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Sharing International Commercial Law across National Boundaries

Festschrift for Albert H Kritzer
on the Occasion of his
Eightieth Birthday

EDITED BY

Camilla B Andersen and
Ulrich G Schroeter

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Albert Kritzer: Pioneer of Open Access to International Private Law

*Marie Stefanini Newman **

INTRODUCTION

This essay explores the enormous contributions that Professor Albert H. Kritzer has made to the field of international commercial law through the creation of a unique and powerful database that explicates the United Nations Convention on Contracts for the International Sale of Goods¹ (CISG). As International Sales Counsel for the General Electric Company (GE), Professor Albert Kritzer negotiated contracts on behalf of GE, some of them utilizing the CISG, the 'world's pre-eminent sales law.'² He became aware of the difficulty of locating materials that construed and elucidated the treaty, but devoted himself to mastering the CISG, and eventually wrote a well-respected text on the CISG intended for practitioners.³ Professor Kritzer has often said that his publisher had difficulty keeping up with orders for the text — large corporate legal departments often bought a copy for each of their at-

* Director of the Pace Law School Library and Associate Professor of Law, Pace University School of Law. The author wishes to thank Professor Mark Shulman, Director of Graduate Programs, Pace University School of Law, and Vicky Gannon, Head of Circulation, Pace University School of Law Library, for their insightful comments on this essay

¹ United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, U.N. Doc. A/CONF.97/18, reprinted in *S. Treaty Doc.* No. 98-9 (1983) and 19 *I.L.M.* 668.

² Yang, F (2006) 'The Application of the CISG in the Current PRC Law and CI-ETAC Arbitration Practice', available at: <http://cisgw3.law.pace.edu/cisg/biblio/yang2.html>, at para 1.1.

³ Kritzer, AH (1989) *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* Kluwer. This is 'considered to be one of if not the most authoritative text on the CISG.' Peoples, L (2006) 'Strategies and Sources for International Legal Research' (60) *Q. Rep.: Conf. on Consumer Fin. L.* 412 at 422.

torneys; this demand reflected both the quality of the text and also the dearth of resources available on interpreting the CISG at that time.

Professor Kritzer notes that he has had four careers: first, as a practicing attorney; second, as an author and Internet innovator; third, as a professor; and fourth, as a clown.⁴ After his retirement from GE in 1982, Professor Kritzer wrote extensively, and then began work on an Internet database that would make available to legal practitioners, business people, academics, and students all over the world full-text primary and secondary authority on the CISG with search capability. Although Professor Kritzer probably did not realize it at the time the project was officially launched in 1996⁵ and would humbly reject the designation now, he was a visionary in recognizing the potential of the Internet to make legal materials widely available. Professor Kritzer was among the first members of the legal community to understand that the Internet would transform the way legal information is disseminated. The CISG database has leveled the playing field for the world trading and academic communities. In addition, it has laid the groundwork for a uniform application of the CISG by courts of the signatory nations.⁶ Practically speaking, it is universally accepted that legal risks and costs would be reduced if there were one law and one judiciary dealing with international trade. There is equally no debate that the creation of a single judiciary worldwide will never eventuate. Hence, the only practical possibility is the creation of a universal trade law which is applied in all or at least in most domestic courts.⁷

Article 7(1) CISG requires that '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

⁴ Interview with Albert Kritzer, Executive Secretary, Pace Institute of International Commercial Law, in White Plains, N.Y. (18 March 2007). The fourth 'career' reflects the fact that Professor Kritzer is a doting grandfather.

⁵ The database was officially launched in Vienna on 30 March 1996 and in New York on 11 April 1996. 'Pace University School of Law Launches Internet Database on International Trade Law' *Metropolitan Corporate Counsel* (April 1996), at 50.

⁶ Andersen, CB (2004) 'From Resource of Law to Source of Law: The Internet as a Source of Law in Unifying the Jurisprudence of the CISG' *Journal of Information, Law and Technology*, available at: http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/andersen.

⁷ Zeller, B (2007) *CISG and the Unification of International Trade Law* Taylor & Francis 3.

trade.' By disseminating materials that aid in the interpretation of the CISG, Professor Kritzer is helping to make Article 7(1) a reality.

