

# Journal of Law & Commerce

Vol. 38 (2019-2020) • ISSN: 2164-7984 (online)  
DOI 10.5195/jlc.2020.171 • <http://jlc.law.pitt.edu>

PRACTICAL CONSIDERATIONS IN OPTING-IN (OR NOT) THE CISG

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## PRACTICAL CONSIDERATIONS IN OPTING-IN (OR NOT) THE CISG

*Susanne Cook\**

### I. INTRODUCTION

Before I was a legal practitioner, I was a law student at the University of Pittsburgh, School of Law, fortunate to be able to focus on my passion: international legal issues. Fittingly, my 1988 law review article focused on the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>1</sup> I was confident that during my years of legal practice the CISG would become a constant companion of mine and would continue to enjoy increased acceptance in the business and legal communities. I envisioned myself advising commercial clients on risk mitigation in their international sales transactions governed by the CISG. I believe that business is generally best served by avoiding litigation. I therefore had envisioned utilizing the CISG as a tool for counseling clients in international sales and for drafting precise sales agreements to increase predictability of the transaction while decreasing the potential of litigation.

### II. WHAT DO THE LAST 30 YEARS TELL US ABOUT THE ACCEPTANCE OF THE CISG?

Looking back at the beliefs and expectations that we held decades ago and comparing them to how events actually unfolded, welcomes a learning opportunity, but requires accepting the discomfort of reevaluating previous expectations. The CISG entered into force right as I was getting ready to graduate from law school and when, according to my recollection, there was a general sense of optimism concerning the future of the CISG. Academic

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<sup>1</sup> See V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988).

writings reflected many peoples' belief in the CISG's bright future and welcomed success—or at least its potential as a widely accepted unifier of international sales law.<sup>2</sup> Building upon *lex mercatoria* and predecessor efforts undertaken by the International Institute for the Unification of Private Law (“UNIDROIT”), the CISG was believed to improve upon the outcome certainty of international sales transactions.<sup>3</sup>

In preparation for this presentation and article, I reviewed many U.S. academic articles on the current level of acceptance and relevance of the CISG in the United States and abroad. As the CISG matured, I noticed a shift from optimism to an underlying tone of realism. Contrary to the previous forecast, there now appears to be disappointment over the lack of acceptance of the CISG by the business and legal community.<sup>4</sup> This has resulted in outright condemnation or rejection of the CISG, as many question the CISG's usefulness as a tool for international sales transactions in light of the low utilization numbers.<sup>5</sup>

As a practitioner, my interactions with the CISG closely follow many of the general trends reported in the writings of scholars and other practitioners. In my experience, the CISG is expressly excluded in most international sales contracts. Only in the rarest of cases will merchants affirmatively opt into the CISG as the governing body of law. However, while the CISG has not been accepted as the prevailing law, or at least a commonly chosen law for international sales transactions, for the reasons further explained below, I propose that the CISG has made a positive contribution to international trade in goods and has increased predictability in international sales transactions.

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<sup>2</sup> See Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1, 13–16 (1995) (reciting the significant number of countries that acceded to the CISG and the significant number of writings around the world focusing on the CISG).

<sup>3</sup> *Id.* at 4–8; see also John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988); James P. Quinn, *The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TRADE & BUS. L. REV. 221 (2004).

<sup>4</sup> See John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195 (2016); Mathias Reimann et al., *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care*, 71 RABEL J. COMP. INT'L. PRIV. L. 115 (2007).

<sup>5</sup> See Coyle, *supra* note 4; Gilles Cuniberti, *Is the CISG Benefitting Anybody?*, 39 VAND. J. TRANSNAT'L L. 1511 (2006); Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J.L. & COM. 1 (2008).

