



THE PUZZLE OF THE LACK OF COLOMBIAN CASES ON THE CISG*

EL ENIGMA DE LA AUSENCIA DE CASOS SOBRE CISG EN COLOMBIA

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ABSTRACT

This paper analyzes the puzzle of the lack of case law on CISG in Colombia; an enigma that is even more perplexing taking into account that this Convention is regarded as a success case in the attempts of unification of international private law and that there is an important amount of case law in other countries. After explaining this puzzle and mentioning that there is case law applying the CISG in countries other than Colombia, this paper studies the reasons that might explain the lack of case law in Colombia. Some of the hypotheses are not feasible, such as (i) a lack of international transactions in contracts for sale of goods where either the seller or the buyer is from Colombia, (ii) the lack of knowledge about the CISG among Colombian companies, or (iii) the fact that international contracts where one of the parties has its establishment in Colombia does not trigger any disputes. Other hypotheses might be partially true, such as (i) the exclusion of the CISG as the governing law of international contracts where one of the parties has its domicile in Colombia, (ii) the CISG is the governing law of international contracts where one of the parties is from Colombia, but the companies, their attorneys at-law and, more importantly, the judges and arbitrators who settle the disputes arising out of such contracts, are unaware about the existence of this Convention, or (iii) that international arbitral tribunals whose venue is a place outside Colombia, involving neither Colombian judges nor arbitrators whose venue is in Colombia, settle the disputes concerning a sale of goods between a Colombian party and a company from other country in confidential awards that, therefore, are not reported in international legal databases. After explaining these hypotheses, this paper concludes and presents the guidelines for future empirical research that might solve the enigma of the lack of cases on CISG in Colombia at a more detailed level.

Keywords: case law; CISG; Colombia; international sales; international contracts

RESUMEN

Este artículo analiza el enigma de la ausencia de fallos proferidos por jueces o árbitros colombianos en los que se aplique la CISG, el cual luce todavía más desconcertante al tener en cuenta que esta Convención es mencionada como un caso de éxito en los intentos de unificación del derecho privado. Luego de explicar este enigma y demostrar cómo sí hay significativa jurisprudencia sobre CISG en otros países, este artículo indaga las razones que pueden motivar la ausencia de casos en nuestro país. Algunas de estas hipótesis no son creíbles, como (i) una supuesta ausencia de transacciones internacionales en las que una parte sea una empresa colombiana, (ii) la falta de conocimiento acerca de esta Convención, o (iii) el que los contratos de compraventa internacional en los que una de las partes es colombiana no generan controversias. Otras hipótesis podrían ser al menos parcialmente verídicas, como (i) la posible exclusión de la CISG como ley sustancial de contratos de compraventa internacional de mercaderías con partes colombianas, (ii) el que tal Convención sí sea aplicable pero que las empresas, sus abogados y los jueces y árbitros que resuelven las controversias ignoren su existencia, o (iii) el que si surjan controversias para las cuales la CISG sí sea la ley sustancial aplicable pero que estas sean dirimidas por tribunales de arbitramento con sede fuera de Colombia y cuyos laudos, por razones de confidencialidad, no se reportan en las bases de datos jurídicas. Luego de la explicación de estas razones, este artículo concluye y plantea bases para futuras investigaciones empíricas que puedan dilucidar definitivamente el enigma planteado.

Palabras clave: CISG; Colombia; compraventas internacionales; contratos internacionales; jurisprudencia; laudos arbitrales; ley aplicable

SUMMARY

INTRODUCTION.- I. THE GEOGRAPHY OF THE APPLICATION OF THE CISG.- II. THE REASONS THAT MAY EXPLAIN THE LACK OF COLOMBIAN CASE LAW ON THE CISG.- A. Minor importance of international trade in Colombia.- B. Colombian companies do not exclude the CISG as the governing law of their international transactions, but these do not generate disputes.- C. Lack of knowledge of the CISG among entrepreneurs and their lawyers.- D. The CISG is the governing law of international transactions in goods, but the court, the plaintiff, the defendant, and their counsels are unaware of this fact.- E. The parties contract out of the CISG as the governing law of their international transactions in goods.- F. The parties do not opt out of the CISG, but the contracts for international sale of goods usually provide that the forum to settle any dispute is a court or an arbitral tribunal whose venue is outside Colombia.- CONCLUDING REMARKS.- BIBLIOGRAPHY.

INTRODUCTION

The importance and reputation of the United Nations Convention on Contracts for the International Sale of Goods, CISG (hereinafter the “Convention” or “CISG”), are widely recognized.¹ Indeed, this legal rule has been regarded as a success beyond imagination;² “a level of success well above that of the predecessor instruments;”³ “the most successful treaty in terms of states’ participation among those prepared by UNCITRAL;”⁴ the best example of unification of private law;⁵ a model text

- 1 Olaf Meyer, *The CISG: Divergences between Success-Scarcity and Theory-Practice*, in *International Sales Law, A Global Challenge*, 23-36 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Filip de Ly, *The Relevance of the Vienna Convention for International Sales Contracts. Should We Stop Contracting it Out?*, 2003 *Business Law International*, 3, 241-249 (2003). Clayton Gillette and Steven D. Walt did contend that the success of the Convention is debatable due to (i) the absence of an international court that unifies the case law, (ii) the fact that governmental employees and academics, who do not always take into account entrepreneurial practices, drafted the legal text, and (iii) that the Convention does not govern some topics of international transactions in goods, such as those related to the validity of the contract. Clayton Gillette & Steven D. Walt, *Sales Law, Domestic and International (Concepts and Insights)*, 5 (2nd ed., Foundation Press, New York, 2002). In respect of the cited text of Professor Meyer, the reader will soon notice that the most frequently cited sources in this paper belong to a collective book that Professor Larry A. DiMatteo edited (*International Sales Law, A Global Challenge*) and might think, in principle, that the present text is excessively based on a single source. This fact, however, is not a shortcoming because: (i) several professors authored such book and (ii) they are distinguished and leading academics with wide expertise in the field of international transactions in goods. United Nations Commission on International Trade Law, UNCITRAL, United Nations Convention on Contracts for the International Sale of Goods, CISG — Vienna Convention, April 11, 1980. Available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>
- 2 Stefan Kröll, Loukas Mistelis & Pilar Perales-Viscasillas, *Introduction to the CISG*, in *UN Convention on Contracts for the International Sale of Goods*, 19-20, 20 (Stefan M. Kröll, Loukas Mistelis & Pilar Perales-Viscasillas, eds., Beck, Munich, 2011).
- 3 Sylvaine Poillot-Peruzzetto, *French Perspective of the CISG*, in *International Sales Law, A Global Challenge*, 338-360 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Only nine countries ratified these predecessor conventions (International Institute for the Unification of Private Law, UNIDROIT, *Convention relating to a The Uniform Law on the International Sale of Goods, ULIS*, The Hague, 1964. Available at: <http://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964>. United Nations Commission on International Trade Law, UNCITRAL, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards — New York Arbitration Convention, New York Convention —, New York, 1958. Available at: <http://www.newyorkconvention.org/new+york+convention+texts>) not being any of them either the United States or France. Peter Schlechtriem & Petra Butler, *UN Law on International Sales*, 1 (Springer, Berlin, 2009).
- 4 Luca G. Castellani, *The CISG in Context of Complementary Texts*, in *International Sales Law, A Global Challenge*, 683-693 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 5 Jan M. Smits, *Problems of Uniform Laws*, in *International Sales Law, A Global Challenge*,

for domestic private laws⁶ in countries such as Germany,⁷ the Netherlands,⁸ and China;⁹ and an useful legal instrument to fill gaps in purely domestic cases.¹⁰

Some figures confirm this success. Since it entered in legal force, on January 1st 1998, 83 out of 193 members of the United Nations have ratified the Convention.¹¹ Thus, the average of accessions per year is close to three, the highest rate for an international treaty after the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and a figure that allows forecasting that the number of members will continue growing.¹² On top of that, these 83 countries account for

