

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: LESSONS LEARNED FROM FIVE YEARS OF CASES

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January 1, 2008 marked the twentieth anniversary of the entry into force of the United Nations Convention on Contracts for the International Sale of Goods (CISG or Convention)¹ as a self-executing treaty of the United States.² Since that date, every international contract for the sale of goods involving a party with its principal place of business in North America and a party based in most of the United States' major trading partners has been subject to the CISG.³

The drafters of the Convention hoped "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."⁴ While international trade undoubtedly has developed during the past twenty years, it is not self-evident either that the Convention has promoted that development or that the Convention has been the governing law for the thousands of international contracts for the sale of goods entered into

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¹ See The United Nations Convention on Contracts for the International Sale of Goods, Mar. 2, 1987, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3 [hereinafter CISG or Convention].

² See CISG, *supra* note 1, at 15 U.S.C.A. App.; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (defining self-executing treaties).

³ See James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 274-75 (1999); see also Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law*, 15 CARDOZO J. INT'L & COMP. L. 461, 478 n. 98 (2007).

⁴ CISG, *supra* note 1, at pmb1.

by United States business during the past two decades. The uncertainty regarding the effectiveness of the CISG in promoting international trade is the subject of much debate and proposals for abandoning or revising the Convention.⁵ However, the uncertainty of whether the CISG is providing the governing law for international contracts for the sale of goods entered into by United States firms is the subject of this article.

In an effort to gauge the application and effectiveness of the CISG in the 20 years it has been the law of international contracts for the United States and most of its trading partners, this paper analyzes five plus years of cases decided by United States courts referencing the Convention. The cases decided over the five-year period are intended to provide a representative sample and a basis for analysis of how courts in the United States are applying the Convention during its second decade. The analysis includes all reported cases decided in state and federal courts of the United States from 2003 through the first half of 2008. Of particular interest was (1) whether the parties to the contract actively attempted to “opt out” of the application of the CISG, and if so, whether they were successful in doing so; and (2) what authorities United States courts used when applying the CISG (specifically, whether the courts relied on the decisions of other countries and whether the courts used the Uniform Commercial Code as a basis for their decisions). The analysis includes a wide variety of cases, some of which do not directly address the application of the CISG but which, by their subject, provide insight into how international contracts are being drafted and how United States courts are addressing the CISG and the decisions of other international courts.

This article begins with a discussion of the current state of the application of the CISG and concludes with an examination of five years of case law related to the application of the Convention by courts in the United States.⁶

⁵ See, e.g., Sheaffer, *supra* note 3, at 469-80. See also Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473 (2001).

⁶ For an exhaustive study of CISG jurisprudence up to 2003, see Larry A. Dimatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299 (2004). The article provides a comprehensive study of cases interpreting the CISG and is well documented with 887 footnotes.

I. BACKGROUND OF THE CISG IN THE UNITED STATES

The CISG is undeniably one of the most successful international conventions promulgated by the United Nations.⁷ The United States and most of its major trading partners quickly adopted the convention after its completion in 1980.⁸ As of the date of this writing, seventy-four countries in total have adopted the Convention.⁹ However, the Convention provides that its adoption is not an all or nothing proposition; countries have the option at the time of ratification to declare that certain portions of the convention are not applicable to contracts made by businesses in the ratifying country.

Numerous countries, including the United States, have opted out of some provisions of the Convention.¹⁰ This piecemeal application of the Convention led one commentator to conclude that “[t]he Convention’s allowance for reservations to various aspects of the CISG both decreases uniformity and increases the likelihood of confusion regarding the application of the CISG.”¹¹

The way in which the United States adopted the Convention may have exacerbated confusion regarding the application of the CISG.¹²

⁷ See Bailey, *supra* note 3, at 279 n. 35.

⁸ *Id.* at 279 n.36.

⁹ Signatory countries include: Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, The former Yugoslav Republic of Macedonia, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), and Zambia. U.N. Commission on International Trade Law, Status, 1980 United Nations Convention on Contracts for the International Sale of Goods, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited November 16, 2009).

¹⁰ See, e.g., Argentina and Canada, *supra* note 9, for two examples.

¹¹ Bailey, *supra* note 3, at 311.

¹² *Id.* at 282.

The United States adopted the CISG as a self-executing treaty.¹³ A self-executing treaty becomes binding in United States law when the ratification process is complete.¹⁴ A non-self-executing treaty binds United States citizens only when acted upon by both houses of Congress and signed into law by the President.¹⁵

The Convention became the supreme contract law of the United States upon ratification by the Senate, thereby governing most international contracts for the sale of goods.¹⁶ One commentator described the enactment process as follows:

[T]he CISG became federal law without any changes, without the addition of individual section numbers, and without being included in the various indices of the U.S. Code. Essentially, the CISG was simply dumped, without introduction or comment, into the Appendix to Title 15 of the U.S. Code. The effect is that one cannot find the CISG in the U.S. Code unless one already knows it exists and where it is located. Further, since none of the provisions of the CISG are contained in the indices to the U.S. Code, the individual subjects regulated by the CISG cannot be discovered through traditional legal research methods.¹⁷

The means by which the CISG became the law of the United States and was included in the U.S. Code made the process of educating the thousands of attorneys' already practicing contract law on the CISG even more difficult. The same commentator noted in his 1999 article that

[d]espite the CISG's applicability to every international contract for the sale of goods in North America as well as for most contracts involving the major trading partners of the United States, many U.S. businesses, lawyers[,] and courts have yet to realize that contracts they assume are governed by the UCC are actually governed by the CISG.¹⁸

¹³ *Id.* at 281-82 nn.43-50.

¹⁴ *Id.* at 281.

¹⁵ *Id.* at 282.

¹⁶ *Id.*

¹⁷ *Id.* at 282-83.

¹⁸ *Id.* at 280.

Like most statutory enactments, the Convention is complicated to navigate in many respects and requires a fair amount of study to fully appreciate its application. For example, just determining when the CISG applies to a transaction requires a four step analysis: (1) Does the transaction involve a sale of goods?; (2) Are the goods excluded from application of the rules of the Convention?; (3) Do the parties to the transaction have their principal places of business in different countries?; and (4) If the answer to (3) is “yes,” are both of the countries parties to the Convention?

Specific sales are excluded from the application of the CISG including: (a) goods bought for personal, family, or household use; (b) goods bought by auction; (c) goods acquired on execution or otherwise by authority of law; (d) sales of stock, shares, investment securities, negotiable instruments, or money; (e) sales of ships, vessels, hovercraft, or aircraft; and (f) sales of electricity.¹⁹ Also exempted are contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or services.”²⁰

If goods are involved, the transaction must also be international in nature for the CISG to govern. A transaction is international, according to the Convention, when both parties have their principal places of business in different countries and both of those countries are parties to the CISG.²¹

Thus, in order to determine if the CISG can apply to a transaction, one must determine the principal place of business of both parties to the contract. If either party has more than one place of business, the Convention provides that the place most closely related to the instant transaction will be considered the principal place of business for purposes of the CISG.²² After that determination is made, one must also determine whether the countries in which both parties have their principal places of business are (1) different countries and (2) parties to the CISG.

If all of the conditions for application of the CISG are met, of particular importance for the drafter of a contract is whether having the CISG govern is desirable. As a self-executing treaty, the CISG is the supreme law of the United States, preempting the application of all state contract law to international contracts. However, the parties may

¹⁹ CISG, *supra* note 1, at art. 2.

²⁰ *Id.* at art. 3(2).

²¹ *Id.* at art. 4.

²² *Id.* at arts. 1(3) & 10.

specifically opt out of the application of the Convention. In such a case, the parties may choose another law to govern the transaction, be it state law or the law of another nation sufficiently connected to the transaction.²³

There is no data available that reveals the extent to which United States attorneys are aware of the CISG and whether they routinely advise clients to negotiate and draft contracts to opt out of the application of the CISG. As late as 1999, one commentator concluded that “[t]he dearth of case law concerning the CISG” was “evidence of the lack of awareness of the CISG.”²⁴ A 2007 article reached the conclusions that “commercial parties are routinely opting out of the CISG due to the uncertainty created by the Convention, as governing contractual law”²⁵ and “as a consequence of [the] CISG’s ambiguity and resulting misinterpretations, parties and lawyers consistently exclude the CISG as applicable law due to its unpredictability in favor of more definite standards.”²⁶ However, these conclusions lack sufficient support because they rely on articles published in 1998 and 1999 and do not provide any data on the number of contracts withdrawing from the CISG.²⁷

While admittedly an imperfect source, the recent decisions of United States courts provide the best information on how and when the CISG is generally being applied to contracts entered into by United States firms and, of course, on what bases these courts are deciding to apply the CISG. An analysis of five years of CISG cases decided by courts in the United States provides a starting point to address two important issues: (1) whether United States firms are routinely opting out of the application of the CISG and, if so, what contract language is

²³ The United States, however, does not allow parties to “opt into” coverage of the Convention. Unless both parties have their principal places of business in different countries that are parties to the CISG, a United States court cannot apply the CISG to the contract. *See Prime Start Ltd. v. Maher Forest Prods. Ltd*, 442 F. Supp. 2d 1113 (W.D. Wash. 2006); *see also infra* notes 353-364 and accompanying text.

²⁴ *See* Bailey, *supra* note 3, at 280.

²⁵ *See* Sheaffer, *supra* note 3, at 469-70.

²⁶ *Id.* at 479.

²⁷ *Id.* at 470 n.51, 479 n.101 (citing Bailey, *supra* note 3, at 276; V. Susanne Cook, *CISG: From the Perspective of a Practitioner*, 17 J.L. & COM. 343, 343 (1998); Paula Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT’L L. 743, 744 (1999)).

required to do so;²⁸ and (2) what authorities United States firms are looking to in interpreting the CISG.

II. FIVE YEARS PLUS OF CISG CASES

A. U.S. FEDERAL COURTS OF APPEALS DECISIONS

Federal courts of appeals have decided fourteen cases based at least in part on the Convention in the years relevant to this article. Seven of those cases were decided before 2003;²⁹ the other seven were decided during the time period of this study.³⁰ Of the seven cases decided before 2003, only one involved the parties to the contract attempting to opt out of the application of the CISG; the other six involved a United States court applying a provision of the CISG to the contract. In each of the cases decided since 2003 in the five year period being studied in this article, the United States Courts of Appeals looked to the language of the Convention and United States domestic law—

²⁸ See John P. McMahon, *Guide for Managers and Counsel* (2006), <http://www.cisg.law.pace.edu/cisg/guides.html> (“The experts suggest language that specifically rules out the application of the Convention, e.g. ‘the law of North Carolina, excluding the CISG’ or ‘Article 2 of the U.C.C. as enacted in New York’ or ‘the law of France, excluding the CISG.’”). A typical choice of law clause that refers to a jurisdiction that has adopted the CISG will not be effective to opt out its provisions.

²⁹ *Schmitz-Werke GMBH Co. v. Rockland Indus., Inc.*, No. 00-1125, 2002 WL 1357095 (4th Cir. June 21, 2002) (per curiam unpublished opinion); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003); *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505 (2d Cir. 1998); *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999); *Attorneys Trust v. Videotape Computer Prods. Inc.*, 93 F.3d 593 (9th Cir. 1996); *Delchi Carrier S.P.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995); *Beijing Metals & Minerals Import/Export Corp. v. Am. Bus. Ctr.*, 993 F.2d 1178 (5th Cir. 1993).

³⁰ *Barbara Berry, S.A. v. Ken M. Spooner Farms, Inc.*, No. 06-35398, 2007 WL 4039341, slip op. (9th Cir. Nov. 16, 2007); *Valero Mktg. & Supply Co. v. Greeni Oy*, Nos. 06-3390, 06-3525, 2007 WL 2064219 (3d Cir. 2007) (unpublished opinion); *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, (11th Cir. 2006); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894 (7th Cir. 2005); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir. 2003); *BP Oil Intn’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003); *Chateau des Charmes Wines Ltd. v. Sabaté USA, Inc.*, 328 F.3d 528 (9th Cir. 2003).

either the decisions of federal or state courts or a state statute (such as the Uniform Commercial Code)—in rendering their decisions.

The Ninth Circuit decided the most recent case during the period of this study in November 2007. In *Barbara Berry, S. A. v. Ken Spooner Farms, Inc.*,³¹ the Ninth Circuit reviewed “de novo the district court’s interpretation and application of treaty language.”³² The court noted that the seller’s place of business was in the state of Washington in the United States and the buyer’s place of business was in Mexico and that both the United States and Mexico were parties to the CISG.³³ The court concluded that the

district court erred in failing to first analyze the formation of the Barbara Berry-Spooner Farms contract under the CISG. [It] reverse[d] due to this error because, applying the CISG, there exist genuine issues of material fact as to when a contract was formed ..., what terms were included in the contract, and whether those terms were later varied.³⁴

The court’s opinion relied on the language of the CISG and the decisions of federal circuit courts of appeals.

