

## A NEW CHALLENGE FOR COMMERCIAL PRACTITIONERS: MAKING THE MOST OF SHARED LAWS AND THEIR 'JURISCONSULTORIUM'

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### I INTRODUCTION

The globalisation of trade and the ensuing internationalisation of commercial law have been unstoppable phenomena for a few decades. In the wake of the merging of financial markets, these phenomena have followed a reawakening of the interest in creating uniform or shared laws in sales and commerce to ensure greater global consistency and predictability. As argued below, uniform concepts of law are not a new development – the idea of adopting similar laws to increase certainty was arguably first developed by Cicero in Roman times and continued through the dissemination of common law in the colonial era to the visions of Ernst Rabel in the 1920s – but the modern establishment of voluntarily shared laws on a global scale in specific fields is a fairly recent challenge for the legal profession. While geographical boundaries naturally continue to exist, independent states are increasingly choosing to share law with other states, prioritising the benefits of consistency and the growth of trade over those of independent domestic laws. This is a relatively new intermediary stage in the evolution of international uniform commercial law, a second modernity in the transition of the contemporary world as Marquis labels it,<sup>1</sup> and it is a transition which needs some help.

The increase in the number of shared laws across national boundaries poses a number of challenges for practitioners in rethinking the geographical boundaries of laws, not least to increase transparency of these new shared regulations so they can meet their goal of reducing transaction costs. This also represents new opportunities in terms of rethinking ways to employ legal arguments.

This article will examine the concept of uniformity in law in a commercial context, focusing on notions of textual and applied uniformity. The article will

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1 Louis Marquis, *International Uniform Commercial Law: Towards a Progressive Consciousness* (Ashgate, 2005) 233.

then introduce the concept of a ‘global jurisconsultorium’,<sup>2</sup> before analysing the possibilities and duties which shared laws present for practitioners, in an attempt to answer the question: How can practitioners navigate the jungles of uniform transnational commercial laws to their advantage? This article will use the 1980 United Nations *Convention on Contracts for the International Sale of Goods* (‘CISG’) as an example of a widespread uniform law which directly affects commercial practitioners in Australia,<sup>3</sup> and its jurisconsultorium in theory and practice.

## II UNDERSTANDING UNIFORMITY

We can define ‘uniformity’ as the varying degree of similar effects on a phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form.<sup>4</sup>

The concept of uniform law is, as evidenced by the definition above, not one easily framed in a modern legal environment. But the first necessary step in learning how to work with it is to embrace that it is different from traditional nation-based law despite the fact that it is being applied in domestic courts and domestic settings.

An analysis of preambles and *travaux* of key uniform instruments in the field of trade law reveals that a key goal of those who work to create legal uniformity, such as the United Nations Commission on International Trade Law (‘UNCITRAL’), the International Institute for the Unification of Trade Law (‘UNIDROIT’) and the International Chamber of Commerce (‘ICC’), is the bringing together of legal systems under one shared roof. UNIDROIT defines this as ‘the removal of legal barriers in international trade’, ‘the development of international trade’,<sup>5</sup> and the establishment of similar rules across divides of legal cultures. Moreover, as previous research establishes, uniform law has a different *origin* and a different *focus*.<sup>6</sup> As opposed to historical harmonisations of law where law is imposed via military conquest (Roman law and the various

2 This concept was first pioneered a decade ago in Camilla Baasch Andersen, ‘The Uniform International Sales Law and the Global Jurisconsultorium’ (2005) 24 *Journal of Law and Commerce* 159.

3 Opened for signature 11 March 1980, 1489 UNTS 58 (entered into force 1 January 1988).

4 Camilla Baasch Andersen, ‘Defining Uniformity in Law’ (2007) 12 *Uniform Law Review* 5, 42.

5 The UNCITRAL defines uniformity as that which ‘contribute[s] to the removal of legal barriers in international trade and promote[s] the development of international trade’: *Convention on Contracts for the International Sale of Goods*, opened for signature 11 March 1980, 1489 UNTS 58 (entered into force 1 January 1988) preamble; UNIDROIT is an institute that ‘seeks to harmonize and co-ordinate national private laws and to prepare for international adoption of uniform rules of private law’: UNIDROIT, *International Institute for the Unification of Private Law* <<http://www.unidroit.org>>.

6 See Camilla Andersen, ‘The Global Jurisconsultorium of the CISG Revisited’ (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 43, 43, citing Niklas Luhmann, who defines the process of law in globalisation as a process of law where ‘functional criteria increasingly replace geographic ones, with nation-states’ traditional law-generating organs diminishing in importance in determining legal significance, regulation and evolution’: Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993) [Vivian Curran trans].

European versions of the *Code civil*) or colonisation (the only method by which common law spread), this is a distinctly *voluntary* process whereby different jurisdictions elect to share a set of rules.<sup>7</sup> In other words, modern uniform laws are laws which are created to establish deliberately shared law between multiple jurisdictions.<sup>8</sup>

Regardless of how impressive it is to create laws which are labelled uniform, this article argues – as previous research has also done<sup>9</sup> – that actual uniformity in law is not achieved through the creation of texts, but through the successful application of such texts. The degree of success in uniformity is determined by the degree of similarity attained, and the practice of its application sums up its actual uniformity. In other words, rules or laws labelled 'uniform' are not technically uniform at all according to our definition above, until they have been applied cross-jurisdictionally and have created similarity on the intended legal phenomenon to the intended degree, as outlined in more detail in Part II(A).

It is in the application of the rule or law, usually when there is a dispute, that issues of applied uniformity arise. It is at this point that the uniform law leaves the control of the scholars and politicians who drafted it, and lands in the hands of the practitioners and judges or arbitrators. It then becomes their task to ensure that it is not just the shared legal text which is uniform, but also the application of the legal rules themselves. The challenge of doing this is exacerbated by the fact that there is no uniform overarching macro-systematic context as evidenced by Part II(B).

The lack of a macro-systematic context of international uniform law will also cause most judges to fall back on the sovereign legal culture already established in their minds, causing uniform application to take a backseat to issues of domestic law and domestic interpretation. But international commerce is not – of its very nature – monocultural. The noted comparative lawyer Otto Kahn-Freund wrote in 1974 that commercial law is culture-free.<sup>10</sup> This is, of course, not strictly true and we see that clearly through the lens of issues which commercial law experiences in achieving uniform results: social, religious, economic and historical aspects of a culture will invariably affect its legal culture in commerce to a certain degree. It is far more accurate to say that, when compared to other areas of law such as tax law, family law and constitutional law, commercial law

7 De Cruz argues that James I, King of England and Scotland, introduced uniformity to England and Scotland when proposing to unify them under a single legal system in the early 16<sup>th</sup> century: Peter de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing, 1993) 23.

8 See Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6, 43.

9 See, eg, Camilla Baasch Andersen, 'Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts through a Global Jurisconsultorium of the *CISG*' in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar Publishing, 2011) 30, 32. See generally Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6; Camilla Baasch Andersen, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (Kluwer, 2007).

10 Kahn-Freund makes the point that commercial law is culture-free: see Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1. The author argues that, in context, what is meant is that commercial law is comparatively more culture-free than other disciplines in law.

is comparatively less hindered by sovereignty and legal culture in its uniform development. This is dealt with in more detail in Part II(C), which also describes how global trade practices and standards need to influence legal culture to the same extent that legal drafting has influenced the law. Most practitioners understandably lack the immediate incentive to help create international uniformly applied rules, as their focus is the case at hand and a favourable outcome for their clients. However, as seen in Part IV below, taking a more transnational approach can help a lawyer's case by increasing the arsenal of persuasive arguments, at the same time as (inadvertently) advancing uniform application. Thus, in the longer term, the increasingly predictable commercial environment which uniform application facilitates promotes both the direct interest of the lawyer's clients and the goal of creating internationally uniform commercial instruments.

