THE ROLE OF THE CISG IN CANADIAN CONTRACT PRACTICE: AN EMPIRICAL STUDY

John F. Coyle[†]

ABSTRACT

In much of the legal literature, the fact that the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been ratified by so many nations constitutes incontrovertible evidence of its success. This narrative fails to account, however, for the fact that private parties can choose to exclude the CISG from their international sales contracts.

This Article draws upon a hand-collected dataset of contracts executed by public companies in Canada to show that these companies overwhelmingly choose to exclude the CISG from their international sales agreements. It also shows that these same companies are frequently unaware that selecting the law of a Canadian province can result in the application of the CISG and that few (if any) of these companies consciously select the CISG by selecting provincial law. While the Article turns up a few tantalizing hints that attorneys practicing in Quebec may be slightly more receptive to the CISG than attorneys practicing in the rest of Canada, the overall portrait that emerges is of a nation where this treaty is excluded by sophisticated actors in almost all cases. This finding raises important questions of whether the CISG is achieving its intended purpose of facilitating international trade.

[†] Reef C. Ivey II Term Professor of Law, University of North Carolina at Chapel Hill. Many thanks to the participants at the *CISG at Middle Age* conference hosted by the University of Pittsburgh for their comments on an earlier draft of this Article.

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is often described as one of the most successful commercial law treaties in history.[1] In many respects, this is a fair description. The treaty has been ratified by a remarkable number of countries and most commentators agree that it is exceptionally well-drafted.[2] In other respects, however, evidence of the CISG's success is less clear cut. Several studies have shown, for example, that practicing lawyers across a range of jurisdictions routinely advise their clients to exclude the CISG from their international sales contracts.[3] In my own previous work, I have shown that public companies in the United States routinely exclude the CISG from such contracts and that they almost never consciously select it indirectly by choosing the law of a U.S. state.[4] These findings—which were based upon a review of more than 5,000 contracts filed with the U.S. Securities and Exchange Commission (SEC)—cut against the narrative that the CISG is becoming more widely accepted in the United States.[5] They also raise important questions as to whether the CISG is, in fact, serving its intended purpose of facilitating international trade.[6]

At the end of the article mentioned above, I urged scholars to conduct additional contract surveys in foreign nations to determine whether U.S.

---

[1] *See* Larry A. DiMatteo, *The Scholarly Response to the Harmonization of International Sales Law*, 30 J.L. & COM. 1, 21 (2011) ("From humble beginnings, the CISG has grown to be an international phenomenon. It is no longer premature to hail it as the first successful unification of international sales law. It is the culmination of the dream presented by Ernst Rabel in the 1920s.").

[2] *See* Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 404 (1991) (stating that the CISG is "'relatively straightforward and uncluttered with detail,' not only because domestic anachronisms have been refined away, but also because some unsightly loose ends were tucked under the rug.") (footnotes omitted) (quoting JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 69 (1st ed. 1982)).

[3] LISA SPAGNOLO, CISG EXCLUSION AND LEGAL EFFICIENCY 150–52, 212–18 (2014).

[4] *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, 238 (2016).

[5] *Id.* at 210–12 (descripting method by which dataset was assembled). A comprehensive discussion of the strengths and weaknesses of this particular methodological approach is also set forth in my previous work. *See id.* at 212–25.

[6] *Id.* at 238–39.

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

lawyers were unique in their antipathy towards the CISG.[7] My earlier research had uncovered data suggesting that Chinese solar companies rarely opt out of the CISG, which in turn suggested that the degree of enthusiasm for this particular treaty may vary by industry and nationality.[8] When I went in search of datasets of private agreements created by companies in other nations, however, I found a desert. There were, as far as I could determine, no public databases of private contracts maintained by governments in Europe, Africa, or Asia that would allow a researcher based in the United States to gain insights into whether companies in these nations regularly exclude the CISG as a source of law.