605-611 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

- 6 Camilla Baasch Andersen, *The CISG in National Courts*, in *International Sales Law, A Global Challenge*, 63-76 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Vikki Rogers & Kaon Lai, *History of the CISG and Its Present Status*, in *International Sales Law, A Global Challenge*, 8-22, 11 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 7 Where the influence of the CISG in the amendment of the German Law of Obligations in 2002 is widely acknowledged. Sörren Kiene, *German Country Analysis: Part II*, in *International Sales Law, A Global Challenge*, 377-398 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Germany, Civil Code [*Bürgerliches Gesetzbuch, BGB*], January 2, 2002. Civil Code in the version promulgated on 2 January 2002 (*Federal Law Gazette [Bundesgesetzblatt]* I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (*Federal Law Gazette* I page 3719). Available at: http://www.gesetze-im-internet.de/englisch_bgb/
- 8 Sonja A. Kruisinga, *The Netherlands*, in *International Sales Law, A Global Challenge*, 486-502 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 9 Li Wei, *People's Republic of China*, in *International Sales Law, A Global Challenge*, 548-561, 548 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 10 As has happened, to take just two illustrations, in Spain and Italy. Spain, Supreme Court of Justice, Judgment, January 5, 2007. Italy, Constitutional Court, *F.A.S. Italiana - Ti.Emme - Pres.Cons.Ministri (Avv.gen.Stato)*, 19 November 1992, number 465. Available at: <http://cisgw3.law.pace.edu/cases/921119i3.html>. Pilar Perales-Viscasillas & Javier Solana-Ramírez, *Spain*, in *International Sales Law, A Global Challenge*, 453-465 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). This has also happened in Colombia. Jorge Oviedo-Albán, *La Convención sobre Compraventa Internacional de Mercaderías: antecedentes y desarrollos alternativos*, 29 *Foro de Derecho Mercantil*, 37-89 (2010).
- 11 Institute of International Commercial Law, IICL, *CISG Database, CISG: Table of Contracting States*. Pace Law School. Available at: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (hereinafter Pace Database).
- 12 Vikki Rogers & Kaon Lai, *History of the CISG and Its Present Status*, in *International Sales Law, A Global Challenge*, 8-22, 11 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). United Nations Commission on International Trade Law, UNCITRAL, *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards — New York Arbitration Convention, New York Convention —*, New York, 1958. Available at: <http://www.newyorkconvention.org/new+york+convention+texts>

between 75 and 80% of international trade,¹³ a percentage that is not so surprising after taking into account that only four of the biggest economies, measured according to the Gross Domestic Product (“GDP”), have not ratified the Convention (the United Kingdom: sixth; India: tenth; Indonesia: sixteenth; Saudi Arabia: nineteen).¹⁴ Not only because of that, but also since the Convention is the legal rule governing international transactions in goods – unless the parties agree otherwise,¹⁵ when (i) the parties have their places of business in Contracting States,¹⁶ or (ii) when “the rules of private international law lead to the application of the law of a Contracting State,”¹⁷ it is not surprising that (i) the CISG has been the governing law of thousands of international sales of goods, (ii) that more than three thousand cases have been

13 Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Ana María Martínez-Granados, *Convención de Viena sobre Compraventa Internacional de Mercaderías: ¿cómo afecta a los empresarios colombianos?*, 2 *Revist@ E-Mercatoria*, 2, 1-11 (2003). Available at: <http://revistas.uexternado.edu.co/index.php/emerca/article/view/2133>

14 Ann Morales-Olazábal, Robert W. Emerson, Karen D. Turner & René Sacacas, *Global Sales Law: An Analysis of Recent CISG Precedents in U.S. Courts 2004-2012*, 67 *Business Lawyer*, 4, 1351-1381 (2012). Available at: http://www.americanbar.org/publications/the_business_lawyer/volume_67/number_4.html. As to figures of countries' GDP, The World Bank, *Indicators*. Available at: <http://data.worldbank.org/indicator>

15 United Nations Commission on International Trade Law, UNCITRAL, United Nations Convention on Contracts for the International Sale of Goods, CISG — Vienna Convention, April 11, 1980, Art. 6. Available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/VI056997-CISG-e-book.pdf>

16 CISG Art. 1(1)(a).

17 CISG Art. 1(1)(b).

decided applying this legal text,¹⁸ and (iii) that more than ten thousand texts in more than thirty languages have analyzed it.¹⁹

This Convention, that has been part of Colombian law since Law 518 of 1999²⁰ was enacted, has also been regarded of utmost importance in this country, where several papers and books about this topic have been published.²¹ Unfortunately, the analysis of the CISG under Colombian law seems restricted to the theory.²² To the knowledge of this paper's author, the number

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- 18 More specifically, the number of cases reported at May 27, 2015 was 3.115. Pace Database. United Nations Commission on International Trade Law, UNCITRAL, *Clout Cases*. Available at: http://www.uncitral.org/uncitral/en/case_law/digests.html. In any event, (i) the real number of cases might be a little lower since the exclusive criterion to be part of the Pace Law School database is that the case has at least one reference to the CISG, not being required that the arbitrators or courts have applied any article of this Convention to the facts of the dispute or, even if this is true, not being relevant whether the legal analysis was a *ratio decidendi* or an *obiter dictum*; but (ii) the real number of cases might be a little higher because (ii-a) not all cases, especially those that arbitral tribunals settle, are reported, and (ii-b) the majority of cases are reported with a significant lag, that might be measured in years. *Infra* § II.F. Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 19 Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Vikki Rogers & Kaon Lai, *History of the CISG and Its Present Status*, in *International Sales Law, A Global Challenge*, 8-22, 21 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 20 Law 518/1999, by which approves the United Nations Convention on Contracts for the International Sale of Goods, CISG — Vienna Convention, Vienna, April 11, 1980, 43.656 *Diario Oficial*, August 5, 1999. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_0518_1999.html
- 21 Jorge Oviedo-Albán, *La protección del comprador por falta de conformidad material en la compraventa internacional de mercaderías*, 26 *Revista de Derecho Privado*, 219-253 (2014). Available at: <http://dialnet.unirioja.es/descarga/articulo/4774789.pdf>. Maximiliano Rodríguez-Fernández, *La conformidad material de las mercaderías en la Convención de Viena de 1980 sobre Compraventa Internacional: estado actual de la materia*, 9 *Revist@ E-Mercatoria*, 1, 1-40 (2010). Available at: <http://revistas.uexternado.edu.co/index.php/emerca/article/view/2008>. Jeannette Namén-Baquero & Ana María Martínez-Granados, *Disposiciones generales sobre la compraventa de mercaderías en la Convención de Viena: su estudio a la luz del derecho interno colombiano*, 3 *Revist@ E-Mercatoria*, 2, 1-37 (2004). Available at: <http://revistas.uexternado.edu.co/index.php/emerca/article/view/2111>
- 22 Ana María Martínez-Granados states that the lack of case law and of practical application of the CISG in Colombia indicates that, although academics have studied this Convention, a deeper knowledge and utilization of the CISG in the commercial world is required. Ana María Martínez-Granados, *Convención de Viena sobre Compraventa Internacional de Mercaderías: ¿cómo afecta a los empresarios colombianos?*, 2 *Revist@ E-Mercatoria*, 2, 1-11 (2003). Available at: <http://revistas.uexternado.edu.co/index.php/emerca/article/view/2133>. Virginia G. Maurer, *Central and South America*, in *International Sales Law, A Global Challenge*, 580-587 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Shani Salama reports that the only Colombian case on the CISG, at the moment of writing her paper, was case C-529-00. Shani Salama, *Pragmatic Responses*

of cases where Colombian courts or arbitrators have applied the CISG to the facts of a dispute is zero, and the same might be asserted regarding cases that arbitrators and courts from other countries have settled and where one of the parties is from Colombia.²³ Admittedly, there are at least five cases from the Colombian highest courts referring to the CISG,²⁴ but these judgments just (i) acknowledge that Law 518/1999 is in accordance with the Colombian Constitution;²⁵ (ii) assert that Article 74 of the CISG, which limits recoverable damages to those that are foreseeable, indicates that a similar Colombian legal rule (Civil Code Article 1616) is neither an exotic norm nor contrary to the Colombian Constitution;²⁶ and, (iii) generically remind, in the three remaining cases, where the local rules were the governing law, the importance of the CISG and state that this text may fill domestic legal gaps in purely internal disputes.²⁷

to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application, 38 *University of Miami Inter-American Law Review*, 1, 225-250 (2006). Available at: <http://repository.law.miami.edu/umialr/vol38/iss1/5/>

- 23 Undeniably, to prove a negative fact is much more difficult than proving a positive fact, a statement that experts in Evidence Law have made since a long time ago. The difficulty of this task, however, is not a reason to skip it. Law 1564/2012, by which establishes the General Procedure Code, 48.489 *Diario Oficial*, July 12, 2012, Article 167 Paragraph 3. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_1564_2012.html
- 24 Pace Database.
- 25 Constitutional Court, constitutional action C-529-00, May 10, 2000, magistrate Antonio Barrera-Carbonell. Available at: <http://www.corteconstitucional.gov.co/relatoria/2000/c-529-00.htm>
- 26 Constitutional Court, constitutional action C-1008-10, Decembre 9, 2000, magistrate Luis Ernesto Vargas-Silva. Available at: <http://www.corteconstitucional.gov.co/relatoria/2010/c-1008-10.htm>
- 27 Supreme Court of Justice, Civil Chamber, *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino contra Granbanco S.A.* (2012). Civil action 11001-3103-040-2006-00537-01, February 21, 2012, magistrate William Namén-Vargas. Available at: <http://www.cisgspanish.com/wp-content/uploads/2013/10/Corte-Suprema-Colombia-21-feb2012.pdf>, <http://www.cisgspanish.com/seccion/jurisprudencia/colombia/>. Supreme Court of Justice, Civil Chamber, *Luis Fernando González Luque v. Compañía Nacional de Microbuses Connalmicros S.A.* (2011). Civil action 11001-3103-012-1999-01957-01, August 30, 2011, magistrate William Namén-Vargas. Available at: <http://www.cisgspanish.com/seccion/jurisprudencia/colombia/>. Supreme Court of Justice, Civil Chamber, *Marítimas Internacionales Ltda. contra Caja de Crédito Agrario Industrial y Minero, Almacenes Generales de Depósito de la Caja Agraria, IDEMA y Banco Ganadero -Almagrario S.A.- y Distribuidora Petrofert Limitada* (2010). Civil action 11001-3103-008-1989-00042-01, Decembre 16, 2010, magistrate Arturo Solarte-Rodríguez. Available at: <http://www.cisgspanish.com/jurisprudencia/colombia/corte-suprema-de-justicia-16-diciembre-2010/>, <http://www.cisgspanish.com/seccion/jurisprudencia/colombia/>

