


April 2015

Is the Albert H Kritzer Database Telling Us More Than We Know?

Thomas Neumann
Aarhus University, School of Business and Social Sciences

Follow this and additional works at: <http://digitalcommons.pace.edu/pilr>

 Part of the [Commercial Law Commons](#), [Comparative and Foreign Law Commons](#), [Contracts Commons](#), [Dispute Resolution and Arbitration Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Legal Education Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Thomas Neumann, *Is the Albert H Kritzer Database Telling Us More Than We Know?*, 27 Pace Int'l L. Rev. 119 (2015)
Available at: <http://digitalcommons.pace.edu/pilr/vol27/iss1/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

IS THE ALBERT H KRITZER DATABASE TELLING US MORE THAN WE KNOW?

Thomas Neumann*

I.	Introduction	2
II.	Thoughts on Success	5
III.	Criteria for Success	7
	A. Consultation of Legal Sources.....	7
	B. Unwarranted Considerations by the Judge	11
	C. Crystallisation in Practice.....	13
	D. A Temporal and Geographical Overview	15
IV.	The Kritzer Database as a Sample.....	15
	A. Content of the Database	17
	i. Domestic Court Decisions and Arbitration Awards	19
	ii. Language and Translation	20
	B. Limitations	23
V.	Cursory Study.....	28
	A. The Courts' Ability to Render Transparent Decisions.....	29
	B. The Courts' Possible Protection of the Home Industry	35
	C. The Courts' Handling of Good Faith.....	37
VI.	Conclusion.....	41

* Associate Professor, School of Business and Social Sciences, Aarhus University. The author is the founder and editor of the CISGNordic.net database. The author wishes to express his gratitude to Professor Dr. iur. Ulrich Magnus for comments on preliminary ideas, to the Danish Council for Independent Research for their generous research grant, and to Aleksandra Vasiljeva for valuable assistance in carrying out the project.

This article is the first in a series of articles attempting to provide a geographical and temporal overview of the application practice of the United Nations Convention on Contracts for the International Sale of Goods (CISG). In this first article, the success of CISG is explored. The article develops the idea of using the Albert H. Kritzer Database to achieve an overview of the success of the Convention in practice. It is argued that the success of the Convention is useful to measure by its uniformity in practice, and therefore a set of criteria relating to the Convention's application by domestic courts are developed. The article contains a cursory study according to which the success of the Convention in Germany and China is considered, and the feasibility of the proposed study is assessed. The article concludes that a geographical and temporal overview of the Convention's application would add to current discussions of revising the Convention and provide the basis for considering alternative ways to promote uniformity. The proposed study concludes that the Albert H. Kritzer Database is capable of shedding a new light on topics like transparency of decisions, the courts' protection of their home industries, and the use of the concept of good faith. The article exposes a number of limitations when it comes to generalising about the entire trading community and providing detailed overview of uniformity over time.

I. INTRODUCTION

Unification of international private law is a decade long process that gained momentum under the auspices of the United Nations (UN) with the establishment of the United Nations Commission on International Trade Law (UNCITRAL) in 1966.¹ The unification of trade law is often motivated by a wish to remove conflict and divergence between laws, thereby encouraging both international trade and peace among nations.²

¹ JOHN O. HONNOLD & HARRY M. FLECHTNER, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 6 (4th ed. 2009).

² Preamble of the United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf/97/18, Annex1, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M 668 (Apr. 11, 1980) [hereinafter CISG]; *Report to the Secretary General ("The Schmitthoff Study")*, U.N. Doc. A/6396 (23 September 1966); PETER SCHLECHTRIEM & INGBORG SCHWENZER,

The first attempt by the UN to create a uniform legal framework of contract and sales failed. Two instruments were agreed upon, but they received a very cold shoulder with fewer than ten states adopting the instruments.³

The UN's second attempt to unify contract and sales law was concluded with the creation of the Convention on Contracts for the International Sale of Goods⁴ (hereinafter the CISG or the Convention). In the light of the preceding failure, this attempt turned into quite a success with currently 80 contracting states and more joining every year.⁵

The Convention has now been in force for more than 25 years and in existence for more than 30 years.⁶ In this light, it is reasonable to give the Convention an official service-check as it has been proposed by Switzerland.⁷ The proposal is to reconsider a possible expansion of the scope of the Convention.⁸

It may be sensible to consider whether there is a need to provide a broader uniform framework for international sales than is the case today. However, considering that the unification of law in practice is as important as the initial removal of textual barriers, it is suggested that the success of the Convention in practice be reconsidered as well. If the Convention does not serve its target group as it is now, then it questions whether the effort to expand its scope would be in vain. Perhaps then

COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 16 (Ingeborg Schwenzer ed., 3rd ed. 2010); Honnold & Flechtner, *supra* note 1, at 5.

³ SCHWENZER, *supra* note 2, at 1 (Less than ten states ended up adopting the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1 July 1964 and the Convention relating to a Uniform Law on the International Sale of Goods.); Honnold & Flechtner, *supra* note 1, at 6.

⁴ CISG, *supra* note 2.

⁵ *Status regarding the 1980 United Nations Convention on Contracts for the International Sale of Goods*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (Last visited September 27 2012), http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_stat_us.html

⁶ CISG, *supra* note 2.

⁷ Possible future work in the area of international contract law; United Nations Commission on International Trade Law; Forty-fifth session; June 25- July 6, 2012; U.N. Doc. A/CN.9/758 (May 8, 2012), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_stat_us.html.

⁸ *Id.*

unification would be better achieved through other means.⁹

The target group of the CISG is, in principle, all enterprises engaged in international sale of goods to which the CISG applies.¹⁰ However, it has been proposed that legally unsophisticated small and medium sized enterprises (SME), particularly in developing countries, may derive a benefit from having the CISG as the default applicable international sales law, rather than being left to the time and resource-consuming private international law.¹¹ There is no reason to assume that this is not true in developed countries, where also the SME group plays a significant role in societies, assuming of course that the SME group is the most legally unsophisticated one in developed countries too.¹²

In the European Union (EU)¹³ more than 67% of jobs in the non-financial sector are provided by SMEs, and 50% of the jobs are provided by enterprises employing less than 50 people in total.¹⁴ When it comes to creating new jobs, the SMEs are the most contributing group of enterprises with a contribution of 80% of new jobs.¹⁵

SME's also play an important role in the United States of America. Even though SMEs do not contribute as much to the employment and growth of jobs as they do in the EU, they provide approximately half of jobs in the United States.¹⁶ The

⁹ See UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW (Morten M. Fogt ed., 2012).

¹⁰ CISG, *supra* note 2, at articles 1-6.

¹¹ See Luca G. Castellani, *Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 1 VINDOBONA J. OF INT'L COM. L. & ARB. 241, (2009).

¹² For a discussion of impact on sophisticated and unsophisticated enterprises see Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 Vand. J. Transnat'l L. 1511.

¹³ All EU member states are also CISG contracting states, except for Ireland, Malta, United Kingdom and Portugal.

¹⁴ *EU SMEs in 2012: at the crossroads: Annual report on small and medium-sized enterprises in the EU*, EUROPEAN COMMISSION (2012), http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/annual-report_en.pdf (SME being defined as an enterprise with less than 250 employees).

¹⁵ *Do SMEs create more and better jobs?*, EUROPEAN COMMISSION (2011), http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/do-smes-create-more-and-better-jobs_en.pdf.

¹⁶ *Statistics about Business Size (including Small Business) from the U.S.*

same is true in China where more than half of employment is within small enterprises.¹⁷

The success of the CISG can be viewed from various angles and could be based on the adoption of the Convention by states, awareness of it among university educators, its use by legal advisors, attention to it by scholars, its impact on legislatures, etc.¹⁸ The reason for choosing to focus on the success of the CISG before domestic courts is not only that it takes into consideration the goal of uniformity, it may also potentially help further international trade for the legally unsophisticated enterprises, who rely on the CISG *ex post*.

It is asserted here that the ability of states to put the Convention into practice is a suitable criterion of success and a useful supplement to a possible review of the Convention's scope, since it addresses the purpose of the Convention, its target group, and in turn growth, wealth, and employment in the CISG contracting states.

If a study indicates that the Convention has very little success in practice, it questions the contracting states' ability to obey international law¹⁹ and it points out that a possible expansion of the scope of the Convention could be rendered futile in practice.

II. THOUGHTS ON SUCCESS

Like with any law-making procedure the drafters of the CISG also had to choose between open, flexible, and vague standards or specific, more rigid, rules.²⁰ A more open and broad wording was deliberately chosen in order to make the text acceptable to adopting states and to provide flexibility for

Census Bureau, UNITED STATES DEPARTMENT OF COMMERCE CENSUS BUREAU (last visited Feb.2013) <https://www.census.gov/econ/smallbus.html>.

¹⁷ Liu Xiangfeng, *SME Development in China: A Policy Perspective on SME Industrial Clustering*, in *SMES IN ASIA AND GLOBALIZATION* 37, 40 (Hank Lim ed. 2008), available at http://www.eria.org/SME%20Development%20in%20China_A%20Policy%20Perspective%20on%20SME%20Industrial%20Clustering.pdf.

¹⁸ The CISG and its Impact on National Legal Systems (Franco Ferrari ed. 2008).

¹⁹ ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 179 (2nd ed. 2007).

²⁰ See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992).

future development, but it inevitably left a greater discretion with the adjudicator.²¹

When the adjudicator is faced with the task of applying the CISG, he must do so within the framework of the Convention's article 7.²² This rule establishes that the CISG is an autonomous international legal framework, free from domestic legal idioms, with the overall purpose of reaching a uniform application of the rules contained within it. The provision reads in its first section: "*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.*"²³

From the viewpoint of a small enterprise without legal expertise, the concern is whether this provision is enough to make sure that the courts of 80 states will apply the rules in the same fashion if presented with the same facts. If not, the premise that the CISG is a uniform framework capable of reducing transaction costs to the benefit of trading enterprises is not true.²⁴ Instead, the trading parties will have to engage in costly forum shopping or face the unknown consequences in case of a dispute.

There is no doubt that the intention behind the CISG was that it should find uniform application before courts, but it is also a fact that no monitoring body or supranational court was established to make sure that this happens in practice. Theo-

²¹ MICHAEL JOACHIM BONELL & CESARE MASSIMO BIANCA, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 73 (1987); John Honnold, *The Sales Convention In Action – Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, § III.B (1988); JOHN FELEMEGAS, AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 12 (John Felemegas ed., 2007); Honnold & Flechtner, *supra* note 1, at 150-51.

²² CISG, *supra* note 2, at art. 7.

²³ CISG, *supra* note 2, at art. 7(1).