After months of searching, I finally discovered a foreign database that would facilitate a comparative study of CISG contract practice. This database was the System for Electronic Document Analysis and Retrieval (SEDAR), administered by the Canadian Securities Administrator (CSA).[9] SEDAR is an online database that contains thousands of unique contracts filed by public companies in Canada.[10] Under Canadian law, public companies are required to report and file "any contract that it or any of its subsidiaries is a party to, other than a contract entered into in the ordinary course of business, that is material to the issuer . . . ."[11] These contracts are then placed on the SEDAR website and may be accessed by the public. The official SEDAR website is not searchable. However, a number of legal research companies—including LexisNexis—have portals that enable researchers to conduct Boolean text searches of the material contracts filed with SEDAR. This means that it is

---

[7] *Id.* at 239 ("[I]t would be helpful if scholars were to conduct additional contract surveys *outside* the United States in order to determine whether U.S. practice is representative or atypical.").

[8] *Id.* at 230–34.

[9] *See* SEDAR Homepage, https://www.sedar.com/homepage_en.htm (last visited Aug. 14, 2019) (explaining that SEDAR is a "filing system developed for the Canadian Securities Administrators to: facilitate the electronic filing of securities information as required by Canadian Securities Administrator; allow for the public dissemination of Canadian securities information collected in the securities filing process; and provide electronic communication between electronic filers, agents and the Canadian Securities Administrator").

[10] *See* Alan L. Monk, *Understanding Streaming Agreements and Royalty Agreements: Alternatives to Traditional Financing*, 51 ROCKY MTN. MIN. L. FOUND. J. 1, 14 (2014) ("In Canada, the agreement will generally be required to be filed (although redaction of sensitive information is permitted) if the transaction is material to the company and the agreement is not entered into in the ordinary course of business.").

[11] *See* National Instrument 51-102, "Continuous Disclosure Obligations," § 12.2 (Can. Sec. Adm'rs).

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

possible to search a broad cross-section of actual contracts involving Canadian companies to see how they address the CISG in their choice-of-law clauses.

At the outset of this research project, I was unsure as to what I would discover. On the one hand, Canada is a common law country whose legal system derives from that of England.[12] This fact suggested that Canadian attitudes towards the CISG would generally resemble those of the United States, another common law country whose legal system derives from that of England. On the other hand, Canada has several attributes that distinguish it from the United States. It has a province—Quebec—where the official language is French and follows a civil law tradition.[13] It also has a national legal culture that, as a general rule, views international law in a much more positive light than in the United States.[14] These facts suggested that Canadian attitudes towards the CISG would be more positive than those exhibited in the United States.

A review of the Canadian contracts in the SEDAR database revealed at least one noteworthy difference in contracting practice between Canada and the United States. As compared to their U.S. counterparts, Canadian companies are much less likely to exclude the CISG needlessly.[15] In the United States, it is common to find choice-of-law clauses that exclude the CISG from agreements to which it would never apply by its own force. In Canada, by comparison, companies are much less likely to exclude the CISG from such agreements.[16] This finding suggests that Canadian companies are better informed as to when the CISG will and will not apply.

---

[12] *See* H. Patrick Glenn, *The Common Law in Canada*, 74 CAN. B. REV. 261, 265, 276 (1995).

[13] *See* Jean Leclair, *A Review of Law Reviews: Comments of a Contented Victim*, 31 QUEEN'S L.J. 385, 394 (2005).

[14] *Compare* David Sloss, *Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims*, 42 SANTA CLARA L. REV. 357, 371 n.59 (2002) (observing that Canadians "have a more favorable attitude towards international law than many other countries . . . ."), *and* Melissa Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 677–78 (2007) (discussing willingness of Canadian courts to rely on international law sources to interpret domestic law), *with* John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 448 (2015) (collecting sources describing U.S. judges as "ambivalent," "wary," and "hostile" toward international law).

[15] *See infra* Part I.B.

[16] *Id.*

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

This superior knowledge notwithstanding, the Canadian companies were in many respects even more hostile to the CISG than their U.S. counterparts. Every single contract in the SEDAR database that referenced the CISG—every one—did so in order to exclude it as a source of law.[17] In the United States, by comparison, I was able to identify sixty agreements that expressly selected the CISG as their governing law.[18] The portrait that emerges from a comparison between the contracting practices of companies in the two nations is one of *better-informed* Canadian companies *generally refusing* to explicitly include the CISG in their international sales agreements.[19]