As further evidence of this lack of Colombian cases, the CISG Database of the Institute of International Commercial Law in Pace Law School only mentions the five cases already indicated here.²⁸ The Unilex Database, in turn, only reports two Colombian cases, which were also reported in the previous paragraph.²⁹ Likewise, a search in the Global Sales Law database only returns three out of the five reported cases.³⁰ To confirm the lack of cases, a search in Colombian databases, such as Vlex and Legal Collection, was also done including the Spanish translation of the following key words: Convention, Vienna, Goods, and Law 518/1999. The only result was the already mentioned case C-529-00.

On the other hand, there are no awards from arbitral tribunals having their venue in Colombia or, alternatively, where one of the parties is from this country.³¹ Finally, the most important books on the CISG do not refer to Colombian case law. A paramount example is the book *International Sales Law, A Global Challenge* (Professor Larry DiMatteo, editor), where the application of the CISG is analyzed in several countries. While the study of the Convention in countries such as the United States, France, and Germany takes, respectively, 18, 23, and 38 pages, the analysis of the Colombian case does not take more than one page, only mentions one case (C-529-00 from the Constitutional Court), and is included in the same chapter with the study of other Latin American countries.³²

28 Pace Database.

29 Constitutional Court, constitutional action C-529-00, May 10, 2000, magistrate Antonio Barrera-Carbonell. Available at: <http://www.corteconstitucional.gov.co/relatoria/2000/c-529-00.htm>. Supreme Court of Justice, Civil Chamber, *Luis Fernando González Luque v. Compañía Nacional de Microbuses Connalmicros S.A.* (2011). Civil action 11001-3103-012-1999-01957-01, August 30, 2011, magistrate William Namén-Vargas. Available at: <http://www.cisgspanish.com/seccion/jurisprudencia/colombia/>. UNILEX, *CISG Database*. Available at: <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315>

30 Constitutional Court, constitutional action C-1008-10, Decembre 9, 2000, and two out of the three cases from the Colombian Supreme Court of Justice. Global Sales Law, *Global Sales Law Database*. Available at: <http://www.globalsaleslaw.org/index.cfm?pageID=29>

31 As to Colombian arbitral awards, Editorial Legis, *Collection of arbitral awards*. Available on subscription in: <http://www2.legis.com.co/Libreria/internet/laudos-arbitrales-colombianos--internet.asp>

32 Larry A. DiMatteo, *The CISG across National Legal Systems*, in *International Sales Law, A Global Challenge*, 588-602 (Larry A. DiMatteo, ed., Cambridge University Press, New

The puzzle of the lack of cases on the CISG in Colombia is the topic of this paper.³³ For this purpose, § I shows how, in contrast to the Colombian case, the CISG has been applied in other countries. § II, in turn, asks the reasons that might explain the lack of cases in Colombia. Finally, Conclusions.

I. THE GEOGRAPHY OF THE APPLICATION OF THE CISG

To show that there is a significant amount of cases in other latitudes, this section mentions the case law on the CISG in the main members of this Convention, to wit (i) the most representative European countries, (ii) China, (iii) United States, and, in the most illustrative parallel with Colombia, (iv) other countries from Latin America.

More than half of all cases applying the CISG have been decided in Europe.³⁴ Not only in Europe, but in the world, Germany is the country with the major number of cases: 530 according to Pace Law School Database,³⁵ and with the highest amount of legal literature on this topic.³⁶ Indeed, it is a settled statement that the German judiciary has been fundamental for the jurisprudential development of the CISG.³⁷ Although lacking the German

York, 2014).

- 33 A puzzle that, by the way, is not new. More than ten years ago some scholars observed the lack of cases on the CISG in Latin American and have admitted that there was no clear explanation for this trend. Ana María Martínez-Granados, *Convención de Viena sobre Compraventa Internacional de Mercaderías: ¿cómo afecta a los empresarios colombianos?*, 2 *Revist@ E-Mercatoria*, 2, 1-11 (2003). Available at: <http://revistas.uexternado.edu.co/index.php/emerca/article/view/2133>. Fernando Hinestrosa, *Harmonization of Sales Law in the Americas and Regional Economic Integration: a Cautious Appraisal*, 8 *Uniform Law Review*, 1-2, 211-218 (2003).
- 34 Larry A. DiMatteo, *The CISG across National Legal Systems*, in *International Sales Law, A Global Challenge*, 588-602 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 35 Pace Database. Sörren Kiene, *German Country Analysis: Part II*, in *International Sales Law, A Global Challenge*, 377-398 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 36 Stefan Kröll, *German Country Analysis: Good Faith, Formation, and Conformity of Goods*, in *International Sales Law, A Global Challenge*, 361-376 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 37 Larry A. DiMatteo, *The CISG across National Legal Systems*, in *International Sales Law, A Global Challenge*, 588-602 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

number of cases, the CISG has been also frequently applied in other European Union's Members, such as (i) the Netherlands, reporting 262 cases;³⁸ (ii) France, where the number is 162;³⁹ (iii) Austria with 145 cases;⁴⁰ (iv) Belgium with 144 judgments;⁴¹ (v) Spain, where the number of reported cases is 107;⁴² and (vi) Italy, where the number is 61.⁴³ As to European countries which are not members of the European Union, the most active countries are (i) Russia with 305 cases;⁴⁴ (ii) Switzerland with 210;⁴⁵ (iii) Slovakia with 75;⁴⁶ and (iv) Serbia with 71.⁴⁷ All these figures show a remarkable contrast with Colombian data, where, as it was indicated above,⁴⁸ the number of cases applying directly the CISG to a dispute is zero and such number, when all cases referring to this Convention are taken into account, is far from the two digits.

After Germany, China is the second country regarding the number of cases applying the CISG (432).⁴⁹ Indeed, arbitral tribunals under the rules of the China International Economic and Trade Arbitration Commission (CIETAC) have decided more than 400 cases on the CISG.⁵⁰ These figures may be surprising,

38 Pace Database.

39 Pace Database. Sylvaine Poillot-Peruzzetto, *French Perspective of the CISG*, in *International Sales Law, A Global Challenge*, 338-360 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

40 Pace Database. Wolfgang Faber, *The CISG in Austria*, in *International Sales Law, A Global Challenge*, 309-330 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

41 Pace Database.

42 Pace Database. Pilar Perales-Viscasillas & Javier Solana-Ramirez, *Spain*, in *International Sales Law, A Global Challenge*, 453-465 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

43 Pace Database. Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

44 Pace Database.

45 Pace Database. Corinne Widmer-Lüchinger, *Switzerland*, in *International Sales Law, A Global Challenge*, 466-485 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

46 Pace Database.

47 Pace Database. Milena Djordjevi & Vladimir Pavi, *The CISG in Southeastern Europe*, in *International Sales Law, A Global Challenge*, 419-452 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

48 *Supra* Introduction.

49 Pace Database. In contrast, the figures of other countries from the Far East are disappointing, such as Korea (7 cases), Japan (1 case) and Taiwan (1 case).