With this work, Professor Kritzer is making a significant contribution to international comity. Professor Kritzer found a home for his work and for his database at the Pace University School of Law, where the Institute of International Commercial Law⁸ and the Pace University School of Law Library have partnered to develop and nurture the database for more than a decade.⁹ Professor Kritzer likes to say that 'Pace means "peace" in Italian,' and he firmly believes that the database is a small but important contribution to creating peace among nations. The spirit of the database echoes the words of nineteenth-century political economist Frédéric Bastiat who is reported to have stated that 'if goods don't cross borders, soldiers will.'¹⁰

INTERNATIONAL LAW RESEARCH AND THE OPEN ACCESS MOVEMENT

International and comparative law research can be difficult, even for those with access to well-stocked law libraries and trained law librarians. Supreme

⁸ The Institute of International Commercial Law was founded by the late Professor Willem C. Vis, who taught at the Pace University School of Law until his death in 1993. The Willem C. Vis International Commercial Arbitration Moot is named in honor of Professor Vis. For more information about the Moot, see text accompanying notes 47-48. According to the CISG website (<http://www.cisg.law.pace.edu/cisg/text/institute.html>), the 'goals of the Pace Institute of International Commercial Law are to facilitate the success of international business transactions by sharing knowledge of international commercial laws and practices through programs that interest and inform the legal profession. The Institute serves international lawyers and law students in areas of law relating to international commercial transactions and dispute settlement procedures. Its programs emphasize practical steps to avoid problems and improve responses to foreign customers and environments, competitive practices and government requirements.' Professor Kritzer serves as Executive Secretary of the Institute, but that title does not begin to reflect the range of activities he undertakes on behalf of the Institute and international sales law.

⁹ Newman, MS (1999) 'Evaluation Criteria and Quality Control for Legal Knowledge Systems on the Internet: A Case Study' (91) *Law Library Journal* 9 at 17-18 (describing, inter alia, the role of the Pace Law Library in the creation and maintenance of the CISG database).

¹⁰ Smith, VL (2005) 'Human Betterment through Globalization', available at: <http://www.fee.org/publications/notes/notes/HumanBetterment.asp>.

Court Associate Justice Stephen Breyer has complained: 'Neither I nor my law clerks can easily find relevant comparative material on our own.'¹¹ If Justice Breyer and his clerks cannot readily find international and comparative law materials in Washington, DC with the Law Library of Congress and a number of fine academic law libraries nearby, imagine the situation in other parts of the world. In many of the countries most desperate to increase trade in order to develop their economies, access to international law materials is generally next to impossible. Even today, one scholar laments, access is far too expensive and thus rare: 'The globalization of legal scholarship requires open access. Cost barriers are significant even in the United States. [...] Internet access is affordable, but subscriptions to expensive proprietary online services are inconceivable.'¹²

The difficulty in accessing legal materials in general has led some commentators in the United States and other countries to argue that efforts should be made to expand access to the materials necessary for research, and consequently for effective counsel. 'Access to law matters [...] access to legal scholarship matters too. And, of course, the Internet matters.'¹³ The Internet has emerged as the most efficient way to make primary and secondary legal authority freely and widely available.¹⁴

¹¹ Breyer, S (2003) 'Keynote Address' (97) *American Society of International Law Proceedings* 265 at 267.

¹² Solum, LB (2006) 'Download It While It's Hot: Open Access and Legal Scholarship' (10) *Lewis & Clark Law Review* 841 at 863.

¹³ Carroll, MW (2006) 'The Movement for Open Access Law' (10) *Lewis & Clark Law Review* 741 at 743 (footnote omitted). But note that there is a downside to making legal materials freely available, at least to lay people. 'Of course, access alone is not enough for non-lawyers seeking to read and understand court decisions. Legal information is undeniably complicated; it is difficult to find, difficult to interpret, and difficult to contextualize. [...] This is not to say [...] that non-lawyers cannot use the law in an effective and persuasive a manner [...] Rather, it is to say that the act of finding and using the law effectively are skills that define lawyers.' Gallacher, I (2006) 'Cite Unseen: How Neutral Citation and America's Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law' (70) *Albany Law Review* 491 at 501-02 (footnotes omitted).