²⁴ See G.A. Res. 2205 (XXII), U.N. GAOR, 21st Sess., 31 U.N. Doc. A/PV.1497 (Dec. 17, 1966) (A similar problem occurs in regard to issues not governed by CISG. The argument made during UNCITRAL's 45th meeting, that instruments like the UNIDROIT Principles could supplement the CISG, does not address the concern that SMEs who do not have the capacity to opt-in to this instrument are left with the CISG and the differences of domestic law.)

retically, article 7²⁵ is “*taking on metaphorically the mantle of a supranational tribunal or court.*”²⁶ However, it could be wishful thinking to expect interpreters around the globe to interpret the Convention in the same way, thus rendering article 7 the wishbone of the CISG rather than its backbone.²⁷

The requirement of uniformity can be understood differently. The less rigid choice of words in article 7(1),²⁸ demanding that regard be paid to the need to promote uniformity, supports the view that uniformity may be relative and that an absolute uniformity is not required.²⁹ However, consideration of the need to promote uniformity must be the minimum requirement for courts putting the Convention into practice.

It is proposed that a quantitative approach addressing the general ability of states to put CISG into practice could shed a new light on the unification of trade law and provide further material to evaluate the success of the CISG. It is the purpose of the present article to explore whether a quantitative assessment is possible and feasible to carry out. This is developed further below by considering criteria for success and access to empirical data. Finally, a cursory study is carried out to assess whether it is practically possible and feasible to carry out a full-scale study.

III. CRITERIA FOR SUCCESS

Defining success as the ability of courts to achieve uniform application is too vague to be operative in a quantitative study of the Convention. Therefore, the theory is consulted to develop the criteria of success further. Doing so allows for more precise selection of units to measure and ensures that the criteria selected are relevant to the definition of success. These considerations are important to a quantitative study of the Convention,

²⁵ CISG, *supra* note 2, at art. 7.

²⁶ BRUNO ZELLER, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS - A METHODOLOGY FOR ITS INTERPRETATION AND APPLICATION 235 (2001).

²⁷ CISG, *supra* note 2, at art. 7.

²⁸ CISG, *supra* note 2, at art. 7(1).

²⁹ LARRY DIMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 10-11 (2005).

as its outcome may otherwise not be reliable or valid.³⁰

A. *Consultation of Legal Sources*

The first criterion of success relates to the goal of uniformity. The very purpose of the Convention was, and still is, to create a uniform set of rules for formation of contracts and sale of goods between different states.³¹ Only by having the same law for the formation and performance of contracts will the barriers for international trade in goods be removed and transaction costs lowered. Not only does this rest on the presumption that the Convention text is the same in all countries (which it is not³²), but it also presumes that courts are able to apply the Convention as required by article 7.³³

Many national court systems operate with a court hierarchy where lower courts are either obliged, or at least logically pressured, to follow a higher court's decision, since deviating interpretations may be overturned in a possible appeals case.³⁴ However, even though the Convention is the default law for contracts regarding international sale of goods in currently 80 states,³⁵ there is no supranational court to which adjudicators can turn for interpretation guidance. Instead, the application of the Convention is left to a plurality of domestic courts that are not bound by an official hierarchy.

³⁰ THOMAS HARBOE, *INDFØRING I SAMFUNDSVIDENSKABELIG METODE* 89-94 (2006); Nahid Golafshani, *Understanding Reliability and Validity in Qualitative Research*, THE QUALITATIVE REPORT, Vol. 8, Num. 4, Dec. 2003, 597, 598, available at <http://www.nova.edu/ssss/QR/QR8-4/golafshani.pdf>; Lee Epstein & Andres D. Martin, *Quantitative Approaches to Empirical Legal Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 901, 908 (Peter Cane & Herbert M. Kritzer eds. 2012).

³¹ CISG, *supra* note 2, at preamble. See also Schwenzer, *supra* note 2, at 13-17.

³² KAI KRÜGER, *NORSK KJØPSRETT* 671-672 (4th ed. 1999) (Not only do discrepancies exist between the authentic language versions of CISG, but some countries choose to translate the CISG and make the unauthentic version the law applicable in the country. An example of this is Norway, where the method has been described as a 'major mistake'.)

³³ CISG, *supra* note 2, at art. 7.

³⁴ See Franco Ferrari, *The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case law (part I)*, 4 INTERNATIONALES HANDELSRECHT 137, 151-52 (2013) (discussing *stare decisis* in the context of the CISG.)

³⁵ UNCITRAL, *supra* note 5.

This does not mean that domestic courts have free hands to interpret and apply the Convention as they please. The courts must consider that the purpose of the Convention is to reach a uniform application. This purpose is embedded in the Convention's preamble, article 7(1), and drafting history.³⁶ Consequently, courts are required to promote uniformity in their decision-making, and only when the matter is not governed by the Convention or no gap-filling principles can be found to fill internal gaps may the court resort to domestic law according to article 7(2).³⁷

Considering the difficulties a global uniformity entails domestic courts should be granted some time to reach uniformity in practice. Having said that, there is no doubt that the proximity, so to say, of the courts' interpretation of the Convention must narrow over time *qua* each court's focus on the need to promote uniformity in each decision. This entails two requirements.

First, a court must take into consideration case law, no matter its origin, when deciding a dispute involving application of CISG.³⁸ Even though a court is not compelled by an official court hierarchy or *stare decisis* to follow foreign precedent, it must be guided by persuasive and well-reasoned case law and be reluctant to deviate from an established and persuasive practice.³⁹ Not doing so is contrary to the economic interests of the trading parties, the goal of uniformity and the very purpose of having spent decades negotiating the Convention. It is, however, not enough for a court to merely consider foreign sources, such as case law, since this in itself does not promote uniformi-

³⁶ Franco Ferrari, *The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case law (part II)*, 5 *INTERNATIONALES HANDELSRECHT* 181, 181-87 (2013); CISG, *supra* note 2, at preamble and art. 7(1).

³⁷ CISG, *supra* note 2, at art. 7(2).

³⁸ FLECHTNER & HONNOLD, *supra* note 1, at 124; SCHWENZER, *supra* note 2, at 124-126. FRITZ ENDERLEIN AND DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS: COMMENTARY* 56-57 (1992).

³⁹ Camilla Andersen, *The Global Jurisconsultorium of the CISG Revisited*, 13 *VINDOBONA J. OF INT'L COM. L. & ARB.* 43, 47 (2009). FLECHTNER & HONNOLD, *supra* note 1, at 124; SCHWENZER, *supra* note 2, at 124-126; ENDERLEIN & MASKOW, *supra* note 38, at 56-57.

ty and this leads to the next requirement.

Second, a court must promote future uniform development by making its own decision transparent, since merely considering foreign sources, such as case law, does not in itself promote a uniform development.⁴⁰ The court may not be obliged to reason their decisions in a certain manner according to the respective domestic procedural laws or traditions, but this is different when the court is applying the autonomous legal body we call CISG. Only when the legal reasoning is transparent will it become possible for other courts to rely on that decision in the future when they themselves have to consider foreign case law in their own promotion of uniformity.⁴¹ If a decision is not transparent, another court could reject the decision on the basis that the first court has not considered the need to promote uniformity, that the decision is not well reasoned, and that the court is not convinced that the autonomous interpretation method of the Convention has been applied.⁴²

Assessing the success of the Convention in light of this would mean to survey how often courts utilize foreign cases when applying the Convention. This could reveal whether particular countries have a stronger tradition of rendering transparent decisions and if the similarity in application style is increasing over time. If not, it questions whether efforts to expand the scope of the Convention will be in vain, because the instrument fails in serving its goal and target group.

It is, however, insufficient to record only the frequency of the courts using foreign case law to render a decision. Other legal sources are permitted, also by the Convention's article 7.⁴³

Looking at article 7(2) it is seen that underlying principles are supposed to fill gaps in the Convention in relation to matters governed but not settled by it.⁴⁴ The provision restricts the

⁴⁰ See, e.g., CAMILLA BAASCH ANDERSEN & MADS ANDENAS, THEORY AND PRACTICE OF HARMONISATION 42-43 (Mads Andenas & Camilla Baasch Andersen eds. 2011).

⁴¹ See Joseph Lookofsky, *De danske domstoles håndtering af CISG*, UGESKRIFT FOR RETSVÆSEN 281, (2012); Thomas Neumann, *Chinese Success and Failure in Achieving Uniform Application of The CISG*, 16(1) VINDOBONA J. OF INT'L COM. L. & ARB. 83 (2012).

⁴² DiMATTEO, *supra* note 29, at 11-12.

⁴³ CISG, *supra* note 2, at art. 7.

⁴⁴ CISG, *supra* note 2, at art. 7(2).

use of domestic law as a gap-filler, since courts are obliged to attempt to extrapolate underlying principles from the Convention before resorting to domestic law. One would therefore expect courts to refer to such principles in their decisions from time to time, and therefore they should be part of the survey.

In the event that the matter is not governed by the Convention or no gap-filling principle can be identified the court may resort to domestic law according to article 7(2).⁴⁵ Considering the limited scope of the Convention, it is expected that courts utilize domestic law, and this should therefore be recorded to get the full picture of the transparent use of legal sources in CISG decisions.

A survey of the courts' transparent use of legal sources is important to the evaluation of success and to trading parties who presume that they can rely on the CISG as a default uniform framework. This may not necessarily be so at the moment, but a possible development could provide hope for the future. A geographical and temporal overview of application practice could shed light on this aspect and perhaps spark further actions promoting uniformity in practice. To gain such geographical and temporal overview the study must record the jurisdiction and year of each decision forming part of the survey.

The first criteria of success can be summarized as being when it is possible to detect that the domestic courts in CISG contracting states render decisions that promote uniformity by utilising legal sources as permitted by article 7 in a way that is transparent.⁴⁶

B. Unwarranted Considerations by the Judge

The second criterion of success developed here is the negative equivalent of demanding the presence of relevant legal sources in court decisions: If courts are obliged to promote uniformity and this is evidenced by consideration and transparency of relevant legal sources, then courts must also leave aside considerations not warranted by the Convention.

Since the Convention is a compromise between legal tradi-

⁴⁵ CISG, *supra* note 2, at art. 7(2).

⁴⁶ CISG, *supra* note 2, at art. 7.

tions, it was deliberately decided to leave the wording more open, for example by referring to physical events instead of including idioms that would contain domestic connotations.⁴⁷ Doing so both maximized initial adoption of the Convention and secured enough flexibility for subsequent modernization through interpretation; thus, extending the lifetime of the Convention. However, flexible words can be used to protect interests not warranted by the Convention,⁴⁸ and history has seen some absurd examples of this.⁴⁹

It would be possible for a court to utilise the flexible words of the Convention to provide a home court advantage to the local industry in a dispute.⁵⁰ In the ideal world of rule of law this would never occur, and to some the suggestion appears to be unlikely. The truth is probably closer to being that the rule of law is being applied to a very different degree from state to state.⁵¹

The question of whether a home-court advantage exists has been raised before. From a general study of approximately 3,000 pieces of U.S. case law, a possible home court advantage could not be ruled out.⁵² In relation to the CISG a small-scale survey led to one author stating that a home court advantage probably did not exist, since the foreign industry's claim was sustained as often as the local industry's.⁵³

It can be questioned whether the win/lose ratio is supposed

⁴⁷ FLECHTNER & HONNOLD, *supra* note 1, at 150-151; Honnold, *supra* note 18, at III.B and BRUNO ZELLER, DAMAGES UNDER THE CONVENTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 182 (2nd ed. 2009).

