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THE INTERPRETATION IN MEXICO OF THE UNITED NATIONS
CONVENTION ON CONTRACTS FOR THE INTERNATIONAL
SALE OF GOODS

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I. INTRODUCTION

THE United Nations Convention on Contracts for the International Sale of Goods (CISG)¹ came into effect in Mexico on January 1, 1989.² The purpose of this Article is to assess the manner in which the CISG has been applied by the Mexican courts. Unfortunately, and despite that it has been more than twenty-four years during which international sales involving parties in Mexico have likely been governed by the CISG, very few cases applying the CISG have come to light.

Finding Mexican CISG cases is complicated. The Mexican judicial system poses the biggest obstacle, since state and federal decisions are generally not reported. Nevertheless, I have been able to obtain twenty-six decisions (at the trial and appellate levels) derived from some nine court cases,³ but I am certain that there are more CISG cases out there.

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1. U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

2. See Diario Oficial de la Federación [DO] [Official Diary of the Federation], Mar. 17, 1988 (Mex.).

3. The cases are: *Peterman Lumber, Inc. v. Encinos Rossy, S.A. de C.V.*, Juzgado Sexto de Primera Instancia del Partido de Estado de Baja California [Sixth Civil Court of First Instance of the State of Baja California], July 2001; *Banks Hardwoods v. Jorge Angel Kyriakidez García*, Segunda Sala del Tribunal Superior de Justicia de Baja California [Second Court of the Superior Tribunal of Justice, Baja California], Mar. 24, 2006; *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*, Baja California, Cuarto Tribunal Colegiado del Decimoquinto Circuito [Baja California, Fourth Panel of the Fifteenth Circuit Court], Aug. 2007; *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.*, Primer Tribunal Colegiado en Materia Civil del Primer Circuito [First Civil Court of the First Circuit], Mar. 2005; *Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.*, Quinto Tribunal Colegiado en Materia Civil del Primer Circuito [Fifth Civil Court of the First Circuit], May 2005; *Barcel, S.A. v. Steve Kliff* [Second Panel of the Superior Court of Justice], Mar. 2007; *Wolf Metals, Inc. v. Fetasa de Mexicalia, S.A.* Also, there are two cases where the CISG clearly applied, but the judges ignored its application: *Texas CCC, Inc., v. A&J Cheese Co. de Mexico, S. de R.L. de C.V.*, decided by the Fifth Civil Court in Tijuana, Baja California; and *Gerhard Deutsch*

Most of the state court decisions were provided to me by acquaintances that are actively involved in litigating collection cases and know of my interest in CISG decisions. A couple of them, I argued myself.

The federal CISG decisions were obtained through contacts in the federal judiciary who assisted me in locating cases in the judiciary's intranet, which is not open to the public. There are three references to the CISG in the Supreme Court-administered JUS case law database, but two of them are derived from administrative cases applying customs legislation, while the other case is in reference to a cosigner of a debt, who secured a CISG governed transaction with real property.

The scope of this Article is rather limited. Instead of discussing each and every one of the Mexican CISG decisions—most of which I have already discussed elsewhere⁴—I have limited my discussion to four cases that address the issues of contract formation, the standard of proof to show a contract exists, contract performance, and damages: *Kolmar Petrochemicals Americas, Inc. v. Grupo Idesa*; *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*; *Banks Hardwoods Inc. v. Jorge Angel Kyriakidez*; and *Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.*

II. A SAMPLING OF MEXICAN CISG CASES

A. *Kolmar Petrochemicals Americas, Inc. v. Grupo Idesa, S.A. de C.V.*⁵

1. *Background*

This case involves an American purchaser-plaintiff and a Mexican seller. A purchase representative at Kolmar, after ending a phone conversation with seller's agent, sent seller an email confirming their discussions, which included: that the contract was for 3,000 metric tons of MEG at \$392.50 FOB/seller's terminal at Coatzacoalcos; payment as of thirty days from the date on the bill of lading; and goods to be delivered in January 2003. Seller then emailed confirming the purchase order, but stating that it needed to get confirmation that their loading terminal would be available in 2003. Seller further added that it would contact buyer by the following Monday.

Three days later (December 2, 2002), buyer sent another email requesting clarification of seller's comments regarding the availability of the terminal. On December 19, buyer sent another email designating the ship

Produktions und Vertriebsges, M.B.H v. Artiken, S.A. de C.V., from Leon, Guanajuato, Mexico.

4. See Alejandro Osuna-González, *La Interpretación Judicial en México Relativa a la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, CONTRATACIÓN Y ARBITRAJE INTERNACIONALES 91–129 (Universidad Nacional Autónoma de México, 2005).

5. See *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.*, Quincuagésimo Juzgado Civil de Primera Instancia del Distrito Federal [Fiftieth Civil Court of First Instance in the Federal District], Oct. 2004. I thank attorney Miguel Bernal for providing me with a copy of the decisions rendered in this case, without whose help this Article would not have been possible.

that would pick up the 3,000 tons of MEG, and requesting that seller confirm its nomination of the ship that afternoon. More than twenty days after buyer's last communication (January 10, 2003), Idesa's agent sent an email claiming that the situation had gotten complicated, that he was *fighting* to save the transaction, but that the 3,000 tons of MEG had already been reserved. Seller further indicated that it was under a lot of pressure so that its company did not lose money, and made a new offer to deliver to buyer at the same terminal but at a price of \$400 per ton, or at \$415 per ton delivered at an alternate terminal in the port of Altamira. Agent for Idesa acknowledged in his email that he was not honoring their original agreement. Agent for Kolmar refused to renegotiate the terms of what he believed was a closed deal, and considered the seller's conduct a breach of their agreement made in late November. Kolmar filed a lawsuit in Mexico City for damages suffered as a consequence of seller's refusal to deliver the goods at the agreed upon price. Idesa defended on the grounds that no contract had been formed because, according to their internal procedures, it was not in their own standard form. Idesa also defended by stating that their January 10th proposal had not been accepted by the buyer.