¹⁴ The sciences have been moving aggressively in this direction, motivated in part by the high costs charged by commercial publishers for scientific materials. Hunter, D (2005) 'Walled Gardens' (62) *Washington & Lee Law Review* 607 at 615. Such databases as the Public Library of Science (PLOS) are 'helping to shape the global

The open access movement in law is a direct reaction to the “walled gardens” of commercial databases,¹⁵ in which ‘legal scholarship is locked up’ so that

Only those who are able to pay for access to the databases can access the scholarship, and a huge number of potential readers—the public-at-large, scholars in other fields without access to commercial legal databases, independent scholars, and scholars at institutions that cannot afford the commercial databases—are walled off from important developments in legal literature. Thus scholarship in law, the social science that is arguably the most useful to the public and that has the greatest effect on public policy, is locked away for a privileged few to read.¹⁶

The open access movement in the legal community was begun by those who believe that ‘law and legal scholarship should be freely available on the Internet [...] This nascent movement is a natural extension of the well-developed movement for free access to primary legal materials and the equally well-developed open access movement, which seeks to make all scholarly journal articles freely available on the Internet.’¹⁷ The open access movement for legal materials is now global, with concerted, organized efforts to make

open access movement — which includes scientists, funders, publishers, librarians, patient advocacy groups, lawmakers, and many others.’ PLoS ‘is a nonprofit organization of scientists and physicians committed to making the world’s scientific and medical literature a freely available public resource. All our activities are governed by our core principles.’ Both of these statements come from the PLoS homepage, <http://www.plos.org>.

¹⁵ Hunter ‘Walled Gardens’ *supra* fn 14 at 611.

¹⁶ *Id* at 611-12.

¹⁷ Carroll ‘The Movement for Open Access Law’ *supra* fn 13 at 743. Carroll is a strong supporter of the open access movement, and provides an introduction to its development, concluding that while great progress has been made in making primary sources available over the Internet, more needs to be done to make secondary materials, such as scholarly articles, available. *Id* at 749-51. One of the motives underlying the open access movement is the cost of information which is ‘pushing well beyond the rate of inflation.’ Markey, K (2007) ‘The Online Library Catalog’ (13) *D-Lib Magazine* (January/February 2007), available at: <http://www.dlib.org/dlib/january07/markey/01markey.html>.

primary sources available online¹⁸ under way in Canada,¹⁹ Australia,²⁰ England and Ireland,²¹ Hong Kong,²² the Pacific Islands,²³ and South Africa.²⁴ However, very few such efforts have been undertaken at the international level thus far, and those that have been undertaken tend to focus mainly on primary authority, ie, texts of treaties and other important enactments.²⁵ What makes the CISG database unique is that it includes both primary and secondary authority relevant to its subject, making it an electronic library of materials on the treaty. This library is regularly updated, and its content is constantly enhanced through the tireless efforts of Professor Kritzer.

THE PACE CISG DATABASE

The goal since the inception of the database has been for it to be a self-contained library on the CISG.²⁶ The database started as a modest undertaking and has grown to include not only the text of the CISG in its official languages and several unofficial languages--seventeen in all--but also the texts of the CISG's antecedents, the ULIS²⁷ and the ULF,²⁸ which are avail-

¹⁸ Carroll 'The Movement for Open Access Law' *supra* fn 13 at 745. The Legal Information Institute at Cornell University Law School (<http://www.law.cornell.edu/lii.html>), which makes available online such important United States primary sources as the United States Code, the Code of Federal Regulations, and Supreme Court opinions, has been the model for similar Legal Information Institutes in the countries listed in the text. *Id.*

¹⁹ <http://www.canlii.org>.

²⁰ <http://www.austlii.edu.au>.

²¹ <http://www.bailii.org>.

²² <http://www.hklii.org>.

²³ <http://www.paclii.org>.

²⁴ <http://www.saflii.org>.

²⁵ See, eg, the Avalon Project at Yale Law School (<http://www.yale.edu/lawweb/avalon/avalon.htm>) and the Multilaterals Project at the Fletcher School of Law and Diplomacy at Tufts University (<http://fletcher.tufts.edu/multilaterals.html>).