In an earlier case, the Ninth Circuit addressed the applicability of the CISG.³⁵ In *Chateau des Charmes Wines Ltd.*, Chateau de Charmes, a winery in Ontario, Canada, orally agreed to purchase corks from Sabaté USA.³⁶ Sabaté France made eleven shipments of corks to Chateau de Charmes.³⁷ Each shipment was accompanied by a document with a forum selection clause stating that disputes would be resolved in “the Court of Commerce of the City of Perpignan.”³⁸ A dispute arose regarding the corks and Chateau des Charmes sued both Sabaté USA and Sabaté France in a federal district court in California.³⁹ The district court granted the defendants’ motion to dismiss based on the validity of the forum selection clauses.⁴⁰

³¹ No. 06-35398, 2007 WL 4039341 (9th Cir. Nov. 16, 2007).

³² *Id.* at *1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528 (9th Cir. 2003).

³⁶ *Id.* at 529.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 529-30.

⁴⁰ *Id.* at 530.

The Ninth Circuit reversed, holding that the Convention controlled the contract because the United States, France, and Canada were all contracting states to the Convention. Applying the CISG, the court held “it is plain that the forum selection clauses were not part of any agreement between the parties.”⁴¹ The court held that the contract was formed by two telephone conversations, and that under the CISG, it could not be changed by the unilateral (albeit repeated) efforts of one of the parties to add the forum selection clause. The court’s opinion referenced the CISG and the decisions of other federal courts of appeal in holding that the CISG governed the contract.

In *Valero Marketing & Supply Co. v. Greeni Oy*, the Third Circuit considered the validity of a contract between a buyer in the United States and a seller in Finland.⁴² In reviewing the lower court’s finding, the court “assume[d] *arguendo* that the District Court was correct in applying [the] CISG in interpreting the September 14 [2001] Agreement.”⁴³ The court held that the lower court misinterpreted the application of Article 29 of the CISG (dealing with contract modifications) and reversed and remanded the case for further consideration.⁴⁴ In reaching its decision, the court relied on the language of the Convention and the opinions of federal courts of appeal. In interpreting the language of the CISG, the court also referred generally to portions of the United Nations Commission on International Trade Law (UNCITRAL) Digest, described by the court as a “digest of international case law analyzing the CISG.”⁴⁵ The court did not cite any specific commentary or cases from the digest. Thus, the Third Circuit considered, at least generally, how the courts of other countries have interpreted the CISG.

The Eleventh Circuit considered the application of the Convention in *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*⁴⁶ In *Treibacher Industrie*, the court considered the validity of two contracts executed in November and December of 2000.⁴⁷ *Treibacher Industrie*, an Austrian company, agreed to sell tantalum carbide to a

⁴¹ *Id.* at 531.

⁴² 242 F. App’x 840 (3d Cir. 2007).

⁴³ *Id.* at 844.

⁴⁴ *Id.* at 845.

⁴⁵ *Id.* at n.8. The digest can be found at United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited Nov. 18, 2009).

⁴⁶ 464 F.3d 1235 (11th Cir. 2006).

⁴⁷ *Id.* at 1236.

buyer in Alabama.⁴⁸ Treibacher sued in a federal district court after the buyer refused to take delivery.⁴⁹ The district court ruled that under the CISG, evidence of the parties' interpretation of the delivery term in their course of dealings controlled over the term's customary usage in the industry.⁵⁰ At both the trial court and the Eleventh Circuit, the parties did not dispute that the CISG controlled the contract.⁵¹ The appellate court affirmed the lower court's holding, stating the "district court properly determined that, under the CISG, the meaning the parties ascribe to a contractual term in their course of dealings establishes the meaning of that term in the fact of a conflicting customary usage of the term."⁵² The court's decision was supported purely by the language of the CISG and did not reference any cases from outside the United States.

The Seventh Circuit addressed the application of the CISG in *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*⁵³ Chicago Prime Packers, a Colorado corporation, agreed to sell pork ribs to Northam Food, a partnership formed under the laws of Ontario, Canada.⁵⁴ The ribs were delivered by Chicago Prime to a third party shipper.⁵⁵ Northam refused to pay the contract price after the ribs arrived in an "off condition."⁵⁶ Chicago Prime prevailed in a breach of contract action in the federal district court.⁵⁷

The Seventh Circuit noted that "the district court held, and the parties do not dispute, that the contract at issue is governed by the United Nations Convention on Contracts for the International Sale of Goods."⁵⁸ An issue arose as to which party had the burden of proof regarding the conformity of the delivery. Noting that "proper assignment of the burden of proof is a question of law that we review de novo," the court found that the "CISG does not state expressly whether the seller or the buyer bears the burden of proof as to the product's conformity to the contract."⁵⁹ Finding little CISG case law,

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1237.

⁵¹ *Id.* at 1238 n.5.

⁵² *Id.* at 1240.

⁵³ 408 F.3d 894 (7th Cir. 2005).

⁵⁴ *Id.* at 895.

⁵⁵ *Id.*

⁵⁶ *Id.* at 896.

⁵⁷ *Id.* at 897.

⁵⁸ *Id.* at 897-98.

⁵⁹ *Id.* at 898.

the court looked to analogous provisions of Article 2 of the Uniform Commercial Code (UCC).⁶⁰ The court concluded that since the CISG warranty provisions “mirror[ed] the structure and content” of Article 2’s warranty provisions, “just as a buyer-defendant bears the burden of proving breach of the implied warranty of fitness for ordinary purpose under the U.C.C., under the CISG, the buyer-defendant bears the burden of proving non-conformity at the time of transfer.”⁶¹ The court affirmed the lower court’s holding that the buyer had not met the burden of proof.⁶² Thus, in interpreting the Convention in connection with which party bears the burden of proving conformity of goods, the court relied on Article 2 of the UCC and cited both an international treatise and a law review article.⁶³ However, the court did not look to the decisions of any court outside the United States.

At least one commentator has cited *Chicago Prime Packers* as an example of the tendency of United States courts “to rely on domestic analogies, methods of interpretation and domestic case law in interpreting matters that fall within the scope of the CISG.”⁶⁴ The commentator further criticized the Seventh Circuit’s reliance on the UCC as “failing to give deference to other courts that have decided similar issues” and failing to support the Convention’s “goal of promoting uniformity in international trade.”⁶⁵

The Third Circuit addressed, but did not apply, the CISG in *Standard Bent Glass Corp. v. Oy*.⁶⁶ Standard Bent Glass, a Pennsylvania corporation, negotiated to purchase a machine from Glassrobots Oy, a Finnish corporation.⁶⁷ The agreement was formed through a variety of communications between the parties.⁶⁸ After Glassrobots delivered the machine, Standard Bent noticed defects in the equipment and brought suit for breach of contract.⁶⁹ Glassrobots removed the case to federal court and filed a motion to compel

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 900.

⁶³ *Id.* at 898 (citing 1 RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS § 1.15, at 39 (2d ed. 2002); DiMatteo, *supra* note 6, at 400).

⁶⁴ Shani Salama, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application*, 38 U. MIAMI INTER-AM. L. REV. 225, 248 (2006).

⁶⁵ *Id.*

⁶⁶ 333 F.3d 440 (3d Cir. 2003).

⁶⁷ *Id.* at 442.

⁶⁸ *Id.* at 442-43.

⁶⁹ *Id.* at 443.

arbitration based on an arbitration agreement in one of the documents comprising the contract.⁷⁰ The district court granted Glassrobots's motion to compel arbitration.⁷¹

The issue before the Third Circuit was whether the binding arbitration clause was part of the contract.⁷² The court applied both Article 2 of the UCC and the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards⁷³ and held the arbitration clause was enforceable.⁷⁴ Noting that the CISG would ordinarily apply to a sale of goods between parties in nations that are signatories to the Convention, the court stated that Finland did not adopt the CISG's provisions regarding contract formation.⁷⁵ However, the parties did not raise the issue of the applicability of the CISG, and the court declined to address it.⁷⁶

In the time period under consideration, the Fifth Circuit Court of Appeals was the only appellate court to directly address the effect of a typical choice of law clause on the application of the CISG to a contract. In *BP Oil International, Ltd. v. Empresa Estatal Petroleos*, the buyer, an Ecuadorian company, contracted with BP Oil, an American corporation, for the purchase of gasoline.⁷⁷ One provision of the final agreement stated: "Jurisdiction: Laws of the Republic of Ecuador."⁷⁸ A dispute arose regarding the conformity of the shipment to the terms of the contract.⁷⁹ The district court applied Ecuadorian substantive law and granted summary judgment for the buyer.⁸⁰ The seller appealed, contending that the contract was governed by the

⁷⁰ *Id.*

⁷¹ *Id.* at 444.

⁷² *Id.* at 443.

⁷³ Art. II §2; 9 U.S.C. §§ 201-208.

⁷⁴ *Standard Bent Glass*, *supra* note 66, at 450.

⁷⁵ *Id.* at 444 n.7; *see also* Finland, U.N. Commission on International Trade Law, Status, 1980 United Nations Convention on Contracts for the International Sale of Goods, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited June 12, 2008).

⁷⁶ *Id.* at 444 n.7.

⁷⁷ 332 F.3d 333 (5th Cir. 2003), *aff'd*, NO. 04-20911, 2008 WL 162889 (Jan 16, 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 105, 172 L.Ed.2d 33 (Oct. 6, 2008).

⁷⁸ *Id.* at 336 n.4 (stating that the court "assume[d] *arguendo* that the provision stating 'Jurisdiction: Laws of the Republic of Ecuador' unambiguously conveys the intent to apply Ecuadorian law").

⁷⁹ *Id.* at 335.

⁸⁰ *Id.*

CISG.⁸¹ The Fifth Circuit noted that CISG, as federal law, governed the dispute unless the parties opted out.⁸² The court rejected the buyer's contention that the choice of law provision referencing Ecuadorian law was sufficient evidence that the parties intended to have Ecuadorian substantive law apply instead of the CISG because Ecuador had adopted the CISG.⁸³

The court reasoned that since the Convention is Ecuadorian law, "a choice of law provision designating Ecuadorian law merely confirms that the treaty governs the transaction. Where parties seek to apply a signatory's domestic law in lieu of [the] CISG, they must affirmatively opt-out of the CISG."⁸⁴ The court concluded that an affirmative opt-out requirement promotes the two principles that guide interpretation of the CISG: "uniformity and observance of good faith in international trade."⁸⁵ In deciding that opting out required a higher burden of proof, the court looked to the language of the CISG, the decisions of United States courts, and the same international treatise used by the court in *Chicago Prime Packers*.⁸⁶

In all of the courts of appeals decisions analyzed, the courts looked to the CISG and United States domestic law in arriving at their decisions. None of the courts looked to decisions of courts outside the United States in determining the application of the CISG. One court included a cursory reference to the UNCITRAL Digest of CISG cases;⁸⁷ two referenced the same international treatise,⁸⁸ and one referenced a law review article.⁸⁹

Thus, the most recent United States circuit court decisions interpreting the CISG support the contention that United States courts

⁸¹ *Id.*

⁸² *Id.* at 337.

⁸³ *Id.*

⁸⁴ *Id.* at 337.

⁸⁵ *Id.*

⁸⁶ *Id.* at 337-38 (citing several CISG articles, United States court cases, and FOLSOM, *supra* note 63, § 1.5, at 12, § 1.15, at 41, § 2.3, at 72 in support of its holding).

⁸⁷ See *supra* note 45 and accompanying text.

⁸⁸ See *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos*, 332 F.3d 333, 337-38 (5th Cir. 2003) (citing FOLSOM, *supra* note 63, § 1.5, at 12, § 1.15, at 41, § 2.3, at 72); *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005) (citing FOLSOM, *supra* note 63, § 1.15, at 39, 41).

⁸⁹ See *Chi. Prime Packers, Inc.*, 408 F.3d at 898 (citing Dimatteo, *supra* note 6, at 400).

are likely to interpret the international convention by relying on domestic law, “in direct opposition to the goals of the Convention.”⁹⁰ The court decisions applying principles of the UCC to cases arising under the Convention may unduly disregard scholarly commentary that “the U.C.C. and the CISG are simply not analogous.”⁹¹ Moreover, United States courts have been criticized by some scholars for following a “homeward trend:” “United States judges will tend to seek authoritative guidance from the texts of prior judicial or arbitral decisions, whereas European judges will be inclined to rely far more on academic commentary.”⁹² While two of the circuit court decisions relied at least partially on academic commentary and one cited the UNCITRAL Digest, none of the decisions relied on interpretations by courts outside the United States.

B. U.S. DISTRICT COURT DECISIONS

During the 20 year period since the United States adopted the CISG, dozens of United States district court cases have dealt with cases addressing at least one issue related to the Convention.⁹³ Twenty-seven of those decisions predate the time period of this study. Thirty-six cases were decided by the United States district courts between 2002 and June 2008 (including the seven decisions that were appealed to the circuit courts of appeals).