⁴⁸ DiMATTEO, *supra* note 29, at 13.

⁴⁹ Ole Lando, *Is Good Faith an Overarching General Clause in the Principles of European Contract Law?*, in LIBER AMICORUM GUIDO ALPA: PRIVATE LAW BEYOND THE NATIONAL SYSTEMS 604 (Mads T. Andenas ed. 2007).

⁵⁰ Ulrich Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations*, in CISG METHODOLOGY 33, 35-37 (Olaf Meyer & André Janssen eds. 2009).

⁵¹ Compare for example China and Germany according to Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce & Christine S. Pratt, THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2012). See also Utpal Bhattacharya, et. al., *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625 (2007), where the study of 3000 cases decided by U.S. state courts could not rule out that local parties enjoy a home court advantage.

⁵² Bhattacharya, Galpin & Haslem, *supra* note 51, at 625.

⁵³ Magnus, *supra* note 50, at 35-37.

to be fifty-fifty. Many factors may legitimately affect the ratio, such as the parties' prediction of legal costs, chances of a beneficial outcome, etc.⁵⁴ The appropriate level of the win/lose ratio may be very difficult to determine, and there is no great need to do so at present since the win/lose ratio is of importance in relation to the courts' adherence to article 7 and the first criterion of success.⁵⁵ If it is possible to detect a correlation between low adherence to the first criterion and a high win ratio of the local industry, compared to courts with high adherence to the first criterion and a lower win ratio of the local industry it may spark further interest in explaining whether some jurisdictions subject the CISG to an unwarranted interpretation, such as a wish to protect the local industry. Clarifying the frequency of cases in which the foreign industry's claims are sustained requires recording of the jurisdiction of both the court and the parties involved. Furthermore, it requires recording of the claims of the parties and the decision of the court. For a more nuanced picture, it would be possible to also record decisions according to which a party's claim is sustained for the preponderant part.

An assessment of a possible protection of the local industry in the form of a geographical overview could be used to pinpoint jurisdictions that protect the local industry to a higher degree than others. In turn, such knowledge could qualify action taken on the matter and direct scholarly attention.

The second criterion of success can be summarised as being when it is not possible to detect a correlation between the adherence to article 7 (first criterion) and the jurisdiction of the party whose claim is sustained by the court.⁵⁶

C. *Crystallisation in Practice*

The third criterion of success has its roots in a discussion dating back to the drafting of the Convention.⁵⁷ The discussion

⁵⁴ Bhattacharya, Galpin & Haslem, *supra* note 51, at 627-628.

⁵⁵ CISG, *supra* note 2, at art. 7.

⁵⁶ CISG, *supra* note 2, at art. 7.

⁵⁷ United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 April) Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, U.N. Doc. A/CONF.97/19 (1991).

is whether the Convention includes a duty for the trading parties to act in good faith or not - an issue that was finally swept under the carpet during the drafting without a clear decision to either exclude or include good faith as a general duty imposed on the parties or not.⁵⁸ It has been stated that concepts like good faith would need time to crystallise in practice,⁵⁹ and considering that the concept of good faith is one of the most debated topics in the literature, it is interesting to assess how courts have handled it in practice.⁶⁰

The problem is that following a literal interpretation of the Convention's article 7(1),⁶¹ the concept of good faith applies only to the interpretation of the Convention and not to the actual behaviour of the trading parties. Some argue that it is impossible to interpret the Convention in good faith without also affecting the trading parties.⁶² Others argue that since good faith in the form of a general duty imposed on the parties was not agreed by the drafting delegates, it cannot later on be included in the Convention.⁶³ Therefore, the scope and role of good faith

⁵⁸ Allan E. Farnsworth, *Duties of Good Faith and Fair Dealing Under The UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 *Tul. J. Int'l & Comp. L.* 47, 55 (1995). Troy Keily, *Good Faith and The Vienna Convention on Contracts for The International Sale of Goods (CISG)*, 3 *VINDOBONA J. OF INT'L COM. L. & ARB.* 15, 20 (1999). Arthur Rosett, *Critical Reflections on The United Nations Convention on Contracts for The International Sale of Goods*, 45 *Ohio St. L.J.* 265, 290 (1984)

⁵⁹ Felemegas, *supra* note 21, at 14.

⁶⁰ See for example: Farnsworth, *supra* note 58. Peter Schlechtriem, *Good faith in German Law and in International Uniform Laws*, *Centro di studi e ricerche di diritto comparato e straniero* 1 (1997). Ulrich Magnus, *Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts*, 10 *Pace International Law Review* 89 (1998). Keily, *supra* note 58. John Felemegas, *Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL*, 13 *Pace International Law Review* 399 (2001). Ole Lando, *Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?*, 15 *European Review of Private Law* 841 (2007). Lisa Spagnolo, *Opening Pandora's Box: Good Faith and Pre-contractual Liability in the CISG*, 21 *Temple International & Comparative Law Journal* 261 (2007). Nathalie Hofmann, *Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe*, 22 *Pace International Law Review* 141 (Winter 2010). SCHWENZER, *supra* note 2, at 127.

⁶¹ CISG, *supra* note 2, art. 7(1).

⁶² Zeller, *supra* note 26, at 102; Keily, *supra* note 58, at 24.

⁶³ Compare Zeller, *supra* note 26, at 102 with Farnsworth, *supra* note 58, at 56.

is one of the most debated issues of the Convention. One may wonder how the plurality of courts has subsequently handled this conundrum and whether they have handled it in a uniform manner or not.

An assessment of this question is significant, since it is important for the trading parties to know which standard they will be measured against and to which extent this standard is different, depending on where the dispute is being heard. At the same time it serves as a specific example of the ability of courts to develop a uniform concept in practice. If the courts are struggling to do this, it questions the drafting style of, for example, a possible expansion of the Convention in favour of more specific, though rigid, rules.

A geographical overview could provide insight to this aspect and clarify if forum shopping is encouraged because of local differences. Should the survey show that courts have never used good faith in the way that particularly the common law delegates feared during the drafting of the Convention, it sheds a new light on the debate about the reluctance of the United Kingdom to adopt the CISG.⁶⁴ If good faith plays a very little or no role in practice, then why should the United Kingdom not adopt the CISG? Doing so would not be to adopt a somewhat binding and unacceptable practice of good faith. Rather, it would assist local SMEs in cross-border trade in goods by removing legal barriers.⁶⁵

A survey of good faith requires recording of how often courts refer to good faith and which form and content the courts believe that the concept has. In the theory, the concept of good faith has been described in a number of forms: 1) a tool for interpreting the Convention;⁶⁶ 2) as an underlying principle;⁶⁷ 3) a standard imposed on the parties;⁶⁸ 4) a requirement

⁶⁴ Factors other than good faith play a role in regard to the United Kingdom; see Silvia E. Nikolova, *UK's Ratification of the CISG – An Old Debate or a New Hope for the Economy of the UK on Its Way Out of the Recession: The potential Impact of the CISG on the UK's SME*, 3 PACE INT'L L. REV. (ONLINE COMPANION) 69, 85-90 (2012).

⁶⁵ *Id.*

⁶⁶ MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 426 (2009).

⁶⁷ Enderlein & Maskow, *supra* note 38, at 56; Bonell & Bianca, *supra* note 67, at 80, 85; PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 95 (Peter

of absence of bad faith;⁶⁹ 5) a domestic concept⁷⁰ and 5) an international concept.⁷¹ The survey should therefore allow for recording of these forms and combinations thereof.

The third criterion of success can be summarised as being when it is possible to detect a similarity in the use of good faith independently of jurisdiction, while at the same time the courts adhere to the first criterion without correlation to the second criterion.

D. *A Temporal and Geographical Overview*

The application of the Convention has been described as coalescing of both very appropriate attempts by courts to promote uniformity and very inappropriate court ignorance or homeward trends.⁷² In relation to the success of the Convention and the reconsideration of the unification mechanism of article 7,⁷³ it would be interesting to know whether particular jurisdictions show a more sophisticated grasp of the Convention than others. For those jurisdictions having a less advanced grasp of the Convention, it would be of interest to know whether a development can be detected over time, thus leaving hope for the future of uniformity. To gain such geographical and temporal overview, it is necessary to record the jurisdiction and year of each decision being surveyed in relation to the three criteria above.

Assessing the success of the Convention across jurisdictions would of course require access to decisions rendered by the courts in the CISG contracting states. Considering constraints of time and money, it may not be possible to acquire all existing case law. As an alternative, using an already existing sample of case law could be considered.

Schlechtriem and Ingeborg Schwenzer eds. 2nd ed. 2005).

⁶⁸ Zeller, *supra* note 26, at 102; *see also* Keily, *supra* note 58, at 24.

⁶⁹ Paul J. Powers, *Defining The Undefinable: Good Faith and The United Nations Convention on Contracts for The International Sale Of Goods*, J. L. & COM. 351 (1999).

⁷⁰ Flechtner & Honnold, *supra* note 1, at 134-35.

⁷¹ As included for example in UNIDROIT Principles.

⁷² DiMATTEO, *supra* note 29, at 177-78.

⁷³ CISG, *supra* note 2, at art. 7.

IV. THE KRITZER DATABASE AS A SAMPLE

If courts are required to consider foreign case law, it is necessary for them to have access to and understand existing case law. A court cannot reasonably be expected to overcome the inertia of bureaucracies in dozens of other contracting states, just to gain access to court records rendered in a language that the judge cannot understand. It would be impracticable, extremely laborious, and require colossal language skills to analyse the entire population of case law produced by domestic courts in 80 countries since the Convention first entered into force in 1988.⁷⁴ The courts are facing the problem of overcoming language and access to decisions and hence is the assessment proposed in the present article.

The Albert H. Kritzer Database⁷⁵ hosted by Pace Law School (hereinafter the Kritzer Database) was created to combat this problem, and as a fortunate by-product a sample of domestic cases has been created, perhaps being suitable for assessing the success of the Convention other than by allowing access to individual pieces of case law. The database and its underlying network of national and regional CISG databases serve the purpose of collecting, translating and making material related to the interpretation and application of the Convention available.⁷⁶ Doing so is the practical way to overcome the problem of accessing and understanding the legal sources of the Convention. The Kritzer Database currently contains approximately 3,000 reported cases relevant to the application of the Convention. In addition, 1,500 full-text articles and books are made available together with the drafting history and a bibliography of nearly 10,000 entries.⁷⁷

⁷⁴ CISG, *supra* note 2.