In his ruling, the first-instance judge qualified Kolmar's November 2002 email as a proposal to Idesa to enter into a contract, and that Idesa's email of January 10, 2003 was a counteroffer per CISG Article 19.⁶ The judge also reasoned that Idesa never issued a final confirmation of *all* of the conditions established in Kolmar's "offer," because Kolmar's proposal not only concerned the price, goods, and quality, but it also referred to the time and manner of delivery, and that not all of these terms had been unconditionally accepted by seller. The judge further argued that seller never consented to delivering the goods at its terminal in Coatzacoalcos, nor did it agree that this delivery would take place in January 2003. In my opinion, the court's first mistake was qualifying Kolmar's agent's confirmatory email as an offer when it was merely putting in writing what was likely a verbal agreement that had been made over the phone.⁷ The court's

6. CISG, *supra* note 1, art. 19 reads:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Id.

7. Professor María del Pilar Perales Viscasillas arrived at this same conclusion on this case. See María del Pilar Perales Viscasillas, *Modification and Termination of the Contract (Art. 29 CISG)*, 25 J.L. & Com. 167, 173 n.30 (2005). This source also

decision should have included an analysis of CISG Article 8 (regarding interpretation of a party's intent),⁸ and CISG Article 14 (on what constitutes an offer)⁹ to see if buyer's email actually qualified as a proposal to make a contract, or if from reading its contents an alternate interpretation was possible. This did not take place.

It was only logical that after this initial *snafu* by the court, any other communication by Kolmar's agent would very likely be qualified as a counteroffer per CISG Article 19. But even this view is questionable. After rereading seller's email of January 10, 2003, agent for Idesa was in fact admitting to Kolmar that it would not be honoring the agreement it had originally made by phone, and recognized that this would surely cause problems. Idesa was now attempting to extract a higher price from Kolmar. Unfortunately, the court did a terrible job of using CISG Article 8 to interpret the statements made by both buyer and seller. In my opinion, the parties agreed on all of the basic terms (goods, quantity, and quality), and only left pending the issue of confirming the availability of seller's terminal. Also, the fact that seller remained silent after buyer emailed seller twice—once to request clarification on issue of the terminal, and later to designate the ship that would pick up the goods—could have been interpreted to mean that seller was in agreement with buyer¹⁰—at least this is the only reasonable understanding that I can extract per CISG Article 8(2). If the contrary were true, Idesa would have immediately con-

appears on UNCITRAL's website at <http://www.uncitral.org/pdf/english/CISG25/Viscasillas.pdf> (last visited Apr. 12, 2013).

8. CISG, *supra* note 1, art. 8 provides:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id.

9. CISG, *supra* note 1, art. 14 reads:

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Id.

10. I am not particularly troubled with CISG Article 18(1) regarding the silence issue, because in this case, buyer was not making a proposal, but was requesting clarification and advising seller of the ship that would pick up the goods.

tacted Kolmar to clarify that no contract had yet been concluded after Kolmar's emails. Instead, Idesa's agent would not email until the second week of January 2003, and only to advise Kolmar that it wanted to increase the price and possibly change the place of delivery, aware that this would potentially cause problems. My opinion is further supported by the fact that Idesa never mentioned that there was an issue regarding the availability of the terminal; it was all about the price.

With regards to the interpretative mandates under CISG's Article 7 (internationality, uniformity, and good faith) the judge used the civilian expression *aceptación lisa y llana* (roughly *full and unconditional acceptance*), a phrase that has a clear local law connotation, although the decision does acknowledge that in matters governed by the CISG, there is no room for the Federal Civil Code to apply. With regard to the need to promote uniformity, the judge did not cite any case law interpreting the CISG, nor does it seem that buyer made any attempt to do so in an attempt to persuade the judge.¹¹ It is also evident that no effort was made by the court to interpret the CISG in a manner that promotes the observance of good faith, although it is likely that the court assumed *it was* by not allowing Kolmar to go after Idesa, with whom (the court believed) it never concluded a contract.

2. *Kolmar Appeals the Decision*

Kolmar appealed to Mexico City's Superior Court,¹² claiming that the trial court had erred when analyzing the evidence and applying the CISG to the facts. According to buyer, the court should have found, by a proper interpretation of CISG Articles 7 and 8, that the parties had in fact made a verbal agreement, and that seller failed to object to the emails sent after they negotiated the contract. Kolmar also claimed that the court misconstrued seller's lack of response to Idesa's email, designating the ship as a non-acceptance, and that in doing so, the trial court had also violated Article 9 of the CISG.¹³ Kolmar further added that CISG Article 19(3) was not applicable.

11. See Zivilgericht Kanton Basel-Stadt [ZG] [Civil Court] Dec. 21, 1992, docket no. P4 1991/238 (Switz.), available at <http://www.unilex.info/case.cfm?id=104>; Oberlandesgericht Frankfurt am Main [OLG] [higher regional court] July 5, 1995 (Ger.), available at <http://www.unilex.info/case.cfm?id=169>.

12. See *Kolmar Petrochemicals America, Inc. v. Grupo Idesa, S.A. de C.V.*, Sala Civil del Tribunal Superior de Justicia del Distrito Federal [Superior Civil Court of Justice of the Federal District], Jan. 2005.

13. This issue arose because Kolmar claimed that the court had misinterpreted Kolmar's email advising it of the name of the ship that would pick up the goods in Altamira, and that in fact, in spite of the email's wording, it was not necessary for Idesa to approve of the ship. This constituted a violation of CISG Article 9, which incorporates commercial usages and practices either followed by the parties or that is widely observed in international trade.

In its decision, the Superior Court affirmed the ruling and reasoned that the trial court had given proper weight to the emails submitted by buyer-plaintiff, and that it was “evident” that:

The parties had not agreed on the price, payment, quality and quantity and place and time of delivery, thus triggering the proviso contained in paragraph 3 of article 19 of the United Nations’ Convention on Contracts for the International Sale of Goods (Vienna, nineteen eighty); therefore, it is incorrect to even talk about the existence of a contract.

Unfortunately, the Superior Court read CISG Article 19(3) as a *check-list* of items which the parties must fully satisfy for a contract to be concluded, an interpretation that is clearly wrong. The Appellate Court further reasoned that, because seller never responded to buyer’s request for clarification on the issue of seller’s terminal, nor to acceptance of the ship designated by buyer to pick up the goods, that this was a clear indication that buyer’s *offer* had not been accepted. The Superior Court further argued that the parties had not agreed on the price and place of delivery, and in doing so, the Superior Court went back to Idesa’s email in which it was attempting to renegotiate the price. Just like the trial court, the Superior Court failed to analyze this issue properly. As noted in my discussion of the trial court’s decision, the parties had already agreed to the goods, the price, and date and place of delivery; the only thing that was pending was the availability of seller’s terminal.