An analysis of the remaining twenty-nine cases that were decided by federal district courts in the period covering the years 2003-2007 and the first six months of 2008 reveals a decidedly eclectic group of cases and decisions.⁹⁴ An examination of these cases, starting with the

⁹⁰ See Salama, *supra* note 64, at 231.

⁹¹ *Id.* at 231.

⁹² *Id.* at 231 & n.46 (quoting Vivian Grosswalk Curran, *The Interpretive Challenge to Uniformity*, 15 J.L. & COM. 175, 176 (1995) (reviewing CLAUDE WITZ, PARIS: LIBRAIRIE GENERALE DE DROIT ET DE JURISPRUDENCE (1995))).

⁹³ For a complete list of cases see Pace Law School Electronic Library on International Commercial Law and the CISG, CISG Database, Country Case Schedule <http://cisgw3.law.pace.edu/cisg/text/casecit.html#us> (last visited June 12, 2008). Some of the district courts have considered the same case more than once.

⁹⁴ See *infra* Table A. *Valkia Ltd. v. United States*, No. 02-00249, 2004 WL 1375747 (Ct. Int'l Trade June 18, 2004) was excluded from the discussion because of the nature of the action. In a proceeding under antidumping duty laws, the court in dicta referenced the CISG in footnote 7: “It would also appear to be a universally accepted proposition among nations with respect for property rights that it is incumbent upon the seller to convey good, clean,

most recent, reveals an increased awareness of the CISG and expertise in applying it. However, the decisions reveal little use by the courts of decisions outside courts of the United States interpreting the CISG and continued application of the UCC when interpreting the Convention. For ease of discussion, the cases are grouped (loosely) by the main topics related to the CISG.

1. USING THE UCC ARTICLE 2 TO INTERPRET THE CISG WHILE IGNORING INTERNATIONAL CASES

The most recent federal district court case interpreting the CISG during the relevant period for this article illustrates three trends that run through many of the recent cases decided by United States courts: (1) the continued reliance on the UCC commentary and case law as a basis for interpreting the CISG;⁹⁵ (2) the assertion that there is “virtually no case law on the Convention”⁹⁶ in spite of the thousands of decisions worldwide collectively interpreting every section of the convention;⁹⁷ and (3) the almost complete disregard for cases decided outside courts of the United States.

In *Macromex SRL v. Globex International, Inc.*, the United States District Court for the Southern District of New York considered the enforceability of an arbitration award.⁹⁸ Globex, an American company, contracted to sell to Macromex, a Romanian company, 112

unencumbered title, unless the parties otherwise agree that title may be conveyed bearing contingencies. *See, e.g.*, Uniform Commercial Code § 2-312 (warranty of title); 1980 United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. No. A/CONF. 97/19 (1981), Art. 41 (seller’s obligation to deliver free and clear of claims unless otherwise agreed).”

⁹⁵ Scholars have criticized using the U.C.C. as a basis for interpreting the CISG. *See e.g.*, Salama, *supra* note 64, at 231 & n.49 (citing Franco Ferrari, *The Relationship Between the U.C.C. and the CISG and the Construction of Uniform Law*, 29 LOY. L. REV. 1021, 1022 (1996)); *see also infra* notes 125-127 and accompanying text.

⁹⁶ *See Macromex SRL v. Globex Int’l, Inc.*, No. 08 Civ. 114(SAS), 2008 WL 1752530, at *1. (S.D.N.Y. Apr. 16, 2008), *aff’d*, 330 F.App’x 241 (2d Cir. 2009).

⁹⁷ *See* Pace Law School Institute of International Commercial Law, CISG Database, Cases on the CISG, <http://www.cisg.law.pace.edu/cisg/text/case-annotations.html> (listing 2,000 cases and 5,000 annotations applying the CISG) (last visited Nov. 18, 2009) [hereinafter Cases on the CISG].

⁹⁸ *Macromex SRL*, *supra* note 96.

containers of chicken parts.⁹⁹ Delivery was to be in Romania.¹⁰⁰ There was no dispute that the CISG governed the contract.¹⁰¹ Globex was not able to perform the contract because of an order by the Romanian Government that chicken could not be imported into Romania after a specified date.¹⁰² As of that date, forty-two containers of chicken remained undelivered.¹⁰³

Macromex instituted arbitration proceedings against Globex for breach of contract.¹⁰⁴ The arbitrator awarded Macromex \$608,323 in damages.¹⁰⁵ Macromex then brought an action for confirmation of the arbitral award against Globex.¹⁰⁶

The court found that the arbitrator used “two extrinsic sources” to interpret the contract: “authorities within the CISG’s scope, including its commentary and caselaw, and material outside the CISG, such as the U.C.C. and caselaw interpreting the U.C.C.”¹⁰⁷ The court stated that the “arbitrator found the materials within the CISG were of limited use” without examining the basis for the finding.¹⁰⁸ It also noted that the arbitrator found that “section 2-614 of the U.C.C. was dispositive of the issue.”¹⁰⁹ The court noted that the “arbitrator’s decision to use the U.C.C. is not contested by Globex.”¹¹⁰

In upholding the arbitrator’s decision, the court quoted a 1995 decision of the Second Circuit as authority for the proposition that “[b]ecause there is virtually no case law under the Convention, we look to its language and to ‘the general principles’ upon which it is based.”¹¹¹ The *Macromex* court went on to hold that the arbitrator properly applied the principles of the UCC to the facts of the case and confirmed the arbitrator’s decision.¹¹²

⁹⁹ *Id.* at *1

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *1 n.11.

¹¹¹ *Id.* at *2 (quoting *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995)).

¹¹² *Id.* at *4.

While the actual decision of the court is not particularly controversial, the court's application of the UCC to a CISG contract is hard to justify.¹¹³ Perhaps in this case the key is that Globex did not contest its application. Another troubling aspect of the case is the continued assertion by a federal court that no significant case law is available under the CISG when there are literally thousands of cases and a growing body of texts and law journal commentaries available.¹¹⁴ The *Macromex* court's citation of a 1995 case to justify a statement of fact about the number of cases available as of April 2008 ignores thirteen years of jurisprudence and international trade law.

A similar result obtained in *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*¹¹⁵ Raw Materials, an Illinois corporation, contracted to buy railroad rail from a German limited partnership, Forberich.¹¹⁶ Forberich failed to deliver the rail as agreed.¹¹⁷ In an action for breach of contract, both parties agreed that the CISG controlled.¹¹⁸ Raw Materials moved for summary judgment, and Forberich contended it was prevented from delivering the rail as agreed because of an unusually cold winter.¹¹⁹ Although the contract did not contain a *force-majeure* provision, the court noted that CISG Article 79 may excuse non-performance in cases of *force-majeure*:

A party is not liable for failure to perform any of his obligations if he proves that failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the

¹¹³ See *supra* notes 64-65 and accompanying text; see also *infra* notes 124-26 and accompanying text. *Id.* at *1, n.11, *2 n.22 (quoting *Orisphere Corp. v. United States*, 726 F.Supp. 1344, 1355 (Ct. Int'l Trade 2989)) (acknowledging implicitly that application of the UCC could be seen as improper, and stating "The CISG permits the use of either authority in interpreting contracts. See CISG art. 7(2)," and "[c]aselaw interpreting analogous provisions of Article 2 of the [UCC], may also inform the court where the language of the relevant CSIG provisions tracks that of the U.C.C.'").

¹¹⁴ See *Cases on the CISG*, *supra* note 97; see also McMahon, *supra* note 28, at part II.

¹¹⁵ No. 03 C 1154, 2004 WL 1535839 (N.D. Ill. July 7, 2004).

¹¹⁶ *Id.* at *1.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *3.

¹¹⁹ *Id.* at *2.

contract or to have avoided or overcome its consequences.¹²⁰

Raw Materials asserted that no American court had interpreted Article 79 and asked the court to use the UCC for guidance in interpreting when performance is excused.¹²¹ Forberich did not dispute the use of the UCC and also pointed to case law interpreting the UCC.¹²² The court analyzed the facts, applied cases interpreting §2-615, and concluded that a summary judgment was not appropriate since there were disputed issues of fact.¹²³

The court's use of interpretation of the UCC to an issue ultimately governed by the CISG has been criticized by one commentator on two grounds. First, since the courts of several jurisdictions other than the United States had interpreted Article 79 of the CISG, it would have been appropriate for those decisions to have been given "considerable weight."¹²⁴ Second, the drafters of the UCC do not support applying decisions based on the UCC to cases arising under the CISG and suggests that courts use the code's common law history as a basis for interpretation.¹²⁵ The CISG "specifically directs courts to interpret its provisions in light of international practice with the goal of achieving international uniformity. . . . This approach specifically eschews the use of domestic law, such as [UCC] Article 2, as a basis for interpretation."¹²⁶

2. EFFECT OF CHOICE OF FORUM AND CHOICE OF LAW CLAUSES

In September 2007, the United States District Court for the district of Kansas decided *Guang Dong Light Headgear Factory Co., Ltd. v. ACI International, Inc.*¹²⁷ The case centered around a 1998 contract between the seller, Guang Dong, a state owned factory located

¹²⁰ *Id.* at *3 (quoting CISG, *supra* note 1, at Art. 79).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at *4-*6.

¹²⁴ Albert H. Kritzer, Comments on Raw Materials Inc. v. Manfred Forberich, Feb. 2005, available at <http://cisgw3.law.pace.edu/cases/040706u1.html> (quoting El Al Isr. Airlines Ltd. v. Tsui Yan Tseng, 525 U.S. 155, 176 (1999) (quoting Air Fr. v. Saks, 470 U.S. 392, 404 (1995))).

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting Harry M. Flechtner, *Substantial Revisions to U.S. Domestic Sales Law*, INT'L HANDELSRECHT 225, 234 (2004)).

¹²⁷ 521 F. Supp. 2d 1153 (D. Kan. 2007).

in the People's Republic of China, and the buyer, ACI, a Kansas corporation.¹²⁸ Beginning in 1999, a series of documents titled "Sales Contracts" were exchanged between the parties.¹²⁹ Each of the 14 sales contracts contained the following arbitration clause:

All disputes arising from the execution of, or in connection with this contract shall be settled amicably through friendly negotiation. In case no settlement can be reached through negotiation, the case shall be submitted to the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, Beijing, for arbitration in accordance with its provisional rules of procedure. The arbitral award is final and binding upon both parties.¹³⁰

A dispute arose regarding payment on the contract and Guang Dong filed a Notice of Arbitration. ACI did not respond to the Notice of Arbitration.¹³¹ On May 28, 2002 an arbitration panel found that Guang Dong had performed on the contract and that ACI had breached Articles 25 and 53 of the CISG. The panel awarded Guang Dong \$205,280.77 in damages, \$12,109.73 in interest, and \$73,973 in arbitration fees.¹³²

The court noted that "[t]he parties appear to agree that the [CISG] governs this matter. The CISG only deals with the formation of the contract for sale and with the rights and obligations of the buyer and seller"¹³³ The dispositive issue became "whether the parties had a direct contractual relationship that rendered the sales contracts enforceable, and thus, arbitrable."¹³⁴ In applying Article 8(2) of the CISG, the court determined it was required to look at the objective evidence of the parties' intent.¹³⁵ The court found that the objective evidence supported Guang Dong's position that the 14 sales contracts showed a meeting of the minds between the seller and the buyer.¹³⁶ The court granted the seller's motion for summary judgment and

¹²⁸ *Id.* at 1155.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1155-56.

¹³¹ *Id.* at 1162

¹³² *Id.*

¹³³ *Id.* at 1166.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1167.

¹³⁶ *Id.* at 1165.

confirmed the arbitration award.¹³⁷ The court thus supported its decision by reference to the international conventions and United States case law but did not refer to any cases outside the United States.¹³⁸

In *Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.*, the United States District Court of the Western District of Pennsylvania relied on *Standard Bent Glass v. Glassrobots Oy*¹³⁹ to decline enforcement of a German judgment.¹⁴⁰ The underlying dispute involved a contract for the purchase of valves between a United States company, Tippins, and Tyco, a German company.¹⁴¹ Tyco received a judgment based on breach of the contract against Tippins in a German court.¹⁴² Tyco argued in district court that the judgment was not enforceable because the original contract required binding arbitration.¹⁴³ Tyco contended that jurisdiction in the German court was proper based on “its standard Terms and Conditions of Sale and the [CISG], Article 57.”¹⁴⁴ The Western District of Pennsylvania did not address the applicability of the CISG but proceeded to analyze the parties’ agreement to determine whether the arbitration clause was part of the agreement.¹⁴⁵ Without applying the CISG, the court applied the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁴⁶ and concluded that the arbitration clause was part of the agreement.¹⁴⁷ Thus, the court relied on the applicable convention and the decisions of other United States courts in deciding whether the arbitration clause was an enforceable term of the agreement.

The United States District Court for the Eastern District of Michigan twice considered the case of *Easom Automation Systems, Inc.*

¹³⁷ *Id.* at 1169.