⁷⁵ See, e.g., Luiz Gustavo & Meira Moser, *Albert H. Kritzer, the 1980 UN Convention (CISG), and the Vis Moot: An Inseparable Relationship*, 24 PACE INT'L L. REV. 258, (2012); *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday* (Camilla B. Andersen & Ulrich Schroeter eds. 2008).

⁷⁶ *Charter of the Autonomous Network of CISG Websites*, Pace Law School (accessed 3 March 2015), <http://www.cisg.law.pace.edu/cisg/charter.html>.

⁷⁷ *Albert H. Kritzer CISG Database*, Pace Law School (accessed 3 March 2015) <http://www.cisg.law.pace.edu>. *Search the Cases*, Pace Law School (accessed 3 March 2015) <http://www.cisg.law.pace.edu/cisg/search-cases.html>.

The fact that such an abundance of material is available is not a guarantee that a uniform application will be achieved.⁷⁸ However, it does make it reasonable to demand that courts engage in a serious attempt to also consider foreign experience in applying the Convention, especially considering the efforts made to summarise the material in more easily accessible digests.⁷⁹

A survey of existing and available case law would clarify to which extent legal sources, both domestic and foreign, in fact assist domestic courts in reaching their decisions and whether this is happening in a transparent manner as required.⁸⁰

In the following, the content of the Kritzer Database is investigated to clarify its suitability and limitations as a sample for assessing the success of the Convention as proposed.

A. *Content of the Database*

Thus far, no detailed overview of the content of the Kritzer Database exists. Since the database is constantly being updated, it is necessary to freeze its content in time in order to present it in this article. A freeze frame from 26 September 2012 shows the relative size of case law based on the jurisdiction of each decision (figure 1). The chart shows both arbitration and court decisions regardless of availability of translations. The total amount of decisions reported at the time was 2,789.⁸¹

⁷⁸ See also Ferrari, *supra* note 18, at 417-19.

⁷⁹ See Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. OF INT'L COM. L. & ARB. 181 (2004) (Noting that the digests do not indicate appropriate approaches in case of conflicting practice.)

⁸⁰ Andenas & Andersen, *supra* note 40, at 42-43; Lookofsky, *supra* note 41, at 281-89; Neumann, *supra* note 41, at 83-94.

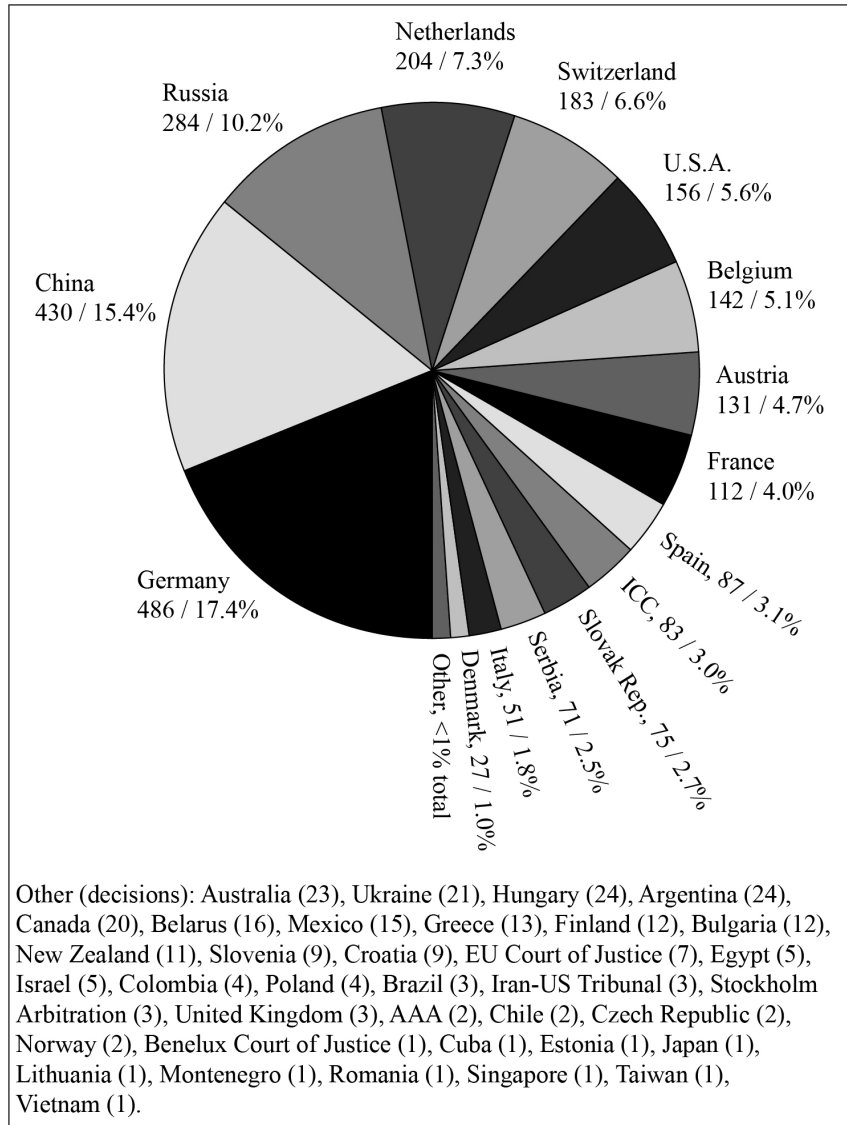
⁸¹ San Marino, Brazil, and Bahrain have adopted the Convention after the overview above was generated.

2015]

ALBERT H KRITZER DATABASE

137

Figure 1 - Content of the Kritzer Database



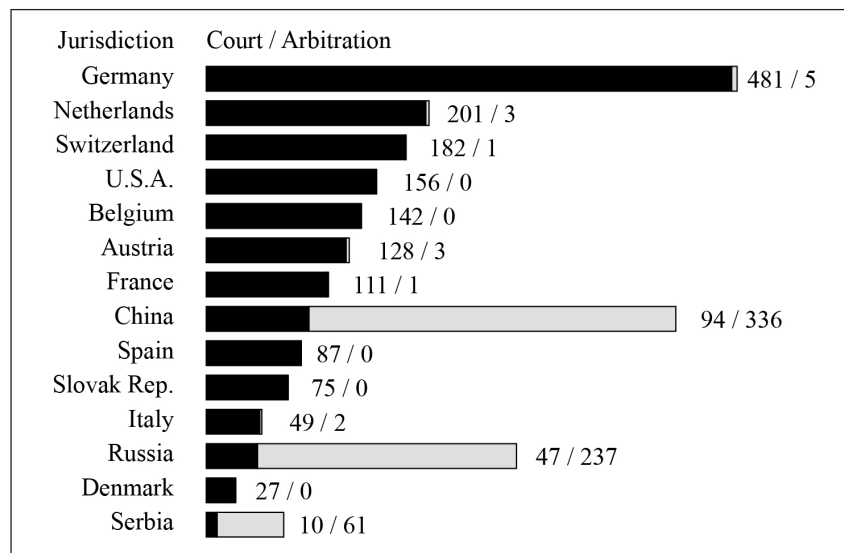
At the first glance the abundance of case law in the database is astonishing. Almost 3,000 individual pieces of case law are available for adjudicators and others to rely on. Such abundance of material should be sufficient to assess the success of the Convention in practice. It is, however, necessary to examine the content closer in relation to the criteria of success de-

fined above.

i. Domestic Court Decisions and Arbitration Awards

Since the proposed assessment of the success of the Convention relates to its application before domestic courts, decision from such courts should be isolated. It is therefore necessary to distinguish between domestic court decisions and decisions by other bodies, such as arbitration institutions (figure 2).

Figure 2 - Distribution between court and arbitration decisions



The chart (figure 2) shows the distribution of case law between domestic court awards and arbitration awards. Decisions by bodies that are not domestic courts are not displayed. These include arbitration institutions and the European Court of Justice. Also domestic decisions representing less than 1% of the database content are omitted from the chart.

Looking at the content of the Kritzer Database as it is designated there, it appears that case law reported from Russia is mostly arbitration cases.⁸² Upon closer examination, some re-

⁸² *CISG Database – Russia*, Pace Law School (accessed 26 September 2012) <http://www.cisg.law.pace.edu/cisg/text/casecit.html#russian>.

ported cases are from regional *Arbitrazh* tribunals and others from the International Commercial Arbitration Court by the Chamber of Commerce and Industry of the Russian Federation (MKAC).⁸³

The regional *Arbitrazh* tribunals, such as the Arbitration Court of Moscow City, are in fact commercial courts that are not necessarily selected through agreement of the parties. These *Arbitrazh* tribunals exist in a four-tiered hierarchy and form part of the judiciary in the Russian Federation together with the constitutional court and the general courts.⁸⁴ They have jurisdiction over commercial matters on a default basis and therefore the cases decided by *Arbitrazh* tribunals are to be considered commercial court decisions and not arbitration awards in the common sense.⁸⁵ The MKAC on the other hand is an arbitration institution in the sense that it only has jurisdiction over matters referred to it by agreement by the trading parties⁸⁶ and is an alternative to the public *Arbitrazh* tribunals.

The distinction between the cases reported from *Arbitrazh* tribunals and MKAC is important, grouping the two together would suggest that Russia should be excluded from the study of the courts' application of the CISG. The true picture is different, though, and the overview above takes this into consideration, thus enabling a study of how the relevant courts of the Russian Federation have received the CISG. Future studies of the database content should consider this in order to achieve the correct impression of the case law contained in the database.

After this initial sorting of the content of the sample, the

⁸³ The International Commercial Arbitration Court at The Chamber of Commerce and Industry of the Russian Federation (20 October 2012), <http://www.tpprf-mkac.ru/en/-whatis-/lawstatus> [hereinafter *ICAC at CCI of RF*].

⁸⁴ WILLIAM BURNHAM, PETER B. MAGGS & GENNADY M. DANILENKO, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 52 (4th ed. 2009).