### A Textual Uniformity versus Applied Uniformity

As evidenced above, there is a need to distinguish between different forms of uniformity. Previous research has suggested a distinction between 'textual' uniformity (the apparent uniformity of shared texts) and 'applied' uniformity (the degree to which uniform results are obtained in the application of shared laws).<sup>11</sup> In his leading *CISG* commentary, Professor Schlechtriem distinguished a 'unity achieved at a verbal level' (the rules as provided by the drafters) from the 'uniform understanding' and 'uniform interpretation' (the commentary and application of these rules).<sup>12</sup> Leading United States ('US') scholar Harry Flechtner uses similar language to indicate the difference between uniformity in application and text by referring to the 'textual non-uniformity' of the different texts of the six official United Nations ('UN') language versions of the *CISG*.<sup>13</sup>

Just like the issue of applied uniformity, the question of textual uniformity is multivalent, and the textual uniformity of legal instruments setting out uniform laws or approaches can vary immensely depending on factors such as linguistic precision, translation, style of drafting etc. Legal language – especially multilingual legal language – is not a precise science, and differences in nuance, context or substantive meaning are unavoidable and bound to have an effect on the way scholars and practitioners working in these various languages interpret and use given provisions, so the degree of *textual uniformity* affects the degree of actual *applied uniformity*.

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11 See, eg, Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6.

12 Peter Schlechtriem, 'Introduction' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 6.

13 Flechtner uses it to indicate the level of similarity between the texts in question. By inference, if they did have the same meanings linguistically, then these texts would (together) represent a textual uniformity. An instrument with only one official text will thus, by definition, always represent a single *textual uniformity*: see Harry M Flechtner, 'The Several Texts of the *CISG* in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)' (1998) 17 *Journal of Law and Commerce* 187.

The problem of achieving textual uniformity aside, we can see it as an expressed goal towards actual *applied* uniformity. Professor John Honnold, who was the first international commentator on the *CISG* and the US delegate to UNCITRAL during the drafting of the *CISG* sums this up by stating that 'uniform words do not create uniform results'.<sup>14</sup> Only the application of textually uniform instruments will reveal whether similar results are reached and whether the goal of uniformity, of varying degrees, is reached and the textual uniformity thus becomes actual and *applied*.

Practitioners and judges need to embrace this or uniformity will always be illusory. While the goal of uniformity might initially sound like an academic problem, it is one which serves the interests of the business community and the legal practitioner in the longer term. The goal of uniformity is one of international predictability and certainty – this is expressed in various *travaux préparatoires* and throughout the literature supporting the field. These are two very attractive and pragmatic advantages to any commercial legal practice, and seeing them enhanced at a transnational level through the realisation of the goals of uniform law, with uniform application of these laws, is a benefit to the commercial community as a whole. There is only a very small minority of commercial legal practitioners who are not currently affected by the transnational nature of commerce. In today's global financial markets, most commercial legal practices engage in international trade and work with numerous legal jurisdictions.

Of course, the interpretation of legal texts – whether in pursuit of uniform application or not – has been itself a subject of longstanding controversy in legal literature. At the risk of oversimplifying the theories of Stanley Fish, the author aligns herself with Nunberg and Eco in criticising Fish's fallacy in presuming that we can make of a text what we like.<sup>15</sup> It is worth noting that, for the purposes of the present article, it is presumed that there is much truth in Scalia and Gardener's 'textualism',<sup>16</sup> but slightly modified to accommodate Fish's point that it is incorrect to posit that all purpose should be derived from the text – often, the purpose lends meaning to the text.<sup>17</sup> This means that for conventions like the international sales law (*CISG*), there is a duty to consider the words in the context of international trade and the ordinary meaning words will have for commercial traders operating in an international context. This is further supported by *CISG* article 7, which requires regard for the international character and uniformity of the international sales law (*CISG*) in the application of the

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14 See John Honnold, 'Uniform Words and Uniform Application: The 1980 Sales Convention and International Juridical Practice' in Peter Schlechtriem (ed), *Einheitliches Kaufrecht und nationales Obligationenrecht* (Nomos, 1987) 115, 146–7.

15 See Umberto Eco, 'Afterword' in Geoffrey Nunberg (ed), *The Future of the Book* (University of California Press, 1996) 295, 303.

16 See generally Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson West, 2012), especially chs 2–3.

17 See Stanley Fish, 'Intention and the Canons of Legal Interpretation', *The New York Times* (online), 16 July 2012 <<http://opinionator.blogs.nytimes.com/2012/07/16/intention-and-the-canons-of-legal-interpretation/>>.

*CISG*.<sup>18</sup> The context of the uniform international law is a combination of its text and its purpose as understood internationally in commerce.

### **B The Trouble with ‘Harmonising’ Uniformity: A Lack of Macro-systematic Context**

This distinction between textual and applied (or actual) uniformity further enhances the problem facing the legal practitioner as well as the judge or arbitrator. Even if all involved parties wish to work together to create uniform applications of uniform laws, how do we define an international context? Where do we find uniform guidelines for interpretation, context and application?

From the above, it should be obvious that we are dealing with a unique phenomenon in legal science when we embark on the analysis of uniform law. The label ‘uniform law’ here does not embrace all forms of legal diffusion where different domestic laws are made similar through the dissemination of shared ideas and practices. Rather, the focus here is so-called ‘hard laws’ which are shared among nation states, and which are expected to function in a more or less undefined context. Reimann dubs this a ‘new dimension’ in lawmaking, stressing the need to embrace it as something new in legal theory as well as practice.<sup>19</sup>

The danger faced by these new uniform ‘hard laws’ is that they may be treated like domestic laws, and thus invariably will be subjected to constant homeward trends in application, interpretation and context. No shared text can be applied with any international uniformity if homeward trends in interpretation are allowed to bend the text to an application which is overly unique in each jurisdiction applying it.<sup>20</sup> If uniform laws are to retain their international character, as well as any degree of uniformity, then they must be recognised as belonging to a different legal order to the traditional nation/state-produced laws. They must have their own set of interpretational rules, contexts, purpose, textualism and affiliation. For the international sales law (*CISG*), as explained above, the purposes of uniformity and internationalisation are clear interpretive markers.

But in considering uniform laws *as a whole*, we need to ask an important question: do uniform commercial laws share a sufficient number of traits to be considered a collective discipline? Or in other words: is there a macro-system of uniform law?

The answer to this – albeit with many different nuances of dissention – is ‘no’, even in a single limited field of law such as commercial law. The various

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18 This accords with Zeller’s interpretational guidelines for the *CISG* in his award-winning paper (Clive M Schmitthoff Essay Competition, Pace Law School, 2003). See Bruno Zeller, ‘Four-Corners – The Methodology for Interpretation and Application of the UN *Convention on Contracts for the International Sale of Goods*’ (Working Paper, Pace Law School, May 2003) <<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>>.

19 Mathias Reimann, ‘Beyond National Systems: A Comparative Law for the International Age’ (2001) 75 *Tulane Law Review* 1103, 1116.

20 See Franco Ferrari, ‘Homeward Trend: What, Why and Why Not’ in Andre Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 171.

forms and contexts of uniform laws (private laws, public laws, model laws, conventions, standard form contracts, etc) as well as the various different regions and groups of jurisdictions they address themselves to (national, regional, European Union ('EU'), global, quasi-global, etc) prevent any assumptions of coherence in application. But, there are of course certain similarities in traits and in contexts, which repeat themselves for selected instruments in selected areas of law. In commercial law, we find selected patterns of systematic interplay in the hierarchy of certain instruments and promulgators of uniform law. Among these patterns are:

- the EU's decision to respect the international sales law (*CISG*) as part of its *aquis*,<sup>21</sup>
- the patterns among certain instruments of specific promulgators in implementing interpretational guidelines,
- the efforts to bridge gaps in communal trade terminology, and
- an arguable option to apply rules of the Vienna Law of Treaties analogously to instruments of private law which transcend borders.<sup>22</sup>

But these patterns, which are often vague and more based on efforts to create visible uniform approaches than tangible uniform results, are not sufficient to satisfy any need for an overarching legal framework for uniform laws, even within one discipline. It can be argued that the uniform approaches are deliberately chosen for their flexibility and adaptability, in order to allow for varied inclusiveness of legal rules. However, when dealing with instruments like the international sales law (*CISG*), which mandate that the international character and uniform application be considered in its interpretation (article 7 of the *CISG*), then uniform results must be prioritised.

There is no macro-systematic interplay of uniform law sources, as concluded in previous writing,<sup>23</sup> and no overarching legal context for interpretation of commercial laws. The quest for shared interpretational rules and contexts for all is a futile one – at least for now. But there is a unifying concept in an international commercial legal culture, which to differing extents provides a basis for unified law.