¹³⁸ In the earlier case, the court cited a law review article related to the enforcement of judgments and arbitration awards. See *Guang Dong Light Headgear Factory*, 2005 WL 1118130, at *3, n.16 (D. Kan. May 10, 2005) (citing Susan Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 29-33 (2002)).

¹³⁹ 333 F.3d 440 (3d Cir. 2003); see also *supra* notes 66-76 and accompanying text.

¹⁴⁰ No. CIV A 04-1626, 2006 WL 2924814 (W.D. Pa. Oct. 10, 2006).

¹⁴¹ *Id.* at *1.

¹⁴² *Id.* at *3.

¹⁴³ *Id.* at *5.

¹⁴⁴ *Id.* at *3.

¹⁴⁵ *Id.* at *5.

¹⁴⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (2009).

¹⁴⁷ Tyco, *supra* note 140, at *6.

v. *Thyssenkrupp Fabco, Corp.*¹⁴⁸ Easom, a Michigan corporation, agreed to purchase a piece of equipment from Thyssenkrupp, a Nova Scotia corporation headquartered in Ontario, Canada.¹⁴⁹ A written purchase order that contained a choice of law/forum selection clause confirmed the oral agreement:

25. *Jurisdiction/Governing law.* The contract created by Seller's acceptance of Buyer's offer as set out in Paragraph 3 hereof shall be deemed in all respects to be a contract made under, and shall for all purposes be governed by and construed in accordance, with, the laws of the Province where the registered head office of Buyer is located and the laws of Canada applicable therein. Any legal action or proceeding with respect to such contract may be brought in the courts of the Province where the registered head office of buyer is located the parties hereto attorn to the non-exclusive jurisdiction of the aforesaid courts.¹⁵⁰

The buyer filed suit in the Eastern District of Michigan for breach of contract.¹⁵¹ The defendant filed a motion to dismiss on the grounds of forum non conveniens.¹⁵² The court did not address the issue of which law controlled but denied the defendant's motion.¹⁵³ The court held that the defendant failed to demonstrate that the 'balance of hardships' or that trial of the matter before the court would be 'oppressive or vexatious' to the defendant.¹⁵⁴ The court noted that at the hearing the defendant had supplied the court with a Canadian case in support of the motion, but the court found the case "to be unpersuasive on the issue of *Forum Non Conveniens*."¹⁵⁵ Without reaching the issue of which law would control, the court noted if

¹⁴⁸ No. 06-145553, 2007 WL 2225863 (E.D. Mich. Aug. 1, 2007), and 2007 WL 2875256 (Sept. 28, 2007).

¹⁴⁹ *Easom Automation Sys., Inc.*, 2007 WL 2225863, at *1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at *1.

¹⁵³ *Id.* at *4.

¹⁵⁴ *Id.* at *3.

¹⁵⁵ *Id.* at *4 n.6 (citing *Gutierrez v. Tropic Int'l Ltd.*, 63 O.R.3d 63 (Ont. Ct. App. 2002)).

Ontario law is found to apply, “it is not uncommon for U.S. courts to hear cases in which foreign law is applied.”¹⁵⁶

The buyer then filed a motion for immediate possession of the machinery under the Michigan Special Tools Lien Act.¹⁵⁷ The defendant seller argued that since the parties had agreed that Ontario law controlled the contract, the Michigan Special Tools Lien Act did not apply.¹⁵⁸ The buyer contended that the contract was governed by the CISG.¹⁵⁹ The court noted that the parties to a contract can opt out of the CISG as the governing law and can agree that their contract be governed by another law.¹⁶⁰ However, the court held that the opt-out provision must expressly exclude application of the CISG.¹⁶¹

The court did not address squarely the effectiveness of the choice of law provision as opting out of the CISG. Instead, the court held that the Convention applied under the terms of the choice of law provision promulgated by the seller, holding that “stating that the law of Canada applied to the agreement indicates that the CISG applied as well, as the Convention is the law of Canada.”¹⁶² The court went on to note that since the CISG governs only formation of contracts and the rights and obligations of the seller and buyer arising from such a contract, the Michigan Special Tools Act may apply.¹⁶³ The court concluded, however, that issues of fact remained regarding what documents constituted the contract and denied the plaintiff’s motion for immediate possession of the goods.¹⁶⁴

Perhaps the most important choice of law case in connection with the CISG decided in the district courts during the time period under study is *Travelers Property Casualty Co. of America v. Saint-Gobain Technical Fabrics Canada Ltd.*¹⁶⁵ In addition to being a consequential

¹⁵⁶ *Id.* at *3 (quoting *Gutierrez v. Diana Inv. Corp.*, 946 F.2d 455, 456 n.3 (6th Cir. 1992)).

¹⁵⁷ *Easom Automation Sys., Inc. v. Thyssenkrupp Fabco, Corp.*, No. 06-145553, 2007 WL 2875256 (Sept. 28, 2007). The relevant statute is MICH. COMP. LAW. §§ 570.563 - .571 (West Supp. 2007). This case may also ultimately involve preemption of state law by the CISG, but it was not an issue in this case.

¹⁵⁸ *Id.* at *2.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *3.

¹⁶¹ *Id.*

¹⁶² *Easom Automation Sys., Inc.*, 2007 WL 2875256, at *3.

¹⁶³ *Id.* at *4.

¹⁶⁴ *Id.* at *4-5.

¹⁶⁵ 474 F. Supp. 2d 1075 (D. Minn. 2007).

and well reasoned opinion, the *Travelers* case presents a very interesting fact situation involving the construction of the Pepsi Center in Denver, Colorado. At the heart of this case was a contract between a Minnesota corporation, TEC Specialty Products, Inc. (TEC) and Saint-Gobain, the Canadian corporation that supplied mesh that was used in the construction of the Pepsi Center.¹⁶⁶ The mesh proved defective and caused portions of the Pepsi Center's exterior to separate from its foundation, resulting in millions of dollars in damages.¹⁶⁷ The plaintiffs in this case brought suit as subrogees and assignees of a variety of claims, including TEC's, against Saint-Gobain regarding its performance of the contract.¹⁶⁸ One issue involved the plaintiffs' motion for summary judgment relying on its contestable interpretation of the contract for the purchase of the mesh.¹⁶⁹

The terms of TEC's purchase order provided that "[t]he validity, interpreta[tion], and performance of these terms and conditions and all rights and obligations of the parties shall be governed by the laws of the State of Minnesota."¹⁷⁰ Section 6 of terms and conditions provided by Saint-Gobain stated:

The Company warrants only that all goods shall be of merchantable quality and in accordance with specifications. It will replace without charge f.o.b. point of designation, Dominion of Canada, all goods shown to be otherwise than as warranted. Liability is limited to such replacement and the Company shall in no case be liable otherwise or for indirect of [sic] consequential damages.¹⁷¹

In their motion for summary judgment, the plaintiffs argued that the CISG should control contract formation issues in the case.¹⁷² The plaintiffs contended that under the Convention, the terms of TEC's purchase order (including indemnification and express warranty provisions) were part of the contract between TEC and Saint-Gobain.¹⁷³ Saint-Gobain argued that the choice of law provision in TEC's

¹⁶⁶ *Id.* at 1077.

¹⁶⁷ *Id.* at 1078.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1079.

¹⁷⁰ *Id.* at 1080.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 1082.

purchase order (which specified Minnesota law as the choice of law) dictated that Minnesota Uniform Commercial Code applied to the contract.¹⁷⁴ The United States District Court for the District of Minnesota sided with the plaintiffs, holding that “since both Canada and the United States have ratified the CISG, it appli[ed] in this case unless the parties excluded its application.”¹⁷⁵ The court rejected Saint-Gobain’s argument that the parties had excluded the application of the CISG by agreeing that Minnesota law governed the transaction.¹⁷⁶ In doing so, the court sided with the vast majority of courts that have interpreted similar choice of law provisions and held that reference to a particular state law is insufficient to opt out of the Convention. The court held that opting out of the CISG requires an express statement by the parties “that the CISG does not apply.”¹⁷⁷

The court went on to note that even if the choice of law referring to a particular state law is effective, the CISG still applies to the transaction.¹⁷⁸ The court based this conclusion on the nature of federal law—in this case the CISG—as the supreme law of the land.¹⁷⁹ Therefore, the parties must affirmatively opt out of the Convention, which is independent of any state law issues. The court’s holding that the parties had not opted-out of the CISG is clearly in line with the great weight of authority.¹⁸⁰ However, in considering the claim for breach of an implied warranty, the court relied on a 1995 case to support its use of the UCC in interpreting the CISG.¹⁸¹ Again, the court generally did not address the controversy surrounding the application of UCC principles to cases decided under the convention.¹⁸²

The court based its holding on the applicability of the CISG on four cases, three of them decided in the period under study. In reaching its conclusion, the court cited the Fifth Circuit’s decision in *BP Oil International Ltd. v. Empresa Estatal Petroleos De Ecuador*¹⁸³ as well

¹⁷⁴ *Id.* at 1083.

¹⁷⁵ *Id.* at 1081.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1081-82.

¹⁷⁸ *Id.* at 1082.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1085 n.4 (citing *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1038 (2d Cir. 1995)).

¹⁸² *See id.* *See supra* notes 64-65 and 124-26 and accompanying text.

¹⁸³ 332 F.3d 333 (5th Cir. 2003). *See also supra* notes 77-86 and accompanying text.

as *American Mint LLC v. GOSoftware, Inc.*,¹⁸⁴ *Ajax Tool Works, Inc. v. Can-Eng Manufacturing, Ltd.*,¹⁸⁵ and *Asante Technologies, Inc. v. PMC-Sierra, Inc.*¹⁸⁶ (decided outside the time period being examined).¹⁸⁷ The court declined to follow *American Biophysics Corp. v. Dubois Marine Specialties*,¹⁸⁸ a 2006 decision of the United States District Court for the District of Rhode Island.¹⁸⁹

In *American Mint*, the court faced two issues regarding whether the CISG applied: (1) whether the litigants from different CISG signatory countries were parties in fact to the disputed contract; and (2) whether a choice of law clause resulted in the parties opting out of the CISG.¹⁹⁰ The parties to the alleged contract included a German citizen, Michael Goede, and two American corporations, American Mint LLC (wholly owned by Goede) and GOSoftware, Inc.¹⁹¹ American Mint contracted to purchase software from GOSoftware.¹⁹² The software, intended for delivery in Germany, needed to be compatible with German numeric symbols.¹⁹³ After the software allegedly malfunctioned, Goede and American Mint filed suit against the seller.¹⁹⁴ The plaintiffs' complaint alleged the CISG governed the contract.¹⁹⁵ The defendant moved to dismiss based on lack of subject matter jurisdiction.¹⁹⁶ The defendant argued that the court did not have federal question jurisdiction because the CISG did not apply for two reasons.¹⁹⁷ First, the parties opted out as evidenced by the contract's choice of law provision.¹⁹⁸ Secondly, Goede was not in fact a party to

¹⁸⁴ No. 1:05- CIV-A-650, 2006 WL 42090, at *3-4 (M.D. Pa. Jan. 6, 2006).

¹⁸⁵ No. 01-C5938, 2003 WL 223187, at *2-3 (N.D. Ill. Jan. 29, 2003).

¹⁸⁶ 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001).

¹⁸⁷ *Travelers*, *supra* note 165, at 1082.

¹⁸⁸ 411 F. Supp. 2d 61, 63 (D.R.I. 2006).

¹⁸⁹ *Travelers*, *supra* note 165, at 1082.

¹⁹⁰ See *Am. Mint LLC v. GOSoftware, Inc.*, No. 1:05-CIV-A-650, 2005 WL 2021248, at *3 (M.D. Pa. Aug. 16, 2005).

¹⁹¹ *Id.* at *1.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at *2.

¹⁹⁸ *Id.*

the contract that was merely between GOSoftware and American Mint, and the CISG therefore did not apply.¹⁹⁹

Addressing the choice of law provision, the court found that the alleged contract contained a provision specifying Georgia law as governing disputes under the contract.²⁰⁰ Relying on *BP Oil International Ltd.*, the court held that the general choice of law language was not sufficient to opt out of the CISG because it did not “expressly exclude the CISG by language which affirmatively states it does not apply.”²⁰¹ Turning to the question of whether Goede was a party in fact to the contract, the court determined that the plaintiff’s evidence was insufficient to show that Goede was a party.²⁰² The court held that the plaintiff had produced no evidence that the CISG applied to the transaction.²⁰³

A similar interpretation of a typical choice of law clause occurred in *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*²⁰⁴ Ajax Tool manufactured tools in Illinois.²⁰⁵ Can-Eng, an Ontario, Canada Corporation, contracted to sell a furnace to Ajax Tool.²⁰⁶ The basis of the agreement was a 1997 proposal that included the following statement: “This agreement shall be governed by the laws of the Province of Ontario, Canada. Any terms and conditions herein, which may be in conflict with Ontario Law, shall be deleted[;] however, all other terms and conditions shall remain in force and effect.”²⁰⁷

A dispute arose regarding the performance of the furnace, and the parties disagreed as to whether the CISG or the law of Ontario with respect to the domestic sale of goods controlled the dispute.²⁰⁸ The court held that the general language specifying Ontario law was not sufficient to opt out of the CISG.²⁰⁹ The court elaborated: “although the parties have designated Ontario law as controlling, it is not the provincial law of Ontario that applies; rather, because the CISG is the law of Ontario, the CISG governs the parties’ agreement.”²¹⁰ Under

¹⁹⁹ *Id.* at *3.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ No. 01 C 5938, 2003 WL 223187 (N.D. Ill. Jan. 30, 2003).

