THE SCOPE OF THE CONVENTION: REACHING OUT TO ARTICLE ONE AND BEYOND

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INTRODUCTION

This article consists of two parts. Part A provides an analysis of the principal components of Article 1 of the Convention on Contracts for the International Sale of Goods (CISG),[1] with particular emphasis on some of the ongoing challenges. Part B is sociological in character. It asks why there are so few reported CISG cases in common law jurisdictions and why, in those jurisdictions, the Convention provisions are often inadequately discussed, or ignored altogether, in the cases where the Convention is relevant. Part B is a logical corollary to Part A because the CISG will not serve its intended purpose as a unifying force in international trade unless it is accepted as a full partner in the domestic legal systems in the states that have adopted the Convention.

PART A: ARTICLE 1 ISSUES

To trigger the Convention it must be shown that the transaction involves (1) a contract, (2) of sale, (3) of goods, (4) between parties (i) who are located in different Convention states, or (ii) where the rules of private international law governing the contract lead to a Convention state. Of these prerequisites, it is probably a fair assessment that requirement 4 is the one most litigated in practice.

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1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) [hereinafter CISG]. CISG Article 1 provides:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

I. Nature of Transaction

A. Contract of Sale

Neither "contract" nor "sale" are defined in CISG. However, the basic ingredients of a contract—offer and acceptance—are common to all modern legal systems and are adequately identified in Part II of the Convention.[2] The term itself, as a prerequisite to the application of the CISG, does not seem to have given rise to significant difficulties.

The meaning of "sale" is more problematic. The term is not defined in the CISG. It clearly involves a transfer of title in goods from a seller to a buyer since the whole purpose of the transaction is to provide the buyer with goods that he is free to use, consume or resell as his own.[3] More contentious is the issue of the extent to which the CISG applies to the seller's retention of title under an installment sale ("conditional sale" in North American terminology) and the seller's remedies on the buyer's default under the contract after the buyer has received the goods.[4] It is commonly agreed that "sale" excludes a lease of goods, but it remains unclear (i) to what extent a tribunal is bound by the parties characterization of the contract as a lease, and (ii) (more speculatively) whether it is open to a tribunal to apply the CISG provisions by analogy to an international lease.[5]

There is also some difference of opinion regarding whether a barter agreement can under any circumstances qualify as a sale given that "price" is not defined in the CISG.[6] Here too the permissibility of a tribunal applying the CISG by analogy deserves further consideration.

The characterization of distribution and franchising agreements also appears to be a source of some confusion.[7] The correct position appears to be that if the agreement merely *entitles* the distributor to order goods from the

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2. CISG arts. 14-24.

3. CISG arts. 41-42.

4. *See* Jacob Ziegel, *Comment on Roder Zelt- und Hallenskonstruktionen GmbH v. Rosedown Park Pty. Ltd.*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 53 (1998).

5. On the latter point, see JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 60.4 (3d ed. 1999).

6. *Id.* § 56.1. *See also* FRANCO FERRARI, THE UNIFICATION OF INTERNATIONAL COMMERCIAL LAW 19-20 (1998); Peter Winship, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 1.02 (Nina Galston & Hans Smit eds., 1980).

7. *Cf.* HONNOLD, *supra* note 5, § 56.2.

other party there is no sale agreement unless and until the distributor or franchisee actually places an order.[8]

B. Meaning of Goods (Marchandises)

The key issue that has emerged here is whether a sale of computer "software" can qualify as a sale of goods.[9] The sale of a computer chip has been held to be a sale of goods[10] whereas, not surprisingly, a contract for the preparation of a research marketing report has not.[11] Professor Lookofsky has argued strongly for treating all sales of software as a sale of goods,[12] but this position is difficult to sustain where the software is not imbedded in a tangible thing at the time of sale, e.g., a disk or as part of a computer, cell phone, or other accessory or piece of equipment. Admittedly, it seems artificial to treat as a sale of goods software imbedded in a disk and to treat the transaction as the sale of an intangible where the software is transmitted electronically to the buyer, but the same observation could be made today about many other transactions where intellectual property can be made available to a buyer or licensee in several forms. If it is desirable to impose a single characterization, regardless of the form in which the software is made available to the buyer, then it is probably more logical to treat it as the sale of an intangible.