One might object that the foregoing analysis is incomplete. It is not strictly necessary, after all, for a Canadian company to reference the CISG to select it as the governing law. In most Canadian provinces, a contract that selects the law of the province without making any mention of the CISG will still be governed by that treaty if the contract is an international sales agreement.[20] It is possible, therefore, that companies are consciously selecting the CISG indirectly by choosing provincial law to govern their international sales agreements without making any mention of the CISG.[21]

In order to test this hypothesis, I went back to the SEDAR database to create a secondary dataset. This secondary dataset was comprised of international sales agreements between Canadian companies and non-Canadian companies that contained choice-of-law clauses that did not mention the CISG. Having compiled this list of contracts, I then contacted the Canadian parties to ask them if they had, in fact, intended to select the CISG notwithstanding their failure to mention it in their choice-of-law

---

[17] *See infra* Part I.A.

[18] *See* Coyle, *supra* note 4, at 219.

[19] This finding is, significantly, consistent with the conclusions reached by other authors who have written about the CISG's reception in Canada. *See* JOHN P. MCEVOY ET AL., THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 33–34 (Franco Ferrari ed., 2008) ("In theory, the CISG should be a significant factor in Canadian international trade . . . [y]et the CISG barely registers on the consciousness of Canadians, let alone Canadians involved in international trade as exporters or importers. Canadian courts have only rarely considered the CISG and, in many Canadian law faculties, the CISG is not taught to students in courses on commercial law. In many instances, the existence of the CISG is acknowledged in Canada by its express exclusion rather than its application to contracts for the international sale of goods."). My review of the contracts in the SEDAR database suggest that very little has changed over the past decade.

[20] *See infra* Part II.A.2.

[21] *See* Coyle, *supra* note 4, at 234–38 (discussing this possibility).

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

clause. In every case save one, I was told that this had *not* been their intent.[22] The notion that most Canadian companies are secret CISG enthusiasts who prefer to select it obliquely is not supported by the available evidence.

I did, however, uncover some scattered hints that Canadian lawyers based in *Quebec* may be marginally more receptive to the CISG than attorneys in other parts of Canada. In conducting additional diligence into this issue, I found one contract (not filed with SEDAR) in which a Quebec-based company chose the CISG as its governing law. I also received one response from a non-lawyer representative of a Quebec-based company expressing support for the CISG. Finally, I received e-mails from several Quebec-based attorneys who reported that they do not *always* advise their clients to exclude the CISG. To be sure, I received a number of e-mails from other Quebec-based attorneys who reported that they *do* always advise their clients to exclude the CISG. There was, however, just enough evidence suggesting possible regional differences within Canada to warrant future research into this topic.

The Article proceeds as follows. Part I describes the methodology used in assembling the primary dataset of contracts used in this Essay—those that reference the CISG—and describes the insights that flow from analyzing this group of contracts. Part II describes the methodology used in assembling the secondary dataset of contracts used in this Article—those that do not reference the CISG but to which it will most likely apply—and describes the insights that flow from analyzing this dataset. Part III draws upon structured e-mail exchanges with nine Quebec-based lawyers in an attempt to determine whether a hidden reservoir of support might exist for the CISG among lawyers in Francophone Canada.

I. CONTRACTS THAT EXPRESSLY SELECT THE CISG

In the summer of 2018, I set out to identify contracts that referred to the CISG in the SEDAR database. In order to accomplish this goal, I performed a search for the term "international sale of goods" in this database through

[22] *See infra* Part II.B.

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

the web portal maintained by Lexis Securities Mosaic.[23] When I searched for this phrase in all material contracts filed between December 31, 1996, and July 22, 2018, the search generated 277 hits.[24] After eliminating duplicate contracts, non-references to the CISG, contracts that were never signed, and contracts where the relevant information was redacted, there were 216 contracts remaining. This group of 216 unique contracts constitutes the primary dataset of contracts analyzed in this Article. Significantly, this dataset is not comprised exclusively of international sales agreements; any contract that referenced the CISG is included.

