draft convention was accepted by a majority of the forty-two of the sixty-two states that participated in the conference. The CISG came into effect on January 1, 1988.

In his letter of transmittal to the Senate, the then-President Reagan reiterated the need for commercial unification by transmitting, in part, to the Senate the following:

International trade now is subject to serious legal uncertainties. Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer claims based on one or another of the many unfamiliar foreign legal systems. The Convention’s uniform rules offer effective answers to these problems. Enhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade. I recommend that the Senate of the United States promptly give its advice and consent to the

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49UNICTRAL did not become operative until 1968.


51id. at 3.

52id.


54Honold, note 50 supra.
ratification of this Convention.\textsuperscript{55}

On December 11, 1986, the United States ratified the CISG, thus providing the impetus to the CISG that was lacking for the ULIS and U.L.F.\textsuperscript{56} The CISG strives to promote certainty among contracting parties and simplicity in judicial understanding by (1) reducing forum shopping, (2) reducing the need to resort to rules of private international law, and (3) establishing a law of sales appropriate for international transactions.\textsuperscript{57} Nations have adopted the CISG to provide for "the orderly conduct of international commerce."\textsuperscript{58} Currently, there are sixty-seven countries that have adopted the CISG.\textsuperscript{59} At least seven of the contracting states are major trading partners of the United States.\textsuperscript{60}

**Practical Application:** A complete list of countries, which are also referred to as "Contracting States," and the full text of the CISG may be found in Appendix A: Text of United Nations Convention on the International Sale of Goods and Table 1: Table of Contracting States to the CISG.

It is well accepted in the international community that the CISG was influenced by civil law principles of contract law.\textsuperscript{61} In addition to its content, it is also important when interpreting the CISG that "[t]raditional rules of civilian legal systems, such as literal, historical, systematical and teleological rules ... make allowances for the Convention's international character and its primary goal of uniform application."\textsuperscript{62} Notably, this is similar to treaty interpretation. See Appendix A-7, Table 5—Checklist of

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\textsuperscript{59}There are currently 67 Contracting States to the CISG. Counsel can obtain, at no cost, current status of Contracting States to the CISG by contacting the United Nations Treaty Collection by mail at United Nations Secretariat Building, Attention: Chief of Treaty Section, Office of Legal Affairs, 32nd Floor, Room 3200, New York, NY 10017; by telephone: 212-963-5047 or by facsimile: 212-963-3693. Counsel can request the form as he or she would prefer the information, e.g., verbal, electronic mail, facsimile, or mail. As an alternative, counsel can visit http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html; contacting the UN directly, however, warrants the most accurate information available.

\textsuperscript{60}William S. Dodge, \textit{State Bar Exam Should Test on All Sources of Contract Law}, Los Angeles Daily Journal, Tuesday November 2, 2004. These countries include Canada, Mexico, China, Germany, France, Italy, and South Korea. Practitioner should note that England has not yet adopted the CISG, although it is considering ratification according to recent initiative by the Department of Trade and Industry.


Legal Research and Analysis Under the CISG. Hence, legal research and argument should primarily focus on the language of the CISG and its legislative history, which can often be achieved by reviewing all relevant case law or scholarly writings.63

Practical Application: In addition to the 1964 Hague Conventions, the legislative history of the CISG should be used for interpretation when an issue of meaning arises. "In construing a treaty, as in construing a statute, [courts] first look to its terms to determine its meaning."64 It is best, as one scholar noted, that only where the plain meaning of one provision contradicts that of another … is recourse to other interpretative methods permissible since such contradictions endanger the Convention’s overall goal to promote uniformity.65 Although the United States is not a party to the 1969 UN Convention on the Law of Treaties (1969 Vienna Convention), it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.66 The Vienna Convention provides that "recourse may be had to supplementary means of interpretation including the preparatory work of the treaty." Article 32 of the Vienna Convention states, “[w]hen important and difficult issues of interpretation are at stake, diligent counsel and courts will need to consult the [CISG’s] legislative history. In some cases this can be decisive.”67 The Secretariat Commentary on provisions of the 1978 draft is, to the extent it is relevant to the official text, perhaps the most authoritative source one can cite. The Pace University website provides a Secretariat Commentary for each respective article of the CISG. Moreover, under the ambit of Article 7(1) an autonomous interpretation of the CISG is warranted.