²⁰⁵ *Id.* at *1.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at *2-3.

²¹⁰ *Id.* at *3.

either reasoning, then, the contract was governed by the CISG as adopted by Ontario.²¹¹ However, the court noted that the CISG did not “preempt” the parties’ contract; instead, it provided a statutory authority on which the contract should be overlaid.²¹² Thus, the parties were free to enter into an agreement and the express terms of that agreement control the contract.²¹³

Applying the CISG, the court declined to enter summary judgment on the buyer’s claim of breach of implied warranty and declined to enter summary judgment barring its claims for consequential damages.²¹⁴ In reaching its conclusions, the court interpreted the CISG by relying on the statutory language and domestic cases.²¹⁵ The court also concluded that since the CISG does not address the issue of waiver of warranty, the laws of Ontario “filled the gap,”²¹⁶ and the court applied Ontario law to the issue of waiver rather than entering summary judgment on the buyer’s claim of breach of express warranty.²¹⁷

The only United States case holding that a simple choice of law provision precluded application of the Convention is *American Biophysics v. Dubois Marine Specialties*.²¹⁸ American Biophysics, a Delaware corporation with its principal place of business in Rhode Island, entered into an agreement to sell “Mosquito Magnets” to Dubois, a Canadian corporation with its principal place of business in Manitoba Province.²¹⁹ The agreement provided at Subsection 11(h): “This Agreement shall be construed and enforced in accordance with the laws of Rhode Island. The parties agree that the courts of the State of Rhode Island, and the Federal Courts located therein, shall have exclusive jurisdiction over all matters arising from this Agreement.”²²⁰ American Biophysics alleged that Dubois breached the agreement and brought suit in the U.S. District Court for the District of Rhode Island. Dubois moved to dismiss the complaint on the grounds of forum non

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at *5-6.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at *5.

²¹⁸ *American Biophysics*, *supra* note 188.

²¹⁹ *Id.* at 62.

²²⁰ *Id.*

conveniens and lack of personal jurisdiction.²²¹ Dubois sought to avoid the forum selection clause and contended that the contract should be governed by the CISG.²²² The court denied the motion and ruled that the CISG was not applicable since the contract contained a choice of law clause.²²³ The court reasoned that Subsection 11(h) of the contract was “sufficient to exclude application of the CISG.”²²⁴ Dubois argued that Subsection 11(h) did not expressly exclude application of the CISG as required by Manitoba law.²²⁵ In so reasoning, the court rejected Dubois’s argument that applicable Manitoba law required the provision to expressly exclude application of the CISG.²²⁶

In concluding that the choice of law clause was sufficient to negate the application of the CISG, the District Court of Rhode Island is at odds with the conclusion of all other courts that have addressed the issue in the past five years. In support of its decision, the court in *American Biophysics* cited *Amco Ukrservice v. American Meter Co.*, a 2004 case.²²⁷ Nowhere in the *Amco* opinion did the court reference or discuss a choice of law provision in the joint venture agreements at dispute in that case. Thus, the reliance of the court in *American Biophysics* on the *Amco* court’s interpretation of the effect of a choice of law clause on opting out of the CISG is misguided. The *American Biophysics* court’s reliance on *Amco* seems especially puzzling since a major holding of the latter was that the CISG did not apply because the disputed contract did not involve a sale of goods but a joint venture.²²⁸ Thus, the facts of the *Amco* case and the *Amco* court’s holding simply do not support the conclusions of the court in *American Biophysics* regarding the effect of a simple choice of forum clause on the applicability of the Convention. Notably, the court in *American Biophysics* relied entirely on the terms of the Convention and the decisions of only United States courts in reaching its decision.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 63.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 64.

²²⁷ 312 F. Supp. 2d 681 (E.D. Pa. 2004).

²²⁸ *Id.* at 683.

3. APPLICABILITY OF THE CISG GENERALLY

During the period under review, the United States district courts illustrated a willingness to apply the CISG, albeit an unwillingness to look to developing jurisprudence outside United States courts.

In *Zhejiang Shaoxing Yongli Printing and Dyeing Co. v. Microflock Textile Group Corp.*, the court granted the plaintiff's motion for summary judgment.²²⁹ The case involved eight orders for shipment of polyester dyed fabric.²³⁰ The court noted that the parties are from the United States and China and concluded that the CISG controlled "automatically" and provided the "substantive law governing this contractual dispute."²³¹ The court went on to state correctly "[d]omestic law, including the Uniform Commercial Code as incorporated in Fla. Stat. §§ 670.101-680.532, does not govern the parties' contractual relationship."²³² The court cited only the decisions of other United States district courts in applying the CISG to the contract and granting the plaintiff's motion for summary judgment.²³³

United States cases again provided the sole authority in *Solae, LLC v. Hershey Canada Inc.*²³⁴ Solae Inc. is a limited liability company with its principal place of business in Missouri.²³⁵ Hershey Canada, the buyer, has its principal place of business in Ontario, Canada.²³⁶ The parties entered into a series of contracts for the sale of soy lecithin products.²³⁷ A dispute arose regarding the performance of a contract entered into in 2006.²³⁸ While a case involving the contract was pending in Ontario, Canada, Solae brought this case in the District Court of Delaware.²³⁹ Hershey Canada asked the court to dismiss the Delaware action.²⁴⁰ Solae contended that a forum selection clause in one of the documents that passed between the parties was part of the contract and required that any disputes about the contract be

²²⁹ No. 06-22608-CIV, 2008 WL 2098062 (S.D. Fla. May 19, 2008).

²³⁰ *Id.* at *1.

²³¹ *Id.* at *2.

²³² *Id.*

²³³ See *Id.* at 2, 4, 5.

²³⁴ 557 F. Supp.2d 452 (D. Del 2008).

²³⁵ *Id.* at 454.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 455.

²⁴⁰ *Id.*

adjudicated in Delaware.²⁴¹ The court noted that the parties agreed that the CISG governed formation of the contract and applying CISG principles for contract formation, held that the forum selection clause was not part of the contract.²⁴² The court went on to hold that the court did not have personal jurisdiction over Hershey Canada and granted its motion to dismiss.²⁴³

Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd. involved a plaintiff's motion to amend its complaint to assert the applicability of the CISG.²⁴⁴ Cedar, a corporation registered in and having its principal place of business in New York, contracted to sell liquid phenol to Ertisa, S.A., a Spanish corporation.²⁴⁵ As a result, Cedar purchased from Dongbu, a Korean corporation, phenol that ultimately did not conform to the contract specifications.²⁴⁶

Cedar sued Dongbu in the United States District Court for the Southern District of New York for breach of contract, negligence, and fraud.²⁴⁷ Cedar then sought to amend its complaint to delete the negligence and fraud claims, to assert the applicability of the CISG, and to add Ertisa as a plaintiff.²⁴⁸ Dongbu consented to the withdrawal of the negligence and fraud claims but "oppos[ed] the remaining amendments on grounds of futility."²⁴⁹ Regarding the plaintiff's amendment asserting that the CISG applied to the contract, the court stated that the CISG applied to the contract since Cedar's principal place of business was in the United States and Dongbu's was in Korea, and both countries are both signatories. The court stated further that there was no indication that the parties opted out of the CISG's provisions.²⁵⁰ The court noted that "[e]ven if Dongbu was correct [and the CISG did not apply], Cedar would still be left with a breach of contract claim."²⁵¹ The court relied solely on decisions of United States

²⁴¹ *Id.* at 456.

²⁴² *Id.* at 457.

²⁴³ *Id.* at 461.

²⁴⁴ No. 06 Civ. 3972(LTS)(JCF), 2007 WL 2059239 (S.D.N.Y. July 19, 2007), *dismissed on other grounds*, No. 6 Civ. 3972(LTS)(JCF) (S.D.N.Y. Mar. 6, 2009).

²⁴⁵ *Id.* at *1.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at *2.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at *3.

courts in reaching its decision to allow plaintiff's motion to amend its petition.

In *Zhanjiang Go-Harvest Aquatic Products Co., Ltd. v. Southeast Fish & Seafood Co.*, the U.S. District Court for the Southern District of Florida denied motions to dismiss and to drop a plaintiff for improper joinder without discussing the law governing the contract in dispute.²⁵² The case considered a series of contracts to purchase seafood by Southeast Fish & Seafood, a business with its principal place of business in Florida.²⁵³ In its order denying defendants' motion to dismiss, the court noted that the plaintiffs, Zhanjian and Hainan Golden Spring Foods, sought recovery for breach of contract under the Convention.²⁵⁴ However, the court did not discuss or rule on the applicability of the Convention to the case at bar and relied entirely on United States case law and statutes to support its decision to deny the motion to dismiss; additionally, it did not mention the principal place of business of the plaintiffs.²⁵⁵

In *China North Chemical Industries Corp. v. Beston Chemical Corp.*, the United States District Court for the Southern District of Texas applied the CISG to a contract between China North, with its principal place of business in China, and Beston, with its principal place of business in the United States.²⁵⁶ China North agreed to sell explosive boosters to Beston deliverable under the "Incoterm" of "Cost, Insurance, and Freight" (CIF).²⁵⁷ China North sought full payment for the boosters while Beston refused because of damage that occurred during shipping.²⁵⁸ China North argued on summary judgment that the Incoterms shifted liability for damage to the buyer after the boosters were loaded onto the transport ship.²⁵⁹

The parties agreed that the CISG governed the contract.²⁶⁰ The court ruled that Incoterms were incorporated into the CISG through

²⁵² No. 07-60126 CIV, 2007 WL 1549458 (S.D. Fla. May 25, 2007).

²⁵³ *Id.* at *1.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at *2-*3.

²⁵⁶ No. Civ.A. H-04-0912, 2006 WL 295395 (S.D. Tex. Feb. 7, 2006).

²⁵⁷ *Id.* at *1. The "Incoterms" are thirteen specific trade agreement terms, propounded by the International Chamber of Commerce, that provide universally understood standards for certain common trade agreement provisions. CIF specifies a seller's duties in delivering goods.

²⁵⁸ *Id.* at *2.

²⁵⁹ *Id.* at *5-7.

²⁶⁰ *Id.* at *8.

Article 9(2),²⁶¹ and it also found that the parties adopted the CIF provision through the provision for CIF delivery in the contract.²⁶² The court ruled that the CIF Incoterm placed the risk of damage to the cargo on the buyer when the goods passed the ship's rail²⁶³ and entered summary judgment in favor of China North subject to a trial on whether the goods were defective, did not meet contract specifications at the time of the performance, or both.²⁶⁴ The case is significant for its holding that the CISG incorporates Incoterms. Since Incoterms are integral to the way that business is conducted internationally, a United States court opinion explicitly stating that the terms are part of contracts under the CISG should provide increased impetus for U.S. firms embracing the CISG.

In *Wausau Tile, Inc. v. Navigators Insurance Co.*, Wausau Tile of Wisconsin purchased a tile grinding and polishing machine from Longionotti Meccanica, Inc., an Italian corporation.²⁶⁵ Wausau Tile contracted with Thomas J. Krenz "to inspect, insure and arrange for shipment of the machine from Italy to Wisconsin."²⁶⁶ Krenz contracted for transport of the machine, which was damaged in shipment and worthless when it arrived in Wisconsin; consequently, Wausau sued the seller, Krenz, and the transporters.²⁶⁷ The case was removed to federal court because the contract was subject to the CISG.²⁶⁸ The court denied the defendants' motion to dismiss without mentioning the CISG or any cases related to it.²⁶⁹ It appears from the facts presented that few of the actions in this case are likely to involve the Convention in spite of the plaintiff's contention that the CSIG applied.

In *Commercializadora Portimex S.A. De CV v. Zen-Noh Grain Corp.*, Zen-Noh, a Louisiana corporation, agreed to sell grain to Portimex, a Mexican corporation.²⁷⁰ A dispute arose as to whether the

²⁶¹ *Id.* at *6 (quoting Article 9(2), which states, "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned").

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at *8.

²⁶⁵ No. 05-C-600-S, 2006 WL 278856 (W.D. Wis. Feb. 2, 2006).

²⁶⁶ *Id.* at *1.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at *2.