The companies that filed agreements referencing the CISG tended to cluster in a relatively small number of industries. Approximately 30% of the contracts were filed by companies in the mining industry. Another 27% of the contracts were filed by companies that operate in the biotechnology space. An additional 9% of agreements were filed by companies that the CSA classifies as technology companies operating in the industrial space. The remaining 34% of the contracts in the dataset were filed by companies across a wide range of industries, including chemicals, communications, manufacturing, and software.[25]

A. Affirmatively Selecting the CISG

Having assembled the primary dataset, I then sought to ascertain whether these contracts generally referred to the CISG in order to *exclude* it as a source of governing law or to *choose* it as a source of governing law.[26] The goal was to obtain a better sense for the role that the CISG played in these agreements and to determine whether there had been any changes in CISG practice over time. As it turns out, there was little to analyze. Every

[23] This phrase was chosen because my initial foray into the database revealed that parties referred to the CISG in many different ways. In almost every instance, however, the formulation utilized by the parties contained the phrase "international sale of goods."

[24] The CSA did not mandate that all public companies submit their filings through EDGAR until January 1, 1997. The earliest-dated contract that referenced the CISG was filed on February 18, 2000.

[25] All of the contracts in the primary dataset contained a choice-of-law clause. The most commonly selected jurisdiction in these agreements was Ontario (64), followed by New York (33), British Columbia (30), England (18), Switzerland (11), Quebec (10), and Delaware (9).

[26] *See generally* Harry M. Flechtner & Ronald A. Brand, *Opting In to the CISG: Avoiding the* Redline Products *Problems*, *in* A TRIBUTE TO JOSEPH M. LOOKOFSKY 97 (Mads Bryde Andersen & René Franz Henschel eds., 2015) (discussing a contract that opted in to the CISG).

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

single contract in the dataset—all 216 of them—referenced the CISG in order to exclude it from their agreement.

This is a remarkable finding. Over the course of the past twenty years, not a single public Canadian company has affirmatively chosen the CISG—said to be the most successful commercial law treaty in the history of the world—to govern any of its material contracts. In each and every case, the Canadian companies chose to exclude the CISG and to have their contracts governed instead by national sales law.

This finding was so remarkable, in fact, that I felt compelled to confirm that this was not some sort of glitch. I conducted an additional search through all of the reported cases decided by Canadian courts over the past twenty years that mentioned the CISG to see if I could find any cases where the parties had affirmatively selected it. After reading through fifty-two cases, I located two clauses that chose the CISG as the governing law. The first clause was written into an agreement between a German seller and a Chilean buyer who wound up litigating their dispute in a Canadian court.[27] There was no Canadian party to that agreement. The second clause appeared in an agreement between a Canadian grain company based in Quebec and a Latvian company.[28] This second clause constituted the only example I was able to uncover during the course of my research that included a Canadian company expressly selecting the CISG.

B. Needlessly Excluding the CISG

Under Canadian law, the CISG will apply to contracts for the sale of goods when the contracting parties have their places of business in different countries and at least one of the countries has ratified the CISG.[29] It follows, therefore, that there is no need for a Canadian company to exclude the CISG when (1) the contract does not involve the sale of goods or (2) the parties have their places of business in the same country. A review of the contracts in the primary dataset suggests that Canadian companies are generally aware

---

[27] Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd., 2015 CanLII 787 (B.C.S.C.).

[28] Sonox Sia v. Albury Grain Sales Inc., 2005 CanLII 26784 (Q.C.C.S).

[29] *See* CISG art. 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.").

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

of these rules and rarely exclude the CISG when it would not otherwise apply.

Only 14% of the contracts in the primary dataset excluded the CISG from a contract between two Canadian companies. This number compares favorably to contract practice in the United States. In prior work looking at a comparable collection of contracts filed the with SEC by U.S. companies, I found that 52% of the agreements excluding the CISG were purely domestic contracts.[30] This disparity suggests that Canadian companies are generally more aware of the situations in which the CISG will apply and are less likely to exclude it reflexively.

Another way to frame this question is to ask how many contracts "correctly" excluded the CISG because they were agreements to which that treaty would have applied but for the exclusion.[31] In Canada, the CISG was correctly excluded 68% of the time. In the United States, by contrast, the CISG was correctly excluded just 31% of the time.[32] Again, this suggests greater awareness among Canadian companies as to when the CISG will apply by its own force. It does not appear, however, that these enhanced levels of awareness have generated any meaningful enthusiasm for the treaty among Canadian companies. Indeed, the overall portrait that emerges from a comparison between the contracting practices of companies in the two nations is one of better-informed Canadian companies generally refusing to choose the CISG to their international sales agreements.