50 China International Economic and Trade Arbitration Commission, CIETAC: <http://>

at a glance, taking into account that (i) China sent delegates to the Diplomatic Conference of Vienna in 1980, but did not participate in the drafting of the final text;⁵¹ (ii) China, when the Convention entered in legal force in 1988, was just starting to adopt practices consistent with a market economy and, therefore, lacked a business law tradition; and (iii) China made an Article 95 declaration excluding the application of the CISG via Article 1(1)(b).⁵² Such surprise, of course, is attenuated after reminding the size (the second in the world) and growth of the Chinese economy.⁵³

The United States is another country with a significant number of cases (169).⁵⁴ This figure, however, might be surprisingly low taking into account that not only that this is the largest world economy,⁵⁵ but also that nine out of its ten major trade partners are CISG Members (Canada, China, Mexico, Japan, Germany, Korea, France, Brazil, and Taiwan, being the United Kingdom the only exception).⁵⁶ Perhaps, the number of cases is not as big as in Germany or China because a significant part of companies and their counsel opt out of the CISG and opt into

www.cietac.org, <http://www.cietac.org/index.cms>. Larry A. DiMatteo, *Future Challenges of International Sales Law*, in *International Sales Law, A Global Challenge*, 725-732, 726 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

- 51 A possible explanation for this significant number of cases is that the CISG is very useful not only for Chinese enterprises, but also for their counterparts in other countries, which might prefer a neutral and supposedly familiar rule to the domestic Chinese law, especially after taking into account that Chinese companies rarely will accept without additional compensation to provide a national governing law other than Chinese law. Li Wei, *People's Republic of China*, in *International Sales Law, A Global Challenge*, 548-561 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Joseph Lookofsky, *Understanding the CISG*, 2 (Wolters Kluwer Law & Business, New York, 2008).
- 52 According to which the Convention is the governing law "when the rules of private international law lead to the application of the law of a Contracting State."
- 53 The World Bank, *Indicators*. Available at: <http://data.worldbank.org/indicator>
- 54 Pace Database.
- 55 The World Bank, *Indicators*. Available at: <http://data.worldbank.org/indicator>
- 56 United States Census Bureau, *Foreign Trade Statistics*. Available at: <http://www.census.gov/foreign-trade/statistics/highlights/top/top1412yr.html>. Ann Morales-Olazábal, Robert W. Emerson, Karen D. Turner & René Sacasas, *Global Sales Law: An Analysis of Recent CISG Precedents in U.S. Courts 2004-2012*, 67 *Business Lawyer*, 4, 1351-1381 (2012). Available at: http://www.americanbar.org/publications/the_business_lawyer/volume_67/number_4.html

the U.S. Uniform Commercial Code on grounds such as a lack of familiarity with its text.⁵⁷

The most useful comparison for the analysis of the Colombian case is with other Latin American countries. Not surprisingly, Argentina with 22 cases and Mexico with 16 are the leaders in the region.⁵⁸ By contrast, the number of jurisprudence in other countries of South and Central America is minimal, a fact that might surprise in cases such as Chile and Peru (each one with three cases),⁵⁹ or that just might be the logical consequence of the small size of an economy (two cases in El Salvador and zero in the Dominican Republic, Ecuador,⁶⁰ Honduras, Paraguay, and Uruguay).⁶¹ Thus, the current state is not very different from the time (1998) when Professor Alejandro Garro contended that Latin America was lagged in comparison with Europe in the harmonization of the legal rules on international sales due to the few cases where the CISG was applied.⁶²

57 *Infra* § II. DiMatteo indicates that the number of cases applying the CISG is much lower in common law countries than in civil law countries). Larry A. DiMatteo, *Future Challenges of International Sales Law*, in *International Sales Law, A Global Challenge*, 725-732 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

58 Pace Database. Virginia G. Maurer, *Central and South America*, in *International Sales Law, A Global Challenge*, 580-587 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Fernando Hinestroza, *Harmonization of Sales Law in the Americas and Regional Economic Integration: a Cautious Appraisal*, 8 *Uniform Law Review*, 1-2, 211-218 (2003). It is normal that Brazil, the major economy of the region, reports very few cases (only five) because the Convention has been only in legal force there since 2014. Pace Database. In any case, Brazilian courts had applied some articles of the CISG, those regarded as consistent with domestic Brazilian legal rules, before it was the law in this country. Brazil, São Paulo Superior Court, Fourth Civil Chamber, May 20, 2009. Virginia G. Maurer, *Central and South America*, in *International Sales Law, A Global Challenge*, 580-587 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

59 The existence of three cases in Cuba is surprising taking into account the isolation of the economy of this country. Pace Database.

60 Although there is at least one case with an Ecuadorian party and decided in another country. United States, Court of Appeals for the Fifth Circuit, *BP Oil International Ltd. v. Empresa Estatal Petróleos de Ecuador*, 332 F.3d 333 (2003). Available at: <http://law.justia.com/cases/federal/appellate-courts/F3/332/333/550400/>

61 Pace Database. Virginia G. Maurer, *Central and South America*, in *International Sales Law, A Global Challenge*, 580-587 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

62 Alejandro Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 17 *Journal of Law and Commerce*, 219-244 (1998). Available at: http://www.jus.uio.no/pace/en/pdf/cisg_in_the_americas_recent_developments.alejandro_garro.portrait.letter.pdf

II. THE REASONS THAT MAY EXPLAIN THE LACK OF COLOMBIAN CASE LAW ON THE CISG

As mentioned in the Introduction of this paper, the lack of Colombian cases on international sale of goods is perplexing, to say the least.⁶³ This section describes the main reasons that might explain this lack of jurisprudence, ranking them from the least to the most likely. Since this list does not pretend to be exhaustive, other reasons might exist. Some of them are not exclusive of Colombia, such as that (i) aggrieved companies might prefer to impose a non-legal sanction, such as stopping further business transactions with the other party rather than to bring a lawsuit, especially if the costs of legal action are very high, at least in proportion to the disputed amount;⁶⁴ and (ii) that while some contracts are, in theory, international transactions because the parties' places of business are in different states, they are indeed sales where both the seller and the buyer belong to the same entrepreneurial group (i.e., they are related companies). This reduces the likelihood of disputes or, if they arise, an internal body, but neither a court nor an arbitrator, settles them. As to the particular case of Colombia, courts other than the highest ones (the Constitutional Court, the Supreme Court of Justice, and the Council of State), such as the *Tribunales Superiores* (the equivalent of Courts of Appeals in other countries) might have settled disputes where the CISG was the governing law, but these cases are not reported in legal databases.⁶⁵ Additionally, the majority of international transactions in goods (at least on the export side) are those related to oil and its derivatives, natural gas, coal, gold, coffee, and flowers —commodities whose

63 *Supra* Introduction.

64 Also, taking into account that the costs of proceedings between parties of different countries could be greater than those between local parties.

65 Regarding other countries, Hossam A. El-Saghir considers as possible that courts of lower hierarchy than both the Court of Cassation and the Constitutional Court apply the CISG but that these cases are unreported and inaccessible. Hossam A. El-Saghir, *The CISG in Islamic Countries: The Case of Egypt*, in *International Sales Law, A Global Challenge*, 505-517 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

contracts might exclude the application of the CISG.⁶⁶ As a result, this legal text would only be applicable to sales of other exports, the amounts of which are not so big and that, therefore, do not generate enough profit to afford litigation expenses; or to imports, where the exporter might impose its own choice of law and choice of forum.⁶⁷

A. Minor Importance of International Trade in Colombia

A basic economic and legal knowledge is enough to forecast that companies from a country whose international trade relative to its GDP is low, will enter into few international transactions and, as a consequence, will have very few disputes with sellers or buyers from other countries. While Colombia is not a country with a ratio of exports over GDP as high as, to take two illustrations, the Netherlands and Switzerland,⁶⁸ the hypothetical example is not the case of our country. Indeed, Colombian exports and imports in 2014 reached, respectively, US\$54.795 million⁶⁹ and 64.028 million,⁷⁰ for a total amount of US\$118.823 million, a figure that

66 *Infra* § II.E.

67 Colombia, Ministry of Commerce, Industry and Tourism, *Informe de exportaciones*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15815>, *Informe de importaciones colombianas y balanza comercial*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15833>

68 Countries whose ratio between exports and GDP is 83 and 72%, respectively. The World Bank, *Indicators*. Available at: <http://data.worldbank.org/indicator>. Due not only to this, but also to other factors (e.g., these countries are the frequent venue of arbitral tribunals), the number of cases on the CISG there is high. *Supra* § II. Kruisinga reminds that international trade has played a significant role in the Netherlands since the incorporation of the Dutch East India Company [*Vereenigde Oostindische Compagnie*, VOC]. Sonja A. Kruisinga, *The Netherlands*, in *International Sales Law, A Global Challenge*, 486-502 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Widmer contends that the CISG is very important for Switzerland taking into account the high percentage of its international transactions. Corinne Widmer-Lüchinger, *Switzerland*, in *International Sales Law, A Global Challenge*, 466-485 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

69 Colombia, Ministry of Commerce, Industry and Tourism, *Informe de exportaciones*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15815>, *Informe de importaciones colombianas y balanza comercial*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15833>

70 Colombia, Ministry of Commerce, Industry and Tourism, *Informe de exportaciones*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15815>, *Informe de importaciones colombianas y balanza comercial*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15833>. Admittedly, only exports and imports of goods must be taken into account

accounts for 31% of the Colombian GDP (US\$377.947 million in 2014).⁷¹ On top of that, any question about the falsehood of this hypothesis is dissipated after reminding that two out of the three Colombia's largest partners (the United States and China),⁷² and most of the European Union's Members —Colombia's second trade partner—,⁷³ have ratified the CISG. Thus, the Convention would be applicable to contracts between a Colombian party and a company from any of these countries, unless otherwise provided.⁷⁴ Admittedly, some Colombian trade partners, such as Panama, Venezuela, and India,⁷⁵ have not ratified the Convention. These countries, however, do not account for a significant percentage of Colombian exports and imports and, even if this was the case, the CISG might be the applicable law if the governing law according to the rules of private international laws is the Colombian law.⁷⁶

and, even within this category, goods that are not part of the scope of the CISG must be excluded. CISG Art. 2.