²⁷⁰ 373 F. Supp. 2d 645 (E.D. La. 2005).

goods conformed with the contract requirements and Portimex filed suit in the Eastern District of Louisiana.²⁷¹ The court decided that Louisiana law governed the transaction, which neither party disputed.²⁷² After a trial, the court entered judgment for Zen-Noh.²⁷³ Portimex brought a new suit on the same transaction in Mexico, and Zen-Noh asked the Eastern District of Louisiana to enjoin Portimex from prosecuting the new suit in Mexico.²⁷⁴

Portimex contended that the Mexican litigation was not duplicative because it alleged claims under the CISG.²⁷⁵ The court disagreed and noted that the Mexican litigation involved the same parties, the same facts and the same causes of action.²⁷⁶ In both suits, Portimex alleged that Zen-Noh breached the same two contracts.²⁷⁷ The court stated that applying the Convention to the allegations did not create a new cause of action.²⁷⁸ The court went on to state that Portimex had a full and fair opportunity to argue in this court that the CISG should apply.²⁷⁹ Portimex never alleged a CISG claim or disputed the application of Louisiana law.²⁸⁰ The court ordered a permanent injunction against Portimex proceeding with its Mexican suit.²⁸¹

The contracts at issue in *Portimex* should have been subject to the CISG since both parties resided in signatory countries to the Convention and the contract involved a sale of goods. Neither party nor the court raised the applicability of the Convention in the first action. Consequently, the application of Louisiana law, albeit erroneous, stands. The court relied on United States cases to support its decision.

²⁷¹ *Id.* at 646.

²⁷² *Id.*

²⁷³ *Id.* at 647-48.

²⁷⁴ *Id.* at 645.

²⁷⁵ *Id.* at 650.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 652-53.

4. THE “GOODS” REQUIREMENT UNDER THE CISG

In *Amco Ukrservice v. American Meter Co.*, the United States District Court for the Eastern District of Pennsylvania held that the CISG did not apply to a joint venture agreement.²⁸² Two Ukrainian corporations, Amco Ukrservice and Prompriladamco, entered into joint venture agreements with American Meter Co. by which American Meter was to provide the Ukrainians with gas meters and related piping.²⁸³

The agreements were negotiated in Ukraine, written in the Ukrainian language, and provided for the creation of Ukrainian corporations.²⁸⁴ However, the court noted that all of the American Meter employees “who hatched the Ukrainian project worked from corporate headquarters in Horsham, Pennsylvania, and most important of all, the parties to the joint venture agreements contemplated that American Meter would oversee the project, extend credit, and arrange for the shipment of goods from its offices here.”²⁸⁵ American Meter moved for summary judgment, arguing that the joint venture agreements were invalid under both the CISG and Ukrainian law.²⁸⁶ In evaluating the argument, the court noted that the United States and Ukraine are both parties to the CISG.²⁸⁷ However, on the issue of whether a joint venture agreement to provide goods was a sale of goods under the Convention, the court noted that the CISG “does not define what constitutes a contract for the sale of goods.”²⁸⁸ The court went on to state “[t]his lacuna has given rise to the problem of the Convention’s applicability to distributorship agreements, which typically create a framework for future sales of goods but do not lay down precise price and quantity terms.”²⁸⁹ In a refreshing salve to the international nature of the CISG, the court considered decisions of both the United States and Germany in arriving at its conclusion that the CISG does not apply to distributorship contracts.

After analyzing decisions of courts in the United States, the court stated: “[t]wo German appellate cases have similarly concluded that the CISG does not apply to distributorship agreements, which they termed

²⁸² *Amco*, *supra* note 227, at 697.

²⁸³ *Id.* at 683.

²⁸⁴ *Id.* at 688.

²⁸⁵ *Id.* at 689.

²⁸⁶ *Id.* at 683.

²⁸⁷ *Id.* at 686.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

'framework agreements,' but does govern sales contracts that the parties enter pursuant to those agreements."²⁹⁰ Thus in 2004, for the first time in the period under review, a court in the United States specifically relied on the interpretation of the CISG by courts in another country in arriving at its decision. In the end, the court ruled that in accordance with choice of law rules, Pennsylvania law governed the validity of the joint venture agreements.²⁹¹

In *Multi-Juice S.A. v. Snapple Beverage Corp.*, the United States District Court for the Southern District of New York considered a breach of contract claim for an exclusive distributorship agreement entered into between Snapple Beverage Corp., a United States corporation, and Multi-Juice, a Greek corporation.²⁹² Acting on the defendant's motion to dismiss, the court addressed the plaintiff's claim that the contract was governed by the CISG.²⁹³ The court concluded that the Convention did not apply to distributorship contracts that do not cover the specific sale of goods.²⁹⁴ In so holding, the court relied on not only United States case law but also quoted from the UNCITRAL Digest of Case Law on the CISG as follows: "Most courts considering the issue have concluded that the Convention does not apply to distribution agreements."²⁹⁵ In doing so, the court looked at least minimally to jurisprudence outside the United States to support its decision.

The Convention was mentioned but not applied in *Beltappo Inc. v. Rich Xiberta, S.A.*²⁹⁶ Rich Xiberta, a Spanish corporation, contracted with Beltappo, a Washington corporation.²⁹⁷ The parties entered into a distribution agreement under which Rich Xiberta would be a distributor of wine corks for Beltappo.²⁹⁸ The agreement contained the following term: "The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the State of

²⁹⁰ *Id.* at 686-87 (citing OLG Dusseldorf, UNILEX No. 6 U 152/95 (July 11, 1996), abstract available at <http://cisgw3.law.pace.edu/cases/960711g1.html>; OLG Koblenz, UNILEX, No. 2 U 1230/91 (Sept. 17, 1993), text available at <http://cisgw3.law.pace.edu/cases/93-917g1.html>).

²⁹¹ *Id.* at 697.

²⁹² No. 02 Civ. 4635 (RPP), 2006 WL 1519981 (S.D.N.Y. June 1, 2006).

²⁹³ *Id.* at *7.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ No. CO5-1343Z, 2006 WL 314338 (W.D. Wash. Feb. 7, 2006).

²⁹⁷ *Id.* at *1.

²⁹⁸ *Id.*

Washington, U.S.A., the state in which this Agreement is [[sic] be performed by [Beltappo].”²⁹⁹ Beltappo brought an action for breach of contract against Rich Xiberta in the United States District Court for the Western District of Washington.³⁰⁰ Acting on the defendant’s motion to dismiss for lack of personal jurisdiction or, in the alternative, to dismiss on the basis of forum non conveniens, the court noted that Rich Xiberta had sued Beltappo in a Spanish court.³⁰¹ In that litigation, Xiberta argued that the applicable law was the CISG.³⁰² In ruling against the defendant’s motion to dismiss this action, the court did not consider whether or not the CISG applied to the transaction.³⁰³ Apparently, the court found the governing law of the transaction to be immaterial to the decision under consideration and stated that the defendant conceded “that there will be no conflict with a sovereign state because of the choice-of-law provision and the fact that both Spain and the United States are signatories to the CISG. This factor is neutral.”³⁰⁴ In arriving at its decision, the court relied on United States case law.

The United States District Court for the Eastern District of New York in *Genpharm Inc. v. Pliva-Lachema A.S* applied the CISG to an agreement to manufacture and supply warfarin, a pharmaceutical ingredient, in an action for breach of contract.³⁰⁵ Genpharm, a Canadian corporation, entered into an agreement with Pliva-Lachema, a corporation in Croatia.³⁰⁶ Genpharm alleged that as part of the agreement Pliva-Lachema agreed to be Genpharm’s sole producer and supplier of warfarin.³⁰⁷ The alleged agreement also required the provision of numerous services by Pliva-Lachema, including allowing U.S. Food and Drug Administration inspectors access to its production facility.³⁰⁸

The court addressed the proper application of the CISG regarding the defendant’s motion to dismiss for lack of subject matter and personal jurisdiction as well as the issue of forum non conveniens.³⁰⁹

²⁹⁹ *Id.* at *2.

³⁰⁰ *Id.* at *3.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at *8.

³⁰⁴ *Id.*

³⁰⁵ 361 F. Supp. 2d 49 (E.D.N.Y. 2005).

³⁰⁶ *Id.* at 51-52.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 52.

³⁰⁹ *Id.* at 53.

The plaintiff argued that the court had subject matter jurisdiction because the contract was governed by the CISG. The defendants claimed the agreement was outside the scope of the CISG, presumably because no express contract for the sale of goods (including price and quantity) existed.³¹⁰ Ignoring the many cases outside the United States interpreting the Convention and case law interpreting the UCC, the court stated “[t]here are only a handful of American cases interpreting the CISG.”³¹¹ The court stated there was “no question that the instant dispute involves an agreement to supply goods,”³¹² and that it

makes no difference whether the agreements may or may not contain price or quantity The applicability of the CISG is not restricted to contracts after formation or contracts containing definite price or quantities. Therefore, this dispute falls within this Court’s treaty jurisdiction and this Court’s subject matter jurisdiction.³¹³

5. INTERACTION/PREEMPTION OF STATE LAW CLAIMS BY APPLICATION OF THE CISG

The decision of the Eastern District of Pennsylvania in 2003 seemed to confuse the CISG with the International Sale of Goods Act (IASG) or perhaps, failed to apply the CISG at all. In *ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc.*, ID Security Systems brought federal antitrust and state law claims against Checkpoint Systems, Inc.³¹⁴ The state law claim included an allegation that Checkpoint Systems interfered with the relationship between ID Security and its customer, Tokai Electronics, Ltd.³¹⁵

At issue was whether there was a valid contract between ID Security Systems and a third party.³¹⁶ In a footnote, the court concluded that no material difference existed between the CISG and the IASG:

³¹⁰ *Id.*

³¹¹ *Id.* at 54.

³¹² *Id.* at 55.

³¹³ *Id.*

³¹⁴ F. Supp. 2d 622 (E.D. Pa. 2003).

³¹⁵ *Id.* at 631.

³¹⁶ *Id.* at 665.

The parties agree that Pennsylvania law supplies the elements of tortious interference with contractual relations. However, they disagree over whether the U.C.C., or the International Sale of Goods Act (“IASG”) constitutes the applicable law under which the jury was to decide whether a contract was still in existence between ID Security and Tokai at the time that Tokai contracted with Checkpoint, or whether material breach and repudiation had terminated that ID-Tokai agreement. The issue of [a] possible conflict between these two laws was raised and discussed during the charge conference, at which all parties and the court concluded that there were no material differences between these laws, that the court’s proposed instructions were accurate under both statutory compilations, and that there was no conflict. Although ID Security now strenuously argues the applicability of the IASG, the court concludes, after a comparison of the two statutory sources, that there is no outcome-determinative conflict between them, and that, even under the U.C.C., the code that Checkpoint favors, Checkpoint is not entitled to judgment as a matter of law on ID Security’s tortious interference claim.³¹⁷

It is impossible to evaluate the court’s decision in terms of its interpretation of the CISG. Since the court did not reference the specific sections of the CISG or even use its correct title, it is difficult to know exactly how the court interpreted it or even whether the court interpreted the CISG or some other act.

The issue of preemption of state tort claims by the CISG arose in *Miami Valley Paper, LCC v. Lebbing Engineering & Consulting GmbH*.³¹⁸ Valley Paper, a Delaware company with its principal place of business in Ohio, purchased a paper winder from Lebbing, a German LLC.³¹⁹ Valley Paper contended the winder did not conform to specifications and sued for breach of contract, breach of warranty, unjust enrichment, fraudulent inducement, and negligent misrepresentation.³²⁰ Lebbing moved to dismiss the fraudulent

³¹⁷ *Id.* at n.24 (citations omitted).

³¹⁸ No. 1:05-CV-00702, 2006 WL 2924779 (S.D. Ohio Oct. 10, 2006).

³¹⁹ *Id.* at *1.

³²⁰ *Id.*

inducement and negligent misrepresentation claims on two grounds, including that the CISG preempted all of Valley Paper's state common law claims.³²¹ Miami Valley argued that the Convention preempted only state law contract claims.³²² The court agreed with Valley Paper since the drafters of the CISG did not address the legal effect of a seller's negligent or fraudulent misrepresentation claims³²³ and held it could plead those claims.³²⁴ The case did not consider cases decided outside the United States but did rely on one law review article.³²⁵

The United States District Court for the Southern District of New York reached a similar result in *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*.³²⁶ In 1995, TeeVee Toons, a United States company, entered into a contact with Gerhard Schubert GmbH, a German company, requiring Schubert to produce and sell packaging for audio and video cassettes.³²⁷ TeeVee Toons and its affiliate, Steve Gottlieb, Inc., eventually sued for various claims based in contract and tort.³²⁸ In

³²¹ *Id.*

³²² *Id.* at *3.

³²³ *Id.* (citing Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J COMP. & INT'L LAW 263, 280 (2003)).

³²⁴ *Miami Valley Paper*, 2006 WL 2924779, at *3. See Editorial remarks, Joseph Lookofsky (Oct. 2006) available at <http://cisgw3.law.pace.edu/cases/061010ul.html>.