II. CONTRACTS THAT SELECT THE LAW OF A CANADIAN PROVINCE

The analysis in Part I of this Article examined contract practice where the contract in question *referenced* the CISG. This methodological approach may, however, fail to capture the nature of Canadian contract practice. It is possible, after all, for the CISG to supply the governing law even where a contract makes no mention of it if the parties select the law of a nation that has ratified the CISG to govern their agreement. In order to evaluate whether Canadian companies sometimes select the CISG indirectly—by consciously

[30] *See* Coyle, *supra* note 4, at 219. The prior study looked at 1319 U.S. contracts filed with the SEC between 2009 and 2014.

[31] This number captures not just wholly domestic contracts but also contracts not for the sale of goods or (in the United States) contracts with a counterparty based in a country that had not ratified the CISG.

[32] *See* Coyle, *supra* note 4, at 219.

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

declining to exclude it while selecting the law of a Canadian province—it is necessary to undertake two additional inquiries. First, one must grapple with the statutes enacted by a number of Canadian provinces that instruct parties on how to opt out of the CISG. Second, one must ask the individuals who drafted the agreements in question to determine whether, in fact, they intended to select the CISG notwithstanding their failure to expressly mention it. Each of these inquiries is undertaken below.

A. Provincial Statutes Relating to CISG Exclusion

When Canada ratifies a treaty intended to provide rights and remedies to individuals engaged in litigation in Canadian court, each of the Canadian provinces must separately enact legislation that implements that treaty.[33] In nine provinces, the implementing legislation for the CISG specifically addresses the question of what a choice-of-law clause needs to say in order to opt out of the CISG. Confusingly, the opt-out rules vary by province. It is useful, therefore, to briefly discuss the statutory rules that the various provinces have adopted to date.

1. Express Opt-Outs

In Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan, the relevant implementing legislation specifically provides that the parties may exclude the CISG by stating that it will not apply.[34] In the remaining provinces and territories—British Columbia, Northwest Territories, Quebec, and Yukon—the implementing legislation does not address the issue of how to opt out of the CISG.[35] In these latter jurisdictions, however, a clause expressly stating that the CISG shall

---

[33] Gib V. Ert, *Canada*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 172 (David Sloss ed., 2009) ("If, however, the treaty falls partly or entirely within provincial legislative jurisdiction, it must be implemented by each provincial legislature.").

[34] *See* The International Sale of Goods Act, C.C.S.M. c. S11, s. 5 (Manitoba); International Sale of Goods Act, S.N.S. 1988, c. 13, s. 8 (Nova Scotia); International Sales Conventions Act, R.S.O. 1990, c. I.10, s. 6, as amended by 2017 c2 Sch8 s2 (Ontario); *supra* note 15.

[35] International Sale of Goods Act, R.S.B.C. 1996, c. 236 (British Columbia); International Sale of Goods Act, R.S.N.W.T. 1988, c. I-7 (Northwest Territories); Act respecting the United Nations Convention on Contracts for the International Sale of Goods, CQLR, c. C-67.01, s. 1 (Quebec); International Sale of Goods Act, R.S.Y. 2002, c. 124 (Yukon).

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

not apply should operate to exclude the treaty as a source of governing law. This is because the statutes give domestic effect to the treaty and the treaty by its terms specifically permits the parties "to exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions."[36]

2. "Law" as Selecting the CISG

In Alberta, New Brunswick, Prince Edward Island, and Saskatchewan, the provincial legislatures have drawn a distinction between clauses that select the "law" of a given province and clauses that select the "local, domestic law" of the province.[37] If the parties select the "law" of the province to govern their agreement, that will not exclude the CISG because it is technically the "law" of the province. However, if the parties select the "local, domestic law" of the province, the statute provides that this language will function to exclude the CISG as a source of law.[38]

As a practical matter, most Canadian choice-of-law clauses select the "law" of a jurisdiction—clauses that select the "local, domestic law" of a particular province are virtually unknown—and so this particular interpretive rule is not implicated in the overwhelming majority of cases. If parties doing business in these four provinces want to opt out of the CISG without making any express reference to that treaty in their agreement, however, they may do so by selecting the "local, domestic law" of a particular province in their choice-of-law clause.