Echoing the view of the trial court, the Superior Court denied that the good faith principle provided for under Article 7 of the CISG had been violated in any way because the parties had never arrived at a consensus with regard to the price of the goods, nor regarding the place and time of delivery, making it improper for buyer to attempt to enforce a contract that was never legally concluded. In its view, the Superior Court probably thought it was in fact enforcing the mandate for the promotion of good faith.

The Superior Court dismissed the claim that the trial court had made a wrongful interpretation of CISG Article 8, instead reasoning that the court had disposed of this issue correctly, and that the exchange of emails showed that the parties were merely negotiating. In my opinion, the Superior Court should have analyzed CISG Article 8 in tandem with Articles 14 and 19, not in an isolated manner as it did.

The Superior Court did not include any citations to case law or treaties, nor does it appear that Kolmar’s counsel attempted to sway the court by doing so. I believe a different result could have been achieved had this occurred.

3. *The Decision at the Circuit Court Level*¹⁴

Finally, buyer appealed before the Circuit Court (*amparo* proceeding), claiming that the trial and appellate courts had infringed Kolmar's fundamental rights due to the lower courts' erroneous interpretation of Article 1853 of the Federal Civil Code and Articles 7, 8, and 9 of the CISG. Unfortunately for buyer, the First Panel of the First Circuit found that neither the trial nor the appellate courts had committed any violations when interpreting CISG Articles 7, 8, and 9, because seller never made an unconditional acceptance (*aceptación lisa y llana*) of buyer's proposal to conclude a contract, and that therefore no violation of buyer's fundamental rights had taken place.

B. *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*¹⁵

1. *Background*

In this case, Georgia Pacific Resins, Inc., (GPR), an American seller-plaintiff, filed a complaint in Tijuana against Grupo Bajaplay, S.A. de C.V. (Bajaplay), a Mexican buyer demanding U.S. \$139,696.98 for various shipments of resins. According to the facts as recited in the decision, the commercial relationship began in 1997 when a corporate officer of buyer completed a sale on a credit application that was transmitted by fax to seller. This application for sale on credit contained a few standard clauses with some general terms. During a period spanning a few years, buyer would fax purchase orders to acquire the resins it would use in its industrial process. The goods would later be shipped from the United States to the Mexican buyer by way of a carrier unrelated to the parties.

In their response, Bajaplay denied having completed the credit application, and also denied faxing any purchase orders to GPR. Buyer also refused to acknowledge it had received the resins seller had sold and delivered, even though evidence such as original invoices and shipping documents issued by the trucking company had been submitted and indicated Bajaplay was the buyer and consignee.

In his decision, the judge agreed with Bajaplay's argument. According to the court, GPR did not meet its burden of proving that it had delivered the goods to Bajaplay nor that Bajaplay had actually received them. The fax printouts, invoices, and shipping documents provided by seller were given no weight, which denied seller the right to receive the payment it was due. Clearly, the judge made a bad decision by setting the evidentiary threshold wrongfully high. In issuing his decision, the judge did not look at the CISG as the law applicable to the merits (nor did he mention

14. *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica, S.A. de C.V., Primer Tribunal Colegiado en Materia Civil del Primer Circuito* [First Civil Court of the First Circuit], Mar. 2005.

15. *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V., Juzgado Primero Civil del Partido Judicial de Tijuana* [Sixth Civil Court of Tijuana], Mar. 2006.

any other law for that matter). A proper methodology applying the CISG would have yielded a different result, and would have ultimately saved GPR a lot of time. The CISG's Article 11 provides that a contract's conclusion or evidence of its existence need not be reduced to a writing. In fact, its existence may be proved by witnesses, a minimum threshold that is clearly surpassed when a party is able to provide invoices, faxed purchase orders, and evidence that the goods were placed in the hands of a carrier for shipment to buyer.¹⁶ Also, commentary to the draft of CISG Article 11 clearly noted that this provision had been included because contracts for the international sale of goods are often concluded by means of communication that do not always involve a written contract.¹⁷ The purpose was to facilitate the showing that a contract exists.

Even from a procedural perspective, the judge contradicted the evidence, weighing rules that were already part of the Commerce Code at the time the judgment was issued,¹⁸ which were heavily influenced by UNCITRAL's Model Law on Electronic Commerce.¹⁹

Another aspect that was evident was the judge's inability to distinguish between seller's obligation to deliver the goods and the arrival of the goods at buyer's premises. Under both the CISG²⁰ and the Commerce Code (enacted in 1889),²¹ goods can be deemed as delivered when the seller places them at a buyer's disposal, or in the hands of a carrier. Had the judge looked at the CISG, he could have easily avoided committing this horrendous mistake.

2. *The Judgment on Appeal*

If the ruling by the trial level court was deficient, the decision rendered by the Second Chamber of the Superior Court of Baja California was worse.²² GPR argued that the trial level judge had failed to give due regard to evidence such as the invoices, transport documents, and the

16. See *Jose Luis Morales y/o Son Export, S.A. de C.V., de Hermosillo Sonora, México v. Nez Marketing de Los Angeles, California, Mexican Commission for the Protection of Foreign Trade (COMPROMEX)*, May 1993.

17. See JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 410 (1989) [hereinafter DOCUMENTARY HISTORY].

18. See Código de Comercio [CCo.] [Commercial Code], arts. 1205, 1298-A (Mex.); *Diario Oficial de la Federación* [DO] [Official Diary of the Federation], 27 de Agosto de 2009. The judge also did not consider that buyer failed to make a proper objection to the documents submitted as evidence.

19. See UNCITRAL Secretariat, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with Additional Article 5 bis as Adopted in 1998* (1999), available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (last visited June 12, 2013).

20. See CISG, *supra* note 1, art. 31.

21. The Mexican Commerce Code was heavily influenced by the Spanish Commerce Code.

22. See *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V., Segunda Sala del Tribunal Superior de Justicia de Baja California* [Second Panel of the Superior Court, Baja California], Jan. 2007.

purchase orders that buyer had sent by fax. GPR also argued that the trial level judge had erred by failing to apply the CISG.