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21 The EU's decision to respect the *CISG* as part of its *aquis* is arguably undermined by its attempts to create a competing regime in the proposed European Sales Law ('CESL'). This proposed instrument is currently limited to online transactions, but spans commercial as well as consumer sales. For more on CESL and the *CISG*, see Ingeborg Schwenzer, 'CESL and *CISG*' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Globalization versus Regionalization* (Eleven International Publishing, 2013) 97–114.

22 The issue of the application of the Vienna Law of Treaties to private law instruments like the *CISG* is an interesting one. For more on this, see Andersen, *Uniform Application of the International Sales Law*, above n 9, 32–4.

23 For an analysis of these aspects of macro-systematic approaches to uniform law, see Camilla Baasch Andersen, 'Macro-systematic Interpretation of Uniform Commercial Law: The Interrelation of the *CISG* and Other Uniform Sources' in Andre Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 207.

### C Bottom Up and Top Down: Respecting Commercial Legal Culture

From a purist comparative law theory point of view, the operation of uniform transnational laws with any form of autonomy is like a proverbial bumblebee. Law cannot exist without culture,<sup>24</sup> so how can autonomous law exist across a variety of differing cultures? Yet it does, and it works to some extent in creating common playing fields for practitioners. In the context of public law, Slaughter offers some explanation of this trans-governmental law in her description of the new world order:

[The nation state] is disaggregating into ... functionally distinct parts. These parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.<sup>25</sup>

This enigmatic relationship between multicultural legal jurisdictions and uniformity is based on numerous factors, which are analysed elsewhere and which are not the focus of this article. However, a key realisation with regard to transnational uniform law is the fact that autonomy and uniformity in international uniform laws often is as illusory as one might expect it to be across the numerous jurisdictions applying it (see the example of notification and examination under the *CISG* given below). But there is still a certain degree of applied uniformity evident. Arguably, the most important factor in understanding why this is the case in the realm of commercial law, is the realisation that globalised trade markets make for playing fields where commercial players are genuinely interested in converging their practices for ease of transaction, and that as business practices converge, so do the legal practices which support them. In turn, this means that in commercial practice, the business culture is converging alongside the lawmaking, not for its own sake but for commercial necessity in streamlining approaches.

A good example of a successful unification of a niche in commercial law is the development of the banking regulations for documentary letters of credit ('L/C'), currently known as the UCP 600.<sup>26</sup> Since these have been under development since 1933 by the ICC and its Banking Commission, in close cooperation with the affected interest groups (ie, banks) at a global scale, these rules are a reflection of business practices developing in tandem with the promulgation of uniform rules. It is not submitted that they necessarily reflect (or respect) diversity in legal cultures, but rather that these converging practices are causing legal cultures to adapt to accommodate specific ways of operating with L/Cs. In their current form, they are among the most uniformly applied

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24 This article will not elaborate on the complex relationship between law and culture, which is one of the cornerstones of modern comparative legal theory. For more on this, see, eg, the writings of prominent comparativists such as Pierre Legrand and David Nelken: Pierre Legrand, 'How To Compare Now' (1996) 16(2) *Legal Studies* 232; David Nelken, 'Defining and Using the Concept of Legal Culture' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 109.

25 Anne-Marie Slaughter, 'The Real New World Order' (1997) 76(5) *Foreign Affairs* 183, 184.

26 International Chamber of Commerce Commission on Banking Technique and Practice, *Uniform Customs and Practice for Documentary Letters of Credit* (Publication No 600, 25 October 2006).



instruments in commercial law today: they are incorporated into all credits opened in all banks worldwide. Although technically not law, the UCP 600 is incorporated into every L/C opened. It thus becomes the law which governs the various contracts constituting a L/C, and the legal understanding of their application is very consistent at a global level. They are a great example of organically grown unification stemming from interest groups representing the organisations which establish the practices; that is, a unification of regulation and practice which happens from the bottom up and is not imposed from the legislature top down. It may be argued that these uniform standards were imposed by banking groups to advance L/Cs, and that this is just as inorganic as imposing legal standards. On one level this is true, this form of unification via long-term development by interests groups is still *not* a case of legal culture reconciling with a legal phenomenon; it is rather an example of legal culture having to accommodate a set way of operating which has been designed by a specific interest group (in this case, a banking organisation) and learning to adapt to it. It is more organic because legal culture has had time to adapt to it, and practitioners in the field have helped to design the aspects that need to be unified. Through this bottom-up approach, the banking industry is appropriately part of the drafting process, and can thus ensure that any ensuing uniform text is based on shared approaches and logic of transactions – this will ultimately facilitate shared and uniform interpretations and practices.

However, many unification efforts do not develop in this manner. They produce legislative texts applying from the top down, instead of growing from the bottom up like the UCP 600, and these frequently do not involve interest groups or industry to the same extent.<sup>27</sup> There is, of course, a good reason for that, as it is through these processes that we typically generate so-called 'hard law' instruments,<sup>28</sup> which apply with force of law. This has undeniable advantages in accelerating changes to existing legal rules. However, where the legislative change does not reflect shared approaches and industry logic, there will be problems in achieving applied uniformity.

As a result, since the actual conversion of commercial practice and the (often overzealous) efforts to converge commercial laws do not always happen at the same pace, we are sometimes left with textual uniformity and very little applied uniformity. While some top-down unification can attempt to capture the industry and to ensure that ensuing texts are based on shared approaches, the majority of legal drafting in the international commercial arena is formulated by lawyers in governmental or non-governmental political working groups. The international sales law (*CISG*) is no exception; drafted through diplomatic conference in UNCITRAL over a period of 13 years, it involved prominent legal scholars and

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27 The Lex Mercatoria website lists a plethora of international commercial law instruments, many of them diplomatically drafted in a top-down manner in UNCITRAL or Hague regimes: Ralph Amissah, *Lex Mercatoria* <<http://www.jus.uio.no/lm/>>.

28 The present author has long had misgivings on the use of the labels 'hard law', 'soft law' and 'softer law' in the context of uniform laws, as they often do not fit with economic and political realities: see Andersen, 'Defining Uniformity in Law', above n 4, 15–17.

legal drafters representing governments and non-governmental organisations in the UN. While much effort was put into ensuring that the resultant text was more internationally acceptable than its precedents,<sup>29</sup> there was not much input from industry and many would argue that the push to create a shared text before industry practices were sufficiently unified was premature.<sup>30</sup>

This is an issue which is strongly affected by homeward trends in interpretation of shared laws, and one which an examination of an example of a ‘top down’ instrument like the international sales law (*CISG*) and its uniformity illustrates below.

### III UNIFORMITY AND THE *CISG*

The *CISG* is a piece of uniform legislation, currently shared by 83 different countries across the world.<sup>31</sup> It has been the law of international sales in Australia since it entered into force in April 1989, which means that in the absence of the choice to opt out, it will automatically apply to a contract of sale where parties have their places of business in two contracting countries,<sup>32</sup> or where the rules of private international law appoint the law of Australia as governing an international sales of goods contract.<sup>33</sup>

The *CISG* is often labelled as a great success in the unification of commercial law.<sup>34</sup> However, studies of the *CISG* reveal that while it is textually uniform, at

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- 29 For a comprehensive analysis of the history of the *CISG* and its drafting process, see John Honnold, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions That Led to the 1980 United Nations Convention with Introductions and Explanations* (Kluwer, 1989).
- 30 See James E Bailey, ‘Facing the Truth: Seeing the *Convention on Contracts for the International Sale of Goods* as an Obstacle to a Uniform Law of International Sales’ (1999) 32 *Cornell International Law Journal* 273.
- 31 As of 26 September 2014, UNCITRAL reports that 83 states have adopted the *CISG*: UNCITRAL, *Status: United Nations Convention on Contracts for the International Sale of Goods* (26 September 2014) <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.
- 32 In accordance with art 1(1)(a): ‘This *Convention* applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States’.
- 33 In accordance with art 1(1)(b): ‘This *Convention* applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State’.
- 34 See, eg, Ingeborg Schwenzer and Pascal Hachem, ‘The *CISG* – Successes and Pitfalls’ (2009) 57 *American Journal of Comparative Law* 457, 457; Olaf Meyer, ‘The *CISG*: Divergences between Success–Scarcity and Theory–Practice’ in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 23, 23–4.

least to some extent,<sup>35</sup> it is often more successful in creating a uniform text than a uniform result, and that applied uniformity suffers in case law.