*A. Litigation*

My most intense interaction with the CISG occurred many years ago when I was the business lawyer and relationship manager to a U.S. client, and accompanied a dispute filed by one of my litigation partners in the United States District Court for the Western District of Pennsylvania.<sup>6</sup> The case arose in the context of the purchase by a U.S. company of a mission-critical piece of equipment manufactured by a Spanish manufacturer and shipped to the purchaser's plant in American Samoa.<sup>7</sup> From the outset, the equipment was nonconforming to the sales agreement as it was defective and continued to break down, causing the repeated shutdown of the entire plant.<sup>8</sup> The manufacturer attempted to remedy the nonconformities, but ultimately failed when a key component shattered, leaving the equipment idle and incapable of repair, in the middle of the Pacific Ocean.<sup>9</sup>

The transaction was governed by the CISG—not because the parties had affirmatively selected the application of the CISG—but rather because the parties had failed to take into account most of the legal terms one would normally expect to see in sales contracts of this nature.<sup>10</sup> While the parties' agreement was precise with respect to the commercial terms, such as the specification of the equipment, its price, and the time of delivery, it failed to provide a choice of law clause.<sup>11</sup>

Because both Spain and the United States of America are signatories to the CISG, without a choice of law clause, the agreement was governed by the CISG. For U.S. commercial attorneys experienced in litigation arising under the Uniform Commercial Code (UCC), the drafting of the initial complaint under the CISG added an unfamiliar layer of analysis and requirements, resulting in additional legal expense. Practitioners likely welcome such challenges, but clients tend to prefer keeping litigation and its associated costs to a minimum. We were fortunate to be able to consult with Professor Harry Flechtner on the unique features of the CISG under the facts

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<sup>6</sup> *Impress USA, Inc. v. Decepeda A.S.A.*, No. 2:02-CV-763-DSC (W.D. Pa. 2004).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

of the case and thus mitigate some legal expenses, but most clients would rather litigate a case by applying the well-tested rules of the UCC.

From our perspective, the evidence clearly supported the breach of the sales agreement and the pleading in the complaint contained the required “short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>12</sup> The complaint affirmatively pleaded the application of the CISG, supporting this assertion by adding: “Both the United States and Spain are signatories to the United Nations Convention of Contracts for the International Sale of Goods (“CISG”).”<sup>13</sup> But the complaint contained other unique CISG features that would not be a part of the pleadings in a complaint under the UCC. For example, we were careful to add pleadings that addressed the requirement of timely examination and notice of the breach and defects, as required by Articles 38 and 39 of the CISG.<sup>14</sup> Since examination of the equipment “in as short a period of time as possible” is a requirement under Article 39 of the CISG, the complaint contained the CISG-specific allegation relating to defects that only appeared during the brief operation of the equipment in American Samoa and stated that they were defects not “capable of detection” at an earlier period of time.<sup>15</sup> A complaint under the UCC would not have contained these additional allegations of provision of prompt notice upon examination or as soon as these defects were capable of detection.

Like many of the reported cases in the U.S. legal system, we never litigated the case on its merits, and were unable to apply the substantive rules of the CISG. Rather, the case resulted in a default judgment since the defendant failed to defend after having entered an initial appearance.<sup>16</sup> The case then proceeded as a collection case in Spain.<sup>17</sup>

An internet search amongst U.S. cases that include the term “CISG” likely will result in many “false” hits. Some search results lead to cases that simply discuss the CISG in passing. Other search results may reveal cases where the CISG clearly applies, but the application of the CISG is either never raised by the parties, or is raised late in the proceedings, and the courts

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<sup>12</sup> FED. R. CIV. P. 8(a)(2).

<sup>13</sup> *Impress USA, Inc.*, *supra* note 6.

<sup>14</sup> Need Citation.

<sup>15</sup> Need Citation.

<sup>16</sup> *Impress USA, Inc.*, *supra* note 6.