²⁶ The database has been more fully described in several articles, including Andersen 'From Resource of Law to Source of Law' *supra* fn 6, and Newman 'Evaluation Criteria and Quality Control' *supra* fn 9 at 17-26.

²⁷ ULIS is the acronym of the Convention Relating to a Uniform Law on the International Sale of Goods, 1 July 1964, 834 *U.N.T.S.* 107.

²⁸ ULF is the acronym of the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1 July 1964, 834 *U.N.T.S.* 169.

able for comparative purposes and help to elucidate the genesis of the CISG. The *travaux préparatoires* of the CISG are presented. Every researcher who has ever needed to access *travaux* for other treaties should understand how valuable it is to have them available online in an organized and coherent manner.²⁹ For each article of the CISG, the database provides an annotated text, which is an extensive presentation frequently including commentaries and analyses written for the database and available nowhere else.³⁰ These annotated presentations feature links to introductions to the article, links to the relevant *travaux*, links to cases that have construed the article, links to scholarly writings about the article, and numerous other relevant materials.³¹ The database's bibliography, which includes approximately 8,000 citations as of this writing, is the most comprehensive bibliography available on international sales law. In addition to citations to commentary on the CISG, the bibliography also includes references to articles and texts discussing the UNIDROIT Principles³² and the Principles of European Contract Law.³³ The bibliography benefits from the 'bibliography *rapporteurs*,' individuals in countries around the world who provide information about relevant new articles and texts published in their countries.

Because individuals who do not have access to well-stocked law libraries had difficulty retrieving secondary authority on international sales law, Professor Kritzer began an initiative several years ago to make available scholarly texts. Approximately 1,100 full-text articles and commentaries are

²⁹ Pratter, J (2005) '*À la Recherche des Travaux Préparatoires: An Approach to Researching the Drafting History of International Agreements*', available at: http://nyulawglobal.org/globalx/Travaux_Preparatoires.htm. Pratter describes the tortuous process sometimes required to access *travaux*, and states that a researcher might want to study them if 'There is doubt or disagreement about the meaning of an international agreement,' and 'the evolution of the text has intrinsic historical interest.' *Id.*

³⁰ See, eg, Article 7 CISG which includes commentaries by Professors Robert Hillman of Cornell University Law School and Ulrich Magnus of the University of Hamburg.

³¹ One of the most useful features of the annotated texts is the comparisons between provisions of the CISG and relevant provisions of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) (<http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.2004/>) and the Principles of European Contract Law (PECL) (<http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>).

³² *Id.*

³³ *Id.*

now available over the database, facilitating research for students, scholars, lawyers, and judges around the world. This collection continues to grow as copyright permissions are sought and obtained by Professor Kritzer. The inclusion of these scholarly texts is critical to the growth and development of the CISG. One proponent of the movement to provide open access to legal materials has noted that 'Access to legal scholarship to promote doctrinal development is only the most demonstrable of many benefits that such access supplies. Another example is access to articles that reframe the way one approaches a range of legal problems.'³⁴ More broadly stated, 'the common thread running through open access publishing approaches is that "all increase access to the journal literature over traditional models of scholarly publishing."³⁵

NETWORKING FOR EXPANSION OF CONTENT

The database has been built through the efforts of many individuals around the world, individuals who have contributed original and previously-published materials so that others might benefit from their insights. Professor Kritzer cultivates such individuals by tirelessly networking with faculty members and others at law faculties around the world. The main avenues for networking are the Autonomous Network of CISG Websites;³⁶ the Willem C. Vis International Commercial Arbitration Moot (Vis Moot);³⁷ the Queen Mary Case Translation Programme;³⁸ and the Clive M. Schmitthoff Student Essay Competition.³⁹ Each of these activities results in enhanced content and visibility for the CISG database.

³⁴ Carroll 'The Movement for Open Access Law' *supra* fn 13 at 743 n. 4.

³⁵ Miller, JS (2006) 'Foreword: Why Open Access to Scholarship Matters' (10) *Lewis & Clark Law Review* 733 at 734 quoting Willinsky, J (2006) *The Access Principle: The Case for Open Access to Research and Scholarship* MIT Press at 211.

³⁶ <http://www.cisg.law.pace.edu/network.html>.

³⁷ <http://www.cisg.law.pace.edu/vis.html>.