Domestic sales law systems have also had to face the same characterization issue and also appear to be divided about the correct answer.[13]

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8. *See* Viva Vino Import Corp. v. Farnese Vini S.r.l., No. CIV.A. 99-6384, 2000 WL 1224903, *1 (E.D. Pa. Aug. 29, 2000); CLOUT Case No. 379 [Corte Suprema di Cassazione, Italy, 14 Dec. 1999] (Imperial Bathroom Co. v. Sanitari Pozzi S.p.a.), *published in* GIUSTIZIA CIVILE 2333-334 (2000), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=390&step=FullText (Italian), English translation *available at* http://cisgw3.law.pace.edu/cases/991214i3.html.

9. HONNOLD, *supra* note 5, § 56.

10. CLOUT Case No. 131 [Landgericht München, Germany, 8 Feb. 1995], *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=225&step=FullText (German), English translation *available at* http://cisgw3.law.pace.edu/cases/950208g4.html.

11. CLOUT Case No. 122 [Oberlandesgericht Köln, Germany, 26 Aug. 1994], *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=66&step=FullText (German), English translation *available at* http://cisgw3.law.pace.edu/cases/940826g1.html.

12. Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention*, 13 DUKE J. COMP. & INT'L L. 263 (2003).

13. *See*, *e.g.*, PATRICK S. ATIYAH, THE SALE OF GOODS 66-71 (10th ed. 2001), citing *inter alia* the contrasting decisions in Beta Computers (Europe) Ltd. v. Adobe Systems (Europe) Ltd., (1996) S.L.T 604 (Sess.) (Scot.), and St. Albans City and District Council v. International Computers Ltd. [1996] 4 All E.R. 481 (EWCA (Civ)) (Eng.). The editor's conclusion is that "the key to the conundrum is not to get lost in metaphysical questions as to whether or not software is goods, but to focus on who is being sued in respect of what sort of defect, and to be clear as to the basis on which liability is being imposed." *Id.* at 71.

Given this uncertainty and the historic meaning of goods, it seems best to continue to distinguish between a sale of software imbedded in a tangible thing and a sale not so imbedded and to hope for an early revision of the Convention so that this uncertainty (together with many others) can be definitively addressed.

C. Meaning of "Parties"

This too is an undefined term. However, Article 1(3) CISG makes it clear that the nationality of the parties or their civil or commercial character is irrelevant.[14] Does this mean that an order for goods placed by a government agency with a foreign seller will be governed by the CISG even though government contracts are regulated by a separate regime under the domestic law of the agency (Article 11 CISG clearly implies that government contracts were meant to be included)?[15] It is also open for consideration to what extent the CISG provisions apply to sales not made in the course of the seller's business, e.g., the sale of used office furniture or redundant computers by a business enterprise or to sales made by an individual who is not a merchant at all, e.g., the sale of a family heirloom by the owner to a jeweler, since the Convention does not distinguish between merchant sellers and non-merchant sellers. A literal application of some of the CISG provisions to a private sale (e.g., with respect to the fitness of the goods or the seller's liability for all reasonably foreseeable damages under Article 74 in case of breach) could lead to untoward results.

D. Location of Parties (Articles 1(1)(a) and 10)[16]

Determining the correct location of the parties is a recurring issue since Article 1(1)(a) will not be triggered unless both parties had their places of business in different Convention states at the material time *and* the location

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14. *See* text of CISG art. 1, *supra* note 1.