In its decision, the Second Chamber considered that the invoices had been unilaterally prepared by the GPR; thus, they lacked any evidentiary value. With regard to the transport documents, the Second Chamber reasoned that because these did not have a signature or a stamp indicating receipt by Bajaplay, the Second Chamber could not consider that the goods had been received; therefore, the existence of the contract had not been proven.²³ Evidently, the Second Chamber committed the same mistake, by refusing to recognize the existence of the contract, and by confusing the delivery of the goods with buyer actually taking possession of them.

The biggest blunder was the Second Chamber's wrong-headed conclusion that, because Article 1 of the CISG provides that it applies to contracts for the international sale of goods, and because seller had not shown that a contract even existed, it was senseless to look into this body of law. This is equivalent to refusing to analyze the U.C.C. to determine whether a contract has been formed under its rules, when a reading of the statute would be necessary in order to make such a determination.

In another part of its opinion, the Second Chamber stated that "from the record it is evident that none of the parties cited the CISG as being applicable." In my opinion, this represents an abdication of the court's obligation to know the law—a duty that stems not just from a rule of procedure,²⁴ but is a fundamental right specifically recognized under the Constitution, that every person appearing before a Mexican court is entitled to receive a decision that is "*reasoned in accordance with the letter of the Law, its legal interpretation, or the general principles of law.*"²⁵

3. *The Decision at the Circuit Court Level (Amparo)*²⁶

Seller then appeared before the Federal Circuit Court claiming that the decision rendered by the Baja California appellate court was in violation of its fundamental right to receive a judgment in accordance with the law because the trial and appellate courts had failed to apply the CISG to the merits of the dispute. The Circuit Court agreed with seller, and ordered the appellate court to issue a new judgment based on the CISG, after reiterating that a judge is under an obligation to apply the law based

23. See *Handelsgericht des Kantons St. Gallen [HG] [Commercial Court]* Dec. 5, 1995 docket no. HG 45/1994 (Switz.), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/550/47/PDF/V0055047.pdf?OpenElement>.

24. See *Código de Comercio [CCo.] [Commercial Code]*, art. 1324.

25. See *Constitución Política de los Estados Unidos Mexicanos [C.P.]*, *Diario Oficial de la Federación [DO]*, 5 de Febrero de 1917, art. 14, ¶ 4 ("In civil cases, the final decision shall be issued pursuant to the letter of law or its legal interpretation, and lacking such law, it shall be rendered based on general principles of law.")

26. *Quejoso [Complaint]*, *Georgia Pacific Resins, Inc. Amparo Directo 225/2007, Cuarto Tribunal Colegiado del Decimoquinto Circuito [Fourth Court of the Fifteenth Circuit]*.

on the legal principle of “*da mihi factum, dabo tibi ius*” (“give me the facts, I shall give you the law”) and “*iura novit curia*” (“the judge knows the law”). According to the Circuit Court, the parties were not required to request that the court of first instance or the Second Chamber apply the CISG, because it was not a foreign body of law, but rather a national law because of its status as a treaty ratified by the Mexican Senate.²⁷

However, the Circuit Court was not exempt from committing its own mistakes. It reasoned that when a contract is concluded abroad, but will have effects in Mexico, a court must first look into the validity of the transaction prior to analyzing the application of the CISG. Clearly, the Circuit Court confused the facts because the contract was not made abroad. Additionally, the invalidity of the contract was never raised as a defense by buyer, but rather that the contract had never even existed, which are two very distinct issues. The case would not end here. The Second Chamber later issued a new decision claiming to apply the CISG, but once again found for buyer on the same evidentiary grounds, refusing to acknowledge the validity of faxed documents.

Seller would once again appeal to the Federal Circuit claiming that the Second Chamber Court was refusing to apply the law and acknowledge the existence of the contract based on the evidence that GPR had submitted. Seller also argued that the CISG did not require that GPR show that the goods actually arrived in Tijuana, and that it would suffice to show that they were delivered to a carrier to deem that GPR had performed its obligations. The Circuit Court agreed with GPR. It would reason that seller had in fact submitted original invoices that were never properly objected to by buyer; that seller performed its obligation to deliver the goods per CISG Article 31 by placing them with a carrier, and that the faxed documents along with parts of the testimony rendered by an officer of Bajaplay were sufficient to deem the contract as existing. The Circuit Court then ordered the Second Chamber to issue a new decision.

Finally, on April 29, 2008,²⁸ the Second Chamber issued a second and final decision consistent with that of the Circuit Court. In that decision, the Second Chamber starts by acknowledging that the dispute is governed by the CISG because seller and buyer have their *domiciles* in contracting states. Clearly, the Second Chamber’s use of the word *domicile* was wrong, since the CISG intentionally left out this word and instead opted for the more neutral phrase “*place of business*.”

27. Professor Alejandro Garro shed some light on the fact that in some legal systems the parties’ failure to cite the CISG could be interpreted as a tacit exclusion under CISG Article 6. The common law system does not follow the “*jura novit curia*” principle and a decision from the Oregon Court of Appeals found that it was extemporaneous for parties to cite the CISG if they did not do so at the trial level. The case is *GPL Treatment, Ltd. v. Louisiana-Pacific Corporation*, 914 P.2d 682 (Or. 1995).

28. This is an unpublished decision of the Judgment of the Second Chamber of the Baja California Superior Court, dated April 29, 2008.

