

Journal of Law & Commerce

Vol. 38 (2019-2020) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2020.173 • <http://jlc.law.pitt.edu>

SPRING 2019 CISG CONFERENCE AT PITT: KEYNOTE ADDRESS

THE PAST, PRESENT AND FUTURE OF THE CISG (AND OTHER
UNIFORM COMMERCIAL LAW INITIATIVES)

Harry M. Flechtner



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*Harry M. Flechtner**

I. THE PAST (A PERSONAL NARRATIVE)

It is a genuine, and doubtless undeserved, honor that I am the keynote speaker for a conference featuring such an amazing line-up of participants. As far as I remember (which I admit is not that far—I'm old), I have never before been a keynote speaker for any conference. That, of course, reflects good sense on the part of conference organizers. But the usual great sense of my extraordinary colleague, buddy, and organizer of this conference—Ron Brand—apparently is clouded by our thirty-five year long friendship. So here I am. Of course, I still think of keynote speakers from my usual perspective as not one: a keynote speaker is the person who spoils dessert. [That, by the way, has no application to anyone in this room who has keynoted a conference in which I have participated.] I will probably spoil dessert—perhaps the only “keynote-speaker” requirement I will tick off—but as you know, I retired last summer, so I can no longer be fired. Not having a job is wonderful job security. That emboldens me to say some stuff that I believe, but cannot support in the usual scholarly fashion. You will do me and others a great favor by pointing out the errors and stupidity of what I say.

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The appearance of the Convention on the International Sale of Goods as a proposed UN Convention, following the successful diplomatic conference in Vienna in March and April 1980, no doubt was greeted with great interest and, at least among supporters of the effort, great enthusiasm. I cannot personally report on that reception because I was still in law school at that time, and I heard nothing about it. I would not encounter the CISG until seven years later, when a certain Professor Ronald Brand convinced me—a domestic commercial law academic hired by the University of Pittsburgh just three years earlier to teach U.S. federal bankruptcy law—to participate in a conference on this commercial law convention I had never heard of. I am an exceedingly generous guy: I have forgiven him.

When I started studying the CISG for that December 1987 conference—a conference held just one month before the CISG would enter into force in the United States and the ten other original Contracting States—I quickly caught the enthusiasm for this instrument. For someone who had been teaching Article 2 of the UCC, which has the same basic purpose and strategy as the CISG (although in a domestic—or more accurately federalist—context), the transition was relatively easy. That was true even for me, even though I had no actual international credentials whatsoever. It helped that it was soon apparent that the scholarly challenges presented by this Convention were many and varied, ranging from the minutiae (often critical minutiae, for parties involved in litigation) of interpreting individual articles of the Convention, to extraordinarily broad questions, such as how to promote uniform interpretation of a text being applied by arbitral panels and non-specialist courts around the world without the benefit of a final interpretative authority. In short, it seemed to me that even I could probably milk this thing for a career—which I have.

Looking back at the history of the CISG over the thirty-plus years since that December 1987 conference, it is vital to remember how successful the CISG has been in stimulating important, indeed critical, advances in so many areas. It was Peter Schlechtriem's extraordinary (and typically) brilliant and creative insights into this aspect of the CISG in a keynote address at a later Pittsburgh CISG conference¹ that first dragged my sluggish mind into considering the multifaceted perspectives needed to assess the success of the

¹ Peter H. Schlechtriem, *25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, in *DRAFTING CONTRACTS UNDER THE CISG* 167 (Harry M. Flechtner et al. eds., 2008).

Convention—from its role in creating a new *lingua franca* for contract law (Peter’s wonderful insight), to stimulating careful study of the methodology needed for producing a truly international and truly autonomous interpretation of a uniform law text, to extraordinary advances in creating the research infrastructure needed to support such an autonomous international interpretation.

My slow insight into a more sophisticated way to assess the success of the Convention was pushed forward by the person who most inspired me to pursue this career avenue—Professor John Honnold. As anyone who had the opportunity to meet him will testify, John was a great intellect melded with a truly kind and beautiful soul. I admit to being fundamentally lazy, but (once again) because of Ron Brand’s indefatigable energy in pushing forward the most critical and intellectually challenging enterprise to which a lawyer can be a party—figuring out how law can become global—I had the extraordinary opportunity to meet and get to know John. John gave ominous warnings about the “homeward trend”—the fatal danger of thinking parochially in this enterprise aimed at creating *uniform* international commercial law—but he also had great confidence in our ability to overcome this danger and to achieve an international perspective on international legal texts. This gave me the context to understand and appreciate Peter’s insights.