15. CISG Article 11 provides: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

16. For the text of Article 1(a), see *supra* note 1. CISG Article 10 provides:

> For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract; (b) if a party does not have a place of business, reference is to be made to his habitual residence.

was known by or disclosed to the other party prior to the contract.[17] Article 10 clarifies the position where a party has more than one place of business but difficulties may still arise in complex corporate structures where several divisions of a group may be involved in the negotiation or performance of a contract.[18]

Difficulties may also arise in electronically concluded contracts where the parties' physical location may not be disclosed, or not be adequately disclosed, in the exchange of email documents. The draft UNCITRAL Convention on the Use of Electronic Communications has some provisions on the point but it is doubtful whether they go far enough.[19]

The relevance of the location of an agent acting for one or other of the parties to the contract in determining whether Article 1(1)(a) has been satisfied or negated has also been raised several times. The clear answer appears to be that the agent's location is irrelevant, even if the agent was involved in the contract negotiations, unless (arguably) the agent was actually authorized to conclude the contract on his own initiative.[20] The distinction revolves around the fact that if the agent merely serves as a conduit pipe he has no power to bind the principal and cannot be treated as a branch of the principal's business. However, if the agent has authority to bind the principal, the other party should be entitled to treat the agent as an intrinsic part of the principal's business operation.

Finally, difficulties may arise in satisfying the Article 1(1) requirements in multipartite contracts where some of the parties are located in different

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17. *See* Impuls I.D. Internacional, S.L. v. Psion-Teklogix, Inc., 234 F. Supp. 2d 1267 (S.D. Fla. 2002), *available at* http://cisgw3.law.pace.edu/cases/021122ul.html.

18. *Cf.* Asante Technologies Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001), *available at* http://cisgw3.law.pace.edu/cases/01072701.html. For the text of Article 10, see *supra* note 16.

19. *See* Draft Convention on the Use of Electronic Communications in International Contracts, U.N. Commission on International Trade Law, 38th Sess., U.N. Doc. A/CN.9/577 (2005), *available at* http://www.uncitral.org/uncitral/en/commission/sessions/38th.html. I am indebted to John Gregory, senior counsel, Ministry of the Attorney General, Toronto, for providing me with this information. Mr. Gregory served as a Canadian representative in the drafting of the Convention. Article 1 of the draft Convention dealing with "scope of application" reads:

> This Convention applies to the use of electronic communications in connection with the [negotiation] [formation] or performance of a contract between parties whose places of business are in different States: (a) When the States are Contracting States; (b) When the rules of private international law lead to the application of the law of a Contracting State; or (c) When the parties have agreed that it applies.

Id.

20. *See Asante*, 164 F. Supp. 2d 1142; Oberlandesgericht Köln, Germany, 13 Nov. 2000, *available at* http://cisgw3.law.pace.edu/cases/001113gl.html.

contracting states and others are located in non-convention states.[21] This appears to be one of many situations where Article 1(1)(b) serves a particularly useful function in overcoming the rigidities of the Article 1(1)(a) requirement by accepting the sufficiency of a Convention state identified as the proper law of the parties' contract. It is also open for consideration whether the problems of multipartite contracts should be specifically addressed in future amendments of the CISG.

E. Role of Article 1(1)(b) and Effect of Article 95 Reservation[22]

As previously indicated, Article 1(1)(b) plays a key role in expanding the scope of the CISG where the contracting parties are not located in different Convention states or one of them is not located in a Convention state. Difficulties may arise in determining the proper law of the contract where the contract does not contain an express choice of law clause given the diverse convention regimes governing the determination of the proper law of a contract and different codal and common law rules at the domestic level. Happily, judging by the reported cases, this has not emerged as a major problem. One reason may be that standard form contracts prepared by enterprises engaged in the export trade frequently contain a choice of law clause. Suppose there is such a choice of law clause in favour of the law of the exporter's country, a Convention state, and that the buyer's place of business is also situated in a Convention state. Given the strong presumption that a choice of law clause designating the law of a Convention state is meant to refer to the whole law of the Convention state and not just its domestic law, the courts of the Convention states will have two reasons to apply the CISG: (a) because Article 1(1)(a) applies, and (b) because the parties have expressly selected the law of a Convention state to govern their contract.[23]

1. Impact of Article 95 Reservation

Article 95 entitles a state to declare at the time of its adherence that it will not be bound by Article 1(1)(b). Fortunately, only five countries have so far

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21. *See Impuls*, 234 F. Supp. 2d 1267.

