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## Is the CISG Benefiting Anybody?

Gilles Cuniberti

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# Is the CISG Benefiting Anybody?

Gilles Cuniberti\*

## ABSTRACT

*The Convention on Contracts for International Sale of Goods (CISG) was supposed to increase legal certainty and reduce the transaction costs of international buyers and sellers. This Article argues that none of these goals has been met. A survey of 181 court decisions and arbitral awards applying the CISG shows that the vast majority of international buyers and sellers do not address the issue of the law governing their contracts, irrespective of the value at stake. Although the data is not easy to interpret, it follows that international buyers and sellers are simply not concerned with the legal regime governing their contracts and may be more generally legally unsophisticated. As a consequence, increasing legal certainty does not benefit them ex ante, and they do not incur the transaction costs that a harmonization of the law of sales could save. It is true that a few of these parties do provide for the applicable law and seem to be more sophisticated. But this Article further argues that even these parties do not clearly benefit from the international harmonization of the applicable law because of its limited scope.*

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## I. INTRODUCTION

Governments have conducted a process of harmonization of international sale law for more than forty years.<sup>1</sup> Legal scholars had advocated the idea since the 1920s.<sup>2</sup> Today, international sales law is harmonized to a very significant extent through the United Nations (U.N.) Convention on Contracts for International Sale of Goods (CISG).<sup>3</sup> This uniform law is applicable in sixty-six states, which include most of the major trading nations.<sup>4</sup> It governs many areas of sale law, particularly the performance of the contract.<sup>5</sup>

Because the process of harmonization has been supported for almost a century, and because so many countries have adopted the CISG, it has become increasingly hard to challenge the usefulness of the whole enterprise. Indeed, most modern treatises on international sale law either state that the benefits of harmonization are obvious<sup>6</sup> or do not even find the issue worth addressing.<sup>7</sup>

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1. The first Hague Conventions on the sale of goods date back to 1964. See COMMENTARY ON THE UN CONVENTION ON INTERNATIONAL SALE OF GOODS 1 (Peter Schlechtriem ed., 1998) [hereinafter Schlechtriem].

2. *Id.*

3. United Nations Convention on Contracts for International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18 [hereinafter CISG].

4. The United Kingdom and Japan are not parties. Michael Bridge, *The UK Sales of Goods Act, the CISG and the Unidroit Principles*, in THE INTERNATIONAL SALE OF GOODS REVISITED 115, 117 (Petar Šarvcevic & Paul Volken eds., 2001). Yet becoming so seems to be favored by their legal elites, and thus it is probably only a matter of time. See *id.* On the relatively little interest in the English business community and thus in the U.K government to ratify the CISG, see Sally Moss, *Why the United Kingdom Has Not Ratified the CISG*, 25 J.L. & COM. 483 (2005–06).

5. It does not govern the validity of the contract or any of its clauses nor the transfer of ownership. CISG, *supra* note 3, at art. 4.

6. See C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 3 (1987).

7. See VINCENT HEUZÉ, LA VENTE INTERNATIONALE DE MARCHANDISES (2000) (Fr.); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1999); Schlechtriem, *supra* note 1.

Yet, some scholars have recently challenged the usefulness of the CISG.<sup>8</sup> They have argued that the poor quality of harmonization that it has achieved makes it doubtful that it has been beneficial to commercial parties. However, none of these scholars have challenged the usefulness of the process itself.<sup>9</sup> This Article will address that issue. For a century, the supporters of international sale law have argued that an instrument such as the CISG would have significant benefits for international sellers and buyers.<sup>10</sup> The CISG has governed international sales for more than fifteen years.<sup>11</sup> It is now possible to review cases in which the CISG was applied and to use these cases to test the century-old hypothesis of the usefulness of harmonizing sales law.

This Article examines whether harmonizing international sale law has been a useful enterprise from two perspectives. Part II lists the arguments put forward by the supporters of international sale law, explores whether they are convincing, and concludes that most of them are not. Part III examines 181 cases where the CISG was applied by U.S., German, and French courts and by arbitral tribunals to determine whether international buyers and sellers have actually benefited from the CISG. This analysis finds that the vast majority of those buyers and sellers have not benefited, due to a lack of sophistication. Part IV considers whether the CISG could be beneficial to a few sophisticated parties but finds the benefits difficult to assess and possibly nonexistent. Part V concludes the Article.

## II. THE ARGUMENTS IN FAVOR OF THE HARMONIZATION OF INTERNATIONAL SALE LAW

The negotiators of the CISG thought that engaging in a process of unification of international sale law would increase international trade. The preamble of the CISG provides that the Convention set out to “contribute to the removal of legal barriers in international trade

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8. See, e.g., Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L REV. L. & ECON. 446 (2005); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999).

9. Although Gillette and Scott do not argue for abandoning the CISG, they propose competition between national commercial laws as an alternative. Gillette & Scott, *supra* note 8, at 480–84.

10. See generally BIANCA & BONELL, *supra* note 6, at 3–7 (giving a history of attempts to harmonize International Sale Law dating back to 1929); Stephan, *supra* note 8, at 744–46.

11. Its entry into force among the first states that ratified it dates back to January 1, 1988. Gillette & Scott, *supra* note 8, at 451.

and promote the development of international trade.”<sup>12</sup> In his address on the Convention to the U.S. Senate Committee on Foreign Relations in April 1984, Peter Pfund, who was acting as Assistant Legal Adviser for Private International Law for the Department of State, also supported the adoption of the CISG by the United States on the grounds that it would allow U.S. corporations to engage in trade with foreign nations and conclude sales that they would not have concluded otherwise.<sup>13</sup> He argued that without the CISG, U.S. corporations would be discouraged by the uncertainties and costs of the determination of the legal regime governing the contract and by litigating contractual disputes abroad.<sup>14</sup>

The negotiators of the CISG seem to have considered that the CISG enterprise would increase international trade by facilitating the conclusion of international sales. Indeed, legal scholars have essentially justified the unification of international sale law since then by claiming that the CISG improves the legal environment in which international sales are concluded by increasing legal certainty and reducing transaction costs.<sup>15</sup> Some scholars have also suggested that the CISG has been an occasion for law reform.<sup>16</sup> This Article will examine and discuss these arguments in turn.

#### A. Legal Certainty

Legal scholars ordinarily justify the unification and harmonization of international sale law on purely legal grounds. Most commonly, they argue that an instrument such as the CISG increases legal certainty, as they believe that the applicability of different national laws has the “obvious consequence” of impairing it,<sup>17</sup> and thus that the CISG must be an improvement.

Yet it is not so easy to see why the adoption of the CISG has increased legal certainty. To begin with, it is unclear to which legal certainty supporters of the CISG refer. Arguably, legal certainty could be harmed in an international context for two reasons. First, it could be difficult to determine which law governs the contract.

12. CISG, *supra* note 3, pmb1.

13. *International Sale of Goods, 1984: Hearing on Treaty Doc. No. 98-9 Before the S. Comm. on Foreign Relations, 98th Cong.* 303–05 (1984).

14. See Heidi Stanton, *How to Be or Not to Be: The United Nations Convention on Contracts for the International Sale of Goods, Article 6*, 4 CARDOZO J. INT'L & COMP. L. 423, 428 (1996).

15. BIANCA & BONELL, *supra* note 6, at 15.

16. *Id.* at 7; FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 1–2 (1992).

17. BIANCA & BONELL, *supra* note 6, at 3; see also FRANCO FERRARI, *INTERNATIONAL SALE OF GOODS* 1, 3 (1999); MARCO TORSSELLO, *COMMON FEATURES OF UNIFORM COMMERCIAL LAW CONVENTIONS* 1–2 (2004); Stephan, *supra* note 8, at 746.

Second, the applicable law could be unclear or imprecise and thus make the substantive legal regime less certain.

One can doubt that the adoption of the CISG has increased legal certainty on the first account. It is true that the CISG applies automatically when the contracting parties have their places of business in two different contracting states.<sup>18</sup> According to the Convention, the applicable legal regime can therefore be determined without resorting to international private law. However, it is doubtful that the CISG has significantly increased legal certainty. The choice of law rule which applied in contractual matters before the CISG allowed the parties who were concerned with legal certainty<sup>19</sup> to determine with the greatest precision the legal regime governing their contract. All they needed to do was to include a choice of law clause in their contract to that effect. Conflict of laws is often presented as a complex area of the law, but here the rule is very simple. It is true that the parties could fail to choose the applicable law, and that the default conflict rule would usually be and still is both very unpredictable and complex. Yet, if the parties were not sufficiently concerned by the issue of the applicable law to make that choice, it may well be that they were actually not very concerned with legal certainty, at least at the time of conclusion of the contract, and that the harmonization of sales law would not be useful to them if it only aimed at increasing legal certainty. Furthermore, although rare in today's world, it is perfectly conceivable to design simple and predictable default conflict rules. The 1955 Hague Convention on the Law Applicable to International Sales of Goods, which still applies in France and in Italy for instance, is a good example: it provides for the application of the law of the seller without giving any discretion to the court applying it.<sup>20</sup> If such a rule had been adopted worldwide, legal certainty would have been achieved as effectively as through a process such as the CISG. Moreover, the CISG has only partially harmonized sales law. For instance, the Convention does not apply to the validity of the contract or of any of its clauses.<sup>21</sup> Therefore, it remains necessary to determine the law governing the contract if the issue of validity arises.<sup>22</sup> In a system relying on international private law, the applicable law would govern almost all contractual issues.<sup>23</sup>

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18. CISG, *supra* note 3, at art. 1(1)(a).

19. On this distinction between parties that are concerned with legal certainty and those that are not and its significance, see cases cited *infra* Part III.

20. Convention on the Law Applicable to International Sale of Goods art. 3, June 15, 1955, 510 U.N.T.S. 147.

21. CISG, *supra* note 3, at art. 4.

22. It has also been stressed that the scope of the Convention, and therefore of the applicable law, is itself uncertain. See Stephan, *supra* note 8, at 774–75.

23. The traditional view is that it would still not govern the transfer of property or the issue of the capacity of the parties. YVON LOUSSOUARN, PIERRE BOUREL

The increase of the legal regimes governing the contract is hardly good for legal certainty,<sup>24</sup> and one could wonder whether such exclusions of the scope of the harmonization do not impair the utility of the whole process.<sup>25</sup>

Some have challenged whether the rules of the CISG provide the degree of legal certainty that many commercial parties seek. It has been noted that its process of negotiation favored the adoption of vague rules, relying too much on legal standards, which are hardly good for legal certainty.<sup>26</sup> The Convention was drafted by representatives of more than fifty states representing all legal traditions.<sup>27</sup> Although the diversity of the individual drafters must have complicated the enterprise of negotiating a complete law of sales, it has been shown that the incentives of the drafters likely led them to settle on unsatisfactory results in order to reach a final resolution.<sup>28</sup> The chances are therefore high that the negotiation resulted in compromises, and in particular, that rules were drafted to make them acceptable to all. It has been noted that in such cases, the drafters “had to seek refuge in vague or obfuscatory language,”<sup>29</sup> or would fail to agree on any rule.<sup>30</sup> More generally, scholars have argued that private legislatures, such as the one set up for the purpose of drafting the CISG, are bound to reach such unsatisfactory results and that the frequency of the use of standards by the Convention demonstrates this flaw quite clearly.<sup>31</sup>

Moreover, not only do vague rules not provide precise answers and thus reduce legal certainty, but if contained in an international instrument, they are also likely to be interpreted differently by courts and thus jeopardize the actual harmonization of the field. It must be

& PASCAL DE VAREILLES-SOMMIÈRES, *DROIT INTERNATIONAL PRIVÉ*, 395, 561 (2004) [Fr.]

24. See Stephan, *supra* note 8, at 778 (noting that “[a]dding the CISG increases legal risk”).

25. Jacob S. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*, 6 N.Z. BUS. L. Q. 335, 344 (2000). This argument has been consistently put forward by leading English lawyers to oppose the United Kingdom’s becoming a Contracting State. See generally Barry Nicholas, *The UK and the Vienna Sales Convention: Another Case of Splendid Isolation?*, 9 CENTRO DI STUDI E RICERCA DI DIRITTO COMPARATIVO E STRANIERO (1993), available at <http://w3.uniroma1.it/idc/centro/publications/09nicholas.pdf>.