After the decision in *Miami Valley*, Lookofsky updated the article, *supra* note 323, to include a discussion of the court's decision. Lookofsky concluded:

Although we need to 'have regard' to the need to 'promote uniformity' in Convention application, the CISG hardly requires decision-makers to preempt (trump) domestic rules designed to provide remedies for unfair or culpable conduct; indeed, the CISG was not designed to deal with issues like these. Contractual and delictual remedies have—for good reasons—coexisted in many jurisdictions for centuries and a given State's ratification of the *sales* convention does *not* imply its intention to 'merge' contract and tort. There is 'no difficulty in regarding the imposition of a duty of care in tort as independent of any contractual liability' and the CISG was designed only to deal with the contractual side.

³²⁵ *Id.* at *3 (citing Lookofsky, *supra* note 323).

³²⁶ No. 00 CIV 5189 (RCC), 2006 WL 2463537 (S.D.N.Y. Aug. 23, 2006).

³²⁷ *Id.* at *1.

³²⁸ *Id.*

ruling on the plaintiff's motion for summary judgment, the court noted that TeeVee Toons' contract claims were subject to the CISG.³²⁹ Regarding the plaintiff's fraud and negligence claims, the court noted that these were "non-CISG" claims and applied New York state law.³³⁰ The court applied the CISG to the contract claims and New York state law to the tort claims and entered partial summary judgment in favor of the plaintiff.³³¹ In arriving at its decision, the court stated, "[t]he question of whether, under the principles of the CISG, a prior oral agreement to disregard boilerplate language itself containing, *inter alia*, a merger clause, trumps the written merger clause itself appears to be a question of first impression for (at the very least) American courts."³³² The court then relied on United States cases, a law review article, and interpretations of the CISG by the Advisory Council in rendering its decision.³³³

The application of the CISG and preemption of some state law claims provided the basis for the court's decision in *Caterpillar, Inc. v. Usinor Industeel*, a case involving several different counts and sources of law, including the CISG, Illinois law, and French law.³³⁴ Caterpillar, Inc., an Illinois corporation, and Caterpillar Mexico, a Mexican corporation, brought suit against Usinor Industeel, a French steel manufacturer; Usinor Industeel USA, Inc; and Leeco Steel Products, Inc., Unisor's North American distributor registered in Illinois.³³⁵ Usinor manufactured and sold a specialized type of steel to the plaintiffs through Leeco.³³⁶ The plaintiffs charged Usinor with breach of warranty and failure to deliver conforming goods in violation of the CISG and the Illinois UCC, promissory estoppels, and violation of French law.³³⁷ Plaintiffs also charged Usinor USA and Leeco with promissory estoppel and breach of warranties in violation of the UCC and charged Leeco with to deliver conforming goods in violation of the CISG and the UCC.³³⁸

³²⁹ *Id.* at *14.

³³⁰ *Id.*

³³¹ *Id.* at *18.

³³² *Id.* at *8.

³³³ *Id.* at *7-8 (citing DiMatteo, *supra* note 6, at 437 n.872; CISG-AC Opinion no. 3 ¶ 4.5 (Oct. 23, 2004)).

³³⁴ 393 F. Supp. 2d 659 (N.D. Ill. 2005).

³³⁵ *Id.* at 663.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.* at 667-68.

The Usinor defendants argued that the CISG preempted plaintiffs' state law UCC and promissory estoppel claims.³³⁹ The court agreed that the CISG applied to some parts of the claims but only to those claims that fell within the scope of the Convention.³⁴⁰ Declining to find that the CISG preempted the state law claims for promissory estoppel, the court relied on both the fact that the CISG "appeared to utilize a 'modified' version of American promissory estoppel which did not require foreseeability or detrimental reliance" and the "need for reluctance in finding preemption in areas traditionally governed by state law."³⁴¹ The court did apply the CISG to Caterpillar Mexico's breach of warranty claim against Usinor and held that the plaintiff sufficiently stated a cause of action under the CISG.³⁴² The court based its decisions primarily on United States case law and one law review scholarly treatise.³⁴³

The District Court for the Northern District of Illinois considered whether the CISG preempted the Illinois Beer Industry Fair Dealing Act in *Stawski Distributing Co. v. Zywiec Breweries PLC*.³⁴⁴ Since 1959, Stawski, an Illinois corporation, had imported products of Zywiec, a Polish corporation.³⁴⁵ In 1997, the two parties entered into an agreement by which Stawski became the exclusive distributor of Zywiec's products in the United States.³⁴⁶ In 2002, Zywiec notified Stawski of its intent to terminate the agreement.³⁴⁷ Stawski obtained a temporary restraining order barring the termination.³⁴⁸ Stawski contended that Zywiec's termination of Stawski's exclusive distributorship violated the Illinois Beer Industry Fair Dealing Act (IBIFDA).³⁴⁹ Zywiec contended that the IBIFDA did not apply because the CISG preempted the application of state law.³⁵⁰

³³⁹ *Id.* at 668.

³⁴⁰ *Id.* at 673.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* (citing Elizabeth Lauzon, Annotation, *Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 200 A.L.R. FED. 541 (2005)).

³⁴⁴ No. 02 C 8708, 2003 WL 22290412 (N.D. Ill. Oct. 6, 2003).

³⁴⁵ *Id.* at *1.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at *1 n.1.

³⁴⁹ 815 ILL. COMP. STAT. 720/1 – 10 (2008).

³⁵⁰ *Stawski*, *supra* note 344, at *3.

With no discussion as to whether the CISG applied to the distributorship agreement, the court stated that Illinois promulgated the IBIFDA pursuant to the powers reserved to the states in the Twenty-First Amendment to the United States Constitution.³⁵¹ The court noted that the provisions of the IBIFDA are not preempted by conflicting provisions in federal law.³⁵² Although the Convention is a federal law, the court held that application of the CISG would not preempt application of the IBIFDA.³⁵³ After reviewing the facts and applicable law, the court ordered the temporary restraining order lifted in all states except Illinois.³⁵⁴

6. APPLICATION OF THE CISG TO PARTIES FROM NON-SIGNATORY COUNTRIES

The district court in *Prime Start Ltd. v. Maher Forest Products Ltd.* held the CISG inapplicable to a contract of the sale of red cedar.³⁵⁵ Prime Start, a British Virgin Islands corporation, agreed to purchase cedar from Maher Forest Products, a Washington corporation, for delivery to Moscow, Russia.³⁵⁶ The Pacific Lumber Inspection Bureau, also a Washington corporation, contracted with Prime Start for services related to quality control of the cedar.³⁵⁷ A dispute arose regarding Maher Forest and Pacific Lumber's performance.³⁵⁸ Prime Start sued the two Washington companies in the United States District Court for the Western District of Washington.³⁵⁹

Acting on the defendants' motion for summary judgment, the court ruled on Prime Start's contention that the contract was governed by the CISG.³⁶⁰ The court noted that while the United States, the principal place of business of both defendants, was a signatory to the CISG, neither the British Virgin Islands, the principal place of business of the plaintiff, nor the United Kingdom were signatories to the Convention.³⁶¹ The court concluded that since the places of business of

³⁵¹ *Id.* at *2.

³⁵² *Id.*

³⁵³ *Id.* at *2.

³⁵⁴ *Id.* at *6.

³⁵⁵ 442 F. Supp. 2d 1113 (W.D. Wash. 2006).

³⁵⁶ *Id.* at 1117.

³⁵⁷ *Id.* at 1116.

³⁵⁸ *Id.* at 1117.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 1118.

all parties to the contract were not parties to the CISG, the Convention could not apply.³⁶²

The plaintiff contended “application of private international law would lead to the application of Canadian, United States or Russian law,” and since all three of those countries are parties to the CISG, the Convention applied.³⁶³ The court recognized that Article 1(1) of the CISG provides that the Convention “applies to contract for the 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.”³⁶⁴ However, when the United States ratified the CISG, it specifically invoked the option of not being bound by Article 1(b) of the Convention.³⁶⁵ Relying on domestic cases, the court held that these circumstances were exclusive for purposes of application of the CISG, and thus, because not all parties to the contract were from signatory countries, “some body of law other than the CISG will govern this dispute.”³⁶⁶

7. PLACE OF BUSINESS OF PARTIES TO THE CONTRACT

The location of the place of business of the seller was the issue in *McDowell Valley Vineyards, Inc. v. Sabaté USA Inc.*³⁶⁷ McDowell, a California corporation, negotiated with Sabaté USA and three other Sabaté entities regarding the purchase of wine corks from France.³⁶⁸ McDowell brought the action against all four entities alleging breach of contract, breach of warranties, and fraud.³⁶⁹ The court considered the defendants’ motion for summary judgment.³⁷⁰ The defendants contended that the CISG controlled the contract since the buyer and the seller were from different signatory countries and since Sabaté SAS was a French entity and Sabaté USA had “limited involvement in the transaction.”³⁷¹

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.* at 1117-18.

³⁶⁵ CISG, *supra* note 1, at art. 95.

³⁶⁶ *Prime Start*, *supra* note 355, at 1118.

³⁶⁷ No. C-04-0708 SC., 2005 WL 2893848 (N.D. Cal. Nov. 2, 2005).

³⁶⁸ *Id.* at *1.

³⁶⁹ *Id.* at *2.

³⁷⁰ *Id.*

³⁷¹ *Id.*

Noting that the application of the CISG turned on the determination of the defendants' place of business, the court stated that "the crucial question is from where the representations about the product came."³⁷² The court found a variety of correspondence related to the transaction came from Sabaté USA and gave addresses and telephone numbers in California.³⁷³ Likewise, invoices and advertising literature showed California addresses.³⁷⁴ On these facts, the court found that the majority of the representations about the product came from California and held that under the CISG, the parties' places of business were in the same state; therefore, the CISG did not apply.³⁷⁵ Based on this reliance on the CISG and United States case law, the court dismissed the case for lack of jurisdiction.³⁷⁶

The district court reached a similar result in *Kliff v. Grace Label, Inc.*³⁷⁷ Kliff, a sole proprietorship in California, agreed to purchase foil trading cards depicting Britney Spears from Grace Label, an Iowa corporation.³⁷⁸ Kliff resold the cards to a buyer in Mexico who rejected the product.³⁷⁹ Grace Label brought the action in the Southern District of Iowa to recover the contract price from Kliff.³⁸⁰ Kliff contended that the contract was subject to the CISG because the contract called for goods manufactured in the United States to be shipped to Mexico.³⁸¹ The court concluded that the CISG did not apply to the transaction because the contract in question was between two firms in the United States.³⁸² Although the contract called for shipment of goods to a third party in Mexico, the third party was not a party to this contract.³⁸³ Thus, the UCC, not the CISG, applied to this transaction.³⁸⁴

The defendant in *Comerica Bank v. Whitehall Specialties, Inc.* attempted to keep a forum selection clause from becoming part of the agreement.³⁸⁵ Because both parties to the contract were United States

³⁷² *Id.*

³⁷³ *Id.* at *3.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at *4.

³⁷⁶ *Id.*

³⁷⁷ 355 F. Supp. 2d 965 (S.D. Iowa 2005).

³⁷⁸ *Id.* at 968.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 967.

³⁸¹ *Id.* at 971.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.* See also *Novelis Corp. v. Anheuser-Busch, Inc.*, 559 F. Supp.2d 877, 882 n.4 (N.D. Ohio 2008).

³⁸⁵ 352 F. Supp. 2d 1077 (C.D. Cal. 2004).

firms, the court held that the UCC governed the case and not the CISG. The court concluded that due to “material differences between the C.I.S.G. and California’s U.C.C., *Chateau des Charmes Wines, Ltd.* d[id] not control th[e] case.”³⁸⁶

C. BANKRUPTCY COURT DECISIONS APPLYING THE CISG

During the period under examination, only one bankruptcy court applied the CISG, in *In re Siskiyou Evergreens, Inc.*³⁸⁷ While applying principles of the UCC, the court, at least generally, also referred to the decisions of European courts interpreting the CISG. In this case, the debtor, an American company, agreed to sell Christmas trees to a Mexican buyer.³⁸⁸ The buyer alleged that the trees did not conform to the contract and filed a claim in Bankruptcy Court for damages.³⁸⁹

The court held that the CISG governed the transaction between the debtor and the buyer since both Mexico and the United States are parties to the Convention.³⁹⁰ Under the CISG, a buyer must have notified the seller of the non-conformity of goods in order to recover for breach of contract; consequently, the issue became what type of notice was required.³⁹¹ In deciding whether a series of phone calls without written notice was sufficient, the court discussed portions of the UCC dealing with notice and looked to other authority outside the United States:

European cases construing the Convention have required the notice to describe the claimed non-conformity with enough detail to allow the seller to identify and correct the problem without further investigation. A more practical interpretation would hold that the notice must be given in time, and in sufficient detail, to allow the seller to cure the defect in a manner allowing the buyer the benefit of his bargain.³⁹²

³⁸⁶ *Id.* at 1083. It is interesting to note that United States courts have little trouble applying U.C.C. Article 2 principles to cases governed by CISG, but this court refused to apply the analogy in the opposite direction.