§1.09 THE CISG IN THE UNITED STATES

As the CISG is a self-executing treaty, it is the supreme law of the United States, preempting state law.68 However, the CISG does not necessarily displace state law as the CISG only applies to international


651969 Vienna Convention, supra note 62.


sales contracts. See Chapter 2 for complete discussion of the application of the CISG. Since the adoption of the CISG by the United States, there has been limited U.S. case law addressing the CISG in comparison to other Contracting States. One reason could be lack of experience with international commercial treaties. Early in the nation's history, government and business focused on the domestic market, and it was not until after World War II that the United States sought to coordinate with world economic systems. As discussed supra, the United States was not an active participant or signatory country to the 1964 Hague Conventions. Hence, there is a lack of familiarity with addressing these issues. The general educational background of the two systems—common law versus continental law—also may be a contributing factor as the two systems produce two types of lawyers. For example, a common law attorney is trained to interpret law based on case law; in contrast, a trained civil law attorney is trained to look at the language of the law itself. As one scholar noted "in his zeal to promote a policy the Continental lawyer sometimes overlooks the realities of life, while the common lawyer drafts his rules of law with the cases at the back of his mind." Hence, both systems mandate that their traditional approaches be re-examined in order to achieve the "international unification as warranted" under the CISG.

Another reason for the limited U.S. experience in this area may be improper application of the CISG in general. Since its adoption by the United States, courts in the United States have consistently held that there is little or scant case law on the CISG, thereby ignoring the application of treaty interpretation as well as the abundance of foreign case law and scholarly articles on the CISG. This factor may be due in part to practitioners' failure to bring to the court's attention foreign law that has examined the issue or their lack of understanding or application of the CISG. Notably, the CISG Preamble and Article 7 of the CISG mandates uniform application of the CISG, thereby warranting courts to look for uniform application by looking not only to language of the CISG and its legislative history but also to foreign courts and scholars for guidance.

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69 But see Stawski Distributing Co., Inc. v. Zywiec Breweries PLC, 2003 WL 22290412 (N.D. Ill. 2003), also available at http://cisgw3.law.pace.edu/cases/031006u1.html (holding Illinois law enacted pursuant to powers reserved to Illinois under Twenty-First Amendment to the U.S. Constitution was not preempted from conflicting provisions of CISG).

70 The work on the U.C.C. led to a new awareness in the United States of Western European efforts to unify private law. Although the adoption of the U.C.C. was an important step in the unification of private law, other considerations also prompted Congress in the early 1960s to authorize U.S. membership in the Hague Conference and UNIDROIT. These factors include an awareness of both the dramatic increase in international trade, commerce, investment and travel, and the probability that further increases were likely to occur. Peter H. Pfund and George Taft, Congress' Role in the International Unification of Private Law, 16 Georgia Journal of International and Comparative Law (1986), 671-686.


74 Delchi v. Rotorex, 71 F.3d 1024, 1028 (2d Cir. 1995), also available at http://cisgw3.law.pace.edu/cases/951206u1.html ("there is virtually no case law under the Convention"); Helen Kaminski v. Marketing Australian Products, 1997 WL 414137 (S.D.N.Y.), available at http://cisgw3.law.pace.edu/cases/970721u1.html (there is little to no case law on the CIG ...);

in interpreting the CISG.\textsuperscript{75} "The intent of the contracting parties to the CISG can be discerned from the introductory text [the Preamble], which states that '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.' "\textsuperscript{76} Article 7 provides the following:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (emphasis added)\textsuperscript{77}

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Based on the plain language of Article 7, domestic application of law and/or reasoning should only be applied if the CISG fails to settle an issue at hand.\textsuperscript{78} Hence, resort to domestic analysis should be warranted