26. Gillette & Scott, *supra* note 8, at 474–75.

27. *Id.* at 450; Stanton, *supra* note 14, at 426.

28. Gillette & Scott, *supra* note 8, at 461–65; Ziegel, *supra* note 25, at 338.

29. Ziegel, *supra* note 25, at 338; see also Larry A. DiMatteo et al., *The Interpretative Turn in International Sales Law: An Analysis of 15 Years of CISG Jurisprudence*, 24 NW. J. INT’L L. & BUS. 299, 311 (2004); Stephan, *supra* note 8, at 774.

30. Ziegel, *supra* note 25, at 345 (taking the example of Article 78, which fails to indicate how to determine the interest rate available to the successful party).

31. Gillette & Scott, *supra* note 8, at 469.

emphasized that, as an international convention, the CISG cannot be authoritatively interpreted by a single superior court: the courts of all Contracting States interpret its provisions, but none of these interpretations is final and binding on other courts.<sup>32</sup> Given the language differences and the likelihood that courts will interpret the Convention provisions through their domestic lenses, notwithstanding that Article 7 of the Convention calls for an interpretation taking into account the international character of the instrument, the chances are high that diverging interpretations will arise.<sup>33</sup> Issues requiring interpretation are therefore likely to remain unsettled and the meaning of the provisions of the Convention uncertain. As a result, it appears that the legal regime governing the contract is less certain when the CISG applies rather than the laws of the most developed nations.<sup>34</sup>

The common statement that the CISG has improved legal certainty is an allegation which requires far more evidence than what its supporters usually provide. This benefit of the CISG is, at the least, questionable.

### B. Law Reform

A few writers claim that international trade requires specific rules, and they seem to argue that the CISG has provided them.<sup>35</sup> Yet they do not provide any explanation as to why domestic rules would be unfit in an international context and how the CISG has provided more appropriate rules in this respect. Professor Ziegel has submitted that some countries may lack a credible domestic sales law, but that local parties would still be unwilling to submit their contracts to the law of the other party.<sup>36</sup> The CISG may therefore be

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32. *Id.* at 472–73.

33. For examples of U.S. courts' interpreting the Convention through their domestic lens and thus providing a distorted image, see generally John E. Murray, *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365 (1998).

34. Some scholars acknowledge that no absolute uniformity will be reached but that the CISG will at least “tend to reduce differences and to eliminate uncertainty.” LARRY A. DiMATTEO ET AL., INTERNATIONAL SALES LAW 11 (2005) (citing Johan Steyn, *A Kind of Esperanto?*, in THE FRONTIERS OF LIABILITY 14–15 (Peter Birks ed., 1994)). Yet they still argue that “the benchmark of relative or useful uniformity is superior to the previous system of private international law characterised by a full panoply of different domestic laws and systems.” *Id.*

35. ENDERLEIN & MASKOW, *supra* note 16, at 1; see also BIANCA & BONELL, *supra* note 6, at 3–20.

36. Professor Ziegel takes the examples of Russia and China. Ziegel, *supra* note 25, at 342. As for China, see Donald L. Grace, *Force Majeure, China & the CISG: Is China's New Contract Law a Step in the Right Direction?*, 2 SAN DIEGO INT'L L.J. 173, 199 (2001) (arguing that the adoption of the CISG in China would increase legal certainty).



the only option allowing parties from such countries to submit their contract to their laws and for the contracting parties to benefit from an at least acceptable legal regime. For those countries, the adoption of the CISG has the clear consequence of offering commercial parties a developed body of rules which may be unquestionably superior to domestic law.

It has also been suggested that the process could have been generally an occasion for sale law reform.<sup>37</sup> Yet, it is much less clear that the CISG is superior to the laws of sales of the states that already had a developed domestic sales law. To begin with, the drafters of the Convention have clearly borrowed numerous, if not most, solutions from the existing national laws of the various legal traditions. It follows that if the CISG could be a better set of rules as a whole, it can hardly be argued that each of its provisions, taken separately, lays down a better rule. At best, the Convention could improve the law of those countries that had a different rule that one could clearly regard as inferior to the rule retained by the drafters of the CISG. Yet one should not forget that the mere fact that one rule was preferred by the drafters over another does not necessarily mean that the chosen rule was clearly superior to the other. Assessing the superiority of a rule is far from an objective exercise. Experts could disagree on the quality of a given rule, not least because they could assess it on very different grounds.<sup>38</sup> Furthermore, the rule could have been retained by the drafters for other reasons than its intrinsic quality, such as the fact that the rule was the only rule acceptable to the drafters. Indeed, it is again the process of drafting the Convention that casts doubts on the ability of the Convention to stand as a model sales law generally. As already stated, the appreciation of the desirability of a given rule was made by individual drafters from a variety of backgrounds.<sup>39</sup> As a consequence, it has been frequently noticed and is hardly surprising that many rules adopted by the drafters were the result of compromises.<sup>40</sup> A rule could be accepted by one sub-group of drafters in exchange for inclusion of another one preferred by another sub-group. Even if an agreement could be reached as to which rule was the best one in each instance, it could very well be that the drafters would settle on two acceptable rules that they would not necessarily regard as being separately the two best rules. Furthermore, as previously noted, another way to reach a

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37. Stephan, *supra* note 8, at 748.

38. For instance, an efficiency analysis could lead to a different result than a more traditional analysis. See Gillette & Scott, *supra* note 8, at 460 (noting the different principles favored by developed countries in contrast to developed countries and nations with planned economies in contrast to those with market economies).

39. See *supra* notes 27-30 and accompanying text.

40. See *id.*

compromise is to draft a vague provision that can be read in different ways.<sup>41</sup>

Although the adoption of the CISG may have been perceived even in developed countries as an improvement to the pre-existing law,<sup>42</sup> it cannot be claimed that the enterprise has led to a significant improvement of sales law.

### C. *Reduction of Transaction Costs*

Finally, for law and economics scholars, the purpose of harmonizing commercial law ought to be to reduce the transaction costs of the parties. Contracting in an international context generally is regarded as more costly than contracting domestically. Because the parties come from different legal backgrounds, it generally is assumed that concluding a contract will be more complicated in the international arena than at home. They will face the specific issue of the applicable law to the contract and will have to address it.<sup>43</sup> Parties will typically agree on the application of the law of one of their home countries, and the other party will therefore need to learn the applicable legal regime, thus incurring a learning effect.<sup>44</sup> Thus, international sale law seems to save transaction costs for two reasons. First, the issue of the applicable law disappears, as the law is the same in the countries of each of the parties. There is therefore no need to determine which one will apply, thereby saving the parties the transaction costs of bargaining over the applicable law. Second, the applicable law is not foreign to any of the parties. As a consequence, none of them needs to learn it.

It is submitted, however, that the effect of international sale law on the transaction costs of commercial parties depends on their

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41. *See id.*

42. For instance, it seems clear that the French Supreme Court has perceived Article 49-1 of the CISG (declaration of avoidance of the contract in case of fundamental breach) as a better rule than the rule in Article 1184 of the Civil Code (declaration must be judicial), since it subsequently adopted the rule for the purposes of French domestic law. *See* Cour de cassation [the highest court of ordinary jurisdiction] Oct. 13, 1999, D. 1999, 197, obs. Jamin (Fr.). Leading English commercial scholars also believe that the CISG is better than English law on numerous grounds. *See* Roy Goode, *Insularity or Leadership? The Role of the UK in the Harmonization of Commercial Law*, 50 INT'L & COMP. L. Q. 751, 753 (2001) (taking the example of the rule that risk passes with control).

43. Michael Whincop & Mary Keyes, *Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELBOURNE U. L. REV. 515, 531 (1997) (Austl.).

44. Gillette & Scott, *supra* note 8, at 447. Some scholars also refer to these costs as "information costs." Larry Ribstein & Bruce Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996).

degree of legal sophistication, which therefore may be a key factor in assessing the usefulness of harmonization of contract law.

### 1. Unsophisticated Parties

The costs of negotiating the law governing an international contract depend to a great extent on the importance that the parties attach to the issue and their awareness of the consequences of the choice of the applicable law.

Unsophisticated parties may be unaware of the importance of the governing legal regime of the contract. They may feel that what really is essential is to agree on the substantive issues of their agreement and that the choice of law clause, just as the jurisdiction clause, will only be material if a dispute arises, which they do not really consider at that stage of their relationship. They will typically regard the law solely as a tool for resolving disputes. They will not appreciate that the law could void some other contractual provisions and that they could use the default rules provided by the applicable law and save the costs of negotiating contractual provisions to the same effect. As a consequence, unsophisticated parties often negotiate without lawyers because they feel that they do not need lawyers for negotiating substantive contractual obligations. In these kinds of cases, the parties will typically put most of their efforts into negotiating substantive clauses and then negotiate the jurisdiction and choice of law clauses in haste, as formal legal ornaments. The limited time for the negotiation will typically have almost expired, a long negotiation on the substantive obligations will often have been exhausting, and these parties will not have the patience to put substantial efforts into a discussion involving issues perceived as minor. Indeed, with the parties often unaware of the consequences of such choices, they will not clearly appreciate their interest and will not see what they should be trying to obtain in the negotiation. Typically, they will therefore either try to seek an agreement on the law of their country of origin or, if they cannot reach such agreement, try to settle on a "neutral" provision: that the law governing the contract be the law of a third party, i.e., the law of a state that is not the state of origin of any of the parties. In an effort for consistency, the parties may also grant jurisdiction to the courts of the third state or, alternatively, to arbitrators sitting in the territory of the third state.<sup>45</sup>

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45. Given the very remote link between the seat of the arbitration and the applicable law in modern international arbitration, this last consistency will generally be illusory.

For such parties, the costs of international contracting will not be significantly higher than the costs of contracting in a domestic context. The parties will not feel the need to invest time and effort in learning the content of the applicable law, whether foreign or not. In whichever context, they will simply incur no learning effect. The only additional transaction cost will be the negotiation of the choice of law clause. However, the parties therefore will put very limited effort in the negotiation of such clause.

This approach to the choice of the law governing the contract is obviously very dangerous. The law chosen by the parties will contain mandatory rules. If some of the contractual provisions contradict some of these rules, they will not be enforceable. The law could even provide that the contract is wholly invalid and allow any of the parties having an interest in doing so to have it set aside. *Ex post*, the parties may thus incur high costs if the negotiated provisions prove unenforceable. However, these costs will only be incurred if a dispute arises and if the parties are unable to settle on a business basis. The unenforceability of a clause or even of the whole contract will be irrelevant if one of the parties has not attempted to take advantage of it either in negotiation or judicial proceedings. The costs will then be a function of the probability of a dispute and one party's reliance on the unenforceability of the clause. They will not necessarily be higher than the transaction costs that the parties will have saved, whether consciously or not, by neglecting the issue of the applicable law.

These costs will not necessarily be higher in an international context than in a domestic context. There is no reason to believe that the probability of a dispute arising would be higher in an international context. The real issue would be whether the probability of the infringement of a mandatory rule would arise. Even if a party does not want to make the effort of ensuring that the contract is legally enforceable, it is likely that a party negotiating a domestic contract would reproduce many of the clauses commonly used in the industry. The probability of such clauses being invalid or unenforceable would thus be lower than for any atypical clause, because other parties in the industry would have hired lawyers or experienced litigation because of these clauses and learned from their experiences. On the other hand, if a foreign law governs the contract, the parties' practices cease to increase the probability of validity of the contract. Thus, if the parties agree on the domestic law of a third party state, it is likely that the probability of the invalidity of the contract increases and thus adds to the costs of international contracting. However, if the applicable law is the law of origin of one of the parties and governs its domestic transactions, the practices of that party remain relevant, at least to the extent that the international negotiation will not result in a compromise and thus in a change of his practices.

It also seems inefficient for the parties not to have determined whether the applicable law contained default rules that were acceptable to them and maybe the same as the provisions that they eventually agreed upon. However, the transaction costs of negotiating these provisions where equivalent or acceptable defaults existed in the applicable legislation could only be saved by incurring a learning effect and establishing the content of the applicable law. Again, whether this learning effect is lower than the unnecessary transaction costs incurred by the parties is unclear.