3. "Law" as Excluding the CISG

One province has enacted an interpretive statute that differs from the others. In Newfoundland and Labrador, the provincial legislature has enacted a statute stipulating that a choice-of-law clause that merely selects the "law" of a particular province must be construed so as to *exclude* the CISG.[39] This

---

[36] CISG art. 6.

[37] *See* International Conventions Implementation Act, RSA 2000, c. I-6, s. 2 (Alberta); International Sale of Goods Act, R.S.N.B. 2011, c. 177, s. 6 (New Brunswick); International Sale of Goods Act, R.S.P.E.I. 1988, c. I-6, s. 6 (Prince Edward Island); The International Sale of Goods Act, S.S. 1990-91, c. I-10.3, s. 6 (Saskatchewan).

[38] *Id.*

[39] International Sale of Goods Act, RSNL 1990, c. I-16, s. 7 (Newfoundland and Labrador).

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

means that an international sales contract stipulating that "this agreement shall be governed by the law of Newfoundland and Labrador" will not be governed by the CISG.[40]

B. Silent Agreements to Which CISG Would Have Applied

Across most of Canada, therefore, a choice-of-law clause in an international sales contract selecting provincial law will be construed to select the CISG as the governing law even if it does not expressly mention the treaty. With this interpretive rule in mind, let us now consider the question of whether and to what extent Canadian companies consciously select the CISG indirectly by choosing the "law" of a particular province while omitting any reference to the treaty.

To answer this question, I went back into the SEDAR database to create a second dataset. This dataset was comprised of international contracts for the sale of goods that did not reference the CISG. Instead, each of these agreements selected the "law" of a Canadian province or a foreign country. In compiling this dataset, I conducted a series of searches in SEDAR for "supply /s agreement," "purchase /s agreement," and "sales /s agreement." I then sought to identify international supply, purchase, and sales contracts involving the sale of goods that selected the "law" of a particular jurisdiction but made no mention of the CISG. I ultimately located seventeen such agreements. I then sent e-mails to each of the Canadian companies that were parties to these agreements to ask if they had, in fact, intended to select the CISG indirectly as the governing law. I received eight responses. In three of these responses, the company representative informed me that he or she did not know the answer to my question or that the transaction did not, in fact, involve the international sale of any goods.

The other five responses specifically addressed the question of whether the company intended to select the CISG. One company representative told me that: "I don't think at the time the contract was signed people realized that the CISG was even applicable. I ordinarily carve it out. In retrospect, we

[40] If a similar interpretive rule were to be adopted in other jurisdictions, it could lead to a dramatic reduction in the number of cases in which the CISG is applied. To date, however, it does not appear that any other jurisdiction has followed the lead of the legislature in Newfoundland and Labrador.

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

would have carved it out."[41] Another representative stated that: "I wasn't aware of it. I've worked on a number of cross-border transactions, both US and UK and France and Sweden and it's never being raised as an issue. I guess it's our ignorance."[42] A third representative stated that: "We are not as smart as you, and we did not consider either including or excluding CISG. It was never discussed or considered in any manner."[43] Still another company representative stated that: "My intention in choosing Texas law was to exclude the CISG. Absolutely that was my intention. My counterpart on the other side was an experienced American lawyer and I'm confident that she wanted to exclude [it] as well. We thought we had but now you're making me second guess."[44]

None of the foregoing responses provide much in the way of support for the notion that Canadian companies routinely select the CISG indirectly. The final response, however, was somewhat different. This response came from a non-lawyer working at a company in Quebec. This individual explained that: "Essentially, we do not have a policy regarding the inclusion or exclusion of the CISG as several factors come into play. For instance, since we are not a drug developer, but rather a licensee/distributor, the licensor/manufacturer will almost always insist on imposing its choice of applicable law."[45] This person went on to add that "I will not exclude CISG by default. Even as a non-lawyer, I still have a favorable opinion of the CISG as it could potentially be useful to eliminate interpretation issues that are drafting/language related."[46] Finally, he stated that: "In the 20 years I've been negotiating transactions, I don't recall working with a counsel who insisted that we negotiate to exclude the CISG."[47]