One such example is found in the determination of what constitutes 'reasonable time' for giving notice in article 39 of the *CISG*. Although a fact-dependent flexible term, various interpretations from *CISG* states run from four days being untimely to four months being timely in troubling patterns of homeward trends – that is, idiosyncratic domestic interpretations of shared international laws.<sup>36</sup> While there are many reasons why such a time frame must remain flexible and subject to the circumstances of a particular case, empirical research carried out for the *CISG* Advisory Council clearly mapped strong jurisdictionally based variations in the way reasonable time was applied.<sup>37</sup>

Given that the failure to comply with this notice requirement means a complete lack of remedies, with few exceptions,<sup>38</sup> this is a very important provision for a buyer suffering from non-conformity of goods. Such divergences in considering notice reasonable do not create a predictable environment for transnational business. One could argue that it provides a helpful divergent set-off option for the practitioner seeking support for a specific legal position. But since the same support may also be found on the opposing counsel's side, it will become a question of who is best at searching for persuasive international cases. So the question is: does this divergence lie outside the acceptable boundaries of uniform application?

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35 As the *CISG* is an instrument of the UN, it exists in six official languages as well as numerous unofficial translations, which pose issues of their own with regard to textual uniformity and precision of legal translation. Moreover, the declarations in *CISG* arts 92–6 allow reservations to be made by ratifying states, which results in some conflicting interpretations of the *CISG*, thus reducing textual uniformity. It is good to be able to report that these issues are now diminishing as a number of states withdraw their reservations: see Camilla Baasch Andersen, 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the *CISG*' (2012) 8 *Journal of Business Law* 699. See also the 2013 declaration by the *CISG* Advisory Council: *CISG* Advisory Council, *Declaration No 2: Use of Reservations Under the CISG* (21 October 2013) <<http://www.cisg.law.pace.edu/cisg/CISG-AC-dec2.html>>.

36 For an early discussion of this, see Camilla Baasch Andersen, 'Reasonable Time in the *CISG*: Is Article 39(1) Truly a Uniform Provision?' in Pace International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998* (Kluwer Law International, 1999) 63. More recently, see, eg, Daniel Girsberger, 'The Time Limits of Article 39 *CISG*' (2005) 25 *Journal of Law and Commerce* 241; Camilla Baasch Andersen, 'Noblesse Oblige ... ? Revisiting the "Noble Month" and the Expectations and Accomplishments It Has Prompted' in Markus Müller-Chen and Andrea Büchler (eds), *Private Law: National – Global – Comparative* (Stämpfli Verlag, 2011) vol 1, 33, 33–50; Camilla Baasch Andersen, 'Article 39 of the *CISG* and Its "Noble Month" for Notice-Giving: A (Gracefully) Ageing Doctrine?' (2012) 30 *Journal of Law and Commerce* 185.

37 See the *CISG* Advisory Council Opinion No 2, with case annex: *CISG* Advisory Council, *Examination of the Goods and Notice of Non-conformity Articles 38 and 39* (Opinion No 2, 7 June 2004) <<http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html>>. For an earlier study, see Andersen, 'Reasonable Time in the *CISG*', above n 36.

38 Exceptions are found in art 40 (for the seller acting in bad faith or quasi-bad faith) and art 44 (for the buyer who has a reasonable excuse). For more on these exceptions, see Camilla Baasch Andersen, 'Exceptions to the Notification Rule – Are They Uniformly Interpreted?' (2005) 9 *Vindobona Journal of International Commercial Law and Arbitration* 17.

To answer this, we should look at the legal basis for the uniformity of the *CISG*, which is found in article 7(1) of the *CISG*, which provides:

In the interpretation of this *Convention*, regard is to be had to its international character and to the need to promote uniformity in its application ...

Previous research has analysed this, and other uniform rules in commercial law, in-depth to establish a reasonable level of uniform expectations. But as previously concluded, the answer to the question ‘how uniform is uniform’ in the context of the uniform *CISG* application is not an easily answered question.<sup>39</sup> Even within the confines of a single uniform instrument like the *CISG*, it is clear – from the *travaux*, antecedents and practice – that different provisions aim for different degrees of applied uniformity, as many of them have various opportunities for in-built flexibility.

However, when considering that the aim of the *CISG* is the removal of barriers to trade, and that communality in trading practices through similar rules is the goal of uniformity, we need to identify a minimum standard of applied uniformity against which to monitor the success of the uniform text in achieving its aim. This, again, is not an easy task. Previous writing has indicated that one minimum standard can be seen in the elimination of persistent forum shopping based on interpretive differences of the shared law.<sup>40</sup> Where we have created so many divergences in case law that there are predictable homeward trends, and ready benefits in forum shopping for more favourable jurisdictions, then uniform laws have failed. That is the case here. This has been illustrated in relation to article 39 and the determination of ‘reasonable time’, where differences in the way the provision is applied are too frequent and follow a foreseeable pattern, and have a direct bearing on the outcome of the cases.<sup>41</sup> These differences can be linked to homeward trend interpretations which reflect domestic laws where they should not, and depart from any autonomous meaning of the provisions in the context of international and uniform application while undermining the shared law of the *CISG*.<sup>42</sup>

The practice of uniform law is being directly undermined by inappropriate interpretive links between domestic laws and uniform international provisions. The effect is an unpleasant one, not only is the *CISG* not applied as the uniform

39 See, eg, Andersen, ‘The Global Jurisconsultorium of the *CISG* Revisited’, above n 6, 45; Andersen, *Uniform Application of the International Sales Law*, above n 9, especially ch 2.

40 See Andersen, *Uniform Application of the International Sales Law*, above n 9, 14–17. This source quotes the standards of Jacob W F Sundberg, *Air Charter: A Study in Legal Development* (P A Norstedt & Söners Förlag, 1961) 249: ‘A certain margin of imperfection is not necessarily an actual defect so long as it does not invite plaintiffs to go “shopping” for the most generous jurisdiction’, quoted in O C Giles, *Uniform Commercial Law: An Essay on International Convention in National Courts* (A W Sijhoff, 1970) 23–4.

41 See, eg, Andersen, ‘Reasonable Time in the *CISG*’, above n 36; Girsberger, above n 36; Andersen, ‘Noblesse Oblige’, above n 36; Andersen, ‘Article 39 of the *CISG* and Its “Noble Month”’, above n 36.

42 For more on the homeward trend and how it undermines uniformity, see Franco Ferrari, ‘Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the *CISG*’s Autonomous Interpretation by Courts’ in Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday* (Wildy, Simmons & Hill, 2008) 134.

law it was intended to be, but – far more worryingly – it may seem deceptive to the unwary trader as it presents a textual semblance of uniformity. The entire structure of false uniformity can mislead business to assume similarity where there is none, and lead to unpleasant surprises.<sup>43</sup> Such deception is not an effective removal of barriers to trade as the convention aims for – but a trap which may encourage business to charge ahead into barriers made invisible.

It is thus an issue which must be urgently addressed, and not just in scholarship. We need to influence courts and arbitrators as well as legal counsel to abstain from homeward trends in interpretation of concepts which should be shared, and to embrace a more uniform and transnational shared approach. One way, which encourages practitioners help to guide this development, and in the process help themselves to navigate a complex area of law to their advantage, lies in the global jurisconsultorium.

#### IV LEARNING BY DOING: THE GLOBAL JURISCONSULTORIUM

In previous writings, I have strongly advocated the use of a global jurisconsultorium, using the term to describe the duty to share international scholarship and cases in the pursuit of autonomy of terms under the *CISG*.<sup>44</sup> It is defined as an obligation to refer to what is being done in other jurisdictions when sharing law; this requires scholars to refer to the works of individuals from other member states and requests judges and legal counsel to find inspiration and even authority in *CISG* precedents from other member states.