22. CISG Article 95 provides: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."

23. *Cf.* Ajax Tool Works, Inc. v. Can-Eng. Mfg. Ltd., No. 01 C 5938, 2003 WL 223186, *1 (N.D. Ill. Jan. 30, 2003), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=834&step=FullText.

invoked the reservation—the United States, China, Singapore, the Czech Republic and Slovakia (Germany has also adopted a limited version of Article 95[24]). Nevertheless, two of the Article 95 reservation states (China and the United States) are very big guns indeed, so the impact of their reservations under Article 95 cannot be ignored.

Text writers have wrestled with the correct answers to the many permutations that can arise theoretically, both under Article 95 and under the reservations in Articles 91 to 94.[25] It seems clear that, if the issue arises in a

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24. Vom 11. April 1980 (BGBl. 1989 II S. 588), Artikel 95. For the text of Article 95, see *supra* note 22.

25. *See*, *e.g.*, HONNOLD, *supra* note 5, § 46-47.5; FERRARI, *supra* note 6, at 15-17; Isaak I. Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L. L. 521 (1983). CISG Article 91 provides:

> (1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981. (2) This Convention is subject to ratification, acceptance or approval by the signatory States. (3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

CISG Article 92 provides:

> (1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention. (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

CISG Article 93 provides:

> (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends. (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends. (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

CISG Article 94 provides:

> (1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations. (2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

contracting state (A) that has made an Article 95 declaration and that is also the proper law of the contract under A's conflict rules, A's courts will ignore the Convention entirely in dealing with the parties' contractual disputes.[26] Does it make a difference if the contracting parties have adopted a choice of law clause designating A's law as the law of the contract? Should the parties' language be interpreted to mean that they want their relationship to be governed by the CISG even though state A has excluded the CISG as a result of its Article 95 reservation? In *Asante Technologies*[27] the federal district court in California held that the Convention applied to determine the parties' dispute. It did so because, in the court's opinion, the choice of California law in the buyer's order triggered the CISG given that the U.S. government's ratification of the CISG also made the CISG part of the state's law.

Unfortunately, the court overlooked the effect of the U.S. government's reservation under Article 95. This error was avoided in another federal court decision, that in *Impuls Internacional*,[28] though without referring to *Asante.* Since there is nothing that precludes the parties from excluding the CISG from their contract where it would otherwise apply, presumably it is also possible for the parties to adopt the CISG even though it has been excluded by the Convention state governing the parties' contract through an Article 95 reservation. Regrettably, neither *Asante* nor *Impuls* considered what contractual language would be required to show that this was the parties' intention.

In both the cases just mentioned, the United States was also the forum state. Consider the effect of an Article 95 reservation by a state (state C) whose law is also the proper law of the contract where the case is heard in forum state A that has adopted the CISG without an Article 95 reservation. The commentators appear generally to agree that state A's courts should respect state C's Article 95 reservation regardless of whether state A has made the same declaration or not. This seems a correct result both on principle and because otherwise, as Professor Honnold has noted, the results of particular litigation involving state C's reservation will depend on the accident of whether or not state A has made an Article 95 reservation.

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(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

26. *See Impuls*, 234 F. Supp. 2d 1267.

27. *Asante*, 164 F. Supp. 2d 1142.

28. *Impuls*, 234 F. Supp. 2d 1267.

PART B: THE SOCIOLOGICAL QUESTION: WHY ARE THERE SO FEW CISG CASES IN COMMON LAW JURISDICTIONS?

The fact that 63 countries have so far adopted the CISG is a very encouraging sign of the importance which states attach to the Convention as a legal vehicle for regulating international sales. However, the number of Convention states tells us little about the importance of the CISG in practice—how it actually influences the drafting of international contracts and the resolution of disputes where disagreements arise in the performance of a contract. Nor does it tell us anything about the influence of the Convention on legal education in the CISG states and on the attitude of judges and legal practitioners. Assessing the CISG's impact on the strength of these criteria would involve complex studies, which appear not to have been made so far.[29]

In the absence of such studies we must look for proxies. The number and types of arbitral awards and court cases seem to serve this purpose well, though, outside China and Russia, most arbitral awards seem not to be reported and the comprehensiveness of reporting of court cases varies widely among the CISG member states. Table 1, below, tells part of the story:

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29. A modest, but nevertheless significant exception, from a U.S. perspective, appears in Michael W. Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 AM. J. COMP. L. 361 (1998). Note also that the UNCITRAL Secretariat is about to launch a questionnaire enquiry to determine why so many contracting parties exclude the CISG in their choice of law provisions.