## 2. Sophisticated Parties

Sophisticated parties will be aware of the importance of the legal regime governing the contract. They will know that the applicable law may prohibit the parties' agreement on certain contractual provisions and could go as far as making the whole contract void. It could also be argued that they would know that the quality of the default rules of the governing law will have an effect on the scope of the parties' negotiation and thus bear on their transaction costs.

### *The Influence of Mandatory Rules on the Costs of International Contracting*

Sophisticated parties would not conclude contracts unless ensured that they are valid and enforceable. This is not to say, however, that they would necessarily want their lawyers to be involved in the negotiation. In some industries, parties will conclude similar contracts on a regular basis. They will typically know the rules applicable to the clauses that they commonly use or at least know that these common clauses are legally acceptable. The transaction costs of concluding a domestic contract will include no additional learning effect. In some other industries, however, parties will conclude contracts tailored to the underlying commercial operation. Typically, the parties will conclude fewer deals, but the value at stake in each deal will be much higher. The intervention of lawyers will then appear both as more necessary and more affordable because of both the novelty of potential specific legal issues that the contract could raise and the value of the deal. Typically, the parties will then seek the advice of their lawyers for each deal because they will not assume that the advice for one given deal will apply to another deal. In other words, the parties will always ask their lawyer to assure them that the contractual provisions that they have negotiated are valid and enforceable.

This difference will entail a very different approach to international contracts and to the possibility of a foreign law governing the contract. For those parties who could not consider

concluding a contract without seeking the advice of their lawyers, the international character of the contract will only marginally increase transaction costs. They will obviously need to bargain over a new issue, the applicable law.<sup>46</sup> However, no additional learning effect will be incurred, since they will seek the advice of their lawyers in any circumstances. Whether their lawyers will assure them that the contract is valid and enforceable under domestic law or a foreign law is essentially irrelevant. Often they will not even need to change lawyers since the law firm they usually use at home will typically have an office in the country the law of which was chosen to govern the contract.

The situation will be very different for the parties who would usually not seek the advice of their lawyers before concluding a domestic contract. If a foreign law or an unfamiliar legal regime governs the contract, they cannot rely on their prior knowledge of the law anymore and must learn the applicable law, thus incurring a learning effect. Practically, these parties will have to seek the advice of a lawyer and ask him how best to use the applicable law. This cost will be incurred by one of the parties only if the applicable law is the law of the other party's home country. It will be incurred by each of the parties and thus doubled if the applicable law is the law of a third party state and thus unfamiliar to both of them.

The learning effect will thus be an additional transaction cost for the conclusion of an international contract in only some circumstances. However, it must be stressed that the choice of the applicable law will command other contractual choices, which may entail further costs for one of the parties. For instance, parties may wish to ensure that the applicable law would be applied by an adjudicator who is familiar with that law.<sup>47</sup> If a court applies a law with which it is not familiar, it may misinterpret it. Indeed, the law would be foreign to the court and thus would have to be established before it. The applicable law would then become the law, the content of which could be proven to the satisfaction of the court. In many cases, the law would be distorted, and in the worst scenario, the court could find that the content of the applicable law was not proven to its satisfaction and declare its own law applicable.<sup>48</sup> To avoid the costs

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46. The parties could come from a non-unified legal system and thus face this issue even for domestic contracts. This is the case of U.S. parties that already evolve in a pluralistic legal environment. For them, this first additional cost of international contracting would be nonexistent unless the pluralistic environment was erased by a far reaching harmonization.

47. In the context of unification of European contract law, see Gerhard Wagner, *The Economics of Harmonization: The Case of Contract Law*, 39 COMMON MKT. L. REV. 995, 1010-11 (2002).

48. In most jurisdictions, the law of the forum will be applied as a substitute if the content of the foreign applicable law cannot be established to the satisfaction of the

of the process of establishing the content of foreign law during a trial<sup>49</sup> and the costs of having a less predictable legal regime governing the contract, the parties should therefore grant jurisdiction to the courts of the state of the law which governs the contract. The consequence of this choice will be that one party will bear the potential costs of litigating abroad, which could be higher than the costs of litigating at home. The most obvious reason for the increase in costs would be the language used in the litigation, which would typically be foreign. All legal documents produced by a party's lawyers would have to be translated. If the law of evidence of the local court demands that witnesses be heard, the costs of having these witnesses travel to testify would also increase. It follows that, if some parties do not incur further learning effects by accepting that a foreign law governs the contract, their litigation costs could be increased as a consequence of the choice of law.

The litigation costs could also be generally higher in one given jurisdiction. Lawyers could charge much more for the same service. Anglo-Saxon lawyers notoriously charge higher hourly rates than most civil lawyers. The local law could require the parties to hire several lawyers when they would only hire one in other countries. In the United Kingdom, the parties must retain a solicitor and a barrister.<sup>50</sup> Local procedure could rely on very costly pre-trial procedures such as discovery. The trial could last much longer, because local civil procedure could be oral and rely heavily on oral testimony. Lawyers would then charge more because they would provide more services. A jurisdiction clause, whether commanded or not by a choice of law clause, could have a significant effect on the potential litigation costs, not only of the party litigating abroad, but of both parties.

In an international context, the parties will generally be able to choose the law governing their contract.<sup>51</sup> From an efficiency

court. DICEY & MORRIS ON THE CONFLICT OF LAWS 221 (Lawrence Collins et al. eds., 13th ed. 2000) (U.K.); PIERRE MAYER & VINCENT HEUZÉ, DROIT INTERNATIONAL PRIVÉ 144 (2004) (Fr.); JAN KROPHOLLER, INTERNATIONALES PRIVATSRECHT 38 (1994) (F.R.G.).

49. Typically, each of the parties would have to retain an expert in the applicable law to prove the content of that law to the satisfaction of the court. They would also have to pay increased litigation costs since an additional issue would have to be litigated.

50. See generally KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 92, 103 (1992).

51. The scope of the freedom of the parties, however, varies from one jurisdiction to another. In most jurisdictions, the parties may choose any law, even wholly unconnected to the contract. This is the case in the European conflict of laws. Convention on the Applicable Law to Contractual Obligations art. 3, June 19, 1980, 19 I.L.M. 1492 (1980). In some other jurisdictions, the law must be connected to the

perspective, the choice of law rule will enable them to make the less costly choice and to bargain over it. The parties should obviously try to choose the applicable law that would most reduce the costs incurred equally by both of them. But they should also try to reduce as much as possible the costs incurred by one of them only, because that party would accept to bear a cost only if this loss is reflected in the share of the surplus that that party would receive from the bargain. Reducing the costs of one party would still increase the overall surplus of the transaction and eventually the share that each party would receive.

For parties for whom the learning effect is an additional cost, a choice can and should be made in favor of the law of origin of one party to keep the learning effect as low as possible. A party with a learning effect would clearly have a disadvantage since it would bear a transaction cost alone, but the deal could take that into account by increasing the share of surplus that party would receive from the bargain. If the parties are aware that the cost can be taken into account in the general equilibrium of the deal, they should not prefer the application of one law over the other but should only ensure that whatever the applicable law, the contract is valid, and its provisions are enforceable.

However, the choice of one law over the other could be commanded by the common loss that both parties would suffer by litigating in one jurisdiction and not the other. If litigation is significantly more costly in one of the two countries of origin of the parties, the only efficient solution seems to be to reach an agreement on the application of the law and the jurisdiction of the courts of the less expensive country and to increase the share of the surplus of the party that consents to learn a foreign law and potentially litigate abroad. Such an agreement would obviously depend upon the cheapest jurisdiction appearing as reasonably fair to foreign parties. Otherwise, unless the other party is ready to accept an even smaller share of the surplus and in effect provide insurance to the party that accepts potential litigation in an unfriendly forum, the parties would have no other choice than to litigate in the more expensive forum or to resort to international arbitration.

The opportunity to choose the applicable law may also be regarded by some parties as a chance to avoid inefficient mandatory rules of their law of origin by choosing a more efficient foreign law to govern their contract.<sup>52</sup> A party that had renounced the opportunity

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contract. This has traditionally been the case in the United States. See U.C.C. § 1-105(1) (2004); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

52. Larry Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 390 (2003) [hereinafter Ribstein, *From Efficiency*]; Larry Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 248 (1993).



to benefit from a given contractual clause because it is void under its law of origin could agree on the application of a foreign law under which the clause would be valid. For one of the parties at least, international contracting would thus reveal itself to be beneficial.

*The Influence of Default Rules on the Costs of International Contracting*

The applicable law is also important because it provides default rules. Default rules apply when the parties were free to agree on a provision governing their relationship but did not do so. These rules will fill the gaps of the incomplete contract that the parties will almost necessarily conclude. Modern contract scholarship claims that default rules would have an influence on the transaction costs of the parties in two ways: if the default rules are favored by the parties, they would allow the parties to negotiate less; if they are disfavored by the parties, they would force them to negotiate more.

*Default Rules Favored by the Parties*

If the parties would have negotiated and drafted a contractual clause having the same effect as the applicable default rule, they could avoid negotiating and drafting the clause and thus save the transaction costs of so doing. The parties would waste time and effort if they were to agree on contractual provisions that would be the same as the default rules of the law governing their agreement. The costs arising out of the negotiation of such clauses would also be wasted, since without the negotiation, the substantive obligations of the parties would have been the same. It follows that the transaction costs of concluding a contract could vary depending on the quality of the default rules of the applicable law. The more the applicable law contained default rules that the parties would actually have negotiated, the shorter, and thus cheaper, could be the negotiation.<sup>53</sup>

In the international context, there would therefore be a case for taking into account the quality of the default rules of the potential applicable laws in the choice of law process. The parties would include this factor into their assessment of the costs of preferring one law over the other.<sup>54</sup>

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53. See Ribstein, *From Efficiency*, *supra* note 52, at 399; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 596 (2003).

54. Francesco Parisi & Larry Ribstein, *Choice of Law*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 236, 237 (1998); Whincop & Keyes, *supra* note 43, at 531 (1997).

It is submitted, however, that good default rules of the applicable law do not save transaction costs.<sup>55</sup> First, the parties cannot assess whether a default rule is good for their purposes before knowing which contractual provision they would prefer. To determine whether they could save costs by avoiding negotiation of a given clause because the applicable default rule is the same, the parties need to determine the obligation that they would prefer, i.e. the content of the clause. Once the content of the preferred clause has been determined, most of the transaction costs have been incurred. Although the clause may not actually be drafted, it has been negotiated. At that stage, the parties could certainly realize that the default rule is actually the same, but whether they would decide to use it or to draft a contractual provision would have no material effect on the transaction costs of negotiating the clause.

The only way that default rules could save costs would be to take them into account at an early stage of the negotiation. For instance, the parties could, on each issue, wonder what the applicable default rule provides and determine whether they would like to keep it or to contract out of it. It does not seem very realistic to expect the parties to conduct a negotiation in that way since their main goal is to reach an agreement on business terms. In most negotiations, the parties come with an idea of the core substantive obligations that they would like to see in the contract and then bargain over them from a business standpoint. The parties would certainly be happy to incur lower transaction costs, but this is a minor concern at the time of the negotiation.

It should also be stressed that for commercial parties, there may be an important difference between an express contractual provision and a default rule in the applicable law. Psychologically, the obligation will appear as more binding and clearer if it is an express clause in the contract rather than a default rule that usually only lawyers are usually able to locate. An express obligation in a contract will always appear as more clearly applicable than any default rule.

#### *Default Rules Disfavored by the Parties*

If the parties initially intended to negotiate a contractual provision on a given issue, the disfavor for the applicable default rule does not bear on their transaction costs. However, if they did not so intend, they will need to negotiate a different contractual provision and thus incur additional costs for opting out of the default rule. If default rules are so different from what the parties would have

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55. The author is currently working on a paper which explores this idea in further detail.

negotiated that they would be unacceptable to them, the parties may be forced to negotiate more in order to contract out of such rules.<sup>56</sup> Initially, the parties may not have intended to address the issue in their negotiation, but after being informed of the content of the disfavored rule by their lawyers who reviewed the contract, the parties thus decided to contract around it. Default rules could be disfavored by the parties for various reasons. Lawmakers could simply have failed to make rules that most parties would favor. Or they could have provided a good default rule for most parties that would not be favored by specific parties. Finally, lawmakers could have made a bad default rule or penalty default rule on purpose to incite the parties to contract around it or address a given issue with a contractual clause.<sup>57</sup>

These kinds of default rules would undoubtedly increase the transaction costs of the parties. The more the applicable law contains unfavorable default rules, the more costly the conclusion of the contract would be. It could therefore be argued that parties to an international contract could enter into a process of comparison of the various potentially applicable laws and assess the quality of their default rules. Such a comparison would further increase transaction costs for the parties, but those costs would be worth incurring if the parties do not want to take the risk of opting out of a disfavored rule in haste and if the parties understand that it would be safer to rely on an acceptable default rule of another legal system. It has been stressed that default rules are often the result of years of experience of the lawyers of a given legal system, and that they have been tested in a multitude of situations and cases.<sup>58</sup> The reasonable option for the parties is therefore to incur either the costs of a full negotiation to determine the most acceptable rule to both parties or the costs of a comparison between a few laws practically available to the parties.<sup>59</sup> That comparison would be aimed at finding rules that simply could be acceptable to both parties but more reliable than provisions agreed upon in haste. The possibility of choosing between several laws could therefore benefit the parties if the laws are not comparable on the issues at stake.