This final response presented the tantalizing possibility that attitudes towards the CISG in Francophone Canada may be different from the attitudes exhibited in Anglophone Canada. In an attempt to determine whether there exists a hidden reservoir of support for the CISG among lawyers in

---

[41] Telephone Interview with Chief Legal Officer, Ontario Cannabis Company (July 30, 2018).
[42] Telephone Interview with Gen. Counsel, N.S. Media Co. (July 30, 2018).
[43] E-mail from CEO, Ont. Tech. Co. (July 27, 2018) (on file with author).
[44] Telephone Interview with Gen. Counsel, Alta. Energy Co. (July 25, 2018).
[45] E-mail from Vice President, Bus. Dev. & Licensing, Que. Pharm. Co. (July 26, 2018) (on file with author).
[46] *Id.*
[47] *Id.*

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

Francophone Canada, therefore, I undertook one final fact-finding expedition.

III. INSIGHTS FROM QUEBEC LAWYERS

I emailed thirty commercial lawyers—all of whom worked at large law firms in Quebec—to ask them about their general practice when it comes to the CISG.[48] If there was a meaningful difference in attitudes between Francophone Canada and Anglophone Canada, I hypothesized, one would have expected at least a few of these Quebecois attorneys to advise their clients not to opt out of the CISG as least some of the time. I received nine responses to my queries, which can be divided up into two categories. First, there were five lawyers who basically said that they advise their clients to exclude the CISG in all cases. Second, there were four lawyers who said that their advice to their clients varied depending on the facts at hand. Each set of responses is discussed below.

A. Always Exclude

There were five Quebec-based lawyers who reported that they advise their clients to opt out of the CISG in all cases. One reported that "[i]n my experience, Canadian lawyers usually advise their clients to exclude the CISG from their international sales agreements."[49] This same attorney also wrote that she "did not notice any difference in practice between lawyers practicing in Quebec and lawyers practicing in other parts of Canada. By my right of practice, I am allowed to practice in the province of Quebec, but I also often negotiate contracts governed by the law of Ontario. In each case, we usually automatically exclude the application of CISG from our agreements. In almost all of the agreements that are governed by the law of

[48] I identified these lawyers by the following process. First, I identified the ten largest law firms in Quebec. I then went through each firm's webpage to identify attorneys who described themselves as experts in (1) commercial contracting, (2) international trade, or (3) both. I then e-mailed each attorney to ask them whether, in their experience, most Canadian lawyers advised their clients to exclude the CISG in their international sales agreements.

[49] Email from Partner, Que. Law Firm I (Dec. 28, 2018) (on file with author).

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

Quebec and have an international scope, we exclude the application of CISG."[50]

A different respondent struck a broadly similar note, stating that "we usually advise our clients to exclude the CISG from international sales agreements and try to have the local laws of our client apply instead."[51] This view was seconded by three additional respondents. The first stated that

> in my experience, Canadian lawyers advise their clients to exclude [the] CISG. The main reason for that is probably the lack of understanding of the CISG, or the desire to avoid inconsistencies or confusion between local laws on purchase and sale and an additional set of laws, which are not perceived as necessary between sophisticated parties.[52]

The second stated that "I typically advise clients to exclude CISG because most of the times some of the clauses of the agreement are in contradiction with the CISG."[53] The third stated that his clients "have a clause that specifically states which province's law, or state if applicable, applies" and that he had "never seen a reference to CIGS [sic] in a contract."[54]

B. Sometimes Exclude

There were also four Quebec-based lawyers who stated that their advice as to whether to select or exclude the CISG depended on the circumstances. One noted that he always advised his clients to exclude the CISG when they were *selling* their goods to foreign purchasers.[55] He explained that "[i]t would be poor legal advice to our clients to have the CISG apply to their sales outside of the province as it would expose them to obligations and liabilities that they do not face when doing business inside the province."[56] When his clients were *purchasing* goods from foreign sellers, however, he usually advised his clients not to exclude the CISG "in order to provide to our clients the maximum protections."[57] He acknowledged, however, that many foreign