⁸⁵ *Id.*

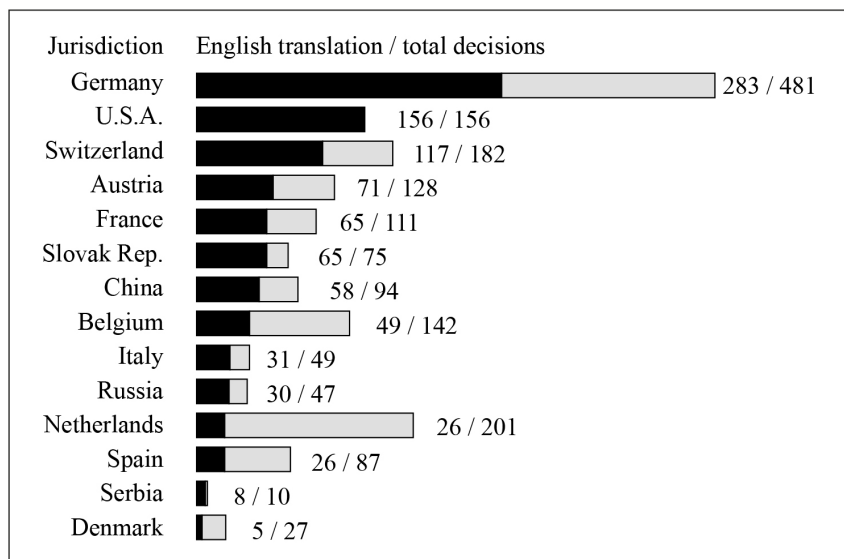
⁸⁶ Therefore, MKAC suggests the following clause be added to the contract: 'Any dispute, controversy or claim which may arise out of or in connection with the present contract (agreement) or the execution, breach, termination or invalidity thereof, shall be settled by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in accordance with its Rules'; *ICAC at CCI of RF, supra* note 83.

amount of relevant decisions is down from 2,789 to 1,790.

ii. Language and Translation

A survey of 1,790 cases would require extensive language capabilities, and assuming that the minimum language intelligible by the surveyor is English, the sample can be further reduced. The chart (figure 3) displays jurisdictions representing more than 1% of the database content.

Figure 3 - Amount of court decisions in the english language



The total amount of domestic court decisions available in the English language is 990. A study of the database content could of course comprise any language that the surveyor possesses; hence the 990 is an expression of minimal study possible by possessing only the English language.

Having a sample of 990 cases is not as desirable as having almost 3,000 cases at disposal, but the question is whether it is a large enough sample to assess how the Convention is being put into practice.

If the assessment is supposed to provide a geographical overview, the survey must be broken down to country of decision. Doing so reduces each group of case law even further, but

it can be observed (figure 3) that seven countries have reported more than 50 domestic cases in the English language. This seems to be enough to get an impression of how the Convention has been put into practice by the courts of those countries, though this is further considered in the cursory study included below.

From the chart above it can be observed that the countries with most reported domestic case law have been CISG contracting countries for 20 years on average. This could potentially enable an assessment of the ability to apply the Convention over time, though this could reduce the amount of case law per year, so much so, that it becomes meaningless to conclude anything about a particular year in a particular jurisdiction. Also this is considered in light of the cursory study below.

The mix of countries in the top-seven list is beneficial to the proposed study when considering the criterion relating to the differences in legal tradition that had to be overcome in the Convention (good faith). A primary contradistinction in this regard is between the civil law tradition and the common law tradition. The contradistinction appears from the drafting history of the Convention and in the scholarly discourse.⁸⁷ Having countries in the assessment that belong to both the civil law group (e.g. Germany) and the common law group (e.g. U.S.A) makes it possible to assess to what extent courts have handled the challenge of leaving their different domestic traditions behind for the sake of a common concept of good faith.

It can also be observed that the mix of countries consists of countries from both the East and the West. This relates to the east-west contradistinction that the drafters of the Convention were faced with when negotiating the CISG during the cold war period.⁸⁸ The CISG is a compromise between politically,

⁸⁷ *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session*, U.N. Doc. A/33/17(30 May-16 June 1978), reprinted in [1978] IX Y.B. U. N. Comm'n Int'l Trade L. 67; Compare remarks by United Kingdom and United States of America with remarks by Norway, Italy, Republic of Korea, Sweden, and Iraq, CISG, *supra* note 2, at 255-58; Compare also Flechtner & Honnold, *supra* note 1, at 133-34, Schlechtriem, *supra* note 67, at 95, and Farnsworth, *supra* note 58, at 56, with Ulrich Magnus in Felemegas, *supra* note 21, at 45-46, Zeller, *supra* note 26, at 102, 255-56, Flechtner & Honnold, *supra* note 1, at 135-36, and Bonell & Bianca, *supra* note 21, at 84.

⁸⁸ Alejandro M. Garro, Reconciliation of Legal Traditions in the U.N.

economically, and socially very different regions, comprising democracies, communist countries, market economies, planned economies etc. By having a mix of east-west countries it is possible to compare the level of awareness among courts of the need for transparent decisions as well as compare tendencies of possible (unwarranted) protection of the local industry across regions with very different politic, economic, and social circumstances.

Based on these observations, the sample of case law that exists in the Kritzer Database appears to be quite valuable, since it removes the need for a costly creation of a sample. Though the Kritzer Database was created with a different purpose, a fortunate by-product in the form of a large sample has been created. A cursory study further assists in evaluating the feasibility of using the Kritzer Database to assess the success of the Convention. Before turning to this, it is worth considering some of the limitations of the Kritzer Database.

B. Limitations

Having established that at least seven countries have reported a high number of court decisions, it is valuable to consider whether an assessment of the success of the Convention in those countries can be used to generalise about the entire group of trading nations.

If the Kritzer Database is to be used as a sample to say something about the real world, it must in itself reflect the real world. If it is so, and assuming that cross-border trade generates court disputes at the same rate in any country, then countries with a high value of cross border trade in goods should also report more case law to the database than countries with a low value of cross border trade in goods.

Comparing the list of most case law reporting countries to the list of most trading countries, it is possible to make a number of observations of the limits to what the database can tell (figure 4 and figure 5).

Convention on Contracts for the International Sale of Goods, 23 International Lawyer 443, 459 (1989).

Figure 4 - Jurisdictions with more than 10 courts decisions reported

Jurisdiction (decisions)	
Germany (481)	Denmark (27)
Netherlands (201)	Australia (24)
Switzerland (182)	Argentina (21)
U.S.A. (156)	Canada (20)
Belgium (142)	Hungary (14)
Austria (128)	Belarus (13)
France (111)	Greece (13)
China (94)	Finland (12)
Spain (87)	Mexico (12)
Slovak Rep. (75)	New Zealand (11)
Italy (49)	Serbia (10)
Russia (47)	

The list (figure 4) expresses the most CISG case law reporting countries in descending order, regardless of whether the reported case law has been translated into the English language or not. When the list is compared to the list of the world's fifty most trading nations, we get an impression of whether the Kritzer Database suffers a selection bias (figure 5). The list is sorted according to the value of export and import of merchandise according to the WTO in 2012.⁸⁹ Though the WTO concept of merchandise and the Convention's concept of goods are not identical, they are overlapping enough to provide an indicator of which countries are expected to generate more international sales disputes.⁹⁰

⁸⁹ World Trade Organisation, *International Trade Statistics 2012*, Statistics Database (26 September 2013), <http://stat.wto.org>.

⁹⁰ Compare *id.* at 190-91, available at http://webservices.wto.org/resources/meta/def_method_e.pdf, with CISG, *supra* note 2, at art. 2, 3, and Flechtner & Honnold, *supra* note 1, at 55-62.

Figure 5 - Fifty most trading nations

Rank, export	CISG state	Kritzer Datab.	Jurisdiction	Rank, import	CISG state	Kritzer Datab.	Jurisdiction
1	✓	✓	China	1	✓	✓	U.S.A.
2	✓	✓	U.S.A.	2	✓	✓	China
3	✓	✓	Germany	3	✓	✓	Germany
4	✓	✓	Japan	4	✓		Japan
5	✓	✓	Netherlands	5			United Kingdom
6	✓	✓	France	6	✓	✓	France
7	✓	✓	Korea, Rep. of	7	✓	✓	Netherlands
8	✓	✓	Russia	8			Hong Kong
9	✓	✓	Italy	9	✓		Korea, Rep. of
10			Hong Kong	10			India
11			United Kingdom	11	✓	✓	Italy
12	✓	✓	Canada	12	✓	✓	Canada
13	✓	✓	Belgium	13	✓	✓	Belgium
14	✓		Singapore	14	✓	✓	Mexico
15			Saudi Arabia	15	✓		Singapore
16	✓	✓	Mexico	16	✓	✓	Russia
17			U.A.E.	17	✓	✓	Spain
18			Taiwan	18			Taiwan
19			India	19	✓	✓	Australia
20	✓	✓	Spain	20			Thailand
21	✓	✓	Australia	21	✓	✓	Turkey
22			Brazil	22			Brazil
23			Thailand	23			U.A.E.
24			Malaysia	24	✓		Switzerland
25	✓	✓	Switzerland	25			Malaysia
26			Indonesia	26	✓		Poland
27	✓		Poland	27			Indonesia
28	✓		Sweden	28	✓	✓	Austria
29	✓	✓	Austria	29	✓		Sweden
30	✓		Norway	30			Saudi Arabia
31	✓		Czech Republic	31	✓		Czech Republic
32	✓		Turkey	32			South Africa
33			Qatar	33			Vietnam
34			Kuwait	34	✓	✓	Hungary
35			Ireland	35	✓	✓	Denmark
36			Nigeria	36	✓		Norway
37			Vietnam	37	✓		Ukraine
38	✓	✓	Denmark	38	✓		Chile
39			Iran	39	✓	✓	Slovak Rep.
40	✓	✓	Hungary	40	✓	✓	Finland
41			Venezuela	41	✓		Israel
42	✓		Iraq	42			Portugal
43			Kazakhstan	43	✓		Romania
44			South Africa	44	✓		Egypt
45	✓	✓	Slovak Rep.	45	✓	✓	Argentina
46	✓	✓	Argentina	46			Philippines
47	✓		Chile	47	✓	✓	Greece
48			Angola	48			Ireland
49	✓	✓	Finland	49			Venezuela
50			Algeria	50			Colombia

From a comparison of the lists above (figure 4 and 5) a number of observations can be made. Many CISG contracting countries have significant cross-border activity, and their domestic CISG related case law is represented in the Kritzer Database. These countries are China, United States of America, Germany, Netherlands, France, Russia, Italy, Canada, Belgium, Mexico, Spain, Australia, Switzerland, Austria, Denmark, Hungary, Slovak Republic, Argentina, Finland, and Greece. In regard to these countries, there is a match between the two lists, and it is likely that the Kritzer Database is a reflection of reality.

Another observation is that a group of countries have not reported CISG case law to the Kritzer Database. Assuming that cross-border trade in merchandise will generate disputes at the same rate in any country, countries ranking high in import/export of merchandise should also report a high number of cases in the Kritzer Database. If they do not, the Kritzer Database provides only part of the full picture. It is tempting to conclude that the countries appearing as having significant cross-border trade, but no reported CISG case law, are simply underreporting their already existing CISG case law to the Kritzer Database, but this would be too hasty a conclusion.

First of all, not all countries are supposed to report CISG case law. The Convention has simply not been ratified by a number of countries. These countries are United Kingdom, Saudi Arabia, United Arab Emirates, India, Brazil,⁹¹ Thailand, Malaysia, Indonesia, Qatar, Kuwait, Ireland, Nigeria, Vietnam, Iran, Venezuela, Kazakhstan, South Africa, Angola, Algeria, Columbia, Philippines, Portugal, Hong Kong, and Taipei/Taiwan.⁹² The Convention does not apply as the default rule in these countries when the private international law rules point to the laws of one of these states. It is therefore likely to be consistent with reality when no domestic CISG case law has been reported from these countries.