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56. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 276 (1985).

57. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

58. Goetz & Scott, *supra* note 56, at 277.

59. That is, arguably, the law of origin of each party so that one only would incur a learning effect.

### III. THE STUDY OF 181 CASES WHERE THE CISG WAS APPLIED

To assess the effect of the CISG on the contractual practices of commercial parties involved in international trade and to find whether it has been beneficial to them, this Article will utilize data on contractual practices since the CISG has been governing international sales of goods. The most accessible data are the cases where the CISG was applied, especially the cases applying the CISG in three major jurisdictions: the United States, Germany, and France. This Article also explores the arbitral awards that were made available to the public, particularly those by the International Chamber of Commerce. In total, the data provides evidence of the contractual practices adopted in 181 cases.

The most important information that the study reveals is that parties to international sales are generally not concerned with the legal regime governing their contracts. The study of judgments rendered by U.S. courts show that in twenty-four out of thirty-eight cases, parties did not even provide for the law governing their contracts, let alone opt in or out of the CISG,<sup>60</sup> and in two other cases

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60. The parties included no choice of law clause in twenty-four cases. *Chateau des Charmes Wines Ltd. v. Sabate USA, Inc.*, 328 F.3d 528, 528–31 (9th Cir. 2003); *Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440, 442–43 (3d Cir. 2003); *Schmitz-Werke GMBH & Co. v. Rockland Indus.*, 37 F. App'x 687, 687–91 (4th Cir. 2002); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 387 (7th Cir. 2002); *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.P.A.*, 144 F.3d 1384, 1385–86 (11th Cir. 1998); *Attorneys Trust v. Videotape Computer Prods., Inc.*, No. CV-92-03442-KN(Ex), 1996 WL 473755, at \*\*1 (9th Cir. Aug. 20, 1996); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1026–27 (2d Cir. 1995); *Beijing Metals & Minerals Imp./Exp. Corp. v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1179–81 (5th Cir. 1993); *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 663–68 (N.D. Ill. 2005); *Comercializadora Portimex S.A. de C.V. v. Zen-Noh Grain Corporation*, 373 F. Supp. 2d 645, 646–48 (E.D. La. 2005); *McDowell Valley Vineyards, Inc. v. Sabate USA Inc.*, No. C-04-0708, 2005 WL 2893848, at \*1–\*2 (N.D. Cal. Nov. 2, 2005); *Amco Ukrservice v. Am. Meter Co.*, 312 F. Supp. 2d 681, 683–85 (E.D. Pa. 2004); *Chi. Prime Packers v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 704–08 (N.D. Ill. 2004); *Raw Materials, Inc. v. Manfred Forberich GMBH & Co., KG*, No. 03-C-1154, 2004 WL 1535839, at \*1–\*2 (N.D. Ill. Jul. 7, 2004); *Chi. Prime Packers v. Northam Food Trading Co.*, No. 01-C-4447, 2003 WL 21254261, at \*1–\*3 (N.D. Ill. May 29, 2003); *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 241–44 (S.D.N.Y. 2002); *Usinor Industeel v. Leeco Steel Prods.*, 9 F. Supp. 2d 880, 881–83 (N.D. Ill. 2002); *Shuttle Packaging Sys. v. Tsonakis*, No. 1:01-CV-691, 2001 WL 34046276, at \*1–\*2 (W.D. Mich. Dec. 17, 2001); *Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147, 1148–49 (N.D. Cal. 2001); *Viva Vino Imp. Corp. v. Farnese Vini S.R.L.*, No. CIV.A. 99-6384, 2000 WL 1224903, at \*1 (E.D. Pa. Aug. 29, 2000); *Fercus, S.R.L. v. Palazzo*, No. 98 CIV. 7728(NRB), 2000 WL 1118925, at \*1 (S.D.N.Y. Aug. 8, 2000); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at \*1–\*3 (S.D.N.Y. Apr. 7, 1998); *Mitchell Aircraft Spares v. European Aircraft Serv.* AB, 23 F. Supp. 2d 915, 916–18 (N.D. Ill. 1998); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F.Supp. 1229, 1230–34 (S.D.N.Y. 1992).

the parties had sent standardized forms or unilaterally provided for the applicable law without seeking the agreement of the other party on the issue.<sup>61</sup> In others words, in twenty-four out of thirty-eight cases, or 63%, the parties were not sufficiently concerned with the applicable law to include a provision in this respect or to ensure that it would be enforceable. The CISG was therefore held applicable under Article 1.1(a), i.e., because the places of business of the parties were in different Contracting States.<sup>62</sup>

This information is confirmed by a study of the cases tried by German and French courts. In Germany, the jurisdiction in which the most cases applying the CISG can be found, the parties provided for the applicable law in only seven cases.<sup>63</sup> In one case, a German court

The parties included a choice of law clause in fourteen cases. BP Oil Int'l Ltd. v. Empresa Estatal Petoleos de Ecuador, 332 F.3d 333, 335 (5th Cir. 2003); Multi-Juice, S.A. v. Snapple Beverage Corp., No. 02 Civ. 4635(RPP), 2006 WL 1519981, at \*2 (S.D.N.Y. June 1, 2006); Beltappo Inc. v. Rich Xiberta, S.A., No. C05-1343Z, 2006 WL 314338, at \*4 (W.D. Wash. Feb. 7, 2006); Am. Biophysics Corp. v. Dubois Marine Specialties, No. C.A. 05-321-T, 2006 WL 225778, at \*1 (D.R.I. Jan. 30, 2006); Fisher v. Thyssen Mannesmann Handel GMBH, No. 05 C 6193, 2006 WL 211858, at \*1 (N.D. Ill. Jan. 19, 2006); Am. Mint LLC v. GO Software, No. Civ.A. 1:05-CV-650, 2005 WL 2021248, at \*1 (M.D. Pa. Aug. 16, 2005); Genpharm v. Pliva-Lachema A.S., 361 F. Supp. 2d 49, 53 (E.D.N.Y. 2005); Ajax Tool Works, Inc. v. Can-Eng Mfg., No. 01 C 5938, 2003 WL 223187, at \*1 (N.D. Ill. Jan. 30, 2003); Jacada (Eur.), Ltd. v. Int'l. Mktg. Strategies, 255 F. Supp. 2d 744, 746 (W.D. Mich. 2003); St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 CIV. 9344(SHS), 2002 WL 465312, at \*1 (S.D.N.Y. Mar. 26, 2002); Asante Techs. v. PMC-Sierra, 164 F. Supp. 2d 1142, 1145 (N.D. Cal. 2001); Hull 753 Corp. v. Elbe Flugzeugwerke GMBH, 58 F. Supp. 2d 925, 927 (N.D. Ill. 1999); Northland Power v. Gen. Elec., 105 F. Supp. 2d 775, 782 (S.D. Ohio 1999); Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., No. 95 CIV. 10506(DLC), 1997 WL 458785, at \*2 (S.D.N.Y. Aug. 11, 1997).

61. Valero Mktg. & Supply Co. v. Greeni Oy & Greeni Trading Oy, 373 F. Supp. 2d 475, 477 (D.N.J. 2005); Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 920-21 (N.D. Ill. 1999).

62. See CISG, *supra* note 3, at art. 1(1)(a).

63. Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Apr. 21, 2004, No. I-15 U 88/03, slip op. at 4, 5 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=915>; Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Jan. 23, 2004, No. I-17 U 110/02, slip op. at 5 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=918>; Oberlandesgericht Zweibrücken [OLG] [Zweibrücken Court of Appeals] July 26, 2002, 2/2002 Internationales Handelsrecht [IHR] 67 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=688>; Oberlandesgericht Rostock [OLG] [Rostock Court of Appeals] Oct. 10, 2001, No. 6 U 126/00, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=671>; Oberlandesgericht Frankfurt [OLG] [Frankfurt Court of Appeals] Aug. 30, 2000, 2001 Recht der Internationalen Wirtschaft [RIW] 383 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=594>; Oberlandesgericht Hamburg [OLG] [Hamburg Court of Appeals] Jan. 26, 2000, 2000 Rechtsprechung des Hanseatischen Oberlandesgerichts Hamburg [OLGR Hamburg] 464 (F.R.G.), available at <http://cisg-online.ch/cisg/overview.php?test=509>; Landgericht [LG] [Bielefeld Trial Court] Dec 12, 2003, No. 15 O 50/03, slip op. at 5 (F.R.G.), <http://cisg-online.ch/cisg/overview.php?test=905>.

found that the parties had implicitly done so but that their contract certainly did not contain an express choice of law clause.<sup>64</sup> In twenty-five cases, German courts expressly noted that the parties had not provided for the applicable law.<sup>65</sup> Finally, in thirty-eight cases,

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64. Oberlandesgericht Köln [OLG] [Köln Court of Appeals] May 28, 2001, 1/2002 Internationales Handelsrecht [IHR] 21 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=681>.

65. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr 30, 2003, No. III ZR 237/02, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=790>; Bundesgerichtshof [BGH] [Federal Court of Justice] Oct 2, 2002, 1/2003 Internationales Handelsrecht [IHR] 28 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=700>; Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, 1/2002 Internationales Handelsrecht [IHR] 16 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=714> (battle of forms); Oberlandesgericht Köln [OLG] [Köln Court of Appeals] Feb. 13, 2006, No. 16 U 17/05, slip op. at 3 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=1219>; Oberlandesgericht Stuttgart [OLG] [Stuttgart Court of Appeals] Dec. 20, 2004, No. 5 U 108/04, slip op. at 5 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=997>; Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] July 22, 2004, Np. I-6 U 210/03, slip op. at 3 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=916>; Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] May 28, 2004, 2004 Internationales Handelsrecht [IHR] 203 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=850>; Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Apr. 21, 2004, No. I-15 U 30/03, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=913>; Oberlandesgericht Zweibrücken [OLG] [Zweibrücken Court of Appeals] Feb. 2, 2004, No. 7 U 4/03, slip op. at 7 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=877>; Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Jan. 30, 2004, 2004 Internationales Handelsrecht [IHR] 108 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=821>; Oberlandesgericht Karlsruhe [OLG] [Karlsruhe Court of Appeals] Dec. 10, 2003, 2004 Internationales Handelsrecht [IHR] 262 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=911>; Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] July 25, 2003, No. I-23 U 70/03, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=821>; Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, 2006 Internationales Handelsrecht [IHR] 26 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=1190> (battle of forms); Landgericht Mönchengladbach [LG] [Mönchengladbach Trial Court] July 15, 2003, 5/2003 Internationales Handelsrecht [IHR] 229 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=813>; Landgericht Tübingen [LG] [Tübingen Trial Court] June 18, 2003, 5/2003 Internationales Handelsrecht [IHR] 236 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=784>; Landgericht Saarbrücken [LG] [Saarbrücken Dist. Ct.] Nov. 25, 2002, 2/2003 Internationales Handelsrecht [IHR] 70 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=718>; Landgericht Braunschweig [LG] [Braunschweig Trial Court] July 30, 2001, 2/2002 Internationales Handelsrecht [IHR] 71 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=689>; Landgericht Trier [LG] [Trier Trial Court] June 28, 2001, No. 7 HKO 204/99, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=673>; Landgericht Trier [LG] [Trier Trial Court] Mar. 29, 2001, No. 7 HKO 204/9, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=674>; Landgericht München [LG] [München Trial Court] Nov. 16, 2000, No. 12 HKO 3804/00, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=667>; Landgericht Stendal [LG] [Stendal Trial Court] Oct. 12, 2000, 2001 Internationales Handelsrecht [IHR] 34 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=592>; Landgericht Memmingen [LG]

German courts held that the CISG applied because the parties had their places of business in different Contracting States without actually mentioning whether the contract contained a choice of law clause.<sup>66</sup> Thus, in more than 75% of the cases that discussed the

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[Memmingen Trial Court] Sept. 13, 2000, No. 2H O 382/99, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=820>; Landgericht Darmstadt [LG] [Darmstadt Trial Court] May 9, 2000, 2001 Internationales Handelsrecht [IHR] 27 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=560>; Landgericht München [LG] [München Trial Court] Apr. 6, 2000, No. 12 HKO 4174/99, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=665>; Amstgericht Duisburg [AG] [Duisburg Local Court] Apr. 13, 2000, No. 49 C 502/00, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overivew.php?test=659>.

66. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 11, 2006, 2/2006 Internationales Handelsrecht [IHR] 82 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=1200>; Bundesgerichtshof [BGH] [Federal Court of Justice] June 30, 2004, 2004 Recht der Internationalen Wirtschaft [RIW] 788 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=847>; Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 31, 2001, No. VIII ZR 60/01, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=617>; Oberlandesgericht Köln [OLG] [Köln Court of Appeals] May 24, 2006, No. 16 W 25/06, slip op. at 4 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=1232>; Oberlandesgericht Köln [OLG] [Köln Court of Appeals] Apr. 3, 2006, No. 16 U 65/05, slip op. at 3 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=1218>; Oberlandesgericht Karlsruhe [OLG] [Karlsruhe Court of Appeals] July 20, 2004, 2004 Internationales Handelsrecht [IHR] 246 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=858>; Oberlandesgericht Celle [OLG] [Celle Court of Appeals] Mar. 10, 2004, 2004 Internationales Handelsrecht [IHR] 106 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=824>; Oberlandesgericht Frankfurt [OLG] [Frankfurt Court of Appeals] Jan. 29, 2004, 2004 Internationales Handelsrecht [IHR] 113 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=822>; Oberlandesgericht Rostock [OLG] [Rostock Court of Appeals] Oct. 27, 2003, No. 3 U 205/02, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=815>; Oberlandesgericht München [OLG] [München Court of Appeals] Nov. 13, 2002, No. 27 U 346/02, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=786>; Oberlandesgericht Schleswig-Holstein [OLG] [Schleswig-Holstein Court of Appeals] Oct. 29, 2002, 2/2003 Internationales Handelsrecht [IHR] 67 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=717>; Oberlandesgericht Köln [OLG] [Köln Court of Appeals] Oct. 14, 2002, 2/2003 Internationales Handelsrecht [IHR] 15 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=709>; Oberlandesgericht Koblenz [OLG] [Koblenz Court of Appeals] Oct. 4, 2002, 2/2003 Internationales Handelsrecht [IHR] 66 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=716>; Oberlandesgericht Rostock [OLG] [Rostock Court of Appeals] Sept. 25, 2002, 1/2003 Internationales Handelsrecht [IHR] 19 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=672>; Oberlandesgericht Schleswig-Holstein [OLG] [Schleswig-Holstein Court of Appeals] Aug. 22, 2002, 1/2003 Internationales Handelsrecht [IHR] 20 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=710>; Oberlandesgericht München [OLG] [München Court of Appeals] July 1, 2002, No. 17 U 2513/02, slip op. (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=656>; Oberlandesgericht Köln [OLG] [Köln Court of Appeals] July 16, 2001, No. 16 U 22/01, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=609>; Oberlandesgericht Stuttgart [OLG] [Stuttgart Court of Appeals] Mar. 12, 2001, No. 5 U 216/99, slip op. at 9 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=841>; Oberlandesgericht Zweibrücken [OLG] [Zweibrücken Court of Appeals] Feb. 14, 2001, 2001 Internationales

existence of a choice of law clause, the parties did not provide for the applicable law to their contract of sale.

In France, the forty-one cases which applied the CISG can be divided along the same lines. If one ignores the seventeen cases where the court held that the CISG applied without stating whether the parties had provided for the applicable law,<sup>67</sup> a review of the

Handelsrecht [IHR] 64 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=610>; Oberlandesgericht Köln [OLG] [Köln Court of Appeals] Nov. 13, 2000, No. 16 U 45/00, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=657>; Oberlandesgericht Stuttgart [OLG] [Stuttgart Court of Appeals] Feb. 28, 2000, 2001 Internationales Handelsrecht [IHR] 65 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=583>; Landgericht Trier [LG] [Trier Trial Court] Jan. 8, 2004, 2004 Internationales Handelsrecht [IHR] 115 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=910>; Landgericht Hamburg [LG] [Hamburg Dist. Ct.] Nov. 26, 2003, No. 411 O 99/02, slip op. at 6 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=875>; Landgericht Bielefeld [LG] [Bielefeld Trial Court] Oct. 31, 2003, No.15 O 6/03, slip op. at 5 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=907>; Landgericht Hamburg [LG] [Hamburg Trial Court] Sept. 10, 2003, No. 411 O 183/02, slip op. at 6 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=874>; Landgericht Bielefeld [LG] [Bielefeld Trial Court] Aug 15, 2003, No. 15 O 5/03, slip op. at 4 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=906>; Landgericht Nürnberg-Fürth [LG] [Nürnberg-Fürth Trial Court] Feb. 27, 2003, 1/2004 Internationales Handelsrecht [IHR] 20 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=818>; Landgericht Gießen [LG] [Gießen Trial Court] Dec. 17, 2002, 2003 Internationales Handelsrecht [IHR] 276 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=766>; Landgericht Göttingen [LG] [Göttingen Trial Court] Sept. 20, 2002, No. 7 O 43/01, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=655>; Landgericht Freiburg [LG] [Freiburg Trial Court] Aug. 22, 2002, 1/2003 Internationales Handelsrecht [IHR] 22 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=711>; Landgericht Saarbrücken [LG] [Saarbrücken Trial Court] July 2, 2002, 1/2003 Internationales Handelsrecht [IHR] 27 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=713> (discussion of German law in correspondence); Landgericht Stuttgart [LG] [Stuttgart Trial Court] June 4, 2002, No. 15 O 179/01, slip op. at 9 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=909>; Landgericht Freiburg [LG] [Freiburg Trial Court] Apr. 26, 2002, 1/2003 Internationales Handelsrecht [IHR] 72 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=690>; Landgericht München [LG] [München Trial Court] Feb. 27, 2002, No. 5HK O 3936/00, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=654>; Landgericht München [LG] [München Trial Court] Aug. 30, 2001, No. 12 HK O 5593/01, slip op. (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=668>; Landgericht Darmstadt [LG] [Darmstadt Trial Court] May 29, 2001, 4/2001 Internationales Handelsrecht [IHR] 160 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=686>; Landgericht Hamburg [LG] [Hamburg Dist. Ct.] Jan. 31, 2001, No. 411 O 11/00, slip op. at 5 (F.R.G.), <http://www.cisg-online.ch/cisg/overview.php?test=876>; Amtsgericht Viechtach [AG] [Viechtach Local Court] Apr. 11, 2002, 2002 Juistisches Büro [JurBüro] 429 (F.R.G.), available at <http://www.cisg-online.ch/cisg/overview.php?test=755>.

67. Cour d'appel [CA] [regional court of appeal] Paris, 14e ch., Sept. 19, 2003, No. 2003/01961, slip op, <http://www.cisg-online.ch/cisg/overview.php?test=789>; Cour d'appel [CA] [regional court of appeal] Paris, 5e ch., Sept. 10, 2003, No. 2002/02304, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=788>; Cour d'appel [CA] [regional court of appeal] Colmar, 1e ch., Nov. 13, 2002, D. 2003, Somm. 2367, obs.



twenty-four other judgments of French courts which applied the CISG reveals that parties seriously addressed the issue of the applicable law in only one case.<sup>68</sup> In nineteen cases, the contract was silent as to the applicable law.<sup>69</sup> In one case, the parties had provided

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Witz; Cour d'appel [CA] [regional court of appeal] Paris, 5e ch., June 14, 2001, No. 2000/13970, slip op., obs. Witz, <http://www.cisg-online.ch/cisg/overview.php?test=693>; Cour d'appel [CA] [regional court of appeal] Orléans, Mar. 29, 2001, No. 00/02909, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=611>; Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Oct. 12, 2000, No. 1998/025917, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=1094>; Cour d'appel [CA] [regional court of appeal] Rouen, Feb. 17, 2000, available at <http://witz.jura.uni-sb.de/CISG/decisions/170200v.htm>; Cour d'appel [CA] [regional court of appeal] Grenoble, Oct. 21, 1999, D. 2000, Somm. 441, obs. Witz, available at <http://www.cisg-online.ch/cisg/overview.php?test=574>; Cour d'appel [CA] [regional court of appeal] Paris, 5e ch., May 21, 1999, D. 2000, Somm. 442, obs. Witz, available at <http://www.cisg-online.ch/cisg/overview.php?test=498>; Cour d'appel [CA] [regional court of appeal] Grenoble, Feb. 4, 1999, D. 1999, Somm. 363, obs. Witz, available at <http://www.cisg-online.ch/cisg/overview.php?test=443>; Cour d'appel [CA] [regional court of appeal] Paris, D. Mar. 18, 1998, No. 97/25212, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=533>; Cour d'appel [CA] [regional court of appeal] Paris, D. Mar. 4, 1998, No. 97/24418, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=535>; Cour d'appel [CA] [regional court of appeal] Versailles, 12e ch., Jan. 29, 1998, No. 1222/95, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=337>; Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Dec. 13, 1995, JCP [1997] II [22772], note Vareilles-Sommières, available at <http://www.cisg-online.ch/cisg/overview.php?test=312>; Cour d'appel [CA] [regional court of appeal] Grenoble, Mar. 29, 1995, No. 93/2821, slip op., note Kahn, <http://www.cisg-online.ch/cisg/overview.php?test=156>; Cour d'appel [CA] [regional court of appeal] Grenoble, Feb. 22, 1995, No. 93/3275, slip op., note Kahn, <http://www.cisg-online.ch/cisg/overview.php?test=151>; Cour d'appel [CA] [regional court of appeal] Grenoble, June 16, 1993, No. 92/4223, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=90>.

68. Cass. com., Dec. 17, 1996, D. 1997, 337, note Remery (Fr.), available at <http://www.cisg-online.ch/cisg/overview.php?test=220>. In another case, the parties had provided for the applicable law (Minnesota) for a concession, but not for the sales made under such concession. Cour d'appel [CA] [regional court of appeal] Grenoble, May 15, 1996, D. 1997, Somm. 221, obs. Witz, available at <http://www.cisg-online.ch/cisg/overview.php?test=219>.

69. Cass. 1e civ., June 26 2001, Bull. civ. I, No. 187, at 120, (Fr.), available at <http://www.cisg-online.ch/cisg/overview.php?test=598>; Cass. 1e civ., June 26 2001, Bull. civ. I, No. 189, at 119, (Fr.), available at <http://www.cisg-online.ch/cisg/overview.php?test=695>; Cass. 1e civ., Dec. 2 1997, Bull. civ. I, No. 336, at 229, (Fr.), available at <http://www.cisg-online.ch/cisg/overview.php?test=294>; Cour d'appel [CA] [regional court of appeal] Paris, Nov. 4 2004, No. 1994/83479, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=1008>; Cour d'appel [CA] [regional court of appeal] Poitiers, 1e ch., Oct. 26 2004, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=952>; Cour d'appel [CA] [regional court of appeal] Paris, 25e ch., June 4, 2004, No. 2002/18702, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=872>; Cour d'appel [CA] [regional court of appeal] Lyon, Dec. 18, 2003, available at <http://www.cisg-online.ch/cisg/overview.php?test=871>; Cour d'appel [CA] [regional court of appeal] Grenoble Nov. 28, 2002, JCP 2003, ed. G, IV 1215, available at <http://www.cisg-online.ch/cisg/overview.php?test=787>; Cour d'appel [CA] [regional court of appeal] Versailles, June 27 2002, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=848&step=FullText>; Cour d'appel [CA] [regional court of appeal] Paris, Nov. 6 2001, D. 2002, 2795, available at <http://www.cisg->

for the application of their law of origin on their commercial forms but did not bother to ensure that the provision would be enforceable.<sup>70</sup> Finally, in one case the parties sporadically mentioned articles of the Italian civil code, which led the court to hold that they had implicitly chosen Italian law.<sup>71</sup> Thus, in more than 95% of these cases, the parties do not seem to have been concerned with the legal regime governing their transaction.