<sup>17</sup> *Impress USA, Inc.*, *supra* note 6.

therefore choose to apply the theory of waiver, estoppel or untimeliness of raising the CISG.<sup>18</sup> Ultimately, the default judgment we received is just another example in this long line of cases where the substantive rules of the CISG were never applied.<sup>19</sup>

### *B. Counseling Clients on International Sales Transactions*

While I have been fortunate enough to fulfill my dream of a legal career, advising clients on their international sales and other international business activities, the CISG has not been a constant companion of mine, in the way I had originally hoped. I am grateful to have remained in touch with my CISG law school mentors, Professors Ronald Brand and Harry Flechtner, who have encouraged me to continue my academic writings and presentations to the academic and business communities, focusing on the CISG.<sup>20</sup> However, in practice, the CISG is typically discussed in terms of “opting out,” and there are only sporadic opportunities to counsel clients on the substantive merits of the CISG.

When counseling U.S. clients on the choice of law clause for international sales agreements I first ascertain whether the parties to the transaction are from countries that are signatories to the CISG. If so, the typical, best practice approach, would entail making the client aware of three basic choices: local U.S. law, the foreign law of the other contract party, or a “neutral” law (such as the CISG).

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<sup>18</sup> Clayton P. Gillette and Steven D. Walt, *Judicial Refusal to Apply Treaty Law: Domestic Law Limitations on the CISG's Application*, 22 UNIFORM L. REV. 452 (2017). In addition, there are cases where the court recognizes the application of the CISG but gives no effect to the CISG, proceeding instead to apply the UCC. A case in point is *Hesham Zaghoul Eldesouky et al. v. Hatem Abdel Aziz et al.*, No. 11-CV-6986 (S.D.N.Y. 2015) (stating, “because there is so little case law applying the CISG, courts often look to Article 2 of the Uniform Commercial Code (“UCC”) for guidance, even though the UCC is not ‘per se applicable’ to the CISG.”). See also *Macromex Srl v. Globex Int’l, Inc.*, No. 08-CV.114 (SAS) (S.D.N.Y. 2008), *aff’d*, 330 F. App’x 241 (2d Cir. 2009). Therefore, as a practical matter, whether the UCC or the CISG governs is likely immaterial.”

<sup>19</sup> *Impress USA, Inc.*, *supra* note 6.

<sup>20</sup> DRAFTING CONTRACTS UNDER THE CISG (Harry M. Flechtner et al. eds., 2007); V. Susanne Cook, *CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343 (1998); V. Susanne Cook, *The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257 (1997); V. Susanne Cook, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988).

I would then explain that while the CISG may be neutral, it is not foreign law. Rather, the CISG is U.S. substantive law that applies in all fifty states to international sales transactions when the parties' places of business are located in different countries and the countries are signatories to the CISG.<sup>21</sup> In situations where the CISG applies, the parties may opt out of its' application, but would have to do so explicitly.<sup>22</sup> For example, providing in an international sales contract for "the application of the laws of the Commonwealth of Pennsylvania" where the parties' place of business are located in different contracting states, would be interpreted as affirmatively choosing that the agreement be governed by the CISG. I would then provide an example of a contract provision that would accomplish opting out.<sup>23</sup> Finally, I would explain that as a general premise, because we cannot anticipate the circumstances and facts of a future hypothetical conflict, it is impossible to predict whether the selection of one law over another would provide an advantage to the U.S. client in the future. Ultimately, however, I would advise that there are good reasons for choosing domestic law, which in this scenario would be the UCC.

### *1. The UCC*

Practitioners advising clients on international sales agreements will "seek a result [that is] advantageous to the client,"<sup>24</sup> which translates into drafting an agreement that reflects the transaction and increases the chances of arriving at predictable results. Accordingly, practitioners will typically advise clients to conduct dispute resolution in a U.S. court or before a U.S. arbitral body. Practitioners will also advise the implementation of a choice of law provision that provides for the application of the UCC, as promulgated in the applicable U.S. State, which expressly excludes the CISG. Choosing to apply the UCC in U.S. courts is good risk mitigation because there is a

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<sup>21</sup> Convention on Contracts for the International Sale of Goods art. 1, Apr. 11, 1980.

<sup>22</sup> *Id.* art. 1, 6.