The Second Chamber then went on to explain that seller had appeared to demand specific performance under CISG Article 61(b). With regards to the existence of the contract, it cited CISG Article 11's stipulation that the contract need not be evidenced by writing, and that notwithstanding, seller had submitted twenty invoices that proved its existence. The Chamber also reasoned that seller had performed its obligations per CISG Articles 30 and 31, as evidenced by the shipping documents when it delivered the goods to the trucking company for shipping. The Second Chamber also ruled that per CISG Article 59, payment was not conditioned on a formal request or compliance with any other formality. Were it not for the fact that the Second Chamber was forced to issue the decision, I would have to acknowledge that it was not that the ruling was not bad in terms of its structure and reasoning. Of course, there were no citations to foreign case law to promote uniform interpretation, but then again, is a court *always* to do so when the language of a CISG provision is clear, or should a judge only do so in what Dworkin would call *hard cases*?²⁹

C. Banks Hardwoods Inc. v. Jorge Angel Kyriakidez³⁰

This case was brought by an American plaintiff, Banks Hardwoods, Inc. (BHI), against a Mexican buyer, Jorge Angel Kyriakidez (JAK), who made a verbal agreement to buy various shipments of timber. It went generally undisputed that the parties had established the practice of entering into verbal agreements for the sale of timber, and that for each order made to BHI, JAK would issue a postdated check as a form security. BHI would make the wood available at its place of business in San Diego, California, where JAK would appear to pick up the timber for its import to Tijuana, Mexico. BHI claimed it was owed a total of U.S. \$9,287.00 worth of goods. JAK raised a defense that is typically raised in such agreements: that they had not agreed on the date of payment and, thus, JAK's obligation would not become due until BHI served JAK with a formal demand for payment, as provided for under Article 2080 of the Federal Civil Code.³¹ That argument—as made by buyer—would make the complaint filed by seller flounder.

29. See generally H. Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges*, 21 DUKE J. COMP. & INT'L L. 269 (2011).

30. See *Banks Hardwoods v. Jorge Angel Kyriakidez García*, Juzgado Sexto de lo Civil de la Ciudad de Tijuana [Sixth Civil Court of the City of Tijuana], Aug. 2005. I would like to thank Romelio Hernández for sharing copies of his decisions.

31. Código Civil Federal [CC] [Federal Civil Code], Diario Oficial de la Federación [DO], 30 de Agosto de 1931. The Federal Civil Code's Article 2080 reads:

If the time to make payment has not been fixed and if such obligation is one to deliver, the creditor may not demand payment until after thirty days following a formal request, either with the assistance of the court, or, with the assistance of a notary or two witnesses. Regarding obligations to perform, it must be complied with when so demanded by the creditor,

The trial court found for BHI. In reaching its decision, however, the judge considered that the documents submitted were of the kind contemplated under Articles 371, 372, and 373 of the Commerce Code, when in fact none of these provisions were applicable because they were displaced by the CISG. With regard to the defense raised by buyer—that no formal demand had been previously made—the judge dismissed buyer’s argument citing CISG Article 58, ruled that payment became due when the goods were placed at buyer’s disposal in San Diego, California, and ordered JAK to pay the outstanding amount plus interest. In doing so, the trial court did not discuss CISG Articles 61 and 62 (nor any other statute) to justify BHI’s right to require that JAK pay the price, making the decision incomplete and legally defective, because the relief granted was not reasoned in law. The same can be said about the court’s order that JAK pay BHI interest at a rate of 6% per annum, because seller was unable to prove that they had agreed to a 2% monthly interest as claimed. Clearly, in spite of the fact that this could be a favorable decision from seller’s perspective, the methodology that was followed leaves much to be desired. The Superior Court of Baja California continued this odd “mix ‘n match” practice of internal and international rules, even though the Commerce Code is clearly inapplicable in cases involving international sales.

On appeal, JAK argued that the trial level judge had failed to consider its argument that no formal demand had been made by BHI, and that therefore BHI’s complaint should not have succeeded.³² The Superior Court dismissed this argument, and affirmed the judgment issued by the trial court, but committed the same mistake of citing provisions from the Commerce Code. Regarding the issue of the prerequisite *formal demand* required under the Civil Code, the Superior Court found that this formality was not applicable, as this matter was governed by Articles 58 and 59 of the CISG, which provide that payment was not subject to the compliance of any type of formality.³³ The Superior Court then went on to discuss the importance of promoting the observance of good faith in international trade, as provided for under Article 7 of the Convention, and even included a passage from the CISG’s preamble,³⁴ when it stated that:

provided sufficient time has transpired for the performance of the obligation.

Id.

32. See *Banks Hardwoods v. Jorge Angel Kyriakidez García*, Segunda Sala del Tribunal Superior de Justicia de Baja California [Second Panel of the Superior Court of Justice of Baja California], Mar. 2006.

33. CISG, *supra* note 1, art. 59 (“The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.”).

34. Although the Preamble was added in the latter part of the discussions, it consequently has a very relative value. See John Honnold, *UNIFORM LAW FOR INTERNATIONAL SALES* 598 (2d ed. 1991) (“UNCITRAL did not prepare a preamble nor was this matter considered by the committees of the Vienna Conference that considered its Convention’s substantive provisions [A] preamble was first consid-

The United Nations Convention on Contracts for the International Sale of Goods, entered into on the eleventh day of April of nineteen eighty, has as its primary objective the creation of common provisions to govern said legal act, based on the premise that international trade must be based on principles of equality and mutual benefit, which constitutes an important element to Foster friendly relations amongst member States, and therefore, taking into account the New International Economic Order, as the Contracting States, by way of this Convention, adopted uniform rules, applicable to the international sale of goods, taking into account different social, economic and legal backgrounds, to contribute to the removal of legal obstacles in international trade.

In spite of its attempt to improve on the judgment issued by the trial court, the Superior Court's decision was just as flawed. It reiterated the practice of issuing judgments citing provisions from the CISG and the Commerce Code that the CISG displaces, even though the Superior Court acknowledged that the domestic statute was displaced. In another part of its decision, the Superior Court said that the CISG includes its own rules of interpretation, requiring that it be applied *uniformly* and in a manner that assures the observance of good faith in international trade. Clearly, in spite of the fact that the Superior Court referred to all of the interpretative criteria, the reality is that it failed to observe at least two criteria: the mandates to apply both an international and uniform interpretation of the CISG, which can only be achieved when judges (or arbitrators) take into account international case law in applying it.

D. Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.

1. *Background*

In this case, Agrofrut Rengo, S.A. (Rengo) a Chilean seller, filed an action against Levadura Azteca, S.A. de C.V. (Azteca), a Mexican buyer of eighty containers of canned peaches. After receiving the first twenty-two containers—and refusing to pay for them—Azteca cancelled the contract for the remainder. The contract was evidenced by a purchase order that was sent in December of 2002, in which buyer requested eighty containers that would each carry nine hundred boxes of canned peaches at a price of \$15.65 per box, payable thirty days after each shipment's date of arrival. The parties agreed that seller would first send eleven containers per month starting in February and ending in July of 2003, and a final shipment of fourteen containers in August 2003, for a total price of \$1,126,800.00.

ered and prepared by the Drafting Committee on April 9, two days before adjournment of the Conference . . .”).