Finally, a study of thirty arbitral awards which applied the CISG, including twenty-five awards of arbitral tribunals constituted under the aegis of the International Chamber of Commerce, reveals that the parties had provided for the applicable law in only twelve cases.<sup>72</sup> In seventeen cases, their contracts were silent in this respect.<sup>73</sup> In one case, the parties were deemed to have chosen the

online.ch/cisg/overview.php?test=677; Cour d'appel [CA] [regional court of appeal] Colmar, June 12, 2001, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=694>; Cour d'appel [CA] [regional court of appeal] Amiens, Jan. 30, 2001, D. 2002, Somm. 323; Cour d'appel [CA] [regional court of appeal] Paris, Feb. 10, 1999, D., No. 1996/82223, available at <http://witz.jura.uni-sb.de/CISG/decisions/100299v.htm>; Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 14, 1998, D. 1998, Somm. 288, obs. B. Audit, available at <http://www.cisg-online.ch/cisg/overview.php?test=347>; Cour d'appel [CA] [regional court of appeal] Paris, D., Oct. 15, 1997, No. 97/08814, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=293>; Cour d'appel [CA] [regional court of appeal] Grenoble, Oct. 23, 1996, No. 94/3859, slip op., note André Huet, <http://www.cisg-online.ch/cisg/overview.php?test=305>; Cour d'appel [CA] [regional court of appeal] Grenoble, Apr. 26, 1995, No. 93/1613, slip op., <http://witz.jura.uni-sb.de/CISG/decisions/2604952v.htm>; Cour d'appel [CA] [regional court of appeal], Grenoble, June 16, 1993, No. 92/4223, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=90>; Cour d'appel [CA] [regional court of appeal], Paris, A, Apr. 22, 1992, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=222>.

70. Cour d'appel [CA] [regional court of appeal] Colmar, 1e ch., Oct. 24, 1990, slip op., <http://www.cisg-online.ch/cisg/overview.php?test=578> (holding that the choice of law appearing on the forms of one party was inapplicable).

71. Cour d'appel [CA] [regional court of appeal] Grenoble, Sept. 13, 1995, No. 93/4126, slip op., note Witz, <http://www.cisg-online.ch/cisg/overview.php?test=157>.

72. ICC Award No. 10329 (2000), reprinted in *KLUWER LAW INT'L*, 29 *YEARBOOK COMMERCIAL ARBITRATION* 108 (2004); ICC Awards Nos. 9448 (1999), 9187 (1999), 9083 (1999), 8769 (1996), 8574 (1996), 8482 (1996), 8453 (1995), 8213 (1995), 7754 (1995), 7645 (1995), reprinted in *INT'L CHAMBER OF COMMERCE*, 11 *INTERNATIONAL COURT OF ARBITRATION BULLETIN*, No. 2 (2000); ICC Award No. 8855 (1997), reprinted in 127 *JOURNAL DU DROIT INTERNATIONAL* 1070 (2000) (Fr.). ICC Awards Nos. 8769 and 8213 expressly provided for the application of the CISG.

73. *China Nat. Metal Prods. Imp./Exp. Co. v. Apex Digital, Inc.*, 141 F. Supp. 2d 1013 (C.D. Cal. 2001) (CIETAC Award); ICC Awards Nos. 9887 (1999), 9773 (1999), 9574 (1998), 9117 (1998), 8786 (1997), 8962 (1997), 8716 (1997), 8740 (1996), 8247 (1996), reprinted in *INT'L CHAMBER OF COMMERCE*, 11 *INTERNATIONAL COURT OF ARBITRATION BULLETIN*; ICC Award No. 8501 (1996), reprinted in 128 *JOURNAL DU DROIT INTERNATIONAL* 1164 (2001) (Fr.); ICC Award No. 9771 (2001), reprinted in *KLUWER LAW INT'L*, 29 *YEARBOOK COMMERCIAL ARBITRATION* 46 (2004); ICC Award No. 8817 (1997), reprinted in *KLUWER LAW INT'L*, 25 *YEARBOOK COMMERCIAL ARBITRATION* 355 (2000); *Hamburg Friendly Arbitration Award* of Dec. 29, 1998, reprinted in *KLUWER LAW INT'L*, 24 *YEARBOOK COMMERCIAL ARBITRATION* 13 (1999);

law governing their contract because their contract referred to a standard contract that contained a standard choice of law clause.<sup>74</sup> Thus, in 60% of the cases, the parties had not provided for the applicable law.

Perhaps no conclusions can be drawn from this study. The data gathered is obviously very limited, since thousands of international contracts of sale are concluded everyday, and this Article has only reviewed a few dozen. Furthermore, this Article has only reviewed contracts that led to a dispute. One could argue that many contracts exist that are better drafted and do not give rise to litigation precisely because they are sufficiently well drafted. This is probably true to some extent, but it is likely that the general trend revealed by the study would not be entirely contradicted by a larger study, even of contracts performed without any difficulty. It may therefore be that the percentage of buyers and sellers actually providing for the law governing their contracts is higher than what the cases reveal.

At the same time, a significant aspect of the data is hard to interpret. Many of the judgments applying the CISG do not mention any choice of law clause. Although they sometimes give no reason why they find that the Convention applies, they usually hold that it is applicable because the places of business of the parties were in different Contracting States. It cannot be ruled out that these contracts contained a choice of law clause but that the court did not find it relevant in assessing whether the CISG applied. Indeed, if the clause provided for the application of the law of origin of one of the parties, which would be the most likely possibility, it would not be relevant to the determination of the applicability of the CISG. If the law of a Contracting State is chosen by the parties, it is now almost universally held that this refers to the CISG, which is the applicable law to such contracts in the law of the Contracting State.<sup>75</sup> In other words, whether the parties chose the law of a Contracting State to govern their contracts is irrelevant as far as the applicability of the CISG is concerned. Yet the Convention allows parties to opt out of it.<sup>76</sup> A choice of law by the parties is therefore not completely

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Zurich Chamber of Commerce Award No. 273/1995 (1996), *reprinted in* KLUWER LAW INT'L, 23 YEARBOOK COMMERCIAL ARBITRATION 128 (1998); Hamburg Chamber of Commerce Award of Sept. 4, 1996, *reprinted in* KLUWER LAW INT'L, 22 YEARBOOK COMMERCIAL ARBITRATION 51 (1997); Hamburg Chamber of Commerce Partial Award of Mar. 21, 1996, *reprinted in* KLUWER LAW INT'L, 22 YEARBOOK COMMERCIAL ARBITRATION 35 (1997).

74. ICC Award No. 8782 (1997), *reprinted in* KLUWER LAW INT'L, 28 YEARBOOK COMMERCIAL ARBITRATION 39 (2003).

75. See, e.g., Franco Ferrari, *What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG*, 25 INT'L REV. L. & ECON. 314, 314 (2005).

76. CISG, *supra* note 3, at art. 6.

insignificant. Although its solution seems now to be settled in several jurisdictions, in particular in the United States, Germany, and France, an issue clearly arises. One could expect a court to mention the choice of law clause and rule that the chosen law includes the CISG, or alternatively that the choice does not amount to an exclusion of the Convention for the purpose of its Article 6. Indeed, most of the judgments mentioning a choice of law went on to say that the CISG applied irrespective of the choice made by the parties.<sup>77</sup> It is therefore very difficult to interpret the judgments that remain silent in this respect. Although there is no direct evidence to support such a conclusion, this Article maintains that most of those decisions dealt with contracts that were silent on the applicable law and that the reason why they did not mention the clause is simply that there was none. If that is the case, it may well be that the percentage of contracts actually providing for a choice of law is much lower than 25%.

If the data gives an accurate sense of the proportion of parties that provide for the applicable law in their contracts, it is hard not to be very pessimistic about the degree of legal sophistication of the parties involved in international sales. If the parties fail to provide for the applicable law to their contracts, it must mean that they are just not concerned with the applicable regime governing their agreements. Theoretically, one could probably argue that the parties could be very much aware of the applicable law even without actually agreeing on it. After all, there are default conflict of laws rules that provide for the applicable law when the parties have not reached an agreement in this respect. And since the CISG has been applicable, one could even argue that they are not even needed anymore, as the CISG governs automatically sales concluded between parties having their places of business in different Contracting States. In other words, it may well be that it is because international buyers and sellers know that the CISG applies that they do not bother providing for the applicable law.

These theoretical explanations are completely unrealistic. To begin with, it is difficult to see how the parties could rely on the default conflict rules in contract matters. In most jurisdictions, these rules are some of the most unpredictable rules of the conflict of laws.<sup>78</sup> In most European countries, pursuant to Article 4 of the 1980 Rome Convention on the Applicable Law to Contractual Obligations,

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77. See Franco Ferrari, *Trimunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*, 20 J.L. & COM. 225, 233–34 (2005).

78. See Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: the Validity Exception to the Convention of Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 6 (noting that one of the key rationales for the CISG was to reduce the need to resort to unpredictable conflict of laws rules).

the applicable law would be the law of the seller, unless the contract is more closely connected to another jurisdiction or, in other words, unless the proper law of the contract is another law.<sup>79</sup> Because all connections between a contract and a jurisdiction can be taken into consideration for the purposes of this rule, an argument can be made in most of the cases that the contract is actually governed by the law of the buyer.<sup>80</sup> Ultimately, a court will decide, but in the meantime, the parties have no certainty as to the applicable law. In the United States, most states would apply the law which as the most appropriate relation or most significant relationship with the transaction and the parties, which could hardly be more predictable for non-specialists.<sup>81</sup> It is therefore more likely that parties not providing for the applicable law in their contracts are, whether consciously or not, neglecting the issue of the legal regime governing their contracts. It is true that the rule providing for the application of the CISG when the parties have their places of business in different Contracting States is very predictable, but it may not be realistic to expect that international buyers and sellers knew about the CISG so quickly after its entry into force and immediately relied on it. To the contrary, there are studies that show both that many lawyers do not know of the CISG<sup>82</sup> and that when they do know of it, they tend to advise their clients to exclude its application because it has not yet been experimented with and litigated to a sufficient extent.<sup>83</sup> In addition, it should be stressed that the CISG has only completed a partial harmonization of international sale law and that parties sophisticated enough to know the CISG a few years after its entry into force should also know that a national law should still be chosen to govern the outstanding issues, in particular to regulate the validity of the contract and its enforceability.<sup>84</sup>

Therefore, most parties that fail to provide for the applicable law neglect the issue of the legal regime governing their contracts. A few

79. See *id.* at 15 (noting that the law of the seller's place of business often applies as the default rule to contracts of sale).

80. *Id.* By exception to this rule, the 1955 Hague Convention provides for the application of the law of the seller when the case is brought before the courts of one of the nine signatories, including France, Italy, and the Scandinavian States. See *supra* note 20 and accompanying text.

81. *Id.*; see also WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 264 (3d ed. 2003).

82. On the ignorance of U.S. lawyers, see generally William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72 (2000); Michael Wallace Gordon, *Some Thoughts on the Receptiveness of Contracts Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 AM. J. COMP. L. 361 (1998).

83. See *infra* note 122 and accompanying text.

84. See *infra* Part IV.A (the scope of the harmonization).

of them may have conducted hard negotiations on the issue and failed to reach any agreement. But the truth of the matter is very probably much simpler: the parties are just unaware of the importance of the applicable law and of the choice of law issue generally. The law governing the contract is just not an issue *ex ante*. It may be that other rules appear to them as more important, such as rules preventing the sale (e.g., the right to export or import goods) or rules increasing the costs of the sale (e.g., customs duties). But any rule that does not have an immediate effect is neglected.