Table 1

Distribution of CISG Cases by Selected Countries[30]

	1988-1998	***2000-2005***
Civil Law Jurisdictions		
1. Germany	209 (36.8% of total)	91 (23% of total)
2. Netherlands	91	23
3. Switzerland	65	27
4. Austria	39	28
5. France	30	29
6. Belgium	27	67
7. Spain	8	31
Common Law Jurisdictions		
1. USA	18	27 cases, 38 decisions
2. Australia	2	7 decisions
3. Canada	1	7 decisions
4. New Zealand	0	6 decisions

Between 1988 and 1998, there were 108 reported arbitral awards and 568 court cases for all Convention states for a total of 676 decisions. As of January 2005, the excellent Pace Law School CISG website listed 1400 decisions; Albert Kritzer recently advised the author that the current number of reported decisions is around 1600. (A large number of the additional cases are made up of arbitral awards from China.) Table 1, above, shows the

30. MICHAEL R. WILL, TWENTY YEARS OF INTERNATIONAL SALES LAW UNDER THE CISG: INTERNATIONAL BIBLIOGRAPHY AND CASE LAW DIGEST (1980-2000) (2000); Pace University Law School, *Yearbook of CISG Cases: 2000-2005*, *available at* http://www.cisg.law.pace.edu/cisg/text/YB2005-2000.html.

distribution of CISG cases among selected civil law and common law jurisdictions. In the period 1988-1998, Germany easily led the list and accounted for 36.8% of the total number of cases; the Netherlands, Switzerland and Austria stood respectively in second, third and fourth place. In the period 2000-2005, Germany still led the field with 91 cases (23% of the total) but Belgium jumped from sixth place in the 1988-1998 period to second place in the 2000-2005 period. The number of Spanish cases also nearly quadrupled from 8 in the first period to 31 in the second period.

The number of common law cases pales by comparison with those from civil law jurisdictions. In the first ten year period following the coming into effect of the CISG, Professor Will was only able to locate 21 cases altogether from the United States, Australia, Canada and New Zealand. In the 2000-2005 period, the number of cases grew to 47, which suggests an increasing awareness by lawyers and courts in common law jurisdictions of the relevance of the CISG in international sales litigation. Nevertheless, even in this more favourable environment, the number of common law cases still accounted for less than 10 percent of the total number of reported cases and arbitral awards for all CISG countries. Still more troubling is the complaint by many common law authors[31] that even where the CISG clearly applies to a dispute, the Convention provisions are often not cited or are only partly cited, and that frequently the common law courts cite the domestic sales provisions together with the CISG provisions without appreciating the inappropriateness of doing so. Another recurring complaint among authors is that too often the common law courts have ignored the wealth of CISG literature and CISG case law. Happily, the position has improved, in some cases very significantly, in all these respects over the past five years.[32]

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31. *See*, *e.g.*, Rod N. Andreason, *MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*, BYU L. REV. 351, 352 (1999); Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 FLA. ST. J. TRANSNAT'L L. & POL'Y 217 (2001), *available at* http://www.law.fsu.edu/journals/transnational/vol102/kilian.pdf; Karen B. Giannuzzi, *The Convention on Contracts for the International Sale of Goods: Temporarily Out of "Service"?*, 28 LAW & POL'Y INT'L BUS. 991 (1997); Albert Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources*, *in* CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 147 (Cornell Int'l Law Journal ed., 1995); Bruno Zeller, *The CISG—Getting off the Fence*, 74(9) L. INST. J. 73 (2000); Jacob Ziegel, *Canada's First Decision on the International Sales Convention*, 32 CAN. BUS. L.J. 313 (1999).