\textsuperscript{75}Italy 26 November 2002 District Court Rimini (Al Palazzo S.r.l. v. Bernaradau di Limoges S.A.), available at http://cisgw3.law.pace.edu/cases/02112631.html (declaring that, though precedents in international case law cannot be considered legally binding, they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of CISG (Article 7(1) CISG)). Chicago Prime Packers, Inc. v. Northam Food Trading Co., 2004 WL 1166628 (N.D. Ill.), also available at http://cisgw3.law.pace.edu/cases/040521u1.html (observing preamble and Article 7, the court looked to foreign case law and scholarly writing for guidance in interpreting the CISG); Italy 29 December 1999 District Court Pavia (Tessile v. Ixela), available at http://cisgw3.law.pace.edu/cases/99122931.html (recognizing that foreign decisions, though not binding, should be taken into account by the judge in construing and applying the Convention); Italy 12 July 2000 District Court Vigevano (Rheinland Versicherungen v. Atlarex), available at http://cisgw3.law.pace.edu/cases/00071231.html (precedents in international case law cannot be considered legally binding; in the court’s opinion they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of CISG (Art. 7(1) CISG)); Medical Marketing International v. Internazionale Medico Scientifica, 1999 WL 311945 (E.D. La.), also available at http://cisgw3.law.pace.edu/cases/990517u1.html (holding finder of fact has a duty to regard the international character of the convention and to promote uniformity in its application); St. Paul Guardian Ins. Co. v. Neumed Med. Sys. & Support GmbH, 2002 WL 465312 (S.D.N.Y.), also available at http://cisgw3.law.pace.edu/cases/020326u1.html (CISG aims to bring uniformity to international business transactions); Asante Tech., Inc. v. PMC-Sierra, Inc., 164 F. Supp.2d 1142, 1151 (N.D. Cal. 2001), also available at http://cisgw3.law.pace.edu/cases/010727u1.html (the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action); Italy 12 July 2000 District Court Vigerano (Rheinland Versicherungen v. Atlarex), available at http://cisgw3.law.pace.edu/cases/021015.html (stating foreign case law is not binding but it is nevertheless to be considered in order to assure and to promote uniform enforcement of the UN Convention according to Article 7); Netherlands 15 October 2002 Netherlands Arbitration Institute, Case No. 2319, available at http://cisgw3.law.pace.edu/cases/021015n.html.


\textsuperscript{78}Austria 22 October 2001 Supreme Court[10b49/oil], available at http://cisgw3.law.pace.edu/cases/01122a4.html (holding Articles 7 and 8 of CISG cannot be used to resolve agency issues); Germany 13 April 2000 Lower Court Duisburg, available at http://cisgw3.law.pace.edu/cases/000413gl.html (applying Italian law pursuant to Article 7(2)); Switzerland 11 July 2000 Federal Supreme Court (Gutta-Werke AG v. Dörken AG), available at http://cisgw3.law.pace.edu/cases/000711s1.html (procedural matters are not governed by the CISG); Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., 313 F.3d 385 (7th Cir. 2002), also available at http://cisgw3.law.pace.edu/cases/021119u1.html (attorney fee issue was procedural issue outside realm of
only upon complete determination that the CISG is inapplicable. Moreover, legal articles on a particular provision should not be overlooked. These publications provide not only legislative history but scholarly analysis and interpretation as well.

It is foreseeable that the impact of the CISG on U.S. law will broaden with time as practitioners, arbitrators, and the courts become more aware of its application and relevance in business transactions. In addition to the CISG being taught in law school in contract courses, there has also been a call for state bar examiners and the National Conference of Bar Examiners to include the CISG for bar admittance. However, it is essential for practitioners to comprehend the proper application of the CISG to ensure compliance with the uniformity and good faith promulgated in the objective and the terms of the CISG.

Practical Application: Interpretation of the CISG treaty focuses the reader on the Preamble and the legislative history. Much scholarly debate has followed on this issue; however, practitioners should focus on the uniform interpretation by looking to the language and history of the CISG. If an issue still remains, foreign and domestic case law on that issue should be reviewed as well as scholarly writings. A practitioner should waiver in his or her decision to adopt domestic application of a concept and seek rather uniformity in the CISG application. Hence, it is incorrect and misleading for a practitioner to state there is no case law on a CISG issue when relevant foreign case law or scholarly writing is available. Case law on the CISG can be obtained for free at the following websites—UNICITRAL website (http://www.unicitral.info), the Pace Institute of International Commercial Law in New York (http://ciscg3.pace.edu), and UNIDROIT (http://unidroit.org).

§1.10 WORLD EFFECT OF THE CISG

The adoption of the CISG generated a new interest in the uniformity of private commercial law. As a result, scholars sought to formulate treaties to assist in interpretation of the CISG—The UNIDROIT Principles of International Commercial Contracts (promulgated in 1994) and the Principles of European

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81Dodge, supra note 60.


Contract Law (complete and revised version 1998). Similar to the U.S. Restatement of Contracts, which has served as a companion to the Uniform Commercial Code (hereinafter referred to as the “U.C.C.”) in the United States, UNIDROIT and PECL documents were written by persons learned in this field of law. The content of both documents is broader in scope; however, these are “Restatements,” since analysis is derived from the CISG. Both “Restatements” take cognizance of insights derived from the text of the CISG, ranging from scholarly commentaries on the CISG to case law interpreting the CISG as well as other sources.

**Practical Application:** Resort to these Restatements should be used only when their application can be justified by the legislative history and the underlying purpose of the CISG. Illustrations of this comparison between UNIDROIT and PECL documents can be found at the Pace website, which can also be used to assist in the interpretation of the CISG.

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86 Koch, supra note 2.