71 Banco de la República, Colombian Central Bank, *Gross Domestic Product*. Available at: <http://www.banrep.gov.co/es/pib>, <http://www.banrep.gov.co/en>

72 The United States account for 25.7% of exports and 28.4% of imports; European Union for the 17.2% and 13.7 of exports and imports; and China for the 10.5% and 18.4% of the same concepts). Colombia, Ministry of Commerce, Industry and Tourism, *Informe de exportaciones*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15815>, *Informe de importaciones colombianas y balanza comercial*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15833>

73 Colombia, Ministry of Commerce, Industry and Tourism, *Informe de exportaciones*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15815>, *Informe de importaciones colombianas y balanza comercial*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15833>. Only 4 out of the 28 European Union's members have not ratified the CISG (Ireland, Malta, Portugal, and the United Kingdom).

74 CISG Art. 1(1)(a).

75 Panama accounts for the 6.6% of exports and a figure lower than the 1.5% of imports; Venezuela 3.6% of exports and a figure lower than 1.5% of imports; and India 5.0% of exports and 2.1% of imports. Colombia, Ministry of Commerce, Industry and Tourism, *Informe de exportaciones*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15815>, *Informe de importaciones colombianas y balanza comercial*. Available at: <http://www.mincit.gov.co/publicaciones.php?id=15833>

76 CISG Art. 1(1)(b).

B. Colombian companies do not exclude the CISG as the governing law of their international transactions, but these do not generate disputes

According to this hypothesis, Colombian companies are aware of the existence and importance of the CISG, and decide not to exclude this legal text as the governing law of their contracts, but (i) they are performed without any problems or, (ii) if some disputes arise, they are related to topics outside of the scope of the Convention, such as the validity of the contract or the transfer of the title of the goods,⁷⁷ or they are amicably settled.⁷⁸ In any case, it seems suspicious that zero out of thousands of transactions in which the CISG is applicable does not trigger any legal dispute between their parties, especially after taking into account that (i) such litigation does arise, not only in other countries, but also in Colombia when both parties are from this country and the governing law is the Colombian Commercial Code; and (ii) there are no persuasive reasons to believe that Colombian companies are less prone to litigation than their pairs of other latitudes. Because of this reasoning, this hypothesis cannot be true.

C. Lack of knowledge of the CISG among entrepreneurs and their lawyers

A third hypothesis is that companies' managers entering into contracts with their pairs from abroad and their lawyers are ignorant either of the existence or of the importance of the CISG⁷⁹

⁷⁷ CISG Art. 4.

⁷⁸ Schroeter reminds that, of course, the number of cases on the CISG does not take into account the disputes that are amicably settled. Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

⁷⁹ Davies and Snyder did state that merchants might have not heard about the existence of the CISG at the moment of closing an international transaction in goods and that, even worse, this might be also true in respect of many lawyers. Martin Davies & David V. Snyder, *International Transactions in Goods, Global Sales in Comparative Context* (Oxford University Press, New York, 2014). The ignorance of the CISG in the case of a lawyer

and, because of that, forget to provide it as the governing law of their international transactions in goods.⁸⁰ This hypothesis, however, does not withstand a minimal analysis considering that (i) Colombia ratified the Convention 16 years ago, enough time to learn of and study it; (ii) a non-negligible percentage of Colombian companies that do businesses with foreign companies have highly qualified managers and top-rated lawyers; (iii) the Convention is, by default, the governing law of international sales between parties that have their places of business in Contracting States; thereby, an agreement is required to opt out of the CISG;⁸¹ and (iv) the provision of the law of a CISG Member (e.g., Colombia) as the governing law of an international sale does not exclude the application of this Convention.⁸² This hypothesis, therefore, cannot be true.

D. The CISG is the governing law of international transactions in goods, but the court, the plaintiff, the defendant, and their counsels are unaware of this fact

A fourth explanation, very alarming if it were to be true, is that (i) the CISG is the law governing international sales where one of

advising international transactions might be a conduct subject to disciplinary action. Colombian Law 1123/2007, by which establishes the Code of Attorneys at-Law's Conduct, 46.519 *Diario Oficial*, January 22, 2007, Art. 20, 28.4, and 34a. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_1123_2007.html. Sörren Kiene, *German Country Analysis: Part II*, in *International Sales Law, A Global Challenge*, 377-398 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668, 662-664 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

80 Ferrante considers as unlikely that the very few number of cases applying the CISG in Italy is related to a lack of knowledge and experience of practicing lawyers and judges since many of them give legal advice to multinational companies and have written papers and books on the topic. Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

81 CISG Art. 6.

82 United States, Court of Appeals for the Fifth Circuit, *BP Oil International Ltd. v. Empresa Estatal Petróleos de Ecuador*, 332 F.3d 333 (2003). Available at: <http://law.justia.com/cases/federal/appellate-courts/F3/332/333/550400/>. On this case, Court of Appeals contends that the CISG was the applicable law to a contract that had provided Ecuadorian law as the governing law. Martin Davies & David V. Snyder, *International Transactions in Goods, Global Sales in Comparative Context*, 64 (Oxford University Press, New York, 2014).

the parties is a Colombian company, and (ii) disputes do arise out of these contracts, but courts and arbitrators, in an aggravated version of the homeward trend,⁸³ claim that the applicable law to these cases is the Colombian domestic law.⁸⁴

The reasons to apply a law other than the legal rules governing the contract might be threefold. First, courts, companies and their lawyers might not have heard about the CISG, a case of negligence, but not of bad faith. Thus, a lawyer might omit the CISG as part of the legal grounds of the civil action that she is filing.⁸⁵ Such conduct, in any event, does not excuse the courts' lack of legal knowledge since the parties do not have to submit to them a copy of Colombian laws, such as Law 518/1999.⁸⁶ Second, and more disturbing, it might happen that parties' counsel and courts do know the rules applicable to international sales, but purposively omit to apply the CISG in order to settle a case applying a more familiar legal rule, such as the domestic law.⁸⁷

83 Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). The moderate version of the homeward trend is the application of the CISG through the lens of the domestic law and not based on the general principles underlying this Convention and on the CISG case law, even if this was decided in other countries. Vikki Rogers & Kaon Lai, *History of the CISG and Its Present Status*, in *International Sales Law, A Global Challenge*, 8-22, 9 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). The most famous example of the homeward trend is the infamous case *Raw Materials Inc. v. Manfred Forberich GmbH*, where a U.S. federal court acknowledged that CISG Art. 79 was the applicable legal rule to the facts of the case, but, then, based its judgment on the case law and comments of the U.S. Uniform Commercial Code. Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich. The Worst CISG Decision in 25 Years?*, 9 *Vindobona Journal of International Commercial Law and Arbitration*, 199-208 (2005). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311459. United States, Federal District Court, *Raw Materials Inc. v. Manfred Forberich GmbH* (2004). WL 1535839 (U.S. District Court, Northern District of Illinois, Eastern Division [Federal Court of 1st instance], 6 July 2004). Available at: <http://cisgw3.law.pace.edu/cases/040706u1.html>

84 Ferrante contends that a similar situation happened in Italy after the CISG entered in legal force in this country. Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413, 401 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

85 Law 1564/2012, by which establishes the General Procedure Code, 48.489 *Diario Oficial*, July 12, 2012, Art. 82.8. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_1564_2012.html

86 Law 1564/2012, by which establishes the General Procedure Code, 48.489 *Diario Oficial*, July 12, 2012, Art. 177 first paragraph. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_1564_2012.html

87 Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge Univer-

A court following this perverse strategy would save the time required to analyze the case law from other latitudes, which frequently has been written in languages other than Spanish,⁸⁸ would avoid overcrowded dockets, and would increase the likelihood of complying with a the goals of a minimum number of settled cases per year.⁸⁹

A third reason to omit the application of the CISG happened at least once. In 2008, the Chilean Supreme Court decided a case between a seller from this country and a buyer from Argentina. While the CISG was clearly the applicable legal rule since the parties were from two Contracting States,⁹⁰ the court claimed that the counsel's omission to mention the CISG in their briefs implied a tacit agreement to substitute the application of the Chilean Civil Code for the CISG.⁹¹ Such case law, besides of being clearly wrong, might have also been a pretense to apply a more familiar law.⁹² Likewise, and according to Professor Ingeborg Schwenzer, litigating an international sales case in a French court might entail an implicit exclusion of the CISG, regardless of whether the parties were or not aware that this Convention was the governing law.⁹³ Fortunately, these cases

sity Press, New York, 2014). Schroeter contends that courts have rejected on purpose the application of the CISG in very few occasions. Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668, 663 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