32. For a striking improvement, see the U.S. District Court's judgment in *Asante*, *supra* note 19, and the high profile to the CISG provisions and literature in *Zapata Hermanos v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002) (U.S.). See in particular the U.S. Solicitor General's Amicus Curiae's Brief in the *Zapata* certiorari petition to the U.S. Supreme Court, *available at* http://cisgw3.law.pace.edu/

I. Suggested Answer to Questions[33]

In the writer's opinion, the paucity or frequency of CISG based litigation in civil law jurisdictions and common law states can be ascribed to one or more of the following factors: (i) cultural factors; (ii) economic factors; and (iii) legal factors endemic to the Convention. I am sure other CISG commentators can readily add to this list.

A. Cultural Factors

The importance of cultural factors was brought home to this writer when he emailed a long query at the beginning of September 2000 to the subscribers to the University of Freiburg CISG website asking them to explain the disproportionate number of German CISG cases. Without exception, all the respondents (7)[34] stressed the fact that the Convention was much better known in Germany than it was in North America. One or more respondents pointed to the important role that German scholars (particularly Ernst Rabel) had played in the evolution of the international sales conventions, to the fact that German courts had already developed a substantial corpus of case law on the ULIS while Germany was an adherent to the Hague Conventions, and that there was a vast body of CISG literature in German, including at least ten texts. I was told that every German law student would be exposed to at least some discussion of the CISG during his law school career (as compared to the paucity of discussion of the Convention at most U.S. law schools) and that many graduate theses at German law schools were devoted to the Convention.

So far as the U.S. position was concerned, Albert Kritzer, director of the excellent Pace University Law School CISG website, emphasized in his reply to me his own belief that lack of familiarity with the Convention was at the root of the paucity of U.S. cases. However, this observation needs to be

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cisg/biblio/zapata4.html. The New Zealand courts also seem to have done a better job of coming to grips with the CISG provisions and case law than their peers in Canada and Australia.

33. The following passages borrow heavily from the author's earlier article. Jacob Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*, 6 N.Z. BUS. L.Q. 336 (2000).

34. Four of them were German, one was a young Belgian scholar, Patrick Wautelet of the University of Belgium, and at the time of his reply a BAEF fellow at the Harvard Law School. The sixth was a doctoral student in Dallas, and the seventh was a young Mexican lawyer who had studied the Convention at the University of Pittsburgh Law School. I exchanged several emails with Mr. Wautelet and his replies were particularly comprehensive and illuminating.

qualified. There is no shortage of U.S. literature on the CISG; U.S. scholars[35] played leading roles in the drafting of the CISG, and one of them wrote what is probably the best known commentary on the Convention.[36] I believe therefore we must also look to other factors to explain the shortage of U.S. case law and, for similar reasons, the paucity of reported decisions in most of the other common law jurisdictions that have adopted the Convention.[37]

B. Economic Factors

Lawyers do not litigate for altruistic reasons. Even if they appreciate that the Convention applies to their sales transaction, they may have no incentive to plead the Convention unless they have reason to believe it will strengthen their claim or defence. Making that determination may not be easy for a variety of reasons. The main issue may turn on questions of fact (for example, whether or not the goods were defective) and the parties may not find it an economical use of scarce resources (their time and their clients' money) to become familiar with a different body of law in case their expectations turn out to be wrong. The lawyers' reluctance may be particularly strong if the amount involved is small (say, less than U.S. $50,000) and if neither counsel is often involved in international sales litigation. Even if counsel feel obliged to plead the CISG, constraints of time and resources may limit the amount of research they are willing to do, which explains why in so many of the U.S. cases there is little, if any, reference to earlier CISG case law and the abundant CISG literature, and even fewer citations to non-U.S. sources. It also explains why U.S. courts appear so ready to interpret the CISG provisions through common law lenses.[38]

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35. Notably, John Honnold, who was the first director of UNCITRAL and a leading international sales law scholar long before he became involved with UNCITRAL, and E. Allan Farnsworth of the Columbia University Law School. Professor Farnsworth was a leading U.S. contract scholar and served for many years as the senior U.S. delegate to UNCITRAL and UNIDROIT. Unhappily, Professor Farnsworth passed away at the beginning of 2005.