A global jurisconsultorium is not only beneficial to the *CISG*, but to other areas of international law. Indeed it can be said to have arisen elsewhere.<sup>45</sup> It was first conceived in a case concerning the *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air* ('*Warsaw Convention*') on the liability of air carriers,<sup>46</sup> *Fothergill v Monarch Airlines* of 1980, which held that uniform international law is unique and must be treated as such.<sup>47</sup> Following this, the *Warsaw Convention* has seen a number of sound cases referring to its uniform nature and need to be shared internationally. In the *Air France v Saks* case of 1985, the US Supreme Court concluded, with regards to the meaning of the term 'accident' under the *Warsaw Convention*, that judicial decisions from other countries interpreting a treaty term are 'entitled to considerable weight'.<sup>48</sup> This was restated by the US Supreme Court in 1999 in the

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43 See Bailey, above n 30, 282.

44 See, eg, Andersen, 'The Uniform International Sales Law', above n 2; and more recently, Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6; see also Ferrari, 'Have the Dragons of Uniform Sales Law Been Tamed?', above n 42.

45 For more on this, see Andersen, 'Applied Uniformity of a Uniform Commercial Law', above n 9, 39.

46 Opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933).

47 *Fothergill v Monarch Airlines Ltd* [1981] AC 251.

48 470 US 392, 404 (1985).

*El Al* case.<sup>49</sup> Finally, in the 2004 case of *Olympic Airways v Husain*, Justice Scalia noted in dissent that:

We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.<sup>50</sup>

The use of foreign cases in domestic courts is gaining momentum in many disciplines of law. However, awareness of the application of uniform law is especially needed in the area of international commercial law, because there are so many immediate economic benefits generated by removing barriers to trade, and because there is no system of monitoring. There is no international commercial court to monitor the application of shared global instruments like the *CISG*, despite calls dating from 1911 to 2003 for such a court to be established.<sup>51</sup> However, the issues of cessation of sovereignty in establishing such a court make it largely unrealisable. So, in the absence of such a monitoring court, we must trust domestic judges and professional arbitrators to acknowledge that when they are applying uniform international commercial laws, they are applying shared multi-jurisdictional law. They must realise that such laws should be applied with a high degree of uniformity, and thus must be treated as a unique phenomenon without following the path of domestic law. Developing autonomous concepts through a shared jurisconsultorium will help to attain communality in the application of shared law.

This will improve certainty and predictability for those working in fields where the uniform law is applied. In global unification efforts, even within the limited area of trade, we often overlook the fact that before we can successfully apply the shared uniform laws the same way, we need to adapt legal systems and legal habits as well as the practices of commercial traders. The global jurisconsultorium suggests that we try to learn from each other in approaching common standards; a ‘learning by doing’ on a global scale of finding an equilibrium of interpretation and commercial practice within the framework of the shared law.

It is not a leap of faith to imagine sharing sources where a law is shared. In the words of Honnold, ‘tribunals construing an international convention will

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49 *El Al Israel Airlines Ltd v Tseng*, 525 US 155, 176 (1999).

50 *Olympic Airways v Husain*, 540 US 644, 660 (Scalia J) (2004), cited in Ernest A Young, ‘Treaties as “Part of Our Law”’ (2009) 88 *Texas Law Review* 91, n 70.

51 Hans Wehberg seems to have been the first to suggest such a tribunal: Hans Wehberg, *Ein Internationaler Gerichtshof für Privatklagen* (Liebheit & Thiesen, 1911) 23. Another suggestion was made in 1992: see Louis Sohn, ‘Uniform Laws Require Uniform Application: Proposals for an International Tribunal To Interpret Uniform Legal Texts’ (Paper presented at Uniform Commercial Law in the Twenty-First Century: Congress of the United Nations Commission on International Trade Law, 18–22 May 1992) 50 <[http://www.uncitral.org/pdf/english/texts/general/Uniform\\_Commercial\\_Law\\_Congress\\_1992\\_e.pdf](http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf)>. The latest official suggestion seems to have been made by Filip de Ly, ‘Uniform Interpretation: What Is Being Done? Official Efforts’ in Franco Ferrari (ed), *The 1980 Uniform Sales Law* (Sellier European Law Publishers, 2003) 335, 346.

appreciate that they are colleagues of a world-wide body of jurists with a common goal'.<sup>52</sup>

There are two main arguments which support this and can be examined using the *CISG* as an example.

### A The Legal Argument for a Jurisconsultorium of the *CISG*

It is not controversial that article 7(1) of the *CISG* forms the legal basis for the duty to aim for uniform interpretation by taking an international vantage point, by mentioning both internationality and uniformity in its guideline for interpretation:

In the interpretation of this *Convention*, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.<sup>53</sup>

Article 7(1) and its reference to 'regard' is interesting in this context. If scrutinised, the direct linguistic inference is that regard pertains to interpretation, and not directly to a duty of uniform application. However, this distinction is a very pedantic one, as the two are indelibly entwined, and there cannot be one without the other. As Lookofsky puts it, '[a]rticle 7(1) commands national courts also to have (some measure of) "regard" to the international view'.<sup>54</sup>

There is a basic comity argument present here as well. In undertaking to share a legal text like the *CISG*, which strives for uniform interpretation, states are also undertaking to pursue the goal of uniformity in unison. The legal basis for this duty to share sources of law is one of comity; that is, of recognising the unique nature of shared international laws, and allowing the influences upon the interpretation of these laws to be as diverse as the systems that share them.

Some *CISG* scholars are tempted to extend the duty of *CISG* member states to *consider* cases from other *CISG* jurisdictions to a duty to *apply* similar reasoning (as long as the reasoning is not defective in any way). Indeed, in one of his earlier articles, DiMatteo states that for the *CISG*, 'national *stare decisis* is to be supplanted by an informal supranational *stare decisis*'.<sup>55</sup> The allure here is obvious for those seeking uniform application, as a more binding form of international case law in the form of a *stare decisis* would invariably increase similarity in application. But – especially to the European lawyer – the use of the word 'supranational' and the power which it has to dictate actions to states who have ceded sovereignty, is simply incongruous in the context of UNCITRAL instruments. It may be realisable in commercial arbitration to a limited extent. But to impose foreign quasi-binding precedents on domestic courts would require cessation of sovereignty akin to that given up by EU members through the EU

52 John O Honnold, 'Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth' (1995) 1 *International Trade and Business Law Journal* 1, 8.

53 *CISG* art 7(1).

54 Joseph Lookofsky, *Understanding the CISG* (Kluwer, 2008) 34. Lookofsky also points out the problematic issue of just how much 'regard' should be had: at 35.

55 Larry A DiMatteo, 'The *CISG* and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings' (1997) 22 *Yale Journal of International Law* 111, 133.

treaties. The instruments of UNCITRAL, of which the *CISG* is one, simply do not have such a powerful machine to back their application. Effectively, UNCITRAL has no ‘teeth’, and so we must refrain from being overly ambitious in what duties we can realistically impose. In short, a number of domestic jurisdictions face difficulties in comfortably accommodating foreign precedents in their courts,<sup>56</sup> and we lack the power to force them. The best thing we can do at present is to emphasise the appeal of the non-binding nature of a *CISG* case from a foreign jurisdiction.<sup>57</sup> If we ask judges and arbitrators to consider foreign cases, hopefully persuasive reasoning will speak for itself.

In short, there should be no questioning of the duty to consider foreign sources or precedents. The content of this duty, however, is merely one of reference and consideration, and anything by way of binding precedent will never be applicable under the current UN framework. However, there must be a duty to take them into account. This duty has been supported in legal scholarship in many guises by numerous other *CISG* experts, including DiMatteo,<sup>58</sup> Ferrari,<sup>59</sup> Zeller,<sup>60</sup> Flechtner,<sup>61</sup> and Schlechtriem.<sup>62</sup>

However obvious this conclusion seems, the fact remains that cases where this duty is actually followed remain very rare.

## B The Policy Argument for a Jurisconsultorium of the *CISG*

Regardless of the legal argument, and the duty for courts to look at foreign precedents in interpreting shared law, this is also something which is very much in the interests of those who are – more often than not and regardless of whether a jurisdiction is *jura noscitur curia* – researching the law: namely the legal representatives of the commercial parties.

As previous scholarship has indicated, it is directly in the interest of legal counsel using the *CISG* for their respective clients to ‘shop’ for precedents as widely as possible.<sup>63</sup> Most legal counsel would surely welcome the opportunity to consult a wider spectrum of cases – from any jurisdiction applying the shared law – in the hope of finding a persuasive case which aids his or her client’s case.