88 Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Schroeter did state that a judge has a natural and perverse incentive to ignore the Convention in order to avoid having to study its 101 articles plus its plentiful case law. Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668, 663 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

89 Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

90 CISG Art. 1(1)(a).

91 Chile, Supreme Court, *Jorge Plaza Oviedo v. Sociedad Agrícola Sector Limitada* (2008). Supreme Court, September 22, 2008 (Chile). Available at: <http://cisgw3.law.pace.edu/cases/080922ch.html>

92 Virginia G. Maurer, *Central and South America*, in *International Sales Law, A Global Challenge*, 580-587 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

93 Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International*

seem to be exceptional since most courts, according to Professor Ulrich G. Schroeter, do not consider that counsel's omission of any reference to the CISG amounts to a willful exclusion of this legal text.⁹⁴

It is not comforting to know that the failure to apply the CISG to a case where it is clearly the governing law, either in good or in bad faith, is a practice that also happens in other countries,⁹⁵ especially those that are part of the common law family.⁹⁶ Professor Schroeter states that there are cases where counsel has made its legal claims based on the local law although the CISG was clearly the applicable legal rule.⁹⁷ While the court might be sometimes aware of this Convention, it might make the mistake of applying the law that the parties wrongly mention in their briefs from time to time.⁹⁸ In the same vein, Professor Ingeborg Schwenzer deems that the number of cases where the CISG is not applied, in spite of being the governing law

Sales Law, A Global Challenge, 102-119, 106 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Jan M. Smits, *Problems of Uniform Laws*, in *International Sales Law, A Global Challenge*, 605-611 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

- 94 Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 95 Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Sometimes, fortunately, a court of appeals corrects the mistake of a trial court which have overlooked the application of the CISG. Mexico, Baja California, Fourth Chamber of the Fifteenth Superior Circuit, *Georgia Pacific Resins, Inc. v. Grupo Bajaplay S.A. de C.V.*, August 9, 2007 (Mexico). Available at: <http://cisgw3.law.pace.edu/cases/070809m1.html>. Virginia G. Maurer, *Central and South America*, in *International Sales Law, A Global Challenge*, 580-587 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 96 Where there might be a stronger bias against a rule regulating the content of contracts. Petra Butler, *New Zealand*, in *International Sales Law, A Global Challenge*, 539-547 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 97 Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 98 Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

of an international sale, might be in the order of thousands.⁹⁹ As evidence of this assertion, Professor Schwenger quotes the Australian case, a country where the reported cases, as of the time of his paper, were only eleven.¹⁰⁰ A low figure taking into account that the Convention has been in legal force there since 1989, that its largest trade partners (China, Japan, United States, and Singapore) have also ratified the Convention, and that there are many dispute resolution centers in the region.¹⁰¹ Professor Schwenger considers very unlikely that this low number of cases is exclusively due to the parties and their counsel who opt out of the CISG in their contracts and considers, as a more likely explanation, the existence of litigation where neither the parties nor their counsel nor the courts were aware that the Convention was the applicable legal rule.¹⁰²

The low number of cases in New Zealand is also surprising,¹⁰³ especially after taking into account that this country ratified the Convention in 1995 and that its exports account for 30% of the GDP.¹⁰⁴ According to Professor Petra Butler, the reason of this low number of cases is that the Convention has been frequently ignored or at least disregarded in spite of being the governing law of international transactions in goods.¹⁰⁵ Other two countries

99 Ingeborg Schwenger, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

100 Pursuant to Pace Law School Database, this figure is now 26 (a number that, in any event is still low). See Pace Database.

101 Ingeborg Schwenger, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

102 Ingeborg Schwenger, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

103 This figure, according to Pace Law School, is *RJ & AM Smallmon v. Transport Sales Ltd.* Butler did state that his first case of real application of the CISG in this country only happened in 2011. Petra Butler, *New Zealand*, in *International Sales Law, A Global Challenge*, 539-547 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). New Zealand, High Court of New Zealand, *RJ & AM Smallmon v. Transport Sales Ltd.* (2009). HC Christchurch, CIV-2009-409-000363, July 30, 2010. Available at: <http://cisgw3.law.pace.edu/cases/100730n6.html>

104 Petra Butler, *New Zealand*, in *International Sales Law, A Global Challenge*, 539-547 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). The World Bank, *Indicators*. Available at: <http://data.worldbank.org/indicator>

105 Petra Butler, *New Zealand*, in *International Sales Law, A Global Challenge*, 539-547 (Larry

where this situation has also happened, although in a fortunately more moderated form, are (i) China, where Professor Li Wei reports the existence of at least six awards where the CISG was not applied in spite of the fact that the parties have their place of business in Contracting states and that they have not opted out of the Convention;¹⁰⁶ (ii) Canada, where Professors Robert W. Emerson and Ann Morales-Olazábal report two cases where something similar happened;¹⁰⁷ and (iii) Israel, where Professor Yehuda Adar claims that courts have ignored the CISG several times.¹⁰⁸

In a more anecdotal situation, since it does not imply a trend of consistent disregard of the CISG, a U.S. judge remarked in a survey that he has rejected the application of the CISG in one case because of his opposition to global laws.¹⁰⁹ Similarly, a German judge stated that the CISG was not in legal force there,¹¹⁰ while another judge from the same country told to the counsel of one of the parties that had argued that the Convention was

A. DiMatteo, ed., Cambridge University Press, New York, 2014).

106 Li Wei, *People's Republic of China*, in *International Sales Law, A Global Challenge*, 548-561 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

107 Robert W. Emerson & Ann Morales-Olazábal, *The United States and Canada*, in *International Sales Law, A Global Challenge*, 562-579 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). These cases are Canada, Ontario Superior Court of Justice, *La San Giuseppe v. Forti Moulding Ltd.* (1999). Carswell Ont. 2837 (Ontario Superior Court of Justice, 31 August 1999). Available at: <http://cisgw3.law.pace.edu/cases/990831c4.html>. And Canada, Ontario Court, General Division, *Nova Tool and Mould, Inc. v. London Industries Inc.* (1998). O.J. No. 5381 (QL), 84 A.C.W.S. (3d) 1089 (Superior Court of Justice, 16 December 1998). Available at: <http://cisgw3.law.pace.edu/cases/981216c4.html>

108 Yehuda Adar, *Israel*, in *International Sales Law, A Global Challenge*, 518-538 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

109 Michael Wallace, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bard with an International Practice, and (3) Judges*, 46 *American Journal of Comparative Law (Supplement)*, 361-388 (1998). Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668, 655 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

110 Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

the applicable law that he was not familiarized with this legal text and, as a result, suggested the parties to settle the case.¹¹¹

Summing up, the hypothesis that Courts ignore the Convention in some cases where it is the governing law of the international transaction seems to be one of the reasons of the lack of cases on the CISG in Colombia. In any event, this hypothesis would only be duly proven when future research reports particular Colombian cases where the Convention was omitted in spite of being the applicable legal rule.

E. The parties contract out of the CISG as the governing law of their international transactions in goods

Both seller and buyer might consider that there is a law more favorable or fitted to their transaction than the Convention or, alternatively, this might be the view of the party holding a stronger bargaining power, which may require the other party the total exclusion¹¹² of the CISG.¹¹³ If the law governing the international sale is the domestic law of a country, this second hypothesis looks more likely since rarely both parties will prefer the same national law rather than an international instrument purporting to be neutral, such as the CISG. Taking into account that Colombia's three largest trade partners are the United States, The European Union and China,¹¹⁴ whose companies are usually bigger than Colombian ones, it is likely that the former, but not the latter are the enterprises requiring their counterparts the application of their own law to the international transaction in goods.¹¹⁵

111 Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

112 Since some contracts might only partially exclude the CISG, as it happens, for instance, whenever an INCOTERM is provided for and, therefore, CISG Art. 66-70 about passing on the risk are excluded.

113 CISG Art. 6.

114 *Supra* § II.A.