³⁸ <http://www.cisg.law.pace.edu/cisg/text/queenmary.html>.

³⁹ <http://www.cisg.law.pace.edu/cisg/text/essay.html>. The Competition is co-sponsored by the Centre for Commercial Law Studies, Queen Mary, University of London and the Institute of International Commercial Law.

The Autonomous Network of CISG Websites

Professor Kritzer recognized early on that he could not track foreign case law entirely by himself because of the growing volume of cases and the difficulty posed by foreign languages. He needed help, and the logical place to look was institutions outside the United States where there were faculty members working in the area of international sales law.⁴⁰ The first institution to join with us was the University of Freiburg, then the Université de la Sarre, and then the Universidad Carlos III de Madrid. There are now almost twenty-five network participants, with new participants joining every year. The CISG-Israel site,⁴¹ which is hosted by Bar Ilan University of Tel Aviv, and the Middle East Center for International Commercial Law site,⁴² which is hosted by Menoufia University of Cairo, refer to the Pace site as the 'mother site.' When CISG-Japan⁴³ began referring to itself as a member of the Autonomous Network of CISG Websites, Professor Kritzer liked the sound of that name and decided to adopt it as the formal name for the consortium.

Each affiliated institution publishes its own site on the Internet, with Pace acting as the coordinator; the purpose of these national sites is to offer materials that will be uniquely valuable to traders and attorneys of that country or region.⁴⁴ Sometimes universities that are joining the Autonomous Network and do not yet have much Internet expertise send fellows to work onsite with the staff at Pace. We have trained several individuals in the technical skills necessary to create and maintain their own CISG databases, hosted the new sites temporarily on our servers, and then moved the sites over to local servers when the visitors returned to their home countries. Their institutions are now full participants in the Autonomous Network.⁴⁵ 'As new participants

⁴⁰ Three of the world's leading authorities on international commercial law are affiliated with these law faculties: Professor Peter Schlechtriem (University of Freiburg), Professor Claude Witz (Université de la Sarre), and Professor Pilar Perales Viscasillas (Universidad Carlos III de Madrid), all of whom serve on the CISG Advisory Council. For more information on the Council, see text accompanying fn 54-59.

⁴¹ <http://www.biu.ac.il/law/cisg>.

⁴² <http://www.cisg.law.pace.edu/cisgarabic/index.html>.

⁴³ http://www.juris.hokudai.ac.jp/~sono/cisg/eng_index.html.

⁴⁴ See, eg, CISG-France, a product of the Université de la Sarre, at <http://witz.jura.uni-saarland.de/CISG/>.

⁴⁵ For instance, the Institute hosted Professor Hossam El-Saghir of Egypt and Dionysios Flambouras of Greece, in addition to working with several other individuals.

join the CISG consortium, we all learn from each other. We benefit from the opportunity to evaluate and, where appropriate, adopt innovative and user-friendly approaches devised by other sites' Web masters.⁴⁶ However, the major benefit flowing from the Autonomous Network is the increased volume of case law that is now available on the database.

Professor Kritzer recruits potential members of the Autonomous Network by identifying schools with a strong program in international sales law or a faculty member active in that area. He then approaches the school and invites it to join the consortium. As the CISG database's reputation has grown, schools or institutions approach Professor Kritzer, nominating themselves as members. This is how the University of Sofia in Bulgaria and the Asser Institut in the Netherlands became members of the Autonomous Network.

The Willem C. Vis International Commercial Arbitration Moot

Another networking opportunity is presented by the Vis Moot, which is held every spring in Vienna. Every year, more universities participate, and more countries are represented. For the Fourteenth Annual Moot that took place in 2007, a record 178 teams from fifty-one countries registered.⁴⁷ Many of these participants joined the Moot Alumni Association,⁴⁸ from whose ranks Professor Kritzer recruits willing case translators for the CISG database.

The Queen Mary Case Translation Programme

One of the most important features of the database is its presentation of cases construing the CISG decided by courts all over the world; these cases are being translated into English through the Institute of International Commercial Law's partnership with the Centre for Commercial Law Studies, Queen Mary College of the University of London, thus 'eliminating the language

⁴⁶ Newman 'Evaluation Criteria and Quality Control' *supra* fn 9 at 26.

