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CHANGING THE OPT-OUT TRADITION IN THE UNITED STATES

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The United States was one of the original Contracting States whose ratification of the CISG permitted the Convention to enter into force; in those States, the CISG has been in effect since 1 January 1988.¹ Despite more than nineteen years during which international sales involving parties located in the United States have potentially been subject to the Convention there have been relatively few reported decisions on the Convention by U.S. courts or involving U.S. parties.² The most likely explanation – one that my own conversations with lawyers in the United States tends to confirm – is that U.S. legal counsel routinely have advised their clients to opt out of the CISG and choose U.S. domestic sales law (almost always Article 2 of our Uniform Commercial Code) as the law governing their international sales transactions.³ My experience suggests, however, that the wisdom of proffering this advice mechanically is now being questioned by U.S. lawyers.

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¹ Under article 99(1), the Convention enters into force after the 10th State ratifies. The requisite number was reached when China, Italy and the United States ratified simultaneously on 11 December 1986, joining eight other States that had already ratified – Argentina, Egypt, France, Hungary, Lesotho, Syria, the former Yugoslavia, and Zambia. As a result, the CISG entered into force in these 11 States on 1 January 1988. See the entry for the United States of America, as well as the entries for Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic and Zambia, in “UNCITRAL, Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods,” http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (visited 7 June 2007); see also the entry for Yugoslavia in the “Table of Participating Countries” in Pace University Institute for International Commercial Law, CISG Database, <http://www.cisg.law.pace.edu/cisg/countries/cntries-Yugoslav.html> (visited 7 June 2007) (explaining that the former Yugoslavia had ratified the CISG on 27 March 1985, and that the Convention had entered into force in the former Yugoslavia on 1 January 1988).

² For discussion of the statistics on reported U.S. CISG cases see Mathias Reiman, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care* (paper from “The Convention on the International Sale of Goods – The 25th Anniversary: Its Impact in the Past – Its Role in the Future; German Society of Comparative Law – Private Law Division Conference 2005: 22-24 September 2005, Würzburg), 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 115, 117-20 (Tübingen, 2007).

³ See *id.* at 122 (“The most important reason for the low number of reported CISG decisions in the United States appears to be [that] the CISG does not apply to the majority of international sales transactions involving the United States simply because parties exclude its operation under Article 6”). Anecdotal evidence on the incidence of opting-out of the Convention, such as that offered by Professor Reiman (see *id.* at 123) and myself, is in general the best available: it has been lamented that “there is scant empirical information on the frequency of . . . CISG opting outs.” Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG’s 25th Anniversary*, in QUO VADIS CISG? CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 25, 34 (Franco Ferrari ed. 2005). However, a recent interesting empirical study on the practice of opting out of the CISG in Germany and in the U.S. has appeared: Martin F. Köhler, *Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application*, <http://www.cisg.law.pace.edu/cisg/biblio/koebler.html> (October, 2006) (visited June 9, 2007). Working with admittedly modest data (a survey that generated 81 responses), Mr. Köhler reports that more German practitioner-respondents (72.7%) than their U.S. colleagues (70.8%) reported excluding the Convention ‘principally or preponderantly’ in their practice. On the other hand, 69.7% of German practitioners who responded to the survey “had contact with the CISG in their day to day work” whereas only 29.2% of the U.S. respondents reported the same.

There were understandable reasons for the opt-out advice, at least during the early years of the Convention.⁴ As a new law – indeed, a new *kind* of law for American attorneys: a uniform international sales law to be interpreted and applied by tribunals from widely different legal traditions – the Convention involved greater uncertainty than our long-established and well-known (at least to U.S. counsel) domestic sales regime. Plus there were start-up costs in becoming familiar with the CISG and learning how to draft appropriately under it⁵ – costs that would either have to be borne by clients paying for extra billable hours expended by lawyers getting up to speed, or absorbed by the lawyers themselves (in the form of unbilled hours of work). Such considerations and costs will have been explored with what I am sure is greater perception and rigor than I can hope to achieve in the panel on the first day of this Congress chaired by former UNCITRAL Secretary Kazuaki Sono and featuring Professors Gerhard Wagner, Jan Smits, and Helmut Wagner.

During the early days of the CISG's effectiveness the costs of permitting the Convention to govern a transaction undoubtedly appeared – and to a degree probably actually were – greater from the perspective of U.S. attorneys than in the view of many of our Civil Law counterparts. For one thing many Civilian lawyers, German attorneys in particular, came to their initial encounters with the CISG with prior experience of uniform international sales law – the UNIDROIT-sponsored Uniform Law on Formation (ULF) and Uniform Law on International Sales (ULIS). U.S. attorneys and their Common Law colleagues, furthermore, are accustomed to looking for guidance from judicial decisions interpreting a law – a process that requires considerable lead time after the appearance of a new law.⁶ The Civil Law tradition of relying more heavily on scholarly commentary, in contrast, meant that even when the Convention first went into force guidance customarily treated as authoritative was available.