The first shipment of eleven containers arrived on February 28, 2003, while a second shipment arrived a mere two weeks later, on April 17. Claiming late delivery of the second shipment, on May 5, 2003, Azteca advised Rengo that it was cancelling the contract for the remaining fifty-eight containers, and additionally refused to pay for the twenty-two containers it had previously received. Rengo filed a complaint with the Twelfth Civil Court in Mexico City³⁵ demanding payment for the twenty-two containers and interest, as well as damages for the loss of profits from the balance of the cancelled shipment. In its response, Azteca raised as a defense that the parties had not agreed on a place and time for payment, per Articles 2080 and 2082 of the Federal Civil Code. Buyer also counter-claimed for specific performance for the fifty-eight containers due under the contract, as well as damages it claimed to have suffered as a result of the late delivery of the other two shipments.

In its decision, the court ordered Azteca to pay seller \$309,870.00 U.S. for the twenty-two containers it had received plus interest, but denied Rengo's claim for loss of profit damages. The court reasoned that buyer's acceptance of the two late deliveries, per Articles 374, 375, and 376 of the Commerce Code, had made the sale final,³⁶ particularly because there was no dispute with regard to the quality of the goods. In spite of the apparent correctness of the result, it is clear that the trial court made a mistake by not applying the CISG to the case. This issue required an analysis of CISG Article 33 regarding the time of delivery³⁷ to first determine if the contract provided that the goods were to be delivered on a fixed date or within a period of time, and then decide whether seller had breached. The next step in the analysis required that the judge assess whether the alleged delay in delivering the second shipment amounted to a fundamental breach per CISG Article 25 (which would have allowed buyer to avoid the contract),³⁸ or if the delay would merely allow buyer to claim damages. Once this occurred, the judge should have ordered Azteca to pay per CISG Articles 61 and 62. Unfortunately, the judge seemed comfortable with applying a law that had already been displaced by the CISG some fifteen years earlier.

With regard to the loss of profit damages claimed by Rengo, the judge considered these to be tantamount to interest and that an order to pay interest had already been made when it ordered Azteca to pay for the two shipments. Clearly, CISG Article 74 authorizes loss of profit damages,³⁹

35. Quejoso [Complaint], Juzgado Décimo Segundo Civil del Distrito Federal [Tenth Civil Court of the Second Federal District], Expediente 30/2004.

36. See Código de Comercio [CCo] [Commercial Code], art. 375, Diario Oficial de la Federación [DO], 27 de Agosto de 2009 (Mex.) ("Si se ha pactado la entrega de las mercancías en cantidad y plazos determinados, el comprador no estará obligado a recibirlos fuera de ellos; pero si aceptare entregas parciales, quedará consumada la venta en lo que a éstas se refiere.")

37. See CISG, *supra* note 1, art. 33.

38. See *id.* art. 25.

39. See *id.* art. 74.

while CISG Article 78 provides that interest does not prejudice the right to any other damages a party may have.⁴⁰ However, the judge seems to have ignored the applicability of the CISG to this issue and made what was clearly a bad decision. The judge further reasoned that Rengo was barred from obtaining damages because no evidence had been submitted to show that these had actually been suffered.

In addressing buyer's defenses (that the time and place for payment had not been fixed in the contract), the judge found this to be a matter governed by the CISG, and that absent an agreement, and per CISG Article 57, seller's place of business is the place to effect payment,⁴¹ while the obligation to pay arises once the seller delivers the goods to the buyer or delivers the documents as provided for under the contract and the CISG.⁴² Unfortunately, the judge did not explain why he decided that some issues should be disposed of based on the Commerce Code (i.e., time of delivery or finality of the sale), while other issues (i.e., right to receive payment even if no place or time have been fixed) were to be decided based on the CISG. The only answer is that the judge was unfamiliar with the scope of the CISG, and opted to travel down a road he was more familiar with, clearly violating not just the CISG, but also a constitutional mandate that judges are obligated to render their decisions based on the applicable law or its legal interpretation. Here, that clearly did not happen.

2. *The Appeal*

Both Rengo and Azteca appealed the trial court's decision to Mexico City's Superior Court.⁴³ In Rengo's appeal, it claimed that the trial court wrongfully applied the Federal Civil Code's Articles 1949, 2104, 2108, 2109, and 2110, and that the trial court did not provide a reasoned decision as to why seller was being denied loss of profit damages. Clearly, Rengo committed a major error in citing these provisions as the applicable law to the merits of the dispute, when these issues (i.e., rights of seller against a breaching buyer and the entitlement to damages) all fall within the CISG. Buyer made a similar error when it appealed arguing (based on the Civil Code) that the trial court had erred in ordering Azteca to pay seller, when neither the date nor the place of payment had been fixed in the contract, that prior to instituting its complaint, Rengo should have made a formal demand for payment, and that the matter was not yet ripe for a lawsuit.

In its decision, the Superior Court made a grandiose statement that it would apply the CISG—an announcement that causes nothing but disap-

40. *See id.* art. 78.

41. *See id.* art. 57.

42. *See id.* art. 58.

43. *See* *Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.* The appeals were lodged under file numbers 767/04/09 and 767/04/10, and were decided by the Superior Court of the Federal District (Mexico City) on March 16, 2005.

pointment after reading it. Most of the issues raised on appeal were disposed of with the Superior Court relying on the Federal Civil Code—a body of law that was (for this case at least) irrelevant. Regarding Rengo’s claim to loss of profit damages, the Superior Court affirmed the trial court’s decision, restating that, when the trial court ordered Azteca to pay interest on the amounts due for the twenty-two containers, seller’s request had been satisfied by the trial court. Clearly, the Superior Court repeated the same mistake of confusing such distinct items as damages and interests, and obviously failed to even look at the CISG, though it is not surprising, considering that not even the seller was claiming that it was the applicable law.