I am extremely impressed with the way the papers and presentations at this conference are taking up the challenge inherent in Peter’s paper and John’s warnings about the homeward trend. I am also, I admit, embarrassed at how far you all are ahead of me on this. Your insights into the diverse ways in which the CISG has succeeded in moving the enterprise of a functional global commercial legal system forward—and the ways in which it could be interpreted to make it more successful—are wonderful. But, because there is nothing like a downer keynote speaker to sour a wonderful evening, I want to acknowledge and focus on an aspect of the CISG that I think we all must admit has not been as successful as we hoped: it simply is not used—or, at least, not consciously used—to the extent needed to achieve its purpose of significantly reducing the transactions costs associated with choice of law in international trade, and thereby stimulating (in a healthy fashion) global

commerce.² Lawyers who are aware of the existence of and potential applicability of the CISG—and that number is doubtless still not as high a number as it should be—often advise their clients to opt out. That appears to be true in a number of different places, and concrete evidence of a contrary approach is slim. Drafting an effective opt out clause is tricky and thus leads to broader application of the Convention,³ but this results in “inadvertent” (from the parties’ perspective) application of the CISG, and that kind of application loses some of the Convention’s most important benefits. The failure of the Convention to be put intentionally into actual use more often undermines the central purposes of the CISG: the reduction of international trade transactions costs associated with choice of law issues.

And here is the thing: I believe the advice to opt out is perfectly rational. I know it has been argued that it may be malpractice for a lawyer to advise a client to opt-out before becoming thoroughly familiar with the advantages and disadvantages of the CISG for the client.⁴ But becoming familiar enough with the CISG to be able to draft a contract under it is an expensive proposition; and if (heaven forbid) the transaction goes south, becoming familiar enough with the CISG to litigate under it would be a much greater additional expense, particularly when you factor in the (likely) greater uncertainty in predicting CISG outcomes compared to outcomes under alternative and longer-standing domestic law. Who will bear that expense? Perhaps the lawyers themselves, in the form of unreimbursed time spent learning about the CISG; perhaps the clients, if the lawyers can find a way to pass on the extra costs of becoming familiar with the Convention. Most likely, there will be some of both. So in my view it is perfectly accurate, rational, and—in most cases, I believe—ethical advice to say to a client:

² See John Coyle, *The Role of the CISG in Canadian Contract Practice: An Empirical Study*, 38 J.L. & COMM. 66 (Fall 2019–Spring 2020); see also Ulrich G. Schroeter, *Empirical Evidence of Courts’, Parties’ and Counsels’ Approach to the CISG*, in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 649 (Larry A. DiMatteo ed., 2014) (This provides a comprehensive and careful discussion of the available evidence on the use of the Convention. That study questions the evidence supporting assertions that the CISG is not often used, and cites evidence that it is used more than generally asserted—although the evidence for that is also, admittedly, thin.)

³ Ulrich G. Schroeter, *Empirical Evidence on Courts’, Parties’ and Counsels’ Approach to the CISG*, in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 649 (Larry A. DiMatteo ed., 2014).

⁴ See, e.g., *id.*

If you want to use the CISG, fine. It may have advantages, or disadvantages for you, but right now I don't know which will be greater. I can tell you that using the CISG will entail increased expense as compared to sticking with the applicable law with which we are familiar. Our fees may have to be increased to cover at least a part of our increased costs.

And I think we all know how clients would likely respond to that.