56 For more on this, see Andersen, ‘The Global Jurisconsultorium of the *CISG* Revisited’, above n 6, 53.

57 For more on the nature of precedents, see *ibid* 54–62.

58 See especially DiMatteo, above n 55; Larry A DiMatteo et al, ‘The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of *CISG* Jurisprudence’ (2004) 34 *Northwestern Journal of International Law and Business* 299.

59 Franco Ferrari, ‘*CISG* Case Law: A New Challenge for Interpreters?’ (1999) 17 *Journal of Law and Commerce* 245, 246: ‘[a]s many legal writers have pointed out, this means, above all, that one should not read the *Convention* through the lenses of domestic law, but rather in an autonomous manner’.

60 Bruno Zeller, ‘Traversing International Waters: With the Growth of International Trade, Lawyers Must Become Familiar with the Terms of the Convention on Contracts for the International Sale of Goods’ (2004) 78(9) *Law Institute Journal* 52.

61 Flechtner, above n 13.

62 See especially Peter Schlechtriem, ‘Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany’ [1991–92] 1 *Juridisk Tidsskrift* 1: he explains how consideration and critique of case law from other jurisdictions, as well as help from scholars and comparative law centres, smooth any divergent interpretations of uniform law.

63 See Andersen, ‘The Global Jurisconsultorium of the *CISG* Revisited’, above n 6, 49.



Restricting cases to those of the same domestic judicial hierarchy, when the law is shared internationally, would not seem sensible. If commercial courts share common commercial values, as we tend to assume in international commercial law,<sup>64</sup> and apply the same shared legal text, then it would seem most sensible – and in line with the duty laid out above – to cite any well-reasoned precedents to the judge. The nationality or hierarchy of the court from which the precedent originates should be immaterial if the reasoning is sound. The benefit of having a wealth of potentially persuasive case law is self-evident for the commercial lawyer.

Moreover, it should also be considered a benefit for judges. As Koch puts it, '[o]nly a fool would refuse to seek guidance in the work of other judges confronted with similar problems'.<sup>65</sup>

The nationality of those judges or cases should be irrelevant – regard should be had to the power of their reasoning alone. Good law is not determined by state boundaries, but by persuasive reasoning.

### C The Statistics of the Global Jurisconsultorium

The above sets out the simple premise that any legal counsel would benefit from citing well-reasoned precedents, foreign or not, and that any judge would find it helpful to learn what is being done in other countries using the same law. The judge even has an arguable duty to look at foreign precedents. On the sum of these cumulative arguments, one might expect the jurisconsultorium of the *CISG* to be a universal interpretive approach in all jurisdictions. But – sadly – that is not the case.

For a variety of reasons, cases which actually *do* refer to foreign judgments are rare. As set out in Part IV(D) below, there are a number of issues with compiling empirical data on the usage of foreign law in domestic courts. However, despite the obvious statistical issues in collecting such data, it is pleasing to report the following numbers of cases utilising the jurisconsultorium which are openly reported in the *CISG* database.<sup>66</sup>

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64 This view is multivalent and subject to some reservations, as pointed out by Kahn-Freund, above n 10.

65 Charles H Koch Jr, 'Envisioning a Global Legal Culture' (2003) 25 *Michigan Journal of International Law* 1, 51.

66 The author keeps a list of reported cases utilising a jurisconsultorium. She welcomes additions to the list, and any correspondence on the topic, at [camilla.andersen@uwa.edu.au](mailto:camilla.andersen@uwa.edu.au).

Table 1: Cases Utilising the Jurisconsultorium Reported in the CISG Database

Jurisdiction	Number of Cases
Australia	3
France	1
Germany	4
Italy	10
The Netherlands	2
Serbia	3
Spain	1
Switzerland	2
Poland	1
United States of America	5
Various arbitration venues worldwide	4

If compared to the overall numbers of reported *CISG* cases, the proportion of practical jurisconsultorium cases to all cases is growing over time. In a statistical analysis of cases reported between 2005 and 2009, there was a rise in cases utilising the jurisconsultorium from 1.1 per cent to 1.5 per cent.<sup>67</sup> At present, approximately 2.7 per cent of reported cases reviewed in the Albert H Kritzer *CISG* Database demonstrate shared sources. Moreover, there is a wider variety of countries contributing to the body of reported jurisconsultorium cases. It may not be much – but it *is* growing.

### D Problems with Measuring the Global Jurisconsultorium

As seen from the above statistics, there are problems in applying the jurisconsultorium. It is still more regional than global in nature as courts will tend to refer to authorities from more familiar foreign courts (if at all).

One example of this is the (in)famous Danish case of *Handelsagentur v DAT-SCHAUB A/S* ('*Wholly Mackerel*').<sup>68</sup> It involved the sale of frozen, so-called 'whole' mackerel from Russia to Denmark. The fish delivered were not of the specified breed, but the buyer did not discover this in time as he failed to defrost a sample and examine it as required by *CISG* article 38. Legal counsel for the buyer cited the well-known Dutch *Stefano v Foodik* ('*Maggots in Mozzarella*') case from the Dutch District Court of Roermond in support of the client's position.<sup>69</sup> This was clearly persuasive to the Danish judge who paraphrased it in

67 Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6, 52.

68 (Unreported, Copenhagen Maritime Commercial Court, Sierverts, Laursen and Petersen JJ, 31 January 2002).

69 (Unreported, District Court of Roermond, 19 December 1991).

his decision, but did not cite it. Previous research has speculated that the Danish judge's reluctance to refer *directly* to the Dutch case is symptomatic of a larger problem.<sup>70</sup> The failure of judges to identify legal sources and authorities in their decisions is a well-known problem in Denmark, where decisions are traditionally short and unsupported, and traditionally referred to as '*oracle-like*'.<sup>71</sup> Moreover, it is an easy leap of logic to conclude that a Danish judge might have traditional/nationalistic views which might make him or her feel uncomfortable directly referring to a Dutch case as a persuasive precedent, whereas the persuasive reasoning of sound commercial sense is more easily transplanted.

However, as seen in the above case, and from a very pragmatic perspective: why does the citation of foreign cases matter, as long as the judge considers the reasoning and finds it useful in forming an autonomous approach to interpreting a given shared provision? Whether or not a Danish judge *cites* the Dutch case remains a purely academic issue – the applied uniformity is safeguarded the moment he or she considers and applies the reasoning involved.

The judge's resistance to citing the Dutch case may well present a purely theoretical problem, but it represents two issues:

1. It is one of a number of different types of cases which obstruct the statistical picture of how frequently and successfully the global jurisconsultorium of the *CISG* is applied. The above case, for instance, would never have been unearthed had it not been for the fact that the author was the specialist consulted in the case. I would not have known that the Dutch case had been cited to the Court had I not drafted the expert opinion myself.
2. This case is not just an example of a court citing its sources, as it goes to some length to cite the lawyer's submissions making the argument. I believe it is indicative of a deep-seated reluctance to allow citation of foreign case law in Danish courts. While the refusal to cite a Dutch case may be irrelevant where the reasoning is followed, it is nevertheless food for thought when a commercial court applying an international sales law chooses to protect its sovereign image over embracing the international character of the shared law.

Luckily, other jurisdictions are faring much better in the promotion of shared laws and utilising the jurisconsultorium.

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70 Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6, 53.

71 See generally Joseph Lookofsky, 'Precedent and the Law in Denmark' (Paper presented at the 17<sup>th</sup> Conference of the International Academy of Comparative Law, Utrecht, July 2006) <<http://www.cisg.law.pace.edu/cisg/biblio/lookofsky15.html#13>>. See especially the quote from Danish Supreme Court Judge Carl Torp in 1911 on Danish judgments: 'the premises are so briefly stated or formulated in such an *oracle-like fashion* that they provide us with no clear guidance beyond the decision in the concrete case': n 59 (emphasis in original).