36. *See* HONNOLD, *supra* note 5.

37. I would exclude New Zealand from the complaint given the fact that its courts produced six reported decisions (several of very high quality) between 2000 and 2005. This was only one decision less than the number of reported Australian judgments even though Australia's population (20 million) is five times larger than New Zealand's (4 million).

38. These traits are also present in the two Canadian cases referred to earlier. In the *Roder-Zelt* case, *supra* note 4, Judge Van Doussa appears to have made a serious attempt to understand the concepts of avoidance and fundamental breach in the Convention but was handicapped in not having the relevant literature cited to him.

C. Legal Factors

What I describe as legal factors come into play at two quite different levels. At one level, legal factors explain why the sales cases often do not refer to the CISG even though to the *cognescenti* the Convention clearly applied. This is because, where the parties are located in different states that have adopted the Convention, the Convention applies unless the parties have contracted out of it, and because the parties may have thought they *had* excluded the Convention when the language they used was inadequate to do so. At the second level, legal factors explain why, if they focus on the question at all, the contracting parties decide to exclude the Convention and do so successfully. The net result in both types of cases, at least in common law jurisdictions, is often the same: whether through misunderstanding or by calculation the case is not argued in court as a CISG case.

Though CISG supporters may regard the exclusion of the Convention as antithetical to the development of a strong international law merchant, the parties may often have convincing reasons for the exclusion. The reasons are largely internal to the Convention itself. A far from exhaustive list of the reasons would include the following:

- The CISG does not govern the validity of the contract or the property effects of the contract. The exclusion of validity issues, though based on sound considerations, is particularly serious both because the Convention does not define "validity" and because the German Supreme Court, with little hesitation, has held that the validity of a clause excluding the seller's liability for damages falls outside the Convention. Limitation of liability clauses are so common in sales contracts that this feature alone seriously impairs the utility of the Convention.
- The case law shows that a substantial number of issues are not dealt with at all in the CISG or are dealt with indequately. Particularly troublesome is Article 78's failure to indicate how the rate of interest is to be determined where judgment is rendered in favour of the plaintiff.
- Some of the formational rules in Part II of the CISG were already dated in 1980[39] and others have become so since then in the light of cybernetic developments.
- The CISG contains no mechanism for updating its provisions and there is no international tribunal competent to resolve conflicting interpretations of important provisions.
- The Convention allows for too many reservations (five) by adhering states. This imposes a heavy burden on the parties' legal advisers to determine the parties' position in any of potentially several dozens countries in which their clients carry on business.

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39. See for example the CISG rules with respect to battle of the forms. *See* CISG art. 19(2).

Given these weaknesses, the contracting parties may find it much more attractive to choose a municipal law with a well developed sales law to govern their contracts in place of the CISG. They will do so because it will provide greater certainty and because they hope the chosen domestic law will be able to resolve all future disputes between the parties, procedural as well as substantive.

II. A More Optimistic Note

I should like to think that the reasons I have offered for the paucity of CISG cases in common law jurisdictions are not static and that in the future both courts and litigants will become more CISG friendly. There are some strong incentives for them to become so. One is the steadily growing number of CISG adherents and the rapidly growing number of CISG decisions and reported arbitral awards, particularly those from the People's Republic of China. A second reason is growing resistance to choice of law clauses excluding the CISG in contracts with the Western hemisphere's new trading partners and the enormous influence on international trade being exerted by the Chinese colossus. Finally, and not least, the remarkable success of the annual Willem Vis International Moot Competition in Vienna has cultivated intense interest in the CISG and the Model UNCITRAL International Arbitration Law among law students from the more than 150 law schools that now participate in the competition. Many of the students hail from common law jurisdictions and they can be expected to be ambassadors of goodwill for the CISG and UNCITRAL's other legislative efforts when they enter the ranks of legal professionals in their home jurisdictions.