115 Garro considers more likely that a U.S. company requires the substitution of the Uniform Commercial Code Article 2 for the CISG as the governing law of an international contract rather than a Latin American corporation demands the application on its local law. Alejandro Garro, *The U.N. Sales Convention in the Americas: Recent Developments*,

The exclusion of the CISG as the governing law of a contract is not an uncommon practice in international business transactions in goods.¹¹⁶ Several surveys made in other countries report a non-negligible percentage of practicing attorneys who frequently opt out of the Convention as the governing law of the contracts that they negotiate and draft for their customers.¹¹⁷ The reasons for this practice are, among others (i) the lack of familiarity with

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- 17 *Journal of Law and Commerce*, 219-244 (1998). Available at: http://www.jus.uio.no/pace/en/pdf/cisg_in_the_americas_recent_developments.alejandro_garro.portrait.letter.pdf
- 116 Yehuda Adar did state that practicing attorneys in this country frequently opt out of the CISG. Yehuda Adar, *Israel*, in *International Sales Law, A Global Challenge*, 518-538 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Butler did report that New Zealand companies rarely choose the CISG as the governing law of their international sales. Petra Butler, *New Zealand*, in *International Sales Law, A Global Challenge*, 539-547 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Ferrante considers as a common practice the exclusion of the CISG as the governing law of an international sale and indicating that, pursuant to some case law, neither a written nor an oral agreement is required to opt out of the Convention, being possible to infer the exclusion from the conduct of the parties either before or after the formation of the contract. Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413, 403 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Widmer claims that there are still many attorneys who opt out of the CISG as the governing law of the international sales that they advise for their customers and reporting two surveys according to which the main reasons for this choice were the lack of certainty on the application of the CISG and the fact that its scope is limited, since it is preferred to apply one law and not two – the CISG on the subjects within its scope and a domestic law regarding other topics. Corinne Widmer-Lüchinger, *Switzerland*, in *International Sales Law, A Global Challenge*, 466-485 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 117 Davies and Snyder did mention a survey made to practicing attorneys in the United States, Germany, and China where 70.8% in the United States, 72.7% in Germany, and 44.4% in China opt out of the CISG) Martin Davies & David V. Snyder, *International Transactions in Goods, Global Sales in Comparative Context*, 41 (Oxford University Press, New York, 2014). Kiene (2014), p. 377 (claiming that, according to a survey made in 2004, only 8% of German practicing attorneys preferred the Convention as the governing law of the contracts that they were negotiating for their customers while 42% expressly exclude this legal instrument). Koehler reports the results of a survey where 70.8% of U.S. companies and 72.2% of the parties to a contract in Germany frequently opt out of the Convention as the governing law of their international sales. 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* (Pace Law School Institute of International Commercial Law, 2006). Available at: www.cisg.law.pace.edu/cisg/biblio/koehler.html. Ingeborg Schwenzer and Christopher Kee did report the results of perhaps the survey with the highest quantity of data. It collected 640 answers from 66 countries and its scope included practicing attorneys (347 answers), arbitrators (98 answers), entrepreneurs (60 answers), and academics (135 answers). According to this survey, only 13% and 32% of the practicing lawyers always exclude the Convention or do that sometimes, respectively, while the remaining 55% rarely or never opt out of the CISG). Ingeborg Schwenzer & Christopher Kee, *Global Sales Law – Theory and Practice*, in *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference*, 155-164 (Ingeborg Schwenzer & Lisa Spagnolo, eds., Eleven International Publishing, The Hague, 2011).

the CISG;¹¹⁸ (ii) the difference between this legal text and the domestic law,¹¹⁹ which sometimes is considered an instrument of higher quality;¹²⁰ and (iii) the view that the Convention is a set of excessively ambiguous and unpredictable legal rules since there is no court unifying the case law.¹²¹ In any event, the sixteen years that have elapsed since the CISG entered in legal force in Colombia, the fact that this legal text is partially based on principles of contracts common to civil law countries,¹²² and that Spanish is one of the six official languages of the CISG -which avoids the application of this legal text based on a translation that may not be very true to the original text-¹²³ makes it less

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- 118 Martin Davies & David V. Snyder, *International Transactions in Goods, Global Sales in Comparative Context*, 42 (Oxford University Press, New York, 2014). Baasch did state that many practicing attorneys distrust of the legal rules on international sales, which they consider unfamiliar and very different to their domestic rules. As a consequence, many of these attorneys advise their customers to opt out of the CISG and to provide more familiar legal rules, such as the U.S. Uniform Commercial Code, the English Sales of Goods Act, and the German Commercial Code – HGB as the governing law of the contract. Camilla Baasch Andersen, *The CISG in National Courts*, in *International Sales Law, A Global Challenge*, 63-76 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Ferrante considers as likely that some attorneys, after being aware that they are not experts on the CISG, prefer to exclude this legal text as the governing law of the contracts that they negotiate and draft for their customers. Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413, 403 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Gillette and Walt did claim that many of the underlying principles to the CISG should be familiar to the experts on the U.S. Uniform Commercial Code. Clayton Gillette & Steven D. Walt, *Sales Law, Domestic and International (Concepts and Insights)*, 5 (2nd ed., Foundation Press, New York, 2002).
- 119 Camilla Baasch Andersen, *The CISG in National Courts*, in *International Sales Law, A Global Challenge*, 63-76 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 120 Kathryn S. Cohen, *Achieving a Uniform Law Governing International Sales: Conforming the Damages Provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Law*, 26 *University of Pennsylvania Journal of International Economic Law*, 3, 601-622, 610 (2005). Available at: <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1218&context=jil>. Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 121 Filip de Ly, *The Relevance of the Vienna Convention for International Sales Contracts. Should We Stop Contracting it Out?*, 2003 *Business Law International*, 3, 241-249 (2003). Clayton Gillette & Steven D. Walt, *Sales Law, Domestic and International (Concepts and Insights)*, 6 (2nd ed., Foundation Press, New York, 2002). Jan M. Smits, *Problems of Uniform Laws*, in *International Sales Law, A Global Challenge*, 605-611 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).
- 122 Martin Davies & David V. Snyder, *International Transactions in Goods, Global Sales in Comparative Context*, 42 (Oxford University Press, New York, 2014).
- 123 Such as, to take just two illustrations, the cases of Italy and the Netherlands. Regarding the former country, Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413, 401 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). The

likely for a Colombian party to consider the Convention as an unfamiliar legal rule.

As an additional reason, the parties to international transactions in goods sold in bulks with constantly fluctuating prices in financial markets (e.g., coffee and sugar) usually opt out of the CISG. One of the reasons for this frequent exclusion might be that the CISG was drafted for contracts involving the sale of goods from either a manufacturer or a retailer to a buyer requiring them either as inputs or as inventory to be resold to consumers downstream, but not for international sales with a mainly speculative purpose, as it happens when a buyer purchases some merchandise without taking delivery and intending to sell it very soon.¹²⁴ Other two reasons are the existence of (i) special rules that trade associations draft and recommend, which exclude the application of the CISG,¹²⁵ and (ii) domestic rules, such as English laws, which might be better fitted to this kind of transactions.¹²⁶

In any event, the number of contracts where the parties exclude the CISG should not be overestimated. To begin with, recall that the CISG is the default legal rule and, therefore, the application of any other law requires an agreement on this topic.¹²⁷ Thus, if

official languages of the Convention are Arabic, Chinese, English, French, Russian, and Spanish.

124 Filip de Ly, *The Relevance of the Vienna Convention for International Sales Contracts. Should We Stop Contracting it Out?*, 2003 *Business Law International*, 3, 241-249 (2003). Martin Davies & David V. Snyder, *International Transactions in Goods, Global Sales in Comparative Context*, 42 (Oxford University Press, New York, 2014). For instance, the parties to a sale of commodities usually prefer to rescind the contract after any breach has occurred, such as inconsistencies in the documents of the transaction. By contrast, CISG Art. 25 only allows the rescission of the contract if the breach has been fundamental. Lisa Spagnolo, *The CISG as Soft Law and Choice of Law: G j Ry ?*, in *International Sales Law, A Global Challenge*, 154-176 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

125 Qi Zhou gave, as examples of these trade associations (i) the Federation of Oils, Seeds, and Fats Associations (FOSFA), (ii) the Grain and Feed Trade Association (GAFTA), and (iii) the Refined Sugar Association (RSA). Qi Zhou, *The CISG and English Sales Law: An Unfair Competition*, in *International Sales Law, A Global Challenge*, 669-682 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

126 Qi Zhou, *The CISG and English Sales Law: An Unfair Competition*, in *International Sales Law, A Global Challenge*, 669-682 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

127 CISG Art. 6. Of course, if the purpose of the contract is the sale of goods outside the scope of the Convention, such as a vessel, the CISG will only be the governing law if it is

the preference for providing a different law is not very strong, both companies and their lawyers might prefer to stick to the CISG rather than spending the transaction costs of negotiating and drafting a substitute governing law clause. Likewise, the CISG will be the applicable law whenever one of the parties prefers to apply a different legal rule, but fails to persuade the other party of this change.¹²⁸ Generally speaking, Professor Russell Korobkin has empirically proven parties rarely divert from default rules.¹²⁹

Additionally, many if not most contracts for the international sale of goods are formed expeditiously and verbally, being enough a phone call, a web chat, or an interchange of e-mails or texts, without intervention of legal advisers and without the parties wasting time inquiring about the existence of treaties on international sales, or about the convenience of excluding any of them as the governing law.¹³⁰ Similarly, the lawyers advising international sales might not know about the CISG and, therefore, are unable to exclude it as the applicable law.¹³¹ As a third reason, the sample of some surveys reporting that a high number of companies and lawyers exclude the CISG as the governing law is too small and, therefore, the results might not be statistically significant.¹³² Finally, many of these surveys were made several

expressly agreed on. CISG Art. 2. De Ly states that CISG Art. 1, which provides that the CISG is the default legal rule, favors the application of this text. Filip de Ly, *The Relevance of the Vienna Convention for International Sales Contracts. Should We Stop Contracting it Out?*, 2003 *Business Law International*, 3, 241-249 (2003).