<sup>23</sup> Sample language to exclude the application of the CISG may read:

This instrument shall be deemed an agreement made under the laws of the Commonwealth of Pennsylvania, and for all purposes shall be construed and enforced in accordance with and governed by the laws of Pennsylvania without regard to its conflict of law provisions and excluding the United Nations Convention for the International Sale of Goods. All actions arising hereunder shall be instituted in Pennsylvania.

<sup>24</sup> 204 PA. CODE § 81.1(2) (2012).

significant body of precedential decisions, developed over many years, which are easily accessible. Furthermore, future disputes are likely to be adjudicated by judges, arbitrators and legal practitioners whom are well versed in interpreting and adjudicating the UCC. In addition, this familiarity of the UCC is likely to translate into lower legal fees.

## *2. Foreign Law*

The foreign party may suggest the application of its own law—a notion that most U.S. clients intuitively resist and interpret as giving the other side an advantage. U.S. practitioners will take into account the general reputation (e.g., English law vs. the laws of a developing nation), but will typically advise against accepting the application of foreign law because it introduces an unknown variable, which could only be overcome by engaging local foreign counsel, thus resulting in an additional layer of cost. In practice, after having been educated on the relative risks, some U.S. clients will accept foreign law rather than jeopardize the transaction. However, this is the point in the discussion where the CISG may be introduced as a better compromise to choice of law.

## *3. The CISG*

Practitioners with some familiarity of the CISG will counsel that it is an international treaty, developed through negotiation amongst predominantly academics, as a compromise between common law and civil law countries. As a general rule, many of the provisions of the CISG will feel logical and in many cases, not too different from the UCC. However, there are significant differences. For example, Article 38 of the CISG requires that goods be examined “in as short a period as practicable” and requires notice of rejection within a reasonable time. The UCC does not provide for a similar notice requirement, making the CISG generally more beneficial to the seller. At the same time, even when representing the seller, if a dispute were to arise, the CISG would present additional drawbacks on account of the following: (1) there are fewer U.S. court decisions that interpret the CISG’s provisions (especially when compared to the UCC),<sup>25</sup> (2) it would be more difficult (and

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<sup>25</sup> At this point, the practitioner may introduce the concept that foreign decisions interpreting the CISG would also be relevant.



probably more expensive) to find legal practitioners that are well versed in analyzing the merits of the case applying the rules of the CISG; (3) U.S. courts are generally not familiar with the CISG, though the trend supports the idea that an increasing number of U.S. courts have now worked with the rules of the CISG; and (4) both the court and the legal practitioner would be adapting pleadings and defenses to take into account those articles of the CISG, which contain unique or different features, as compared to the UCC. Therefore, a dispute governed by the CISG would be more expensive. However, because the CISG enjoys broad acceptance (a total of eighty-nine countries are signatories to the CISG), there are still situations where it makes more sense to consider opting in:

**a. Choice of Law Compromise:** The CISG is an acceptable, maybe even preferred, compromise over accepting the laws of the foreign counterpart. In the event of a dispute, application of the CISG would be much easier to manage in U.S. courts than application of a foreign law, because the CISG is U.S. law for international sales transactions between parties from different contracting states. Even if the dispute were to be adjudicated in a foreign court, located in a distant location and governed by unfamiliar procedural rules, the CISG would be a familiar law to the U.S. party. Also, even if the official language of the foreign court were a language other than English, it would be feasible to provide in the contract that the official English version of the CISG was to be applied.