In its wrong-headed analysis, the Superior Court also reasoned that Rengo needed to prove there was a direct nexus between the breach and the damages it claimed to have suffered, and that Rengo had failed to show a deprivation of a profit as a direct result of the breach. The court further argued that Rengo did not even provide evidence showing that it had purchased additional machinery to perform its obligations under the contract, nor that it had manufactured the goods. The court’s reasoning is not only wrong, it is also blatantly absurd. Parties enter into sales contracts to make a profit. If breached, this will typically cause a loss to the non-breaching party. CISG Article 74 clearly authorizes a party to demand damages,⁴⁴ *including* loss of profits, which, in the case of a seller, could be calculated by taking into account the seller’s sales price minus its expenses in producing the goods. With regard to the issue that seller did not prove it had produced the goods pending delivery under the contract, it is evident that the Superior Court, showing absolute ignorance, failed to take into account that under CISG Article 77,⁴⁵ a non-breaching party is required to take measures to mitigate its losses (including loss of profit), at the risk of having the other party claim a reduction. Because buyer had cancelled the contract, it is very likely that Rengo refrained from producing the canned fruit. Clearly, it was not under a duty to produce the goods, and had it acted otherwise, this would have increased damages.

Another mistake that is evident from the Superior Court’s reasoning is its interpretation of what the limit for damages should be. It stated that a party may be entitled to damages that are an *immediate and direct* result of the breach—a rule that is provided for under the Civil Code that was superseded in cases governed by the CISG. It is not surprising, given the inconsistent application of the CISG, that the Superior Court would not understand that this matter was not governed by the Civil Code. The mistake is not trivial. The limits set forth under the Mexican Civil Code’s Article 2110 and Article 74 of the CISG are different. While under the Civil Code damages are subject to an immediacy and directness requirement (which severely limits the amounts that a party may be entitled to

44. See CISG, *supra* note 1, art. 74.

45. See *id.* art. 77.

receive), the CISG takes a more liberal approach. By allowing a party to claim damages that the breaching party knew would be a *possible consequence* of his or her breach of contract, the CISG includes a foreseeability requirement that considers what the contracting party knew at the time it was making the contract.

The Superior Court committed another error by violating the three CISG interpretative *commandments* provided for under Article 7. First, it relied on case law interpreting the Federal Civil Code's Article 1949 in order to deny Rengo its claim to loss of profit damages, in a clear violation of the CISG's mandate to take into account its international character. It also failed to promote uniformity, because not a single case or treatise on the CISG was cited, which could have assisted the Superior Court in making a correct decision. Finally, it allowed Azteca to walk away without properly compensating Rengo after it had wrongfully terminated the contract (depriving Rengo of its profits), which clearly does not do much in terms of promoting the observance of good faith in international trade.

With regard to Azteca's counterclaim for specific performance for the remainder of the fifty-eight containers, the Superior Court ruled against Azteca because it had not performed its part of the bargain, and in reaching this decision, it also mistakenly relied on Article 1949 of the Federal Civil Code.⁴⁶ Even if there is an apparent soundness in the result, the reasoning is evidently flawed because this provision did not even apply. A correct methodology would have included a discussion of CISG Article 81,⁴⁷ which relieved Rengo from any pending performance that was due under the contract because of Azteca's notice that it was cancelling it.⁴⁸ This decision once again shows a complete misunderstanding of the CISG and how it displaces the Commerce and Civil Codes. Of the few salvageable fragments from the decision on appeal is the confirmation that Article 57 of the CISG provides a gap filling rule for those cases where the parties do not agree on the place of payment.

46. See Código Civil Federal [CC] [Federal Civil Code], art. 1949, Diario Oficial de la Federación [DO], 30 de Agosto de 1931. This provision reads:

Article 1949—The right to avoid contractual obligations is implicit in reciprocal agreements, in the event that one of the parties fails to perform what it is obliged to.

The non-breaching party may choose between demanding specific performance or avoidance, and will be entitled to damages in any case. A party may also request avoidance even after it has chosen specific performance, when it is impossible to perform.

Id. It is worth noting that even the application of this provision was wrong from a domestic perspective. The applicable provision should have been Article 376 of the Commerce Code.

47. See CISG, *supra* note 1, art. 81(1).

48. See *id.* art. 72.

3. *Federal Court Review of the Superior Court's Decision*

As a consequence of the decision rendered by the Superior Court, both Rengo and Azteca appealed before the Fifth Panel of the First Circuit.⁴⁹ In a nutshell, seller's issue was that its fundamental rights had been violated when the courts refused to grant Rengo's claim for damages, because it was being deprived of earnings it was rightfully entitled to receive from the cancelled contract. According to Rengo, neither the judge at the trial level nor the magistrates on appeal took into account that there was evidence on record showing Azteca's breach for failure to pay, as well as the cancellation of the contract, and that therefore, the courts should have ordered buyer to pay damages. The Panel from the Circuit Court did not agree.

In its decision, the Circuit Court made an interpretation of Articles 1949, 2108, 2109, and 2110 of the Federal Civil Code and refused to find for Rengo, claiming that no evidence had been submitted to allow the calculation to be made. As with the trial and Superior Court, this decision was wrong because it continued to apply the Federal Civil Code when it was not even applicable,⁵⁰ as if it in some way superseded the CISG. The Circuit Court was also wrong in setting such a high standard for the proof of damages. According to an opinion of the CISG Advisory Council, it would suffice to show the facts in a reasonable manner, not with mathematical precision;⁵¹ otherwise, one of the purposes of the CISG—uniform application—would be undermined,⁵² because some countries may have varying standards to prove damages. Such varying standards would in turn

49. See *Agrofrut Rengo, S.A.*, amparo No. 292/2005, and *Levadura Azteca, S.A. de C.V.*, amparo No. 293/2005, both before el Quinto Tribunal Colegiado en Materia Civil del Primer Circuito.

50. Seller's rights can be enforced under the CISG per Article 61, which includes a *catalogue* of available remedies that a seller can use to enforce its rights against the buyer, such as the right to demand performance of the payment obligation. Articles 74 and 76 include rules that permit the parties to calculate their damages. CISG Article 78 explains the cumulative nature of damages and interest.

51. See CISG Advisory Council, Opinion No. 6, Calculation of Damages under CISG Article 74, *available at* <http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html>.