It has been argued that the reason the CISG is not used is because it is substantively inferior to the alternatives—specifically (for U.S. parties) inferior to the alternative of applying Article 2 of the UCC.⁵ I don't buy that explanation because I don't think it fits the facts. I do not see non-U.S. parties opting in to the UCC because of its substantive superiority. The only parties I see insisting on UCC Article 2 are from the United States. The evidence I see suggests that parties routinely prefer the domestic law with which they are familiar, and for which their tested contract forms and models have been drafted.⁶ The sunk costs of getting familiar with that law, and drafting appropriate documents thereunder, have already been incurred. And parties who cannot get their own already-familiar domestic law, I understand, are not flocking to UCC Article 2 as an alternative. I understand they have tended to opt for Swiss Law or English Law, because (in the former case) that law (or at least the culture behind it) has the reputation of being even-handed, “neutral,” and fair (like the Swiss), or (in the latter case) because that law has the reputation of being well-adapted to international trade. I think the word “reputation” is the key word here, for I have never seen yet any study quantifying the substantive superiority of English law for international sales. And many years ago, Ingeborg Schwenzer disabused me of the idea that

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The CISG is a treaty whose provisions are likely to become less and less useful as time goes on. Indeed, we predict that CISG ultimately will lose out in competition with alternative legal regimes. The most likely competitors are prominent domestic law systems that offer the kinds of substantive rules preferred by commercial parties. Should that prediction materialize, then CISG would simply remain as a costly impediment to the sort of harmonization that has occurred in the common law of contracts in the United States. In the United States, a natural experiment with multiple common law regimes has shown that economic and cultural forces over time produce a remarkable degree of harmonization around substantively uniform rules of contract law.

See Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 446, 484 (2005).

⁶ This factor is recognized in *id.* at 477. Those authors also assert, however, that “[p]ersistent and substantial opting out of the CISG . . . is likely to reflect a distaste for its substantive terms.” *Id.*

Swiss sales law was substantively superior or fairer compared to other domestic laws.

The fact is that the CISG is caught in a kind of prisoner's or public goods dilemma: it would benefit global commerce if the Convention was widely known and used so that parties could spend less time and money bargaining over choice of law, and less time becoming familiar with a foreign domestic law if they fail to get their own law to apply. I repeat, that would reduce transactions costs associated with choice of law issues. Those savings to global commerce, in general, would almost surely far outweigh the start-up costs (the costs of learning about the CISG) associated with transitioning to the Convention. Indeed, in a previous Pittsburgh conference, Professor Ken Lehn from Pitt's business school contributed an economic essay that makes a convincing case for significant transactions costs saving if the CISG replaced the system of applying (generally) domestic sales law to international sales transactions; he demonstrates how such savings, although small in the case of individual transactions, can become eye-popping when aggregated over the vast number of international sales transactions.⁷ Yet the rational self-interest of individual clients (and their lawyers) leads to a preference for opting out in favor of the law they already know—an outcome that makes sense for each particular transaction, but which loses the advantages to the international trading community which the CISG was designed to produce.

The only way that I know to overcome the kind of prisoner's or public goods dilemma from which the CISG suffers is to be coercive. In the case of the Convention, that means to force those engaged in international sales transactions (as least those located in Contracting States) to apply the CISG, and thus get past the rational calculation by individual international sales participants that prevents the outcome best for global commerce as a whole. In the case of the CISG that coercion would likely have involved Contracting States being required to apply the CISG, rather than domestic sales law, to an international transaction when their law was applicable to the transaction. In other words, eliminate opting out in favor of familiar domestic sales law as an alternative by forbidding the choice of a Contracting State's domestic sale law for an international sale. You could still give parties great

⁷ Kenneth Lehn, *The CISG: Perspectives from an Economist*, in DRAFTING CONTRACTS UNDER THE CISG 261 (Harry M. Flechtner et al. eds., 2008).

autonomy—they could agree to change any (or virtually any) CISG provision—but they could not simply opt out of the CISG as applicable law in favor of familiar domestic sales law. Eliminating that easy alternative would, I believe, by this point have engendered widespread understanding and use of the CISG. It thus would have forced the investment needed to acquire knowledge of the CISG, which would have led to the socially superior solution of widespread use of the Convention.

That coercive approach is exactly the model that was adopted for the UCC. The UCC did not offer an *alternative* to existing state commercial law; rather, it *replaced* that law (except in Louisiana). And this coercive approach—which required lawyers and clients to abandon the no-longer operative law with which they were familiar and to acquire knowledge of its replacement—worked. By all accounts, it has increased homogeneity (even if it failed to achieve perfect uniformity) in the sales law applicable across the United States, and it has reduced the transactions costs of choosing law when parties are located in different U.S. states. This is due, I believe, primarily to the fact the easy alternative of continuing to use the sales law with which lawyers and clients were already familiar was not available. If the UCC had been a functionally opt-in (i.e., easy to opt-out) instrument like the CISG—one that was a mere alternative to, rather than a replacement for, existing commercial law—I suspect it would not have become any more used than the CISG.