128 Filip de Ly, *The Relevance of the Vienna Convention for International Sales Contracts. Should We Stop Contracting it Out?*, 2003 *Business Law International*, 3, 241-249 (2003).

129 Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 *Cornell Law Review*, 608-687, 611-612 (1998). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=52240

130 Martin Davies & David V. Snyder, *International Transactions in Goods, Global Sales in Comparative Context*, 42 (Oxford University Press, New York, 2014).

131 *Supra* § II.D. Schroeter contends that a significant percentage of entrepreneurs and lawyers who might prefer not to apply the CISG might not know about its existence and, therefore, omit its exclusion as the governing law of a contract. Ulrich G. Schroeter, *Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)*, in *International Sales Law, A Global Challenge*, 649-668 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

132 *Supra* note 116. Schwenzer and Kee did contend that the existent empirical studies that have been made are not conclusive evidence of the fact that the CISG is consistently rejected as the applicable law. Ingeborg Schwenzer & Christopher Kee, *Global Sales Law – Theory and Practice*, in *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG*

years ago, making it possible for this trend to have been reverted due to (i) the emergence of new generations of lawyers, who might be less attached to the local law and more open to the application of international laws, and (ii) that veteran lawyers have had now enough time to be familiarized with the Convention.¹³³ Although empirical studies are required to verify it (e.g., surveys sent to practicing lawyers), this hypothesis might partially explain the lack of cases on the CISG in Colombia.

F. The parties do not opt out of the CISG, but the contracts for international sale of goods usually provide that the forum to settle any dispute is a court or an arbitral tribunal whose venue is outside Colombia

In accordance with this hypothesis, the CISG is the law governing several international sales where either the seller or the buyer is a Colombian company, but the contract provides that neither Colombian courts nor arbitral tribunals having their venue in this country have jurisdiction to settle any dispute arising out of the transaction. This hypothesis might make sense taking into account not only that many international contracts provide an

Conference, 155-164 (Ingeborg Schwenzer & Lisa Spagnolo, eds., Eleven International Publishing, The Hague, 2011).

133 Stefan Kröll, Loukas Mistelis & Pilar Perales-Viscasillas, *Introduction to the CISG*, in *UN Convention on Contracts for the International Sale of Goods*, 19-20, 20 (Stefan M. Kröll, Loukas Mistelis & Pilar Perales-Viscasillas, eds., Beck, Munich, 2011). Filip de Ly, *The Relevance of the Vienna Convention for International Sales Contracts. Should We Stop Contracting it Out?*, 2003 *Business Law International*, 3, 241-249 (2003). Schwenzer and Kee did report the results of a survey where the 63% of entrepreneurs and 78% of lawyers from CISG Members were familiarized with the CISG. Ingeborg Schwenzer & Christopher Kee, *Global Sales Law – Theory and Practice*, in *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference*, 155-164 (Ingeborg Schwenzer & Lisa Spagnolo, eds., Eleven International Publishing, The Hague, 2011).

arbitral clause,¹³⁴ but also that Colombia is rarely the venue of international arbitral tribunals.¹³⁵

In any event, an enigma remains unsolved: the search in legal databases of cases where either the seller or the buyer is a Colombian company and that courts and arbitrators from other countries have decided, does not return any result.¹³⁶ Two possible answers to this question exist. First, these cases might not exist. A second and more likely reason is that such case law does exist, but it comes from arbitral tribunals whose awards are confidential and, therefore, not reported in databases.¹³⁷ In this vein, Professor Loukas Mistelis estimates that less than 5% of all arbitral awards are reported and, based on that figure, concludes that the CISG has been applied in a number of awards between 4.250 and 5.000.¹³⁸

134 Arbitral tribunals, and not courts, settle a non-negligible percentage of cases applying the CISG. Edoardo Ferrante, *Italy*, in *International Sales Law, A Global Challenge*, 399-413, 405 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). In any event, there is no consensus about the precise ratio of awards over total cases. Schwenzer did state that while courts settle the majority of disputes among medium and small-sized companies, arbitral tribunals do settle disputes among big and sophisticated corporations. Ingeborg Schwenzer, *Divergent Interpretations: Reasons and Solutions*, in *International Sales Law, A Global Challenge*, 102-119, 115 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Janssen and Spilker did contend that 818 out of 2.872 cases reported in the Pace Law School database as of August 2013 were arbitral awards. André Janssen & Matthias Spilker, *The CISG and International Arbitration*, in *International Sales Law, A Global Challenge*, 135-153 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

135 This decision might be due to the negative stance of some Colombian courts towards arbitration. Juan Antonio Gaviria, *The New Colombian Legal Rules on International Arbitration*, 3 *The Arbitration Brief*, 1, 65-91 (2013). Available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1035&context=ab>

136 *Supra* Introduction.

137 Janssen and Spilker did mention that, due to the confidentiality policies of many arbitration centers, it is very likely that the number of arbitral awards on the CISG is much higher than the reported figure. André Janssen & Matthias Spilker, *The CISG and International Arbitration*, in *International Sales Law, A Global Challenge*, 135-153 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Jan Ramberg reminds that most arbitral awards are not reported. Jan Ramberg, *The Nordic Countries*, in *International Sales Law, A Global Challenge*, 414-418 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). Widmer contends that the number of cases on the CISG in Switzerland might be higher, taking into account the confidentiality of many arbitral awards. Corinne Widmer-Lüchinger, *Switzerland*, in *International Sales Law, A Global Challenge*, 466-485, 468 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014).

138 Loukas A. Mistelis, *CISG and Arbitration*, in *CISG Methodology*, 375-395 (André Janssen & Olaf Meyer, eds., Sellier, European Law Publishers, Munich, 2009). Schwenzer and Kee speculate that the number of arbitral awards related to sales of goods between 2004 and

In sum, this hypothesis might partially explain the lack of Colombian cases on the CISG, although other explanations are also possible, such as the parties' choice to opt out of this Convention as the applicable law to their international sales and the failure of courts to apply this legal instrument in cases where it is the governing law. In any event, this is a theoretical statement that requires empirical studies proving or rejecting it.¹³⁹

2008 might be close to 5,000, but acknowledging that the CISG might have not been the governing law in all these cases. Ingeborg Schwenzer & Christopher Kee, *Global Sales Law – Theory and Practice*, in *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference*, 155-164, 157 (Ingeborg Schwenzer & Lisa Spagnolo, eds., Eleven International Publishing, The Hague, 2011).

- 139 Hinestrosa contends that the best form of establishing the importance of the CISG in Latin America is through surveys, interviews, and questionnaires sent to entrepreneurs and lawyers of the region, comparing their answers with those from other parts of the world, while also indicating that, unfortunately, this kind of analysis has not been made. Fernando Hinestrosa, *Harmonization of Sales Law in the Americas and Regional Economic Integration: a Cautious Appraisal*, 8 *Uniform Law Review*, 1-2, 211-218 (2003).

CONCLUDING REMARKS

The main contributions of this paper are twofold. First, to remind that, up to date, there are no reported cases (i) where a Colombian court or arbitrator applies the CISG, and (ii) when the court or arbitrator is outside of Colombia, but either the seller or the buyer is from this country. The second and more important contribution has been to inquire into the reasons that might explain this lack of cases. Some of these reasons are unsatisfactory (low relevance of international trade, lack of knowledge of the CISG among companies and their lawyers, and lack of disputes arising out of international sales where either the seller or the buyer is a Colombian company). Other reasons, such as the no application of the CISG to the facts of a dispute in spite of the fact that it is the governing law of the contract; the explicit exclusion of the Convention and provision of a different governing law; and the possible existence of foreign and unreported arbitral awards where one of the parties is a Colombian company are more plausible explanations, although, in any event, they require deeper and preferably empirical studies. Notwithstanding, this paper hopes that the first case applying the CISG in Colombia will be decided soon, taking into account that new generations of lawyers might be less reluctant to the application of international laws and therefore, less prone to either opt out of the Convention as the governing law of an international sale or to ignore it whenever it is the legal instrument applicable to the facts of a dispute.¹⁴⁰

140 Milena Djordjevi & Vladimir Pavi , *The CISG in Southeastern Europe*, in *International Sales Law, A Global Challenge*, 419-452 (Larry A. DiMatteo, ed., Cambridge University Press, New York, 2014). See also DiMatteo (2014), p. 601 (hoping that, even in countries where the CISG has been ignored, the next generation of lawyers, judges, and arbitrators have a deeper knowledge of the CISG and a more favorable attitude to this legal instrument).

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