**b. International Terms and Conditions:** When developing International Terms and Conditions of Sale or of Purchase, or of other standard sales agreements that will be used globally for a large number of international sales transactions, some U.S. companies with sufficient negotiation power simply provide for dispute resolution in the U.S. home court and application of the UCC as promulgated in the U.S. state of operation—expressly excluding the application of the CISG. However, depending upon the industry and the sophistication of the typical counterpart, the election of U.S. law (and U.S. dispute resolution) may be faced with opposition by the other party to the international sales transaction. Rather than negotiating the choice of law clause every time, some U.S. companies have made the decision to provide at the outset for the application of the CISG. In that situation, to the extent the company enters into international sales contracts with other parties that have their place of business in one of the many

countries that contract to the CISG, the situation is clear and the CISG will apply. However, the situation is less clear when the other party maintains its place of business in a country that has not joined the CISG as a contracting party, because the United States made an Article 95 election to have the CISG apply only in situations where the parties maintain their place of business in a different contracting state.<sup>26</sup> Therefore, as practitioners, we would advise to provide for a clear alternative choice of law clause for situations where the transaction involves a party that maintains its place of business in a country that is not a contracting state to the CISG.<sup>27</sup>

Given these options, practitioners are clear that in the majority of cases, U.S. clients continue to opt out of the CISG.

### III. WHAT WE ARE LEFT WITH

Inbound and outbound, cross-border sales transactions in the United States and worldwide are increasing<sup>28</sup> and my prediction is that this trend will continue even at a time when anti-globalization movements seem to be getting much of the attention and headlines.<sup>29</sup>

Inevitably, the number of U.S. and foreign cases that are governed by the CISG will continue to grow, whether because the parties intended the international sales transaction to be governed by the CISG, or because the contract inadvertently opted into the CISG much to the surprise of the parties, their attorneys, and the court. I am not sure that the background of how and why the international sales contract was deemed to have opted into the CISG matters. What matters is that this is an inevitable, and I believe, unstoppable development. Over time, more CISG case law will develop and more lawyers and courts knowledgeable in the unique features of the CISG will emerge.

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<sup>26</sup> Need Citation

<sup>27</sup> Harry M. Flechtner & Ronald A. Brand, *Opting In to the CISG: Avoiding the Redline Products Problems*, in A TRIBUTE TO JOSEPH M. LOOKOFSKY 95 (Mads Bryde Andersen & René Franz Henschel eds., Djøf Publishing 2015).

<sup>28</sup> See *Trade in Goods with World*, CENSUS.GOV, <https://www.census.gov/foreign-trade/balance/c0004.html> (last visited June 15, 2019); *Merchandise Exports*, DATA.WORLDBANK.ORG, <https://data.worldbank.org/indicator/TX.VAL.MRCH.CD.WT> (last visited June 15, 2019).

<sup>29</sup> See Silke Roth, *Introduction: Contemporary Counter-Movements in the Age of Brexit and Trump*, 23 SAGE J. 496 (2018).

U.S. practitioners are trained to draft agreements and adjudicate cases governed by the UCC, and thus now have a long history of precedential cases to assist in such a task. The urge of U.S. practitioners to master the rules of the CISG by looking for common ground between the CISG and the UCC is understandable, but not accurate, and likely not helpful. While there are commonalities between the two, the approach should be to view the CISG as another area of the law to be added to the legal skill set.<sup>30</sup>

What is abundantly clear is that there is a place for the CISG today and tomorrow. When opting in, the CISG provides for an additional tool to the parties to an international sales transaction on how to structure and regulate transactions. Also, when parties inadvertently choose the application of the CISG, either because the choice of law clause provides for the application of the laws of the Commonwealth of Pennsylvania, which in an international sales transaction that points to the CISG, or because the parties failed to address what law should apply to the transaction, the CISG is there to provide a rule and resolve the matter promptly.<sup>31</sup> Lengthy and expensive proceedings debating choice of law rules are unnecessary—the rules as to whether the CISG is applicable is, for the most part, clear and concise.<sup>32</sup> Practitioners want a set of rules to apply that are most advantageous to our client. But what may be equally as important is that a matter is settled quickly without undue deliberation.

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<sup>30</sup> See Quinn, *supra* note 3; Franco Ferrari, *The Relationship between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021 (1996).

<sup>31</sup> See Honnold, *supra* note 3.

<sup>32</sup> Article 95 of the CISG, however, adds some uncertainty. See Flechtner & Brand, *supra* note 24.