Second, Japan (CISG entered into force august 2009) and

⁹¹ At the time of the freeze frame Brazil was not yet a CISG contracting state. The CISG enters into force in Brazil in April 2014.

⁹² Hong Kong and Taiwan are being treated as separate entities from China in both the statistics of WTO and in the list of CISG contracting states.

Turkey (August 2011) have only just recently become CISG contracting states, and therefore it is to be expected that, despite a high value in cross-border activity, they have yet to report case law. It is therefore likely that the Kritzer Database provides a true picture when it contains little, if any, case law from those two countries.

Third, and more curiously, Korea (March 2005), Singapore (March 1996), Poland (June 1996), Sweden (January 1989), Norway (August 1989), Czech Republic (January 1993), Iraq (April 1991), and Chile (March 1991) have been CISG contracting states for a significant amount of time and in spite of this, no or very little, case law has been reported. This questions whether the Kritzer Database is likely to be an expression of reality in this regard.

Some of the countries in this group may be affected by particular political issues or by reservations made against the full application of the Convention. In regard to the latter, Sweden has made a reservation against the application of part II of the CISG,⁹³ but this alone cannot justify that no case law has been reported. Either the courts of Korea, Singapore, Poland, and Sweden refuse to apply the Convention or, more likely, this is due to a lack of rapporteurs in those particular countries. Of course, there may be other factors imaginable, such as traditions among lawyers to automatically exclude the application of the Convention in contracts or to refer disputed cases to arbitration.

The comparison of lists above naturally has its flaws, but the point here is that the significant countries, in terms of amount of reported case law, cannot be used to generalize for the entire group of countries engaged in international trade in goods.

Furthermore, the overview reveals the countries where rapporteurs and scholars could direct their attention. If the quality of the Kritzer Database were to be improved, it could therefore be done by locating case law in the countries expected to report such. Doing so would ease access to foreign case law,

⁹³ The reservation has recently been withdrawn. See Thomas Neumann, *The Continued Saga of the CISG in the Nordic Countries: Reservations and Transformation Reconsidered*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1 (2013).

thus promoting the development of a uniform application of the Convention.

In summary, the Kritzer Database suffers from some selection bias, meaning that its content is unlikely to be representative of the world trade in goods. In turn, the database cannot be used as a sample for making observations about the success of the Convention in the entire group of CISG contracting states. However, the bias does not hinder detection of trends in the countries that are reporting CISG case law, and this would still have value in the assessment of the success of the Convention, since it covers several of the countries having significant cross-border activity.

V. CURSORY STUDY

It would be beyond the scope and purpose of the current article to carry out a complete quantification of the content of the Kritzer Database in regard to the three criteria of success described above. Instead, a smaller cursory study is carried out. Its primary purpose is to evaluate whether the proposed study is capable of revealing a geographical and temporal overview as envisaged. The secondary purpose is to assess the success of the Convention in the two jurisdictions selected and to outline some of the questions that may follow in the wake of a full-scale study.

The cursory study is limited to the domestic court decisions of Germany and China. The two countries have been selected for the cursory study because of their differences and because they both appear on the top-seven list of countries with the most available translated case law. 283 and 58 cases are available respectively, thus providing access to the required court data from two legally very different countries. The two countries are almost polar opposites in delivery of justice and each represent their side in the East-West contradistinction under which the CISG was drafted.⁹⁴

By selecting Germany and China it becomes possible to evaluate both the Kritzer Database's capability to say some-

⁹⁴ AGRAST ET AL, *supra* note 51; Peter Schlechtriem, UNIFORM SALES LAW - THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 17-20 (1986).

thing about the geographical and temporal dimensions of the success of the Convention and to contrast two major CISG case law contributors.

Each of the three criteria of success must necessarily be broken down to a number of measurable units. Common for the three criteria is that the year and the jurisdiction of the decisions play an important role and therefore these units are recorded for each court decision in the study.

A. *The Courts' Ability to Render Transparent Decisions*

Transparency of case law and the consideration of foreign case law are key elements in achieving a uniform application of the Convention. Studying the transparency of case law from Germany and China first and foremost requires a sorting of relevant case law and, secondly, a selection of sources to be surveyed for.

All available and translated case law from the two countries has initially been selected for the study.⁹⁵ Subsequently, case law where the CISG was not applied has been removed, thus providing 258 cases from Germany and 42 cases from China available for further study.

Based on the Convention's article 7⁹⁶ as described above, a number of legal sources are allowed, required or expected to form part of the judge's reasoning. These are: a) the provisions of the CISG, b) the underlying principles of the Convention, c) domestic law, d) foreign case law, e) domestic case law, and f) scholarly works.⁹⁷

Only sources that can be attributed to the court are recorded. This is done from the point of view that it is an obligation of the court to promote a uniform development, not only by taking into consideration the sources demanded by article 7,⁹⁸ but by doing so in a transparent manner. Therefore, sources referred to by the legal counsel of one of the parties are left out of the study summarized below (figure 6 and figure 7).

⁹⁵ Availability and translation as indicated by the Kritzer Database as of 26 September 2012.

⁹⁶ CISG, *supra* note 2, at art. 7.

⁹⁷ See section III. (A)

⁹⁸ CISG, *supra* note 2, at art. 7.

The summarizing charts below indicate the yearly amount of case decisions according to which one or more legal sources were transparently referred to. Looking at figure 6 below, it is seen that in the year 1989 two court decisions transparently referred to CISG provisions, and these two decisions make up 100% of the available case law from that year.

Figure 6 - Transparent use of sources by German courts

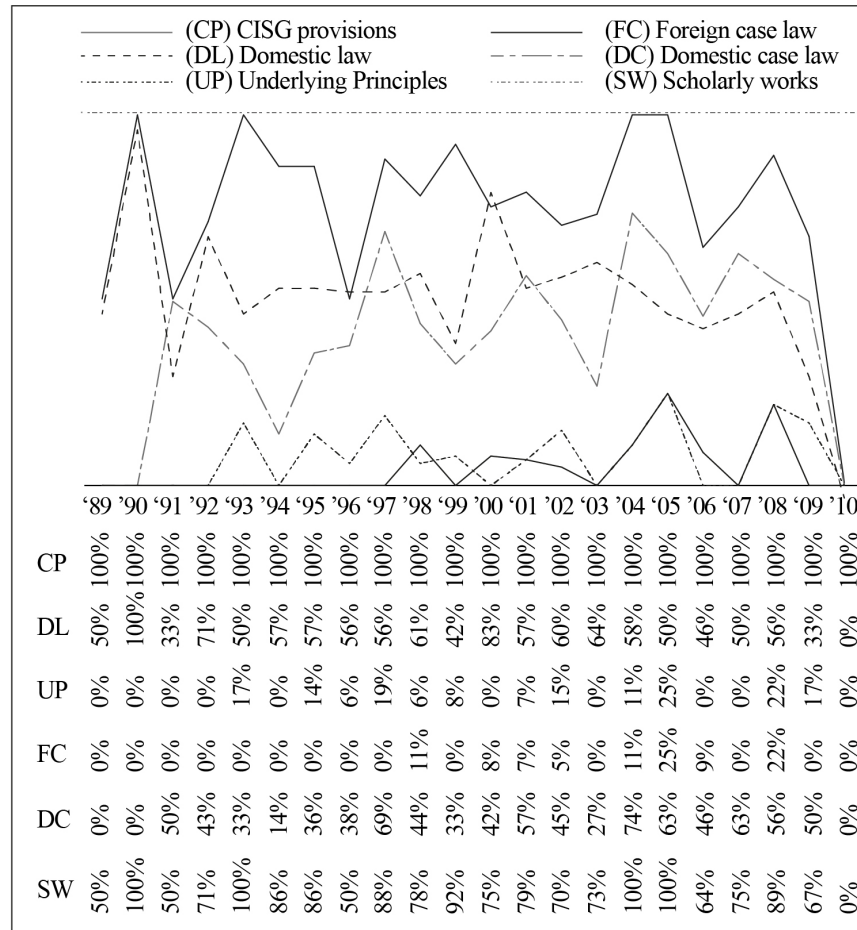
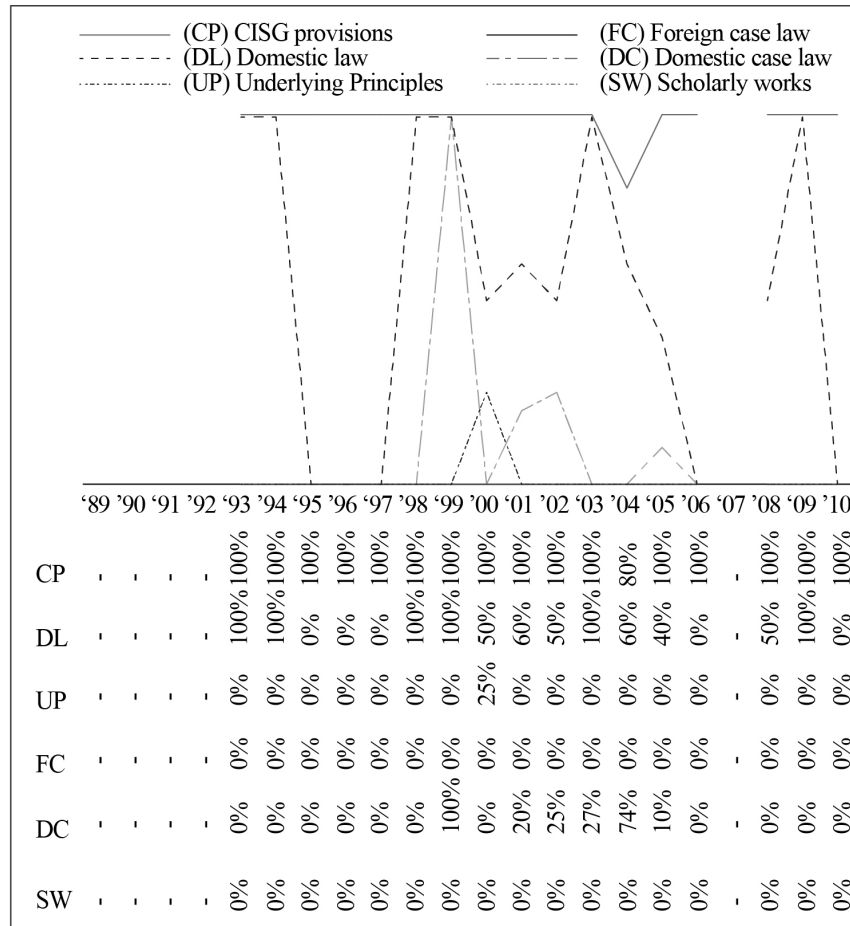


Figure 7 - Transparent use of sources by Chinese courts



It can be observed from the study that the primary transparent legal source in both Germany and China is the text of the CISG. One or more provisions of the Convention text are referred to in 100% of case decisions in Germany and in 98% of case decisions in China.