---

[50] *Id.*
[51] Email from Partner at Que. Law Firm II (Dec. 28, 2018) (on file with author).
[52] Email from Partner I at Que. Law Firm III (Jan. 7, 2019) (on file with author).
[53] Email from Partner I at Que. Law Firm IV (Jan. 15, 2019) (on file with author).
[54] Email from Partner II at Que. Law Firm IV (Jan. 15, 2019) (on file with author).
[55] Email from Partner II at Que. Law Firm III (Dec. 28, 2018) (on file with author).
[56] *Id.*
[57] *Id.*

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

sellers exclude the CISG in their standard-form contracts, which meant that these contracts usually wound up being governed by the national sales law of the seller's jurisdiction notwithstanding his advice.[58]

Another respondent divided Canadian lawyers into three categories: (1) those who are unaware of the CISG and who therefore do not exclude it, (2) those who are aware of the CISG but who have not taken the time to become acquainted with its terms and who therefore automatically exclude it, and (3) those who are aware of the CISG and who evaluate the terms of the agreement against the CISG before deciding to exclude.[59] He placed himself in the third category. He reported that many clients—for cost reasons—do not want him to engage in a detailed analysis as to whether or not to include the CISG in their international contracts.[60] In such cases, he reported that

> our general rule of thumb is not to exclude the application the CISG if our firm represents the purchaser and to exclude the application of the CISG if our firm represents the seller, based on the sense that the terms of the CISG are generally more favourable than the standard terms imposed by sellers with significant bargaining power.[61]

Still, another Quebec attorney observed that it is "standard practice in Canada to exclude the CISG where it would otherwise apply, as it [is] generally less advantageous to Canadian clients."[62] That lawyer went on to state, however, that she will not exclude it "where the client is very sophisticated and actually uses the CISG in its other international contracts, or if the CISG provisions are more advantageous to our client than local law."[63] A final respondent distinguished between (1) contracts between Canadian companies and counterparties in nations with "well-developed legal systems with which they feel comfortable," and (2) contracts between Canadian companies and counterparties in "China and Africa."[64] In the first group of contracts, he reported, Canadian companies will regularly exclude

---

[58] *Id.*
[59] Email from Partner at Que. Law Firm V (Dec. 30, 2018) (on file with author).
[60] *Id.*
[61] *Id.*
[62] Email from Partner at Que. Law Firm VI (Jan. 3, 2019) (on file with author).
[63] *Id.*
[64] Email from Partner III at Que. Law Firm III (Dec. 31, 2018) (on file with author).

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

the CISG.[65] In the second group of contracts, by comparison, Canadian companies generally prefer the CISG to the national sales law of the counterparty's home country in cases where the counterparty outright refuses to accept Canadian law as the governing law.[66]

To sum up, this second group of attorneys suggested that they generally will not exclude the CISG under the following scenarios: when (1) the CISG contains provisions advantageous to their client, as when a Canadian company is buying goods from a foreign seller; (2) the client is sophisticated and has utilized the CISG in the past; or (3) the client is leery of having the contract governed by the national sales law of the counterparty based in a country with a less-developed legal system.

These responses suggest that there may be a greater degree of support for the CISG among a subset of Canadian attorneys—those practicing at large firms in Quebec—than in the general population of Canadian attorneys. This observation is, however, subject to a number of caveats. First, all of the evidence from the Quebec attorneys is anecdotal. In order to truly test this hypothesis, it would be necessary to survey attorneys elsewhere in Canada and compare their responses to those given by attorneys in Quebec. Second, none of the three "opt in" scenarios identified by the latter group of respondents arise with any regularity. Most foreign sellers will insist on the application of their own law and most Canadian companies continue to prefer their own provincial sales law to the CISG. These caveats notwithstanding, the possibility that lawyers based in Quebec are marginally more likely than lawyers elsewhere in Canada to select the CISG as the law to govern their international sales contracts is a topic that warrants additional study.

CONCLUSION

In much of the legal literature, the fact that the CISG has been ratified by so many nations constitutes incontrovertible evidence of the treaty's success. The problem with this narrative is that it fails to account for the fact that private parties can choose to exclude the CISG from their international sales contracts. Contract surveys from additional countries would help to

[65] *Id.*
[66] *Id.*

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu

determine whether the antipathy towards the CISG felt by companies in the United States and Canada is typical or exceptional.

Vol. 38 (2019-2020) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2020.170 ● http://jlc.law.pitt.edu