Of course, the UCC's coercive approach had its costs. The widespread adoption of the UCC occurred in the 1970s, and even when I went to law school (in 1978) you could hear echoes of the wailing and gnashing of teeth among lawyers (and, no doubt, clients) brought about by this forced conversion to a complex and expensive-to-learn-about new commercial legal regime. Yes, at the beginning there was resentment and extra expense for lawyers and clients—but it worked. And it worked despite the limitations of our federal system and the autonomy granted our states to change the text of the uniform law and then interpret it all according to their best lights. For a variety of reasons, mostly political necessity, the UCC adopted a flexible and decentralized implementation approach that required the UCC be enacted by individual states (rather than the national legislature). This approach frequently produced non-uniform versions in state enactments. And, of course, this implementation approach also meant there was no “Supreme Court” for the UCC, but rather a multitude of final authorities on the meaning of the UCC within each separate state. The UCC approach thus precluded the

existence of a single final authority to establish the definitive meaning of the statute. Sound familiar?⁸ The coercive aspects of the UCC approach overcame those limitations. In other words, for the purpose of creating “more uniform” law (which, after all, *is* the basic purpose of both the UCC and the CISG), the coercive approach of the UCC produced the desired result: a better-coordinated law that reduced the costs associated with choice of law bargaining and issues because it was very widely used.

Of course, we all know—or at least we intuit—why such an approach would not have worked with the CISG. To ask states to give up the alternative of applying their own domestic sales law to international sales transactions, in my opinion (and probably yours), would have sunk the Convention’s chances for widespread ratification, because that approach would almost certainly have significantly increased opposition to ratification of the CISG among the international traders (and their counsel) who were the main objects of the CISG. And the fact that the CISG eschewed that approach no doubt explains its most notable success—widespread ratification. The reason the coercive approach would have produced increased opposition is, I suspect, the same as the reason for the failure of more widespread use (at least intended use) of the CISG in actual transactions: the legal community and their clients would not want to be forced to abandon, in international transactions, the familiar domestic law that had worked sufficiently well up to this point, particularly when that would have required an initial outlay of significant additional expense for the sake of benefits that would be reaped not exclusively by those who incurred that expense, but would be spread across the broader international trading community. In other words, once again, the prisoner’s or public goods dilemma.

⁸ The two sponsoring organizations for the UCC—the American Law Institute and the National Conference of Commissioners on Uniform State Law—attempted to counter the centrifugal tendencies of a multitude of equally-authoritative final interpretative authorities by establishing a joint “Permanent Editorial Board for the UCC.” The mission of that body is to “assist[] in attaining and maintaining uniformity in state statutes governing commercial transactions by discouraging non-uniform amendments to the UCC by the states, and by approving and promulgating amendments to the UCC when necessary.” See *Uniform Commercial Code UCC*, AMERICAN LAW INSTITUTE, <https://www.ali.org/publications/show/uniform-commercial-code/> (last visited June 16, 2019). A body with a similar mission for the Convention—to promote a uniform interpretation of the CISG by issuing Advisory Opinions on issues of importance under the Convention—is the CISG Advisory Council (of which the author of this paper is a member). See CISG ADVISORY COUNCIL, <https://www.cisgac.com/> (last visited June 16, 2019). The creation of a body for the CISG with a mission akin to that of the UCC Permanent Editorial Board was urged in John E. Murray, Jr., *The Neglect of the CISG: A Workable Solution*, 17 J.L. & COMM. 365 (1998).

This situation, however, illustrates the truth of the old joke about how many psychiatrists it takes to change a light bulb. The answer is, only one—but the lightbulb has to *want* to change. The CISG's prisoner's/public goods dilemma meant that, on an individual basis, the lightbulbs did not want to change to the CISG. They might have liked everybody else to change, and thus drive down the costs of changing, but no one wants to lead that charge: everyone wants to be the late-arriving free-rider on the efforts of others to learn about the CISG.