³⁸⁷ No. 02-66975-fra11, 2004 Bankr. LEXIS 1044 (D. Or. Mar. 29, 2004).

³⁸⁸ *Id.* at *2.

³⁸⁹ *Id.* at *12, *14.

³⁹⁰ *Id.* at *6-*7.

³⁹¹ *Id.* at *17.

³⁹² *Id.* at *16-17.

The court concluded that the notice nonconformity was sufficient because “the seller could not have, as the Convention put it, been unaware of the nature of the nonconformity.”³⁹³ The court allowed the buyer’s claim for the entire amount paid for nonconforming loads, along with reasonably foreseeable lost profits.³⁹⁴

D. STATE COURT DECISIONS APPLYING THE CISG

Two state courts, one in Massachusetts and one in California, decided cases concerning the CISG during the period under consideration. In *Vision Systems, Inc. v. EMC Corp.*, on motion for summary judgment, the Superior Court of Massachusetts decided whether the CISG applied to a contract between EMC, a Massachusetts corporation; Vision Systems, Inc., a Maryland corporation; and Vision Fire & Security Pty, Ltd., an Australian corporation with its principal place of business in Australia.³⁹⁵ After a series of negotiations, Vision Systems agreed to sell smoke detection units to EMC at a price quoted as “FOB [buyer’s place of business].”³⁹⁶ Vision Fire was charged with researching, developing, and manufacturing the units. After EMC notified the parties it would not order any more units, Vision Fire and Vision Systems brought the action, claiming breach of contract under the CISG, among other claims.³⁹⁷

One issue before the court was whether the buyer and seller had their places of business in different countries that were parties to the CISG. Noting that the “international component is a jurisdictional prerequisite to the application of the CISG,” the court found it lacking in this case.³⁹⁸ The court looked at the “center of gravity” for the transaction and found that it was in Massachusetts.³⁹⁹ The court also stated that the “CISG does not apply to the sale of goods between parties if one party has ‘multiple business locations’ unless it is shown that the party’s international location ‘has the closest relationship to the contact and its performance.’”⁴⁰⁰

³⁹³ *Id.* at *17-*18.

³⁹⁴ *Id.* at *18.

³⁹⁵ No. 034305BLS, 2005 WL 705107 (Mass. Super. Ct. Feb. 28, 2005).

³⁹⁶ *Id.* at *1.

³⁹⁷ *Id.* at *6.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* (quoting WILLIAM A. HANCOCK, GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION § 100.002 (2002)).

A California court of appeals upheld the trial court's decision that the CISG did not apply to a contract in *Orthotec, LLC v. Eurosururgical, S.A.*⁴⁰¹ The case involved a series of complicated licensing and distributing agreements between Orthotec, a United States corporation, and Eurosururgical, a French corporation.⁴⁰² Based on the agreements, Orthotec had the exclusive rights to sell spinal interlaminar devices produced by Eurosururgical.⁴⁰³ Many disagreements arose between the parties and resulted in the action by Orthotec in California state court.⁴⁰⁴ The trial involved eight causes of action, ranging from breach of an assignment agreement to intentional interference with a contract.⁴⁰⁵ Eurosururgical appealed from a judgment entered after a four-week jury trial and a two-day bench trial.⁴⁰⁶ The court of appeals upheld the lower court's holding that the CISG did not govern the contract portion of the case, based on evidence of the parties' intent:

The trial court based its finding the CISG did not apply to the assignment agreement on the agreement's express direction that it would be governed by California law and on evidence (1) the initial draft of the agreement provided for the application of the CISG; (2) [Orthotec] believed potential distributors would be uncomfortable with a treaty governing the parties' relationship and discussed the matter with [Eurosururgical]; (3) [Eurosururgical] agreed to eliminate application of the CISG; and (4) the final version of the agreement omitted any reference to the CISG and provided only for the application of California law.⁴⁰⁷

The court distinguished *BP Oil International, Ltd.*⁴⁰⁸ stating that in *BP Oil* the parties did not expressly opt out of the application of the CISG, as had the parties in *Orthotec*. Since the *Orthotec* case is unpublished and cannot be cited by California courts, the decision is

⁴⁰¹ Nos. B179387, B189213, 2007 WL 1830810 (Cal. Ct. App. June 27, 2007).

⁴⁰² *Id.* at *1-*3.

⁴⁰³ *Id.* at *2.

⁴⁰⁴ *Id.* at *7.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at *12 n.14.

⁴⁰⁸ See *BP Oil*, *supra* notes 77-86 and accompanying text.

interesting for several reasons. It might well be the first case to provide evidence of actual negotiations between contracting parties as to both whether and why the CISG should govern a transaction. It is also interesting that the parties stated they “believed potential distributors would be uncomfortable with a treaty governing the parties’ relations.”⁴⁰⁹ Since the Convention has the status of national law, one wonders what was meant by such a statement. Finally, in determining whether the CISG applied, the court looked outside the terms of the agreement and looked at how the agreement was arrived at in determining the intent of the parties regarding the CISG. However, the court did not consider interpretations of the Convention by courts other than those in the United States in arriving at its decision.

III. CONCLUSIONS AND PROPOSAL FOR FURTHER STUDY

The eclectic nature of the decisions made by the courts in the United States interpreting and applying the CISG during the relevant period of study make it difficult to draw many broad conclusions regarding the applicability and construction of the Convention as determined by United States courts. However, two conclusions are clear from the analysis of these cases. First, a standard choice of law provision will not be sufficient to opt-out of the application of the CISG. United States firms contracting with businesses in countries that are parties to the Convention and not wishing to have the CISG apply must use specific and unequivocal language in order to do so. Second, when applying the CISG, courts in the United States are not routinely considering the decisions of courts of other jurisdictions or even scholarly works in interpreting how and when the Convention should apply.

As illustrated on Table A, courts of the United States are more likely to apply the principles of Article 2 of the UCC to contracts that are governed by the Convention than to look to decisions from other jurisdictions for guidance. In only two of the cases discussed did the court even reference decisions of other countries. Likewise, the courts only twice referenced the UNCITRAL Digest. One court referred to interpretations of the CISG Advisory Council, but six cited a scholarly commentary. Four cases specifically referred to UCC Article 2 principles, and all of the cases relied on prior United States cases in reaching their decisions.

⁴⁰⁹ *Orthotec*, *supra* note 401, at *12 n.14.

United States courts appear likely to continue to apply decisions under the UCC when interpreting the CISG in spite of the opinion of the drafters of the UCC and scholars that such analogies are inappropriate. United States courts continue to insist that there is a dearth of case law available, ignoring the thousands of cases that have been decided by the courts of countries around world. By continuing to interpret the CISG in light of United States cases and UCC principles, courts in the United States may be thwarting the uniformity that the CISG was intended to foster.

One additional and somewhat troubling issue is the continued insistence by some commentators that firms “are routinely opting out of the CISG.”⁴¹⁰ While there is no evidence to support the contention, if it is indeed true, the purposes of the Convention cannot be achieved. Research on this topic would provide important information for those who are concerned about the effectiveness of the Convention and those who are proposing new changes in the law of international contracts.

As United States courts continue to deal with the CISG and its application, their decisions should be analyzed in the context of the CISG interpretations worldwide. Only then can it be determined whether the CISG has any chance to achieve its stated goals of removing legal barriers to and promoting the development of international trade.

⁴¹⁰ See Sheaffer, *supra* note 3, at 469-70.

Table A
United States Court Cases Applying the CISG
2002 – June 2008

**With notations of references to scholarly commentary, UCC and
Non-United States jurisprudence**

Circuit Court Cases (in order discussed in paper)	Circuit	Year of Contract	Year of Decision
Barbara Berry. S.A. v. Ken Spooner Farms	9th	Unknown	2007
Chateau des Charmes Wines Ltd. v. Sabaté	9 th	2000	2003
Valero Marketing & Supply Co. v. Greeni Oy (citing the UNCITRAL Digest)	3 rd	2001	2007
Treibacher Industries, A.G. v. Allegheny Technologies, Inc.	11 th	200	2006
Chicago Prime Packers, Inc. v. Northam Food Trading Co. (applying Article 2 principles, citing Folsom, <i>supra</i> note 45 and DiMatteo, <i>supra</i> note 6).	7 th	2001	2005
Standard Bent Glass Corp. v. Oy	3 rd	1999	2003
BP Oil International, Ltd. v. Empresa Estatal (citing Folsom, <i>supra</i> note 45)	5 th	Unknown	2003
Federal District Court Decisions Grouped By Topic	District	Year of Contract	Year of Decision
<i>Using the UCC Article 2; Ignoring International Cases</i>			
Macromex SRL v. Globex Intn'l Inc.	S.D. N.Y.	2006(?)	2008
Raw Materials, Inc. v. Manfred Forberick GmbH & Co.	N.D. Ill.	2002	2004
<i>Effect of Choice of Forum/Choice of Law Clauses</i>			
Guang Dong Light Headgear Factory Co., Ltd. v. ACI International (citing Karamanian, <i>supra</i> note 80)	D. Kan.	1999	2007
Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.	W.D. Pa.	1998-99	2006
Easom Automation, Inc. v. Thyssenkrupp Fabco, Corp.	E.D. Mich.	2005	2007

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Travelers Property Casualty Co. v. Saint-Gobain Technical Fabrics Canada Ltd.	D. Minn.	1998	2007
American Mint LLC v. GOSoftware, Inc.	M.D. Pa.	2005	2006
Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd. (citing Cook, <i>supra</i> note 27)	N.D. Ill.	1997	2003
American Biophysics v. Dubois Marine Specialties	D. R.I.	2002	2006
<i>Applicability of the CISG Generally</i>			
Solae, LLC v. Hershey Canada Inc. 582 F.Supp.2d 130	C. Del.	2006	2008
Zhejiang Shaoxing Yongli Printing & Dyeing v. Microflock Textile Group Corp.	S. D. Fla.	2002/2004	2008
Cedar Petrochemicals, Inc. v. Dongbuy Hannong Chemical Co., Ltd.	S.D. N.Y.	2005	2007
Zhanjiang Go-Harvest Aquatic Products Co., Ltd. v. Southeast Fish & Seafood Co.	S.D. Fla.	2004-2006	2007
China North Chemical Industries Corp. v. Beaston Chemical Corp.	S.D. Tex.	1999	2006
Wausau Tile, Inc. v. Navigators Insurance Co.	W.D. Wis.	2003	2006
Portimex S.A. v. Zen-Noh Grain Corp.	E.D. La.	unknown	2005
<i>"Goods or Non Goods"</i>			
Amco Ukrservice v. American Meter Co. (specifically relying on German cases interpreting the CISG)	E.D. Pa.	1997	2004
Multi-Juice S.A. v. Snapple Beverage Corp. (citing the UNCITRAL Digest)	S.D. N.Y.	1997	2006
Beltappo Inc. v. Rich Xiberta, S.A.	W.D. Wash.	2004	2006
Genpharm Inc. v. Pliva-Lachema A.S. (applying U.C.C. Art. 2 principles)	E.D. N.Y.	2001	2005
ID Security Systems Canada, Inc.	E.D. Pa.	Unknown	2003

v. Checkpoint Systems, Inc.			
Miami Valley Paper, LCC v. Lebbing Engineering & Consulting GmbH (citing Lookofsky, <i>supra</i> note 147)	S.D. Ohio	2003	2006
TeeVee Toons, Inc. v. Gerhard Schubert GmbH (citing DiMatteo, <i>supra</i> note 6, and interpretations of the CISG Advisory Council, <i>supra</i> note 153)	S.D. N.Y.	1995	2006
Caterpillar, Inc. v. Usinor Industeel (citing Lauzon, <i>supra</i> note 156)	N.D. Ill.	2000	2005
Stawski Distributing Co. Inc. v. Zywiec Brewers PLC	N.D. Ill.	1997	2003
<i>Parties from Non Signatory Countries</i>			
Prime Start Ltd. v. Maher Forest Products Ltd.	W.D. Wash.	Unknown	2006
<i>Place of Business of Parties</i>			
McDowell Valley Vineyards, Inc. v. Sabaté USA Inc.	N.D. Cal.	Unknown	2005
Kliff v. Grace Label, Inc.	S.D. Iowa	Unknown	2005
Comerica Bank v. Whitehall Specialties, Inc.	C.D. Cal.	Unknown	2004
<i>Bankruptcy Court Decisions</i>			
<i>In re</i> Siskiyou Evergreen, Inc. (applying U.C.C. Art. 2 principles but referencing European cases interpreting the Convention, <i>supra</i> note 170)	D. Or.	1999	2004
<i>State Court Decisions</i>			
Orthotec, LCC v. EuroSurgical, S.A.	Cal. Ct. App.	1998-1999	2007
Vision Systems, Inc. v. EMC Corp	Superior Ct. Mass.	2002	2005