

COMMENTS ON LUKE NOTTAGE'S PAPER

*Meredith Kolsky Lewis**

Thank you, Luke, for such an interesting and thought-provoking paper.

I particularly like Luke's explanation why, despite the accessibility, intelligibility, and consistency of the CISG, practitioners may be choosing not to use it. Having spent most of the last 10 years in private practice in Washington, D.C., I can say from personal experience that lawyers – at least in the United States – do seem to have a preference for sticking with the familiar.

I think Luke is also correct in thinking that lawyers probably notice the negative write-ups of the CISG more than the positive ones, because they are predisposed to prefer what they are used to.

I also think Luke had very good practical suggestions for increasing awareness of the CISG, including teaching more about the CISG in law school, continuing legal education classes, and more articles and other writings about the CISG.

I just want to make a couple of points to follow up on Luke's comments about the use of the Convention in the United States.

First, as I just discussed, Luke has identified some of the reasons why the CISG may be opted out of in the United States. I want to mention some additional factors that may also be playing a role. Second, I will explain why we should perhaps be more optimistic about the use of the CISG in the United States.

I WHY AMERICANS MAY BE OPTING OUT OF THE CISG

Lawyers may be hesitant to accept the CISG because of the Convention's lack of an explicit duty of good faith. The duty of good faith is an essential principle in American contract law, and the Uniform Commercial Code (UCC) explicitly provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."¹ Similarly, the Restatement of Contracts provides that "[e]very contract imposes upon each party a duty of good faith and fair

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¹ Uniform Commercial Code, s 1-203.

dealing in its performance and its enforcement."² Therefore, American attorneys may feel more comfortable opting out of the CISG in favour of the UCC and its unambiguous good faith requirement.

In addition, American lawyers may opt out of the CISG because of its scope. The coverage of the CISG is narrower than the UCC in that it does not cover purchases for personal consumption or distributor agreements. As a result, lawyers who deal with transactions outside the scope of the CISG can't use the CISG all the time, but they could, assuming the other parties agree, use the UCC all the time. Under these circumstances, counsel may prefer to opt out of the CISG when it could be applied in favour of the UCC, rather than switching back and forth depending on the type of transaction.

Furthermore, Americans may be advising their clients to opt out of the CISG because of the relative uncertainty of outcome in comparison to the UCC. The UCC has been extensively litigated in the United States courts. In contrast, there has been little litigation involving the CISG, and only a small percentage of those cases substantively interpret provisions of the Convention. Thus lawyers may caution their clients that, were litigation to arise out of the contract at issue, the outcome under the UCC would be more predictable than the outcome under the CISG.

II THE GLASS IS HALF FULL, NOT HALF EMPTY

The second point I wanted to make is that perhaps we should be more optimistic about the use of the CISG in the United States. There are a few reasons to think the glass may be half full rather than half empty.

First, the United States has supported the CISG from the start. It was one of the original signatories. The first eleven countries to ratify the Convention were Argentina, the People's Republic of China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia. A pretty interesting list, all things considered! Now 62 states are signatories, including all of North America. So this isn't a case where everyone has signed on and the United States has reluctantly come in at the end, but rather one where the United States has led the effort to develop this multilateral set of rules. In fact, American input and the model of the UCC were somewhat important in developing the CISG text.

Commentators suggest that Americans like that the CISG is perceived as neutral, yet it embodies many provisions quite similar to the UCC. And in practice, cases that have applied the CISG often involve provisions that are substantially identical to article 2 of the Uniform Commercial Code, and have been interpreted in keeping with past interpretations of the UCC. A good argument can be made that United States courts should not be interpreting an international convention by looking to domestic law. Be that as it may, this practice of interpretation probably gives practitioners comfort

² Restatement of Contracts (2 ed, 1981) §205.

that courts will not interpret the CISG counter to like UCC provisions, and may lead to more lawyers accepting the application of the Convention rather than opting out.

Second, Americans may come to accept the Convention more as their exposure to it grows. The Convention is relatively new. It only entered into force 17 years ago (following its ratification by 10 countries, as provided for in Article 99(1)). Given how many more domestic contracts the average American lawyer encounters than international ones, it will probably take more time for people to familiarize themselves with the CISG.

Third, the fact that there aren't that many reported cases in the United States does not necessarily mean it is not being used; it may just mean it is not being litigated to judgment very often. Over 95 per cent of cases filed in the United States settle. So it may be that the CISG governs thousands and thousands of contracts every year in the United States, but most of these will not result in a dispute. Of those that involve a dispute, the vast majority will settle. Of the cases that do not settle, only a portion will entail a dispute over the CISG. And among the cases that go to trial, some will resolve the CISG issue in unpublished motions practice and thus the CISG will not be mentioned in the published case opinion.

The lack of reported cases could also mean that the provisions of the CISG are relatively clear and straightforward, and so there are not many disputes over its interpretation. For these reasons, I do not think we can draw any conclusions about the use of the CISG from the number of reported cases that discuss the Convention.

I should also note that civil law countries may have more cases interpreting the CISG in part because there is more of a tradition of litigating code provisions, and less of a tradition of settling cases, once brought, than in the United States.

Fourth, if the CISG is not being used much in the United States it is not necessarily because it is unpopular, but it may be because of who the United States is doing business with.

In 2004, Japan and the United Kingdom were the third and fourth largest purchasers of United States goods; and the fourth and sixth largest suppliers of goods the United States purchased. Thus American companies are doing quite a lot of business with companies from non-signatory nations, and presumably none of those contracts will be governed by the CISG.

Finally, I want to report that despite all of the obstacles that have been identified, the CISG is in fact being used in the United States and is not being opted out of as a matter of course. Between 2001 and 2003, there were as many published opinions in the United States on the CISG as there had been in the previous 13 years combined.

So while I do not think we can determine how much the CISG is being used based on the number of reported court decisions discussing the convention, I do think we can conclude that the increase in reported decisions likely correlates with an increase in use of the Convention. Thus on

balance I think we should be optimistic about the use of the CISG in the United States, and can expect that, over time, its use will only increase.