⁴⁷ <http://www.cisg.law.pace.edu/cisg/moot/participants14.html>.

⁴⁸ <http://www.maa.net>. The website describes the projects and activities of the Association, one of which is the 'Casenote Project,' through which cases are translated and made available over the Pace website.

barrier to the use of foreign case law.⁴⁹ Professor Kritzer has partnered with Queen Mary to set up an informal network of translators, most of whom are law students, usually doctoral candidates. All cases go through two more iterations after the initial translation. For the second iteration, the translated text is edited by an individual who is knowledgeable about the CISG and fluent in English. Approximately sixty percent of the time, Professor Kritzer does the second-iteration edits himself. For the third iteration, the text is reviewed by a person, usually a professor, who is fluent in the language of the decision and in English, and is knowledgeable about the CISG. Professor Kritzer is able to recruit translators and editors through his extensive network of contacts around the world, which he spends a great deal of effort cultivating. One of the ways Professor Kritzer identifies potential translators and other contributors is by reading everything written in English on international sales law. When Professor Kritzer does not know the author but likes his or her work, he introduces himself in writing. This type of contact frequently leads to offers to translate cases or contribute a piece of scholarship to the database. Other offers for help come via the database's feedback form and guestbook. Professor Kritzer follows up on these messages, a number of which have led to contributions to the database and/or offers to translate cases. Many original commentaries are published on the Pace site following peer review. After publication on the Internet, Professor Kritzer has placed many of these commentaries in law journals. Because Professor Kritzer is on the advisory boards of law journals of three continents, he has had a ninety-five per cent success rate in placing material for publication. This provides an added incentive for database contributors who wish to see their works published in such prestigious journals.

The Clive M. Schmitthoff Student Essay Competition

Finally, the Institute of International Commercial Law runs an annual Essay Competition that provides additional opportunities for networking. Students from around the world submit essays on any topic related to the CISG, UNIDROIT Principles, or the PECL. The winner receives a cash prize and has the honor of having his essay included in the database.

⁴⁹ Andersen 'From Resource of Law to Source of Law' *supra* fn 6.

ACCESS TO CASE LAW AND ARBITRAL AWARDS

The rationale underlying many of Professor Kritzer's networking efforts is to increase the number of cases, both in their original languages and translated, available in the database.⁵⁰ In this way, he has sought to create a 'global jurisconsultorium,' a term coined by Professor Kritzer and Vikki Rogers, to foster the uniform interpretation of the CISG.⁵¹ The term 'global jurisconsultorium' 'denote[s] the need for cross-border consultation in deciding issues of uniform law [...] [It] plays a fundamental and crucial role in achieving the harmonisation and unification of international sales law ultimately.'⁵² Despite care taken by the drafters of the CISG to 'root out words that carry "domestic baggage," courts and arbitration panels still struggle with the words, and their legal implications, when they interpret and apply this international law.'⁵³

Another recent initiative of Professor Kritzer will also help to promote a uniform understanding of the CISG. The Advisory Council of the United Nations Convention on Contracts for the International Sale of Goods (CISG-AC) is composed of some of the most learned scholars in international sales law from around the world; however, 'its members do not represent countries or legal cultures, but they [...] look beyond the cooking pot for ideas and for a more profound understanding of issues relating to CISG.'⁵⁴ In the words of Loukas Mistelis, Secretary of the CISG-AC and a Professor at Queen Mary, Professor Kritzer was the "*spiritus rector*" of the idea of an interpretative council.⁵⁵ Six opinions have been issued so far, and they are available as part of the database.⁵⁶ The mission of the CISG-AC 'is to issue opinions relating to the interpretation and application of the Convention on request or on its

⁵⁰ As of this writing, there are over 2,000 cases available on the database.

⁵¹ See Rogers, V and Kritzer, A (2003) 'A Uniform International Sales Law Terminology' in Schwenzer, I and Hager, G (eds) *Festschrift für Peter Schlechtriem zum 70. Geburtstag* Mohr Siebeck at 225-30.

⁵² Yang 'The Application of the CISG' *supra* fn 2 at para 1.129.

⁵³ Rogers and Kritzer 'A Uniform International Sales Law Terminology' *supra* fn 51 at 224 (footnote omitted).