It therefore seems possible to say that the vast majority of international sellers and buyers are unsophisticated, legally speaking. They do not address any legal issue *ex ante*. They are not aware of the fact that the applicable law could void their contracts or that it could contain default rules that they could like or dislike. These parties see the law solely as a mechanism for resolving disputes. Indeed, many of them include a jurisdiction clause in their contracts but fail to provide for the applicable law.<sup>85</sup> For these parties, the law will be applied by an adjudicator *ex post* if a dispute arises, but it has no relevance at the stage of the conclusion of the contract. In this respect, the arbitral cases are very revealing. As already mentioned, in 60% of the cases the parties failed to provide for the applicable law yet provided for the jurisdiction of international arbitrators to settle the dispute.<sup>86</sup> These parties were sufficiently sophisticated to be aware of the issue of which court would try any dispute arising out of the contract and of the difference between a court and an arbitral tribunal, but they were not sufficiently sophisticated to add a provision as to the applicable law. Maybe the parties did not really see the difference between choosing the competent court and choosing the applicable law, but what is clear is that in their minds, legal rules and disputes were intimately connected.

This conclusion allows the examination of the issue of the unification of international law of sale from a new perspective. If the vast majority of commercial parties involved in international sales are unsophisticated parties that are not concerned with the law governing their transactions, it is fair to wonder whether an enterprise such as the CISG is beneficial at all for international buyers and sellers.

One possible explanation for this data could be the low value of the transactions which lead to these judgments. Parties involved in low-value transactions could be less sophisticated than parties involved in higher-value transactions. Moreover, even sophisticated

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85. See discussion and cases cited *supra* Part III.

86. See *supra* notes 72–73 and accompanying text.

parties could engage in a cost/benefit analysis and conclude that the low value of their transactions does not make it worthwhile to incur costs to determine the applicable legal regime. It seems, however, that this explanation is contradicted by the facts since the study of the cases where the parties had not chosen the applicable law does not confirm this intuitive idea.<sup>87</sup> It seems that no correlation can be drawn between the failure to provide for the applicable law and the value at stake in these cases. Indeed, the forty-four decisions that mentioned both the value of the sale and the fact that the parties had not chosen the applicable law are almost evenly divided between cases involving sales between \$10,000 and \$50,000, sales between \$100,000 and \$500,000, and sales over \$1 million.<sup>88</sup> If one only considers the U.S. cases, the value of the sales is most often greater than \$1 million.<sup>89</sup>

The purpose behind the treaty was to increase international trade.<sup>90</sup> The negotiators seemed to believe that the diversity of national laws would hinder commercial parties from concluding international sales and that the harmonization of international sale law would remedy this by increasing legal certainty. The study shows that not only are there other ways to ensure the legal certainty of the legal regime applicable to the contract but also that the parties are not concerned with the law applicable to their contract. As already argued, it is very likely that the reason why they do not choose the applicable law is not that they are happy with the default applicable law but because they are not aware of the importance of the applicable law. It is very likely that they just do not ask the question and thus do not know which law governs their contract. International sellers and buyers generally conclude sales without knowing, and indeed even wondering, which law governs their contracts. It follows that it does not seem that they are looking for legal certainty *ex ante*.

It was believed that unifying the international law of sales would reduce the transaction costs of the parties for two reasons: the parties would not have to bargain over the applicable law anymore and no parties would have to learn a foreign law in order to understand how to use it best at the conclusion of the contract. The cases reveal that none of these costs is actually incurred by the majority of international sellers and buyers. First, the parties do not bargain

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87. See discussion and cases cited *supra* Part III.

88. Respectively, the divisions are 25%, 27.2%, and 22.7% of the contracts. Sixteen percent of the contracts were worth between \$50,000 and \$100,000. The figure does not include most of the arbitral awards because they are almost invariably published without any figure. See *id.*

89. That is true in seven out of twelve contracts. See cases cited *supra* notes 60–61.

90. THE INTERNATIONAL SALE OF GOODS REVISITED, *supra* note 4, at 79.

over the applicable law; their contract is usually silent in this respect. Second, none of them puts any effort into learning the foreign applicable law. A good reason for it is that none of them really knows which law governs the contract, but more generally, none of them cares *ex ante*. Parties only care for the product and the price.

The CISG enterprise has tried to save costs that do not exist for the majority of the parties. From an efficiency perspective, whether the Convention should have been entered into in the first place is therefore very doubtful. The resources dedicated to the passage of the treaty are not increasing the welfare of the actors that were targeted as potential beneficiaries. Of course, other actors have obviously benefited from the enterprise of negotiating the CISG, such as the negotiators themselves. However, if the treaty is not useful to commercial parties themselves, the benefits conferred to the negotiators cannot be justified.<sup>91</sup>

Some scholars have argued that not only would the CISG not save commercial parties transaction costs but that it would actually increase such costs.<sup>92</sup> Because of the poor quality of its rules, the CISG would force parties to opt out of the Convention when they would not necessarily have done so had a better national law been applicable. Their transaction costs would thus increase.<sup>93</sup> The cases that this Article reviewed illustrate that for most commercial parties, this criticism is unfounded. Because the parties are generally unsophisticated, they do not appreciate the importance of the legal rules governing their contracts to such an extent that they neglect to include a choice of law clause in their contract. The parties probably do not even know which law applies to their contract, making it hard to see how they could be aware of the applicability and content of the CISG. It may be that if the parties were told the content of a given provision in the CISG and told that they could opt out of it, they would actually do so, but that just does not happen. The CISG does not increase their transaction costs because the applicable law is not a transaction cost for those parties. The existence of the CISG is irrelevant to them. For most parties, therefore, the justification for the CISG can only be an *ex post* benefit, because it is neutral *ex ante*.

The cases that this Article has reviewed show that most international buyers and sellers are unsophisticated parties that are not concerned with the legal regime governing their contracts when they conclude them. It seems clear, therefore, that the CISG has not brought them any *ex ante* benefit. Legal certainty is not a concern at

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91. *But see* Stephan, *supra* note 8, at 750–51 (arguing that unification improves the skills of the lawyers involved in the transactions to the benefit of the society as a whole).

92. *See supra* Part II.C.

93. *See id.*



that stage of the contracting process, and contracting with merchants from other jurisdictions is no more costly than contracting domestically. The legal regime governing their contracts did not prevent most parties from concluding them. The aim of the drafters of the CISG was the removal of legal barriers to increase international trade, but it seems clear that these barriers have been overstated.

Although lawyers and legal scholars may generally overestimate the importance of the law for economic actors, not all commercial parties are legally unsophisticated. The data gathered concerns international sales and shows that commercial parties from that industry are generally unsophisticated. Commercial parties from other industries, however, may be far more sophisticated. It is interesting to note that, on average, parties that refer their disputes to the International Court of Arbitration of the International Chamber of Commerce provide for the applicable law in 80% of the cases,<sup>94</sup> while they only do in 35% of the sales cases.<sup>95</sup> Parties concluding fewer contracts for a much greater value may be far more concerned with the legal regime governing their contracts. Whether they could benefit *ex ante* from harmonization of the law governing their industry is an entirely different issue.

It must also be stressed that the survey findings do not preclude the conclusion that parties may benefit from the CISG in some situations. First, unsophisticated parties may not benefit from the CISG *ex ante*, but they may *ex post*. These parties will obviously not reduce their transaction costs after the contract has been concluded, but they may welcome more legal certainty if the CISG increases it after negotiations. Second, a minority of international sellers and buyers have to be legally sophisticated. These parties do not comprise all of the parties that provide for the law governing their contract, since many of them may do so mechanically, without actually perceiving the consequences of making such provision. But it is clear that some parties, in particular those selling high value goods on a

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94. See INT'L CHAMBER OF COMMERCE, 16 INTERNATIONAL COURT OF ARBITRATION BULLETIN, No. 1, at 11 (2005) (8% of the contracts underlying the disputes referred to ICC arbitration in 2004); INT'L CHAMBER OF COMMERCE, 15 INTERNATIONAL COURT OF ARBITRATION BULLETIN, No. 1, at 13 (2004) (82% of the contracts underlying the disputes referred to ICC arbitration in 2003); INT'L CHAMBER OF COMMERCE, 14 INTERNATIONAL COURT OF ARBITRATION BULLETIN, No. 1, at 14 (2003) (82% of the contracts underlying the disputes referred to ICC arbitration in 2002); INT'L CHAMBER OF COMMERCE, 13 INTERNATIONAL COURT OF ARBITRATION BULLETIN, No. 1, at 12 (2002) (78% of the contracts underlying the disputes referred to ICC arbitration in 2001).

95. The ICC states that the disputes referred to ICC arbitration involve all sectors of the economy, but more frequently they concern construction, engineering, energy, and information technology. See INT'L CHAMBER OF COMMERCE, 15 INTERNATIONAL COURT OF ARBITRATION BULLETIN, No. 1, at 13 (2004) (a third of the cases submitted to ICC arbitration in 2003).

much less frequent basis than average international traders, are concerned with the applicable legal regime. This Article will now explore whether the CISG has at least been beneficial to one of these two groups.

#### IV. WHO CAN BENEFIT FROM THE CISG?

The data provided in Part III identifies two hypotheses in which international buyers and sellers may be able to benefit from the CISG. First, unsophisticated parties could benefit from the CISG *ex post*. They are not concerned *ex ante* with the legal regime that will govern their transaction. In particular, they do not seek to ensure that their contract will be enforceable. However, if an issue arises, they may then wonder what the law is and seek legal advice. At that stage of the contracting process, they may become concerned with the legal regime governing their contract. The CISG could thus be beneficial if it could facilitate the resolution of the issue, which may later turn into a dispute. That resolution could include determination of the governing legal regime. Then the parties could determine more easily or with more certainty what their rights are under this legal regime and negotiate or litigate accordingly. In other words, the CISG could increase legal certainty and decrease the litigation or pre-litigation costs of the parties. These *ex post* benefits would be more convincing than *ex ante* benefits. One reason is that because an issue would have arisen, the parties would care for the applicable legal regime and would incur the costs of determining the applicable law. Another reason is that because the parties are unsophisticated, they would not have provided for the applicable law to the contract *ex ante*. Thus, the alternative to the CISG would not be a choice of law providing clearly for the applicable legal regime but a default choice of law rule, which would typically be rather unpredictable.<sup>96</sup>

Second, as explained above, some sophisticated parties incur higher transaction costs when contracting internationally.<sup>97</sup> That is the case for the parties that would not retain a lawyer for domestic transactions but would do so for international transactions. Harmonizing international sale law would allow them to avoid negotiating over the applicable legal regime and learning the content of the applicable foreign law, which should therefore reduce their transaction costs.<sup>98</sup>

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96. See *supra* note 78 and accompanying text.

97. See discussion *supra* Part II.C.2.

98. Some very sophisticated parties, on the other hand, would incur comparable transaction costs even for domestic transactions. Their transaction costs

Although these two groups of parties are different, both could benefit from the harmonization of the applicable law for the same reason. In an international context, the harmonization of the applicable law would make determining the governing legal regime much easier. It would be common to both parties and foreign to none. The parties could thus save the costs of determining and learning the governing legal regime. This would save litigation costs for unsophisticated parties and transaction costs for sophisticated parties. However, it must be emphasized that these benefits would only occur if the harmonized legal regime were of equal quality to the national laws that would have been applicable in its absence. Otherwise, the poor quality of the harmonized law could eventually make the parties worse off than if a national law had been deemed applicable. This Article next examines whether the harmonization achieved by the CISG has provided the expected simplicity in the determination of the applicable law as well as a quality legal regime.

#### A. *Scope of the Harmonization*

The scope of the harmonization achieved by the CISG is limited. It does not apply to the validity of the contract, any of its clauses, or the transfer of ownership.<sup>99</sup> While a complete harmonization of the applicable law would clearly make it easier to determine the legal regime governing the contract, it is unclear that a partial harmonization would be beneficial at all.

Indeed, the limited scope of the CISG has several consequences. First, because the CISG does not govern the validity of the contract,<sup>100</sup> it has no effect on the potential for parties to shop for efficient mandatory rules. Second, for those issues that are not governed by the unified law, it remains necessary to determine which domestic law applies and, for at least one party, to learn it. In other words, a partial harmonization can only partially reduce the additional transaction or litigation costs that international contracting entails. Such an international sale law only reduces costs with regard to those issues that are covered by the harmonization and does not prevent the parties from having to determine, and for one party to learn, the domestic regime applicable to the outstanding issues.