## E Italian Use of the Practical Jurisconsultorium

Throughout the history of the jurisconsultorium of the *CISG*, the Italians have always done it best. They were the first to openly refer to foreign *CISG* cases in 1996 when the judge in Tribunale Civile de Cuneo considered both German and Swiss case law,<sup>72</sup> and they excel by providing the most reported cases utilising a jurisconsultorium, as well as the most comprehensive. One of the most impressive examples is a case from the Tribunale Civile de Vigevano in 2000, where the judge cites American, Austrian, Dutch, French, German, Italian, and Swiss *CISG* cases as well as arbitral awards.<sup>73</sup>

This is an intriguing phenomenon, and previous research has provided an interesting – albeit unusual – explanation for it.<sup>74</sup> The age of Italian judges is directly linked to their ability to embrace new forms of law, like uniform international shared laws. Italian judges take office at a relatively young age, and they arrive on the bench with freshly educated mindsets which include new and untraditional applications and understandings of law. Fresh from university lectures and the modern scholarship which they are taught, they embrace a modern understanding of the role of uniform shared laws and shared sources, which they bring to the to the bench with them.<sup>75</sup>

This need to ensure a fresh education of the judiciary is a point made by Roy Goode, long before the young Italian judges started illustrating the point. He wrote in 1993:

It is primarily by the spreading of awareness of foreign legal systems among our students that we can hope to accelerate the process of harmonization and to produce practitioners and judges of the future prepared to look beyond the horizon of their own legal system.<sup>76</sup>

It follows from this that a re-education of the existing and experienced judiciary would also have a positive effect on the application of these new shared international laws.

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72 *Sport d'Hiver di Genevieve Culet v Ets Louys et Fils* (Unreported, District Court of Cuneo, Meinardi, Petraghani and Macagno JJ, 31 January 1996). Ten years ago, Ferrari reported that the decision from Cuneo was the only one of 300 cases reported by Michael Will to comply with the duty to look to foreign case law: Franco Ferrari, 'Remarks on the Autonomy and the Uniform Application of the *CISG* on the Occasion of Its Tenth Anniversary' (1998) 41 *International Contract Advisor* 33.

73 *Rheinland Versicherungen v Atlarex* (Unreported, District Court of Vigevano, Rizzieri J, 12 July 2000). This is criticised by Sant'Elia for not containing references to civilian commentaries: Charles Sant'Elia, *Editorial Remarks* <<http://cisgw3.law.pace.edu/cases/000712i3.html#ce>>. However, it should be remembered that the Italian civil procedure prohibits references to such academic works in case law. Thus, the referencing of the *CISG* websites and UNILEX in the case is all the more remarkable.

74 Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6, 50.

75 As an interesting aside, according to Professor Franco Ferrari (during an informal conversation at Hotel Wandl in Vienna in 2006), the judges in all the reported Italian jurisconsultorium cases are his recently graduated students from law school. This is heartening news for the crusading academic trying to make a difference in a practical world of law – we *can* influence our students and the world they work in.

76 Roy Goode, 'Reflections on the Harmonization of Commercial Law' in Ross Cranston and Roy Goode (eds), *Commercial and Consumer Law: National and International Dimensions* (Oxford University Press, 1993) 3, 26.

Another interesting aspect of the Italian references to foreign case law is the way in which their justifications have developed, which is indicative of how new emerging thinking takes hold and becomes the norm.<sup>77</sup> In the first few Italian jurisconsultorium cases, the judges justified their decision to refer to foreign case law by extensively citing scholarship in the area and analysing the type of non-binding precedent consulted. This justification shrank to merely indicate *CISG* article 7(1) and the non-binding nature of the precedent at the end of the 1990s, as in the 1999 case from Padova.<sup>78</sup> More recent Italian cases cite foreign cases alongside the Italian ones as if it were self-evident that they be consulted, such as in the 2008 case from Forli.<sup>79</sup> This maturing of the process of consulting foreign cases as a natural step in applying shared law is very encouraging.

Even more encouraging is the fact that this good Italian practice seems to be spreading. In a Polish Supreme Court case from 2007, the Supreme Court cited an Austrian Supreme Court decision without feeling a need to justify the relevance of foreign case law.<sup>80</sup>

It is hoped that the Italian approach will be followed by legal practitioners in other jurisdictions. We cannot impose a duty to follow the reasoning of international cases, but if we can convince counsel to bring it to judges, good reasoning will speak for itself.

## F Australia and the Practical Jurisconsultorium

As evidenced above, Australia has contributed to the statistics of international referencing in *CISG* cases three times thus far. This is not bad for a country which otherwise does not have a very good track record of applying the *CISG*,<sup>81</sup> with only 26 *CISG* cases reported in total (compared to the 523 from Germany or 215 from the Netherlands).<sup>82</sup> I have not included in these statistics references to any persuasive precedents on issues of common law from English or other common law jurisdictions.

The first two cases are from the Supreme Court of Queensland, the latter from the Court of Appeal affirming the decision of the former. In both decisions, the Supreme Court relied on a variety of US cases (both cited and uncited) in finding, that the failure to open a timely letter of credit was a fundamental breach under article 25 and article 64(1)(a) of the *CISG*,<sup>83</sup> and to interpret damages calculation under article 75 of the *CISG*.<sup>84</sup>

77 This is analysed in more detail in Andersen, 'The Global Jurisconsultorium of the *CISG* Revisited', above n 6.

78 *Tessile v Ixela* (Unreported, District Court of Pavia, 29 December 1999).

79 *Mitias v Solidea Srl* (Unreported, District Court of Forli, Cortesi J, 11 December 2008).

80 *Spoldzielnia Pracy 'A' in N v GmbH & Co KG in B* (Unreported, Supreme Court of Poland, Bienieck, Wrzeszcz, Romanska JJ, 11 May 2007) ('*Shoe Leather case*').

81 Spagnolo has recently completed her extensive analysis of the phenomenon of 'opting out' of the *CISG*: see Lisa Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer Law International, 2014).

82 Albert H Kritzer *CISG* Database, *Country Case Schedule* (14 April 2015) <<http://www.cisg.law.pace.edu/cisg/text/casedit.html>>.

83 *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd* [2000] QSC 421, [62] (Ambrose J).

84 *Ibid*, [91]–[108] (Ambrose J), affd [2002] 2 Qd R 462, 484 [46] (Williams JA).

It is arguable whether these cases truly represent an attempt to look to international sources, or whether the common law tradition of sharing persuasive precedents among the Commonwealth is simply benefiting uniform development here. But, as the saying goes, one should not look a gift horse in the mouth. Regardless of whether these US references stem from a pursuit of international uniformity or traditional reliance, it is a step in the right direction.

However, the third example from Australia is from the Federal Court of Australia, and cites a well-known French case supporting the fact that the *CISG* does not apply in Hong Kong.<sup>85</sup> By referring to a civil law jurisdiction, this provides encouraging support for the conclusion that Australian courts are attempting to bring a transnational jurisconsultorium to the *CISG* in this case.

Although not part of the *CISG* statistics, in 2012 the Federal Court had an opportunity to hear a case on the enforcement of an arbitral award involving the *CISG* in the sale of coal and coke, and cited cases from several jurisdictions, including civil law authorities (France) in support of its findings.<sup>86</sup>

All in all, considering that almost one sixth of all reported Australian *CISG* cases refer to international case law, it is a very impressive statistic. But it may have to be taken with a grain of salt, in light of the overall picture of *CISG* applications.

Nevertheless, the strong indication that judges in Australia are willing to cite foreign cases as found above reinforces the point that it is up to legal counsel to find and bring the persuasive arguments to court. How, then, do they find them?

### **G Navigating the Jungle of Information: Using the Jurisconsultorium**

Some of us still remember legal research before the arrival of the internet and digital sources. But – luckily – it is a distant memory. The ability to search and find material online has long benefited disciplines such as ours in law, where the need to find specific persuasive material to present to a judge is sometimes pressing. Before the internet, the idea of asking practitioners to find Dutch, French, Chinese or German cases to support their clients was unfeasible. Now, however, the world has changed.

For example, over half of the reported *CISG* cases come from the jurisdictions mentioned above.<sup>87</sup> We find them in the Albert H Kritzer *CISG* Database, located on a server in New York hosted by the International Institute of Commercial law under Pace University School of Law. A decade ago this database was the recipient of numerous prizes,<sup>88</sup> and was hailed as unique as it

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85 *Hannaford v Australian Farmlink Pty Ltd* [2008] FCA 1591, [5] (Finn J), citing Cour de cassation [French Court of Cassation], 04-17.726, 2 April 2008 reported in (2008) Bull civ n° 96, 81.