⁵⁴ Mistelis, L (2006) 'CISG-AC Publishes First Opinions', available at: <http://cisgw3.law.pace.edu/cisg/CISG-AC.html>. This article provides a history of the CISG-AC, a list of the participants, and a list of the decisions to date.

⁵⁵ *Id.*

⁵⁶ <http://cisgw3.law.pace.edu/cisg/CISG-AC.html>.

own initiative,⁵⁷ and to 'provide a certain framework for the interpretation of the convention.'⁵⁸

It is in the interest of the international legal and business communities for national courts to examine the decisions of other courts that have construed the CISG and the opinions of the CISG-AC in order to reach a common understanding of what the treaty means; global trading conditions make such uniformity absolutely essential.⁵⁹ Of course, courts cannot engage in this exercise in the absence of access to decisions of the courts of other countries. Secondary authority may be extremely useful in understanding the operation of the treaty, but it cannot form the basis of precedent; 'it is the judgments itself [sic] which should form the precedents and not the scholarly interpretation and commentary.'⁶⁰

Use of foreign decisions to interpret domestic law is extremely controversial in the United States; in particular, there is strong resistance to using foreign cases to construe the United States Constitution, most notably by some members of the United States Supreme Court.⁶¹ However, even the most ardent opponents of using foreign law to construe the Constitution agree that using foreign case decisions to construe an international treaty makes good sense. Justice Antonin Scalia has written that 'When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to estab-

⁵⁷ Mistelis 'CISG-AC Publishes First Opinions' supra fn 54.

⁵⁸ Andersen 'From Resource of Law to Source of Law' supra fn 6.

⁵⁹ Markesinis, B and Fedtke, J (2006) *Judicial Recourse to Foreign Law: A New Source of Inspiration?* Routledge Cavendish at 224.

⁶⁰ Andersen 'From Resource of Law to Source of Law' supra fn 6.

⁶¹ Alford, RP (2006) 'Four Mistakes in the Debate on "Outsourcing Authority"' (69) *Albany Law Review* 653 at 657-58. Alford points out that Justice Breyer, who is a pragmatist, 'embraces comparativism.' Justice Scalia has expressed a 'truculent refusal to rely on foreign experiences in the constitutional context,' even though he 'is an outspoken (and surprising) proponent of comparativism to understand the shared meaning of a treaty.' As for former Justice Sandra Day O'Connor, Alford says she 'often expresses strong support for comparative references, but in her opinions she has proven to be far more conservative.' Justice Kennedy is skeptical about comparativism, while the late 'Chief Justice Rehnquist was thought to be warming to the trend. Recent years have shown them to be precisely the opposite.' *Id.* (footnotes omitted).

lish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.’⁶²

Despite Justice Scalia’s exhortation, courts in the United States have struggled to construe the CISG appropriately.⁶³ It is hard to understand why United States judges have difficulty using foreign court decisions to construe the CISG when ‘Arbitral tribunals and to a lesser extent courts, around the world, do take into consideration foreign decisions in deciding CISG issues.’⁶⁴ In fact, several United States court decisions⁶⁵ exemplify what some commentators have called the

“homeward trend.” This is the tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention. Indulging in the homeward trend, obviously, violates the mandate of Art. 7(1) [...] and constitutes a serious—quite possibly the most serious—threat to the main purpose of the CISG: progress toward a uniform regime of international sales law.’⁶⁶

⁶² Scalia, A (2004) ‘Keynote Address: Foreign Legal Authority in the Federal Courts’ (98) *American Society of International Law Proceedings* 305.

⁶³ See, eg, *infra* fn 64–66.

⁶⁴ Mazzotta, FG (2005) ‘Why Do Some American Courts Fail to Get It Right?’ (3) *Loyola University of Chicago International Law Review* 85 at 90 (footnote omitted).