The reasons behind the opt-out advice in the United States often made sense in the short term. For any particular transaction, the uncertainty and start-up costs associated with the Convention might well make it worthwhile to pay the price – for a price is inevitably exacted for getting the other party to agree to something you want – to opt out of the CISG. Over the longer term, however, the extra costs associated with the a new law like the Convention tend to decrease: uncertainty concerning its interpretation and operation lessens as the number of decisions applying it and the volume of commentary on it grow, and as tribunals become familiar with it; start-up costs, once incurred, can be amortized over many subsequent transactions. Just as important, the costs of opting out become more evident – not just the price paid to get the other side to agree to apply U.S. domestic sales law (less advantageous financial arrangements and/or concessions on other terms) but also the price in the form of deals lost when the other side refuses to allow U.S. domestic sales law to govern. From the perspective of the business side of law practice, law firms that lack expertise in the Convention will find themselves at a competitive disadvantage: why would a business employ legal counsel unable to support a bargaining outcome (applying the Convention) that in at least some cases offers economic advantages – indeed, that may salvage a lucrative deal stalled on the issue of applicable law – when competitor firms have the necessary capacity? That competitive issue becomes even more pressing in an era when the legal marketplace is increasingly global, and there are non-U.S. firms with extensive experience negotiating and drafting under the Convention.

With respect to the foregoing considerations the CISG is little different from any new commercial law (although, as noted earlier, the Convention's international scope does create some special challenges). The process by which the community of U.S. commercial lawyers eventually accepts and learns to work with new laws – a process that had to be gone through in the 1950's and 1960's with respect to what is now our domestic sales law, Article 2 of the Uniform Commercial Code – eventually runs its course. I suspect that process has now reached a fairly advanced stage with respect to the

⁴ Compare the discussion in the text with Reiman, *supra* note 2, at 124-27 (arguing that American lawyers advise the clients to opt out of the CISG in favor of U.S. domestic sales not because the Convention is viewed as substantively inferior, but because it is perceived to involve greater uncertainty, because its application would entail additional costs in becoming familiar with its terms, and because of sheer inertia following early decisions to opt-out).

⁵ More and more resources are available to address the need for guidance in such areas. See, e.g., DRAFTING CONTRACTS UNDER THE CISG (Harry Flechtner, Ronald Brand and Mark Walter, eds., forthcoming in Oxford University Press as part of the *CILE Studies* series).

⁶ See Reiman, *supra* note 2, at 126 (“the paucity of American case law is unnerving to common lawyers who tend not to trust a statutory rule before they have seen what courts actually do with it”).

Convention. Judging from communications I receive from practitioners and other anecdotal evidence, the U.S. legal community is (somewhat grudgingly) coming to accept the Convention's relevance, to reject the view that its applicability must be avoided at all costs, and even to see the CISG as a perhaps-useful implement in the commercial lawyer's tool box. Earlier, almost all of the Convention-related inquiries and information that come to me related to litigation, and almost certainly arose out of transactions subject to the Convention not as a matter of conscious choice, but by inadvertence. That is, the CISG governed the transaction in dispute because the parties had not consulted lawyers at the contract-formation stage, and hence had not addressed (or perhaps even considered) the choice of law question or had employed an inadequately-drafted opt-out clause. Of course this situation is one of the levers that, slowly but surely, is prying open the doors that U.S. commercial attorneys have closed on the Convention: firms that gain expertise in the CISG because they have litigated disputes where the transaction was accidentally governed by the Convention have now incurred the "start-up" costs I mentioned earlier, and can use their new knowledge and skills in serving clients at the transaction-planning stage. As a result I increasingly – particularly over the past year – encounter transactions in which the Convention is consciously and advisedly (if not always completely willingly) chosen as the applicable law.

Thus market forces, as well as progress in the inevitably cumbersome process by which large legal communities absorb change, is altering the traditional practice of U.S. lawyers to advise their clients to opt out of the Convention in favor of the application U.S. domestic sales law. The good U.S. attorneys are out front, already to the point of viewing the Convention not as an annoying complication to be swept aside, but as a useful tool that can help them serve their clients' needs. Even mediocre U.S. attorneys will eventually be forced to that position – or suffer the consequences in the market-place. A propos the theme of the commentary portion of this panel, it is not merely time to change the practice in the United States of excluding the CISG in knee-jerk fashion; the change has already begun. Given the forces impelling it, I believe completion of the change is a *fait accompli*.