52. See *id.* The CISG opinion provides the following:

2.3 The existence of differing rules concerning the proof of damage could lead to the differential treatment of similarly situated parties. For example, buyers attempting to prove future losses often rely on assumptions about market prices and the amount of future sales. If a seller wrongfully refuses to deliver a new product or a product that the buyer had not previously been in the business of selling, there may be little concrete evidence on which the aggrieved buyer can base its damages claim, which would mainly consist of loss of profit. In such a case, countries requiring a high level of proof with regard to the fact that the aggrieved party suffered a loss would likely not allow the recovery of lost profits under Article 74. However, in countries that have a more relaxed level of proof, the aggrieved party may be able to recover such damages under Article 74. This result would be unfair and undermine the goal of the CISG to provide a uniform law on the sale of goods. In addition, the former approach would be contrary to the principle of full compensa-

invite breach of contracts, undermining the principle of full compensation on which the CISG is based. In this case, that is exactly what has happened. All the courts involved in this matter set the standard unreasonably high, and ruled in accordance with the local “*immediate and direct consequence*” standard, not the “possible consequence” standard provided for under Article 74 of the CISG.

The Circuit Court, parroting the trial and the Superior Court, opined that seller was not entitled to receive loss of profit damages, because seller had not shown that it had made the pending delivery of goods under the contract.⁵³ However, buyer’s notice that it would no longer receive seller’s goods was wrongful avoidance, which freed seller from any pending obligation under the contract and also left its rights to claim damages intact.⁵⁴ Furthermore, had seller manufactured the goods (as the court implied was a prerequisite), this would have constituted a violation of the duty to mitigate provided for under CISG Article 77, which I have already addressed.

With regard to the claims asserted by Azteca stemming from what it considered to be a flawed application of Article 375 of the Commerce Code,⁵⁵ Rengo was entitled to obtain payment because it was under an obligation to show that it had complied with all of its obligations under the contract—namely, the production of the remaining fifty-eight containers of canned peaches. Buyer also insisted that its fundamental rights were being violated because Rengo had not served Azteca with a formal demand for payment, and that therefore the case was not ripe and should have been dismissed. The Circuit Court dismissed buyer’s claim—but for the wrong reasons—and simply parroted the argument from the trial and appellate courts regarding the time of payment, but did not mention Article 59 of the CISG, which was also relevant.⁵⁶

III. THE MISAPPLICATION OF THE CISG IN MEXICO

After this sampling of Mexican cases, one should wonder whether this uniform sales law endeavor makes any sense, at least from the Mexican perspective. All of the cases that I have found have been particularly bad examples of CISG application. There was an abundant use (and abuse) of

tion. It also could provide an incentive for a party to breach its contractual obligations.

Id.

53. See CISG, *supra* note 1, art. 72.

54. See *id.* art. 81.

55. This Article provides that if delivery has been agreed to, in certain amounts and at a certain time, the buyer is not obligated to receive the goods if they are late, but if the buyer accepts partial delivery, the sale shall be deemed final with regard to these goods.

56. See CISG, *supra* note 1, art. 59 (“El comprador deberá pagar el precio en la fecha fijada o que pueda determinarse con arreglo al contrato y a la presente Convención, sin necesidad de requerimiento ni de ninguna otra formalidad por parte del vendedor.”).

expressions typical of Mexican contract law, as well as excessive court reliance on the Mexican Commercial and Civil Codes and case law interpreting them, even when issues were clearly governed by the CISG. Even in those cases where judges made a grandiose announcement that they would apply the CISG, it would all end in a hollow promise—judges continued to reason their cases based on domestic statutes.

From this sample, it was also clear that the lawyers involved in these disputes were not citing the CISG properly, nor were they attempting to persuade judges with foreign case law interpreting the CISG or treatises discussing it. I believe that part of the problem may be cultural. As I have mentioned on other occasions, the responsibility for this abandonment of the CISG cannot be placed on the shoulders of judges alone; some of it must be shared by the Mexican bar and law schools. Law schools must teach the CISG and make it part of their mandatory curricula, and it must also be included by the publishers of commercial statutes in Mexico. Save for one publisher, none of them include the CISG as part of their commercial law compilations.

The same problem the CISG faces has also affected other uniform laws that we have adopted. Take for example UNCITRAL's Model Law of Arbitration adopted in Mexico's Commerce Code in 1993. In 2006, the Mexican Supreme Court addressed the issue of *Kompetenz-Kompetenz* in a manner that caused more than a few eyebrows to rise.⁵⁷ In a divided decision, the majority held that courts had jurisdiction to address the validity of arbitration clauses, and not arbitrators. The minority cited ample authority, including the Model Law, as well as various rules from major arbitration institutions showing how this was a uniform standard. Unfortunately, the majority was not swayed, and issued a judgment that is contrary to the international consensus that arbitrators have jurisdiction to rule on their own jurisdiction.

In another example, Mexico adopted various rules on electronic commerce (clearly inspired by UNCITRAL's Model Law on Electronic Commerce), which were dispersedly included in various statutes such as the Federal and Civil and Commercial Codes and the Federal Code of Civil Procedures. To this date, courts still struggle with the proper weight to be given to electronic communications.

In spite of my somewhat bleak assessment, I still believe there is hope. Recent changes to Mexico's Constitution have incorporated by reference those rights afforded under human rights treaties that Mexico has ratified, which has caused an interesting effect: Mexican lawyers and judges are now becoming aware of the need to take into account these international instruments and now look at decisions from human rights courts. The

57. See *Competencia para conocer de la acción de nulidad del acuerdo de arbitraje prevista en el primer párrafo del art. 1424 del código de comercio*, Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation], *Novena Época*, tomo XXIV, Sept. 2006, *Materia: Civil*, Tesis: 1a./J. 25/2006, *Página 5* (Mex.).

question is how to replicate this effect in the international commercial law field.

I close with two suggestions. First, I propose that UNCITRAL prepare a practical handbook for judges to interpret the CISG and other uniform laws. This could be done in collaboration with other organizations such as UNIDROIT or the Hague Conference on Private International Law, which has published numerous handbooks on the international treaties it has promoted. Second, I propose that UNCITRAL promote training on the use and interpretation of its international treaties and uniform laws to reach the goal of promoting the uniform interpretation of international trade law.