⁶⁵ Two of the most egregious decisions are U.S. District Court [N.D. Illinois], 6 July 2004 (*Raw Materials Inc. v. Manfred Forberich GmbH & Co.*), available at: <http://cisgw3.law.pace.edu/cases/040706u1.html>, and U.S. District Court [Minnesota], 31 January 2007 (*Travelers Property Casualty Co. of America v. Saint-Gobain Technical Fabrics Canada Ltd.*), available at: <http://cisgw3.law.pace.edu/cases/070131u1.html>. Both mistakenly relied on the reasoning of U.S. Court of Appeals [2nd Cir.], 6 December 1995 (*Delchi Carrier v. Rotorex Corp.*), 71 F.3d 1024, available at: <http://cisgw3.law.pace.edu/cases/951206u1.html>, according to which ‘Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code (“UCC”), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw “is not *per se* applicable.”’ *Id* at 1028 (emphasis in original) (citation omitted).

⁶⁶ Lookofsky, J and Flechtner, H (2005) ‘Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?’ (9) *Vindobona Journal of International Commercial Law and Arbitration* 199 at 202 (footnotes omitted).

At one time, judges might have been able to claim that they could not access CISG decisions from foreign tribunals. Today, however, with the Pace CISG database, UNCITRAL's CLOUT system,⁶⁷ and the UNILEX system,⁶⁸ access to case law is no longer a problem, and 'courts should not read the CISG through a "domestic lens."' ⁶⁹

It is also important for courts to have access to the decisions of arbitral tribunals that have construed the CISG. In most cases, disputes between parties to a contract governed by the CISG are referred for arbitration rather than for a judicial proceeding. 'More than 90% of international commercial disputes are [. . .] decided by international arbitral tribunals.'⁷⁰ However, most arbitral awards are confidential and not disseminated beyond the parties. 'Also, awards by international arbitral tribunals are frequently handed over from one practitioner to another in an informal way instead of being published in official collections.'⁷¹ Because of this, the Pace CISG database today includes mainly court decisions, not arbitral awards, but Professor Kritzer is working actively to improve the database's coverage of the latter. For instance, he has reached out to the China International Economic and Trade Arbitration Commission (CIETAC), 'one of the most active international commercial arbitration institutions in the world,'⁷² to add its awards to the Pace database. There are approximately two hundred CIETAC arbitral awards now available through the CISG database, and most of them have

⁶⁷ CLOUT is the acronym for 'Case Law on UNCITRAL Texts,' and it is available at http://www.uncitral.org/uncitral/en/case_law.html. CLOUT consists of abstracts and digests, but is not as complete as what is available through the Pace CISG database. 'The purpose of the [CLOUT] system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts.' *Id.*

⁶⁸ <http://www.unilex.info/dynasite.cfm?dssid=2375&dsmid=14276>. UNILEX is a 'collection of international caselaw and bibliography on two of the most important international instruments for the regulation of international commercial transactions': the CISG and the UNIDROIT Principles of International Commercial Law. *Id.* UNILEX also includes decisions of arbitral tribunals.

⁶⁹ Mazzotta 'Why Do Some American Courts Fail to Get It Right?' *supra* fn 64 at 95 (footnote omitted).

⁷⁰ Berger, KP (1999) *The Creeping Codification of the Lex Mercatoria* Kluwer at 65.

⁷¹ *Id.* at 62 (footnote omitted).

⁷² Yang 'The Application of the CISG' *supra* fn 2 at para 1.83 (footnote omitted).

been translated into English. One commentator from the People's Republic of China believes that

the quality of CIETAC awards will be tremendously enhanced by participation in the global consultorium, which promotes sharing and exchanging ideas and approaches in the application and interpretation of an international uniform law instrument such as the CISG. The reasoning behind the CIETAC awards will be enriched which in return will reinforce the persuasiveness of the awards and the observance of the rule of law in the CIETAC arbitration practice.⁷³

CONCLUSION

Professor Kritzer has spent the last twenty-five years promoting the uniform application of international sales law, and although he is disappointed when judges fail to construe the CISG according to international principles, he perseveres in his work. He tells an anecdote about judges in the United States who use the Uniform Commercial Code to construe the CISG. He likens such judges to 'a fellow [who] loses a coin on a dark street, and goes several blocks away to a street without a lamp to look for the coin there.'⁷⁴ Thanks to Professor Kritzer, there are fewer dark streets.

⁷³ Id at para 1.131.

⁷⁴ Interview with Albert Kritzer, Executive Secretary, Pace Institute of International Commercial Law, in New York, N.Y. (12 February 2007).