It can also be observed that the decisions from the two countries show significant differences in the transparent use and frequency of other legal sources. German decisions very often contain references to scholarly material (78%) and domestic law (56%), whereas Chinese decisions to less extent refer to domestic law (50%) and never utilizes scholarly works (0%).

2015]

ALBERT H KRITZER DATABASE

151

The courts of the two countries thus have a common starting point in the text of the CISG, and from there their ways part. The contrast in transparent use of legal sources is apparent when listing the sources and their collective frequency.

Figure 8 - Comparison of most used sources

German courts	Decisions	Chinese courts	Decisions
CISG Provisions	100% (258)	CISG Provisions	98% (41)
Scholarly works	78% (202)	Domestic law	50% (21)
Domestic law	56% (145)	Domestic case law	10% (4)
Domestic case law	45% (116)	Underlying principles	2% (1)
Underlying principles	9% (22)	Foreign case law	0% (0)
Foreign case law	5% (13)	Scholarly works	0% (0)

Considering the criterion of success being the court's ability to achieve uniform application by way of transparent use of the legal sources as permitted by article 7,⁹⁹ the preliminary conclusion is split.

The fact that courts rely on the text of the Convention is applauded since the Convention text is supposed to be the point of departure.¹⁰⁰ This emphasizes the importance of textual uniformity, as it is less likely that courts will arrive at a somewhat applied uniformity, if their point of departure is textually different. Perhaps attention to the problems of the text of the Convention would assist a development of also applied uniformity. Several problems regarding the text of the Convention are known; among those are discrepancies among the authentic texts of the Convention, domestic transformation mistakes, and the use of unauthentic language versions.

The German courts' use of scholarly works appears to be the way German courts render decisions in general. The question is, though, whether the use of scholarly works demonstrates a grasp of the CISG methodology or not. On the one hand, scholarly works can be a way for a court to consider a broad range of foreign case law that may not be readily available to the court. On the other hand, scholarly works are not a

⁹⁹ CISG, *supra* note 2, at art. 7.

¹⁰⁰ ENDERLEIN & MASKOW, *supra* note 38, at 60; VILLIGER, *supra* note 66, at 426.

primary source of the CISG, the trading parties cannot derive rights or obligations from it, and blind use of scholarly works has the inherent danger that a particular German focused application style is being developed.

In this regard it is curious to see that domestic law, domestic case law, and scholarly works are being used while other sources are not when article 7(2) instructs that matters requiring clarification should be solved firstly by the use of underlying principles before resorting to domestic law.¹⁰¹ The explanation could of course be that almost all cases in both Germany and China were so clear on the CISG matters that the court needed only to resort to the text of the Convention and that domestic law has only been used when no underlying principle could be found or when the matter was not governed by the CISG. This explanation seems unlikely.

A more plausible explanation could be that the application of article 7(2) is rather difficult. First, it requires determination whether the matter is governed by the Convention or not. This is not always clear.¹⁰² Second, it requires identification and extrapolation of the principles underlying the CISG. This is difficult, particularly without looking towards the experience of the entire community of courts. Instead, the judge resorts to domestic law with which he is familiar – the homeward trend that undermines the Convention's uniform application and in turn renders the CISG less useful for businesses.

Of course, one could argue that in Germany, underlying principles and foreign case law are considered indirectly to the extent that these are described in the scholarly works actually used by German courts. This could explain that German courts refer to principles in 9% of their decisions and to foreign case law in 5% of decisions. However, considering the high frequency in the use of scholarly works and the risk of creating a German application style, the transparent use of case law and underlying principles are better ways to promote uniformity, since they enable other courts to be persuaded by the proper interpretation of the Convention.

Looking at the general characteristics of the judiciary in

¹⁰¹ CISG, *supra* note 2, at art. 7(2).

¹⁰² Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic Law*, 25 J.L. & COM. 87, 90 (2005-06).

the two jurisdictions, the (varied) success of the Convention probably reflects a general problem of the judiciary in China, whereas Germany has less excuse as their judiciary generally performs very well (figure 9). This could point to a problem of the method of unification that was chosen for the CISG, and it questions whether expanding the scope of the Convention, as part of a possible revision, will provide businesses with a uniform cost-reducing framework.

At the general level, the adherence to the rule of law is very different in Germany and China. According to the Rule of Law Index China ranks 79 out of 97 surveyed countries in delivery of justice and Germany ranks 2.¹⁰³

Figure 9 - Comparison of delivery of justice

	China	Germany
Total score on delivery of justice	0.43	0.80
Civil justice is free of discrimination	0.45	0.87
Civil justice is free of corruption	0.37	0.85
Civil justice is free of improper government influence	0.10	0.83
Civil justice is not subject to unreasonable delays	0.64	0.68

Source: World Justice Project

The observations made here cannot be used to conclude that the decisions from Germany and China have wrong outcomes for the parties involved, but more that they do not confirm that the Courts of those two countries have developed a sophisticated grasp of the application of the Convention as envisaged by its drafters and demanded by article 7.¹⁰⁴

It could be argued that courts should be granted time to familiarize themselves with the particular method of the CISG. However, looking at the use of sources over time there is no indicator that neither German nor Chinese courts have changed their application style over the decades they have been applying the Convention (figure 6 and figure 7). This adds to the concern whether the method of leaving it to a plurality of do-

¹⁰³ AGRAST ET AL, *supra* note 51; The World Justice Project, *Civil Justice* (Sept. 26, 2013), <http://worldjusticeproject.org/factors/effective-civil-justice>.

¹⁰⁴ CISG, *supra* note 2, at art. 7.

mestic courts to achieve a uniform application is the one serving trading businesses best.

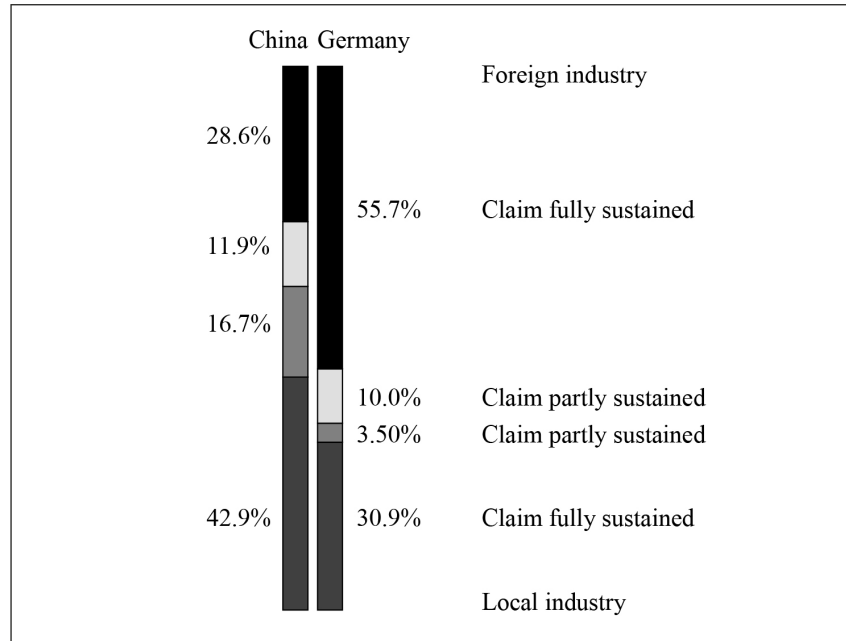
B. The Courts' Possible Protection of the Home Industry

Lack of transparency raises doubt whether the judge has relied on sources warranted by the CISG or whether other unwarranted considerations may have played a role. A myriad of reasons could have affected the judge. At present, the success of foreign industries before the domestic courts of Germany and China is to be clarified. This, together with the transparency criterion, could question whether protection of the home industry has played a role in the decision or not.

The survey focuses only on disputes between a local party and a foreign party. The local party is defined as a party who has been recorded as coming from the same jurisdiction as the seat of the court and the foreign party as one who does not. The study therefore leaves out court decisions decided between two parties who do not share jurisdiction with the court. The sorting leaves 230 court decisions from Germany and 42 court decisions from China relevant to the survey summarised below (figure 10).

The survey records how often the claims of the foreign party are sustained versus the claims of the local party. In situations where a claim has not been fully sustained by the court, for example because of a reduction of damages, the claim is recorded as being partly sustained. This makes it possible to map the collective win/lose ratio between foreign and local industries.

Figure 10 - Success of foreign industries in international disputes



Considering the criterion of success being the lack of a correlation between a court's adherence to article 7¹⁰⁵ and the win/lose ratio of foreign industries in international disputes, the preliminary conclusion causes concern.

As described previously, it is not a given fact that the win/lose ratio should be 50/50 between the local and the foreign industry. However, it may show the effect of the courts' general ability to demonstrate a sophisticated use of the Convention and general ability to adhere to the rule of law. Seeing that German courts generally rank very high on the general ability to adhere to the rule of law and that they render transparent decisions more often than Chinese ones, one cannot rule out that the large difference in the win/lose ratio of foreign industries in China is due to unwarranted considerations like a protection of the home industry.

This again confirms the importance of rendering transparent decisions, not only because it promotes uniformity, but also

¹⁰⁵ CISG, *supra* note 2, at art. 7.

because it eliminates most accusations that a protection of the home industry has been decisive. As it stands now, it is difficult to rule out the possibility that protection of the home industry has been a consideration in the Chinese court decisions.

Looking at the survey over time makes the win/lose ratio very sensitive to each individual decision, since the number of court decisions per year drops. It is difficult to observe an improvement or change in the win/lose ratio over time (figure 11 and figure 12).