86 *Traxys Europe SA v Balaji Coke Industry Pty Ltd* [No 2] (2012) 201 FCR 535.

87 See the Kritzer database: Institute of International Commercial Law, *Albert H Kritzer CISG Database* (28 May 2015) Pace Law School <[www.cisg.law.pace.edu](http://www.cisg.law.pace.edu)>.

88 Including the International Association of Law Libraries 'Database of the Year' and special awards from Bar Associations worldwide.

was referred to as an actual source of law.<sup>89</sup> It continues to be an outstanding legal resource, not least because it continues to be free and include impressive features such as English language translations of most reported cases. This is useful as English has become the commercial language of choice. Now, luckily for other areas of law, there are similar resources available for other commercial law disciplines – although very few of the high-quality ones are free.

The *CISG* database contains cases which are reported through an efficient network of collaborations with UNCITRAL and other institutions, neatly bundled into several search parameters, the most useful in practice probably being the provisions they concern. It constitutes a veritable cornucopia of information, including scholarly articles, bibliographies and case law, and serves as a one-stop shop for those seeking material in support of an argument on the *CISG*.

My enthusiasm for this database is strong. But so is the point I am trying to make: there are few excuses for why a lawyer would choose not to hunt for persuasive legal sources from other jurisdictions. They are accessible, free for the taking, and already translated. Excuses in the realm of 'can't find it', 'can't understand it' and 'can't read it' are really not viable. In fact, I would venture the opinion that lawyers representing clients in a *CISG* case run a real risk of discovering the utility of good malpractice insurance if they do not search for persuasive material in such easily accessible databases. We are starting to see a number of (settled and thus not citeable) cases where American lawyers have been liable for counselling clients to opt out of the *CISG* where the *CISG* would have actually benefitted the client. Examples include cases where significant differences in substantive law concerning revocation of offers and non-availability of remedies are concerned. I believe it is only a matter of time before the standard of judicial practice is raised to the point where we will also have liability for lawyers who use it, but not very well.

## V CONCLUSION: THE GLOBAL JURISCONSULTORIUM – A POTENTIAL BASIS FOR MUCH MORE

While the jurisconsultorium has previously been a significant tool in shaping the way certain concepts are shared and understood at a uniform international level for a single shared law like the *CISG*, it could potentially also be considered a useful methodology for the convergence of international commercial law generally. This is especially the case in the light of the functional basis (as opposed to a basis of nation-state laws) on which trade and commerce operate.

This may sound unrealisable. But I firmly believe that it should be the role of commercial lawyers to move towards a shared legal environment for as many aspects of commercial law as possible. Utilising a global jurisconsultorium for international trade law disputes, and thus removing them from any domestic

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<sup>89</sup> See Camilla Baasch Andersen, 'Furthering the Uniform Application of the *CISG*: Sources of Law on the Internet' (1998) 10 *Pace International Law Review* 403.

setting in dispute resolution and instead referring them to an international commercial context, regardless of the applicable substantive law, sounds ideal. Clearly, this would have to be confined by the limits of party autonomy as defined by mandatory laws. But if Ferrari is right, that mandatory laws are becoming less significant in international dispute resolution, there may be more freedom to realise this ideal. If commercial lawyers are to keep up with globalisation, in response to Spagnolo's damning – yet correct – observation, then thinking about law in a new context is called for. Australian legal practitioners have a long tradition of sharing laws through the Commonwealth. The experience of this tradition should increase the ease with which the benefits of transnational sources and cases are consulted, to increase the likelihood of finding sources in support of their clients.

This may sound as idealistic as the Court of Commercial Law, which remains an unrealised idea from the writings of René David to those of Filip de Ly, as mentioned above. But it is far easier to implement. It does not require a complex political negotiation or any cessation of sovereignty. All that is actually needed is a new mindset for judges, 'borrowing' the freedom of arbitrators to find inspiration from a greater variety of sources. Needless to say, the internet will be a powerful ally in this, and the modern use of English as a common commercial language is a key enabler. And – of course – the research required to find these transnational sources is not laid at the judges' door, but at the feet of counsel who should be free to cite foreign sources and cases from similar commercial contexts, regardless of the applicable substantive law or the domestic forum. There is no need to use the scary word 'precedent' here; that would be tantamount to legal anarchy, violating countless procedural rules and legal principles spanning the common law–civil law divide. Nor would I advocate the use of foreign 'law' as such.<sup>90</sup>

There are undoubtedly other, and perhaps more formal, routes that can aid in what Marquis refers to as the transition of the contemporary world from modernity to a second modernity.<sup>91</sup> Slaughter discusses the notion of 'transjudicialism'<sup>92</sup> – and her concept of a global system of governance based on joint legal doctrines is a very appealing one, albeit hotly criticised in some areas

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90 The use of foreign law in domestic courts is becoming an increasingly topical issue, sparking hot debate on legal norms and authority paradigms in all areas of law. See, eg, Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501; Gilbert Guillaume, 'The Work of the Committee on International Law in National Courts of the International Law Association' (2001) 3 *International Law Forum du droit international* 34; Eric Engle, 'European Law in American Courts: Foreign Law as Evidence of Domestic Law' (2007) 33 *Ohio Northern University Law Review* 99; Adam M Smith 'Making Itself a Home – Understanding Foreign Law in Domestic Jurisprudence: The Indian Case' (2006) 24 *Berkeley Journal of International Law* 218; Lee Faircloth Peoples, 'The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities' (2008) 35 *Syracuse Journal of International Law and Commerce* 219.

91 Marquis, above n 1.

92 See the concept in Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191 as well as her concept of the new world order, first promoted in Slaughter, 'The Real New World Order', above n 25, and subsequently published in her acclaimed book: Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).



of law (notably comparative constitutional law).<sup>93</sup> In this author's view, this remains an interesting idea with tangible advantages in the realm of commercial law, and this article does not wish to detract from Slaughter's ideas of transjudicialism or indeed any other avenues in the pursuit of unification of transnational law. It merely hopes to inspire the advancement of a less formal approach which, in most domestic jurisdictions, does not require anything except a change in mindset to embrace a transnational approach.<sup>94</sup>

What I propose is to open the gates to exemplary international sources, allowing legal counsel to cite common sense scholarship and cases with similar facts, which may or may not be convincing to the judge in the case at hand, from any other jurisdiction using the same shared law. This should not be an impossible dream. Briefly put, international commerce is rarely restricted by geographic limitations with respect to its markets – why should litigation be confined by such limitations in its legal sources?

I remain convinced that the global jurisconsultorium would be a great way forward for international commercial law as a whole, and not just for single shared instruments. I also believe, however, that although the use of foreign law in domestic courts is beginning to occur with greater frequency,<sup>95</sup> such a large-scale change in the mindset of domestic commercial law judges will be slow in the making. More importantly, however, I believe that facing this challenge is in the interest of the legal practitioner on two levels:

1. By shopping for persuasive arguments on a larger playing field of transnational cases and scholarship, which the internet has made mostly available in English, the Australian practitioner is more likely to find support for his or her clients' cases.
2. By serving themselves in this manner, they are also inadvertently serving the goal of increasing uniformity through a global jurisconsultorium, aiding the goal of increased certainty and predictability in transnational commercial law.

If we share sources and problem solving techniques to build common approaches in support of a global commercial market, then lawyers are truly reacting to globalisation, creating uniform approaches which benefit all stakeholders.

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93 See, eg, Kenneth Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks' (2005) 118 *Harvard Law Review* 1255.

94 Admittedly, in selected jurisdictions, more than a mindset would have to change: in some jurisdictions, the referencing of case law or scholarship would require minor procedural changes. Eg, current Italian civil procedure prohibits reference to scholarship.

95 In the US, a number of recent cases have even dared to look beyond the nation's borders for inspiration in constitutional matters. See *Atkins v Virginia*, 536 US 304 (2002) (on death penalties applied to people with intellectual impairments being unconstitutional); *Lawrence v Texas*, 539 US 558 (2003) (holding that a Texas statute criminalising same-sex sodomy is unconstitutional); *Roper v Simons*, 543 US 551 (2005) (holding that the death penalty applied to minors is unconstitutional).