It is important to note that it will not only be necessary to determine the domestic governing law for those issues not covered

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would therefore remain unaffected by the origin of the applicable law, be it domestic, foreign, or international. *See id.*

99. CISG, *supra* note 3, at art. 4.

100. *Id.*

expressly by the harmonization, but also which national interpretation of some of the issues covered by the harmonization should prevail. Because no final interpretation of the provisions of the international sale law will be possible,<sup>101</sup> each jurisdiction may develop its own interpretation of the law's provisions. One would hope that the courts of the Contracting States would try to follow the exhortation of the CISG to take into account its international character when interpreting it,<sup>102</sup> but the accounts of parochial interpretations are numerous<sup>103</sup> and were probably predictable. If one also believes that the provisions of the CISG are indeed vague and unclear and will require substantial interpretation,<sup>104</sup> it is not difficult to predict that a substantial part of the provisions of the unified law will not be understood in the same way in the various Contracting States. Local interpretations will develop, and thus local CISG laws. Parties that care about the actual regime governing their contracts will therefore need to determine which interpretation will prevail. Article 7(2) of the CISG directs courts of the Contracting States to ultimately settle such issues "in conformity with the law applicable by virtue of the rules of private international law."<sup>105</sup> Even with regard to issues governed by the unified law, it will be necessary to determine the domestic law applicable and learn its content.

The partial harmonization creates additional complications. The mere fact that the contract is governed by more than one applicable regime creates new legal issues that need to be resolved. Rules are not independent from each other and frequently build on distinctions existing in other areas of the law. In other words, rules are interrelated, and if the relationship between them is broken, one rule cannot be used anymore without further analysis. French law provides an interesting example. Under the French domestic law of sale, exculpatory clauses may be declared invalid depending on the grounds for the buyer's remedy.<sup>106</sup> French law traditionally has distinguished between actions for hidden defects and actions for goods that do not conform to the contract.<sup>107</sup> If the buyer sought a remedy because the goods contained a hidden defect, the clause was

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101. Gillette & Scott, *supra* note 8, at 452-53 (discussing the lack of an international commercial court of last resort to hear cases under the CISG and the result of divergent interpretations of the treaty's provisions).

102. CISG, *supra* note 3, at art. 7(1).

103. See Murray, *supra* note 33, at 369 (discussing such accounts in the United States); see also DiMatteo et al., *supra* note 29, at 299.

104. See Gillette & Scott, *supra* note 8, at 474-75.

105. CISG, *supra* note 3, at art. 7(2).

106. See Philippe Malinvaud, *Redhibitory Defects and Their Importance in Contemporary Society*, 50 TUL. L. REV. 517, 519 (1976).

107. *Id.*

invalid.<sup>108</sup> On the other hand, if the ground for his claim was the non conformity of the goods, the clause was valid.<sup>109</sup> Under the CISG, French domestic law still governs the validity of any of the clauses of the contract, including exculpatory clauses.<sup>110</sup> Yet French domestic law refers to a distinction (action for non-conforming goods and action for goods containing a hidden defect) which does not exist under the CISG.<sup>111</sup> The applicability of two legal regimes therefore creates a new legal problem that needs to be resolved. Determining the content of the rules governing the contract therefore becomes more complex for parties willing to determine the applicable legal regime. An additional transaction or litigation cost is thus incurred by the parties.

The limited scope of the harmonization achieved by the CISG also limits its benefits for international sellers and buyers. It reduces their transaction or litigation costs to a limited extent and increases them in other manners. The CISG is therefore only beneficial if the reduction is more important than the increase.

### B. *Quality of the Harmonization*

This Article has already shown that several legal scholars have challenged the quality of the harmonization achieved by the CISG.<sup>112</sup> In particular, Gillette and Scott argue that the political economy of the Convention would lead its drafters to adopt rules that would be disfavored by parties.<sup>113</sup> Because the drafters would have important incentives to reach an agreement when such agreement would in fact be very difficult to reach, the rules that they would eventually adopt would be the result of important compromises and would try to accommodate as many drafters as possible. Hence, the rules would be more vague and rely more heavily on standards that could be interpreted differently. Gillette and Scott emphasize that the CISG relies heavily on standards, which seems to support their argument.<sup>114</sup>

If these scholars are correct that the Convention provides a significantly worse legal regime than domestic laws, two consequences may follow. First, sophisticated parties may opt out of the Convention as a whole or from some of its provisions, as the

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108. *Id.* at 522.

109. *Id.*

110. CISG, *supra* note 3, at art. 4(a).

111. *Id.* at art. 35 (discussing nonconformity of goods but making no distinction between hidden defects and nonconforming goods).

112. *See* discussion *supra* Part II.

113. Gillette & Scott, *supra* note 8, at 469.

114. *Id.* at 474-75.

Convention allows them to do.<sup>115</sup> That is the conclusion that Gillette and Scott reach; they argue that since vague rules are unhelpful to parties because they provide no actual guidance and allow for moral hazard, parties will disfavor the rules of the CISG and want to opt out of them.<sup>116</sup> Far from reducing the transaction costs of the parties, the Convention would actually increase them. Second, many inefficient rules would still remain applicable. Unsophisticated parties would not have had the opportunity to opt out from them *ex ante*, because they would not have cared for the applicable legal regime at the time. When a dispute would arise, it would be unlikely that the parties agree on a better rule, as the default rule would typically favor one of the parties, who would have no incentive to give up such benefit. But it is important to realize that sophisticated parties may not find incurring these additional costs worthwhile if the probability of the contingency is too low. They would therefore opt out of some of the disfavored rules and leave others applicable because the costs of opting out of them would be too high. The second consequence of the poor quality of the harmonization would therefore be to increase the number of inefficient rules governing the contract.

It is hard to find data either confirming or contradicting the theory of Gillette and Scott. Cases are generally unhelpful because the vast majority of them concern unsophisticated parties that are barely aware of the relevance of the law governing their contract. Yet a few of the sophisticated parties that provided for the applicable law went on to exclude the CISG.<sup>117</sup> Some other anecdotal evidence can be gathered. Professor Bridge states that it has long been the practice of the Grain and Free Trade Association (GAFTA) and some major oil companies to exclude the Convention from its forms.<sup>118</sup> Professor Ziegel states that he had “heard it said often that large companies routinely exclude the Convention from their contracts as the governing law,” but acknowledges that he has no significant data to support his opinion.<sup>119</sup> He notes, however, that the reported cases do not involve well known companies and usually deal with relatively small claims (less than \$10,000), which suggests that major corporations may exclude the CISG.<sup>120</sup> This Article’s survey of the

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115. CISG, *supra* note 3, at arts. 28, 92–96.

116. Gillette & Scott, *supra* note 8, at 456.

117. Three cases out of the 181 reviewed for the purpose of this paper are *Fisher v. Thyssen Mannesmann Handel GMBH*, No. 05 C 6193, 2006 WL 211858 (N.D. Ill. Jan. 19, 2006) (sale of steel); *Jacada (Eur.), Ltd. v. Int’l Mktg. Strategies, Inc.*, 255 F. Supp. 2d 744 (W.D. Mich. 2003) (distribution of software); *Northland Power v. Gen. Elec.*, 105 F. Supp. 2d 775 (S.D. Ohio 1999) (sale of a gas generator engine).

118. BP and Shell. See MICHAEL BRIDGE, *THE INTERNATIONAL SALE OF GOODS* §1.03 (1999).

119. Ziegel, *supra* note 25, at 341.

120. *Id.*

reported cases does not confirm this analysis.<sup>121</sup> More recently, a German scholar, Mr. Köhler, conducted a “survey regarding the relevance of the CISG in legal practice and the exclusion of its application” in Germany and in the United States.<sup>122</sup> In the United States, most of the fifty law practitioners who replied stated that the CISG was “predominantly” or “generally” excluded.<sup>123</sup> Yet even this anecdotal evidence is hard to interpret. If major corporations routinely exclude the CISG, one would hope that it would not be because of the ignorance of their arguably sophisticated lawyers<sup>124</sup> but for reasons related to the CISG itself. Corporations could indeed dislike some of its rules, but they could also dislike the fact that it forces them to combine several legal regimes, or they may be unwilling to trust a body of law that has not been experimented with and litigated to a sufficient extent. That last answer was predominantly made by the practitioners who replied to Mr. Köhler’s survey,<sup>125</sup> although they also often stated that they could see no advantage in the application of the CISG and were not of the opinion that the CISG was legally advantageous over national laws.<sup>126</sup>

The only thing one can learn from these examples of exclusion of the CISG is that no case or contract has partially excluded the Convention. In all these examples, the Convention was excluded entirely. This shows either that the CISG is not trusted as a whole, or that a sufficient number of its provisions have been judged bad enough by parties to exclude the whole regime. This further shows that the fear that parties may exclude some of its rules and leave some others applicable, despite their poor quality, is for the time being probably theoretical.

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121. The cases involve more than \$1 million as often as \$10,000. See discussion *supra* Part III.

122. Forthcoming. I am grateful to Mr. Martin Köhler to have allowed me to cite the data that he gathered. Martin F. Koehler, *Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application*, available at <http://www.cisg.law.pace.edu/cisg/biblio/koehler.html>.

123. Of the practitioners who replied, 37.5% stated that that it was excluded “generally,” and 33.3% stated that it was excluded “predominantly.” Data provided to Author by Martin F. Koehler.

124. See *supra* note 82 and accompanying text.

125. Of the U.S. interviewees, 54.2% stated that the CISG is generally unknown; 33.3% stated that there is still insufficient case law related to it; and 31.3% stated that they had insufficient experience in the field of CISG. Data provided to Author by Martin F. Koehler.

126. Of the U.S. interviewees, 39.6% stated that they exclude the CISG because they can see no advantage in its application. As far as the comparison between the CISG and national laws is concerned, 39.6% stated that neither had decisive advantages, but 35.4% thought national rules are legally advantageous. Koehler, *supra* note 122.

It could also be argued that the demonstration of Gillette and Scott does not conclusively show that the CISG is worse than most domestic laws. Gillette and Scott show that it could be predicted that the CISG would contain many vague and imprecise rules and that the CISG indeed uses many of them.<sup>127</sup> But they do not show that the CISG is significantly worse than domestic laws. Indeed, the argument that Gillette and Scott make about the CISG was made earlier about the Uniform Commercial Code (UCC); it was argued that a private legislature would ultimately propose legislation relying heavily on vague rules and standards and that the UCC was indeed very much doing so.<sup>128</sup> In some civil law countries, vague and imprecise rules are not the sad consequence of an unfortunate legislative process; rather, they are an ideal, as illustrated by the continued worship of pieces such as the legendary Napoleonic Civil Code in France and beyond.<sup>129</sup> It is therefore extremely unclear whether many commercial parties will regard the CISG as a significant regression in comparison to their domestic sale law. If they do not, they would obviously not incur additional transaction costs to opt out of it.

If it could be shown that the CISG provides for more disfavored rules than the domestic law that can be practically chosen by the parties, its applicability could force the parties to further negotiate to opt out of it in more instances than they would have if a domestic law had been applicable and would increase the number of applicable inefficient rules.

## V. CONCLUSION

Has the CISG been useful to commercial parties? This Article indicates that the answer is no for the vast majority of parties and that it has at best a very limited use for the others.

The question therefore arises whether the enterprise should have been pursued in the first place. There are two possible answers to this question. The first is that it should not have been pursued, because it has been costly for society without being helpful to many private actors. Indeed, it has been costly for society, not only because of the negotiations of it, but also the increase in complexity of the law of the Contracting States and the extra burden on judges who must apply alternative or mixed legal regimes.

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127. Gillette & Scott, *supra* note 8, at 473–74.

128. See generally Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PENN. L. REV. 595 (1995).

129. See, e.g., ZWEIGERT & KÖTZ, *supra* note 50, at 103.



The second answer is that the flaws of the CISG may disappear one day. The CISG may have been just the first step towards complete harmonization. This complete harmonization could not be achieved immediately but no doubt will be one day, and the quality of the harmonization will also improve. To reach that point, a first step had to be taken, and that was the CISG. Retrospectively, the CISG will appear as a transition towards a better world. It will have been a necessary evil. However, it should not be forgotten that most international sellers and buyers are not legally sophisticated and may only benefit from any harmonization of sale law *ex post* if an issue or a dispute arises. If one adds the small number of potential beneficiaries to the costs of pursuing the enterprise for the society, a wise conclusion would be to direct such efforts to an industry more likely to benefit from them.