Figure 11 - Development of foreign industry's succes in Germany

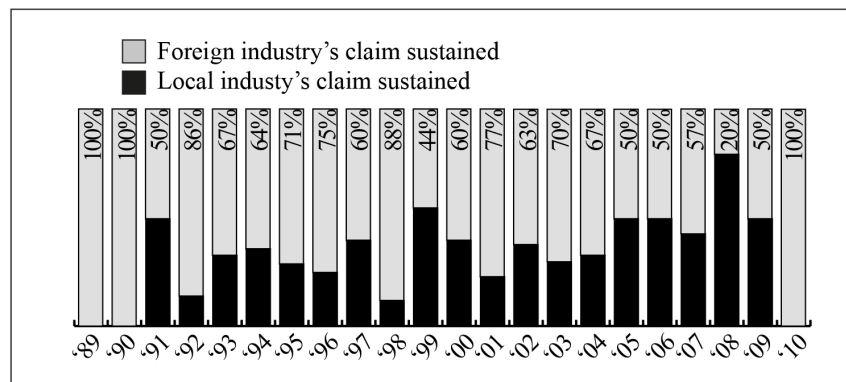
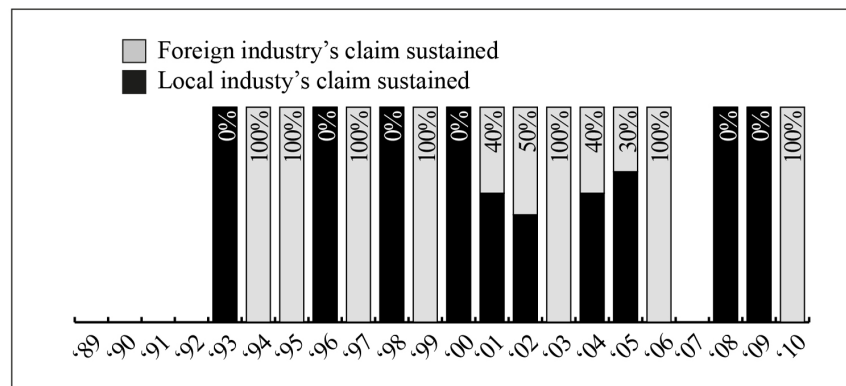


Figure 12 - Development of foreign industry's succes in China



C. The Courts' Handling of Good Faith

Finally, the ultimate success of the community of CISG courts would be, if they managed to handle one of the most controversial issues in a uniform manner – the question of the role and content of good faith.

In order to get an overview of how jurisdictions see the notion of good faith, a number of possibilities can be set up. Good faith may be referred to by the court as one of, or a combination of, the following options: a) an aid to read the CISG, b) a principle underlying the CISG, c) a domestic concept, d) an international concept outside of the CISG, e) a standard of behaviour imposed on the parties, or f) a requirement for the parties not to act in bad faith.¹⁰⁶

The survey only takes into account transparent references to good faith, its content, and role. This is consistent with article 7's requirement to promote uniformity through transparent decisions and will promote reliability of the survey,¹⁰⁷ since recording a case as supporting a particular view on good faith without a transparent reference contains a subjective element or guesswork.

A number of the 247 decisions from Germany and 42 decisions from China formed part of the survey. The survey is based on all domestic court decisions by German and Chinese courts available in the English language in the Kritzer Database. Decisions in which the case was dismissed and referred to another court and decisions where the CISG was not applied have been excluded.

The survey shows that Chinese courts made transparent reference to good faith in 2.4% of their decisions and German courts in 13% of their decisions. The more detailed reference made by the courts is summarised below (figure 13).

¹⁰⁶ See section III. (C).

¹⁰⁷ CISG, *supra* note 2, at art. 7.

Figure 13 - Forms of transparent use of good faith

Form of good faith	Germany	China
An aid to read the CISG	0% (0)	0% (0)
A principle underlying the CISG	7.7% (19)	0% (0)
A domestic concept	4.9% (12)	2.4% (1)
An international concept	0% (0)	0% (0)
A standard imposed on the parties	6.5% (16)	2.4% (1)
A requirement of absence of bad faith	1.6% (4)	0% (0)

The combination between the source of good faith and its content is interesting. In the single case identified from China the court imposed a standard of behaviour on the parties with reference to good faith according to domestic law. This could perhaps indirectly be taken as the Chinese courts' rejection of good faith being included in the Convention. Alternatively, Chinese courts have merely never been faced with a dispute involving a need to consider good faith as either an interpretation tool, a standard of behaviour or as an underlying principle.

The 32 German decisions referring to good faith can be grouped in three. The first group consists of two decisions referring to the concept of good faith without further justification of source or content. The second group (figure 14) consists of cases referring to good faith as being a principle underlying the Convention. Out of these cases the majority of decisions use good faith to impose a standard of behaviour on the parties. Another, almost equally large, amount of decisions only refers to the underlying principle without further notice as to its content or function. One decision makes mention of the standard being a requirement for the parties not to act in bad faith, and yet another decision refers to good faith as coming from both domestic law as well as an underlying principle.

The third group (figure 14) consists of decisions in which the concept of good faith is referred to as being a domestic one. In this group, the preponderant part of the decisions merely refers to the concept without express explanation of the content of the concept. Two decisions use the domestic concept to impose a standard of behaviour on the parties, two decisions require absence of bad faith from the parties, and the final decision makes reference to good faith as being both a domestic

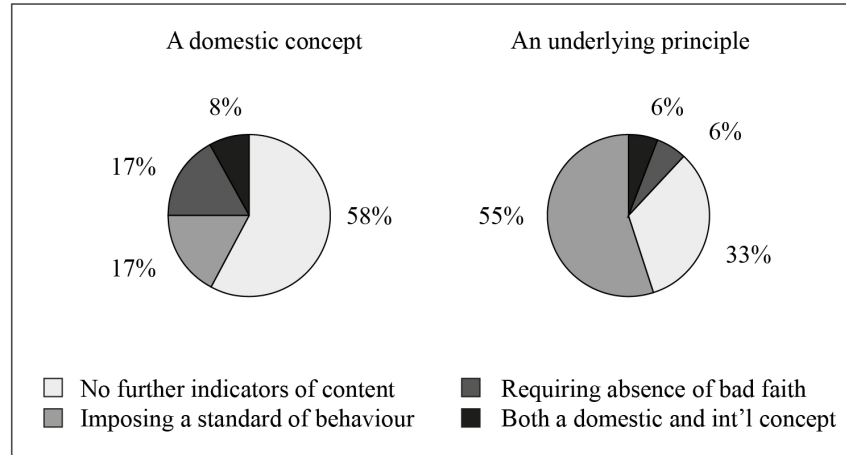
2015]

ALBERT H KRITZER DATABASE

159

concept as well as a principle underlying the CISG.

Figure 14 - Source and content of good faith in Germany



It can be observed that German courts consistently apply good faith as a standard of behaviour imposed on the parties. Sometimes this standard is justified with reference to a general principle underlying the CISG and sometimes with reference to domestic law. This does not necessarily mean that German courts have an inconsistent view on whether good faith is an underlying principle of the Convention or not. The difference in source could be due to the fact that for matters outside the scope of the Convention the appropriate gap-filler is domestic law, which also contains a concept of good faith.

A more pessimistic possibility is that the higher frequency in the use of good faith in Germany compared with China is an expression of a homeward trend. Since German courts have a long tradition of requiring good faith by trading parties in domestic disputes, it is not impossible that the courts construct a similar principle for the CISG or attempts to resort to the familiar domestic concept.¹⁰⁸ Taking into consideration the lack of transparent use of for example foreign case law in the German courts' reasoning, it cannot be ruled out that a homeward trend is taking place in the interpretation of good faith, rather than a careful consideration of foreign material and the need to

¹⁰⁸ Schlechtriem, *supra* note 60.

promote uniformity.

Looking at the success of the Convention, it is recalled that the third criterion of success pertains more to the success of the community of courts as it relates to the similarity in the use of the concept good faith independently of jurisdiction. Of course, the cursory study is impaired by the fact that merely two jurisdictions have been surveyed. The preliminary conclusion is that no common CISG approach to good faith is seen between Germany and China as German courts deal with the concept as a principle underlying the Convention as well as a domestic concept, and China largely ignores it.

Naturally, the development of good faith requires more jurisdictions to be surveyed. However, this cursory study does indicate that perhaps the courts' ability to achieve uniformity has failed when it comes to the concept of good faith. Such view is supported by the lack of transparency in decisions and consideration of relevant material from other CISG contracting states.

Considering the development over time, the study shows that the two jurisdictions are consistent. This indicates that a development in the courts' view on good faith is not taking place. In turn, it questions whether leaving uniformity in the hands of a community of domestic courts is an efficient one and whether it serves the internationally trading businesses well.

VI. CONCLUSION

The answer to the overall question of this article can be summarised as: Yes, the Kritzer Database is telling us more than we currently know. The database is a solid collection of sources relevant to the application of the Convention. It acts as more than a place where application experience can be drawn on case-by-case basis. It contains data capable of generating an overview of the application practice of the Convention across jurisdictions and over time.

Based on the study of the content of the Kritzer Database and the cursory study carried out, it appears to be possible and within reasonable reach to quantify the application practice of the Convention according to the criteria of success set-up.

Assuming that the minimal study of the decisions con-

tained in the Kritzer Database would comprise only decisions in the English language, there are still seven jurisdictions, each with more than 50 available decisions – enough to provide good indicators of the success of the Convention.

However, the proposal to quantify is not without its limits. First, the Kritzer Database does not in its amount of decisions reflect world trade. This both raises the question why some CISG contracting states do not report any case law, but it also puts a limit on the possibility of making general observations about the entire trading community.

A second limitation is found in the amount of decisions. Whilst it is possible to generate an overview of the success of the Convention in each jurisdiction, the possibility to generate a temporal overview is impaired. Though the cursory study showed that some indicators of the temporal dimension are possible to generate, the amount of decisions per year becomes so small that it is very sensitive to single case outcomes. This problem is particularly seen in regard to the question of the courts' possible protection of the home industry.

These limitations should not discourage a quantitative study of the application practice of the Convention. The cursory study has shown that studying court practice at a general level actually sheds a new light on the success of the Convention and adds to the discussions of what can be done to serve the trading community.

The cursory study thus showed that while it is possible to find examples of courts rendering sound CISG decisions, the courts' overall grasp of the Convention leaves more to be desired. It is not possible to conclude that the outcome of the individual decisions are wrong, but the fact that transparent use of sources is uncommon, that claims of foreign industries are sustained to varying degree depending on jurisdiction, and that no crystallisation of good faith is taking place, questions whether a plurality of domestic courts are capable of achieving uniform application. It also questions whether efforts to expand the scope of the Convention would be in vain or whether it would be beneficial to trading enterprises, if further efforts were made to push the development of a uniform application. This could happen at different levels, such as efforts to translate more case decisions, finding country rapporteurs, educat-

ing and informing adjudicators, looking into legal educations, or raising awareness of the uniformity goal among practitioners, states and courts.

The study also shows a willingness of courts to rely on the text of the CISG. This emphasizes the importance of creating textual uniformity as this is closely related to applied uniformity. The Convention exists in six authentic language versions, which supposedly have the same content. However, it is possible to find discrepancies among the language versions, and perhaps efforts to remedy this problem would also serve unification.

In conclusion, the proposed quantification of application practice do not require collection of case law from CISG contracting states as the Kritzer Database contains enough data to find indicators of the success of the Convention. By relying on an existing database it becomes feasible to carry out quantification for more than just a few jurisdictions. Doing so sheds a new light on the success of the Convention and sparks further questions of how best to serve the trading enterprises. Attention to such questions could potentially assist businesses which cannot afford legal expertise, but which holds potential to expand to foreign markets, and thereby add to the wealth of the country in which they are located.