II. THE PRESENT (MERCIFULLY BRIEF)

I do not want to dwell long on the present. After all, in a moment, it will be gone. Plus, the present is not that pleasant to talk about. But as context for discussion of the future, the present can be important. So, a few words.

The CISG was built on a basic shared faith that increasing international commerce, which required international cooperation and understanding, was—with proper regulation (on which there was no doubt *not* a consensus)—a good thing. I quote from the Convention's Preamble:

THE STATES PARTIES TO THIS CONVENTION, . . . BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, HAVE AGREED AS FOLLOWS . . .⁹

That view, which was clearly a working consensus among those who put together the Convention, justified the effort put into the Convention. It has also acted as a guide for those charged with the task of trying to interpret the CISG in a way that achieves its purposes. And, of course, the values expressed in, and lying behind, the Preamble to the Convention are, at this moment in history, questioned—in fact, I (and probably many of you) would say they are besieged—in the United States, in Europe, and (I wouldn't be surprised) in much of the rest of the world (but I have to admit I am not qualified to testify as to all that). That questioning of the values that underlie the Convention, of course, makes the prospect of correcting what I see as the flaw in the approach of the CISG—a lack of willingness to require the effort

⁹ U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods pmbl., Apr. 11, 1980, 1489 U.N.T.S. 3.

needed to make the Convention widely applied so that it can operate to decrease the transactions costs of international sales—even more unlikely. As far as I can see, that conclusion is just undeniable. So much for the present.

III. THE FUTURE

At this point, the proper thing to do, of course, is to assert one's optimism about the ability of folks of good intent, like us, to overcome these problems. I do not want to do that—I cannot do that. Embracing optimism at this point is, in my view, exactly what we don't need—just as embracing pessimism would be. What we don't need is more leap-of-faith allegiance, not based on looking at reality, to a wished-for or a feared outcome. Such allegiance interferes with our ability to perceive reality as clearly and accurately as we can, and I think we need as much accurate understanding of reality as we can muster. I fervently believe we must continue to deepen, not distort, our understanding of the way things actually are in order to succeed in the enterprise of learning to live and flourish together as the human species. In this enterprise, the CISG plays a modest but, I believe, critical role—critical because it helps pave the way for and encourages a whole lot of other efforts to build a functional global legal system. My skeptical attitude toward both optimism and pessimism was well-captured by (of course) an American stand-up comedian—the late George Carlin. The optimist, Carlin said, sees the glass as half-full; the pessimist sees the glass as half-empty. “I see a glass,” he said, “that's twice as big as it needs to be.” I concur with Carlin. And his understanding of the partially-full glass situation is the one that might actually help us deal with that situation effectively.

Thus, I urge you (and myself) to turn away from optimism (and, equally, pessimism) as an underlying approach to understanding the situation facing uniform international law initiatives, and human life in general. Having said that, let me now offer words of—well, perhaps not hope (you know, my anti-optimism thing), but at least a call to invigorating action. Our hope, in fact, lies in our ignorance. We don't, by any means, deeply understand reality, and we certainly don't know with any precision what is going to happen in the future. Isaac Newton is alleged to have said, shortly before he died: “I do not know what I may appear to the world, but to myself I seem to have been only like a boy playing on the seashore, and diverting myself in now and then finding a smoother pebble or a prettier shell than ordinary, whilst the great ocean of truth lay all undiscovered before me.” I certainly am no Isaac

Newton. You may be. But even so, that just means that even you have merely been gathering pebbles of truth while the great ocean still remains almost completely undiscovered. None of us knows with even the slightest certainty how things will turn out.

So maybe uniform international law initiatives are doomed—and perhaps, the human species as well (note how deftly I expand the perspective). But we absolutely do not know that for a certainty. And in the face of that uncertainty, the only *rational* thing to do is to bet on and work toward the hopeful possibility. If that turns out to be futile, well we haven't made it any worse, and we apparently could not avoid it. But wouldn't we all feel a little stupid if it turned out we could have made a difference, but we didn't bother trying because we were depressed by the current situation. So, let us all join hands and march bravely and energetically forward. It may be our march is doomed to be futile—but at least the company will be good. And who knows, perhaps our efforts will produce a glorious new paradise of international cooperation and incredible international prosperity—or at least a somewhat better world—than if we don't bother. It just makes sense to bother. Let's do it.

